

THE
WHANGANUI RIVER
REPORT



WAITANGI TRIBUNAL REPORT 1999

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

A Waitangi Tribunal report

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The Waitangi Tribunal
Wellington

The Honourable Tau Henare
Minister of Maori Affairs
Parliament Buildings
Wellington

Te Minita Maori

Tena koe te Minita mo nga take Maori

This is the report of the Waitangi Tribunal on the Whanganui River claim brought on behalf of the people of the river, Te Atihaunui-a-Paparangi. The essence of their claim is that Atihaunui, for many hundreds of years, possessed and controlled the Whanganui River and its tributaries, and they have never since 1840 freely and knowingly relinquished their rights and interests in the river. The critical question is whether the interests of Whanganui Maori in the river have been extinguished and, if so, whether this was done in accordance with Treaty of Waitangi principles.

We have found that, in Maori terms, the Whanganui River is a water resource, a single and indivisible entity, which was owned in its entirety by Atihaunui in 1840. We have further found that the Treaty has been breached by the Crown in various ways. Broadly put, the Tribunal has found that the acts of the Crown in depriving Atihaunui of their possession and control of the Whanganui River and its tributaries and its failure to protect Atihaunui rangatiratanga in and over their river were and are contrary to the principles of the Treaty of Waitangi. Atihaunui have been and continue to be prejudiced as a consequence.

In our concluding comments in chapter 11, we make certain proposals as to how the rightful interests of Atihaunui in the river might be restored. This will require the goodwill of all parties if the legitimate interests of Atihaunui are to be recognised and restored in a meaningful way while ensuring that public access to the river is not unduly constrained.

One member of the Tribunal, John Kneebone, in a dissenting opinion, is unable to support any proposal that Atihaunui should own natural water or be designated a consent authority in respect of the river under the Resource Management Act 1991. His reasons and a proposed remedy are recorded in chapter 11.

Na reira

*Hei te Minita, e nga reo karangaranga, e nga mana, e nga ihiihi, rau rangatira ma
Anei ra ripoata te puawaitanga i moemocatia ai e te hunga tautoko
Ratou kua huri ki tua o nga maunga ihoiho ha ratou i kokiri te kaupapanai
hei ohaki mo nga kanohi whakarere iho*

*Ahako kua ngaro atu koutou
Tenei te tangimihia ake
Hei nga Toka-a-nuku,
Nga Totara haeamata o Te-Wao-Tapu-nui-a-Tane
Kua takahia atu ra e koutou nga tapuwae o nga matua tipuna
Ki te uira o te rangi
Tenei te maioha ake nei
I runga i te aroha, me te roimata
E kore koutou e warewaretia
Haere atu ra ki te Putahi-tanganui-o-Rehua
Haere haere haere
Atu ra
Heoi ano*

EXECUTIVE SUMMARY

For nearly a millennium, the Atihaunui hapu have held the Whanganui River. They were known as the river people, for uniquely amongst the rivers of New Zealand, the Whanganui River winds through a precipitous terrain that confined most of the large Atihaunui population to a narrow margin along its banks. There were, last century, some 140 river pa and many large, carved houses that tell of substantial and permanent settlements. The river was central to Atihaunui lives, their source of food, their single highway, their spiritual mentor. It was the aortic artery of the Atihaunui heart. Shrouded in history and tradition, the river remains symbolic of Atihaunui identity. It is the focal point for the Atihaunui people, whether living there or away. Numerous marae still line its shores (secs 2.5–2.7, 3.2).

Atihaunui claim that, by the Treaty of Waitangi, they are entitled to the river's ownership, management, and control. This, they say, was guaranteed to them by the Treaty of Waitangi for so long as they wished to retain the same in their possession, and they have never freely and willingly relinquished it. For the reasons given in this report, we accept that claim. Basically, the Treaty guaranteed to Maori all those properties that they in fact possessed. The river was their property. As will be seen, it was accepted as their property, at 1840, by the courts.

There is nothing novel in our finding that, as a matter of law, on the assumption of British sovereignty in 1840, the Whanganui River was owned by the Atihaunui people. In 24 years of litigation over the Whanganui River, from 1938 to 1962, the Native Land Court, the Native Appellate Court, the Supreme Court, the Court of Appeal, and a royal commission of inquiry were effectively to find the same. The only difference was that the finding was made technically in respect of the riverbed, since the proceedings were begun in the Native Land Court, which had jurisdiction only in respect of land (ch 7).

We find further that they would own the riverbed today but for the enactment of a statute in 1903, made without consultation with, or the consent of, Atihaunui, to vest the bed of the river in the Crown. That statute, as a result, was contrary to the principles of the Treaty of Waitangi (ch 9).

We also find, however, that that which the Treaty guaranteed to Atihaunui was that which they possessed in fact, and that which they possessed in fact was a river resource, not a dry bed. It is purely a quirk of English law that river ownership is perceived in terms of riverbeds, or simply as land with water on it. But that peculiarity cannot deny to Atihaunui that which they possessed in fact, which was a river resource, or the river as a single entity, comprised of both water and bed.

In the river litigation, it was also held that some parts of the river passed from Maori ownership with the sale of adjacent land. On this question, the general courts were conscious of the need to see the river as Maori saw it when determining the effect of alienations, and the Court of Appeal sought the opinion of the Maori

Appellate Court thereon. Unfortunately, the Maori Appellate Court was no better informed of Maori law than the Court of Appeal and saw the river in terms of individual ownership according to English law (ch 7).

There is authority in English law, from sources as high as the Privy Council, that native title is to be rendered conceptually as the native people saw it, and not according to concepts that developed in England (sec 2.2). That point is so obvious that we would hold to it whether or not it were a settled principle of English law, but it adds strength to the claimants' case that it was so settled as a principle by the Privy Council in 1927. The Maori Appellate Court opinion was patently wrong. It was made by judges with no training in Maori law, by upbringing or by preparatory education. They also had no need to be so trained, for the historical function of that court was not to identify Maori law but to change it to an English form, and the issues generally before that court related not to custom but to a new form of statutory law.

We have made an extensive study of Maori customary law, utilising the skills of several disciplines and conscious of new awarenesses arising from the study of anthropology, which had barely developed as a science at the time of the river litigation. We are satisfied that, in Maori terms, the river was a single and indivisible entity, a resource comprised of water, banks, and bed, in which individuals had particular use rights of parts but where the underlying title remained with the descent group as a whole, or conceptually, with their ancestors. Thus, the river is called a *tupuna awa*, or a river that either is an ancestor itself or derives from ancestral title (secs 2.2, 2.3, 2.8, 9.1).

The same principle applies also to the land, and here we come face to face with the real difficulty that the Maori Appellate Court, with its background of supplanting Maori law, was unable to get around. In order to convert Maori title to an English form, the court had necessarily to equate use rights with ownership, when in Maori custom that was not the case. Use rights equated with a revocable or alterable licence from the true owner, the tribe, and were conditional upon subscription and contribution to the common tribal weal. We note also that the opinion ran contrary to earlier decisions of the Native Appellate Court (secs 2.3, 9.1).

That does not entirely determine whether Atihaunui alienated that part of their river interests as was affected by the alienation of riparian lands. The Treaty contemplated that Maori might freely and willingly dispose of their possessions, but in construing the terms, a free and knowing consent was required. It could not be taken on a sidewind, as, for example, through the operation of some aspect of English law of which Maori were unaware.

We have examined the relevant transactions. An early sale of the coast area where the city of Wanganui is today made reference to rivers generally but excluded the Whanganui River from the sale plan (secs 4.1, 4.5, 4.6.4, 4.8). Subsequent alienations by direct Crown purchase of riparian lands upriver were defined by the river's edge and did not specifically include the river. The same applies to the subsequent alienations under the Maori Land Court system (secs 2.2–2.8). There is

EXECUTIVE SUMMARY

a further hurdle in the case of the latter that the court system did not include all customary interests, especially the tribal interest of Atihaunui as a whole. The sale of riparian lands was by some individuals only, they being said to have had use rights in those lands, but as we have said, the use rights were incidental to the substantial ownership, which was vested in Atihaunui as a whole.

Accordingly, applying the Treaty test, which was not considered in the earlier litigation, we are again satisfied that there was no willing and conscious alienation of the river. We were unable to find any document that included the river in an alienation. In addition, in no case did the primary owner, the collective voice of Atihaunui, have a say (chs 9–11).

We come, then, to the question of the water. As we have said, what the tribe owned was a river, or a particular form of water resource, not a dry bed. Who then owns water? It is obvious as a general proposition that freely flowing water is not something that can be owned in the usual way. It none the less remains a fact that access to water may be constrained while the water is in a river that is privately owned. Even in terms of English law, access to water – for the watering of stock, for example – may be limited to the private owners of the river, they being the owners of the riparian lands, or their licencees. The issue, then, is not about the ownership of water but about access to a private water resource. It was the full and exclusive use of the river, as a water resource, that was guaranteed to Atihaunui (secs 9.1, 9.2.9).

In considering what might now be done, it is obvious that today the river has also come to be seen as a public domain. This also must be brought into account in considering remedies. In addition, local European families have used the river for four generations, or perhaps more. This does not compare with the Atihaunui case, where use rights descend not just from a waka supposed to have arrived in about 1350 but from those who were here well before and who also rank in Atihaunui genealogies. None the less, a European use for some four generations has also to be considered (secs 2.2–2.8, 3.1–3.3, ch 11).

Despite the terms of the Treaty, the river has also been used by the Government or statutory authorities over the years for a number of public purposes – transportation, harbour works, waste disposal, flood control, tourism, power generation, and scenery preservation – even before the bed was formally taken in 1903. It is now especially desired by many for recreation (secs 2.2, 3.3, 6.2, ch 8). Some claim a vested interest by right of what they call ‘the public estate’. Commercial groups may claim a vested interest too, having acquired rights in good faith and at a cost (ch 8).

The public debate has been primarily about access and the maintenance of proper environmental standards. Many people, some of whom may be described as environmentalists, share the deep concern that Atihaunui have expressed over the river’s despoliation, especially through water abstraction for the Tongariro power scheme, and share also a desire to enhance the river’s natural attributes. By no means does this exclude persons of the commercial sector. Many industries have now developed standards of self-regulation that may exceed the strict

requirements of law (secs 8.1–8.6). They are, in any event, obliged by law to consider the environmental consequences of their operations. None the less, these three interest groups, commercial, environmental, and Maori, are in conflict with each other on the river's ownership, management, and control (secs 9.1.7(4), 10.3, ch 11).

Presently, the conflict is managed through the Resource Management Act 1991, but that Act does not recognise the fundamental rights of property ownership that Atihaunui have and that were guaranteed to them. But neither is the Act neutral on property rights, though it may claim to be, for in large measure the effect of the Act is to subsume them. Though on its face it is a management Act, where questions of ownership do not arise, in effect the Atihaunui right of ownership and control is vested in statutory authorities (secs 9.1.1–9.1.7(4), 10.1–10.7, ch 11).

It is also pertinent to consider the extent to which Maori and public interests may be reconciled in light of the larger Treaty objective of keeping harmony between peoples without compromising the Treaty's terms. We have also assumed the desirability of maintaining the national management scheme (sec 3.3, ch 11).

The issue is liable to considerable emotive interference, especially in view of the 'public estate' claims. This circumstance, and honesty of purpose, requires that those charged with the ultimate responsibility to decide should acquaint themselves with the facts and analyse the arguments in the light of them.

It is not a fact, for example, that, as a matter of law, Maori cannot own rivers. In past litigation, the courts have recognised that, at 1840, Atihaunui legally owned the Whanganui riverbed. The same finding has been made that the Waikato tribes owned the Waikato riverbed and that this legal ownership endured until it was lawfully taken away. The courts have found that any part of the Whanganui riverbed not divested by alienation was divested by the Coal-mines Act Amendment Act 1903. In the case of the Waikato, it has been held that the bed was confiscated from Maori by proclamations under the New Zealand Settlements Act 1863. In both cases, the bed was taken by Government action and the question for us is whether those acts were consistent with the principles of the Treaty of Waitangi. Clearly, they were not (sec 2.2, ch 7).

Nor is it a fact that, as a matter of law, rivers in New Zealand have always been publicly owned. We can understand how that perception has arisen, since the Crown in early years enacted a number of statutes to facilitate particular river uses for industrial and river control purposes, but the basic legal position has been quite to the contrary. The English law was clear – riverbeds were vested in the Crown to the tidal limit and thereafter were presumed to be owned to the centre line by the landowners on either side, but with public rights of navigation, where such rights existed by immemorial user or dedication. The presumption might be set aside by reference to the particular terms of a Crown grant, for example, but generally the private ownership presumption applied (sec 2.2).

Contrary to some popular opinion, the English law that favoured private ownership was adopted in New Zealand with effect from 14 January 1840, modified only to the extent that it was thought, having regard to the circumstances of the

EXECUTIVE SUMMARY

colony and especially since here all private freehold land emanated from a Crown grant, that the presumption might be more readily displaced in New Zealand by reference to the terms of the Crown grant and the attendant circumstances (sec 2.2).

We have found no Crown grants that preserve the public interest in rivers. At this point, it is to be noted that the Maori rights did not emanate from the Crown and had no need to depend upon a Crown grant because the native title preceded the Crown. This has been noted in court decisions. It was also observed by at least one judge in the case of the Waikato River that the English law did not apply so long as the Maori title to the river had not been extinguished and that the Maori title was protected by the Treaty of Waitangi (secs 2.2–2.3).

As earlier mentioned, the common law position was also modified in New Zealand by specific statutory provisions for particular rivers, which allowed them to be used for log floating, gold mining, or other particular uses, but the common law of England was not generally abrogated. Save for a specific statutory intervention, the common law position still prevails. Now, as has been seen, the beds of all navigable rivers have been vested in the Crown, but even today, the common law presumption still applies to all non-navigable rivers above the tidal limit, unless a particular Act has made some alternative provision (sec 2.2).

In brief, New Zealand was not in fact settled on the basis that all rivers would be publicly owned. Rights of public use required a particular enactment. Further, New Zealand was in fact settled on the basis that Maori property would be respected. It was recognised by the New Zealand judiciary that the property interests included interests in rivers (secs 2.2–2.8).

It is further important that the character of the Atihaunui ownership should be understood if native title is to be properly seen in its own terms. The report discusses this at some length. We begin with this, for we suspect that most of those involved in the debate are unaware of the depth or rationale of the underlying culture. In our view, one cannot treat fairly with the Atihaunui people or adequately judge the issues if they are not first so informed (secs 2.3–2.8, 3.2).

The report describes also the tribal structures, where some matters are in the sphere of autonomous hapu while others belong to the Atihaunui collective (secs 2.3–2.7, 3.2, 4.1–4.4). It forms the basis for our recommendation that any dealings on the river as a whole be had with the Whanganui River Maori Trust Board and explains why, in this instance, overlaps with other tribal descent groups do not present a problem. Given this data, it would not be an honest approach to capitalise on any diversity of Maori views so as to divide and rule (secs 9.1.1, 9.2.4, ch 11).

Nor can there be an adequate consideration of all relevant matters without reference to the history that describes the basis on which the European settlers were given access. In typical Polynesian fashion, settlers were welcome in the tribal territory, land was allocated, and access to the river was given without question. In this case, the Europeans settled on the lands along the coast at the river mouth. All this was on the usual basis, in Polynesian thinking, that the traditional authority in the area would continue to be respected.

The record clearly shows that Atihaunui became determined to hold on to the control of the river at all costs from the moment their traditional authority was challenged and their river rights appeared to be threatened. From the scale of that protest, the Whanganui River case may be unique. It takes away any element of implied consent or waiver (ch 6).

Initially, when the Governor sent troops to the territory to assert his authority, access was denied from the point where the river entered the hills and European settlement finished. Following the subsequent change in de facto power, we trace Maori protests over the use of the river from the nineteenth century, when attempts were made to alter the river for transportation purposes. It was sometimes necessary for the constabulary to intervene. A number of parliamentary petitions followed (ch 5).

This century, Atihaunui spent the 24 years between 1938 and 1962 in litigation to secure title to the river. This was undoubtedly one of the longest running items of litigation in New Zealand legal history (ch 7, sec 9.2). Thereafter, Atihaunui were involved in further petitions and in litigation under town planning or resource management laws, where again they asserted their river entitlements. One case over the special concern of water abstraction for power generation purposes lasted some four years (chs 8, 9).

Their protest, in various shapes and forms, has continued virtually unabated for over a century. In addition, their particular concern today is that they are obliged to appear as supplicants before a number of authorities that control the river's use, when, in terms of the Treaty, they own the river and the authorities should be making supplications to them. It is something that adds considerable salt to the wound of wrongful deprivation, and it is something to be brought into account in any plan for remedial action.

Yet, at no stage during this long history have Atihaunui departed from the position taken at the time of the first European settlement. It is still the position of the Atihaunui leaders that they have no objection to the reasonable use of the river by the public, provided that the Atihaunui mana or authority is respected. It is specified in the claim that public access should continue and that existing use rights should be maintained for current terms (chs 2, 11).

From the history of culture conflict in the Whanganui district, as detailed in this report, three things can be observed as to the development of Maori opinion:

- The first is that Europeans were seen to add to tribal mana and to strengthen the tribe.
- The second is that, at the time of the Treaty of Waitangi, and ever since in our view, Maori placed more emphasis on that part of the Treaty that refers to their authority over their possessions, and were not so jealous about the use of them. In Maori thinking, it is a question of mana. So long as mana is maintained, reasonable use by others can be accepted. The term that the Treaty used for this authority or mana was 'rangatiratanga' (secs 2.3–2.8, 3.3, 9.2.3–9.3.4).

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- The third is that the subsequent war between Maori and Pakeha in the Whanganui district, and consequential restrictions that Maori placed on Europeans using the river's upper reaches, came not as the result of a natural antagonism between the people but from the settlers' refusal to recognise the mana of the Atihaunui people, as represented in their rangatira (secs 5.1–5.3).

These historical clues assist us in seeking a solution today, though if we take the view that 'Maori shared the river so therefore it is now ours', we will have achieved nothing. The key to the answer is in fact in the quality of the relationship between Maori and Pakeha and the ethical relationship of people to rivers. It is only when we appreciate that it is not possessions that most count but how we relate to, and respect the mana of, each other and the environment that we will understand the contribution that Maori thinking can make to a better society, and can develop a philosophy of law that is more in tune with the Pacific way (ch 11).

We are also assisted by current realities. In today's more complex world, good river management requires funds and special skills. There is room for cooperation, and it is, in our view, the sort of cooperation that Maori forebears foresaw when the settlers first arrived in Wanganui (secs 2.3–2.7, ch 11).

In looking to reparation, the legal cost for past petitions and proceedings, while important, is not the main concern. The more significant damages are exemplary. We refer to the social cost of cultural deprivation that flowed from the refusal to respect the mana of the Maori people and from what might just as well have been a confiscation of the river. The particular respects in which Atihaunui suffer from the legal loss of the river, its physical degradation, and their powerlessness in ongoing river use submissions are also detailed in this report (chs 3, 6–10).

In a summary of the report, we can refer to only some of the more particular arguments.

We set aside any suggestion that the Atihaunui entitlement confers or perpetuates a privilege based on race. It is neither a privilege nor racist that a people should be able to retain their lawful possessions. That is something that goes to the heart of a valid legal system. If any racism arises, it is only in the suggestion that one race might be deprived of its possessions because the public wishes to have them for recreation while other races are required to give over their property only for a necessary public work and then only with compensation (ch 11).

It is important to recognise the true principles involved. The Maori right to retain the properties that they possess is founded not on race or privilege but on universal principles of law. The legal principles arise from the doctrine of aboriginal title. This developed in Europe centuries ago, was applied in England from 1608, was adopted in New Zealand's first piece of law of 14 January 1840, was applied by the New Zealand courts in 1847, and has been adopted in many parts of the world. It finds modern expression in the emerging principles of modern international human rights. In guaranteeing the property rights of the indigenous people, the Treaty of Waitangi was asserting not anything new but fundamental tenets of established law (ch 11).

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A further principle is that respect for these tenets of law was the foundation on which the Treaty envisaged an orderly and peaceful European colonisation. A purpose of the Treaty was to enable the Governor to introduce laws that were necessary for peace and good order and to require that Maori in turn would respect the Governor's laws to that end. While, today, no one can countenance a breach of the laws that are necessary for peace and good order under any circumstances, none the less it does not assist the Maori leadership in their promotion of law observance amongst their own people if the laws that were promised to Maori are not likewise respected by the Government. It does not assist in upholding respect for the law if legal principles affecting Maori are a ready prey for convenience or public desire while they are obliged to respect all other laws of the land.

That takes us to the question of the 'public estate'. Four matters are relevant:

- The first is that there is no established principle of law that private property may be taken for public recreational purposes. The matter is at Parliament's discretion, but in the exercise of its discretion, it is instructive for Parliament to consider the written constitutions of several democratic states. Many provide good precedent for the view that private property should not be taken except for a necessary public work.
- The second is that we are dealing not with the private property of individuals but with the common property of a people. Further, they are defined not by race, though that is coincidental, but by aboriginality, in which there are the added ingredients of prior occupation and possession from time immemorial (sec 3.2, ch 11).
- The third is that the compulsory taking of property is supported by the legal view that private rights of title emanate from the State and may, for some sound reason, be resumed by the State. Settlers took title to lands in New Zealand in the form of Crown grants with that implied understanding. But that is not the Maori position. Their title predates the Crown and comes from their ancestors.
- The fourth is simply that possession was guaranteed in return for the cession of sovereignty and rights of settlement (ch 11).

We have had more difficulty in finding remedies. In making proposals, we stress that they are directed to the Whanganui River, and not to rivers generally. Each case must be measured according to its own circumstances, and those applicable to Atihaunui should not be assumed to represent the norm (ch 11). We refer to the geography that focused the Atihaunui people on a narrow margin along the river's bank as indicative of the intensity of their river associations, the number of pa on the river's edge, which shows the size of a distinctive river population, the specific sale of riparian lands (compared to the sale of lands elsewhere encompassing virtual provinces with rivers included), and the unparalleled lengths that Atihaunui went to to maintain their customary river rights, which negate any suggestion of implied consent or waiver (secs 2.3–2.5, chs 7, 8, 10).

In some cases, Maori must be taken to have ceded their interests in rivers. In others, a minor or major role in river management might be appropriate. Whatever

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the appropriate criteria, Atihaunui deserve exceptional consideration. Conversely, Atihaunui should not be constrained by arrangements made for other Maori groups in river management if their case is larger (ch 11).

We have also had to consider that, were the control and management of the river vested in a body representative of Atihaunui, that body would need to be funded. If funded from local rate levies, we must be mindful of some opinion in the history of local management that there is no taxation without representation.

The room for conflict is considered finally in chapter 11 but it is felt that this should not outweigh the potential for solutions. The problem may not be as large as it appears, since the Whanganui River case is special and should not be seen as setting a national pattern. It may be unduly pretentious to contend in other cases that, after large land alienations, a 'full exclusive and undisturbed possession' was expected to be maintained. The Whanganui River case is unique for the close physical and spiritual association of the people to the river and the history of their assertion of river ownership.

Further, Atihaunui have accepted, and accept today, the need to accommodate public interests for so long as their interests are respected in return. There is room for an agreement to be reached with the Government, and that is what Atihaunui seek.

Our principal recommendation is that a negotiated solution be now sought. At the very least, however, any settlement should recognise Atihaunui ownership and authority in respect of the river; the desirability of assuring continued public access and of maintaining existing use rights for current terms; the need to maintain, to the extent appropriate, national planning under the Resource Management Act 1991; and the need for collaboration in modern river management. We propose for consideration that the consent of Atihaunui be required for any resource use applications and, as a second option, that the Whanganui River Maori Trust Board act jointly with current authorities in river planning and hearing applications.

The resolution of a river treaty between Atihaunui and the Crown will require more particular guidelines. Negotiating these guidelines will make the highest calls on statesmanship on both sides.

This report represents the conclusions of all Tribunal members, save to the extent that a contrary view is given in a dissenting opinion, which is also recorded in the last chapter.

EDITORIAL NOTE

'Whanganui' is the correct spelling for the name of the river, though the city is spelt 'Wanganui'. 'Whanganui' is the preferred Maori form as most approximating the local dialect (the 'wh' is pronounced as in 'what'). This report uses 'Wanganui' for references to the city and its environs and, where appropriate, in proper nouns, otherwise it uses 'Whanganui'.

LIST OF ABBREVIATIONS

AC	<i>Appeal Cases</i>
AJHR	<i>Appendices to the Journals of the House of Representatives</i>
All ER	<i>All England Law Reports</i>
app	appendix
BPP	<i>British Parliamentary Papers: Colonies New Zealand</i> (17 vols, Shannon, Irish University Press, 1968–69)
CA	Court of Appeal
ch	chapter
Ch D	<i>Law Reports, Chancery Division</i> (England)
comp	compiler
DLR	<i>Dominion Law Reports</i>
DNZB	W H Oliver (ed), <i>The Dictionary of New Zealand Biography</i> , Wellington, Allen and Unwin and Department of Internal Affairs, 1990
doc	document
DOSLI HO	Department of Survey and Land Information head office file
ECNZ	Electricity Corporation of New Zealand
fig	figure
fn	footnote
fol	folio
GLR	<i>Gazette Law Reports</i>
Knapp	<i>Knapp's Reports</i>
LE	legislative series file
LINZ	Land Information New Zealand
LS	Department of Lands and Survey file
ltd	limited
LR Ind App	<i>Law Reports, Indian Appeals, Privy Council</i> (England)
MA	Department of Maori Affairs file
MOW	Ministry of Works file
MS	manuscript
NA	National Archives
NZCA	New Zealand Company archives file
NZED	New Zealand Electricity Department
NZLR	<i>New Zealand Law Reports</i>
NZPCC	<i>New Zealand Privy Council Cases</i>
NZRMA	<i>New Zealand Resource Management Appeals</i>
p, pp	page, pages
PANZ	Public Access New Zealand
para	paragraph
PC	Privy Council
pl	plate
pt	part
ROD	record of documents
SASR	<i>South Australian State Reports</i>
s, ss	section, sections (of an Act)
SC	Supreme Court
sec	section (of a book, report, etc)
sess	session
vol	volume
Wai	Waitangi Tribunal claim
Wm Bl	<i>William Blackstone's Reports</i>

CHAPTER 1

THE INQUIRY

This chapter concerns the claim, the process, and the parties, as relevant to the inquiry. It considers especially the history of protest and litigation behind the claim, the outstanding cultural concerns, and the issue of representation.

Chapter outline

1.1 THE CLAIM

The nub of the Whanganui River claim is that the people of Atihaunui-a-Paparangi possessed and controlled the Whanganui River and its tributaries. The claimants also argue that the river was never freely and knowingly surrendered by them but that, contrary to the Treaty of Waitangi, and to their prejudice, Crown acts, policies, practices, and omissions combined over the years to relieve them of it (see app 1). The essential question then is whether Maori interests in the river were extinguished, and if so, whether that was done in accordance with the principles of the Treaty. From here, we refer to ‘the Whanganui River’ as including both the river proper and its tributaries.

Claim that the river was not surrendered

The outcome that the claimants seek, in broad terms, is the restoration of their mana in the river. From a Maori view, the question of mana has been central to Maori and Pakeha relations since colonisation began.

That Maori authority be restored

1.2 THE CLAIMANTS

The claim was brought for ‘Te Iwi o Whanganui’ by the late Hikaia Amohia, a respected kaumatua of several of the Whanganui River hapu, and nine others, who are, or were at the time, members of the Whanganui River Maori Trust Board. The board is a statutory body established under the Whanganui River Trust Board Act 1988. Under section 6 of that Act, it is empowered to negotiate for the settlement of:

People and trust board

all outstanding claims relating to the customary rights and usages of te iwi o Whanganui, or any particular hapu, whanau, or group, in respect of the Whanganui River, including the bed of the river, its minerals, its water and its fish.

The board is also constituted as a Maori trust board under the Maori Trust Boards Act 1955, with provisions for local representation and accountability.

The nine board members represent the people of the river's upper, middle, and lower reaches, a geographical division that encapsulates the customary association of the three parts with certain ancestors: Hinengakau for the upper, Tama Upoko for the middle, and Tupoho for the lower.¹ However, the traditional allusion was to stress unity, not severance, for the point is that the three ancestors were siblings.

In any event, Amohia and the nine board members brought the claim for and on behalf of Te Atihaunui-a-Paparangi, the parent name for the river hapu, which describes the people of the several hapu as a collectivity.² They did so also on behalf of the board, as a body representative of those who traditionally lined the river. Whether the board is in fact representative of all affected is considered at section 1.5.

1.3 THE CONTEXT

To be appreciated, the claim must be seen in context.

1.3.1 A people's claim

The claim is brought not for individuals but for the whole of the traditional river people. It gives vent to the people's anxiety that their culture, history, and traditions, and their customary association with the river, should be known and understood. However, the essential contention is that the people's status in matters concerning use of the river should be acknowledged for the future. It is a question of recognition and mana. The claim thus touches upon the relationship between Maori and Pakeha generally and how the mana of each should be respected.

1.3.2 Comparative unity

Support for the claim

While both Maori and Pakeha perspectives of the river are relevant, we were reminded from the outset that, if the claim was to be fully understood, it had especially to be seen in light of the culture and experience of the people bringing it. From our first entry into Putiki Marae, it was obvious that the claimants' world had a dynamic of its own. The staffing of the paepae in itself pointed to the support of people from many river places, and whaikorero confirmed that this was so. Others in attendance from different descent groups with customary associations were further evidence that prior discussions had been held and that the claim had wide

1. While the river people may be seen in the three geographic divisions of upper, middle, and lower reaches, the divisions should not be overly emphasised, for there has been considerable movement of people between the three, and Maori claim interests or connections in all of them.
2. Under the Whanganui River Trust Board Act 1988, the board's beneficiaries are the descendants of the hapu of Tama Upoko, Hinengakau, and Tupoho. This is reiterated in the statement of claim (see app 1). It is a cause of concern to one group that claimed to be unconnected with those ancestors. This is discussed at section 1.5.

Maori acquiescence. These pointers have weight in Maori society, and were keenly observed by the Tribunal's Maori members. The relative absence of inter-tribal antagonism was to become a feature of the subsequent hearings.

1.3.3 Living evidence

So, too, from the first of the formal submissions, we sensed that the accounts would be no ordinary evidence of a historical kind. We were dealing not with a dry record of past habitations but with evidence that is lived. Witnesses spoke of former habitations as their homes, as though they were occupied now, because past settlement patterns still influence how people relate to each other. In that context, the Tribunal was introduced to more than 100 pa sites, and learnt of the formerly dense populations along the river's length. No matter where people live today, the old sites are still their 'homes', and the river that once sustained them physically still provides for spiritual needs. The claim, in short, was a living claim, despite the references to the past, for the people then are the same people today.

A history that is lived

1.3.4 Cultural dimension

The claim must also be seen in its own cultural milieu. Again, while both Pakeha and Maori views are relevant, the former so pervades, and has so dominated the examination of the claim in the past, that there is a need to state a Maori view on social structure and rivers at the beginning. This is done, in chapter 2.

Importance of cultural milieu

1.3.5 The antiquity of the claim

Most especially, however, the claim is old. It is not some new concoction; it began in petitions last century and has been ongoing, for over 100 years, with long judicial proceedings involved. The point was emphasised in claimant counsel's extraordinary opening:

Record of protest

In this claim it is impossible to escape the weight of history and the presence of those who refused to give up the struggle: Hikaia Amohia, who brought this claim; Titi Tihu, who was petitioner in 1927 and plaintiff in the great litigation which went twice to the Court of Appeal; Hekenui Whakarake, who gave the evidence of loss to the Native Land Court and the Royal Commission.³

The Tribunal, in an interim report to the Minister, had already expressed this view: 'Rarely has a Maori river claim been so persistently maintained as that of the Whanganui people.'⁴

Though the history is covered in detail in the report, a summary provides an essential background to the circumstances in which the claim was brought. The

3. Document A77, p 2

4. Paper 2.10, p 1

assumption that Maori still had control of the river after British sovereignty was proclaimed is evident before 1860, when Maori required a toll of Europeans travelling upstream. The same assumption is apparent in Maori letters from 1876 protesting against European encroachments.

The claim of ownership by protest and formal objections, however, begins in parliamentary petitions from 1873.⁵ It is clear that Maori did not consider that, by land alienation or other means, their right over the river had been extinguished. By the 1890s, direct action accompanied formal protests with the obstruction of channel clearance work. In the early twentieth century, the claim was mixed with objections over compulsory land acquisitions. By 1927, it also covered the use of the river by a steamer company, the taking of gravel, the release of trout, and the destruction of fishing weirs.

Record of litigation

Litigation over the riverbed title began in 1938, the Native Land Court, and then the Native Appellate Court ruling in Maori favour, but in 1949, the Crown succeeded in an appeal to the Supreme Court. It was held that Parliament had vested the bed in the Crown through the Coal-mines Act Amendment Act 1903. This, in turn, was upset in the 1950 royal commission findings of a Supreme Court judge. The commission endorsed the Native Land Court opinions, finding that, but for the 1903 legislation, the tribe would be the customary owner of the bed. Maori, it was added, were owed compensation for substantial gravel extractions.

Maori Appellate Court – the river was owned like the land

By enacting special legislation, the Crown put the matter to the Court of Appeal, which, in 1954, while declining any of the relief that the Crown had sought, referred certain questions to a newly constituted Maori Appellate Court. The court's answers implied that, although Maori owned the river at 1840, they owned it in the same way as the land. This answer, and a presumption of English law that the owners of land abutting on a river own the riverbed to the river's centre line, led the Court of Appeal in 1962 to find that the customary river interests were extinguished by the Native Land Court when it investigated the titles to the adjoining land. This was even though ownership of the river had not been adverted to in the Native Land Court. The bed thus passed to the Crown when it acquired the Maori land.

Post-litigation petitions

After 24 years, the litigation had ended, but this was not the end of the matter for the person who had brought the claim in 1938. Titi Tihu was joined by his nephew, Hikaia Amohia, who was the principal claimant in this claim, and many others. Without resiling from their contention that Maori interests in the river had not been freely alienated, they continued to negotiate for compensation for the extraction of gravel in accordance with the royal commission's recommendations. In 1979, they petitioned Parliament once more, and were involved in select committee hearings as late as 1980. The end result, in 1988, was a statute to establish the Whanganui River Maori Trust Board, with authority to negotiate on gravel and river matters, and an 'interim' payment to the board of \$140,500 for negotiating costs and establishment expenses.

5. In 1873, Te Keepa Rangihiwini (Major Kemp) of the Whanganui River petitioned the Government against the Timber Floating Bill of that year: LE1/1873/10, NA Wellington.

By then, Titi Tihu had been involved in judicial or parliamentary proceedings on the river for 50 years. In 1988, when he was about 100 years old, he passed away.⁶ It is now 48 years since the royal commission recommended that compensation for gravel extractions be paid but a settlement has yet to be made.

While persistence in proceedings is not evidence that the proceedings were always right, it indicates how the claimants sincerely believe in the justice of their case and it shows how the claim is nothing new. The frustration arising from years of legal and political debate, with little progress evident, was apparent in informal comments at Tieke made by certain of those who had earlier effected an occupation. It was evident that they held honest opinions on the rightness of their cause, and genuinely considered that, in past proceedings, the Maori view of the matter had not been properly understood. They felt that their forebears had done all that they could and that no other option was left open to them to reclaim what they saw as their rightful inheritance. They were not a group making trouble for the sake of it, and they gave evidence of their hospitality to all river users who visited them.

In view of the statements at Tieke and elsewhere during the hearings, and in view of the importance of land and river tenures in the preceding litigation, the Tribunal was concerned to inquire into the traditional perspectives on river rights and land tenure.

An honest belief in the justice of the case

1.3.6 The currency of the claim

No sooner was the Whanganui River Maori Trust Board established than it too was embroiled in lengthy and costly litigation in endeavours to maintain the Maori interest in the river. This was in the face of what Maori saw as yet further encroachments upon their traditional and unextinguished right of control. Indeed, this claim to the Waitangi Tribunal came as a last recourse, though witnesses expressed the tiredness with which they brought their concerns to yet another forum, and the frustration they felt knowing they had still to face further projected planning inquiries on the river's management. As the board's chairman said:

More recent litigation

what I firstly want to do is to say to the Tribunal that . . . our people are tired, they're fed up, they feel embarrassed to come along continually and to say who they are, what is theirs. And you would have seen [on the site visit] some . . . [of] our people living along the river . . . getting their spiritual, their physical and their material sustenance from the river. And you see where they're located and then having to

6. As was the case with many Maori of his generation, Titi Tihu's date of birth is uncertain. An article in the *New Zealand Herald* on 1 January 1981 suggests that he would have been 106 at the time of his death: MA7/6/188, NA Wellington, Whanganui River Petitions, 1973–84 (Wai 167 ROD, doc B26, p 584). According to an article in *Tu Tangata*, he was 105 when he died, the evidence there being based on records of the Sisters of Convent School at Ranana, while the transcript of evidence before the royal commission of 1950 would mean, if correct, that he was aged about 92: *Tu Tangata*, no 8, October–November 1982, p 15 (doc A27(f), p 219). A succession order cited by David Young states that in 1912 Titi Tihu was 19 years old, while Rohu Te Kani of Pakipaki Marae was certain that he was more than 100 years old when he died: David Young, *Woven By Water: Histories from the Whanganui River*, Wellington, Huia Publishers, 1998, p 269, fn 5.

come and spend over a hundred years trying to say 'This is us, this is what we're trying to hold onto, this is what we have for our future generations'.⁷

In 1958, even before the Court of Appeal had made its ruling on ownership, the Government had authorised the diversion of water from the Whanganui, Whakapapa, and several other rivers for the Tongariro power scheme by the New Zealand Electricity Department. In the mid-1980s, the department was corporatised. The new State-owned enterprise, the Electricity Corporation of New Zealand (ECNZ), had to apply for resource consents for continued water abstractions. Following hearings before a tribunal for the Central Districts Catchment Board in 1988, a substantial increase was proposed to the minimum flow level. ECNZ appealed to the Planning Tribunal in 1989 and the hearings continued for 94 sitting days, spread over seven months. They involved up to 14 lawyers and 104 witnesses. Other parties have estimated ECNZ's costs to be between \$7 million and \$15 million, and it was on account of the projected expense, and the possibility of an award of costs, that the Royal Forest and Bird Protection Society of New Zealand withdrew, at least officially, as a party.⁸ This left, in opposition, the Department of Conservation, the Whanganui River Flows Coalition, and the Whanganui River Maori Trust Board. From the Planning Tribunal, the matter proceeded to the High Court in 1992. The board was thus involved in the 'minimum flows' litigation for about four years.

Need to settle status

Further proceedings were pending as a consequence of the 1993 application by the Royal Forest and Bird Protection Society for a water conservation order for the Whanganui River and its tributaries. The Manawatu–Whanganui Regional Council's process for the formation of a regional plan for lake beds was likely to involve the trust board in further legal action, as could the Crown's proposals for a generic policy on Maori claims to natural resources. Claimants pointed out that the formation of a generic policy had been used by the Crown as a way to defer negotiations between the Crown and the river claimants.

The board is of the view that, unless the Maori right in the river is settled, properly acknowledged, and provided for, the people will be always on the back foot, responding, without sufficient resources, to complex planning proposals by which others assume control. They seek more than the right to be heard and the resources necessary for a fair hearing. They challenge the power of others to make decisions and say that the power should be vested in them.

1.4 THE PROCESS

1.4.1 Legal representation

Counsel appearing were Sian Elias, John Dawson, and Kathy Ertel for the claimants; Ellen France and Camilla Owen for the Crown; Ann Callaghan for the

7. Transcription of oral submission by Archie Taiaroa, 19 April 1994

8. *Forest and Bird*, November 1990, p 41

Electricity Corporation of New Zealand; Phillip Milne for the Manawatu-Wanganui Regional Council; and Carrie Wainwright for the Wanganui District Council. (See appendix 11 for the record of inquiry.)

1.4.2 Bicultural procedures

For all to be heard in comfort, alternative procedures were adopted. Maori were heard on marae, where practicable, along marae kawa lines but allowing for cross-examination.⁹ Pakeha were heard under Western protocols in halls, where preferred, though some were comfortable with a marae setting. The presentation of legal argument followed court practices.

A bicultural approach was urged for both process and submissions. Claimants contended that New Zealand history has been largely a European discourse based on documentary records, where European opinion prevails, while in Maori history, based on Maori knowledge, there are two different narratives – a Maori narrative, which focuses on the relationship of people to each other and to the environment.¹⁰ Others added that Western techniques had devalued the spiritual and cultural importance of the river to Maori, Maori evidence being seen out of context in a European setting. We consider that these views have force.

Need for bicultural perceptions

We are aware that traditional views that knowledge is tapu and should be selectively transmitted mean that many Maori do not wish to be seen as making a general broadcast of it, whether or not it is already in the public domain. Nor do many wish to be cited or have their evidence used by others without their knowing. The issue is one not of confidentiality but of respect for traditions.

Protection of evidence

In response to requests, we directed that use of the Maori evidence be restricted to purposes associated with the inquiry and any legal review, save for media reports on the proceedings at the time. It is now available to members of the public wishing to critique the inquiry, provided that any publication does not cite the evidence in detail unless it is given in this report. We thought this necessary for people to speak freely and for a full inquiry to be made.

Maori were also heard on location, during site visits. This was important, and not only because the environs may corroborate or contextualise testimony. The hills, rich in history, the pa sites, and the remains of former habitations are also important cues when recounting oral tradition.

Site visits

1.4.3 Other iwi

As previously mentioned, persons from other tribal groups attended to give the claimants support or to maintain a watching brief, though not necessarily to make submissions. Tumu Te Heuheu of Tuwharetoa (Taupo) attended. Sir Robert Mahuta of Tainui (Waikato); George Hawkins and Maraea Aranui of Ngati

9. For the authority to adopt marae kawa, refer to clause 5(9) of the schedule to the Treaty of Waitangi Act 1975.

10. Document A51, pp 4–5, 10

Pahauwera (Hawke's Bay); Maanu Paul, Hohepa Waiti, and James Doherty of Ngati Manawa (Bay of Plenty); Potanga Neilson of Nga Rauru (Taranaki); and Ruth Harris and Tom Tuhiwai of Rangitane (Manawatu) made submissions.

1.4.4 General public

Submissions were also received from public and private bodies of the general population. These included the Wanganui District Council (and the mayor, Charles Poynter), the Manawatu–Wanganui Regional Council, the Federated Mountain Clubs of New Zealand, the Whanganui River Users Group, the Royal Forest and Bird Protection Society of New Zealand, and the Electricity Corporation of New Zealand.

1.4.5 Grant of urgency

The proceedings commenced in Wellington on 2 November 1993 with an application for an urgent hearing. That hearing was necessary to achieve priority in the queue of waiting claims, and in this case the application was granted in an interim report of 19 November. The ground was that, if their rights in the river were not first determined, the river people could be prejudiced in the hearing of an application for a water conservation order by the Royal Forest and Bird Protection Society. The Tribunal recommended that the Crown take no steps to appoint a special tribunal to consider the application before the Waitangi Tribunal had reported. It was a factor, too, that the claimants would limit the inquiry to river matters and defer their land claims to later, despite practical difficulties in severing the two. The decision on urgency is reproduced at appendix iv.

1.4.6 Itinerary and site visits

Occupation and
hearing delays

A small delay was occasioned by the need for some preliminary research and by an occupation of certain river land at Tieke administered by the Department of Conservation. Because the occupation appeared to have been effected by members of the tribal group represented by the claimants, the Tribunal did not wish to proceed, lest its inquiry should compromise the prosecution of actions that might be unlawful.¹¹ The research was done, however, and eventually the department granted a licence to the occupiers.

Range of persons
heard

Following public and individual notices, hearings commenced at Putiki–Wharanui Marae in Wanganui in the week from 14 to 18 March 1994. Since it cannot be assumed that all of a large and dispersed tribal group are agreed on a claim, and particular interests and differences must be noted, the Tribunal cooperated with claimant counsel's suggestion to hear first the concerns and opinions of the people. The Tribunal was thus to be addressed by many, ranging

11. An occupation of Pakaitore (Moutoa Gardens) occurred after the hearings had closed.

from tribal leaders and tohunga to kitchen hands, from urbanites to remote rural dwellers, from academics to bush scholars, and from Arama Gardiner, a young boy from the Kura Kaupapa Maori, to 95-year-old Te Paea Arapata.

To hear all who might wish to be heard, and to provide some orientation, the Tribunal, at the claimants' initiative, travelled from Putiki-Wharanui Marae north by road some 18 kilometres to Kaiwhaiki. From there, we travelled to the river settlements of Pungarehu, Parikino, Kakata (Atene), Otukopiri (Koroniti), Matahiwi, Ranana (at Ruaka and Te Pou-o-Rongo Marae), Patiarero (Jerusalem), and Pipiriki. This last settlement is 90 kilometres upriver at the end of the Whanganui River Road. From Pipiriki, the Tribunal travelled some 20 kilometres by river to Tieke, which lacks road access, travelling past the renowned drop scene composed by near-vertical cliffs, and the canyons in dense bush at the confluence with the Manganui-a-te-Ao River. At Tieke, we were addressed by current occupants and descendants of that district, who now live at Raetihi.

Marae visits

The inland marae of Otoko, 44 kilometres north of Wanganui on the main highway to Raetihi, was then visited. The Tribunal also sat at two places in Taumarunui: Ngapuwaiwaha Marae and the Taumarunui Memorial Hall, the site of the former Morero Marae and Hauaroa meeting house. Time prevented a proposed sitting at the historically renowned Tawata, the river settlement some 50 kilometres downstream of Taumarunui, but speakers from there attended other sessions.

Professional witnesses were heard mainly at Putiki-Wharanui Marae and submissions from the general community at a venue in Wanganui City. Following final legal argument, the claimants conducted a ceremonial closing of the claim at Wharauroa Marae in Taumarunui, with some Tribunal members present.

Professional and general public evidence

The hearings were conducted during the weeks commencing 14 March, 18 April, 21 June, and 25 July 1994, with each hearing first being publicly notified.

Hearing time

1.4.7 The report

Though affected by rules of natural justice, the Tribunal is not a court bound by pleadings or constrained by the arguments and evidence proffered. It must inquire and report on all matters thought necessary for a final Government decision.

In the result, this report does not necessarily follow the framework adopted by the claimants or the Crown, and though an attempt is made to cover the issues counsel raised, to avoid undue prolixity or confusion in reporting, counsel's arguments may be omitted or reduced. It does not, however, follow that they have not received full attention.

1.5 HAPU AND IWI

Since claims must be brought by Maori rather than a board – but may be brought by Maori on behalf of a group – the claimants brought the claim for the people as a

Why a single claim was presented

whole and under the umbrella of the Whanganui River Maori Trust Board. This was appropriate in our view. While the river hapu have distinct interests at various places in the river's natural resources, they also have a common interest in the entire river, and customary responsibilities to all the hapu and river people. In this case, the issues mainly revolve around matters of common concern.

None the less, it was arranged that particular hapu interests or viewpoints should still be separately ventilated, and accordingly, the Tribunal travelled to marae in different parts of the district that all might be heard and, where appropriate, that any local concerns might be brought into account. It was then apparent that a greater prejudice to most people was likely to occur if a holistic view was not maintained, or if the claim was splintered to discrete hapu.

We are further satisfied that, for the purposes of the claim, the people as a whole are now best represented through the board. The board was established by section 4(1) of the Whanganui River Trust Board Act 1988 and is authorised by section 6 to negotiate with the Government on matters affecting the whole of the river people. It must account for its activities. It is also the board that is best resourced to handle a claim affecting large numbers over a wide area and involving complex issues.

Support for a united claim through the board When we travelled to different parts of the country, all but a few from one hapu supported this. Setting aside historic hapu rivalries, and following instead equally historic moments of concerted action, compelling calls for unity were made.

Maintenance of the common interest Further, we consider the prosecution of a united claim is consistent with local history and with the custom, as it was, and as it has developed in more recent years. The relevant custom is more particularly considered in chapter 2. By way of summary, we consider that the possession and authority of the river accrued to the individual hapu for most purposes, and to the people as a whole for others. The maintenance of a common interest has been notable where this has been necessary to protect the people's interest in the river, or to deal with matters affecting the people as a whole.

Tamahaki objection There was one objection to the presentation of the claim through the board. A representative for the Tamahaki people of the middle-river section drew attention to the fact that, by section 4(2) of the Whanganui River Trust Board Act 1988, the beneficiaries of the board are 'the descendants of the hapu of Tama Upoko, Hinengakau, and Tupoho'. It was contended that the Tamahaki members descend from Tamahaki and not from any of those three, thereby implying that Tamahaki were an unrelated group that should be dealt with separately. In addition, it was claimed, they were excluded from representation on the board.

Board's constitution In terms of section 5, board members are elected according to beneficiary rolls, and regulations may provide for the representation of specific sections or divisions of the beneficiaries. We were informed that representation was provided for according to the three ancestral divisions, or, in effect, according to the upper-, middle-, and lower-river sections. No other grounds were given for severing Tamahaki from the general claim, though they were given their own hearing to raise such matters as they chose.

We note at this point that the definition of beneficiaries does not affect the statutory authority of the board, in section 6 of the Act, to represent all the river people in negotiations with the Government. Section 6 provides that:

Board to negotiate for all

6. Board to negotiate outstanding claims—In addition to the functions conferred on the Board by section 24 of the Maori Trust Boards Act 1955, the Board shall from time to time negotiate with the Government, or any other body or authority concerned, for the settlement of all outstanding claims relating to the customary rights and usages of *te iwi o Whanganui, or any particular hapu, whanau, or group*, in respect of the Whanganui River, including the bed of the river, its minerals, its water, and its fish. [Emphasis added.]

In any event, the claim that Tamahaki members have no descent from any of the three named ancestors appears to us to be exaggerated, and that they should stand in isolation from other groups is inconsistent with the history and traditions as outlined in the next chapter. It is unusual, in Maori tradition, for a group to claim exclusivity or that it cannot trace a connection to a local ancestral icon. It is the very purpose of the whakapapa that dominates Maori thinking to draw connections between people and unite. It is thus the Maori way for people to seek out and acknowledge genealogical descent ties. The lack of such a link is also rare, given the breadth of Maori whakapapa tables.

Hapu as related

The Tribunal is regularly reminded of the connections between hapu in submissions on claims from Muriwhenua in the far north to the South Island. Speaking to a claim in Hawke's Bay, Professor James Ritchie approached the matter from the standpoint of the rangatira:

A chief, or rangatira, exercises the authority which derives from mana. A rangatira has personal mana but also carries the mana of the hapuu . . . Mana is an extremely central and culturally complex concept.

Mana derives, in the first place, from whakapapa, notably through firstborn lineages but also incorporating affinal or marriage linkages through both male and female lines of descent. A person or a group may speak of their major lineage as their whakapapa, but since this relates to that of all other kinsfolk, lineages ramify into extended networks. Raymond Firth coined the term ramage as a descriptive for these networks which uniquely, amongst world tribal systems, link in inclusive ways, almost as though the village kainga of related families is a model for the whole universe of human relations.

These can (and do) connect the person or hapu with every other in the iwi (descent group from a common ancestor, such as Kahungunu), waka (a group of iwi who have a common origin explanation such as the arrival in Aotearoa of their canoe), and with every other waka. People and groups can also whakapapa to pre-waka ancestors (the original people) who shade off into non-human personalities or personifications of entities such as the rainbow, mythic spirits, a major mountain or river. Through whakapapa the links reach back to Io, the primal God and those who descend from Io, such as the major 'departmental Gods', of which Tangaroa, God of the oceanic waters is most relevant here.¹²

12. Brief of evidence of James Ritchie (Wai 55 ROD, doc E2), p 2

Professor Ritchie went on to explain how the several hapu of the district were related and how it is by these networks that collective mana, or mana tangata as he put it, was considerable. This thinking appears to be universal amongst Maori, and applied to Atihaunui no less.

Anihira Henare was one of those who claimed affiliation with all the Atihaunui hapu. In genealogical evidence, she showed how a number of the hapu were connected and how Tamahaki fitted in.¹³ No evidence was tendered that any member of Tamahaki had been excluded from the board's beneficial rolls or was incapable of applying.

We also consider the Tamahaki contention confused the purpose for which the three ancestors were put up, as symbolic of a relationship rather than as the founding ancestral figures for the Atihaunui people. For reasons given later in this report, the names are synonymous with unity and the inclusion of all. We recognise that, amongst Maori, some well-known groups have survived amidst a more numerous people with their separate history, traditions, and identity intact. In this case, however, such a history and tradition is not known or acknowledged by the other hapu. Nor did the Tamahaki representatives establish it themselves, or avail themselves of the opportunity to do so while others were present who might challenge their contentions.

Tamahaki
contention as new

The Tamahaki claim appeared also to be a new development. The traditional, ancestral references set out above have been maintained by the Maori involved in the long river litigation from 1938 to 1962, and again in the promotion and drafting of the Whanganui River Trust Board Act 1988. No one pointed to, and we could not find, any record that the Tamahaki concern had been stated before.

Tamahaki
submissions

In any event, in the way that the issue was developed before us, the question was not whether the three traditional ancestors could represent all the hapu but whether the claim was brought for all the hapu. The two Tamahaki kaumatua who made submissions were in accord with this position, as put by one of them:

the concern of my people was simply that Tamahaki be included alongside the other three tupuna, or recognised, which would then bind our iwi as one, when we could then support, and we fully support, . . . [the] claims that are before you.¹⁴

Claimant counsel then gave an assurance that the claim was for all the people and Tamahaki would not be excluded from any relief that might be given. The kaumatua appeared to be satisfied. We understood claimant counsel to add that the statement of claim would be amended if need be to make that position clear, but the assurance having been given, we did not think an amendment to the claim was required.

We also understood that, if need be, the chairman of the board would seek legislation to amend the definition of beneficiaries and the system of

13. Simon T Morvin, *Taku Whare E: My Home My Heart*, Wanganui, Wanganui Regional Community College, 1986 (doc A56), p 9

14. Transcript of oral evidence of Larry Ponga, 21 June 1994

representation. It did not wish to exclude anyone. However, this was not considered necessary, and Tamahaki representatives did not urge this course.

Subsequent to the hearings, the Tamahaki representatives again sought to stand independently of the other hapu and the people as a whole, filing, one year after the hearings had closed, a separate river claim.¹⁵ Nevertheless, we consider that Tamahaki had sufficient opportunity to present their concerns at the time, and a reconvening of the hearings would have caused hardship to the many who had assembled from dispersed places so that such issues could be debated amongst them all.

While Maori custom generally favours hapu autonomy, it also recognises that, on occasion, the hapu must operate collectively. We consider that this is one such occasion and that this is the generally held view. There are times when hapu should be dealt with separately, and the board may find that any settlement benefits should be allocated between them. However, on the evidence, it is not practicable, reasonable, or fair to the majority's point of view that the Government should treat separately for the resolution of this claim, or that one group that has not established a unique status outside of the general genealogical ties should weaken a united position by standing apart.

We add, as an aside, that the position may be otherwise in the later hearing of land claims. The issues are different there, and for that purpose the roles of the hapu and the iwi may need to be reviewed. We mention this, for in making submissions, Tamahaki representatives spoke mainly of the early alienation of land, and it appeared that this could be their primary concern.

In all, we consider that, for the purposes of dealing with the outside world, be it other Maori or the Government, on matters affecting the hapu and the river as a whole, representation today is best effected through one body. The Whanganui River Maori Trust Board serves that purpose in our view, and should continue to do so for as long as the board remains accountable to the hapu, respecting their traditional autonomy and recognising their interest in any outcome. A unity is required for dealing with the outside world, and at this time that can best be achieved and executed through the board.

**Acknowledging
both hapu
autonomy and hapu
unity**

15. Wai 555 is the Taumatamahoe block claim, lodged by Mark Cribb and another on 29 September 1995.



Map 1: The Whanganui River catchment area

CHAPTER 2

CUSTOMARY TENURES

2.1 INTRODUCTION

To consider whether the Crown extinguished Maori interests in the river, we have first to ask what those interests were. This, and claimants' concerns that their customary association with the river be properly understood, emphasised the need for an early examination of customary tenures.

Need to define
Maori interests

Custom also intersects with other issues introduced in chapter 1 – whether the claim should have been severed to individual hapu, whether the Government and other parties should treat with one body on Maori river interests in future, and the responsibilities of the Whanganui River Maori Trust Board to the hapu. Custom is also central to the conflict between Maori and Pakeha over rights to land and water resources, a conflict that is central to the claim.

Relevance of custom
to other issues

2.2 ENGLISH LAND TENURE

This section summarises some broad principles of English law as applied in New Zealand before the turn of the century.

All land is vested in the Crown. All grants of transferable titles in fee simple, which constitutes the system of private land ownership as known today, come only from the Crown. Where land was purchased direct from Maori, the purchase was acknowledged in the form of a Crown grant.

Crown's radical title
and 'private land'

Though the Crown grants land, it still retains the underlying or radical title. The same applies if the land was appropriated for a public purpose. The Crown's unappropriated lands are sometimes called the Crown's wastelands.

This doctrine of tenure in English law was applied in New Zealand from the commencement of colonisation – though not without prior dispute.¹

1. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, sec 4.7. The two ordinances that instigated English land tenure were the New Zealand Land Claims Ordinance 1840 (NSW) and, after New Zealand became an independent colony, the Land Claims Ordinance 1841. Prior to the former ordinance, when New Zealand was a dependency of New South Wales, it was argued before the Governor that this part of English law could not apply in New Zealand because the underlying title was already held by Maori. A system of private ownership was argued for, without the intermediary of the Crown, enabling direct purchase from Maori. The British Government did not agree.

Maori customary land

After other early debates, it was also admitted that Maori held all land in New Zealand according to their customs and usages.² This was accommodated within the English legal framework by reference to established canons of colonial common law. The land was still Crown land, but the Crown's radical title was held subject to Maori customary usages until the Maori customary interest had been extinguished.³ Subsequently, the Maori customary usage has been referred to as the aboriginal or native title. It is said to be a burden on the title of the Crown.

Extinguishment

The Maori customary burden on the Crown's radical title was largely extinguished last century by a combination of purchase, expropriation, or grant of freehold title to those Maori determined as owners. The Native Land Court was established in 1865 to give private titles to prescribed Maori for all Maori land then remaining. Leaving aside the question of seabeds, the process of reforming Maori land has been completed, with only isolated exceptions. Principally, titles were awarded according to contemporary Maori occupation.

Land categories

Thus, there were only two categories of land in early colonial law: Crown land (even though burdened with Maori customary interests, leased, or appropriated for a public purpose) and freehold land. This latter type is what might be called 'private' land. It arose from a Crown grant (whether to a Pakeha or a Maori). There have since been many other ways of categorising land in New Zealand.

Application of English law in New Zealand

Behind the application of the English doctrine of tenure was the presumption that Britain's acquisition or assumption of sovereignty over New Zealand brought with it the application of English law, or at least to the extent applicable to New Zealand circumstances. By statute, English law was deemed to apply in New Zealand from 14 January 1840, being the date when Governor Hobson issued his first proclamations.⁴ Early arguments that the English doctrine of tenure was inappropriate to the New Zealand circumstances, whether on account of prior Maori interests or because of some early preference for Crown leaseholds, were not adopted.

Rivers, lakes, sea, and foreshores – Crown, private, and 'public' interests

At English common law, it was presumed that non-tidal rivers, lakes, and high-ways were owned by the adjoining proprietors of the land to the centre line, or to the centre point in the case of lakes. Land covered by water regimes, permanently or from time to time, was either Crown land or privately owned land but, whichever, there was no general public right of use and access.

Following the tradition of English law, the Crown was presumed to hold the seabed (at that time, to about three miles), the foreshore, and the bed of the tidal

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2. The debate is further referred to in a subsequent chapter to this report. It was argued that Maori owned only those lands that they occupied and tilled and that all else was wastelands or unappropriated lands of the Crown. Though this argument was maintained for some years, it did not prevail. While it was opposed on principle, there was not the military power to enforce it against Maori, for whom every part of the country was possessed by one or other hapu.
 3. Thus, section 2 of the Land Claims Ordinance 1841 declared all unappropriated land to be Crown land subject to the rightful and necessary occupation and use thereof by the aboriginal inhabitants. In subsequent Maori affairs legislation, until the Te Ture Whenua Maori Act 1993, 'Maori customary land' was defined as Crown land held subject to Maori customary usage.
 4. The English Laws Act 1858, as re-enacted in the English Laws Act 1908.

reaches of a river as an arm of the sea.⁵ In England, the presumption was rebuttable on proof of a long-standing private use, generally of a fishery. There was no general public right of use, however, except for navigation or fishing, and no general right of foreshore use, except as ancillary to navigation or fishing. Rather, rights of foreshore use, or littoral rights, accrued to the private owners of adjoining land.

The non-tidal parts of riverbeds, and the beds of lakes, were presumed to be owned by the proprietors of the riparian lands (lands with river frontage) to the rivers' centre lines or the lakes' centre points. This is expressed in the maxim *ad medium filum aquae*.⁶ Again, the presumption was rebuttable as upon proof of a private fishery from immemorial time or some grant, but generally rights of fishing, or navigation in a reasonable way for a reasonable purpose, accrued not to the public but to riparian owners. Any public rights of navigation on non-tidal rivers depended upon immemorial user or dedication by a riparian landowner.

The English common law presumption that non-tidal rivers, lakes, and highways were owned by the adjoining landowners to the centre line or centre point was adopted in New Zealand from the commencement of settlement. The common law rule was no more than a presumption, however, and the view developed that the presumption may be rebutted more readily in New Zealand owing to our own circumstances. Thus, the rule was rebutted in its entirety with regard to highways. From the beginning of settlement, roads had been laid off by the Crown, and the legal opinion was that roads should be vested in the Crown.

The Crown somewhat assumed that the same would apply to rivers and lakes. Unlike highways, however, rivers and lakes were not laid off by the Crown – they had always existed. None the less, the Crown was to assert that it was the owner of navigable rivers and lakes because this was necessary to protect the 'national interest' in transportation, power supply, drainage, flood control, town water supplies, and tourism, and to avoid the private control of hunting and fishing, as had happened in England. This was not accepted by the courts. It was held that the English common law principle applied in New Zealand, but in the New Zealand circumstances, the presumption might be more readily displaced. It was so displaced by the Court of Appeal in *Muellar v Taupiri Coalmines Ltd*, in respect of the Waikato River.⁷ There, it was considered that the presumption may be rebutted either by the terms of the Crown grants of riparian land or by attendant circumstances. In that case, the bed of the Waikato River was held to be vested in

Seas, foreshores,
and tidal rivers

Modifications to
suit local
circumstance

5. Claimant counsel disputed that the tidal reaches of the river belong to the Crown in application of the English common law, but she had no need to pursue the point, since the Crown's right, for the purposes of Treaty claims, is considered in terms of the Treaty of Waitangi. She may have been referring to the English Laws Act 1858, which deemed the laws of England to have applied from 14 January 1840, but only so far as they were applicable to the circumstances in New Zealand. Arguably, the law of the Crown's presumptive right has no application, since Maori already possessed the tidal reaches.
6. Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), March 1998, sec 1.2.1 (citing H J W Coulson and U A Forbes, *The Law Relating to Waters: Sea, Tidal and Inland*, London, Henry Sweet, 1880, p 98; *Halsbury's Laws of England*, 4th ed, London, Butterworths, 1984, vol 49, p 219)
7. *Muellar v Taupiri Coalmines Ltd* (1900) 20 NZLR 89 (CA)

the Crown, even although the Crown grants were silent on the point, through a combination of attendant circumstances.

More particularly, the district had been confiscated from the native proprietors pursuant to the New Zealand Settlements Act 1863, in order to establish military settlements to maintain peace. The river was the only practicable highway for military and other purposes. Further, certain preceding Crown statutes were held to indicate the Crown's general intention to retain the beds of rivers, streams, and creeks.

Chief Justice Stout dissented. In his view, the fact that the river was navigable was insufficient to rebut the presumption of riparian ownership. Further, the Crown grants, following the form that was usual throughout the colony, did nothing to amend the common law of presumption of riparian ownership. The position as the chief justice saw it was that rivers throughout the country were privately owned but that a public right of navigation might exist by express or implied dedication.

It is of interest to note that in that case, Justice Edwards recognised the prior Maori ownership of the river. Up to the point of confiscation, he noted:

the lands were native lands, the owners of which were entitled to the full, exclusive, and undisturbed possession thereof guaranteed to them by the Treaty of Waitangi. These rights have from the time of the foundation of the colony being recognised by the Crown and by the Legislature. The Native Land Act 1862 recites the treaty, and the rights of the natives thereunder; and the whole of the legislation relating to Natives lands up to the present date recognises the existence of these rights. These are also recognised by the Native Rights Act 1865.⁸

Further, Justice Edwards felt that it was:

impossible to infer any dedication by the Crown (of a right of public user) so long as the soil in the river remained native land and in the possession of the native owners. To do so would be to assume that the sovereign power has not respected, but has improperly invaded, the native proprietary rights.⁹

Mueller was considered by the Court of Appeal in *In re the Bed of the Whanganui River*.¹⁰ There, the Court of Appeal tended more to the view of Chief Justice Stout, effectively confining *Mueller* to its particular facts and holding that non-tidal parts of the Whanganui River were owned privately by the riparian owners.

Several decisions of the United States, Canadian, and Australian courts have held that the *ad medium filum aquae* rule with regard to lands adjoining water-courses is more readily rebutted in countries that do not have the long history of settlement that gave rise to the common law in Britain. The decisions appear to have varied on the question in relation to rivers, but they are more consistent with regard to lakes. The courts in both the United States and Canada held that the Great

8. *Muellar v Taupiri Coalmines Ltd*, p 122

9. *Ibid*, p 123

10. *In re the Bed of the Whanganui River* [1962] NZLR 600

Lakes dividing those countries were held to the political boundary by the State and the Crown respectively. In South Australia, it was held that lakes were vested in the Crown.¹¹

This century, the courts of New Zealand, Canada, and Australia developed the view that the *ad medium filum aquae* doctrine was more refutable outside England, that in the circumstances of those countries it does not apply to navigable waterways, and that the bed of navigable waterways is vested in the Crown. A major thought in the most recent Australian case was the idea that it was inappropriate to apply the *ad medium filum aquae* rule in countries that do not have the long history of settlement.

In New Zealand, the position with regard to rivers was resolved by statutory intervention. Following a variety of statutes permitting particular public uses, from log floating to the provision of steamer services, the beds of navigable rivers were vested in the Crown by section 14 of the Coal-mines Act Amendment Act 1903.¹² There were similar enactments to give the Crown the ownership of the seabed and harbour beds, but no similar enactment was made for lakes. The lack of a general statutory regime for lakes was possibly due to the trenchant opposition of the major hapu, which continued to depend on them.

Statutory
intervention

The lakes position is instructive, for in the absence of statutory constraints, it was judicially recognised that Maori customary interests could exist in lakes independent of the ownership of the surrounding land. In the result, unless the customary interest had been extinguished, a separate 'lake title' could be given.¹³

Lakes

The position is confused by political intervention, but broadly the Native Land Court considered that it could award the beds of lakes to Maori upon proof of customary usages. Its jurisdiction to do so was to be upheld in the Supreme Court in *Tamihana Korokai v Solicitor-General*.¹⁴ Thus, despite settler protests owing to flooding and their desire to drain the lakes for farming, the Native Land Court awarded Lakes Wairarapa and Onoke to Maori in 1883. However, after further settler protests and long negotiations, a land exchange was effected and the lakes passed to the Crown.

Drainage and public access concerns led the Crown to negotiate also for Lake Horowhenua, which had been reserved for Maori fishing by the Native Land Court in 1896. The resulting legislation (the Horowhenua Lake Act 1905 and the Reserves and Other Lands Disposal Act 1956) recognised Maori ownership of the bed but vested control in a board with Maori representation.

In the Rotorua lakes case, Maori had supplemented traditional uses with revenue-earning schemes in tourism and toll charges on users. In negotiations for the establishment of a European settlement at Rotorua, the Crown had

11. *Southern Centre of Theosophy Inc v South Australia* (1979) 21 SASR 399. The position of New Zealand lakes is discussed in White, secs 1.2-1.3.

12. Subsequently, section 261(2) of the Coal Mines Act 1979 was continued in force by section 354(1)(c) of the Resource Management Act 1991. There has been judicial disagreement on what 'navigable' means.

13. The position with regard to lakes is considered in White.

14. *Tamihana Korokai v Solicitor-General* (1912) 15 GLR 96

acknowledged the Maori ownership of the lakes, as noted in the Thermal Springs Act 1881. However, in 1910, the Crown sought to prevent the Native Land Court awarding titles to the lake beds when Maori sought title. In 1922, a settlement was reached vesting the lake beds in the Crown in exchange for an annuity and certain specific rights. However, the Native Land Court was to issue titles to Lakes Rotokakahi and Rotokawau, which were outside the agreement.

The preservation of scenery and generation of electricity, and public access for recreational purposes, also led to negotiations over Lake Waikaremoana. Again, the Native Land Court vested it in Maori. In a settlement of 1971 (the Lake Waikaremoana Act 1971), the lake was leased to the Urewera National Park Board.

Control of the tourist industry and the prevention of private rights in game were factors behind the Crown's negotiations for Lake Taupo. There, Maori had developed an industry in providing anglers with camp sites and charging them to fish from their land. Maori had not sought a title from the Native Land Court, when, in 1924, the Native Land Amendment and Native Land Claims Adjustment Act enabled the Crown to enter into negotiations. In 1926, the lake bed was vested in the Crown. In 1992, title was restored to the tribe but public access remained. The Native Land Court issued a title to Maori for the nearby Lake Rotoaira, and this remains, though the lake is also used for the Tongariro power scheme.

The Crown did not pursue negotiations for Lake Omapere. The Native Land Court awarded title to Maori in the face of the Crown's opposition. The decision in this case is probably the most comprehensive on the legal right of Maori to the ownership of lakes.¹⁵

A separate 'river title'?

This leaves a question of whether Maori customary interests in rivers could also have existed independently of interests in the riparian land to support a separate 'river title'. The question is deferred to later in this report in the context of certain judicial proceedings where it was raised.

Early colonial position

By the common law at the time of annexation, however, riverbeds were legally owned by the riparian owners without a public right of navigation over them. This was soon out of kilter with what was happening on the ground. Rivers were in fact being used for Government and settler purposes, irrespective of what the law provided or who owned the river banks. Public use rights were provided by legislation.¹⁶ A raft of statutes followed for drainage, flood protection, and town water supply purposes. The question of a prospective Maori ownership was not considered. While the Government made laws for the protection, reform, and acquisition of Maori customary land, specific statutory recognition of Maori interests in lands covered by water was given only in respect of lakes.

Water ownership

There is no certainty in the common law on the ownership of running water. Crown counsel cited an early legal opinion that water in its natural state cannot be privately owned; that as 'a movable, wandering thing', it must 'of necessity

15. White, p 233

16. For a full review, see Michael Roche, *Land and Water: Water and Soil Conservation in New Zealand, 1941-88*, Wellington, Department of Internal Affairs, 1994, ch 1

continue common by the law of nature'.¹⁷ While not stating that the Crown owns water, Crown counsel considered that the Crown manages it for the nation. However, claimant counsel argued that the legal position is not clear, and instanced occasions where, by statute or executive opinion, the Crown had recognised a Maori interest in freely flowing water.¹⁸

The English common law focused on use rather than ownership. It accorded to the owners of land abutting on rivers the right to draw on water for domestic use and stock watering, as long as the natural flow was not diminished in quantity or quality.

It is only by deeming provisions in statutes that the Crown has asserted the ownership of water for the particular purposes of specific Acts. For example, by section 3 of the Municipal Corporations Waterworks Act 1872, all waters abstracted by municipal corporations for domestic supplies were deemed to be the property of and vested in the Crown.

Statutory
intervention on
water ownership

However, while ownership was uncertain, in early New Zealand, the Crown assumed the right to control and license private water uses by statute. Provincial laws from at least 1864 provided the legal authority for privately owned water-powered flourmills and sawmills to use water for power. Specific water rights for mining, irrigation, and hydroelectricity were established by statute, as with the Gold Fields Act 1862, Mines Act 1877, Public Works Act 1882, Water Supply Act 1891, and Water-power Act 1903.¹⁹ These, and their amendments, consolidated the Government's control over water, regulated potential conflict between farming, mining, and industrial interests, prevented monopolies, and assured public access or private usages.²⁰

Statutory
modifications of
water-use law

Today, the Crown assumes the right to control, manage, and allocate water uses – in particular, under the Resource Management Act 1991 – but the legislation does not address the question of ownership.²¹

A popular view is that rivers were always 'public property' with the Government regulating user access. There was no legal basis for such a thing as a 'public title', as distinct from Crown land. The Crown appropriated land for public use, scenic reserves, and (following the gift of Tongariro National Park by Maori in 1887)

'Public interest'

17. *Blackstone's Commentaries on the Law of England* (1765) 2 Wm Bl 14, 18 (cited in A Angell, *Treatise on the Law of Watercourses*, p 11, and doc C21, p 8). Claimant counsel also challenged this proposition as a principle of law, but for the same reasons as above it was not pursued.

18. Roche, ch 1

19. For an overview of the Crown's power generation monopoly and its eventual relinquishment in 1987, see Waitangi Tribunal, *Te Ika Whenua Rivers Report*, Wellington, GP Publications, 1998, secs 5.1–5.4.

20. Roche, ch 1

21. The Crown's presumptive right to control water uses, including discharges as well as abstractions, was eventually provided for in more extensive form in the Water and Soil Conservation Act 1967. Section 21(1) vested in the Crown 'the sole right to dam any water or stream, or to divert or take any natural water, or discharge natural water or waste into any natural water, or to use natural water'. This and a host of water and land use laws were brought together and modified in the Resource Management Act 1991, which provides the current regime for resource consents for water uses, balancing commercial and environmental interests. ECNZ has to apply for consents to divert the Whanganui and Whakapapa Rivers under section 30(1)(e) of the Resource Management Act, although its rights granted under the previous legislation continue until the expiry date.

national parks, but the land remained Crown land.²² Rivers were not appropriated for public use and the non-tidal parts were privately owned, but the Crown presumed to control the use of them just as it controls or delegates the control of private land uses today.

Queen's chain

Another popular view is that the public has always had a right of access along river banks, foreshores, and lake edges over what is called 'the Queen's chain'. There is no basis for this at English common law.

It has been claimed that an instruction from the Secretary of State for Colonies to Governor Hobson on 9 December 1840 is a constitutional commitment because that instruction was attached to the 'Charter under the Great Seal for the future government of New Zealand as a separate Colony'.²³ This is not the case. The instruction was separate from the charter and does not invoke the concept of a Queen's chain. As with all other sets of instructions issued before responsible government, they were merely a reflection of a particular administration's policy. In paragraph 43, about the establishment of the survey office, the Colonial Secretary instructed Hobson to require and authorise his Surveyor-General to:

Reserve in each county, hundred, and parish, so to be surveyed by him as foresaid, for public roads and other internal communications, whether by land or water, or as the sites of towns, villages, churches, school-houses, or parsonage houses, or as places for the internment of the dead, or as places for the future extension of any existing towns or villages, or as places fit to be set apart for the recreation and amusement of the inhabitants of any town or village, or for promoting the health of such inhabitants, or as the sites of landing-places which might at any time in the future be expedient to erect, form or establish on the sea coast or in the neighbourhood of navigable streams, or which it may be desirable to reserve for any other purpose of public convenience, utility, health, or enjoyment . . .²⁴

Earl Grey sent similar general instructions to Lieutenant-Governor Grey with the 1846 charter.²⁵ The significance of these instructions has been exaggerated, and the responsibility for survey went to the provincial governments from 1852 until 1876. The first provision for a Queen's chain was in the Land Act 1892. Under section 110, when the Crown sold lands abutting the foreshore, lakes over 50 acres, or streams or rivers wider than 33 feet, a one-chain strip was to be reserved and

22. But see now the definition of 'Crown land' in section 2 of the Land Act 1948, as 'land vested in Her Majesty which is not for the time being set aside for a public purpose' and so on. While national parks and many reserves are still Crown land, statutory appointees undertake management, as with the Department of Conservation. Principal statutes are the Conservation Act 1987, the National Parks Act 1980, and the Reserves Act 1977.

23. Margaret O'Brien, *Community Perspectives of Riparian Management: A Case Study in Marlborough*, Department of Conservation Research Series, no 79, 1995, p 1

24. Lord John Russell to Hobson, 9 December 1840, BPP, 1840, vol 3, p 162

25. Earl Grey to Grey, 28 December 1846, BPP, vol 5, p 542. For an overview, see Joanne M Johnson, 'The Queen's Chain: The Development of Legislation', dissertation, degree of surveying, University of Otago, 1990.

vested in the Crown. This provision did not affect lands that had already passed into private ownership.²⁶

2.3 MAORI CUSTOMARY TENURE – COUNSEL’S ARGUMENTS

In lengthy submissions on Maori tenure, claimant counsel argued that the Atihaunui tribal interest in the river was never properly provided for in the Native Land Court’s extinguishment of customary title. As a result, it has never been extinguished. To the extent that it may have been extinguished, the extinguishment was contrary to the principles of the Treaty of Waitangi.

Claimant counsel submitted that the river is a taonga and a possession of central significance, temporally and spiritually, to all of Te Atihaunui. It is essential to their identity, culture, and spiritual wellbeing. Historically, Te Atihaunui had asserted rangatiratanga, or control, over it.

A taonga

The river is seen as a living entity with its own personality and life-force, counsel argued, and as an indivisible whole, not something to be analysed by the constituent parts of water, bed, and banks, or of tidal and non-tidal, navigable and non-navigable portions. Past judicial determinations of Maori interests were erroneous, for they relied on such divisions, she contended. The decisions had fitted Maori interests into categories that were relevant to English law so that Maori interests had not been assessed in terms of Maori concepts. Moreover, the whole river was a traditional fishery of the Whanganui people, not just particular parts, and the whole had been used as a waterway.

A living whole

For the same reason, claimant counsel argued, *ad medium filum aquae* should not have been applied as a principle in deciding Maori interests. In addition, there were both tribal and individual interests in the river, and the Native Land Court’s determination of ‘ownership’ according to individual occupations and uses failed to provide for the tribal interest and diminished that which Maori had in fact.²⁷

Ad medium and tribal interests

Crown counsel’s submissions were no less lengthy and detailed. She challenged the existence of a general tribal property in the river. A supposed tribal interest gave a false hierarchy of rights, making hapu and individual interests subordinate to those of the iwi, while historical records show that such proprietary interests as existed in the river were held by individuals and hapu. Practice showed a correlation between the ownership of property interests in the river and the ownership of property interests in the adjoining land, so that the principle of *ad medium filum aquae* had application in terms of Maori custom. Consistently,

Crown counsel – no general tribal property

26. The provision was later re-enacted by section 58 of the Lands Act 1948. Current provisions for public access along rivers, lakes, and seas are sections 230 and 237(f) of the Resource Management Act 1991, requiring esplanade reserves and strips on the subdivision of land, and sections 24 and 24C of the Conservation Act 1987 on marginal strips arising from the alienation of land by the Crown. For land use planning purposes, section 6(d) of the Resource Management Act 1991 identifies the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers as a matter of national importance. Many lands in private ownership continue to run to the riverbank.

27. Documents A77, D18, D20

evidence with regard to a similar situation, the sale of lands adjoining the sea, showed that Maori expected the purchasers, or the European people, to have rights in areas when the riparian or seaboard lands were sold.²⁸

Ownership and
spiritual dimension
not formerly
stressed

Crown counsel relied on a substantial and documented submission from Crown historian Fergus Sinclair, who, drawing upon archival accounts from Europeans, Maori petitions, and Native Land Court records, added that such proprietary interests as existed were interests in particular resource uses, none of which amounted to ownership of the river as such.²⁹ The claim to the ownership of the river, as distinct from particular resources or erections within it, depended upon assertions of a metaphysical and ideological nature, Sinclair argued. Such assertions and a claim to a spiritual relationship with the river were not raised until recently, and were not evident in the early record. The more modern spiritual claim was contrary to the tenor of the historical accounts where Maori expressed themselves in a practical and matter-of-fact way, and were concerned with particular interests of a more proprietorial kind.

No water ownership
or iwi over-right

The claimants appear to claim ownership of the water as well as the bed, Sinclair submitted, and there was no evidence of any Maori custom supporting the ownership of running water. In any event, it is doubtful that Maori considered that a river could be owned; instead, Maori saw themselves as owning only particular interests in it. Further, contrary to claimant contentions, modern scholarship suggests that there was no group larger than the hapu that had a regular corporate existence and that, therefore, was able to possess a tribal right in the river as a whole.³⁰ There is also evidence that, amongst Maori, no single chief was so paramount as to be able to tell the chiefs of other hapu what to do. In the result also, it was hapu, not iwi, that made claims to ownership in the Native Land Court, and in awarding titles to the individuals of the hapu, the Native Land Court was merely giving effect to contemporary Maori preference.

Thus, Crown counsel saw use rights as less than English legal ownership. They were also seen as separate from authority and control. Crown counsel asked if it was correct to assume that the totality of Maori interests could be described as 'rangatiratanga'. As Sinclair had pointed out, claims on the basis of mana, or authority, and claims on the basis of descent from a remote forebear, either of which could have the effect of including the whole of a tribe, were generally rejected in the Native Land Court in favour of actual occupancies of specific areas. Accordingly, Crown counsel also sought the Tribunal's view on whether Maori interests were only rights of use and thus different from ownership in the English legal sense; whether Maori interests in the river should be severed to their component parts, with fishing interests separate from spiritual interests, for

28. Reference was made to earlier Tribunal opinion that Europeans could not be excluded from water bodies: Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Government Printer, 1985, secs 8.3, 9.2.3; *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, para 5.5.2.

29. Document c10, pp 1-4

30. Particular reference was made to Angela Ballara, 'The Origins of Ngati Kahungunu', doctoral thesis, Victoria University, 1991, of which the Tribunal has a copy.

example; and whether the component parts of the spiritual interests could be further identified.

In replying, claimant counsel challenged the distinction between authority and control on the one hand, and ownership on the other. Counsel contended that the focus had to be on rangatiratanga, or the mana to control possessions, and reiterated that thinking in categories of property interests, with the river seen only as a resource, and not as a taonga essential to the identity, culture, and spiritual wellbeing of the people, merely perpetuated the English property approach.

Claimant counsel further submitted:

- First, that the historical material Crown counsel relied on was set in no developed context; ideological beliefs had not surfaced early because there was no willingness to argue spiritual beliefs in debates with Europeans; and tribal interests were not inimical to, or inconsistent with individual use rights, but the two coexisted.³¹
- Secondly, the equation of ownership with occupation was too simple for the complex array of use rights that in fact existed.³² Contrary to Crown counsel's submissions, group identity and united action by Atihaunui was apparent from early European accounts. In law, there is no sound distinction between 'metaphysical' and 'property' interests for the ascertainment of rights; the law does not in fact dismiss spiritual interests or other intangibles in assessing property interests; and the courts have taken full account of spiritual dimensions in the past.³³
- Thirdly, the law on the ownership of running water is of recent origin, the legal position is still uncertain, and a Maori interest in running water has been acknowledged by governments in the past.³⁴

Thus, we were faced with two different approaches: the legal approach of Crown counsel, with its inevitable compartmentalisation, and the Maori approach of claimant counsel, with its inevitable holism.

We found help in the Privy Council warning of 1921, to which Ms Elias adverted, cautioning that 'There is a tendency operating at times unconsciously, to render

Custom to be seen
in own terms

31. It was added that Justice Cooke had so found in *In re the Bed of the Wanganui River* [1955] NZLR 419, 433.

32. Document D18(a), pp 17–18

33. Intellectual property and company law, it was contended, were built on abstract concepts, and even the notion that land can be owned is itself a legal construct that does not follow from any a priori principle, as is illustrated in the Maori position that land is not owned. The common law was capable of managing the abstract concepts of distinctive cultures, reference being made to *Mullick v Mullick* (1925) 52 LR Indian Appeals 245 (the juridical status of a hindu idol) and *Bumper Development Corp Ltd v Commissioner of Police of the Metropolis and Others* [1991] 4 All ER 638 (the legal personality of a Hindu temple), and to the approach taken in New Zealand on Maori interests in rivers in *Huakina v Waikato Valley Authority* [1987] 2 NZLR 188 and *Te Runanga o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20. Likewise, there is no property in fish until captured, yet fisheries give rise to property rights.

34. It was added that the legal position on water ownership was left open in the report of the interdepartmental working party (doc A77, vol 6), p 24. Maori claims were one reason, as noted in Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 7.4.4. Statutory indications of a Maori interest in water are apparent in section 6 of the Whanganui River Trust Board Act 1988 and section 3 of the Thermal Springs Districts Act 1881.

that title [to native land] in terms which are appropriate only to systems which have grown up under English law'.³⁵

2.4 RESOLVING THE ARGUMENTS

Issues The arguments showed the need for a comprehensive view of Maori relationships. Later, aspects will be revisited in more detail, but at this point we are mainly concerned with the central issues to which the arguments can be reduced. The first concerns how, in Maori law, the relationship is managed between broad tribal interests (if there are any), and individual or family use rights. The second relates to the two laws, and whether English 'ownership' equates best with Maori 'use', Maori 'possession', or both ('possession' in this context including the 'control' of that possessed). The third is an aspect of the second and concerns the political relationship between Maori and the Crown. The question is whether, for the purpose of applying the principles of the Treaty of Waitangi, Maori interests are to be compared with private ownership at English law, or with the underlying possession of the relevant territory, which the Crown has in England.

Context The questions must be answered in the context of the social framework of the affected Maori people, and not in the context of any alien structure to which Maori norms do not relate. A point-by-point examination of each of counsel's views does not provide this context, and as a specialist and inquisitorial body, we prefer to start with an overview of Maori social dynamics that posits Maori river interests within their own social fabric, leaving answers to emerge along the way. This approach also enables the other contentions, earlier mentioned, to be dealt with at the same time.

Relevance of contemporary accounts

For now, we make some comments on methodology. While we accept submissions for the Crown that perceptions of the past must be grounded on evidence from the period in question, perceptions from the period in question are still conditioned by that which went before.³⁶ It is not enough to rely on contemporary commentaries during a time of change, when, by river intrusions, land acquisitions, and native title reforms, Maori law was being reconstructed to fit an English framework. One has still to consider the preceding philosophies of the parties to determine where each was coming from. In the same way, even today, lawyers revert to early law in deciding current rights, as Crown counsel did when debating the ownership of running water.

Isolated accounts do not provide the underlying philosophy

Similarly, isolated observations from the historical record do not provide a sound scholastic base for deciding contemporary societal norms, especially if the evidence was not part of a discussion of social structures. Such observations disclose only snapshots, and not an underlying philosophy. The Crown argued

35. *Amodu Tijani v Secretary, Southern Rhodesia* [1921] 2 AC 399, 403 (cited in *Tē Runanga o Tē Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 26)

36. Document C10, p 88

that, because Maori had day-to-day concerns with particular properties, individual property rights prevailed as in England. However, it is only by reference to the philosophies of each culture that an over-right may be discernible, whether it is vested in a tribe or a monarch.

If isolated accounts cannot be put into a context, they are of little use in argument. They can be meaningfully used only when the context is known and the author has, from prior studies or experience, sufficient knowledge of the ethnic group to place them in perspective.

Protests about particular property infringements may establish no more than that those infringements were the immediate manifestation of the problem at the time, or most directly affected the person protesting. They do not in themselves establish that individual uses of resources had priority and that Maori law was therefore similar to that of England or that general tribal interests did not exist. Any larger implications of the infringements of property interests, if seen at all at the time, may have been more difficult to cope with. Likewise, a response for any general tribal interest may have been harder to arrange, especially if there were no permanent tribal committee to reply. A tribal response may also need to be handled in another way, for at that level, the issue is not limited to property but concerns the political status of the tribe vis à vis the status of the Crown.

Individual protest
and wider tribal
interests

Thus, major issues may begin with small ones. The question of who owned the bed of Lake Rotorua, for example, began with a debate on whether a certain Maori could fish for trout at the Oahu channel. The initial debate about one person's rights did not mean that the individual had priority or that there were no larger interests involved.

As to values, evidence of contrary conduct is not evidence that particular values do not pertain. The value a society places on peace and security, for example, is not negated by copious records of violence in that society – the sorts of records that might be compiled from newspaper accounts of proceedings in the courts. One must look to what people generally believe in or would aspire to, and not just to that which is sometimes done.

Underlying values

So, too, little should be made of the fact that people spoke mainly of damage to their properties, their eel weirs, for example, and in a practical and matter-of-fact way, without esoteric explanations of the spiritual dimensions of their lives. Who in our society would lecture on property regimes or religious beliefs to cope with someone who had damaged their car? It is only when the full import of events is obvious, and is seen as destructive of the culture as a whole, that the debate shifts to a higher plane.

Underlying beliefs

Finally, the question of whether Maori were unduly tardy in raising a spiritual relationship with the river is a separate question from whether a spiritual relationship with the river existed in fact.

2.5 MAORI INTERESTS

2.5.1 Customary structures

Three levels of interests

We now summarise our understanding of the distinctive elements of Maori custom that are relevant at this point, adopting for the moment a Western, categorised approach in order to explain. It appears to us that these items of custom are common to Maori throughout the country. The first is that use rights, personal identity, and executive functions were all seen to arise from ancestral devolution and to exist contemporaneously at the three levels of the individual, the hapu, and the people of the common descent group as a whole.

Importance of single, broad claim

Accordingly, in managing the current claim we have been concerned to hear both the people as a whole and the hapu individually. To deal with each hapu, separately, would prejudice any collective interests, but particular interests may still be brought into account when treating with the collective.

Web of customary interests

The second is that at the personal level, and to a large extent at the level of the hapu as well, use rights were most regularly in the form of a licence to access a particular resource in a certain way, at a prescribed time. They were rarely in the form known to Europeans of an individual right to access all the resources of a prescribed area, in any way, and at any time. As a result, a complex web of customary usages existed. To illustrate the point, one resource might be utilised by different persons or hapu at different times, or even by several hapu at the same time.³⁷

Individual interests not absolute

Thirdly, rights to access resources were rarely absolute. The personal use of resources was surrounded by social obligations to contribute to the hapu according to its laws, and was conditioned by the ethic that mana came not from the aggregation of property rights for personal gain but from one's contribution to the community. Those persons who built an eel weir, for example, may have claimed it as theirs, not to secure an exclusive ownership but to secure the honour, or the mana, of having made it. Thus, Maori could fiercely debate the right to something but at stake was a question of mana, not an individual gain in wealth. The incidence of property accumulation as understood by Europeans was not the primary or key motivator for Maori action. The ethic or value of providing for the group was.

Hapu interests not absolute

The resources thus existed for the benefit of the people of the several hapu. From this, it might be extrapolated that the underlying proprietary interest was vested in the hapu, but the hapu interest was not absolute either.

Whakapapa networks were very complex. Some smaller settlements comprised members of one hapu, while larger ones usually included people from several hapu. Major hapu had a presence in more than one settlement. An incomplete list compiled from nineteenth-century records gives 52 Atihaunui hapu.³⁸

37. See Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c1769 to c1945*, Wellington, Victoria University Press, 1988, pp 194–195. Also, the works of Ron Crocombe on land tenure in the Pacific, as referred to by claimant counsel, provide significant insights to the numerous types of use rights that were held by individuals and by large and small groups. The rights to which he refers have application to the New Zealand Maori situation: Ron Crocombe, 'Overview', in *Land Tenure in the Pacific*, Ron Crocombe (ed), Melbourne, 1971 (doc D18(a)), pp 17–18.

38. Document A47, p 26; T L Downes, *Old Whanganui*, Hawera, WA Parkinson, 1915 (doc A40), pp 163–164

Relationships between neighbouring hapu were not always cordial. A rangatira, for example, might place a rahui over part of the river as a reprisal for a provocation. It was a main responsibility of the rangatira of the river to resolve such situations, calling on the assistance of other leading rangatira if necessary.³⁹ It was also their responsibility to provide leadership in the defence of the region against threats or incursions from outside people, either by diplomacy or by military leadership. This was a real threat. Thus, a taua could get from Taumarunui to Putiki-waranui in two to three days and there were tracks on the right bank from Ngati Ruanui, Te Atiawa, and Ngati Maru, and on the left from Ngati Tuwharetoa and Ngati Kahungunu.

The hapu were related by descent, with marriages and gift exchanges renewing the bonds between them. Rangatira maintained an interest or a say in the affairs of several hapu and they needed each other for protection. Any major decision on the resources of a place or the affairs of the people as a whole might be made by the rangatira of many hapu spread over a wide area, or ultimately by rangatira from throughout the descent group's district.

Accordingly, while there is strength in Crown counsel's argument that no single chief of a descent group was consistently paramount (though often a powerful rangatira might have mana over many hapu or all the hapu of a group) it does not follow that there was no tribal entity above the hapu. Tribal combinations existed (though not tribal institutions of authority), and not because of the paramountcy of one rangatira but because of the paramountcy of several when acting in concert.⁴⁰ It has to be remembered that a rangatira was not a chief in the generally understood sense of a single leader of a tribe. A rangatira was a leading figure who brought people together, but in any hapu there were many rangatira, and many more for the people of the descent group as a whole. In pre-European times, there was no concept of a single, personal leadership, but in 1853, a number of rangatira sought unity through the raising up of one of their number as king.⁴¹ Te Anaua and Peehi Turoa were in turn visited to see if they would consent to being king, but though they supported the appointment, they declined the honour.

The recognition of a wider descent group than the hapu has in turn led to the view that the ultimate proprietary right, or the over-right of control, was vested in the iwi, or all the people of the descent group as a whole, 'iwi' meaning simply 'the people'. This, too, may overly formalise or exaggerate the position. It is certainly true that the people as a whole had an interest in the whole of the land that the descent group possessed, but we consider that there was no absolute or ultimate right anywhere, in the Western sense. Rather, there were interests at each of the three levels described, those of the individual, the hapu, and the people, and these were mediated or brought into account according to the circumstances of the case. In practice, no person or group at any level could act without considering the

Recognition of larger group identity

No one level paramount

39. Document D24

40. Ballara, *Iwi*, pp 179-193

41. *Ibid*, p 218; John Te H Grace, *Tuwharetoa: The History of the Maori People of the Taupo District*, Wellington, Reed, 1959, p 444

interests of the other two, or at least not without the risk of losing possession of what they had.

The people

In this claim, there was no argument that those customarily entitled to the river's benefit were the people of the hapu that line the river or lined it in former years. Although these hapu or tribes multiplied over the years, and although their structure and names changed with the passage of time, in the usual way, the people concerned were still the same. Members of the many river hapu retained the original ancestral name of Te Atihaunui-a-Paparangi, also called Atihaunui or Ngati Hau. As a collectivity, they are thus known by the name of one of the founding ancestors, Haunui-a-Paparangi, who many generations ago came with Turi on the Aotea waka to settle in the area with the original people, Nga Paerangi. Their lineage is also from certain of the Kuruhaupo waka, especially Haupipi, and there are connections to other waka as well. All find commonality under the Atihaunui title.

As the descendants of Haunui spread along the river, forming new hapu or tribes in the process, it was not unnatural that they should collectivise at more regional levels from time to time, or that these combinations should accord to the natural geographic divisions of the river in roughly its upper, middle, and lower reaches. These combinations varied according to different purposes and changing allegiances, but consistent with the Maori concern to maintain their ancestral identities, the sense of commonality under Te Atihaunui-a-Paparangi was kept.

Levels of identification

In the result, the Whanganui River Maori identified at various political levels. The first, that which we would equate with 'tribe', or the most regularly functioning political unit, was the hapu, formerly represented in a settlement or group of settlements comprised of several closely related whanau (families). They also operated or identified from time to time as a regional group, generally according to the river's upper, middle, or lower parts. Then, despite occasional hapu and regional rivalries, the hapu of the three regions also identified as a people, or iwi, under the calling of Te Atihaunui-a-Paparangi. It was clear to us from the evidence, and from visiting the many marae of the area, that these identities are maintained to this day. Although formerly 'iwi' was not a regularly functioning unit, and the people came together mainly to defend the area in war, this larger identity served to remind the people of their common origins, that they might work together when confronting an outside force.⁴² Thus, many who spoke to us described how the people traditionally saw themselves, as one claimant researcher put it, 'both as separate groups and as a collective whole'.⁴³

River as a unifying force

Accordingly, we agree and disagree with Crown counsel. We accept that which Fergus Sinclair pointed out, relying upon material from Angela Ballara, that in traditional society the group exercising regular corporate functions was the hapu, and not the collective entity of the people, or the iwi. However, we consider that

42. Thus, while there were battles between hapu, there was also a unity if that were required. For example, when the people as a whole were threatened during the musket wars, they joined together to repulse attacks from Te Rauparaha and others in the 1820s and the early 1830s.

43. Document A49, p 8

there was still a wider interest, though the extent to which it had a regular effect or influence may have varied from place to place over the country, according to various circumstances such as geographic dispersal and overlaps or close relationships with other major descent groups.

In Whanganui, the river added significantly to common descent as a unifying force, together with the fact that the dispersal of the people was not broadly across the ancestral territory but narrowly throughout the length of a long river flowing through a precipitous terrain. Again, a mountainous hinterland meant that overlaps with other descent groups did not apply generally throughout the tribal area and were limited mainly to the open lands at the northern and southern extremes. The river was thus a ready link between the various sections of a relatively homogeneous descent group. Although there is a record of internecine rivalry, there is also a record of concerted action, as a people. There is, therefore, a double metaphor in the 'tupuna awa' as the river that is an ancestor. While it gives vent to creation beliefs, it stresses that, just as an ancestor brings people together, so also does the river.

Accordingly, we see the social and political structure as one where, in a very real sense, Maori interests existed at the three levels of the individual, the hapu, and the people.

The political structure forms only part of the picture. The peculiarities of traditional resource-use entitlements are relevant too. Maori claimed use entitlements by reference to the actions of remote forebears and the maintenance of particular uses by later antecedents. Once more, ancestors provided the putake, or the source of the individual's entitlement to utilise a particular resource in a certain way, and so also the entitlement of their families and hapu. Accordingly, ancestors underpinned both the use entitlements and the identities of individuals and their associated groups.

The river was little different from the land in that respect, as both a resource and a source of identity. The actions and usages of remote and subsequent forebears were cited for the river in the same way as for the land to legitimise particular contemporary usages or to show the connections between hapu, the interconnectedness of the people as a whole, or the connections to other descent groups. The choice of ancestor depended upon the purpose. So, also, in the case of the river, ancestors were invoked to emphasise that, while a host of river uses obtained in different parts, the people as a single entity also held the right to the river. Accordingly, when speaking of the river as a whole, three ancestors have been regularly invoked by the people when speaking amongst themselves, or to others, or to tribunals and courts, to show that, though the river flowed through many places, the river, like the people, was a single entity. The ancestors, as earlier noted (sec 1.2), were Hinengakau, who was associated with the river's upper reaches, Tama Upoko, who settled in the middle, and Tupoho, who was known for the lower part. The point is that these three ancestors were siblings, the children of Tamakehu, a leading rangatira of Te Atihaunui-a-Paparangi and his first wife, Ruaka. The children's names thus served to illustrate the people's basic unity. We

Basis for resource
uses

Three symbolic
ancestors

had to keep their names in mind, for they were regularly referred to in this and earlier inquiries.

Other symbols of
unity

Traditionally, this ancient sentiment of unity found expression in art, song, and proverbs. These, too, should be noted, for past advocates or adjudicators have treated the resultant symbols as fanciful and have not looked to their underlying meanings. Thus, carvings on the tribal meeting houses at Ngapuwaiwaha and Putiki, towards either end of the river, depict a rope of three strands signifying the unity of the three river sections. They also illustrate certain tribal sayings, such as, for example, that the people are 'a spliced rope, entire from source to mouth', which is also encapsulated in the expression 'te taura whiri a Hinengakau (the plaited rope of Hinengakau), a reference to Hinengakau and her two brothers. It is also said, in the context of internal feuds or outside conquests, that 'a spliced rope, if broken, is made whole again'. The symbolism was important to remind the people of their interconnectedness, the more so since the river, like the land, had different names at different places, the name 'Whanganui' originally applying mainly to the lower reaches. Other parts were variously called Te Awanui a Rua, Te Awanui a Tarawera, Te Wai Tahuparae, and Te Koura Putaroa.⁴⁴ Although the river was variously known at different places, the river's flow was a reminder that the people, like the river, were still part of a whole.

Boundaries and
other groups

We interpolate a caveat at this point. The picture of an iwi estate with defined boundaries is misleading. Though the natural geography tended to isolate the Atihaunui people, Te Atihaunui were surrounded by other major descent groups. These included Ngati Tuwharetoa at the northern headwaters, Ngati Maniapoto and Ngati Maru on the northwestern tributaries, Ngati Ruanui and Nga Rauru by the western catchment area, and Ngati Apa to the south and east. Through intermarriage, hapu on the border lands could relate to the descent groups on either side. By way of example, at the northern end, people relating mainly to Tuwharetoa might freely take tuna at Papakai or other places at the Whanganui headwaters, on account of their marital and ancestral ties, and those at Papakai might fish or hunt around Lake Rotoaira. At the southern extremity, there were blood ties with Nga Rauru to the west and Ngati Apa to the east. These relationships are a reminder that Maori identities are defined by whakapapa, not boundaries, and loyalties may fluctuate according to the temperament of the border hapu at any time.

Traditionally, these overlaps did not present a problem, for connections with other tribes were invoked to add to one's strength and to keep the peace, not to start a war. Nor do they present a problem in this case, for the claimants are experienced in Maori protocols. We could not help but notice how senior delegates from outer groups were present at the hearings, how connections to each were recited on the marae, how their interests were acknowledged, and how their mana was maintained. Although there was the prospect of a cross-claim from Ngati Apa, the claimants acknowledged the blood ties and the matter was not pursued.

44. Document A50, p 3; doc A77, pp 78–89

In this traditional climate, understandings may exist that make it unnecessary and uncustomary to lay down defined boundary lines. It may be sufficient to say, as Hikaia Amohia is reputed to have said with reference to Tuwharetoa, ‘the further you go up the river, the thicker the blood becomes’.⁴⁵

We sound a similar warning on the boundaries of hapu, for the picture of diverse hapu utilising discrete river sections is equally at fault. Hapu, or individuals, used parts of the river at widely different places and were highly mobile. It appears that all hapu travelled south to fish kahawai at the river mouth, for example, and that groups from as far apart as Pipiriki and Taumarunui fished for tunariki at the confluence of the Ohura and Whanganui Rivers. In addition, the individual tribal members were invariably connected to more than one hapu, and their lineages could give them access to the resources of many places. Large sections of the people sometimes relocated, as did those led by Te Mamaku, who left the upper reaches to establish a pa in the centre during the musket wars of the 1820s. In those days, such overlaps or movements were not necessarily a source of friction and could add to the sense of commonality.

Hapu boundaries

This is not to say that the hapu were never located in one place. They were, and in travelling along the river, the mana of each would need to be respected. They operated from centres of interest, however undefined at the edges. Lines were drawn for cultivations, hunting areas, or war (the aukati marking not necessarily jurisdictional boundaries but defensible positions). Some recent tendencies to see hard and fast hapu boundaries appear to be an exaggeration, or fail to appreciate the existing Maori dynamic.

It is thus consistent with custom that, with the exception of only one group, the many Maori who appeared before us strongly supported the presentation of a united claim and urged that their collective concerns be managed by a group or body representative of them all. However, we did not understand this to mean that such a body had the primary right or authority over the river. The distinction, we consider, is important, and is now further elaborated on.

On hapu and iwi

It appears that, traditionally, the individuals of the hapu or individual families had the primary right of river user, although fishing expeditions or major eel weir constructions might be undertaken on a hapu or combined-hapu basis. As the Tribunal considered in the *Mohaka River Report 1992*, adopting submissions of researcher Graham Butterworth, the individual or family interest was limited by the proprietary right of the hapu to control use and access in the area.⁴⁶ We also consider, however, that when the actions of one hapu were likely to affect its neighbours, a decision was most likely to be made by a meeting of the district hapu. Sometimes, there was a meeting of the rangatira for the whole river, and when one hapu was threatened by a group from outside, several hapu, or the hapu as a whole, might come to its aid. We thus concur with the opinion in the *Mohaka River Report 1992* that hapu interests in turn were either constrained or assisted by the larger

45. Brief of evidence of James Ritchie, Wai 201 R0D, doc B28, p 6

46. Waitangi Tribunal, *The Mohaka River Report 1992*, secs 2.9, 4.5.3

concerns of the principal rangatira of the several related hapu, who controlled or protected the resources of the iwi, or the people as a whole.

Relevance to this
claim

Following the advent of Europeans, it was necessary that this traditional understanding should be taken a stage further. Increasingly, from the nineteenth century the river Maori, like Maori throughout the country, were, with varying degrees of success, seeking to work more often as one body to deal with outside forces. Today, such 'iwi' bodies have become common, and have emerged as established, functioning, units to represent the many hapu on those matters that affect them all. This claim provides an occasion where such iwi representation is now required, in our view, in the interests of all. None the less, a tension remains as to the respective roles of hapu and iwi bodies. In defining those roles, we think it important to recognise that, while changes have taken place, the traditional ethic has remained the same: that is, political authority moves from the bottom up. Accordingly, the legitimacy of an iwi group today, in our view, depends on its accountability to the hapu, its respect for hapu autonomy, and its sensitivity to local conditions and interests.

Hapu and combined
hapu interests

For those reasons, it appears to us, first, that individual and hapu interests, while mainly associated with one place, were not confined to that place. Individuals could have use rights in many different areas along the river's length, and hapu groups could find themselves fishing at sites far removed from their homes. The hapu, in any event, were mobile and could relocate. Persons from different hapu could also combine for fishing purposes.

In brief, the record of uses of the river by particular persons or hapu at the places near to their habitations is by no means a complete record of the river uses that applied. Persons and groups had interests in eel weirs and other structures a distance from where they lived. The whole river was a fishery, and the people of the river fished generally.

While particular hapu might block parts of a river in times of war, and while each hapu had a rangatiratanga of its own, the right of control depended ultimately on the collective authority of the people. In the final analysis, control and rangatiratanga vested in the people as a whole, and it was this collective interest that was most expressed in oral and artistic imagery.

In modern terms, representation through a single body like the Whanganui River Maori Trust Board is appropriate in this case, but there must be sensitivity to particular hapu interests and the traditions for both hapu autonomy and hapu cohesion.

2.5.2 A mana-based approach

The foregoing has endeavoured to explain Maori structures in terms comprehensible to lawyers in light of the preceding legal argument. A Maori approach, while reaching the same result, would not be quite the same. Professor James Ritchie, based on his experience and discussion with Maori over many years, expressed a more cultural perspective to the Tribunal in the Whanganui-a-Orotu

claim.⁴⁷ He has had a particular interest in the Maori perception of water regimes, and gave evidence thereon to the Tribunal as early as 1984, in the Manukau claim.⁴⁸ He has also given evidence for Atihaunui in the minimum flows hearings.

In the Te Whanganui-a-Orotu case, Professor Ritchie began with a discussion of the mana of the rangatira, founded on the whakapapa, or genealogies, that are central to Maori thinking, with emphasis, not on structures but on personal relationships. He then examined the complex network of whakapapa that binds people together, linking all Maori in an inclusive pattern, and that gives rise to what he called mana tangata. By whakapapa, Maori link also to the gods, and since the gods produced not only people but all life-forms, and even things that have a force of their own – the mountains, rivers, wind, and rain – Maori see themselves as related to these things in a personal way.

Land rights and mana

The lands of the people, then, are defined not by boundaries but by relationships. The identifiable lands of a group of Maori people are the lands of their history, the places where their tupuna are buried, all those lands that they could occupy or defend, or on which they could keep their fires alight.

Boundaries and relationships

In other words, to get inside the Maori world one must set aside preconceived notions of State-like territories and concepts of private ownership or rights. In the Maori scheme, relationships were more important than boundaries, the former being inclusive and the latter tending to exclude. This explains why whole hapu could change locations, moving from one part of the river to another, why individuals could leave one hapu to live elsewhere, why a rangatira could have mana in many places along the river, and why a descent group could have the control of a territory but not insist on exclusive rights of user.⁴⁹

It also explains why, on two occasions, certain early Europeans, visiting Whanganui for the first time, found the people who were fishing at the river mouth were from Taupo, and belonged to the different descent group of Tuwharetoa. A European might inquire of their territorial rights. A Maori would inquire of the relationship between the Tuwharetoa and Atihaunui people.

Accordingly, Ritchie went on to explain that the next component of mana is what some term mana huaanga – the possession of riches with which to show generosity to others:

Mana huaanga

[Mana huaanga], that mana which rises from riches, the possession of resource-rich territories or waters, the fruits of the bush, its birds, the eels, gardens and waters, inland or oceanic. These not only sustained the iwi but with these good things they could make their mana material through the hospitality they could offer and the koha which they could carry when they travelled or joined others in celebration, or to mourn.⁵⁰

47. Brief of evidence of James Ritchie, Wai 55 ROD, doc E2; Waitangi Tribunal, *Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, secs 1.3–1.5

48. Submissions of R Mahuta and J Ritchie, Wai 8 ROD, doc B47

49. Brief of evidence of James Ritchie, Wai 55 ROD, doc E2, paras 6.3.1–6.3.4

50. *Ibid*, para 6.4

The mana and tapu associated with resources and features of the land, he submitted, are something that continues even after people have been removed:

The mana associated with tapu is never destroyed but goes on forever, whoever owns the land; land on which blood has been spilt, for example, will always be tapu, even after it has been bulldozed flat and had any and every kind of engineering damage done to it.⁵¹

We add that mana was also at the heart of traditional giving. It required that things, even land, should be given freely and generously, and that recipients should respond likewise in time. This fitted notions of honour and prestige, and of maintaining one's own mana while acknowledging that of others. The point of mana in this context is that, in a society where food preservation was limited and crops could fail, survival might depend upon the obligations owed by others.

2.6 THE MAORI COMPREHENSION OF RIVERS

Importance of river values and beliefs

Maori losses over the Whanganui River depend on what they in fact possessed, but certainly they possessed more than rights of use. River despoliation and a foreign management regime denigrated Maori values and beliefs, affecting Maori self-esteem. It is necessary to consider how Maori saw and related to the river, recalling again the philosophy of their place in the natural order, and the centrality of the river to everyday lives.

River's centrality for survival and cultural growth

It should be remembered that this is the second longest river in the North Island. Its gentle gradient makes it navigable for more than 230 kilometres, and yet the river flows through mountainous terrain. It has been a home for a numerous people from immemorial time, but a home that was built around a river life. The region was marginal for major food crops, but the river, with its eels, fish, freshwater shellfish, and waterfowl, provided the staples.

The river was also the pathway to the sea, and the roadway that knitted the people spread along its banks into a single entity. People travelled by canoe as far inland as Ongarue. Journeys upstream through the many rapids took from 10 days to a fortnight, but downstream journeys could be made in three days.⁵² Small settlements were strung out along the entire length of the river.⁵³ A map provided by the claimants lists 143 marae.⁵⁴ The only sizeable inland settlements away from the banks of the Whanganui were in the Turingamotu and Manganuiateao Valleys.⁵⁵

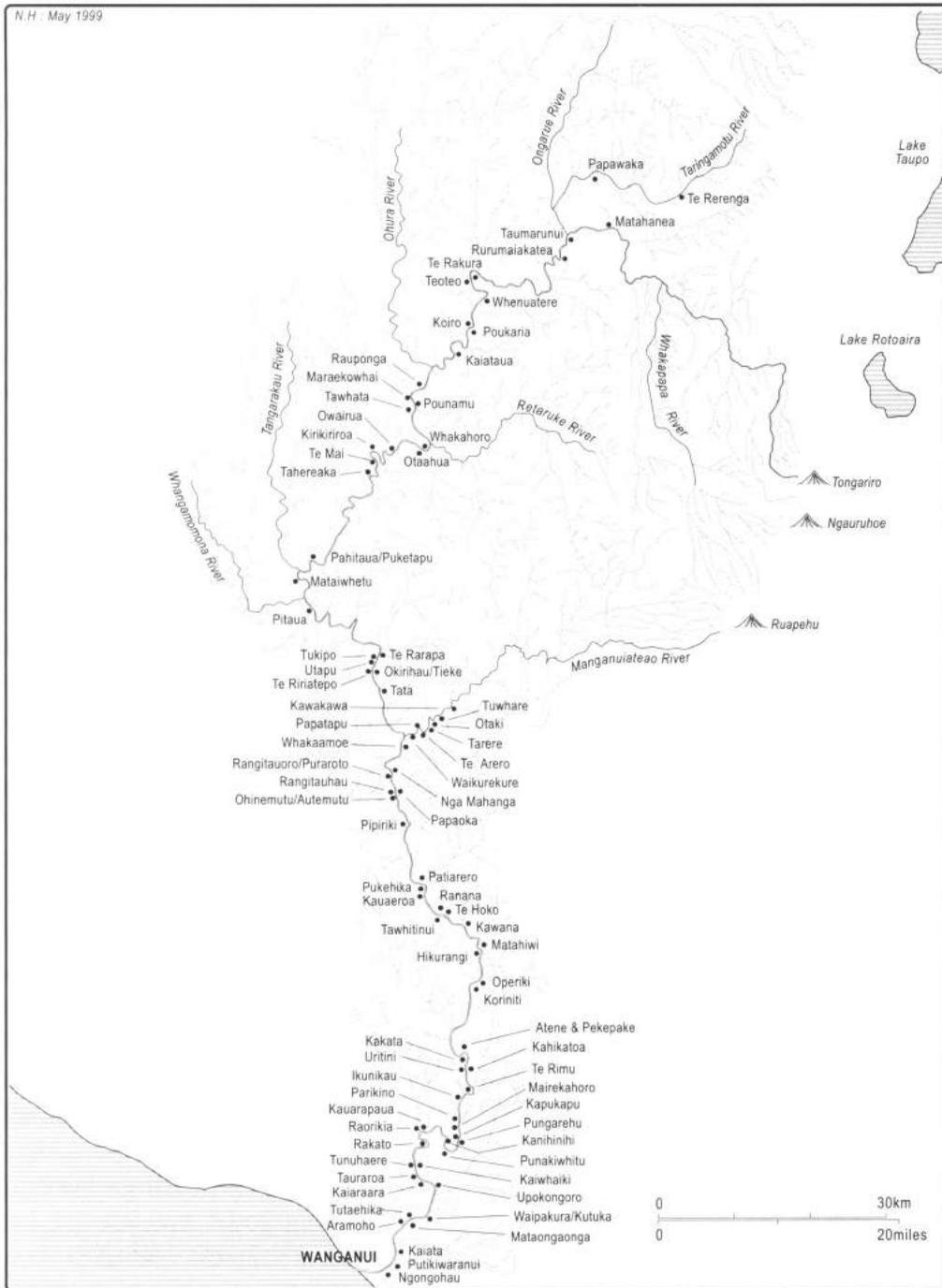
51. Brief of evidence of James Ritchie, Wai 55 R01, doc E2, para 6.5

52. Document A47, p 9. This should be contrasted with James Belich's construction of a river journey in *I Shall Not Die: Titokowaru's War, New Zealand, 1868-1869*, Wellington, Allen and Unwin, 1995, pp 29-31.

