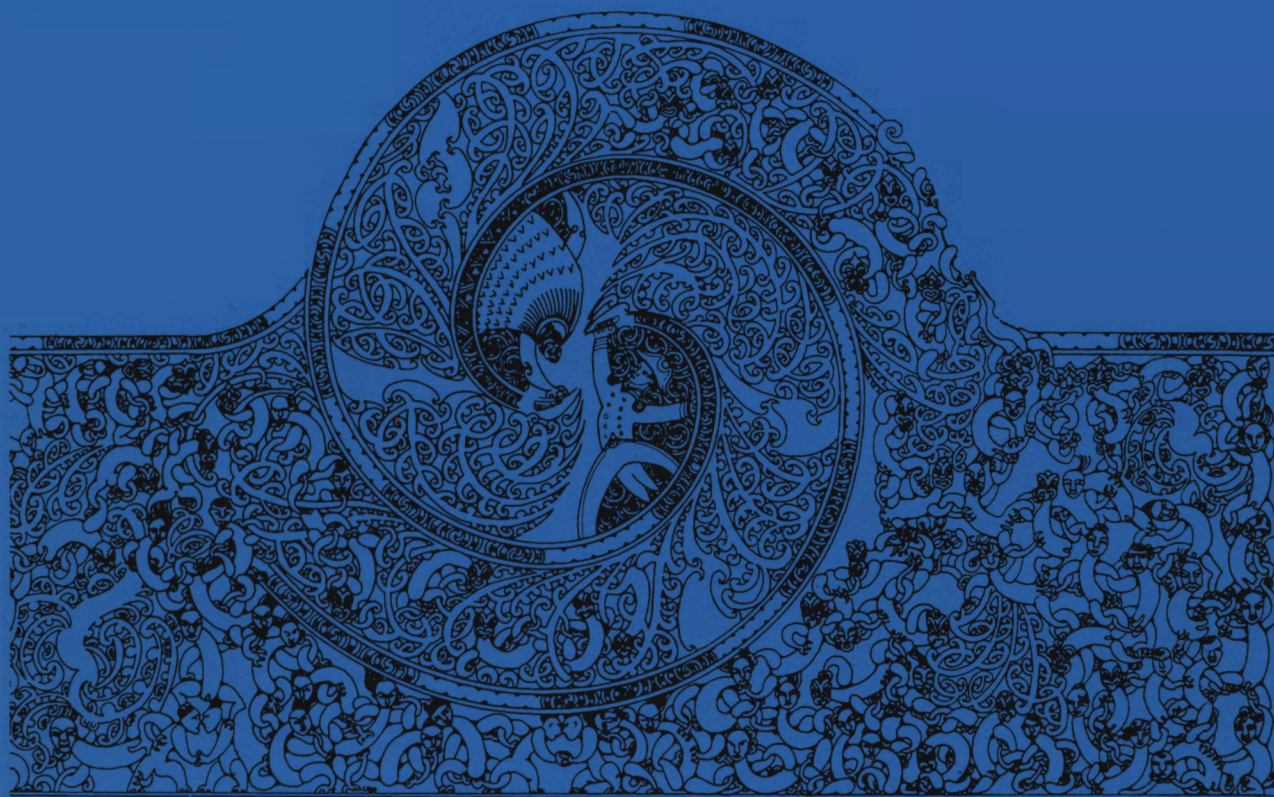


PRELIMINARY REPORT ON THE
TE ARAWA REPRESENTATIVE
GEOTHERMAL RESOURCE CLAIMS



WAITANGI TRIBUNAL REPORT 1993

PRELIMINARY REPORT ON THE
TE ARAWA REPRESENTATIVE
GEOTHERMAL RESOURCE CLAIMS

WAI 153

WAITANGI TRIBUNAL REPORT 1993



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

A Waitangi Tribunal report
© Crown copyright 1993
ISBN 1-86956-219-4

First published 1993
Reprinted 1998
Published by GP Publications, Wellington, New Zealand
Printed by GP Digital, Wellington, New Zealand
Set in CG Times

Contents

1	The Claims	1
	Introduction	1
	The Rotokawa Baths Claim (Wai 154)	1
	The Whakarewarewa Claim (Wai 204)	3
	Related Claims	4
	Hearing of Rotokawa Baths and Whakarewarewa Claims	4
	The Rotoma Claims (Wai 165, 193 and 197)	5
	Findings on the Right of the Whakarewarewa, Rotokawa Baths and Rotoma Claimants to Bring Their Claims	7
	Application to Issue Interim Findings and Recommendations	9
2	The Claimants' Interests in the Geothermal Fields	13
	Introduction	13
	The Rotokawa Baths Claimants	13
	The Whakarewarewa Claimants	14
	The Rotoma Claimants	15
3	The Crown's Treaty Obligations to the Claimants	17
	Introduction	17
	The Duty of the Crown to Protect the Claimants' Taonga	18

Te Arawa Representative Geothermal Claims

4	Discussion of Findings and Recommendations Sought by the Claimants	21
	Findings Sought	21
	Recommendations Sought	28
5	Findings and Recommendations of the Tribunal	31
	Introduction	31
	Relevant Treaty Principles.	31
	Tribunal Findings.	33
	Recommendations Pursuant to s6(3) of the Treaty of Waitangi Act 1975	35
	Appendix	
	<i>Ngawha Geothermal Resource Report 1993 Chapter 5</i>	39

The Honourable Minister of Maori Affairs
Parliament Buildings
WELLINGTON

Te Minita Maori

Tena koe e te rangatira

This is a preliminary report on three claims by hapu of Te Arawa concerning their interest in the geothermal resource in the Rotorua district. The claimants are Hiko Hohepa on behalf of himself and Ngati Uenuku Kopako hapu of Te Arawa in respect of the Rotokawa Baths and associated geothermal field; Anaru Rangiheuea on behalf of himself and Tuhourangi and Ngati Wahiao hapu of Te Arawa in respect of their interest in the Whakarewarewa village geothermal area and Joseph Malcolm of Ngati Tamateatutahi a hapu of the greater Te Arawa hapu Ngati Pikia for himself and those having an interest in the Waitangi Soda Springs and the associated Rotoma geothermal field. These claims are brought in a representative capacity with the support of the Federation of Maori Authorities, many of whose members have an interest in geothermal resources in and around Rotorua.