53. Document A47, p 9

54. Document A60(a)

55. Document A47, p 10



Map 2: Pa sites on the Whanganui River. Source: doc A56.

Spring was the time for planting; summer for fishing at the mouth of the river; and autumn for taking eel and lamprey, harvesting, collecting berries, and storing food. People moved up and down the river and changed their places of residence in accordance with their seasonal calendar for gardening, fishing, and gathering food.⁵⁶

56. Ibid, p 9

The mild gradient of the Whanganui River over most of its 300 kilometres and its numerous rapids made it an ideal river to fish. Down through the generations, Whanganui Maori studied the habits of the river's water creatures and became expert in trapping, preserving, and preparing them for eating. Eighteen species of native freshwater fish were found in the river and its tributaries, as well as koura, kakahi (mussels), and mawhitiwhiti (shrimp). Whanganui Maori were renowned for their pa tuna (eel weirs) and utu piharau (lamprey weirs).⁵⁷

Food played a very important part in traditional hospitality, and delicacies such as dried fish taken at the mouth of the river and parrots caught in the upper reaches and preserved in calabashes in their own fat had a prized place in gift exchanges within the tribe and with other tribes.⁵⁸ Lavish presentations of food for important visitors were a powerful expression of the mana of the people providing them.⁵⁹ Ease of communication along the river facilitated these exchanges and no doubt intensified their competitive character.

Around the river had been woven many stories and beliefs. For the Atihaunui people, the river is a doctor, a priest, a larder, a highway, a moat to protect their cliff-top pa, and, with the cliffs, a shelter from winds and storms. It was, as the Tribunal said in its interim report, 'the aortic artery, the central bloodline of that one heart'.⁶⁰

The emotive bond

The emotive bond cannot be described solely in terms of a sentimental regard for the landforms of one's country. Even the centrality of the river to the people's lives is insufficient to explain how they think of it. It is tied as well to the Polynesian comprehension of the environment, where a river can be described as a tupuna or matua as with a caring parent. This points beyond personification to fundamental beliefs.

Creation beliefs

As we see it, the relationship, for Maori, is first and foremost genealogical. Ancestral ties bind the people and the river. At our first hearing, Tiwha Puketapu called it the Rarangi Matua, or the 'chronological ancestral sequence which binds the celestial and temporal realms'.⁶¹ Just as land entitlements, personal identity, and executive functions arose from ancestral devolution, so also it is by ancestry that Maori relate to the natural world. Based on their conception of the creation, all things in the universe, animate or inanimate, have their own genealogy, genealogies that were popularly remembered in detail. These each go back to Papatuanuku, the mother earth, through her offspring gods. Accordingly, for Maori the works of nature – the animals, plants, rivers, mountains, and lakes – are either kin, ancestors, or primeval parents according to the case, with each requiring the same respect as one would accord a fellow human being.

Codes of conduct

Consistent with this, fishing codes were extremely precise, not only to ensure the peaceful sharing of resources or to maintain stocks but more fundamentally to

57. Document A49, pp 14–15

58. E Shortland, *Traditions and Superstitions of the New Zealanders*, 2nd ed, London, Longman, 1856, p 214

59. Document A47, p 26

60. Paper 2.10, p 1

61. Document A51, p 2

keep faith with the gods, to maintain water purity, and to avoid any appearance of greed or disrespect. Propitiatory karakia, or prayers, regularly preceded expeditions. New nets were first blessed and then made whakanoa to avoid spiritual contamination. Rules of personal hygiene were punctiliously observed – there were places for bathing and places for religious ceremonies. Fish were not processed or consumed within the watercourse, fish waste was deposited in defined middens, and waste was generally not discharged to water but returned to the cleansing qualities of the land. Times for fishing different species were maintained, the sharing of catches was informally but still definitely required, and food was preserved, not least for personal consumption but to show gratitude to the gods by the sumptuous hosting of visitors. Codes of conduct for the regulation of society were all bound up with rituals of identity between people and the deity.

From the detailed cosmogony of the Maori, it follows further that all things have a mauri, a life-force and personality of their own, and it was certainly the case that a river was seen to be so endowed. Again, the mauri or the natural bent of a thing was to be respected. People could not alter it or fundamentally change its character without an appropriate propitiation of the associated ancestral god, by ritual and with evidence that the change was necessary for the wellbeing of the related people.⁶² Conversely, if the mauri of a river or a forest, for example, were not respected, or if people assumed to assert some dominance over it, it would lose its vitality and force, and its kindred people, those who depend on it, would ultimately suffer. Again, it was to be respected as though it were one's close kin.

Mauri beliefs

A group may have another mauri again. A tree has a mauri, but so also does the forest, of which it is part. Likewise, a person has a mauri, while there may be another again for a group to which that person belongs. The mauri of the group may be stronger or preferred, for it is rare that Maori will examine the component parts of a thing without first looking to the ahua, or the shape and appearance of the whole. We thus noticed that when the claimants spoke of the river, or referred to its mana, wairua (spirit), or mauri, they might in fact have been referring not just to the river proper but to the whole river system, the associated cliffs, hills, river flats, lakes, swamps, tributaries, and all other things that serve to show its character and form. Sometimes this was explicitly stated, as with the people at Tieke, or in the submissions of claimant counsel. Thus, it appeared to us that when Maori and Pakeha spoke of the 'Whanganui River' they were not necessarily talking of the same thing. For Maori, it included all things related to the river: the tributaries, the land catchment area, or the silt once deposited on what is now dry land.

It follows that, in rendering native title in its own terms, the river is to be seen as an indivisible whole, not something to be analysed by the constituent parts of water, bed, and banks, or of tidal and non-tidal, navigable and non-navigable portions, as may be necessary for the purposes of English law. The following

62. Customary precepts and the conditions enabling natural resource development were considered by the Tribunal in the *Report of the Waitangi Tribunal on the Manukau Claim*, sec 7.2, following submissions thereon from R Mahuta and J Ritchie (Wai 8 R0D, doc B47).

observations of the Native Land Court in 1929 with regard to the title to the bed of Lake Omapere are apposite:

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

A lake is land covered with water, and it is part of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream.⁶³

With regard to the mauri of water bodies, the court had this to say:

[to Maori] a lake was something that stirred the hidden forces in him. It was . . . something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a 'mauri' or 'indwelling life principle' which bound it closely to the fortunes and destiny of his tribe.⁶⁴

River as tapu

The river might also be described as tapu, or sacred, though in these proceedings the matter was debated. In evidence before the Maori affairs select committee in 1980, the elder Titi Tihu considered that the river, or the water in the river, was not strictly tapu, though the river contained tapu sites.⁶⁵ However, it really depends upon the level at which one is thinking at the time. There is a sense in which all life forms and significant natural phenomena are sacred on account of the scheme we have described; that is, as part of the earth mother or the works of her offspring gods. Certainly, the river was seen as deserving of high respect and as having mana or power. This could apply to all rivers, but the Whanganui River, perhaps because of its length and the large attendant population, was held in special esteem. It was prayed to and was used in ritual, for healing, or as a medium to keep contact with the gods. Its awesome nature was enhanced by the many who had populated its length for generations, for in the result, numerous ancestral spirits came to be held within its flow. Accordingly, it is still regularly prayed to for healing purposes, as a prelude to an undertaking of some kind, or simply as a matter of course.

We understood that some parts of the river were especially sacred on account of a past event – a battle with many deaths, for example. It was also usual that each village had its own wai tapu, or sacred place, where children were dedicated to the

63. *Application by Ripi Hongi and Other Natives for Investigation of Title* unreported, 1 August 1929, Judge Acheson, Native Land Court (Bay of Islands Native Land Court minute book, vol 2, pp 253–278), p 7. For a commentary on that decision, see White, sec 7.8.3.

64. *Ibid*, p 8

65. 'Memorandum for the Select Committee on Maori Affairs in Support of the Petition of Titi Tihu and Hikaia Amohia Regarding the Bed of the Whanganui River', MA7/6/188, NA Wellington (doc B26, pp 517–518)

gods in *tohi* (baptism) rites, where the sick were cleansed of spiritual or physical afflictions, and where warriors or tribal emissaries were prepared for pending tasks. Other parts had become synonymous with famous ancestors of some 20 or so generations ago. Their spirits have also mingled with the spirit of the river itself, the people maintaining a substantial record of ancestors within a complex spirit world.

There is no shortage of early writings to support the contention that watercourses loomed large in the religious practices and beliefs of the Maori people. The following account from Elsdon Best refers to the use of water in ritual functions, with particular reference to baptism and spiritual cleansing:

Water as tapu and tapu sites

It may be said that water entered largely into Maori ritual performances; both aspersion and immersion being practised. Near every village some stream or pond was utilized as a *tapu* place at which ceremonies of what we may term a religious nature were performed. Such a place was termed the *wai tapu* [or] *wai whakaika* . . . At this stream many rites were performed. In many cases those who took part in such a performance stood in the water, in some cases waist-deep. In performing certain ritual the *tohunga*, or priests, cast off their garments, and, clad in nothing more than a bunch of leaves, entered the water and took their stand at a place where the water surrounded them. The idea prompting this act was the desire for what may be termed spiritual insulation; all contaminating influences were avoided by this means.⁶⁶

Best then illustrates the importance that Maori placed on water that was pure or unpolluted, and how, in earlier days, it even had to be utilised, for religious purposes, at its natural place:

The Maori folk would never have consented to our form of baptizing infants, simply because the water employed in the rite was contained in a vessel fashioned by human hands. This would affect its efficacy or potency; hence our Maori always turned to the *wai matua o Tuapapa*, as he termed it – virgin water as it flows from the earth – when utilizing water in his religious ceremonies. This was the only water free from polluting tendencies. When the Maori first saw the Christian form of christening, the sprinkling of water contained in a vessel made by human hands, his verdict was '*Kaore i hangai*' – meaning that it did not comply with the demands of ancient custom and propriety. Pure water is that produced by Para-whenuamea (personified form and origin of water); it must be used in its natural font. Thus the baptism of infants was performed at a *wai tapu*. In old-time Babylonia water was considered as the primal element from which life came; and in the superior cosmogonic myths of the Maori we note that, ere the earth was formed, all was water, and that *io*, the Supreme Being, abode in space. In native teachings it was said that the welfare of all things depends upon water; without it nothing can flourish. When Tane ascended to the heavens in order to obtain the three baskets of knowledge, he was compelled to twice undergo the *tohi* ceremony in *tapu* water ere he could be admitted to the divine presence.⁶⁷

66. Elsdon Best, *Maori Religion and Mythology*, 2 vols, Wellington, Government Printer, 1976, vol 1, p 343

67. Best, pp 343-344

Water and other rites and rituals

Best's account also describes similar water rites for those about to engage in battle (*wai taua*), for those made *tapu* by attending a *tangi* (*atahu* rite), and for scholars graduating from a *tapu* school. With regard to proceedings to cure physical or spiritual sickness, he refers to the *whakahoro* rite, a rite well known to the Whanganui River people, as the name for the settlement of Whakahoro shows. It was, as Best's informant expressed it, '*hei muru i ona hara, hei whakamarama i tona ngakau*' ('to condone or abolish his faults, to enlighten his mind'). Spiritual cleansing was essential to healthy living. In Best's representation of Maori religion, man could himself be a descendant of the gods, and when he placed himself in the hands of the gods, he had to approach them in a fit and proper condition.⁶⁸ There were further rites associated with childbirth, the removal of *tapu* through contact with death or disease, and for giving protection when making a journey, especially into another tribe's territory.

Role of taniwha

Cementing the association of the people and the river is the presence of *taniwha*, revered water creatures of extraordinary powers, and *ngarara*, or giant reptiles, which, or who, control the watery domains of particular river caves or beds. These were sometimes deceased forebears whose spirits had taken a *taniwha* form, but in any event, they were relatives, for both people and *taniwha* are descendants of the god Tane. More *taniwha* appear to have been recorded for the Whanganui River than most rivers, again presumably because of its length and the many settlements along its banks.⁶⁹ The *taniwha* are fondly revered, even if they are feared, having been part of the landscape for a long time. Tutangatakino of the Te Ohu district, for example, a *taniwha* about 30-feet long, who, it was said, could swallow a person whole, had guided the Aotea waka from Hawaiki numerous generations ago and was the pet of the commander's grandson, whom he carried on his back.⁷⁰ His usual lair is beneath Petipetiaurangi, a large flat rock on the upper river, where still today river travellers leave a placatory branch offering.

Like humans, the *taniwha* differed in temperament, but unlike humans their forms were much more various and might change. Some were friendly, others threatened lives, but the more troublesome often had cause to be aggrieved. All were superhuman. Some of them could alter the landscape, or the river course, by lashing with their tails. Others were more likely to trouble river travellers. The appearance of some foretold of disaster or death, while others indicated good fortune. Yet, they were mortals, not gods. Mangapuera of Ahuahua, Otarahura of Ruapirau, and Tutaeporoporo of (now) Shakespeare cliffs near Wanganui City were all *taniwha* that were killed by Maori forebears in daring expeditions to curb

68. *Ibid.*, pp 213–215

69. We understand that the Waikato River is also famous amongst Maori for its *taniwha*. It is said that there is a *taniwha* at every bend: '*Waikato taniwha rau, he piko he taniwha, he piko he taniwha*'. Having regard to Maori poetry, however, in this instance, '*taniwha*' may refer to each or all of the *taniwha* proper, the numerous *kainga* along the river, the power of the river, and the power of the associated people.

70. Another account of this is recorded at section 3.2.9, where Anihera Henry considers that Tu Tangatakino came in the form of a whale and from Rapanui.

their excesses. Te Maru, a taniwha of Koroniti, was destroyed in a flood in about 1850.

Through the settlers' disbeliefs, and their assessment of taniwha in their own cultural terms, Maori became reluctant to talk of them. This was not always so, however, and there were earlier Europeans who recorded various details. Some Europeans claimed to have had personal encounters. Elsdon Best recorded how a survey party was surprised by the taniwha Kawautahi at Retaruke late last century. They gave a fairly detailed description.⁷¹ Reed records a claim that the taniwha Ratata, of Ohauti, was captured by a Pakeha in 1878 and later escaped.⁷² Mihiatakai was sighted in 1861.

Whatever doubts may be harboured of such accounts are not relevant at this point. The important fact is that Maori both believed in and relied on the existence of their taniwha. Still today, twigs and other tokens of respect are left near their lairs on passing by, and the taniwha continue to be spoken to as human beings. That which some might find incredible is a given for the local people, a natural part of the river life.

Most importantly, there was a taniwha for each settlement, and they served to show the right and title of the occupants, and to secure compliance with their law. Though often malevolent, and sometimes indiscriminate in their slaughter, the taniwha were seen as protectors and guardians of both the river and the people. It may have been with that in mind that Titi Tihu advised the Maori affairs select committee in 1980 that the taniwha are 'a local embodiment of the spirit of the river people'.⁷³ In other accounts, however, the taniwha were tangible. They punished those of the hapu who breached the river-use laws and those from outside the hapu who entered the area with hostile or disrespectful intents. Even today, many Maori are not comfortable when travelling on rivers that are not their own unless in the company of a local person conversant with the ways and whereabouts of these beings.

In *Faces of the River*, David Young describes an encounter with a taniwha by Titi Tihu at age eight. As Titi's uncle lay ailing, his mother demanded that he row upstream to Ohura to fetch medicine. Fearful of rowing the long distance in the dark, he none the less went and was confronted by Tutangatakino with 'two great eyes . . . like the signal lamps on the big Pakeha fireboats'. Rather than being consumed, as Titi expected, Tutangatakino guided him safely to the next village. Years later, Tutangatakino visited him at a marae near Waitara, assisting him to raise the ridgepole of a new meeting house, astonishing workers the next morning that this was done single-handedly.

As the grandson and chosen child of the tohunga, prophet, and leader Te Kere Ngataierua of Tawata, who died in 1901, Titi was renowned for his intimate acquaintance with the Maori spiritual world and with Maori prophecies. Young comments that, between them, Te Kere and Titi Tihu spanned a sweep of time from

71. Best, vol 2, p 503

72. A W Reed, *Treasury of Maori Folklore*, Wellington, Reed, 1963, p 313

73. 'Memorandum for the Select Committee'

when Europeans were unknown on the river to when Titi acquired his own jetboat.⁷⁴

In evidence before the Native Land Court in 1938, Hekenui Whakarake described the taniwha Koruana, who lived at Okirihau and Taumatamahoe. Then, with apparent reference to several taniwha and more particular reference to Koruana, he said:

The elders of the Taniwha were all tohungas. According to my elders these tohungas recited incantations the purport of which was to give this man power to go into the river and when he acquired the necessary power he went into the river in the form of a human being. He jumped into the rivers and disappeared for some considerable time then he reappeared and was seen sitting on a rock in the river. When people who saw him approached him he disappeared again. He lived in this particular part of the river for some years then he left that part and was seen going in the direction of Rotoaira.

Judge: When was he last seen?

Hekenui: I cannot say when he was last seen. Some of my elders saw him going in the direction of Rotoaira.

Mr Morison [counsel]: Have you ever heard of Tutaeporoporo and who was he?

Hekenui: Yes, he reveals himself in the Wanganui River in the form of a Totara at Sandy Hook. A relative of mine by marriage tried to lift him out of the river but did not succeed. He may still be there.⁷⁵

Some of the claimants saw the taniwha as under threat, just as the people are threatened in their river control. It was said, in a matter-of-fact way, that certain taniwha have shifted on account of river pollution or the loss of river flows through water abstractions for hydroelectric and other schemes. Some said the taniwha had not been seen for many years. Whatever the situation, however, this much is clear – the taniwha are part of the rich tapestry of history and lore that the river brings to mind. They are part of the mix that binds the people and the river together.

Ancestral
association

Ancestors do the same. The naming of ancestors for any part of the river becomes a validation of authority. It is by this process, by myths and legends, stories and song, and the recitation of ancient karakia and genealogies, that Maori continue to assert their river entitlements.

Water, purity,
mixing, and non-
interference

Water, whether it comes in the form of rain, snow, the mists that fall upon the ground and leave the dew, or the spring that bursts from the earth, comes from the longing and loss in the separation of Rangi-o-te-ra and Papatuanuku in the primal myth. The tears that fall from the sky are the nourishment of the land itself. The life-giving water is founded upon a deep quality of sentiment that, to Maori, puts it beyond the realm of a mere useable commodity and places it on a spiritual plane.

As to the purity of water regimes, to which we have already adverted, we adopt this overview from Professor James Ritchie in evidence before the Tribunal on the Te Whanganui-a-Orotu claim:

74. David Young and Bruce Foster, *Faces of the River*, Wellington, TVNZ Publishing, 1986, pp 11–12

75. Document A77, vol 1(1), p 12

Water has mauri, essential sanctity, both as wai maaori and as wai tai. Water must be kept in its natural state as far as it is possible to do so. The explanations of the origin of water, its different forms, types and so on, in Maaori science, emphasise that ethic. Water, as wai ora, sustains, protects and enhances life. It is avoided if unclean – whether physically or spiritually. It cannot be purified without effort; human effort is not enough, the enlistment of aid beyond the secular is required. . . . It is only through the agency of Papa-tu-a-nuku and her offspring Tangaroa, and his mokopuna Tuutewehiwehi that the mauri of desecrated water can be restored. . . . Desecration of water was powerfully sanctioned and the human agencies to enforce them were the kaitiaki, the taniwha of the hapuu and the rangatira. The connection between upstream contamination or other pollution of food sources was known and rigorously policed and sanctioned.⁷⁶

He further argued that water was viewed from its origin to the ocean as one system. Estuaries were considered special places and there were often taniwha there, whose primary role was to reinforce conservation.

Professor Ritchie went on to develop his theme that in water management an ethic of least interference applied. It was an ethic that resulted from a highly complex set of origin explanations and that placed limitations on the human right to exploit and defined the parameters of safe and reasonable use. There was a particular aversion to the contamination of water from human and food wastes, as the Tribunal has noted in several earlier reports.

Referring back to earlier evidence in the Manukau claim in 1984, Professor Ritchie described the difficulties created for Maori when modern works mix water regimes. In this case, we are concerned with the transfer of Whanganui River water to Lake Taupo and the Waikato River through the Tongariro power scheme. If not mediated in an appropriate Maori way, this is spiritually offensive to Maori people, as the Tribunal in the Manukau claim was to find. It also violated the political harmony between the people of different places, disturbed the exercise of their rangatiratanga over their traditional resources, and affected conservation practices and the productivity of the resources in question.⁷⁷

The relationship between the people and the river might therefore be described as god given, at least in their eyes, calling for respect between people and the natural world as Maori saw it, and in which the river is a living being or tupuna with its own mauri and spiritual integrity. People speak and listen to it, for the water is so much their blood as to produce a state of communication.

Ethic of respect

76. Brief of evidence of James Ritchie, Wai 55 ROD, doc E2, paras 8.1–8.2; *Te Ika Whenua Rivers Report*, secs 6.2.1, 11.3.1. Maori water classifications include waiora, the purest form of water from Ranginui, the sky father, which contains the source of life and wellbeing; wairoa, or rainwater made pure for human consumption through contact with Papatuanuku, or mother earth; waimaori, freely running fresh water or water that is clear or lucid; waikino, in the temporal sense being turbulent water, as in a gorge or rapids and, in the spiritual sense, water with a dangerous mauri, in that it has been polluted or debased; waimate, in the temporal sense being a sluggish backwater and, in the spiritual sense, water that has lost its mauri and become dead; and waitai, seawater, or water that has returned to Tangaroa in the natural process of generation, degradation, and rejuvenation. The spiritual implications are considered in an appendix to the brief of evidence of James Ritchie.

77. Brief of evidence of James Ritchie, Wai 55 ROD, doc E2, paras 8.1–8.2

Mana, and the value placed on mana, made respectful behaviour a natural part of everyday life, something not confined to ceremony and ritual, and it was respect, first and foremost, that was accorded the river. This ethic of respect is a central dynamic throughout the Pacific.

A taonga

The river is thus seen as a taonga – as an ancestral treasure handed down, as a living being related to the people of the place, where that relationship has been further sanctioned and sanctified by antiquity and many ancestral beings. It governed their lives, and like a tupuna, it served both to chastise and to protect. There are stories of those who were punished by the river for transgressions and of those who have encountered its protective power. It was something that they treasured, and though they had possession and control in fact, they did not see it in those terms; rather, they saw themselves as users of something controlled and possessed by gods and forebears. It was a taonga made more valuable because it was beyond possession.

Not a commodity

On this view of things, the river was not a commodity, not something to be traded. It was inconceivable that such a thing could be done or that anything other than the pre-existing order could continue to prevail.

A symbol of identity

The river as a line of communication between otherwise isolated communities was a further factor in determining both the relationship of the people to the river and their relationship to each other. The river wends its way through precipitous terrain, providing access to fertile lands at diverse places and to the riches of a forest otherwise barely penetrable, but the river is the common link for all. Identity with the river, like the threads of kinship, provides an inescapable unity and loyalty – whatever the disputes over eel weirs, the destruction or theft of canoes, trespassing, or simple differences of view. It pulls them back together, no matter how much they are torn apart internally. Without the river, others may not have seen them as a single people, and conversely, it is the river that makes them unique.

The triple metaphor where land, water, and people are treated as one and the same is common to all Maori and parts of Polynesia. The land is usually represented by a sacred place, a mountain especially, the water by a significant lake, river, or ocean. It is by Ruapehu and the Whanganui River that Atihaunui are known.⁷⁸

Psychological consequences

Accordingly, what was denied the people, in the subsequent disregard of their association with the river, was not merely a right of user but their status and esteem, and the foundation for their existence as a people. It was central to their lives and to their identity.

Professor Ritchie's evidence in *Te Whanganui-a-Orotu*, already referred to, describes the psychological consequences seen when people are deprived of that which has deep cultural value, when the object of their concerns remains evident before them, and when, as a result, the loss cannot be worked through and put to

78. Though geographers give the Whanganui River as commencing at Ngaruahoe, with tributaries feeding also from Tongariro and Ruapehu, Maori had many names for the river at different places, and several tributaries with particular names are still seen to be part of the river system. While recognising the connections to Tongariro and Ngaruahoe, local Maori tend to follow a mental path from Ruapehu along the Whakapapa River, which feeds into the Whanganui River near the Hohotaka blocks, and associate the Whanganui River with Ruapehu.

rest. The grief becomes transmitted through generations and institutionalised, and a deep sadness is evident in visiting sites redolent with meaning and memories. The songs, stories, and speeches on marae keep old associations alive, and anguish is never far away:

Anonymous, faceless action or simply denial by some unidentifiable 'them' cannot even be confronted to any effect. Helplessness becomes a habit. Psychologists even have a name for it; 'learned helplessness' is that special kind of helplessness which arises from low status, powerlessness, the imputation that somehow you have brought it on yourself, learning how to be a victim. It exists amongst colonised people everywhere, amongst contemporary minorities and has a subtle corroding effect upon self-esteem and competence.⁷⁹

The reaction, he thought, expressed itself in many ways: in an anger that lashes out at any target that gets in the way, in hostility to the surrounding social environment, in a search for charismatic saviours, in a devaluation of traditional leadership and values, or in an obsession with power, either to attack it or to seek it. The world became alienating, where formerly Maori success was attributed to the gods, who were seen as positively supporting humankind. The Maori ethos brimmed over with beneficence and confidence. The world had been trustworthy, orderly, and good.

The antidote to current feelings of powerlessness, deprivation, alienation, and distrust, in Professor Ritchie's view, was twofold. Maori had first to 'own' the grievance, understanding the cause and bringing the past back into the present. It was then necessary to re-establish the mana of the people, 'from here on and forever'.⁸⁰

2.7 CONCLUSIONS ON MAORI CUSTOMARY TENURE

We thus conclude the above sections on Maori social structure, customary interests, and comprehension of the river with these findings:

- The river was a taonga of central, material, and spiritual significance to the Atihaunui people and the constituent hapu that lined its banks.
- Within the river, whanau and hapu maintained usages both near to where they lived and, generally, at many places throughout its length.
- Activities were also undertaken collectively by persons from several hapu.
- Resource use was conditioned by social obligations to the hapu.
- Fishing was also undertaken by persons outside the Atihaunui descent group, probably on the basis of long-standing arrangements built on kin connections.
- The river as a whole was a fishery, and the whole of the river was important as a waterway.

79. Brief of evidence of James Ritchie, Wai 55 ROD, doc E2, p 13

80. Ibid, p 15

- It was inconsistent with Maori river interests, according to their philosophy, that those interests might be determined according to divisions of tidal or non-tidal, navigable or non-navigable portions, or the severance of water, banks, and bed.
- While hapu exercised particular control rights from time to time, ultimate control and rangatiratanga vested in the people as a whole.
- The river claim should be treated as one claim, and Maori representation should be effected through one body, the Whanganui River Maori Trust Board, for purposes related to the claim with the board continuing to be accountable to all the river hapu.

2.8 THE INTERPLAY OF MAORI AND ENGLISH CUSTOMS

We have yet to consider the arguments on the interplay of Maori and English laws. These are dealt with further in succeeding chapters, for they go to the essence of the claim. For now, however, some further review is required of particular legal submissions.

Was the river 'owned'? Did the Native Land Court fail to provide for tribal interests?

The first, as raised for the Crown by Fergus Sinclair, is that the river could not be 'owned' in Maori law. The second, as argued by both claimant and Crown counsel is whether the Native Land Court failed to provide for tribal interests when issuing titles for the riparian lands. Sinclair submitted these questions were in the ideological realm, but they are answerable by considering the appropriate principles to apply.

2.8.1 River 'ownership'

Constructs of 'ownership' and 'possession'

We accept that, in the Maori scheme, rivers were not 'owned' in the English sense of the term, bearing in mind that 'land ownership' is not a universal law but a particular construct of some cultures. The same of course applied also to the land. It, too, was not owned in the technical sense of English law. In that respect, Maori made no distinction between land and water regimes – they were all part of that which the tribe possessed.

The river, like the land, was transmitted from ancestors, from the original ancestress, Papatuanuku, the earth mother, through the first people to the current occupying tribes, and was bound to pass to the tribes' future generations. For the same reason, the river, like the land, was not a tradeable item. Whether speaking of the land or the river, the right to benefit from them was the same. The right was not absolute, for example. The use of resources from either was conditional upon contribution to the hapu.

Could strangers entering the territory assume rights of river user? In custom, the answer was no. Outsiders had no right except by leave, although leave might be implied through some blood connection, long-standing arrangement, or prior acknowledgement of the local hapu. Strangers might also acquire rights by joining

one or other hapu, but then they would cease to be strangers. While customarily new recruits were related by blood or marriage, the incorporation of outsiders was a known Polynesian trait to strengthen the tribe and maintain a competitive edge. None the less, as was more fully considered in the *Muriwhenua Land Report*, the underlying ‘title’ to the land did not depart from the collective of hapu, save for violence or abandonment, and the right of personal use and occupation remained conditional upon continued contribution to the tribal weal.⁸¹

In short, whether with regard to the land or the river, Maori saw themselves as permitted users of ancestral resources. With regard to the prospective threat from other descent groups, they thought in terms of ‘possession’ and ‘control’. Within their own hapu, their use of resources was always conditional on obligations to ancestral values and future generations, but they did not think in terms of ‘ownership’ at English common law, with its rights of use and alienation independent of the local community.

Possession and control

It does not follow that, in matching Maori and English laws, Maori were to be deemed to own nothing. Nor would it follow that as a result, and save for violence, the Crown must be deemed to own all. One would still have to inquire of the legitimacy of that assumption, and in that context, and since English ownership includes the right of possession, whether that result was agreed.

Equation of ownership with possession

It was obvious and sensible that English ‘ownership’ was to be equated with Maori ‘possession’. The framers of the Treaty of Waitangi took that view. They did not assume that what Maori had might be the same as a private landowner in England, and so they wrote in article 2:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their *possession*; . . . [Emphasis added.]

The distinction is a fine one. In the *Concise Oxford Dictionary*, to ‘possess’ means to ‘hold as property, own’, while to ‘own’ means to ‘have as property, possess’. The difference appears to be that one may own without possessing and possess without owning. The difference is not important for the present debate.

The evidence is clear that the Whanganui River is part of that which Te Atihaunui possessed by right of immemorial occupation. It must therefore be taken as part of that which they owned.

In brief, Maori ‘rights’ in either land or waterways can be seen to be based on usage and possession, from which, according to the law as settled in the Native Land Court, ownership derives. Under English common law, the reverse applies. Generally use rights flow from ownership. A modern Maori focus on ‘property’ and ‘rights’ reflects how they were forced to reconceptualise their customs to make them cognisable in English law.

81. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, sec 2.3.1

Referring then to Crown counsel's questions on customary land and river interests, and relating those to the Treaty of Waitangi (which is discussed in chapter 9), the first question was whether Maori interests were mere rights of user or amounted to ownership in the English legal sense. The answer is that they are more than use rights and include the incidences of English ownership, save those of free transferability or escheat to the State. But they are also more, for there exists, in the hapu and the descent group as a whole, the right to manage and control according to tribal preference and to be left in quiet possession.

The Treaty of Waitangi does not change any of this, save that it introduces the concept of alienation.

Counsel's second question was whether the Crown is correct in assuming that it is appropriate to describe 'this bundle of interests' as rangatiratanga.

We see rangatiratanga not as the sum total of use or ownership rights but as expressive of political autonomy in the management of the total of the people's affairs.

Crown counsel next asked whether it is appropriate, in terms of the principles of the Treaty, to value these interests in the river in their component parts; for example, to treat fishing interests as separate from spiritual interests in the water.

The answer is no. Though they may be severally seen, there is a spiritual element to all parts of life. Though some things are tapu and some things are noa, all is spiritual in origin.

Crown counsel's fourth question asked whether the component parts of the spiritual interests can be further identified. To enumerate all the component parts of the complex Maori spiritual world, even limited to the purposes of this case, would be demanding, risky, and probably unfruitful. It was difficult enough to attempt the same in respect of English land tenure. At this stage, we think it sufficient to say that as a spiritual power and force, the river should be looked at as a single entity, respected as a living being, and recognised for its authority in the lives of the Maori river people. In addition, specific significance will attach to particular places on account of tohi rites, taniwha, ancestors, or the like.

Ownership of water

As to the matter raised by Crown counsel in section 2.3, that there was no Maori custom on the ownership of water, the same considerations apply: that is, 'ownership' was not integral to the Maori scheme. Counsel went on to say, however, that, as something freely flowing, it was not 'possessed' in the sense that it was contained. English legal authority was cited in support.

In terms of law, that which Maori possessed must be determined by reference to that which they possessed in fact, and not by reference to that which may be legally possessed in England. Claimant counsel raised this point, with which we concur. We consider that, if the river is regarded as a whole, as we think it must be in terms of Maori possessory concepts, the water is an integral part of the river that was possessed, and was possessed as well. Though its molecules may pass by, as a water regime it remains.

Indeed, the river would be meaningless without it. The river was a waterway. The whole river was a fishery. It was the habitat of creatures to which Maori were

related, from fish to taniwha. The emphasis on water purity for ritualistic and other reasons has also been described. The water was treasured as the gift of Ranginui just as much as the land was respected as part of Papatuanuku. The water was their water, at least until it naturally escaped to the sea, at which point its mauri or character changed.

Other aspects of this question are considered in section 9.2.

2.8.2 The Native Land Court and tribal interests

Claimant counsel submitted that the Native Land Court dealt with particular uses but not the tribal interest, which remained unextinguished as a result. Crown counsel’s response was to deny that a tribal interest existed. We have already found against that. Mention is made, however, of the submission that the Native Land Court process was further evidence that there was either no tribal interest or that individual or local interests had such priority as to render any tribal interest virtually nugatory. Reliance was placed on evidence that only local land claims were put up to the Native Land Court, that there was little or no mention of tribal interests, and that the Native Land Court was giving effect to Maori preferences as they were at that time.

Whether the tribal interest was provided for

We consider that only local claims were put, with little reference to tribal interests as a result, for the simple reason that, having regard to the Native Land Court process itself, there was little other practical option. In addition, we doubt that the court was giving effect to contemporary Maori practice.

Native Land Court ‘policy’

There may have been some areas where the Native Land Court process was accepted with alacrity, but the greater evidence by far is that Maori generally were strongly opposed to the court but eventually had to submit to it. The court would sit at a distance from the place of protest, if need be, and award lands to whoever came in, if no one else attended to oppose.

Protest against the operation of the court

Just a few examples need be considered, from reports the Tribunal has already written. They come from Auckland and the large pan-tribal conference at Kohimarama, where Paora Tuhaere warned of the system where the laws of the ancestors were relegated to those of the court. They extend to Maketu, in the Bay of Plenty, where an attempt was made to prevent a judge’s ship from landing. The examples extend inland to the Rohe Potae, which includes a significant part of the Whanganui River catchment area, where a boundary was placed by the Maori King, beyond which the Native Land Court was not to proceed – though eventually it did. Particular opposition from Atihaunui and their attempts to retain all their land as one are detailed later in this report (see secs 5.3.1, 5.4).

The single most important factor in Maori opposition was undoubtedly the projected loss of tribal control.

None the less, the court came in. Though strictly there was provision for the award of tribal titles for lands exceeding 5000 acres, the reality was quite different. The chief judge of the Native Land Court’s opposition to tribal awards has been documented in the *Report of the Waitangi Tribunal on the Orakei Claim*. In his view,

Bias against tribal control

the whole point of this major exercise in land tenure reform was to secure individual ownership, and any tribal award could only have been a temporary expedient.

Survey and land
sales

Further, Maori had to survey the parcels of land for which titles were sought, with a prescribed scale of costs. For Atihaunui, the survey of the whole of their territory would not have been economically feasible. The territory extended on both sides of the Whanganui River for some 227 kilometres and covered more than a million acres. If, as the Maori Appellate Court suggested in 1958, it was open to the tribe to apply to the Native Land Court for an investigation into the whole of its tribal territory, section 13 of the Native Lands Act Act 1865 required that a survey of these lands be produced to the court before it could make a decision. Such a survey had to be made by a surveyor licensed by the Governor on an approved scale and with proof that the boundaries of the lands had been distinctly marked on the ground.

Even for much smaller blocks, survey costs were advanced by the Crown or, later, by private persons. This was also because sales, or sometimes leases, had been negotiated beforehand, even though the 'ownership' had not been finally settled. The purchaser simply trusted that the court would award titles on the basis of existing occupancies, or would uphold the interests of the party that the would-be purchaser was sponsoring.

In the result, though the customary occupations were referred to in court, and were debated, the litigants might be expecting to share not in the land but in the proceeds of its alienation.

Bias against claims
based on mana or
remote forbears

Looking to the broad climate, this was not a court where general tribal interests could expect a receptive hearing. Moreover, as Fergus Sinclair pointed out, claims based on mana, that is, on the basis of some right to control on behalf of a hapu or larger descent group, or on remote ancestors, which also would have brought in all of the hapu or descent group, were rejected. If people went into the court to win, it would follow that general tribal interests would not figure much in their submissions. The case would be framed to suit the mindset of the adjudicator, and evidence of custom manicured to suit the terms of English law, with more emphasis on local use and occupation.

Native Land Court
preference for local
occupations

It was largely in reliance upon the Native Land Court record that Crown counsel claimed the primacy of private proprietary interests over tribal interests in Maori custom, even to the extent of excluding the latter. This points to the major flaw of the Native Land Court process in adopting that priority itself. It was as though local use rights and tribal rights were seen as conflicting – as though there could be one but not the other.

English and Maori
over-rights and use
rights

In fact, as claimant counsel argued, in Maori custom the two coexisted, each dependent upon and tied into the other. It is not unusual that we are comfortable with dualities and ambiguities in our own social structure, because we understand them, but intolerant of the same in other cultures, for we understand them more easily if they are rendered simplistically. For their part, Maori are comfortable with ambiguities in their own language and culture, for they know how to apply them,

but may struggle with English concepts. The meaning of the Crown as the Legislature, Executive, and judiciary, and not the monarch, is an example. They may also struggle with the concept of the Crown's radical title.

Although there is a danger in using analogies, it may help to consider that the Crown's radical title in English law and titles from the Crown as evidence of private ownership are conceptually similar to the over-right of a descent group that permits of individual user. It may also help to consider that English law is no more than a development of over-right and use-right situations. It may be further considered that what the Atihaunui people had in fact was both imperium (territorial authority) and dominium (ownership).

An alternative scheme to that provided for by the Native Land Court would have been to award land to bodies representing the descent group, which in turn would apportion particular controls to constituent hapu. After some protests and petitions, a scheme along those lines was legislated for for the Urewera district. It was one of the few districts still unaffected by Native Land Court operations at that time. Even there, however, the scheme was short-lived and the Native Land Court eventually got in.

Crown counsel contended that use rights were more in accord with ownership rights at English law. Here again, in our view, the equation had properly to be with 'possessions'. The use-right approach excluded that which Maori had in fact, while 'possessions' allows for all that they possessed, use-rights included.

Tribal titles

2.8.3 The national interest

It appears that Maori interests were overlooked, disregarded, or not considered to exist in the raft of water use and management statutes that have already been adverted to (see secs 2.2, 3.3). To the extent that they were considered, it was sometimes argued or assumed that the steps taken to provide for public access or use were justifiable in what is called the national or public interest. The same arguments are made today with industrial, agricultural, recreational, environmental, and public work interests in mind. Maori and Pakeha interests are seen as on the same footing, in that both must yield to the national interest or the common good.

In the historical context, however, when, for example, the choice was between butterfat or eels, as in the Wairarapa lakes case, or, as in the lakes of Taupo and Rotorua, between Maori or Crown control of tourism or hunting and fishing, the national interest was invariably that of the Pakeha and was in conflict with Maori economies.⁸² We know of no principle of English or New Zealand law, however, whereby legitimate interests of a property kind, once proven, can be expropriated in the national interest without compensation, and there are some principles of law that would limit the extent to which private rights may be taken away.

82. *Muriwhenua Land Report*, sec 2.3.1

2.8.4 Conclusion

We conclude that claimant counsel was correct in contending that the Native Land Court process dealt only with usages at one end of the spectrum, and that a tribal right also existed. It follows that that process did not extinguish the tribal interest.

The immediate consequence for Maori was that they were deprived of the right to develop structures for the people as a whole, if they wished, for governance and the maintenance of tribal assets, including the river. There is some evidence that, even at the time of the Native Land Court adjudications on land titles, that is the direction in which Te Atihaunui, like the hapu of other descent groups, were heading. There is reference to this in subsequent chapters.

CHAPTER 3

PERSPECTIVES

3.1 INTRODUCTION

To background the issues before us, this chapter considers perspectives about claimant views and the river in more recent times. It covers the claimants' beliefs, recollections, experiences, and hopes that define the nature of their current association with the river, their concerns over despoliation, and their claim for the restoration of their traditional authority. Their views, and additional material on river use and degradation, explain the concerns that gave rise to the claim. A Pakeha perspective follows as a reminder of other interests in the river and other opinions on its management.

3.2 THE FIRST PEOPLE

3.2.1 Past voices

Atawhai (Archie) Taiaroa, the chairman of the Whanganui River Maori Trust Board, opened the people's submissions, and following Maori tradition, honoured the forebears before addressing the living.

He referred to the longstanding nature of the claim and stated that the Whanganui iwi:

are embarrassed after 118 years of making applications to different forums, to different levels of government, trying to prove who they are, trying to say 'This is our tupuna awa, this is our ancestor', and to come again today to make the same presentation. And as such they are saying, 'This is it'.¹

The claim, he added, was a memorial not only to the past leaders 'but to the many who have passed through the 118 years'.

We thus recall the words of Te Keepa Rangihwinui, one of the first former river leaders to argue that the old Maori laws for the river should still apply, in a letter of 1876 to the Whanganui Harbour and River Conservation Board:

1. Oral submission of Archie Taiaroa, Putiki Marae, 18 March 1994. The written record of protest over the river probably begins with the petition of Te Keepa Rangihwinui on the Timber Floating Bill of 1873, expressing fears of the Crown's quiet assumption of what he saw as Maori waterways: see 'Report on Petition of Major Kemp and Others', t.11/1873/10, NA Wellington, p 9.

I salute you! and convey my thoughts to you. My ancestors downwards, have been in the habit of frequenting these waters from the ancient Pa of Putiki wharanui. The right passage for the waters of the Whanganui to take is that through Te Patapu, which is now being closed by the European. If you persist in closing up the passage naturally sought after by the contending waters of the Whanganui, the money of the Government spent thereon will float to the sea and be lost sight of. In the ancient days, before the memory of living man, this was the course taken by the Whanganui. Therefore, I advise you, let the waters seek their ancient outlet by the direct channel of my ancestor, Rere o Maki, to nature's outlet.²

A century later, the first named claimant, Hikaia Amohia, who died in 1991, was to say:

The Whanganui River has a Significance to the Maori People of this Region, beyond its use as a Commercial/Resource Product. The Whanganui River retains and, maintains the *Spiritual Elements, and, Tribal Cultural bondage of our Maori People together*, that can be described within the Terms and, Practical Observances of: *IHI, TAPU, and MANA*.

For our People, *IHI, TAPU and MANA go together*. Each one is dependant upon the others. An interference or breach of one affects the rest. Any interference with NATURE, including the RIVER, breaks the LAW OF TAPU; breaks the IHI or Sacred Affinity of our Maori People with the River; and, reduces the MANA and Soul of the Whanganui River, to what it is becoming regarded of today, to being nothing more than a Product for Commercialisation or, a product for purely aesthetic appreciation. The Whanganui River is far more than that.

Physical Pollution of the Whanganui River affects its SOUL, its WAIRUA; . . . its MANA; and, through the Sacred Affinity of this Sacred Place to our People *affects us*, mentally, physically, and, spiritually . . .

When you interfere with the Flow of the River you are interfering with NATURE. Carried out intentionally, you interfere with TAPU . . . [Emphasis in original.]³

3.2.2 Living voices

An account of
personal and tribal
experience

The many who spoke at the numerous marae described what it was to be part of the traditional river people, calling in aid their experiences and such of the history and values as had been orally passed down. Much was to be gleaned as well from the accompanying speaking tools, the many genealogies, proverbs, chants, and songs to support the speaker's ancient association with the territory. Nor could we dismiss the silent testimony of the surrounds, from the ancestral effigies and woven panels that amply adorn their striking carved houses to the cemeteries and bush-clad remains of early habitations that pepper the rugged beauty of the landscape.

The late Matiu Mareikura provided a contemporary overview:

2. Cited in M J G Smart and A P Bates, *The Whanganui Story*, Whanganui, Whanganui Newspapers, 1972, pp 98-99
3. Document A64, pp 1, 3

My affiliations to Whanganui the river go back to my inception as a child, and even before that. I had no option about it, I had no right to choose it, it is my way of life to belong to the river.

... Our Whanganuitanga is the ultimate in things that are Maori. The things that have been left behind from our old people to us, and only to us as caretakers. Not to us as owners. To us as caretakers for the future. Rangatiratanga means to me that nothing shall come between what is right for me, Whanganui, and what has been left behind from our ancestors.

That Rangatiratanga, my Whanganuitanga, is something to be always treasured, and we have always been brought up to believe that we need that. That's why our people have left behind what they've left behind for us. And now we find that we have to go and see other people to get permission to go places that are special for us.

... It's important that we have the right to do what we have to do, because culturally we will suffer for it otherwise. We will suffer physically and we will suffer spiritually for the things that we are unable to do. If anything impedes our Rangatiratanga then we the Tribe will suffer immensely psychologically. Physically, we can end up being quite sick, spiritually we will go down. All these things will be detrimental to the tribe if our Rangatiratanga is taken away from us.

... As the people of the river, we speak of the teardrops, the teardrops of Ranginui, and one of the teardrops was our river. Our river is the Whanganui River, and some people claim the Whanganui River comes out of the Tongariro mountain. That's right, if they don't know how Tongariro got there. Before Tongariro was there, the river was there. So if we go back in history, we find that the tear drops of Ranginui were given to Ruapehu.

And so we go back to the river, and the river is the beginning, the beginning for our people from the mountain to the sea. It ties us together like the umbilical cord of the unborn child. Without that, it dies. Without that strand of life it has no meaning. The river is ultimately our mana. Our tapu, our ihi, our wehi, all these things make up what the river means to us. It is our life cord, not just because it's *water* – but because it's sacred water to us.

Our people go to the river to cleanse themselves, they go to the river to pray, and they go to the river to wash. They go to the river for everything leads back to the river. And the river, in return, suffices all our needs. Without the river we really would be nothing because of all the resources that it gives back to us, the history that has gone on in the past with our people who have lived on the banks and used it as a motorway, used it as the only thoroughfare. We have been taught to treasure the river for what it is, and what it has been given to us for. For we are its caretakers, we have been given the job of taking care of the river. And we care for it jealously, which is why we argue about the things that go on today.

Tribal karakia and rituals, poi, action songs and haka all go back to the river, and to the mountains, and to the sea. We have been given the task to hold and preserve these things for our mokopuna – not for us, but for the generations yet to come. We do that because if we say it's for us, the time is only short, but if we say it's for our mokopuna, then that time is like this shadow. It starts to spread out and spread out and spread out, and when our shadow is long, we are in line with the old people and the ancestors.

To me, the river has been the ultimate part of my learning, my own learning in the Whare Wananga, and it has been a source of spiritual things that even you and I can't discuss. It is something that has been discussed by the ancient ones, and the rituals that went on are not to be discussed. But those are the spiritualities that the river holds for us. We give to it the things that people don't realise – it is hard to even begin to understand what we're talking about when we talk about the spirituality of the river. [Emphasis in original.]⁴

An underlying history and unity

Pervading the submissions was an omnipresent sense of history, of an enveloping past that caresses the people's present and directs their future. It is from that history too, as Mareikura stressed, from their common origins and shared experience, that the people were to be seen as one people, though traditionally arranged as several hapu and though now largely dispersed.

3.2.3 Children's voices

A training place and playground

Speaking of a place where steep hills highlight an expanse of flowing water, Te Kuia Peeti was one of many who recalled the river of their childhood. At Kaiwhaiki, she said, she could swim before she could walk:

From morning till night, we would swim and learn about ourselves and surrounding environment. As youngsters, our bodies were developed in the water. Limbs were stretched and pulled. We learnt fleetness of body and mind. We swam continuously across and back a dozen times a day without a thought. The river was our playground. As a child to be a fully fledged and accepted part of the 'elite' was to have prowess and abilities in the water.

As children we had our special landings, special places where we swam. Our favourite landing was below the marae. It always had a lovely wide beach where we could sit, sing, talk, eat and play. We would splash water on to the banks and slide into the river. It was fun. We would dry our hair with the willow branches. Flicking our hair back and forth, back and forth.⁵

For Dardanella Metekingi at Putiki, the river was her and her friends' 'main playground'. She recounted such games as crab races, making mud cakes, catching flounder, jumping from one floating log to the next, piggy-back fights in the water, and swimming races: 'We used to virtually live down there,' she added.⁶

Swimming was paramount. Arthur Anderson claimed that 'the same time that I walked, I swam as well because I lived in the river'.⁷ Julie Ranginui remembered being 'thrown in the river to learn how to swim, and I can remember coming up from under the water and seeing all my kuia and my dad standing there waiting to see whether I was going to come out of the water or not'.⁸

4. Document B11, pp 1–4

5. Document A58, pp 1–2

6. Document A57, p 1

7. Document A60, pp 1–2

8. Document A70, p 1

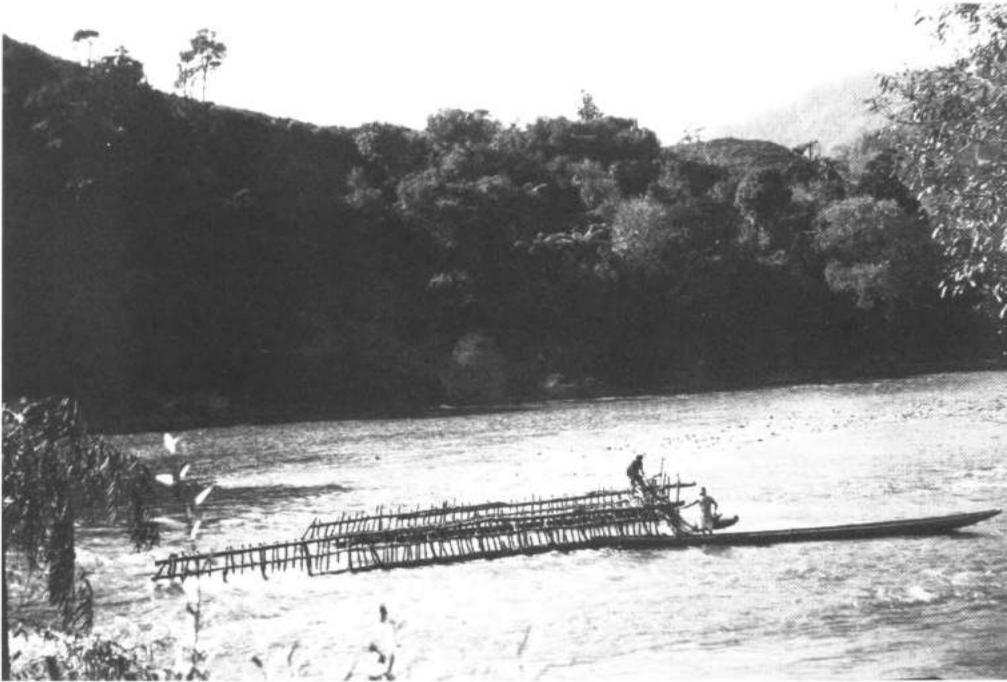


Figure 1: Lamprey and eel weir in the Whanganui River, 1921.

Photograph by James McDonald. Courtesy Alexander Turnbull Library (P-A1 257-076-3-Q).

3.2.4 Fisheries

Play place and training ground though it may have been, the river was also a place of work and provided a plentiful supply of food. It supported 18 kinds of native freshwater fish and other species such as freshwater crayfish and mussels.⁹ Matiu Mareikura explained how the activity of fishing was controlled:

A communal fishing activity

Fishing was a family thing, a tribal thing. Everybody had a job and you knew your job. You knew when to go fishing, and you only went fishing for reasons. You didn't go to catch a couple of thousand fish just for you and your family, it wasn't like that. When you fished, you fished for everyone. You fished for the tribe and you fished for a hui that you knew was coming up. Everybody went prepared for those particular things at a particular time.¹⁰

Resource conservation was stressed, Mr Mareikura considering that the old people:

Conservation

knew when to go out, and they knew when to stop. They didn't go out fishing and eeling and just stay there and take hundreds – which they could have done because there were plenty at that time – they just went to get sufficient food. They were conservationists at their best. The little ones were always put back, and you only took a certain size so as the population was plentiful all the time.¹¹

9. Document A49, p 14

10. Document B11, p 7

11. Ibid



Figure 2: Eel pots, Whanganui Regional Museum.
Photograph courtesy Alexander Turnbull Library (G7414½).

Others described the restraints placed on fishing when stocks were low, to allow numbers to increase. Kevin Amohia spoke of learning to respect nature when being taught to fish by his father, and of the custom of releasing the first fish as an antidote to greed:

My dad caught an eel further down river from where we were swimming. He went into the undergrowth beside the river, and came back without the eel, and I wondered why. I asked him and he said 'Oh well, I made an offering son, we'll get

another one'. And he did. He caught a big one. It was that big that the tail was dragging on the ground when we carried it home. We know that nature will provide.¹²

To introduce the variety of fish that the river sustains, and their migratory patterns, the claimants called Ronald Little, a fisheries biologist.¹³ He listed five groups of native species for the river:

Fish species

- freshwater, non-migratory species: the upland bully, Crans bully, and giant kokopu (giant whitebait);
- species that spawn in freshwater but have marine larval development: the common bully, red-finned bully, torrentfish, and various whitebait, including the inanga;¹⁴
- marine species that feed in freshwater: the yellow eyed mullet, grey mullet, black flounder (found well upstream), yellow belly flounder, and kahawai;¹⁵
- marine species that also use the freshwater environment: the common smelt and the lamprey;¹⁶
- freshwater species that must spawn at sea: the short- and long-finned tuna (eel). Although scientists recognise only two species of eel, Maori have many names for them, according to their different appearances at separate stages of their life-cycles.¹⁷

12. Document A65, pp 1-2

13. Document B10, pp 4-7

14. Inanga represent about 95 percent of New Zealand's whitebait catch. The adults live in flowing fresh water and spawn in autumn and early winter, and the larvae are washed out to sea. In spring, countless millions of transparent inanga whitebait make their way to the inland waterways from the sea. These are known to Whanganui Maori as karohi. The young inanga feed and grow over the summer and take on their adult appearance of an olive-green back and silver belly. In March, to coincide with the spring tide in the estuaries, the inanga begin their long migration down to the estuarine areas to spawn: doc B10, p 4; R A J Knox (ed), *New Zealand's Nature Heritage*, Hong Kong, Hamlyn, 1974, p 559; doc A62, p 1.

15. Grey mullet, or kanae, generally keep to estuarine and tidal areas as well as harbours and bays: *New Zealand's Nature Heritage*, pp 759-760.

16. The smelt, or ngaore, is a silvery fish found along the coast and spawns in estuarine conditions or near sea estuaries. In spring, however, the young move in large numbers through river estuaries from the sea. They can be caught and eaten like whitebait. Mature two-year-old fish, eight to 10 centimetres long, move upriver during the rising tide when they are approaching spawning. The lamprey, or piharau, on the other hand, is a long, thin, eel-like creature (not strictly a fish), which grows up to two feet long and weighs up to 200 grams. The piharau is parasitic on larger fish and spends part of its life at sea. Between May and October, the adults migrate upstream to spawn in fresh water: doc B10, p 5; *New Zealand's Nature Heritage*, pp 523, 563-564.

17. The long-finned eel, the larger of the two species, may exceed 20 kilograms and grow to almost 1.8 metres. Short-finned eels seldom reach more than four or five kilograms and one metre. The habitat of the adult eels extends from the estuaries to the headwater swamps. In springtime, large columns migrate upstream from the estuaries. The short-finned eels stay mainly in the lower reaches, but most long-finned eels migrate further up the river in January and February. In autumn, in new guise, they move to the sea to spawn, the short-finned eels as the silver belly eel ('longer than the ordinary tuna [eel], silver in colour, generally very rich in flavour and very fat' according to Arthur Anderson (doc A60, attachment, p 1), while the long-finned eels are distinctively black. The peak migration is in March and April, when the river is in flood. The adults are presumed to die somewhere in the south-west Pacific, the young returning to the river within a year of hatching. Some eels - the largest always long-finned females - do not migrate to the sea. They are thought to be sterile and to have lost the urge to spawn: *New Zealand's Nature Heritage*, pp 509-514.

In addition to the five fin-fish categories are the kakahi and koura. The kakahi, another substantial contributor to the Whanganui diet before it disappeared through reduced river flows and altered habitats, is a freshwater mollusc, which grows to 12 centimetres amongst the stones or sand along the banks.¹⁸ The koura or freshwater crayfish was also taken as food from the river and creeks, but today is no longer available.¹⁹

Traditional fishing

Tom Bennion described European accounts of the tribe's extensive knowledge of the fish and of their intricate fishing habits.²⁰ Mr Little regretted that the Government had made limited use of the documented traditional knowledge of the fisheries before effecting a diversion of much of the river's headwaters.²¹

For centuries, tuna (eels) had been caught in numerous and substantial weirs, or pa tuna. Before about 1890, it was estimated that there were some 350 of them. They were generally erected in the rapids in the middle, to catch tuna migrating downstream in the fastest flowing current. Impressively solid structures requiring skill and effort to erect on stony riverbeds from canoes held steady by poles, the pa were able to withstand strong currents and the weight of loaded eel baskets. Regular repairs were required after flooding, however, and it appears that many did not withstand the larger floods that followed the clearing of the catchment area for farming.²² The pa consisted of a v-shaped wooden race, into which the tuna would swim, narrowing at the downstream end, where a hinaki (basket or trap) was attached. Once inside the pa, the force of the current prevented the tuna from swimming upstream and escaping, but the hinaki had a small opening at the downstream end for smaller tuna to pass through. The very large hinaki, of which examples were produced to the Tribunal, were extremely heavy. Emptying them was a skilled operation, the canoes being poled up rapids and attached to the pa.²³

Titapu Henare of Pipiriki continues to rely on many traditional ways, navigating at night by the stars to check or set his traps. He described the method of catching three types of tuna today, the tunaheke, tunapa, and tunatoke. The tunaheke, the migrating eel, is caught in hinaki or speared at night by a gaff with the aid of torchlight. They migrate down the river during the first and second floods in

18. Document A62, p 1; *New Zealand's Nature Heritage*, p 2522

19. Document A66, p 5

20. Document A49, pp 14-16

21. Document B10, p 21

22. Crown counsel submitted in closing submissions that without regular maintenance the weirs would eventually have disintegrated. She argued that the lack of maintenance, as well as dietary and cultural changes, not just channel-clearing destruction, would account for the weirs' disappearance: doc D19(c), pp 66-68. William Robertson, employed on the river from 1915, told the Native Land Court in 1939 that high floods broke the weirs, adding that Maori repaired them from time to time: doc A27(f), p 112. In a recent doctoral thesis, Suzanne Doig considered that pa tuna 'could be built with solid beams to last generations and withstand major floods'. In this, she distinguishes between varieties of weirs considering that the pa auroa were especially able to cope and, if maintained, would almost never need replacing. Even when allowed to fall into disrepair, their remains could last for generations: Suzanne Doig, 'Customary Maori Freshwater Fishing Rights: An Exploration of Maori Evidence and Pakeha Interpretations', doctoral thesis, University of Canterbury, 1996, pp 156, 160-161.

23. Document A49, pp 15-16. During the first week of our hearing of the claim, we visited the Whanganui Regional Museum and were shown James McDonald's 1921 film *Scenes of Maori Life on the Whanganui River*, which included footage of river iwi poling canoes and fishing in the traditional way.

March, he said, adding that in earlier times they were caught in weirs with catches so full it was nearly impossible to lift them out of the water. The tunapa, he said (which we understand to be the non-migrating, female long-finned eel), is a large eel that dwells in the deepest water and is caught by using a long line. Formerly, piharau was used for bait. Thirdly, he spoke of the tunatoke, caught year-round in hinaki, or by bobbing from a boat or the river bank.²⁴

Bobbing was mentioned also by Julie Ranginui:

Glow worms were threaded onto the fibre of the flax and tied onto the end of quite a long stick. Normally it was a manuka stick because the manuka could stand the strain of pulling fairly big eels.²⁵

She described the seasonal lifestyle of eel fishing:

We would go further down from Matahiwi and the name of that place was called Ruapirau. Ruapirau creek comes out into the river from up in the hills, and the eels there are quite long and good for putting into a smoke house. At a certain time of the year we would go down to that area when we wanted to catch the big ones for smoking. Other than that, because there were other eels handy to where we lived, we always used to leave Ruapirau for a specific time of the year. That was when the eels came out from the creek from the lakes that were up in the hills. We would be there waiting at a specific time of the year, from the middle of March to the end of April. The most uncanny thing about it was that after April, there were no fish there.²⁶

Arthur Anderson recalled the enormous catches of his school years in Taumarunui:

I would also go down to the river to catch eels for the local hui held on the marae, at Ngapuwaiwaha. We have an eel basket in the dining hall, that we would use in past times to catch hundreds of eels. We would go down and set this basket and in one catch we would have enough to feed our people on the Marae.²⁷

The hinaki, he added, six feet long and three feet high, was often so heavy with eels that it could not be carried and was instead rolled to shore.²⁸ He remembered, too, the autumn droves of ascending tunaheke:

They'd come up, and the only time we could ever catch them was at the Ohura Falls, just off the Whanganui River, they'd go off the Falls. And we used to watch them. The whole lot dropped off.²⁹

24. Document A61, pp 3-4

25. Document A70, pp 1-2

26. *Ibid*, p 2

27. Document A63, p 2

28. Document A60, p 3

29. *Ibid*, p 2

The tunariki, the small eel, travelling in arrow formation, would scale the Ohura Falls in their hundreds, he said, and 'If you knocked the top one off they would all fall into your kerosene tin'.³⁰

Te Wera Firmin described how the tunaheke and the tunarere were caught in a pa:

The Tuna Pa had to be set up so that the full body of the main current of the river flowed down through it. Tuna coming down were travelling out to sea to spawn. It is a well known fact among the older people that as the tunaheke travels down the river it doesn't swim like you would normally think a tuna would swim, which is parallel with the surface. As they come down the river, the tips of their noses just touch the surface, and their movement is quite distinctive. Vertical as opposed to horizontal.

The method of catching them was, as they came down the river a big funnel shaped net with a ring, up to five feet across the opening. This is called a poha. The smaller end of the funnel was attached to the opening of the hinaki. . . . Another method of catching the tuna is that they have a big plaited rope or wire rope strung right across the river and anchored on both sides, with a big triangular-shaped cradle in the middle with a poha behind it. You move the big poha out into exactly the right place on the awa so you got the full force of the current as the tuna came down.³¹

On the other hand, the piharau, when travelling upstream, keep away from the stronger currents in the middle of the river and are caught in a weir, or utu piharau, placed adjacent to the river bank. The utu or pa consists of a barrier in the water with a gap in the middle, which concentrates the water flow through that point, with the hinaki immediately behind it. Constructed at a right angle to the bank, the utu prevents the upstream movement of the fish, and as they attempt to swim through the gap in the barrier, they are forced back down into the hinaki. A second hinaki is set on the river side of the barrier to catch piharau that attempt to swim around it. In former times, the utu were much larger, with as many as seven traps extending up to 16 metres into the river.³²

Mr Anderson considered that, in his area and in his time, the people did not catch piharau further north than Maraekowhai, about midway between Tawata and the Ohura River junction. The piharau season at Maraekowhai started later than at Pipiriki, at the end of July or the beginning of August, and after September the piharau no longer ran. He said that they set their utu every night and a good catch would be about 80 piharau.³³

Titapu Henare assessed the period from the beginning of June to the end of August as the best time to catch piharau in his area. When the fish reach Pipiriki, where he catches them, they have already been travelling up the river for some time. He described the required skills:

30. Document A60, attachment, p 2

31. Document A62, p 2

32. *New Zealand's Nature Heritage*, vol 2, pp 563-564; doc A61, attachment, pp 19-20

33. Document A60, attachment, p 1

The location of the weir requires a specialised knowledge and a place near specific rapids among currents which behave in a particular way. Catching piharau depends on an accurate reading of the behaviour of the water after the trap or basket has been set in the evening, based on close familiarity over many years with the river and its behaviour, with the climate and other factors.³⁴

Likewise, there is an art to utu construction. Mr Anderson recalled assisting his uncle, Titi Tihu, in building an utu piharau at Maraekowhai in 1936:

Before constructing the utu my Uncle surveyed the river. He was looking for the high water, a water that would encourage the flow of the piharau and studied the currents of the water.

Piharau will always take the easy side of the route up the river, the lowest part of the water. They do not go out into the fast flows. In selecting sites for the utu you had to take several considerations into account. You could put your utu right in the path of a lot of logs coming down from the river. You had to try to eliminate [that] by placing it in such a position that would overcome it, but at the same time you would still have to erect your utu on a site which is at right angles to a fast flow of water, . . . creating a back water that the piharau would come up in. You had to make sure that you erected the utu on solid ground. When you started you had to clear the bottom and make it flat to ensure that the piharau did not escape underneath. Construction of the utu took place when the water was low.

The Kaumatua performed his Karakia during the period of Awatea (dawn) and, prior to the arrival of myself and other younger ones, began the construction.

The materials for the utu began with the tools for erection. A jumper, shaped like a horseshoe at the bottom and a long pole. The jumper had a metal base. Kanuka poles were used, two poles were used, and in between were the tightly compressed leaves so that no piharau could escape and to block the water volume to create a fast flow at the end of the weir.

. . . The utu also had to have props to strengthen against the flow of water.

We had to work long hours to ensure we had the right type of water and at that time of the year it could rain and become too high for us to work. We had to work to ensure we caught the tail end of the piharau migration, August. It took from daylight to dark working continuously. We had to eat no food until we had finished it and then we went home and had something to eat.

Among the tools we had to use a bore made out of a root of a manuka, big enough to accept the top of the pole so that we drove into the pole with the jumpers. It went into the ground about two to three feet and the pole was about four inches through. Behind the weir, above the high water mark we made a walkway to go from shore to the outside part of the weir where we sat the basket down into the throat of the fast flowing current. There was a funnel arrangement made from a woven flax. One part would be three feet across and then it narrowed to the bottom of the hinaki, tied to it; which guided the piharau into the hinaki.

The weaving of the flax was special to let the water flow through it but at the same time stopped the piharau from going through it. It was a very fine weave. My sister knows this weave extremely well. The hinaki itself had a different weave called poha.

34. Document A61, pp 1-2

We had to make sure that we were on the bottom end of the utu. If caught in the top end of [the] utu, we would be caught in the current and there would be no way to survive.³⁵

Kakahi were eaten 'either fresh or threaded on flax and hung to dry', according to Te Wera Firmin, 'and you took them as you wanted them'.³⁶ Mr Anderson said that they could be found among the roots of shade-giving willow trees in the water.³⁷ They were a great delicacy for the old people, said Mike Potaka. He was mainly familiar with the kakahi beds at Parikino and Paetawa:

These were within my hapu area and were food sources over which my people exercise particular authority. The beds were in both the eastern and western side of the river. That on the western side of the river was about 100 metres long and some 18 inches wide. On the eastern side were a larger number of shorter beds. Before the diversion, the beds were covered in 6 inches to a foot of water and the shellfish flourished.³⁸

Mr Potaka also described catching ngaore and karohi:

[They] are traditionally caught in a race called a Pa on the edge of a shingle bed over which flows, shallowly, the current of a rapid. The Pa is built from available rocks and stones, parallel to the beach with its open end downstream. If it is correctly positioned, concerning which careful judgement must be exercised, then ngaore and karohi travelling upstream will enter the race. A net is then placed at the opening and the fish are encouraged back down the race into the open net. Most members of the hapu took part in this activity. The drying of the fish was a means of preserving for off season and winter months. This was considered a delicacy. My brothers and I on hunting trips would fill our pockets with the dried fish to chew on whenever we felt hungry.³⁹

Until the 1970s, he said, he and his family would expect to catch ngaore and karohi by the bucketful at pa located at Pungarehu, Huiarere, Parikino, Whakahuruawaka, Upokopoito, Atene, and Koroniti.

The trick to catching ngaore, according to Matiu Mareikura, is to create a special current to diminish the main flow. The fish will come through in their millions and feel for the right channel to swim through. The old people had taught him to catch ngaore this way, he said, and that is how he had passed it on to his children:

Its an ancient way of doing things. . . . People think 'Oh, you just build a paa . . .' and you wait and wait and wait, but you're building a special current, they like the water at a certain speed and that's how you catch them. And nobody catches any fish like that. Once it fills up, you put the net at the bottom with the kids in there and

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35. Document A63, pp 5-7

36. Document A62, p 2

37. Document A60, attachment, p 2

38. Document A66, p 4

39. Ibid, p 3

that's when the kids really enjoy it – kids with branches . . . shaking them, running down the race. That's how we've got to teach our children.⁴⁰

Kanae were highly prized for food, said Te Wera Firmin, recalling how large numbers of the fish came up the river from the sea between November and March. He remembered shoals of 30 to 40 when he was a boy, and that the only way to catch them was with a net.⁴¹

3.2.5 Fish depletion

Several others spoke of fish depletion. That the river is no longer the main source of food, they say, is the result not only of changed lifestyles but of the destruction of fisheries. Worse, river food has become a rare treat at hui. This cuts deep in tribal pride, because traditionally visitors would be fed the river delicacies for which the river people were renowned. Some species have gone altogether. Others are diminished in number and size.

The people still build their eel weirs, but as Mr Mareikura put it:

Today, the catch is there, if the fish come. And we prepare every year, we go to the river, and we prepare these paa, and we wait. Sometimes it's in vain, they're not coming.⁴²

He thought that it was important to continue teaching traditional fishing methods, however, 'because when they did come, you were prepared, you were ready. And so you'd wait seasons after seasons to get a catch.'⁴³ In his view:

When our fish don't come, there's something wrong with our river. They tell us what is good. It's like the birds, when the birds keep landing on your tree, then your tree is healthy. When they don't come any more, there's something wrong with your tree. And likewise with the river. When we found that the fish didn't come any more, the old people were concerned . . .⁴⁴

Many reasons were proffered for the fishery decline – sewage discharge, bush clearance, farm run-off, sedimentation, land-fills, gravel extraction, water abstraction, headwater diversion, commercial fishing operations, and competition from introduced species. The Tongariro hydroelectricity scheme, which diverts water from the Whanganui headwaters and the Whakapapa River into the Lake Taupo catchment area, was especially targeted. After the scheme was introduced, river levels dropped, river vegetation was affected, there was an insufficient water volume to wash away sediment, and, reputedly, fish catches became less reliable. According to Mr Mareikura:

40. Document B11, p 8

41. Document A62, pp 2-3

42. Document B11, pp 7-8

43. Ibid, p 7

44. Ibid, p 6



Figure 3: Whanganui River utu piharau at Patupa, Pungarehu, circa 1890.
Photograph courtesy Alexander Turnbull Library (F J Denton collection, G482½).

Reducing the headwaters has brought about algae because of the low waters that we get now, and we have had a downturn in fish because of the low waters. Piharau, and ngaore, are not so prominent now. Now we have less fish, and that's because we haven't got enough water in our river.⁴⁵

Speakers contended that the headwater diversion had made the river lower, slower, and warmer. They stated that fish that had once thrived had lost their natural habitat and have either gone or dwindled in numbers. Kakahi beds along the banks were exposed, and claimants say that nowhere is this food now obtainable. Similarly, eels like cool, dark water, it was asserted, and claimants say that they are much less plentiful now than before the diversion. The usual habitat of eels – holes amongst the stones or in the rocks of the river bank – was, in places, exposed above the water line after the diversion, leaving sheer papa faces that give no shelter from the sun.

For Titapu Henare, the erratic flows make it nearly impossible to set the piharau traps in the right place, while Arthur Anderson complained that there is insufficient water in places even to cover the old eel baskets.⁴⁶

45. Document B11, p 5

46. Document A61, p 2; doc A63, p 2

Kevin Amohia considered that the former flows washed quantities of shingle downstream to clean the riverbed, but now the bed is muddy and slimy. You can still get eels, he said, but they taste different, while trout have a muddy flavour.⁴⁷

In the opinion of Niko Tangaroa, the reduced flow has lessened oxygen levels, threatening fish numbers and causing the proliferation of algae.⁴⁸

In addition, perceived competition between eels and trout, it was alleged, had led to large-scale eel destruction by anglers. As early as 1944, the claimants told us, Titi Tihu and Hikaia Amohia had objected to the 'war against eels' project of the Taumarunui Rod and Gun Club.⁴⁹

The impact of metal extraction was a concern to several speakers. We understand that it has been found, from prior proceedings where Maori sought compensation, that large quantities of gravel were removed from the bed for the building of roads, the Whanganui River Road included, and for other purposes. Here, the concern was with not lost royalties but the environmental consequences.

Metal extraction

Mike Potaka spoke of the harmful effect on key fishing places:

I remember seeing Thompson O'Foley Trucks, taking out loads and loads of crushed metal from a crusher situated at Upokopoitō. We stood in awe at the sight of the trucks speeding back and forward.

All of these places have depended for their suitability as sites for Pa (fish) upon the gravel beds being in a particular configuration in relation to the rapids. All have for many years before the 70's been affected at different times by the taking of metal from shingle beds bordering the rapids.⁵⁰

47. Document A65, p 5. This opinion was supported by geographer Richard Heerdegen: doc B14, p 2.

48. Document A73, p 4; Richard Heerdegen considered that the effect of abstraction was cumulative, because the river is becoming adjusted to a new and changed regime of lower flows: doc B14, p 7.

Biologist Ronald Little opined that the drop in water levels had damaged fish populations and habitats, and not just near the abstraction points. Even the distant estuary was affected. The river and estuary form a coherent biological entity, and damage to the estuary affects the river as a whole. Amongst other things, the estuary is a feeding ground and part of the migratory fish pathway. Its delicate equilibrium was affected by more than abstraction. It had also been affected by road-making, vegetation removal, infilling, and deepening.

Little gave estuarine pollution and change as the greatest threats to the whitebait fisheries; for example, destroying the spawning ground. Eels are more especially affected by reduced water levels in the upper reaches, he considered, with increased sediment and reduced river flows diminishing the food supply. It was apparent that the eels had become fewer and smaller. The habitat of the kakahi had been destroyed throughout the river as well, by changes in river levels, flow, and sediment. He thought piharau catch reductions could be owing to new problems in catching as well as a decline in population. The river's rapid rise and fall created difficulties in finding new catching sites or in attempting to use old ones. However, he thought the population would recover if the river flow were restored. Juvenile piharau particularly require specific stable habitats in the headwaters, he said, where the abstraction is done. He had no doubt that reduced wetted areas, altered substrate types, and artificial water flows had reduced the habitat to the point that this once vital fishery no longer existed for the Maori people: doc B10, pp 7-9, 13-17.

For the Electricity Corporation of New Zealand, Russell Howie stated that, in 1964, the Crown agreed that the diversion of water would not be allowed to cause the safety of the fish to be endangered. A minimum flow regime now applied, and following a 1990 Planning Tribunal decision, the diversion was now 19 percent less than that allowed for in the original design. Less electricity was generated as a result: doc B5, paras 3.5-3.7.

49. Document A24, p 2

50. Document A66, p 4



Figure 4: Poutama Te Ture and family at Otukopiri (Koroniti).
Photograph by James McDonald. Courtesy Alexander Turnbull Library (F53059½).

Before the 1970s, he added, the volume of water in the river washed enough shingle down to replenish the beds, but this no longer happens.

Te Wera Firmin said that Pungarehu was the most popular fishing spot on the lower Whanganui River. Ngaore, karohi, tuna, kanae, pariri, patiki paro, and piharau could all be caught there in large numbers. Today, he claimed, the extraction of metal from the riverbed has ruined the rapids and the associated fishery.⁵¹

Destruction of eel
weirs

The historical destruction of eel weirs still rankles, embellished with stories of the police action last century to quell the Maori protest. From the 1880s, clearance for steamboat navigation was undertaken in stages from Wanganui. A 1950 estimate was that before 1890 there had been 350 eel weirs and 92 utu piharau on the river. Nearly all the weirs had been removed by the end of the century. The utu piharau fared better, since they did not obstruct navigation as much as the others, but, as we have footnoted above, the altered flow regime today has made catching piharau in weirs more difficult.⁵²

Titapu Henare said that today there are only six utu piharau: four at Pipiriki (two of which the Tribunal saw, shortly upstream from the Pipiriki wharf), one at Matahiwi, and one at Upokopito. He said he had experienced catches of 600 piharau in a single night, and that a very good season would yield several thousand. He remembered good seasons like that until the 1960s and 1970s.⁵³

51. Document A62, p 6

52. See Doig, pp 335–336, 347; doc A49, p 16 (citing 1950 royal commission report of proceedings)

53. Document A61, p 2

3.2.6 Sacred waters

Throughout the world, there are river people who see their rivers as sacred, or who regard the flowing waters as having a power to bless or absolve. The people of the Whanganui River said that they are no exception. In the view of Kevin Amohia, the relationship of the people to the river may be likened to that of other people to the Ganges or the Jordan.⁵⁴

River as healer and purifier

Moving accounts were tendered of the river's power to cleanse and purify, to bless and heal, or to give strength and resolve. For Te Kuia Peeti, while growing up, the river was 'the life-blood of my life'. She and her family looked upon it as 'part of the whanau, a faithful friend who was always there'. It had a wairua, she contended, a spirit that had meant more to her than the imported religions of England and Rome. It healed, purified, and sustained. The first baptism of the river children, she stressed, was in this 'sacred taonga'.⁵⁵

The nurturing, care-giving significance of the river was evoked in Julie Ranginui's words: 'The river for me is like my mother, is like my father. The river is my grandfather, my grandmother, it's my tupuna.'⁵⁶ Arthur Anderson added that his family have recourse to the river when in need of peace of mind, 'And 9 times out of 10 it works wonders'.⁵⁷ It was his grandmother who taught him of the need for spiritual cleansing, he recalled:

Whenever there was sickness in the family we would all sit down and talk about the whole thing. Our grandmother would say prayers and she would take us down to the river. We would never go down to the river without having this *korero* first, to get this [side] of things correct before seeking assistance from the river.

When we got down there she would say prayers, she would get a stone pebble and she would draw it across our foreheads in the sign of the cross and then she would discard it back into the water. That would take away any hurt, cleanse our minds and we could feel the cleansing. I found leaving the river and coming back home that I felt I was cleansed and being a different person altogether and, because of the value that we as a family got out of it, we never ever neglected it. [Emphasis in original.]⁵⁸

As children, Mr Anderson and his brothers and sisters were never referred to a doctor, he claimed, for his mother would care for them through accessing the river. He later used the spiritual strength derived from the river to handle other forms of adversity. In the Second World War, he found fortitude in recalling the river and his grandmother's advice, and a similar courage and resolve from the Sangro River in Italy.⁵⁹

Dardanella Metekingi recalled that her mother fetched water from the river when the children were sick before applying European medicines or calling the doctor. Her mother, she said, spoke to the river, and:

54. Document A65, p 7

55. Document A58, pp 1,3

56. Document A70, p 5

57. Document A60, pp 5-6

58. Document A63, pp 3-4

59. *Ibid*, pp 4-5

it was like she was talking to someone special. She shared the awa with us. Those karakia meant more to us than going to our services. They were part of us.

She also used the water and karakia when we had a problem in the house. If she wasn't able to communicate with anyone else, she would gather us and we would sit down and she would use the water to sprinkle us and say her prayers and talk about what was concerning her.⁶⁰

Hera Tuka said that she would be taken to the river as a child when she was sick and submerged in its waters and prayed over by her parents, in order that the sickness would be cast into the water. She recalled how, when assisting in childbirths at Koroniti, she would first prepare herself by going down to the river. She would bring back water to wash the mother's head, and later return to the river to fetch more water to anoint the new-born baby.⁶¹

The practice endures. Still today, Hinewai Barrett has a horoi (wash) in the river before going to the doctor when sick, and this, she claimed, always helps her.⁶² Niko Tangaroa advised that he moved away from the river for a time, returning in severely poor health. The river renewed his strength, both physically and spiritually, giving him the will and the power to continue living.⁶³

In comparing these accounts with those given in the preceding chapter, it is apparent that, as with all religions, changing circumstances and new ideologies have wrought change in the people's religious observances. None the less, the underlying values and beliefs have remained on the sanctity and healing power of water, and on the need to maintain water bodies in unpolluted form.

Given the spiritual use of water in the everyday lives of the Maori people, it is unsurprising that, even today, the people's union with the river is seen to run deep, as was brought out, for example, in the submissions of Dardanella Metekingi. She considered that:

The awa is a beautiful thing. You need the people. It lives with the people. The spirit of the awa has to be the people. It's not a separate thing. It's part of who you are – like a soul partner. Sharing everything with you, and it gives it back to you. 'You don't get your strength from what you see, but from what you believe!'. These things that nature has given us are our inheritance, are our family.⁶⁴

Others testified that the spiritual dimension of the river stayed with them long after they had moved away. It was said that parents now living at a distance still teach their children about the strength that the river can give them. In all, the evidence showed that the psychological wellbeing of the people is still bound to the state of the river and their continued possession of it. When others pollute its waters or when the control of the river is assumed by people of another ideology, it

60. Document A57, pp 1, 2, 3

61. Document A68, p 3

62. Document A72(a), p 1

63. Document A73, p 3

64. Document A57, p 2

is as though the world is no longer theirs to control, as though they have no place in it, or as though their own history and beliefs have been expunged from the river's face.

3.2.7 River guardians

In former times, the river guardians were the taniwha that inhabited its course, exacting retribution on those who did not observe the local law. We introduced and described them in the previous chapter. In reality, however, the law was the law of the people, and as the elder Titi Tihu observed before the Maori affairs select committee in 1980, the taniwha embodied the spirit of the river people (see sec 2.6). Today, the people of the river describe both themselves and the taniwha as the traditional river guardians, invoking in the process the teachings of their forebears and their gods, the taniwha amongst them.

On taniwha and people

The philosophy of the Whanganui people, which was often put to us, was that, if you respect the river and treat it well, it will in turn look after you. Time and again, they said that they had no fear of the river, and neither did their children or mokopuna, because they treated it with respect. Ngatangi Huch was always told by her elders that Titipa, their local kaitiaki, or awa tupuna to use her expression, would protect them if they were respectful. Indeed, she added, she could not recall any accidents or drownings. The river had always felt warm, and she had always felt safe.⁶⁵

Ethic of respect

Kevin Amohia likewise stressed the importance of showing deference to the river's taniwha or kaitiaki. He recalled how some canoeists on the annual hikoi, or journey down the river, may not have observed proper protocols, and when 'they came down on the Victory Bridge . . . the old fulla flipped them up in the air'.⁶⁶

Matiu Mareikura also referred to these river beings and the right way of doing things:

Kaitiaki

The Kaitiaki is very, very important for us because he is our connection to our rights to go to the river. You see it's not just going to the water, you have to talk to these things first. You sit, and you pray, and you ask for their help, their assistance and their guidance and they give it to you and then you go. Not the other way around. You don't go half way across the river and start asking. He might say no. Those are ultimately important for us because we know that we have many Kaitiaki and we can inter-relate with them . . . as we go up the river. Those ones of us who are fortunate to go on the Tira Hoe Waka [the annual river journey] every year, we become very involved and at one with those Kaitiaki. Some people get afraid of them. Some, the bond gets stronger and stronger.⁶⁷

65. Document A72(a), p 2. Drownings did, however, occur. Three Maori crewmen, for example, drowned in a riverboat accident in 1940, while the old Maori riverboat captain Andy Anderson drowned on the river in 1958: see Robert D Campbell, *Rapids and Riverboats on the Whanganui River*, Wanganui, Wanganui Newspapers, 1990, pp 204–207, 240.

66. Document A65, p 7

67. Document B11, p 12

Unity of people,
land, and river

In short, the relationship of the Whanganui people to their river transcends the mere physical world. The river, for them, is a sacred taonga and the essence of their life. It is not a convenient conduit for sewage or farm run-off, a means of electricity generation, or even just a transport link or source of food. It is the font of spiritual sustenance and renewal, a friend and a companion. It is a caregiver, a guardian, and a totemic symbol of unity. In the words of Niko Tangaroa:

The river and the land and its people are inseparable. And so if one is affected, the other is affected also. My father mother and our tupuna lived on the Whanganui River. They knew the river well. The river is the heartbeat, the pulse of our people. Without the Awa we are nothing, and therefore I am reminded of the korero when one of our elders Taitoko Tawhiri said of the River, if the Awa dies we die as a people. Ka mate te Awa, ka mate tatou te Iwi.⁶⁸

It appeared to the Tribunal that, when speakers described themselves and the river beings as kaitiaki, or river guardians, it was done not merely to protect the state of the river or even the traditional river laws but also to protect themselves.

3.2.8 River highway

River settlements

The people's knowledge of the river was, and remains, intimate. There are known locations of 143 marae along its length, as shown in a map produced by Arthur Anderson.⁶⁹ The 240 or so rapids between Taumarunui and the tidal limits all have descriptive titles. The names of some, like Kaiwaka (canoe eater), tell stories on their own. The early location of numerous marae on the water's edge, we were told, showed both the importance of the river for meeting daily living needs and the role of the river as a highway. As Matiu Mareikura put it, 'They never take the water to the marae, they take the marae to the water'.⁷⁰ Today, most marae still line the river's border, but they are serviced from the road, not the river. The decline of river traffic inevitably rendered most river communities without road access unviable, and the people moved away or the buildings were shifted.⁷¹ It is well documented, however, that the river traditionally served to link isolated settlements. That is still the case in some places, and the time when the river provided the main means of transport is still within living memory.

Steamers

A number of witnesses recalled the days when the river steamers plied the waters, carrying provisions and mail, and canoes were used to send wool bales to Wanganui. Mr Anderson said that, in his youth, he worked for the Wanganui River

68. Document A73, pp 1-2

69. Document A60(a)

70. Document B11, p 5

71. For example, in 1967 Panatahi Metekingi dismantled the wharepuni Poutama at Karatia (earlier called Poutama or Hikurangi) opposite Matahiwi. It was reassembled at Koroniti, eight kilometres downstream. The Karatia location was on the opposite side of the river to the road and had been abandoned by 1934. Koroniti adjoined both the river and the road. The finely carved house had been the subject of vandalism and scavenging: Morvin T Simon, *Taku Whare E: My Home My Heart*, 2nd ed, Wanganui, Wanganui Regional Community Polytechnic, 1991 (doc A59), p 35.

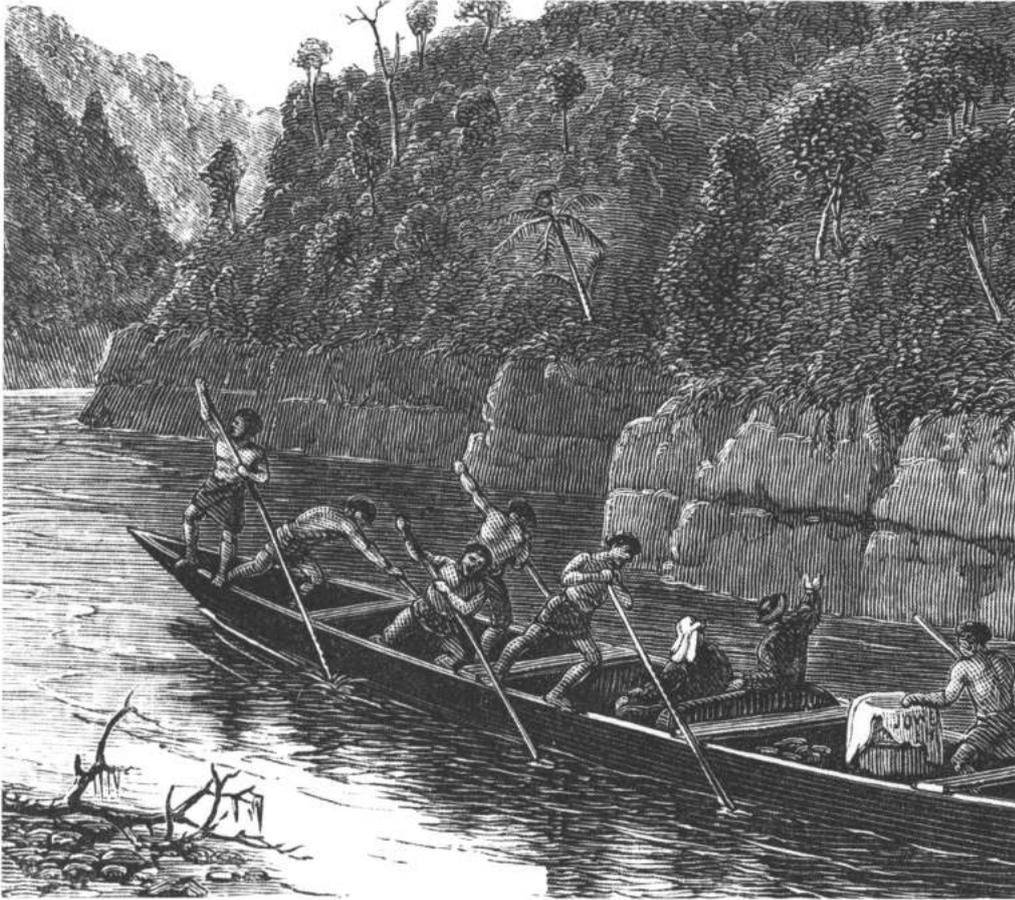


Figure 5: Poling on the Whanganui River, 1861.
Engraving by James Crawford. Courtesy Alexander Turnbull Library (D-PP 0085-096).

Trust. Then, the riverboat ran three times a week between Tawata and Taumarunui, leaving Tawata at eight in the morning and arriving in Taumarunui at three in the afternoon:

When we returned from Taumarunui, the boat would service the farms adjacent to the river and they would take their stores and everything down and throw them down on the landings. And during the shearing season, the wool went by river too. Provisions for the farmers and ourselves came by river. There were no roads.⁷²

Julie Ranginui's father was a riverboat captain and she recalled travelling with him on the runs from Taumarunui to Pipiriki and calling in at all the marae along the river, many of which are no longer there.⁷³ Te Wera Firmin said that the river:

was used as a road by steamers and waka. Mail and groceries were delivered by the steamers. You were also able to travel to town by boat. Fruit, produce and livestock were also taken to market on the steamers and waka. It's changed dramatically.⁷⁴

72. Document A60, p 4

73. Document A70, p 4

74. Document A62, p 3

Poling Traditionally, the river was traversed by many waka. Such old ways are not forgotten, and some members saw for themselves the skill with which the late Grace Taiaroa, an old river identity, handled a canoe on her own in swift waters. The old technique for ascending rapids – standing in the canoe and using long poles to push through them – is still known. Arthur Anderson, for example, recalled how he was taught poling by his elders, and the challenges of his youthful friends to pole the swiftest rapids.⁷⁵ The poling holes drilled in the cliff-banks, by early antecedents, are still in evidence, as are large boulders used to secure the canoes, with rope-holes drilled through them. Many are unusable now, because water levels have been lowered, but the art of poling is not forgotten.

3.2.9 River unity

Just as the river served to link the scattered settlements, so too are the people linked by common origins, and a history with which they remain familiar.

River's origins John Tahuparae referred to the river's origins, presenting a different account from that which the Tribunal heard in Taranaki, but one that more accurately reflects the Whanganui tradition.⁷⁶ In this account, Ranginui, 'the supreme universe', created the mountain Ruapehu (or Matua Te Mana, which he translated as 'absolute Mana') in order to becalm Maui's great fish, Te Ika a Maui (the North Island). When Ruapehu expressed his loneliness, however, Ranginui responded by placing two teardrops at Ruapehu's feet, one becoming the Whanganui River, the other the Tongariro River, which emerges on the other side of Lake Taupo as the Waikato. Thus, the Whanganui River is known to them also as Te Awanui-a-rua – the second teardrop of Ranginui. The subsequent story accords more with other traditions, of how Ranginui created the further mountains to provide companions for Ruapehu – the maiden Pihanga, Tongariro the warrior, the servant Ngauruhoe, and the sacred Taranaki – and of the departure of Taranaki following his ill-fated interest in Pihanga. In this account, however, Taranaki did not create the Whanganui River, but followed the pre-existing watercourse to cool and cleanse his feet as he travelled to the ocean.

Followers of tribal politics might observe how this legend gives paramountcy to Ruapehu, and links the Whanganui River not to Taranaki but to Ruapehu and the further waterways beyond. Anthropologists might additionally observe how the sacredness of the river is also thus accounted for, as a gift of compassion from the gods. John Tahuparae added, however, that Taranaki's footprints to the sea are firmly etched in the Whanganui riverbed.

Tribal history and unity Kaumatua Anihera Henry referred to subsequent events in the history of Te Atihaunui-a-Paparangi. She spoke on the basis of her 'birth-right', she said, in order 'to affirm the true and rightful guardianship of the river to all the hapu, the tribal people of Te Ati-hau-nui-a-Paparangi'. She stressed that all the hapu of the river are related. She said that she had lived at Taumarunui for most of her 76 years.

75. Document A60, p 4

76. Document A50

She is a kaumatua affiliated to all the 'subtribes of Ati-hau-nui-a-Paparangi'. In the usual Maori way, she acknowledged descent from several sources, from the 'tangata-whenua tuturu', the autochthonous people of the river and the land; from Turi, the Aotea canoe leader; and from Tamatea, the Takitimu ariki who visited Whanganui in the early days. In referring to the tribal hostilities in 1828 and 1829, she traced her tangata whenua tuturu line back to the warrior chief Tukaioa, a generation before any intermarriage with Turi's descendants.⁷⁷

Anihera's account also brought out the unity of the Te Atihaunui-a-Paparangi hapu in defence of the river against the combined attacks of those from outside, of Ngati Toa and Ngati Raukawa under Te Rauparaha.

Anihera then spoke of Tamatuna, one of the legendary river chiefs and a descendent of Turi. Tamatuna's principal wife was Tauira, a sister of Ruaka, who married Tamakehu and had Tamaupoko, Hinengakau, and Tupoho, as earlier described. She also referred to Tu Tangatakino, the kaitiaki of the Aotea waka, who came from the islands to make his final home here. Tu Tangatakino, taking the form of a whale, she said, guided the waka from Rapanui to Aotearoa. She added:

Tutangatakino guarded and cared for our ancestors [of] the Aotea waka, from whom we also descend. Today, he resides within the Whanganui River, at the upper reaches. He guards the passage for us, the descendants of all hapu of the tribal people of *Ati-hau-nui-a-Paparangi*; I [reaffirm] to the Tribunal that we are the true and rightful *tangata-kaitiaki* of te awa o Whanganui.⁷⁸

Matiu Mareikura, of Ohakune, was amongst those who contended that the ties between the people remain strong, indeed as strong at the river's source and the river's mouth as they are from one bend to the next. There was, he maintained, 'no difference between us living here, and those people living down there, because we keep them in mind and in connection with the river and all that's going on'.⁷⁹

Unity today

The Whanganui people, it was said, have always gathered together to reinforce their bonds. Just as the waters of the Whanganui and the Ongarue meet at Ngapuwaiwaha Marae in Taumarunui, Arthur Anderson contended, so would people come from different parts of the river to talk:

I suppose every five or ten miles on the river there would be a settlement of people closely related all the way through. We have on our marae carvings which represent the people from the top end of the river and the bottom end of the river represented by two birds in the carving – the koau (black shag) and the torea (seagull) represent the people that used to go there and talk from down the river and up the river. They came from all parts of the river.⁸⁰

Others emphasised that the close connection between the river people was and is exemplified by their cooperation, and the sharing of resources in times of both

77. Document A56, pp 1–8

78. Ibid, pp 9, 12

79. Document B11, p 1

80. Document A60, p 6

need and plenty. People from different hapu shared transportation and food and would help each other in times of sickness. Mike Potaka stressed that fish caught from the awa served to feed not only one's own family but also one's relations throughout the tribal district. This generosity had an economic significance, he explained:

because it brought reciprocity, now or later, from most to whom it was distributed, and was an important means of providing hospitality to guests and expressing the mana and generosity of the people of the river.⁸¹

The close connections up and down the river were reflected in the way the people came together. Te Kuia Peeti spoke of the thriving social life along the river during her younger years after the war. Intense, yet friendly, inter-hapu rivalry was played out in numerous sporting and cultural activities, and Te Wainuiarua Sporting Movement was born. 'Contacts were made,' she said, 'romances bloomed and marriages were born during these times of great social [significance]'.⁸²

Tariana Turia considered that, before the widespread post-war urbanisation, 'the social activities of whanau centred around the marae on the awa'.⁸³ She noted that Te Wainuiarua is now being revived after 25 years of minimal participation.

Julie Ranginui said that a tangi in one whanau would affect groups the length of the river because of the interrelatedness of the people. The connection, she argued, can be traced through whakapapa back to the ancestors Tamakehu and Ruaka:

From Tamakehu and Ruaka came the three children – Tamaupoko (the central area where I am from), Hinengakau (second child – the daughter) and she married into the King Country, the top part of the river, so her area comes down as far as Whakahoro . . . From Paparua down to the mouth of the river was the third child, Tupoho. So Tamaupoko, Hinengakau, and Tupoho were the three children of these tupuna. From these three children derive the people of the river. What would happen is they would marry out of the river, but they would come back and live in the river. The inter-relationship – its the whakapapa. If there was a wedding in say Wellington, if all didn't go from the three rohe, at least some of them would go to represent these communities.⁸⁴

Matiu Mareikura emphasised the way that the tribe stood together as one. One group's problem was a problem for the entire tribe. He described the way that each whanau knew it was only part of a wider whole:

It is ultimately important to have those inter-hapu, inter-whanau, inter-tribal links and relationships. They are important for our well-being because it's not good for Ngati Rangi to be okay and Ngati Tupoho not to be. It's no good for Hinengakau to be okay when Tamaupoko is not okay. It's important that we all know this. We need one another for strength, we need one another to be able to hold ourselves

81. Document A66, p 2

82. Document A58, p 4

83. Document A55, p 5

84. Document A70, p 4

together as a people, as a tribe. Without that, we become individuals. That wasn't what the old people wanted us to do. They wanted us always first to hold together for 'divided we fall, and, united we stand'.

And our iwi-hapu relationships are strong . . . even up here in Ngati Rangi, we're still strong with our relationship to the river, and anywhere along the river because we're Whanganui, we belong to the greater tribe. And so really, we're only small fish in relation to whanaungatanga, we belong to a family. We haven't the right to pull away. And when it's time to stay together and to help one another, look after one another, that's where the hapu come in.⁸⁵

The hapu of Whanganui thus proclaimed how they saw themselves as constituent parts of a wider tribal body. Identity was seen to be derived from the whanau and hapu, but Whanganuitanga overarched all. The river was seen to link the people from the mountains to the coast, a constant reminder of the irrevocable connection between the whanau and hapu who belong throughout its length.

In short, we received striking evidence of a people whose identity and outlook are inextricably connected to their eponymous river. We heard how the river and the people both prosper together or share ill health, as the case may be, and we frequently heard the comment that the people did not claim to own the river but rather were owned by it. As Mr Mareikura contended, by his birth he had no option but to belong to the river.⁸⁶ A tau, pepeha, or waiata accompanied each speaker, and the following remains one of the Tribunal's enduring memories of the hearings:

*E rere kau mai te awa nui nei,
Mai te kahui maunga ki Tangaroa,
Ko au te Awa
Ko te Awa ko au*

*The river flows from the mountain to the sea
I am the river
The river is me⁸⁷*

3.2.10 Winds of change

The people's current concerns were especially highlighted. The association with their ancestral river is being severed and the river spoilt by new developments. Their complaints of spoliation are more poignant when seen in the context of their cultural duty to transmit the whenua, unharmed, to succeeding generations. Kaumatua contrasted that which they had loved and enjoyed with the remnant that is their mokopuna's birthright. Younger persons spoke of the river life as told to them by their parents, and of the life they are leading now.

Sense of loss

85. Document B11, p 9

86. Ibid, p 1

87. Document A55, p 13

This was more than a lament for a lost way of life. It was a protest against that which was seen as an imposed alternative. Matiu Mareikura said he was:

quite sorry for our mokopuna because they won't have those opportunities of seeing and knowing the river like I knew the river, and it's nowhere near how my father knew it, and how his father knew it, in the times when the river was truly the highway of New Zealand as it was called in the past. And now the river's coming back down to something a bit more than a trickle, I suppose. I find things are going to be very difficult for my moko – *but I'm going to fight for them.* [Emphasis in original]⁸⁸

Te Kuia Peeti saw it this way:

To my sorrow my own children and mokopuna have not grown up in this environment, but what we had as children is no longer there. What we thought was unchangeable and immutable, the river, [has] undergone changes which we never dreamt of. Our beautiful safe swimming places have all gone. Because so much of the water was taken away, and therefore made it inhospitable for the fishlife to live, it was not uncommon for us to see dead [fish] floating down the river. Where once stood strong trees all along the river, we now have very serious erosion on our banks.

Where once the birds were plentiful and we could recognise their cries, or squawks, we hardly see them at all now. Where once we had crystal clear water flowing up and down our marae, this is now a very rare occurrence. In fact, the river is filthy dirty most of the time, that is our friend, tupuna, our whanau, has been desecrated by bad farming practices. Where once we had a healthy waterway, we now have a sick river, which is dying, unless drastic measures are taken to alleviate this situation.⁸⁹

Tariana Turia also expressed this sense of loss. She said that her adopted mother at Putiki spoke to her:

about her relationship with the River as if it was an integral part of her life. Her life was about the river as their sustenance. It provided for them physically, spiritually, and culturally. It was also their place of recreation. I never understood this as a teenager, because my experience of the river down here at Putiki was that we were not allowed to swim or to eat kai from the river as it was polluted.⁹⁰

Most especially, witnesses sought to maintain the association of the people and the river. Each was presented as meaningless without the other. As Dardanella Metekingi put it:

We believe that we should have the awa back. . . . We are a race at risk. If we are to continue being Maori and not just brown skin Pakeha, then we need our awa back to do the things we need to do as Maori. Our awa is not separate, it's all part of us. We can't be separated. You don't just send your eyes to the concert.⁹¹

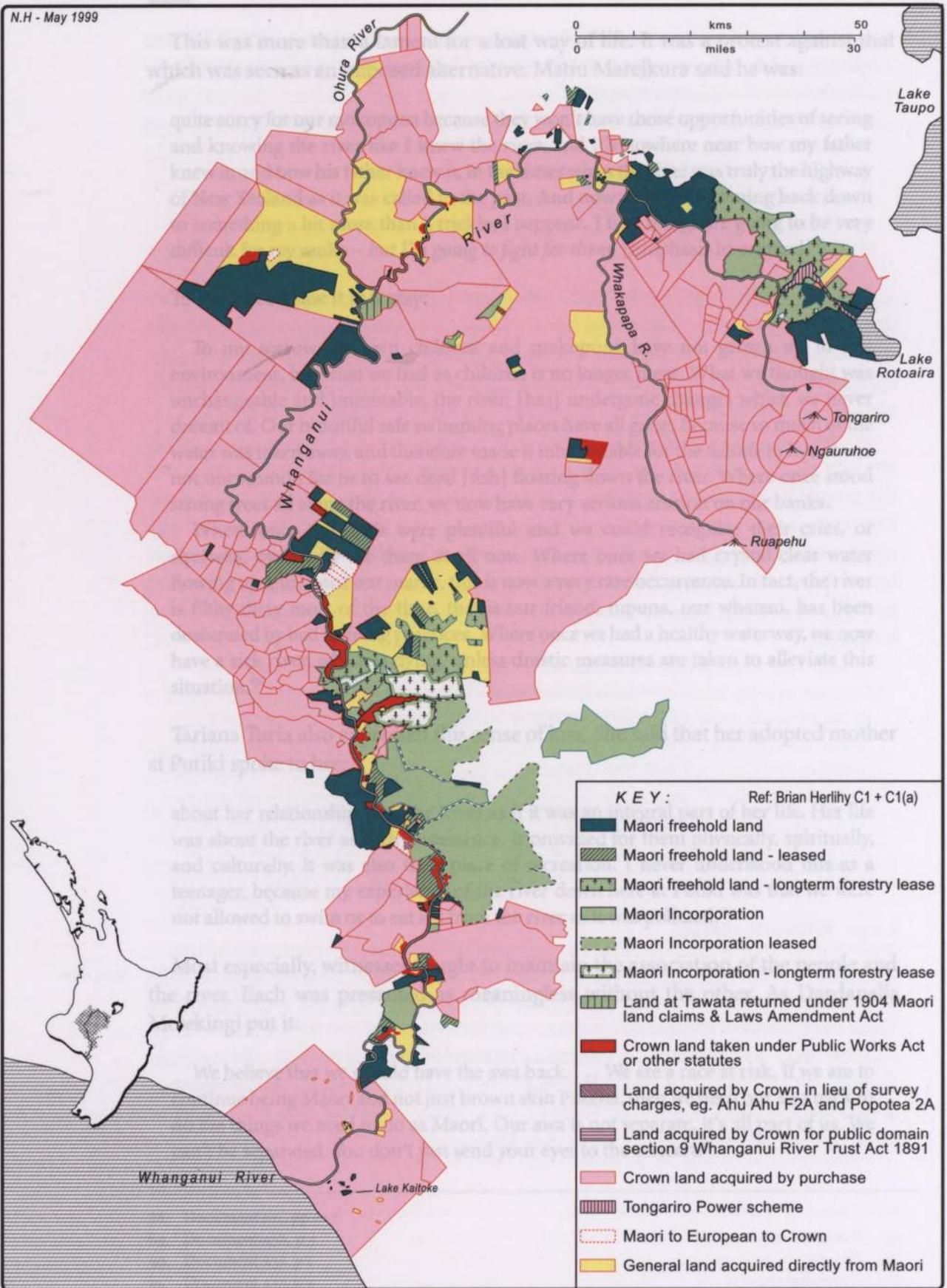
88. Document B11, pp 6–7

89. Document A58, p 3

90. Document A55, p 1

91. Document A57, p 2

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Map 3: Alienation of land blocks bordering the Whanganui River

She thought that control of the river should be 'a sharing thing. Respectfully shared taking into consideration that it's just not a large expanse of water to be used commercially and things like that.'⁹²

Other concerns referred to were pollution, loss of control, and a migration to the towns and cities. The Government, it was claimed, was responsible for the urban shift through the disproportionate acquisition of Maori land, land reform, planning laws, building restrictions, and the failure to prefer local employment when opportunities were presented. In earlier days, Governor Grey had provided flour mills to inaugurate local Maori development. They pointed to the remnants of the Kawana (Governor's) flourmill during site visits, but claimed that later policies were directed to the people's removal.

Urban migration

Although there is a greater proportion of Maori land in this district than many others, much of it is remote, precipitous, inaccessible, or so zoned as to limit or prevent commercial exploitation.⁹³ Generally, it was not cultivable land able to sustain a large population; indeed, it had little commercial value before afforestation in the second half of this century. Evidence of a policy of fair sharing, when the Government embarked on land-buying in the district, is not immediately apparent.

Land acquisition

Land acquisitions were referred to by various speakers, and Patrick O'Sullivan made particular reference to some.⁹⁴ As this was not an inquiry into land claims, however, we simply note the amount of land conveyed in the catchment area. Though the land was not necessarily abutting the river, these acquisitions must have affected the people's association with the river.

Major acquisitions before 1900 included the 1887 Waimarino 1 block purchase of 384,260 acres (which we believe to have been the single largest Crown purchase in the North Island, and which contained significant stretches of the left bank of the river), the 1893 Taumatamahoe 1 block purchase of 82,670 acres (which included no land contiguous to the river), and the 1848 Whanganui purchase (on the coastal flats, bisected by the river) of 86,200 acres. There had been numerous other purchases of various sizes by 1907, in which year the Stout–Ngata commission reported that 1,273,000 acres had been acquired in the Whanganui region.⁹⁵

It may not be popularly known but it is well understood by claimants that the Maori land law of today has little relationship to the traditional tenure; that it was imposed by the Government last century; that it was directed to or expedited Maori land sales; and that it led to unworkable titles in multiple ownership for the Maori land that remained. Indeed, various speakers regarded land sales, imposed land reform, and Government land use policies as the main causes for the severance of many from the river territory that remained.

Migration, land reform, loans, and town planning

92. Ibid, p 5

93. Alan Ward, *National Overview*, 3 vols, Wellington, GP Publications, 1997, vol 1, pp xxi–xxiv

94. Documents C12, C13, C16

95. The commissioners added that 'There yet remain to the Maoris of the Whanganui District about 500,000 acres, at a liberal estimate': 'Interim Report of Native Lands in the Whanganui District', AJHR, 1907, G-1A, p 15–16.

Matiu Mareikura claimed that you had to own 10 acres solely to build a house in his area.⁹⁶ We are aware that by the time to which he referred, Maori land ownership had become fragmented, that partitions were required for housing or individual farm loans, and that partitions, or building permits, were not always available. Nor were they regularly granted for rural land where the subdivided lots were not economic farm units or where a house already existed. Papakainga zoning to maintain existing settlements had not been provided for at that time.

In the Tribunal's experience, when Maori could not reside on or use multiply owned land, as a result of such laws and the title system, and when rates mounted or one or other of the many owners became financially stressed, a sale of the land was likely to follow. Mr Mareikura claimed that, as the Maori occupants moved out, 'a lot of white people moved in and did very, very well, on the same lands that our people couldn't farm'.⁹⁷

Tariana Turia contended that the Maori affairs policy of the late 1950s and early 1960s was to force or encourage Maori to move to urban areas. We consider that multiple land ownership, partition restrictions, Government land development policies, and town planning laws had the same effect. Ms Turia referred to a further blow to Maori with the subsequent disinheritance of many through the compulsory acquisition of shares deemed to be uneconomic.⁹⁸

Meterei and Esther Tinirau considered that large-scale agriculture under Maori incorporations and Board of Maori Affairs development schemes provided something of a solution to the development of the fragmented land. Nevertheless, the development itself was not ultimately successful, because holdings were uneconomical and the scheme referred to took control out of the hands of the owners.⁹⁹ Ms Turia had similar concerns:

We have to wonder how effective Incorporations have really been in returning land to the whanau.

The whole voting process of our Incorporations is founded on the principle that 'they who have the most shall have the greatest say'.

This is not in line with kaupapa Maori but in fact is again policies of Kawanatanga.¹⁰⁰

Many claimed that the urban movement from the river communities to the towns could have been resisted but for Government policy. When Te Kuia Peeti married, she said, she wanted to build a home on her marae but was prevented from doing so because of rural zoning laws and Maori affairs policies. Consequently, she and her family were forced to shift into the city, leaving the stable structures of the whanau. They are, she said:

96. Document B11, p 10

97. Ibid, p 11

98. Document A55, pp 3, 5

99. Document A67; doc A76

100. Document A55, p 4

a product of the social dislocation in terms of the urbanisation process which has systematically dismantled our way of living and those relationships with our resources, whenua, iwi and the awa.¹⁰¹

The extent of the migration from the river was not quantified in the submissions, nor have we inquired fully into the causes. At the national level, the urbanisation of the Maori people has been dramatic, from 84 percent rural in 1926 to 76 percent urban in 1976, and 84 percent urban in 1986.¹⁰² Arthur Anderson's map of over 143 past and present river marae indicated that a much larger population inhabited the river previously.¹⁰³ Missionary census data from the 1840s and 1850s depict a relatively even spread of settlement the length of the river, with larger aggregations at present-day Tieke, Pipiriki, Jerusalem, and Parikino. In the 1840s, broad and general estimates of those living on the river varied between 3000 and 5600.¹⁰⁴ The evidence for the subsequent depletion of the Maori river communities, though compelling, is largely anecdotal. Until recently, the picture to be gained of each of the remaining communities on the River Road as far north as Pipiriki, and those upriver of Whakahoro such as Tawata, has been one of retreat or decay. The present-day concentrations of Te Atihaunui-a-Paparangi are in the urban environs of Taumarunui and Whanganui, though many have left the district altogether.

We have not inquired fully into the causes of the Maori migration. Maori access to European goods and services and the pursuit of work were obviously important, and no doubt there were world-wide economic forces leading to urban migration globally that were beyond the power of a government to control. Land loss and land reform must have had an impact, however, and many Maori recall how Maori land laws, town planning laws, and Government housing policies worked against those who sought to stay in their traditional communities. Certainly, no one has pointed out to us any positive policies designed to give effect to the Treaty's guarantee of continued possession of the land by Maori for so long as they might wish to retain the same in their possession.

We should add that, in comparison with other areas, the Whanganui region has been one of poor economic growth since the Second World War and was thus never able to provide full employment for the migrating iwi. The town was (and is) a declining port and service centre. As S Harvey Franklin wrote in 1978:

101. Document A58, p 5

102. Ian Pool, *Te Iwi Maori: A New Zealand Population, Past, Present and Projected*, Auckland, Auckland University Press, 1991, especially pp 239–240. Pool refers to Maori society as involved in an:

almost total transformation from an agrarian to an urban population in the two decades 1945–66, over less than one generation. This transition has been accorded less significance than it should, probably because there is little appreciation about how rapid it really was when viewed from a global perspective. It was probably the most rapid urban shift anywhere, and recognition of this is fundamental to an understanding of all aspects of Maori social dynamics since World War II.

103. Document A60(a)

104. Document A47, pp 2–3

The region's opportunities for growth are restricted by the limited area and the limited resources of the region, by competition, [and] by the fact that within the total structure of the economy many of its resources have already been developed.¹⁰⁵

Tariana Turia gave this perspective of the consequences in Wanganui City:

Certain areas of Whanganui were designated for Maori. We saw the development of Housing estates in the Whanganui East Pepper Block area, Aramoho Kotare St area, and the Castlecliff Matipo St area.

These areas are now identified by Social Service agencies as the 'lower socio economic' areas of Whanganui and where we can expect certain social problems.

Maori Affairs also had a policy of ensuring that our iwi of Whanganui were kept in the area of Castlecliff. In fact, Maori Affairs even pre bought sections and sold them on to prospective Maori Home buyers.