Urgency was accorded the hearing of these claims because of a concern that any findings and recommendations of the tribunal on the Ngawha geothermal claim could impact directly or indirectly on them and other geothermal resource claims.

It became apparent during the hearing of these claims that it was very desirable that the tribunal should report before the Bay of Plenty Regional Council publicly notified its proposed regional plan for the Rotorua geothermal field early in July 1993.

Because of time constraints, the tribunal is issuing this preliminary report. At the request of the claimants, land questions which may bear upon their interest in the geothermal resource have not been dealt with. The report is confined to the claimants' interest in surface manifestations of the geothermal resource and the impact of the Resource Management Act 1991 on their Treaty rights to their geothermal taonga.

Our findings and recommendations are recorded in section 5 of the report.

Te Arawa Representative Geothermal Claims

Section 1

The Claims

Introduction

This preliminary report concerns certain claims by hapu of Te Arawa in respect of geothermal resources in and around Rotorua. They are by no means all Te Arawa geothermal claims. Initially, urgency was sought for two claims, one brought by Ngati Uenuku Kopako (Wai 154) and the other by Tuhourangi/Ngati Wahiao (Wai 204). They were selected to bring a representative claim for themselves and the Federation of Maori Authorities (FOMA) Te Arawa, many of whose members have an interest in geothermal resources in or around Rotorua.

In October 1992 the tribunal commenced hearing a claim by hapu of Ngapuhi concerning the Ngawha geothermal resource in Northland. On 5 November 1992 the tribunal acceded to an application by the two Te Arawa representative claimants to accord urgency to their claims. It did so because of a not unreasonable concern on their part that any findings and recommendations of the tribunal on the Ngawha claim and any subsequent actions or policies of the Crown could have either a direct or indirect bearing on their and other claims to the geothermal resource generally. A fixture was arranged for the hearing of the two representative claims to commence in Rotorua on 15 February 1993 by which time the hearing of the Ngawha geothermal claim had been completed.

The Rotokawa Baths Claim (Wai 154)

Wai 154 is brought by Hiko Hohepa on behalf of himself and Ngati Uenuku Kopako. It concerns the Rotokawa Baths and associated geothermal field. The geothermal resource surfaces near Lake Rotokawa on land vested in the Rotokawa Baths trustees. This land is Maori freehold land held on behalf of three related hapu: Ngati Uenuku Kopako, Ngati Rangiteaorere and Te Roro-o-te-Rangi. It was agreed that Hiko Hohepa should file the claim as he belongs to each of the three hapu. The present legal rights to use the resource vest in the descendants of the three hapu. For convenience, we refer to this claim as the Rotokawa Baths claim.

The Rotokawa Baths claimants maintain in their amended statement of claim that the geothermal resource of a geothermal field is customarily owned by the hapu owning the land with associated surface activity and by several hapu in common if the land of more than one is involved. In modern times, they say the geothermal resource is owned by the owners of the associated Maori lands, provided that in the exploitation of that resource the representatives for those lands must maintain customary responsibilities for the hapu as a whole. The claimants say that where land associated with the geothermal field has been alienated from Maori customary or freehold ownership, ownership of the resource will depend on a range of circumstances surrounding such alienation.

Te Arawa Representative Geothermal Claims

There is some uncertainty among scientists as to whether the field known as East Lake Rotorua geothermal field is independent of the Rotorua field centred on Rotorua and Whakarewarewa. The East Lake Rotorua field is thought to include the springs on Mokoia Island and Lake Rotokawa including the nearby Rotokawa Baths. A Crown scientific witness, Dr Hugh Bibby, writing with other scientists in 1992, thought that the East Lake Rotorua low resistivity zone was not part of the Rotorua geothermal system. However, in recent evidence before us, he suggested there is some uncertainty in this interpretation. He concluded that the independence of the thermal activity at Rotokawa and Mokoia from that of the Rotorua geothermal system cannot be established unequivocally without more information on the zone between the two. We note that Lake Rotorua, the bed of which is at present vested in the Crown, lies between Mokoia Island and the Rotokawa Baths area. The issue of ownership of Lake Rotorua is presently the subject of direct negotiations between Te Arawa and the Crown.

In addition to the highly valued surface manifestations at the Rotokawa Baths, there are also surface manifestations at Lake Rotokawa (now in Crown ownership) and, until recently, at Karamuramu on the shores of Lake Rotorua, and also various pools on Mokoia Island. Mokoia Island is a Maori Reservation under s439 of the Maori Affairs Act 1953 and is held by trustees for the common use and benefit of Ngati Whakaue, Ngati Uenuku Kopako, Ngati Rangiwewehi and Ngati Rangiteaorere. There is also a trust under s438 of the 1953 Act covering approximately 18 acres of the island which could be developed as a tourist venture. The surface pools and springs on Mokoia lie in the land set aside under the s439 reservation. Both the s439 reservation and the s438 trust are administered by the same board of trustees.

The Rotokawa Baths are part of the former Whakapoungakau Pukepoto block of 10,876 acres awarded to Ngati Uenuku Kopako and Ngati Rangiteaorere in 1882. It was later divided between the two hapu with Ngati Rangiteaorere taking the northern portion of the land. The Ngati Uenuku Kopako southern portion was subdivided into nine parts, the land the baths lie in being part of Whakapoungakau 15 or Kakahoroa.

In 1900 the Native Land Court awarded £234 17s 11d and interest to the Crown for survey costs. In lieu of payment of this sum, approximately 636 acres were ceded to the Crown. Included in this area was the bed of Lake Rotokawa where the geothermal indications are to be found. Out of Whakapoungakau 15 Ngati Uenuku Kopako lost 30 acres of dry land and Lake Rotokawa to the Crown. A Crown historian, Dr Ashley Gould, gave detailed evidence of the circumstances surrounding the Crown's acquisition of Lake Rotokawa. He reached the conclusion that the acquisition by the Crown was legal, but noted that the larger issue of the Crown's policy with respect to Maori land and survey liens, vis-a-vis its obligations under the Treaty, requires further consideration and was beyond the scope of his report. It is an issue which may come before the tribunal at a later date in this and other contexts.

The Rotokawa Baths were set aside as a Maori Reservation, under s439 of the Maori Affairs Act, in 1965. Six and a half acres were set aside as a bathing place for three hapu: Ngati Uenuku Kopako, Ngati Rangiteaorere and Te Roro-o-te-Rangi. Although this land had been awarded to Ngati Uenuku Kopako, the trust was to be shared by the three hapu because of their close relationship and physical proximity and the fact that these were the only baths serving the locality.

Part of the lands within the East Lake Rotorua geothermal field was taken from Ngati Uenuku Kopako in 1961 under the Public Works Act for the purposes of an airport. The land taken included an important papakainga and the bath site, Karamuramu, which together with the Rotokawa Baths and Lake Rotokawa are the only surface manifestations on the mainland in this geothermal field. The Rotorua Airport lands are now owned by Rotorua Regional Airport Ltd, in which the Crown and Rotorua District Council have shares.

With the exception of the airport and the Crown lands at Lake Rotokawa, including a school site, much of the remainder of the land within the geothermal field is Maori owned, some being owned by Ngati Rangiteaorere and some within Te Roro-o-te-Rangi lands, some of which has been alienated. There are a few commercial users of the field including a commercial tomato growing firm, Rotokawa Tomatoes, the local school and possibly the local motel. The amount of domestic draw off is not known but is not thought to be extensive.

The Whakarewarewa Claim (Wai 204)

The second representative claim, Wai 204, is brought by Anaru Rangiheuea on behalf of himself and the trustees of the Rotomahana-Parekarangi Trust, being a trust established pursuant to s438 Maori Affairs Act 1953 and on behalf of the Tuhourangi and Ngati Wahiao hapu and iwi of Te Arawa. In particular, that part of the claim heard by the tribunal centred on the well-known Whakarewarewa village geothermal area. This comprises some 33 acres of which approximately one and a half acres, known as the Rahui Land Trust, is vested in trustees pursuant to s438 of the Maori Affairs Act 1953. The balance of the area is in multiple Maori ownership and is known as Whakarewarewa block 3 section 1B. We refer to this claim as the Whakarewarewa claim.

The Whakarewarewa claimants contend that the hot springs and other geothermal surface features at Whakarewarewa and the associated underground resource are and always have been a taonga of Tuhourangi and Ngati Wahiao. They state that, although parts of the surface features relating to the Rotorua geothermal field at Whakarewarewa are now in Crown ownership, the Tuhourangi and Ngati Wahiao are landowners at Whakarewarewa and the geothermal resource there has remained central to their lifestyle and identity to the present day.

The Whakarewarewa claimants note that they well understand that the geothermal field which manifests itself at Whakarewarewa is part of a larger interconnected field which appears at Ohinemutu and other parts of the Rotorua geothermal field. They claim that allocation of iwi, hapu and whanau rights in geothermal resources at Rotorua has long been successfully managed according to the rules of Maori customary law.

Related Claims

There are several related claims concerning land and the geothermal resource in proximity to that involved in the Whakarewarewa claim. Wai 77 concerns the Maori land known as Peka in the vicinity of the Whakarewarewa geothermal resource. It is a claim on behalf of members of Ngati Wahiao for the return of Crown-owned land and recognition that the geothermal resource associated with the land was not included in the alienation of the land. Wai 153, made on behalf of the Rahui trustees, disputes Crown methods of acquiring title to the Whakarewarewa thermal reserves and failure to assure to their ownership and management of the geothermal resource upon and under the land. Wai 282, also brought on behalf of the Rahui Trust and of Ngati Wahiao, disputes the purchases by the Crown of Whakarewarewa no 2 and 3 blocks and the method of allocation of land within those blocks to non-sellers. Wai 268 is brought on behalf of Ngati Whakaue and associated hapu of Ngati Te Hurunga, Ngati Kahu and Ngati Taeotu. It disputes the acquisition by the Crown from Ngati Whakaue of an area of land comprising some 1144 acres, more commonly known as the Whakarewarewa geothermal valley. The claim extends to the Crown land upon which the New Zealand Maori Arts and Crafts Institute is situate but does not include the land under the administration of the Rahui Trust. The claim extends to the geothermal resource associated with the land included in the claim. A further claim by Ngati Whakaue, Wai 335, concerns Crown intervention with their rights in the geothermal resource in the area traditionally known as Pukeroa Oruawhata stretching from the Puarenga stream to Kawaha.

Hearing of the Rotokawa Baths and Whakarewarewa claims (Wai 154 and 204)

The first hearing of these claims commenced on 15 February 1993. During the first week the tribunal heard evidence from kaumatua, kuia and other witnesses in support of the two claims. In addition, evidence was presented by kaumatua, kuia and others representing other claimants. The purpose of this evidence was to apprise the tribunal of the nature of their respective interests in land and associated geothermal resources including in some instances certain cold springs. This evidence included:

- the Rotorua geothermal resource;
- the Tikitere/Taheke geothermal resource;
- the interest of Ngati Whakaue in the Rotorua geothermal resource;

Waitangi Tribunal Reports

- the interest of Ngati Rangiwewehi in the Taniwha Springs and the Hamurana Springs; and
- the interest of Ngati Rangitihi in Tarawera and associated geothermal resource.

On 3 March 1993, the last day of the first hearing of the Rotokawa Baths and Whakarewarewa claims, claimants' counsel sought to have two further groups of claims added to the two claims which the tribunal had been hearing. These two groups were:

- (a) The Ngati Pikiao and Ngati Rangiteaorere claims in relation to the Tikitere/Taheke geothermal field and the Ngati Pikiao claims in relation to the Rotoma geothermal field; and
- (b) The claims on behalf of Ngati Rangiwewehi in relation to Taniwha Springs and Hamurana Springs.