Contact with the awa lessened as these families struggled to survive. They lost the ability to utilise what little land they had in their backyard to grow kai. From self sufficient people of the awa we became dependant on the system to provide for us.

Our bodies that were once lean and strong have succumbed to the lifestyle behaviours of our colonisers.

Our rangatahi no longer have an affinity with their awa as they have become alienated from their own culture. They have become part of the sub culture of rastafarianism, drugs and alcohol.

They can align themselves more with the messages of Bob Marley of freedom from oppression.

These same mokopuna of the awa are now filling the mental institutions with drug and alcohol related mental illnesses.

Criminal offending has increased tenfold amongst our young in the past ten years.

There would be few families who have not experienced the pain of seeing their young in jail.

They are wandering around our streets of Whanganui today with no sense of purpose in life. Some have taken their lives. It breaks your heart.¹⁰⁶

Pollution

Those who return from the towns to their ancestral marae, which many do when circumstances allow, and those who still occupy the river lands now face a problem of increasing river pollution, as has already been mentioned. The river is sick, they say. Pollution and development, they claim, have affected the river itself, the associated food chain, the vegetation on the river bank, the fish, and the human beings.

Some perceived the people's association with the river as such that, when the latter was sick, the former were also. As Ms Turia observed: 'Our health which is tied irrevocably to the Awa has suffered. When the Awa became sick, so did the wellbeing of our Iwi. Such is our relationship.'¹⁰⁷

105. S Harvey Franklin, *Trade Growth and Anxiety: New Zealand Beyond the Welfare State*, Wellington, 1978, p 279

106. Document A55, pp 5-6

107. *Ibid*, p 12

The Maori cultural demand for the maintenance of pure water streams makes despoliation a cultural offence, a desecration in terms – especially the discharge of raw sewage to water, rather than to the cleansing land, as has occurred in Taumarunui and Wanganui. Matiu Mareikura spoke of his distress:

The sewerage that goes into the water to us is absolutely sacrilege – it is sacrilege to contaminate water anywhere but in particular, to contaminate the river. For that is our source of life as a people, as a tribe. We go there, and we suffer for these things.¹⁰⁸

For Dardanella Metekingi, the discharge of sewage is ‘a betrayal’. She added:

From what I’ve seen, the Government is not doing a good job in controlling the river. There’s been a deterioration in the river. It’s spirit is dying. It looks dead. Don’t just look on top, you need to look underneath, and at all that makes up the river. There is less bird life, particularly less shags.¹⁰⁹

The diversion of much of the headwaters to Lake Taupo and the Waikato River through the Tongariro power scheme was affirmed as a spiritual affront. As Matiu Mareikura put it, it has ‘severed the cord of our unity’:

Water diversion

You see – we follow the river, and once we follow the river, we carry on up to the mountain. And that’s how we pray. We go up the pathway. Now the spiritual cord has been cut because they have taken the water away from us. And that to us is sacrilege. And then to give it over and put it into another tribal area is equally bad, because the water wasn’t meant for those people. It doesn’t belong to those people, it belongs to us. We all share, but this is not sharing. This is completely taking it away from us and giving it over to our relations in Tainui, first to Tuwharetoa, and then to Tainui. And so you know the spirituality of that has untold heartaches; tears have flowed. I remember the old man crying, our koro, Taitoko [Tawhiri] shedding his tears because he said that ‘my river has been severed, the head has been cut – what is there left for me?’¹¹⁰

For Kevin Amohia, the river’s mauri had been damaged:

The Maori view things differently from Pakeha. We cannot divorce one part of the river from the other. Because without one, the other does not exist. If you empty half of the water out of the river, you have a stream, and that’s what it’s like up this end. In some places, you can walk the river.¹¹¹

Arthur Anderson remembered the swimming contests with his friends and where it was a challenge to swim to the opposite bank and back. Today, he claimed, he can walk across some of those same places, and once again, Richard Heerdegen supported this perception.¹¹² Mr Anderson thought that the spiritual dimension had also been affected:

108. Document B11, p 3

109. Document A57, p 2

110. Document B11, p 4

111. Document A65, p 3

112. Document A63, p 3; doc B14, p 3

I can recall when my mother died, which was a sad occasion for me and I went down to the river. This was in Taumarunui itself after the diversion. I looked at the river but found that it was not the river I had known as a child. I had to go further down the river to find a spot that I felt would be correct. It was past the Hospital Hill, near the Herlihy Bluff. There I found a spot that was more like the Whanganui River that I know. In the time of grief when I needed the river, I found I could not use the river by Taumarunui.¹¹³

3.2.11 Future planning

River resettlement

Whatever the effects of spoliation of the river and dispersal of the people, a solid group of all ages remains determined to recover their birthright, to keep their links with the river and to fortify the cultural values that have sustained them. 'What I want to see is something that could be given back to me to give to my babies,' said Julie Ranginui, adding:

Irrespective of the condition of the river, the little water that I have there is still my mother, is still my father, is still my tupuna, and as long as I see that bit of water, at least I have a little hope to hold that the wairua is still alive, but it is dying.¹¹⁴

The wairua remains, in the opinion of Kevin Amohia, even though most of the old kainga are now empty. Indeed, the people are ready to reclaim their presence on the river:

I can assure you that in today's environment of economic development that a lot of our people will certainly go back to those old kainga to live. Even if they had to go back to doing the things that their old people did. Planting their gardens. Living in a tin shack if that's the only one they've got. They will do it. They will live from the river, they will exercise their spiritual and physical well-being.¹¹⁵

A group that reoccupied the former village site at Tieke in October 1993, in what is now the Whanganui National Park under the Department of Conservation, showed the lengths to which some would go to achieve this.¹¹⁶ It was welcomed by speakers in so far as it showed a determination to move back to the river. Referring to Tieke Hut, Mr Anderson said, 'A lot of our young people sat in there and wouldn't move. They said "We own this place", and so in the finish, the Government has sort of softened towards that and agreed to it.' He was encouraged by the Government's approach and rejoiced that young people were now 'beginning to realise what they have left behind and that the river is still there if they need it'. He added that many river marae were being rejuvenated.¹¹⁷

Mike Potaka agreed. He said that Parikino, which had a population of 100 when he was a boy, had been reduced to only 30 inhabitants, but that he was now

113. Document A63, p 5

114. Document A70, p 6

115. Document A65, p 6

116. Document B24

117. Document A60, pp 7-8

witnessing a gradual return of people to live near their ancestral river. At present, the Kaitangata Trust, which he chairs, is able to assist with some finance for housing construction, and he said that, in the past three years, six new houses had been built. 'Those who have returned,' he opined, 'and others wanting to return all believe that the river is calling them back':

There are always things that bring the people back. They have to have that finishing, or come where they belong, and nothing calls them back except the river, and more so as they get older.

It is a korero – the river is calling for its people. At some time in your life you need something when you are out there, home is the river and you say 'I need to go home'.¹¹⁸

Prominent amongst the drives to re-establish the culture, history, and traditions of the Whanganui River people is an enterprising project funded by the Whanganui River Maori Trust Board, Te Tira Hoe Waka. Te Tira Hoe Waka began in 1989 as an annual canoe pilgrimage in January from the confluence of the Whanganui and Ongarue Rivers by Ngapuwaiwaha Marae in Taumarunui. The journey downstream to Putiki Marae, near the mouth at Wanganui, covers 210 kilometres, reliving the summertime passage of the many ancestors who traversed the river's length to fish for kahawai where the river meets the sea. This journey, which regularly attracts 70 to 100 Atihaunui canoeists, young and old, is undertaken in some 30 to 40 canoes or waka, and is conducted over two weeks. It also involves visits to the ancient pa and kainga sites, formal receptions at several marae along the way, and swimming, tramping, or touch rugby on the river banks. Evening campfires resound to haka and waiata practice, teachings of history and lore, and drills on canoe handling or how to survive spills. Most of the younger participants are from cities or towns, and some have not been to the river before. A number of them attended the hearings to relate their Tira Hoe Waka experience. Matiu Mareikura spoke of this:

Te Tira Hoe Waka

Some of our young people have no contact with the river. And that's not their fault. Our young people who have had no contact with the river, once they get on the Tira Hoe Waka, after two days, they don't want to get off. They are in the realm of the awa. They stay up late at night wanting to listen to more talk, only to listen to korero. And when the camp fires burn down, you get up in the morning and those kids are strewn all over the place because they wanted to sleep there. They've never done it before. They've never gone to the washing places down by the little wee stream that have been provided for them. They cry and they shed tears knowing it's going to end.¹¹⁹

The Tira Hoe Waka experience led Ned Tapa to return to Parikino, where he had been brought up.¹²⁰ For Leon Rerekura, Te Tira Hoe Waka was a platform for the

118. Document A66, pp 1, 7

119. Document B11, p 14

120. Ned Tapa, oral evidence, 17 March 1994

rediscovery of his Maori roots. He was, he explained, born in Wanganui, and did not grow up on the river. Instead, his family had moved into town to seek employment, and his parents, from Parikino and Upokongaro, never spoke Maori to him or his brothers and sisters, having been conditioned into believing it had no future place. Te Tira Hoe Waka had opened a door that had been closed to him:

The daily wananga on the awa and in the evenings around the fires [with] our kaumatua were so special to me. The more I learned about the awa and our tupuna, the closer I felt to it and them. . . . I have been given a rare insight into the lives of our tupuna and I have been able to share and experience the totality of Whanganuitanga with regards to learning some of the ancient ruruku and tikanga, concepts of aroha, manaakitanga, wairua, mouri, iwi, hapu, whanau . . . These things I did not learn at a young age and my only regret is that I will never be able to experience the physical things like traditional fishing and accordingly hand those on to my own children. . . .

Learning to appreciate the awa as they did has enhanced my own wairua and reasons for being. Mere words cannot express the feelings I have for our awa. I only know I am as much a part of the awa as it is of me. I have my identity as one of many of the mokopuna of the awa and through me, so do my children.¹²¹

Gerrard Albert said that the younger generation of Whanganui Maori had not had the experiences of their parents and sometimes questioned their own identity. He was emphatic, however, that members of his generation would carry on as their parents and grandparents had done before them:

For young people, brought up within the 'sensibilities' of western thinking, of Christian doctrine, of western science, how is it we readily and quite comfortably accept as fact that our tupuna, our kaitiaki reside within the water, within the bed, and upon the banks of our River? We do so with a faith that is absolute, that is unquestionable, that is unchallengeable. A faith borne out of an ancient bond with the River that dictates that its mana resides with the Iwi. We, the present generation of the Whanganui Iwi, descendants of the River, will perpetuate this view into the next, for without the River, we are nobody.¹²²

Thus, we were regaled with the people's account of their beliefs, practices, experiences, and hopes with regard to the Whanganui River. They spoke, too, of their concerns that their traditional association with the river, and their time-honoured authority over its use and management, have been wrested from them. In all, they claimed, their rangatiratanga and mana had been trampled on by rules, policies, regulations, and practices that neglected or negated their legitimate, customary interests. They say that they have not been properly recognised as the tangata whenua and river kaitiaki, and that policy makers and administrators seem even unaware of their customs and traditions or of what they mean or entail. Their traditional control of the river, and of themselves, they said, was wrongly taken over by the Government, and their mana should be restored.

121. Document A72(a), pp 4-5

122. Document A72, pp 3-4

The assumption of governance over the Whanganui River and the question of whether it was rightly or wrongly assumed are considered in succeeding chapters. For the moment, mention is made of general public views. Clearly, there are a number of interested parties in the river besides the claimants: those with commercial interests in effluent disposal, water abstraction, and transportation, and those with recreational and environmental concerns. Their perspectives will be better understood if they are examined in a wider context of changing attitudes to the natural environment and its management as colonisation proceeded.

3.3 TE IWI PAKEHA

Pakeha settling in New Zealand in the nineteenth century encountered an alien natural environment, and set about transforming it into a 'Britain of the South'. English plants and animals were acclimatised and bush cleared. Native bush was not romanticised in popular culture until the end of the century. By then, the majority of Pakeha were New Zealand-born, while the bush had ceased to represent the same obstacle to farming and settlement. Only once the forest cover was greatly reduced could the remnant be accommodated and even revered. The completion of the main trunk railway line through the King Country in 1908 was one event that symbolised a victory over the forest. At the time, there were the beginnings of a public cry for scenery preservation. 'Is it true, then,' asked Monte Holcroft in 1946, 'that contact with the wilderness has induced, not a spiritual humility, but a strong sense of superiority?' Answering his own question he replied:

Conquest or
adaptation? Monte
Holcroft

Our ancestors saw the forest as an impediment to be removed. They acknowledged its vastness and took pride in the vigour with which they attacked it, carved out their paths and settlements, and introduced the framework of a transplanted civilization. Behind them was the power of an age growing up to industrialism.¹²³

Comparing the predominantly spiritual and communal Maori world, with its emphasis on the primacy of nature and the need to tread carefully when interfering with natural laws and processes, the Manukau Tribunal commented in 1985:

It might be considered that Western society, although espousing a religion, is predominantly secular and individualistic in its world-view. Although there is a religious premise for the presumption that humankind has authority over nature, that view probably springs from the secular and rational characteristics of our society.

The Tribunal noted a shift away from the desire to reshape the environment towards a wish to live with the natural features of the country:

Shift from conquest
to accommodation

123. M H Holcroft, *The Deepening Stream: Cultural Influences in New Zealand*, Christchurch, Caxton Press, 1946, p 28

Western society, after the large scale modification of the natural environment, has seen the need to impose constraints. It has come to uphold certain values that argue the case for the maintenance of more of the natural environment or higher standards in environmental care. In some quarters the approach is rationalised in the view that nature has its own purpose.¹²⁴

Accommodation of
Maori

It is one thing to come to terms with the natural world that was here before human settlement, however, and another to come to terms with the first people here, who have been acknowledged in law to have legitimate property interests by discovery and prior occupation.¹²⁵ Should they be accommodated too, and if so, how?

Maori and Pakeha cultures were very different, with the former stressing extended family values and the latter the individual. While the Maori economy at 1840 could be described as emerging from subsistence, the settler economy was industrial and based on capital accumulation. These different cultural perspectives were reflected in their respective legal systems. While the culturally specific dimension of Maori law is often criticised, the cultural influences inherent in Pakeha law are rarely acknowledged. The imposition of Pakeha law on Maori, without consultation, can be equated to an invasion – an invasion that was devastating to Maori culture. The imposition of that law on the administration of the Whanganui River was equally crushing.

Many of the beliefs and values of the Atihaunui River people were incompatible with Pakeha perceptions of future commercial development. Greater emphasis on private property and exclusive ownership forced Maori to adapt, while the newcomers assumed that theirs was the only relevant view.

Such a settler attitude ignored the fact that both cultures valued the river, valued trade, and could accept the other on the river. Maori and Pakeha had sophisticated political systems, which were adept at dealing with change and which could have been used to harness new solutions for river management. The settler mindset appeared to be that communal values were fundamentally incompatible with progress. The narrow views taken by those in authority meant that they saw only one solution – Maori law and administration had to be totally replaced with settler law.

As a consequence, an evolution that occurred over centuries in Britain was squeezed into just a few decades in New Zealand (see sec 2.2, chs 6, 8). The settlers believed, as do many of their descendants today, that the imposition of the labyrinth of administrative controls brought greater benefit than detriment to Maori. This may or may not be so, but in introducing what were often for Maori totally alien practices in land tenure, boundary definition, and property ownership, the settler governments officially invalidated much that was vital for the

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

125. This has long been recognised in United States, Canadian, and New Zealand courts under what is sometimes referred to as the doctrine of aboriginal title, and in 1992, it was acknowledged by the Australian High Court in the *Mabo* decision.

efficient functioning of a communal society. These changes lead to Maori and Pakeha talking past each other to a much greater degree than is willingly acknowledged. It is a legacy that continues to inhibit dialogue and a true meeting of minds.

If new statute law represented settler agendas, they were also more likely to understand English common law such as arm of the sea. Many also feared severe consequences for farming and industry if individuals or groups were given ownership over freely flowing water. European freehold landowners came to recognise and accept the centre line of a river as a convenient boundary, and there were few Pakeha who objected to the Crown assumption of ownership of navigable rivers by legislation. Crown ownership was sympathetic with a European cultural construction of rivers and could be seen to reinforce a strong settler preference for public river access.

The case was put to us that 'public access' to the outdoors should not in any way be compromised. The strength of feeling on this issue is perhaps the contemporary equivalent of the desire of many nineteenth-century settlers that New Zealand should be free of English game laws and the like, whereunder labourers and tenant farmers risked dire penalties to supplement their food supply by poaching from the estates of the privileged few. As G T Alley and D O W Hall wrote in 1941: 'To the liberals of 1840 New Zealand must have seemed gloriously free of the weight of custom and oppression.'¹²⁶

Perhaps in this vein, therefore, Hugh Barr for the Federated Mountain Clubs of New Zealand left little room for anything short of 'public' ownership of the Whanganui River, though his argument was based on an assumed affinity with Maori ethics:

As an advocate for human back country recreation we strongly support the concept that all the natural lands, rivers, coasts and lakes owned by the Crown should be in full public ownership. This must be with government, accountable to the people, to manage those lands and resources, so as to be 'preserved in perpetuity' in their natural state (in the words of the National Parks Act, and of the Reserves Act for Scenic, Scientific and Nature Reserves). The expectation also of our outstanding wild and/or scenic rivers, is that they too should be preserved in perpetuity, in their natural state.

Commonly owned resources such as the Conservation Estate and rivers are the 'Commons' of our society. Because they are owned in common by us all, we all gain from their existence, and we all should have an interest in their protection. In these characteristics they would bear some resemblance to the idea of communal ownership by Iwi, but on a national rather than a tribal scale, and under a democratic rather than a chiefly authority.

Federated Mountain
Clubs and public
ownership

126. G T Alley and D O W Hall, *The Farmer in New Zealand*, Wellington, Department of Internal Affairs, 1941, p 36

Mr Barr likened those of a conservationist mood to Maori themselves. Most who have immigrated here and have come to know the land, he contended, are moved to protect it:

This land makes those of us who feel this way in a very real sense the tangata whenua, the people of the land, whether we are of Maori descent or not. These feelings and these obligations are what has created New Zealand's public conservation estate. It has been the commitment of many individual citizens, often in the face of opposition from Government and the exploitive interests in our society.

He went on to describe the struggle of many people to establish conservation areas and national parks, despite Government lethargy or opposition. The process of creating such treasures began, he considered, with the gift of the Tongariro National Park mountains by Tukino Te Heuheu in 1887. 'The Whanganui River,' Barr added, 'is one such natural treasure in the eyes of most New Zealanders.' Extending his earlier metaphor, he continued:

Conservationists including many recreational users, are in a very true sense an iwi, with common interests in protection of these natural lands. Our rohe is the Public Conservation Estate.

We 'have kept our fires burning' in these areas for over four generations.¹²⁷

PANZ and public
ownership

Other material submitted by Mr Barr included publications by Public Access New Zealand (PANZ), formed in 1992 to preserve and improve 'public access to public lands and waters, and the countryside, through the retention of public ownership and control over resources of value for recreation'. While acknowledging 'the legitimacy of [proven] Maori claims over public lands', PANZ believes that, 'to reach equitable settlements, Government should use government assets, rather than public lands and waters held in trust for the benefit of all New Zealanders.'¹²⁸

The distinction between 'government assets' and 'public lands and waters held in trust for the benefit of all New Zealanders' reflects a sentiment rather than the legal position. 'Government land' is either unappropriated Crown land, or Crown land appropriated for a particular purpose, such as national parks and certain reserves under the Conservation Act 1987 or the National Parks Act 1980. These may be managed by a prescribed body, such as the Department of Conservation (see sec 2.2).

Here again, the view in the material submitted was that nothing short of 'public ownership' could be considered. Shared management with Maori was not seen as a possibility, and Maori ownership could not be contemplated, presumably even if a 'legitimate' claim to 'public' land was 'proven'.

127. Document D1, pp 3-6

128. Document D1(c), p 16

TO PANZ, Maori claims appeared to depend upon the application of the principle of partnership, as found for by the courts in interpreting the Treaty of Waitangi. It warned against the extension of that to impute a 50:50 entitlement between Maori and the Crown.¹²⁹

Further, PANZ considered that most Maori claimants ‘do not subscribe to the concept of preservation of intrinsic natural values for their own inherent worth, rather preferring utilisation of conserved natural resources’. In addition, ‘Tribal authority over access to and use of natural areas contrasts markedly with existing rights of access, conveyed equally on everyone’.¹³⁰

A concern for public access to lakes, rivers, and seas, and the maintenance of public walkways along their edges, has grown in recent years. Current laws requiring esplanades and marginal strips on the transfer of land from the Crown or on the subdivision of private land have been seen as insufficient. Arguments have been advanced for a general law to impose public walkways along lakes, rivers, and foreshores (see sec 2.2).

Comparatively speaking, the accommodation of Maori interests in rivers, lakes, seas, and foreshores has attracted little attention in policy formulation. Rather, the Crown has opposed Maori claims for legal recognition of customary interests in rivers, foreshores, and lakes (see secs 1.3.5, 2.2).¹³¹ Claims to sea fisheries, and for the protection of particular customary fishing areas, followed only after Waitangi Tribunal inquiries or court litigation.

This is illustrated in the lack of provisions for customary fishing rights in the history of fishing legislation. They were vaguely acknowledged but not specifically provided for.¹³² Until more recent years, no search has been made for a comprehensive policy or law to reconcile perceived public interests in natural resources with the legal rights of Maori, under the doctrine of aboriginal title.

The assumption that the Whanganui River was part of the public domain has been made from early pioneer times – though as seen, the common law did not so provide (see sec 2.2). It was one of the first rivers to be developed as a highway, for tourism and as an access to the interior. River development was proposed to link with a projected railway line from Auckland. Though few people ventured by river beyond Pipiriki before the late 1880s, steamboats were operating on lower sections

Principle of public access

Principle of accommodating prior Maori interests

Presumption of public right – access and riverboats

129. Ibid, p 1. PANZ researcher Bruce Mason traces the development of the concept of partnership from its use by the courts to denote the responsibilities that Maori and the Crown bear to each other to act in the utmost good faith to its use by the public service to depict something more in the nature of a contractual, business partnership. Here, he argues, references to the equal status of the Crown and Maori in Treaty terms become references to equal asset sharing. We agree that the judicial interpretation of the principle of partnership has been misconstrued in practice, as is noted in Waitangi Tribunal, *Te Whanau o Waipareira Report*, Wellington, GP Publications, 1998, secs 8.2.5, 8.3.

130. Document D1(c), p 2

131. Maori claims to the Ninety Mile Beach were also opposed by the Crown in litigation: see *In re Ninety Mile Beach* [1963] NZLR 461.

132. Consider, for example, section 8 of the Fish Protection Act 1877, which did not define Maori fishing rights but provided only that nothing in the Act ‘shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder’. Similar provisions appeared in subsequent fisheries legislation.

from 1864. Over time, riverboat operations expanded, and Maori eel weirs were progressively cleared off. In places, the river flow was realigned. David Young wrote:

Centuries of Maori habitation have left little mark on the river itself: only the round holes of toko (canoe poles) stamped in the papa cliffs beside wild waters. But in recent history the European steamboats and settlers made more forceful demands. The remains of their endeavours are still to be seen: a ring-bolt secured in rock above a rapid, used to winch a boat up through white water; a retaining wall that wrestled the river into another pathway; the shadowy outline of a riverboat wreck – brief glimpses of an era when the river was known internationally as ‘The Rhine of New Zealand’.¹³³

Use for tourism

The scenic splendour of the Whanganui River, and the uniqueness of its Maori inhabitants, impressed many an early traveller. The river, its people, its history, and its natural beauty have been the subject of a prolific number of books over the years, but Alfred Burton’s descriptions and photographs of 1885 may have most helped in initiating a substantial tourist flow.¹³⁴ Hatrick’s riverboats loaded with colourful tourists were to become an institution on the river. Deep in the interior, a houseboat was established at Retaruke, and this was replaced by tearooms after it was destroyed, though these disappeared in a flood in 1940. In the gorge at Otumangu, a tearoom with magnificent views was maintained by the Shaw farming family from the 1930s, but it was abandoned, with the farm, in the 1940s.¹³⁵ The famed Pipiriki House, a luxury hotel for river visitors, burnt down in 1959.¹³⁶

**A wilderness area
for outdoor
recreation**

Since the 1950s, the river has been used by the general public for mainly outdoor recreation, though there is still a significant tourist industry involving large craft and jetboats. In Young’s words:

The Whanganui River enjoys considerable fame for its unique combination of history – natural and human – and the wilderness-like recreation which it provides on trips undertaken by canoe, raft and even jetboat. It has been argued that taking a trip down the river is one of those uniquely ‘Kiwi’ endeavours, like walking the Milford Track or reaching Cape Reinga, that have become almost a prerequisite for being a New Zealander. Last summer some 18,000 recreational canoe days were spent on the river.¹³⁷

The easy gradient for canoeing makes the river suitable for school groups and families. Swimming, fishing, eeling, bush walks, exploring streams, climbing waterfalls, and camping and barbecue sites are all available, and in an unspoilt

133. David Young, ‘River of Great Waiting’, *New Zealand Geographic*, July–September 1989, p 98

134. For a list of over 20 publications, ranging from Richard Taylor’s *Te Ika a Maui*, published in 1855, to recent publications, see Arthur P Bates, *The Whanganui River Digest*, Wanganui, Wanganui Newspapers, 1983, pp 74–75; David Young, *Histories from the Whanganui River: Woven by Water*, Wellington, Huia Publishers, 1998, bibliography.

135. Arthur P Bates, ‘Otumangu: Site of Mysterious Whanganui Tearooms’, *Whanganui River Annual*, 1991, pp 47–48

136. Campbell, p 240

137. Young, ‘River of Great Waiting’, p 98



Figure 6: Utu piharau being built at Patiarero (Hiruharama).
 Photograph by James McDonald. Courtesy Alexander Turnbull Library (c8998).

utopia where time stands still. The isolation between Whakahoro and Pipiriki is especially preferred, but the beauty extends throughout. Again, from Young:

Even outside the Wanganui's spell-bindingly beautiful gorge, the banks are often steep papa or sandstone, bare or covered in moss, liverworts, parataniwha and tangled festoons of kiekie. Sometimes the banks are broken by exotic openings, cracks, 'coves' and caves, now yielding to tall and slender cascades, now breaking open to admit one of the river's tributaries. Behind the smaller plants and umbrella punga the cover rises magnificently into tawa, kamahi and rimu, rewarewa and occasionally rata and totara.¹³⁸

To the settlers' descendants, a river conjures two principal images. The more pleasurable and benign image arises from its aesthetic and recreational value. The second image is as a channel. This has many aspects. A river is primarily a drain to allow water to escape to the sea, but in so doing it provides a means of transport for crafts carrying people and freight. A river is also a conveyance for pollutants to the sea. Industrial waste and public sewage spring to mind as the main pollutants, but they are easily identified and can be dealt with. Multi-point discharges of heavy metals from the atmosphere, agricultural chemicals, and farm waste are more difficult to identify, while the introduction of disease-causing organisms is particularly hard to isolate. The river takes all contaminants with it to the sea. This

Industrial and
 pastoral uses

138. David Young and Bruce Foster, *Faces of the River: New Zealand's Living Water*, Auckland, TVNZ Publishing, 1986, p 17

role is not always easy to reconcile with the river as a domestic and industrial water source. In the post-war period, the waters of the Whanganui River have been diverted and re-channelled to provide electricity.

The settlers also wanted to be protected from the ravages that rivers could cause. This was most commonly achieved through stopbanking and diversion. Because the Whanganui River discharges almost directly from its valleys in the hills into the sea with no delta or flood plain, less intervention was needed than for other rivers. There is, however, some stopbanking in the urban reaches and where the road and railway run parallel.

Development at
Wanganui

In Wanganui, in the 1930s, the town wharf served coastal shipping, with often six coasters berthing at a single time. The collier *Gabriella* discharged Newcastle coal at the gas works wharf every second week, and as frequently, the *Puriri* unloaded coal from the West Coast. Castlecliff wharf handled phosphate rock from Nauru Island and sulphur from Mexico for the fertiliser works at Aramoho. Imlay wharf served lighters loading overseas shipping anchored in the roadstead offshore. It was necessary to extend and strengthen the harbour facilities in the river, and large stone was barged down from the quarry at Kaiwhaiki. Sewage and industrial wastes were discharged into the river.¹³⁹

Even in its lower reaches, however, the river was valued not just for industrial purposes but for fishing. Norm Hubbard reminisced on growing up in Wanganui in the 1930s:

We could actually live on the riverbank, so we reckoned. There were plenty of fish, mainly herring, a few kawhai, whitebait, flounder and we caught the odd brown trout, helped along at times with a drop of aniseed on the bait, bought from Mark's chemist shop in Duncan St. Usually we had a fire going on the bank and a good size fish would soon be cooking on the end of a piece of wire.

... at the Aramoho bridge on an in-coming tide it was possible to see the flounder coming in with the rising water. I could catch an average of six a week.

... Kukuta was a favoured swimming area and kakahi could be found there in the river.¹⁴⁰

It was to be many years before the concept of the Crown's responsibilities for water quality developed. While river control and erosion prevention came to be regarded as essential activities for the continued progress of farming and the protection of harbours, the remedy for damage arising from pollution still depended on actions in tort under English common law. One such action was taken in 1912, against flax millers whose discharges to the Oroua River near Palmerston North made the water unfit for stock and also blocked waterways. The Pollution of Water Act 1912, which resulted, did not change the legal regime, but it enabled water users to obtain injunctions where diminution of water purity was established.¹⁴¹

139. The Wanganui and Ruapehu District Councils have been involved in schemes aimed at gradually eliminating sewage discharges from Wanganui and Taumarunui, respectively, from the early 1990s.

140. Norm Hubbard, *Whanganui River Annual 1993*, Wanganui, Friends of the Whanganui River, 1993, p 31

141. Michael Roche, *Land and Water: Water and Soil Conservation and Central Government in New Zealand, 1941-88*, Wellington, Department of Internal Affairs, 1994, pp 28-29

The assumption that the river and its waters were available for general public use was highlighted in the 1950s when the New Zealand Electricity Department began to build the diversion necessary for taking water to drive the Tongariro power scheme from the tributaries in the river's upper reaches. The water was first discharged to another water regime in 1969 through Lake Taupo and the Waikato River, to pass away to the north. As a consequence, the Whanganui River was denied much of its volume, 50 percent of normal flow when measured at Taumarunui, with, in many opinions, catastrophic effects. Opposition to continued abstraction, in resource consent litigation, threw Pakeha and Maori together.¹⁴²

Hydroelectric
development

Was Monte Holcroft's postulation that Pakeha contact with the wilderness engendered a sense of superiority reasonable? Certain Pakeha families who have now lived along the river for many years, indeed for generations, would answer no to this. Industrialists may come to the river to use it. Recreationalists may come to enjoy, or to conquer the surrounding peaks and discover hidden river recesses. At times, some will be captured by an inner peace, or at least for a while until they go home, but a deeper comprehension of the river is to be found from those who have decided to live with it.

Residential
adaptation

Save for the Wanganui seaboard, farm settlement came late in the Whanganui district. Farming in the upper catchment area, under the Government's returned soldier schemes, was on the heavily bushed central area. Trees were felled and fired, but the land quickly reverted to bush and scrub. The Government's Mangapurua settlement, 31 kilometres above Pipiriki, was planned from 1917. Some 50 settlers were involved, but all had abandoned their farms by 1942. Today, a graphic reminder of the past stands above the forest on a river tributary – 'The Bridge to Nowhere' – a bridge built to take a road that was never laid for a settlement that no longer exists.

Development for
farming – the
central area

Through regeneration, the central hills have regained their wilderness character, but only after bush clearance had been followed by major floods, extensive erosion, and silting of the river, with the damage extending to the river mouth and harbour.

Still, the country was slow to deal with flooding as a land-use problem – indeed, for many years floods were seen as acts of God rather than as a consequence of farming. Engineering solutions were sought with stopbanks, river realignment, and plantations of willow. Farmers whose lands were liable to inundation were rated for flood protection works under river boards established from the 1870s, but

Erosion and
flooding

142. Document A78(a), pp 7–12. For the purposes of proceedings and public campaigning, numerous groups melded together as the Whanganui River Flows Coalition, including King Country Federated Farmers and the Wanganui Chamber of Commerce. Following a hearing before a Tribunal for the Central Districts Catchment Board, and while the matter was before the Planning Tribunal, the Royal Forest and Bird Protection Society withdrew (at least officially, as a party), and the opposition was maintained by the Department of Conservation, the coalition, and the Whanganui River Maori Trust Board. The Planning Tribunal decision, in 1990, that ECNZ (the successor to the New Zealand Electricity Department) must increase minimum flows in the upper Whanganui was subsequently upheld in the High Court.

it was not until the Soil Conservation and Rivers Control Act 1941 was passed that attention became more focused on farming practices.¹⁴³

The problem remains. Arthur Bates, the chairman of the Friends of the Whanganui River, has referred to the excessive amount of silt carried by the river:

To anyone who travels the length of the river, the major source of this river pollution is obviously from the Ohura, Tangarakau and the Whangamomona Rivers, the three large tributaries that drain the Taranaki back country. In the slightest fresh, these rivers run thick with heavy silt and logs, eroded from the Taranaki papa country, and contaminating the comparatively clean, at that stage, Whanganui River.¹⁴⁴

Bates looked to the Manawatu–Wanganui Regional Council to produce a management plan to control erosion.

Perception of rivers
as public property

Over many years, a raft of legislation enabling the Crown to control the use of rivers and water for agricultural, industrial, drainage, town, and recreational purposes has raised the public perception that rivers are ‘public property’ vested in the Crown. For the purposes of some of those Acts, the Crown has been deemed to be the owner of the water, or water streams have been deemed to be ‘public drains’ and placed under the control of local authorities.¹⁴⁵ Local authorities and private companies have been empowered to alter the course or level of natural waterways.¹⁴⁶ The use of rivers for transportation, or timber floating, has been authorised by statute, even where this has had serious consequences for Maori customary usages, especially the maintenance of eel weirs. Maori protested against the introduction of the Timber Floating Act 1873.¹⁴⁷

The bestowal of rights or the exercise of control by the Crown does not in itself impute the assertion of ownership. The Crown may control the use of private land, for example, limiting or expanding upon private use and enjoyment, but without taking away private ownership. Whether the exercise of controls or the authorisation of rights or works is tantamount to the assertion of ownership, or extinguishes Maori customary interests in the Crown’s radical title, may depend upon the particular facts of a case. By the same token, the regular exercise of such controls and powers over water regimes can create the public impression that the Crown owns them or holds them on behalf of the public, and is free of any obligation to respect Maori interests.

Farming interests

Farmers near the river may well claim a greater proprietorial interest in the river than occasional users, even though, since 1903, their presumptive ownership under the doctrine of *ad medium filum aquae* has been replaced by the Crown’s statutory ownership of the bed, on the assumption that at law the doctrine was not to be

143. National legislation was enacted with the River Boards Act 1884

144. Document D1(a), p 4

145. For example, s 3 Municipal Corporations Waterworks Act 1872, ss 165–166 Public Works Act 1876

146. For example, s 34(4) Railways and Construction and Land Act 1881

147. Hauraki Maori vigorously protested against the Timber Floating Act 1873: Robyn Anderson, *The Crown, the Treaty and the Hauraki Tribes, 1800–1885*, vol 4 of *Hauraki Treaty Claims Research*, Paeroa, Hauraki Maori Trust Board, Paeroa, 1997, pp 274–279.

rebutted on the ground that the river was navigable. It would not be surprising if those whose lands were liable to inundation and who were rated for river protection works claimed a special interest, the more so when many had a substantial say in the works. River works were controlled by river boards, which in turn were elected by ratepayers.¹⁴⁸

Many who lived by the river, however, had much larger concerns than flood protection. In answer to growing problems, not only of erosion but also of environmental damage and neglect, the Wanganui River Scenic Board was established in 1957 with Wanganui auctioneer John Coull as first chairman. Friends of the Whanganui River was formed in 1988, with Pakeha and Maori members, under the chairmanship of Arthur Bates, a well-known river identity and author. It was from the latter group's publication entitled the *Whanganui River Annual*, with its remarkable compilation of oral history, that we learnt of the spiritual dimension of Pakeha relationships to the river, and the close empathy that many have with the Maori river people. For example, Jock Erceg, an honorary ranger who farmed 'Nukunuku' in the upper reaches, wrote:

Local initiatives in environmental protection and the Pakeha spiritual dimension

I came on to the banks of the river as a young school-boy in 1932. It became clear to me very early on, after listening to the early pioneers, that the historical side of the river was a priority. The Maori warrior and his maiden, the deserted kainga and pah, the legends and myths, and the struggle of the early settlers became all important. The water of the river, the force and power of the singing rapids, and the most beautiful of all, the native forests which lined the banks. The preservation and protection of all these became my main interest. This is where I learned to swim, canoe and fish, and dream about the future and the past.¹⁴⁹

Erceg became part of a concerted local effort to restore the river and its surrounds. Though many farmers resisted any changes in their patch, meetings were held with farmers, pighunters, deerstalkers, and possum trappers. Ministers and officials were hosted on the river, and operations began to control goats, eradicate weeds, clear channels, plant native trees, put up fencing to control wandering stock, and build huts and service facilities. Some farmers gave land to secure key sites.

Erceg, like many others, came to know local Maori. He described camping out on a river trip with Titi Tihu in 1958:

Titi Tihu chose the camp site, a beautiful spot on a bend in the river [by] a swirling whirlpool . . . With the camp fire well ablaze, Titi Tihu asked our friends to carry on and prepare the evening meal, as he wanted to talk to me alone – we were not to be disturbed. He took me down to a small bed of shingle where he asked me to sit, watch and listen.

Before us was the whirlpool and as the light was fading it looked moody and mysterious, but its murmurs could be plainly heard. Titi Tihu told me that he was going to talk to the Taniwha, something that no Pakeha had witnessed and very few

148. Section 18 of the River Boards Act 1884

149. *Whanganui River Annual 1996*, Wanganui, Friends of the Whanganui River, 1996, p 35

Maori either. He picked up a few pebbles, moved to a darkening corner, and squatted down looking every inch someone completely in tune with the surroundings. He started a mysterious chant which slowly rose in volume and tempo. At this stage he threw a few pebbles in to the water and to my amazement the pool responded. The water whirled faster and faster, rising and foaming until a frenzied peak was reached by both the chanter and the pool. A brief moment, a foaming surge, and all was quiet. The Taniwha had spoken. Titi Tihu was quite exhausted and just sat quietly gazing in to the swirling depths for several moments, then without a word, stood up and came over to me and said, 'It was good. We will go and eat'. One of the very special moments in my life.¹⁵⁰

Keith Chapple came to the district in 1980, settling at Kakahi on the Whakapapa River, the home of the artist Peter McIntyre.¹⁵¹ Made the chairperson of the Royal Forest and Bird Protection Society's King Country branch in 1986, Chapple is widely known amongst environmentalists for his work and was prominent in the minimum flows litigation. Chapple observed the change in Pakeha perspectives:

When we arrived King Country people had a pioneering ethic but you couldn't blame them. Now we've become accepted for our views. Just look at the stance taken by the locals over the Wanganui – that's a real achievement.¹⁵²

River law and a New Zealand legal regime

Recognition of the importance of cultural and spiritual values in relation to the natural features of the land has increased with the urgency of modern environmental awareness, but the law has yet to catch up. Much still depends upon the somewhat vague comprehension of rivers in the English legal context, though New Zealand rivers vary greatly, and the cultural history associated with each of them is different.

Save for the submissions of Keith Chapple and the writings of David Young, one of the Friends of the Whanganui River, we found nothing in the material supplied that pointed to any attempt to grapple with a New Zealand legal framework for the ownership of rivers that might cope with our two streams of law, Maori and English.¹⁵³ At a local level, however, there have been new initiatives to provide for both Maori and public interests in natural resources: for example, the Ngai Tahu settlement deed sections on Aoraki (Mount Cook) and taonga fisheries.¹⁵⁴

Contrasting views

As described, the English common law favours private ownership based upon the ownership of the adjoining land. The New Zealand Parliament favoured Crown ownership of navigable rivers, but largely with access to minerals in mind, and the regulation of river usages. Certain environmental groups envisage the rivers as part of a public estate, while Maori see them as entities coexisting physically and spiritually with the people of the customarily associated hapu.

150. Jock Erceg, 'The Whanganui River: A Success Story', in *Whanganui River Annual 1996*, p 42

151. Peter McIntyre, *Kakahi: New Zealand*, Wellington, AH and AW Reed, 1972

152. Cited in *Forest and Bird*, November 1990, p 42 (doc D23, attachment)

153. Young and Foster, p 207. The need for a legal framework is considered in a section of the appendix 'The Right to the River' and an overview of the Maori litigation is provided in 'Who Owns a River Bed?'

154. 'Crown's Settlement Offer to Ngai Tahu', *Maori Law Review*, October 1997, pp 6-8

There has been strong opposition to the Maori claims. One concern is that Maori might enter into development modes and not respect the environmental standards now required. Their experience in modern-day environmental management has also been questioned, whereas the skills of Pakeha scientists and engineers and the work actually done by local Pakeha residents has been lauded. Hugh Barr instanced cases where, in his view, the return of land to Maori threatened public access – where recreational access was denied (Parekarengarenga Scenic Reserve, Taupo), where that access was charged for (the Kaimanawa West Highway), or where intentions to deny or control access were expressed by Maori and where, he argued, access covenants give insufficient protection (Tutae Patu or Woodend Lagoon in north Canterbury and Mount Hikurangi at East Cape).¹⁵⁵

Opposition to
Maori claims

Various articles in the popular press show that many members of the general public see the issue not as one of respecting the prior rights of the indigenous people, recognised in law for some centuries, but as one of sanctioning racial privilege. The claims of particular descent groups may also be generalised as though the claims were on behalf of everyone of Maori descent.

Other Pakeha have no difficulty with Maori ownership or control. In support of the present claim, the Tribunal received three letters from Pakeha New Zealanders from outside the district, and one from a visiting scholar from the United States.¹⁵⁶ The writers had experienced kayaking or similar trips down the river, some had been hosted by the Maori occupants at Tieke, and each supported the return of ownership, guardianship, or control to Whanganui Maori. The correspondents in one letter suggested a particular solution:

Support for Maori
claims

the vesting of the guardianship of the river in duly appointed representatives of the local iwi with appropriate powers and directions given to them to the effect that all matters pertaining to the river, including proposed commercial uses, operations and exploitations be first subject to consultation and agreement with such appointed guardians.

They added:

We write as Pakeha New Zealanders resident in Auckland and as such have no connection with the claimants or any group they represent. However, from our own study and experience we can readily recognise the sacredness of this great river to the local iwi and having visited it with pleasure on many occasions can appreciate the aura of spirituality which surrounds this historic waterway.¹⁵⁷

In reasoned and balanced submissions, Keith Chapple considered that nature conservation transcends politics and has the highest moral authority.¹⁵⁸ While not opposing the Atihaunui claim to the ownership and control of the river, he drew attention to the high conservation values of the river and the forests, the moral duty

Conservation values

155. Document D23

156. Documents B17, B19–21, B25

157. Document B25

158. Document D3, para 6.3

to protect them, the magnitude and complexity of conservation management, and the need to maintain funding levels for conservation purposes.¹⁵⁹ His review of the work of the Royal Forest and Bird Protection Society and the history of the debate and consultations over the Tongariro power scheme was evidence of the considerable effort required to maintain a proper respect for the river in today's world. It is appropriate for the Crown to exercise *kawanatanga* for the purposes of resource management and the protection of ecological and public values, he argued, and public access must be preserved and enhanced. He urged a flexible approach in meeting Maori claims, but doubted the practicability of shared management owing to structural complexities and costs.

Finally, Chapple referred to the provisions for the protection of Maori interests under existing resource management laws that would apply on the making of a water conservation order. He suggested that, while these may not reflect the full extent of the Atihaunui interests, and there were areas of ambiguity, they had the potential to ensure the centrality of Atihaunui interests.¹⁶⁰

A New Zealand legal
framework

Still lacking, however, is a New Zealand legal framework for rivers and water that is able to accommodate the distinctive sources of law for this country from both England and the Pacific or that accommodates legal presumptions from England concerning the Crown's radical title with the New Zealand reality that the 'radical title' was already spoken for.

Keith Chapple's submissions suggested that control, not ownership, is the key element in managing natural resources. Perhaps this points to a prospective merger of the two laws, for if we look to Maori history from the time of colonisation, as we do in the next chapter, it is not ownership but control that was central to their thinking, and respect for the *mana* of different peoples.

The significance of many current river rights is frequently not evident to wider society. As an example, all discharges into rivers are subject to consents. While householders are often covered by developer-obtained consents, farmers and all businesses that discharge water are subject to consent processes. The constraints can be, and often are, made more restrictive on renewal, so that the quality of river water is improved.

Maori claims for the return of ownership of a riverbed where they are no longer the adjoining landowner, or where the river is deemed to be navigable, pose challenges to the general assumptions that many people make about river rights. If all or part of a river could be privately owned, then would the owner restrict access and charge a toll for use?

The Department of Conservation's facility user charges regime was interpreted by some as a river toll. The wider issue of tolls is under public debate at the moment. The use of tolls is being seriously canvassed as a way to hasten future roading developments. A similar general river regime could have some dramatic consequences and impinge upon thousands of bridge abutments and support structures. The electricity industry would have to ponder on the security of its

159. Document D3, paras 4-4.5

160. *Ibid*, paras 12.8-12.9

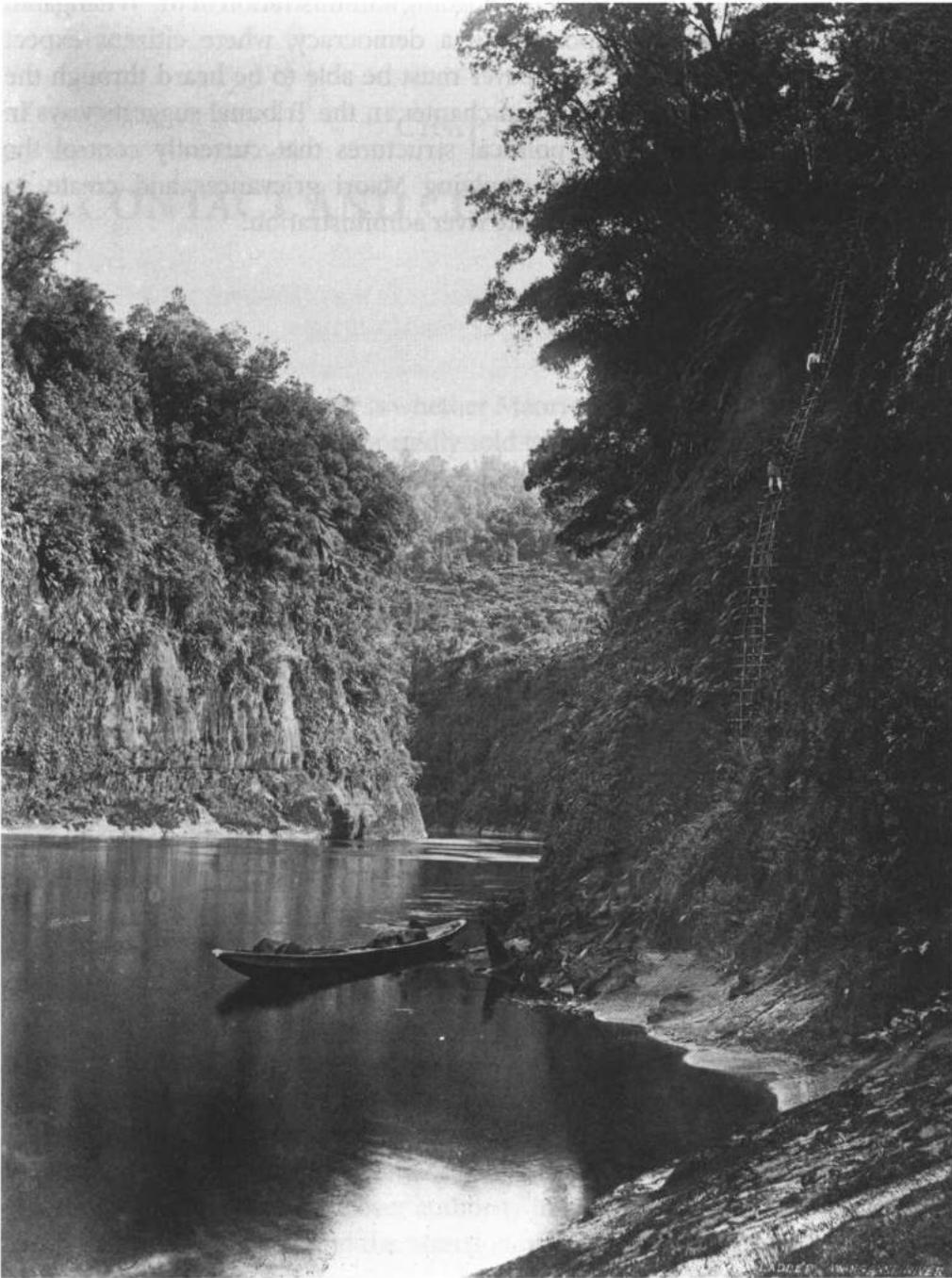


Figure 7: Arawhata on the Whanganui River, circa 1890s.

Photograph courtesy Alexander Turnbull Library (*Auckland Star* collection, G3005 $\frac{1}{4}$).

access to water for hydro generation. Tolls could also impact on water supplies and the numerous rights that individuals have gained under the current, and former, resource management laws.

People become insecure at the prospect of change, and this can lead individuals or groups into extreme reactions. It is important that any new regime is perceived

as a viable and legitimate system for the ongoing administration of the Whanganui River. This is particularly important in a democracy, where citizens expect representation with taxation. A ratepayer must be able to be heard through the ballot box. In the recommendations in chapter 11, the Tribunal suggests ways in which a re-examination of the political structures that currently control the Whanganui River could assist in resolving Maori grievances and create an enduring, legitimate structure for future river administration.

CHAPTER 4

CONTACT AND CONFLICTING VIEWS

4.1 INTRODUCTION

The main issue in this chapter is whether Maori sold the lower river reaches when the surrounding land was purportedly sold by a land deed of 1848. From a Maori perspective, this begs the question. It assumes the matter is to be addressed within the terms of English law, which does not permit of the question of whether anything was sold at all. Were the parties sufficiently of one mind for a sale to have occurred? Did Maori sell knowing of all that a sale entailed in English law? Did they see it as an extinguishment of their ancestral interests? Did they knowingly relinquish their traditional authority over the area or merely give possession? Did they know that settlers coming on to the land would not envisage continuing obligations to the Maori alienators? Or were Maori still affected by their old customs, and if the customs of Maori and Pakeha were known to be different, were they agreed on whose applied?

Was the lower river sold?

No final opinion can be given now on the validity of the deed, for claims about the early land sales have been deferred for later hearings. None the less, because the Crown has contended that 'the tidal reaches were sold along with other water bodies as part of the 1848 deed of purchase', and claimant counsel has responded 'that the text of the Deed clearly does not import any intention to sell the River', we are obliged to decide the issue by looking at the deed.¹

For context, this chapter also traces relevant parts of the history of the early years of contact in and around the tidal reaches of the river. The focus is on the foundation of the township of Wanganui in 1841 on land that Te Atihaunui still regarded as theirs but that the New Zealand Company claimed to have purchased, and on the conflict that arose over authority in 1847. Here, we are conscious that a focus on land acquisition and the assertion of British control may not give vent to contemporary Maori concerns.

Historical review and cultural perspectives

Just as Maori and Pakeha had different views on rivers, they had distinctive laws on land transactions and on the obligations between the parties concerned. The mental gap was not bridged by contact, change, and adjustment but resolved through the assertion of power.² For the meantime, the early governors were

Distinctive social orders and questions of control

1. Document C21, p 7; doc D18, p 22

2. Historians have made this point before, but for a recent essay on the theme: see James Belich, *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Allen Lane and Penguin, 1996, especially ch 8.

instructed to protect Maori customs not inconsistent with the principles of humanity from the operation of English law. However, the ultimate objective of British policy was to assimilate Maori into English law and political institutions.³

Maori had other expectations. Early European visitors and settlers would conform to their law and recognise their mana and rangatiratanga as guaranteed in article 2 of the Treaty of Waitangi.⁴ Whose law would apply would eventually depend on might.

When Europeans sought to buy land, their system of private land ownership was unknown to Maori. What mattered for Maori, in terms of their traditions, was not land ownership but hapu authority over individual land users and relationships with other hapu. They were concerned with the balancing of power rather than its aggregation, and the maintenance of personal obligations, which were prerequisites for stability in their social order. Looking back to the early years of settlement, the issue was how Maori and Pakeha would relate, and that was not adequately addressed. Following their own traditions, both sides simply assumed positions of their own.

The historical record suggests that Maori saw the issue as one of authority. This required not a control over Pakeha but a relationship with them on Maori terms. To understand Maori conduct towards the settlers and their governors, we need to review how customary relationships formed.

We begin this chapter, then, by considering Maori relationships and obligations.

4.2 CUSTOMARY TRANSACTIONS

Maori trade Maori customary arrangements stressed the importance of ongoing relationships, relationships that were founded on trust and respect.⁵ Thus, in 'gift exchange', a significant form of Maori trade, there was no thought for an immediate rejoinder when goods were deposited with another group, but mana compelled the receiver to respond with an equal or larger return in time. The cycle of giving and later receiving something back, if repeated again and again, gave rise to a mutually dependent relationship. In a significant number of cases, it was not the prospect of an immediate exchange but the expectation of a continuing trading partnership that motivated the initial proffering of goods.

Notions of honour and prestige, or mana, dictated that giving should be free and generous, whether of goods or access to resources of the land. Receivers were obliged to respond in like manner. If crops failed or the season were bad, survival might depend on the credit that one held through the obligations owed by others.

Ancestral 'titles' and incorporation Again, land was not a tradable or disposable item. Having passed down through forebears from Papatuanuku, it was entailed to the tribe's future generations –

3. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847*, Auckland, Auckland University Press and Oxford University Press, 1977, p 230

4. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, sec 4.2

5. *Ibid*, especially secs 2.1–2.3, chs 1, 3, 6

unless they were removed through war. Obligations were owed to the relevant hapu on any use of land. Outsiders could use tribal land by becoming part of the tribe. The incorporation of outsiders was a known Polynesian trait. Alternatively, a group might exist as a separate unit in a client relationship. Either way, the underlying 'title' did not depart from the ancestral line, save for violence, and the right of personal use and occupation was conditional upon continued contribution to the tribal weal.

So land could also be given, but the underlying interest remained with the ancestral hapu, to whom the donees continued to be obliged.

Land gifts

Consequentially, Maori, as users of the land, thought in terms of relationships and control, not in terms of ownership. Indeed, some interests in land were not even dependent on possession. The hapu had interests in land even when they permitted occupation by others, as with donees or hapu in a subservient or client position.

Associational interests

A unique feature of ancestral tenure was the value placed on associational interests. Persons not in occupation claimed interests in land so long as an ancestral association remained alive in their minds. It could be, for example, that their ancestors had been on the land previously, lived and died there, named places there, or spilt their blood there in battle. In submissions on water issues to the Tribunal in the Te Whanganui-a-Orotu claim, Professor James Ritchie put it this way:

Defeat in battle might injure the exercise of rangatiratanga but the mana remained. The ancestors remain. The mana whenua remains even after conquest, and can be restored at any future time. The mana associated with tapu is never destroyed but goes on forever, whoever owns the land . . .⁶

Maori thus referred to European townships on 'their' land long after the land was sold. The survival of this practice testifies to the extent to which it was ingrained. As late as 1977, for the purposes of land-use planning, the New Zealand Maori Council sought and obtained a change to the Town and Country Planning Act to recognise the relationship of Maori to their ancestral land, whether or not the land had long been sold.⁷

There were also land interests through blood connections. Maori with such links to other hapu might choose to join them. Members from distant tribes, like those of Taupo, Taranaki, or what is now the King Country, might claim an interest, albeit latent, in Whanganui lands. While such interests were seen as remote by Europeans, they were real to Maori, being founded on their predominating concepts of ancestry. In all, a variety of interests were respected. What might be considered emotive or remote interests were as real to Maori as interests in possession.

6. Submission of James Ritchie, Wai 55 ROD, doc C2, p 5

7. Section 3(1)(g) of the Town and Country Planning Act 1977. Some years elapsed before the courts appreciated the import of the provision: see E T Durie, 'Will the Settlers Settle?: Cultural Conciliation and Law', *Otago Law Review*, vol 8, no 4, 1996, p 452.

4.3 MAORI AND PAKEHA TRANSACTIONS

4.3.1 The incorporation of Europeans

Customary notions on land devolution and occupiers' responsibilities to tribal 'title-holders' appear to have influenced Maori in seeking out Europeans. For example, with reference to the few and dispersed Europeans who settled in the Far North before the Treaty of Waitangi, land allocations to the Europeans of that time were probably not sales of land but acquisitions of people.⁸ The newcomers were spoken of as 'my Pakeha'. They were expected to contribute to the hapu and the hapu owed them protection.

Trade with
Europeans

Similarly, customary relationships built on generosity, trust, and respect to promote trade and peace appear to have influenced Maori relationships with early European traders, whalers, missionaries, and settlers. By bringing much sought-after trade goods to the hapu, they gave mana to that hapu. Early land buyers were probably perceived as traders and early land transactions as trading transactions.

If the Europeans did not respond as Maori custom required, relationships rapidly soured. Repudiation of agreements or physical action could follow a failure to maintain trade exchanges or an omission to acknowledge the mana of the Maori partner. Maori protocols are punctiliously honed to building relationships through the careful acknowledgement of the status of others, but conversely, a failure to acknowledge the status or the mana of others was a ground for utu (revenge), muru (compensation), or war.

Relationships with
European 'tribes'

Customary considerations did not cease to apply when planned settlement by the New Zealand Company brought Europeans in greater numbers and when land transactions on a much larger scale were made. By Maori custom, the newcomers were obliged to acknowledge who had placed them on the land, preferring them in trade or supporting them against their former enemies. In Maori thinking, the land was still Maori land, and the hapu might even presume to say where the newcomers could site their townships and build their homes.

A question of mana
rather than land

Accordingly, large numbers of European arrivals, as at Port Nicholson (Wellington) in 1840, were not always seen as a threat. Rather, the hapu – or at least their rangatira, with whom the company's land purchase agents had dealt – initially expected that they would be respected and would benefit. Indeed, these land transactions may have been entered into not to terminate their mana but to enhance it. As historian Ann Parsonson has recognised, many Maori and Pakeha transactions are referable to the Maori pursuit of mana.⁹ James Belich has described mana, for ease of Pakeha comprehension, as 'spiritual capital'. 'If capitalism, the Pakeha system, is used as an analogy for the Maori system,' he

8. *Muriwhenua Land Report*, secs 2.3.1, 3.7

9. Ann Parsonson, 'The Pursuit of Mana' in *The Oxford History of New Zealand*, W H Oliver and B R Williams (eds), Oxford and Wellington, Clarendon Press and Oxford University Press, 1981, pp 140–167; compare Angela Ballara 'The Pursuit of Mana? A Re-evaluation of the Process of Land Alienation by Maori, 1840–1890', *Journal of the Polynesian Society*, vol 91, no 4, 1982, pp 519–541

wrote, 'then mana was its capital, the accumulation and use of which was in itself desirable.'¹⁰

Status or mana accrued to Maori through providing for and being acknowledged by others, and land transactions were a way of establishing mana with Pakeha. Again, it was not the land but the relationship that was important, and the transaction was the beginning not the end of an association akin to a partnership. The relationship required that each party should respect the mana of the other and act in good faith, while acknowledging each other's autonomy.¹¹

Imperatives of mana

If the relationships were not maintained as custom dictated, matters could rapidly sour. When settlers acted independently, as though they alone had the say, then previous transactions might be repudiated, and attempts might be made to reinstate the mana that, in Maori eyes, had been taken away. Accordingly, in early land transactions, Maori were concerned not only about the payment that they would receive but about the value of that which might come; for example, from the expansion of trade or public works. It was not the admission of Europeans that was the issue, at least initially; it was the maintenance of a customary relationship with them. Thus, there was ideological conflict from the start.

Authority for the British was based not on relationships between Maori and Pakeha as equals but on the principle of political amalgamation. Peace and good order, in the contemporary British view, would come from the supremacy of the Crown in Parliament, with all people, Maori or Pakeha, as equal citizens. In colonial circumstances, the Crown would be obliged to regulate all relationships between its subjects, especially those between Maori and Pakeha.

Authority for the British

As Maori were unacquainted with European ways and were seen to be untutored in matters of religion, agriculture, industry, and law, and susceptible to European disease and unscrupulous European land purchasers and settlers, the Crown assumed the obligation to provide special protection and assistance. This accorded with the evangelical and humanitarian doctrine that they should be protected until such time as they were sufficiently assimilated for the colony to be granted self-government.

Protection of Maori 'wards'

Under the amalgamation policies of Governor Grey, Maori law and authority were acknowledged only in districts where the Queen's writ could not be enforced. As Belich has pointed out: 'Between 1840 and 1872, and a number of years thereafter, the history of Maori-Pakeha relations is the history of the two independent zones or spheres', neither being politically unified.¹²

Substitution of Maori law

As to land, the presumption was that all land was Crown land but subject to Maori customary usage, where established, until the customary interest was

Settler views on land rights

10. James Belich, 'The Governors and the Maori (1840-1872)', in *The Oxford Illustrated History of New Zealand*, Keith Sinclair (ed), Oxford and Auckland, Oxford University Press, 1990, p 81

11. Maori concepts of partnership and autonomy are considered by the Waitangi Tribunal in the *Taranaki Report*, sec 2.1.

12. Belich, 'The Governors and the Maori', p 75. The Maori zones consisted of numerous tribes and hapu - see the Pakeha zones of 'six colonies' that later became nine provinces: Belich, *Making Peoples*, pp 188, 191.

extinguished by purchase or expropriation (see sec 2.2). This position, however, was reached only after a very considerable debate in official circles in the 1840s.

Wastelands

Influential colonisers, including representatives of the New Zealand Company, which effected the first European settlement in Wanganui, believed that Maori interests should be recognised only in respect of those lands where they had their homes, cultivations, and burial places. The rest was wasteland available for colonisation. Underlying this view was the well-known theory of Emmerich de Vattel, an eighteenth-century international lawyer, that Europeans had the right to plant colonies in the New World and appropriate lands unsettled and uncultivated by the indigenous inhabitants.¹³ On this view, land had value only through the addition of labour and capital and was valueless to Maori unless utilised in some commercial way.

Influence on Maori rights

Notwithstanding official acceptance that all land in New Zealand belonged to Maori until they sold it, the view of some colonists on wastelands was not entirely set aside. It appears to have been assumed, for example, that Maori could not own rivers, lakes, or foreshores, or possibly even swamps; indeed, sometimes such assumptions still persist today. Furthermore, no wrong was seen in acquiring Maori land as cheaply as possible and disposing of it to others at a much higher price, as did both the Crown and the New Zealand Company. The thought was that Maori would benefit from the development of the land about them and that the land they retained would grow in value from the settlers' enterprise.

Minimal Maori reserves

The same thought, reinforced by evidence that Maori were increasingly participating in the European economy and declining in numbers, partly accounted for the general reluctance of the Crown and the company to reserve sufficient land for Maori to provide for their existing and future needs. In fact, the company's policy of reserving for Maori 'tenths' of the land surveyed in town and country allotments, after selection by land purchasers, was deliberately intended to promote peaceful amalgamation. Company reserves were scattered through European settlement regardless of pa sites, cultivations, and burial grounds, though many Crown reserves did include such lands.

Maori and Pakeha views of land transactions

Stemming from the theory of wastelands were fundamental differences in Maori and Pakeha views of land transactions, and, in terms of contracts, on the goal to be achieved. Maori were primarily concerned with relationships to land, land users, and other hapu. These relationships were founded on ancestors and on arrangements with the living. There was no equivalent to English law, where individuals held defined parcels of land without concomitant duties to an associated community, and where land might be given over to strangers without the community's permission. There was no concept that a land transaction put an end to any relationship between the parties. The thought that the parties might not

13. In *The Law of Nations: Or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, London, Joseph Chitty, 1834, p 35, de Vattel wrote of hunter-gatherer societies: "Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands."

have continuing obligations to each other was not only foreign but antithetical to Maori customs.

Accordingly, early documents assuming that Maori entered into transactions on English legal terms must be treated with circumspection. The Maori use of the word 'sale', for example, is not evidence that they understood its meaning. It was simply the Pakeha term for whatever they were doing. Translations putting 'sale' in the mouths of Maori cannot be relied on either, when Maori had no word for it. Then, in the context of making contracts with those of an oral culture, the written contract may not represent the intentions of both parties.

Application of
indicative evidence

Even a shift in the real politic of power does not in itself establish that Maori would have capitulated to the English legal regime. Any substitution of an alternative philosophy on land would happen only over time, with old beliefs and habits continuing to influence what people thought and did. Were it accepted, after time, that 'sale' was an extinguishment of Maori interests in the land, though that was impossible in traditional thinking, the settlers may still have been expected to honour those with whom they had dealt. Ingrained notions of mana could have conceived of nothing else.

Maori, nevertheless, keenly appreciated that the question of whose law prevailed depended on the balance of power. Generally, they were receptive to settlers but wary of the Governor's military might. So long as they were a force to be reckoned with, their view of the relationships between people, arising from contractual obligations, could not be ignored. When the settlers presumed to act contrary to the interests of their Maori 'benefactors', it was necessary to shift the focus from contractual obligations to the changing balance of power.

A question of power
and control

4.4 TRIBAL WARFARE AND UNITY

4.4.1 Guns and warfare

The advantages of European trade first became apparent to Atihaunui during the musket wars of the 1820s and 1830s. Hapu possessing muskets extended their power, while those without them were taxed to maintain their defences. Northern tribes that acquired muskets first conducted raids well down the island, and local infighting followed the weakening of former tribal powers.¹⁴

Atihaunui reacted like many others by uniting for defence; those residing at the fringes withdrew to the central recesses for security. In the European record of interaction with Maori, three Atihaunui rangatira are most mentioned: Topine Te Mamaku of Ngati Haua-te-rangi and Ngati Rangatahi, who lived at Tuhua on the Ohura River north of Taumarunui and at Maraekowhai and Whakahoro on the upper reaches of the Whanganui; Te Peehi Turoa of Ngati Patutokotoko, who lived at Utapu in the centre (and later his son, Te Peehi Pakaro); and Te Anaua of Ngati

Unity and mobility

14. Malcolm McKinnon (ed), *New Zealand Historical Atlas*, Auckland, David Bateman Ltd, 1997, pl 29

Ruaka, who occupied Putiki-wharanui.¹⁵ All three were fighting chiefs who engaged in the musket warfare, and, as a result of outside threats, more regularly acted in concert. All three lived in a number of localities and had interests throughout large areas of the river. They were not confined to the upper, middle, and lower spheres of interest. Te Mamaku figures most in this chapter through his interaction with Europeans.

Initially, Te Mamaku had the larger task of defending the access route down the river. He shifted from the upper reaches to join others in a defensive position further to the south.¹⁶ In the early 1840s, he was in Wellington, 'and by 1846 he had brought his Ngati Haua-te-rangi warriors down to join Te Rangihaeata in support of Ngati Rangatahi in their dispute with the European settlers in the Hutt Valley'.¹⁷ In September 1846, Te Mamaku returned to Whanganui.

The aggregation of Atihaunui along the banks of the middle reaches of the river, such as the concentration in and around Pukehika, for example, commanded the approaches to the ancient network of tracks and waterways linking them with the hapu of the neighbouring descent groups.¹⁸ The rugged terrain and sheer river cliffs, sometimes 80 metres high, provided strong natural defences. 'On parts of the river, notably above Pipiriki,' David Young wrote, 'the local villagers could withdraw their vine ladders, securing themselves from attack and exposing their enemies to the terror of tumbling boulders.'¹⁹

It was nothing new that, while the fringes were at risk, the centre was protected. A poetic name for the river was 'te koura puta roa', an abbreviation of a saying that the people were like the crayfish for which they were renowned, for though the legs are pulled off, they still escape amongst the stones.²⁰

In 1819 or 1820, a musket-armed northern taua (war party) joined by Te Rauparaha and moving south attacked and defeated an Atihaunui pa at Purua near the exposed river mouth. A combined force of Atihaunui, with some help from Tuwharetoa, confronted them on their return journey and eventually defeated

Attacks from Te
Rauparaha and
others

15. For Topine Te Mamaku, see David Young, 'Te Mamaku', DNZB, T49, p 469; I M Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832-1852*, Wellington, Department of Internal Affairs, 1968, p 302.

For Te Peehi Turoa, see Steven Oliver, 'Te Peehi Turoa', DNZB, T115, p 559; doc D25. The chief undoubtedly had other residences as well. His main stronghold was the Manganui-a-te-Ao River, but he extended his influence right down to the lower reaches: see David Young, *Woven by Water: Histories from the Whanganui River*, Wellington, Huia Publishers, 1998, p 31.

For Te Anaua, see Steven Oliver 'Te Anaua', in *The People of Many Peaks: Maori Biographies from the Dictionary of New Zealand Biography, 1769-1869*, Claudia Orange (ed), 2 vols, Wellington, Bridget Williams Books and Department of Internal Affairs, 1991, vol 1, p 152.

16. This, too, is a reminder of Maori mobility. We noted several other examples of how blood connections allowed people to move about.

17. Young, 'Te Mamaku', p 470

18. Document A47, p 9

19. David Young, 'River of Great Waiting', *New Zealand Geographic*, July-September 1989, p 110. He added: 'At least one such ladder, at Arawhata, survived in the 1890s to be photographed.'

20. Richard Taylor, *Te Ika a Maui: New Zealand and its Inhabitants*, London, Wertheim and McIntosh, 1855 (reprinted Wellington, 1974), p 146

them well upriver at Kaiwhakauka.²¹ A further assault came from the Amiowhenua war expedition of 1821 and 1822, which came from the north and part of which Te Anaua managed to defeat at Mangatoa near Koroniti.²² Soon enough, Atihaunui were fighting an intrusion from the interior by Ngati Raukawa under Te Ruamaioro. Atihaunui were besieged at Makakote above Kaiwhakauka, but were spared death by starvation by Te Peehi Turoa.²³

After his eviction from Kawhia by Waikato and Ngati Maniapoto, Te Rauparaha came south once more in 1821 and 1822, with Ngati Toa and Ngati Raukawa on a tribal migration known as Te Heke Tataramoa, forcing Atihaunui to withdraw upriver as he passed.²⁴ Some heavy fighting with tribes in the Horowhenua area followed, in which Atihaunui were also involved. Te Rauparaha attacked Whanganui for the last time in 1829, in part seeking retribution for the death of his Ngati Raukawa relation Te Ruamaioro at Makakote. He laid siege to Putikiwharanui Pa for some two months, eventually gaining victory, but Te Anaua, Te Mamaku, and Te Peehi Turoa were able to escape upriver to the tribe's fastness.²⁵

Some more fighting at the river mouth followed in 1832, as a Te Atiawa heke passed through on its journey south. By this time, and until the signing of the Treaty of Waitangi, most of the Atihaunui were living at upriver pa and cultivations for reasons of security, visiting the coast only seasonally.²⁶ Others, including Ngati Rangatahi from the upper reaches, themselves went south to make contact with the Europeans in Wellington. Some remained on the upper Whanganui, and their descendants are there to this day; others of Rangatahi found an alternative home on the banks of the Rangitikei River.²⁷

The musket war period sheds light on matters relevant to the present claim. It tells us that the people were highly mobile and not constrained by boundaries. It indicates that, though divided into hapu, they still acted as one if required. It shows, too, how Atihaunui were vulnerable to the predatory raids of musket-bearing tribes, since their relative isolation from trading and whaling stations had afforded them few opportunities to obtain firearms themselves. Moreover, after Te Rauparaha settled at Kapiti, he largely monopolised the European trade from the Horowhenua to the Whanganui districts. The vulnerability of Atihaunui disposed them to seek alliances with Europeans through trade and the Treaty of Waitangi.

Significance for this claim

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21. T W Downes, *Old Whanganui*, Hawera, WA Parkinson, 1915 (doc A40), pp 119–124
 22. *Ibid*, pp 127–128; Oliver, 'Te Anaua', p 152
 23. Document A40, pp 130–132; Oliver, 'Te Peehi Turoa', p 559; Oliver, 'Te Anaua', p 152
 24. Steven Oliver, 'Te Rauparaha', *The People of Many Peaks*, pp 272–273
 25. Document A40, pp 146–147; Young, 'Te Mamaku', p 470; Oliver, 'Te Peehi Turoa', p 559
 26. Suzanne Cross and Brian Bargh, *Whanganui District*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), April 1996 (doc E2), p 7
 27. Joy Hippolite, 'Ngati Rangatahi', report commissioned by the Waitangi Tribunal (Wai 145 ROD, doc H4), p 48. Ngati Rangatahi are usually associated with Ngati Maniapoto, but they also have strong Atihaunui connections.

4.5 EUROPEAN CONTACT AND EARLY LAND TRANSACTIONS

Itinerant traders

The earliest recorded visits of European traders to Whanganui were in 1831 – the first trader, Joe Rowe, came to seek dried heads; the second, a Mr Scott, to trade in flax. Rowe died violently, and his own head was taken and preserved. A missionary later suggested that certain Taupo Maori were responsible, since the trader would not give up the heads of two of their leaders while at Kapiti, so they had waited for him at the river mouth, his next known place of call.²⁸ In 1834, John Nicol, whose wife was born near Pipiriki, arrived and traded on the river for some 12 months. He was offered land to establish a store but declined.²⁹

Spread of Christianity

Just as guns were introduced through Maori agents, so also was Christianity. After two attempts by Maori teachers of Ngati Ruanui to spread the gospel ended in their being killed and eaten, Wiremu Tauri, from Taupo, preached the Christian faith at Putiki and gained converts.³⁰ Later, when the first European missionary, Henry Williams, visited the district in 1839, he found Maori throughout the Whanganui River involved in Christian practices.³¹

The first resident missionary was the Reverend John Mason, who established a mission station at Putiki in June 1840 and was expected to cover Whanganui, Rangitikei, and Manawatu. He found the people ‘generally willing to receive Christian instruction’ but very widely dispersed – ‘five thousand people scattered 200 miles on the banks of the River Wanganui, and 130 miles along the sea coast . . . dependent on the feeble exertions of one individual’. When Mason was drowned in January 1843 crossing the Turakina River, and the Reverend Richard Taylor replaced him in May of that year, the majority in most villages were still not baptised.³²

Missionaries and the first land transaction

During his 1839 visit, Williams was concerned to protect Maori from Sydney and New Zealand Company land buyers and arranged a land transaction for that purpose. His son-in-law and biographer, Hugh Carleton, recorded that at the now reoccupied Putiki-wharanui Pa, in December 1839: ‘A council of chiefs . . . approved of their land being purchased, *and held in trust for their benefit alone*’ (emphasis in original).³³

After completing the transaction, Williams left notice of it with Te Anaua, to pass on to the New Zealand Company representative should he arrive, and this Te Anaua was to do.³⁴

28. Document A40, pp 167–170; Young, *Woven By Water*, p 15

29. M J G Smart and A P Bates, *The Wanganui Story*, Wanganui, Wanganui Newspapers, 1972, p 46; R D Campbell, *Rapids and Riverboats on the Wanganui River*, Wanganui, Wanganui Newspapers, 1990, p 11; Young, *Woven by Water*, pp 17–18. Young spells the trader’s name ‘Nicol’.

30. Document A40, pp 170–171

31. Lawrence M Rogers, *Te Wiremu: A Biography of Henry Williams*, Christchurch, Pegasus, 1973, p 149

32. Janet Murray, ‘A Missionary in Action: The Rev Richard Taylor and Christianity among the Wanganui Maoris in the 1840s and Early 1850s’, in *The Feel of Truth: Essays in New Zealand and Pacific History*, Peter Munz (ed), Wellington, AH and AW Reed, 1969, pp 198–199

33. Hugh Carleton, *The Life of Henry Williams: Archdeacon of Waimate*, revised ed, Wellington, AH and AW Reed, 1948, p 274

34. E J Wakefield, *Adventure in New Zealand, from 1839 to 1844, with Some Account of the Beginning of the British Colonization of the Islands*, Christchurch, Whitcombe and Tombs, 1908, p 176

Such transactions were not approved of by the committee of the Church Missionary Society or by the British Government. Later, when the Land Claims Ordinance 1841 provided for the validation of pre-1840 land transactions, no provision was made to validate land deeds creating such trusts, though the Government had been made aware of them, and Williams' trust, like others, fell into obscurity.³⁵

On the secular side, the European settlement of Wanganui was, in the words of Ian Wards, 'an overflow for Wellington', the first and principal New Zealand Company settlement.³⁶ The decision of its agent to open Wanganui land for selection by Wellington settlers may be traced back to a deed executed by Colonel Wakefield for the company and two Maori, aboard the *Tory*, lying off Kapiti, in November 1839. According to evidence later given to Commissioner William Spain, it followed a 'partial sale' on the boat by Ngati Toa, whereafter two Whanganui 'chiefs' offered land, and, after signing a deed, were also presented with merchandise.³⁷

At best, it was an embryonic proposal, if not a 'farce'. Indeed, it purported to convey the whole or parts of Whanganui, Taranaki, Taupo, Rangitikei, and Manawatu. Though it was probably seen by Maori as trade exchange, it was to lead eventually to the Crown's acquisition of the greater part of the Whanganui coastal territory. The land boundaries were most uncertain and the area must have encompassed well over a million acres, extending from the mouths of the Patea and Manawatu Rivers and inland along their courses to Mount Tongariro.³⁸ This was far beyond what all the Whanganui 'chiefs' could convey, let alone two of them.

Colonel Wakefield promised to visit Whanganui with a cargo of trade goods to 'complete' the purchase but was unable to do so because of bad weather. In the event, his 19-year-old 'lively and irresponsible' nephew, Edward Jerningham Wakefield, went there in March 1840 to meet the people and inspect the country, but at that time the completion of the payment was taken no further.³⁹

On that occasion, Te Anaua presented the notice of Williams' transaction, which Wakefield dismissed as an 'arrant falsehood'.⁴⁰ The New Zealand Company should have been aware that, if Williams' transaction were an 'arrant falsehood', its own proposed purchase could be no better, for in January 1840, the Governor had

Colonel Wakefield
and the New
Zealand Company
transaction

E J Wakefield

Transactions by this
time null and void

35. Other missionaries, including the Reverend Richard Taylor, while in north Auckland and before he went to Whanganui, had endeavoured to devise some means to preserve lands to Maori or to make sales more difficult or less general. To that end, many land trusts were formed or implied in missionary land deeds. In November 1840, George Clarke presented Hobson with particulars of 17 such trusts, though many more are known of in North Auckland: see *Muriwhenua Land Report*, sec 3.3.4. With reference to two large tracts held in trust for some hapu in the Bay of Islands, this means of preserving the land had been disapproved of by the committee of the Church Missionary Society: Carleton, p 287.

36. Wards, p 305

37. Report of Commissioner Spain and attachments, 31 March 1845, BPP, vol 5, pp 80-81

38. H H Turton, *Maori Deeds of Old Private Land Purchases in New Zealand, from the Year 1815 to 1840*, Wellington, Government Printer, 1882, deed 421, pp 394-395, 'Whanganui block'

39. John Miller, *Early Victorian New Zealand*, Wellington, Oxford University Press, 1974, p 55; Wakefield, p 177

40. Wakefield, p 177

intervened to stop private purchases, which after that date were ‘absolutely null and void’.⁴¹

Putiki not involved

Despite the law, a transaction was purportedly completed, shortly up the river, on E J Wakefield’s second visit in May. At that time, Putiki, on the left bank, was the main village of the area, though most of its ‘principal people’ were away.⁴² Upriver Maori, however, had gathered where they usually camped for fishing or other purposes on the bank opposite. In the opinion of the local historian T W Downes, this was the site of the present-day Moutoa Gardens in Wanganui City.⁴³

The transaction was executed there without the participation of significant Putiki leaders. Because they were local residents, their interests could not be denied, not that they were the only ones absent. The deed covered several descent groups far afield, in Manawatu, Rangitikei, Taranaki, and the volcanic plateau.

Procedure

There are significant differences between European and Maori evidence of the events, as later given to Commissioner Spain, the former describing total acquiescence, the latter saying that only a few had agreed but that many more were keen to uplift the proffered trade goods. Estimates of those present varied from 400 to 800. Wakefield related that 27 ‘chiefs’ then boarded the schooner, moored in the river, and their marks were secured to the 1839 deed.⁴⁴ Later that day, Wakefield arranged for £700 in trade goods, including a quantity of firearms, to be deposited on the shore, but, in a departure from Maori custom, he did not accompany the goods for their distribution.

The goods were taken from Wakefield’s ship and placed on the shore under the supervision of Kuru, one of the Whanganui Maori who had been aboard the *Tory* at Kapiti. Kuru is not known to have been a leading rangatira, but he acted as Wakefield’s agent, assembling the hapu and advocating in favour of the arrangement. By the time Wakefield arrived on shore, the distribution was already under way. Wakefield observed the proceedings from the roof of a hut. When, in his words, the assembled groups of Maori began to encroach on the space, ‘creeping, without rising, nearer to some tempting heap’, on Kuru’s advice, Wakefield retired to his ship to avoid being embroiled in what seemed likely to be a fight. From there, he observed events through a telescope. In competition for the goods, there was an unruly scramble amongst ‘Seven hundred naked savages’, to the extent that he ‘feared that some loss of life would ensue’.⁴⁵

Cultural misunderstanding

Wakefield’s graphic but exaggerated account contains no awareness that, if the Maori party were as savage as he described them, the reality of his own transaction might be in question. Here, we reflect on the cultural gap between the parties. Maori gift presentation was accompanied by ceremony, as in the pan-tribal hakari,

41. ‘Proclamation by His Excellency William Hobson, Esq, Lieutenant-Governor of the British Settlements in Progress in New Zealand’, 30 January 1840, BPP, vol 3, pp 129–30

42. Spain’s report, 31 March 1845, BPP, vol 5, p 87

43. Document A40, p 188

44. Wakefield, p 208; note that the deed itself has 34 signatories: H H Turton, *Provinces of Taranaki, Wellington, and Hawke’s Bay*, vol 2 of *Maori Deeds of Land Purchases in the North Island of New Zealand*, Wellington, Government Printer, 1878, p 395.

45. Wakefield, pp 208–210

where the host leader, calling the name of each group, pointed to the goods intended for them, carefully acknowledging each party and mindful of their mana, rank, and roles on the occasion. Were etiquette breached, a graphic response would be sure to follow, debasing the host and memorialising the event as a reminder of why rules are needed. As necessary for their mana, the leading rangatira held back from the *mêlée*, but others like Kuru were quickly involved.⁴⁶

The Reverend Richard Taylor doubted that this could have constituted a proper hargain. Kuru, as Wakefield's agent, secured 'much the largest portion of the booty', and Wakefield 'had received individually their signatures, and he did not in like manner deliver the goods, but abandoned them before delivery'.⁴⁷

Taylor's view

Taylor considered that the transaction would have been seen by Maori as no more than a trade in goods, for on the following day, 10 tonnes of potatoes and 30 pigs were arranged where Wakefield's trade goods had been, and Wakefield was invited on shore to receive them. Wakefield called it a 'homai no homai, literally "a gift for a gift"'.⁴⁸ In response, he left a blanket for every pig and tobacco for the potatoes. He then departed and did not return to maintain a reciprocal trading relationship.

A gift exchange?

Though Wakefield saw the deposit of his goods as payment for the land, official investigations subsequently exposed grave irregularities in the whole transaction: the huge area involved; the lack of Manawatu, Taranaki, Rangitikei, and Taupo representatives; the absence of Putiki leaders, especially if it was to relate primarily to the coastal area; the lack of protocol; the appearance of gift exchange; and formal evidence from Maori before Commissioner Spain that there was no general agreement to sell. Furthermore, Colonel Wakefield later acknowledged that the Kapiti encounter did not complete the contract. Yet, by May 1840, further contracting was illegal.

Status of the Wakefield transaction

Only a few days earlier, on 23 May 1840, the Treaty of Waitangi had been presented at Putiki, with its Crown right of pre-emption clause a reminder that only the Crown could acquire land from Maori. It was presented by Henry Williams and the Otaki missionary Octavius Hadfield. In essence, it sought to establish a working relationship between two peoples based on promises that each would respect the other's authority, and on 'Peace and Good Order', not only between Maori and Pakeha but amongst Maori themselves. As an agreement for ongoing relationships between Maori and Pakeha, it was something to which Maori could subscribe.

Treaty of Waitangi

Representatives from various parts of the river were present, and 14 Whanganui rangatira signed the Maori text.⁴⁹ Amongst them were Te Peehi Turoa and his son Pakoro; Te Anaua; and Rere o Maki, the mother of Keepa Te Rangihwinui, who

46. The same breach of etiquette marred the first land transaction in Muriwhenua and produced the same result: see *Muriwhenua Land Report*, sec 3.3.1

47. Cited in document A40, p 191

48. Wakefield, p 211

49. Document A40, pp 182–183. In fact, it seems that 10 signatures were collected on 23 May and another four were collected eight days later on 31 May: see Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin and Port Nicholson Press, 1987, pp 62–63.

was soon to become famous as Major Kemp. Te Mamaku – who was probably in Wellington at the time – did not sign, an omission that David Young believes was ‘almost certainly of his own choosing’.⁵⁰

We found no report of proceedings specific to Whanganui, but on 11 June 1840, Henry Williams wrote to Governor Hobson stating that chiefs on both sides of Cook Strait:

as far as Wanganui, signed the treaty with much satisfaction and appeared much gratified that a check was put to the importunities of the Europeans to the purchase of their lands, and that protection was now afforded to them in common with Her Majesty’s subjects.⁵¹

In fact, the envisaged protection was undone by the New Zealand Company within a week.

Focus of early transactions

Looking back on the transactions of 1839, first, with the missionary Henry Williams and, secondly, with the New Zealand Company, the focus for Pakeha was on the land but for Maori was on the relationships that might follow.

4.6 THE COLONISATION OF THE COASTAL RIVER FLATS

Stages of European settlement

Initial European settlement may be seen in four stages. The first concerns the arrival of settlers and surveyors, who were permitted to remain on the site where they were establishing a town, even though the Government still had to recognise that there had been a valid sale of that land. In the second stage, Commissioner of Land Claims William Spain determined that a sale had been entered into, but that those who had not shared in the original payment should receive £1000 compensation and the company in return would be entitled to a Crown grant of 40,000 acres, less reserves. The third stage was marked by military intervention and inconclusive fighting, reflecting Maori determination to maintain their authority over the land and river, and the Governor’s attempts to impose his. Fourthly, and finally, after peace was restored, the land transaction was completed by Donald McLean in 1848.

The question for the purposes of this claim is not whether the land was validly ‘sold’, and on whose terms, but, since the land lay on either side of the river’s lower reaches, whether Maori knowingly and willingly relinquished their traditional authority over that part of the river. The two questions, however, cannot be entirely divorced.

50. Young, *Woven by Water*, p 29

51. BPP, vol 3, p 227

4.6.1 The assumption of settlement rights

The New Zealand Company settlement of lands near the river mouth was effected before the right of settlement was established by law. This may have materially affected the legal process by which Maori and Pakeha rights there were determined. Furthermore, as New Zealand 'began its constitutional life as a dependency of New South Wales', the law relevant to this process 'was patterned on models from New South Wales, where native rights were not part of the design'.⁵² Thus, as the Muriwhenua Land Tribunal has observed, 'the necessary matters to consider for the protection of Maori interests' were not specifically spelt out.⁵³

Settlement effected before rights established

On 14 January 1840, just before Hobson's departure from Sydney, Governor Gipps issued three proclamations drawn up in London at Hobson's request and re-issued by him on 30 January, after his arrival in New Zealand. These Crown proclamations were categorical that all transactions made thereafter were to be 'considered as absolutely null and void, and neither confirmed nor in any way recognised by Her Majesty'. No title to land purchased from then on would be recognised, unless derived from the Crown. Commissioners would be appointed to investigate past purchases, and future acquisitions of land from Maori chiefs or tribes would be illegal.⁵⁴

Crown proclamations, January 1840

The Crown's pre-emptive right to purchase Maori land was provided for in article 2 of the Treaty of Waitangi, first executed on 6 February 1840. In terms of Normanby's instructions to Hobson, that right carried with it a concomitant duty to protect Maori interests. To that end, Hobson appointed a protector of aborigines, who was also to conduct land purchases and ensure proper terms.

Crown's right of pre-emption and duty to protect

Governor Gipps's New Zealand Land Claims Ordinance 1840 provided for commissioners to investigate claims based on alleged purchases before the date of the proclamations, and for land grants to issue if the claims were allowed, but to a maximum of 2560 acres unless the Governor in Council specially authorised more. Nevertheless, after an interview with a deputation of agitated Wellington settlers in Sydney, he decided to grant the company 'one continuous block of 110,000 acres', including the harbour, and to limit further acquisitions of land by the company 'to localities approved by the Governor and to continuous blocks, each being no less than half a million acres'.⁵⁵

Land Claims Ordinances 1840-41

After New Zealand ceased to be a dependency of New South Wales, the Land Claims Ordinance 1840 was adopted in New Zealand, then repealed and re-enacted in almost identical terms.⁵⁶

For the purposes of this claim, it should be noted that the Land Claims Ordinance 1841 did not provide the land claims commissioners with authority to exam-

52. AH McLintock, *Crown Colony Government in New Zealand*, Wellington, Government Printer, 1958, p 98; *Muriwhenua Land Report*, sec 4.7

53. *Muriwhenua Land Report*, sec 4.7

54. Gipps, 14 January 1840, BPP, vol 3, pp 123-125; Hobson, 30 January 1840, BPP, vol 3, pp 129-130

55. EJ Tapp, *Early New Zealand: A Dependency of New South Wales, 1788-1841*, Carlton, Melbourne University Press, 1958, pp 142-143; McLintock, pp 121-122

56. New South Wales Laws Adoption Ordinance, 3 June 1841; Ordinances, Legislative Council, 9 June 1841, sess 1, no 2

ine transactions made after the 1840 proclamations. Moreover, in the preamble and section 3, it refers to Normanby's instructions to Hobson of 14 August 1839, stating that the Crown would not recognise any title to land thereafter acquired unless derived from, or confirmed by, a Crown grant. Further, the 'schedule B' scale for determining awards provided for purchases only to December 1839.

It should also be noted that there is nothing in that ordinance exempting the New Zealand Company from these provisions. In the event, Commissioner Spain was to begin his 'final report on the New Zealand Company's claim to the district of Wanganui', dated 31 March 1845, by outlining that the claim regarded an alleged purchase in November 1839; but he was to continue that, in May 1840, E J Wakefield was 'commissioned by the principal agent to *conclude* the negotiations for the acquisition of the district of Wanganui' (emphasis added).⁵⁷

November 1840
agreement

Running against this tide was the November 1840 agreement reached by the New Zealand Company directors in London with the Colonial Secretary, Lord John Russell, for a grant of land commensurate with their expenditure on colonisation.⁵⁸ The land was to be selected within the limits of the 20 million acres the company claimed to have purchased in the Wellington and Taranaki districts, as well as the northern part of the South Island, assuming that it had been fairly purchased.

The company claimed, and Russell apparently believed, that 'it was in possession of large tracts of land', but that point still had to be established. Based on an agreed formula of one acre for every £4 expenditure, James Pennington, an accountant nominated by the British Government, estimated that the company was entitled to almost one million acres. This was much more than Russell had expected; indeed, he later said that he 'did not support the view which the Company take of the unqualified nature of the engagement entered into on the part of the Government'.⁵⁹ In January 1841, he appointed William Spain as a commissioner to investigate the company's land claims, and Spain sailed for New Zealand on 20 April 1841.

Statutory
recognition
unnecessary

Special legislation to effect the November 1840 agreement was unnecessary.⁶⁰ If the company's land claims were fair and valid, then, in the exercise of the discretion reserved in the New Zealand Land Claims Ordinance 1840, the Governor in Council could effectuate the agreement and not limit the company to 2560 acres.

Application to
Whanganui

The November 1840 agreement and Pennington's award did not overcome the legal difficulties in relation to the company's claim to land in the Whanganui district. The places where the company could take up land, on account of its

57. BPP, vol 5, pp 80–81

58. Rosemary Tonk, "'A Difficult and Complicated Question": the New Zealand Company's Wellington (Port Nicholson) Claim', in *The Making of Wellington, 1800–1914*, David Hamer and Roberta Nicholls (eds), Wellington, Victoria University Press, 1990, p 36

59. Adams, p 257

60. For completeness, it is added that statutory recognition was proposed but did not proceed. This was included in the Land Claims Ordinance 1842, which was approved by the Governor but disallowed by the British Government: Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, secs 2.3.3, 2.4.6. In law, this ordinance was unnecessary and did not add anything. All land claims transactions had still to be approved by commissioners. The ordinance merely provided for larger awards for the company in terms of the agreement where company claims were proven.

entitlement, were expressed to be those places where it had established a claim before Hobson's arrival in New Zealand; any other claims had to be abandoned. While Colonel Wakefield claimed Whanganui land had been purchased in November 1839, the cargo of goods he promised to complete the payment was not delivered until May 1840.

Because of the shortage of suitable rural allotments for selection in the 110,000-acre Wellington block, on 22 December 1840, Colonel Wakefield declared that the second series of selectors could, if they chose, select their land in the Wanganui district – notwithstanding the agreement with Gipps that they were to be confined to this compact block and that there would be no diffusion of settlement beyond its limits. Hobson then gazetted a notice prohibiting the sale of lands at Wanganui until entitlement could be legally established. Yet, by early February 1841, there were some 30 to 40 settlers living there awaiting allotments.⁶¹

Occupation taken

The site chosen for the town named Petre was four miles from the river mouth and could be easily navigated by vessels of 14 tonnes. The survey of town, port, and country allotments on both sides of the river was soon under way, and the first 80 selections were made in September. Maori seemed to be agreeable to the settlers occupying and using the area where they were establishing a town but objected to their occupation of any lands beyond.

In 1841, after the survey work began, some Taupo Maori who were present objected, saying that they had not received any payment for the land that was theirs, an illustration of the complex nature of Maori land interests.⁶²

Maori protest

As the survey and selection of land proceeded, Maori increasingly protested that they had not agreed. The local missionaries, Mason and Matthews, advised a party of settlers arriving overland from Wellington that Wakefield's purchase had been 'a farce from beginning to end'. When they cross-examined Colonel Wakefield at a public meeting, he merely conceded that his nephew's failure to purchase Putiki was 'not unlikely'. He authorised settlers to offer a reasonable payment to the Maori, but according to John Miller, 'when a deputation went to the pa the Maori firmly reiterated their refusal to sell'.⁶³

After the September selection of land, Maori obstructed settlers from taking possession of their country allotments and refused further offers of payment. In *Old Whanganui*, T W Downes quotes a settler's account of 'sectionists' attempting to take their farm allotments but being driven back to town and a letter from a settler whose home was occupied by Maori and a pa was built close by.⁶⁴ According to Dawson, the police magistrate and sub-protector, Maori 'were positive that land had been sold for twenty-three miles to the north of the river', but 'they had not, and would never, sell land on the south or east side'. Yet, as an irate settler pointed out, 'the greater number, and the best' of the company's sections were on this side.⁶⁵

61. Document A40, p 200

62. Document E2, p 12

63. Miller, pp 56–57

64. Document A40, pp 208, 211

65. Wards, pp 305, 306

Maori objections were not to the settlers themselves, but to their taking possession of places not specifically allotted to them by the hapu. In fact, Maori had quickly learned to value the trading opportunities that the settlers brought. Ian Wards records that, for the first six years of the settlement, 'canoes laden with pork, kumara, potatoes, and before long, fruit, vegetables, and poultry, paddled down to the town and returned with the colourful, and coveted, articles of trade'.⁶⁶ Downes considered that the settlers had no fear for their safety during the early stages of settlement. Apart from tense situations over the survey and occupation of land, relationships with local Maori were cordial. Indeed, the settlers found 'living very cheap, owing to the abundance of food brought in by the natives'.⁶⁷

Waiver of
pre-emption

News of the November 1840 agreement did not reach Hobson until April 1841. During his first visit to Wellington in September 1841, he tried to reconcile Treaty promises and company colonisation.⁶⁸ In a letter to Colonel Wakefield of 6 September 1841, he agreed that the Crown would forgo its right of pre-emption to all land claimed by the company in an accompanying schedule, and that the company would receive a grant 'of all such Lands as may by any one have been *validly* purchased from the Natives' (emphasis added).⁶⁹ The schedule referred to up to 110,000 acres in the Port Nicholson and Porirua districts, and up to 50,000 acres in New Plymouth. But, by this time, there were some 150 settlers in Wanganui waiting to select land being surveyed.

As Wards puts it, 'because his hand was forced both by the shrewd Wakefield and by instructions to accommodate the Company', Hobson extended this arrangement to Wanganui.⁷⁰ The amount listed in the schedule was 50,000 acres, more or less, to be surveyed and allotted by the company. The boundaries were described as follows:

The sea coast, commencing one mile westward from the mouth of the river Wanganui, and extending from that point 10 miles eastward along the coast; from thence, a line bearing north by compass, eight miles; then, by a line bearing west, 10 miles; and from thence by a line bearing south to the coast.⁷¹

The Governor's letter must be seen to have proposed no more than that the company might purchase, direct from Whanganui Maori, up to 50,000 acres in the future. It predicated that the initial transaction might not be valid or allowed, in which case, a further purchase would be necessary.

Spain's instructions

When Commissioner Spain arrived in Auckland on 24 December 1841, Hobson decided to confine his work to investigating the New Zealand Company's claims and any non-company counterclaims to the same land. He instructed Spain to give effect to the current land commission ordinance and the November 1840 and

66. Wards, p 308

67. Document A40, p 200

68. Wards, p 219

69. *Ibid*, p 220

70. *Ibid*, p 305

71. 'Schedule of Lands Referred to in Despatch No 41/30', 1 September 1841, BPP, vol 3, pp 523-525

September 1841 agreements. Colonel Wakefield protested against the investigation of the company's claims on the ground that it was exempt under the November 1840 agreement. Clearly, that was not so, and Wakefield had eventually to accede to the legal position. He then assumed that, in his case, the inquiry would be a mere formality, though there was no legal basis for that assumption either.⁷²

4.6.2 Spain's recommendations

In investigating the company's Wanganui claim, Spain was to act more as an agent of the Crown than as an impartial investigator, taking special steps to secure for the company the land that it had come to expect from the agreements with Russell and Hobson and appearing anxious to meet the objective of European settlement. No doubt he was influenced by the situation on the ground, where settlers were confined to the area where they were establishing a township but could not take up the promised country allotments.

Spain's approach

The same situation had applied in Wellington, where, three months after he had opened his investigations on 15 May 1842, he had discovered how weak the company's claim really was. To circumvent 'further complications' and 'unintended and undesirable results for those most immediately concerned with the outcome', he 'radically change[d] the focus of the commission's work' by adopting a compensation scheme proposed by Colonel Wakefield.⁷³ This was simply to compensate those who had not participated in the 1839 transaction earlier.

Spain in Wellington

The compensation scheme was not written into law and neither was there a common law principle to support it. The legal position was that no Maori were bound to sell if they did not agree to do so, nor could they be made to sell land by accepting compensation. Furthermore, under the Land Claims Ordinance the commissioner had to determine the propriety of transactions, not take steps to complete them himself. Yet, Spain did that, and even where the sellers were in a minority, he tried to persuade all those concerned to accept compensation. In the result, his investigations were aimed at deciding where compensation was due, not the validity of the transaction, or, if valid, which land was company land and which was Maori.⁷⁴

Compensation scheme

On his first visit to Wanganui in April 1843, Spain opened his court with a three-day examination of Maori witnesses, then closed it because Colonel Wakefield did not attend. After E J Wakefield's late arrival, he reconvened it for two days, but Wakefield called only one witness.

Spain's court

Spain announced that, in his view, a sale had been made and that compensation should be paid to those who had not been party to it. He invited the assembled Maori to make some proposition through George Clarke junior, their protector, as to the amount. The Government, he assured them, had never intended that they

72. Tonk, pp 36–39

73. Ibid, p 57. Tonk gives a full account of Spain's investigation: pp 47–58.

74. Ibid, pp 57–58

would be disturbed in the possession of their pa, burial places, and cultivations, and would see they were paid such compensation as he should award them.⁷⁵

Spain's views on
Wakefield
transaction

Spain did not consider the evidence he heard in terms of equity and good conscience. In his final report of 31 March 1845, he noted that the deed covered land from Manawatu and Patea to Tongariro, and observed that the boundaries were uncertain and the deed difficult to comprehend. He recorded how Maori witnesses claimed that they had not agreed to the transaction; that it had not been seen as a land conveyance by those who did; that only some of those who assembled were willing to sign the deed; that the leaders of Putiki had not been involved; and that there was widespread dissatisfaction. He observed how, after three days of trying, E J Wakefield could produce only one 'very infirm man, with faculties somewhat impaired' to support the claim, and he lamented how Kuru, or Kurukanga, the Maori most involved in the transaction, assiduously avoided the court.⁷⁶

Further, Spain criticised Colonel Wakefield's employment of his youthful and inexperienced nephew to conduct the purchase, and his private speculation for the exchange of blankets and tobacco for pigs and potatoes: 'This intermixture of payments for land, and barter . . . has necessarily been the source of immense confusion in the minds of the natives.'⁷⁷

A sale declared

Nevertheless, he declared that there had been a sale. The following passage from his report reveals his thinking:

The whole of the evidence, I think, goes to show that the people who were assembled at [the] meeting, and particularly those who took the most active part in its proceedings, were utterly regardless of what land they proposed to sell, whether it belonged to them or not, and evinced a determination to get possession of the goods landed from the schooner upon any terms; nor does it appear that those who at this time, according to the statement of some of the native witnesses, dissented from the sale took any steps to oppose it, or to make Mr Wakefield acquainted with their unwillingness to alienate their land; on the contrary, they seem to have joined with the others in appropriating to their own use whatever part of the merchandize they could lay their hands upon.⁷⁸

This is not indication of a sale, the more so since he also reported that:

the majority at least of those who consented to the sale were people brought down from several miles up the river by Kurukanga to receive the goods, and could have had little, if any, claim to or interest in the land near the mouth of the Whanganui, comprised within the limits of the Company's survey.⁷⁹

Here, it may be noted that, if Maori were 'utterly regardless of what land they proposed to sell', that was consistent with their habits when making gifts of goods,

75. Spain's report, 31 March 1845, BPP, vol 5, p 91

76. Ibid, pp 86, 87

77. Ibid, p 87

78. Ibid, p 90

79. Ibid, p 87

though it was expected that the receiver would respond with equal generosity over time.

Before Spain revisited Wanganui in May 1844, he received the Reverend Richard Taylor in Wellington, who told him that 'he had been deputed by the Wanganui chiefs to convey their desire that they should be paid compensation for the land claimed by the Company'. According to Ian Wards, Taylor 'had been quietly working to this end for some time'. He gave Spain a list of chiefs entitled to payment, with the amount of money and goods required by each, which he attributed to 'his own conversations'. It was this payment, totalling about £1300, he explained, that the chiefs were 'most anxious to receive'.⁸⁰

Taylor's
intervention

Spain, it seems, accepted Taylor's alleged arrangements with the chiefs.⁸¹ Immediately after his arrival at Wanganui with George Clarke on 3 May 1844, he 'despatched a circular letter to the chiefs of all parts of the district, requesting their attendance at a general meeting, to receive the payment [he] had brought them at their own request'. Taylor then informed him that on his return he had found the Maori 'much altered in their notions of this subject'.⁸²

Spain's attempted
settlement

George Clarke must have found this too, for on 15 May, he informed Colonel Wakefield that he had been 'unable to procure a satisfactory termination to [his] negotiations with the chiefs'. Wards relates how:

Te Mawai, and others not parties to the 1840 agreement, positively refused to accept any payment regardless of the amount. . . . He therefore suggested . . . that the fixed sum of £1000, together with four sections from the Company block, plus sundry eel cuts, three small lakes and a lagoon, should be offered the tribes . . .⁸³

The colonel then agreed to place £1000 at Clarke's disposal to settle the company's claim.

On 16 May, Spain and Clarke met the chiefs at Putiki, in company with the colonel, who had brought £1000 in gold and silver from Wellington.⁸⁴ Spain read his decision affirming his earlier announcement that a sale had been entered into with E J Wakefield and adding that the company:

had done all that was further necessary to the extinguishment of the native title to the district of Wanganui in offering the sum of money which had been demanded for that purpose, on behalf of the aborigines, by the Protector.⁸⁵

He 'desired Mr Clarke to tender them the 1,000*l* which he had agreed upon with Colonel Wakefield as the amount they were to receive'.⁸⁶ In return, the company was to be entitled to a Crown grant of 40,000 acres of coastlands, less all pa, burial

80. Wards, p 309

81. *Ibid.*, p 311

82. Spain's report, 31 March 1845, BPP, vol 5, p 88

83. Wards, p 311

84. *Ibid.*, p 311. Wards states that the meeting took place on 17 May, but this appears to be an error.

85. Spain's report, 31 March 1845, BPP, vol 5, p 90

86. *Ibid.*, p 89

grounds, cultivations, eel cuts, a tenth of the block in natives reserves, three small lakes, and a lagoon.⁸⁷ Spain referred to the reserves as being marked on an accompanying plan, but this plan was not published with his report.⁸⁸

In keeping with a stance that they had taken at a previous meeting with Spain on 9 May, the assembled Maori positively refused to accept the compensation money. At that time, they had denied that they had ever agreed with Taylor to accept the compensation money, and Spain had berated them:

I am much surprised at your conduct. I had always entertained a very different opinion of you; you have deceived Mr Taylor, and deceived me. I came here on the strength of your own request, and am prepared to accede to all your reasonable wishes, and the reserves you mentioned to Mr Taylor shall be made; but understand me distinctly, that you cannot hold back the land; I shall award it to the Europeans whether you take the payment or not.⁸⁹

All he could do, Spain said at the 16 May meeting, was to represent their refusal to the Governor, who would determine how the £1000 should be laid out for their benefit.⁹⁰

Maori acquiescence
a mistaken
presumption

In making his determination that the company was entitled to a Crown block of 40,000 acres less reserves, Spain was acting on the mistaken presumption that those chiefs who were absent at the time of the sale would acquiesce 'in the proposition to accept payment for their claims to the land which some of their countrymen . . . had conveyed to the Company'.⁹¹ He believed what Taylor conveyed to him in Wellington, and left Clarke in Wanganui to negotiate with the chiefs over reserves and compensation rather than ascertain their own wishes. Like Taylor and Clarke, he regarded their refusal of compensation and desire to keep their land as a 'temporary aberration'.⁹²

In the circumstances of this case, we consider that Maori acquiescence could only have been established if consent had been given in court or could be verified in writing, and in this case there were no written consents and in appearing before the court they had objected. Clearly, the requirements of the Land Claims Ordinance were not followed; indeed, the case proceeded on a basis for which there was no provision in law. Spain was influenced not only by the Governor's instructions but by the company's plans and the settlers' prior possession.

Spain referred to his decision as an 'award', and many others have done so since. In terms of the ordinance, however, it was plainly a recommendation. Only the Governor could make an award, and he deferred action on account of Maori opposition and his inability to enforce an award at that time.

87. Spain's report, 31 March 1845, BPP, vol 5, pp 90-91

88. Spain's reserves are shown on Turton's map: see Turton, *Provinces of Taranaki, Wellington, and Hawke's Bay*, map deed 77, 'Map of the Settlement of Wanganui'.

89. Minutes of Spain's proceedings, 9 May 1844, BPP, vol 5, p 96

90. Wards, p 312; see also BPP, vol 5, p 99, for a copy of the original letter

91. Spain's report, 31 March 1845, BPP, vol 5, p 90

92. Wards, p 309

In September 1844, four chiefs, including Te Anaua and Te Mawai, wrote to Governor FitzRoy asking him to come to Wanganui to settle the dispute.⁹³ Precisely what had to be resolved is not clear. It could have related to the acceptance of compensation or it could equally have related to who had the mana over the town, the upriver or lower-river Maori. Te Peehi declared that he alone had consented to the deed and that he had pointed out the places where Pakeha were to settle.⁹⁴ He may have meant that he alone had the authority over the town side of the river, while Putiki Maori had the other side, where they were left with a reserve.

Subsequent developments

In December 1844, Governor FitzRoy sent J J Symonds, his private secretary, to treat with local Maori, but to no avail. Soon afterwards, a large taua of Ngati Tuwharetoa arrived seeking local support for an attack on Ngati Ruanui and living off the land. FitzRoy could offer little protection; indeed, at one stage he contemplated abandoning the settlement. HMS *Hazard* was dispatched from Wellington for a show of force, but military intervention was averted when the weather blew the ship south before the troops on board could disembark. Moreover, with the growth of trade and the spread of Christianity, Maori were more accepting of Europeans and increasingly reluctant to continue tribal feuding and warfare. In the end, the conciliatory and mediating influence of Taylor, Bishop Selwyn, and Donald McLean, the Taranaki protector, prevailed, and the taua returned to Taupo without loss of face.⁹⁵ When Governor Grey took office in November 1845, he had the troops and financial support that FitzRoy had lacked to renew attempts to resolve the land question, but not before Whanganui Maori became involved in military engagements in the Wellington district.

No final conclusion

4.6.3 Military action

Military action in Whanganui followed similar events in the south, where tension over disputed land purchases and the question of authority had been high since 1842.⁹⁶ Nevertheless, as Wards has pointed out: 'It had little to do with European settlement in Wanganui itself, and perhaps even less with the local land purchases'. On the one side was Te Mamaku, who was then in alliance with Te Rangihaeata (but Te Rauparaha was not involved). On the other side were the Government and its military forces.

Te Mamaku and hostilities to the south

In the Cook Strait area, there were two outbreaks of fighting: the Wairau affray in 1843 and the Hutt Valley skirmishes in 1846. These events aroused a sense of panic among the Wanganui settlers, for the same could happen to them. In response, Governor Grey took it upon himself to visit Wanganui to settle the land question, which he saw as the means of removing Maori opposition to the Government. Grey

Proposals to resolve the Whanganui land question

93. Ibid, p 312

94. Spain report, BPP, vol 5, p 85

95. Wards, pp 313-315

96. James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*, Auckland, Auckland University Press, 1986, p 73; Wards, p 324

claimed to have persuaded the Putiki rangatira to accept the £1000. He then sent the money with Symonds to conclude matters.⁹⁷

Symonds found the need to apply more persuasion. With Donald McLean as interpreter, he told an assembly of lower Whanganui Maori that 'the tribes could expect friendship and increasing benefits from the Europeans, if only they met their wishes'.⁹⁸ Such talk may have affirmed Maori customary expectations of continuing obligations, though Maori may have suspected more and more that Pakeha might not act as honour required.

Symonds agreed to larger, more compact reserves coinciding with existing cultivations rather than the scattered blocks offered by Spain, and he permitted the survey of several additional reserves, much to the concern of the settlers, who thought Maori would 'end up with the best parts of the block'.⁹⁹ The friction between Maori and surveyors recurred.

Proposals
abandoned

Matters then took a turn for the worse when, in the Hutt Valley, Te Mamaku led an attack by 200 warriors on Boulcott's farm. Requests from him asking Whanganui hapu for reinforcements were brought north by a messenger. Symonds abruptly decided that the Wanganui land question could not be finally settled in what he saw as an atmosphere of distrust. He had the £1000 secretly shipped back to Wellington and departed abruptly. Te Mawai likened him to 'a wild pig when you thought you had got hold of him he ran away'.¹⁰⁰

Grey's Wellington
campaign

Grey directed his increased resources to settling the question of authority in Wellington, but he was unable to secure any decisive victory. On 23 July 1846, the neutral Te Rauparaha was captured in his home, breaking the spell of influence that Ngati Toa had wielded over Maori and Pakeha alike. After several clashes with Grey's troops, Te Rangihaeata and his followers dispersed and escaped north in August, eventually taking up a defensible position in the Poroutawhao Swamp south of the Manawatu River mouth.¹⁰¹

Te Mamaku returns
in peace

After Symonds had left for Wellington, three Putiki chiefs wrote to Grey assuring him that the majority of local Maori wanted the sale to proceed. Major Richmond suggested that Donald McLean return to Wanganui to settle the deal,

97. Wards, pp 316–317. The fighting followed the attempt of Te Rauparaha and Te Rangihaeata to turn back surveyors in the Wairau Valley by burning their huts and the arrival of an armed party to arrest the chiefs for arson. A stray shot killed Te Rangihaeata's wife, and he executed utu by clubbing nine European prisoners. Twenty-two Europeans and at least four Maori were killed. The Acting-Governor, Willoughby Shortland, and his officials were too weak to risk more conflict with Maori and refused to embark on the more vengeful course that the panic-stricken colonists demanded. The new Governor, Robert FitzRoy, after hearing both parties, rebuked them and declared that, because the Europeans were first in the wrong, he would not avenge the prisoners' deaths: see A D McIntosh, *Marlborough: A Provincial History*, Christchurch, Capper Press, 1977, pp 6–83; Angela Ballara, 'Te Rangihaeata', DNZB, 163, p 488. For a brief account of the fighting in the Hutt Valley, see Belich, *The New Zealand Wars*, pp 73–74.

98. Wards, p 318

99. Ibid

100. Ibid, p 321; Te Mamaku's hapu, Ngati Rangatahi, who were originally from the upper Whanganui, had been granted rights of occupation in the Hutt Valley in return for gifts of tribute by Te Rangihaeata: DNZB, 163, p 490; reference to Te Mamaku's request for reinforcements is in Wards, p 319.

101. Wards, pp 278–288

and Colonel Wakefield agreed to make the £1000 available again. Te Mamaku and his followers returned to Wanganui, in September 1846, and went quietly upriver. At the opening of a new church at Hikurangi on 4 October, he and the assembled chiefs 'expressed a determination to live in peace both with other tribes and with Europeans'.¹⁰²

Nevertheless, continuing military operations in the Wellington district and the news of Te Rauparaha's capture were followed by the arrival of a large taua from up the river on 19 October 1846, with the avowed intention of travelling south to assist Te Rangihaeata. That caused great alarm amongst the townspeople, who asked Grey to provide military assistance or to remove the settlement. Taylor, who was in Otaki at the time, immediately wrote to Richmond requesting the dispatch of troops. On 13 December, 180 men disembarked from HMS *Calliope* with instructions to construct a stockade to defend the township.¹⁰³

In the opinion of historian Ian Wards, the military intervention was 'but the end-run of military operations in Wellington, with no local reason for its outbreak'.¹⁰⁴ Maori were peaceably disposed. Reliance was placed on Taylor's view, which may have depended on exaggerated rumours, for he was not in Whanganui at the time. It was known that Te Mamaku sought settlers, but he could not accept soldiers, whom he regarded as a challenge to his authority. Peace depended not on the presence of military forces but on their absence. When the soldiers arrived, they found no enemy and, instead, Putiki Maori helped them cut wood for a stockade.¹⁰⁵

Issue of authority

Eventually, incidents occurred, culminating in the murder of several members of an out-settler family, the Gilfillans, occupying a country allotment, though no agreement had been reached and no grant made for the transfer of the land. Rightly or wrongly, Te Mamaku was thought to be implicated. Putiki Maori assisted the capture of five young Maori escaping upriver, which would not have endeared them to the upper river hapu. These five were said to be the culprits, and after a civil inquest and court martial, four were hanged immediately and the fifth, on account of his youth, was transported for life, thereafter commuted.¹⁰⁶

Descent to war

In May 1847, Te Mamaku, Te Pehi Pakaro, Maketu, and Ngapara responded with a taua from the upper river to challenge the Governor's presumptive control. Their plan was to entice the soldiers out of the stockade and upstream so that they could fortify an area and fight on their own ground. Governor Grey arrived with reinforcements, taking the number of troops in the town to 750, and attempted an advance upriver. Progress was so slow, however, that Te Mamaku came south to meet them. The result of this and a subsequent engagement was inconclusive, with only a few casualties on each side. Te Mamaku then announced it was time to go home to plant crops.

102. *Ibid.*, p 322

103. *Ibid.*, pp 323, 327

104. *Ibid.*, p 350

105. *Ibid.*, pp 325-327

106. *Ibid.*, pp 330-332; Young, *Woven by Water*, p 35

Thereafter, Te Mamaku was not pursued and many of the troops were withdrawn. When Taylor met him and a large assembly of Maori upriver just beyond Mataongaonga on 30 December 1847, he considered that Te Mamaku and many other rangatira desired peace.¹⁰⁷

Putiki Maori were not involved, but one settler opined:

all our river natives are so intimately connected and related, that it would be folly to believe that mere interested friendship, and such is the basis of their love for us, would, on emergency, supersede or dis sever the firmer ties of consanguinity.¹⁰⁸

Maintenance of
Maori authority and
peace

Te Mamaku had made it clear throughout the campaign that his quarrel was with the military and the Governor, not the settlers. From a Maori perspective, Te Mamaku had challenged the Governor's authority and had withstood an attempted response, thus showing he and his hapu had kept their authority over the land, river, and township, and therefore matters should still be regulated on customary terms.

The purpose of the peacemaking that followed was twofold: to reconcile Te Mamaku, Te Pehi, and their allies with the Governor; and to restore peace among the Whanganui River hapu. Both aims were finally achieved at a meeting of reconciliation at Putiki-wharanui on 17 February 1848. Te Anaua said that he wanted all bad feelings superseded by peace and love, though he emphasised that his cause had 'been one with the Europeans' and would remain so. Others spoke, and Te Mamaku is reported to have said: 'It is right for one to make peace and shake hands with his enemy: there is one pa, but many families; one tribe but many minds: now I make peace with the Pakeha for ever'. His image of one pa captured the relationship of the hapu to each other, as did Pakaru, a chief from Waikato, who said, 'Wanganui is but one river but has many branches'.¹⁰⁹

4.6.4 McLean's transaction

McLean's operations

Soon after the peace, Donald McLean was called in to complete the land transaction. McLean had been sub-protector of aborigines in Taranaki until the Protectorate Department was abolished in 1846. Having acted as the interpreter for Symonds in his attempt to complete the purchase of the Wanganui block during April and May of that year, he was already familiar with the situation on the ground.¹¹⁰ This, together with his good working knowledge of Maori language and protocol, his respect for chiefly rank, and his own imposing presence, stood him in good stead in negotiating land purchases with the Maori claimants.

107. For a fuller account of the foregoing, see Wards, pp 334–340; Young, *Woven by Water*, pp 35–38.

108. Document A40, p 298 (citing Dr Wilson's diary)

109. 'Evidence from the Journals and Writing of Two Missionaries (Reverend Richard Taylor and Father Jean-Marie Vibaud)', Taylor journal typescript, QMS TAY 1989 vol 5, ATL (doc D15), pp 179–180; compare with doc A40, pp 317–318, – both sources are reproductions of the contents of Taylor's journals, but differ slightly in their wording.

110. Wards, pp 317–318

A shrewd observer of Maori manners and customs, McLean none the less assumed that Maori would rapidly adopt European ideas and institutions. Rather than seeking to give effect to Maori preferences concerning the disposal of their land, he sought to buy large blocks outright and to minimise native reserves, so that Maori would be encouraged to buy back land from the Crown and farm it as individuals. Faced with objections from Maori claimants to parting with their lands, he endeavoured to convince them that they would benefit in the long run from European settlement through the establishment of peace and security, the growth of trade and agriculture, and the provision of roads, hospitals, and schools – all of which would add to the value of the land and reserves they retained.¹¹¹ This gave his transactions the flavour more of ongoing reciprocity than of final settlements.

On the day McLean left New Plymouth for Wanganui, he took up his new appointment as inspector of police. On his return to New Plymouth, he was to choose and enrol 10 constables and a sergeant for an armed police force detachment. According to Richard Hill, Governor Grey envisaged this extension of the armed police system as ‘integral to his wider strategy of control of both Pakeha and Maori society’. As Hill has put it, these arrangements were to provide McLean with ‘coercive backing’ for his land transactions.¹¹²

Between 1 and 29 May, McLean, assisted by the company’s assistant surveyor, Alfred Wills, who had been a member of Symonds’s party in 1846, obtained consents not only from the hapu with whom Wakefield and Spain had dealt (from the upper river and the lower river, respectively) but also from others outside the Atihaunui allegiance who claimed interests in Whanganui lands, such as Ngati Ruanui. A letter from Wills to William Wakefield of 23 June 1848 gives a detailed account of their proceedings up to 27 May, when he was compelled to return to Wellington on account of his mother’s dangerous illness.¹¹³ McLean’s report to the Colonial Secretary of New Munster of September 1848 was much more considered and general, having been written after his return to New Plymouth from Wanganui, where he had been laid up with a rheumatic attack for several weeks after the final execution of the deed of sale.¹¹⁴

According to Wills, immediately after his arrival, McLean communicated with all the chiefs near the town. He ‘quietly but firmly’ informed them that ‘they must all meet together for the purpose of calmly and fully agreeing amongst themselves as to the claims for compensation of those who had not been previously paid’ and lay the same before him.¹¹⁵ He then prepared and widely distributed a circular letter from Lieutenant-Governor Eyre to a large number of named chiefs describing the

Proceedings for
consents

Determining bona
fide claimants

111. For a fuller account of McLean’s approach to land purchases, see Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker’s Ltd, 1995, sec 3.4.1; brief of evidence of Keith Sinclair, Wai 119 ROD, doc A56; Alan Ward, ‘Donald McLean’, DNZB, M11, p 255; Wards, pp 317–318

112. Richard Hill, *Policing the Colonial Frontier*, Wellington, Department of Internal Affairs, 1986, pt 1, p 246

113. NZCA3/8, NA Wellington, pp 384–414

114. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, pp 248–251

115. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, pp 402–403

outside boundaries of the block required by the Europeans and calling on those who were 'bona fide Claimants' to communicate with him. He told them that:

the payment was not to be made to one or a few great Chiefs but was to be divided amongst all, that it was a last payment and intended for those whose claims had not previously been extinguished, and that the amount of compensation money was £1,000.¹¹⁶

Symonds's reserves
and the eastern
boundary settled

McLean then lost no time in obtaining consents to Symonds's reserves and to the eastern outside boundary, which he had observed being carefully marked out by Wills in the presence of 'delegates from the natives of Wanganui and Wangaehu'. In settling the reserves, McLean 'firmly and consistently opposed' initial Maori insistence on retaining valuable pieces of bush land, and stressed 'the propriety of their abandoning their numerous small cultivations', which 'they could not possibly stand in need of' in addition to Symonds's 'ample reserves'.¹¹⁷

Ngati Ruanui
'troublesome'

On 17 May 1848, McLean 'found it necessary to direct immediate attention to the Ngatiruanui and Waitotara claimants, who were assembled in considerable numbers at Kai Iwi' and had sent for him to inform him that:

they were not bound as a distinct tribe, possessing a distinct claim to confirm the sale by Whanganui natives, or recognise imaginary boundaries on maps which in any way interfered with their rights without their knowledge or sanction.¹¹⁸

In a hasty note to Lieutenant-Governor Eyre on 27 May, McLean observed that they had 'been most troublesome'; indeed, 'in running the northern boundary line they gave a deal of trouble and endeavoured to reduce the block by several thousand acres'.¹¹⁹ He related their resistance to Spain, who, in his award, had 'considered no other claims than those of the people of Wanganui', whereas there was:

a powerful body of other claimants who had a title to a large portion of the district awarded by him without the natives knowing what the boundaries of the land awarded by him were.

The Whanganui people, however, 'considered that they were alone entitled to receive the [amount] publicly and [expressly] awarded to them'. Those not recognised were 'fully determined not to part with any portion of their land at any hazard unless it was fairly and openly purchased from them'.¹²⁰ In his September 1848 report to the Colonial Secretary, McLean added that the Kai Iwi Maori were 'evidently actuated by strong feelings of jealousy towards the Whanganui tribes', which he had endeavoured to remove.¹²¹

116. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, p 357

117. Ibid, pp 358-359

118. McLean to Colonial Secretary, September 1848, AJHR, 1861, c-1, p 248

119. McLean to Lieutenant-Governor Eyre, 27 May 1848, Donald McLean papers, qms 1208, ATL (cited in doc A49(a), p 67)

120. Ibid, p 68

121. McLean to Colonial Secretary, September 1848, AJHR, 1861, c-1, p 248

On 18 May, McLean had a long korero with them at Kai Iwi, which in his opinion convinced them that:

Ngati Ruanui
acknowledged

a settlement of their claims and disputed boundaries . . . would be the surest means of extinguishing their long-pending animosities, and of ultimately introducing Europeans to live on the land they were desired to part with, who would promote peace and harmony, and confer lasting benefits on themselves and their posterity.¹²²

Thereafter, 'having succeeded in bringing those Natives to an understanding respecting their claims', he requested that the most influential accompany him to witness the cutting of the northeast boundary line, while the others should go on to Wanganui to await his return there.

The Kai Iwi korero was a propitious event for the Government because a question of mana was involved. Who would have mana with settlers and the Governor if the Governor recognised Ngati Ruanui but no other? At first, while McLean was engaged with the northeastern boundary, Maori arrived 'from different parts of the coast, some of whom had travelled day and night to oppose the boundary'. However, McLean wrote that he overcame this opposition, 'and the opposing Natives [were] induced to form an accession to our working party'.¹²³

A matter of mana

Where Wakefield had appeared to acknowledge the Atihaunui hapu upriver, and Spain had seemingly preferred those at Putiki, McLean was to involve them all in one open hui after his return to Wanganui. One effect, it seems, was that the Putiki position was subordinated to the opinion of the tribal majority, and the majority were able to assert that their mana in the coastal area – and not just that of Putiki – should be recognised by the Government and the settlers as well.

At 'Tunuhaere (the boundary of the Block on the river)', McLean's party was 'met in the most friendly manner by "Takarangi" – "Te Ropiha" and several chiefs of that place' and ascended the cliff to the pa where 'a great "Korero" was held; every chief in the place declaring and reiterating his desire that the purchase should be completed and Europeans settled in the District'.¹²⁴

Tunuhaere chiefs
satisfied with
boundary

From Tunuhaere, McLean took a canoe down the river, calling on the way at Waipakura reserve, where he found Pehi Turoa, Ngapara, and Hamarama, 'the principal Chiefs (excepting Te Mamaku) who were engaged in the hostilities against the Europeans, and whose claims I had been instructed to take into consideration'.¹²⁵ According to Wills, they had 'hastened down the river' and 'appeared to be much gratified that their claims to land within the Block were recognised'. They said that Mamaku was 'so very far up the river . . . that they did not expect he would be down for many weeks, but . . . that [he] would be perfectly satisfied if Hamarama acted for him'. They all expressed themselves as being fully satisfied with their 480-acre reserve at Waipukura and the small reserve at Purua opposite the town where they had a cultivation.¹²⁶

Upriver claimants
acknowledged

122. Ibid

123. Ibid

124. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, pp 360–361

125. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 248

126. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, pp 361–362

These upriver chiefs appeared to McLean 'less decided about parting with their land than those of Tunuhaere', but they did agree to have a conference with him on the subject. They objected, however, to entering 'into negotiation in concert with the Putiki tribes, as a feeling of enmity existed between them, and no reconciliation had taken place since the late war'. McLean informed them that all the other tribes with whom he had been negotiating 'promised to make up their difficulty, and unite in a friendly spirit to dispose of their claims' and that he 'did not expect that they, as Chiefs, would allow petty animosities to influence them against doing the same'.¹²⁷

McLean brings them
all in

In visiting the different tribes, McLean later reported, he had taken 'every pains in instructing them as to the binding nature, on themselves and posterity, of the engagements they were entering into respecting the transfer of their land'. By intimating that he would have 'a minute and public investigation' of the claims of every tribe, he believed that he had 'induced many of the principal Chiefs to moderate their exclusive ideas . . . and to admit the equitable right of others'. Furthermore, to afford the different tribes 'every opportunity of adducing their claims, and fully reflecting on the engagements they were entering into', he had given 'timely notice' that he would hold three public meetings in Wanganui on 26, 27, and 29 May.¹²⁸

For three days before the deed signing, according to Wills, Wanganui:

was full of Natives from Kai-Iwi, the Waitotara river, from Tunuhaere and other places up the Wanganui. The different tribes held daily meetings at which the respective claims of the members of the tribe were fully discussed, and lists of the names of the parties really entitled to payment agreed upon and sent in to Mr McLean, to whom they were very useful in apportioning the payment equitably.¹²⁹

On 26 May:

the whole of the Natives in Wanganui assembled before the Commercial Hotel at Petre – Preliminary speeches were made by the different Chiefs, Mawae and George King leading off, followed by Pehi Turoa and Ngapara . . . and all expressed their pleasure that the purchase was at length to be completed and their gratification at the ample opportunities Mr McLean had offered them of fully discussing their claims and at his patience in having at all times listened to their representations.¹³⁰

McLean gave a more colourful and rather different account of the event:

On the 26th, the several tribes and claimants, to the number of about six hundred (600), assembled. The Natives appeared fully impressed with the importance of this meeting, which was attended with more than usual Native pomp and ceremony. The elder men were dressed in their best dog-skin and kaitaka mats . . . The younger

127. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, pp 248–249

128. *Ibid*, p 249

129. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, p 365

130. *Ibid*, p 366

Chiefs and members of tribes were generally dressed in the best European garments they could procure for the occasion.

The preliminaries of recognizing the Natives being over, I requested them to give unreserved expression to their sentiments respecting the definitive sale of their land. To this they successively responded by several animated speeches to the effect that they had, in accordance with their own customs, cried, lamented, and wept over their land, which they now wished for ever to be given up to the Government.¹³¹

McLean had drawn up the deed of sale 'in the most simple and perspicuous, yet binding, terms that the Native language would admit of'.¹³² In reading it to them, he 'repeatedly inquired if they thoroughly understood its purport and was invariably answered by 1 or 200 voices'.¹³³ As 'each Reserve was described, the Chiefs examined the plan which with Mr McLean's assistance' Wills fully explained.¹³⁴ When preparing the deed, McLean had requested him 'to write the description of the external boundaries of the Block and also those of the reserves' and:

Signing the deed of sale

to make a skeleton Map only for the Deed so that both the Deed and the Map should be easily and thoroughly understood by the Natives:— to this end greater pains could not have been taken.¹³⁵

The deed was signed 'in the presence of most of the settlers, the resident clergyman and Missionary and many Military Officers stationed in Wanganui'.¹³⁶ On 26 May, 83 came forward and signed; on 27 May, 114; and, on the following Monday, 29 May, the day the payment money was to be distributed, 10 more. A total of 207 persons signed.¹³⁷

The deed contained this clause:

'Tangi clause'

131. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 249

132. Ibid, p 249

133. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, p 366

134. Ibid

135. Ibid, p 365

136. Ibid, p 366

137. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 249. The original deed (deed 286) and deed map (map 221) are now held by Land Information New Zealand (previously the Department of Survey and Land Information) at its head office in Wellington. The English translation with the deed was made by McLean several days after the signing: see doc A49(a), p 30. A note on the map states that it is the 'Map made for the Natives in explanation of the boundaries of the Block and of the Native Reserves (coloured yellow) as described in the final Deed of Sale': see doc B2. The note is signed 'Donald McLean Inspector of Police' but is not dated. Matching folds and a faint pencil line on both the deed and the map, as well as the top left-hand corner piece of the map (still attached to the deed), are proof that this map is the one that McLean annexed to the deed before dispatching it to Lieutenant-Governor Eyre on 19 July 1848: see McLean to Eyre, 19 July 1848, NZCA3/8, NA Wellington, p 384. According to information obtained from the Department of Survey and Land Information, when early land deeds with maps annexed to them first came under its control, they were kept folded together in envelopes. Then, in the late 1980s, they were removed, flattened, and separated for conservation and filming purposes and stored in plan drawers: see *Te Whanganui-a-Orotu Report 1995*, sec 4.1.2. A 'True Copy of the original Deed, Translation, and Endorsement, Wellington, August 6th, 1875' was published in Turton, *Provinces of Taranaki, Wellington, and Hawke's Bay*, pp 238-244, but the map Turton published was different from the original plan: see doc B1; H H Turton, *Plans of Land Purchases in the North Island of New Zealand*, vol 2, map deed 77.

A ko te wenua katoa e takoto ana i roto i enei rohe haunga ano nga wahi i wakatapua i te tuinga i roto i tenei pukapuka mo matou kua oti nei i a matou te tangi te mihi te poroporoake te tuku tonu atu ma te Pakeha me nga awa me nga wai me nga rakau me nga aha noa iho o taua wenua.

An English translation was later provided:

Now all the land contained within these boundaries excepting the places mentioned in this paper as reserved for ourselves we have wept and sighed over bidden farewell to and delivered up for ever to the Europeans; together with the rivers streams trees and all and everything connected with the said land.¹³⁸

McLean's tangi clause became standard in later deeds for Crown purchases, and its origins and significance have already been examined by the Waitangi Tribunal in its *Mohaka River Report 1992* and *Te Whanganui-a-Orotu Report 1995*. In the former report, it is described as 'an attempt by McLean to create an absolute transfer of title to land that would be explicable to Maori in cultural terms using metaphors of the tangi'.¹³⁹

In a research report entitled 'Maori Land Boundaries' commissioned by the Waitangi Tribunal, Lyndsay Head noted that more often than not early land deeds contained what she calls a 'landscape clause', which described the resources on the land in question. The Maori versions have different emphases from the English, 'apparently to highlight matters important to Maori'. The majority of pre-Treaty deeds purported to 'buy the landscape, with everything in it, in an area defined by boundaries'.¹⁴⁰ Probably, the tangi clause in the deed of sale for the Wanganui block was McLean's adaptation of this model, incorporating a form of words that the chiefs customarily used in expressing their sentiments before parting with their land.

In regard to land deeds in which rivers were part of the landscape, Head further noted that while:

it appears that the alienation of inland waterways was accepted by Maori . . . it is more likely that a proper study would show that the answers lie in how Maori differentiated rivers and resources taken from them. . . . In the Wanganui case, what was reserved from sale were resources such as eel pa, which utilised the river. Research might find that 'resources' were not defined by Maori in terms of (for example) the fish or the river, but of human input.¹⁴¹

138. Turton, *Provinces of Taranaki, Wellington, and Hawke's Bay*, pp 238, 242 (doc A49(a), pp 70, 74). Claimant researcher Tom Bennion observed that the concluding words of the tangi clause – 'me nga awa me nga wai me nga rakau me nga aha noa iho o taua wenua' – were inserted on the Maori text of the deed: 'suggesting that it may have been a late addition to, or even after, the discussions'. The insert was not apparent on the English translation: doc A49, pp 29–30. Our inspection of the deed and translation confirmed this. Whether or not Maori heard or saw the insertion before they signed the deed is an open question.

139. Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 3.5. This is reiterated in the *Te Whanganui-a-Orotu Report 1995*, sec 4.4.6.

140. Document A23, pp 33–37

141. *Ibid*, p 43

When Maori offer to sell land, Head continued:

they do not offer to sell rivers too. . . . nevertheless, rivers feature prominently in boundary descriptions and are treated very specifically. Boundaries cross rivers, go along their banks, flow in the waters and go along the river bed.¹⁴²

A few days before the sale, McLean had a long conversation with Wills about the distribution of the £1000 payment. A memorandum was prepared of the different tribes to be paid and the amount to be paid to each, according to which 12 tribes were to have received sums varying from £20 to £140. Afterwards, McLean told Wills that he intended to make some alteration to the particulars of the payments.¹⁴³

Distribution of the
payment

On 29 May, the £1000 compensation money, divided into bags each containing £10 of silver, was distributed by McLean, assisted, at the request of the Maori, by Hori Kingi (Te Anaua), the chief and assessor at Putiki.¹⁴⁴ A list showing the order in which it was handed over to the tribes receiving payment and the chiefs to whom it was paid was sent by McLean to Lieutenant-Governor Eyre on 19 July 1848, along with the signed deed. Annexed to the deed was a map, and the deed's translation.¹⁴⁵ Also listed were the number of bags and the amounts that each chief received. 'After receiving their money,' McLean later reported, 'the tribes quietly dispersed to their residences and encampments, evincing perfect satisfaction with the compensation received.'¹⁴⁶ In all, there were 22 separate payments to 23 individual chiefs (one five-bag payment being shared by two chiefs), representing 16 different tribal or hapu groupings.

The largest single payment of nine bags was received by Mawae for Ngati Ruaka, who altogether received a total of 15 bags. The smallest single payment of one bag was received by three individual chiefs: Hori Kingi (Te Anaua), in trust for Te Keepa Rangihiwini of Ngati Ruaka, who was absent; Hamarama, who had offered to represent the interests of his brother-in-law, Te Mamaku of Ngatihau, who was absent in the interior bird-snaring; and Rangitaurira for Ngapairangi.¹⁴⁷ Other separate payments ranged from two to seven bags, with 13 of them being for five bags.

Hapu from outside appeared to have done almost as well as Ngati Ruaka: Whangaehu Maori receiving eight bags and Kai Iwi Maori seven. Te Mamaku later expressed his gratification at his claim being recognised and made it his wish that his amount be taken upriver and presented to him.¹⁴⁸ In his September 1848 report to the Colonial Secretary, McLean maintained that, by prior investigation, he had

142. *Ibid.*, p 44

143. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, pp 413–414

144. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, pp 249–250

145. McLean to Lieutenant-Governor Eyre, 19 July 1848, NZCA3/8, NA Wellington, pp 384–386. This list also appears in McLean's report to the Colonial Secretary, September 1848, AJHR, 1861, C-1, p 249.

146. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 250

147. *Ibid.*; McLean to Civil Secretary, New Ulster, 4 December 1848, AJHR, 1861, C-1, p 251

148. McLean to Civil Secretary, New Ulster, 4 December 1848, AJHR, 1861, C-1, p 251

been able to 'obtain a more accurate knowledge of the several claimants, and of the extent of land owned by them both individually and collectively'.¹⁴⁹

Wills was not present at the distribution of payments. For an account of it, he referred William Wakefield to a letter from Dr Rees, a purchaser of land from the company and one of the oldest settlers in Wanganui, published in the *Wellington Independent* on 10 June 1848. In the letter, Rees stated that, 'although the prospect of an arrangement at first appeared to him (as it did to most of the Settlers) very remote', he now considered 'the Wanganui Land question to be finally settled and in such a manner as scarcely to leave room for any future dispute'.¹⁵⁰ Yet, like the earlier transactions, there are problems with that associated with McLean.

Dependence on the
validity of prior
transactions

Was it a new 'sale' or a continuation of the old one? McLean referred to it as 'the final Settlement of the Land Question', Wills as 'the completion of the purchase of [the] Block'.¹⁵¹ Yet, in some respects it was new. The reserves were altered and the deed words, about Maori farewelling the land, implied that it had not been parted with before. As a new transaction, any invalidity accruing to those before would not matter; if it was a continuation of transactions that went before, it may have been contingent on their validity.

In so far as it was a new transaction, the adequacy of consideration was in question. If criteria in the Land Claims Ordinance 1841 were used, the £1000 would have given an entitlement of only 2560 acres, whereas McLean's transaction enclosed 86,200 acres. If, however, it is viewed in an historical perspective, the payment of trade goods estimated at £700 and compensation of £1000 appears to be more in line with payments made by McLean for Crown land purchases in Rangitikei, Hawke's Bay, and Wairarapa. In completing the purchase of the Wanganui block, McLean was in effect implementing Grey's new policy of using the Crown's pre-emptive right to acquire large blocks ahead of the needs of settlers as cheaply and quickly as possible, and before settlement had enhanced the land's value and the sellers fully realised the advantages of leasing rather than selling.¹⁵²

Yet, in the Wanganui case, the purchase payment was determined by the Wakefield transaction and Spain's 'award', not hard bargaining between McLean and the vendors. In his report, McLean talked not of buying the land or of paying the 'purchase price' but of distributing the 'compensation money', which was precisely the amount earlier offered and refused.¹⁵³ The primary issue does not appear to have been whether the land should be sold, but to whom the 'compensation money' should be allocated and in what shares. In other words, who should be recognised by being paid.

149. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 249

150. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, p 403

151. McLean to Eyre, 19 July 1848, NZCA3/8, NA Wellington, p 385; Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, pp 412-413

152. *The Mohaka River Report* 1992, pp 23-24. The amounts McLean paid for the three Hawke's Bay blocks in 1851 were £4800 for 279,000 acres (Waipukurau), £1500 for 265,000 acres (Ahuriri), and £1000 for 85,000 acres (Mohaka); J G Wilson, *History of Hawke's Bay*, Dunedin, AH and AW Reed, 1939, p 205.

153. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 249

McLean's transaction marked not just the resolution of that issue but the cessation of prior hostilities over it. To what extent, then, were Maori free agents? Were they not to agree among themselves and with McLean, and if the Governor forced the issue, they faced the prospect of more coercion, if not renewed war. Grey had shown that he was a force to be reckoned with, much stronger in that respect than his predecessor. To date, Maori had maintained their mana, from their own point of view, but their chances of continuing to do so had also to be weighed.

Prior hostilities

McLean's transaction more than doubled the area of 40,000 surveyed acres (less reserves) that Spain had recommended should be awarded to the New Zealand Company. Yet, neither the deed nor the deed map gave any reference to the total acreage; they simply defined the boundaries of the land being given up and the native reserves. As seen, no addition was made to the £1000 offered by Spain and refused by Whanganui Maori. Presumably, McLean either failed or declined to see that Spain's decision was based not on survey but on acreage, in accordance with the maximum of 50,000 acres specified in Hobson's September 1841 schedule.

Alteration of
acreage

In his general report, McLean stated that the boundaries of the Wanganui purchase contained, including native reserves, 86,200 acres, as shown on the accompanying map.¹⁵⁴ We have identified this map on the basis of construction to be the original of the map published by H H Turton.¹⁵⁵ It is entitled 'Map of the Settlement of Wanganui New Zealand shewing The Land purchased from the Wanganui and other Tribes, as finally completed by Mr McLean - May 1848'. It is signed 'Donald McLean Inspector of Police New Plymouth' but not dated.

McLean brushed off the discrepancy in acreage between Spain's recommendation and his own transaction by implying that it was an error by Spain. From an official return furnished by Mr Sheppard, one of the New Zealand Company surveyors, to the police magistrate at Wanganui, he reported, it would be perceived that the company's plan of the district, signed by Spain, was estimated to contain 89,600 acres, whereas 'the award' that Spain had made in favour of the company was only for the surveyed part of 40,000 acres. 'It is not improbable,' he added, 'that this difference arose from the marginal line on the map being considered the boundary.'¹⁵⁶ This glib explanation does not disguise the fact that the total acreage of McLean's transaction largely conformed to that on the company's plan, whereas Spain's was within the upper limit proposed by Hobson.

As to the reduction in the total acreage of Symonds's native reserves by 600 to 700 acres, or approximately 10 percent, McLean acknowledged that this was considerably less than that to which Maori would have been entitled under the arrangements of the New Zealand Company.¹⁵⁷ Nevertheless, he submitted that the advantages to the Maori of their selections might be held equivalent to the decrease in amount, particularly since they included a valuable block at Putiki Pa near the

154. Ibid, p 250

155. Document B1

156. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 250

157. Alan Ward, Robyn Anderson, Suzanne Cross, and Michael Harman, 'Historical Report on Whanganui Land', Crown Congress Joint Working Party draft report, 1993, p 14

river mouth and other favourite localities.¹⁵⁸ This seems more a reflection of his belief in the principle of assimilation than of concern to protect Maori rights, interests, and entitlements.

No protective structure

At no stage in the chequered history of the Wanganui purchase was any protective structure in place to ensure that fairness and equity prevailed and customary and Treaty rights were respected. Spain was not an independent investigator. The early governors and Protectorate Department were too weak to be effective watchdogs. Governor Grey stood between Maori and settler and provided 'coercive backing' for Crown land purchases. The Reverend Richard Taylor preached obedience to the governors and 'used his great influence to smooth the path for the Europeans'.¹⁵⁹

Mutuality

It cannot be assumed that Maori and Pakeha saw the 1848 transaction the same way. For example, the tangi clause may have more significance for Pakeha than for Maori. A Maori tangi, for many reasons, is not limited to farewelling. Though in the deed it is connected to farewelling the land, that is McLean's perception, not theirs.

'Forever'

Likewise, there is no tradition that something may be 'forever'. It may be earnestly hoped that a relationship will last, and commitments of undying loyalty may be made, but it is known that a relationship is continued only for so long as it is in fact maintained. No Maori word could be found for 'forever', but, as in the Lord's prayer, the missionaries used 'ake, ake, ake'. This denotes 'ongoing', which is less absolute than 'forever'. Here, 'tonu atu' was used to the same effect. It would be consistent with Maori thinking were it said in a positive way, that an arrangement would last, and were it thought that lasting arrangements depended on keeping good relations.

In any event, past experience did not suggest that European deeds were 'forever'. Williams' land deed had come to nought. Wakefield had disregarded the Crown's right of pre-emption under the Treaty with impunity only days after the Treaty was executed in Whanganui. Wakefield's transaction for land from Tongariro to Manawatu and Patea was turned into 40,000 acres by Spain. Spain's assertion to Maori that the land was gone forever, whether or not compensation was accepted, had not proven to be true, else why was McLean seeking a new deed? Why then should McLean's deed be treated differently? There is sense in the Maori view that nothing is 'forever' unless those affected continue to agree.

Maori perspectives

Maori may have lamented the loss of the possession, which is not in itself the loss of land. They may still have been operating in traditional mode, expecting a handsome return for the magnitude of that given and over which they had shed tears. Old beliefs may have endured that ancestral interests remain with latent rights of control, or that they still had mana over the area, as evidenced in the recognition given to them by paying further money. 'Future benefits' may have been seen not as a pious hope but as a contractual undertaking.

158. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 250

159. Wards, p 309

4.7 WAS THE RIVER ‘SOLD’?

Since land claim hearings are pending, the question of the validity of the various transactions is not answered. Instead, for the purpose of determining whether the lower river was sold too, the deeds will be looked at as though they were valid.

Question of contractual validity deferred

The first deed, that of Wakefield, can be set aside. By law, any award arising from that deed could be only such as Spain allowed in terms of acres. The question there would be whether the riverbed was included as part of the 40,000 acres that was recommended. That was clearly not the intent, and had the Governor acted on Spain’s recommendation, the riverbed would not have been part of the deal, because of the presumption under English common law that it was an arm of the sea and belonged to the Crown.

Wakefield’s deed

To the extent that McLean’s transaction was to finalise what Spain had allowed, it too can be set aside. If the company’s entitlement could lawfully have been changed to 86,200 acres, though it is unlikely that it could, in terms of the current Land Claims Ordinance and the November 1840 and September 1841 agreements, the question is whether the area of the riverbed was part of the 86,200 acres. Again, it was not, and the riverbed could not have been conveyed, because again the arm of the sea presumption would have applied.

McLean’s deed did not lead to a river transfer unless a separate purchase

Were it determined, however, that McLean’s transaction was a new deal unrelated to Spain’s decision, and were it considered that the land conveyed was not referable to the number of acres but to whatever area was encompassed in the description of the land, then, and only then – and if the deed was otherwise valid – would the question arise of whether the river was part of the deal.

Nothing in the surrounding evidence establishes that Maori intended to convey the river on the execution of the deed. Maori minds do not appear to have been directed to the river at all. There were other major issues to consider, not least whether Pakeha should be admitted to land beyond the town, whether compensation should be accepted and, if accepted, whose mana should be recognised. There is no evidence that river rights formed part of the discussion, save to the extent that the deed referred to rivers and was read out by McLean and fully explained with Wills’s assistance to the assembled tribes before the signing.

River in negotiations

There is no specific reference to the river in the record of discussions, even though the river was vitally important to both sides. For Maori, it provided access to the new town and European shipping and trade, as well as being a traditional waterway and a seasonal fishing ground at the nearby mouth. For settlers, it provided a safe harbour essential for the survival and development of the town and hinterland. The omission may have been due to no more than weightier considerations or to assumptions that were simply taken for granted. Maori assumed that the river owned them, whereas officials and settlers assumed that it was owned by the Crown.

The available evidence of any discussion of the future ‘ownership’ of the river is slender, even for the whole of the events from 1839. In evidence to Commissioner Spain in 1843, John Brook, a Wakefield employee, described how he read the

'Wakefield Deed' to the assembled Maori in 1840, in the Maori language. A record survives only of the protector's translation. This reads, with reference to Maori reserves:

And know ye, do not ye speak; hearken ye! you have given the land (to us), do not be jealous (do not suppose) that we, the Europeans, shall take all the land; one side will be saved for you and your children in all the rivers, trees as far as inside at Tongariro; all the lands, islands, all the trees, the large streams, the anchoring places, the little streams, Manawatu, Rangitikei, Wanganui, Patea, till it reaches the interior at Tongariro.¹⁶⁰

While the sense to be made of this is debatable, and it may have been meaningless to Maori at the time, it could not have conveyed any thought that Maori were to lose all interests in the rivers, and may have implied that they were to keep them.

There is then an entry in Taylor's diary in 1847, before the McLean transaction, that Te Mamaku:

gave the natives a long account of what he thought was European policy, saying that we had taken the harbour of Wellington so that no native could go in or out without permission, that we were doing the same at Waikanae, Porirua, Otaki, Ohau, Manawatu and Wanganui.

Taylor had replied that at Wanganui 'one side of the river at least' belonged to the natives and that they possessed the entrance 'as much as the Europeans'.¹⁶¹ This could have meant to Te Mamaku that, were the land transaction settled, the river would at least be shared and only the township side would pass to the Europeans. More likely, however, Te Mamaku did not relate the matter to the completion of a deed. He thought that restrictions on river use arose from 'European policy'.

Subsequent conduct

We found no evidence of subsequent Maori conduct to show that Maori knew that the 'ownership' of the river had changed. Matters just carried on as before. Though it was much later, Te Keepa's letter of 1876 (see sec 3.2.1) shows that at that time Maori interests in the lower river reaches were presumed to have remained.

In addition, we found no instance where, prior to our hearings, the Crown claimed this part of the river on the basis of the 1848 deed.¹⁶²

The deed

Authority for any transfer of the river therefore depends on McLean's deed itself, its words, and the map annexed to it. There were competing arguments from counsel on that matter, though it is unnecessary to set them out in detail, for they were based on issues of fact with respect to the deed, which additional research has enabled us to resolve.

Only a general reference in deed

Though the wide-flowing Whanganui River severed the block into two parts, the deed made no specific reference to its conveyance. There is only the general

160. Spain's report, 31 March 1845, BPP, vol 5, p 83

161. Document A49, pp 24-25. Taylor was obviously referring to the Putiki side of the river.

162. This point was made also by claimant researcher Tom Bennion in cross-examination by the Tribunal on 22 April 1994 on his report: see doc C11, p 56.

wording of the tangi clause conveying, with the land, ‘the rivers streams trees and all and everything connected with [it]’ or, in the Maori text, ‘me nga awa me nga wai me nga rakau me nga aha noa iho o taua wenua’; literally, ‘and the rivers and the waters and the trees and all else of that land’.

Such reference as the deed makes to the Whanganui River itself is only to delineate the outside boundary of the lands conveyed where it goes: ‘in a straight line to the river of Wanganui a little distance below the Pa of Tunuhaere and crosses from thence to the first or upper stake of the Native Reserve marked out by Mr White at Kaiwaiki’.¹⁶³ Some small fishing lakes and eel cuts on the lands transferred are named in the deed, but only to reserve them to Maori.

Crown counsel submitted that:

Argument

the tidal reaches were sold along with other water bodies as part of the 1848 deed of purchase, because of the clear words of the deed (*‘me nga awa me nga wai’*; the English version refers to the boundary *‘crossing’* the River) and because that was intended to be and was the effect of the sale of the land. [Emphasis in original.]¹⁶⁴

Claimant counsel responded that:

the text of the Deed clearly does not import any intention to sell the River. In the English version, the boundary simply ‘crosses’ the River. . . . The general inclusion of streams and waters within the boundaries of the blocks sold is not apt to include the Whanganui River.

The words purporting to include the River ‘nga awa me nga wai’ . . . [were] extremely general. One might have expected even such a phrase as ‘awa nui’, but there is none.¹⁶⁵

Looking to the words alone, and deferring for the moment a question concerning the deed map, we incline to claimant counsel’s view. Other rivers and streams, and the various small lakes, may be seen as waters ‘on’ the two blocks concerned, ‘connected’ to the land or part of ‘that land’. A major river that divides the land into two blocks is not the same. In the case of a major waterway like the Whanganui River, it is reasonable to expect that a specific reference would be made.

Conclusion on the deed’s words

Similarly, it is not enough to say that the text refers to the boundary as ‘crossing’ the river. To make the matter certain, it would be necessary to say that the river was ‘included’.

At best, there is an ambiguity, and following settled canons of construction, the ambiguity is to be construed against the drafter.

There is a further question, however, of whether the map annexed to the deed ‘in explanation of the boundaries of the New Zealand Company’s block and the

Cartographic record

163. Turton, *Provinces of Taranaki, Wellington, and Hawke’s Bay*, p 242; Turton, *Plans of Land Purchases in the North Island of New Zealand*, map deed 77

164. Document C21, p 7

165. Document D18, p 22

Reserves therein made for the natives as arranged by Mr Symonds in 1846' indicated an intent that the river was included in the area 'sold'.¹⁶⁶ As already seen, this is map 221, currently held by the head office of Land Information New Zealand in Wellington and stored separately from the deed in a plan drawer. It is clear from the description of certain reserves in the deed that McLean had a map that was shown to certain Maori before the deed was signed; also, that certain Maori were given a map by McLean. It is clear, too, that McLean 'furnished the several tribes with plans similar to that annexed to the Deed'.¹⁶⁷ We find on the basis of construction that the map shown to Maori and the map annexed to the deed were the same map; that is, map 221.

On this map, the outside boundary line is hatched red and follows the northern boundaries of native reserves 11 and 12, which are separated by the Whanganui River but stop at the river's edge on both sides. The red hatched line is not continued across the river. Nor is the black line along the sea coast, which served as the southern boundary of the block, continued across the river mouth. This map indicates that the Whanganui River did not form part of McLean's transaction.

This conclusion fits with standard practice. A scheme plan, like the Land Information map, was prepared to accompany purchase proposals, and only if the deed was signed was a full survey done, as was required for titles to issue.

Cultural
presumptions

Why is there no specific mention of the Whanganui River in the record of the discussions or in the deed? Crown counsel thought it hard to believe that the river ownership would not have been canvassed by McLean, given its strategic importance as a harbour for the town.¹⁶⁸ The answer is in the different assumptions made.

The river was important for Maori too, but it appears that they also did not raise the matter. This is not surprising. It was incomprehensible to Maori law that something like a river could be divided into parts and that one part could be owned separately.

The situation on the ground was that the settlers were in the town on one side of the river while Maori occupied the area around Putiki on the opposite bank. The only Maori concern, in accordance with their customs, was with who could use the river and who had control. It appears to have been satisfactory to Maori at the time that both Maori and Pakeha were using the river. There was no dispute over use. If settlers were occupying abutting river land, it was naturally assumed that they would use the river.

For his part, McLean may have equally assumed that this part of the river passed to the Crown as a matter of English law. There was no need to buy it, because the tidal river reaches – and the whole of the affected river was within the tidal regime – was *prima facie* the Crown's as an arm of the sea.¹⁶⁹

166. McLean to Lieutenant-Governor, 19 July 1848, NZCA3/8, NA Wellington, p 384

167. *Ibid*, p 385

168. Document D19(c), p 51

169. This proposition was canvassed by Tom Bennion (doc C11, pp 50–51)

Alternatively, McLean may have thought that raising the river could open a can of worms to queer the land transaction. The omission of any reference to Te Whanganui-a-Orotu in the Ahuriri purchase of 1851 supports this view. In that case, McLean thought it ‘essentially necessary’ to command the harbour for the settlement of Napier to advance. There is no evidence that McLean negotiated its purchase, however, or that the chiefs agreed to sell.¹⁷⁰ In that case, as in this, he remained silent.

An intentional omission?

The Te Whanganui-a-Orotu Tribunal concluded that McLean was deliberately silent so as not to prejudice the pending land purchase.¹⁷¹ The harbour and lagoon were a major waterway and a valuable taonga and resource, and it was thought that McLean would have known that Maori would not knowingly or willingly surrender it.

4.8 CONCLUSIONS

On the evidence, it appears to us that McLean’s deed, if otherwise valid, was insufficiently particular to effect a conveyance of the river’s lower reaches.

In Treaty terms, the legal effect of the deed is not the issue. While English law can accommodate cultural difference by setting aside contracts where the parties are not of one mind, even to decide matters in terms of English law is to assume that that law applies. For the Tribunal to reach a conclusion based on this assumption would be tantamount to a failure on its part to comprehend correctly the cultural thinking and practices conveyed in the iwi oral history submissions or to acknowledge that there is a Maori history based on Maori knowledge different from, and a challenge to, a European discourse based on European documentary records. Viewed historically, the substantive question was: Which would prevail – the Maori law of relationships or the ‘Governor’s law’, where the Governor had control? Considered in Treaty terms, the question is how Maori and the Crown should relate, both constitutionally and in terms of such matters as access to, and control over, rivers. That points to the need for a New Zealand law that accommodates or reconciles the norms of its two founding peoples.

Were Maori precepts followed, there would be no difficulty in accepting settlers on the land, if that were agreed and the mana of the hapu were acknowledged. The settlers would have the use of the river and most of the seaboard lands but an underlying hapu interest would remain. The question would not be whether the river was sold but whether Maori contracted with Maori notions in mind, and whether they knowingly relinquished their authority in that regard.

We have not reached final conclusions on these matters because they cut into the land claim, but at the same time we acknowledge their relevance. At heart was a question of whose law applied or whether the two could be merged. The Governor assumed that English law must prevail, and that depended on the assertion of

170. *Te Whanganui-a-Orotu Report 1995*, sec 3.8

171. *Ibid*

British power. Maori remained intent on upholding their own authority, while seeking a bond with the settlers at the same time. For the one, it was a question of control, and, for the other, a question of relationships and mana. The immediate question for Maori, however, was whether their authority could in fact be maintained. That became the burning issue over the succeeding years, as is considered in the next chapter.

CHAPTER 5

MANA IN WAR AND PEACE

5.1 INTRODUCTION

McLean's transaction did not resolve the question of the ownership of the adjoining river, either on paper or in people's minds. At the time, the question was not in contention; nor was the deed cited as authority for river rights. Its ownership has really been raised only this century – most recently, as a result of this claim. After 1848, life on the river simply carried on and settlers used the lower reaches just as Maori did, neither thinking to question the other's use until some years had passed.

Question of
authority leads to
war

Certainly, Maori did not consider that their mana in respect of the lower river had gone. Naturally, they expected that settlers admitted to the coastal area would use the adjoining river, but custom dictated that the mana of the local hapu would be recognised too. Later, they protested against projects undertaken without their advice and consent.

Different Maori and Crown views on authority and relationships applied generally and led to war in the 1860s. In the opinion of the historian James Belich, 'an overarching cause' was that perhaps most British, not just the governors, were by a fatal tendency to believe that the Queen's Government must be demonstrably exercised over all those who, since the Treaty of Waitangi, had been regarded as British subjects. The Governor considered that nothing short of British control must prevail.¹

This chapter considers the war as it affected Whanganui and its impact upon Maori interests in the river as a whole. At the end of it, Pakeha remained on the coast as before and Maori continued to control the interior. But once peace was secure, the Government was able to implement the policies designed to gain adequate control over the remaining Maori districts in the North Island.

Post-war, Maori
considered their
authority remained

Still, Whanganui Maori remained unbeaten and had cause to believe that their own authority would continue to be respected. The river was still their waterway, at least for the greater part, until it gradually passed from their control through Government policies and enactments over time.

1. The cause of the war has been considered by the Waitangi Tribunal in *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, and by James Belich in *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*, Auckland, Auckland University Press, 1986, p 78.

5.2 THE QUESTION OF AUTHORITY IN WAR

Growth of European settlement

Between 1848 and 1868, the settler population on the coast expanded from about 200 to 2120 in the town and 2000 in the Wanganui electorate, and by 1868 settlers owned or leased 120,000 acres of farm lands running 136,000 sheep, 12,000 cattle, and 3000 horses.² The picture painted by historians is one of rapid growth, early prosperity, and relative security. Even in the war years, the local economy was boosted by the presence of a military garrison. The population trebled after General Cameron's troops arrived, and many soldiers took their discharges in the district.³

Maori development

Maori developed too. With peace, Christianity, and the introduction of European agriculture and trade, defensive, cliff-top pa were abandoned for kainga on the river plains and valleys, most apparently having shifted by 1852. The large populations of the pa at Pukehika and Operiki dispersed and resettled beside the river at Kauaeroa, Tawhitinui, Kauika, Karatia, Parikino, Tunuhaere, and Koroniti.⁴ Major building projects, often involving more than one hapu, provided new homes, meeting houses, and churches. Although the traditional framework for whare and whare runanga was still used, European tools, pit-sawing, shingling, and weatherboarding were increasingly applied.⁵

Joint development

The settlers provided markets for the Maori communities, and new forms of production were introduced. Flax continued to be traded until the 1850s, and wheat growing became popular. There were 1300 acres under cultivation in 1848, and in 1850 Governor Grey financed Maori to build flour mills at Kaiwhaiki, Operiki, Kawana, and on the Kaukore Stream near Pipiriki.⁶ 'The beach' on the river at the Wanganui town, Pakaitore to Maori and Taupo Quay to Europeans, became the canoe landing site and marketplace for Maori and settler trade.⁷ A bond between Maori and Pakeha seemed feasible.

Detrimental aspects

Contact with Europeans had adverse effects on Maori health and mortality, however. Epidemics of influenza, whooping cough, mumps, and measles swept through the river kainga, and the Reverend Richard Taylor noted that 'many of them were cut off'.⁸ Early population counts or estimates are unreliable, but the trends are more certain. From about 1840, the Whanganui Maori population declined and had very poor fertility and replacement ratios.⁹

2. James Belich, *I Shall Not Die: Titokowaru's War: New Zealand, 1868-1869*, Wellington, Allen and Unwin, 1989, pp 23, 31-32

3. Ibid, pp 25-26

4. Richard Taylor to Church Missionary Society, 5 August 1852, qms 1984-1999, ATL, Wellington (cited in doc A47, pp 24-25)

5. Janet Murray, 'A Missionary in Action: The Reverend Richard Taylor Among the Wanganui Maoris in the 1840s and 1850s', in *The Feel of Truth: Essays in New Zealand and Pacific History*, Peter Munz (ed), Wellington, AH and AW Reed, 1969, pp 205-206

6. T W Downes, *Old Whanganui*, Hawera, WA Parkinson, 1915 (doc A40), pp 94, 318

7. M J G Smart and A P Bates, *The Wanganui Story*, Wanganui, Wanganui Newspapers, 1972, pp 33, 175

8. Richard Taylor journals, vols 2-3, 28 November 1844 - c15 September 1854, ATL (cited in doc A47, p 7)

9. Ian Pool, *Te Iwi Maori: A Population Past, Present and Projected*, Auckland, Auckland University Press, 1991, ch 5, particularly pp 91, 95-96, 99; doc A47, pp 40-41

While there were opportunities for Maori and Pakeha trade, the growth rates of the two were not the same. Maori goods were required less as settler agriculture increased. New foods were introduced, but Maori remained reliant on traditional harvesting. Gift exchange and ceremonial feasting continued as before.¹⁰ The mutual dependency inherent in customary relationships was undermined by the scale of European arrivals, which created an imbalance of power that put customary authority at risk.

This was not so apparent to those on the Putiki reserve. The rangatira Te Anaua and others were treated civilly in the township, with every courtesy and respect, for trouble from the interior was always a possibility and their friendship was valued. The rangatira may not have appreciated, however, the fine line between respect and patronage.

Maori who found work as seasonal and casual labourers and minor officials no doubt saw the benefits of regular pay, but they may not have appreciated the distinction, formerly unknown to Maori, between working for someone else and being in control.

Still, an interdependent relationship had developed. When war came, most Putiki Maori did not take arms against the Government.

Maori throughout the river traded at the town, and the river may have been more used by them than before. As the initial work of the Church Missionary Society mission at Putiki-wharanui shows, the river served as a connecting link for the various hapu even before the township was fully established. Taylor was regularly up and down the river, and Maori from all parts attended his mission. His Christmas hui, coinciding with the annual down-river migration for fishing, attracted large numbers. Maori also provided virtually all river transport for Europeans until the early 1890s. Maori dominance over river transport, before the advent of steamers, was such that some European travellers felt hard-done-by paying the charges demanded.¹¹ Apart from the coastal flats, the Whanganui lands were still in Maori hands.

Enhanced role of river

The idyllic life that Taylor worked to create proved illusory. Only 12 years after McLean's transaction, war was resumed on an unprecedented scale in Taranaki, and Atihaunui became involved.

Clouds of war

By the late 1850s, Te Atihaunui could no longer be indifferent to the growing determination of Ngati Ruanui, Taranaki, Te Atiawa, Ngati Tuwharetoa, Ngati Maniapoto, and Waikato to resist further European encroachments by placing their land under the mana of a Maori king.¹² Given the strategic importance of the

10. Document A47, pp 26–27 (citing various Richard Taylor journal extracts, MS 254, ATL)

11. James Belich implies that, such was the Maori monopoly on the provision of river transport, paddlers could demand higher payment: Belich, *I Shall Not Die*, p 31. We note that Belich's apparent construction of a two-day journey from Wanganui to Pipiriki is incompatible with Richard Taylor's 1850s (as well as other) descriptions of upriver journeys. A journey downriver could take as little as three days, while a journey upriver would take from 10 days to a fortnight: W Swainson, *Auckland: The Capital of New Zealand*, London, Elder Smith, 1853, p 118 (cited in doc A47, p 9).

12. Taylor to Native Secretary, 4 September 1861, AJHR, 1862, E-7, p 29 (cited in Suzanne Cross and Brian Bargh, *Whanganui District*, Waitangi Tribunal Rangahaua Whanui Series (working paper, first release), April 1996 (doc E2), p 25)

Whanganui River, the Kingitanga supporters courted the Whanganui hapu. Te Anaua, Te Mamaku, and Te Pehi were each offered the kingship but declined.¹³ Te Mamaku and Te Pehi were sympathetic, and later joined the Kingitanga movement, while Te Anaua remained apart. Te Pehi, his brother Tahana, and his son Turoa Topia became the Whanganui leaders of the Kingitanga, and Pipiriki was to become the southern boundary of the Rohe Potae – the district immediately subject to the authority of the Maori king.

Kingitanga as
pro-Maori but not
anti-Pakeha

The Kingitanga was portrayed by Governor Grey as a challenge to British sovereignty, but modern historical opinion does not support that view. The movement sought rather to limit European expansion so that Maori authority over Maori land would remain:

The King would have mana over his lands, the Queen over hers 'but that their love [aroha] should be one, in accordance with the precepts of God and that the king should have love for both races and protect them.'¹⁴

In September 1861, after the war had begun in Taranaki, Taylor wrote to the Native Secretary, reflecting a personal view:

The Upper Wanganui chiefs appear generally to side with the disaffected, and to sympathise with the King Movement. They openly say that in the case of the King being attacked at Waikato, they should go and join in his defence; but one and all express their kindly feeling to the settlers, and their unwillingness to have the war brought into this district. The lower Wanganui Natives are decidedly attached to the Government, though alarmed at the military preparations, and especially by the calling out of the militia.¹⁵

Internal policy
divisions

Taylor and most settlers saw Maori as divided on policy according to upper and lower river sections, but the reality was different. In the kainga between Pipiriki and Kaiwhaiki, 'friendly' Maori and 'Kingite' Maori lived side by side.¹⁶ Many kainga from Pipiriki to Putiki were theatres of intense ideological debate, as runanga (councils) to administer the Maori King's law were established as far south as Kaiwhaiki, and runanga for the Queen's law were set up at Putiki, Aramoho, Koriniti, Hiruharama, and Ranana.¹⁷ In context, the issue was not about whose law would apply but about alternative political strategies.

Religious divisions

Religious differences between people, even in the same hapu, also assumed political significance. Te Pehi Topia supported the Roman Catholic mission at Kauaeroa and persuaded Catholics nearby to declare for the King. Then Taylor

13. James Cowan, *The New Zealand Wars and the Pioneering Period*, 2 vols, Wellington, Government Print, 1922–1923, vol 1, pp 445–446; DNZB, T24, p 440, T49, p 470

14. *Te Hikioi*, 8 December 1862 (cited in Alan Ward, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand*, Auckland, Auckland University Press, 1974, p 100)

15. 'Taylor to Native Secretary, 4 September 1861, AJHR, 1862, E-7, p 29 (cited in doc E2, p 25)

16. 'Sketch of the Coast between the Rivers Manawatu and Patea and of the River Whanganui', November 1862, MA24/22 (cited in doc E2, p 27)

17. Document D25, pp 19, 21; 'Sketch of the Coast'

excluded from his Anglican services those Maori who were opposed to the Government.¹⁸

In May 1864, an armed party of members of the Pai Marire faith arrived at Putiki and challenged Te Pehi and his followers to embrace this new religion. It appears that some did.

It cannot be said of the war, when it came, that this hapu was on one side or that hapu was on another. People acted variously and changed positions over time. Leaders embarking for the Taranaki war might need to canvas several hapu to raise a respectable force. Motives varied, one being support for Taranaki relatives on account of old ties. In brief, the popular settler view that lower river Maori were loyal and upper river Maori were not was far removed from reality, and the classification of hapu as 'Kingites', 'Queenites', Anglicans, Catholics, 'loyal', and 'hostile' was largely their perception.

Whanganui Maori fought on both sides in the first Taranaki war. Two years later, Governor Grey reoccupied the Tataraimaka block, which was Pakeha land that had been occupied during the first Taranaki war, in reprisal for the taking of Waitara. Some Kingite and Queenite Whanganui Maori were sufficiently outraged to assist Taranaki Maori in the second Taranaki War against troops under Lieutenant-General Duncan Cameron. Even here, Whanganui Maori fought on both sides of the conflict, and chiefs would change sides for their own reasons.¹⁹ For example, Te Mamaku and Te Pehi remained neutral in the Taranaki wars except to take part in the Tapuiwaewae raid of 1863, when they were avenging the death of Whanganui chief Hori Patene at the recent battle of Katiare.²⁰

Many of the Maori who had suffered land confiscation became followers of the religious prophet Te Ua Haumene. His Pai Marire faith, also known as Hauhauism, was based largely on the Old Testament and spread rapidly from Taranaki to the Bay of Plenty, Taupo, Urewera, and the East Coast, and included Whanganui. It was opposed to missionary-controlled Christianity.

In 1864, the war came to the Whanganui River itself with the battle of Moutoa, but significantly the battle was fought between Maori and did not involve Government troops. Moreover, it was not a battle between upriver Maori opposed to Europeans and down-river Maori who supported them, as it has often been portrayed. The issue was whether an upriver group should be allowed to attack the Europeans at Wanganui and could use the river 'highway' for that purpose. The questions were whether all would be implicated if one war party were allowed to pass through and whether the war would then be brought to the kainga of the

Varying participation in the Taranaki war

Battle of Moutoa on the Whanganui River

18. Document D25, p 22; DNZB, L1, p 235; Richard Taylor journals, vol 12, 26 April 1862, ATL (cited in Paul Clark, *'Hauhau': The Pai Marire Search for Maori Identity*, Auckland, 1975, p 70)

19. Document D25, pp 6, 13-14. For example, Inia Te Marahi fought on the side of the Crown in the first Taranaki war and Ao o Te Ranapi Haimoana Hirotu fought against the Crown, while Topine Te Mamaku joined in the conflict against the Crown in the second Taranaki war: see also Cowan, p 164.

20. David Young, *Woven by Water: Histories from the Whanganui River*, Wellington, Huia Publishers, 1998, p 55 (citing Turoa to Ezekiel, George, Henry et al, AJHR, 1863, E-3, pp 50-51, and Richard Taylor journal, 8 September 1863); doc D25, pp 13, 15-22

Atihaunui people. The assumption was that the hapu could control passage along the river.

More particularly, the Hauhau taua that had arrived unannounced at Pipiriki under Matene Rangitauira of the upper river reaches challenged Te Pehi to allow them to move down the river to attack the Wanganui town. It is to be noted that they did not assume a right of free passage when travelling for war-like purposes.

Te Pehi appears to have played for time, suspending deliberation and delaying the war party while he sought the opinions of hapu as far south as Tawhitinui, 16 kilometres downstream. Predictably, they were thrown into turmoil, some wanting Te Pehi to join Matene, others believing that Matene should be allowed to pass through, and others again that he should not be so permitted. In the meantime, Te Pehi had sent a warning to Te Anaua, at Putiki, of the journeying party.²¹

Te Anaua mobilised a force under Metekingi, nominating the Ngati Hine boundary at the north end of Moutoa Island, within his own territory, as the point beyond which Matene could not proceed without a fight. Intensive diplomacy failed to get Matene to back off. Some Whanganui chiefs sided with Matene, but most joined Metekingi or, like Te Mamaku, remained neutral. On the morning before the attack, two old men, 'ancestors of all the Ranana people and several up the river', took their stand on each side of the river and throughout the day held a rope across the river, 'as a sign to the Hauhaus that they were not to pass'.²² Matene's warriors came close to defeating Metekingi's force, but were finally driven back to the right bank. In the fighting, some of the Pai Marire taua were taken prisoner and Matene was killed, but Metekingi let the remainder of his taua retreat unmolested.²³ James Cowan considered that:

An uncompromising refusal of the right of way was returned by Haimona Hiroti, Mete Kingi, and the other leaders, not so much out of regard for the pakeha of the Town of Wanganui as for the mana of their river. Ngati-Hau, Ngati-Pamoana, and the lower-river men were resolved to resist to the utmost the insolent passage of an enemy war-party.

But they fought also to protect Wanganui Town, and their determined stand won the gratitude of the townspeople and the Government.²⁴

On our analysis, the Pai Marire incursion was not, as has been claimed, a re-enactment of a historical animosity between 'upper' and 'lower' river hapu but a threat, as much to Te Pehi and the other Kingite leaders as to those called 'friendly'.²⁵ Though they employed different tactics, they were generally imbued by a common strategy of protecting ancestral land, minimising the risk to their

21. Document 025, pp 19–21; Tinirau pamphlet, Wanganui Museum (cited in doc A49(a), p 85). For other accounts of the battle see *The Wanganui Chronicle*, no 18, 21, 28 May 1864; John White, outward correspondence, MS 75, ATL; see also DNZB, T49, p 470

22. Tinirau pamphlet

23. Ibid; Cowan, vol 2, pp 32–36

24. Cowan, vol 2, pp 32, 36

25. Document E2, p 29



Figure 8: Moutoa Island on the Whanganui River.
Photograph courtesy Alexander Turnbull Library (F75310½).

people, limiting the conflict, and doing what was necessary to limit its consequences as well.

Crown historian Fergus Sinclair considered that ‘it seems an artificial reading of the evidence to suggest that the battle of Moutoa symbolises Maori as opposed to European control of the river’.²⁶ While control of the river was not the central issue, the important point is that control is what Maori asserted in fact and that, in doing so, they followed historical precedent. It is indicative that the river was seen as part of their territory.

Maori authority and control of river passage

Although the battle may not have related to a contest between Maori and European over control of the river, the circumstances show how Maori authority was still intact. The surrounding land was still Maori land, tribal structures were still intact, the only Europeans in the vicinity were under Maori protection, and it was Maori who kept them from harm, or for their own reasons chose not to.²⁷ The battle itself was fought at a place of no strategic importance for a defence of Wanganui, but it was a marker of spiritual significance for the hapu of Tupoho, and as a result of the battle, the mana of Tupoho was greater.²⁸

Following the battle of Moutoa, and with concern for the settlers’ security, the Governor and his Ministers saw the need to assert the authority of the Queen while avoiding a recourse to arms, unless that were necessary. He demanded that Maori show their loyalty to the Queen and deliver to him the prisoners taken in the battle. The lower river Maori were probably most interested in protecting ‘their valuable entrepôt of Wanganui Town’.²⁹ Once the battle was over, Matene’s people were still

Issue of prisoners

26. Document C10, p 87

27. Document D25, pp 16, 20–21

28. Tinirau pamphlet

29. Belich, *The New Zealand Wars*, p 212

their relatives and it was time to mend bad feelings. Moreover, the battle had been Maori business and Imperial troops had had no part in it.

However, the provincial superintendent, Dr Featherston, arrived with 25 men of the colonial defence force. Escorted by Te Anaua, they proceeded up the river. Meetings were held at Raorikia, Parikino, Koriniti, Ranana, and Pipiriki. Despite passionate pleas from Te Anaua and Te Pehi, the provincial superintendent determined that the prisoners had been in arms against the Queen and must be held by the Government.

Maori agreed. To have opposed the superintendent's request may well have led to the arrival of troops on grounds of suspected disloyalty. Te Anaua's response reveals his anguish: 'the hearts of all the chiefs and their people are dark, very sad this morning . . . because of these prisoners. They are our friends and nearest relatives; but we shall take and give them up to you.'³⁰

Pipiriki stockade
and war

None the less, each side remained suspicious of the other, and for lower river Maori there was always the prospect that those whom they had defeated in battle would seek utu. The official documentary record is that 'friendly' Maori sought military settlers and the construction of roads.³¹ Clearly, however, the Government also desired a presence. A stockade was established at Pipiriki and manned by colonial militia, supported by a native contingent of about 60 under Captain Te Keepa Rangihwinui (later Major Kemp).

Te Pehi appears to have seen this as a challenge to his authority and responded by building fighting pa at Pukehinau and Ohinemutu, about two miles further up the river. It is said that he was supported by nearly 1000 warriors from 'all the Upper Wanganui hapus as high up as Taumarunui, and many men of Ngati-Maniapoto, Ngati-Raukawa, and Ngati-Tuwharetoa'.³² Following skirmishes, a truce was arranged and both sides agreed to disengage. Maori maintained their authority, but their territory had been penetrated by Government forces.³³

Maori negotiations
for internal unity
and peace

Concerted Maori efforts to secure peace with the Government and unity amongst the hapu followed. Nearly six years of diplomacy was required to restore the broken canoe. Te Anaua made the first move, in 1865, travelling up the river to Te Pehi, and stopping beside Ohinemutu, which had been razed during military operations. There, he twisted a knot in a taunoka shrub and said: 'I have made this knot that there may be peace inland of this place.'³⁴ The taunoka creeper interlaces itself to become strong and impenetrable, and so was his meaning made known – the Whanganui hapu must unite as the plaited rope of the taunoka creeper. His process of reconciliation was called Whiritaunoka (to plait the taunoka vine).³⁵

30. 'Report by his Honour the Superintendent of Wellington, of the Battle of Motua, and Subsequent Events on the Wanganui River' in 'Further Papers Relative to the Native Insurrection', AJHR, 1864, E-3, p 83

31. Ibid, p 82

32. Cowan, vol 2, p 38

33. Ibid, p 37

34. 'Notes of Native Meetings Held in Upper Wanganui', AJHR, 1870, A-13, p 3

35. Ibid; Father Jean Marie Vimbaud SM memoirs, DNM17(i), Archives of the Society of Mary, Wellington (cited in doc D15, p 4)

Replying, Te Pehi built a meeting house called Te Ao Marama (the world of light that follows the dark). When Te Anaua died, in 1868, before the work was completed, his life-sized effigy was carved for a centre post.³⁶ Te Anaua had led his people through the turbulent years of European settlement and war. By the time of his death, a new generation of Tupoho leaders, among them Te Keepa and Metekingi, were to follow in his footsteps.

In the year of Te Anaua's death, 110 highly skilled warriors under Te Keepa were a significant part of the colonial forces facing Titokowaru. Even here, hapu and iwi agendas predominated, with the Kingitanga bringing considerable pressure to bear on Whanganui kupapa (those who fought with the Crown against other Maori) to cease supporting the Government against Titokowaru, while Te Keepa was determined, primarily for reasons of mana, to fight alongside the Crown.³⁷

Peace was elusive at first, owing to a development that threatened to divide, though it eventually assisted unification. The opening of Te Ao Marama coincided with Te Kooti's running battle with the Government. In September 1868, Te Kooti had been defeated at Te Porere, near Rotoaira, by Government forces that included a Maori contingent under Te Keepa. Te Kooti escaped and, at the time of the opening of Te Ao Marama, was reported to be hiding in the upper Manganuiateao.³⁸ Would local Maori assist his capture or would they support him?

Te Kooti issue

Once more, there were divisions. The opening of the house turned into a dramatic meeting, the Kingites favouring Te Kooti, others supporting the Government, and two days of plain speaking proving inconclusive. Some tension was eased when a message from King Tawhiao renounced Te Kooti; thereafter, the Kingite, Turoa Topia, declared that he would pursue Te Kooti if he were given guns to do so. That raised two more questions: whether neutral hapu would allow a taua against Te Kooti to use their part of the river and whether those supporting the Government, and the Government itself, could trust the Kingite warriors with guns and ammunition.³⁹

Discussion continued at Ranana nine days later, with Te Keepa present, followed by a meeting with the Premier, William Fox, who was conciliatory. He assured all that they would not be punished with land confiscations if they now rejected Te Kooti, whatever their history in the recent war. Advised by Te Keepa and Metekingi, Fox agreed to trust Turoa Topia to fight Te Kooti, and let him have a stand of arms. In return, Topia promised to work with the Native Minister, Donald McLean, in the cause of peace.⁴⁰

Thus was the reconciliation advanced a stage further. The Premier was then welcomed to Te Ao Marama, where the last word was left to Tahana:

Let this first day of December, 1869, be the first day in our new life; let all the old thoughts and grievances be washed out; let this house, the Aomarama, be as the pool

36. 'Notes of Native Meetings Held in Upper Wanganui', AJHR, 1870, A-13, p 3

37. Belich, *The New Zealand Wars*, pp 238, 256

38. 'Notes of Native Meetings Held in Upper Wanganui', AJHR, 1870, A-13, p 5

39. *Ibid*, p 5

40. *Ibid*, pp 7-10



Figure 9: Te Keepa's pole at Raorikia, Whanganui River.

Photograph courtesy Alexander Turnbull Library (Harding–Denton collection, G477½).

of Siloam. . . . let all the old prejudices and old feuds be washed away. . . . When we separate do not let this be a long separation; let the Pakeha and the Maori come to the Aomarama, and let us hope for better times for the future.⁴¹

**Te Mamaku's
change of mind**

Finally, Te Mamaku came over, though he remained a Kingite throughout. He was not opposed to the taua against Te Kooti as such, but at first he would not let them use his stretch of the river.⁴² By the end of the year, however, he had withdrawn this opposition. Te Kooti's continuing, elusive presence in the bush appears to have encouraged him, and he made his peace with the Government. In March 1870, he sent his wife down the river 'for the purpose of making peace with Pehi and the rest of the Government Natives'.⁴³ When Richard Woon, the recently appointed resident magistrate for the upper Whanganui, visited Maraekowhai in April, he was overwhelmed by the warmth of his reception. Te Mamaku and his people, he reported, earnestly desired that 'Wanganui tribes may once more become a united people under the Queen'. At Te Mamaku's request, he held sittings at Maraekowhai and other settlements high up the river.⁴⁴

41. 'Notes of Native Meetings Held in Upper Wanganui', AJHR, 1870, A-13, pp 10–11

42. 'Further Papers Related to Military Operations Against Rebel Native', AJHR, 1870, A-8A, p 18

43. 'Reports From Offices in Native Districts', AJHR, 1870, A-16, p 22

44. 'Further Reports from Officers in Native Districts', AJHR, 1871, F-6B, pp 9–20

Te Mamaku and Te Pehi then attended a peace meeting at Putiki-wharanui in April 1872 under the auspices of Te Keepa to confirm peace and unity amongst the Atihaunui hapu from the source of the river to its mouth. Peace with each other and with Pakeha was symbolised when Te Pehi's brother, Tahana, wrapped a dogskin mat and a blanket – the clothing of Maori and Pakeha – around a young girl, and the girl was handed over to Topine, signifying how Whanganui Maori had come together again. Te Mamaku for his part presented Te Mawae with a magnificent canoe in honour of his dead brother, Te Anaua. The symbolism was again evident. A new canoe had been fashioned.⁴⁵

Peace and unity secured

Thereafter, Te Mamaku continued to exert his influence from the river's upper reaches until his death in 1887.⁴⁶

So ended the war, though the significant aspect of it for the purposes of this claim is that, at the end of it, the mana of Atihaunui remained. Peace was not a capitulation. It was simply something that was desired.

Retention of mana and river control

As for the river, during the war Maori continued to assume the right to control river passage in the time-honoured way. Though in practice the right could not always be maintained – against Government forces, for example. There had been no conquest that could take away the right altogether, and it was not part of the peace agreement that Maori should have to open their traditional territory to settlement. No authority was ceded. No surrender was made, and by 1870 the Government was as anxious for peace as anybody. It was sufficient that it had shown that it was a force to be reckoned with.

Subsequent conduct corroborates the Maori view that their authority remained as before. This is covered in the next section, but we note for now that in 1880 Te Keepa, the Maori fighter for the Government, erected a pole on the river near to where the coastal flats met the hills. His pole was to mark the outer limit to European expansion without his approval. At the same time, he proposed that the hapu place their lands into a single trust to prevent their further alienation. Thus, the inefficacy of 'Kingite' and 'Queenite' labels. Here, the Queenite was proposing the principle to which the Kingites had adhered.

Te Keepa's pole

5.3 THE QUESTION OF AUTHORITY IN PEACE

Following the peace pact of 1872, from a Maori point of view the issue of authority remained alive as before. For the New Zealand Government, peace was the opportunity to promote colonisation with renewed vigour. While there were four Maori members of Parliament, they tended to represent kupapa interests. The Government was well aware that control still had to be extended into many of the lands of those it had fought against. This included mainly central North Island land, which had to be purchased and opened up.

Assumptions on authority after the war

45. Resident Magistrate Woon to Native Minister, 23 April 1872, AJHR, 1872, F-3A, p 3

46. DNZB, T49, pp 469–470

Government policy
of rapid European
settlement

Under Sir Julius Vogel's policy, the Government pursued a bold, comprehensive strategy to ensure a steady European advance into Maori districts, borrowing heavily to assist immigration and to build a telegraph system, railways, and roads. An increasing European presence, it was envisaged, would help pacify Maori districts and extend the rule of British law, while the progressive acquisition of Maori land for settlement would strengthen the colonial economy.

Associated
legislation

Preceding the policy was a raft of facilitating statutes. The two most well known being the euphemistically named New Zealand Settlements Act 1863, under which land was confiscated for military settlements in proclaimed districts where a considerable portion of Maori had been engaged in 'rebellion'. The aim was to establish a sufficient number of settlers able to protect themselves and preserve the peace, and to defray the cost of the war.

Impact of the Native
Land Acts

The historical record shows that the Native Land Court process facilitated the purchase of Maori land and partition. It did so by obviating the widespread tribal opposition to land sales by enabling the Crown and private purchasers to buy direct from individual Maori shareholders named on the certificate of title awarded by the court.

Few things could have been more threatening to the peace pact of 1872. Not merely a peace with the Government, it had been intended to unite the hapu. Like Te Keepa's trust, it had augured of an iwi control, not dealings by the Government with individual Maori shareholders. This threat to Maori autonomy applied nationally, and throughout the country Maori reacted with various national and regional schemes.

These schemes are now briefly considered to show how Maori saw their own authority as continuing, while appreciating that the new environment compelled the taking of special steps to maintain it.

5.3.1 The quest for national autonomy

Maori autonomy
and the repudiation
movement

From the early 1870s until after the turn of the century, large intertribal meetings were held to formulate a coherent policy of self-government and self-administration of land, and to devise an organisational structure that the Government could work through. In May 1874, Henare Matua, the chief Ngati Kahungunu spokesman of the Hawke's Bay repudiation movement, and 100 followers attended an eight-day meeting on the Whanganui River at Kaiwhaiki. In his speech, Matua said that all land selling and leasing should cease, the Native Land Court should be abolished, every major tribe should be represented in Parliament, and roads, telegraph lines, and railways should not traverse Maori land. Over 300 Whanganui Maori gave their names as active supporters, and a council of 12 was elected to present their grievances and demands to Parliament.⁴⁷

Komiti and the
Maori parliament

The movement, which began in Hawke's Bay, was to take a national character and lead to a resurrection of a Maori parliament along the lines of that set up by

47. DNZB, M38, pp 284-285; Woon to Native Secretary, 16 June 1874, AJHR, 1874, G-2, pp 15-16 (cited in doc #2, p 38)

Governor Browne at Kohimarama in 1860. First, a network of komiti, or committees, was formed. Whanganui representatives attended large meetings held for the purpose at Porangahau in 1874, Pakowhai in 1875 and 1876, Omahu in 1877, and elsewhere. Maori, it was considered, should organise their own land management policies through their own parliament.⁴⁸

In 1877, Mete Kingi built a 'quasi-parliament' called Te Paku o te Rangi at Putiki, and in 1881 the Ngapuhi people built the meeting house Te Tiriti o Waitangi in the Bay of Islands. Both places were the centre of talk for the establishment of a Maori parliament for Maori and the tribes as a whole.⁴⁹

The intention was to separate in order to ensure that Maori people would decide Maori policy, rather than have Pakeha do it for them. In consequence, the two races would work together more harmoniously, not one above the other but each cooperating in their own ways. Some of the staunchest adherents of a Maori parliament, like Te Keepa and Metekingi in Whanganui, were those who had acted in alliance with the Government in the war. Moreover, Metekingi and other kupapa held the four Maori seats in the New Zealand Parliament.

Such a position was not understood by most Pakeha and was more often than not seen as a threat, rather than a basis for peaceful coexistence. Petitions asking for a Maori parliament were ignored. In 1879, Paora Tuhaere, a Ngati Whatua chief who had also stood in alliance with the Government during the war, reconvened the 1860 Kohimarama conference at Orakei. Some 300 chiefs discussed the Treaty of Waitangi as 'a covenant of peace' and a basis for unity, not only for the tribes but for Maori and Pakeha. Again, this was to no avail.⁵⁰

1879 Kohimarama conference

After the Orakei meeting, the drive to establish a Maori parliament was taken up by the Kotahitanga, or unity movement. The goal was to obtain parliamentary authority for a Maori parliament established in accordance with the principles of the Treaty of Waitangi, and to have self-governing Maori districts set aside as provided for in section 71 of the New Zealand Constitution Act 1852. Once more, the Whanganui tribes were involved, and once more the proposal was not seen as separatist. As Te Keepa said, 'It was only by working in friendly relations with the Pakeha that they could attain their desired ends.'⁵¹

Kotahitanga movement

Still the Government was not sympathetic, and the proposition appears to have received no serious consideration by the House. Eventually, in 1888, an intertribal meeting at Putiki resolved to create a Maori parliament. In 1891, the Kingitanga established its own parliament – Te Kauhanganui – but not all could support a parliament under the King's name, and in January 1892, at Parikino on the Whanganui River, a representative committee of 80 was formed to draft suitable legislation for another. A constitution comprising a lower house elected by tribally based districts and an upper house of chiefs was adopted at Waitangi in April, and

Maori parliaments

48. Keith Sinclair, *Kinds of Peace: Maori People after the Wars, 1875-85*, Auckland, Auckland University Press, 1991, pp 105-110

49. For an overview of these initiatives, see Ward, p 272; doc E2, pp 45-46.

50. Ward, pp 115-118, 272

51. Cited in John Williams, *Politics of the New Zealand Maori*, Auckland, Oxford University Press, 1969, pp 48-67 especially p 49

the first parliament assembled at Waipatu in June 1892. Thereafter, it met annually at different places until 1902, when a motion to disband was passed.⁵²

5.3.2 The quest for local autonomy

Rohe Potae (King Country)

Action at a local level varied from place to place throughout the country, but here the concern is with that action taken in the Whanganui district. A part of the upper catchment area was included in the Rohe Potae (King Country). This lay behind the aukati (boundary) erected by the King party along the confiscation line. After defeat in Waikato and the loss of Waikato and Waipa land in 1864, Tawhiao, the Maori King, withdrew into the fastness of his Ngati Maniapoto domain. Europeans were denied access, and the King called on his supporters to keep surveyors and the Native Land Court out of the King Country.⁵³

Runanga and Maori justice systems

At places along the river, however, new runanga, sometimes called komiti, were established to administer local affairs. About 1861, runanga had functioned amongst Ngati Kahungunu of central Hawke's Bay, who had not joined the Kingitanga movement but desired none the less to keep social order and stop land selling; the pattern was similar in other places.⁵⁴ In 1862, Governor Grey had tried to incorporate a system of village and district runanga into the structure of Government on the basis of 1858 legislation. According to historian Keith Sinclair, 'in the atmosphere of uneasy peace after the first Taranaki war, the system did not work and little was achieved'.⁵⁵ In the 1870s, Maori in many districts created their own runanga or komiti, which were sometimes indistinguishable from runanga. In 1875, and again in 1878, Richard Woon, a resident magistrate, reported that a runanga was operating on the Whanganui River at Parikino, where his court sat. It was summoning people for minor offences, imposing fines, seizing property, settling land disputes, issuing certificates of title for land, and charging fees.⁵⁶

Runanga opposition to the Native Land Court

The runanga was also very much concerned with land affairs and attempted to thwart the Government's presumptive control of Maori land through the Native Land Court. The court was a direct affront to their rangatiratanga, their right to manage and control their own resources themselves. When the court began to investigate and award title to land adjoining the river, as a prelude to land buying from individuals, the Whanganui rangatira sought to keep the matter out of the court by settling their land boundaries themselves.

52. Williams, pp 48-67

53. M P K Sorrenson, 'The Maori King Movement 1858-1885', in *Studies of a Small Democracy: Essays in Honour of Willis Airey*, Robert Chapman and Keith Sinclair (eds), Auckland, Auckland University, 1963, pp 48-55; Cathy Marr, *The Alienation of Maori Land in the Rohe Potae (Aotea Block), 1840-1920*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), December 1996, ch 2

54. As considered by the Waitangi Tribunal in *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995, sec 5.4.2; J Rutherford, *Sir George Grey KCB, 1812-1898: A Study in Colonial Government*, London, Cassell, 1961, pp 457-459, 473 569

55. Sinclair, pp 99-102

56. *Ibid*, p 105; Woon to under-secretary of Native Affairs, May-June 1874, AJHR, 1874, G-2, pp 14-18 (cited in doc E2, p 38)

At Parikino in May 1871, the Whanganui and Ngati Apa rangatira and representatives from Ngati Raukawa and Ngati Whiti agreed, 'for the most part', that the boundaries of their lands lying between the Whanganui and Rangitikei Rivers inland to the base of Tongariro would remain in tribal title. Then, at Koriniti in February 1872, some 300 people from all parts of the river between Putiki and Jerusalem discussed the setting aside of land between the Whanganui and the Turakina Rivers, and in the neighbourhood of Atene and Ranana, as a reserve in perpetuity for their descendants.⁵⁷

Runanga
establishment of
tribal boundaries

Prominent in this plan to prevent the further alienation of Maori land through the Native Land Court subdivision and individualisation of customary title was a scheme promoted amongst the hapu by Te Keepa. This former Government ally had been relieved of his duties as a native assessor in the resident magistrate's court and as a land purchase officer for opposing surveys and land sales around Murimotu. Adopting both Maori and European techniques, in 1880 Te Keepa proposed that the Atihaunui people should place their land in a trust to control its alienation much as the Reverend Henry Williams had attempted 41 years before. In this case, the intention was that the trust should put the land through the Native Land Court to obtain 'a marketable title', set aside inalienable reserves, and open up land for settlement under its control.

Te Keepa's land trust

Te Keepa was joined by a council of some 180 Whanganui leaders and signatories to the trust, including a number who were minor office holders in the Government.⁵⁸ For reasons that are given later, the scheme could not withstand the omnipresent programme of the Native Land Court.

5.3.3 The quest for river control

In an assertion of control of the river, Te Keepa imposed an aukati. A carved post some 30-feet high was erected at the confluence of the Kuarapaua Stream and the Whanganui River to mark where the boundary for the land trust commenced. Te Keepa announced that the river above Raorikia would thenceforth be closed to all Pakeha without a pass signed by him.⁵⁹

Assertion of river
control

This was neither the first nor the last time that Whanganui Maori, assuming a right of river control, imposed either an aukati (a boundary beyond which no one is supposed to go) or a rahui (a restriction most commonly used on resources to ensure they were not depleted). While Europeans thought of the river as a public highway open to all, to Whanganui Maori it was a tribal waterway over which their rangatira exercised authority. From time immemorial, customary rights, protocols, obligations, and sanctions had governed its use. At times, control was demonstrated by rahui to reserve parts from use and aukati to control river passage.⁶⁰

River control: aukati
and rahui

57. For references to meetings, see doc E2, pp 33-4.

58. Woon to Halse, 14 June 1871, MA2/1 (cited in doc E2, pp 33-34)

59. Woon to under-secretary, 20 October 1880, MA13/14 (cited in doc E2, p 52)

60. Document A23, p 29; doc A77, vol 1, pp 12-13; doc A49, pp 52, 56-65, 121-22; doc D22, pp 1-2 (citing Elsdon Best, *Religion and Mythology*, Wellington, 1982, pt 2, pp 15, 17, 55, 184-191); Booth to Major H Straith, Pipiriki, 19 April 1859, CN/M21, micro MS 4, pp 276-279, ATL (cited in doc D24, pp 6-7)

Although Te Keepa's aukati was the example best known to the settlers, other chiefs also placed aukati on the Whanganui and its tributaries according to their areas of interest. At different times, aukati were placed on the Tangarakau River, which joins the Whanganui 32 kilometres above Pipiriki, to keep out Europeans prospecting for coal or gold. In 1861, James Crawford was prevented from going further upriver than Utapu because he refused to pay a toll, and the river beyond that point remained closed to Europeans for some five years. In 1877 and 1884, there were reports of later parties being turned back.⁶¹

Early in 1884, John Rochfort was sent by the Government to make a reconnaissance survey of the central plateau, pending its decision on the route of the main trunk railway. Rochfort made two unsuccessful attempts to get to Taumarunui via the Whanganui, Pehi and other rangatira refusing him passage over those parts of the river or its tributaries in their control. On the advice of the Native Minister, John Bryce, he decided to 'go around the north end of the district' to try again to enlist Pehi's support. He finally reached Taumarunui after visiting and obtaining support from, in turn, Topia Turoa at Rotoaira, Matuahū at Tokaanu, and Te Heu Heu at Waihi.⁶²

5.4 THE IMPACT OF GOVERNMENT POLICY

Counter-policy of
the Native Land
Court

These endeavours were to no avail. Te Keepa's trust, the runanga, and the Maori parliaments were short-lived, for nothing could withstand the onslaught of the Native Land Court. It made its determinations even if only one person appeared, compelling others to attend or have their names omitted from the listed interest holders, and nothing could restrain the individual from applying for a partition of interests once tribal controls were removed. Nor could the tribe withstand the power of the Government, with its laws and supporting infrastructures, to wrest control of the river.

The process by which the Government assumed an exclusive authority over the river, is considered in the next chapter. Here, brief mention is made of Government land acquisition programmes, and the machinery established to administer Maori lands.

Government land
acquisition
programmes

Beginning in 1871, the Government set out to acquire as much land as it could between Whanganui and Taupo for 'colonization and settlement' after it had been put through the Native Land Court.⁶³ By 1907, the Stout–Ngata commission estimated that, in Whanganui, Maori retained about 500,000 acres of the approximately 1.77 million acres they had held under customary ownership.⁶⁴ Most

61. 'Reports from Offices in Native Districts', AJHR, 1877, G1, p 19; 1878, G-1, p 13; 1880, G-4, p 17. For an overview, see doc A49, pp 56–67.

62. 'John Rochfort's Report on Obstructions to Survey', AJHR, 1884, D-5, pp 3–5 (doc A49(a), pp 195–200)

63. McLean to Booth, 7 September 1871, AJHR, 1873, G-8, p 27; Booth to under-secretary of Public Works, 12 July 1872, AJHR, 1873, G-8, p 27 (cited in doc E2, p 36)

64. Robert Stout and Apirana Ngata, 'Interim Report on Native Lands in the Whanganui District', AJHR, 1907, G-1A, pp 15–16 (cited in doc E2, pp 75–6)

of their customary land had been purchased after the wars but before the end of the century.

When, in 1958, the Maori Appellate Court investigated the previous progress of court proceedings concerning lands above the tidal limit at Raorikia, it found that, of the combined totals of 142½ miles on the left bank and 143 miles on the right bank, only two miles and 25 chains had not been investigated before 1903.⁶⁵ All but one of the riparian blocks, Ohoto 1, bordered the river on one side only, and none of the grants purported to confer the bed of the river, or any part of it, on the purchasers.⁶⁶

Conversion of riparian lands

As for the Maori komiti or runanga, they largely lapsed as did the alternative bodies introduced by the Government with more limited powers. In 1882, Henare Tomoana, the member for Eastern Maori, introduced a Bill for elected Maori committees to decide disputes between Maori and regulate social abuses in proclaimed districts. It contained a clause that the Native Land Court should take judicial notice of committee decisions when determining owners, successors, and boundaries, but the Bill was withdrawn when the Government undertook to introduce a substitute.⁶⁷

Maori komiti

The Native Committees Act 1883, which resulted, was not an effective vehicle for the management of Maori affairs at that time. The committees were regional, not tribal, the elected leadership was limited to 12, they could hear only small disputes involving less than £20, and any views on land questions were simply to be reported to the court. Native Minister John Ballance observed that a native committee under the Act existed when he visited Whanganui in 1885, but committees under this statute were not generally supported, and in 1886 the Act was repealed.⁶⁸

The Government gave no further consideration to Maori representative structures until, at the urging of Sir James Carroll and assisted by a new generation of young Maori leaders including Apirana Ngata, the Maori Councils Act and the Maori Lands Administration Act were passed in 1900. This legislation was essentially an attempt to reach a compromise with the Kotahitanga movement over a Maori parliament, but it fell far short of providing for Maori self-government.

Maori councils

The Maori councils were harnessed to a programme of health reform under the Health Department. The Maori land councils with a majority of Maori members were intended to administer land that had not passed through the Native Land Court, and Whanganui Maori vested significant amounts of land in the Aotea Land Council for that purpose. But after the Act was amended in 1905 and 1909, Maori members were in the minority, and the Aotea Land Board leased and sold large amounts of papakainga land during the next two decades.⁶⁹

Aotea Land Board

65. Document A77, vol 2(9), p 5

66. Document A27(p), p 257; doc A49, pp 43-44

67. The Native Committees Empowering Bill 1881 from 'Crown Bills Rejected 1881-82', Crown Forestry Rental Trust

68. Document E2, p 56; AJHR, 1885, G-1, pp 1, 5

69. Selwyn Katene, 'The Administration of Land in the Aotea District, 1900-27', MA thesis, Victoria University of Wellington, 1990 (cited in doc A49(d), pp 94-115); Williams, pp 98-129

5.5 CONCLUSION

The wars did not relieve Atihaunui of their traditional authority and rights of river control. In the peace that followed, Maori took strenuous steps to maintain their authority, their lands, and their control of the river, but alternative Government policies inimical to that course prevailed.

The Native Land Court system of land purchase policies and the machinery provided for local Maori administration subsumed mana Maori.

None the less, the Maori leadership still favoured development and continuing association with the settlers. Theirs was not a separatist movement, as some contended, but an endeavour to capitalise on the asset that they had, to ensure lasting benefits for their people, and to prevent their marginalisation. It was an endeavour to keep a place where two peoples could coexist and to maintain an environment where both their own authority and that of the Government could be respected. The Treaty of Waitangi had guaranteed no less.

CHAPTER 6

HOW THE RIVER WAS TAKEN

6.1 INTRODUCTION

The river passed from Maori control partly through the application of English law but primarily through the operation of New Zealand statutes. It did not result from the sale and purchase of riparian land or from negotiations with Atihaunui. In the final analysis, it came about because the New Zealand Government had assumed and had then acquired, in fact, an unbridled power over the Maori people.

River passed primarily through parliamentary intervention

This chapter considers the statutory process and Maori objections.

6.2 THE STATUTORY REGIME

Earlier, we introduced the raft of legislation over years by which the Government assumed control of rivers and water for agricultural, industrial, drainage, town, and recreational purposes. This was traced from ordinances of 1864 for water-powered flourmills and sawmills through to statutes on water rights for mining, irrigation, and hydroelectricity, beginning with the Gold Fields Act 1862 and culminating in the Resource Management Act 1991. Provisions to secure rivers for transport were considered, beginning with the Timber Floating Act 1873, and also measures for flood protection, such as the River Boards Act 1884. These consolidated the Government's control over rivers and water, regulating potential conflict between farming, mining, and industrial interests, preventing monopolies and assuring public access, though rarely with thought for Maori customary usages.

General statutes on water and statutes specific to Whanganui

Here, we are concerned with statutes more specific to the Whanganui River.

6.2.1 Enabling legislation for the port

From 1854, the Government was in the settlers' control. With the introduction of representative institutions, the Wanganui settlers could readily enlist the support of the Wellington Provincial Council and the General Assembly for legislative authority to develop the river, the port, and the sea entrance. Wanganui settlers elected four members to the Wellington Provincial Council and one member to the House of Representatives. They also made common cause on matters involving wider west coast concerns with the members for the neighbouring Rangitikei,

Settler control of the Government

Waitotara, and Egmont electorates, and their interests were at all times well served by influential members of the House.

The position was not materially altered when four Maori electorates were established in 1867, because the Maori members were so outnumbered.

Between 1858 and 1878, the General Assembly passed four general Acts governing the building of roads, bridges, ports, and harbours and four Acts specific to Wanganui.¹

Highways and
Watercourses
Diversion Act 1858

The Highways and Watercourses Diversion Act 1858 empowered superintendents and provincial councils to 'build Bridges Dams Wharves and other erections on the Banks or in the Beds of any . . . River Stream or Creek'. They could also 'sell exchange or otherwise dispose of . . . the bed of any river stream, or creek so diverted or stopped up'. Crown titles were granted on any land for the purposes of the Act and later disposed of. Compensation for Maori prejudicially affected was not provided for and they were not represented on the local bodies.

Marine Acts 1866,
1867

The Marine Acts of 1866 and 1867 dealt with ports, pilots, and lighthouses. The 1867 Act set out a comprehensive code for the control and management of ports. A port was defined as 'any port harbour or haven or navigable creek or river or lake or inland water within the limits defined for such a port' (s 3).

The Act delegated administrative responsibility to provincial superintendents, boards, or marine boards, subject to overriding powers of supervision and regulation vested in the Governor in Council. The power to define and re-define port perimeters was to be exercised by the Governor or a provincial superintendent, subject to notification in the *Provincial Gazette* (s 32). Nothing in the Act, however, was to interfere 'with any rights or privileges of water frontage or any other rights or privileges of any persons in to or over any lands reclaimed or to be reclaimed from the sea' (s 33).

Wanganui Bridge
and Wharf Act 1872

During the Taranaki wars, a bridge across the Whanganui River to link Manawatu and South Taranaki by road became a military priority, and the provincial government made a number of unsuccessful attempts to fund and build one. In 1872, the General Assembly passed the Wanganui Bridge and Wharf Act to sort out a financial tangle, authorise the Borough of Wanganui to raise £20,000 to finance the bridge, empower it to control and manage the bridge and the wharf, and charge tolls for their use. Section 26 of the Act defined the boundaries of the wharf to include:

all the foreshore of the Wanganui River between Victoria Avenue and Churton Street, containing three acres three roods and thirty-eight perches . . . and bounded towards the South-east by a line of three feet in depth at low-water spring tides, and towards the North-west by the line of high-water spring tides . . .

1. The four general Acts were the Highways and Watercourses Diversion Act 1858; the Marine Acts of 1866 and 1867 (concerned with ports and related matters); and the Harbours Act 1878. The four Acts specific to Wanganui were the Wanganui Bridge and Wharf Act 1872; the Wanganui River Foreshore Grant Acts of 1873 and 1874; and the Wanganui Harbour and River Conservators Board Act 1876.



Figure 10: Tawhitinui Pa on the Whanganui River. Photograph by Frank Denton.
Courtesy Alexander Turnbull Library (Tesla Studios collection, G2331274).

The Governor was empowered to issue a Crown grant for the wharf in the name of the Wanganui Borough. Subject to the consent of the Governor, the borough was also empowered to build works obstructing public navigation over so much of the wharf as was covered by the water at high tide (s 31). It was assumed that, by common law, the Crown had an estate and interest in the bed of the river on which the wharf was constructed.

The Wanganui River Foreshore Grant Act 1873 authorised the Governor to grant certain land, being ‘part of the bed of the River Whanganui’ to the Wellington provincial superintendent under the provisions of the Public Reserves Act 1854. In this case, the transfer was to be without prejudice to the ‘rights of any persons claiming and entitled to water frontage’. Owners or persons deprived of water frontage as a result of the wharf and its facilities were entitled to compensation. The land comprised 29 acres on the right side of the Whanganui River but excluded the three acres three roods 38 perches of river foreshore between Victoria Avenue and Churton Street referred to in the Wanganui Bridge and Wharf Act 1872. The Act also excluded up to a quarter of an acre from the designated port area for its customs examination shed and river frontage (ss 2–4, schedule).

These provisions were repealed by the Wanganui River Foreshore Grant Act 1874. The principal purpose of this Act was to substitute the Wanganui Borough for the Wellington provincial superintendent as the body to whom a Crown grant

Wanganui River
Foreshore Grant Act
1873

would be given in respect of part of the bed of the Whanganui River. The area of land comprised some 56 acres (schedule). It appears that this included the 29 acres referred to in the 1873 Act. The approval of the Governor was necessary before the Wanganui Borough could reclaim any land granted to it or carry out harbour or other works. Owners of land injuriously affected were entitled to compensation.

Maori town reserve

On this occasion, however, the Native Minister, now Sir Donald McLean, secured a provision excepting up to one acre out of the lands authorised to be granted to the Wanganui Borough. This was to be vested in the Crown as a reserve for the use of the Maori inhabitants of the town of Wanganui and the neighbourhood as ‘a market-place and place for landing and embarking goods and persons’, and such other purposes as the Governor might determine (s 4).

Wanganui Harbour
and River
Conservators Board
Act 1876

The 1874 Act survived a little over two years before being repealed by the Wanganui Harbour and River Conservators Board Act 1876. The 1876 Act established a board to take the control and management of the Wanganui Bridge and wharf from the Wanganui Borough Council. The board comprised nine members, six elective and three ex officio. There was no provision for Maori representation.

The river was defined as ‘all the navigable waters of the River Wanganui as far inward as the railway bridge across the river’ (s 2). The Governor was authorised to grant to the board the 56 acres referred to in the 1874 Act and four further lots comprising 200, 1000, 67, and eight acres. This additional land, it appears, was not part of the riverbed and was to provide the board with a leasing endowment. The earlier provision to reserve up to one acre as a landing place for Maori was retained. In addition, the Crown reserved 10 acres for a flagstaff battery and signal station and 20 acres for a land-guard battery (s 53).

6.2.2 Code of management for harbours

Harbours Act 1878

In 1878, a comprehensive code was enacted for the management of New Zealand harbours. The Harbours Act 1878 repealed all existing harbour board Acts and associated legislation relating to the seven provinces. In some cases, including the Wanganui Harbour and River Conservators Board Act 1876, certain provisions of the repealed legislation were kept in force (s 3, first schedule). The existing boards named in the second schedule were deemed to be constituted under the 1878 Act, as provided in the second schedule (ss 19–20). The earlier provisions relating to the control of the Wanganui bridge and wharf by the board were retained (s 3, first schedule). Once again, there was no provision for Maori representation on the Wanganui Harbour Board (s 19).

The 1878 Act defined ‘harbour’ and ‘port’ in extremely wide terms. These included ‘any harbour properly so called, whether natural or artificial, and any haven, estuary, navigable lake or river’ (s 8). It is likely, however, that the intention of the Act was to extend the board’s jurisdiction only over the tidal parts, extending upriver to Raorikia, some 24 kilometres from the town bridge. ‘Navigable river’ was presumably meant to refer to the tidal part, and once more we must refer to the underlying principle of the common law that, by prerogative right,

the Crown is prima face the owner of the beds of seas, foreshores, and the tidal reaches of rivers.

Tidal lands were defined as 'such parts of the bed, shore, or banks of a tidal water as are covered and uncovered by the flow and ebb of the tide at ordinary spring tides', and 'tidal water' had a corresponding meaning. Section 7 provided that nothing in the Act should be construed or allowed to affect any right or prerogative of the Crown.

The Harbours Act 1878 replaced some 18 separate Acts and provided uniform conditions for the control and management of all ports in the colony. As with earlier legislation for the use of harbours, lakes, and navigable rivers, it was grounded in two assumptions: the Crown's prerogative rights must be acknowledged and statutory provisions should be consistent with common law principles. The Act was silent on both Treaty and customary Maori rights to the foreshore and rivers. In its *Report on the Muriwhenua Fishing Claim*, the Tribunal noted that the Harbours Act 1878 'put paid to any contention that the Crown's common law right to the foreshore was subject to customary usage, at least until 1986 when the doctrine of aboriginal title was revived'.²

6.2.3 Wanganui River Trust to open and improve navigation

(1) Navigation hazards

From the time Europeans first traversed the Whanganui River, they were impressed by its beauty and grandeur; but they were soon to discover that the numerous rapids, along with fallen trees and large boulders, were formidable obstructions to paddle steamers. Some rapids in late summer, when water levels were low, were impassable.

During the summer of 1886 to 1887, the *Tuhua* ran a weekly service between Wanganui and Pipiriki, but the local managing company was soon in financial difficulties and the steamer was laid up. The vision, it appears, was to establish an all-year service, and then extend beyond Pipiriki to Taumarunui, where a link could be made with the main trunk railway from Auckland. Such a link would create a significant river tourist route to Wanganui.

The 140-mile journey by steamer from Wanganui to Taumarunui, and the proposed junction of the river and the main trunk railway, faced enormous difficulties. There were 40 rapids in the lower section of 51 miles from the port to Pipiriki, and 103 in the middle section of 59 miles from Pipiriki to Maraekowhai. To establish and maintain an all-year service was to require not only more venture capital but also considerable public money and 30 years' persistent effort with surveys, snag removals, and the broaching of rapids, as well as the building and maintenance of groynes and training walls to regulate water flows.³

2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, sec 5.4.5

3. David Young, *Woven by Water: Histories from the Whanganui River*, Wellington, Huia Publishers, 1998, pp 191–225

The harbour board lacked the power to levy a rate for river improvement, and in any event, there was a strong case for giving priority to the development of the port. Furthermore, the board's jurisdiction extended only as far as Raorikia, the furthest point of the tidal flow. Ballance made unsuccessful attempts in 1884 and 1887 to get a local rating Bill through the House. As Premier, however, his scope for legislative enactment was greatly increased.

(2) Establishment of the Wanganui River Trust, 1891

River Boards Act
1884

The River Boards Act 1884 had given wide-ranging powers to local authorities responsible for the management of rivers, streams, and watercourses, but the creation of new river boards required separate enactments. Ballance successfully promoted the Wanganui River Trust Bill in 1891.

Wanganui River
Trust Bill

The Bill attracted little attention in the House. Two members commended the Government for the initiative it was taking to preserve the Whanganui River's scenic beauty but qualified their endorsement with serious doubts about the wisdom of attempting to remove rapids from its upper reaches. Hoani Taipua, the member for Western Maori, shared their concerns: 'if these natural drifts or rapids were dug away the water would rush out and dry up the river'.⁴

Protection of Maori
interests

While working up his Bill, however, Ballance had official advice that to empower the trust to do all things necessary for opening or improving the navigation of the river might have 'Native complications'.⁵ However, this was ignored during drafting, except in so far as the eventual Act exempted customary lands from the trust's jurisdiction, but as soon as customary land was passed through the Native Land Court, the Governor could declare lands subject to section 8 or section 9. Private lands were also exempt under section 11.

During the second reading, James Carroll, the member for Waiapu and the first Maori to represent a European electorate, proposed an amendment to safeguard Maori rights under the Treaty of Waitangi, referring to 'fishing rights and so forth'. The amendment, which was adopted as section 11, was correspondingly general:

Nothing in this Act contained shall affect any rights conferred upon the Natives by the Treaty of Waitangi, or shall be deemed to confer upon the Trust any jurisdiction over private lands, or over any Native lands the title to which has not been investigated by the Native Land Court.

The Act had two objectives: to preserve the natural scenery along the banks of the upper Whanganui and to keep the river in a fit state for navigation. The river board district established by the Act began at Raorikia and extended for one mile on each side of the river to a point four miles from its source (s 3). The place where Taumarunui would be built, at the junction of the Ohura, was thus included. Over that district – estimated by one member of the House to be about 200,000 acres – the trust could do 'all things necessary for opening up or improving the navigation

4. Hoani Taipua, 3 September 1891, NZPD, 1891, vol 74, p 220

5. John Ballance, 3 September 1891, NZPD, 1891, vol 74, pp 217–218; memorandum from Crown Law to John Ballance, 24 February 1891, J1 1895/947, NA Wellington (doc A49(b), p 305)

of that part of the Wanganui River'. With the approval of the Governor, it could 'erect jetties and make landing-places' (s 5). Instead of being authorised to levy rates, the trust was granted a land endowment of 10,000 acres from the Waimarino block (s 6). With the approval of the Governor, the trust could declare any land within its district to be a public domain and administer it under the Public Domains Act (s 9). It could also take over lands outside its boundaries for public domains (s 10).

The trust comprised seven members: the Mayor of Wanganui; two representatives of local county councils; the chairman of the Wanganui chamber of commerce; the two local members of the House of Representatives; and a person appointed by the Governor (s 2). The member for Western Maori was not included, and there was no provision for consulting those Maori immediately affected. Referring to the membership of the trust, Ballance said 'he could not conceive that any public body could be more fairly constituted'.⁶ By the standards of the day, and for long afterward, that was no doubt an acceptable statement from a Pakeha point of view. Yet, in fact, it constituted further disregard of Maori river interests.

(3) Increase of river trust's powers, 1893

The Wanganui River Trust Act Amendment Act 1893 increased the trust's powers. 'At any time and without giving any notice', it was authorised under section 2:

- (1) To remove any earth, stone, boulders, or sand off, from, or out of the channel or any land upon the banks of the river, . . .
- (2) To deposit the same in any other part of the district:
- (3) and for any of the purposes of the trust to make use of any such earth, stone, boulders, or sand, notwithstanding anything contained in the said Act, and notwithstanding any such earth, stone, boulders or sand shall be removed from or used upon land which is owned by Natives under their customs or usages, whether the ownership of the same has or has not been defined by the Native Land Court.

Maori claiming an interest in land from which any such materials were taken could apply to the Native Land Court for compensation, and the court could make orders as it saw fit, having regard to the provisions of the Public Works Act 1882 (s 3).

Introducing the amendment Bill, Archibald Willis, the member for Wanganui, described it as 'simply to allow the navigation of the river to be proceeded with'. Its passage through the House was short but tense. Mutu Kapa, the member for Northern Maori, said that it might be 'favourable to the Europeans, but the Natives considered it detrimental to their interests'.⁷ If it became law:

the River Trust could dig the banks of the river where they pleased, and interfere with the Natives generally . . . It was all very well to bring pressure upon members to pass

6. John Ballance, 3 September 1891, NZPD, 1891, vol 74, p 218

7. Archibald Willis, 25 September 1893, NZPD, 1893, vol 82, p 636

Bills which gave great benefits to Europeans, but the House never passed any Bills which gave benefit to the Native people.⁸

Taipua supported him. The Bill, he said, should be sent to the Native Affairs Committee, where it would be possible for Te Keepa to appear and give evidence. This was a pointed reminder to the House that, four days previously, the Native Affairs Committee had reported on a petition of Te Keepa and 59 others protesting against the Bill, but it had made no recommendation.⁹

Seddon intervened. The Bill, he said, was 'simply to give some slight extended powers, and to remove some technical difficulties'. He hoped the Maori members would not force the House to vote. The Bill, he claimed:

did not really affect the interests of the Natives prejudicially: in fact, it was for their benefit. No one would benefit more than the Natives, who were making a good living on the river. The removal of these falls and the protection of the river bank were really in their interests.¹⁰

He then appealed to the national interest. The river was 'one of the colony's assets', he claimed, and its navigation was of national importance.

The House divided and the Bill passed its second and third readings. No further regard appears to have been had to section 11 of the principal Act, which expressly preserved the rights conferred on Maori by the Treaty of Waitangi.

The Wanganui River Trust thus obtained sufficient statutory authority to do all that it thought necessary to clear the river for a regular steamer service. The Government encouraged local efforts to establish such a service, providing annual subsidies for river mail deliveries amounting to £19,680 for the period 1890 to 1912. From 1899, it also provided subsidies to 'the owners of steamboat services', which by 1912, totalled just over £7900. Between 1905 and 1912, it assisted the work of the trust through the expenditure of £11,550.¹¹

(4) The trust empowered to remove river gravel

Gravel and the
Wanganui River
Trust Amendment
Act 1920

The assumption that the Crown owned the bed of the Whanganui River, and thus the gravels and minerals within it, was continued in the Wanganui River Trust Amendment Act 1920. Section 5 of the Act gave the Wanganui River Trust control over, and liberty to sell, the river gravel and shingle in its district.

It was a valuable concession. Work on the main trunk railway in the vicinity of Taumarunui created a demand for river stones and gravel as ballast for the railway track. With further railway works and roading for motorised transport, this demand was to increase in succeeding decades. Before 1920, only limited use had been made of extraction and crushing machinery, but mechanised gravel processing was to become a significant industry thereafter, along with sand

8. Mutu Kapa, 25 September 1893, NZPD, 1893, vol 82, p 636

9. Hoani Taipua, 18 July 1893, NZPD, 1893, vol 82, p 636; 'Major Kemp's Petition', NZPD, 1893, vol 79, p 549; 'Native Affairs Committee', AJHR, 1893, 1-3, p 17

10. Richard Seddon, 25 September 1893, NZPD, 1893, vol 82, p 636

11. J Hislop, under-secretary of Internal Affairs, 4 November 1912, AJHR, 1912, C-15B, pp 1-2

extraction for concrete. The demand increased when the construction of the River Road to Pipiriki began in 1931.¹² The 1920 amendment Act contained no provision for compensating Maori. In 1958, the Wanganui Harbour Board was given the right to license gravel and sand extraction from the river's tidal reaches.¹³

(5) Substantial increase in the trust's powers

The Wanganui River Trust Amendment Act 1922 had reconstituted the Wanganui River Trust as a trust board, amended representation on it, and substantially increased its powers. The reconstituted board comprised representatives of the counties and boroughs of the region and the members of Parliament of the four electorates in the board's district. The member for Western Maori was not included and Maori identified with the river were not represented. Once more, Maori river interests were denied or ignored.

Steamer services
and the Wanganui
River Trust
Amendment Act
1922

Grafted to the authority vested in the former trust board were powers to purchase or hire steamers or other craft, to carry on the business of common carriers, to convey passengers, to erect or purchase accommodation houses, and to erect buildings and workshops for making or repairing vessels. Such buildings were not to be erected on the river below the spring high-tide watermark without the prior approval of the Governor-General in Council.

The change was explicable in terms of the changing fortunes of the old steamer company. Steamer services on the river enjoyed a heyday from 1903, when services were extended to Taumarunui, until the First World War. After the war, problems increased. A network of roads spread through the region and the demand for river services declined. The maintenance of open river channels was a never-ending concern, and from the beginning, two matters could not be resolved. The upper reaches below Taumarunui remained difficult to navigate, so regular services could not be guaranteed, and, in the late summer months, when the demand for space for both freight and passengers was at its height, water levels in stretches below Pipiriki could become too low for steamers to operate. Furthermore, floods of increasing severity occurred in the 1910s, a consequence of the loss of bush cover in the river catchment area.

Solutions to these problems were beyond the trust board's financial capacity. Various proposals were put to the Wanganui public and the Government and what was eventually settled on was to empower a reconstituted trust to run a steamer service of its own.¹⁴

(6) Abolition of the board

In the end, neither the board nor the Government ever took over Hatrick's steamers. The demand for river services continued to decline and, in 1929, Kirikau, 24 miles below Taumarunui, became the upper terminus, passengers travelling

12. Document A31, p 5

13. Ibid, p 16

14. For an overview, see Robert D Campbell, *Rapids and Riverboats on the Wanganui River*, Wanganui, Wanganui Newspapers, 1990, particularly ch 14.

between there and Taumarunui by bus. During the 1930s, bus services competed with or replaced steamers between Pipiriki and Wanganui. The Depression of the 1930s was the final blow. The Government discontinued the subsidy for maintenance work on the river from the end of 1933 and abolished the board in 1940. Section 28(1) of the Reserves and Other Lands Disposal Act 1940 vested all its property in the Crown.¹⁵

Section 28(1) further provided that such lands should be controlled and administered by the Minister of Lands and the commissioner of Crown lands, unless a domain board was later appointed for this purpose. This was fortified by sections 64 and 65 of the Public Reserves, Domains, and National Parks Act 1928.

Section 28(6) of the 1940 Act revoked the endowment of land provided for in the 1891 Act and vested it as Crown land subject to the Land Act 1924. Section 28(9) authorised the Minister of Public Works to do anything necessary for opening up or improving the portion of the Whanganui River previously within the jurisdiction of the trust and board, and for the removal of all obstructions affecting navigation of the river.

(7) Maori concern over Treaty rights

At the third reading of the Reserves and Other Lands Disposal Act 1940 in the Legislative Council, the Honourable Rangi Mawhete had sought an assurance that Maori would not lose the protection of their Treaty rights that the Wanganui River Trust Act had given them. Referring to a recent decision of the Native Land Court in favour of the Maori claim to customary ownership of the river, and to the Crown's decision to appeal it, he said, 'All along the Crown has assumed that it owned the Wanganui River, but the Native Appeal Court will now be called upon to decide who is the rightful owner'. The leader of the Council assured him that nothing in the Bill would affect any river rights that Maori had previously held.¹⁶

6.2.4 Enabling legislation for Pipiriki township

(1) Hotel accommodation at Pipiriki

After the inauguration of steamer services between Wanganui and Pipiriki in the summer of 1894–95, the time had come to do something decisive about the Pipiriki hotel. An existing accommodation house was built under an arrangement with local Maori on Maori customary land. This could not be improved because lending institutions did not recognise such arrangements as sufficient security for loans.¹⁷ Te Keepa, for one, was opposed to putting the land through the Native Land Court. Even if some land could be brought under freehold title, prospective land-buyers would still have to gather signatures from a majority of interest holders. Under the

15. Proclamation of abolition date for Wanganui River Trust Board, *New Zealand Gazette*, 21 November 1940, no 118, p 3445

16. Rangi Mawhete (Legislative Council), 29 August 1940, NZPD, 1940, vol 257, pp 951–952

17. Campbell, p 58; J McKenzie, 27 June 1895, NZPD, vol 87, p 180

procedures of the law as it then stood, there was no quick or certain way by which Europeans seeking to invest in Pipiriki's future could obtain a firm title.

(2) The Native Townships Act 1895

The idea of establishing a township on Maori land was first promoted by Ballance with Te Keepa, Topine Turoa, and other influential rangatira of the district. When Ballance died, his successor, Willis, continued to press the case with the Government. At Wanganui in March, Seddon met with members of the chamber of commerce, who stressed that the development of the river tourist trade was hampered by the inadequate accommodation at Pipiriki. Pipiriki was only one of several central North Island places where Maori land was required for townships. Drawing on the precedent of the Thermal Springs Districts Act 1881, Parliament passed the Native Townships Act 1895, 'promoting the settlement and opening-up of the interior of the North Island'. This Act enabled Maori land to be laid out as a town, with sections to be available for sale or lease.

The three North Island Maori members were out of Wellington during the debate on the second reading of the Bill in the General Assembly, but Hone Heke, the member for Northern Maori, spoke during the third reading. He had recently visited many Maori settlements in the North Island, he said, and had talked to people about letting their lands be used for native townships. They seemed prepared to do so. He believed that the only reason that they were withholding land was their objection to the Native Land Court Act 1894, which had put an end to free trade in Maori land and resumed the Crown's right of pre-emption:

The intention of this Bill to make townships as a sort of reserve for the Natives was a very good one in its way, but for such townships to be of any benefit to the Natives the Crown must be barred from acquiring any interest in them.

Heke gave examples of land purchase officers who, when given the opportunity, purchased the beneficial interests of Maori in their lands, and he argued that it should be illegal for them to do so.¹⁸

Carroll responded with a vigorous defence of the Government's intentions. It was in the public interest, he argued, that there should be townships in places where settlement was increasing. In many such places, land held under customary tenure 'was in such a state of entanglement that there was not under present law any convenient method of dealing with [it]'. This was 'a good Bill', which, in the end, 'would prove exceedingly satisfactory to the Natives'.

The Bill was passed with only one division. While it was in committee in the House, an attempt was made to exclude 'any Native burying ground or any native pa' from the streets, reserves, or allotments of a native township. The three Maori members present voted for an amendment to this effect but it was defeated 27 to 22.