After hearing counsel for both parties, the tribunal determined that the Ngati Pikiao geothermal claims Wai 165 (Rotoma Incorporated, Matawhaura and Waitangi no 3); Wai 193 (Waitangi no 3) and Wai 197 (Rotoiti 15), relating to the Rotoma geothermal field, could appropriately be heard in a representative capacity along with Wai 154 and Wai 204. The tribunal declined to add the claims in relation to the Tikitere/Taheke geothermal field and the Taniwha Springs and Hamurana Springs.

The Rotoma Claims (Wai 165, 193 and 197)

As indicated, there are three separate but related claims concerned with the Rotoma geothermal field. This field is located between Lakes Rotoma and Rotoehu and the Tarawera river to the south. The dominant feature on the landscape is the Tikorangi volcanic dome. The principal surface manifestation is the Waitangi Soda Springs which rise in the Waitangi no 3 Springs Reserve.

Wai 165 is brought by Joseph Malcolm of Ngati Tamateatutahi, a hapu of the greater Ngati Pikiao, for himself and:

- (1) the Rotoma Incorporation;
- (2) the trustees for the owners of Matawhaura no 3 (formerly a Maori development scheme); and
- (3) the trustees under s438 of the Maori Affairs Act 1953 of the Waitangi no 3 Trust.

Te Arawa Representative Geothermal Claims

In their statement of claim, the claimants say they are prejudicially affected by the failure of the Crown to acknowledge and protect the iwi rights to the use and ownership of the thermal resource in each case, of the respective trusts and the incorporation. Among other matters they seek assurance that the Crown will give appropriate consideration to the trusts and the incorporation that have traditionally claimed the ownership of the geothermal field and the rights to protect it.

Wai 193 is brought by Joseph Malcolm for himself and on behalf of the Waitangi no 3 (Soda Springs) trustees and for Ngati Pikiao. It overlaps with claim 165 which also includes Waitangi no 3. The statement of claim alleges the claimants are prejudiced by the failure of the Crown to acknowledge and provide for Maori interest in the geothermal resource and in providing for the use, management or ownership of the geothermal resource, without first ascertaining or settling the Maori interest in the resource or adequately protecting that resource.

Wai 197 is brought by David Whata for himself and on behalf of Rotoiti 15 Incorporated and for Ngati Pikiao. The statement of claim makes claims of prejudice by actions of the Crown identical with those in claim 193.

The three claims each relate to land in the Rotoma geothermal field. The Rotoma Incorporation is an incorporation of some 1500 Ngati Pikiao and related hapu owners who are the proprietors of Rotoma 1B block containing some 1595 hectares. Part of this block adjoins Lake Rotoma and a significant part lies within the Rotoma geothermal field.

The Matawhaura block of 3618 hectares is in two separate parts but is under a common administration on behalf of some 1800 Ngati Pikiao and related hapu owners. The top portion is to the north-east of Lake Rotoiti, abuts Lake Rotoehu and is slightly larger than the other portion (commonly known as the Totara block) which abuts the southern shore of Lake Rotoehu and shares a common border with part of Rotoma 1B block. A relatively small part on the eastern side of the block lies within the Rotoma geothermal field.

The Waitangi no 3 and Waitangi no 2, adjoining blocks, are in the multiple ownership of several hundred members of Ngati Pikiao and related hapu. Waitangi no 1 block, also adjoining, is in the name of the Maori Trustee as trustee for the Ngati Pikiao and related hapu owners. These three blocks lie between Lakes Rotoehu and Rotoma and are within the northern end of the Rotoma geothermal field. The highly valued taonga, the Waitangi Soda Springs, are on Waitangi no 3.

To the south of the Waitangi blocks and to the north of the common boundary between the Matawhaura (Totara) and the Rotoma no 1B blocks, are various relatively small parts of the Taumanu block. One part (no 4) is owned by the proprietors of the Rotoma block. The remainder is general land owned by Maori

having Ngati Pikiao and related hapu association. These various parts of the Taumanu block all lie within the Rotoma geothermal field.

The trustees of the Rotoiti 15 Incorporation, claimants in Wai 197, are the proprietors of some 8404.5 hectares. This large block has a frontage to the south eastern end of Lake Rotoiti and borders much of the southern side of the Matawhaura (Totara) block. A very small area abuts part of the south western boundary of the Rotoma block and the northern boundary of the Haehaenga blocks (which lie to the south of the Rotoma block). Only this small area of the Rotoiti 15 block lies within the Rotoma geothermal field.

The Haehaenga blocks referred to run south from the Rotoma no 1 block to the Tarawera river. They are extensive blocks of general (non-Maori) land and are owned by Tarawera Forests Ltd. The shareholders of this company are Maori Investments Ltd, Tasman Pulp and Paper Co Ltd and the Crown. Part of these blocks, of the order of 1500 hectares, lies within the Rotoma geothermal field which terminates at the Tarawera river.

Findings on the Right of the Whakarewarewa, Rotokawa Baths and Rotoma Claimants to Bring Their Claims

The Arawa people assert an undisputed mana whenua over all the lands represented in the claims under review. The tribunal learned much of the basis of this assertion through listening to the detailed kaumatua oral evidence submitted to it over several days at different venues; evidence that began with myths of the cosmogony and continued up to recent historical times, with explanations about the origins of place names, eponymous ancestors, patterns of intra-tribal relations and the like. We were left in no doubt as to the extent of the Arawa people's rangatiratanga and that the geothermal resource over which it was exercised was, for them, a taonga of the highest value. For the purpose of this preliminary report the terms rangatiratanga and taonga have the same meanings as given in our *Ngawha Geothermal Resource Report 1993* at paragraphs 2.5 and 2.6. It may also be noted that these include the concept of kaitiakitanga and its relationship to rangatiratanga. We advert later to the significance of these terms for the Treaty guarantees they entail.