The native townships were to be an extension of the settler world. Their local government was left to the determination of the Governor in Council. Although

18. Hone Heke, 16 July 1895, NZPD, 1895, vol 87, p 595

some members expressed views on the form that this should take, no one proposed any form of local Maori representation on governing township boards or consultation with them.¹⁹ Without this consent, they effectively lost control.

As finally passed, the Act enabled the Governor to declare that any native land not exceeding 500 acres be set apart for a native township, provided that there was not within it a homestead of less than 100 acres tenanted under a valid lease, and provided that no other native township site was closer than 10 miles (s 3). The land was to be surveyed and laid off by the Surveyor-General with streets, allotments, and reserves, as he thought fit (s 5). No more than 20 percent of the area was to be 'reserved and laid off for the use of the Native owners', and this was to include 'every Native burying-ground, and every building actually occupied by a Native at the date of the gazetting of the Proclamation' (s 6). Maori rights, however, were subordinate to the requirements of the township as a whole.

In the selection of native reserves, the wishes of Maori owners were to be complied with only in so far as, in the opinion of the Surveyor-General, such compliance did not interfere with the survey and layout as a whole (s 7). Dissatisfied Maori could take their objections to the chief judge of the Native Land Court, who would decide whether the plan should be altered (s 9).

All land in a native township would be vested in the Crown. Native allotments would be held by the Crown in trust 'for the use and enjoyment of the Native owners' (s 12), and that land would be inalienable (s 18(1)). Other reserves laid off for public use would be administered under the Public Reserves Act 1881 (s 12). All other allotments would be vested in the Crown 'in trust for the Native owners according to their relative shares or interests therein' (s 12), and the chief judge of the Native Land Court would determine their individual interests (s 22). Maori could then sell their shares, but only to the Crown (s 18(1)).

Those seeking to establish themselves in the area could lease land from the commissioner of Crown lands for up to 21 years, renewable, and owning their own improvements, but only the Crown could buy Maori shares (ss 14, 15, 18). The Maori owners would receive net payments for the sale of leaseholds, the cost of surveys being charged against their land. Rental payments, less administrative costs, would be paid each six months according to their shares (ss 18,19,20).

Maori were without representation on the governing township boards, and without their consent, they had effectively lost control.

In November 1895, Seddon met with Te Keepa and Topine Turoa at Pipiriki formally to receive the site. A township of 366 acres was laid out, and the first sections were auctioned in July 1897.²⁰ In December 1903, the main trunk railway reached Taumarunui, and from there two days later, a weekly steamer service began to Pipiriki and Wanganui. The last link in the chain was forged when Taumarunui was gazetted a native township in 1906. Travellers could now venture into what Hatrick's publicity called 'the very heart of Maori land'.²¹

19. Debate on the Native Township Bill, NZPD, 1895, vol 87, pp 180-181, 593-597

20. Campbell, p 47

21. Ibid, pp 95-96

6.2.5 Preserving river scenery

(1) *Objective of Wanganui River Trust*

As discussed at section 6.2.3(2), one of the objectives of the Wanganui River Trust Act 1891 was to preserve natural scenery along the banks of the Whanganui River. By the beginning of the new century, the board controlled 1084 acres. According to Willis, the member for Wanganui, the land reserved for scenic purposes on each side of the river was still in Maori ownership in 1903.²²

By the early years of the new century, a growing body of opinion in the colony was in favour of conserving native bush. Preservation was argued for intrinsic reasons and for its importance for a growing tourist industry. The Scenery Preservation Bill 1903 sought to achieve both objectives. Some members criticised the way that the proposed Scenery Preservation Commission would be funded, and objections were made to money being spent on roads and bridges for remote districts.

Scenery
Preservation Bill
1903

Heke entirely agreed with the object and sentiment of the Bill, noting that something had to be done to preserve the northern kauri forests from sale. But he objected to the provision for the Native Land Court to assess the value of the Maori lands to be reserved for scenic or historical purposes. That would not be a proper use of the court, he said: 'the same tribunal should assess the value of Native lands that assesses the value of pakeha lands'.²³ The Bill was widely supported, however, and passed without much further opposition. Instead, several members regretted that the work of preservation had not begun 20 years earlier. Scenic and historical spots in many parts of the colony were extolled, but none more than the Whanganui River.

(2) *The establishment of the Scenery Preservation Commission*

Under the Scenery Preservation Act 1903, the Scenery Preservation Commission, comprising not more than five persons (s 2), was established to make its own inspections and inquiries and to recommend to the Governor lands that 'should be permanently reserved as scenic, thermal, or historical reserves' (s 3). Much of the land likely to be reserved was already held by the Crown, but private and Maori lands came under the commission's purview.

The Governor, acting on a recommendation from the commission, could create reserves that were to be preserved intact as an inalienable patrimony of the people of New Zealand (s 4). The cutting or removal of timber or otherwise damaging the reserves was made an offence (s 9).

Any land, including native land, required for the purposes of scenery preservation could be taken under the Public Works Act 1894, which made provision for compensation in section 90 and, in section 2, defined 'Native land' as being 'land held by Natives under their customs or usages, whether the ownership thereof has been determined by the Native Land Court or not'. There was no

22. Archibald Willis, 22 October 1903, NZPD, 1903, vol 126, p 710

23. Hone Heke, 22 October 1903, NZPD, 1903, vol 126, p 711

provision for Maori to be notified of the intention to take land, giving them the right to object, as there was with the taking of European land or Crown land granted to Maori.

In the case of native land, a map was to be prepared showing its position and extent. The Governor, by Order in Council, could then declare that this land had been taken for a public work. Thereafter, the land vested in the Crown (s 88).

In the case of both Maori customary land and Maori land under freehold title, compensation was to be fixed by the Native Land Court. This was the provision objected to by Heke. Compensation for European landowners was fixed by the Compensation Court, which, depending on the amount involved, comprised a magistrate or Supreme Court judge, sitting in each case with two assessors. These provisions were carried forward into the Public Works Acts of 1905 and 1908.

(3) No Maori representation on commission

Maori
representation

The Scenery Preservation Commission (later the board) comprised three officials, but in 1906 the Government sought to broaden its membership by including 'a member of the Native race'. On the ruling of the chairman of committees, however, this provision was struck out of the amendment Bill since it affected 'the Maori race' but had not been translated to Maori.²⁴ In the debate, Apirana Ngata, the member for Eastern Maori, regretted the lack of Maori representation. Maori people, he told the House, were not being sufficiently consulted on matters in which they had a direct interest. The board often made recommendations, he said:

without viewing the spots proposed to be reserved; . . . and owing to that a great many spots that should have been reserved had been deliberately destroyed by the Natives as a sort of protest against the methods of the Scenery Preservation Commissioners. There was a way of dealing with Natives and their lands, and if the method was not pursued tactfully the Maori was inclined to be irritable and take objection . . . it would pay the colony if the Natives were approached in a proper way, and in a way that Europeans would be approached. The Maori was not accustomed to giving his consent in writing, but from time immemorial he had been accustomed to give it in a meeting in his own way. It was necessary to explain the policy of your legislation to him there in his own environment, and when he had once given his consent you could go and take the land under any Act; but it was necessary, first of all, to get the approval of the leading men in the district.²⁵

An amendment of 1910 enabled the under-secretary of the Native Department to sit on the board (s 4).

Maori opposition

As shall be seen in the following chapter, the activities of the Scenery Preservation Commission aroused considerable opposition amongst Whanganui Maori. Not surprisingly, given the arbitrary powers of the Crown to take Native land, the commission received protests from Whanganui Maori covering the procedure for both the taking of their land and the assessment of compensation.

24. J G Ward, 24 October 1906, NZPD, 1906, vol 138, p 595 (doc A49(b), p 356)

25. Apirana Ngata, 24 October 1906, NZPD, 1906, vol 138, p 596 (doc A49(b), p 356)

Although the commission made no recommendation to improve the relevant parts of the Public Works Act, it did propose the assessment of compensation by arbitration, with one arbiter appointed by Maori.²⁶ The recommendation was not implemented.

6.2.6 The statutory vesting of the riverbed in the Crown

The long-held official assumption was that the bed of the Whanganui River either was or should be vested in the Crown. Although several enactments had already given that assumption practical recognition, it was finally given full force and effect to in section 14 of the Coal-mines Act Amendment Act 1903. This arose from some doubts as to the true legal position in a case affecting coal-mining on the Waikato River. By this enactment, all beds of navigable rivers, which included the Whanganui River, and thus all associated minerals, were deemed to be and to have always been vested in the Crown, unless the Crown had granted the riverbed to someone else.

Coal-mines Act
Amendment Act
1903

6.3 THE MAORI PROTEST

As Maori became aware of the statutory regime, they could do little but protest against Government 'interference'.

Protests neither
anti-European nor
anti-development

Their protests were not against the Government, the Europeans, or development as such but against the assumption that things could be done without Maori agreement. They show a concern for Maori participation in district development, as well as a continuing unwillingness to cede their river interests and rights of control. In a word, they were about mana.

6.4 THE EMERGING DEBATE

In the late 1860s, works to control the river flow around the port appear to have caused erosion of about a chain's width from the Putiki reserve on the opposite foreshore. The occasion provided a lesson on the application of Western law.

Putiki River
encroachment

From 1871, Maori owners applied to the Native Land Court to adjust the boundaries of their allotments. One would have the boundary on the new river route but at the low-water mark; another claimed to the river's centre line. Another again sought exclusive use of the river between the high- and low-tide levels, arguing that everyone could use that part but that 'if there were pipis there my father only would have a right to them'. Moreover, the water had 'consumed' land on which taro and kumara had been planted. Certain Putiki rangatira asked the

26. Report of the Scenery Preservation Commission, *Wanganui Chronicle*, 27 June 1917; Campbell, pp 174-176

court to preserve the original foreshore boundaries. The Crown was represented at the hearings.²⁷

The court fixed the boundaries at the new high-water mark, contrary to Maori pleas, but, since it gave no reasons for its decision or account of the proceedings, recourse must be had to a newspaper account. The *Wanganui Evening Herald* reported that counsel for the Crown had gone to the court:

to argue on behalf of the Crown for rights which have come to be universally recognised among civilized nations. The natives relied on the treaty of Waitanga [sic], which secured to them the land, forests and fisheries of New Zealand, in exchange for their acknowledgement of the Sovereign rights of the Queen, her heirs and successors. If the natives had then been advised as to the law of nations, they would have seen that 'Sovereign rights' debarred them from claiming below high water mark.²⁸

The 'aboriginals', the report commented, received the decision 'with many shakes of the head expressive of dissatisfaction with the application of a law which they fancied was made in favour of the *white man*' (emphasis in original).

In 1876, Te Keepa complained to the chairman of the Whanganui Harbour and River Conservation Board about public works to control the river flow:

I salute you! and convey my thoughts to you. My ancestors downwards, have been in the habit of frequenting these waters of the ancient Pa of Putiki wharanui. The right passage for the waters of the Wanganui to take is that through Te Patapu, which is now being closed by the European. If you persist in closing up the passage naturally sought after by the contending waters of the Wanganui, the money of the Government spent thereon will float to the sea and be lost sight of. In the ancient days, before the memory of living man, this was the course taken by the Wanganui. Therefore, I advise you, let the waters seek their ancient outlet by the direct channel of my ancestor, Rere o Maki, to nature's outlet.²⁹

This was not opposition to development as such but an intimation that Te Keepa still expected a say on how the river was used.³⁰ Te Keepa, Mete Kingi, and Takarangī were later directors of the Wanganui Prospecting Company formed in 1884 to prospect for minerals on the Tangarakau River.³¹

Te Keepa's
complaint to
Whanganui Harbour
and River
Conservation Board

27. Whanganui Native Land Court minute book 1D, 12–13 December 1871, pp 489–492 (doc A49(d), pp 1–4); doc C10, pp 33–36

28. *Wanganui Evening Herald*, 15 December 1871 (doc C10, p 32); doc A49, p 35

29. Te Keepa Rangihiwini to the Whanganui Harbour Board (cited in M J G Smart and A P Bates, *The Wanganui Story*, Wanganui, Wanganui Newspapers, 1972, pp 98–99). There is evidence of earlier Maori protest at Government encroachment on river rights, particularly in Hauraki: see Robyn Anderson, *The Crown, The Treaty and the Hauraki Tribes, 1800–1880*, vol 4 of *Hauraki Treaty Claims*, Paeroa, Hauraki Maori Trust Board, 1997, pp 274–279, and Alan Ward, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand*, Auckland, Auckland University Press, 1974, p 305.

30. *Evening Herald*, 30 November 1871 (doc C10, p 30). This material includes a laudatory speech by Te Keepa about the bridge and Pakeha technology. (Sinclair refers to the chiefs taking debentures in the bridge project. While it may be true, it cannot be confirmed from his footnotes.)

31. *Wanganui Chronicle*, 9 May 1884 (doc A49(iii), p 511); *The Yoeman*, 28 March 1884, p 10 (doc C10, p 61)

Similarly, Maori still assumed the right to limit river passage in the interior, as seen by the denial of access to the surveyor John Rochfort in 1884, until after he had spoken with the principal rangatira of several localities (see sec 5.3.3). Rochfort comforted himself with the thought that, as a result, the rangatira were better informed of the Government's intentions and did not appear averse to them. But the rangatira had made a political point. The main trunk railway line was as much an opportunity as a threat, but rights of entry and control could not be assumed.

Denial of access to
Taumarunui

Clearly, Maori saw the maintenance of their own law and authority as the key to their future development and relations with the Government and Europeans, and it was the inroads into their law and authority that led to a substantial parliamentary petition, with, significantly, four major tribal groups combining for that purpose. In 1883, Ngati Maniapoto, Ngati Raukawa, Ngati Tuwharetoa, and Atihaunui-a-Paparangi petitioned Parliament, complaining that its laws deprived them of rights secured by the Treaty of Waitangi. They saw no good in the new laws affecting their lands. They wished to be relieved of the entanglements of the Native Land Court and asked instead for a law making their lands 'absolutely inalienable by sale' (but not by licence or lease), with the tribes to fix tribal boundaries amongst themselves. Yet, as the Waitangi Tribunal observed in the *Pouakani Report 1993*, their intention was not to lock out Europeans but to ensure their control over, and participation in, the development of their lands.³²

Combined tribal
protest

This was further apparent in negotiations over the Government's plans to develop the interior. When John Ballance, the parliamentary member for Wanganui, became the Minister of Native Affairs in 1884, Te Keepa and others sought to raise the Government's proposals with him, and in January 1885, Ballance attended marae meetings at Ranana, Kauaeroa, and Pipiriki. At Ranana, Paori Kurimate, speaking for the group, raised questions of tribal boundaries, surveys, the Maori committee's role in land administration, and the proposed route of the main trunk railway over Maori land. Maori would cooperate with the Government, he said, but would still seek to keep control. Ballance was informed that they would 'allow a steamer to be put on the Wanganui River'. A report on the meeting added that this would be dealt with by the committees, a rider suggesting that Maori assumed that their own committees would determine the nature and extent of the river usage.³³

Railway and steamer
proposals

Others spoke only for their own areas. Te Pehi wanted a road from Waimarino to Manganui-a-te-ao to link Pipiriki to the railway. Hakaraja of Koriniti wanted the railway from Marton started 'as soon as possible' because of his interest in the Te Kopua block, though he was reported as saying to Te Keepa that he wanted nothing to do with the steamer.

Ballance, in reply, emphasised the benefits of a steamer to Maori, increasing the value of their lands, transporting their produce, and themselves, more cheaply than by canoe, and delivering mail each week. A steamer, he said, 'would make the Whanganui what it was intended to be – a great highway for the people into the

32. Waitangi Tribunal, *The Pouakani Report 1993*, Wellington, Brooker's Ltd, 1993, sec 7.1, app 6

33. 'Notes of Native Meetings', AJHR, 1885, G-1, p 2 (doc A49, p 66)

interior'. However, it was not for the Government but for private individuals to build and run the steamers. Some people in Wanganui proposed to form a company for this purpose, and thought the chiefs might seek to be involved, but he saw:

difficulties in the way – not great difficulties, but difficulties in the way of steamers passing up and down the river. The rapids will have to be made so as to allow a steamer to pass up and down; and I think it is likely that the Government will come to their assistance and vote money for the improvement of the rapids.³⁴

He did not suggest a role for the Maori committee in regulating the steamers, but rather implied that the right of regulation was with the Crown. Indeed, this was what the Wanganui Harbour Board, of which he was a member, assured. He simply advised them of the Government's proposals to make the Maori committees statutory, making no mention of their intended powers.³⁵

6.5 OBSTRUCTION OF WORKS

River clearance works

Soon after Ballance's visit, work began removing snags and boulders in the rapids for a steamer channel, but Maori were considerably uneasy. The problem that brought matters to a head was not only that the work interfered with eel and lamprey weirs but that, by this time, larger pleas to recognise Maori authority had fallen on deaf ears.

The district engineer for the Public Works Department had listed 203 rapids requiring clearance work, with four or possibly five eel pa to be removed below Pipiriki. The initial work reached Pipiriki, and the steamer was running to there by 1886, but more clearing and maintenance work, or the building of further groynes or training walls, was required.³⁶ This affected additional eel and lamprey weirs, either directly by removal or indirectly by weakening the structures through the mining of stones and impairing the catches through the change of river flows.

Maori obstruction

In 1891, Maori obstructed workers for the Wanganui River Trust. Although the trust's wide-ranging powers were not meant to affect 'any rights conferred upon the Natives by the Treaty of Waitangi', the weirs were seriously affected. Ranana became a centre of resistance and obstruction because it was near to there that most of the additional clearing was required. A section below Pipiriki, some 10 miles between Matahiwi and Hiruharama, proved the most difficult because it was thought that two eel weirs at Kauaeroa, one at Kaiwaka, and, later, two at Matahiwi would have to be removed.³⁷

34. 'Notes of Native Meetings', AJHR, 1885, G-1, pp 1-8 (doc A49(b), pp 226-234)

35. *Ibid*, pp 3-4 (pp 228-229)

36. 'Annual Report of Railways', AJHR, 1886, D-1 (doc A49(b), pp 246); 1887, D-1 (doc A49(b), p 256)

37. Tom Bennion cites various evidence of obstruction of the clearing of the river between 1892 and 1895: doc A49, pp 82-84.

Thirty workers, some of them Maori, were obstructed at Karatia and Kauaeroa, and police protection was required. Some Maori were charged with obstruction and one was fined, but other charges of assault were dismissed.³⁸ Twice, in 1891 and 1892, the Government asked Te Keepa to use his influence but he did not obtain the people's agreement.³⁹

Maori cooperation was needed because without their agreement the trust was obliged to follow lengthy public works processes in order to remove weirs, but the agreement was not forthcoming. By then, the removal of stones was an issue. The trust offered Kauaeroa Maori sixpence a cubic yard but this was refused.

To break the impasse, the trust appealed to the Native Minister in early May 1893.⁴⁰ Seddon, who became the Minister of Native Affairs shortly thereafter, drove an amending Act through the General Assembly, enabling the trust to remove stones and other materials from the riverbed and banks, but stopping short of allowing it to remove weirs without recourse to the Public Works Act. Then, in 1894, as the Premier and Native Minister, he visited Pipiriki with Carroll – a Minister without portfolio 'representing the Native race'. Both advised the protesters that 'they must not take the law into their own hands, as the country would not tolerate such a line'. They must instead 'consult the Government so that a reasonable understanding might be arrived at'. No mention was made of Maori Treaty rights being written into the trust's governing Act.⁴¹

Maori responded by constructing new eel weirs. Soon after Seddon's visit, Hatrick informed the local member of Parliament that two eel weirs had been built in the most dangerous rapids in the river. A valuable canoe in the steamer's tow had been smashed, costing him £35, he said, and if the obstructions continued he thought the steamer might be smashed too, 'with probable loss of life'. The steamer had cost £3500, could not be insured, and his company could not continue the risk. If there were no understanding with Maori, he would need to stop the service and lay off the staff.⁴²

Tamatea Aurunui alone showed a token willingness to compromise. He wrote to Seddon claiming the Kauaeroa eel and inanga weirs as his and offering, for £90,000 compensation for weirs and rocks, 'paid in a lump sum', to 'cease to have anything to do with Kauae-roa'.⁴³ His letter does not appear to have been answered.

River clearance work then shifted to the Te Autemutu rapid just above Pipiriki. Once more, the workers were obstructed, the police were brought in, and the work did not start again until two days later, when the local people finally agreed not to

38. *Wanganui Chronicle*, 3 July 1891, 1, 2 December 1892 (doc A49(c), pp 519--521)

39. Document A49, p 82; Wanganui River Trust to Minister of Native Affairs, 10 May 1893, J1 1895/947, NA Wellington (doc A49(b), pp 302-304)

40. Wanganui River Trust to Minister of Native Affairs, 10 May 1893, J1 1895/947, NA Wellington (doc A49(b), pp 302-304). A J Cadman was the Minister of Native Affairs under Ballance, but he resigned within two months of Seddon becoming Premier. Seddon took over as Minister of Native Affairs.

41. Document A49, p 85; 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', AJHR, 1895, G-1, pp 7-9

42. A Hatrick to Archibald Willis, 5 May 1894 (doc B23, pp 1-2). Note that this is obviously NA material, but it is not referenced except at the top of the page with 94/418.

43. Tamatea Aurunui to Premier, 31 October 1895, J1 1895/947, NA Wellington (doc A49(b), p 293)



Figure 11: River weir right across the Whanganui River below Kauika, Ranana.
Photograph courtesy Alexander Turnbull Library (1116¼).

stand in the way. The trust insisted that it always tried not to antagonise local Maori and that it considered their interests as far as possible. With one exception, there were no further recorded protests against the clearance work between Pipiriki and Taumarunui.⁴⁴

6.6 FURTHER RECOURSE TO PETITIONS

1887 petitions

Maori were thus persuaded to observe the Government's law, though they had already adopted legal channels by petitioning Parliament. In 1887, there were two petitions from different Whanganui groups. Paora Tutaawha and 66 others said 'that their fisheries and eel weirs are being destroyed by the steamers running on the Wanganui River'. It was claimed that, at the Ranana meeting, Ballance had said that the steamers would not go beyond Ranana.⁴⁵

In the second petition, Werahiko Ateara and 162 others prayed 'that the work of deepening the Wanganui River may be stopped, as they have never agreed to it'.⁴⁶

44. Document c10, pp 65, 73

45. Petition of Paora Tutaawha and 66 others, 'Native Affairs Committee', AJHR, 1887, 1-3, p 8 (doc A49, pp 71-72)

46. Petition of Werahiko Ateara and 162 others, 'Native Affairs Committee' AJHR, 1888, 1-3 (doc A49(b), p 258)



Figure 12: The paddle steamer *Manuwai* on the Whanganui River, circa 1910s. Photograph by Frank Denton. Courtesy Alexander Turnbull Library (Harding–Denton collection, G17102¼).

The petition was presented by Hoani Taipua, the member for Western Maori, who, speaking on the Wanganui River Trust Bill in 1891, recalled:

The Natives objected to the works because, as they pointed out, the works interfered with certain fishing rights at places where they caught lampreys, and those works had to be pulled down. The places where they were in the habit of catching lampreys had been handed to them by their ancestors, and these they guarded very jealously: they looked upon these as being of very great importance to them . . . [If] these natural drifts or rapids were dug away the water would rush out and dry up the river.⁴⁷

The Native Affairs Committee referred the first petition to the Government for consideration, but no action was taken. On the second petition, it made no recommendation.⁴⁸

On 18 November 1895, Nga Komiti Wahine o Te Tai Hauru (the Ladies Committee) of the Whanganui people wrote a letter to the Premier and petitioned Parliament after an unsuccessful bid to pursue Supreme Court proceedings over the damage to the constructions of their ancestors. Signed by 151 women, the

**Nga Komiti Wahine
take up the cause**

47. Hoani Taipua, 3 September 1891, NZPD, 1891, vol 74, p 220

48. Petition of Werahiko Aterea and 162 others, 'Native Affairs Committee', AJHR, 1888, 1-3, p 5 (doc A49(b), p 258); and see doc A49, p 72

petition, they said, was 'drafted by an influential assembly of women of rank' at meetings at Karioi, Pipiriki, and Jerusalem.⁴⁹

In a letter following up the petition, they alleged, as with the petition of Paora Tutaawha, that Ballance had said that the steamers would stop at Ranana and that 'no meeting of hapu or influential chiefs or Govt ever agreed or arranged that the steamer and the road should go up to Pipiriki'.⁵⁰ They had petitioned against the destruction of eel weirs, lamprey weirs, and whitebait dams on the river, the sides of the river, and its banks. They wanted the taking of stones to cease:

We your petitioners all say that we are Maori women of Aotearoa. In the year 1840 Queen Victoria's Treaty of Waitangi gave to the Maoris of Aotearoa the absolute rights over their fishing grounds, their lands and their tidal rivers.

Your petitioners ask what is the principal reason of the Government breaking Queen Victoria's Laws of the year 1840 as mentioned herein.⁵¹

On this occasion, there was at least a response, though the outcome for Maori was not great. Presented by Ropata Te Ao, the member for Western Maori, the petition was referred to the Native Affairs Committee, thence to the House, from there to the Government, and then Seddon met with Maori at Pipiriki in November 1895.⁵² In anticipation, Nga Komiti Wahine had written to him.⁵³ Seddon concluded that one of the two Kauaeroa weirs could stay, Aterea then agreeing to the removal of the other. The first was taken out in January 1896, a 650-foot training wall was made for the Haumoana rapid, with 'a small passage for canoes', and the Te Puhi rapid between Pipiriki and Hiruharama was cleared of large boulders and stones.⁵⁴

Maori dissatisfaction thereafter was expressed over the sale of liquor, and it was the liquor question that enabled Maori to assert that the river was really theirs. In brief, Maori wanted no liquor in the area, but the steamer owners wished to supply it, both on board and at accommodation houses along the way. At Maori urgings, the upper Whanganui area, as far south as Parikino, which in turn was 56 kilometres below Pipiriki, had been a no-licence district since 1887. This no-licence district had been proclaimed under section 25 of the Licensing Act 1881, which related specifically to Maori land.⁵⁵

Liquor petition 1902
and subsequent
proceedings

49. Translation of petition of Mereaina Ranangina and 151 others, J1 1895/947, NA Wellington (doc A49(b), pp 296–297); doc B13, pp 5–7; Nga Komiti Wahine o Te Tai Hauru to Premier, 18 November 1895, J1 1895/947, NA Wellington (doc A49(b), pp 298–300)

50. Translation of petition of Mereaina Ranangina and 151 others, J1 1895/947, NA Wellington (doc A49(b), pp 296–297)

51. Ibid

52. 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', AJHR, 1895, G-1, pp 7–9; doc A49, p 87; doc C10, p 70

53. Nga Komiti Wahine o Te Tai Hauru to Premier, 18 November 1895, J1 1895/947, NA Wellington (Wai 167 ROD, doc A49(b), pp 296–297); doc B13, pp 9–10

54. Whanganui River Trust to Department of Justice, 9 March 1896, J1 1895/947, NA Wellington; Under-Secretary of Justice to Te Keepa Rangihwinui, 9 March 1896, J1 1895/947, NA Wellington (doc A49(b), pp 284–285, 288); 'Lands and Survey Report: Whanganui and Tangarakau Rivers', AJHR, 1896, C-1, pp 114–115 (doc A49(b), pp 311–312)

55. Campbell, pp 81–83; proclamation prohibiting licences on certain native lands, *New Zealand Gazette*, 7 April 1887, no 23, pp 436–437

Some members of Parliament lamented the fact that river travellers could not be served liquor at the Pipiriki accommodation house, but when the Native Townships Bill was considered, differences on the liquor question were too strong for them to do anything about it.⁵⁶ In 1902, the Wanganui Licensed Victuallers Association, of which Hatrick was a prominent member, pressed the Wanganui Licensing Committee to relax restrictions on non-Maori travelling in the no-licence district. Te Keepa's widow, Wikitoria, and other Maori opposed this and successfully petitioned the licensing committee to have the no-licence status of Pipiriki and the area confirmed.⁵⁷ On this occasion, Wikitoria and her associates also challenged the legality of liquor sales on the steamers themselves, which had packet licences to sell liquor to passengers on the river but not to people on the land. Though there were allegations of sly-grogging from the steamers, the central point was the validity of the licences themselves. The question was whether the river was part of the no-licence district or part of the no-licence land, with Maori contending it was indeed part of the land and was Maori land.

In 1903, the Solicitor General, on behalf of Eruera Te Kahu, Hori Pukehika, and Wikitoria Keepa applied to the Supreme Court to quash the two packet licences issued by the Wanganui Licensing Committee.⁵⁸

Rights in the river were raised as a secondary line of argument. The question was whether it was lawful for a steamer to be granted a packet licence in Wanganui, when most of its journey was through lands in the no-licence district. Counsel for the relators – namely, Wikitoria Keepa, Eruera Te Kahu, and Hori Pukehika – cited the opinion of Chief Justice Sir Robert Stout in *Mueller v Taupiriri Coal-Mines Ltd* that 'the river was within the proclaimed area'. He invoked the Wanganui River Trust Act 1891, which preserved 'the rights of Natives where they have not yet been acquired by the Crown', and argued that 'The bed of the river is Native land, and it is the same as other Native land, even though there be a public right of navigation'.⁵⁹

Counsel for the licensing committee countered by arguing for the Crown's prerogative right:

The applicant must show that a licence cannot be issued when part of the district passed over is a prohibited area. The Wanganui River was not Native land. All Native lands are demesne of the Crown, subject to the Native rights of occupation. The mere right of occupation could not vest the bed of the river in the Natives. In non-tidal rivers the soil is presumed to be in the adjoining owners, but this depends upon a presumption of a grant, which cannot apply in the case of Native possessory rights. Their possessory rights over the adjoining lands and rights of fishing in the river are all that they have. It is absurd to suppose that they have possessory rights in the bed of the river: that is demesne of the Crown. 'The Wanganui River Trust Act, 1891,' recognises the river as a public highway.⁶⁰

56. John Duthie, George Smith, 27 June 1895, NZPD, 1895, vol 87, pp 180–181

57. Campbell, pp 82–83; *In re Wanganui River Packet Licence to Stuart* (1903) 23 NZLR 510

58. Document A49, p 95; *In re Wanganui River Packet Licence to Stuart*, p 514

59. *In re Wanganui River Packet Licence to Stuart*, p 512

60. *Ibid*, p 514

The judges did not advert directly to these arguments. Justice Conolly stated, however, that the relevant legislation and proclamation implied a place within the area of Maori land and could not be extended to a vessel that was near, though not upon, some part of the Maori land one day, and the next day near, though not upon, another part of the same land some 50 miles off. The appeal was dismissed.⁶¹ The court held that:

the packet licence was not a licence 'granted within' or 'to take effect within' the proclaimed area within the meaning of section 25, and that the Wanganui Licensing Committee had therefore power to grant it.

The prohibition of section 25 extends only to licences which are local to and confined to a proclaimed area, in the sense of being in respect of defined premises within the area.⁶²

The decision was on the basis that the licence did not relate to any particular site in the district and was instead an 'ambulatory' one. Hence, the issue of the legal ownership of the river was avoided. In the decision, however, the English common law presumption of Crown ownership of navigable rivers was reinforced.⁶³

6.7 PROTEST AND SCENIC LANDS

On the need to
change the
argument

By the turn of the century, the Government and the settler community had established their control of the river in fact and the supremacy of English law in New Zealand. To Maori, there must have seemed little point in pursuing the claims of their parents and grandparents to rights of self-government and self-administration, or to argue outside the framework of European politics and law. Without resiling from their forebears' position, they came rather to contend that the river was owned by them, either presenting their case in terms of the Treaty of Waitangi or arguing it within the confines of English law.

People's
circumstances

Maori were no longer a political force and were preoccupied with their own survival. About two-thirds of their lands and their economic base had gone. While settler numbers increased, Maori population on the river declined dramatically between 1857 and 1901, and in 1891 Wanganui fertility rates were one of the three lowest in the North Island.⁶⁴

The skills of the Maori canoeist were no longer in demand. The Maori committees, councils, and land boards had been marginalised. Eel and lamprey weirs had been destroyed or made ineffective, access to traditional foods had been

61. The judgment cannot be considered a precedent on the ownership of the Whanganui River. It was not treated as binding in *In re the Bed of the Wanganui River* [1955] NZLR 419.

62. *In re Wanganui River Packet Licence to Stuart*, p 510

63. *Ibid.* The decision on 14 July 1903 explicitly draws this inference out (see semblance). On 23 November 1903, this was given legislative force in the Coal-mines Act Amendment Act 1903.

64. A Walton, 'Settlement Patterns in the Whanganui River Valley, 1839-1864', tables 1-8 (doc A49, pp 36-43); 'Maori Population', AJHR, 1906, H-26A; Ian Pool, *Te Iwi Maori: A New Zealand Population, Past, Present and Projected*, Auckland, Auckland University Press, 1991, app 1

taken away, and major developments in new forms of production had not materialised.

The popular Pakeha perception of Maori as a dying race infected Maori too, and those old enough to remember their earlier condition were bitter about their plight. When Kerehoma wrote a history of his people in about 1895, he recalled the exploits of the famous Tamatuna and his underwater struggle with a totara tree:

Image of a dying race

The stump of that totara tree can still be seen . . . but where is the canoe? Alas, long since gone, like all our old people, our mighty works and our histories. Why do you pakeha want to know these things, and why have you come here? You have come to be great mountains like Rua-pehu, while we remain low on the ground as little hillocks. Why should one hill be high and another low? This is bad. See! When you came to our land, you looked at it and stopped, and then came up our river. What did we do? We gave you potatoes. You gave us one fish-hook; that is all. We have been cheated. You pakeha are thieves. You tear one blanket and make two pieces, which you sell us for two blankets. You buy a pig for £1 in gold and sell it back to us for three! But what does it matter? We have had our day – Ka tuhoa te ra, ka warara, ka hinga. (The sun rises to its zenith and then declines). Our land is nearly all gone, and we, too, are a vanishing people, and will soon be like the moa, extinct (ka ngaro a moa te iwi nei), and when this happens, in a few short years hence, perhaps you grasping pakeha will be satisfied.⁶⁵

Only the ancestral pride remained. Tutairoa, his ancestor, he revered as:

the stone pillar from whom descended all the chiefs of Whanganui, even to the Rangitane tribe. . . All the taniwha (great chiefs) of this river of Whanganui come from this chief – all the great chiefs who have been heard of in this island, commencing at the source, even to the mouth of the river. . . Hence the saying, ‘A spliced rope, if broken, is made whole again’.⁶⁶

While most Pakeha and many Maori assumed that the decline would continue, by the 1890s there were signs of a population increase and positive adaptations to the ravages earlier in the nineteenth century. The population increase resulted from a stabilisation and slight improvement in fertility rates, a greater immunity to disease, and possibly from better sanitation and health care, although the latter two factors probably had a greater impact later in the twentieth century. There was an improvement in Maori political organisation. While James Carroll, Apirana Ngata, and the work of the Young Maori Party are often cited as evidence of this trend, the Kotahitanga movement, the continuing influence of prophets, and the Kingitanga movement were also essential factors in Maori reinvigoration. Maori protest, which had never ceased, became a force that Pakeha governments increasingly had to address, albeit with only minor successes for Maori in the initial stages.⁶⁷

Signs of reinvigoration

65. T W Downes, *Old Whanganui*, Hawera, WA Parkinson, 1915 (doc A40), p 45

66. *Ibid*, p 41

67. Michael King, ‘Between Two Worlds’, in *The Oxford History of New Zealand*, 2nd ed, Geoffrey Rice (ed), Auckland, Oxford University Press, 1992, pp 285–307; Judith Binney, ‘Maori Prophet Leaders’, in *The Oxford Illustrated History of New Zealand*, Keith Sinclair (ed), Auckland, Oxford University Press, 1990, pp 153–184

Compulsory
acquisition of scenic
lands

For Wanganui Maori, there was the immediate problem over the compulsory taking of Maori riverside land for scenery preservation purposes. About 4000 acres were acquired, most of them by 1912.⁶⁸ A further 15,000 acres had been recommended to be taken by the Scenery Preservation Commission in 1904. Of the total of 19,140 acres recommended for scenery preservation purposes, only 190 acres were owned by Pakeha.

The policy itself was controversial in a district where the clear felling and burning of the bush were the usual practices to establish grazing land. Settler farmers and Maori owners would burn and clear the bush for grazing (or perhaps to prevent its acquisition), while preservationists would protect a pristine river environment and an asset that was winning domestic and international acclaim. Hatrick was a leading advocate for taking the land along the river banks and was indignant that Maori were destroying bush on lands designated for scenery preservation. He publicised his views, protested to the Lands and Survey and Tourist Departments, and lobbied Ministers and members of Parliament. Disastrous fires in the upper river districts in 1908 were evidence of what could happen when late-summer burn-offs got out of hand.⁶⁹

1913-14 petitions

Maori protested too. In 1913, Eruera Hurutara and nine others of Pipiriki petitioned Parliament to return Te Aomarama Papakainga, the marae and village that marked the post-war reconciliation earlier described and that was part of the Whakaihuwaka block said to have been taken as a scenic reserve. Perhaps it was felt that to ask for the return of more may have prejudiced the recovery of the most sacred part, for in another petition of the same year, Te Weri Haeretuturangi and 196 others simply sought relief for 'land at Wanganui River taken for scenery-preservation purposes'.

In 1914, Waata Hipango and 406 others of Whanganui petitioned for two forms of relief: that land vested in the Maori Land Board be exempt from takings for scenery preservation purposes and that a commission be established to inquire into the taking of the Whanganui lands as a whole for scenery preservation purposes.⁷⁰

1916 commission

On the recommendation of the Native Affairs Committee of the House, a commission was appointed in 1916.⁷¹ It was to report on:

- (1) Whether the reservation over any of the existing scenic reserves should be cancelled:
- (2) What portion of the proposed scenic reserves should be acquired and set apart under the Scenery Preservation Act:
- (3) Which of the existing forest areas on Native, private, or Crown land, or in the Wanganui River Trust Domain ... should be retained under forest for water

68. Document A49, pp 101-103; doc A49(f), pp 11-12. The takings before 1910 were under the Public Works Act; those after were under the Scenery Preservation Act, which had been amended to allow the taking of Maori land.

69. Campbell, pp 105-106, 127; doc C10, pp 76-77

70. 'Native Affairs Committee', AJHR, 1914, 1-3, p 17

71. Ibid; doc C10, p 78

conservation or the protection of the river banks from denudation or in the interests of river navigation generally, or for any other purposes.⁷²

The commission comprised Thomas Duncan, a sheep farmer of Hunterville, as the chair, Edward Turner, the inspector of scenic reserves and one of those who had surveyed the Maori land for acquisition, and Hikaka Takirau of Oeo, Taranaki.⁷³ Evidence was taken at Wanganui, Ranana, Hiruharama, Pipiriki, Parinui, and Taumarunui. Thirty-four Maori witnesses were heard, 12 days were spent on the river, and sites were inspected on the way.⁷⁴

Some Maori said they had not been consulted on the land to be taken, others that they had received no compensation, and others again complained of arbitrary procedures where Maori land was involved. It was urged that only the cliffs and inaccessible land be taken, that in all cases burial grounds be kept out, and that full compensation be paid for that taken, having regard to the scenic value of the land. Hatrick, they claimed, was benefiting from tourism at their expense.

Tahuri Ngahinu asked the commission to recommend:

that as these lands are of special interest . . . we should be paid a special price for them. Here we have an instance . . . of a specially fat and big pig for which the owner would be paid a special fat pig price, whereas if it were the case of a small and lean pig the price would be correspondingly lean and small.⁷⁵

When asked how scenery was to be valued, Te Iriringa Te Pikikotuku replied:

That is easily answered. If these beauty spots are so interesting to a multitude of people, and if as I personally know so many people photograph and paint these beauty spots for money, then these beauty spots have intrinsic value, notwithstanding that they are cliffs and we expect to be paid for them.⁷⁶

The commission made 50 recommendations on lands either reserved or proposed for reserves. These included reserving to the skyline and releasing the remainder, providing river access for 26 blocks, and excluding urupa from three reserves and a kainga at Tieke from another.⁷⁷

Commission's
recommendations

Most of the report was considered controversial, and the wartime coalition Government had resolved that controversial matters be shelved in the interim. Thus, only a few small matters were actioned. At times till 1926, the Lands Department reminded its Ministers that the commission's recommendations affecting Maori riparian lands were still to be determined, but they were allowed to lapse.⁷⁸

72. DOSLI H0228/01/04, LINZ (doc A49(b), pp 410-427)

73. Campbell, p 174; DOSLI H0228/01/04 (doc A49(b), pp 410-427)

74. DOSLI H0228/05/07 (doc C10(a)(7))

75. Ibid, p 28

76. Ibid, p 32

77. DOSLI H0228/05/04 (doc A49(b), pp 410-427); *Wanganui Chronicle*, 27 June 1917, p 7

78. 'An Investigation of the Circumstances of the Crown's Acquisition of an Area of Land Located on the Wanganui River and Associated with Tieke Hut', Crown Law Office memorandum, 2 March 1994, paras 98-123 (citing LS4/219, Department of Conservation, Wellington)

Given the lack of an outcome, the main interest in the commission's proceedings, for the purposes of this chapter, is in the opportunity it afforded Maori to raise once more their rights in relation to the river. Technically, river rights were outside the commission's terms of reference, but they were raised anyhow.

In reporting, the commission's consideration of the river was limited to the inquiry's purposes. It was seen as 'an important highway' and, with the difficulty in building roads, was likely to remain 'the chief means of transport' for Europeans and Maori.⁷⁹ It had therefore to be kept navigable, and to that end, bush along its banks had to be preserved. As seen, there were already problems with water flows. A former steamer master for 24 years had deposed that the water flow had become less regular since the bush felling and, after heavy rains, rose more rapidly and correspondingly fell more quickly. As a result, there was 'a shorter time available for the running of the river steamers with comparative convenience'.⁸⁰

For Maori witnesses, the recognition of their river rights was the more consuming matter. As translated, Wharawhara Topine said:

No doubt the work of the Commission is more in the matter of scenic reserves, but to us Native owners the question of our river rights has suddenly overshadowed that of the scenic reserves, and we realise that if we do not press the matter now, we will get no compensation or recognition for our river rights . . .

This question as to river rights extends from the head of the river to its mouth, and all of our sub-tribes who own the abutting lands are interested in its solution.⁸¹

To a 'chorus of Eh Eh' from the other Maori present, he concluded that part of his 1030-acre block should go for scenery purposes, but with the condition that the river rights be fixed first.

Hakiaka Tawhaio, listed as the head chief, said much the same: 'If the river waters fail there will be no longer travellers to visit and admire the scenic beauties, and that brings me to the great question of the river itself'. He argued for compensation based not on the land lost to scenic reserves but on the river:

We should be compensated for the benefits that others are deriving from our river waters. First of all we are entitled to compensation from Mr Hatrick for the eel-pas destroyed by his steamers. Secondly now Mr Hatrick derives a large amount of benefit and income by his use of the Wanganui River and in taking along these tourists to admire the scenic beauties, whilst we Native owners are being correspondingly put towards the losing of our land and property, at first along the foreshores and cliffs, but now the system is being extended to the main lands all for the benefit of other people. My purpose here is not so much to discuss and object to the scenic system, as to ask that we be compensated for the benefits which so many other people are getting from the use of our river waters about which we have petitioned Parliament, basing our claims on the provisions of the Treaty of Waitangi . . . I want from the Government a clear statement as to what it proposes to do in

79. *Wanganui Chronicle*, 27 June 1917, p 7

80. Campbell, pp 174–176

81. DOSLI H0228/05/07 (doc C10(a)(7), p 37)

regard to the river waters submitting that those waters belong entirely to us. The Maoris own the river . . . I lay far more stress on our river rights than on these scenic lands.⁸²

The commission chairman was 'glad' to have heard their remarks about their river rights but could not make any recommendation with regard to them.⁸³ They were matters 'between the owners themselves and the Government'. The owners were insistent that, if not answered before more scenic land was taken, they would lose their right as landowners to press for them. Tawhiao was sceptical about the likely outcome:

No doubt it is the position as explained by the Chairman. In all probability there will be as little notice taken of our wish and our protests, by the Government, as there has been in regard to our representations about our rights in our fairway.⁸⁴

Compensation was at the heart of two further petitions of 1927, though in other respects these were essentially the same as those of 1887. The petition of Te Akihana Rangitaroia and 210 others linked the lack of compensation paid to Maori for the use of the river with the payment of £2000 to Hatrick for carrying the mail. It pointed out that Maori were required to pay the full freight and passenger charges. It also asked for Moutoa Island to be reserved.⁸⁵

1927 petitions

The petition of Piti Kotuku and 125 others of Taumarunui prayed for £300,000 in compensation for their numerous and varied 'rights in the Wanganui River and its tributaries'. The riparian owners should be compensated for money made by the steamer company that used the river, it claimed. Eel, lamprey, and other weirs had been destroyed, and coming generations 'deprived of the benefits accruing therefrom as means of obtaining a livelihood'. The release of trout into the river had killed off toitoi, pariri, papanoko, inanga, paneroro, and tuna-riki species, and compensation should be paid from a portion of the fees for trout fishing licences. Royalties should be furnished for gravel taken from the river and compensation paid for the land taken for scenic purposes:

All the benefits have accrued to the Company controlling the steamers plying on the Wanganui river because tourists come to see the beautiful scenery on the river. These lands did not belong to the Europeans but to us and were practically confiscated for scenic purposes.⁸⁶

The Government acted by including a clause in the Native Land Amendment and Native Land Claims Adjustment Act 1930 authorising the chief judge of the

82. Ibid (pp 30-31); doc C10, pp 79-80

83. DOSL1 H0228/05/07 (doc C10(a)(7), p 37)

84. Ibid (p 34)

85. Petition of Te Akihana Rangitaroia, 18 July 1927, MA15/13/188, pt 1, NA Wellington (doc A49, pp 108-109)

86. Petition of Piki Kotuku and others, 1927, 'Native Affairs Committee', AJHR, 1928, 1-3, p 10; *Evening Post*, 6 September 1927; for the full text, see MA5/13/188, pt 1, NA Wellington (doc A49(d), pp 211-213)

Native Land Court to inquire into the petition's 'claims and allegations' and to report to Parliament 'on as early a date as possible' (s 34, schedule).

When, some seven years later, no report had been made to Parliament by the chief judge, Titi Tihu applied to the Native Land Court for an investigation of the ownership of the Whanganui riverbed, and the great litigation began.

CHAPTER 7

THE RIVERBED LITIGATION

7.1 INTRODUCTION

The riverbed litigation, which began with the Atihaunui attempts to maintain their river interests through a claim to the courts for the ownership of the riverbed, resolved at least one thing: that, at 1840, Maori possessed the river, and, thus, the riverbed, according to their customs. That point has not been challenged since and was not at issue in these proceedings. It also disclosed that Maori were relieved of the riverbed, not by a conscious and willing disposal, but by the application of statutory law. They were likewise relieved of the control of the use of its waters, by further Government enactments (see secs 2.2–2.3). The question is whether these statutes were contrary to the principles of the Treaty of Waitangi.

Outcome of litigation

This chapter describes the litigation, which is no small task. The Atihaunui claim, and the further proceedings to which it gave rise, extended over 24 years, from 1938 to 1962. It passed through the Native Appellate Court (1944); the Supreme Court (1949); a royal commission (1950); the Court of Appeal (1953–54); the Maori Appellate Court (1958), and the Court of Appeal again (1960), culminating in a decision in 1962.

Purpose of chapter

In the course of those proceedings, seven judges of the Native Land Court, one of the Supreme Court, and three of the Court of Appeal were all to conclude that, as a matter of law, Maori had owned the riverbed. The Supreme Court noted, however, that the Crown's 1903 amendment to the Coal-mines Act had vested the riverbed in the Crown.

Summation

That conclusion did not end the litigation. Had it done so, the obligation on the Crown to provide relief or amend the Coal-mines Act would have been self-evident. Instead, the Crown brought special legislation to continue the proceedings. It was then effectively determined that the tribal interest in the relevant parts of the river had been extinguished last century, before the Coal-mines Act Amendment Act was passed. Relying on opinions from the Maori Appellate Court, the Court of Appeal held that it was extinguished when the Native Land Court reformed the titles to the adjoining Maori lands.

Extinguishment by statute

The title reform referred to was itself pursuant to the Government's programme to alter Maori land tenure, a programme that Maori, including Atihaunui, had opposed. Accordingly, once more Maori interests were extinguished, not freely, willingly, and knowingly by the tribes concerned but by the operation of law.

Extinguishment by statutory process



Figure 13: Representatives of the Whanganui iwi in Wellington in 1945 for a hearing in the Maori Appellate Court of their claim to the ownership of the Whanganui River.

Back row (l-r): Kaiwhare Kiriona, Tanginoa Tapa, Tekiira Peina, Tonga Tume, Hohepa Hekenui, Henare Keremeneta. Middle row: Te Rama Whanarere, Hekenui Whakarake, D G B Morison (solicitor), Titi Tihu, Ponga Awhikau. Front row: Taka-te-iwa Anderson, Kahukiwi Whakarake. Photograph courtesy Alexander Turnbull Library (Margaret A Maynard collection, C15422).

More particularly, the courts finally found that, in awarding the adjoining land to individual Maori, the Native Land Court had effectively also awarded the land *ad medium filum aquae*; that is, to the centre line of the river. The bed had thus passed to those individual owners, and from them to the Crown when the Crown acquired the land. It is doubtful that the individual Maori knew that this was so, but in any event, though the Native Land Court purported to determine individual ownership according to Maori custom, no provision was made for the tribal interest.

No free and willing
disposal

The substantive question is whether, in terms of the Treaty of Waitangi, Maori knowingly and willingly relinquished their traditional authority or interests in the river. No answer could have been given to this question by the courts themselves, since the Treaty of Waitangi was outside their purview, but the judgments show that Maori did not. The riverbed passed from their hands because of statutes and principles of English law. There was no cession that was made in a Maori way, by the rangatira of the hapu acting in concert with the views of the people first known.

Maori action to
retain their river
interests

The litigation itself is evidence of the lengths to which Atihaunui would go to keep their river interests. Then, not only had they to bear the burden of the lengthy

litigation, but also they were obliged to frame their case within the rules of English law, as seen by the lawyers of the day.

To do this, they had largely to lose control of the argument, passing the ball to lawyers to play the game by alien rules, reshaping the Maori view to fit the parameters of English legal process and law. Yet, this was a risk they took, trusting in legal advice, for in the political reality of the time they had no choice. By their own law, what they had were more than rights of ownership and use: that is, rights of authority and control. The Government had not recognised Maori authority, however, and if the past was any indication of what the future might hold, the traditional argument was unlikely to enjoy any greater success in a court.

Accordingly, their case to the court was a claim not for authority over the river in the Maori way but to the ownership of the riverbed, as English law was thought at the time to require. Nor could that have been a Maori case, for, in the Maori view, the river was part of an indivisible whole, a resource comprised of the water, the bed, the tributaries, the banks, the flats, and, indeed, the whole catchment area, over which their authority had been traditionally maintained.

The record of the proceedings includes extensive evidence and opinions on Maori law. Here, we enter a caveat from the start. Again, evidence and submissions were contrived to fit the issues as defined by pleadings, Maori custom was manicured to suit the presumptions of another world view and Maori perceptions appear to have been judged or even comprehended not in their own terms but in terms of European culture.

Case cast in terms of English law

Argument adapted to suit

7.2 NATIVE LAND COURT INVESTIGATION, 1938–39

7.2.1 The application

By 1937, the inquiry directed by Parliament seven years earlier, as referred to in the previous chapter, had still not been carried out by the chief judge of the Native Land Court, though he was obliged to report 'on as early a date as possible'.¹ In the meantime, Hekenui Whakarake and Wharawhara Topine, who had given evidence before the 1916 Scenery Preservation Commission, had consulted D G B Morison, a Wellington lawyer. He advised them to abandon their petition and apply to the Native Land Court for a native freehold order for the riverbed. Between them, Hekenui and Wharawhara traced their whakapapa to the main hapu on the river. Further, they enlisted the help of Titi Tihu, a nephew of the petitioner Piti Kotuku, who had also given evidence before the 1916 commission. In 1962, Titi was still to be involved in the proceedings that flowed from the claim, and as late as 1983, 45 years after he was first involved, he was before a select committee of the House explaining his petition on the same matter.

In any event, on 24 February 1938, Titi Tihu and others applied under the Native Land Act 1930 to the Aotea District Native Land Court to investigate the title to part

Impact of Native Land Court failure to hear petition

1. See s 34 Native Land Amendment and Native Land Claims Adjustment Act 1930 and the schedule

of the Whanganui River and its bed. The part was described in the later amended application as extending from the tidal limit at Raorikia to its junction with the Whakapapa River above Taumarunui.²

Issues as prescribed

The application was heard by Judge Browne. By agreement with the Crown, the only question for the first hearing was whether Whanganui Maori owned the bed of the river, according to native custom, at the time of the Treaty of Waitangi in 1840. Morison, for the claimants, indicated that, if the decision was that Maori did not own it at that time, that was the end of the matter so far as the riverbed was concerned, though questions might remain on fishing and other rights.³ If the court held in favour of the claimants, then the second stage would be to determine whether Whanganui Maori still held the riverbed under their customs and usages.⁴ Should the court uphold the claimants on the second stage, then the third stage would be a hearing to determine the riverbed's owners.⁵

Inquiry's limitations

It should be noted that, although the application referred to part of the Whanganui River and its bed, it was essentially in respect of the bed alone. The Native Land Act 1931 made no provision for an investigation of the ownership of a river as such, and the court's jurisdiction to inquire was limited to the title to land. As a result, the inquiry did not extend to the river as a total entity comprising its waters, its bed, and its banks. This artificial severance of the bed of the river from its other components meant that the investigation was also artificial and incomplete and excluded a proper appreciation of the Maori concept of the physical, spiritual, and cultural qualities of the river as a unified whole.

Nor was there a discussion of the nature and extent of the rangatiratanga over the Whanganui River as a taonga. This limitation in the jurisdiction of the Native Land Court was reflected in the various proceedings that followed.

Exclusion of Treaty

It is stressed that, in the absence of statutory incorporation of the Treaty of Waitangi in New Zealand general law, none of these court proceedings directly involved the claimants' Treaty rights, except for a saving provision of limited application in the Whanganui River Trust Act 1891 (s 11) (see sec 6.2.3(2)). Instead, they were concerned with customary rights and usages in respect of the river, English common law and conveyancing rules, and various New Zealand statutes. Certain evidence, however, is relevant to Treaty rights and thus pertinent to this current inquiry.

7.2.2 The terms of the application

Tidal reaches excluded; nature of Maori case

At the first hearing, beginning on 3 November 1938, counsel for the applicants, Morison explained in opening that the application excluded the tidal waters of the river because of the Supreme Court decision in *Waipapakura v Hempton*.⁶ This case

2. Document A77, vol 4, pp 15–16

3. Ibid, vol 1(1), p 2

4. *The King v Morison and Another* [1950] NZLR 247, 249 (SC) (doc A77, vol 1(4))

5. Document A77, vol 1(2), p 1

6. *Waipapakura v Hempton* (1914) 33 NZLR 1065

was taken as authority that tidal waters were vested in the Crown. The only question to be dealt with at the hearing was whether Whanganui Maori owned the bed of the river at the time of the Treaty of Waitangi. The applicants' case was based on the proposition that the bed of the river in 1840 was customary land, was used, occupied, and owned by the Whanganui tribe according to their customs and usages, and that native custom recognised the ownership of beds of rivers as part of their land just as much as any other part.

7.2.3 The applicants' evidence

Counsel called three witnesses to give evidence on the customary relationship of the Whanganui people with the river – Hekenui Whakaraka, Wharawhara Topine, and Pareta Wereta. These appeared to maintain that the river was a separate entity from the land, because there were different ancestors for each. Three ancestors were given for the river, Hinengakau, Tamaupoko, and Tupoho, but these were not the ancestors who had been cited when the riparian lands were put through the Native Land Court. Counsel argued that the Native Land Court could therefore not have investigated the title to the river when it investigated the title to the abutting land, and the river could not have passed with the land. However, we do not think that the Maori were intending quite that. Rather, they were saying that, no matter what was done with the land, the river should be held as one.

Evidence on
ancestors

This requires some explanation. Maori claimed land rights in the Native Land Court through their mother's or father's use of the land or, to make their case more compelling, through use by a remoter antecedent and down to them. For so long as the Native Land Court was dealing with localised blocks of land, and preferred to work from actual occupations, ancestors particularly associated with that block were chosen. They were consequentially more recent. To go back too far on the genealogical chain would be to include others whose primary residence was elsewhere.⁷

Maori claims based
on ancestry

Had the court been dealing with all the Atihaunui lands as a single block, then Maori would have referred to an even remoter ancestor, the original tribal founder, so as to include all. In brief, the choice of ancestor depended on the matter in hand.

In this case, the witnesses were effectively saying that the river was for all. They could well have used the name of the original founder of the Atihaunui people, but chose instead the children of Tamakehu and Ruaka: Hinengakau, who dwelt in the upper reaches, Tamaupoko of the middle, and Tupoho of the lower part. This was because these were the ancestors most regularly cited in song and legends or carved on houses to show how the hapu of the river were related and how the river was held as one (see sec 2.5.1). Had the same witnesses been talking of who had the

7. Recent antecedents were raised in the Native Land Court, when dealing with particular blocks, for another reason too. It was often presumptuous to speak for other than one's own family when making a claim, unless one was a leader and the occasion otherwise required it. It was usually more appropriate for the individual to call in aid the names of recent family heads.

right to a build an eel weir at a particular place, a much more recent forebear would have been cited – the person who last put one there.

Interpretation of
the evidence

This aspect of Maori culture appears to have been misinterpreted. The question became: Were the river ancestors different from those for the land? In truth, we think that they were the same but that different ancestors were used according to the occasion. The substantive question was whether, notwithstanding local uses of the river, the river was also a single entity and, as such, a taonga of the people as a whole. Though the river as a flowing entity was in a category of its own, the same question could in fact have been asked of the land. But since the land court would not admit to tribal ownership or the award of tribal lands as a single block, it could not ask that question.⁸ In referring to more remote ancestors, the witnesses were asserting the tribal overright.

The related question of whether the court included the title to the river when it issued a title to the abutting land is to be addressed according to the facts. If it did, then the question in terms of the Treaty of Waitangi is whether Maori knew of this and agreed, and not just the individual land grantees but the tribe, assuming that customarily a tribal interest were held.

In any event, the witnesses relied on the existence of separate river ancestors more remote than those used to claim specific blocks of riparian land, thereby claiming that the river was held for Atihaunui as a whole. Over the 24 years of proceedings, no Maori is known to have come forward to challenge that position.

Evidence of Hekenui
Whakarake

Hekenui Whakarake deposed that he was a direct descendant of Hinengakau, one of the three tipuna from whom all Whanganui Maori could trace rights to the river.⁹ He belonged to several Whanganui River hapu, principally Ngati Ruaka based at Ranana. He defined the territorial boundaries of the Whanganui tribe as including the Whanganui River from its mouth to its junction with the Whakapapa River. The Whanganui tribe was occupying the river up to that point at the time of the Treaty. He named Tamakehu as the greatest tipuna or ancestor for the Whanganui people, and his offspring as the three tipuna for the river: Hinengakau, Tamaupoko, and Tupoho. He said that these three tipuna were for the river, and that their descendants were tipuna for the land. The rights of those living on the river bank lands were traced from the people who had established pa on these lands, not from the three earlier tipuna for the river. In other words, he was asserting that the ancestors to be named for the river were prior forebears, while those who had been named for the land were subsequent ancestors, not ancestors on a separate line.¹⁰

8. The Native Land Court process and its antipathy to tribal interests were considered at section 2.8.2. The vesting of lands in the tribe as a whole, by reference to a remote ancestor, is legally achievable it seems and is more acceptable today. As part of the settlement of the Waikato raupatu claim in 1995, lands may be vested in Te Wherowhero, though long deceased, a radical departure from the Native Land Court law and something of a reversion to customary norms. Significantly, the settlement excludes the Maori Land Court from exercising jurisdiction over those lands.

9. Document A77, vol 1(1), pp 7–19

10. Document A49, p 116

Asked whether there were visits up and down the river in times of peace, Hekenui said that they visited one another by invitation. If they went without permission, there would be strife. The river was not a general highway.

Wharawhara Topine, of Taumarunui, belonged to the Ngatihaua hapu of the Whanganui tribe.¹¹ He confirmed that the territory of the Whanganui people went right down to the sea. At the time of the Treaty of Waitangi, they used and occupied the river. His people came over in the Aotea waka accompanied by three atua, or gods. When they arrived, Tawhirimatea remained in suspense in the air and controlled the weather; Tangaroa remained in the water and had power over all the fish, the stones and soil, and everything else that was in the water, as well as control of the taniwha; Tane went inland and had mana over the forests. Wharawhara also confirmed that the Whanganui people were all descended from the three tipuna named for the river and that these tipuna had never been set up as ancestors for the adjoining land.

Evidence of
Wharawhara Topine

On the basis of information handed down by his elders, Wharawhara gave detailed evidence of the fish that were in the river and of how tuna were caught in the pa tuna. He recounted the names and locations of a great many rapids and the pa tuna on them. All these pa, and all the birds and the fish and the stones in the river, he claimed, belonged to the Whanganui tribe. In pre-Treaty times, if a party of Ngati Tuwharetoa had come down the river in a canoe, there would be war, unless they had made some arrangement. A member of one hapu wishing to take a canoe down the river past the land of another hapu would have to get permission. At every village along the river, the same hapu lived on each side.

Pareta Wereta of Matahiwi, who belonged to five hapu of the Whanganui River, also said that the rights to the river were with the three tipuna.¹² Asked whether these tipuna had ever been set up in claims for land adjoining the river, he answered, 'No, Wanganui is Papatupu [customary] land'. From this, it can be seen that, in his view, the Native Land Court had not investigated the title to the river when it investigated the title to the land.

Evidence of Pareta
Wereta

Asked what had happened to the large number of pa tuna and pa piharau in the river, Pareta said that they had been removed by Pakeha, who came on barges and punts. His people protested and eventually ended up in Wanganui to attend a sitting of the Magistrates Court, but the case was settled out of court.

7.2.4 The Crown's reply

At the next hearing on 27 April 1939, Crown counsel called Eruera Te Aka, who was born in 1851 and died within a week of giving his evidence.¹³ Because he was too old to travel, the court agreed to hear him at Hawera. Eruera belonged to Ngarauru, Ngati Ruanui, and others, and had connections with Whanganui. When young, he

Evidence of Eruera
Te Aka

11. Document A77, vol 1(1), pp 19–31

12. Ibid, pp 30–31

13. Ibid, pp 40–49

had lived at Tawhitinui on the river near Moutoa Island, but he had lived away from the Whanganui district for 60 years.

The Ngarauru, he said, occupied land that reached to the Whanganui River. Whanganui were the main people to work on the river, but a few Ngarauru worked on it too. There were many times when the Ngarauru went up the river, sometimes to a hui, sometimes to visit their relatives and to tangi. As long as they kept on the water and did not interfere with fishing rights, there were no objections. A messenger would be sent to say that they would be coming; sometimes on hearing the news of a death, they would just go.

The river was the Maori road and belonged to Maori, he said, and the other road belonged to the Queen. Asked whether the bottom of the river was of interest to Maori, he said that from the shore right to the riverbed and the land under the river was all of interest to them. If he had a section on the river, he could place a pa in the river. Nobody would object. The land at the bottom of the river would belong to him, but the water above it belonged to everybody. He agreed that Hinengakau, Tamaupoko, and Tupoho were the tipuna of the Whanganui River and that no other tipuna ranked equally with them, 'only their descendants'. From them, the main chiefs of the Whanganui descended. He was unable to say who was the great ancestor of the Whanganui people.

At the third and final hearing commencing at Wanganui on 18 May 1939, Crown counsel called six witnesses. As Judge Browne was later to note, their evidence related mainly to the use made of the river in recent years, and very little of it to the time of the signing of the Treaty.

Evidence of William
Robertson

William Robertson had been employed on the river from 1915 to 1937.¹⁴ His father was European and his mother Ngati Tuwharetoa. He was brought up in Tokaanu, but knew much of the river well. He had not heard of Maori or anyone else being blocked from going up and down the river. It was free for all to use. He had heard complaints of eel weirs being damaged from the erection of stone walls that diverted the river. High floods also broke eel weirs. He did not know what was happening on the river before the Treaty.

Evidence of Andrew
Robertson

Andrew Robertson's father was European and his mother Ngati Kura of Pipiriki, where he was born.¹⁵ He had lived in the district all his life, served on the river for some time, and been captain of one of their boats for the past nine years. He had inherited a lamprey weir in the river at Paparoa that he still used. There were four lamprey weirs at Pipiriki and one eel weir. He did not know about fishing or navigation at the time of the Treaty. He had not heard of any claims to the bed of the river until the previous two or three years. His uncle was made to shift his eel weir back about a chain. He had to rebuild it himself.

Evidence of Arthur
Burgess

Arthur Burgess, a European of Wanganui, first went up the river to Pipiriki in the early 1890s.¹⁶ He claimed that, in those years, no eel weirs blocked it but that later

14. Document A27(f), pp 110–119

15. *Ibid*, pp 119–27

16. *Ibid*, pp 127–130

they were extended so far out that they were across the only channel through which the boats could pass. He did not say how many times he had been on the river.

Joseph Tarry, a European, joined the river service in 1908. He was a captain and retired after many years on the river.¹⁷ He ran mainly between Pipiriki, the houseboat, and Taumarunui. There were plenty of eel weirs on that stretch in earlier times, but they were not placed so as to block navigation. He did not hear Maori complain about the boats except, when a groyne was put in, sometimes making it difficult for them to get their canoes through. There were fishing restrictions among Maori on the river. He never heard any expressions or opinions as to the ownership of the river. An act of god (a flood) destroyed some eel weirs in 1913 and 1915. He knew that there was a main tribe and a sub-tribe but did not know which was which. He thought that, in olden times, if people from one hapu wanted to go into the territory of another hapu, they would send a messenger in advance to notify them.

Evidence of Joseph
Tarry

Kuki Wakarua, or Tautahi, a chieftainess of the Ngarauru people of nearby Taranaki, had no interest in any land on the Whanganui River and had never lived on the river.¹⁸ She was not able to say what uses her people made of the river, though they used their canoes for paying visits to their relatives. She could not say whether the fishing rights were owned by individual Maori, or whether the river was for the use of all. She could not speak with authority about anything on the river. She knew the Wanganui end of the river.

Evidence of Kuki
Wakarua

The last Crown witness was Maui Rangihaeata of Ngati Ruanui and Ngarauru of Taranaki, Whanganui, and Ngati Apa of Rangitikei.¹⁹ He was born in about 1876 and lived in the vicinity of Patea for nearly 20 years. He described fishing, the use of stones and gravel, and navigation on the Patea River. Before the Pakeha came, Maori people could go up and down the river if it was for a good purpose, the river being navigable for about 30 to 40 miles. He had never heard his ancestors speak of any use that they made of the Whanganui River. He did not travel in the Whanganui district until the time of the steamers.

Evidence of Maui
Rangihaeata

7.2.5 Judgment

On 20 September 1939, Judge Browne delivered his decision. He ruled that the riverbed in the application, from the tidal limit to the Whakapapa River, was land held by Whanganui Maori under their customs and usages.²⁰ In doing so, the court rejected each of the five grounds relied on by the Crown in support of its contention that Whanganui Maori did not, at the time of the Treaty, own the bed of the Whanganui River. These were as follows.

Findings of Native
Land Court

First, the court disagreed with the Crown's allegations that native custom did not recognise the exclusive ownership of the beds of rivers such as the Whanganui.

17. *Ibid*, pp 130–139

18. *Ibid*, pp 139–151

19. *Ibid*, pp 151–159

20. Document A77, vol 1(2), pp 1–3

Judge Browne found that the bed of the Whanganui River belonged to the Whanganui Maori through whose territory it ran, just as much as the land forming its banks did. The test was that, if one of the outside tribes had claimed to make use of the bed for the purpose of erecting pa tuna on the ground asserted by the Crown to be public property, such a claim would have been strenuously resisted by the local people and would probably have resulted in bloodshed.

Judge Browne further held that the general use made of the river in recent years without any proper agreement or arrangement with Whanganui Maori was, in the court's opinion, largely resulted from the fact that those living on its banks, owing to their want of unity and the absence of a powerful and influential leader, were not strong enough to offer an effective resistance. It also resulted from the Crown's mistaken assumption that the river was a main highway available to everyone. He found that Whanganui Maori had used the bed of the river from time immemorial for the erection of eel weirs and other fish traps, yet, apparently without any right or justification, these were indiscriminately destroyed or done away with to provide a passage for river steamers. Any protests by the unfortunate people who owned the eel weirs remained unheeded.²¹

Secondly, the court dismissed the Crown's allegation that native custom related solely to rights of fishing, navigation, and ordinary domestic use of the river waters. Judge Browne found the rights of the Whanganui Maori in the river followed as a matter of course and were incidental to the ownership of the bed. They could not in any way be separated from the ownership.

The judge went on to say that, in all his experience of Maori land and the investigation of the title to such land, he had never heard it asserted by any Maori claimant that the ownership of the bed of a stream or river, running through or along the boundaries of the land subject to investigation, whether navigable or not, was in any way different from the ownership of the land on its banks.²²

Thirdly, Judge Browne considered the Crown's contention that such rights as Maori had in relation to the Whanganui River did not confer rights of ownership upon which freehold orders could be made to the bed of the river. Holding as he did the opinion that the rights to water were incidental to the ownership of the bed over which water flows, or on which it lies, he could not see why freehold orders should not be issued for the bed of a river in the same manner as they had already been issued for the bed of a lake.²³

Fourthly, Judge Browne considered the Crown's argument that, at the time of the signing of the Treaty, 'land' meant land in the common acceptance of the term and not in the highly legal sense. To a Maori mind, he ruled, 'land' at that time meant

21. Document A77, vol 1(2), p 2

22. We note here that this observation of Judge Browne is referred to by the judges of the Maori Appellate Court in their answers to certain questions referred to them by the Court of Appeal by order of 7 May 1956. These answers were recorded in a memorandum dated 6 June 1958: doc A77, vol 2(9), pp 1-11. We defer our comments on this observation until we consider the second Maori Appellate Court hearing in 1958 (see sec 7.7).

23. Document A77, vol 1(2), p 2

the whole of the territory within the tribal boundaries over which the tribe had complete control, whether covered with water or not.

Fifthly, Judge Browne unhesitatingly disagreed with the Crown's contention that the rights of sovereignty referred to in the English version of the Treaty included the rights of ownership of access over the country and its navigable waters. He cited English common law authority in support of his finding. In addition, he made the perceptive comment that:

this matter of general access is so foreign to Maori ideas that any proposal to grant a concession of the kind claimed by the Crown would, the Court is absolutely certain, have been most strenuously objected to by the Chiefs who were invited to sign the Treaty as leading to an unwarranted interference with their rights and might if persisted in, have in the end wrecked the Treaty.²⁴

7.3 THE NATIVE APPELLATE COURT, 1944

Judge Browne's decision was a crushing defeat for the Crown, which, not surprisingly, appealed to the Native Appellate Court. The appeal, however, was not heard by the court until 1944, presumably due to the exigencies of the Second World War.

Crown appeals

Chief Judge Shepherd presided over a court of six Native Land Court judges. The Crown contended that native custom did not recognise exclusive native ownership of beds of navigable rivers, nor that the bed of a river or lake was land covered with water. Further, the Crown contended that it was not in fact true that every foot of land in New Zealand, apart from such land as may have been alienated, belonged to some Maori tribe or hapu. No further witnesses were called.

Crown argument on appeal

The six judges issued separate judgments on 20 December 1944.²⁵ All six upheld Judge Browne's decision and added little to his judgment.

Chief Judge Shepherd, in a brief judgment, dismissed the Crown's contentions.²⁶ The Crown, he held, had failed to show that Judge Browne's decision was wrong.

Shepherd's judgment

Judge H H Carr also dismissed the Crown's contentions.²⁷ As to the first, he said that 'The water and the land beneath it are to the Maori indivisible' and that, to Maori, the water would be the predominating factor and the exclusive use of the water would carry with it everything below. He saw little point in the second contention because the case was not concerned with every foot of land in New Zealand. It had been sufficiently established to Judge Browne's satisfaction that the Whanganui tribe exercised an exclusive right of ownership over this body of water, and over its bed of land below, in accordance with their customs and usage. The right to fish came through, or under, the general right of ownership of everything

Carr's judgment

24. *Ibid.*, p 3

25. Document A77, vol 1(3), pp 1-13

26. *Ibid.*, pp 1-2

27. *Ibid.*, pp 4-5

within the tribal boundaries – the tribal right was an absolute one. He considered that the Crown appeal should fail.

Harvey's judgment Judge J Harvey stated that the evidence before the lower court proved that a section of the Maori people of New Zealand (the Whanganui tribe) had occupation of the bed of the river under ancestral rights. These had been preserved against all other sections by means of the 'strong arm', and such occupation and ancestral rights justified the decision appealed from.²⁸

Dykes's judgement Judge R P Dykes invoked the judgment of Justice Edwards in *Tamihana Korokai v Solicitor-General* and provisions of successive Native Land Acts as giving the court jurisdiction to investigate land covered with water as much as land covered with forest.²⁹ He pointed out that witnesses giving evidence in 1939 of matters occurring before 1840 could give to the court only the stories handed down to them by their elders: 'That is how the claims to interest in Native land are established and as such are accepted by the Courts on investigation to any title,' he said. He held that the Crown appeal failed.³⁰

Beechey's judgment Judge E M Beechey upheld the judgment of Judge Browne.³¹ In the course of considering the nature of the Whanganui tribe's interest in the river, he did not think that the Maori mind adverted to the question of the ownership of riverbeds as opposed to the use of the waters. He wrote:

As long as they had exclusive occupation of the land adjoining the navigable river they would be content to use the waters and the bed of the river just in so far as either one or the other would serve their purposes, either for transport or for the maintenance of their food supplies.

Judge Beechey was the only one of the six appellate judges to advert expressly to the evidence of ancestors for the riverbed separate from those given for the land. He commented that he could not understand why different take (the basis for a claim) were being advanced for the river as distinct from the land but did not think this was relevant to the question then before the court.

Whitehead's judgment Judge A A Whitehead also affirmed the decision of the court below, holding it to be well established that, by native custom, all the land within the tribal boundaries of each tribe, including land covered by water, whether navigable or not, belonged exclusively to the tribe.³²

28. Document A77, vol 1(3), pp 5-7

29. *Tamihana Korokai v Solicitor-General* (1913) 32 NZLR 321

30. Document A77, vol 1(3), pp 7-9

31. *Ibid*, pp 9-12

32. *Ibid*, pp 12-13

7.4 THE SUPREME COURT, 1949

7.4.1 Supreme Court proceedings

Following the success of the Whanganui claimants, the Crown instituted proceedings in the Supreme Court for the issue of writs preventing Whanganui Maori from obtaining a title for the riverbed from the Maori Land Court.³³ In the meantime, counsel for Whanganui Maori, D G B Morison, had been appointed chief judge. In this capacity, he was named first defendant in the Supreme Court proceedings, while Titi Tihu was named second defendant.

Crown moves to
stymie action

The case was not heard until May 1949, when it came before Justice Hay. The proceedings are known as *The King v Morison and Another*.³⁴

7.4.2 The evidence for the Maori defendants

Several affidavits were filed on behalf of the Maori defendants. By then, the question of whether the Maori Land Court had extinguished the customary title to the riverbed in its investigation of the adjoining lands appears to have been uppermost in legal counsel's thoughts.

Hekenui Whakarake stated on oath that:

- He was one of the leaders of the Whanganui tribe and had acted as an agent for them in the investigation and administration of their lands for 22 years.
- He was a direct descendant of Hinengakau, whom the whole of the Whanganui tribe acknowledged to be one of three ancestors or tipuna from whom were derived the rights to the Whanganui River. The other two ancestors were Tamaupoko and Tupoho, all three being children of Tamakehu and Ruaka, who were both prominent rangatira of the tribe. These ancestors had rights in the Whanganui River, and their descendants had continued to exercise these rights and occupy the river down to the present time.
- He had an intimate knowledge of the blocks of land adjoining the Whanganui River and of the investigation of title to the land. No application had been made or heard to investigate the title to the Whanganui River prior to the application for investigation filed in the Native Land Court at Wanganui on 22 February 1938.
- Applications had been made at various times during the previous 80 years or more, and investigations of title had been conducted and completed in respect of all lands on both banks of the Whanganui River.
- Upon completion of the investigations and the court's finding, the land ceased to be Maori customary land held under the customs and usages of the Maori people and became instead Maori freehold land.
- He had caused searches to be made of the records of the Maori Land Court relating to the investigation of the title to all blocks of land adjoining the Whanganui River on both banks from the Kaiwhaiki reserve (a little below the

Evidence of Hekenui
Whakarake

33. In 1947, the Native Land Court was renamed the Maori Land Court.

34. *The King v Morison and Another* [1950] NZLR 247 (SC)

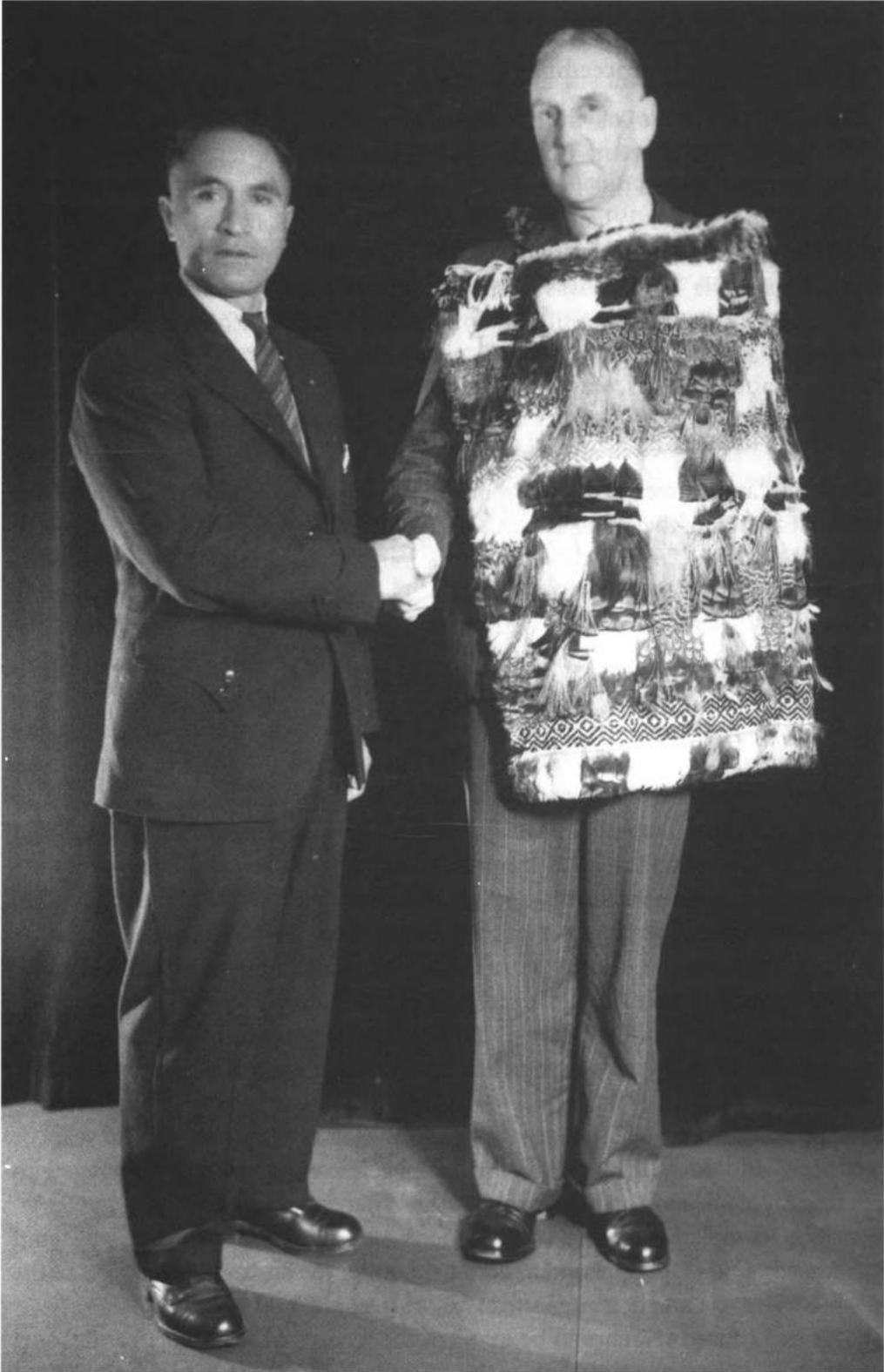


Figure 14: Titi Tihu of Taumarunui and D G B Morison on the occasion of the 1945 hearing in the Maori Appellate Court. Morison was the solicitor and counsel prosecuting the claim. The cloak that he is wearing was especially made to commemorate the case by Titi Tihu's mother. Photograph courtesy Alexander Turnbull Library (Margaret A Maynard collection, C15421).

Raorikia tidal limit) to Taumarunui, and was present when his searches were checked at the office of the Aotea District Maori Land Court at Wanganui.

- The names Hinengakau, Tamaupoko, and Tupoho did not appear in such records as having been put forward by the claimants as the ancestors or 'tipuna' in respect of any such blocks.
- Except for a block of land known as Ohutu 1, no block extends to include land on both banks of that portion of the Whanganui River referred to in the application to the Native Land Court of February 1938.
- It was quite common for the same group of Maori or hapu to occupy land on both banks of the Whanganui River. When it was investigated by the court, the title was, with the one exception referred to above, dealt with as though it were a separate block, with a separate name. It was separately surveyed and was the subject of a separate application.
- He explained that, in the case of the Ohutu block, which was claimed by the Ngati Poutama hapu, the reasons for the inclusion of an area on the right bank in the main portion of the block on the left bank arose from particular circumstances. These were that a large pa named Hikurangi and a burial ground, which were sacred to Ngati Poutama, were situated on the right bank of the river. Ngati Poutama lived on both sides of the river. Ngati Pamoana, another Whanganui River hapu, were claiming as part of their blocks all the land surrounding Hikurangi Pa. It was agreed between the two hapu that the area surrounding the pa and burial ground would be set aside for Ngati Poutama. Accordingly, this land was included in the Ohutu block. At no time was the Whanganui River or any part of it included in the Ohutu block as a result of this arrangement, nor was it intended to be included.³⁵

Neville Simpson, a solicitor and partner in the Wellington law firm of Morison Spratt and Taylor, deposed that:

Evidence of Neville Simpson

- He had lengthy experience in Maori land practice, and following the appointment of Morison as chief judge of the Maori Land Court, he assumed responsibility for the greater part of his firm's extensive Maori practice.
- In January 1938, at the Wanganui Native Land Court, he searched the title to all the blocks of land on both banks of the Whanganui River from the Kaiwhaiki reserve to Taumarunui. Only one block, namely Ohutu 1, was shown as intersected by the river.
- He had recently searched the Maori Land Court minutes of the application for investigation of title to the Ohutu block in the year 1897 and also to a number of other blocks on the banks of the Whanganui River. In no case did he find any reference or evidence to the effect that the bed of the river or any part of it was included in the investigation of any such block.
- In the case of the Ohutu block, the claim was based on ancestry and occupation, and at least 12 persons were named as 'take tipuna' (or ancestral root of title).

35. Document A27(f), pp 51-54

- In his search of the title to the blocks of land lying on the banks of the Whanganui River and of the Maori Land Court's minutes relating to such blocks, he found no reference to the named Hinengakau, Tamaupoko, or Tupoho, nor could he find that these persons had been named as the tipuna or common ancestors in respect of any block of land.³⁶

Evidence of Norman
Stevens and John
Caradus

Affidavits were also sworn by Norman Stevens on 4 May 1949 and John Caradus on 19 May 1949.³⁷ Stevens, prior to his retirement in 1946, was the native land draughtsman at the Lands and Survey Department in Wellington. He reinspected the plan attached to the order of the Native Land Court of 20 July 1897 relating to Ohutu 1 and registered in the District Land Registry at Wellington. In his opinion, the plan wrongly included portions of the Whanganui River, whereas all three plans in the possession of the Lands and Survey Department in respect of Ohutu 1 agreed in excluding the Whanganui River from the boundaries of the block.

Caradus, prior to his retirement in 1948, was Registrar-General of Lands for New Zealand. The Whanganui River is shown on certificate of title for Ohutu 1 as passing through the block.³⁸ In February 1939, when the district land registrar at Wellington, and at the request of Morison (then a practising solicitor) in Wellington, he examined the plans in the possession of the Lands and Survey Department and in the Wellington Land Registry Office relating to Ohutu 1. These were the plans from which the plan on the certificate of title had been compiled. He was satisfied, as a result of this examination, that the land described in the certificate of title did not include any area of land of the bed of the Whanganui River.

7.4.3 The judgment

Court's judgment

With reference to Ohutu 1, Justice Hay accepted early in his judgment that the plan endorsed on the certificate of title for the block had been drawn in error. This plan showed the boundary lines continuing across the river, as if to include a portion of the river within the block.

Two main contentions had been relied on by the Crown in support of its claim that neither the Maori Land Court nor the Maori Appellate Court had jurisdiction to investigate the title to the riverbed. The first was that there had already been a complete investigation of the bed of the Whanganui River as part of the investigation of the adjoining land. The second was that, in consequence, the bed of the river was vested *ad medium filum aquae* in the riparian owners. Therefore, no part of the river was held by Maori, or their descendants, under the customs and usages of the Maori people.

The second defendant, Titi Tihu, by his counsel agreed that there was no longer any land upon the river banks that had not been investigated by the Native Land Court and had hence ceased to be Maori customary land. But Titi Tihu did not

36. Document A27(f), pp 56–58

37. Ibid, pp 54–55, 58–59

38. Certificates of title, vol 135, fol 186, Wellington Registry

concede that such investigation of title to the land had also completed investigations of title to the riverbed. This remained one of the main subjects of controversy in the proceedings.

Justice Hay held that there was nothing to show that, in any of the investigations of title throughout the years in regard to lands on the bank of the river, the Native Land Court had ever adverted to the question of the riverbed or given any consideration to the possible effect of its orders upon the title to the bed.

On whether the customary title had been extinguished by the Native Land Court

He then considered at some length the Crown's first contention that the English doctrine of *ad medium filum aquae* was necessarily incorporated in the various orders of the Native Land Court. Before this doctrine could be applied, much fuller information as to the surrounding circumstances would need to be placed before the court. He found it somewhat singular that the Crown in this case was invoking the doctrine of *ad medium filum aquae*, whereas it had successfully opposed its application in the Waikato River case (*Mueller v Taupiri Coal-Mines Ltd*).³⁹

Justice Hay decided, however, that, for the purposes of his judgment, it was not necessary to determine whether the *ad medium filum aquae* rule applied, in view of the conclusion that he had reached on the Crown's second contention that the bed of the river for its relevant length was vested in the Crown by virtue of section 206 of the Coal Mines Act 1925 (originally, section 14 of the Coal-mines Act Amendment Act 1903). It was common ground between the parties that, for much of its length, the river was navigable and was a 'navigable river' within the meaning of section 14, and that the bed had not been granted by the Crown.

Justice Hay concluded that the language of section 206 of the Coal Mines Act was plain and unambiguous as expressing an intention on the part of the Legislature that the beds of all navigable rivers were to be deemed always to have been vested beneficially in the Crown, except in cases where such beds had been expressly granted by the Crown to someone else. In short, the court held that, as a result of that Act, the bed of the Whanganui River was Crown, not Maori land. The judge stated that, unless his interpretation of section 206 was adopted it was difficult to see what purpose was to be served by passing the legislation at all.

The Supreme Court decision was, in part at least, a vindication for the Crown. The Crown, as a consequence of the Coal Mines Act provision, owned the bed of the Whanganui River, and, in the opinion of Justice Hay, it had not acted in a confiscatory manner in so acquiring it. Justice Hay rejected the contention that the Crown had confiscated the river, because under section 14 of the Coal-mines Act Amendment Act 1903, the beds of all 'navigable' rivers were deemed to have 'always' been vested beneficially in the Crown, and that, while the conscience of the Crown was to be directed by part IV of the Maori Land Act 1931, it was 'bound primarily by the welfare of the State as a whole'.⁴⁰

For the sake of completeness, we note that the High Court reached a different conclusion on a much later case in 1984. In *Tait-Jamieson v G C Smith Metal Containers Ltd*, it ruled that section 261 of the Coal Mines Act 1979 (the former

Another opinion in a later case

39. *Mueller v Taupiri Coal-mines Ltd* (1902) 20 NZLR 89

40. *The King v Morison and Another*, pp 266-267

section 206 of the 1925 Act) did not affect the presumption that the Crown grant of land bordering a river conveyed the bed to the middle line.⁴¹ If the presumption was not to apply as a consequence of section 261, the Crown grant had expressly to exclude the riverbed.

Unfortunately, the decision of Justice Hay in *The King v Morison and Another* was not cited or referred to in the judgment. The Law Commission, in commenting on *Tait-Jamieson*, observed that, if *Tait-Jamieson* were correct, there would be little to which section 261 of the Coal Mines Act 1979 could apply, and its purpose becomes difficult to understand.⁴² This reflects the view of Justice Hay.

7.5 THE 1950 ROYAL COMMISSION

7.5.1 Purpose

Maori response

Maori responded quickly to Justice Hay's decision. On 11 October 1949, two weeks after the judgment was delivered, their representatives met at Parliament with senior Government Ministers. It was suggested that, instead of requiring Maori to pursue their legal remedies in the Court of Appeal and, if necessary, the Privy Council, the question of their continued ownership of the bed of the river might be referred to a royal commission.⁴³

On 25 January 1950, the Governor-General appointed Sir Harold Johnston, a retired Supreme Court judge, to a royal commission to:

- (a) advise whether, but for the Coal-Mines Act Amendment Act 1903 provision, Maori were owners of the Whanganui River according to their custom and usage;
- (b) inquire whether Maori had suffered any loss in respect of the riverbed as a result of the 1903 provision that 'in equity and good conscience' entitled them to compensation;
- (c) recommend the amount, to whom, and on what terms any such compensation should be paid; and
- (d) report whether any rights should be abandoned or surrendered in return for compensation.⁴⁴

7.5.2 The evidence

The royal commission commenced its hearing in Parliament Buildings on 26 April 1950. F C Spratt, counsel for Titi Tihu, Hekenui Whakarake, and associated

41. *Tait-Jamieson v G C Smith Metal Containers Ltd* [1984] 2 NZLR 513

42. New Zealand Law Commission, *The Treaty of Waitangi and Maori Fisheries: Mataitai – Nga Tikanga Maori Me Te Tiriti o Waitangi*, preliminary paper no 9, Wellington, March 1989, pp 75–76

43. 'Notes of Representations Made to the Right Honourable P Fraser, Minister of Maori Affairs, at Parliament Building, 11 October, 1949', MA5/13/188, pt 2, NA Wellington (doc A49(d), pp 222–227)

44. Sir Harold Johnston, 'Report of Royal Commission Appointed to Inquire into and Report on Claims Made by Certain Maoris in Respect of the Wanganui River', AJHR, 1950, G-2 (doc A77, vol 1(6)), pp 1–3

Whanganui Maori, made lengthy opening submissions and then called his witnesses.⁴⁵

Hekenui Whakarake, aged 67 or 68, said that he was one of the leaders of the Whanganui tribe. He was appointed by all the elder chiefs of the 12 hapu, who wanted him to represent them. The 12 hapu he named as Ngatihaua, Ngatipeketuroa, Ngatikura, Ngatihau, Ngatiruaka, Ngapoutama, Ngatipamoana, Ngatituwera, Ngapaerangi, Ngatitupoho, Ngatirangi, and Ngatienuku.⁴⁶

Evidence of Hekenui
Whakarake

As agent, he had acted in the investigation of titles and the administration of lands for tribal interests for about 32 years. His cousin, Titi Tihu of Taumarunui, made application for the investigation of the Whanganui riverbed before Judge Browne. Titi was the financier for the case, but Hekenui did the actual work. In so doing, Hekenui had the support of the people of the tribe and travelled to the various marae and settlements of the people. Each hapu appointed a chief to represent them on a committee for the people as a whole. When Titi Tihu said that he applied on behalf of all concerned, he meant all of the Whanganui people.

The Whanganui people originally owned the land on both sides of the river from its mouth right up to the Whakapapa River, but in 1848, the land on both sides of the river from its mouth to about Raorikia was ceded to the Crown. He did not know of any investigation of the title to the river itself before Titi Tihu's application. Asked how the people looked upon the river, he said that 'Everybody . . . who lived along the river – well, it was the mana'.⁴⁷

'Take tipuna', Hekenui said, gives the right to the river. It is acquired by going back to ancestry. When there is an investigation (by the court) of a block of particular concern to a hapu, those on the block show a tipuna in the application. They go back to a common owner, but not right back to the three ancestors who started off beside the river, from whom the 12 hapu he named were descended. These hapu were all on the river.

Hekenui explained that in pre-European times the tribe held the land but portions would be allotted; that is, given to individual families for special purposes, such as cultivations. When the land was worked out, they would move elsewhere; indeed, they were working round all the time. In the bird-snaring season, some would go into the forests for two or three weeks and on their return share out the catch with the rest of the people. In the same way, those who went fishing in the river would share out the fish and eels.

In pre-European times, most of the Whanganui people, being descendants of the three tipuna, lived alongside the river, but they claimed land miles away from it. Whole stretches were shown on the maps. They marked out the boundaries of their own pieces of land and they claimed through the court by their right of occupation.

45. Document A77, vol 1(5), pp 1–30

46. *Ibid*, pp 31, 35

47. *Ibid*, p 33. At page 34, answers to a critical question were given in Maori and are unrecorded since no interpreter was present. The record notes at page 36 that, when the commission resumed on the second day, counsel for the Whanganui Maori advised the commissioner that the witness Hekenui was having difficulty with some of counsel's expressions and sought an interpreter. The commissioner agreed to an interpreter being available as required.

Asked whether the various hapu owned any particular part of the river, Hekenui replied, 'No. This was left to the Native Land Court. The river has never been investigated so therefore it belonged to everybody.'⁴⁸ By everybody, he said that he meant all the hapu that were descendants of the three tipuna. He personally had never claimed any portion of the river as being his, nor had he known of anybody who had done so.

Asked about passage on the river, Hekenui said that the river was the highway for members of the tribe – they went by canoe.⁴⁹ Outside tribes were not recognised as having any rights to travel up or down. Whanganui hapu members usually sent a messenger and obtained permission from the hapu that they wished to visit. This was because there were outside (non-Whanganui) tribes that could constitute a threat. If Ngatihaua, for instance, wished to go right down the river, they would have sent a messenger to other hapu because of the fear of outside tribes. It was common for members of one hapu to visit another on the river.

Following some discussion of fishing practices, Hekenui was asked whether the hapu member who built a pa tuna, perhaps with the help of others, was responsible for it and took the catch from the eel weir. He agreed, but added that the catch would be shared and regarded as a hapu catch. Some might be preserved and put into a store house, a pataka. Catches were hapu catches, whether they were on the land or the river.

On re-examination about the Ohutu block being on both sides of the Whanganui River, Hekenui gave in substance the same explanation that he had previously given in paragraph 13 of his sworn affidavit in connection with the earlier Supreme Court proceedings. No part of the river was included in the Ohutu block. 'They left it in the usual way of the river belonging to everybody,' he said.⁵⁰

Finally, a series of questions were put to Hekenui concerning the nature of claims that might be made on an investigation of title to a block of land adjoining the river by the Native Land Court. He agreed that one man might support his claim by the fact that he lived on a part of the block and cultivated land on it. Another might rely on his living there and being engaged in snaring activities in the bush. Yet another man might say that, while living on the block, he looked after or owned a pa tuna on the river. Any one of these claims might be made on an investigation of title to a piece of land on the banks of the river.

Evidence of Joseph
Tarry

Joseph Tarry of Auckland, a retired ship's master, was called by counsel for Whanganui Maori.⁵¹ He amplified the evidence that he had given for the Crown in the proceedings before Judge Browne. He had spent some 25 years in service as a captain on riverboats. On his section of the river, which was some 80 miles between Pipiriki and Kaukapanui, there were five permanent pa tuna. But he had counted the remains of 200 or more on that section. Groynes were put in the river, and these affected the eel weirs. He had heard objections from Maori who referred

48. Document A77, vol 1(5), p 39

49. Ibid, p 44

50. Ibid, p 69

51. Ibid, pp 70-76

to the Treaty of Waitangi. The Reverend Henry Keremeneta was one of the staunchest of the Whanganui River people on rights under the Treaty. Every wall that was put in meant hours of labour for Maori to pole up the river, whereas the riverboat was using cables and an engine to steam up the river. So Maori had a hard job to pole their canoes up after the walls were put in. There were complaints from Maori about loss of fishing.

Titi Tihu was called next.⁵² He was assisted by an interpreter. He confirmed that there were 12 hapu of the Whanganui tribe having as their tipuna between them Hinengakau, Tamaupoko, and Tupoho: 'For the river those are the three ancestors, but for the land there are others also.'⁵³ He also gave lengthy evidence about the destruction of some eel weirs in 1905 and 1906, the methods of catching tuna and piharau, and the taking of gravel.

Evidence of Titi Tihu

Albert Davey, a farmer living at Jerusalem (Hiruharama) who had associated with Maori in the district for over 40 years, was the next witness. He first went to Jerusalem in about 1909, by which time the eel weirs there had been seriously affected through the building of groynes by the Whanganui River Trust Board. There appeared to be considerable dissatisfaction among Maori concerning the erection of these structures. They had the effect of diverting the current on to the eel weirs, thus rendering them more or less useless. He had seen as many as 1000 to 1200 piharau caught in the one pa in the river. They were a great delicacy among Maori. In the construction of these breakwaters, many of the pa piharau were destroyed. Work had gone on right up to the time that the river trust ceased operations about 10 or 12 years previously. He knew of only one pa piharau on the river at the time that he was giving evidence.⁵⁴

Evidence of Albert Davey

He was followed by Rufus Oxley, a Ministry of Works highways overseer for part of the Whanganui River Road. The part of the road he was responsible for included Koroniti, where he lived.⁵⁵ Oxley belonged to the Ngatipoumoana hapu. He had been employed in connection with the River Road since 1935. The roads that he supervised required a great deal of metalling, the bulk of which was obtained from the bed of the Whanganui River. The metal from the river was greatly superior to the metal in pits on land by the road. The metal for use on the roads was excavated from the river by loader and bulldozer and put through a crushing plant. At the time of giving evidence, metal was being extracted from Pitanga and Jerusalem. Prior to that, metal had been obtained from the river at Koroniti, Rauparau, Kaiwaka, Te Puha, and Pipiriki. This had been used to metal the road from Pipiriki to Raetihi. On occasion, the whole of the road was scoured away at places and the road had to be reformed with metal. His department would have details of the amount of metal from the river used on the roads. So far as he was aware, the department had not paid Maori any royalties for metal taken from the river.

Evidence of Rufus Oxley

52. *Ibid*, pp 76–80

53. *Ibid*, p 78

54. *Ibid*, pp 89–95

55. *Ibid*, pp 96–104



Figure 15: Kaumoia on the Whanganui River.
 Photograph courtesy Alexander Turnbull Library (Tesla Studios collection, G23315½).

Asked by the commissioner whether the young Maori of his generation whose families were from the river wanted to stay in the area or leave, he said that a lot of the younger men definitely wanted to stay but were more or less compelled to leave by the older people. This was because there was not a living for them on the river. He spoke of their emotional reaction when they returned to the river after a period away.

Evidence of Derisley
 Hobbs for Crown

Derisley Hobbs, a senior fishing officer with the Marine Department, was called by Crown counsel. In written evidence which referred to published work by Mair, Downes, and Elsdon Best, he stated that, in former times, Maori exploited eels on a considerable scale and took lamprey and smaller fish. He also produced evidence of a progressive decline in the use of pa tuna on the Whanganui River. He cited Best as showing that a few more eel weirs were used in the 1920s than the two that Downes claimed remained in use in 1917. The falling away in the pursuit of eels and other freshwater fish by Maori was general in both islands. He attributed this to the greater variety of foodstuffs that became available following European settlement, and changes in the social and economic condition of the Maori people. The available facts suggested that, if the Maori fishery in indigenous fish in the Whanganui River had suffered at all, then:

the only general loss could have been of exclusiveness of enjoyment of what the Maoris, themselves, have for long been unwilling to make appreciable use of, and

also of what Europeans do not seek to use today and are unlikely to use in the future.⁵⁶

Counsel for Whanganui Maori called a witness who provided some information about royalties collected by the Lands and Survey Department for the 10 years since 1940, when the department had taken over from the Whanganui River Trust.⁵⁷ He also called a public accountant, who produced a computation of compensation for gravel taken from the river and for the loss of fisheries.⁵⁸

Evidence on compensation payable for gravel

Crown counsel also called a retired Valuer-General and a former Deputy Valuer-General to discuss the effect of the Coal-mines Act Amendment Act 1903 on the value of the adjoining riparian lands.⁵⁹ As this valuation and related evidence is discussed in some detail in the report of the royal commission, it is not reproduced here.

75.3 The report

Commissioner Johnston made his report on 18 July 1950. He had no hesitation in accepting the opinion of Judge Browne and the judges of the Native Appellate Court that the bed of the Whanganui River for the relevant stretch, whether navigable or not, was held by the Whanganui Maori under their custom and usage and was customary Maori land. He also accepted their finding that the river was not a main highway available to everyone in 1840, citing various extracts from the judgments of the Native Land Court judges in support.⁶⁰

That Maori had owned the riverbed

He went on to consider the application of the *ad medium filum aquae* rule. The presumption that it applied might be rebutted by proof of surrounding circumstances, which negated any intention that any portion of the river should pass to the transferee of any adjoining land:

That customary title to bed had not been extinguished by Native Land Court

Considering the use of the river by the Maoris, considering the river itself with its rapids and its numerous eel-weirs, it is, in my opinion, clear that there should be no presumption that the bed of the river passed to the transferees of the land and that the owners of the weirs lost their right to the bed of the river.⁶¹

In short, he considered that the facts rebutted any *ad medium filum* presumption.

In coming to this conclusion, it appears that he was reassured by his conviction that a comparable outcome would arise from the application of English law. He thought that:

no other than a right recognised in English law need be claimed by the Maoris in their claim to the bed of the river as I think it clear that if Europeans had used the

56. Document A77, vol 1(5), pp 125, 130

57. Ibid, pp 105–109

58. Ibid, pp 209–219

59. Ibid, pp 119–124

60. 'Report of Royal Commission'

61. Ibid, p 9

river in the same way and ownership were in European hands they would have made the same claim as now made by the Maoris.⁶²

Here, the commissioner was referring to a common law rule that the owner of a several fishery (which could be a weir or something of that kind), is presumed to be the owner of the soil under the fishery. More particularly, he was referring to remarks of Lord Herschell in *Attorney-General v Emerson* in relation to eel-weirs:

they are constructions or erections by which the soil is more or less permanently occupied and that it is this occupation of a portion of the soil which leads Lord Hale to say that they are 'the very soil itself'.⁶³

He considered that 'no more imaginative concept of ownership is needed to establish the Maori title arising from the erection of their eel-weirs than is in accord with English presumption in like cases'.⁶⁴

After expressing the view that the Crown had not paid sufficient regard to the principles of tribal administration and organisation, which are matters of history and could be gleaned from the Native Land Court judgments, he concluded that:

it was not until the Coal-mines Act of 1903 – a matter which was not raised in the Maori Land and Appellate Courts – that legislation vested the title of the bed of the river in the Crown. That being so, I answer the first question by saying, but for the Coal-mines Act, the bed of the river would be owned by the Whanganui Maoris, as it was at the time of the signing of the Treaty of Waitangi.⁶⁵

Conclusion on compensation

As to compensation, the commissioner answered the second question of the terms of reference by saying that, in his opinion, a court endowed with power to determine questions according to equity and good conscience would find the claimants entitled to compensation for the loss of their right to the bed of the river.⁶⁶

Counsel for Whanganui Maori had advanced claims for compensation under two heads: first, for the loss of their fishery resource, including the eel weirs, and, secondly, royalties for gravel taken from the bed of the river.

The commissioner rejected the first claim. He could see no cause for compensation for a change from what he characterised as 'an uneconomic way of life on their traditional lands by the river to an economic one [in Whanganui and elsewhere]', or for a change of diet, 'to a great extent voluntary'.⁶⁷

He found, however, that the Maori owners were entitled to compensation for the loss of gravel from the riverbed. Owing to insufficient evidence, he was unable to

62. 'Report of Royal Commission'

63. *Attorney-General v Emerson* [1891] AC 649. Later, in the same vein, he cites from the headnote to another English case, *Hanbury v Jenkins* (1901) 2 Ch D 401. Both are quoted in 'Report of Royal Commission', p 9.

64. 'Report of Royal Commission', p 11

65. *Ibid*, p 13

66. *Ibid*, p 14

67. *Ibid*, p 15

assess the loss and recommended that the potential value of the gravel at 1903 (when the Coal-mines Act Amendment Act took effect) should be assessed by a panel of three, including an assessor appointed by the claimants. Before this occurred, and finally to dispose of the whole matter, he recommended that the Maori owners of the riverbed at the time of the passing of the amendment Act of 1903, or their successors, should be ascertained by the Maori Land Court. As that court was then prohibited by the Supreme Court decision of Justice Hay from entering into any such investigation, he wrote that legislation might be required to permit the Maori Land Court to act in the matter.

While the commissioner accepted the opinion of Judge Browne and the Native Appellate Court that the riverbed was held by Whanganui Maori owners according to their custom and usage, and that it was customary Maori land, he nevertheless resorted to the more familiar concepts of English common law rules as the basis for his finding on the first question. On that basis, he had no need to refer to the argument on separate ancestors. Rather, he related the use of pa tuna in the river to the English notion of a several fishery and applied what he considered to be the relevant English common law to the Maori interest in the Whanganui River.

We note, however, the opinion of a recent legal commentator that the English cases invoked by the royal commissioner have their basis in a completely different legal history of land tenure, and rested on specific grants by the riparian owner to another person. This, in his view, makes the application of the English rules inappropriate to Maori customary ownership of land and fisheries in New Zealand.⁶⁸

None the less, the commissioner rejected the proposition advanced by the Crown that Whanganui Maori had abandoned their rights in the river.

75.4 Government reaction

The Crown's legal advisers were not happy with the royal commission report, notwithstanding that compensation was limited to gravel extraction only.⁶⁹ In April 1951, Hekenui Whakarake, Titi Tihu, Rangi Mawhete, and several other representatives of the Whanganui people, and their solicitors, met with the Minister of Maori Affairs to discuss it. They sought to short-circuit the further hearing on gravel compensation recommended. Instead, in the interests of the Maori people, they urged an early settlement. They proposed a payment of £19,000 to meet expenses incurred by Hekenui Whakarake and Titi Tihu, and associated costs of 45 full-scale meetings and other out-of-pocket expenses. They also claimed an annual payment of £6500 in perpetuity to a trust board representative of the hapu of Whanganui for the benefit of the tribe as a whole.⁷⁰

Commentary on the application of English law

How Government stymied the report

68. Document A49(d), pp 266, 275

69. Document A49, p 132

70. 'Notes of Representations Made to Minister of Maori Affairs (Hon E B Corbett) at Parliament Buildings on 16 April 1951', MA5/13/188, NA Wellington (doc A49(c), pp 582-584)

In a memorandum of 26 June 1951 to the Minister of Maori Affairs from the under-secretary of the Department of Maori Affairs, the Whanganui tribe's proposals for settlement were characterised as 'so exaggerated as to be ridiculous' and were seen to preclude all possibility of a settlement for any reasonable sum.⁷¹ Instead, the Government's attitude should be that:

in the light of the inherent defects in the Commissioner's view of the claim, and the practical impossibility of carrying out its recommendations ... Government ... [should] seek a full determination of the questions involved by referring them, by means of legislation, to the Court of Appeal, providing for a possible appeal by either party to the Privy Council.

On 16 October 1951, representatives of the Whanganui people again met with the Minister of Maori Affairs, and Hekenui Whakarake asked whether the Government had made a decision on their April 1951 representations to the Minister. They were advised that the Government proposed to refer certain questions to the Court of Appeal for determination.⁷² In the event, this was done without reference to the Whanganui tribe or their counsel, by section 36 of the Maori Purposes Act 1951. It authorised the Court of Appeal to determine certain questions relating to the soil of the bed of the Whanganui River.

7.6 COURT OF APPEAL, 1953-54

The proceedings in the Court of Appeal are recorded as *In re the Bed of the Whanganui River*.⁷³

7.6.1 The hearing

Terms of reference

The statutory reference to the Court of Appeal required it to determine two issues:

- (a) Whether, immediately prior to the Coal-mines Act Amendment Act 1903, Maori, under their customs and usages, held the soil or any other rights to the bed of the Whanganui River between the tidal limit at Raorikia and the junction of the Whanganui and Whakapapa Rivers above Taumarunui; and
- (b) to what Maori, hapu, tribe, or other groups of Maori (if any), the riverbed or other rights belonged.⁷⁴

Declarations sought by the Crown

Before hearing argument, the court – comprising five judges – sought notice of the questions upon which relief was sought. The Crown responded by filing a motion asking the court to declare:

71. Memorandum from T J Ropiha to Minister of Maori Affairs, 26 June 1951, MA5/13/188, NA Wellington (doc A49(c), pp 582-584)
72. 'Re Notes of representations Made to Minister of Maori Affairs (Hon E B Corbett) at Parliament Buildings on 16 April 1951', 30 September 1951, MA5/13/188, NA Wellington (doc A49(c), p 578)
73. *In re the Bed of the Whanganui River* [1955] NZLR 419 (doc A77, vol 2(7))
74. Ibid

- (a) that the bed of the river between the tidal limit at Raorikia and the junction of the Whanganui and Whakapapa Rivers above Taumarunui had, ever since the Treaty of Waitangi, been a navigable public highway, and not land held by Maori under their custom and usages;
- (b) that any rights possessed by Maori were only rights of fishing and ordinary domestic uses of the waters exercisable in respect of each settlement only by hapu occupying the settlement, and navigation rights in common with all other persons; and
- (c) that, on the acquisition of sovereignty, the riverbed became the property of the Crown subject only to the rights referred to in (b).

Alternatively, the court was asked to declare that, immediately before the passing of the Coal-mines Act Amendment Act 1903:

- (d) where the title to any riparian block fronting the river had been investigated, the bed adjoining that block became *ad medium filum aquae* a part of the block and the property of the owners of the block or of the Crown, if acquired from such owners; and
- (e) that the bed of the Whanganui River was confirmed as being Crown land by the passing of the Wanganui River Trust Act 1891.⁷⁵

7.6.2 Court's conclusion

The Court of Appeal, presided over by Justice Northcroft, heard the case from 6 to 10 July 1953. Before the court's decision was delivered a year later, on 15 July 1954, Justice Northcroft had died.

The remaining four judges, Justices Hutchison, Cooke, Adams, and North, were unanimous in declining to make the declaration sought in paragraph (e) above. They declared instead that the passing of the Wanganui River Trust Act 1891 and its amendments did not affect whatever rights in the riverbed that Maori then possessed.

As to the declarations sought in paragraphs (a), (b), and (c) above, the court held, by the majority decisions of Justices Hutchison, Cooke, and North, that the motion should be declined, and that it should be declared that the bed of the river within the limits stated was, at the time of the Treaty of Waitangi and upon the acquisition of British sovereignty, land held by Maori – namely the Whanganui tribe – under their customs and usages.

Justice Adams did not agree that Maori owned the bed of the river at 1840 and accordingly dissented from his colleagues. He also differed from the Native Land Court judges in the earlier proceedings on the grounds that there was no proof:

that the customs and usages of the Maori as a people recognized ownership of the bed of a river such as the Wanganui; or, alternatively, that the customs and usages of the Maoris of the Wanganui tribe in particular, recognized ownership of the bed of this river.⁷⁶

Finding that Maori had owned the riverbed

75. Ibid, pp 419–420

76. Ibid, p 440

Native Land Court
extinguishment
deferred

This left the remaining paragraph (d), where a declaration was sought that, where the title to any riparian block fronting the river had been investigated by the Native Land Court, the bed adjoining that block became *ad medium filum aquae* a part of the block and the property of the owners of the block or of the Crown, if acquired from such owners. The court held that, at present, no such declaration should be made, but that all matters covered by the paragraph should be adjourned for further consideration to enable additional information relating to this question to be obtained and placed before the court.

Separate judgments were given, however, and we review those of the three who constituted the majority.

Judgment of Justice
Hutchison

Justice Hutchison generally agreed with the views of Justices Cooke and North on paragraphs (a) and (b) and substantially for the reasons given by them.⁷⁷ He considered that the contrary view expressed by Justice Adams called for a standard of proof that was impossible to achieve and was unreal to expect.⁷⁸

The judge observed that the Solicitor General may have been right to say that the claim by Whanganui Maori to the riverbed was an afterthought. However, even if it was, the claim was still entitled to consideration. He added that the fact that the actual ownership of the river, as claimed from 1938, was not made an issue earlier might be highly relevant to a question of compensation for the confiscation of riverbed rights. But in his view it did not, in all the circumstances, afford very strong evidence against the claim itself.⁷⁹

We note that the judge was almost certainly unaware of the various claims to the river made by Whanganui Maori last century, and at times this century, prior to 1938, when the matter went to the Native Land Court.

Judgment of Justice
Cooke

Justice Cooke referred to the suggestion of the Solicitor General of inconsistencies in the evidence of Hekenui Whakarake before the royal commission as to the fishing rights of the respective hapu, and the claim of the tribe as a whole to the soil of the riverbed. After considering the other evidence before the commission as well, Justice Cooke concluded that the proper inference was that there were domestic arrangements inside the tribe as to fishing rights that were not inconsistent with a tribal holding of the bed. He added that he thought that the stretch of the river in question was a highway, but only for the tribe.⁸⁰

Justice Cooke later concluded that the reasonable inference from the material before the court was that, immediately before the signing of the Treaty, and after its signing and implementation by legislation, the bed of the river throughout the stretch in question was held by the Whanganui tribe under their customs and usages.⁸¹ He added, 'Indeed, one is tempted to ask who owned the bed of the river at the time if the Wanganui Tribe did not, and to suggest that there is no satisfactory

77. *In re the Bed of the Wanganui River*, p 424

78. *Ibid*, p 439

79. *Ibid*, p 424

80. *Ibid*, p 433

81. This appears to be a reference to the Native Land Acts of 1862 and 1865: see *In re the Bed of the Wanganui River*, pp 462-463, per Justice North.

answer to that question.⁸² He was also careful to mention that, while at the time of the Treaty the Whanganui tribe owned the stretch of the bed in question, he was not expressing any opinion on whether, on an application made before 1903 for investigation of title to any part of the bed, any Maori or group of Maori could have established a claim to a separate title to any part of it.⁸³

Justice North thought it plain that, before the signing of the Treaty of Waitangi, the territory held by the Whanganui tribe had to be regarded in its entirety as tribal property. Both dry land and land covered by water were tribal territory and both had their uses and served the needs of the tribe. He also considered that the conception of a river through tribal territory being a public highway (as submitted by the Solicitor General for the Crown) would be entirely foreign to the Maori mind.⁸⁴

Judgment of Justice
North

Later, he rejected submissions of the Solicitor General that the Wanganui River Trust Act 1891 showed that the riverbed had been Crown property since sovereignty was first asserted.⁸⁵ He next adverted to a further Crown submission that, in some way or another – how, he was not certain – the 1891 statute was akin to a proclamation that the riverbed had ceased to be customary Maori land. After citing New Zealand and Privy Council case law he stated:

in the view of their Lordships in the Judicial Committee of the Privy Council, the Native title cannot be extinguished except by the free consent of the Native owners, or by virtue of a statute, and in strict compliance with its terms, or by a proclamation which has been gazetted in accordance with the provisions to that effect contained in the various statutes commencing with s 105 of the Native Land Act 1873 . . .⁸⁶

Justice North reached no conclusion on whether the common law *ad medium filum aquae* rule applied in respect of grants issued by the Crown consequent upon a Native Land Court investigation of title to riparian land. If it did, he would still need to consider whether the surrounding circumstances were sufficient to rebut that presumption, and he appeared to doubt that the presumption could apply in this case. If Whanganui Maori could freely use the river, not as members of the public but as members of the owning tribe, and if they were still doing so when the Native Land Court investigated the title to the riparian land, why would the court or the Crown intend to confer a title on individual Maori *ad medium filum aquae*?⁸⁷

7.6.3 Outcome

Thus, the Crown failed on all issues before the Court of Appeal, save whether the *ad medium filum aquae* rule should be presumed to apply, and on that the court

Deferral of
extinguishment
question

82. *In re the Bed of the Wanganui River*, p 434

83. *Ibid*, p 435

84. *Ibid*, p 461

85. *Ibid*, pp 463–464

86. *Ibid*, 465. He cited *The Queen v Symonds* (1847) NZPCC 387, 390, per Justice Chapman, and its adoption 50 years later by the Privy Council in *Nireaha Tamaki v Baker* (1901) NZPCC 371.

87. *In re the Bed of the Wanganui River*, p 470

required more information. It proposed that the Government pass legislation for this to be obtained. As a result, section 36 of the Maori Purposes Act 1951 was amended in 1954 to enable the Maori Appellate Court to take further evidence on such questions as might be submitted to it by the Court of Appeal about Maori custom and usage.⁸⁸

7.7 THE MAORI APPELLATE COURT, 1958

7.7.1 The evidence

The Maori Appellate Court was constituted to comprise five judges presided over by Judge Ivor Prichard. None had been members of the earlier Maori Appellate Court that heard the appeal from the decision of Judge Browne in 1944. In 1958, the court began a three-day hearing of evidence and submissions on 13 questions referred by the Court of Appeal.

Much of the first day was spent discussing the relevance of the Native Land Court's minute books for the title investigations of the riparian blocks. Extracts from some were read. None of these made a reference to eel weirs but a list of those that did was later put in by the Lands and Survey Department.⁸⁹ Crown counsel thought that the list should go in as evidence, but he did not know that it carried the matter any further.⁹⁰

The Crown also produced plans showing the various riparian blocks investigated by the Native Land Court before 1903 and a list of the deeds of Crown purchase.

Maori evidence

In opening for Whanganui Maori, senior counsel F C Spratt advised the court that only one witness, Titi Tihu, would be called, since, with the passage of time, elders who had been connected with the claim had died or were too old or infirm to attend. During the Court of Appeal hearing in July 1953, an affidavit had been produced to the effect that Titi had the authority of all the hapu to represent them in the litigation. It also recorded that Titi's uncle, the leading chief Piki Kotuku, who presented the 1927 petition to Parliament, had died before 1937, and that Hekenui Whakarake had died in 1952.⁹¹

Titi Tihu's evidence-in-chief before the Maori Appellate Court was brief, troubled by interpretation difficulties, and punctuated by questions from certain judges. As to the river ancestors, he confirmed the names of the three tipuna and that there were different tipuna for the land adjoining the river.⁹² He also related the tradition of the plaited rope. It was Hinengakau who plaited the rope of which the

88. Section 6 of the Maori Purposes Act 1954, which added section 36(5)(a)–(h) to the Maori Purposes Act 1951.

89. Document A77, vol 2(8), p 25

90. *Ibid*

91. Affidavit of Titi Tihu, 9 July 1956, CA file 20/53, AAOM W3558, NA Wellington (doc A27(k), pp 1–4)

92. Document A77, vol 2(8), pp 35–36



Figure 16: Skipper Andy Anderson watches as a passenger boards the riverboat. By the 1950s, the riverboats were smaller than those of the 1920s; this picture was taken in February 1955. Photograph by E P Christensen. Courtesy Alexander Turnbull Library (F19757½).

three tipuna were the strands, and that was the beginning of understanding and peace among the river peoples.⁹³

Later, in the course of a lengthy cross-examination by Crown counsel characterised by interpretation problems, Titi referred to the ancestral tribal name of Te Atihaunui-a-Paparangi as associated with the Hawaiki-Nui canoe. The three tipuna for the river retained this name, and their descendants retained their names as names for the sub-tribes under Te Atihaunui-a-Paparangi.⁹⁴

7.7.2 The court's advice

The Maori Appellate Court's answers to the Court of Appeal's questions were delivered on 6 June 1958.⁹⁵ From these, it is not clear how much of the Maori evidence in earlier hearings was taken into account. It is also apparent that there was no evidence before the court of the Maori protests over the river in the nineteenth century, or of their various parliamentary petitions.

93. *Ibid*, p 37

94. *Ibid*, pp 44-45

95. Document A77, vol 2(9), pp 1-11

On separate
ancestors

Much of the court's relatively brief discussion focused on the first question, whether the ancestral right to the river was separate or different from that to the riparian lands; and, if so, what (if any) was the significance of the distinction.

Counsel's
arguments

Spratt submitted that the evidence of Titi Tihu and Hekenui Whakarake, with certain unspecified documentary evidence, provided a rational basis for the claim that the ancestral right to the river was different from that to the adjoining lands.

Crown counsel's response was brief. It was prefaced with an invitation to the court to:

depreciate any attempt to introduce matters of Maori mythology into a mundane matter like this. Those matters are entirely irrelevant. I am not going to make any reference beyond that to such matters as plaited ropes and the mana of rivers and things like that.⁹⁶

It was not exotic concepts like mana that were important in his view, but *ad medium filum aquae*. It made no difference if there were river ancestors separate to those for the riparian land, he submitted, in the light of the historical circumstances relating to investigation of the titles of riparian blocks. As a result of this process, he contended that the division of tribal lands amongst various sections of the tribe and the subsequent conversion of these interests into freehold titles meant that the river *ad medium filum* had gone to the riparian owners and did not remain in the original tribal ownership, the tribe as a whole.

Counsel for Whanganui Maori replied that nowhere in the history of the matter, from the first hearing before Judge Browne down to the present, was there any suggestion of proof of the recognition by Maori of the *ad medium filum* rule. He submitted that:

The Maoris say this being a matter of presumption, European law could not have applied to the bed of the Wanganui River, the aboriginal owners of which knew nothing about the notions of *ad medium filum* whether in the Latin or in the English or in the Maori tongue.⁹⁷

Maori would not be concerned to identify the middle line of the river when navigating canoes or erecting pa tuna, he added.⁹⁸ The direction and strength of the current, the position of the rapids, and the depth or shallowness of the water would determine where they were put.

However, Crown counsel found the eel weirs of little if any relevance:

In Judge Smith's book [Norman Smith, *Maori Land Law*] he points out that the setting of an eel weir is one of the acts that is commonly put forward as supporting the claim for an ancestral right. It has to be conceded that in this case there is no express instance we can find where such a claim was put forward to an interest in a

96. Document A77, vol 2(8), pp 75-76

97. Ibid, p 61

98. Ibid, pp 63-64; see doc A49(d), p 279

block. There is no express claim. These eel weirs were discussed at length at various places but they didn't seem to – it is very difficult to get anything conclusive from them.⁹⁹

The court noted that only Titi Tihu had appeared before it on any question of Maori custom. His evidence, it said, was directed to showing that, in the symbolic or metaphysical regard that the Whanganui tribe had towards its territory, the land came from Tane, the god of land, and the river from Tangaroa, the god of waters.

Court's answer on separate ancestors

Added to this was the story of the rope plaited by Hinengakau to bring peace and unity among the peoples of the river and the submission (which it accepted) that the river had a special significance and 'mana' in the minds of the Whanganui tribe. But it concluded that the principal merit or significance that evidence of this kind possessed was to provide, at most, 'a background to an understanding of the general and cosmogenic conceptions which the ancient Maori had towards his property'.¹⁰⁰ It considered that claims to the court should be 'tied more to the foundations of practical realism rather than to those of mere symbolism'.¹⁰¹

The court continued that nothing in the evidence showed that a separate take to the river had ever been claimed until the proceedings had been brought in 1938. The court thought it reasonable to suppose that such an assertion would have been made long since and recorded in the minute books. When he was before the 1950 royal commission, Hekenui Whakaraka was asked whether the hapu owned any particular part of the river, the court noted. He had replied, 'No. This was left to the Native Land Court. The river has never been investigated so therefore it belongs to everybody'.¹⁰² By everybody, Hekenui meant all the hapu, descended from the three tipuna of the river.

The court observed that Hekenui had also testified that the names of these three did not appear in the Native Land Court records of investigations of title as having been put forward as ancestors or take tupuna in respect of any of the lands.¹⁰³ The court found, however, that, although they do not adjoin the river, Tamakehu was put forward as an ancestor in respect of the Tawhitinui and Morikau blocks.

The court found that assertions made in and since 1938 were of insufficient value, standing alone, upon which it could express an opinion in favour of the Maori claimants.

The court then speculated that, if ownership of the river and land were separate, at some time when a Maori claimed an area on the river bank and his proof was his right to the use of an eel weir opposite, then some opponent would surely have stood up and said most clearly: 'The river is owned by the tribe, so user of the eel

99. Document A77, vol 2(8), pp 75-77

100. *Ibid*, vol 2(9), p 2

101. *Ibid*

102. *Ibid*, vol 1(5), p 39

103. We note that this evidence of Hekenui was confirmed by a solicitor, N F Simpson, in an affidavit dated 11 May 1949: 'In the Matter of a Reference to the Court of Appeal of New Zealand under Section 36 of the Maori Purposes Act 1951 of Certain Questions Relating to the Bed of Portions of the Wanganui River' (doc A27(2), p 58).

weir comes from the tribe, and does not confer any rights to land on the bank.’ But they had found no evidence of this ever having happened.¹⁰⁴

It also endorsed Judge Browne’s 1938 statement when he rejected the Crown’s contention that:

‘Native Custom relates solely to rights of fishing, navigation, and ordinary domestic uses of water.’ In the Court’s opinion, so far as the Maoris are concerned, these rights, in the case of this River, follow as a matter of course and are incidental to the ownership of the bed of the river and cannot in any way be separated from that ownership. This Court, in all its experience of Native land and the investigation of the titles thereto, never once heard it asserted by any Maori claimant that the ownership of the bed of a stream or river, running through or along the boundaries of the land the subject of investigation, whether that Stream or River was navigable or not, was in any way different from the ownership of the land on its banks. Nor has it ever heard it denied that the tribes or hapus that owned the land on the banks of a stream or river had not the exclusive right to construct eel weirs or fish traps in its bed or exercise rights of ownership over it. The river bed being a source of food in ancient time would be looked upon as a highly important asset to any tribe and the right to it would be very jealously guarded by the members of that tribe.¹⁰⁵

Agreeing with that statement, the Appellate Court went on to say that the:

rights of ownership and use of the river for various purposes by the hapus on its banks were subject to the right of passage, of other hapus or groups of the tribe. To that extent, it seems to us [the court] that such original or ‘papatipu’ right of passage of the tribe existed over the whole river . . .

The tribe was seen as an ‘aggregation of separate, though to some extent, independent sub-tribes each of which exercised immediate rights of ownership and control over the section of the river that lay within its boundaries’.¹⁰⁶

The Appellate Court then considered that if the whole tribal territory, even though most extensive, had been investigated as one block, the Native Land Court might well have been disposed to issue a freehold order for title to the territory. Such orders would have been founded upon the claims made by the tribe according to its ancestral rights and other rights under Maori custom. The claims of hapu to their respective territories could have been determined later.

It pointed out, however, that this procedure was not followed either by Whanganui Maori or by the court. Instead, hapu or smaller groups themselves made separate applications to the court to be awarded the respective areas of the tribal lands in their occupation according to the ‘internal rules’ of the tribe as

104. Document A77, vol 2(9), p 3. We assume that the court was here postulating a situation where such a claimant did not also point to his belonging to the whanau or hapu that occupied the adjoining block and his occupation of part of such a block. This would have been the normal situation, rather than relying on a single factor such as a connection with an eel weir in the river.

105. Document A77, vol 2(9), p 4; doc A77, vol 1(2), p 2

106. Document A77, vol 2(9), p 4

found by the court. The appellate court noted that all this took place over a period of years extending from the year 1866 to the end of the century:

In the practical result, therefore, the original or tribal right, not being insisted upon by the tribe, was being converted by these processes into the recognised rights of the sub-tribes or smaller groups as they obtained freeholds in fee simple from the Court.¹⁰⁷

The Maori Appellate Court concluded, in answer to the Court of Appeal's first question, that the ancestral right to the Whanganui River was not separate or different from that to the riparian lands. The implication, in light of the previous discussion, was that any customary interests in the river were held by the owners of the riparian lands; and it was that which most put paid to the Maori riverbed claim.

A critique of the appellate court's answer to this question is given at section 9.2.2.

The court stated that the riverbed title had not been decided by the Native Land Court prior to the 1938 consideration and that there was no record of earlier claims. The river frontage of the part of the river in question amounted to 142½ miles on the left bank and 143 miles on the right, and only two miles 25 chains, within the Pukehika block (1907) and the Mangapukatea 2 block (1914) had not been investigated before 1903. Small communities owned all eel weirs and fishing structures, although others were sometimes allowed use rights. Even though hapu usually occupied both sides of the river, what determined the placing of a weir was the best site, not which side of the river the owners lived on. There was evidence that people fished outside their lands, although it was important when they did so to acknowledge the people of that part of the river. The court was not able to determine whether there was any stretch of the river where there was no fishing. No example could be found where the Maori Land Court had been asked to determine the ownership of eel weirs, although they were often cited as evidence of occupation for determining adjacent land ownership. In general, the river owners did not allow others to travel along the river without their permission and so it could not have been termed a highway. The court reiterated its view that occupation of riparian lands would have an important, if not decisive bearing, along with other customary river uses, on any determination of riverbed ownership in 1840. Finally, the court reflected on the fragmented nature of customary rights and the relationship of these rights to the Maori Land Court process.¹⁰⁸

7.7.3 Outcome

The Maori Appellate Court's answers to the questions from the Court of Appeal were a turning point in the litigants' fortunes. Since 1938, Whanganui Maori had received favourable responses to the effect that the riverbed was Maori land at 1840,

107. *Ibid*

108. Document A77, vol 2(9)

or at least until the Coal-mines Act Amendment Act 1903, from the Native Land Court, the Native Appellate Court, the Supreme Court, and the royal commission. The Crown had sought to negate these views, appealing from the Native Land Court, applying to injunct the Native Appellate Court, appointing a royal commission to obviate further litigation, and then enacting special legislation for further court hearings after a response unfavourable to it was received.

In the first Court of Appeal hearing in 1953, the court, with one dissenting judge, held against the Crown on three of the four matters it had advanced, finding yet again that, at 1840, the riverbed in question was land held by the Whanganui tribe under their custom and usages. This left the remaining contention of the Crown as to whether the riverbed became part of the titles of the adjoining land, *ad medium filum aquae*, when titles were investigated. To determine that, questions were put to the Maori Appellate Court. The critical question was answered in favour of the Crown.

The matter passed back to the Court of Appeal.

7.8 THE COURT OF APPEAL, 1960–62

Constitution of court

None of the judges who sat on the first hearing of the Court of Appeal in 1953 was a member of the 1960 court. That court comprised Justices Gresson (the president of the Court of Appeal), Cleary, and Turner. The hearing took place from 10 to 12 August 1960.

The decision

The decision was issued 19 months later, on 2 March 1962.¹⁰⁹ The court held that, where a block of land fronting on a non-tidal river has been held by Maori under their custom and usages and later the title has been investigated and separate titles issued, the bed of the land adjoining the river becomes *ad medium filum* a part of that block and the property of the respective owners of that block.

The court considered that, while a whole tribe may have exercised a right of passage over the river, and that eel weirs and fishing devices placed by individuals or hapu were not rigidly limited to the portion of the river immediately adjacent to their land, this did not negate the application of the *ad medium filum* rule.¹¹⁰

In reaching their decision, the three judges relied principally on the Maori Appellate Court's answer to the first question, that the ancestral right to the river was not separate to, or different from, that to the riparian lands. Having adopted this answer, it was a relatively short step to their conclusion that, upon investigation and the award of land adjoining the river to Maori claimants, they acquired the right to the middle line (*ad medium filum*) of the river.

Justice Turner expressly found that, whatever was originally the nature of the customary title to lands that had come before the Maori Land Court for investigation, the incidents of the title which the same court had issued and

109. *In re the Bed of the Whanganui River* [1962] NZLR 600 (CA) (doc A77, vol 2(10)), pp 600–627

110. *Ibid*

certified were, and always had been, the incidents of English freehold title.¹¹¹ In the same vein, Justice Cleary stated:

It is obvious that this process of the transformation of Maori customary rights into freehold titles involved conferring on the ascertained owners rights of a nature which had never been present to the Maori mind. It was stressed in argument that the presumption of a conveyance carrying title *ad medium filum* could not be made to apply to the grant of freehold titles based on Maori custom, when neither the idea of conveyance nor the notion of ownership *ad medium filum* had any place in Maori conceptions. To my mind this argument loses force when it is borne in mind that the whole notion of a fee simple estate owned by a limited group of ascertained persons was foreign to the Maori mind, and I do not see why the transformation of customary rights into freehold titles should result in the exclusion of the *ad medium filum* rule any more than that it should exclude any other incident attaching to a grant of freehold, however alien such incident may have been to the Maori.¹¹²

Though the Native Land Act 1865 had provided that the title to customary land was to be determined in accordance with Maori custom, the decision made clear that the incidents of the new title were those of the laws of England.

In opening legal submissions, counsel for Maori had stressed that, in reviewing the investigation of lands by the Native Land Court Maori, customary titles had properly to be seen as Maori saw them. He referred to the warnings of the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria* and *Oyekau v Adele*.¹¹³ In the first of these, the Privy Council had said:

Later judicial
comment

in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.¹¹⁴

It was to no avail, but the point has since been taken up in a unanimous judgment of five judges of the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, reported in 1994. After adverting to findings of the Waitangi Tribunal in *Te Ika Whenua – Energy Assets Report 1993* and *The Mohaka River Report 1992*, in which the Tribunal adopted the concept of a river as a taonga, the court commented:

One expression of the concept is ‘a whole and indivisible entity, not separated into beds and banks and waters’. The vesting of the beds of navigable rivers in the Crown provided for by the Coal-mines Act Amendment 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept, although it is odd that the concept seems not to have been put forward in quite that way in the line

111. *Ibid*, p 624

112. *Ibid*, pp 618–619

113. *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399, 402–403; *Oyekau v Adele* [1957] 2 All ER 785

114. *Amodu Tijani v The Secretary*, pp 402–404

of cases concerning the Wanganui river, the last of which was the decision of this Court in *Re the Bed of the Wanganui River* [1962] NZLR 600. Perhaps the approach which counsel for Maori argued for in that line of cases, emphasising the bed and the adjacent land more than the flow of water, is an example of the tendency against which the Privy Council warned in *Amodu Tijani* (at p 403) of rendering native title conceptually in terms which are appropriate only to systems which have grown up under English law. Similarly, as the Waitangi Tribunal bring out in their *Mohaka River Report* at pp 34–38, the *ad medium flum aquae* rule applied in the 1962 case is inconsistent with the concept and may well be unreliable in determining what Maori have agreed to part with.¹¹⁵

7.9 THE TREATY ISSUE

The matter before the Court of Appeal was not the same as that now before us. The question here is whether extinguishment was consistent with the principles of the Treaty of Waitangi. The central issue is whether Maori knowingly and willingly relinquished their river interests or their traditional authority over the river as a whole. Conversely, Treaty principles were not in issue before the courts at that time.

No conscious
disposal of river
interests

We can find nothing in the extensive evidence before the courts to suggest that Maori knowingly and willingly relinquished their river interests or their traditional authority over the river as a whole. There is no record of some conscious act, positive averment, or free consent.

There is no compelling evidence that, on the title investigations or subsequent land sales, they consciously and positively saw themselves as individualising and alienating their river interests as well. Rather, the inference from the evidence is the other way. Maori were involved in applications to determine the ownership of parcels of land, not parcels of river – the survey drawings encompassed only land, the applicants' minds were not directed to the river, and the Native Land Court did not advise that customary river interests were affected. Indeed, the matter does not appear to have entered the court's mind either.

No tribal consent

Nor could there have been the general tribal consent that was required – a meeting of the leading rangatira acting in consultation with their respective hapu. At best, individual interests were affected. There could have been no general consent for the extinguishment of the tribal interest as part of the court's process, for each land case involved only the local people.

No consent to the
process

More telling is that, acting collectively, the leading persons of Atihaunui had opposed the Native Land Court process as a whole, and had set up proposals of their own for dealing with their land. This was to no avail (see secs 5.3.2–5.3.3). The method by which the Native Land Court 'got in', to use the expression of the time, has been described (see secs 2.8.2, 5.4). The people had no option but to submit to it. An overview of the 1938 to 1962 litigation is given at section 9.2.

115. *Tē Runanganui o Tē Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 26, 26–27

CHAPTER 8

CONTROL OF USE AND MANAGEMENT

8.1 INTRODUCTION

Atihaunui decided against a Privy Council appeal over the 1962 decision. Costs and their opinion that the Privy Council would return the matter to the New Zealand Government were considerations.¹ Besides, other matters were pressing their attention by then. The most significant was a proposal mooted since at least 1955 to divert the river headwaters for hydroelectrical generation so that they passed to the north. These proposals, which led to the Tongariro power scheme, no doubt gave impetus to the Crown's opposition to the Maori river claim. In the exigencies of the time, when the country faced power shortages and 'blackouts' were a part of the New Zealand way of life, no weight at all was given to the Atihaunui claim.

Hydroelectricity,
environmental and
Maori concerns

This chapter considers the Crown's total control of the river when establishing the Tongariro power scheme and its subsequent attempts to resolve industrial, recreational, environmental, and Maori conflicts by legislating a management plan. The use of the waters for electricity generation had highlighted the fact that the river was not only a developmental resource but a vital artery of a significant water catchment ecosystem.

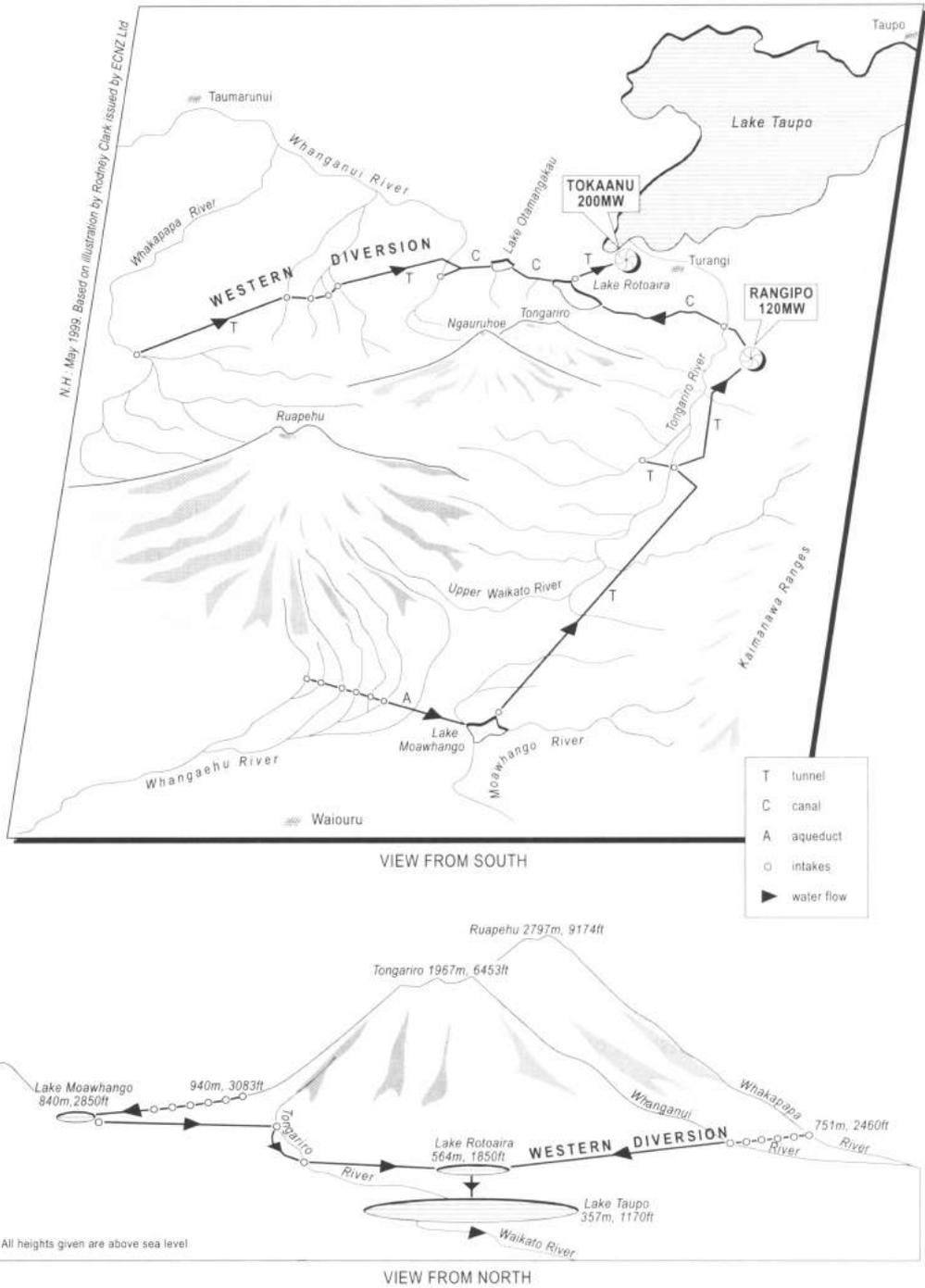
As well as the negotiations between the Crown and Atihaunui, as Atihaunui continued their claim to the river's ownership, this chapter addresses the litigation to constrain the impact of the electrical works by fixing minimum levels of river water flows; the establishment of Whanganui National Park; and the introduction to the river of a user pass system.

8.2 THE TONGARIRO POWER DEVELOPMENT PROJECT

The Tongariro power development project took water from all three major catchment areas draining the mountains of Tongariro National Park, diverting the flow to Lake Rotoaira, which would serve as a storage lake, and passing it by tunnel to drive the turbines of the Tokaanu Power Station. From there, the water passed through Lake Taupo to the Waikato River. Thus, waters naturally flowing to the Whanganui River were diverted to the north.

The project

1. Document B8, p 3



Map 4: The Tongariro power development project

Our interest is in the western diversion taking water from the Whanganui River and the Whakapapa and Mangatepopo Rivers, which led into it, thus affecting the flows and water levels of the Whanganui River entire.

Tuwharetoa and Lake Rotoaira

At the time, the main concern relating to the impact of the scheme on Maori (and those who fished for trout) was with the lakes. The Tuwharetoa interest in

Lake Taupo had been settled in the negotiations from 1924, but a Tuwharetoa right to Lake Rotoaira was also recognised. Lake Rotoaira was a private trout fishery, where Maori charged for fishing licences and could fish without licences themselves, but the project would result in fluctuating lake levels, affecting the places where trout fed. In 1956, the Maori Land Court investigated the title to the lake, vested it in 2778 owners, and appointed trustees to manage it, to continue licensing for profit, and, later, to negotiate for compensation arising from the effect of the scheme.

Even though the Whanganui River was vitally affected as well – some 97 percent of the massive flow of the Whanganui headwaters was to be diverted for electricity generation – the Atihaunui position was seen differently. Despite the fact that Atihaunui had made known their concern with the use of water for hydroelectricity from when the prospect of that was first mooted, and the litigation was still running when the project was conceived and planned, their interest was not recognised. (As has been seen, their claim was actively opposed, and eventually the Court of Appeal determined that customary Maori interest had been extinguished.)

Atihaunui interests compared

The Crown's policy was initially laid down in the Water-power Act 1903. 'Subject to any rights lawfully held', that Act vested in the Crown the sole right to use water in lakes, falls, rivers, and streams to generate and store electricity, with the power to delegate rights to local authorities. During the second reading, Hone Heke objected that the Bill was 'going too far' and was an 'an attempt to take away Native rights'.² The Minister of Works replied that the answer to his concern was in the Bill itself: 'If there are vested interests held by the Natives or others, they would be preserved, and if required . . . would have to be paid for.'³

Hydroelectricity and notice of Maori concerns from 1903

Despite such protest, the Crown's exclusive right to use water to generate electricity, without specific provisions to compensate Maori, was made concrete in the Water-power Act. That Act was replaced by the Public Works Act 1905, which, with its amendment of 1906, enabled the Minister of Public Works to construct the necessary works; to raise or lower the level of any lake, river, or stream; and to impound or divert waters. Eventually, it was under the more extensive provisions of the Electricity Act 1945, administered by the State Hydro-electric Department, that Governments committed themselves to large-scale hydro schemes, as increasing power shortages became manifest during the Second World War. In 1958, responsibility passed to the Minister of Electricity.

Electricity Act 1945

In 1955, the Government commissioned a technical appraisal for the Tongariro scheme. Planning consents were not then required for such a project, and in 1958, without giving notice to Whanganui Maori or obtaining their consent, and with no limit on its duration, the Crown issued an Order in Council authorising it to take water from the Whanganui, Tokaanu, Tongariro, Rangitikei, and Whangaehu Rivers and tributaries and to raise or lower water levels.

Commencement of investigations

2. Hone Heke, 24 September 1905, NZPD, 1903, vol 125, p 798

3. W Hall-Jones, 24 September 1903, NZPD, 1903, vol 125, p 799

Entry on land

Automated water-level recorders, cableways, and footbridges were ready for installation, but some of the gauging stations had to stand on Maori land. To obviate anticipated delays in obtaining owner approvals, a further Order in Council was issued in 1958 enabling work to be undertaken without giving prior notice or obtaining consents.⁴

1962 report on benefits and costs

Following a consultant's report in 1962, the scheme was to proceed in five stages, beginning with the western diversion. This would produce 629 million units a year through Tokaanu and, owing to the increased water supply, an additional 450 units through the power stations already operating on the Waikato River below Taupo.⁵

At that stage, little thought was given to the effect of the scheme on the river as a whole. The report considered that the 'diversion of 800 cusecs [22.6 cumecs], the product of 4 percent of the Wanganui River catchment, will have no significant effect on the harbour bar at Wanganui'. Major floods of the river would be unaffected by the small abstraction proposed.⁶

Approval in principle

The Government approved the scheme in principle in 1964 and authorised the start of the first three stages at a cost of £46.8 million.⁷

Impact assessment

At that point, there had been no public consultation. Although there were pros and cons, the advantages were seen considerably to outweigh the disadvantages – of which six were foreseen. One was the effect of reduced flows on the Whanganui, Rangitikei, and Whangaehu Rivers, and another was the effect on trout fisheries, particularly in the Tongariro River and Lake Rotoaira.⁸ The Ministry was directed to undertake discussions and further studies and to negotiate compensation with those whom it thought could be affected.

Consultation on fish

As to fish, in 1955 the Ministry of Works had consulted Government departments, including the Department of Maori Affairs, and noted that the headwaters of the Whakapapa, Mangatepopo, and Whanganui Rivers 'could be improved by hydro development, and . . . there is no objection from fisheries officers to [the] proposed development on the western side of the mountains'.⁹

Following the 1962 report, the Ministry had further talks with the Marine and Internal Affairs Departments, whose experts were said to be 'thoroughly satisfied' with the proposals for fisheries affected by the scheme. Lake Rotoaira would be kept close to its natural level, although its fishery could be affected during construction. Fishing rights to the lake, the Ministry noted, were 'owned by certain Maoris who may seek compensation'.¹⁰

4. Order in Council, 29 October 1958, *New Zealand Gazette*, 1958, no 66, vol 3, p 1463

5. Document c8, p ii

6. Ibid, pp 20–21

7. Commissioner of Works to New Zealand Electricity Department, 15 July 1966, MOW92/12/67/1, pt 3 (doc A78(c), p 51); Secretary of Cabinet to Minister of Electricity, 7 April 1964, MOW92/12/67/1, pt 1 (doc A78(c), p 49)

8. Commissioner of Works to Minister of Works, 6 February 1964, MOW92/12/67/1 (doc A78(c), p 67)

9. Document A78, para 5.7.1

10. Commissioner of Works to Minister of Works, 6 February 1964, MOW92/12/67/1 (doc A78(c), p 68)

After the approval in principle, compensation was negotiated with the Tuwharetoa Maori Trust Board for fishing in the Tokaanu Stream.¹¹ Atihaunui were not consulted and received no compensation.¹²

Meanwhile, acclimatisation societies were protesting over the threat to the public fishing interest. The Minister of Electricity assured the Wellington, Auckland, and Waimarino societies in 1964 that the rivers 'will not be allowed to fall so low that the safety of fish is endangered even if this means that diversion has to be temporarily discontinued'.¹³ But there were different views on what the appropriate minimum flow should be. The Waimarino Acclimatisation Society asked for 80 cusecs (2.3 cumecs) flow in the Whakapapa River below the diversion structure. The New Zealand Electricity Department, on advice from the Ministry of Agriculture and Fisheries, considered a flow of 10 to 15 cusecs (0.28–0.42 cumecs) sufficient to maintain a continuous flow between pools. Anglers argued that flows of that order would produce unacceptable increases in water temperatures in summer, and fish would die.¹⁴

In 1965, the Electricity Department agreed with the Department of Internal Affairs to maintain minimum flows in the Whakapapa that would ensure a water temperature safe for fish. In 1973, the Minister of Electricity authorised a minimum flow of 20 cusecs (0.57 cumecs).¹⁵

1965 agreement on flows

Of all the issues, the Ministry considered that the abstraction of water from the Whanganui was the most controversial because of reduced flows at Taumarunui and the likely impact on the town's water supply intakes, sewage outfalls, the abattoir effluent outfall, and the operation of the Piriaka power scheme.

Agreement with Taumarunui Borough

The Taumarunui Borough Council and the Minister of Electricity reached an agreement on compensation in September 1969.¹⁶ To protect the council's water supply and other works, liquidated damages were payable if the main daily flow at Piriaka dropped below 350 cusecs (9.9 cumecs) and much higher damages if it fell below 250 cusecs (7.1 cumecs).

In light of the council's other responsibilities, it was settled that, even if the diversion had to be temporarily discontinued, the flows in the Whanganui and Whakapapa Rivers would not be allowed to fall so low as to endanger the safety of fish. The river bed was to be kept clear of plant growth and all reasonable steps were to be taken to ensure that jet boats could continue to operate. That required a depth of at least six inches and a deepening of parts.¹⁷ However, it was agreed that there were no adverse effects on river scenery or on recreational or tourist interests, and the borough's request for £250,000 for aesthetic loss was denied.

11. File note, January 1967, MOW92/12/67/14, pt 2, p 5 (doc A78(c), p 89)

12. *Ibid*, pp 3–5 (pp 87–89)

13. Draft of letter from Minister of Electricity to Auckland, Wellington, and Waimarino Acclimatisation Societies, 13 August 1964, MOW92/12/67/14, pt 3 (doc A78(c), p 71)

14. Sir Alexander Gibb and Partners, 'Tongariro River Power Development: Report on Investigations', report commissioned by Ministry of Works, April 1962, vol 1, sec 7 (doc A78(c), pp 20–21)

15. Document A78, paras 5.7.8–5.7.9

16. *Ibid*, para 5.8.5

17. *Ibid*, paras 5.8–5.9

Agreement with
harbour board and
Tuwharetoa

In other settlements, the Wanganui Harbour Board was to be compensated for any adverse effects that would have to be made good and the National Historic Places Trust was to enter into an agreement with the Tuwharetoa Maori Trust Board to carry out an archaeological programme to record and protect sites at Lake Rotoaira and on the lower Tongariro.¹⁸ The cost to the Government from all the undertakings was estimated at \$3 million in 1973.¹⁹

No consultation
with Atihaunui

But there was no consultation with Atihaunui. Their river interests were still unrecognised. In evidence before us Mr Taiaroa stated that 'at no time during the development of the Tongariro Power Project were Whanganui Iwi or any of its representatives consulted, although the Crown were fully aware of Whanganui Iwi claims'.²⁰ He said that the only meeting of which he was aware was that arranged in 1968 by the Taumarunui Borough Council to advise the public of the likely impact on the town. On that occasion, an explanation was given by the mayor and the Minister of Electricity. As well as Mr Taiaroa, Hikaia Amohia and other Maori residents were present.

In the course of the meeting, Amohia spoke of Maori ownership of the river, and asked why the Government was 'taking water out of [it] without the approval of the Whanganui Iwi'.²¹ The chairman ruled him out of order and asked him to sit. Amohia stayed on his feet and continued his explanation of the Maori claim, the legal processes it had been through, and the people's concern over the diversion of the water. Mr Taiaroa claimed that there was no response from the Minister or the mayor, adding: 'There was nothing particularly unusual about this reaction from the chairman of the meeting and the Minister, to an explanation of the Iwi point of view. There was a total failure or unwillingness to understand.'²²

Works operative

Water diverted from the Whanganui River was first used for power generation in 1971 and from the Mangatepopo, Tawhitikuri, and Whakapapa Rivers in 1972.²³

8.3 NEGOTIATIONS ON THE PROJECT AND THE CLAIM

Attempt to revive
river claim

That year, Atihaunui revived their river claim. The issue had lain dormant after the 1962 decision, save to the extent that Atihaunui made such efforts as they could to be heard in opposition to the power project. At that time, however, there were no receptive minds within the Government, and with some desperation Titi Tihu and Hikaia Amohia applied to the Aotea Maori Land Court for a rehearing of the 1949 Supreme Court decision.²⁴ Needless to say, nothing came of that application, but by then a new Minister in the House, the Honourable Matiu Rata, was much more

18. File note, January 1967, MOW92/12/67/14, pt 2, p 5 (doc A78(c), p 89); document A78, paras 6.1-6.2

19. Document A78, para 7.2

20. Document B8, para 25

21. *Ibid*, para 26

22. *Ibid*, para 29

23. Document A78, para 4.9

24. The description of the negotiations in this section is taken from material in document B8(a), pp 1-89.

sympathetic to Maori matters. He was the first Maori to be appointed Minister of Maori Affairs since Sir Apirana Ngata.

A meeting with the Minister of Maori Affairs in 1974 opened the way to protracted correspondence and discussions with Ministers during the next 10 years. The central question as to the ownership of the Whanganui River remained the same, but there were other issues, including the ownership of riparian lands, compensation for gravel extraction, and actioning the recommendations of the 1950 royal commission.

With a change of government in 1975, matters had to start afresh. A meeting was held with the Honourable Duncan MacIntyre, the new Minister of Maori Affairs, that same year at Putiki Marae. Formal submissions were presented.

At Putiki, the usual claim was made, but there had been a significant change. Rata had introduced the Treaty of Waitangi Act 1975, giving limited recognition to the Treaty of Waitangi. At the time, the founding members of the Waitangi Tribunal had still to be appointed, but Atihaunui added to their formal, written submissions that which they had been unable to plead in the courts – that the failure to recognise their river interests was a ‘direct breach’ of that Treaty.²⁵

The Minister rested his reply on the decision of the Court of Appeal. There had never been a separate title to the bed of the river under Maori custom, he said. Each block bordering the river had the right to the bed to the centre of the river, he noted, and any claims to be brought on behalf of such owners in 1903, when the Coal-mines Act Amendment Act was passed, would ‘have to establish details of specific loss’.²⁶

The initial operations of the Waitangi Tribunal had not inspired much confidence. Atihaunui therefore responded to the Minister with a petition to Queen Elizabeth II. This was transmitted by the member of Parliament Koro Wetera to her official secretary during the 1977 royal visit to New Zealand. The appeal was to the Crown, on whose behalf the Treaty of Waitangi was signed. The claim was reiterated, but with the additional reliance on the Treaty. Further, an appeal was made on the basis of religious freedom. The river was sacred and the statutory vesting in the Crown ‘was a direct attack on religious ritual and custom, which has always been forbidden when Great Britain extended her Government to other peoples’.²⁷ The petitioners prayed that Her Majesty would assist ‘in removing the blemish which has been cast by the Coal Mines Act on the good name of all our ancestors’.²⁸

In due course, the petition was returned to the Governor-General, who advised Hikaia Amohia in September 1978 that the ‘proper procedure’ would be for him and his fellow petitioners to make a formal petition to the House of Representatives.²⁹ This, they did.

25. Petition of Titi Tihu and Hikaia Amohia to her Majesty the Queen, p 1 (doc B8(a), p 9)

26. Minister of Maori Affairs to Hikaia Amohia, 23 January 1976 (doc B8(a), p 7)

27. Petition of Titi Tihu and Hikaia Amohia to her Majesty the Queen, p 1 ((doc B8(a), p 9)

28. *Ibid.*, p 2 (p 10)

29. Governor-General to Hikaia Amohia, 5 September 1976 (doc B8(a), p 22)

Meetings with the new Ministers

Putiki meeting and a new criterion – the Treaty of Waitangi

Petition to Queen

Petition to
Parliament

The petition, praying that the title to the Wanganui River be vested in nine named tribes, was presented in the names of Titi Tihu and Hikaia Amohia in 1979. In his submission to the select committee, the petitioners' lawyer, Mr E D Morgan, stressed that his clients were not seeking material gain:

It bears repeating again that what is sought by the petitioners is not material gain. They do not seek compensation for loss of gravel, or the loss of fishing, or any other material losses, they do not seek rights of navigation or rights of the use of the water for the creation of power or any other of the multiple uses of water.³⁰

The petition was heard by the Maori Affairs Committee of the House in 1980. A summary of the history by the Department of Maori Affairs, produced as background for the committee, ended on a different note from previous official advice. Instead of stressing the finality of the Court of Appeal decision, it included a legal opinion that Maori landholders may not have been aware of the *ad medium* presumption when they received Crown titles. Also, it added that it could no longer be regarded as settled that the Treaty of Waitangi conferred no rights recognisable in a court of law in view of the subsequent incorporation of the Treaty in statutes.

In referring the petition to the House, the committee added a rider: 'That wherever possible the Government take account of that part of the petition which lays emphasis on the restoration of Mana O Te Turangawaewae as distinct from material rights'.³¹

Issue of 'no material
gain'

The matter had still to pass to the Cabinet Committee on Legislation and Parliamentary Questions. At that point, the then Minister of Maori Affairs, the Honourable Ben Couch, put suggestions to the Atihaunui leaders. One was that the recently established Maori land advisory committees should employ researchers to search out the details of the land claims. Another was that he was prepared to consider legislation to provide 'for the underlying ownership of the river bed to be in the names of the appropriate tribal representatives', so long as it was clear that 'material control would not pass from the Crown'.³² Further, he considered increasing Maori representation on the Wanganui River Scenic Board from one to three.

Titi Tihu and Hikaia Amohia, for the tribal leadership, agreed. They did not want 'material control of the river', they appreciated that the Minister might have difficulty with his legislative suggestion, and they proposed the 'senior Elders' who would hold title to the river and the three representatives to the scenic board.³³

Nothing had happened when, in May 1983, Titi Tihu sought gravel compensation. The Minister expressed surprise, the petitioners having disavowed

30. Submission to select committee by counsel for Titi Tihu and Hikaia Amohia (doc B8(a), p 37)

31. Maori Affairs Committee, 'Report on Petition of Titi Tihu and Hikaia Amohia', report to House of Representatives, 9 December 1980 (doc B8(a), p 44)

32. Minister of Maori Affairs to counsel for Titi Tihu and Hikaia Amohia, 28 January 1982 (doc B8(a), p 56)

33. Counsel for Titi Tihu and Hikaia Amohia to Minister of Maori Affairs, 17 February 1982 (doc B8(a), p 58)

any material gain, but he would not rule out the possibility. A lawyer replied for Titi Tihu that his client was a 'tohunga of the old school', for whom material matters are irrelevant but he had overlooked the interests of others of the tribe. The lawyer later advised him that the beneficiaries of any compensation should be all the 'tribes who form the community of the Wanganui River' and that a Maori trust board should be set up to represent them.³⁴

Meanwhile, before the Cabinet Committee on Legislative and Parliamentary Questions, the Ministry of Energy and the Treasury sought that, whatever concessions might be made, the Crown retain ownership of the riverbed, minerals, and water. The river was 'the most economic untapped hydro-electric power source in the North Island', it was argued, and while the Electricity Department had no immediate plans, there should be no restrictions that might hinder any future hydro power scheme.³⁵ The Treasury warned of the implication of any move to compensate for gravel takings. There were other 'navigable rivers' that would also qualify. European as well as Maori landowners might have claims as well. And, if it were to be conceded that the Coal-mines Act Amendment Act 1903 was contrary to the Treaty of Waitangi, new claims might well be made for 'the New Zealand coastline and tidal rivers'. It observed a change in the Maori approach from 'spiritual sovereignty or mana over the river' to a 'more direct control'.³⁶

The Minister of Maori Affairs agreed that there could be no concessions to Crown ownership of the bed but wanted the Government to confirm that it had 'always recognised the spiritual significance and the mana attached to the Wanganui River' by the tribes along its banks. He also sought authority to 'promote further consultation with the petitioners on possible recognition of mana attaching to the river'.

The petition for title to the bed of the river was declined, but the Minister was given the authority that he sought for further consultation.³⁷

Departmental
opposition

Decision

8.4 NEGOTIATIONS AND THE WHANGANUI NATIONAL PARK

In the subsequent negotiations, a further matter was added to the agenda on account of more Government proposals – the plan to create a national park in the Whanganui hinterland, as put up by the National Parks and Reserves Authority.³⁸

Atihaunui began to formulate their position with a tribal hui in 1983. In essence, they resolved over time to seek 50 percent Maori representation on the envisaged

Whanganui national
park proposed

Atihaunui position

34. Counsel for Titi Tihu and Hikaia Amohia to Minister of Maori Affairs, 20 June 1983 (doc 88(a), pp 68–69)

35. 'Whanganui River Maori "Land" Claim: Petition of Titi Tihu and Hikaia Amohia', Treasury paper, p 4 (doc 88(a), p 82)

36. 'Whanganui River Maori "Land" Claim', pp 2–4 (doc 88(a), pp 81–82)

37. Cabinet Committee on Legislation and Parliamentary Questions paper, 17 November 1983, CM(83)M38 (doc 88(a), pp 84–85)

38. The description of the Crown and Atihaunui negotiations in this section is taken from material in the submission of Archie Tāiaroa (doc 88, pp 72–152).

park board and special provisions to protect archaeological sites, and that the river should be kept out of the park.³⁹

Motunui–Waitara
report

From about this time, a new awareness of the Treaty and of Maori interests in natural resources was to enter official consciousness, following the Waitangi Tribunal's first substantive report, made that year. The *Report of the Waitangi Tribunal on the Motunui–Waitara Claim* considered the impact of public works and development on certain reefs off the Waitara and Taranaki coasts. The proceedings had been attended by Titi Tihu and Hikaia Amohia, the latter addressing the Tribunal and drawing attention to the Whanganui River question, where similar issues arose.

Meeting with the
authority

The Atihaunui proposals were discussed at a special meeting of the National Parks and Reserves Authority in 1984. Concern was expressed at the proposal to exclude the river from the park. It was explained that, although the Government had not accepted the petition by Maori on the ownership of the riverbed, the Departments of Lands and Maori Affairs were negotiating with the Maori people to find a formula by which the spiritual significance of the river to Maori could be recognised, and this could be by way of special legislation in the future. However, it was thought possible to tie the river's management with the management of the adjoining land under the National Parks Act 1980.⁴⁰

Meeting with the
commissioner

Later that year, an Atihaunui delegation met with a commissioner of Crown lands and other officials. Among the matters discussed was Maori representation on the board responsible for the proposed park. The commissioner explained that the board in fact governed all reserves and parks from Wellington to Lake Taupo, including the Whanganui River. He thought that they should moderate their proposal to three people, because other districts would also want representation. He suggested an additional body of six Whanganui Maori, with a statutory role of advising the board. The commissioner thought that this would result in a 'very "[M]aori" national park' with a large Maori influence in its management. He also hoped that 'As far as possible the manpower we will be employing will be from your people apart from the rangers'.⁴¹

Whanganui River
reserves trust

Little evident progress occurred for a considerable time thereafter. In the meantime, to provide a legal entity to handle any compensation moneys and a body for Atihaunui representation, Whanganui Maori set up the Whanganui River Reserves Trust with nine members, three for each of Hinengakao, Tamaupoko, and Tupoho. Hikaia Amohia was the chairman. Further consultation was to be through the trust.

1985 proposals to
Minister

By August 1985, when there had been no response from the Honourable Koro Wetere, the then Minister of Lands, to the proposals put to him the previous November, Amohia had to be restrained from leading a land march in protest. Then, in November 1985, the Minister announced approval in principle to the

39. Document B8(a), pp 72–74

40. Minutes of a special meeting of the National Parks and Reserves Authority, 3 May 1984 (doc B8(a), pp 99–104)

41. Document B8(a), pp 94, 98, 110–111

Whanganui national park. Support, he said, was widespread and included the Wanganui Regional Development Council. He announced that he would meet the 'Wanganui River tribes' at Taumarunui in December to ensure that they were briefed, adding:

I want to discuss the question of the most appropriate name for the park, traditional rights, such as fishing, and the claim to the river itself, establishing a Maori advisory body, Maori membership of the park board, the question of the taking of metal from the river, and, indeed, all matters which impinge on the Maori people and their centuries long involvement with it.⁴²

With all the matters of importance to them still unresolved, the trust hardened its position. On 3 February 1986, it put up a claim for not less than \$4 million for gravel compensation.⁴³ On 18 February, it met the Minister to present him with three resolutions:

1986 gravel claim
and proposals

1. That the Wanganui River *not* be included in any proposed national park in the Wanganui River region.
2. That the proposed Wanganui park be administered, maintained and managed by representatives of the Wanganui river tribes with the assistance of government.
3. That no name can be decided for the proposed Wanganui national park by the Maori tribes of the Whanganui river region until satisfactory assurances is given to those Maori tribes by government in regard to numbers 1 and 2 above. [Emphasis in original.]⁴⁴

The Minister replied on 3 April that, in his view, the first two resolutions were not 'practical'. If the river were not included in the park, there would be no grounds for the trust to be involved in its administration, in his view, and he believed that it was 'very much in the interests of the people of the Wanganui River to have the river managed as part of the park so that your people can be involved with decision-making and management issues'. He hoped to achieve that by involving the trust as an adviser to the Wellington National Parks and Reserve Board. He was also proposing a Maori appointment on the National Parks and Reserves Board. That would require a legislative amendment, and he had authority to promote it during the coming parliamentary session. That would enable him to establish a trust board and to deal with 'cultural and traditional matters'. For that to happen, the legislation would need to be agreed to by the middle of the year. He was not yet able to respond on the question of compensation for gravel extraction, but he confirmed that he supported 'a payment ... to cover the question of metal extraction'.⁴⁵

Minister's
alternative
proposals

In May 1986, the trust replied, reaffirming the two resolutions to which the Minister had taken exception. It remained their unanimous position that the river

Trust's response

42. Press release from Minister of Lands, 13 November 1985 (doc B8(a), p 106)

43. Counsel for the Wanganui River Reserve Trust to Minister of Lands, 3 February 1986 (doc B8(b), p 109)

44. Submission presented to Minister of Lands, 18 February 1986 (doc B8(a), p 116)

45. Minister of Maori Affairs and Lands to Archie Tairaroa, 3 April 1986 (doc B8(a), pp 119-120)

not be included in the proposed park until their 'original claims' to the river were resolved and that the proposed park be maintained and managed by representatives of the Whanganui River tribes assisted by the Government. The trust named three of its members to work with officials on legislative details and on the matter of compensation.⁴⁶

Minister's response

Then, on 10 September, the Minister proposed and advised the trust that:

- the riverbed would not be included in the park but that the legislation would 'tie in management activities affecting the river with the procedures for managing the park'.
- the legislation would 'recognise the spiritual value and mana' of the river to the Whanganui Maori people.
- the Government would not agree 'to total management of the proposed park by the trust board or any other body representing exclusively the Whanganui tribes'. However, the trust and its representative on the National Parks and Reserves Board would 'have a very real say in matters which affect Maori cultural values and spirituality'.
- he was obliged to formally gazette the park and could not wait much longer to give it a name.
- finality on gravel compensation would take time to resolve, but that there was enough evidence to support an interim payment to enable the trust to employ a researcher to investigate the matter more fully.
- the trust's agreement to proceed on the basis above would be without prejudice to future claims to the bed of the river or other lands.⁴⁷

Trust settles name

In reply, the trust proposed, on 14 October, that the new park be called Whanganui National Park.

Competing legislative drafts and gazetting of park

After consultation with the trust, the draft legislation provided for a Whanganui River National Park Board and a Whanganui River Maori Trust Board, with three of the 12 members of the park board to be appointed by the Minister on the recommendation of the trust board. Clause 8 of the draft required the park board:

to seek and have regard to the advice of the Wanganui River Maori Trust Board on all matters bearing on Maori custom and usage, cultural values or spiritual significance. The Wanganui River Maori Trust Board may further offer advice to the Wanganui National Parks & Reserves Board on any matter with the river & its environs.⁴⁸

On 22 October 1986, the Minister confirmed that the establishment of the national park would not prejudice further negotiations to obtain 'customary Maori title' to the bed of the river.⁴⁹

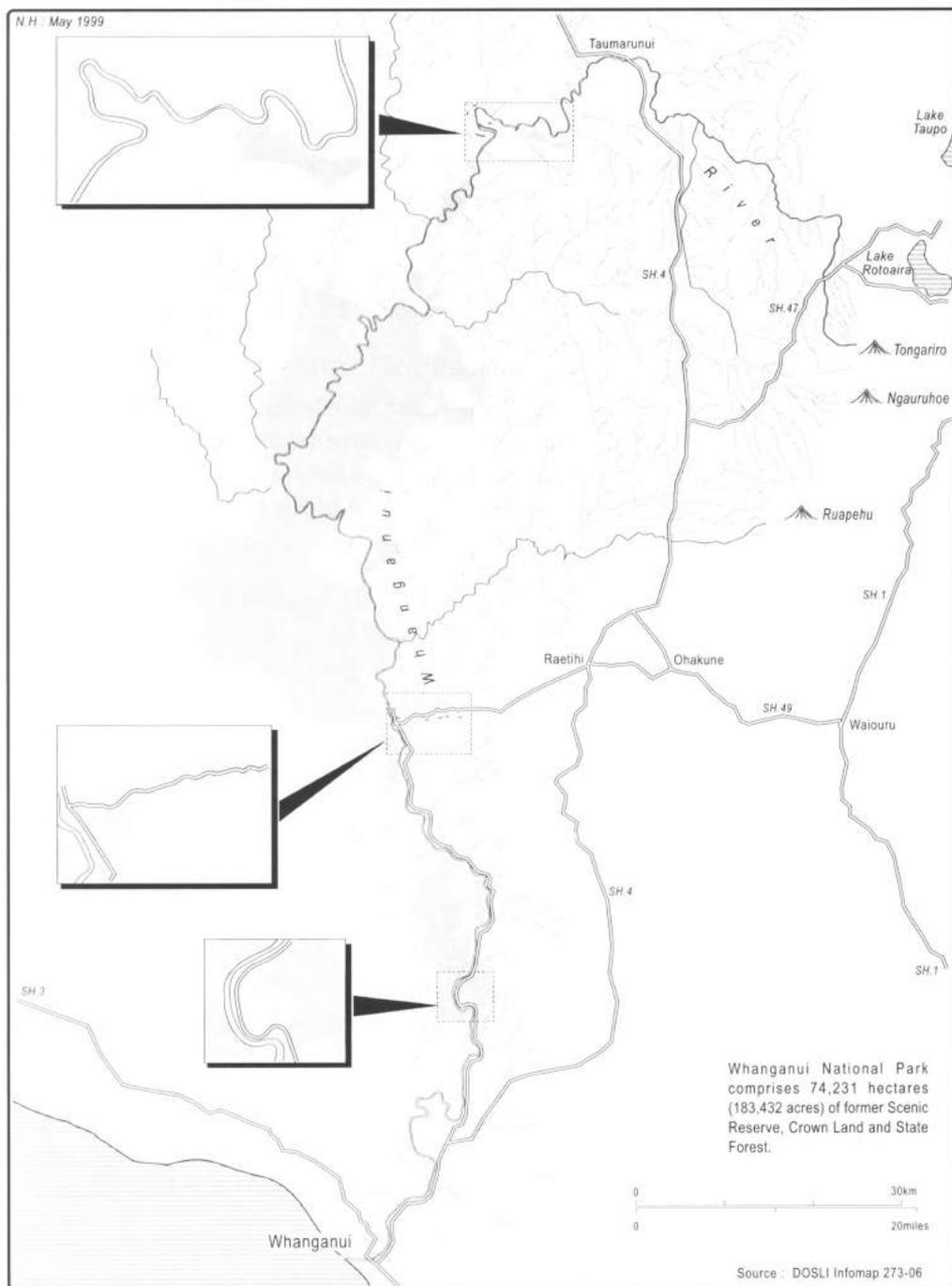
On 10 November 1986, the trust solicitors submitted an amended draft of the legislation, including a requirement for an inalienable title, deemed to be a

46. Department of Maori Affairs to Minister of Maori Affairs and Lands, 9 May 1986 (doc B8(a), pp 121-122)

47. Minister of Lands to Maurice Takarangi and Archie Taiaroa, 10 September 1986 (doc B8(a), pp 128-129)

48. 'Draft of Legislation for the Wanganui River', attached to Cooney Lees and Morgan to commissioner of Crown lands, 10 November 1986 (doc B8(a), p 141)

49. Minister of Lands and Maori Affairs to Maurice Takarangi, 22 October 1986 (doc B8(a), pp 134-135)



Map 5: Whanganui National Park

‘customary title’ to issue to the trust for specific parts of the Whanganui, Ongarue, and Retaruke Rivers and strengthening the provision for the park board to have regard to the trust’s advice.⁵⁰ The Minister rejected it. The Whanganui National Park was gazetted on 6 December 1986.

50. ‘Draft of Legislation for the Whanganui River’ (doc B8(a), pp 137–142)

Interim gravel
payment

In 1987, the Department of Lands and Survey made an interim payment of \$140,500 for the costs of establishment and for the first year of operation of the Whanganui River Maori Trust Board, noting this as 'the only interim payment that will be made towards the final cost for settlement for metal extraction from the Whanganui River, [and] is made on a without prejudice basis'.⁵¹

Whanganui River
Maori Trust Board
established

The Whanganui River Maori Trust Board Act 1988 confirmed a board of nine members appointed on the recommendation of the Minister of Maori Affairs and operating as a Maori trust board under the Maori Trust Boards Act 1955. The beneficiaries were the descendants of Tama Upoko, Hinengakau, and Tupoho. In addition, under section 6 the board would:

from time to time negotiate with the Government, or any other body or authority concerned, for the settlement of all outstanding claims relating to the customary rights and usages of te iwi o Whanganui, or any particular hapu, whanau, or group, in respect of the Whanganui River, including the bed of the river, its minerals, its water, and its fish.

1990 – trust board
members on park
authority reduced

Then, in 1990, the Conservation Law Reform Act amended the Conservation Act 1987 and abolished the National Parks and Reserves Authority, as well as all national parks and reserves boards, and under section 6A substituted the New Zealand Conservation Authority, with the Minister of Conservation to establish not more than 19 conservation boards. It provided that the board, whose area of jurisdiction included the Whanganui National Park, was to consist of not more than 11 members, one appointed on the recommendation of the Whanganui River Maori Trust Board (s 6P(7)). This reduced the trust's representation from three to one.

Section 30(2) of the National Parks Act 1980 was amended under section 113 of the Conservation Law Reform Act 1990 to provide that:

The Board having jurisdiction in respect of the Whanganui National Park shall, in carrying out its functions,—

- (a) Have regard to the spiritual, historical, and cultural significance of the Whanganui River to the Whanganui iwi; and
- (b) Seek and have regard to the advice of the Whanganui River Maori Trust Board on any matter that involves the spiritual, historical, and cultural significance of the park to the Whanganui iwi.

No sooner had the board been established than it and its establishment funds were to be absorbed in litigation to restore the river's flow, but we first digress to note the complex legislative regime for the river's governance at the time.

51. Director-General of Lands and Survey to Touche Ross and Company, 30 March 1987 (doc B8(a), pp 152-153)

8.5 THE STATUTORY REGIME

During the negotiations, the trust had to cope with many officials. From 1967, the Water and Soil Conservation Act brought several Government departments and the many local bodies, drainage boards, and catchment boards under one statutory umbrella. The National Water and Soil Conservation Authority, comprising seven members and chaired by the Minister of Works, had a very broad responsibility for the quality, conservation, allocation, and use of natural water, including sea water, for soil conservation, and for the control of multiple uses of water and the drainage of land.

Under its aegis, the Water Allocation Council, comprising officials from the Departments of Agriculture, Internal Affairs, Electricity, Works, and Health and representatives of municipal and county councils, drainage and catchment boards, Federated Farmers, and the Manufacturers' Federation, dealt with the numerous day-to-day issues that arose over the use of water. The previously existing Soil Conservation and Rivers Control Council was brought under the administration of the Act. There was no provision for the formal representation of Maori interests on any of these statutory bodies. The management, conservation, and use of water was, by the Act, assumed to be a matter to be arrogated exclusively to the Crown. The Water and Soil Conservation Organisation was the administrative arm of the authority.

The bed of the river continued to be vested in the Crown under the Coal Mines Act 1979, and the Crown's land interest was administered by the Department of Works under the Public Works Act. Under the Harbours Act 1950, the Wanganui Harbour Board administered the Whanganui River up to the tidal limit. The Water and Soil Conservation Organisation administered the surface waters of the river under delegation from the Department of Transport. The Marine Department had charge of fisheries. The Department of Health had powers under the Waters Pollution Act 1953. The Department of Internal Affairs had duties under the Native Plants Protection Act 1934. The Department of Lands had responsibilities under the Reserves Act 1977 and the National Parks Act 1980, together with the National Parks and Reserves Authority. The Department of Maori Affairs had obligations for the welfare of Maori communities.

8.6 RIVER FLOWS LITIGATION

Severe impacts on the river became noticeable after the Tongariro power development project became operative in 1971. At that time, the diversion was controlled by the Electricity Department and Division for the Crown, and the Crown had a perpetual right to divert water by the 1958 Order in Council, as validated by section 31 of the Water and Soil Conservation Amendment Act 1973.

Overview

By an agreement of March 1988, pursuant to section 23 of the State-Owned Enterprises Act 1986 and section 3 of the Electricity Operators Act 1987, the Crown

transferred, broadly speaking, all its assets and business in electricity generation to the Electricity Corporation of New Zealand Limited (ECNZ). It became the responsibility of ECNZ, not the Crown, to produce electricity in New Zealand.

Electricity generation now occurs in a deregulated environment. As part of its agreement with the Crown, ECNZ stated its intention to apply within 15 years for water rights to replace those formerly held in perpetuity.⁵² It was one thing to take water, however, and another to take water so as to seriously prejudice interests downstream. The Water and Soil Conservation Act 1967 enabled applications to be made to limit the amount abstracted.

Legal proceedings to set minimum flow levels began in 1977 and were reactivated at various times to 1992. In protracted litigation, Atihaunui argued that the river be restored to its natural flows, other organisations urged that the flow be increased, while ECNZ sought protection for its interest in hydro generation.

Statutory authority
to determine river
flows

The Water and Soil Conservation Act 1967 had made major changes to the delegation of the Crown's assumed responsibilities for the management of rivers. It established the National Water and Soil Conservation Authority, which was empowered to fix the minimum acceptable flow and the maximum range of flow of any river (s14(3)(o)) on the recommendation of local catchment boards constituted as regional water boards (s 20(5)(d)). There was no appeal from the authority's decision.

1977 application

In 1977, the New Zealand Canoeing Association applied to the authority for increased water flows in the Whakapapa and Whanganui Rivers, and its application was referred to the Rangitikei-Whanganui Catchment Board for investigation. Atihaunui made submissions. They were concerned about the effect of changes in the river on Maori cultural associations and the discharge of sewage.⁵³

1983 minimum flows

The board reported in 1982 with a flow management plan, which the authority adopted in 1983. It fixed minimum flows at Te Maire, about 17 kilometres below Taumarunui, at 22 cumecs from 1 December to 14 February and for the days of Easter each year, and 16 cumecs for the rest of the year. There was provision for the Electricity Department to seek a lower minimum flow in times of national power shortage. The decision applied for five years and expired in 1988.⁵⁴

1987 application

In March 1987, the catchment board sought to fix new minimum flows before the 1988 expiry date. The authority was abolished in March 1988 and the catchment board was itself empowered to do this, but an appeal lay to the Planning Tribunal. The board (by then known as the Central Districts Catchment Board) conducted a consultative process, hearing the 76 witnesses of 16 parties with interests in the Whanganui River.

Trust board's
position

By this time, the Whanganui River Maori Trust Board had been established with a statutory basis to provide representation for Maori. Calling 13 witnesses at a

52. *Electricity Corporation of New Zealand Limited and Whanganui River Maori Trust Board v Manawatu-Wanganui Regional Council* 29 October 1990, Planning Tribunal decision w70/90 (doc. A6), p 67

53. Document B8, para 73

54. *Electricity Corporation v Manawatu-Wanganui Regional Council*, p 8

hearing at Ngapuwaiwaha Marae, Taumarunui, the trust urged that all diversions cease and natural flows be restored.⁵⁵

The board fixed minimum acceptable flows for five years expiring on 31 October 1993. The intake to the upper Whanganui River immediately downstream of the western diversion was fixed at 100 percent of the natural flow. The intake to the Whakapapa River at the footbridge recording site was fixed at a minimum flow of 8.5 cumecs between 1 December and 30 April and 4.2 cumecs for the rest of the year, subject to the flows being naturally available. ECNZ was able to seek a lower minimum flow at times of national power shortage.

1988 minimum flows

An intent was to produce flows at Te Maire that were always above the 22 cumecs of the 1983 decision. In recognition of Atihaunui concerns, the Whanganui intake on the western diversion would close to restore the natural flow there, the Whakapapa diversion would be controlled to achieve the minimum flows specified, and the diversions from the other four tributaries of the Whanganui would continue.⁵⁶

The Whanganui River Maori Trust Board and ECNZ lodged separate appeals with the Planning Tribunal against the catchment board's decision. The tribunal was to travel extensively through the catchment area, sitting for 84 days and hearing 105 witnesses.

Planning Tribunal appeal

The trust board's position was the same – the river's natural flow should be the minimum acceptable flow or, effectively, there should be no diversion of water from the Whanganui River at all. It called 24 witnesses in support.

Parties

According to the submissions of ECNZ, that would be unfair and unreasonable. Calling 40 witnesses, it sought restoration of the 1983 levels for a five-year term.

The Manawatu–Wanganui Regional Council, substantially supporting the decision under appeal, was respondent as successor to the regional water board that made the decision.

Counsel for the Minister for the Environment took a neutral stance, while the Minister of Conservation, calling 23 witnesses, wanted to restrict the water abstracted for power even more, to ameliorate perceived damage to the ecological systems, the human uses, and the river's intrinsic values.

The Wanganui River Flows Coalition combined a number of farming, recreational, and environmental interest groups. Calling eight witnesses, it supported the flow proposed by the Minister of Conservation, urging the tribunal to focus upon restoring the natural rhythms of the river system and seeking to restore the river to a natural and healthy appearance.⁵⁷

The tribunal observed of the Maori case that a full flow was sought because of the status of the river:

Planning Tribunal on the Maori case

as taonga, as whenua, and of kainga, (all concepts redolent of sustenance); and its spiritual, cultural and practical significance to the mana, wairua and mauri of the

55. Ibid, p 9; doc B8, para 73; doc D7, p 7

56. *Electricity Corporation v Manawatu–Wanganui Regional Council*, p 9; doc D7, p 7

57. Ibid, pp 3–5, 10–15

tangata whenua, and their responsibilities as rangatira and kaitiaki in respect of it which, it was submitted, are protected by the Second Article of the Treaty of Waitangi.

It was claimed that diversion of the headwater tributaries without their consent, without consultation of or acknowledgment of any kind of the mana and kaitiaki role of the tangata whenua, and without regard to their spiritual and cultural identity with the river, was an affront to the mana which the Whanganui iwi derive from the river. Adverse physical consequences of diversion on fisheries, navigation, and appearance of the river were also relied on.

It was submitted that this is a case where the Treaty of Waitangi obligation should be enforced rather than compromised, because compromise (it was said) is not really possible while the mana of the people remains unacknowledged. Countervailing interests could only prevail if they are of greater importance than a breach of a treaty.⁵⁸

**Decision on
legislative purpose**

After extensive legal debate, the tribunal determined that:

the purpose of fixing a minimum acceptable flow of the natural water of a river is the conservation of resources of natural water so that they are protected against harm and waste, and are available to meet as many demands as possible, so that their benefits can be enjoyed and shared by all interests to the best advantage of the nation and of the region in which they exist in the course of nature. The essence of it is the conservation of valuable resources. The demands, benefits and interests which are relevant will vary from one case to another; but they will generally include instream values, and the cultural values of the tangata whenua.⁵⁹

**Limitations on
Treaty recognition
provisions**

The trust board had submitted that priority should be given to the preservation of the character of rivers in their natural state and to the preservation of taonga of great spiritual, cultural, and material significance. It contended that there was a powerful presumption that the natural flow is to remain intact, a presumption derived from a construction of the legislation in the light of Treaty principles and from section 2 of the Water and Soil Conservation Amendment Act 1981. It could be rebutted only by the most compelling proof of public interest, and then only to the minimum extent possible. While accepting the relevance of spiritual, cultural, and traditional relationships, on its construction of the Water and Soil Conservation Act 1967, the tribunal was unable to accept that such values, or rights under the Treaty of Waitangi, could be given priority.

The Planning Tribunal, after referring to section 9 of the State-Owned Enterprises Act 1986, which provides that nothing in that Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi, and section 4 of the Conservation Act 1987, which states that that Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi, held that neither the Treaty nor the sections referred to imposed any obligation on ECNZ.⁶⁰

58. *Electricity Corporation v Manawatu-Wanganui Regional Council*, p 12.

59. *Ibid*, p 199.

60. *Ibid*, pp 57, 69-72, 74, 78.



Figure 17: Patiarero (Hiruharama), circa 1890s. Photograph courtesy Alexander Turnbull Library (Wanganui Museum collection, G1123¼).

The Planning Tribunal concluded:

That is not to preclude a decision-maker giving great weight to Maori cultural and spiritual values, in those cases where the evidence, of the kind referred to by Mr Justice Chilwell in the *Huakina* case, justifies it. However, what counsel were contending for was a presumption, and an extra weighting of the scales, in favour of retaining the natural flow independent of the weight the evidence might indicate. That would, in our opinion, be to distort the purpose of the Water Act [Water and Soil Conservation Act 1967]. To the extent that it is the claim of Te Atihau-nui-a-Paparangi that that is their entitlement under the Treaty, and that the Water Act fails to provide for the Crown's obligations under the Treaty in that respect, then those are claims which this Tribunal lacks jurisdiction to adjudicate upon.

For those reasons we do not accept the submissions of the Coalition and of the Trust Board for primacy for an ecological baseline; for priority for preservation of instream values, or for preservation of rivers in their natural state, or for preservation of taonga of great significance.⁶¹

Others who argued that the legislation gave a bias to their particular concerns enjoyed no more success. On the tribunal's reading of the law, no primacy, preference, priority, or bias could be accorded the conservation of instream values, ecology, or the natural flow of the river, as had been argued for the Minister of

Balancing act
required

61. Ibid, pp 78–79

Conservation; and contrary to submissions of ECNZ, no priority could be given to national interests over local and regional concerns or to the existing use rights of ECNZ over present or future uses.

In brief, a balancing was required and matters were to be given the weight that the decision-maker judges that they deserve in the circumstances of the particular case.⁶² Thereafter, in sequential chapters the tribunal gave careful consideration to Maori cultural and spiritual values; the natural features of the river; recreation and tourism; and the contribution of the western diversion to the welfare of New Zealanders and the economics of electricity generation.

Balancing act
applied

The tribunal's balancing of several concerns in a detailed and extensive evaluation is now summarised.⁶³

The river is a taonga of central importance for Atihaunui and, were there not competing interests, their concerns would be sufficient to justify restoration of the natural flow.

So, too, the river's natural features are adversely affected to a considerable degree. The natural pattern of flows is altered in a number of respects, particularly reduced minimum flows, reduction in seasonal variations, reduced peak flows in medium-flow events, reduced number of peak events, and truncated recessions. Water clarity is affected, and so is the transport and deposition of sediment. Spalling of papa ledges is increased and that affects the quantity of mud silts in the river. A substantial limitation of the diversions would alleviate this, increase the habitat for endangered blue ducks, improve trout spawning conditions in a valued fishery, improve the native fishery, and enhance scenic values. Were there no competing purposes, these too would present a good case to restore the natural flow.

Recreation and tourism, taken alone, did not amount to a case for the full restoration of natural flows, but they did provide a substantial basis for an increase.

The tribunal, however, had to consider the value to the nation of 'its water resources'. The western diversion contributes to the supply for the Tokaanu power station and has a flow-on effect for the Waikato hydro stations and cooling at one geothermal and two thermal power stations. Loss of hydroelectric generation, were the diversion seriously reduced, would be made up by thermal generation, which would involve the emission of greenhouse gases and the depletion of non-renewable resources, which, though relatively minor, would be contrary to sound resource management policy. A substantial net economic cost would also be borne by the public. The western diversion structures have substantial life remaining, although the perpetual nature of the entitlement for the diversions is qualified by its susceptibility to suspension or restriction to maintain minimum flows, and by the current holder's intention to apply for replacement water rights. These make a powerful case against fixing minimum flows that would suspend or restrict the diversions.

62. *Electricity Corporation v Manawatu-Wanganui Regional Council*, pp 79-82

63. *Ibid*, pp 175-197

In striking a balance, the tribunal would guard against a tendency to ascribe less weight to non-economic considerations than to economic ones, even if the latter are difficult to quantify fully.

The tribunal concluded that the diversion has considerable value for the nation and elimination would be at cost to the country and ECNZ. However, there were such grave adverse effects that minimum flows needed to be fixed to eliminate or mitigate them, and the flows permitted by the board should be reduced, despite the commitment made to the diversion in lawful expectation of a perpetual entitlement. The board's regime favoured the national interest at the expense of regional interests. Substantial sums had been spent on fisheries and environmental protection and the region had not been adequately compensated.⁶⁴

The board's decision was cancelled, and the tribunal fixed the minimum flow of the Whakapapa River at the footbridge flow-gauging station from 1 June 1991 at three cumecs or the natural flow of the river, whichever is the lower. It fixed the minimum flow of the Whanganui River at the Te Maire flow-gauging station from 1 June 1991 for the period from 1 December in each year to 31 May in each following year at 29 cumecs or the natural flow of the river, whichever is the lower.

A consequence of this was to cancel the provision in the board's decision that had fixed the minimum flow of the Whanganui River immediately downstream of the western diversion intake at 100 percent of the natural flow in the upper Whanganui River.

The tribunal considered that a combination of the two measures would involve the least restriction on the diversion that was necessary for the instream uses. It would involve an appropriate readjustment between the interests of the nation and those of the region. In proportion to the total diversions, the loss of water for electricity generation would not be high, in its view, and the effect on the strategic utility of the Tokaanu Power Station for special functions would be minor.

The Whanganui River Maori Trust Board, ECNZ, and the Minister of Conservation made separate appeals to the High Court, which were heard in 1992. The Planning Tribunal decision was upheld.⁶⁵

Planning Tribunal's
conclusions

8.7 THE TREATY DEBATE

The issues before the Waitangi Tribunal are of another kind. We can accept and are much assisted by the Planning Tribunal's assessment and application of the facts and law, as upheld in the High Court. The substantive questions before us are whether the Crown's assumption of the river's control through the enactment of a statutory regime, and particular initiatives like the Tongariro power development scheme, are consistent with the principles of the Treaty of Waitangi and, if these were proper exercises of the Crown's authority under the Treaty, whether the

Issues in claim

64. *Ibid.*, ch 9

65. Document 17, p 8

regime itself takes adequate account of Maori Treaty interests. Here, we set out the arguments and the evidence that we received.

Evidence on the
diversion's impact

Archie Taiaroa emphasised the deleterious effects on the river's mauri, made worse, in his view, because the diversion is near the snow-covered peaks that supply the freshest and clearest water. The impact is more at times of lower flows, but river freshes, the benefit of which ECNZ wishes to retain, are also important. These flow variations were well known to his tupuna and 'helped us to read the river, and give it life'.⁶⁶

We were presented with other evidence, as well, on fisheries, the stability of river banks, discolouration and water quality, navigability, tourism, recreational uses, and scenic and other natural qualities. It was helpful as background, but none added to the opinions before the Planning Tribunal, as recorded in its decision.

Submissions of
Marian Melhuish

The reports of technical witnesses before the Planning Tribunal, put into our record by the Crown, especially those stressing the importance of electricity to the New Zealand economy, were the subject of submissions by Marian Melhuish, a recognised expert in the economics of the electricity industry, who was called by the claimants.⁶⁷ This was in the context that, if the Waitangi Tribunal found that the Crown's implementation of the diversion were contrary to the principles of the Treaty of Waitangi, the Tribunal should not resile from recommending that that diversion should be closed.

Ms Melhuish argued that a significant proportion of electricity could, over time, be replaced by alternative sources of generation, by other fuels, by investment in energy efficiency, and by energy management practices. While recognising hydroelectric power as an important source of energy, she considered that existing generation or load growth could be met in alternative ways. She instanced the use of fossil fuel and the expansion of the Cook Strait cable.

Ms Melhuish also stressed the prospect of reducing demand through efficiency and agreed with an estimate by the Energy Efficiency and Conservation Authority that at least 15 percent of 1994 electricity consumption could be saved by both investment and management methods. She stated that ECNZ estimated in 1988, based on consultation with energy efficiency consultant Amory Lovins, that savings of 58 percent were technically possible. This figure had been revised several times, but there was no dispute that savings of around half the electricity being used in 1994 were technically feasible. She argued that it is now widely accepted that market barriers are preventing cost-effective energy efficiency and conservation from being implemented. To overcome this, the Government established the Energy Efficiency and Conservation Authority to devise strategies to help overcome market barriers to energy efficiency.⁶⁸

Ms Melhuish also explored the possibilities of wind generation, as shown by the performance of the ECNZ wind turbine. Estimates of cost-effective wind generation for this country were said to vary from about 6 percent of present generation to

66. Document B8, para 43

67. Documents C5-C9; doc D17

68. *Ibid*, paras 4.4-4.6

about 40 percent. Various local power companies had recently become interested in the generation of electricity. Proposals actively being considered by local companies amounted to at least 7000 gigawatt-hours per year, 10 times the power available from the western diversion.⁶⁹

On the other hand, Planning Tribunal evidence had emphasised the importance of the western diversion to the Tongariro power scheme and of the Tongariro power scheme to the national energy generation system. This had stressed the integrated relationship between the western diversion flows and the peaking capacity of the Waikato River system. While acknowledging the high value that resulted from the ability of the Waikato system to meet peak demand loads, the witness noted that the ability to respond to peak loads could be replaced by alternatives. She instanced an alternative to flexibility in the timing of supply of electricity to meet peak demands – namely, flexibility of demand, which can be achieved through ‘time-of-day pricing’ (high prices at peak times and low prices when demand is low).⁷⁰

Ms Melhuish has been an active participant in developing a wholesale electricity market to encourage this flexibility. She has recognised that it will take many years fully to implement the necessary market mechanisms but has noted that they are already under way. She has predicted that the economic benefits will be extremely large, as will the environmental benefits, because it is peaking power that requires highly variable river flows, which lead to alternating scouring and drying of river beds.

Ms Melhuish concluded by observing that the western diversion provided a very small amount of the total power needs of New Zealand.⁷¹ In her opinion, both its energy supply and its flexible peak-flow function could be substituted by a number of other means. If its contribution were cancelled or substantially reduced, other alternatives would be available.

Claimant counsel contended that the western diversion arose from an action of the Crown that was contrary to the principles of the Treaty of Waitangi, since, by the Treaty, the ownership and control of the river had been preserved to Atihaunui and not willingly relinquished. Had Treaty interests been considered, the project would not have gone ahead. There was no consultation with Atihaunui at any stage.

Claimant counsel's
arguments

Likewise, the assumption of control of water in the Water and Soil Conservation Act 1967 was contrary to Treaty principles in that it failed to presume prior Maori rights. Moreover, the consultation and hearing processes involved had committed Atihaunui to huge expenses they would not have incurred had their rangatiratanga been recognised, as the Treaty requires.

Crown counsel acknowledged that Atihaunui had not been consulted prior to the commencement of the Tongariro power development scheme but stressed the

69. Ibid, paras 4.7–4.8

70. Ibid, para 8.4

71. Ibid, para 11. The Planning Tribunal decision of 1990 found that the water diverted from the Whanganui River had value for the generation of about 3.5 percent of the then national generation of electricity: *Electricity Corporation v Manawatu–Wanganui Regional Council*, p 204.

importance of the western diversion for hydroelectric power in the North Island and the power demands of the time. In the exigencies of the day, it was a legitimate exercise of *kawanatanga* for the Crown to take the steps that it did to meet the anticipated demands of society. Given the continued use of electricity in preference to coal-fired power, the continued authorisation of the diversion of the waters from the Whanganui River was argued to be a valid exercise of the Crown's Treaty powers. We note, however, that the Crown sold its interest in electricity generation to ECNZ, relinquishing its own rights to take water. Thus, the diversion now occurs in a deregulated environment and where the generation of electricity is left to the operation of market forces.

Crown counsel further contended that the enactment of the Water and Soil Conservation Act 1967 was also a valid exercise of the Crown's article 1 powers. In submissions directed principally at the Resource Management Act 1991, but which are also applicable to the Water and Soil Conservation Act, she stressed that resource management laws need to apply to all persons equally if they are to succeed.

Claimants' reply

Claimant counsel accepted that the Crown has a residual right under the Treaty to pass laws for conservation purposes and in the wider public interest, where necessary. But it did not follow that authority in the first instance needed to be exercised by the Crown or its local government delegates. It could be exercised by the *iwi*, as was appropriate in terms of the Treaty, and the Crown had the power to intervene in the national interest by legislation, if need be.

Claimant counsel observed that, while the Crown asserts that it is necessary for it to manage resources under its article 1 powers, it has passed on that power to delegates in the form of local authorities. If, as Crown counsel claims, such authorities are independent of the Crown, then such delegation constitutes a serious Treaty breach, the Crown abdicating its Treaty responsibility actively to protect Maori interests.

We observe in relation to this last submission that there was no provision in the Water and Soil Conservation Act 1967 that required the catchment board, regional water board, or, on appeal, the Planning Tribunal to comply with or consider Treaty principles along similar lines to the requirements in section 9 of the State-Owned Enterprises Act 1986, section 4 of the Conservation Act 1987, or section 8 of the Resource Management Act 1991.

Claimant counsel contended that the Crown submissions are based on the assumption that control of natural resources rests with the Crown and was ceded to the Crown as a necessary incident of *kawanatanga*. She noted that the Waitangi Tribunal in the Mohaka River claim rejected a similar submission.⁷² A corollary of the Crown submission was that *rangatiratanga* excluded any concept of authority, control, responsibility, or stewardship in respect of natural resource *taonga* from the signing of the Treaty. This was unsustainable. Maori would have no more than a right to be consulted and considered, as was wrongly the situation under the

72. Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd. 1992, sec 5.5.2

Resource Management Act. It would place natural resources outside the protection of article 2, with its recognition of rangatiratanga, and solely within the province of article 1, where the Crown has all the say.

8.8 THE FACILITIES USER PASS

What better evidence of river ownership than charging an entrance fee? Maori did it instinctively from the 1850s, demonstrating in practical form their presumption that the river was theirs. The Department of Conservation intended nothing of the sort when it introduced the facilities user pass in 1993, requiring a fee of everyone using the facilities it provided in the Whanganui National Park.

Pass as assertion of ownership

Symbols are important, however, and the pass was perceived by some as a river entrance fee.⁷³ After all, the hundreds who access the park each year nearly all go in by river and the available facilities are the huts that cling to the river's edge.

To all intents and purposes, the claimants say, the pass is for the river, which is the more significant facility, and the pass is a poor show considering the negotiated agreement that the river was specifically not part of the park. They did not agree with the system when it was discussed with them; indeed, it would be more in line with some Maori views if the department paid them rent for the public use of the river.

Crown counsel noted that the relevant bylaws apply to a riparian strip 250 metres from the river. She argued that the Crown had consulted in good faith and the department had since built on or upgraded eight of the 13 affected sites.⁷⁴ There are also restrictions on camping outside designated areas, but the bylaw does not apply to those camping on Maori land or other privately owned land.

Pass as payment for facilities

The pass and bylaws assist environmental control and apply to the use of facilities, not to the use of the river or the park.

Part of the problem was the lack of Atihaunui involvement in park management, despite the proposals made during the negotiations. Crown counsel indicated that the Crown was willing to explore the possibilities of further developing the involvement of Atihaunui with management processes relating to visitors to the river and its environs, but the Crown could not depart from its duties to manage riparian areas with conservation values.⁷⁵

It appears to us more important to settle first who owns the river.

8.9 THE TREATY NEGOTIATIONS

For several great tohunga like Titi Tihu, who was known to members of this Tribunal, money was secondary to the spiritual dimension to their lives. Spiritual

Gravel question

73. Document 118, para 233

74. Document 119(c), para 38

75. Ibid, para 216

matters must be settled first. To other tohunga of no lesser ranking, money appeased spiritual transgressions when it served as utu, that which restores harmony and balance through recognition of a wrong. We suspect that it may reflect Titi's views that claims to gravel compensation were not as strenuously urged as the claim for a riverbed title, even though payment would at least be a passing recognition of customary possession. In any event, compensation had still to be paid, and it appeared that a very substantial sum would be involved. Almost 40 years to the day since the 1950 royal commission had recommended payment to Atihaunui for gravel takings, with a process for settling quantum, the Minister of Justice proposed negotiations to settle all Atihaunui Treaty claims in a letter to the trust dated 13 July 1990.⁷⁶ Furthermore, the Government now had a negotiation structure with the potential to settle in one comprehensive plan all outstanding issues: the river, the gravel, the Atihaunui land, the management of the park, and compensation for anything wrongly done in the past.

Offer of negotiations

Though Atihaunui policy was to negotiate directly too – they had still to file the river claim at that time – after three years of trying, the negotiations did not get far off the ground. The claimants thought it necessary to explain this; also their pursuit of the present claim, which, from the Government's point of view, put an end to the negotiations. In the claimants' eyes, this was not a breach of the good faith in dealings between Maori and the Crown that the Court of Appeal has spoken of since 1987.

Why this claim was brought

The trust's understanding was that the Crown's decision to enter negotiations assumed a 'measure of agreement about the basic issues of the claim', though the areas of agreement were not known.⁷⁷ For the Crown, the Treaty of Waitangi Policy Unit prescribed a three-phased process, which had not been agreed to by the trust. The first was to complete a 'framework agreement' by about March 1991, but supervening Government decisions upset the timetable.⁷⁸

Mohaka question

Owing to budget restrictions, agreement could not be reached over a suitable level of funding for research, legal advice, and consultation. None the less, in August 1992, the policy unit agreed to monthly meetings with the trust, subject to a proviso. The Waitangi Tribunal report on the Mohaka River claim was expected (it was released that November) and negotiations had to be confined to 'administrative matters such as the Framework Agreement and budgets' until the Government could make a policy decision on any of the Mohaka Tribunal's recommendations.⁷⁹

The trust thought that the *Mohaka River Report 1992* might be of some assistance but that the particular history and river associations of Atihaunui must be dealt with on their own merits and, further, that decisions in principle on the Mohaka case should not be made until the Whanganui position was known and had been fully considered. Still, the trust approved the framework agreement. The Crown,

76. Minister of Justice to Archie Tairora, 13 July 1990 (doc B8(b), p 69)

77. Document B8, para 84

78. Negotiations manager, Treaty of Waitangi Policy Unit, to Archie Tairora, 13 March 1991 (doc B8(b), p 72)

79. Treaty of Waitangi Policy Unit to claimant counsel, 10 September 1992 (doc B8(b), p 76(b))

however, would not.⁸⁰ Consultations continued into 1993, but a basis could not be established that was satisfactory to both sides.

To the Government, it was first necessary to consider the national implications of the Mohaka report for the management of rivers and lakes before Whanganui rights could be considered. The trust had still to sign the framework agreement and by March was becoming alarmed at the absence of any Government response. In April, the trust was advised by letter that, for the Government to be better informed of the implications of Maori water resource claims, Ministers needed 'more information about the sort of outcomes that iwi may seek from negotiations and how they envisage the practical implementation of tino rangatiratanga over natural resources'.⁸¹ Three years had elapsed since the original invitation to negotiate and there had been no progress.

Generic policy issue

The trust prepared a detailed memorandum for the Minister reminding him that it had a statutory power and duty 'to negotiate with the Government . . . for the settlement of all outstanding claims relating to the customary rights and usages of te iwi o Whanganui'.⁸² It urged that the Crown demonstrate good faith by agreeing to minimum negotiating rules, including a set timetable with monthly meetings, a recognised Crown team, a broadly agreed agenda, settlement of funding, and a Crown moratorium on further river proceedings during negotiations.⁸³

Trust's memorandum

As to 'the sort of outcomes that iwi may seek from negotiations and how they envisage the practical implementation of tino rangatiratanga over natural resources', the trust suggested that rangatiratanga meant the right to determine use of the river, the right to any income therefrom with the associated risks and rewards, and the resolution of ownership in their favour.⁸⁴ It added that these were matters for negotiation, and the means for achieving them are several and need not clash with the Crown's Treaty aspirations and responsibilities.

Finally, the trust sought urgency owing to Government policies under the Resource Management Act 1991, the prospective transfer of the Crown's hydro generating assets to third parties, and the possibility of privatisation.

The Minister of Justice met a deputation of the trust on 30 April. On 18 May, he advised the trust that the Cabinet Committee on Treaty of Waitangi Issues had decided to defer the signing of the 'draft Framework Agreement' until it had decided its position on 'river issues in general'. It was considering 'a generic approach to Treaty claims to natural resources such as rivers, lakes, geothermal energy and the conservation estate'.⁸⁵

80. Claimant counsel to Treaty of Waitangi Policy Unit, 14 September 1992 (doc B8(b), p 76(d)); Whanganui River Maori Trust Board to Minister of Justice (doc B8(b), p 77(a)); Barnery Haaami, Kaiwhakahaere, to Minister of Justice, 20 October 1992 (doc B8(b), p 78)

81. Treaty of Waitangi Policy Unit to claimant counsel, 7 April 1993 (doc B8(b), p 85)

82. Archie Tairaroa to Minister of Justice, 31 March 1993 (doc B8(b), pp 8(a), 86-88)

83. Section 6 of the Whanganui River Trust Act 1988

84. Treaty of Waitangi Policy Unit to claimant counsel, 7 April 1993 (doc B8(b), p 85)

85. Minister of Justice to Archie Tairaroa, 18 May 1993 (doc B8(b), p 89)

Application for
water conservation
order

Then, in June, the Royal Forest and Bird Protection Society applied for a water conservation order for the Whanganui River.⁸⁶ The trust saw this and other pending proceedings as showing yet again how the customary rights of Atihaunui were not recognised and were unprotected.⁸⁷ Archie Taiaroa, the trust chairman added, in his evidence to us:

about the Resource Management Act and the Regional and Local Authorities we deal with, I regret having to be negative about the processes under the Act, that recognise some may be trying to do their best. However, in the end, when iwi are talking about their tupuna taonga, especially for us of the Whanganui River, to do so with those who would make decisions over it without Whanganui iwi themselves having the proper authority, is simply not in accordance with custom or the Treaty. We are also doing so in the circumstances where we have few resources to meet those of the bodies with whom we are dealing. For proper decisions to be made in the interest of everybody, tino rangatiratanga Maori must be recognised. Iwi will then be much better placed to live and act for themselves and with others in the interest of the community as a whole. The present situation is a tangle compounded by well-meaning efforts which frustrate the ultimate objective of Maori and leave things much as they always were, somewhat redecorated.⁸⁸

Final meeting

The trust chairman discussed his concerns with the Minister on 29 June, urging that negotiations be no longer delayed. The Minister advised the trust to take such steps as it thought 'appropriate to protect the river'.⁸⁹

In July, the trust filed this claim and sought an urgent hearing.

86. Document D3, p 2

87. Document A1, p 4

88. Document B8, para 228

89. Ibid, para 102

CHAPTER 9

THE RIVER AND THE TREATY

9.1 TREATY FINDINGS

9.1.1 Introduction and claim summary

Section 9.1 provides a Treaty audit of matters in chapters 1 to 8 with findings on the claim. Legal argument and key summaries are given in section 9.2.

The essence of the claim is:

- that Atihaunui-a-Paparangi have the customary authority, possession, and title to the lands, waters, and fisheries of the Whanganui River;
- that these were guaranteed to them by the Treaty of Waitangi and have not been willingly relinquished;
- that the claimed authority, possession, and title have been eroded or displaced by Crown laws, policies, and practices inimical to the Treaty; and
- that they continue to be eroded or displaced by current Crown laws, policies, and practices.

We find that these claims are established.

9.1.2 The title to the river in Treaty terms

At 1840, the Whanganui River and its tributaries were possessed by Te Atihaunui-a-Paparangi. That has long been recognised in the courts (see secs 9.2.1, 9.2.2).

That which was possessed

The river system was possessed as a taonga of central significance to Atihaunui. The meaning of taonga is discussed in section 9.2.3. The river was conceptualised as a whole and indivisible entity, not separated into beds, banks, and waters, nor into tidal and non-tidal, navigable and non-navigable parts. Through creation beliefs, it is a living being, an ancestor with its own mauri, mana, and tapu. To Atihaunui, it was their ‘tupuna awa’.

A taonga

The river, like lakes, swamps, and inshore seas, was no different from the land in that respect. These were all part of the people’s inheritance.

In 1990, the Planning Tribunal (now the Environment Court), on the Maori evidence before it, reached the same conclusion – the river was a taonga (see ch 8). Independently of the Planning Tribunal’s opinion, and without relying on Maori evidence that might be seen as self-serving, we reached the same conclusion in chapter 2.

The river was held by both the hapu and the people as a whole. The underlying social structure was outlined in chapter 2. Individual uses and hapu controls

Distribution of control

applied at different places, changing over time, but the hapu were part of one body and the river was as the aortic artery of their one heart.

Though the hapu were autonomous, ultimate control and rangatiratanga of the river vested in the single descent group. Other descent groups had interests as well. Atihaunui would be last to deny their interests, as the opening proceedings at Putitki showed (see sec 1.4.3). Their interests, however, were not as direct.

The balance between local autonomy and central control depends on the matter in hand. In a world where relationships and utu prevailed, Western structures for political unity were not required. Songs, stories, carvings, and genealogies of symbolic value gave vent to the sentiment of unity and the river's unifying force. They represented an ethical code for unity as required.

These matters were addressed at section 1.5 and especially in chapter 2. For the reasons given, at this time Maori river interests should be represented through the Whanganui River Maori Trust Board.

The case is also about cultural survival. It includes but is larger than private property rights. It seeks recognition of the way that Maori relate to other people and to the environment, and how this informs race conflict and environmental care today. At heart is the ethic of respect.

The claimants' relationship with the river, its control of their lives, and its identity value were described in terms of the traditional Maori cosmos in chapter 2 and were expressed in the words of the people today in chapter 3.

The significance of relationships is crucial to understanding Maori culture, a key to unlocking the past. The relationship that Maori sought with Europeans, as dictated by their customs, was considered in chapters 4 and 5. Where the latter sought ownership and political control, the former sought trade, reciprocity on a continuing basis, and something closer to a partnership. Elements still survive of the traditional Maori preference for a society based on working relationships rather than bureaucratic controls. But in time, the need arose for new forms of social and political organisation.

Ownership is now required. Customary rights and interests are not enough in an English legal framework. In light of the experience set out in chapters 5 and 6, when authority was imposed from outside by the settler governments and governments assumed rights of river control, attitudes changed, and consonant with the now prevalent English law, Atihaunui sought ownership of the river. The consequential litigation from 1938 is described in chapter 7.

Applying the criteria of English law to the reality on the ground, Atihaunui held the river as a waterway, not a public road. It was in all respects a private, tribal waterway and access was controlled. It was also a fishery, and private fisheries are protected in English law just as they are protected in the Treaty of Waitangi.

Included in that possessed was the water. The river would be meaningless without it. The river was a waterway. The whole river was a fishery. The water was the habitat of creatures to whom Maori were related, from fish to taniwha. The emphasis on water purity for ritualistic and other reasons was described in

Whanganui River
Maori Trust Board

Case concerns
cultural survival and
race relationships

Significance of
relationships

Ownership now
required

Waterway and
fishery

Water

section 2.6. The water was treasured as the gift of Ranginui just as much as the land was respected as part of Papatuanuku.

It was said by Europeans that, as a freely flowing thing, water in its natural state could not be possessed. The question, however, is: What did Maori possess in terms of their own – not English – law, prevailing when the Treaty was signed? Adopting the holistic thinking of Maori, water was an integral part of the river that they possessed. Though its molecules pass by, the river, as a water entity, remains. The water was their water, at least until it naturally escaped to the sea, at which point its mauri changed. (This matter was considered at section 2.8.1 and see also section 9.2.9.)

Article 2 of the Treaty of Waitangi guaranteed to Maori that which they in fact possessed. In English, it said:

Application of the
Treaty of Waitangi

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess . . .

The Maori text provided:

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangitira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangitiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa . . .

In other words, the Maori text guaranteed to Maori their full authority over lands, habitations, and all other things treasured by them (until they wished to dispose of them). Combining the texts, the river is a taonga and property which Maori possessed. Transposing possession to English law as discussed at section 2.8.1, it is a taonga that they owned.

Rivers in the Treaty

Context supports this conclusion. ‘Lands and Estates Forests Fisheries and other properties’ is a broad phrase, which, when read with the opening concern in the preamble to preserve the ‘property’ and ‘just rights’ of Maori, infers that the whole resources that a tribe possessed were intended. It is relevant to ask if the rangatira at Putiki would have signed the Treaty had they been advised that the river would pass to the Crown, and reasonable to assume a negative reaction.¹

‘Taonga’ in the Maori text is a word of broad application. As the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* noted, ‘estates’, ‘forests’, and ‘fisheries’ are not specifically mentioned in that text, but ‘taonga’ covers them all.² It also covers rivers. While exclusivity is not expressed, it is inherent in both ‘taonga’ and ‘rangatiratanga’.

We find that in Treaty terms Atihaunui had ownership of, and rangatiratanga – control or authority – over, the Whanganui River. An appreciation of

Finding

1. The same test was applied in Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 5.5.2.
2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, sec 10.3

rangatiratanga is given in section 9.2.4. It includes but is much larger than that which is referred to as guardianship, stewardship, or kaitiakitanga.

Their possessions

Further, the property rights that were guaranteed by the Treaty were the rights that Maori had. They were guaranteed their possessions, not possessions at English law. The test of possession in this context is a question of fact, not law, and the nature of the possession is not to be judged by property rights in England. There, lands had been largely enclosed (though there were still many commons) and ran, according to the case, to the water's edge or a river's centre line. Therefore, rivers could be owned in parts. Enclosure of rivers for individual possession was as foreign to Atihaunui experience as land enclosures. That which they possessed was the river as a whole.

Maori law applies

Supports for this approach are the oral undertakings to respect Maori law. In the record of the Treaty debate, there is reference to the importation of the Queen's law for the maintenance of peace, which Maori were pleased to hear, but they also expected that their own law would be recognised as well. The Governor's response was to promise that recognition. The particulars are set out in section 9.2.7.

American precedent is undoubtedly correct in asserting that, in treaties with indigenous people of oral traditions, spoken promises are as much a part of the treaty as those written in the formal document. It cannot then be said, as a matter of fact, that the Treaty introduced the law of England if the corollary is that Maori laws then ceased to apply. The Treaty is, rather, authority for the proposition that the law of the country would be sourced to two streams.³

**Application of
English Laws Act
1858**

Wittingly, or unwittingly, the English Laws Act 1858 allowed for this duality, though it was not always recognised in practice. Made retrospective to 1840, the Act provided for English law to apply, but only 'so far as applicable to the circumstances' of the colony. It was thus arguable that English law did not apply if the effect was to prejudice existing Maori interests arising under Maori law.

This appears to have been the view of Chief Justice Stout in *Baldick v Jackson*.⁴ It was considered that the Crown's right to whales was not applicable to the circumstances of the colony in view of the Maori claim to them. In recent cases considered in chapter 2, it was also a reason for considering that navigable rivers and lakes in recently settled countries are not owned according to tenets of English law.

Fisheries

Though the Whanganui River was also a fishery and fisheries too were protected, in terms of the *Report on the Muriwhenua Fishing Claim*, this provides not an exclusive right to the river so much as a right to be protected in the business and activity of fishing. The fishing guarantee is thus more relevant to a further contention in the claim – that fishing practices have been deleteriously affected by the diversion of river waters. We find that they have been so affected, by river clearance work for steamers, direct pollution through discharges and land

3. David V Williams, *Te Kooti Tango Whenua: The Native Land Court, 1864–1909*, Wellington, Huia Publishers, 1999, pp 116–119

4. *Baldick v Jackson* (1910) 30 NZLR 343 (SC)

clearance, and indirect pollution through water abstraction from the Tongariro power scheme, as seen in chapters 3 and 6.

Continuing Maori control was also guaranteed. As stated by the Waitangi Tribunal in the 1985 *Report of the Waitangi Tribunal on the Manukau Claim*, rangatiratanga in the Maori text denotes more than a right to use and enjoy and covers both possession and authority and the right to control and manage according to one's own preference. It is a question of mana. We accept in that respect claimant counsel's submissions.⁵ Their interest was larger than the mere right of user for which Crown counsel contended (see also sec 9.2.4).

Control

9.1.3 Treaty principles

Four broad Treaty principles now well established in Treaty jurisprudence are applicable to this case. The first is that the Maori gift of governance to the Crown was in exchange for the Crown's protection of Maori rangatiratanga. Thus, governance is a qualified sovereignty. The same may be said of rangatiratanga in Treaty terms.

Sovereignty
constrained

The second is that active protection is required. The duty in this case is actively to protect Atihaunui river interests and their rangatiratanga or autonomous control. The degree of protection may vary according to the nature and value of the thing involved, but in this case the magnitude of the asset is large.

Active protection

The third is that the Crown cannot avoid its duty of active protection by delegating responsibilities to others, thus any delegation must be on terms that ensure that the duty of protection is fulfilled.

Duty on delegation

The fourth, known as the partnership principle, requires that the Crown and Maori act towards each other reasonably and with the utmost good faith.

Partnership

9.1.4 Extinguishment

No satisfactory evidence was adduced or is known to us to demonstrate that Te Atihaunui-a-Paparangi have at any time since 1840 willingly or knowingly relinquished their Treaty rights in the river. Instead, there has been an extraordinarily long record of attempts to retain those interests, as is summarised in section 9.2.5.

No willing
relinquishment

For reasons given in chapter 4, the Tribunal is also not satisfied that Whanganui Maori intended or knowingly agreed to sell the tidal reaches of the river as part of the 1848 transaction for European settlement.

McLean's deed

The effect of the Court of Appeal decision in 1962 was to determine that Maori customary interests in the Whanganui River were extinguished when the Native Land Court reformed the customary native title. This was extinguishment by a sidewind, as is further considered below.

Native Land Court
extinguishment

5. Document D18, p 17



Figure 18: View of Wanganui showing waka on the riverside at Pakaitore, circa 1870s. Photograph courtesy Alexander Turnbull Library (W J Harding collection, F11830½).

Limitations of
earlier court
decisions

The 1962 decision has limited value today. It turned most on the observations and advice of the Maori Appellate Court in 1958, observations unlikely to have been made if the court had before it the factual evidence and information that we have today. This is explained in section 9.2.2.

The nature of the case before us is not the same as that which was before the courts in the litigation of 1938 to 1962. Those proceedings concerned the riverbed as necessitated by statutory law; this claim concerns the river entire and the requirements of the Treaty of Waitangi. The question before the Court of Appeal was whether the Native Land Court, wittingly or unwittingly, had, as a matter of law, included the bed of the river in the title to the riparian land. The question before us is whether Maori knowingly and willingly agreed to relinquish their river interests.

The court proceedings were limited by the jurisdictional constraint that the Native Land Court could consider only land – and thus the riverbed. It prevented a necessary overview of the place of the river as a whole in the lives of the Atihaunui people.

As to extinguishment by the Native Land Court, the evidence is clear that, when the Native Land Court was operating, no one was thinking of the river, least of all the court, and neither did it enter their minds that river interests could be affected. Even afterwards, it appears, at least before the court's decision of 1962, that no one was conscious that river rights might pass upon the alienation of the riparian land, though by then the bed of the river had been taken under the coalmines legislation.

In any event, we find that Atihaunui did not agree to the Native Land Court process but had perforce to submit to it (see secs 9.2.1, 9.2.2, 9.2.12).

In law, river rights had been extinguished by the Coal-mines Act Amendment Act 1903 and also by a raft of other legislation vesting control of water uses and river management in the Crown, as described at sections 2.2, 3.3, and chapters 6 and 8. Further mention is made of these Acts below.

Statutory extinguishment

None of this is extinguishment in accordance with the Treaty of Waitangi. There, the question is whether Maori freely and knowingly disposed of their customary river interests and their traditional mana or control. The first part of article 2 of the Treaty was given above. The second part guarantees Maori possession of their properties 'so long as it is their wish and desire to retain the same in their possession'. It then introduces the concept of free and willing alienations to the Crown.

Treaty standards for extinguishment

A question consistent with the Maori text is whether Maori agreed to the extinguishment of their rangatiratanga over their taonga.

Extinguishment is not inferable from a willingness to share. From the record as given in chapter 4, it appears that, up to at least 1848 and for so long as their mana was recognised, Maori expected that Europeans provided for in their territory would share the river's lower reaches. Their ships brought in the desired goods and ongoing relationships with Pakeha were sought. We can find no compelling evidence, however, that, in the pursuit of this goal, Maori knowingly divested themselves of their customary interests and rights.

Sharing is not extinguishment

On the contrary, Maori action, in war and in peace, and their initiatives to establish committees and land trusts and to keep out the Native Land Court, are evidence of their continuing concern to retain their tribal properties and their traditional authority, at least upriver. These matters were described in chapters 5 and 6 and are referred to in section 9.2.5. Maori action was not anti-Pakeha but anti Government control of their upriver possessions and lives. Free and willing land sales could proceed as a matter of course so long as their own status and interests were respected, and, again in accordance with tradition, so long as beneficial relationships endured.

Evidence of Maori assumptions of control

As seen in chapter 6, conversely, the Crown did not acquire the Maori river interests as the Treaty required. There was no negotiation or agreement with the assembled rangatira of the several hapu, and indeed no negotiation or agreement with anyone that was specific to the river.

Crown's title not founded in agreement

The Crown's unburdened title is by virtue of its own statutes or, in the case of the river's tidal parts, through presumptions of English law.⁶ In turn, those presumptions were probably inconsistent with the circumstances of the colony, to use words in the English Laws Act 1858, given that prior Maori interests had first to be cleared. They were also probably inconsistent with long-established principles of English law for the recognition of the laws, customs, and properties of indigenous peoples on the assumption of British sovereignty. This is sometimes referred to as the doctrine of aboriginal or native title.

By statute and presumption

6. We found, at section 4.8, that Maori interests in the lower river reaches were not extinguished by the transaction of 1848.

Arm of the sea For reasons given in section 9.2.7, we find that the application by the Crown of the common law presumption that the Crown owned the tidal reaches of the Whanganui River as an arm of the sea was a breach of the Treaty principle that obliges the Crown actively to protect Maori interests under article 2.

Ad medium flum So also was the application of the *ad medium flum aquae* rule a breach of Treaty principle. The rule had limited or no application in Maori custom and could not apply to negate the tribal interest or the principle of rangatiratanga (see also sec 9.2.10).

Riparian interests and tenure reform To the extent that the Crown may claim rights by acquisition of riparian lands from Maori, there is the caveat that the lands did not come from the tribe. They came from individuals of the tribe and that was the result of the Crown's reform of customary titles in native land legislation. These reforms were opposed by the leaders of the tribe. They subsumed tribal controls and the leaders had other plans. As considered at sections 2.8.2 and 2.8.4, the tribal interest was not extinguished by this process.

Coal-mines Act Amendment Act 1903 It is arguable that tribal interests in the river were not extinguished by the Coal-mines Act Amendment Act 1903 either, but that is a complex question of law. We consider that Act in terms of the Treaty.

Section 14 of the Coal-mines Act Amendment Act deemed all beds of navigable rivers to be and to have always been vested in the Crown, unless the Crown had granted the riverbed to someone else. This has been seen to provide the more explicit extinguishment of customary interests, yet it was not entirely explicit since its purpose was never made clear, since in the context of the principal Act the purpose may be construed as intending to regulate the mining of coal, and since its application was limited to the bed.

Crown counsel contended that this and subsequent Acts vesting ownership of the Whanganui riverbed in the Crown was a valid exercise of the Crown's power under article 1 and thus was consistent with Treaty principles. We do not agree. Governance was conditioned by article 2 of the Treaty and could not be exercised to negate it. As an integral part of the river, the bed was also guaranteed to Maori. The right of governance carried the duty to protect Maori properties, not to take part away.

An agreement required The governing rule appears to be that the Treaty of Waitangi, whether in terms or principles, does not allow of any diminution of Atihaunui ownership and control of the river without an explicit agreement to which the Crown and Maori subscribe and of which both are fully sensible. The only possible and rare exception to this rule that might justify the Crown in overriding the fundamental rights guaranteed to Maori in article 2 would be the existence of exceptional circumstances requiring such action as a last resort in the national interest.⁷

7. Waitangi Tribunal, *The Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, sec 15.2.1(3). We discuss national interest in relation to the Tongariro power scheme later in this chapter.

9.1.5 Finding

The extinguishment of the river interests of Te Atihaunui-a-Paparangi arose from acts and policies of the Crown that were inconsistent with the principles of the Treaty of Waitangi requiring the Crown actively to protect the rangatiratanga of Atihaunui in their river. It was also prejudicial to them, denying them their legal and Treaty rights, affecting their livelihoods, and involving them in extensive and debilitating protests within and outside the courts. We conclude as a result that the claim is well founded. The extent of prejudice is now reviewed.

Claim well founded

9.1.6 Impact

(1) Legal standing

The lack of a recognised legal standing with regard to the river was to involve Atihaunui in protracted protests and proceedings.

The protests and petitions from 1873, the obstruction of channel clearance work in the 1890s, and the gravel claims and protests that continued until the present were considered in chapters 6 and 8. As noted, these and other attempts to retain the ownership of the river are summarised in section 9.2.5. They were all part of the Atihaunui attempts to hold on to that which in terms of the Treaty was theirs, and which would have been avoided had their legal and Treaty rights been recognised from the beginning.

Protest

Then, in a further attempt to hold on to their river rights, Atihaunui were involved in exhausting litigation from 1938 to 1962. This was described in chapter 7. Atihaunui began proceedings after seven years of waiting for a Native Land Court inquiry into one of their petitions. That inquiry was never undertaken. Parliament had referred the petition to the court with a request for a response as early as possible.

Riverbed litigation

The Crown's steps to overturn decisions unfavourable to it then extended proceedings. They included special legislation to refer matters to the Court of Appeal after a report from a royal commission.

The end of the riverbed case after 24 years was not an end to all litigation or political representations. As described in chapter 8, the gravel question remained outstanding, though a royal commission had recommended compensation as early as 1950. However, gravel was not a principal issue in the negotiations that followed from 1974 to the present. The river's ownership was still the focus. The first nine years of negotiations to 1983 were inconclusive. During that period, there was also a petition to the Queen and a petition to Parliament. By the end of the first round of negotiations in 1983, Titi Tihu had been involved in river petitions and litigation for over 50 years.

Negotiations

After 1983, the negotiations involved as well matters relating to the Whanganui National Park and user passes. The third round of negotiations from 1990 were no more conclusive than those preceding it. These negotiations are described in chapter 8.

River flows litigation

In the meantime, Atihaunui were ignored in the administration of matters relating to the river. Recognition of their interests did not emerge until after the Waitangi Tribunal's *Report on the Motunui–Waitara Claim* in 1983, whereafter a new Treaty consciousness developed and was reflected in planning legislation.⁸ However, it provided for much less than ownership.

The Government ignored all attempts by Atihaunui to be heard on the planning and construction of the Tongariro power project between 1955 and 1971, although this work adversely affected the Whanganui River more than other rivers. They could be heard only through the litigation on minimum water flows, as allowed for in planning legislation. They appeared on the first application in 1977 and again on the second in 1987. They were a principal party in the subsequent proceedings in the Planning Tribunal in 1989 and in the appeal to the High Court in 1992. By then, the Whanganui River Maori Trust Board had been established by statute.

Pending proceedings and status

Now they face further proceedings and inquiries in an application for a water conservation order and the development of regional plans. These will be separately considered in chapter 10.

The earlier projects and proceedings were referred to in chapter 8. Collectively, they describe how in the statutory regime the full extent of Atihaunui Treaty rights remains unrecognised. They point to the need to establish ownership and control rights first. In the interim, Atihaunui are as supplicants representing only one of several competing public interests, and control and authority remains vested in the Crown, either directly or indirectly through its statutory delegates.