Under the general mana whenua of Te Arawa each of the claimants offered evidence of their rangatiratanga over the surface manifestation of the geothermal resource in their area. The tribunal accepts this evidence as adequate justification for bringing the several claims, and notes the main points as follows:

The Whakarewarewa claim

The Whakarewarewa village comprises some 38 acres of the former 1143 acre Whakarewarewa block itself set apart from the Rotorua township block in 1883. Subsequent Maori Land Court investigation into Maori ownership awarded title to the following major divisions of Te Arawa: Ngati Whakaue, Tuhourangi and Ngati

Te Arawa Representative Geothermal Claims

Wahiao in unequal shares. In so far as the village land is concerned, some 33 acres are now owned variously by Tuhourangi and Ngati Wahiao, with the remaining five acres in Ngati Whakaue title. However what is of particular relevance to the joint Tuhourangi-Wahiao claim is the nature of their collective rights in the village today, rights which reflect a history of common interest and occupation for more than 100 years. These include:

- (a) their common marae, Te Pakira (a former joint stronghold at Lake Rotokakahi);
- (b) their meeting house, Wahiao, named after their common ancestor;
- (c) their dining hall, Te Rau Aroha;
- (d) their jointly developed and administered papakainga including the one and a half acre Rahui (hot spring reserve) and wahi tapu; and finally
- (e) the etymology of the name Whakarewarewa (in its expanded form) which allows the inclusion of either 'Tuhourangi' or 'Wahiao' but no other.

While it appears the area now known as the Whakarewarewa village was not occupied by any hapu of Te Arawa in 1840, it is well established that Ngati Wahiao took up permanent occupation in accordance with Maori custom in the 1860s. Following the disastrous Tarawera eruption in 1886 many Tuhourangi people relocated at Whakarewarewa at the invitation of their close relations Ngati Wahiao. Both have lived there since and collectively have exercised rangatiratanga over the hot pools and springs and other surface geothermal manifestations in the 33 acres owned by them. Their right to do so is not in dispute. While occupation of land at 1840 will frequently indicate the rangatiratanga of the occupiers at the time over such land the situation is obviously different when land is unoccupied. Subsequent occupation in accordance with Maori custom by a hapu of an iwi which for hundreds of years has had undisputed mana whenua over the land and geothermal resources on it carries with it rangatiratanga over such land. The tribunal is satisfied Ngati Wahiao and their close relations Tuhourangi between them have rangatiratanga over the land occupied by them at Whakarewarewa and over their highly valued taonga of which they are, and have been for more than a century, the kaitiaki.

The Rotokawa Baths claim

Although in this claim there are three hapu of Te Arawa: Ngati Uenuku Kopako, Ngati Rangiteaorere and Te Roro-o-te-rangi, all are closely linked by kinship and descent, and while there is no dispute as to title, (the six and a half acre Rotokawa Baths reservation being owned by Ngati Uenuku Kopako) all three hapu are represented by three trustees each in the administration of the baths. The claimant Hiko Hohepa, while assisting the tribunal with extensive citations of Te Arawa history, in general focused our attention not least on this (Rotokawa) part of the tribal domain. In doing so he pointed once again to the basic ingredients in both rangatiratanga and legal title regarding discovery or conquest and occupation. None of this evidence was challenged. Of particular significance to the tribunal was his discussion of the extent of awareness among his people of geological processes, the

mineral and curative properties of the baths at Rotokawa, as well as their customs as to the proper use and conservation of the resource. The tribunal was thus persuaded that not only did this information underpin responsible administration of the baths today, but also that it reflected a long continued occupation of the area and a perceptive observation of their taonga by all the people of these hapu: in a phrase, the 'tino rangatiratanga' over the land and the surface manifestation of the geothermal resource.

The Rotoma claim

The principal spokesman for the claimant Ngati Pikiao section of Te Arawa, Joseph Malcolm, was equally forthright about Ngati Pikiao's rangatiratanga over the geothermal resource in and about Lake Rotoma including their taonga, the Waitangi Soda Springs. The genealogical basis of the rangatiratanga and therefore of the claim lies with the primal pair Ranginui, the Sky Father, and Papatuanuku, the Earth Mother, from whom are descended Ngatoroirangi and Tamatekapua, tohunga and captain respectively of the Arawa canoe, and from whom in turn are descended Ngati Pikiao, Ngati Terawhai, Ngati Kawiti, Ngati Tamateatutahi, Ngati Rangiunuora and related iwi.

According to evidence presented by Paora Maxwell, it is this ancestry and undisputed occupation of Rotoma, Rotoehu and Rotoiti lands that has been defended through generations, that gives Ngati Pikiao the ownership to the lands and all that they contain. Mr Malcolm himself in his oral submission said:

given all the information we have had yesterday and this morning I believe we have argued we own the resource, we owned it from the dawn of time ... and nowhere along the line of ancestral descent were our rights alienated or given away; nowhere, anywhere did anyone come and take it ... anyone who can claim ownership should do what we have done ... and we would like to see their whakapapa, their genealogy ... the way they have lived on the land; and if they conquered, when and how, and sing waiatas that are appropriate to those incidents ...

The tribunal is in no doubt that the Ngati Pikiao and associated hapu for very many generations exercised rangatiratanga over the Rotoma geothermal resource and that they continue to exercise rangatiratanga over the principal surface manifestation, the Waitangi Soda Springs, and to occupy the land overlying a substantial part of the Rotoma geothermal field.

Application to Issue Interim Findings and Recommendations

As will be seen, the claimants in this urgent hearing have sought interim findings on a number of matters affecting their interest in the geothermal resource. They have also requested the tribunal to report before the Bay of Plenty Regional Council settles and publicly notifies its proposed Rotorua Geothermal Regional Plan early in July 1993.

Te Arawa Representative Geothermal Claims

The full extent of the claimants' interest in the geothermal resource in the respective fields cannot be determined by the tribunal until various claims concerning acquisition by the Crown of land within the various fields have been resolved.

In the case of the Rotorua geothermal field we have earlier noted a number of related claims which challenge the legitimacy of Crown acquisition of land within the Rotorua geothermal field. The Whakarewarewa claimants have in their amended statement of claim a separate land claim concerning the acquisition by the Crown of the Whakarewarewa State Forest which lies immediately adjacent to the surface hot springs at Whakarewarewa. The area now occupied by the forest is said to include a substantial part of the underground resource and some isolated geothermal surface features. Because of the urgency afforded this hearing, this part of the claim has not been heard.