(2) Other losses

Property

Losses of a property nature have already been adverted to. They include the destruction of eel weirs, the extraction of gravel, the loss of income from river use charges, and, through pollution and water abstraction, the loss of fisheries. These would all be actionable losses in tort were the private property interests of Atihaunui recognised.

Gravel

As mentioned, compensation for the extraction of gravel was recommended by a royal commission as long ago as 1950, but a settlement has not been effected. In the meantime, gravel continued to be taken and at a greater rate. In view of the findings above, Atihaunui are entitled to compensation for all gravel taken and not just that removed until the Crown took the bed in 1903. The issue of compensation is reviewed in section 9.2.6. On one assessment, Atihaunui are entitled to \$21.7 million just for 1920 to 1988.

Personal

The further cost in human terms, in loss of esteem and status, and the inheritance of a grievance that compounds over generations, is more difficult to assess. It is a loss that Professor Ritchie described, as given at section 3.2.10.

8. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed, Wellington, Government Printing Office, 1989

9.1.7 Treaty breaches

Without reference to Atihaunui or, initially, with only such reference as the exigencies of peace might require, the Government passed legislation for the river's control. We would not attempt to list each and every Treaty breach that followed but refer to some in illustration of a point.

(1) Legislation specific to the Whanganui River

Legislation specific to the Whanganui River was introduced in chapter 6. The Wanganui Bridge and Wharf Act 1872 empowered the Wanganui Borough to build a bridge over the river near the town and to control the bridge and the wharf. It assumed that, by common law, the riverbed was vested in the Crown. For reasons earlier given, that assumption should not have been made. Maori appear to have been happy with the bridge but their agreement was required.

The same assumption underlay the Wanganui Foreshore Grant Act 1873 to grant part of the riverbed to the Wellington provincial superintendent and the 1874 Act to change the grant to the Wanganui Borough.

The Wanganui Harbour and River Conservator's Board Act 1876 replaced the 1874 Act and established a board to take the bridge and wharf from the borough. No provision was made for Atihaunui on the nine-member board.

The Highways and Watercourses Division Act 1858 empowered provincial councils to build bridges, dams, wharves, and the like in or beside rivers or to sell or otherwise dispose of the bed of any river that been diverted or stopped up. There was no provision for Maori agreement or compensation.

The Marine Acts of 1866 and 1867 enabled superintendents, boards, or marine boards to control or manage ports or associated works, again without Maori consent or representation.

The Harbours Act 1878 made new arrangements, but again without Maori representation on the Wanganui Board. As with earlier legislation, the Act was silent on both Treaty and customary Maori rights to the foreshore and rivers.

The Wanganui Harbour Board Act 1893 and the Harbours Act 1950 reconstituted the board in the latter case with members chosen by electors of the city and environs but without separate provision for Maori representation. The Wanganui Harbour Act 1988 abolished the Wanganui Harbour Board and passed powers and responsibilities to the Wanganui City Council. The council was obliged to establish a standing committee of members appointed by Wanganui City, the Wanganui County Council, and the Patea District Council, but again without provision for the traditional authority of Atihaunui.

The two objectives of the Wanganui River Trust Act 1891 were to preserve the natural scenery along the banks of the upper river and to keep the river fit for navigation. Section 2 of the Wanganui River Trust Act Amendment Act 1893 authorised the trust, without notice, to remove earth, sand, and metal from the river. Whanganui Maori were not consulted on the Bill, and they opposed it. Their petition was referred to a committee of the House that failed to hear any of the petitioners.

Section 5 of the Wanganui River Trust Amendment Act 1920 vested in the trust the ownership of, and the right to sell, gravel and shingle in the river under its control. There was no provision for notice or compensation.

The trust comprised representatives for the Wanganui Borough and adjoining county councils, the Wanganui Chamber of Commerce, two local members of Parliament, and a Governor's appointee. The member for Western Maori was not included, nor was any member of Atihaunui, despite the trust's work in destroying eel weirs. There was no provision for consulting them.

Section 11 of the 1891 Act expressly preserved the rights conferred on Maori by the Treaty of Waitangi. It was a general provision without teeth, largely negated by the Act's specific terms, and effectively meaningless unless a complicated and expensive case was taken to the Supreme Court with uncertain chances of success.

In 1958, the Wanganui Harbour Board was given the right to license the taking of gravel and sand from the tidal reaches of the river.

The Wanganui River Trust Amendment Act 1922 substituted a trust board for the trust members under the 1891 Act and extended its powers. Neither the member of Parliament for Western Maori nor an Atihaunui representative was included in the board's membership. Maori Treaty interests in the river were ignored or implicitly denied.

The Native Townships Act 1895 was something of a misnomer, since it created not native but European townships in places where Maori communities existed. It was an Act to promote the opening and European settlement of the interior without the need for Maori consents or purchases of Maori land. Pipiriki was established as a river town under this provision. Not more than 20 percent of the township area could be reserved for Maori. They had no representation on the governing township body.

The Scenic Preservation Act 1903 created a Scenery Preservation Commission of not more than five persons. Maori land could be taken as for a public work but without prior notice or rights of objection. A 1906 attempt to include a Maori on the commission failed. The commission was to encounter considerable opposition from Atihaunui.

Finding Indeed, we could find no evidence of recognition of Atihaunui river interests in any legislation specific to the Whanganui River. The legislation as a whole was in contravention of the Treaty of Waitangi and the Treaty principles that required the Crown actively to protect the rangatiratanga of Atihaunui in and over the river and to recognise and respect tribal autonomy over the river.

(2) The Native Land Acts

Final conclusions on the Native Land Acts are deferred in view of pending land claims. However, the operation of these Acts was eventually determinative of legal river ownership as well, though neither Maori nor the machine that drove the Act, the Native Land Court, was aware of that at the time. To the extent that the Acts led to major changes to Maori river tenure, it was done without Maori acquiescence or

knowledge. In the Atihaunui case, there was Maori opposition to the scheme as a whole. Matters relating to these Acts were reviewed in section 2.8.2 and chapter 7.

(3) General legislation for resource control

The control of the river by a series of water use laws began more than 100 years ago. These laws were introduced at sections 2.3 and 3.3. Ordinances of 1864 for water-powered flourmills and sawmills are early examples. Subsequent Acts are too many for individual assessment, but some of the more recent legislation is commented on below, and the compilation of environmental law in current statutes is reviewed in chapter 10. The Coal-mines Act Amendment Act 1903 has already been referred to.

Assumption of control

Arguments for the Crown's long-standing assertion of the right to exercise control over the river have been based on at least two assumptions. The first was that rivers were incapable of ownership save for the beds. This may represent English law but it does not reflect the Maori reality that preceded English law or the protection promised in article 2 of the Treaty.

Counsel's arguments

The second, argued for the Crown in this case, is that the control of river resources rests with the Crown under article 1, and article 2 gives no more than a right to be consulted and for Maori views to be considered. The effect deprives Maori of their authority over important tribal possessions, yet authority over possessions is what article 2 guaranteed. It is not a proper construction of the Treaty to so read article 1 as to make article 2 nugatory.

With regard to the legislation generally, however, and although there were some exceptions, especially in the case of lakes, the Crown took no adequate steps to inquire into Maori Treaty rights to natural resources prior to passing legislation. The Crown simply assumed control rights, and for the most part the Treaty of Waitangi was barely thought of.

No inquiry of Maori rights

We find that, in so far as national legislation affected the Whanganui River, the Crown took no adequate steps to ascertain that, in terms of the Treaty of Waitangi, Atihaunui owned the river and its tributaries, had never willingly relinquished their authority over them, and their interests were larger than use rights. This was inconsistent with the Treaty duty to protect those interests.

We further find that the taking of the bed of the river by the Coal-mines Act Amendment Act 1903 and succeeding legislation, and the perpetuation of the Crown's statutory title in section 354 of the Resource Management Act 1991, were and are inconsistent with article 2 of the Treaty and the Treaty principle requiring active protection of the Atihaunui ownership of the river and their authority over it (see sec 9.2.16).

Statutory constraints on customary land claims, as introduced in 1909 and continued in the Limitation Act 1950 and the Te Ture Whenua Maori Act 1993, and as more particularly described in section 9.2.13, were and are inconsistent with the principles of the Treaty of Waitangi. It was inconsistent with the Treaty to deny Maori access to law, and the Treaty principle that customary interests cannot be extinguished except upon proof of a free and willing alienation of them remains to this day.

(4) The Tongariro power scheme and laws relevant thereto

No inquiry of Treaty rights

The Crown proceeded with the Tongariro power development scheme and, in particular, the western diversion of the headwaters of the Whanganui River, without first ascertaining the Atihaunui Treaty rights over the river. It relied instead on an interpretation of the general law.

No consultation or agreement with Atihaunui

As considered in chapter 8, the Crown consulted with many parties claiming a river interest when proposing the power scheme. The Crown also consulted with Tuwharetoa in respect of their affected rivers and lakes. However, the Crown did not consult with the party having the 'full exclusive and undisturbed' interest in the Whanganui River in terms of the Treaty of Waitangi, and it did not include Atihaunui in the compensation payments that were made. There was a cavalier dismissal of their attempt to be heard.

No statutory provision

In view of the finding now made that, in Treaty terms, the Atihaunui river interest remained, the Crown was under a Treaty obligation to consult with them and secure their agreement to the power project, but it did not do so.

The Crown did not provide for Atihaunui ownership of the river in the Water-power Act 1903, the Public Works Act 1905, and subsequent public works legislation, including the Public Works Act 1928 and the Water and Soil Conservation Act 1967, though their Treaty rights were affected and though the Treaty required that such interests be protected.

There was no provision in the Public Works Act 1928 requiring the Crown first to consult with Maori, where Maori retained river interests, before effecting river works.

The Order in Council under section 311 of that Act authorised the Crown to raise or lower the level of the Whanganui River and its tributaries and to impound or divert their waters without the consent of Atihaunui and without consulting them. It also authorised public works access to Maori lands without notice.

The 1964 Government approval in principle to the construction of the Tongariro power development was without prior notice to or consultation with Atihaunui, although the abstraction of water from the Whanganui River was the most controversial issue to be resolved.

The Water and Soil Conservation Act 1967 contained no provision for the recognition of Treaty principles or Maori ownership of rivers when empowering authorities to determine minimum river flows. The rivers where Maori retained significant interests in terms of the Treaty of Waitangi had not been determined before this legislation was passed, as would have been necessary to fairly protect those interests. In the result, the Act afforded no recognition of the Treaty rights of Whanganui Maori to the protection of their rangatiratanga over their river.

Status in proceedings

In effect, Maori interests became no greater than those of any other public group with an interest in the river. The 1967 Act required authorities to meet as many demands as possible; gave no guidance as to the criteria to be taken into account or the relative weight to be given to competing claims; accorded no priority to Maori ownership of, or Maori values and interests in, the river; and omitted any requirement to give effect to the Treaty rights of Maori.

Instead, the need was seen to accommodate Crown interests, or interests that the Crown had assigned to ECNZ, though founded on works undertaken in contravention of the Treaty, and probably in contravention of the standards that the 1967 Act later imposed.

Accommodation of
ECNZ

The Crown has submitted that, at the time that it exercised its statutory power to proceed with the Tongariro power development and the western diversion, it was essential in the national interest to do so. A taking in the national or public interest requires at least a positive averment of that fact, however, as happens with a public work. In this case, the action was taken without prior ascertainment of the Treaty rights of Atihaunui in the river. In the result, there was no attempt to notify, seek consents, or consult, and the citizens' right of appeal to the courts was denied.

Essential in the
national interest

Had the Crown done those things, it might well have chosen other options that were open to it and avoided the grave consequences that the scheme was to have.

9.2 LEGAL ARGUMENTS AND KEY SUMMARIES

9.2.1 The long-standing legal recognition that Atihaunui owned the bed at 1840

The litigation of 1938 to 1962, described in chapter 7, resolved a central issue in this claim: that, as a matter of fact and law, at 1840 the bed of the Whanganui River was held by Atihaunui under their customs and usages. That has not been questioned since.

Riverbed ownership
at 1840

In the first hearing in the Native Land Court, Judge Browne found that the bed belonged to Whanganui Maori through whose territory the river ran as much as the land forming its banks did. At the time of the Treaty, the bed was land held by Whanganui Maori under their customs and usages.

The six judges of the Native Appellate Court unanimously upheld that decision. Judge Carr noted that 'the water and the land underneath it [was] to the Maori indivisible'.⁹ Judge Whitehead found it to be well established that by native custom all the land within the tribal boundaries of each tribe, including land covered by water, whether navigable or not, belonged exclusively to the tribe.

In 1950, a royal commissioner (a former Supreme Court judge) endorsed the opinion of Judge Browne and the Native Appellate Court that the bed was held by Whanganui Maori owners under their customs and usages and was customary Maori land.

Three of the four judges of the Court of Appeal reached a similar decision in 1954. Though 'the bed' was defined as extending from the tidal limit to the junction with the Whakapapa River, that was because the application to the Native Land Court had been so framed.

9. *Title to the Bed of the Whanganui River* unreported, 20 December 1944, Maori Appellate Court (doc A77, vol 1(3)), pp 4-5

9.2.2 Critique of 1938–62 litigation

Looking back on it, the final result of this extensive litigation turned most on the observations and advice of the Maori Appellate Court in 1958, observations unlikely to have been made if the court had before it the evidence and information that we have today.

Before considering the court's advice, we recapitulate on the Native Land Court operations as described at section 2.8.2 and also our comments at section 7.2.3. When the land court heard evidence on who was entitled to various blocks of land, Maori made their claims on the basis of their forebears' use of it. For the most part, they need not have bothered, for the court generally decided on evidence of actual use and occupation of the land in question; but the ancestral evidence was received and entertained.

However, in their affairs generally, Maori put up remote ancestors for the tribe as a whole when speaking for the tribe, since remote ancestors included everybody. They put up recent ancestors when talking of local matters, for generally these covered only the local people. The choice of ancestors depended on the matter in hand.

Use of remote
ancestors for
riverbed title

Adopting the symbolic Maori way of speaking, the Maori river claimants in 1938 had put up remote ancestors for the river. This was to say no more than that the river should be held for all. In this case, the chosen ancestors were also symbolic, in Atihaunui traditions, of the essential unity of the river and the river people, for the ancestors were three siblings who had respectively occupied the river's upper, middle, and lower reaches (see also sec 2.5).

Use of recent
ancestors for land
blocks

On the other hand, however, the records of the Native Land Court showed that, when particular land blocks had passed through that court last century, the Maori claimants had nominated more recent ancestors as the ancestral source of title. This was understandable. The court was dealing with local blocks and to have used a remote, founding ancestor would have been to put everyone in every block. Only if the court been dealing with the whole of the Atihaunui lands as one title would a remote ancestor have been used. Again, this was covered at section 7.2.3.

Matters were confused by the way the case was presented. The Maori witnesses gave three ancestors for the river. These were not the same as those given for the land. There being different ancestors for the land and river, counsel argued that the Native Land Court had not investigated the river when it investigated the land. But in Maori terms, the evidence should have been read another way. The Native Land Court divided the land and so recent ancestors were used for each block. The river should not be so divided, however, for in fact and tradition it is a single entity and therefore remote ancestors should be used. The issue was not whether there were separate ancestors but whether the river should be conceived of in parts or as a whole. If it had been considered that it should be divided into parts, then recent ancestors would have been put up for each part, but no one came forward throughout the 24 years of litigation to urge that.

Another way of looking at it was this: if all the resources of the tribe should have been held tribally, as Maori had contended in the past, then the problem was not

with the choice of ancestors for the river but with the earlier choice of ancestors for the land.

Sitting in 1938, Judge Browne grasped the point. He wrote in his decision that he had never heard of such a proposition as separate ancestors for the river and the land, quickly dismissed the thought, then got down to the real issue of whether in the final analysis the river was held locally or by the people as a whole. Of course, there were both local and tribal interests, but it was obvious that one could only provide for both if the tribe took the title. To vest in local interests is to exclude the tribal interest, while a tribal title allows for traditional tribal operations and provides for hapu interests and hapu autonomy as well. This was discussed at section 2.8.2.

The key question put to the Maori Appellate Court by the Court of Appeal in 1958, which occupied most of the former's decision, was whether the ancestral right to the river was separate or different from that to the riparian lands. In replying that the ancestral right for both was the same, the court adopted Judge Browne's view, but in explaining why it was the same it took quite a different tack from Judge Browne and the Native Appellate Court that had upheld him. It observed that the Maori claims to the abutting lands had been for specific land parcels, for which recent ancestors were named. It noted that there had been no claim for the tribal estate as one block. It then assumed that that was so because that was the choice of Maori. They had sought to divide the land in preference to having one tribal title, it was thought. The implication was that, if that was the Maori desire at the time, the river should not now be dealt with differently.

It can thus be seen that the heart of the issue was not whether there were separate ancestors for the land or the river, but whether the river should be treated as the land was – that is, divided into portions with each part held locally – or whether it should be kept for the tribe as a whole. On that point, the court had a clear view. In making applications for the land, it was thought that 'the original or tribal right' had not been 'insisted upon by the tribe'.¹⁰ The inference was that it was now too late to insist upon the original or tribal right for the river.

The Court of Appeal's decision was that in making orders for the land the Native Land Court had, as a matter of law and even though it may not have appreciated it, included the adjoining river to the centre line.¹¹ The thought most pertaining to the Court of Appeal's decision was that given by the Maori Appellate Court – that this was consonant with Maori preference, as evidenced by the way that Maori had taken local and not tribal claims to the Native Land Court.

The flaw in this is that Maori did not in fact prefer to put up claims for individual blocks, but they had no choice, owing to the practice and procedure of the Native Land Court and the purposes of the Native Land Acts. For reasons given at section 2.8.2, the operations of that court made it impracticable and impossible for Maori to claim for the whole tribal estate. Survey plans were required at a prescribed rate

Whether ancestral right to the river is different from riparian rights

Insistence on tribal right

Court of Appeal decision

Virtually no scope for tribal claims under Native Land Acts

10. *Title to the Bed of the Wanganui River*, p 4

11. The Court of Appeal may have overlooked, however, that, at the time that the Native Land Court sat, the *ad medium filum* rule does not appear to have applied in the country: see sec 9.2.12.

for fees and no one could have afforded the costs, the tribal estate here being over one million acres from the central plateau to the coast. In any event, the court itself was intent on smaller block-by-block investigations; individual, not tribal, ownership was preferred; and, in line with that, claims based on mana or remote ancestors were rejected. The process was driven by the 'court's policies', to use the Maori expression, though more accurately it was instigated by the Government in its land reform policies, as provided for in the Native Land Acts. There was a 'court's policy', however, with some legislative sanction, and that was to limit the owners in any block to no more than 10.

In 1958, the Maori Appellate Court appears to have been unaware of these matters. Title investigations had begun in this district in 1866 and most of them were completed by the 1880s. The court was not dealing with matters within its own knowledge and experience but with the practices, procedures, and circumstances as they applied about 80 years before, and it was considering an area of jurisdiction that, comparatively, had ceased to have significance for the court from the turn of the century.

However, the court had no evidence on the early operations of the Native Land Court, save that of official documents and maps. These did not give the surrounding circumstances. On the face of the record, Maori had applied for the investigation of specific surveyed blocks but had not applied for an investigation of the tribal district as one.

Research since 1958

Since 1958, considerable historical research has been undertaken on the operations of, and the circumstances surrounding, the original Native Land Court.¹² This material is now known to this Tribunal. It paints the entirely different picture described above. We believe that the court would not have reached the conclusion that it did had this information been available to it.

There has also been much more research undertaken on Maori social structures. It is apparent that the tribal right and the distinction between it and local rights to particular uses, each operating in their own, but overlapping, spheres, were not appreciated in the court's account. Similarly, its comments on tribal structures and boundaries reflect a Eurocentric conceptualisation of Maori society.

Attempts to assert tribal rights

More especially, however, subsequent historical research has shown that Maori, including Atihaunui Maori, in fact took all steps that they might reasonably have taken to keep their tribal lands as one and to prevent the Native Land Court from operating. Nevertheless, as discussed at section 5.3, they eventually had to submit to the court's process of land dismemberment. In brief, contrary to the court's assertion, Maori did in fact 'insist' on the 'tribal right' to the best of their ability. That research is now available to us. On reading it, we find that the Maori Appellate Court could not have reached the conclusion that it did had this evidence also been before it.

12. Historical research on Maori land purchases exists from an earlier period but has exponentially increased since the 1950s. Seminal in modern scholarship is Keith Sorrenson's 'The Purchase of Maori Lands, 1865-1892', MA thesis, University of Auckland, 1955.

There was also a further comment of some mystery, that being that Maori had never before claimed separate river ancestors. It is a strange comment because Maori had never before claimed a river. The reasons why are given at section 9.2.11. The Native Land Court on every previous occasion was investigating the claim to land adjoining the Whanganui River, not investigating a claim to the bed of the river, and there was no thought at the time that the river was affected.

First river claim

Custom was relevant to the extent that a knowledge of it would have assisted counsel and the court to appreciate what the Maori witnesses were saying. Judge Browne had an instinct for the matter. It was not the question of separate ancestors for the land and the river that was important but the message, of which the ancestors were symbolic – in this case, that the river was a single entity and should be held intact. In 1958, however, little had been written on how Maori symbolism should be interpreted.

It was not something that Maori Land Court judges were necessarily experienced in either. They were versed in law, and often in Maori land law, but not necessarily in custom. The ‘custom’ cases arose mainly on title investigations, and most of those were done last century.

Land court law and Maori custom

Nor could the witnesses assist much. All three of the original Maori witnesses were dead by then, and all but one of the Maori who had previously given evidence were deceased or infirm, including Hekenui Whakarake and Piki Kotuku, who had been the more coherent in explaining matters. Of the original claimant group, only Titi Tihu survived, and only he gave evidence in 1958. He was a tohunga steeped in Maori learning but not in the art of cross-cultural dialogue. The lengthy cross-examination appears to have suffered problems of translation and interpretation. His evidence was largely dismissed as metaphysical and cosmogenic. It was felt that claims to the court should be ‘tied more to the foundations of practical realism rather than to those of mere symbolism’.¹³

It is one thing for a Maori to give evidence in terms of their customs and quite another thing again to give evidence that explains them. It is how customary evidence is interpreted that is the more crucial matter. The Tribunal uses expert evidence, Maori or Pakeha, for that purpose. Today, we have the benefit of anthropologists who provide just that. Anthropology was but a fledgling discipline in 1958, and Maori studies had still to receive independent recognition in universities. Moreover, today there are Maori who are able to clarify the meaning behind the symbols and to impart knowledge of their customs in terms comprehensible to Europeans. Several Maori witnesses before us were able to do this.

Interpretation of customary evidence

We do not think that the Maori Appellate Court would have treated as it did with the evidence of Titi Tihu were there an expert witness to explain the metaphors in the Maori manner of speaking.

13. Document A77, vol 2(9), p 2

Apart from the finding that Atihaunui owned the bed at 1840, we consider that the decisions in the courts now have limited value for this inquiry. The factual base on which the legal findings depended is now too much in question.

Special legislative authority was needed for the Maori Appellate Court to act. It was not operating within its normal jurisdiction. Also, the matters before that court were matters of fact not law – matters of custom and Native Land Court process – but its findings of fact were determinative.

Waitangi Tribunal
jurisdiction

Nor are they binding on us. Though the results are binding on the parties unless overturned, we are not a court, and on questions of fact (not law) we can inquire beyond the evidence that was before the court.

On the application of facts to law, or in our case to the principles of the Treaty, this claim differs in two critical respects. First, it is concerned with the river entire. To fit the jurisdiction of the Native Land Court, the litigation concerned only the bed, creating an artificial division of the river. This appears to have influenced the approach taken. The nature of the case before us is not that which was before the courts.

Rights under Treaty
of Waitangi

Second, the claim before us is founded on the rights of the claimants under the Treaty of Waitangi. The Treaty rights of Atihaunui were not in issue in the riverbed litigation; they were not within the jurisdiction of the courts to consider at that time.¹⁴

The question before the Court of Appeal was whether the Native Land Court, wittingly or unwittingly, had, as a matter of law, included the bed of the river in the title to the riparian land. The question before us is whether Maori knowingly and willingly agreed to relinquish their river interests.

Atihaunui did not
agree with Native
Land Court process

Looking to the facts, we find that Atihaunui did not agree to the Native Land Court process by which their tribal interests were extinguished. Were it the case that they had agreed to it, then on the evidence, especially that of Hekenui Whakarake and Simpson and others who examined the plans with the applications, they still would have been entirely unaware that their river interests were also affected.

9.2.3 An appreciation of taonga

Atihaunui claim that the river is a living taonga. In chapter 2, we accepted that on the basis of our own understanding of Maori anthropology and so without reference to the Maori evidence, which could be seen as self-serving (see sec 2.7). Thus, the ‘peoples’ account’ in chapter 3 then follows.

Elaboration on
taonga

But taonga requires elaboration. From our own knowledge and research on the Maori comprehension of rivers (see sec 2.6), we see the river, like other taonga, as a manifestation of the Maori physical and spiritual conception of life and life’s forces. It contains economic benefits, but it is also a giver of personal identity, tribal

14. In only one statute, the Wanganui River Trust Act 1891, was there a savings provision for Maori rights to the river under the Treaty (s 11), but that was limited to the purposes of that Act, was too general to have practical effect, and was not relevant to the case.

cohesion, social stability, empathy with ancestors, and emotional and spiritual strength.

Thus, while previous judicial findings that Atihaunui owned the bed at 1840 are supported by clear fact and law, they are still partial findings, for Atihaunui owned more than a bed and more even than a river. They owned a taonga. It is that which underlines for Atihaunui the incongruity of dissecting it to parts, dividing it along a centre line, or seeing it as an adjunct to riparian land interests – especially since they occupied both sides. In short, it was one whole and indivisible entity.

We adopt the exposition of ‘taonga’ in the *Report on the Muriwhenua Fishing Claim*, of which part is reproduced below. Though the reference is to fisheries, it applies also to the Whanganui River, and not just because the river was also a fishery:

Definition of
‘taonga’ from
Muriwhenua fishing
report

- (a) There are obvious distortions when Maori concepts are translated in Western terms. It must be understood that the division of properties was less important to Maori than the rules that governed their user. These criteria underline Maori thinking—
- (i) A reverence for the total creation as one whole;
 - (ii) A sense of kinship with fellow beings;
 - (iii) A sacred regard for the whole of nature and its resources as being gifts from the gods;
 - (iv) A sense of responsibility for these gifts as the appointed stewards, guardians and rangatira;
 - (v) A distinctive economic ethic of reciprocity; and
 - (vi) A sense of commitment to safeguard all of nature's resources (taonga) for the future generations.

To meet their responsibilities for these taonga, an effective form of control operated. It ensured that both supply and demand were kept in proper balance, and conserved resources for future needs.

Maori extended their deep sense of spirituality to the whole of creation. In their myths and legends they acknowledged gods and other beings who bequeathed all of nature's resources to them. There was a system of tapu rules, which combined with the Maori belief in departmental gods as having an overall responsibility for nature's resources served effectively to protect those resources from improper exploitation and the avarice of man. To disregard or to disobey any of the rules of tapu was to court calamity and disaster.

To the pre-European Maori, creation was one total entity – land, sea and sky were all part of their united environment, all having a spiritual source. It was by divine favour that the fruits from these resources became theirs to use. The first fruits taken were invariably offered back to the gods.

All resources were ‘taonga’, or something of value, derived from gods. In a very special way Maori were aware that their possession was on behalf of someone else in the future. Their myths and legends support a holistic view not only of creation but of time and of peoples.

- (b) To understand the significance of such key Treaty words as ‘taonga’ and ‘tino rangatiratanga’ each must be seen within the context of Maori cultural values. In the Maori idiom ‘taonga’ in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift-exchange, and is a part of the complex relationship between Maori and their ancestral lands and waters. The fisheries taonga contains a vision stretching back into the past, and encompasses 1000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.

This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.

The Maori ‘taonga’ in terms of fisheries has a depth and breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future which colours their thinking, attitude and behaviour towards their fisheries.

The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or ‘belonging’, but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a ‘hurt’ to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.

The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life’s forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.

This vision provided the mauri (life-force) which ensured the continued survival of the iwi Maori. Maori fisheries include, but are not limited to a narrow physical view of fisheries, fish, fishing grounds, fishing methods and the sale of resources, for monetary gain; but they also embrace much deeper dimensions in the Maori mind, as referred to in evidence by Miraka Szazy in the context of spiritual guardianship.¹⁵

9.2.4 An appreciation of rangatiratanga

Te tino
rangatiratanga

Atihaunui also claimed rangatiratanga over the river. The Muriwhenua Tribunal considered that:

15. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, sec 10.3.2; adopted also in Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 4.3.2

'Te tino rangatiratanga o ratou taonga' tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga.¹⁶

In the Maori Treaty text, authority is expressed as rangatiratanga, derived from rangatira or chiefs, who led by virtue of their mana, or personal and spiritual prowess. It was usual for Maori to personalise authority in that way, so that the one word mana applies to both temporal authority and personal attributes.

The *Report of the Waitangi Tribunal on the Manukau Claim* considered that mana is the more usual Maori word for authority but was avoided by the missionary composer of the Treaty for its association with heathen gods.¹⁷ The Tribunal observed that in again debating the Treaty in 1879, it was mana that Maori consistently used to describe that which they thought the Treaty had reserved.

The Tribunal in both the *Report on the Muriwhenua Fishing Claim* and the *Ngai Tahu Sea Fisheries Report* rejected Crown and fishing industry suggestions that rangatiratanga denotes something less than ownership for stewardship (or kaitiakitanga as it is now called).

We reject that view too. Stewardship, which involves the oversight of resources to protect and conserve, is but a part of the exercise of rangatiratanga or control. It describes an ethic of ownership, but not ownership itself, while rangatiratanga includes both. Like the Ngai Tahu Tribunal, we endorse this conclusion from Muriwhenua that:

Maori autonomy

Maori ranked those properties much higher than mere commodities, holding them with profound spiritual regard for a vast family, of which many are dead, few are living, and countless are still unborn. That cultural peculiarity cannot be used to deny ownership, however, or to imply that because of it, the resources must be shared.¹⁸

Muriwhenua and *Ngai Tahu* both referred to three elements in the Treaty guarantee of rangatiratanga:

The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically, and spiritually. The second is that the exercise of authority must recognise the spiritual source o taonga (an indeed of the authority itself) and the reason for stewardship as being the maintenance if the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources.¹⁹

The larger dimension to rangatiratanga as sovereignty or Maori autonomy was given in the *Taranaki Report*:

16. *Report on the Muriwhenua Fishing Claim*, sec 10.3.2; *Ngai Tahu Sea Fisheries Report 1992*, sec 4.3.2

17. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989, sec 8.3

18. *Report on the Muriwhenua Fishing Claim*, sec 10.3.3; *Ngai Tahu Sea Fisheries Report 1992*, sec 4.3.4

19. *Report on the Muriwhenua Fishing Claim*, sec 10.3.2; *Ngai Tahu Sea Fisheries Report 1992*, sec 4.3.7

We see the claims as standing on two major foundations, land deprivation and disempowerment, with the latter being the main. By 'disempowerment', we mean the denigration and destruction of Maori autonomy or self-government. Extensive land loss and debilitating land reform would likely have been contained had Maori autonomy and authority been respected, as the Treaty required.

Maori autonomy is pivotal to the Treaty and to the partnership concept it entails. Its more particular recognition is article 2 of the Maori text. In our view, it is also the inherent right of peoples in their native territories. Further, it is the fundamental issue in the Taranaki claims and appears to be the issue most central to the affairs of colonised indigenes throughout the world.

The international term of 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Maori words are 'tino rangatiratanga' as used in the Treaty, and 'mana motuhake', as used since the 1860s.²⁰

We adopt these statements and consider that rangatiratanga includes the notions of 'autonomy', 'self-management', 'self-regulation', and 'self-government' that have been variously used in earlier Tribunal reports.

9.2.5 The record of Atihaunui attempts to retain ownership of the river

The claim is further that possession and authority in respect of the river have not been willingly relinquished. That is clearly so. History provides a lengthy record of Atihaunui determination to hold on to both.

Relationships
compared with
ownership

Chapter 4 covered a time to about 1850. It described that which we consider pivotal to understanding the history of Maori and Pakeha relationships. While settlers sought ownership of land and political control, as consonant with their traditions, Maori, following traditions of their own, sought a relationship with Pakeha where Maori mana or status would also be recognised. The English incidents of land ownership and their centralised system of power were unknown.

These distinctive traditions inform the actions of both Maori and Pakeha in the period described, from land transactions to military intervention, with Maori continuing to seek working relationships with Pakeha while retaining their own mana in the theatres of a small war. That was also the time when the McLean transaction was put up.

Resistance to land
sales

Chapter 5 describes an increasing resistance to land sales thereafter amongst the Atihaunui and some sympathy for a Maori king. In the war that followed throughout the country, for Whanganui the 1864 battle of Moutoa was critical for the protection of the town at the river's mouth. The early historian James Cowan observed, however, that the Maori refusal of a river right of way was 'not so much

20. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, sec 1.4

out of regard for the pakeha of the Town of Wanganui as for the mana of their river'.²¹

We saw too that Maori opposition was directed not at the settlers as such but at the presumed power of the Governor. The subsequent building of a Government stockade 50 miles upriver at Pipiriki led to Maori building a fighting pa some two miles further along, and this in turn led to further military action.

In the peace that followed 1871, and as word got about of the Native Land Court, Maori took steps to keep their land out of the court and to retain it intact.

Rather than have the Native Land Court fix boundaries, in 1871 leaders of Atihaunui, Ngatiapa, Ngati Raukawa, and Ngati Whiti largely reached agreement on boundaries themselves. At Koroniti in 1872, some 300 Maori from all parts of the river between Putiki and Hiruharama discussed setting aside land between the Whanganui and Turikino Rivers as a reserve in perpetuity. In 1874, over 300 Whanganui Maori gave their names as active supporters of a proposal by Henare Matua of Kahungunu that all land selling and leasing cease, that the Native Land Court be abolished, and that every major tribe be represented in a parliament. A network of komiti was formed to organise the repudiation movement and Whanganui representatives attended meetings each year from 1874 to 1878 at various locations. A primary goal was that Maori should organise their own land management policies (see sec 5.3).

In an attempt to regain control over their land, some 180 Whanganui Maori signed a deed for Te Keepa's land trust. The trust was to enable Atihaunui to manage the alienation of their land on a tribal basis and encompassed an estimated 1.5 million acres from Wanganui to Mt Ruapehu. At the upper limit of the river's tidal reaches, Te Keepa erected a carved post some 30 feet high to mark the point where the river was closed to Europeans in the interim without a pass signed by him.

Te Keepa's land trust

Following the reconvened 1860 Kohimarama conference at Orakei in 1879, Whanganui along with other tribes continued their efforts to persuade the Government to establish a Maori parliament under the Treaty of Waitangi and the Constitution Act 1852. They attended hui throughout the country. In 1877, Metekingi built the 'quasi-parliament', Te Paku o te Rangī, at Putiki. At Parakino on the Whanganui River in 1892, a committee of 80 drafted legislation for a Maori parliament, which was adopted at Waitangi in April. The first Maori Parliament comprising two Houses met in June 1892. Thereafter, it met each year until 1902, when it disbanded (see sec 5.4).

Te Paku o te Rangī at Putiki

In the meantime, there were various attempts to close the river to Pakeha. Te Keepa's pole was not the first attempted aukati. The Tangarakau River was closed to prevent Europeans prospecting for coal or gold. In 1861, Crawford was turned back at Utapu for not paying a toll, and other parties were stopped from proceeding in 1877 and 1884. When river steamers were mooted with Maori in 1844, at a meeting

Attempts to close the river to Pakeha

21. James Cowan, *The New Zealand Wars: A History of the Maori Campaigns and the Pioneering Period*, 2 vols, Wellington, Government Printer, 1922, vol 2, p 32

with the Native Minister at Ranana, Maori assumed the Maori committees would decide and the Minister was so advised.

Though these initiatives were all thwarted, they tell of Maori concern to formulate a coherent policy of self-government and self-administration of their lands – and in the Whanganui case, also to keep control of the river. The intention was not to separate the races but to ensure Maori participation in national affairs with Maori deciding Maori policy.

In illustration, support for these initiatives was from Te Keepa and Metekingi, who had fought with the Governor in the wars. But Maori could not withstand the power of the Government to control Maori affairs. They were obliged to submit to alternative Government plans or to proceed by protest and petition.

Protest Chapter 6, from section 6.3, describes the record of subsequent protest to about 1930. Prominent in the written material is the record of parliamentary petitions. These ranged from the general to the specific. Thus, the 1883 combined petition of Maniapoto, Raukawa, Tuwharctoa, and Whanganui complained of laws said to be contrary to the Treaty of Waitangi and sought, amongst other things, the replacement of the Native Land Court. The majority of the petitions were specific and related to the introduction of steamers, river clearance and deepening work, the destruction of eel and lamprey weirs, the removal of gravel, the taking of abutting land for scenic purposes, the sale of liquor, the release of trout, and payment of compensation for the public use of the river. A consistent underlying assumption was that Maori owned the river and that their agreement to any development was required. In evidence before parliamentary committees or commissions of inquiry appointed to consider the petitions, Maori ownership of the river was explicitly claimed or assumed.

River clearance works were physically obstructed at various times during 1891 to 1896, leading eventually to police arrests.

All this was a prelude to the debilitating litigation from 1938 to 1962, as chapter 7 describes, and thereafter a substantial involvement in the water flows litigation, detailed in chapter 8, from 1977 to 1992, and submissions as to Maori ownership of the river in the reform of environmental legislation between 1986 and 1991. The latter is described in chapter 10.

The claim that Maori never willingly relinquished their river rights is an understatement. They went beyond exhaustion to maintain them.

9.2.6 Gravel compensation

**Authority to remove
gravel**

The Wanganui River Trust Amendment Act 1893 authorised the Wanganui River Trust, comprised of members of Parliament and representatives of local authorities but with no Maori representation, at any time and without notice, to remove earth, sand, and metal from the river. Any Maori adversely affected could seek compensation from the Native Land Court. Wanganui Maori were not consulted about the Bill, which was opposed by them. A petition to Parliament protesting the

Bill was referred to a committee of the House, which failed to hear any of the Maori petitioners.

Section 5 of the Wanganui River Trust Amendment Act 1920 vested in the trust ownership of, and the right to sell, gravel and shingle in the river under its control. Atihaunui consent was not sought or obtained and this time there was no provision for compensation.

Right to sell gravel and shingle

The 1922 amendment substituted a trust board for trust members and extended its powers. Again, there was no provision for Maori representation.

In 1940, the trust and the board were abolished and their lands and functions dispersed to the Minister of Lands and other Government agencies. The Lands and Survey Department proceeded to collect royalties for gravel taken from the river (see sec 6.2.1).

In 1950, a royal commission under a Supreme Court judge found Atihaunui owned the riverbed until 1903, when the bed was taken under the Coal-mines Act Amendment Act. He determined that the Maori owners were entitled to compensation for the loss of gravel from the riverbed to that date. However, the commissioner lacked sufficient evidence to quantify the loss and recommended that a panel of three, including an assessor appointed by Whanganui Maori, should assess the extent of the Maori loss. The Crown has not yet implemented this recommendation (see sec 7.5).

1950 royal commission recommended compensation

In April 1989, the Whanganui River Maori Trust Board, considering Atihaunui was entitled to the bed after 1903 since it was taken without agreement or compensation, received a report that it commissioned from Beca Carter Hollings and Ferner on the quality and value of the gravel extracted from the Whanganui River between 1903 and 1988.²²

The report noted that:

- It is unlikely that great quantities of sand and shingle were extracted from the river before the 1920s, when the general use of the motor car made the use of metalled roads a necessity.
- Evidence before the 1950 royal commission showed that the extraction of gravel for reballasting the railway started in the 1930s and that the Public Works Department and counties were consistent users in the decades up to 1950.
- After the Second World War, the demand for concrete construction, road formation, and sealing greatly increased, and its use for railway ballast continued.
- The harbour board gained the right to license gravel and sand extraction in the lower tidal reaches of the river in 1958.
- Catchment board records detail substantial quantities of gravel extracted under licence between 1977 and 1987.
- On the basis of the above and other information (as given in the report), an estimate could be made of the quantities of gravel extracted for the period

22. Document A31

from 1920 to 1988 and the likely stream of royalties accruing from such extractions. The 'minimum justifiable value' of such royalties as at March 1989 is \$8.267 million. A 'more likely investment probability', assuming the claimants had invested the funds accruing in property, would yield a value, at 1989, of \$21.786 million.

- Because of the scarcity of gravel in the Wanganui region, actively negotiated prices would probably have produced a higher estimated value.

Compensation negotiations

The report was given to the Minister of Maori Affairs in May 1989.²³ When the Government established the Whanganui River Maori Trust Board in 1988 to negotiate the gravel claim for Atihaunui and to represent Atihaunui on other matters, it agreed to pay an establishment cost of \$140,500. In October 1990, the Government paid the trust a further \$200,000 on the condition that that payment and the earlier payment were to be regarded as an advance on its claim.²⁴ A large part of the latter payment was used to meet the cost of the minimum flow hearings.²⁵

9.2.7 Legal argument on the 'arm of the sea'

The English common law presumption that the Crown owns the tidal reaches of a navigable river as an arm of the sea was introduced at section 2.2.

To Atihaunui, the tidal reaches of a river are a part of the river, not the sea. The river mauri proceeds into the sea even beyond the mouth, as can be seen in a view from a hill, until its mana finally mingles with that of the ocean.

Atihaunui view of water

The difference is that Maori did not see water from a human interest view, in terms of ship navigability and safe harbours. They looked to the gods and the origins of water in creation beliefs. Salt water came from Tangaroa, the god of oceans, and in Atihaunui traditions the fresh water derived from Ranginui, the sky father. The mauri of each was distinctive.

Implication of Crown ownership of tidal reaches

The Crown submitted that the bed of the tidal reaches – that is, the river up to Raorikia – became the Crown's through the common law rule, though as a presumption it is rebuttable as upon proof of a private fishery.²⁶ If the Crown's submission is correct, there was the potential to deprive Maori of valuable resources without agreement or compensation. Legislative action (described in chapter 6) suggests that the Crown acted on the common law premise.

Claimant counsel submitted that the rule is inconsistent both with aboriginal title and with Treaty principles. We are concerned with the Treaty, but in this instance the two may be analogous.

Crown counsel saw the arm of the sea rule as consistent with Treaty principles, saying that the Treaty signatories would have been surprised had it been said that

23. Document 88(b), p 59

24. Ibid, p 64

25. Document 88, p 71

26. *Halsbury's Laws of England*, 4th ed, London, Butterworths, 1984, vol 8, para 1418

the Government would come without its laws. On its face, the Treaty contemplated European settlement, which would require English law.

But how could Maori agree to a doctrine of law that they knew not of (we suspect many English had not heard of it either) and that was antithetical to their own beliefs? We think that Maori expected settlement, and while they did not appreciate the size of it at the time, they also expected that arrangements with the settlers would be on the basis of Maori customary relationships. That was the view we took of the history in chapter 4.

The more relevant question is whether Maori were informed that, on signing the Treaty, their rights to the tidal reaches would go. They were not, but had they been, they would likely have disagreed. The river mouth was a primary fishing place, and there was fishing elsewhere in the tidal reaches.

In any event, in the words of the Treaty, fisheries and all those things they treasured were actually reserved.

These words did not suggest that the Governor's law, even where unknown, would determine rights between Maori and the Crown. Moreover, the Governor's law appeared limited. In the Treaty, it was said to be for the purposes of keeping peace, and the application of it for these purposes was also stated in the accompanying debates, according to the record, and was given in the context of the preceding musket wars between tribes and tensions between Maori and some sailors. Though it is said today that the assumption of sovereignty brought in English law, that is a construct of law that was not a reality on the ground for some years after, and it was not written into the Treaty.

In any event, Maori clarified the point. They asked if their own law would be protected and it was said that it would be. That at least was at Waitangi and at Kaitaia, as is noted in the *Muriwhenua Land Report*. There is no record of what was said at Putiki, but the Kaitaia and Waitangi statements are indicative of the Governor's thinking. At Waitangi, the Governor assured Maori, after preparing a written statement, that Maori customs would be protected by him, and at Kaitaia, it was said on the Governor's behalf that 'the Queen will not interfere with your native laws or customs'.²⁷

In the Treaty debate, things unsaid may be as significant as those stated. It was not said, for example, that for the British sovereignty meant that the Queen's authority was absolute. Nor was it said that with sovereignty came British law, with hardly a modification. (This is not to impute deception. Matters had to be simply put and British legal norms were as incomprehensible to Maori as Maori societal norms were a mystery to the British.²⁸)

The British position is illuminated by Lord Normanby's instructions for the preparation of the Treaty.²⁹ He cautioned against acquiring 'any Territory the retention of which by them would be essential, or highly conducive, to their own

Maori not informed of doctrine

Oral promise of protection of customs

27. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, sec 4.2

28. *Ibid*, sec 4.3

29. *Ibid*, sec 4.4

comfort, safety or subsistence'.³⁰ While the reference was to land, the principle has application to all properties, as described in the eventual Treaty texts.

American precedent

American precedent asserts that, in a treaty with indigenous people of oral traditions, spoken promises are as much a part of the arrangement as those written in the formal document, and surrounding papers may be used to flesh out the parties' intentions. It cannot then be said, as a matter of fact, that the Treaty introduced the law of England if the corollary is that Maori laws thereafter ceased to apply. The Treaty is rather authority for the proposition that the law of the country would be sourced to two streams.³¹

**Qualification of
English Laws Act
1858**

Subsequent enactments also suggest that the Crown did not intend English law to apply totally. The English Laws Act 1858, made retrospective to 1840, provided for English law to apply, but only 'so far as applicable to the circumstances' of the colony. It is arguably inapplicable if the effect is to deprive persons of their possessions. That would also rationalise the English tenure laws with the doctrine of aboriginal title, which dates in England from at least the 1600s.

The qualification in the English Laws Act has recently been applied in former British colonies to determine that the law allowing private ownership of navigable rivers and lakes is inapplicable to the circumstances of those new countries. This was noted in chapter 2.

Having regard to the foregoing and the guarantee of taonga in article 2, we consider that the arm of the sea presumption does follow as a consequence of the Treaty but is in breach of it.

Royal protection

Crown counsel sought further support from article 3, which extended a 'royal protection' to Maori and imparted to them all the rights and privileges of British subjects. As we see it, this does not mean that English law applies to everyone the same. Leaving aside the Maori text, where arguably the article could be a guarantee of Maori law, we think that the focus is primarily on civil rights. The applicable right in this case is the right to have one's private property interests respected.

9.2.8 Legal argument on 'exclusive ownership'

Crown counsel went on to contend that the Maori interest did not amount to exclusive ownership. They invoked the following passage in the *Report on the Manukau Claim*:

That interest [the Maori interest in the Manukau Harbour] is certainly something more than that of a minority section of the general public, more than just a particular interest in particular fishing grounds, but less than that of exclusive ownership. It is in the nature of an interest in partnership the precise terms of which have yet to be worked out.³²

30. 'Annexation of New Zealand to New South Wales: Lord Normanby's Instructions to Captain William Hobson, on Appointment as Consul and Lieutenant-Governor', in *Speeches and Documents in New Zealand History*, W D McIntyre and W J Gardiner (eds), London, Oxford University Press, 1971, doc 5, p 14

31. Williams, pp 116–119

32. *Report on the Manukau Claim*, sec 8.3

The report considered, however, that the Manukau Harbour occupied a unique position. It is the second biggest harbour in New Zealand. Traditionally, it was shared by several descent groups. Today, it is subject to the special demands of the largest city in New Zealand and the demands of major projects approved and supported by the Crown. The Tribunal considered that protection and management of the harbour deserves national as well as regional support.³³

These factors appear to have influenced the Tribunal's finding. But it must be borne in mind that the Tribunal said this in the context of its then jurisdiction, which was limited to 'contemporary claims', to consider matters arising post-1975, and when the Tribunal itself was limited to three persons. The context was a question of how competing interests at the time of hearing could be reconciled.

As a general proposition, that Maori interests in rivers, lakes, or harbours cannot be exclusive to the descent group, we consider, with respect, in the light of further evidence revealed by the Tribunal's historical claims process, that the Manukau conclusion is unsustainable on the facts. At least, it is unsustainable on the facts in this case.

Manukau
conclusion
unsustainable

9.2.9 Ownership of water

The ownership of water was introduced at section 2.8.1. We considered that Maori owned the water as part of that which they possessed.

In terms of both the general law and the Treaty, that which Maori possessed must be determined by reference to what they possessed in fact, and not by reference to what may be legally possessed in England. We considered that, if the river is regarded as a whole, as we think it must be in terms of Maori possessory concepts, then the water is an integral part of the river that was possessed. Accordingly, the water was possessed as well. Though its molecules may pass by, as a water regime the water remains, constantly being replenished.

Possession of a river
regime

Indeed, we thought, the river would be meaningless without it. The river was a waterway. The whole river was a fishery. It was the habitat of creatures to whom Maori were related, from fish to taniwha. The emphasis on water purity for ritualistic and other reasons was also described (sec 2.6). The water was treasured as the gift of Ranginui just as much as the land was respected as part of Papatuanuku. The water was their water, at least until it naturally escaped to the sea, at which point its mauri or character changed.

As Judge Carr held in the Maori Appellate Court decision of 20 December 1944:

It was a recognised feature of the ancient customs of the Maori that all land within the boundaries of a tribe belonged to the members of that tribe and to no one else. Woe betide any outsider who trespassed on track or on water without permission – it mattered little whether the water was stationary or whether it was running.³⁴

33. Ibid, sec 9.2.6

34. Document A77 p 4

Aboriginal title to
water

However, Crown counsel also noted that the doctrine of aboriginal title recognises a right to water but claimed that it is described as a use right. They referred to a passage in the decision of the Supreme Court of Canada (on appeal from the Court of Appeal of British Columbia) in *Calder v Attorney-General of British Columbia*.

In fact, this case makes it clear that the indigenous people in that case, the Nishga of British Columbia, were the owners of both the lands and the waters that had been in their possession from time immemorial. Given the Crown's contention that any sort of claim to running water is novel, it is desirable to refer in some detail to the *Calder* decision, which removes that novelty.

*Calder v Attorney-
General of British
Columbia*

Seven judges heard the appeal in the Supreme Court. Justice Judson, in a judgment concurred with by Justices Martland and Ritchie, cited the *Indian History of British Columbia* by Dr Wilson Duff:

It is not correct to say that the Indians did not 'own' the land but only roamed over the face of it and 'used' it. The patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognised by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn't subdivide and cultivate the land, they did recognise ownership of plots used for village sites, fishing places, berry and root patches and similar purposes. Even if they didn't subject the forests to wholesale logging, they did establish ownership of tracts used for hunting, trapping and food-gathering. Even if they didn't sink mine-shafts into the mountains, they did own peaks and valleys for mountain goat hunting and as sources of raw materials. Except for barren and inaccessible areas which are not utilized even today, every part of the Province was formerly within the owned and recognised territory of one or other of the Indian tribes.³⁵

Dr Duff gave evidence on behalf of the Nishga, who were the appellants in the Supreme Court proceedings. In citing the above passage, Justice Judson noted that Dr Duff had been described by the trial judge as a scholar of renown. Dr Duff was asked if the foregoing passage applied to the Nishga people and he confirmed that it did.³⁶

Notwithstanding the approval of the foregoing by Justice Judson and his two colleagues, they disallowed the appeal on the ground that the sovereign authority had elected to exercise complete dominion over the lands in question, adverse to any rights of occupancy that the Nishga tribe may have had when, by legislation, it opened up such lands for settlement, subject to the land reserves set aside for Indian occupation. Such claims of sovereignty, it was said, were inconsistent with any conflicting interests, including one as to 'aboriginal title'. This finding does not, however, detract from their acceptance of the statement by Dr Duff cited by Justice Judson.

35. *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145, 149 (citing Wilson Duff, *Indian History of British Columbia*, British Columbia, Provincial Museum of Natural History and Anthropology, 1964, vol 1)

36. *Ibid*, pp 178, 180-181

A different view of the matter was taken by Justice Hall, with the concurrence of Justices Spence and Laskin. In his judgment, Justice Hall stated:

When asked to state the nature of the right being asserted and for which a declaration was being sought, counsel for the appellants [the Nishga] described it as 'an interest which is a burden on the title of the Crown; an interest which is usufructuary in nature, a tribal interest inalienable except to the Crown and extinguishable only by the legislative enactment of the Parliament of Canada'. The exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation. The issue here is whether any right or title the Indians possess as occupants of the land from time immemorial has been extinguished.³⁷

Justice Hall noted that Dr Duff was cross-examined by counsel for the Attorney-General as to the basis for his statement that the Nishga owned their land and waters.³⁸ Dr Duff duly cited authority for his views. Counsel further put to him that anyone 'has to be careful about what word you apply because of the legal implications and to speak of ownership simply because some-one has an unchallenged possession is to confuse two things'. To this, Duff responded that, 'although their concepts of ownership were not the same as our legal concept of ownership, they nevertheless existed and were recognised'.³⁹

Concepts of
ownership in
Canada

Following his account of this cross-examination, Justice Hall stated that: 'Possession is of itself at common law proof of ownership.' He cited leading texts by Cheshire and Megarry and Wade on the law of real property in support.⁴⁰

In his judgment, Justice Hall sets out a line of questioning by the trial judge in which Justice Gould endeavoured to relate Dr Duff's evidence as to Nishga concepts of ownership of real property to the conventional common law elements of ownership.⁴¹ Such questions (which he set out), Justice Hall said, disclose that Justice Gould's consideration of the issue was inhibited by a preoccupation with the traditional indicia of ownership. In so doing, Justice Gould failed to appreciate what Lord Haldane had said in *Amodu Tijani v The Secretary, Southern Nigeria*:

in interpreting native title to land, not only in Southern Nigeria, but other parts of the British Empire much caution is essential. There is a tendency, operating at times increasingly, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.⁴²

After setting out the trial judge's questioning of Dr Duff, Justice Hall said that:

In enumerating the *indicia* of ownership, the trial judge overlooked that possession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are the

37. *Ibid.*, p 173

38. *Ibid.*, p 184

39. *Ibid.*, p 173

40. *Ibid.*, p 185

41. *Ibid.*, p 184

42. *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399, 402

owners of the lands that have been in their possession from time immemorial and, therefore the burden of establishing that their right has been extinguished rests squarely on the respondent [the Crown].

What emerged from the foregoing evidence is the following: the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law . . .⁴³

Justices Hall, Spence, and Laskin held that the Nishga were entitled to assert their Indian title as a legal right and that their right had not been extinguished by surrender to the Crown or by competent legislative authority. They would have allowed the appeal. However, the seventh judge, Justice Pigeon, held against the Nishga on a technical question of jurisdiction, and accordingly the view of Justice Judson and his two colleagues prevailed.

Atahanui and
ownership

In our view, this case, which was invoked by the Crown, does not support their contention that Te Atahanui-a-Paparangi had no more than a use right in their river. Rather, it supports the view that they did in fact own it. Dr Duff's statement, approved by six of the Supreme Court judges in *Calder* that the Nishga 'patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognised by our system of law, but were nonetheless clearly defined and mutually respected' applies equally to the relationship of the Whanganui iwi to their river.⁴⁴

In our opinion, there is nothing in the judgments in *Calder* to suggest that a distinction was drawn by the Nishga between lands on the one hand and waters on the other. It is clear that Dr Duff considered that the Nishga's concept of ownership applied to both. The same equally applies to the Atihaunui concept of ownership. Lord Haldane's warning against imposing common law notions on those of indigenous peoples with a distinct concept of ownership should be applied to Atihaunui in our view, and to their concept of the nature of their relationship with the river.

9.2.10 Whether *ad medium filum* was also Maori custom

The *ad medium filum aquae* rule was introduced in chapter 2. It is a rebuttable presumption of English conveyancing law that ownership of land adjoining a non-tidal river includes the ownership of the bed of the river (or of a lake) to its mid-point.

*Ad medium filum
aquae* and the Treaty

For the same reasons as were given for the 'arm of the sea' debate, we consider that this rule does not apply in terms of the Treaty (and is probably rebutted in law) if the effect is to deny existing property interests, or the Atihaunui interests in this case. We note that, in applying facts to law in the Mohaka River claim – facts that were not materially different from this case – the Tribunal found that, even were the

43. *Calder v Attorney-General of British Columbia*, pp 189–190

44. *Ibid*, p 149

Crown entitled to rely on the *ad medium* rule, the presumption would have been rebutted.⁴⁵

However, here the arguments were different. Crown counsel gave examples to say that the rule was sufficiently consonant with Maori customary opinion. At section 2.4, we cautioned against such an approach, since anecdotal comments and particular incidences are not usually expressive of fundamental beliefs. In any event, we think that the examples given have too many variables for the inference that was drawn.

(1) *Mamaku's discussion with Taylor*

A diary note of the Reverend Richard Taylor of 1847 notes a conversation with Te Mamaku. It records that Mamaku:

gave the natives a long account of what he thought was European policy, saying that we [the Europeans] had taken the harbour of Wellington so that no native could go in or out without permission, that we were doing the same at Waikanae, Porirua, Otaki, Ohau, Manawatu, and Wanganui.

Taylor replied that, at Wanganui, 'one side at least belonged to the natives and they possessed the entrance "as much as the Europeans"'.⁴⁶

Taylor's diary does not record that Te Mamaku objected, and that could imply that he agreed.⁴⁷ However, a rangatira's silence is not assent in Maori custom. More regularly, it is the opposite. Leaving that aside, however, and many other possibilities, we think that the diary note can be seen as a record of opposing views.

In our perspective of the history as given in chapter 4, Maori expected to share the river's use but not to cede authority. That emerges from the record of Te Mamaku's concern. He is anxious that Europeans are assuming a right of control. Taylor's reply does not address the implied question. It is relevant only to usage.

(2) *The log in the river*

In 1849, McLean sought to settle a Maori claim to a log of timber bearing their mark that was sunk in the river and was taken from there by a gunboat's crew.⁴⁸ He gave the Maori to understand, so he said, that all logs in the river, excepting those immediately fronting their reserves, were European property. This 'decision', he said in a letter to the Governor, was satisfactory to them.

Taylor and McLean thus implied different things, one that Maori had 'at least half the river, the other that it belonged to the Europeans, presumably meaning the Crown and relying on the 'arm of the sea'.

We think, as Sinclair suggested, that Maori acquiescence, if there was any, was more likely on the basis of the settled Maori law that flotsam was a gift from Tangaroa and belonged to the people nearest to where it was delivered or was

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

46. Taylor, QMS diary, 12 March 1847–31 December 1848, pp 39–40 (doc A49, pp 24–25)

47. Document C10, p 22

48. Document A49, p 31

beached.⁴⁹ There was excitement as to where floating goods might be delivered for no one owned them until they were beached. It was not tika (right) for the Europeans to take the log in this case, but Maori also could not claim it. The issue in other words was referable not to river ownership but to the ownership of floating logs. They may also have decided not to make too much of the matter in order to maintain good relations with the Europeans.

(3) Kawana Paipai's centre line claim

In the centre line claim of Kawana Paipai, the facts are obscure but appear to be that, possibly because of some river works on the 'European side' of the river, about a chain was eroded from the 'Maori side' at Putiki.⁵⁰ This led Maori, in 1873, to seek approval from the Maori Land Court for new plans for their sections. Some claimed the foreshore, the part under water, probably because it had been part of their title originally. However, Paipai claimed to the centre line.

Some evidence suggests that Paipai, a warrior leader of old, was about 90 at the time. The court dismissed the application without giving reasons. It does not follow that Paipai saw the centre line view as part of Maori custom or that he accepted that view. Applications to the Native Land Court are indicative not always of what Maori believed were their customary rights but sometimes of what Maori thought that court might deliver. The court required a plan, and the surveyor may have thought that Paipai could claim to the centre line – and so on. The possibilities are many.

(4) The 1916 Scenery Preservation Commission

The 1916 Scenery Preservation Commission was appointed following Maori protests over the taking of riparian land for scenic purposes. Maori witnesses spoke of their land and also their interests in the adjoining river.

It is only natural that on this inquiry local interests were referred to. It is not evidence that Maori saw the river as divided into parts belonging to riparian landowners. More significant is the fact that, although the inquiry was localised and related to land, Maori still raised the tribal river interest.

Thus, Wharawhara Topine said, 'this question of our river rights extends from the head of the river to its mouth, and all the subtribes who own the abutting lands are interested in its solution'.⁵¹ Hakiaka Tawhaio sought a clear statement on what the Government proposed for the river waters, which, he said, 'belong entirely to us'. He added later, 'The Maoris own the river . . . I lay more stress on our river rights than on these scenic lands'.⁵²

49. Document c10, pp 25-26

50. Ibid, p 30

51. Transcript of evidence before 1916 Scenery Preservation Commission, DOST.1 H0228/05/07 LINZ (doc c10(a)(7), p 37)

52. Document c10(a), pp 30-31

(5) The 1927 petitions

In separate parliamentary petitions, different petitioners sought, in the first case, compensation ‘in respect of our rights in the Wanganui River and its tributaries’ and, in the second, compensation in respect of the Whanganui River.⁵³ The signatories in the latter petition were ‘the owners of the Wanganui River commencing from Taumarunui to Wanganui a distance of 144 miles’. The context was the use of the river by steamers and tourists and the destruction of eel weirs to allow for steamer passage. In total, there were 377 petitioners.

There is reference to local river uses by people of abutting lands, as was necessary for the context in which the claims were brought, but the petitions relate also to the tribal conception of the river as a whole. Evidence of the former is not a denial of the latter when the two coexist, and does not establish the customary acceptance of an *ad medium filum* rule.

(6) The Tuwharetoa experience

In 1939, a Tuwharetoa claim to part of the river’s upper reaches near Lake Rotoaira was withdrawn when the Crown admitted that, where Maori owned the banks of non-navigable streams, they owned the land to the centre of the streams.⁵⁴

We do not see this as an acceptance that such a rule customarily applied. At this time, and much earlier, Maori had need to think in English law terms, and could accept the doctrine if their interests were not too compromised. As we understand the position, nearly all the land in and around Lake Rotoaira at that time was Maori land, on both sides of the stream, and the Crown’s proposal could be agreed. The alternative would be long and expensive litigation. Circumstances were different for Atihaunui, who needed to challenge the rule – no matter the cost.

Acquiescence
cannot be seen as
consent

9.2.11 Why the river claim was not made until 1938

The river claim was not made until 1938, well after the title to the abutting lands had been investigated. It was then argued that the river was held as a whole. This led the Crown to contend that the novelty of the claim showed that it lacked substance and was an afterthought. The inference was that it was fabricated. It was submitted that matters of spiritual value and the contention that the river was held as a whole had not been raised earlier when there was the opportunity to do so.

The facts are against the Crown’s view. In the first instance, we consider there was not a realistic opportunity to have brought the river claim earlier to the Native Land Court. That court dealt with land, and as was considered at section 2.8.2, the court’s own process determined the types of cases that might be brought. It was not considered at the time that a claim could be made to rivers, though it was eventually accepted in 1883, after the main land investigations were completed, that a claim could be made for lakes (see the discussion on lakes at section 2.2).

53. Document 119(a), pp 6, 7

54. Document 110(a), p 22



Figure 19: Front view of Poutama Meeting House, Hikurangi, Karatea, Whanganui River, with P H Metekingi seated in front, 1967. Photograph courtesy Alexander Turnbull Library (F61140½).

No opportunity for
tribal river claim

Moreover, there was little chance of succeeding with a claim to anything last century on the basis that it might be held as a large and single entity. The whole purpose of the Native Land Acts made the Native Land Court averse to large tribal claims (see sec 2.8.2). The predilection of the court was to break things down into small blocks, and Maori just had to fit in with that process.

Crown historian Fergus Sinclair observed the novelty in the thought that the land could be owned one way and the river another. However, as was seen in section 9.2.2, the novelty came not from Maori but from the Native Land Acts. Though it was occupied in severalty, Atihaunui owned the whole of their territory as one, land and river the same. It was the Native Land Acts that broke the land to parts and introduced some novelty. Maori sought to resist this, as seen in chapter 5, but to no avail. It is unsurprising that they sought to keep the river entire.

Statutory
constraints

Finally, statutory constraints were introduced from 1909 to prevent Maori from claiming rivers, lakes, and foreshores. The riverbed case was not brought until after those restrictions were relaxed. This is dealt with at section 9.2.13.

In the result, Atihaunui had come to depend on petitions to Parliament. As discussed at section 7.2.1, the river claim came only through the enterprise of a Wellington lawyer. It came as an innovative answer to his clients' problem that after seven years waiting the Native Land Court had failed to address the Atihaunui river petition as Parliament had required of it with a request for an early response. Even then, he was obliged to fashion the case to fit the limitation of the Native Land Court to matters of land, thus bringing the claim to the bed. In the end, this limitation proved fatal.

It does not follow that Maori had not regarded themselves as having a ‘whole river’ claim before 1938. We think that there is compelling evidence that that view was held. That has been the gravamen of our review of the evidence in the report to this point.

The lack of reference to spiritual concerns in prior material was considered at section 2.4. In the preceding period, the issues had focused on the more mundane – the introduction of steamers, the destruction of eel weirs, the acquisition of scenic lands, and the like. It was not the time to raise spiritual concerns, and there was no likelihood of a receptive audience to spiritual pleas at the time.

This was to show when the case was eventually brought. As described at section 7.7.2, Crown counsel invited the court to ‘depreciate any attempt to introduce matters of Maori mythology into mundane matters like this’, saying they were entirely irrelevant and that he would not refer further to ‘such matters as plaited ropes and the mana of rivers and things like that’. The court responded that claims should be ‘tied more to the foundations of practical realism rather than to those of mere symbolism’. An alternative legal view on spiritual evidence is given elsewhere: see section 9.2.14.

Unwilling to recognise Maori customary beliefs

In considering whether there was some novelty in the 1938 application to the court, we also bear in mind that thoughts and approaches mature over time. We need only look at the dynamics of the legal process to see that that is so. For example, though *ad medium filum aquae* is an old law from England, it did not come into judicial consciousness in New Zealand until 1900. This is addressed next.

9.2.12 *Ad medium filum* did not in fact apply when customary titles investigated

Though raised vaguely by lay observers like Richard Taylor, it appears that *ad medium filum aquae* did not receive explicit judicial recognition in New Zealand until 1900.⁵⁵ We consider that claimant counsel was correct in contending that previously the Crown asserted a river control by virtue of some presumed general right of navigation and that the rule was not comprehensively advanced until the 1938 litigation.

Ad medium filum aquae not recognised

Evidence that the Crown itself relied upon the river’s navigability is in the Crown’s assertion to that effect in its Court of Appeal submissions and in its similar assertion with regard to the Waikato River, where it opposed the contention that *ad medium filum* applied.⁵⁶

As noted in chapter 7, the Court of Appeal held that, where a block of land fronting on a non-tidal river has been held by Maori under their customs and usages and later the title has been investigated by the Native Land Court and separate titles issued, the bed of the river becomes, to its middle line, a part of the adjoining block and the property of its respective owners.

55. Document A49(d), pp 260–313

56. *Mueller v Taupiri Coal Mines* (1902) 29 NZLR 89

Claimant counsel's observation underlines that riparian ownership was probably not in the mind of the Native Land Court when, last century, the titles were investigated.

Nor does it appear to have been in Maori minds. As discussed in chapter 7, Hekenui Wharawhara deposed, in 1949, 'at no time was the Whanganui River . . . included in the Ohutu block as a result of this arrangement nor was it intended to be so included'. That was the only block that lay on both sides of the river. Affidavits by N F Simpson, N A Stevens, and J Caradus confirmed that that was so.

9.2.13 Statutory constraints on customary land claims

From late last century, Maori brought claims to the ownership of lakes, and with some success (see the discussion on lakes at section 2.2). Similar thoughts were entertained with regard to rivers, and there was no certainty that the Coal-mines Act Amendment Act 1903, which applied only to beds, would prevent customary claims to water regimes as a whole.

Legislation to
prevent Maori
customary claims

In 1909, the Crown introduced legislation to prevent further Maori customary claims without the Crown's approval. It was a denial of Maori free access to the law but, having been put forward by New Zealand's most famous Maori politician and drafted by an outstanding New Zealand jurist, the proposal was not unkindly made in the circumstances of the day. Litigation was consuming Maori efforts and assets. The alternative was legislation that would recognise Maori and public interests in water regimes – but, despite Sir Apirana Ngata's exertions, the alternative never came.

Sections 84 to 87 of the Native Land Act 1909 provided that native customary title to land was not available or enforceable against the Crown; that a proclamation that any Crown land was free from native customary title was conclusive in all proceedings; and that no grant or other disposition of land by the Crown could be questioned or invalidated on the ground that native title had not been extinguished. In addition, customary title was automatically extinguished in respect of land that for 10 years before 31 March 1910 had been continuously in the possession of the Crown, 'whether through its tenants, or otherwise'.

Section 100 of the 1909 Act empowered the Governor by Order in Council, at any time and for any reason he thought fit, to prohibit the Native Land Court from ascertaining the title to any area of customary land. There was a hiatus for a period after 1913, when the Whanganui River claim was brought. The provision was repealed by section 43 of the Native Land Amendment Act 1913 and a savings provision introduced to give Maori the right to have their claims to customary land investigated and adjudicated by the court.

With these qualifications, the provisions were continued through to sections 153 to 157 of the Maori Affairs Act 1953. They remained in force until 1993, when they were repealed, along with the remainder of the 1953 Act, by the Te Ture Whenua Maori Act 1993. The 1993 Act did not re-enact them, but instead sections 360 and 361, by amendments to the Limitation Act 1950, provide that no action can be

brought against the Crown to recover Maori customary land after the expiration of 12 years from the date when the right accrued. A six-year limitation period is provided for in the case of any action against the Crown in respect of any trespass or injury to Maori customary land. In each case, the right of action is the date on which the wrong occurred, whether before or after the commencement of the 1993 Act.

While the Maori right to bring proceedings against the Crown in respect of customary land is now recognised, it is unlikely, given the antiquity of most causes of action, that many will fall within the limitation periods. In short, the great majority of actions will be barred.

9.2.14 The recognition of spiritual values in law

Crown counsel submitted that ‘a Treaty cannot be read as guaranteeing the full expression of any form of Maori religious belief regardless of the consequences for other subjects of the Crown’.⁵⁷ The Crown considered that the economic dimension of the claim must be separated from the symbolic and spiritual concerns.

In responding, Sian Elias for the claimants commented on the ‘chasm in understanding’ between her and Crown counsel on this matter. We accept her response that the river is a subject of veneration as well as a source of physical and material sustenance and that there is no inconsistency between the two. We also accept Ms Elias’s submission that it is not accurate to say that the spiritual relationship of Whanganui Maori with the river is symbolic, for it is part of their daily existence. The evidence of the people is testimony to this and that it is not simply a ‘natural resource’.

No inconsistency
between veneration
of river and use for
sustenance

Claimant counsel further submitted that a distinction between ‘metaphysical’ interests and ‘property’ interests is unsound as a matter of English law. We agree. That the English common law is capable of understanding quite different and abstract cultural aspects is, she said, demonstrated by the decision of the Privy Council in *Mullick v Mullick*.⁵⁸

This was an appeal to the Privy Council from a decision of the Indian High Court Appellate Division and concerned the legal status of a Hindu idol. The Privy Council stated that:

A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the regulations thereof by Courts of law, a ‘juridical entity’. It has a juridical status with the power of suing and being sued. Its interests are attended by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir . . .⁵⁹

57. Document B19(c), p 45

58. *Mullick v Mullick* (1925) 1.R 52 Ind App 245

59. *Ibid*, p 250

It went on to say:

The true view . . . is that the will of the idol in regard to location must be respected. If, in the course of a proper and unassailable administration of the worship of the idol by the shebait [guardian], it be thought that a family idol should change its location the will of the idol itself, expressed through his guardian, must be given effect to.⁶⁰

The Privy Council ruled that the idol should appear by a disinterested next friend appointed by the Indian High Court. We note, however, that this decision was made by the Privy Council applying Indian, not English, common law and accordingly cannot be taken as a recognition under English law of the legal personality of an idol.

Ms Elias also referred to a recent decision of the English Court of Appeal in *Bumper Development Corp Ltd v Commissioner of Police of the Metropolis and Others*, in which it was held that a Hindu temple, with legal personality in Indian, but not English, law was entitled to sue in an English court. The Court of Appeal found that this accorded with the principles of the comity of nations and did not offend English principles of public policy.⁶¹

Claimant counsel next referred to *Huakina v Waikato Valley Authority*, where Justice Chilwell considered whether the provisions of the Water and Soil Conservation Act 1967 'can embrace an objection on the ground that discharge of cowshed effluence prejudices one's interest in the spiritual value of a river or the interests of the public generally in that spiritual value'.⁶² The judge decided that:

Customs and beliefs are capable of being established on evidence by the Courts. See *Mullick v Mullick* (1829), *Nireaha Tamaki v Baker* (1901), *Mullick v Mullick* (1925), *Public Trustee v Loasby* (1908), and *Te Weehi v Regional Fisheries Officer* (1986), all previously referred to.

The Privy Council decision of *Nireaha Tamaki* involved the interpretation of a statute which recognised customary Maori rights guaranteed by the Treaty of Waitangi, Lord Davy said:

'It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence' ((1901) NZPCC 371, 382).⁶³

9.2.15 The Lake Omapere decision

One of the most perceptive judgments of the Native Land Court, in our view, and one that is instructive for this claim is the 1929 decision of Judge F O V Acheson on Lake Omapere. It was referred to in the *Te Whanganui-a-Orotu Report 1995*, but bears repeating where relevant to the Whanganui River:

60. *Mullick v Mullick*, p 259

61. *Bumper Development Corp Ltd v Commissioner of Police of the Metropolis and Others* [1991] 4 All ER 638

62. *Huakina v Waikato Valley Authority* [1987] 2NZLR 188

63. *Ibid*, pp 214-215

Did the ancient custom and usage of the Maoris recognise ownership of the beds of lakes?

... Yes! And this answer necessarily follows from the more important fact that Maori custom and usage recognised full ownership of lakes themselves.

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

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

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

... To the Maori, also, a lake was something that added rank, and dignity, and an intangible mana or prestige to his tribe and to himself. On that account alone it would be highly prized, and defended.

... Finally, to all these things there was added the value of a lake as a permanent source of food supply.

... Lake Omapere ... has been to the Ngapuhis for hundreds of years a well-filled and constantly-available reservoir of food in the form of the shellfish and the eels that live in the bed of the lake. ...

... Was Lake Omapere, at the time of the Treaty of Waitangi (1840), effectively occupied and owned by the Ngapuhi Tribe in accordance with the requirements of ancient Maori custom and usage?

... Yes! The occupation of Omapere was as effective, continuous, unrestricted and exclusive as it was possible for any lake occupation to be.

It is not contested that for many hundreds of years the Ngapuhis have been in undisputed possession of this lake, and have lived around or close to its shores ... Great numbers of the Ngapuhi must have grown up within sight of Omapere's waters, and have regarded the lake as one of the treasured tribal possessions. By no [process] of reasoning known to the Native Land Court would it be possible to convince the Ngapuhis that they and their forefathers owned merely the fishing rights and not the whole lake itself.

According to ancient Maori custom and usage, the supreme test of ownership was possession, occupation, the right to perform such acts of ownership as were usual and necessary in respect of each particular portion of the territory possessed.

In the case of a lake the usual signs of ownership would be the unrestricted exercise of fishing rights over it, the setting up of eel-weirs at its outlets, the gathering of raupo or flax along its borders, and the occupation of villages or fighting pas on or close to its shores.

In short, the Ngapuhis used and occupied Lake Omapere for all purposes for which a lake could reasonably be used and occupied by them, and the Native Land Court says that much less use and occupation would be ample, according to ancient custom and usage, to prove actual and effective ownership of the lake, bed and all.

... It was contended (but not seriously pressed) on behalf of the Crown that sales by Natives to the Crown, of areas adjoining Lake Omapere, gave to the Crown rights in those portions of the bed of the lake fronting on to the portions sold.

This contention had no merit whatever. The sales to the Crown were of particular areas of land well defined as to area and boundaries, and could not possibly have been intended to include portions of the lake bed adjoining. See also Judgment of Court of Appeal in *Re Mueller v Taupiri Coal Mines Co* (1900) 3 GLR 154.

Also the mere fact that Lake Omapere was 'customary land' was an absolute bar to sales of any portions of it to the Crown. Section 89 of 'The Native Land Act, 1909', forbids sales of 'customary land' to the Crown, and earlier statutory provisions were to the same effect.

Moreover, Lake Omapere was tribal territory, and therefore, according to established Maori custom and usage, no individual or group of individuals had the right to alienate any portion of its bed. To hold otherwise would be to give support to that lamentable doctrine which led, in the celebrated Waitara Case, to tragic and unnecessary wars between Pakeha and Maori.

There can thus be no presumption either in law or in fact that the sales of some lands to the Crown adjoining Lake Omapere carried with them rights to portions of the lake or of its bed.⁶⁴

Just as Lake Omapere was tribal territory, so was the Whanganui River.

9.2.16 Coal mines and the statutory taking of the bed

The far-reaching provision in section 14 of the Coal-mines Act Amendment Act 1903, which deemed all beds of navigable rivers to be and to have always been vested in the Crown, unless it had granted a riverbed to someone else, was grafted on a minor washing-up Bill at the last moment (see sec 2.2).

64. *Application by Ripi Hongi and Other Natives for Investigation of Title* unreported, 1 August 1929, Judge Acheson, Native Land Court (Bay of Islands Native Land Court minute book, vol 2, pp 253-278) (cited in Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995, sec 12.3.4). Material from pages 8 and 9 of this decision is also quoted in the section on Maori belief systems in section 2.6 of this report.

Shortly before the Bill was read a third and final time, the Premier, Richard Seddon, had the Bill recommitted to consider a new clause (which became section 14). He explained that some members wished to conserve existing rights, which Seddon said the Government did not wish to disturb. The nature of such rights was not explained, but he thought that the new clause would meet the difficulty. William Massey (the member for Franklin) agreed.

One reading of
section 14

That is the sole recorded discussion. The new clause was approved and added to the Bill, which was read a third time and passed without further discussion.⁶⁵

The provision appears to have been a sequel to *Mueller v Taupiri Coal Mines Ltd* (see secs 2.2, 6.6, 7.4.2). The court there held that Crown grants of land alongside the Waikato River did not pass ownership of the bed to the middle line because surrounding circumstances, particularly the use of the river as a public highway, rebutted the *ad medium filum* presumption, which would otherwise apply.⁶⁶

Section 14 a reaction
to *Mueller v Taupiri
Coal Mines Ltd*

The 1903 Act reflects the Crown's desire to assert an exclusive title to the beds of navigable rivers analogous to its claimed common law title to the foreshore and the tidal part of navigable rivers. There is no evidence of Maori being consulted.

The arrangement still applies. Section 14(1) of the 1903 Act was re-enacted as section 3 of the Coal Mines Acts of 1905 and 1908. In the Coal Mines Act 1925, it was again re-enacted (in section 206), save only for a shorter definition of 'navigable river'. The saving provision for rights of riparian owners in respect of the beds of non-navigable rivers was retained (s 206(3)). These provisions were in turn re-enacted in section 261 of the Coal Mines Act 1979.

In 1991, the Crown Minerals Act repealed section 261 of the Coal Mines Act 1975. However, section 354(1) of the Resource Management Act 1991 stated that the repeal of section 261 of the Coal Mines Act 1979:

shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

Thus, the Crown's statutory ownership remains.

In 1950, the Supreme Court had held, in *The King v Morison and Another*, that the bed of the Whanganui River, for such of its length as was capable of being used for navigation, was vested in the Crown by virtue of section 206 of the Coal Mines Act 1925 (originally provided for in section 3 of the 1903 Act).⁶⁷

As considered at section 9.2.13, any suggestion that Maori customary rights to the bed of the Whanganui River might have survived the enactment of section 3 of the Coal-mines Act Amendment Act 1903 was effectively decided in favour of the Crown by sections 84 to 87 of the Native Land Act 1909.

The statement of claim contends that:

65. Coal-mines Act Amendment Act 1903, NZPD, 1903, vol 127, p 68 (doc A49(b), pp 343-351)

66. *Mueller v Taupiri Coalmines Ltd* (1900) 20 NZLR 89 (CA)

67. *The King v Morison and Another* [1950] NZLR 247. For a fuller discussion of Justice Hay's decision, see section 7.4.

The Crown by interfering with Maori rangatiratanga customary and common law rights in respect of the River purportedly under s 261 of the Coal Mines Act 1979 and its predecessors failed to protect the economic interests, ownership rights, and Treaty rights of Atihaunui a Paparangi. Their customary and common law rights were interfered with but not extinguished.⁶⁸

In her closing submissions, Ms Elias referred in some detail to the Court of Appeal decision in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*.⁶⁹ In addition to comments on the possible unreliability of the application of the *ad medium filum* rule, it was said that:

The Maori Affairs Act 1953, s 155, enacts that except so far as may be otherwise expressly provided in any other Act the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any manner against the Crown. The provision goes back to 1909 and the draftsmanship of Sir John Salmond. It is not clear that the provision extends to water, and in their *Te Ika Whenua – Energy Assets Report* in 1993 and *Mohaka River Report* in 1992 the Waitangi Tribunal have adopted the concept of a river as being taonga. One expression of the concept is ‘a whole and indivisible entity, not separated into bed, banks and waters’. The vesting of the beds of navigable rivers in the Crown provided for by the Coal Mines Act Amendment 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept . . .⁷⁰

Need for test cases

These comments were obiter but cast doubts on the legal effectiveness of the various statutes that relate only to land and not to rivers as such. Whether as a matter of law the rights to rivers and waters may exist as a matter of aboriginal title or customary law and may not be overridden by the Coal-mines Act Amendment Act 1903 and succeeding legislation, or the *ad medium filum aquae* rule, will not be known until such time, if ever, as the issues are further tested in the High Court and Court of Appeal.

Meanwhile, the Crown in opening submissions claimed that it has title to the beds of navigable rivers, including the Whanganui, by virtue of the Coal Mines Act 1979 and its predecessors and section 354 of the Resource Management Act 1991.

Crown position

The Crown further claimed that section 3 of the Coal-mines Act Amendment Act 1903 was a valid exercise of the Crown’s power under article 1 of the Treaty of Waitangi and also that it was consistent with the principles of the Treaty in general terms. It was acknowledged, however, that the Act removed Maori rights, having regard to the 1962 Court of Appeal decision, since in 1903 significant amounts of land abutting the Whanganui River were still in Maori ownership. They thought that, though more information was needed to assess the extent of impact, the Crown may be prepared to concede that, having been done without consultation or compensation, it may have constituted a breach of the principles of the Treaty.⁷¹

68. Claim 1.1, para 6.1

69. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20

70. *Ibid*, p 26

71. Document C21, p 10

In closing, however, the Crown somewhat resiled from this position. It reiterated its preceding view that the legal ownership of the bed is settled and that the legal position is consistent with the principles of the Treaty. It went further and claimed that, in any event, the Waitangi Tribunal is not the forum for revisiting these issues. We address the latter point at section 9.2.17.

The question is whether section 3 of the Coal-mines Act Amendment Act 1903, the provisions that succeeded it, and section 354 of the Resource Management Act 1991 are inconsistent with the Treaty and Treaty principles.

We have found that the river was owned by Atihaunui at 1840. We have also found that they never knowingly or willingly relinquished it, as the Treaty requires for a proper alienation to have been made. The 1962 decision of the Court of Appeal does not say otherwise.

The question of whether it was properly taken for a public work does not arise since it was not taken for a public work, even if the intention was to secure it for public access, and none of the processes for a public works taking were adopted. Instead, it was taken, by statute, without the agreement or the knowledge of the owners and without compensation being paid.

The Crown has established no basis on which it might have been taken consistently with the Treaty. We find that the powers ceded by Maori to the Crown in article 1 were and remain subject to, and necessarily qualified by, the protection guaranteed by the Crown to Maori in article 2.

We find that the legislative severance of one essential element of the Whanganui River, namely the bed, and the taking of the bed by the Coal-mines Act Amendment Act 1903 and succeeding legislation, and as continued in force by section 354 of the Resource Management Act 1991, was and is inconsistent with article 2 of the Treaty and the Treaty principle requiring active protection of the Atihaunui ownership of the river and their authority over it.

Inconsistent with
the Treaty of
Waitangi

9.2.17 Can the Waitangi Tribunal address questions of law?

Crown counsel submitted in effect that the Waitangi Tribunal cannot address questions of law. No authority was cited in support. We reject this view. There is a distinction between binding determinations of the law – a task for the courts – and the interpretation of law for the purposes of the Treaty of Waitangi Act 1975. To consider whether a law is consistent with the principles of the Treaty of Waitangi, the Tribunal must consider what that law is.

CHAPTER 10

ENVIRONMENTAL LAW AND THE TREATY TODAY

10.1 ENVIRONMENTAL LAW AND THE TREATY

Between 1986 and 1991, Parliament reviewed all legislation for the protection and use of New Zealand's natural resources. A new legislative framework was established for the management of natural resources, and changes were made to the way that management decisions are made and carried out. The legislative package is principally represented in the Environment Act 1986, the Conservation Act 1987, and the Resource Management Act 1991.¹ Our attention has mainly been directed to the last Act.

Legislative review,
1986–91

Mr Taiaroa outlined the considerable but unsuccessful efforts of the Whanganui River Maori Trust Board to effect changes to the legislation during the period of its review and to the complex proposals for the Resource Management Act in particular.² The proposals, in his view, were to avoid giving the Treaty effect. It was also necessary to respond to public announcements that the Act did not deal with ownership. That was not in fact correct, he contended, and the effect of the proposals was to circumvent the vital component of rangatiratanga in the Treaty, which requires that the taonga possessed by Maori are not only protected to them but managed by them.

Claimants'
contentions

The Environment Act 1986 promotes a balancing of five matters in the management of natural and physical resources: the intrinsic values of ecosystems; the values that are placed by individuals and groups on the quality of the environment; the principles of the Treaty of Waitangi; the sustainability of natural and physical resources; and the needs of future generations.³ There is no requirement that management conform to Treaty principles; rather, Treaty principles are to be balanced alongside other considerations.

Environment Act
1986 and the Treaty

The Act established the Ministry for the Environment to advise the Government and public authorities on environmental matters and policy (ss 31(a), 32) having regard to the five matters mentioned.

1. See also the Conservation Law Reform Act 1990.
2. The Whanganui River Maori Trust Board made submissions to those reviewing the environmental legislation (see doc B8(b), pp 134–145) and later to the select committee considering the Resource Management Bill (doc B8(b), pp 146–150).
3. See the long title to the Act.

**Conservation Acts
and the Treaty**

In contrast, the Conservation Act 1987 requires that Act to be administered to give effect to the principles of the Treaty (s 4). A failure to do so could be litigated in the courts.

This Act established the Department of Conservation to manage the Crown's conservation responsibilities. Conservation is defined as the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.

The Conservation Law Reform Act 1990 established the New Zealand Conservation Authority and regional conservation boards to bridge the interface between the Department of Conservation and the public (s 6(a)). The main purpose of the authority was to advise the Minister of Conservation on statements of general policy under the 1987 Act and associated legislation. Also, the Conservation Authority took over the responsibilities of the old National Parks and Reserves Authority (s 112(1)). Of its 12 members, two are appointed after consultation with the Minister of Maori Affairs (s 6D Conservation Act 1987).

The Act requires conservation management strategies from the Department of Conservation for all national and historic resources under the Act (s 17(d) Conservation Act 1987) and any managed by the department under the Wildlife Act 1953, the Marine Reserves Act 1971, the Reserves Act 1977, the Wild Animal Control Act 1977, the Marine Mammals Protection Act 1978, the National Parks Act 1980, the New Zealand Walkways Act 1990, and the Conservation Act 1987.⁴

Conservation boards may be appointed to advise the Conservation Authority and to approve conservation management plans and amendments (ss 6L, 6M). The conservation board for the Whanganui National Park is to have no more than 11 members and is to include one member recommended by the Whanganui River Maori Trust Board (s 6(p)(7)). Other members are appointed by the Minister.

**Resource
Management Act
1991**

The Resource Management Act 1991 unified and reformed dispersed legislation on land, air, and water use and brought together the responsibilities of all central Government agencies other than those for mineral extraction. Planning responsibility was delegated to regional and district councils established under the Local Government Act (No 2) 1989.

**Purpose of Resource
Management Act**

The Resource Management Act is to promote 'sustainable management' of natural and physical resources (s 5(1)), and that is defined in section 5(2) to mean their use, development, and protection in a way, or at a rate, that enables people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety while:

- (a) sustaining the potential of physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

4. Section 65(8) of the Conservation Act 1987 transferred to the Minister of Conservation the power to make bylaws under the National Parks Act 1980.

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

All persons exercising functions under the Act must recognise five principles of 'national importance' (s 6). The first four refer to the protection of coastal marine areas, wetlands, lakes and rivers, outstanding natural features, and indigenous vegetation and fauna. The fifth is 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga'.

Resource
management
principles

Also, they 'shall have regard to' eight matters (s 7). The first, kaitiakitanga, is 'the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship' (s 2).⁵ The seven other matters include the efficient use and development of resources, protecting the heritage value of sites and buildings, and enhancing amenity values and the environment. There is also specific provision for protecting the habitat of trout and salmon (but no specific reference is made to indigenous fish).

In achieving the purpose of the Act with regard to the above principles, those with responsibilities shall 'take into account' the principles of the Treaty of Waitangi (s 8).

Resource
Management Act
1991 Treaty
provision

The Act apportions authority to the Minister for the Environment to determine national standards for sustainable management, and to regional councils to apply those standards at the local level in regional management plans. Regional councils have responsibilities previously administered by numerous single purpose authorities acting under different statutes. They must maintain and review resource management plans, which in turn must be approved by the Minister. The beds of rivers and lakes and the coastal margins of the sea come under their jurisdiction. The Minister, in certain circumstances and in the national interest, may issue national policy statements and resource consents, with which regional councils must comply.

National and local
division of
responsibilities

Regional and district councils are also governed by the Local Government Act 1974. Section 37K, which came into force in 1989, lists nine purposes of local government of which the seventh is 'recognition of communities of interest'.

Local Government
Act 1974

Counsel for the Whanganui District Council agreed that the Local Government Act makes no specific reference to Maori communities or the Treaty. He noted that provisions for Maori advisory committees were proposed during the 1988 reviews but not enacted. Then, the proposed devolution of Government functions to iwi councils under the Runanga Iwi Act 1990 did not proceed when a new government repealed that Act in 1991.

In any event, the legislation constituting local government does not provide for any particular relationship between local government and traditional tribal government, and in counsel's words 'the voice of the Treaty of Waitangi is ... silent'.⁶

5. Part 1 of the Resource Management Amendment Act 1997

6. Document 08, pp 4-5

From literature accompanying the proposed environmental legislation during the review stages, Atihaunui had cause to consider that the ownership of resources was not within the purview of the proposed Resource Management Act. According to Mr Taiaroa, the talk of the day was that the right of management and the duty of stewardship were more important than ownership.

The other side of the coin, however, is that environmental laws are not a denial of private ownership, no matter how much they may constrain property use. They cannot deny to Maori the rights of property ownership that English law has extended to all British subjects since the beginnings of the creation of a royal justice system in the twelfth century.⁷

Kaitiakitanga rights do not amount to ownership for example. If Atihaunui are entitled to ownership of the river, the concept of kaitiakitanga is not enough. That concept and other principles of environmental law cannot be used to deny them their just entitlements.

The legislation, in fact, dealt with ownership issues that were crucial to Atihaunui interests. Thus, while the Crown's ownership of the bed of the Whanganui River is by virtue of the Coal-mines Act Amendment Act 1903, ownership was confirmed when the coalmines legislation was repealed. Section 354(1) of the Resource Management Act 1991 provides that, notwithstanding the repeal of section 21 of the Coal Mines Act 1979, the beds of all navigable rivers remain vested in the Crown. If ownership is not important and kaitiakitanga is all that matters, why was the Crown's ownership preserved?

The same was done in section 354 of the Resource Management Act for the Crown's ownership of the sole right to take and use geothermal energy (vested in the Crown by section 3 of the Geothermal Energy Act 1953) and its sole right to divert, take, or use natural water (vested in the Crown by section 21 of the Water and Soil Conservation Act 1957).

Under the Act, ownership rights could also be created. For example, an esplanade reserve arising from subdivision along the bank of any river or the margin of any lake is to vest in the territorial authority (s 230(1)), and in certain circumstances foreshores and the beds of rivers and lakes are to vest in the Crown (s 235).

Thus, during the review of legislation, the trust submitted that Maori Treaty rights were being further prejudiced by the proposals. It submitted that, instead, all persons exercising powers under the Act should have a duty to ensure that Maori have decisive power of management over their taonga and that all decisions and actions are consistent with the Treaty.

10.2 WATER CONSERVATION ORDERS

Ownership must be settled, in the claimants' views, before anything else is done. That is the substance of their complaint about a current application for a water

7. P Spiller, J Finn, and R Boast, *A New Zealand Legal History*, Wellington, Brooker's Ltd, 1995, pp 4-6

conservation order. Each new assertion of statutory authority impinges upon Atihaunui traditional rights and inculcates in the public mind that the river is publicly owned. Each formulation of a legal right or sanction, especially after public hearings have been held, entrenches that assumption and prejudices recovery by the river's proper owners.

Concern for their river compels their attendance at hearings or consultations, but each appearance reinforces their role as supplicants, not decision-makers, as one of several groups with interests often competing, and involves costs and a loss of status.

That is why they opposed the application for a water conservation order at this time – not because the objectives are necessarily wrong but because it conflicts with and diminishes their own recognition. These concerns apply equally to the process for settling regional and other management plans.

The Royal Forest and Bird Protection Society applied to the Minister for the Environment for a water conservation order pursuant to section 201 of the Resource Management Act 1991.⁸ Section 199 describes the purpose of an order and what it may provide:

Purpose of the application

(1) Notwithstanding anything to the contrary in Part II, the purpose of a water conservation order is to recognise and sustain—

(a) Outstanding amenity or intrinsic values which are afforded by waters in their natural state:

(2) A water conservation order may provide for any of the following:

(a) The preservation as far as possible in its natural state of any water body that is considered to be outstanding;

(b) The protection of characteristics which any water body has or contributes to, and which are considered to be outstanding,—

(i) As a habitat for terrestrial or aquatic organisms;

(ii) As a fishery;

(iii) For its wild, scenic, or other natural characteristics;

(iv) For scientific and ecological values;

(v) For recreational, historical, spiritual, or cultural purposes;

(c) The protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori.

However, a water conservation order may impose restrictions or prohibitions on a regional council's powers to regulate water levels and flows.⁹

Practical consequences

8. Document D3, p 19. Statutory provision for water conservation orders was introduced by the Water and Soil Conservation Amendment Act 1981. Those provisions were replaced by part IX of the Resource Management Act 1991.

9. A water conservation order is made under section 214 for any of the purposes set out in section 199. For specific powers, see section 30(1)(e), (f) and section 200.

Treaty limitations The empowering opening – ‘notwithstanding anything to the contrary in Part II’ – suggests an independent code so that water conservation orders may set aside requirements to take account of Treaty principles when applying statutory principles for environmental management.

Process Any person may apply for a water conservation order (s 201). This was not always so. Under the prior Water and Soil Conservation Act 1967, only Ministers of the Crown and certain public bodies could apply.

The Minister may reject applications or send them forward for hearing by a specially appointed tribunal. He is to consult with the Ministers of Maori Affairs and Conservation before the tribunal members are appointed (s 202).

The special tribunal must have regard to the requirements of section 199; the needs of primary and secondary interests and of the community, national, and regional policy statements; the New Zealand coastal policy statement; and regional or district plans or proposed plans.

After the tribunal has reported to the Minister, any aggrieved party may refer the matter to the Environmental Court, which is then to hold a public inquiry. If, after this process, a water conservation order is recommended, the Minister may still reject it but is obliged to lay reasons before Parliament (ss 213–215).

No water conservation order may affect or restrict any resource consent granted before the order is made (s 217). In this case, this means that the 1990 minimum flow order would remain in force until its expiry in 2001; that is, the diversion of water for the power scheme could continue, at least until that year.

Conclusion Upon our reading of the law, there is no assurance that the order sought will or could recognise the full interests of Atihaunui in the river. We also accept the claimants’ position that the process, no matter how good the objective, is diminishing of their status. They may need to weigh this, however, with whether other gains may be made.

Grant of urgency As mentioned at section 1.4.5, it was the application for a water conservation order for the Whanganui River that triggered Atihaunui to bring this claim and seek an urgent hearing. In granting urgency, the Tribunal found that the claimants were prejudiced in being put to a form of proceedings, the propriety of which was a central issue in contention.¹⁰ Accordingly, the Tribunal recommended that the Minister for the Environment take no steps to appoint a special tribunal to hear and report on the application for a water conservation order until the Waitangi Tribunal had reported.

Crown counsel subsequently advised us that the Minister for the Environment had consented to a stay on any further action pending the Tribunal’s report.¹¹ The Royal Forest and Bird Protection Society has not objected to this stay.

10. Paper 2.10, pp 7–8 (see app iv)

11. Paper 2.18(6)

10.3 TONGARIRO POWER DEVELOPMENT CONSENTS PROJECT

The same concerns of status have affected Atihaunui in negotiations to settle the diversion of water for the future in what is called the Tongariro power development consents project.

Question of status

The 1990 minimum flows order was continued in force after the Resource Management Act 1991 replaced the Water and Soil Conservation Act 1967, but section 386(3) of the Resource Management Act placed a 10-year time-frame on all existing authorisations. We were told that this means that ECNZ must obtain a new resource consent for water abstractions to continue by 1 October 2001 at the latest.¹² The Tongariro power development consents project is an attempt to find an agreement on the matter.

Reason for project

W R Howie, the fuel resources strategy manager for ECNZ, confirmed that the corporation had embarked on a process for the renewal of all resource consents for the entire Tongariro power development, including those in the Whanganui catchment area. Corporation policy is to pursue a consultative process. Costs and investigations are funded by ECNZ and information is shared by all parties. The intention is to seek agreement on the terms and conditions for the new resource consents, and holds the prospect of an agreed application.¹³

ECNZ position

K R Chapple for the Royal Forest and Bird Protection Society described the society's position.¹⁴ It should first be recalled, as was mentioned at section 3.3, that the society has a record of involvement. In 1986, it successfully campaigned to stop various power boards damming a tributary, the Whanganui a te Ao. In 1987, it formed the Whanganui River Flows Coalition, and in 1988, it coordinated and presented over 1200 submissions to the river flows hearing. For reasons to do with costs, it adopted a background role, vigorous none the less, during the Planning Tribunal (Environment Court) hearings, and the society contributed to expenses.

Forest and Bird position

In 1990, the society began an energy campaign to publicly promote its view that the degradation of the Whanganui and other rivers was directly related to the wasteful uses of electricity. In 1993, it lodged its application for a water conservation order. Mr Chapple described the water diversion to us as 'one of the more notable acts of environmental vandalism in New Zealand'.¹⁵

Mr Chapple traced his involvement in the consents project to a public meeting at Turangi in 1991 held both to discuss a public consultation process for ECNZ resource consents and to form a steering group to plan ongoing consultations and address relevant issues. He described further meetings, the election of a management group, the establishment of working parties for conservation, fisheries, recreation, and operations, and the areas of recommended study.

Consultation with Maori was seen as important, and minutes and information were sent to Tuwharetoa, Ngati Apa, Ngati Raukawa, and the Whanganui River

12. Document 07, p 10

13. Document 05, paras 4.2-4.4

14. Document 03, pp 11-16

15. Ibid, p 14

Maori Trust Board. At the time of his evidence in 1994, these groups, Mr Chapple said, had not formally entered the consultation process.

Regional Council
position

The Manawatu–Wanganui Regional Council, through Dr Brent Cowie, supported consultation, believing it a prerequisite for Resource Management Act applications. Dr Cowie thought that the four named iwi were represented at the meeting when the management group was appointed but considered that, despite every encouragement, Atihaunui had not joined the process.¹⁶

However, the Whanganui River Maori Trust Board did attend a meeting that his council had convened at Taumarunui in January 1993. At this meeting, the board continued its argument for the reinstatement of the natural flow. ECNZ would not comply with this request, and in Dr Cowie's view could not be compelled to do so.

Atihaunui position

Mr Taiaroa gave a different picture. He spoke of a pragmatic concern for the Whanganui intake and a conceptual concern for status. He referred to the compromise required of buying into a process that does not address fundamental property rights and ownership.¹⁷

After the High Court decision of June 1992, he said, ECNZ and others proposed the consultation project for an agreement on the way the new minimum flows would be implemented. Under discussion at subsequent meetings were the sequence and times when the various intakes would be closed to achieve the minimum flows directed.

Mr Taiaroa considered that, of the five tributaries affected – Okupata, Taurewa, Tawhitikari, Mangatepopo, and Whanganui – the Whanganui intake contributed a very small proportion of the waters being removed. Present at a meeting at the offices of the Ruapehu District Council on 14 January 1993 were representatives of the regional council, ECNZ, the Department of Conservation, the Whanganui River Maori Trust Board, the tangata whenua, the Royal Forest and Bird Protection Society, and the Plateau Guides. Mr Taiaroa sought the permanent closure of the Whanganui intake. Though that alone would not meet Atihaunui concerns, a reply was expected on that first.

His proposal, he said, was consistent with what the catchment board and its special tribunal had considered in 1988 as necessary in view of Atihaunui concerns. He claimed support for this stance from the Department of Conservation and, later, from the regional council.

On 21 January 1993, ECNZ wrote to the regional council regretting that closure of the Whanganui intake was not an option and saying that closing it would create major operational difficulties, especially since 'Any freshes occurring in the Whanganui headwaters would be lost to ECNZ for electricity generation purposes'.¹⁸ These were the freshes that the river needed, in Mr Taiaroa's opinion. They provided the variations in the river that would give 'some semblance for Maori of its old character'.¹⁹ However, he considered that:

16. Document 107, p 10

17. Document 88, pp 53–56; doc 88(c), p 327

18. ECNZ to Manawatu–Wanganui Regional Council, 21 January 1993 (doc 88(c), pp 332–334)

19. Document 88, para 203

No attempt was made to discuss or overcome these problems with us – the ECNZ decision closed the matter off, and no further support was forthcoming from other members of the group for the Whanganui iwi position.²⁰

He became unwilling to participate further in the project.

Mr Taiaroa then referred to the conceptual inhibition that was equally important in his view:

The TPD Consultative Committee continues to send us reports of their meetings and have invited us to participate, but there is the need first to get the correct levels of authority in terms of the Whanganui River clarified first.²¹

He considered that Atihaunui relations with many of the district councils and others at a local level are good and that meetings are conducted with humour and courtesy but:

in the end when decisions are made about our tupuna taonga, Te Awa O Whanganui, it is not us who makes them, and our rangatiratanga is liable at any time to be overridden, and we again become submitters to others about Te Awa and have to justify ourselves.²²

10.4 REGIONAL POLICY STATEMENTS AND PLANS

A further indication of how Atihaunui traditional authority is subsumed is found in the making of regional policy statements and plans.

Regional policy statements provide an overview of a region's resource management issues and its proposals for the integrated management of the region's natural and physical resources (s 59). Regional plans are written to assist a regional council to carry out its functions (s 63).

Content and purposes

Regional policy statements must provide for such of the matters in part 1 of the second schedule to the Act as are applicable, including matters significant to iwi (s 62(1), (2)). The statements and plans may provide for the taking and diverting of water and may control the quality, level, and flow of water in a river. They may also provide for cultural heritage sites and wahi tapu (clauses 1 and 4 of the second schedule).

The Manawatu–Wanganui Regional Council covers an extensive area from south of Levin and Eketahuna to Hawke's Bay, Taranaki, Waikato, and beyond Taumarunui to Waitomo.²³ All or parts of the Stratford, Ruapehu, Wanganui, Rangitikei, Manawatu, Horowhenua, and Tararua District Councils are included, and each has its own responsibilities under the Resource Management Act.

20. *Ibid*, para 204

21. *Ibid*, para 206

22. *Ibid*, para 207

23. Proposed regional policy statement for Manawatu–Wanganui Regional Council (doc A79), map 1, p 9

Process During the preparation of a proposed policy statement or plan, the council must consult with affected tangata whenua through iwi authorities and tribal runanga (part 1 of the first schedule) and have regard to any relevant planning document recognised by an iwi authority (s 61(2)).²⁴

The proposed regional policy statement or plan must then be publicly notified. Any person may make submissions, a summary of the submissions must be publicly notified, a hearing is to be held, the council's decision is to be notified, and the matter may be taken to the Environment Court.²⁵

At the time of our sittings, the regional council had released its proposed policy statement, submissions had been received, and hearings were under way.

**Atihaunui
reservations**

Mr Taiaroa was a member of the regional council until October 1993, was for some years the deputy-mayor of Taumarunui, and for a time chaired Te Roopu Awhina, the consultative body representing iwi in the regional council's area. He was involved in planning processes.

Mr Taiaroa formed the opinion that the regional council, the district councils, and the Planning Tribunal are insufficiently informed in Maori knowledge and law to manage the river (or presumably to understand and give effect to Atihaunui cultural preference).²⁶ Discussions between the regional council and Te Roopu Awhina had resulted in some provisions in the proposed regional policy statement that issued in September 1993, he acknowledged, and the discussions provided an opportunity to educate the regional council.

To avoid compromising their position, however, Mr Taiaroa felt once more that Atihaunui needed to pull back from processes when their proper status was not recognised and where the governing Act accorded no priority to Treaty and Maori concerns. He submitted that:

It was my view, however, that Maori were not accorded any or significant authority in relation to decisions to be made, and I became concerned that the range of activities under the Resource Management Act which the Regional Council was undertaking were likely to prejudice the position of iwi, because the more that was done to establish new laws and plans which do not accord iwi a proper place, the less likely it is that the damage to our position can be repaired.

I therefore attended a meeting of the Manawatu Wanganui Regional Council on 20 July 1993 and advised at the time that the iwi had made application to the Waitangi Tribunal for an urgent hearing of their claims because the Crown had stopped negotiating, and there seemed to be a multiplicity of activity in relation to the river, that would prejudice the iwi. The iwi had no confidence that their interests would be protected and their rangatiratanga and Treaty rights would be properly recognised. I asked them to delay action so that a solution could be found and the Tribunal could make its recommendations.

24. Both regional policy statements and plans are to be prepared and changed in accordance, among other matters, with part 11 of the Resource Management Act 1991 (ss 61, 66).

25. See part 1 of the first schedule to the Resource Management Act 1991

26. Document B8, paras 140, 141, 150

However, the Council approved its proposed Regional Policy Statement at its meeting on 17 August 1993, and submissions were called for. The steam roller was moving.²⁷

The 'steam roller' is the process earlier described for public submissions and hearings. In this process, Mr Taiaroa submitted, Maori submissions rank with those of other members of the public.

The trust board notified its objections to the proposed regional policy statement in only general terms until the Atihaunui status had been considered and resolved with the Crown, and the Crown had given proper recognition to Atihaunui Treaty rights.²⁸

Dr Cowie for the regional council advised that the council lacked jurisdiction to accede to the trust board's request for deferment. The council had notified its proposal and began hearing submissions on 20 July 1994. He also referred to the trust board's subsequent notice that it opposed submissions by Federated Farmers but without identifying its particular concerns. He expressed the council's disappointment that the trust board had not used the submission and hearing process to voice its concerns.²⁹

Council could not defer inquiry

In illustration of the Act's deficiencies, Mr Taiaroa referred to some particular submissions. In one, it is argued that the Treaty of Waitangi is to be 'taken into account', which effectively means, the submission contends, that it must be balanced with other matters with which it may conflict. The submission continues that partnership requires compromising differences to reach consensus. To 'take into account' does not mean to give effect to, it was noted.

Maori rights are seen to be compromised

In Mr Taiaroa's view, if this submission is correct, it shows how Maori must compromise their Treaty rights if they enter into the planning process and how adjudicators are required to give the Treaty less than its proper force and effect. He contended that the status of the Treaty, like the status of Atihaunui, must be recognised and secured before all else.

Dr Cowie referred to an inference in Mr Taiaroa's submissions that the council should delegate control of the Whanganui River to the Whanganui River Maori Trust Board. He said that there were practical, technical, and legal difficulties in this, and he pointed to the high level of expertise required in modern land and water management.

Council's reply – ownership and control compared

He then asserted that the issue of resource ownership and rangatiratanga needed to be separated from that of resource management. He pointed to gravel extractions to show the distinction between ownership and control. A resource management consent to abstract gravel does not amount to a licence to do so, he said. Permission from the resource owner is still required.

27. Ibid, paras 155-157

28. Ibid, para 160

29. Document 127, para 48

We thought that put matters simply and presented the case for Atihaunui ownership of the river to be recognised in law. It stated the relationship between resource management and private ownership – that a use of property may not be allowed if it offends sound environmental management but the use of a property is also not allowed if the owner of the property does not agree. That seems a sound principle and points to the essential question – Who owns the river?

However, we understood Dr Cowie to contend further that ‘iwi advocacy and guardianship’ can most efficiently and reasonably be achieved through the Act’s consultation, submission, and hearing processes.³⁰ That is another matter and one that is not so clear, for it compromises Atihaunui river ownership, if ownership is what they are entitled to.

Is balancing
required by the
Treaty or by the
Resource
Management Act?

Mr Taiaroa referred to part 4 of the proposed regional policy statement which includes a Maori view of resource management and covers the principles of the Treaty of Waitangi. He welcomed the reference to the guarantee to iwi and hapu of full chieftainship or authority over their land, resources, and taonga but noted that, according to the document, this is to be balanced against ‘the Crown’s right to make laws and govern, and by extension, the devolved responsibilities of Regional Councils’.³¹

Dr Cowie disputed the submission that Atihaunui lacks any effective recognised authority in relation to the river. He thought it clear from the objectives and policies in the proposed policy statement that the rangatiratanga of iwi and their ability to manage their taonga in accordance with the Act are fully recognised by the council.³²

However, this does not reconcile with his conclusions. It also conflicts with the council’s interpretation of Treaty principles in part 4 of its proposed policy statement. These express the view that the rights conferred on Maori by article 2 of the Treaty are to be balanced with the right to govern conferred on the Crown by article 1.

That puts the Treaty out of context and does not reflect what the Crown and Maori actually agreed. As we see it, the Crown assumed the governance on the basis of its promise that Maori authority or rangatiratanga over their possessions would be guaranteed. It is not that Maori rangatiratanga was to be qualified by a balancing of interests but, rather, that the assumption of sovereign rights was qualified by a promise to protect and guarantee the full authority, or rangatiratanga of Maori, over all that they possessed, for as long as they wished to retain the same in their possession. Governance was conditional, but the prior rights of Maori were expressed as protected absolutely.

It may very well be that the Resource Management Act 1991 requires a balancing, and as a result, the council itself may be constrained. The balancing act is a

30. Document 07, para 69

31. Document 08, para 169

32. Document 07, para 76

statutory requirement, however, and should be attributed not to the Treaty but to its source – the statute.³³

We intend no other criticism of the regional council's proposed statement. A genuine concern to provide for Maori interests is self-evident. The conflict is between the Treaty and the Act and arises from the Crown's failure to acknowledge and protect the Maori ownership of the Whanganui River, or at least to give to Maori rights of private property ownership – the same rights and protection as are given to Europeans. There is nothing the regional council can do about that, however. It is a matter between Maori and the Crown.

We have examined the objectives in this part of the proposed policy statement and consider that none contains an assurance that effect will be given to the Treaty rights of Atihaunui in relation to the river. With the exception noted, however, this derives not from an omission in the proposed policy statement but from the terms of the legislation.

Having regard to the legislation, Mr Taiaroa and Atihaunui are justified in their misgivings about subscribing to a process wherein their Treaty rights are compromised. That is not to say, however, that they should not be involved. It is for them to judge whether, within the limitations of the system, there are still benefits to be gained and whether submissions can be prefaced as being without prejudice to their claim to rights of private ownership and ultimate control.

Section 30 of the Resource Management Act 1991 confers extensive powers on regional councils, among other matters, to control water use and diversion and the flow of water in rivers. Chapter 3 of part 5 of the proposed regional policy statement contains policies for managing the region's water resources. Among the significant issues identified is the contamination of water in the Whanganui River near Wanganui by agricultural, human, and industrial effluent. It adverts to the adverse effects of extreme water flows and notes that abstraction for hydroelectric power generation can exacerbate the effects of periods of low flow. Competing demands on water resources can lead to conflicts between different uses.

Chapter 4 of part 5 deals more particularly with lakes, rivers, and wetlands, and includes activities that affect natural water flows in rivers and streams. On this topic, it says:

Dams or major diversions of rivers or streams can have major effects on instream values. These include fisheries and recreational uses, and in some cases upon Maori spiritual and cultural values. Dams create lakes behind them and often dewater

33. The same gloss on rangatiratanga appears in other words in paragraph 4.8 of the proposed policy statement. Paragraph 4.8 sets out certain objectives and its policies with respect to them. These state "To recognise the tino rangatiratanga of nga iwi of the Manawatu-Wanganui region, as affected by the council's exercise of kawanatanga, in the development of their own resources". The paragraph also sets out methods for implementing policies. It is stated that the regional council shall actively protect the resource management interests of nga iwi, amongst other things, by 'considering' their resource management interests in resource consent decisions. This would appear to be consonant with the Act, but it is not consonant with the Treaty, which guaranteed to Maori continued control or rangatiratanga of their own resources.

sections of river below the dam. Their effects on fisheries and wildlife values are well documented. They can prevent the migration of various species within the river, destroy the habitat of those species that inhabit fast-moving waters and interfere with various types of recreation.

In this Region these issues are largely associated with the Tongariro Power Development. Resource consents will be required for all the Tongariro Power Development by 1 October 2001. The Moawhangao River is completely dammed with only a small residual flow below the dam. Its waters are diverted north to the Tongariro River. Twenty-two small tributaries of the Whangaehu River are diverted into the Wahianoa Aqueduct and then through to Lake Moawhango and the Tongariro River. Much of the low flows of five small tributaries in the headwaters of the Whanganui River and the Whanganui River itself are diverted northwards into Lake Otamangakau and from there into Lake Rotoaira and the Waikato power system. Much of the base flow of the Whakapapa River is diverted into the same system.

Following the Whanganui River minimum flows decision, at least three cubic metres per second must be passed down the Whakapapa always. Similarly, downstream flows at Te Maire on the Whanganui River must not fall below 29 cubic metres per second, except, where this would occur naturally.