In the case of the Rotokawa Baths claim, the claimants say that where land associated with the geothermal resource has been alienated to the Crown, the associated hapu continue to own the geothermal resource unless and until the Crown proves otherwise. While evidence was called by the Crown on its acquisition of Lake Rotokawa the claimants have not been able at this urgent hearing to respond to this evidence or adduce detailed evidence relating to other alienations to the Crown including the airport. These matters, and their relevance to the extent of the claimants' rangatiratanga over the geothermal resource, await resolution by the tribunal.

In the case of the Rotoma claim, part of the Rotoma field is under land now owned by Tarawera Forests Ltd. The circumstances surrounding this alienation and its possible effect on the claimants' rights to the underlying geothermal resource have yet to be determined.

The tribunal is, however, satisfied that the respective claimants have an interest in important surface manifestations on land within the relevant geothermal fields to which Treaty rights attach, and which serve as a basis for certain findings and recommendations.

Another reason for this preliminary report is that the Ministry for the Environment has recently completed a review of royalties in the Rotorua geothermal field, and its recommendations are currently under consideration by government. The claimants seek a recommendation from the tribunal that in the meantime the Crown should not impose a system of resource rentals upon the claimants in relation to the geothermal resource, and should pay to the claimants such proportion of any resource rental obtained from non-Maori as may be agreed between the claimants and the Crown. The claimants are anxious that the tribunal should report on this issue before the government reaches a decision on the Ministry for the Environment's review.

A third reason for the tribunal issuing a preliminary report is that the claimants seek a finding that it would be contrary to Treaty principles for the Bay of Plenty Regional Council to notify a management plan in respect of any geothermal field the subject of claim, without the claimants' beneficial interest being first determined and given effect to and their right to exercise authority in relation to the field being determined. As indicated above, the Bay of Plenty Regional Council intends to promulgate its proposed Rotorua geothermal field plan pursuant to the Resource Management Act 1991 early in July 1993. Once public notice of the proposed plan is given, the formal process of public submissions (to be made within 40 working days) begins, and the statutory timetable for the hearing of submissions and decision is set in train.

Counsel for the claimants has expressed concern that once the timeline reaches its formal phase under the Resource Management Act (scheduled for early July 1993), the regional council will be obliged to follow the Act's timetable regardless of whether the tribunal has been able to report. There is considerable concern on the part of the claimants that too much haste at this stage will preclude options which are consistent with the Treaty being adequately considered. In this connection, counsel noted that both the Ministry for the Environment background paper to the review (referred to above) and the Bay of Plenty Regional Council plans specifically acknowledge that guidance is expected from the Waitangi Tribunal. The claimants emphasise that, if the statutory formal planning procedure is triggered off in July 1993 before proper consideration is given to solutions consistent with the Treaty, they will again be placed in the position of trying to set aside, at great cost, legislative provisions that many in the community will be committed to. This, they consider, will be productive of tension within the community and be contrary to the spirit of the Treaty.

The tribunal considers the claimants' apprehensions are well founded. We are strongly of the view that if Treaty obligations are to be met, the regional council should not promulgate its proposed Rotorua geothermal field plan until it has had the opportunity to consider the tribunal's views and the claimants have also had a full opportunity of consulting with the regional council on the implications of the tribunal's report.

For these various reasons, the tribunal has decided that it is essential to issue this preliminary report before the Bay of Plenty Regional Council settles and notifies its proposed plan early in July. We would expect that, as a result of this report, the regional council will defer the promulgation of its proposed plan until such time as it has been able to consider its implications, and to consult fully on the issues raised in it with the claimants, in particular the Whakarewarewa claimants. Such a course is essential if effect is to be given to Treaty principles.

Te Arawa Representative Geothermal Claims

The tribunal regrets that it is unable to issue a fully reasoned report by the end of June 1993. Closing submissions by the parties were heard on 21 April 1993 and the subsequent Crown reply and claimant response were received on 26 April 1993. Since then, the tribunal has been engaged in completing its Ngawha geothermal report. Certain of our findings and recommendations in that report are relevant to the present claims.

While we have been able to make the findings and recommendations in this preliminary report in the time available, these will receive amplification in a further report. That report will, however, be interim in nature because of the outstanding land and associated claims yet to be heard, which may have a bearing on the full extent of the claimants' respective interests in the relevant geothermal fields.

Section 2

The Claimants' Interests in the Geothermal Fields

Introduction

Because of various outstanding land claims and of the inability of the parties, due to time constraints imposed by this urgent hearing, to carry out the necessary research to determine the full extent of their respective interests in the geothermal resource, any finding of the tribunal at this stage is necessarily confined to what has been established to date. We state our findings on this basis, bearing in mind that subsequent research may show the nature and extent of the claimants' interest in the geothermal resource to be more extensive than we have determined on the evidence so far available. We note again that, because of the urgent need to issue this report, fuller reasons for our findings must be left to a later report.

The Rotokawa Baths Claimants

This claim concerns the claimants' interest in the field known as the East Lake Rotorua geothermal field. The principal surface manifestation is the Rotokawa Baths on some six and a half acres near Lake Rotokawa, owned by Ngati Uenuku Kopako. The land and associated hot pools have been set aside as a Maori reservation under s439 of the Maori Affairs Act for Ngati Uenuku Kopako, Ngati Rangiteaorere and Te Roro-o-te-Rangi. These three hapu are closely related and their traditional lands are in close physical proximity. As we have earlier recorded, the Rotokawa Baths are a greatly valued taonga of the claimants, which are shared with their close relations, and which are treasured for their healing powers. They have rangatiratanga over the pools and the trustees act as kaitiaki of them. The Crown is under an obligation to ensure that their rights under article 2 of the Treaty are actively protected (see *Ngawha Geothermal Resource Report*). The nature and extent of the Crown's obligation is discussed later, along with the Crown's obligation to the other two sets of claimants.