Inter-catchment transfer of water within the Tongariro Power Development impinges strongly in some cases on Maori cultural and spiritual values. This is particularly so for the Whanganui River, which the Whanganui River Maori consider to be 'beheaded'.³⁴

One of the clauses in the proposed policy statement would commit councils to preserving the natural character of rivers. This is except for the case where modification is reasonably required to mitigate the effects of natural hazards, provide for the social and economic wellbeing of communities, or provide for essential public utilities and services, provided that any adverse effects are adequately avoided, remedied, or mitigated.³⁵

In deciding whether to grant a new resource consent for the Tongariro power development diversion, the regional council will be guided by the above policies, or those that might replace them when the statement becomes operative. It will also have regard to section 8 of the Resource Management Act, which requires it to take into account (but not necessarily apply) the principles of the Treaty (assuming this section applies, as was raised in the earlier discussion of section 199).

Before leaving this topic, we would not wish it to be thought that we consider the regional council to have acted otherwise than in good faith. It has been faced with the impossible task of reconciling the statutory mandate conferred on it by the Resource Management Act with the meaningful recognition and implementation of the Treaty rights of Whanganui Maori. The Crown has failed to provide that the statutory powers must be exercised in a manner consistent with the Treaty rights of Atihaunui. Until such time as that is done, regional councils and other authorities

34. Proposed regional policy statement, pp 92-93

35. *Ibid*, p 94

exercising powers and functions under the Act will lack the requisite authority and obligation actively and effectively to recognise and implement Maori Treaty rights in and over their rivers. As the Act stands at present, the Whanganui iwi, although consulted by the regional council, has no power of decision over its tupuna awa. In short, it is simply another 'submitter' before a series of decision-making bodies and courts, with no assurance that its Treaty rights will be implemented.

10.5 REGIONAL PLAN FOR THE BEDS OF LAKES AND RIVERS

The regional council's discussion document on a regional plan for the beds of lakes and rivers was placed in evidence.³⁶ We are unaware whether the council has proceeded with a proposed regional plan. Mr Taiaroa submitted that:

Again, this document deals with the Whanganui iwi tupuna taonga, the Whanganui River, in critical ways. It deals with matters relating to gravel extraction, river control schemes, boundaries, the regional plan, recognition and protection of areas of national importance, sedimentation, river bed degradation, recreational uses and works in the river to protect against erosion and the like. All matters intimately associated with the river and with the people of the river.

The document sets a framework for future decision-making about the river. Yet at the same time Whanganui iwi along with all other people are being asked to 'submit' their views on this. Nowhere in the initial discussion document is there a place for the Whanganui iwi to be involved in that process except as submitters.³⁷

As in the case of the proposed regional policy statement, the regional council, in deciding on the regional plan for the beds of lakes and rivers, is not required to do more than 'take into account' the Treaty interests of the Whanganui iwi. The iwi has no assurance that the regional council will act consistently with Treaty principles. It is under no statutory or other legal requirement to do so.

10.6 SEWAGE, PORT DEVELOPMENT, CHANNELLING, AND REGULATING

Matters relating to sewage, port development, and channelling that also fall within the ambit of the Resource Management Act 1991 were raised to show the diversity of Atihaunui concerns and how the planning process circumscribes their Treaty interests.

10.6.1 Sewage discharge

From the early development of Wanganui, sewage and stormwater were combined and discharged directly into the river without treatment. Taumarunui did the

36. Manawatu-Wanganui Regional Council, *Regional Plan for the Beds of Lakes and Rivers: Discussion Document*, Palmerston North, Manawatu-Wanganui Regional Council, March 1993 (doc A11)

37. Document 88, paras 176-177

same. Atihaunui, following the Maori cultural imperative for pure water and the discharge of animal wastes on land, have repeatedly objected.³⁸

In 1989, the catchment boards compelled the district to upgrade treatment. When the city council's water right lapsed in 1989, the board granted only a two-year right for further discharge and required the district council to establish a consultative waste water working party to deal with the problem.³⁹ The working party included representatives of the Whanganui River Maori Trust Board, the district council, and the Department of Conservation. It reported in October 1990.

Eventually, the district council adopted the working party's proposal, and the regional council granted consents for the project in 1992. The consents run for a 15-year period, ending in July 2007. The initial construction of interceptors was to remove about 95 percent of non-sewage discharges into the river.

When completed, the scheme will greatly improve water quality in the lower river. It will, belatedly, minimise a proven health risk and a culturally offensive practice.

In Taumarunui, the then catchment board granted short-term rights to the Ruapehu District Council on the condition that it took steps to upgrade its sewage treatment. Mr Taiaroa advised us that Taumarunui now has a system by which sewage is filtered through the soil and cleansed before the traces enter the river.⁴⁰

It seemed to us that the sewage cases highlight the advantages of the planning process in compelling necessary changes.

10.6.2 Wanganui port development

The Wanganui port development is an ongoing project, which was first mooted in 1990. The proposal is for a channel cut through the south spit, for some 2½ kilometres of the present river mouth, to divert the river away from the port, create a blue-water port, and recover some 40 hectares of land for port operations.⁴¹ In Mr Taiaroa's view, the circumstances illustrate the conundrum for Atihaunui. With all goodwill, the regional council involved the trust, but by agreeing to take part, the trust found itself in a position not of making decisions, or sharing in decision making, but of making submissions to someone else, who would eventually decide.⁴²

The council was concerned to address Maori and environmental interests from an early stage. The Whanganui River Maori Trust Board was included in the project team, which was constituted in 1991. In mid-1993, when the first stage of the team's work was drawing to a close, a general meeting with Maori was arranged. The feeling of the meeting was that Maori should explore the implications of the scheme and a paper should be filed. This was duly done.

38. Document B8, para 193

39. Document D7, pp 3-4

40. Document B8(c), pp 285-323

41. *Ibid*, pp 339-345

42. Document B8, pp 56-57



Figure 20: Looking up the river from the city, circa 1880s.
Photograph courtesy Alexander Turnbull Library (W J Harding collection, G213¼).

The recollection of the council's planning director, who was at the meeting, was that those present became concerned with Treaty implications and the ownership of the riverbed.

Mr Taiaroa advised the Tribunal that the team made no response to the Maori paper and there was no further discussion. On inquiry, it was learnt that the Maori position paper had simply been attached to a summary report submitted by the team to the district council.

In evidence to us, the planning director submitted that the regional council had made no decisions on the port development and it was unlikely to proceed in the near future. Before it did so, there would need to be the full participation of the tangata whenua, as required by the Resource Management Act 1991.

In Mr Taiaroa's view, this was not shared decision making or discussion but the collation of a Maori position as a prelude to Resource Management Act procedures where, as the planning director had said, 'Maori people would be fully involved in that ... process along with a large number of other interested and affected parties'.⁴³

We take Mr Taiaroa's point, but we would still place value on maintaining consultations and participation in investigatory teams, so that, at the least, different points of view may be understood.

43. Document D10, para 9

The case also highlights, however, that discussions and understandings may not be significantly advanced so long as Maori ownership of the river is unrecognised and the usual incidents of ownership are not seen to apply.

10.6.3 Coastal permit to dredge a channel in the Whanganui riverbed

This case illustrates how Maori usages may be accommodated by the planning process but that this may also obscure the failure to accommodate the larger Treaty interest, the guarantee of rangatiratanga, and a full, exclusive, and undisturbed possession.

In 1993, the Minister of Conservation granted a coastal permit to dredge a channel 75 metres wide by 380 metres long in the Whanganui riverbed, pursuant to section 119 of the Resource Management Act 1991.⁴⁴

The applicant for consent was Ocean Terminals Limited, which manages the Wanganui port. To enable it to dredge the channel, it was necessary to divert the Whanganui River by breaching the basin wall (the natural spit at the entrance to the river) over a length of 100 metres. The regional council appointed a hearings committee. Mr Taiaroa stated that, in order to participate in this process, the Whanganui River Maori Trust Board had to object to the application. It appears that the company had not previously consulted it.

At the hearing, Mr Taiaroa, on behalf of the trust board, stated that the board, for the hapu and iwi of the river, should be considering and making the decision on the applications, not the regional council. He further stated that the board strongly objected to the granting of the consents unless conditions were imposed to ensure that sacred sites, traditional fishing resources, shellfish-gathering areas, and water quality were protected and maintained, and that the tangata whenua be a part of the monitoring process.⁴⁵

The Putiki Marae Committee also objected, on the grounds that the applicants never properly consulted them, the area is used for traditional food gathering, and it is culturally important to them. They would entertain consents on condition that further consultation was carried out, effects on mahinga kai were monitored, and the tangata whenua were involved in protecting the traditional fishing resource.

While the coastal permit granted by the Minister contains a number of conditions, mainly of a technical nature, none of those sought by either the Whanganui River Maori Trust Board or the Putiki Marae Committee is included.

Mr Taiaroa cited this decision as another instance of the real decision being taken out of the hands of the iwi.

We appreciate the weight of his final observation that 'assurances recorded in minutes of committee meetings that to protect iwi interest, the Resource Management Act processes will be used, only serves to increase our concern'.⁴⁶

44. Document 88(c), pp 367-369

45. *Ibid*, p 362

46. Document 88, para 218

10.6.4 River channel project

The Whanganui River Users Group is an incorporated body established in 1993, which liaises with others interested in the river. It supports the formal recognition of the Whanganui iwi as guardians of the river and as having a primary role in all matters affecting it.⁴⁷

The group promotes the river channel project. This project is to clear snags from rapids, increase the navigability of the river, and enhance tourism prospects. It is hoped to restore the river channels to the depths achieved during the busy days of the riverboat era.

Counsel for the group stated that the Whanganui River Maori Trust Board has at all times made it clear that it does not seek to restrict public access but wishes to be a principal party in developing and administering the necessary regulations for the river's use and maintenance. In turn, the group has made it clear that it would not proceed with the project if Atihaunui were opposed.

The trust board chairman expressed misgivings that, when planning consent was sought for clearance work, the board would once again be 'submitters' and the outcome would be in the hands of a regional council or tribunal, neither of whom needs give effect to the Treaty.

However, the Whanganui River Users Group said that it would not seek a resource consent unless the board agreed. Instead, an application was drafted in terms agreed to by them both, and at the time of our hearing was the subject of ongoing discussions.

The group appeared before us to urge that we recommend an arrangement to elevate the iwi organisation from supplicant or consultative party to equal decision-maker.

Mr Taiaroa contended that the matter raises questions of standards and authority. The standards that the iwi might wish to apply are not necessarily those of the regional council or the Planning Tribunal, and neither can the trust agree to act merely as an agent under some other authority. It is its independent authority in respect of the river that is in issue.

10.6.5 River control bylaws

Bylaws to control commercial boating were formerly administered by the three affected district councils of Wanganui, Ruapehu, and Stratford, which in turn had authorised their administration by the Department of Conservation and the Whanganui River Maori Trust Board.⁴⁸ These bylaws were the Whanganui River Control By-Laws 1991.

The Whanganui River Maori Trust Board and the Whanganui River Users Group were agreed that bylaws were required and that the control of navigation should not be under a voluntary regime.

47. Document 112.

48. Document C20; see the agreement dated 10 July 1992 between the Whanganui River Maori Trust Board and the Department of Conservation (doc C20, pp 91-94).

Under the Resource Management Act 1991, the local bylaws lapsed and responsibilities passed to the Crown. The Water Recreation Regulations 1979 now apply, as they do to any water body in New Zealand not controlled by bylaws or by a rule in a regional plan. The Ministry of Transport's Maritime Division administered these regulations in 1994, but this is now one of the functions of the Marine Safety Authority. The regulations cover such matters as boat speeds and swimming from jetties.

Mr Taiaroa submitted that the formulation and administration of bylaws for the river should be shared between Atihaunui and the Crown.

10.7 THE APPLICATION OF THE TREATY

The Resource Management Act 1991 has contemporary importance to Atihaunui. In 2001 or before, they will face a further resource application for headwater abstraction and a review of minimum flows and levels. At present, proceedings are current or pending for a regional policy statement, a regional plan for the beds of lakes and rivers, a regional coastal plan, and a water conservation order. There are proposals for port development and channelling. Before these are discussed, they say, the voice of the Treaty should be properly heard and their river interests should be properly recognised.

Crown arguments

Crown counsel saw the claim as pondering the balance between the Crown's governance and Maori rangatiratanga. The Crown must control resources in the interests of conservation and the wider public, they submitted, and this must override the claimed Maori interests, save to the extent that they can be provided for. The Resource Management Act was therefore a legitimate exercise of the Crown's article 1 powers, and it was appropriate to provide for Treaty responsibilities as in section 8. The Act was legislated only after several years' consultation.

Claimant arguments

Ms Elias for the claimants submitted that the Treaty guaranteed to Maori full authority over their taonga – the Whanganui River in this instance – and that this required that Maori authority and management should prevail, except in extreme cases of national interest.

Ms Elias further submitted that:

The Crown submissions are based on the assumption that control of natural resources rests with the Crown and was ceded to the Crown as a necessary incident of kawanatanga. This is the submission advanced in *Mohaka* and rejected by the Tribunal because its corollary is that rangatiratanga from the signing of the treaty excluded any concept of authority, control, responsibility or stewardship in respect of natural resources which are taonga. Instead, Maori have a right to be consulted and considered, [which is] the solution of the Resource Management Act. The submission of the Crown in effect is that natural resources fall outside the Article 11 protection of tino rangatiratanga and are solely within the province of Article 1. The Crown seeks a finding that the Treaty deprived Maori of authority over natural

resources. Such an argument is inconsistent with the Treaty language and contemporary understanding of it.⁴⁹

We find this a persuasive submission.

Counsel for the Manawatu–Wanganui Regional Council noted that section 8 obliges the council to take the Treaty of Waitangi into account. He accepted that Atihaunui have no absolute assurance that priority will be given to their interests but submitted that the regional council is obliged to give them considerable weight. Regional policy statements and plans require the council to consult with the affected tangata whenua. These and the planning process enabled the claimants to have ‘an effective voice’, he submitted, and a role in influencing management decisions.

Regional council's arguments

He thought it unlikely that the regional council would transfer its resource management responsibilities for the river to iwi. He submitted that in terms of section 33, the regional council better represents ‘the appropriate community of interest’ for the Whanganui catchment area, is in a better position to exercise integrated management over the whole catchment area, and has better technical capability and expertise for resource management functions.⁵⁰ He submitted that transfer may lead to conflicts of interest between the iwi’s ownership or advocacy role and resource management functions.

He referred to an explanation of objective 2 in the proposed regional policy statement, which considers that there are few situations where the council could transfer functions to iwi. It was said that this would be appropriate only where an iwi authority clearly owns a particular resource and has sufficient wherewithall to manage it in accordance with the Act.

We consider that the essential point, as was earlier stated, is that the Crown assumed the governance of New Zealand on the basis of a promise that Maori authority or rangatiratanga over their possessions would be guaranteed. It thus subscribed to a tenet of English law as old as the Magna Carta that private property interests are respected, and to a principle of colonial common law that dates at least from the 1600s that, upon British annexation of other lands, the same applies to the properties of the indigenous people.

Tribunal's opinion

The principles are the same in the Treaty of Waitangi, but as it was expressed, Maori were guaranteed the ‘rangatiratanga’ over that which they possessed. The meaning of that term was discussed in section 9.2. Applied to this claim, it means that the Whanganui River should be managed by the iwi, as claimant counsel contended.

Maori rangatiratanga is not therefore to be qualified by a balancing of interests. It is not conditional but was expressed to be protected, absolutely. It is rather that governance is qualified by the promise to protect and guarantee rangatiratanga for as long as Maori wish to retain it.

49. Document 020, para 60

50. Document 06, para 40

We do not therefore accept that the Crown's right or duty to control and manage resources overrides Atihaunui ownership of, and rangatiratanga over, the river. The effect of that is to negate, largely if not wholly, that guaranteed to Atihaunui.

This finding follows previous Tribunal opinion.⁵¹ Though it has been considered that the guarantee may be overridden in exceptional circumstances in the national interest, the national interest in conservation is not a reason for negating Maori rights of property. In similar vein, the national interest in conservation does not negate the property interests of other citizens, even without the benefit of protective Treaty covenants. Resource management may have the effect of constraining private ownership but cannot be used to deny its existence.

We disagree with Crown submissions that section 8 of the Resource Management Act provides for recognition and implementation of the Crown's Treaty duties. It does not require those with responsibilities under the Act to give effect to Treaty principles but only to take them into account. This is less than an obligation to apply them. When ranked with the competing interests of others, this means that guaranteed Treaty rights may be diminished in the balancing exercise that the Act requires.

A comparison with section 4 of the Conservation Act 1987 may be useful. This requires the Department of Conservation to give effect to the principles of the Treaty in managing the Crown's conservation responsibilities. There may be good reason for the distinction, but it has not been made apparent to us. Possibly, something may be made of the fact that the department manages a given estate while the Resource Management Act defines the rights of citizens. The Tribunal has commented on this difference in earlier reports.⁵²

In this case, functions under the Resource Management Act are generally exercised not by the Crown but by bodies that the Crown has established. The point has been well made, however, in earlier Tribunal reports, from 1983, that the

51. Thus, see Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, Wellington, Brooker and Friend Ltd, 1993, pp 33-34:

In the case of a highly valued, rare and irreplaceable taonga of great spiritual and physical importance, such as the taonga of the claimants [thermal hot pools and springs], the Crown is under an obligation to ensure its protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected.

Also see Waitangi Tribunal, *Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, sec 15.2.1(3):

Maori insistence on their right to retain tino rangatiratanga over their land resulted in the inclusion of article 2 in the Treaty, and was a measure of the depth and intensity of their relationship to their land and other natural resources. It follows that if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Maori in article 2 it should be only in exceptional circumstances and as a last resort in the national interest.

52. See Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 7.7.9(c):

It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed.



Figure 21: A pa tuna at Koiro was exposed in November 1998. It was last used in 1911.
Photograph courtesy Whanganui River Maori Trust Board.

Crown's duty of active protection of Maori property interests is not avoided by legislative or other delegation. If the Crown chooses to so delegate, it must do so in terms that ensure that its Treaty duty of protection is fulfilled.⁵³

The principle of partnership was referred to, but that too cannot be used to replace or water down the Treaty's clear terms. A partnership of Crown and Atihaunui may be necessary to manage the river's resources in today's more complex world, but that is a separate matter. It is one that the trust board and the Government may care to negotiate.

We earlier commented that resource management laws may have the effect of constraining private ownership but cannot be used to deny its existence. The converse is also true. Contrary to the tenor of some claimants' submissions, we consider that the Resource Management Act is not a vehicle for asserting property rights that have not been established by title or overt recognition. Though the Act is not entirely neutral on ownership – amongst other things, section 354 maintains the Crown's statutory ownership of the riverbed – the scheme of the Act is directed not to ownership but to resource management.

That, however, points to the fundamental flaw in the application of the Resource Management Act to the Whanganui River, as Mr Taiaroa was continually at pains to say, that nothing should be done about the river except that ownership is settled first. That has been at the root of Atihaunui grievance for about 150 years and is the heart, the core, and the pith of this claim.

We find that:

- The Crown failed to ascertain the Treaty rights of the claimant iwi, Te Atihaunui-a-Paparangi, in the Whanganui River, including its ownership of the river, before enacting the Resource Management Act 1991.
- The Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision that ensures that all persons as identified in section 2 of the Act exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are to do so in a way that is consistent with, and gives effect to, the Treaty of Waitangi.

The Resource Management Act authorises:

- the control by regional councils of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body;
 - the making of water conservation orders by the Governor-General by Order in Council on the recommendation of the Minister for the Environment; and
 - the making of regional policy statements and regional plans for the beds of lakes and rivers by regional councils.
- All such powers and others may be exercised in respect of the Whanganui River without the consent of Atihaunui and without any obligation to ensure

53. See, for example, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, p 34

that such powers are exercised in a way that is consistent with, and gives effect to, the Treaty rights of the claimants.

- As a consequence of the foregoing acts and omissions of the Crown and provisions of the Resource Management Act 1991, the Crown has failed to protect the Treaty rights of Atihaunui to exercise their rangatiratanga over their river for so long as they wish; failed to facilitate the Treaty right of Atihaunui to manage and control and exercise autonomy over their river; and failed to act reasonably towards their Treaty partner, in accordance with Treaty principles.

The Tribunal further finds that, as a consequence of the foregoing acts and omissions of the Crown and legislative provisions referred to, the claimant iwi Atihaunui has been, and is likely to be, seriously prejudiced by such Treaty breaches.

CHAPTER 11

CONCLUDING COMMENTS AND RECOMMENDATIONS

As our findings have been itemised in previous chapters, our concluding remarks, as follows, will focus on the broad points of principle that need to be addressed. We emphasise first the legal basis of Atihaunui ownership.

11.1 THE LEGAL BASIS OF ATIHAUNUI OWNERSHIP

The Atihaunui right of ownership is based not on the Treaty of Waitangi alone but also derived from recognised law. This adds force to the Treaty's principles.

Contrary to some popular opinions, New Zealand was not colonised on the basis that rivers were publicly owned. From the beginning of colonial rule, English law was applied, and by that law, private ownership was the norm. By that law too, the territorial possessions of the indigenous people were recognised as giving rise to lawful property rights. The English Laws Act 1858 affirmed that English law had applied in New Zealand from 14 January 1840.

Under the law that the settlers brought with them from England, it was presumed that, from the tidal reaches to the source, riverbeds were privately owned by the riparian owners to the centre line. Only that part from the sea to the end of the tidal reach was said to be owned by the Crown. The ownership as so settled determined rights of access and use. The private property right was subject to such rights of public navigation as existed by immemorial use or dedication.

Following the establishment of responsible government, successive New Zealand parliaments enacted a number of statutes affecting rivers. These did not vest all rivers in the Crown or even seek to secure public access. They focused on authorising particular commercial uses of specific rivers (such as log floating or gold mining) or particular works affecting rivers generally (such as river control or sewage disposal). None of these departed from the common law norm of private ownership, but they placed a gloss on the owners' rights of control.

It may be that settlers expected the Crown to retain rivers for public benefit, the more so since, unlike Maori, settler land rights all emanated from a Crown grant of land. In fact, it appears that public river rights were not reserved in the Crown grants. The reservations in them were mainly in respect of minerals. Public rights, therefore, depended on particular statutory provisions. As we have seen, particular

provisions were made for commercial or local body purposes from time to time, but it was not until 1903 that the Government enacted a general provision affecting river ownership.

The 1903 provision vested the bed of all navigable rivers in the Crown. All non-navigable rivers remained privately owned by the riparian owners, as they do to this day, unless a particular statute applies.

The legal recognition of the prior property interests of the indigenous peoples of colonies, or the 'native title' as it was called, was also a long-standing principle of European and English law.¹ This principle was recognised by the Supreme Court in New Zealand as early as 1847.²

Later, the courts would determine, as a matter of law, that the prior ownership of the Maori people extended to rivers. This was first determined with regard to the Waikato River, which was held to have been lawfully owned by Maori at 1840. However, it was also held that the river was taken from them with the Waikato land confiscation by proclamation in 1864. Similarly, in litigation from 1938 to 1962, the bed of the Whanganui River was judicially found to have been owned by the Whanganui tribes at 1840. That finding was made by no less than four courts: the Native Land Court, the Native Appellate Court, the Supreme Court, and the Court of Appeal. It was also the opinion of a royal commission of inquiry under a Supreme Court judge.

Further, it was found that the 1903 legislation vesting the bed of navigable rivers in the Crown had taken the ownership from Maori. The Court of Appeal, following the advice of the Maori Appellate Court, was also of the view that ownership of various sections of the river passed with the alienation of riparian lands, but as we have described, that is unsustainable in Maori customary terms.

By the legislation of 1903, the Maori interest was expropriated without consultation or compensation. The matter simply slipped through the House, without debate, in the form of the Coal-mines Act Amendment Act. In 24 years of litigation, starting in 1938, Atihaunui opposed the assumption of ownership by the Crown and claimed that the river was theirs.

In the courts, the matter was decided in terms of the bed of the river because of the way the case was brought. The proceedings began in the Native Land Court, which had jurisdiction only in respect of land, so only an order as to land could have been sought. The Court of Appeal has since opined that a different conclusion might have been reached had the claim been made to the river as a whole.³ At English law, it is generally only the bed of a river that is owned, and rivers are divided according to the boundaries of adjoining lands, centre lines, and beds. However, it is also a principle of English law that native title is to be rendered conceptually in its own terms, and not in terms of systems that have grown up in England.

1. Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, Oxford University Press, 1991, pp 31–2, 83–96, 171, 376

2. *R v Symonds* (1847) NZPCC 387

3. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 26–27

In Maori terms, the Whanganui River is a water resource, a single and indivisible entity comprised of water, banks, and bed. There is nothing unexpected in that. It is obvious that a river exists as a water regime and not as a dry bed. The conceptual understanding of the river as a *tupuna* or ancestor emphasises the Maori thought that the river exists as a single and undivided entity or essence. Rendering the native title in its own terms, then, what Atihaunui owned was a river, not a bed, and a river entire, not dissected into parts.

As mentioned earlier in this report, it does not matter that Maori did not think in terms of ownership in the same way as Europeans. What they possessed is equated with ownership for the purposes of English or New Zealand law. Similarly, it does not matter that they thought in terms of territory rather than property. What they possessed, even rivers, is deemed to be a property interest for the purposes of law, and it has been treated that way by the courts.

Ordinarily, water in free-flowing form cannot be owned or possessed, but that is not the point. The issue is not about the ownership of water as such but about the right to access the water while it is in the river. We will refer to that again in the context of the Treaty, though the principles there referred to appear to us to have equal application in law.

11.2 THE TREATY BASIS

It may therefore be seen that, in affirming Maori property rights, the Treaty of Waitangi added no more to established law than that the full, exclusive, and undisturbed possession of traditional properties was guaranteed Maori for so long as they wished to retain them. The English text of the Treaty provides:

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

That rivers come within 'other properties' follows from the court decisions already referred to. The courts accepted that the bed of the Whanganui River was the lawful property of Atihaunui at the time of annexation. The Maori text uses the more compendious term 'taonga', and so guarantees to Maori all those things that they treasured. The river they treasured too, but whichever text is used, the result is the same.

Likewise, in terms of both law and the Treaty, Maori are entitled to more than the bed. The Treaty guaranteed what Maori possessed, and that must be measured in terms of what they possessed in fact, according to their own constructs. It was not put to Maori that what they might lawfully possess was what they might own in terms of English law. In any event, Maori did not know of English law at the time, so the application of English law could not have even been an implied term.

What Atihaunui possessed in fact was a river, not a dry bed. Likewise, what they conceptually possessed was a water resource. It was the water that gave the river its purpose, life, and form. It also supported 'their fisheries', which the Treaty specifically mentions and guarantees as well. Likewise, what they possessed in terms of their own traditions and beliefs was a river that was seen as an ancestral, living being. What made the river a resource, a fishery, and a living being was the water. It was none of these things without water. As a living being, it was also a single and indivisible entity, though local usages applied at particular parts.

As mentioned, water in free-flowing form cannot be owned or possessed in terms of English law, but the issue is not about the ownership of water. It is about the right to access water while it is in the river. The Treaty guaranteed to Atihaunui the 'full exclusive and undisturbed possession of their . . . properties'. As earlier seen, that includes the river and that must include as well the property right of access to the river water.

Though the claimants seek to constrain the use of the water in order to protect the river's health, they did not pursue compensation for the use of the water by others, as with the abstraction of water by ECNZ. None the less, their exclusive right of access to the river and the water in it is a valuable, tradable commodity. In our view, their just rights and property in the river must include the right to license others to use the river water. The right to develop and exploit a water resource is conceptually no different from a right to develop and exploit the resources on dry land.

If one owns a resource, it is only natural to assume that one can profit from that ownership. That is the way with property. In illustration, following a natural bent, Mangonui Maori charged a 'watering fee' to early visiting boats.⁴ The expectation can only be more if the recipient expects to profit from the water's use.

Having said that, we repeat that the claimants did not seek to profit from water abstraction. Nor did they seek to maintain exclusive possession. That is their choice as we see it. Our concern is with their legal and Treaty rights.

Finally, as we think is now well known, in the Maori text of the Treaty rangatiratanga, or authority, was guaranteed. In this case, the point need not be laboured. The 'full exclusive and undisturbed' possession of properties connotes all rights of authority, management, and control.

11.3 THE TREATY BREACH

The several respects in which the Treaty has been breached have been set out at various parts of this report. Broadly, however, the finding of the Tribunal is that the acts of the Crown in removing from Atihaunui the possession and control of the Whanganui River and its tributaries, and its omission to protect the Atihaunui rangatiratanga in and over the river, were and are contrary to the principles of the

4. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, secs 2.6, 5.2, 6.3.5, 7.3.3

Treaty of Waitangi, and Atihaunui have been and continue to be prejudiced as a result.

Acts contrary to the principles of the Treaty of Waitangi include the Coal-mines Act Amendment Act 1903 in expropriating the riverbed. To the extent that the Resource Management Act 1991 vests authority or control in respect of the river in other than Atihaunui, without Atihaunui consent, that Act too is inconsistent with Treaty principles. The Act in fact vests control of rivers in regional authorities, with certain rights of hearing and appeal being given to the public, including Atihaunui. 'Management' is the word used for the powers exercised in relation to the Act, but on our analysis of the statute, the powers given to regional authorities in respect of rivers are more akin to ownership. However viewed, and no matter how often it is said that the Resource Management Act concerns management and not ownership, in reality the authority or rangatiratanga that was guaranteed to Atihaunui has been taken away. Moreover, the Act perpetuates the vesting of the Whanganui riverbed in the Crown.

As we have said, Atihaunui possessed and controlled the river. We have also found that possession and control was not taken from them in any way that was consistent with the Treaty of Waitangi. It follows that such use rights as are consistent with the Treaty are only those that Atihaunui have freely and willingly allowed.

11.4 THE PRINCIPLE INVOLVED

It is important to appreciate the principle involved. Far from it being the fact that New Zealand was settled on the basis that rivers were publicly owned, the country was settled on the basis of the Treaty of Waitangi and established principles of law. These provided that the pre-existing rights of Maori would be respected.

The principle is that the lawful interests of all people, Maori included and not just those from England, are respected under the Queen's law according to what those interests are in fact and the manner in which they were derived. The principle as applied to Maori is set out clearly in the Treaty of Waitangi, on which the modern State was founded. All persons who were here at that time and those who have since arrived must be taken to have known of it.

Accordingly, we set aside any suggestion that the Atihaunui entitlement confers a privilege based on race. It is neither a privilege nor racist that a people should be able to retain what they have possessed. Property rights go to the heart of any just legal system. It is not a privilege that the claimants should be able to retain their property, even though the public may use parts of that property for recreational purposes. It would not be a privilege even were it the law that other New Zealanders were liable to lose property simply because the public desired it. The origin of Atihaunui's title, unlike that of the general population, is not based on fealty to the Crown, for it predated the Crown. In any event, it was a condition precedent to

settlement in New Zealand that their properties were guaranteed to them by the Crown.

Far from being founded on race or privilege, the Maori right to retain the properties that they possess is founded on universally accepted principles, from the doctrine of native title, as recognised in law, to the Treaty of Waitangi, which contains the promises of the Crown, to the emerging principles of international human rights.

The issue is not only about law but also about order. Order requires that Maori must respect the law and the property rights of others. There can be no compromise of that, and offenders must bear the full punishment of the law. But by the same token, the property rights of Maori must be respected as well. They cannot be a ready prey for convenience or public desire.

11.5 THE ESSENTIAL FACTS

We review the essential facts as we have found them to be.

At 1840, the hapu of Atihaunui, collectively as to the whole and individually as to parts, possessed the Whanganui River. It maintained a practical control of that area and held in respect of it an authority or rangatiratanga. Hapu of other tribal groups had an interest in the river as well, but at the hearings, Atihaunui acknowledged the interests of these other groups and they in turn acknowledged the primacy of the Atihaunui possession.

What Atihaunui possessed was the river inclusive of the water and all those things that gave the river its essential life. Particular use rights applied throughout the river, but the Atihaunui people held the river as a whole.

The Treaty of Waitangi guaranteed to the Atihaunui people their possession of the river and their authority over it – or rangatiratanga to use the word in the Maori text. It was guaranteed to them for so long as they wished to retain the same. The guarantee was not limited to land; it extended to what was possessed.

The Atihaunui possession of, and authority over, the river was never ceded or taken in a manner that the Treaty contemplated – that is, by a free and willing disposal. It is clear from the historical record that Atihaunui were willing to have Europeans in their territory, and to let them use the river, provided that their traditional authority, as represented in their rangatira, was respected. In this, the Atihaunui position has been constant.

Since the Treaty signing, a large number of other people have come to live in the Whanganui River catchment area and use the river. The river is now widely used for a number of commercial and income-generating purposes, including the abstraction of water for power generation. It is now widely regarded by the public as both a local and a national treasure. There are strong public feelings that this river, and others, should be held in public ownership and control.

Through most of last century and all of this, Atihaunui have consistently resisted such views, maintaining for that purpose one of the longest running cases in New

Zealand legal history, and pursuing recognition of their ownership rights in subsequent litigation and negotiations.

Today, a number of uses, including especially the abstraction of water for power purposes, deleteriously impact on the spiritual and physical enjoyment of the river by the Atihaunui customary proprietors.

11.6 CONFLICT AND RESOLUTION

Clearly, there is room for conflict. For more than a century, the rights of Atihaunui have been ignored, and now others have expectations about access to the river and the water's use. It would be naive not to acknowledge the importance of rivers to all and the importance of water as essential to life. On the other hand, fundamental principles about property rights and the rights of indigenous people are involved. None the less, the potential for conflict should not outweigh the potential for solutions.

First, the problem may not be as large as it appears. The Whanganui River situation is special, not a prototype case for river claims. Elsewhere, large areas were acquired by the Crown and it would appear that, in many of those cases, river rights were acquired with them. It would be unduly pretentious to assume that, when those lands were sold, Maori expected that their 'full exclusive and undisturbed' possession of the associated rivers would be maintained. What makes this case unique is that the Whanganui River, from its source to the sea, was central to the lives and identity of the river people. Geography made it that way, and in no alienation can it be said or implied that the river people intended to alienate their river interest.

History evidences their view that the river was not sold. At all material times, Atihaunui insisted that the control of the river was still vested in them. There is no other tribal group that we know of that has gone to the same lengths to keep that position to the fore.

In brief, Atihaunui deserve exceptional consideration, and the unique should not be taken as the norm.

Secondly, Atihaunui in fact share the public's concern for access. This, too, is evident from their history, from their current submissions, and from their claim. Although this history has been described, it is helpful to be reminded of its import. From the time that lands were sold for the fledgling settlement of what is now the city of Wanganui, Atihaunui accepted, as a matter of course, that the Europeans coming into their territory should have access to the river and the water, provided that the status and authority of their leaders were respected. Atihaunui raised no objections until their status and authority were effectively challenged. Only then were restrictions imposed on the use of the river away from European settlements. Later, when those restrictions could not in practice be maintained, particular river uses by Europeans were challenged.

In more recent times, Atihaunui have objected not to the use of the river as such, but to its abuse. Throughout all this, however, Atihaunui have insisted that their interest in the river be respected and acknowledged.

This report has described the Maori custom and practice. Consistently, there has been room for others for so long as there are sound working relationships based upon respect. Indeed, in Maori tradition, property rights, while important, are not as important as the way in which people relate. Others may use the river for so long as the mana of the ancestral inheritors is maintained. This is pivotal to understanding Maori matters.

Despite all that has happened since Atihaunui first accepted Europeans to their lower river reaches – war, protest, and litigation – it is still the Atihaunui position that a working relationship is sought. In written pleadings and oral submissions, the point was made repeatedly that Atihaunui do not seek to exclude the public from the river, they do not seek to take away existing user rights, and they do not seek compensation for past water uses. They would negotiate on protocols for the use of the river in future. But, first and foremost, they seek recognition of their status and their legitimate rights.

In brief, there is room for a river treaty to be made and for solutions to be sought. The primary concerns of various parties – of Atihaunui for recognition, of the public for access, and of industry not to be unduly constrained – may all be reconcilable. Atihaunui seek dialogue and discussions, and that is the course that we urge. However, we have some proposals for them to consider.

11.7 PROPOSALS

In making proposals, we emphasise that they are directed to the Whanganui River, and not to rivers generally. Each case must be looked at according to its own circumstances. Relevant criteria may include, by way of illustration, the intensity of the Maori association with the river over time, the number of marae involved, the alienation of riparian lands, the extent to which this was voluntary and may be taken to have included river rights, and the evidence of the expectations of all concerned over time. Again, we are reminded of the uniqueness of the Whanganui River case. Conversely, other arrangements already made to give Maori a say in river management may not go far enough to suit the Atihaunui case.

In considering proposals, we have had regard to the significance of the Resource Management Act 1991 in repealing a plethora of laws and in seeking to bring about a coherent and uniform national strategy. In the end, however, we considered that the desirability of national uniformity cannot prevail over the need to do justice to the particular case. Nevertheless, we first looked for a solution within the scheme of that Act. We could find none that could do justice to the issues involved. The authority to transfer powers to various bodies, including iwi authorities, is discretionary and limited in scope. Water conservation orders do not give iwi a meaningful decision making role, and heritage protection orders are of doubtful

application and utility in this instance. There is no process within the Act that does not leave ultimate power and control in the hands of a regional or territorial authority.

On the other hand, within the authorities are a competence and an experience in management that are needed for today's more complex world and on which we ought to capitalise. We consider that there is a need for collaboration in modern river management.

We propose first that, whatever is done, the authority of Atihaunui in the Whanganui River should be recognised in appropriate legislation. It should include recognition of the Atihaunui right of ownership of the Whanganui River, as an entity and as a resource, without reference to the English legal conception of river ownership in terms of riverbeds.

We further propose that any settlement should protect existing use rights for their current terms and provide for continuing public access. Broad parameters for the terms of access will, however, need to be agreed. It should be clear that the public right is theirs not as of right but by permission. The settlement may require joint management of the Whanganui River on a regular basis, and in that event, it should allow for the deployment of Atihaunui people. It would be necessary to provide funding for the functioning of the Whanganui River Maori Trust Board, and, if need be, this might be built into local authority levies.

In addition, the current application for a water conservation order would need to be further deferred until settlement is reached, since there may be matters that the Minister needs to address.

Subject to the above, we propose two options for consideration in negotiations:

- (a) *Owner approval:* The first option is that the river in its entirety be vested in an ancestor or ancestors representative of Atihaunui, with the Whanganui River Maori Trust Board as trustee. Any resource consent application in respect of the river would require the approval of the trust board. This would give greater effect to Atihaunui's rangatiratanga and would maintain the 'management' regime of the Resource Management Act 1991. A resource consent would still have to be sought if the owner's approval is given. An amendment to the regional plan relating to the river would be needed, setting out that the board's consent is required before a resource consent is applied for.
- (b) *Consent authority:* The second option is that the Whanganui River Maori Trust Board be added as a 'consent authority' in terms of the Resource Management Act 1991, where the Whanganui River is involved, to act severally and jointly with the current consenting authority for any particular case, and that both must consent to an application for the consent to be exercised. In terms of section 2 of the Act, consent authorities are currently the Minister of Conservation, a regional council, a territorial authority, or a local authority that is both a regional council and a territorial authority. Rights of appeal under the Act would be preserved.

At present, the board has only the same right to make submissions to others as ordinary members of the public. This proposal provides a positive role but may be seen to fall short of effective recognition of the authority of Atihaunui. The final decision regarding an application would still rest with the courts.

The Resource Management Act would need further amendment, first and foremost because it does not reflect the Crown's Treaty obligations. It needs to provide that, in achieving the purpose of the Act, all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with, and gives effect to, the principles of the Treaty of Waitangi.

The Act currently provides for joint hearings to reduce the costs to applicants where there is more than one consent authority. This could be applied in this instance. Separate decisions may be given, but the conditions applied by each authority must be consistent. A difficulty arises where the consent authorities come to different decisions in respect of the application. However, each decision is subject to appeal, and under the current provisions of the Act, the hearing before the Environment Court takes place as if the earlier hearing had not occurred, and the matter is determined afresh.

Under this option, the most important issue concerns the drafting of a plan specific to the Whanganui River. In terms of the Act, both consent authorities could draft a plan, although a joint approach would be preferable. The Act refers specifically to regional councils and regional plans, and an amendment would be necessary to reflect that the plan is to be prepared by the relevant consent authorities. The plan would set out the matters relevant to the use of the Whanganui River, providing certainty and guidelines for applicants. The plan would also form the basis for an appeal to the Environment Court.

To increase recognition of Atihaunui's authority, we propose that this joint consent structure be reviewed after five years with a view to elevating the trust board to the sole consent authority or to making other recommendations considered necessary. This would also allow time to draft a new plan for the river setting out the necessary criteria for future river use. The review should be conducted by independent representatives appointed by Parliament and Atihaunui.

11.8 RECOMMENDATIONS

Our primary recommendation is that the Crown now negotiate with Atihaunui through the Whanganui River Maori Trust Board, having regard to the above proposals. Leave is given to either party to seek more specific recommendations if an agreement cannot be reached. In addition:

- (a) Compensation for the taking of water for the Tongariro power scheme was not sought in these proceedings because the focus was on returning the water to the river. But we consider that compensation is due. The question

of the ownership of water in an abstract sense does not arise. The issue concerns the presumptive use of a resource that properly belongs to the Atihaunui people. Compensation, then, is due under two headings: as exemplary damages for the use of a private resource without consent and as compensation for the deleterious impact of a large water abstraction.

We recommend that this also form part of the negotiations and that the compensation provide the funding base for the trust board's continuing operations.

- (b) It was recognised by a royal commission in the 1950s that Atihaunui were entitled to compensation for gravel extraction. The Government has recognised that compensation is due but Atihaunui have still to be fully compensated. It is recommended that gravel compensation be dealt with separately, with provision for arbitration. It should not depend on the settlement of future management but be seen as a separate issue. Nor should it be seen as furnishing a fund for the board's future operations, because the compensation is due to the people. It should be held by the board for projects for the benefit of Atihaunui as a whole, but with a power of distribution to marae at the board's discretion.
- (c) Costs should be covered by the Crown – compensation for past litigation costs, costs in this claim, and legal costs in negotiating the settlement.

11.9 DISSENTING OPINION

As provided for in clause 5(7) of the second schedule to the Treaty of Waitangi Act 1975, the foregoing of this report represents the Tribunal's decision. Tribunal member John Kneebone dissents to the extent given in his opinion, which now follows.

I am unable to support any proposal that Atihaunui should own natural water or be designated as a consent authority under the Resource Management Act 1991, but I would urge the many people with a keen interest in the issue of Treaty rights and obligations, and rivers, to read this report in depth and in its entirety.

While readers should remember that this report is focused only on the Whanganui River, and much of the evidence is unique to it, this is a river story and is about the people who have lived in its valley for hundreds of years. The report is a faithful portrait of the comprehensive evidence presented to the Tribunal. It recounts in an eloquent and lucid manner the people's story and provides non-Maori readers with a privileged insight into the lives of an extended family of Maori who lived in intimate association with this ancient river. I diverge from my colleagues only on the issue of remedy arising from my interpretation and vision of the river. These divergences must colour my view on its management and control.

There are two very distinct components in a river. The moving body of water and the trench that the water has scoured out as it gravitates to the sea. The water has its own energy and will, and flows as part of nature's cycle. The trench on the

other hand is benign, passive, and part of the land. It is forever being altered as the flow fluctuates, meanders, and responds to natural forces.

River management must extend well beyond a river's banks, and it is necessary to recognise the complexity and physical characteristics of its component parts. There has been a legal evolution of laws governing rivers since 1840, and this evolution continues with the review of the Resource Management Act. It is only after coming to an understanding of those changes that one can see why a riverbed is separated from the water above it. The dramatic increase in human population densities, the industrialisation of our landscape, and the very special role that water plays in contemporary society have forced these governmental interventions into the aquatic ecosystem that we recognise as a river.

Humanity has never commanded authority over natural water as it evaporates, precipitates, freezes, melts, and flows. No New Zealand government, nor government elsewhere, has laid a general claim to ownership of water. Humankind and all other life is dependent on water. It is borrowed from nature, made use of, then returned to be cleansed and refurbished. The general privatisation of natural water is not a practical political option.

I accept that as a matter of fact Atihaunui controlled human activity in the Whanganui River catchment area at 1840. I acknowledge that they controlled access to, travel upon, and activity in, the Whanganui River. Atihaunui were resident managers of their estate, and this was interpreted to mean that they owned the riverbed in a series of legal decisions leading up to the 1962 Court of Appeal case that overturned this interpretation.

To suggest that a river as an entity should be alienated and legally transferred to a particular and specific descent group is not in my view a viable option. Such an action could not escape the interpretation that naturally occurring, free-flowing water, and access to it, will become subject to private control, which must then lead to the potential for private exploitation of an essential natural resource. All life depends on water. Rivers also transport naturally occurring and man-created waste to the sea and are a traditional energy resource.

The trench or riverbed is a different issue. Rivers form themselves, and their dominant function is drainage. Precipitation surplus to the land's ability to absorb gravitates to the sea. All significant interventions by man into river systems are to manage this drainage function, whether they make it more accommodating to navigation or mitigate damage to adjacent property or river structures. The rapacious nature of an industrial society requires community intervention to protect water quality and to ration abstraction.

Defining a river is more complex than casual observation. Its point of discharge is obvious, its origin much less so. In a modern river management regime, a river begins at the apex of a watershed, so that all the land within a catchment area is a practical and integral part of a river. The land use within the catchment area dictates the flow and the quality of water within the system. Effective river management is not possible without the ability to influence, often to the point of

prohibiting, any particular land use, be it a commercial building complex, a forest, or a farm.

It is stretching public tolerance to expect citizens to accept restrictions without right of redress. The right to restrict land use is currently legitimised via the transparent democratic process, which provides for a free choice of candidates, who then are responsible for the river management process.

While settler development and consequent river management and control regimes have developed incrementally, they have relentlessly wrested control and management from Atihaunui. The authority and financial responsibility for this now resides with the wider community, and is exercised by the application of the Resource Management Act 1991.

It is an unfortunate reality that the Whanganui River is both the tangible focus of Atihaunui spiritual and physical wellbeing and the main arterial trench of a very large drainage system in industrialised contemporary society. This is my honest appraisal, brutal though it may appear, of the dilemma we face in seeking a universally acceptable compromise.

Atihaunui describe their relationship to the river as like a plaited flaxen rope that extends for the length of the river. It has three distinctive strands, which represent descent groups from an ancestor. This flaxen rope is strong, flexible, and accommodates differing tensions between the strands. To carry the analogy further, there is another rope that also stretches along the river. It has many colours and strands. The strands of this synthetic rope represent modern man's interventions and constructions, which now intrude upon this ancient river. As we enter the new millennium, we need to recognise that this other rope has wound its way up the river.

11.10 REMEDY

New Zealand society has changed since 1840, but the Treaty principles do not change. The Crown is obliged now to act honourably with Atihaunui, who have experienced misery and anguish, as well as spiritual and economic loss, at the hands of past governments. The Crown has to atone for past Government actions.

I recommend that the Crown give serious consideration to sharing equally the ownership of the Whanganui riverbed – that is, the watercourse – with Atihaunui.

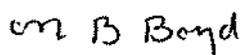
The Crown should create a body jointly with Atihaunui to exercise all the rights and responsibilities of legal ownership of the bed, and that body should be bound, as are other landowners, by the laws and regulations that apply. This body would consist of six appointees: three appointed by Atihaunui and three by the Crown. The Crown appointees should be the Ministers whose portfolios reflect aspects of the special values of the Whanganui River. The constitution should allow the body to elect one of their number as chair, and it should be obliged to meet at least once a year. All meeting costs should be born by the Crown.

Recognition by the Crown as a full and equal partner in the bed of the river, and an honourable settlement for gravel extraction, is a small concession for the Crown to make, when balanced against 100 years of struggle by Atihaunui to defend their heritage and rights.

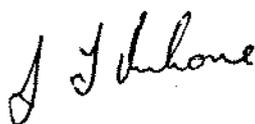
Dated at Wellington this *8th* day of *June* 1999



E T Duric, presiding officer



M B Boyd, member



J T Kneebone, member



G S Orr, member



K W Walker, member



APPENDIX I

STATEMENT OF CLAIM

IN THE WAITANGI TRIBUNAL

IN THE MATTER OF section 6 of the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF claims by HIKAIA AMOHIA – Kaumatua, and by ARCHIE TE ATAWHAI TAIAROA – Hinengakau, RAUMATIKI LINDA HENRY – Hinengakau, KEVIN AMOHIA – Hinengakau, HOANA JOAN AKAPITA – Tama Upoko, TE TURI JULIE RANGINUI – Tama Upoko, BRENDAN PUKETAPU – Tama Upoko, MICHAEL POTAKA – Tupoho, JOHN MAIHI – Tupoho, RANGIPO METE-KINGI – Tupoho, members of the WHANGANUI RIVER MAORI TRUST BOARD, constituted by the WHANGANUI RIVER TRUST BOARD ACT 1988, on behalf of TE IWI O WHANGANUI

STATEMENT OF CLAIMS

1. The Claimants

1.1 We of Atihaunui a Paparangi, descended of Hinengakau, Tama Upoko, Tupoho and as representatives of these iwi are the members of the Whanganui River Maori Trust Board thus:

Archie Te Atawhai Taiaroa	}	Hinengakau
Raumatiki Linda Henry		
Kevin Amohia		
Hoana Joan Akapita	}	Tama Upoko
Te Turi Julie Ranginui		
Brendan Puketapu		
Rangipo Metekingi	}	Tupoho
Michael Potaka		
John Maihi		

and are claimants along with Hikaia Amohia, Kaumatua.

1.2 The nine Trustees of the Whanganui River Maori Trust Board, are established by the Whanganui River Trust Board Act 1988 as a Maori Trust Board. Section 6 of the Act empowers the Whanganui River Trust Board to deal with outstanding claims relating to the customary rights and usages of Te Iwi o Whanganui in respect of te Awa Whanganui River including the bed of the River, its minerals, its water and its fish.

1.3 The beneficiaries of the Trust Board and those for whom the present Trustees act are described in the Act as the descendants of Hinengakau, Tama Upoko and Tupoho.

1.4 The Whanganui River Iwi, Te Atihaunui a Paparangi, identify particularly Hinengakau (the upper reaches), Tama Upoko (the middle reaches) and Tupoho (the lower reaches), the children of Tamakehu and Ruaka, as tupuna from whom they descend. The people are joined by a rope of peace with three strands (depicted on the meeting houses at Ngapuwaiwaha and Putiki) signifying the unity of the people of Hinengakau and her brothers.

1.5 It is part of the Trust Board's function to exercise responsibility, as rangatira and kaitiaki, for the protection of the Whanganui River. It cares for the heritage of the Whanganui people; advocates on behalf of the identification the people have with the River; and, ensures its integrity which is of profound importance to the continuation of their man, wairua and mauri.

2. The Estate

2.1 The Whanganui River, its catchment of lands and forests, its tributaries, its bed, waters and fisheries have from time immemorial been the kainga, whenua and taonga in respect of which the people maintain tino rangatiratanga and kaitiaki roles, never relinquished, and repeatedly asserted.

2.2 From the River, its bed, the waters above it, and its lands Atihaunui a Paparangi derive their strength, wealth, identity, mana, mauri, wairua, and sustenance. Their social order and economic survival are intertwined with the condition of the River. The retention and exercise of their tino rangatiratanga and kaitiaki roles in respect of the river (in its fullest sense) are essential to the future progress of the people.

2.3 Atihaunui a Paparangi have and have always had customary and common law rights and title to the lands and waters, fisheries and other taonga of the Whanganui River which rights remain unextinguished.

2.4 By the Treaty of Waitangi the Crown guarantees to Atihaunui a Paparangi, the descendants of Hinengakau, Tama Upoko and Tupoho tino rangatiratanga, full exclusive and undisturbed possession and all their rights over and of the River and the lands, waters, fisheries and other taonga associated with it.

3. The Claim

3.1 Atihaunui a Paparangi claim to be prejudicially affected by Acts, policies and omissions of the Crown whereby they have been:

- (a) alienated from their lands and waters and from their spiritual heritage and source of being;
- (b) denied access to and the use of their customary food and material resources necessary to their economic and social development;
- (c) denied thereby the capacity to participate in the cash economy beyond the level of hired labour;
- (d) denied education beyond a rudimentary level;
- (e) denied participation in local and central government political processes except as individuals in a minority.

4. The Wanganui River Trusts Act, the Wanganui Foreshore Grants Acts and other Acts, policies and conduct.

4.1 The Crown, by these enactments from the 1880's for several decades, has promoted and permitted unrestricted navigation of the River by large vessels and granted land in association with this purpose. The Crown authorised the destruction of eel weirs and other works belonging to Atihaunui a Paparangi; damaging the riverbed, its banks, rapids and fisheries.

4.2 In particular the Whanganui River Foreshore Grant Acts and River Board's Act and the subsequent Whanganui River Trusts Acts granted authority to other than Atihaunui a Paparangi in respect of the River including its harbour and foreshore areas in ways which interfere with their rangatira and kaitiaki roles and with their mana.

4.3 Atihaunui a Paparangi's rangatiratanga and entitlement in respect of the river mouth, the harbour and the sea fisheries beyond has been affected by legislation which is in breach of rangatiratanga, customary and aboriginal entitlement.

4.4 In sweeping aside what was of great value attacks have been perpetrated against taniwha, wahi tapu, and other spiritual, and material properties of the River undermining the security of Atihaunui a Paparangi, their society and economy, their means of sustenance and their sources of wealth.

5. Fisheries Acts and other enactments, conduct and omission

5.1 The Crown has denied the fishing rights guaranteed by the Treaty of Waitangi in relation to the River and its Tributaries, the harbour and coastline within the boundaries of Atihaunui a Paparangi and the sea fisheries beyond.

6. The Coal Mines Acts.

6.1 The Crown by interfering with Maori rangatiratanga customary and common law rights in respect of the River purportedly under s 261 of the Coal Mines Act 1979 and its

predecessors failed to protect the economic interests, ownership rights, and Treaty rights of Atihaunui a Paparangi. Their customary and common law rights were interfered with but not extinguished.

6.2 Gravel extraction occurred from at least 1903 until 1989. During this time the Crown caused, and failed to protect Atihaunui a Paparangi's resource title and interests against, the extraction of large quantities of gravel from the bed of the River. Profound damage and expropriation resulted without consultation or compensation.

6.3 This attack on the mana and rangatiratanga of Atihaunui a Paparangi and the River denied the people economic resources and the community development to be derived from them over many decades. While the Crown has agreed to compensation it has not been made.

7. The Whanganui River Trust, Public Works and other Acts.

7.1 From the 1890s the Crown set aside and took by compulsion ancestral land of Atihaunui a Paparangi including land on the banks of the Whanganui River for scenic reserve and other 'public purposes'. This expropriation further diminished the tribal estate held from time immemorial. It also attacked the mana and rangatiratanga of Atihaunui a Paparangi by implying that they could not administer their land as scenic reserve or when it was used for other public purposes.

8. The Native Land Acts.

8.1 The enactment and application of the Native Land Acts in policy caused and permitted the fragmentation of Atihaunui a Paparangi communal land by the individualisation and manipulation of title which led to the significant break-up of the tribal estate and the alienation of lands along the banks of the River and in the catchment, causing great loss.

9. Order in Council 1958, the Water and Soil Conservation Amendment Act 1973 and other Acts and authorisations.

9.1 The Crown took and authorised the taking, and failed to protect Atihaunui a Paparangi from the taking of large volumes of water from the headwaters and tributaries of the Whanganui River by Order in Council in 1958 and later authorisations, for electric power generation.

9.2 The Crown failed to consult Atihaunui a Paparangi in regard to the consequences to them of taking waters into another catchment assuming that Atihaunui a Paparangi could not administer their river for the benefit of others.

9.3 Thereby Atihaunui a Paparangi were committed to pursuing by available means the recognition of their rangatiratanga and mana and that of the River and at the same time were deprived of social and economic resources to support this necessity.

9.4 In breach of its fiduciary duty and Treaty obligations, the Crown failed to protect the River from or to cleanse it of pollution including human and chemical waste. It was poisoned as a source of food and as a viable home for Iwi Whanganui.

10. National Parks Act.

10.1 In about 1986 the Crown created the Whanganui National Park out of approximately 80,000 hectares of Atihaunui a Paparangi ancestral land.

10.2 The River was excluded from the Park at the insistence of Atihaunui a Paparangi.

10.3 No adequate provision was made for the recognition of Treaty, customary and aboriginal entitlement to the Whanganui River and its lands.

11. Crown response.

11.1 The Crown – despite numerous petitions, litigation and the Royal Commission Report (1950) and repeated protests over the Crown’s denial of Atihaunui a Paparangi’s tino rangatiratanga and mana; and, the diminution of social, economic and cultural resources as a result of contesting these repeated and cumulative actions – has failed so far to recognise and restore tino rangatiratanga; to rectify the wrongs done; and, to provide compensation for damage done in the past and persisting to the present day.

12. Education, language and cultural omissions.

12.1 The Crown has failed in its duty to protect the language and culture of Atihaunui a Paparangi in circumstances of settlement and development or to make available on equal terms a sufficient education.

13. Local and National Government.

13.1 The Crown has failed in the terms outlined in this claim to assure to Atihaunui a Paparangi their rangatiratanga and mana in respect of all that is of value to them.

13.2 The Crown has further placed the governance of such taonga in the hands of others, and has perpetuated that by an insistence on majority rule without any protection for Maori who have become, by Crown action, a minority.

14. Relief

14.1 The Tribunal is asked to recommend as follows.

14.2 The restoration to Atihaunui a Paparangi of their tino rangatiratanga over the Whanganui River and its tributaries, their full customary entitlements and other attributes of the River, and its tributaries which have been theirs from time immemorial.

- 14.3 That the arrangements for the assessment and payment of compensation for the removal of gravel from the River between 1903 and the present be completed forthwith.
- 14.4 The restoration of the River to its full strength by the return of its natural waters.
- 14.5 Compensation for the taking of large volumes of the water of the River since 1973 down to the present time.
- 14.6 Removal of sewage and restoration of the River as a source of native fresh water flora and fauna.
- 14.7 Compensation for the loss of food from the River as a result of pollution, water abstraction and other damage.
- 14.8 The return of all ancestral lands and forests wrongfully acquired.
- 14.9 The restoration to Atihaunui a Paparangi of full, exclusive and undisturbed possession and rangatiratanga in respect of all their land, forests and fisheries and other taonga.
- 14.10 The provision of resources for the full protection and recognition of Maori language and culture as an essential part of New Zealand; and the repair of all inequities in education, by the application and autonomous control of these resources.
- 14.11 The restoration to Atihaunui a Paparangi of their exclusive rangatiratanga in respect of all their taonga and the guarantee of a decisive voice in other matters affecting them.
- 14.12 The restoration by other means of the social cultural and economic base of Atihaunui a Paparangi in full and substantial manner.
15. This claim is lodged without prejudice to common law and other rights of the people including the right to commence any action. It is not a complete statement of the Treaty breaches nor of their prejudicial effects and is subject to amendment following research (historical, social and economic) during the course of the preparation for the claim.
16. The Tribunal is asked to commission a researcher to prepare reports on the claim before any hearing.
17. The Tribunal is asked to appoint a lawyer to assist the claimant – J M Dawson, Luckie Hain Kennard & Selater.
18. The Tribunal is asked to hear the claim at Ngapuawaiwaha Marae, Taumarunui Street, Taumarunui and at other marae of the claimants.
19. The claimants may be contacted at telephone (0812) 57049, PO Box 344, Taumarunui or at the offices of the solicitors abovenamed.
20. Persons affected by this claim who should have notice of it are to be identified.

APPENDIX II

RECORD OF INQUIRY

RECORD OF HEARINGS

THE TRIBUNAL

The Tribunal constituted to hear claim Wai 167, concerning the Whanganui River, comprised Chief Judge Eddie Durie (presiding), Mary Boyd, John Kneebone, Professor Gordon Orr, Makarini Temara, and Keita Walker. Mr Temara passed away on 21 October 1995, after the completion of the hearings.

COUNSEL

Sian Elias with John Dawson and Kathy Ertel appeared for the Wai 167 claimants, Ellen France and Camilla Owen for the Crown, Ann Callaghan for the Electricity Corporation of New Zealand, Phillip Milne for the Manawatu–Wanganui Regional Council, and Carrie Wainwright for the Wanganui District Council.

THE FIRST HEARING

The inquiry opened at Putiki–Wharanui Marae in Wanganui on 14 March 1994.

Submissions

Submissions were received from John Tahuparae, Morvin Simon, Brendon Puketapu, Te Paea Arapata, Niko Tangaroa, Matiu Mareikura (14 March); Arthur Andersen, Maraea Aranui, Te Paea Arapata, George Hawkins, Anihira Henry, Robert Mahuta, Dardanella Metekingi, Wai Murioho, Te Kuia Peeti, Tariana Turia (15 March); Kevin Amohia, Arthur Andersen, James Doherty, Te Wera Firmin, Titapu Henare, Ken Mair, Maanu Paul, Michael Potaka, Meterei Tinirau, Hera Tuka, Hohepa Waiti (16 March); Gerrard Albert, Hinewai Barrett, Robert Goff, Geoffrey Hipango, Ngatangí Huch, William Huch, Damian Te Huia, Sister Dorothea (Mary Meade), Potonga Neilson, Manawanui Pauro, Brendon Puketapu, Julie Ranginui, Leon Rerekura, Chris Shenton, Niko Tangaroa, Ned Tapa, Joe Tihu (17 March); Sian Elias (18 March).

THE SECOND HEARING

The second hearing was held at Putiki–Wharanui Marae in Wanganui from 18 to 22 April 1994. There were two site visits: the first on 18 April to Kaiwahaiki, Pungarehu, Parikino, Atene, Koroniti, Matahiwi, Ranana, and Pipiriki; and the second on 21 April to Patiarero (Jerusalem), Tieke, and Otoko.

Submissions

Submissions were received from Ronald Little, Archie Taiaroa (19 April); Tom Bennion, Ruth Harris, Richard Heerdegen, Matiu Mareikura, Tania Rei, Tom Tuhiwai (20 April); Patrick O'Sullivan (21 April, during site visit at Tieke Marae, near Pipiriki); Tom Bennion (22 April).

THE THIRD HEARING

The third hearing was held at the Avenue Motor Inn in Wanganui from 21 to 23 June 1994.

Submissions

Submissions were received from Mark Cribb, Sian Elias, Richard Heerdegen, Patrick O'Sullivan, Larry Ponga (21 June); Fergus Sinclair (22 June); Ellen France, Camilla Owen (23 June).

THE FOURTH HEARING

The fourth hearing was held at the Avenue Motor Inn in Wanganui on 25 and 26 July 1994, at Ngapuwaiwaha Marae in Taumarunui on 27 July 1994, and at the Taumarunui Memorial Hall on 28 and 29 July 1994.

Submissions

Submissions were received from Hugh Barr, Ann Callaghan, Keith Chapple, William Howie, Peter Robinson (25 July); Brent Cowie, Murray Gilbertson, Phillip Milne, Charles Poynter, Kevin Ross, Carrie Wainwright, Ross Wallis (26 July); Tom Bennion, Sian Elias, John Tahuparae, Archie Taiaroa (27 July); Sian Elias, Ellen France, Camilla Owen (28 July); Sian Elias, Camilla Owen (29 July).

RECORD OF PROCEEDINGS

1. CLAIMS

1.1 Wai 167

A claim by Archie Tairaroa and others for the Whanganui River Maori Trust Board concerning the Whanganui River, 14 October 1990

2. PAPERS IN PROCEEDINGS

2.1 Direction of chairperson registering claim 1.1, 11 December 1990

2.2 Memorandum from claimant counsel to Tribunal requesting urgent hearing, 2 July 1993

2.3 Direction of chairperson instructing registrar to seek response from Waikato River claimants on request for urgency, 13 July 1993

2.4 Letter from counsel for Tainui to registrar stating that Tainui have no objection to priority being accorded to the Whanganui River claim, 14 October 1993

2.5 Memorandum from claimant counsel to Tribunal concerning urgency and interim recommendations, 15 October 1993

(a) Memorandum from claimant counsel to Tribunal concerning urgency and interim recommendations, 22 October 1993 (also filed as doc A1)

2.6 Memorandum from Crown counsel to Tribunal concerning claimants' request for urgency, 22 October 1993 (also filed as doc A2)

2.7 Memorandum of chairperson concerning hearing on urgency, 22 October 1993

2.8 Direction of chairperson constituting Tribunal (Chief Judge Eddie Durie, Professor Gordon Orr, Keita Walker) for hearing on urgency, 22 October 1993

2.9 Memorandum from claimant counsel to Tribunal concerning proceedings, framework agreement, and legal aid, 1 November 1993

2.10 Interim report and recommendation of Tribunal, 19 November 1993

2.11 Direction of chairperson constituting Tribunal (Chief Judge Eddie Durie, Mary Boyd, John Kneebone, Professor Gordon Orr, Makarini Temara, Keita Walker) for substantive hearing, 29 November 1993

- 2.12** Memorandum from Tribunal to counsel concerning conference on 26 January 1994 and additions to the record of documents, 22 December 1993
Memorandum from Tribunal to counsel concerning initial statement of issues, 22 December 1993
(a) Letter from Crown counsel to claimant counsel concerning the Minister for the Environment's decision not to appoint a special tribunal under section 202 of the Resource Management Act 1991, 23 December 1993
- 2.13** Direction of Tribunal releasing report by Lyndsay Head ('Maori Land Boundaries'), 18 January 1994
- 2.14** Direction of Tribunal releasing report by Tarah Nikora, 18 January 1994
- 2.15** Memorandum from claimant counsel to Tribunal in response to paper 2.12 on initial statement of issues, 26 January 1994
- 2.16** List of documentary material filed by claimants, undated
- 2.17** Directions of Tribunal concerning statement of issues, additions to the record of documents, assistance with research report, and form of notification, 27 January 1994
- 2.18** Memorandum from Crown counsel to Tribunal in response to paper 2.15, 10 February 1994
- 2.19** Memorandum of registrar certifying that notice of first hearing given, 28 February 1994
- 2.20** Notice of first and second hearings, 28 February 1994
List of parties sent notice of first and second hearings, 1 March 1994
- 2.21** Direction of Tribunal releasing draft of report by Suzanne Cross ('Whanganui, 1840-1907') to Crown and claimant counsel only, 7 March 1994
- 2.22** Opening submissions of claimant counsel (also filed as doc A77)
- 2.23** Memorandum from claimant counsel to Tribunal concerning jurisdiction, 24 March 1994
- 2.24** Direction of Tribunal concerning further hearings, 31 March 1994
- 2.25** Memorandum of registrar certifying that notice of third hearing given, 27 May 1994
Notice of third hearing, 26 May 1994
List of parties sent notice of third hearing, undated
- 2.26** Fax from Tamahaki Incorporated to Tribunal requesting to be heard, 26 May 1994

- 2.27 Memorandum from claimant counsel to Tribunal concerning confidentiality of evidence, 17 June 1994
- 2.28 Memorandum of registrar certifying that notice of fourth hearing given, 1 July 1994
Notice of fourth hearing, 1 July 1994
List of parties sent notice of fourth hearing, 1 July 1994
- 2.29 Notice of fourth hearing, 1 July 1994
- 2.30 Memorandum from Tribunal to counsel concerning submissions of Federated Mountain Clubs of New Zealand, appearances at fourth hearing, and further inquiries of Tribunal, 3 August 1994
- 2.31 Letter from claimant counsel for Wai 555, 26 August 1996

3. RESEARCH COMMISSIONS

- 3.1 Direction from the Tribunal commissioning Tarah Nikora to prepare a report in schedule form on all legislation applying specifically to the Whanganui River, 1 December 1993
- 3.2 Direction from the Tribunal commissioning Lyndsay Head to prepare a report, based on Maori language letters in the McLean collection, on the relationship between rivers and boundaries in traditional terms, 7 December 1993
- 3.3 Direction from the Tribunal commissioning Suzanne Cross to prepare a report on Waitangi Tribunal claims in the King Country (Rohe Potae) and Wanganui areas, 12 July 1993
- 3.4 Direction from the Tribunal authorising claimant counsel to commission Tom Bennion to prepare a report on Maori use of the Whanganui River up to 1866, the Native Land Court between 1866 and 1900, river works between 1891 and 1933, and riverbed litigation between 1938 and 1962, 10 March 1994
- 3.5 Direction from the Tribunal commissioning Tom Bennion to prepare a report on the Aotea Maori Land Board and its alienations between 1903 and 1953, 22 March 1994
- 3.6 Direction from the Tribunal commissioning Brian Herlihy to prepare maps relating to land blocks with frontages on the Whanganui River, 23 March 1994
- 3.7 Direction from the Tribunal commissioning Nan Wehipeihana to assist Brian Herlihy to complete commission 3.6 by searching Wanganui Land Court files, 24 March 1994
- 3.8 Direction from the Tribunal commissioning Brian Herlihy to prepare additional maps relating to land blocks with frontages on the Whanganui River, 28 June 1994

4. SUMMATIONS OF PROCEEDINGS

There are no summations of proceedings

5. TRANSCRIPTS AND TRANSLATIONS

- 5.1 Transcript of cross-examination of witnesses, 19–22 April 1994 (see also doc c11)
- 5.2 Transcript of cross-examination of Fergus Sinclair, 22 June 1994 (see also doc c24)
- 5.3 Transcript of cross-examination of Richard Heerdegen, 21 June 1994 (see also doc c25)

RECORD OF DOCUMENTS

* Document confidential and unavailable to the public without a Tribunal order

† Document held in the Waitangi Tribunal library, Waitangi Tribunal offices, third floor, 110 Featherston Street, Wellington

A. TO END OF FIRST HEARING

A1 Memorandum from claimant counsel to Tribunal concerning urgency and interim recommendations, 22 October 1993 (also filed as paper 2.5(a))

A2 Memorandum from Crown counsel to Tribunal concerning claimants' request for urgency, 22 October 1993 (also filed as paper 2.6)

A3 Amended statement of claim of Marama Laurenson, 1 September 1993, from *Laurenson v Attorney-General* unreported, 25 November 1993, High Court Wellington CP225/93 (concerning the Whanganui River Maori Trust Board's mandate to negotiate on behalf of Te Atihaunui-a-Paparangi)

A4 Letter from Crown counsel to Waitangi Tribunal concerning framework agreement between Crown and Whanganui River Maori Trust Board, 1 November 1993
Framework agreement between Crown and Whanganui River Maori Trust Board concerning Whanganui River claim, undated

A5 The Whanganui River Trust Board Act 1988 (1988 no 230)

A6 *Electricity Corporation of New Zealand Limited and Whanganui River Maori Trust Board v Manawatu–Wanganui Regional Council* 29 October 1990, Planning Tribunal decision w70/90

(a) List of contents for document A6, undated

A7 Submissions of claimant counsel, 2 November 1993

(a) Flowchart entitled 'Process for Preparing A Regional Plan', undated

- A8** Letter from Minister of Justice to Whanganui River Maori Trust Board concerning Cabinet approval of framework agreement, 18 May 1993
 Letter from Minister of Justice to National Maori Congress concerning protection of Maori interests in surplus Crown assets, 21 May 1993
 Letter from Whanganui River Maori Trust Board to Minister for the Environment concerning application by Royal Forest and Bird Protection Society for water conservation order over Whanganui River, 13 July 1993
 Letter from Minister for the Environment to Whanganui River Maori Trust Board concerning application by Royal Forest and Bird Protection Society for water conservation order over Whanganui River, 7 September 1993
 Royal Forest and Bird Protection Society press release concerning application for water conservation order over Whanganui River, 28 June 1993
 Application to Minister for the Environment by Royal Forest and Bird Protection Society for water conservation order over Whanganui River, 25 June 1993 (also filed as doc A13)
- A9** Chronological list of petitions, court judgments, and claims concerning the Whanganui River from 1887 to 1992
- A10** Commentated copy of part 1X (water conservation orders) of the Resource Management Act 1991 (extract from *Resource Management*, Wellington, Brooker's Ltd, 1991, pp A9-1 (dated 15 November 1991), A9-3 – A9-18 (dated 3 September 1993))
- A11** Manawatu–Wanganui Regional Council, *Regional Plan for the Beds of Lakes and Rivers: Discussion Document*, Palmerston North, Manawatu–Wanganui Regional Council, March 1993
- A12** Submissions of Crown counsel, 2 November 1993
- A13** Application to Minister for the Environment by Royal Forest and Bird Protection Society for water conservation order over Whanganui River, 25 June 1993 (also filed as part of doc A8)
- A14** Memorandum from claimant counsel to Tribunal concerning case law on meaning of 'the Crown', 3 November 1993
 Peter W Hogg, *Liability of the Crown*, 2nd ed, Law Book Company Ltd, 1989, pp 248–253
Housing Corporation v Kontouleas [1988] DCR 284
- A15** Memorandum from claimant counsel to Tribunal concerning Manawatu–Wanganui Regional Council's draft regional plan and request for additional relief, 17 November 1993
 (a) Letter from Manawatu–Wanganui Regional Council to Whanganui River Maori Trust Board concerning proposed regional policy statement for Manawatu–Wanganui, 14 September 1993
 (b) Fax from Manawatu–Wanganui Regional Council to Whanganui River Maori Trust Board concerning council's role in management of Whanganui River, 21 September 1993

- A16** Further submissions of Crown council, 18 November 1993
 Peter W Hogg, *Liability of the Crown*, 2nd ed, Law Book Company Ltd, 1989, pp 9–13
 Sections 2(1), 14, and 35(2)(f) of the Crown Proceedings Act 1950
 Section 236 of the Local Government Act 1974
 G W Hinde and M S Hinde, *New Zealand Law Dictionary*, revised 3rd ed, Wellington, Butterworths of New Zealand Ltd, 1986, p 273 (definition of ‘person’)
- A17** Submissions of claimant counsel in reply to document A12, 18 November 1993
- A18** Tarah Nikora, ‘Report of Tarah Nikora on Historic Legislation Pertaining to the Whanganui River’, report commissioned by the Waitangi Tribunal, 22 December 1993
- A19** Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992
- A20** Alan Ward, ‘Whanganui ki Maniapoto: Preliminary Historical Report, Wai 48 and Related Claims’, report commissioned by the Waitangi Tribunal, March 1992
- A21** G V Butterworth, ‘The Mohaka Purchase and Deed: Some Comments’, unpublished report, undated
- A22**[†] Ann Parsonson, ‘Te Mana o te Kingitanga Maori: A Study of Waikato–Ngati Maniapoto Relations during the Struggle for the King Country, 1878–84’, MA thesis, University of Canterbury, 1972
- A23** L F Head, ‘Maori Land Boundaries’, report commissioned by the Waitangi Tribunal, undated
- A24** List entitled ‘Whanganui River: Select Petitions, 1876–1983’
- A25** List entitled ‘Whanganui River Maori Trust Board: Selected References’
- A26** Section 36 of the Maori Purposes Act 1951
 Section 6 of the Maori Purposes Act 1954
- A27** File CA20/53, AAOM W3558, National Archives
- (a) Deeds and other instruments of title relating to the purchase by the Crown of certain riparian blocks
- (b) Court orders and other instruments of title issued at the time of the original investigation of various riparian blocks (vol 1)
- (c) Affidavit of Bryce Briffault concerning documents A27(a), (b)
- (d) Affidavit of N A Stevens
- (e) Proceedings and documents submitted to the court (vol 1)
- (f) Proceedings and documents submitted to the court (vol 2)
- Miscellaneous court orders, motions and other papers relating to the riverbed litigation in the Court of Appeal

- (g) Order by the Court of Appeal for the Maori Appellate Court to take further evidence, 7 December 1956
- (h) Case stated for the Maori Appellate Court, 7 December 1956
- (i) Motion for order, 9 July 1953
- (j) Petition of 3 August 1927 and early references to navigation of the river
- (k) Affidavit of Titi Tihu, 9 July 1953
- (l) Motion for Titi Tihu to represent Whanganui tribe, 9 July 1953
- (m) Miscellaneous title papers concerning Retaruke, Kirikau, Opatu, Koiro, and Waimarino blocks
- (n) Miscellaneous letters and court papers
- (o) Motion for conditional leave to appeal to her Majesty in Council, 2 April 1962
- (p) Copies of court orders and other instruments of title issued at the time of the original investigation of various riparian blocks (vol 2)

A28 'Plan of Wanganui River', 1:126,720 map compiled for royal commission showing river and ownership of land blocks as at 23 November 1903, 1950

A29 Letter from Crown Law Office to Native Department requesting searches of original investigation of land blocks adjoining Whanganui River, 24 December 1946
 Memorandum to registrar, Native Department, from Mr Davidson concerning searches requested by Crown Law Office, 10 February 1947
 Letter from registrar, Native Department, to Crown Law Office concerning searches requested by office, 31 March 1947
 Extracts from Native Land Court minute books concerning eel weirs and land blocks, 1893–1918

A30 Department of Lands and Survey (comp), *Crown Land Acquisitions (Wanganui River Region), 1881–1916: A Schedule of Acquisitions by the Crown from Original Maori Owners of Lands within the Proposed Wanganui River National Park*, Wellington, Department of Lands and Survey, June 1983

A31 Beca Carter Hollings and Ferner in association with BERL, 'Quantity and Value of the Gravel Extracted from the Wanganui River, 1903–1988', report commissioned by the Whanganui River Maori Trust Board, April 1989

A32 List of nine books published about the Whanganui River

A33 List of selected AJHR references relevant to the claim

A34[†] Alan Ward, Robyn Anderson, Suzanne Cross, and Michael Harman, 'Historical Report on Whanganui Land', Crown–Congress Joint Working Party draft report, 1993

A35[†] Dr Mike Ashby, 'Claim to the Whanganui River: A Draft for the Whanganui Maori Trust Board', Wheeler Campbell Ltd, 1992

- A36**[†] Dr Pei Te Hurinui Jones, *Ngapuwaiwaha Marae: A Souvenir Booklet to Commemorate the Official Opening of the New Carved Meeting House, Te Taura-whiti a Hinengakau, Saturday, 20th December, 1975*, Taumarunui, 1975
- A37**[†] Athol L Kirk, 'Purchase of Wanganui – New Zealand Company', 'Richard Taylor and Purchase of Wanganui', and 'Maori Land Laws', *Historical Record*, vol 6, no 2, November 1975, pp 11–21
- A38**[†] Marama Laurenson, 'The Crown's Acquisition of the Waimarino Block', draft copy, report commissioned by the Waitangi Tribunal, 28 June 1991
- A39**[†] Chris Shenton, 'Historical Report on the Whanganui Purchase', draft report
- A40**[†] T W Downes, *Old Whanganui*, Hawera, W A Parkinson, 1915 (reprinted Christchurch, Capper Press, 1976)
- A41**[†] Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852*, Wellington, 1968
- A42**[†] T L Buick, *An Old New Zealander: Or Te Rauparaha, the Napoleon of the South*, Dunedin, 1935
- A43** *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* unreported, 17 December 1993, Court of Appeal CA124/93 (since reported at [1994] 2 NZLR 20)
- A44**[†] David Young and Bruce Foster, *Faces of the River: New Zealand's Living Water*, Auckland, TVNZ Publishing, 1986
- A45** R J Young, 'Wanganui River Claim and Related Issues', report commissioned by Manatu Maori, 19 May 1990
- A46** List entitled 'Current Legislation Affecting the Whanganui River', undated
- A47** A Walton, 'Settlement Patterns in the Whanganui River Valley, 1839–1864', report commissioned by the Department of Conservation
- A48** Suzanne Cross, 'Overview Report on Whanganui, 1840–1907', report commissioned by the Waitangi Tribunal, February 1994
- A49** Tom Bennion, 'Whanganui River Report: Research Report for Urgent Hearing, Wai 167', 9 March 1994
- (a) Supporting documents to document A49 (vol 1)
 - (b) Supporting documents to document A49 (vol 2)
 - (c) Supporting documents to document A49 (vol 3)
 - (d) Supporting documents to document A49 (vol 4)
 - (e) Further explanatory notes to document A49

(f) Tom Bennion, 'The Aotea Maori Land Board and Scenery Preservation: A Supplement to the Whanganui River Report: Research Report for Urgent Hearing, Wai 167', supplementary report, 15 April 1994

A50* Submission of John Tahuparae concerning the birth of the mountains, undated

A51* Submission of Te Tiwha Puketapu concerning how the Tribunal should treat iwi oral histories, 14–18 March 1994

A52 Submission of Maraea Aranui concerning the Ngati Pahauwera claim to the Mohaka River and in support of the Whanganui River claim, 15 March 1994

A53 Submission of George Hawkins concerning the Ngati Pahauwera claim to the Mohaka River and in support of the Whanganui River claim, 15 March 1994

(a) Correspondence between the Ngati Pauahuwera Negotiating Team and the Crown, November 1992–October 1993

A54 Submission of the Tainui Maori Trust Board in support of the Whanganui River claim, 14 March 1994

A55* Submission of Tariana Turia, undated

A56* Submission of Anihira Henry, undated

A57* Submission of Dardanella Metekingi, undated

A58* Submission of Te Kuia Peeti, 15 March 1994

A59 Morvin T Simon, *Taku Whare E, He Mauri Tu: My Home My Heart, the Spirit Dwells Still*, 2nd ed, Wanganui, Wanganui Regional Community Polytechnic, 1991

A60* Brief of evidence of Arthur Turiki Anderson, undated

(a)* Map of past and present Whanganui marae locations

A61* Brief of evidence of Titapu Henare concerning traditional fishing, undated

A62* Brief of evidence of Te Wera Firmin concerning traditional fishing, 16 March 1994

A63* Evidence of Arthur Anderson, 16 March 1994

A64* Submission of Kevin Amohia, 14–16 March 1994

A65* Brief of evidence of Kevin Amohia, undated

A66* Brief of evidence of Michael Potaka, undated

- A67*** Submission of Meterei Tinirau concerning the Morikaunui Incorporation, 15 March 1994
(a)* Supporting documents to document A67
(b)* Cadastral maps
- A68*** Transcript of oral evidence of Hera Tuka, 21–25 February 1994
- A69*** Submission of Potonga Neilson of Nga Rauru in support of the Whanganui River claim, 16 March 1994
- A70*** Submission of Julie Ranginui, undated
- A71** Chris Shenton (comp), 'Submission to the Waitangi Tribunal Regarding the Imposition of Kawanatanga upon Whanganui Iwi Knowledge Framework', undated
- A72*** Submission of Gerrard Albert, March 1994
(a)* Submissions from Tira Hoe Waka participants Hinewai Barrett, Ngatangi Te Iringa Huch, Leon Rerekura, Geoffrey Hipango, 17 March 1994
- A73*** Submission of Niko Tangaroa, 23 February 1994
- A74*** Submission of Sister Dorothea (Mary Meade) in support of the Whanganui River claim, 16 March 1994
- A75*** Submission of Brendon Puketapu, undated
- A76** Esther Tinirau, Morikau Farm to Morikaunui Incorporation, December 1993
- A77** Opening submissions of claimant counsel (also filed as paper 2.22)
 Six volumes of supporting documents
- A78** Brief of evidence of Robert Offer to Planning Tribunal in *Electricity Corporation of New Zealand Limited and Whanganui River Maori Trust Board v Manawatu–Wanganui Regional Council* 29 October 1990, Planning Tribunal decision w70/90
 Errata list for brief of evidence of Robert Offer
(a) Works and Development Services Corporation (NZ) Limited, 'Tongariro Power Development: History and Background to Committal', report commissioned by the Electricity Corporation of New Zealand Limited, March 1989
(b) Works and Development Services Corporation (NZ) Limited, 'Tongariro Power Development: History and Background to Committal – Supplementary Study of Taumarunui Files of MWD', report commissioned by the Electricity Corporation of New Zealand Limited, June 1989
(c) Supporting documents to document A78(a)
- A79** Manawatu–Wanganui Regional Council, *Proposed Regional Policy Statement for Manawatu–Wanganui*, Manawatu–Wanganui Regional Council, September 1993

A80 Manawatu–Wanganui Regional Council, ‘Proposed Regional Policy Statement for Manawatu–Wanganui: Summary of Discussions Requested’, unpublished report, February 1994

A81* Waiata o Te Iwi o Whanganui (typescript and translation of Whanganui waiata) (also filed as doc B16)

A82 Map of land ownership in blocks adjoining the river

B. TO END OF SECOND HEARING

B1 1:76,000 map entitled ‘Map of the Settlement of Wanganui, New Zealand, Showing the Land Purchased from the Wanganui and Other Tribes, as Officially Completed by Mr McLean, May 1848’, from *Provinces of Taranaki, Wellington, and Hawke’s Bay*, vol 2 of H H Turton, *Plans of Land Purchases in the North Island of New Zealand*, Government Printer, 1878

B2 Map of 1848 Wanganui purchase annotated by Donald McLean, inspector of police: ‘Map made for the Natives in explanation of the boundaries of the Block and of the Native Reserves (coloured yellow) as described in the final Deed of Sale’, undated

B3 Paul Hamer, ‘The Crown’s Purchase of the Waimarino Block and Related Issues’, report commissioned by the Treaty of Waitangi Policy Unit, August 1992
Supplementary report, October 1992

B4 Submission of Te Runanga o Ngati Apa, undated

B5 Timetable entitled ‘Whanganui River Tribunal Hearing: Programme for Week Two, 18th to 22nd April 1994’, undated

B6 Extracts from *Taku Whare E* by Morvin Simon (see doc A59) detailing marae to be visited on site visit (pp 15, 17, 27, 31, 33, 35, 37, 39, 41, 43, 46, 48, 50, 52, 54, 56, 58, 60, map)

B7 Hoani Hipango, ‘Ranana Development Scheme’, submission to the Waitangi Tribunal, 18 April 1994

B8 Brief of evidence of Archie Taiaroa, undated

(a) Supporting documents to document B8 (vol 1)

(b) Supporting documents to document B8 (vol 2)

(c) Supporting documents to document B8 (vol 3)

(d) Supporting documents to document B8 (vol 4)

(e) Supporting documents to document B8 (vol 5)

(f) Supporting documents to document B8 (vol 6)

- B9** Submission of T Gardiner concerning 'Te Kura Kaupapa Maori o Te Atihaunui-a-Paparangi
- B10** Brief of evidence of Ronald Little concerning Whanganui River fisheries, undated
- B11** Submission of Matiu Mareikura, undated
- B12** Submission of Ruth Harris of Te Runanga Nui o Rangitane in support of the Whanganui River claim, 20 April 1994
- B13** Brief of evidence of Tania Rei concerning organisational efforts of women of Whanganui from 1840 to 1960, 14 April 1994
- B14** Brief of evidence of Richard Heerdegen concerning Whanganui River flow regime, undated
- B15** Submission of Mark Koro Cribb concerning Tieke, undated
- B16*** Waiata o Te Iwi o Whanganui, undated (also filed as doc A81)
- B17** Submission in support of the claim by D A Johnson, 15 April 1994 (also filed as doc B20)
- B18** Submission of Hilda Takarangi Edwards, undated
- B19** Submission in support of the claim by William Sturges, 15 April 1994
- B20** Submission in support of the claim by D A Johnson, 15 April 1994 (also filed as doc B17)
- B21** Submission in support of the claim by Bruce Gabites, 15 April 1994
- B22** Plan submitted by Crown entitled 'Ngongohau No 1: Part of Putiki Reserve in the Wanganui District', H C Field (surveyor), 12 September 1871
- B23** Papers submitted by E France concerning document A49
- B24** Te Whanau o Tieke diary and register, submitted by Mark Koro Cribb (also filed as doc B15)
- B25** Submission in support of the claim by K and P Reid, undated
- B26** Maori Affairs file of Whanganui River petitions, 1973–84, National Archives
- B27** Photographs from the Whanganui site visits of 18, 21 April 1994

C. TO END OF THIRD HEARING

c1[†] Map research commissioned work of Brian Herlihy and Nan Wehipeihana showing contemporary Maori land holdings and Crown purchases and compulsory acquisitions in riparian Whanganui River blocks (includes 10 cadastral maps)

(a) Report accompanying the maps

c2 Robyn Anderson, 'Whanganui Land Loss and Protest in the Nineteenth Century', April 1994

c3 Submission of Patrick O'Sullivan concerning Ruapehu District Council's Whanganui River scenic protection zone, April 1994

c4 Submission of Patrick O'Sullivan concerning introduction of facilities user charges in Whanganui National Park, April 1994

(a) Supporting documents to c4

c5 Evidence of Michael Turner (in the Planning Tribunal minimum flows hearing) concerning generation and management of electricity in New Zealand, undated

c6 Evidence of Michael Lear (of the Ministry of Commerce) before the Waitangi Tribunal in the Te Ika Whenua claim (Wai 212) concerning electricity generation

c7 Sir Alexander Gibb and Partners, 'Tongariro River Power Development: Preliminary Report of Sir Alexander Gibb and Partners on Possible Schemes of Development with Recommendations and Assessment of Costs', August 1957

c8 Sir Alexander Gibb and Partners, 'Tongariro River Power Development: Report on Investigations', report commissioned by Ministry of Works, April 1962, vol 1

c9 G W Mills, R J Aspden, and R E Stewart, *Hydro Resources of New Zealand*, Wellington, Ministry of Commerce: Energy and Resources Division, Resource Information Report 7, April 1990

c10 Historical evidence for the Crown of Fergus Sinclair

(a) Supporting documents to document c10

c11 Transcript of cross-examination of witnesses, 19–22 April 1994 (also filed as paper 5.1)

c12 Submission of Patrick O'Sullivan, 'A Brief History of Kirikiriroa', 21 June 1994

c13 Submission of Patrick O'Sullivan, 'A Brief History of Tieke', 21 June 1994

c14 Ashley Gould, 'Investigation of the Circumstances of the Crown's Acquisition of an Area of Land Located on the Wanganui River and Associated with Tieke Hut', report commissioned by the Crown Law Office, 2 March 1994

- c15** Sally Mclean, 'Waimarino Waahi Tapu', report commissioned by the Treaty of Waitangi Policy Unit, 16 May 1994
- c16** Native Appellate Court minutes of the Whitianga block rehearing, 1895
- c17** Submission of Larry Ponga concerning exclusion of the tupuna Tamahaki and his descendants as beneficiaries of settlement, 26 May 1994
- c18** Submission of Ross Wallis concerning draft 1993 Tamaupoko Trust 'Whanganui River Management Plan', 14 June 1994
- c19** Supplementary submissions of claimant counsel on 1979 petition of Titi Tihu and Hikaia Amohia for the bed of the Whanganui River
- c20** 'Document Bank: Background Information', Crown counsel submission concerning Transpower, negotiations process, coastal permit, conservation management, facilities user pass, and bylaws, June 1994
- c21** Synopsis of opening submissions of Crown counsel, 20 June 1994
- c22** Statement by Matiu Mareikura dissociating the Whanganui Whare Wananga Trust from comments made to the press by Patrick O'Sullivan, 23 June 1994
- c23** Whanganui River Control Bylaws, 1991
- c24** Transcript of cross-examination of Fergus Sinclair, 22 June 1994 (also filed as paper 5.2)
- c25** Transcript of cross-examination of R G Heerdegen, 21 June 1994

D. TO END OF FOURTH HEARING

- D1** Submission of Hugh Barr on behalf of the Federated Mountain Clubs of New Zealand
(a) *Federated Mountain Clubs Bulletin*, no 111, October 1992
(b) Bruce Mason, 'The Principle of "Partnership" and the Treaty of Waitangi: Implications for the Public Conservation Estate', Public Access New Zealand monograph series number 6, December 1993
- D2** Submission of Peter Robinson on behalf of the Whanganui River Users Group
(a) 'Report on Required Maintenance on the Whanganui River for the Safety and Continued Use of the River by Displacement Hulled Craft', Whanganui River channel evaluation report, October 1993
- D3** Submission of K R Chapple on behalf of the Royal Forest and Bird Protection Society

- D4** Submission of Ann Callaghan
(a) Electricity Corporation of New Zealand twelve month report, 31 March 1994
- D5** Submission of William Russell Howie (with attachments)
- D6** Submission of Phillip Milne, 26 July 1994
- D7** Submission of Brent Cowie
- D8** Submission of Carrie Wainwright, 26 July 1994
- D9** Submission of Charles Poynter
- D10** Submission of Murray Gilbertson
- D11** Submission of Kevin Ross
- D12** Ross Wallis, 'Tamahaki Resource Management Issues', submission on behalf of Tamahaki Incorporation
- D13** Internal Department of Conservation memorandum concerning 'Maori dimension', 7 August 1991
- D14** Te Mana Whakauu o Whanganui Hei Matua Iwi (Whanganui Iwi declaration of nationhood)
(a) English translation
- D15** Tom Bennion, 'Evidence from the Journals and Writings of Two Missionaries' (with attached extracts)
- D16** Submission of Phillip Toyne on Aboriginal management and ownership of Uluru-Kata Tjuta National Park
- D17** Submission of Marian Melhuish concerning documents c5-c9, undated
- D18** Closing submissions of claimant counsel
Supporting documents:
(a) Ron Crocombe, 'Overview', in *Land Tenure in the Pacific*, Ron Crocombe (ed), Melbourne, 1971, pp 1-24
(b) *Mullick v Mullick* (1925) LR 52 Ind App 245
Department of Conservation, 'Report of the Department of Conservation for the Year Ended 30 June 1991' report to the House of Representatives, 1991, pp 6-7, 10-15, 48-49, 72-73
(c) *Re the Estate of Tupuna Maori* unreported, 19 May 1988, Justice Greig, High Court Wellington P580/88

D18—*continued*

(d) *Bumper Development Corp Ltd v Commissioner of Police of the Metropolis and Others* [1991] 4 All ER 638

(e) Letter from Deputy Prime Minister to New Zealand Maori Council concerning settlement of litigation over transfer of Crown assets to State-owned enterprises, 9 December 1987

(f) *Gill v Rotorua District Council* (1993) 2 NZRMA 604

Haddon v Auckland Regional Council [1994] NZRMA 49

Sea Tow Ltd v Auckland Regional Council 14 December 1993, Planning Tribunal decision A129/93

Hanton v Auckland City Council 1 March 1994, Planning Tribunal decision A10/94

Quarantine Waste (New Zealand) Ltd v Waste Resources Ltd unreported, 2 March 1994, Justice Blanchard, High Court Auckland CP306/93

(g) Amended version of parts XVI (findings) and XVII (remedy) of document D18

D19 Synopsis of closing submissions of Crown counsel, undated

(a) Petition of Piki Kotuku and others, 3 August 1927, and related papers

Petition of Te Akihana Rangitaroia and others, undated

Department of Lands and Survey 1:54,000 map entitled 'Wanganui River: To Accompany Report by John T Stewart', July 1900

(b) Report of the Department of Conservation for the year ended 30 June 1993

(c) Synopsis of closing submissions of Crown counsel (final version)

D20 Submissions of claimant counsel in reply, undated

D21 Wanganui Wastewater Working Party, 'Final Report to the Wanganui District Council on the Recommended Scheme for Wastewater Treatment and Disposal for the City of Wanganui', report commissioned by the Wanganui District Council, November 1990

(a) Appendices to document D21

D22 Document entitled 'Further Quotations from Taylor et al', undated

D23 Further submission of the Federated Mountain Clubs of New Zealand on the denial of public access to land returned under Treaty settlements

Forest and Bird, vol 21, no 4, November 1990

D24 Largely photocopied material entitled 'Archival Material Relative to the Whanganui River Claim: Letters from James Booth to the Church Mission Society from CN/M21'

D25 Photocopied material entitled 'Register of Chiefs Held at National Archives Wellington', undated

E. RECEIVED SUBSEQUENT TO CLOSURE

E1 Cathy Marr, 'Whanganui Land Claims: Historical Overview', report commissioned by the Office of Treaty Settlements, November 1995

E2 Suzanne Cross and Brian Bargh, *The Whanganui District*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), April 1996 (final version of doc A48)

E3 Paul Hamer, 'Commentary on Ashley Gould's Report Dated 2 March 1994 Regarding the Crown's Acquisition of Tieke', 12 July 1994

E4[†] Suzanne Doig, 'Customary Maori Freshwater Fishing Rights: An Exploration of Maori Evidence and Pakeha Interpretations', doctoral thesis, University of Canterbury, 1996

APPENDIX III

FINDINGS AND REMEDIES SOUGHT

Note: The following is from the closing submissions of claimant counsel (doc D18(g)).
A few minor editorial changes and corrections have been made to the text.

XVI. FINDINGS

1) The River and the People

1. The Whanganui River is tupuna awa of the Whanganui iwi.
2. It is consistent with the principles of the Treaty that authority over the River be exercised by Whanganui iwi and that benefit obtained from the River be available to the iwi first for the protection of the River and secondly to benefit the people of the Whanganui iwi.
3. The interest of the Whanganui iwi in the River, their tupuna awa, is more extensive than the attributes of ownership according to English legal notions: the Whanganui iwi are entitled to benefit from the River and exercise authority in relation to it as its guardians for future generations
4. The Whanganui River is a living taonga which is not divisible into its constituent parts.
5. The interest of the Whanganui iwi in the River as a matter of custom gives rise to Treaty rights to protection and ought to give rise to rights recognisable and enforceable in New Zealand law.
6. The result in the *In re the Bed of the Whanganui River* decision in 1962 is not in accordance with custom and is in breach of the Treaty.
7. The whole River is a traditional fishery of the Whanganui iwi.

2) Treaty Breach

The following acts by or on behalf of the Crown are in breach of the Treaty:

- 1) the failure to provide a system within which the customary rights of the Whanganui iwi to the River are adequately recognised
- 2) the management of the River by which the lifestyle and economy of the Whanganui iwi were destroyed. These actions include
 - destruction of eel weirs

- regulation of navigation
 - the takings for scenery preservation purposes
 - extraction of gravel
 - depletion of their traditional fisheries in the River
 - pollution and failure to protect the River from pollution
 - zoning restrictions
- 3) the assumption of ownership over parts of the River by
 - reliance upon ownership of the bed of the tidal reaches
 - the Coal Mines Amendment Act 1903 and its successors
 - application of the common law doctrine *ad medium filum aquae*
 - 4) the assumption of control of water in the Water & Soil Conservation Act 1967 and its successor the Resource Management Act 1991
 - 5) the system by which the exercise by Whanganui iwi of its rangatiratanga in relation to the Whanganui River has required its participation at huge expense in consultative processes set up by local authorities, and hearings including the minimum flows hearing
 - 6) the statutes regulating control of the River, particularly the Resource Management Act and its precursors which fail to give effect to Whanganui rangatiratanga and delegate authority to the Regional Council and District Council on a basis which does not require them to act in conformity with the Crown's obligations under the Treaty
 - 7) failure to provide a system for recognition and protection of the traditional fisheries of the Whanganui iwi in the River
 - 8) the imposition of the Tongariro Power Development scheme
 - 9) the policy of the Crown in developing a generic approach to matters of natural resource rather than dealing with the Whanganui River on its merits

XVII. REMEDY

1. The recommendations sought

a) *The Water Conservation Order*

- 1) that the Minister reject the water conservation order application

b) *Whanganui Rangatiratanga*

- 1) the Crown must recognise the Whanganui River as having personality, as being the tupuna awa of the Whanganui iwi
- 2) the Whanganui iwi are to manage and control use of the River for the benefit of the River, the benefit of the Whanganui iwi, and the benefit of the wider community in accordance with the Treaty of Waitangi
- 3) from a date to be agreed between the Whanganui iwi and the Crown, or failing such agreement from the 31st of December 1998, no Acts or delegated legislation (including the plans and regulations adopted by local and regional authorities) relating to management or use of rivers, navigation or fisheries shall apply to the Whanganui River provided that all existing rights and consents granted lawfully before that date are to continue for their terms. From that date Whanganui iwi are

to have sole authority to make laws for the management and control of use of the River

- 4) the application of section 354 of the Resource Management Act saving Crown rights acquired under the Coal Mines Act is to be abrogated in its application to the Whanganui River
- 5) the Crown is to provide to the Whanganui iwi sufficient resources to enable it to carry out the management functions at present carried out by the Regional Council and District Council and other bodies presently funded publicly having authority in relation to the Whanganui and its fisheries

c) Rehearing of the 1962 Case

- 1) If required by the Whanganui iwi after considering the Crown's response to recommendation 2, the Crown is to agree to the determination by the Court of the Appeal of the iwi's legal claim to the River based on customary title, and will pass any enabling legislation to permit the Court to hear the matter.

d) Recovery of Iwi Costs in the Minimum Flows Hearings and before this Tribunal

2. Comment

8. The recommendations as to rangatiratanga sought tries to achieve proper recognition of the relationship between the Whanganui iwi and their River. It seeks to stop the segmentation of the River into its constituent parts. It does not rely upon Crown conferral of title because the Wanganui iwi do not need any Crown title to their River. Nor is the English notion of property apt to describe the relationship of the people and the River: the people are possessed by the River as much as they possess and exercise authority in relation to it.

9. The aim has been to clear away the interference with the rangatiratanga of Whanganui iwi in relation to the River by requiring the Crown to stand back and remove its legislation. In a small way what is sought to be achieved is the purpose of section 71 of the 1852 Constitution Act which, ironically, was looked to by the Crown as a possible precedent for dealing with the Whanganui during the discussions following the 1979 petition. It is accepted that such a solution cannot be implemented immediately and will require preparation. That is why it is suggested that there be a deferral, so that the details of transition can be worked out. What the Tribunal is in effect being asked for are recommendations in principle from which the Crown and iwi can negotiate the detail. Nor is the intention to exclude others either from use of the River or from a voice. The iwi do expect and wish to work closely with the local authorities. They do not exclude the possibility of delegation of some of their responsibilities to local authorities. In effect what is sought is to reverse the present order so that the Whanganui iwi have real authority in respect of their taonga.

10. A beneficial entitlement is part of the exercise of rangatiratanga although no specific form of title is required.

11. An opportunity to rehear the 1962 case would not be required if the Tribunal recommends and the Crown agrees to the main proposal. What is of concern, however, is that the 1962 case will remain an impediment as it was in the discussion that followed the 1979 petition. In 1979 Titi Tihu and Hikaia Amohia sought a rehearing of the 1962 case. If it is necessary to bring a claim based on aboriginal title to the River in the Courts, the 1962 case is an impediment even though the claim only in part involve a rehearing of the earlier case (which was based on a claim to title to the bed of the River only). It would be hugely ironic if after all the effort the Whanganui iwi have made to assert their rights in relation to the River they are precluded from an aboriginal title claim. It is not certain that the 1962 decision will operate in that way. Much depends on the attitude of the Crown (for example, whether it will rely on *res judicata*). It may be that enabling legislation will be required. To put the matter beyond doubt, the Tribunal is asked to make a recommendation that, if necessary, the Crown should facilitate the matter of aboriginal title being resolved.

12. The relief sought does not include compensation for the detriment caused to the River, most particularly by the Tongariro Power Development scheme. The evidence has established that the nett present value of the Western Diversion is approximately \$183 million (see evidence of Dr Cowie and Planning Tribunal Decision, page 165). That results in an annual average cost of \$14.5 million (the \$18 million at which the Planning Tribunal valued the full return of the waters less the \$3.5 million mentioned by Dr Cowie as the annual average cost of the water now returned). This is a measure of the benefit to the country of the loss suffered by Whanganui iwi in the desecration of their taonga. Compensation is not sought in this hearing because for the Whanganui iwi the claim for the River is tapu. They do not want to distort it by seeking monetary recompense for sacrilege.

13. The experience of the past 150 years on the Whanganui River is that without real authority the people and the River cannot have health. The suggestions put forward are to liberate the awa and enable healing both of the Whanganui iwi and their relations with the Crown and the community. As Titi Tihu said consistently in his letters and petitions: Government actions have taken away an essential part of the spirituality of the River and the people. The Whanganui iwi have never sought to exclude others from sharing in the awa, as the petitions make clear. What they now seek is a process of reconciliation which cannot be achieved if they remain powerless.

APPENDIX IV

INTERIM REPORT AND RECOMMENDATION

Note: A few minor editorial corrections have been made to this text.

WAITANGI TRIBUNAL

WAI 167

CONCERNING the Treaty of Waitangi Act 1975

AND a claim in respect of the Whanganui River

TO the Minister of Maori Affairs

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

INTERIM REPORT AND RECOMMENDATION

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

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

The Claim

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

1. that Atihau-a-Paparangi has the customary authority, possession and title to the lands, waters, fisheries and associated taonga, of the Whanganui river;
2. that this was guaranteed to them by the Treaty of Waitangi and has not been willingly relinquished;
3. that the claimed authority, possession and title has been eroded or displaced by Crown laws, policies and practices inimical to the Treaty; and
4. that they continue to be eroded or displaced by current Crown laws, policies and practices.

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

The claim is brought by the late Hikaia Amohia and by nine persons who are, or were at the time, members of the Whanganui River Maori Trust Board ('the Board'). The Board was established by the Whanganui River Trust Board Act 1988 for the members of Atihau-a-Paparangi according to their three hapu, Tama Upoko, Hinengakau and Tupoho. The Board is constituted as a Maori Trust Board under the Maori Trust Boards Act 1955, and in that capacity has particular functions in promoting the health, housing, education, employment and welfare of its Atihau-a-Paparangi beneficiaries (s 24). Such Boards may also participate in Government schemes for Maori social and economic development (s 24D), and as some indication of an intention that they should act generally in the interests of their people, the Boards may acquire and farm lands (s 26), administer private trusts including Maori land management trusts (s 24C), act as the Committee of Management for a Maori Incorporation (s 24E) and provide administrative services for local Maori trusts and bodies (s 24F).

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

'. . . negotiate with the Government, or any other body or authority concerned, for the settlement of all outstanding claims relating to the customary rights and usages of Te Iwi o Whanganui, or any particular hapu, whanau or group, in respect of the Whanganui River, including the bed of the river, its minerals, its water and its fish' (s 6 Whanganui River Trust Board Act 1988)

The Board maintains a roll of its beneficiaries, or hapu members, and reports annually to a beneficiary's hui which in turn elects the Board. Accordingly the Board appears to

qualify as a prospective 'iwi authority' for the purposes of consultation under the Resource Management Act 1991.

The Claim for a Stay on Certain Proceedings

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

More particularly the claimants refer to the following:

- the discussion document of the Manawatu-Wanganui Regional Council of March 1993 which precedes the preparation of a 'Regional Plan for the Beds of Lakes and Rivers' in the district, and which is ancillary to the Regional Policy Statement required under the Resource Management Act 1991. The regional plan will provide the guidelines and rules for lake and river usage. The discussion document called for submissions and envisaged consultations;
- the application of 25 June 1993 of the Royal Forest and Bird Protection Society of New Zealand Incorporated ('the Society'), to the Minister for the Environment, for a Water Conservation Order for the Whanganui river to restrict the development and use of the river for the purposes of safeguarding the important characteristics that the Society attributes to it. Part 1x of the Resource Management Act 1991 enables any person to apply to the Minister to set in train a process for such an order to be made. The order, if made, would restrict the powers of the Manawatu-Wanganui Regional Council to approve certain river uses. The order would preserve however, (amongst other things), the minimum flows fixed by the Planning Tribunal in 1990, and thus the existing rights of abstraction held by Electricorp for the purposes of the Tongariro Power Development Scheme;
- the actual and prospective amendment and extension of rules governing the use of the river's surface waters under the Water Recreation Regulations 1979 and the Whanganui River Control By-Laws 1991. These are administered respectively by the Department of Conservation and the Whanganui, Ruapehu and Stratford District Councils. There are current proposals to substitute certain regulations with a 'voluntary code' to be settled in consultation with river users;
- the implementation of a Facility User Pass System by the Department of Conservation, a fee on visitors using the Whanganui National Park facilities; and
- the prospective granting of new resource consents under the Resource Management Act 1991, or the renewal or amendment of those currently operative.

The claimants contend they are prejudiced by each of these developments. Claimant counsel has proffered various grounds that we see as resolving themselves to these:

- that each new assertion of statutory authority impinges upon the authority that the iwi claim to possess;
- that each new assertion of statutory authority reinforces in the public mind the assumption that the authority of the river is vested in the Crown, without fetter, or in the Crown's chosen delegates; or conversely, it reinforces the view that the iwi have no authority or proprietary interest in the river, or that their interest is less than that which the claimants contend for;
- that each formulation of a legal right or sanction, especially those in the wake of lengthy public discussions or hearings, entrenches the underlying assumption about the right to formulate them, and makes future change more difficult in the event that the claimants' claim is upheld;
- that the application for a Water Conservation Order, if allowed to proceed to an inquiry, would or could:
 - reduce the claimants to the status of supplicants before the Special Tribunal to be constituted, or before the Planning Tribunal that may follow;
 - involve them in litigation costs in addition to the costs borne from the 1990's Planning Tribunal proceedings;
 - means that the Special Tribunal, and if necessary the Planning Tribunal, in considering Maori factors, would lack the benefit of a specialist inquiry into those factors;
 - result in a restrictive order that would be contrary to the claimants' claimed right of management;
 - and further, a report from this Tribunal, if favourable and if accepted by the Government, would lead to the revocation or amendment of the proposed hearing process with regard to the Whanganui river;
- that likewise, the process for settling the Regional Plan relegates the claimants to supplicants and is inconsistent with the priority of interest and the status that the claimants contend for;
- that the claimants are denied collaboration in local and central Government processes except as a minority group of private individuals without special status;
- that the proposed 'voluntary code' for river users, places 'ownership' of the code in those of the general public who sanction or formulate the code, creating an informal law and set of understandings amongst the public that is not readily displaceable;
- that as the National Park structural facilities are mainly accessed via the river, the Facility User Pass System assumes the character of a fee for river access, the payment to the Crown appearing to the Crown as the current river owner; and
- that resource consents may be granted and become entrenched before the claimants' status is determined.

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

- a greater awareness of and information on the extent of the Maori interest and on the application of the Treaty;
- an enlarged status for iwi representatives in making submissions or in treating with authorities;
- a greater weighting to iwi submissions and opinions; and

- the amendment of legislation to locate the proper authority of the iwi in any decision-making processes required.

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

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

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

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

Accordingly the claimants sought recommendations:

- that the Minister for the Environment makes no decision under section 202(1)(a) (on the application for a Water Conservation Order) until the Waitangi Tribunal has reported on the Whanganui River and that report has been considered by the Crown (memo 2.5 para 3.1, submissions A7 para 11.2);
- that the Crown impose a moratorium to the effect that the Regional Council does not proceed further to notify the Regional Plan insofar as it related to the Whanganui River or that no action is taken on the Regional Plan until the Waitangi Tribunal reports on the claim of Atihau-a-Paparangi to the Whanganui River (memo 2.5 para 3.1, submission A15); and
- that no other action be taken in respect of the river (memorandum 2.5 para 3.1).

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

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

The Application for a Water Conservation Order

Crown Counsel contended, though there is no current judicial authority on the matter, that under section 202 of the Resource Management Act 1991, the Minister for the Environment is constrained in determining whether or not to refer the Water Conservation Order application to a special tribunal. A purpose of such an order is to

protect a river's outstanding amenity or intrinsic values and, in her submission, the Minister could reject the application only if the inquiries the Minister is bound to undertake, led to the view that the river did not have those values (A12: para 7). The Minister must make those inquiries 'as promptly as is reasonable in the circumstances' (section 21), and having made them is bound to act 'as soon as practicable' (section 202). She questioned moreover whether a report from this Tribunal could assist the Minister's deliberations, presumably because of the constraints described and the fact that all relevant considerations would be addressed by any Special Tribunal convened (A12: paras 6, 7). This Tribunal's eventual report might also not assist the Special Tribunal, she argued, unless it was linked to the matters the Special Tribunal is bound to consider (A12: para 9). It was added that the claimants were not prejudiced to the extent that they could advance their views in submissions to the Special Tribunal and the Special Tribunal was bound to take into consideration, Maori cultural and treaty factors (A12: paras 15, 17 and see the Act, sections 6(e), 7 and 8). (The claimants argued that Maori values and the treaty can be overridden, however, by a Water Conservation Order, if those values and the treaty are inconsistent with the order's purpose (A7: 7.4) and they referred to the Tribunal's Ngawha report (1993, 146–7) which doubts the efficacy of the provisions for Maori interests and the treaty to be considered).

In any event, Crown counsel argued, the ultimate decision after hearings and reports, remained with the Minister (A12 para 11 and Act section 215). This latter point was relevant also to whether the claim needed to be given an urgent or early hearing. On that it was added that proceedings for Water Conservation Orders are invariably protracted (A12: para 17). Pertinent to the constraints upon the Minister's role, and the jurisdiction of the Special Tribunal, was the Crown's further observation that questions of river ownership are not relevant to Water Conservation Orders under the Resource Management Act (A2: para 12) – and that last point, as we see it, goes to the nub of the problem.

In support of the claimants' requests, counsel for the society argued that the Minister's discretion under section 202 is wider than Crown counsel had contended. While the Minister cannot bring into account extraneous matters outside the parameters of the Resource Management Act, the further information the Minister could require included the matters in section 199, which embraces Maori cultural concerns by virtue of the definition of 'amenity values' in section 2 and as is provided for in section 199(1)(c). These are matters on which the Tribunal, presumably, would report. The Minister may be bound to act 'as soon as practicable' on completing inquiries (s 202) and to undertake inquiries 'as promptly as is reasonable in the circumstances' (s 21) but it is reasonable to await the report of this Tribunal, and not practicable to act until the Tribunal has done so.

We accept claimant counsel's argument that the Maori complaint arises not from the actions of the society but from the framework and assumptions of the Resource Management legislation which allows those actions to be taken. As we see it, this Act is an Act of the Crown that allows resource rights to be determined before outstanding Maori claims to the resource have been investigated and settled. Though there was little argument on the principles of the Treaty, yet it appears clear to us that the Treaty intended protection for the Maori use and 'rangatiratanga' of those resources not willingly alienated, and guaranteed a right of undisturbed possession. The determination of use

and control rights pursuant to the Act, in our view, is inconsistent with those provisions and the principles flowing from them without prior inquiry as to whether the claimed Maori control and use rights existed and still enure, or would enure save for some act of extinguishment that itself was contrary to the Treaty.

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

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

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

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

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

The Regional Plan and Other Matters

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

The further recommendation sought, 'that no other action be taken in respect of the river' is too general, we consider, to enable a proper consideration to be given to the action required or the possible implications of that action. No specific interim recommendations

were asked for in respect of the proposed river use laws, the 'voluntary code', the Facility User Pass system or the prospective granting of new resource consents.

Substantive Hearing

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

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

The Registrar has also been directed to ensure that the Society and Manawatu-Wanganui Regional Council are given notice of any hearings and afforded the opportunity to make submissions if they wish.

Copies of this report will be sent to counsel appearing:

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

and to:

- Manawatu-Wanganui Regional Council

Dated at Wellington this 19th day of November 1993

E T J Durie

G S Orr

K W Walker

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