Mokoia Island is thought to be included in the East Lake Rotorua geothermal field although, as earlier indicated, there remains some uncertainty among scientists as to whether this field is independent of the Rotorua field. While these doubts exist, management must nevertheless continue, and plans will have to proceed on the basis of the best information available. The tribunal understands that current scientific opinion, on balance, supports the likelihood of an independent East Rotorua Lake geothermal field. As earlier noted, Mokoia is a Maori Reservation under s439 of the Maori Affairs Act 1953 and is held by trustees for the common use and benefit of Ngati Whakaue, Ngati Uenuku Kopako, Ngati Rangiwhewehi and Ngati Rangiteaorere. The surface hot springs and pools on Mokoia all lie in the land set aside under the s439 reservation. The tribunal received no representations from Ngati

Whakaue or Ngati Rangiwewehi as to what interest they claimed in the East Lake Rotorua field and accordingly we make no finding on the question. Nor is it necessary to do so, as the interest of Ngati Uenuku Kopako and the two associated hapu in the Rotokawa Baths surface manifestation is well established and is sufficient to support the findings which we later make in respect of the Crown's Treaty obligations towards them.

Crown counsel, in closing submissions, in addition to referring to the possibility that the springs at Mokoia might be part of the Rotorua field, referred to the Karamuramu Springs previously on the lake shore which were lost through submersion when land was taken by the Crown for the Rotorua airport. We agree with the Crown that, until more detailed research is done on the taking of this land (which is over part of the geothermal field), it would be premature to make any findings on the lake shore springs or the claimants' interest in that part of the geothermal resource underlying the airport.

The Rotokawa Baths claim also seeks findings which could affect adjoining land owners who have geothermal bores: the market gardens and possibly the motel. In the absence of full details on the alienation of this land no finding can be made by the tribunal as to whether the claimants continue to have an interest in the geothermal resource underlying such land, or, indeed, in respect of any other land within the geothermal field no longer in the possession of the claimants or associated hapu. None of these circumstances, however, affects the ability of the tribunal to make a finding of the claimants' Treaty rights arising from their undoubted rangatiratanga and kaitiakitanga over their long held taonga, the Rotokawa Baths.

The Whakarewarewa Claimants

This claim concerns the interest of Ngati Wahiao and Tuhourangi in the Rotorua geothermal field. It is not disputed that the claimants' land at Whakarewarewa village, including the Rahui Trust land, lies within the Rotorua geothermal field. In an earlier section of this report we have found that the claimants have rangatiratanga over the hot pools and springs and other geothermal surface manifestations within the land owned by them at Whakarewarewa, and that these are a taonga of immense value. The claimants are kaitiaki of the taonga and the Crown is under an obligation to ensure that their rights under article 2 of the Treaty are actively protected (see *Ngawha Geothermal Resource Report*).

The claimants freely acknowledge the interest of Ngati Whakaue in the geothermal surface manifestations at Ohinemutu adjoining Lake Rotorua. Claims to extensive geothermal surface pools, springs and geysers at present in Crown ownership at Whakarewarewa, and elsewhere in and around Rotorua, are yet to be heard and determined as is the interest of certain hapu of Te Arawa in the geothermal resource under privately owned land in Rotorua city.

The existence of other interests in the Rotorua geothermal field, some yet to be resolved, does not however detract from, or adversely affect, the rangatiratanga and kaitiakitanga of the Whakarewarewa claimants over their taonga. This comprises the hot springs and pools and other surface manifestations on their Whakarewarewa village and Rahui land. Nor does it affect their Treaty rights in respect of these resources, or the ability of the tribunal to make findings as to such rights, at this stage of the proceedings.

The Rotoma Claimants

This claim concerns the interest of Ngati Pikiao and associated hapu in the Rotoma geothermal field. The parameters of this field have earlier been described. The highly valued taonga, the Waitangi Soda Springs at the northern end of the Rotoma geothermal field, is the principal surface manifestation of the geothermal resource within the Rotoma field. The springs are vested in a s438 trust and held on behalf of the owners, the members of the Ngati Pikiao hapu of Ngati Tamateatutahi and Ngati Te Rangiunuora.

These springs have been used by Ngati Pikiao people for centuries. They have been used for cooking and their healing properties have been greatly valued. The trustees have aspirations to provide modern facilities at the Waitangi Soda Springs and develop a health spa there.

As noted earlier, a significant part of the underlying geothermal resource appears to be under land in the ownership of Tarawera Forests Ltd owned by Maori interests, the Crown and Tasman Pulp and Paper Ltd. The land in question is in the southern portion of the field and extends to the Tarawera river. Further research is required to ascertain the circumstances surrounding the alienation of this land and the effect it may have had on the claimants' interest in the underlying geothermal resource. There is evidence of a geothermal field on the southern side of the Tarawera river but this appears to be separate from and independent of the Rotoma field.

The tribunal finds that the claimants have rangatiratanga over a substantial part of the land overlying the Rotoma geothermal field including, in particular, the Waitangi Soda Springs taonga of which they are the kaitiaki. The Crown is under an obligation to ensure that their rights under article 2 of the Treaty are actively protected (see *Ngawha Geothermal Resource Report*). The fact that part of the land in the geothermal field has been alienated does not affect the claimants' Treaty rights in respect of their taonga nor the ability of the tribunal to make findings as to such rights.

Te Arawa Representative Geothermal Claims

Section 3

The Crown's Treaty Obligations to the Claimants

Introduction

In each of the above claims there are marked similarities with the nature of the geothermal resource held to be a taonga of the hapu of Ngawha. In the *Ngawha Geothermal Resource Report* we found that while the claimant hapu no longer have an exclusive interest in the whole of the Ngawha geothermal resource, we accepted without hesitation that certain hot springs at Ngawha were a taonga of immense value to them, and indeed to all Ngapuhi, especially for their healing powers.

So, in the claims before us, the respective claimants have rangatiratanga over hot pools and springs which, in each case, are a highly valued taonga over which they exercise kaitiakitanga, and which they wish to preserve.

In the case of Whakarewarewa, the taonga continues to be resorted to by Ngati Wahiao and Tuhourangi for bathing, for healing, for recreational purposes and is used for other traditional purposes such as curing and dyeing flax and other materials and, of course, for cooking. In addition the taonga attracts thousands of tourists a year and the village has been substantially upgraded and its amenities greatly enhanced to this end. It remains home for those the limited housing can accommodate. At the same time it is, surely, a national treasure of unique and irreplaceable value.

The recent history of the Whakarewarewa taonga has shown how near they came to suffering irreversible damage because of excessive quantities of geothermal steam being drawn off by bores in the vicinity of Whakarewarewa. Crown witness Lindsay Gow, Deputy-Secretary of the Ministry for the Environment, told us that in the last decade, the Rotorua field has been over-exploited to the brink of its sustainable use. He said it has been brought back from that brink but demands for its use continue. He considers the field to be effectively fully allocated in that further extraction is likely to affect its performance.

The Rotokawa Baths, or Waikawa springs, while much smaller in scale, are likewise a highly valued and long-held taonga which, along with (until recently) the Karamuramu pools on the shore of Lake Rotorua, and the springs and pools on Mokoia Island reserve, are of great significance to Ngati Uenuku Kopako and associated hapu. Housing has been erected adjacent to the Rotokawa Baths for the local kaumatua. This reflects their attachment to the pools which are regularly used and valued for their healing qualities and have been so used for many generations. As with the Whakarewarewa claimants, Ngati Uenuku Kopako and associated hapu

attach a high priority to maintaining the integrity of the pools and the underlying resource from which they come.

The Waitangi Soda Springs are unquestionably a greatly valued taonga of Ngati Pikiao and associated hapu having an interest in them. Proposals are presently being formulated to develop a modern health spa at the springs. The tribunal was assured that the current proposals to seek a resource consent to utilise the underlying geothermal resource for the generation of electricity will include a system of monitoring to ensure that the Waitangi Soda Springs are not weakened. Unlike the hapu of Ngawha, the Rotoma claimants have no objection in principle to the utilisation of the underground resource, provided their taonga, the Waitangi Soda Springs, are protected. They are hopeful that the joint venture in which they are equal partners will secure the right to a resource consent to utilise the geothermal energy. If so, they believe they can ensure their taonga is protected. We discuss later their claim of a Treaty right to develop the resource for economic benefit and by modern technology.

In our Ngawha report we found that, although the hapu of Ngawha no longer have an exclusive interest in the underlying geothermal resource, they nonetheless retain a substantial interest in the resource. We have yet finally to determine the nature and extent of the respective claimants' interest in the geothermal resource in the light of further research and the outcome of pending land and associated claims. However as noted, the respective claimants each have rangatiratanga over certain hot pools or springs and they act as kaitiaki of them.

We further found in the Ngawha report that the preservation of the taonga, the Ngawha hot springs, necessarily depends on the preservation and continued integrity of the underlying resource which manifests itself in their hot springs and pools. This is because it is totally unrealistic to isolate or divorce the Ngawha claimants' interest in the Ngawha hot springs from the geothermal resource which finds expression in them. This finding is equally applicable to the claims now before us.

The Duty of the Crown to Protect the Claimants' Taonga

In our Ngawha report we found the Crown to be under a Treaty duty to protect the hot springs at Ngawha being the taonga of the hapu of Ngawha. By way of elaboration we said:

The degree of protection to be given to Maori resources will depend upon the nature and value of the resource. The tribunal considers that in the case of a very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori, 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. The Ngawha geothermal springs fall into this category. We would stress that the value attached to such a taonga is essentially a

matter for Maori to determine (7.6.1).

In the particular circumstances of this claim the tribunal has no doubt that if the Treaty's article 2 guarantee is to be given a meaning compatible with Maori culture and spiritual values, as plainly it must, the Crown's right or obligation to manage geothermal resources in the wider public interest must be constrained so as to ensure the claimants' interest in their taonga is preserved in accordance with their wishes. We are unaware of any exceptional circumstances or overriding public interest which would justify any other conclusion which might leave it open for the claimants' interest in their taonga to be harmed or rendered ineffectual (7.6.3).¹

We find the Crown to be under a similar Treaty duty to the Whakarewarewa, Rotokawa Baths and Rotoma claimants to protect their respective taonga. And subject to the amplification which follows, we find this statement from the Ngawha report applicable to the present claimants and their taonga.

It would be invidious for this tribunal to attempt a comparative evaluation of the value to the three groups of claimants of their respective taonga. We would again stress that the value attached to such taonga is essentially for those having rangatiratanga and exercising kaitiakitanga over them to determine. But such value is not confined to, or restricted by, traditional uses of the taonga. It will include present day usage and such potential usage as may be thought appropriate by those with rangatiratanga over the taonga.

References

- 1 *Ngawha Geothermal Resource Report 1993* (Wai 304)(Wellington, 1993) pp 152-153

Te Arawa Representative Geothermal Claims

Section 4

Discussion of Findings and Recommendations Sought by the Claimants

Findings Sought

Counsel for the claimants seeks eight findings by the tribunal. We consider each in turn. The tribunal's findings and recommendations are recorded in section 5.

1 That the geothermal resource in the fields in respect of which the claims are made are taonga of the claimants.

Counsel for the claimants has recognised that until further research is undertaken into land sales and related matters the extent of the various claimants' interest in the geothermal resource cannot be determined. She has also recognised that different answers may be appropriate in relation to different fields. At this stage the tribunal has found that:

- (a) The hot pools known as the Rotokawa Baths are a taonga of the Rotokawa Baths claimants. They have rangatiratanga over them and act as kaitiaki of them.
- (b) The hot pools and springs and other geothermal surface manifestations within the Whakarewarewa claimants' land at Whakarewarewa village including the Rahui trust land are a taonga of the Whakarewarewa claimants. They have rangatiratanga over them and act as kaitiaki of them.
- (c) The Waitangi Soda Springs which rise in the Waitangi no 3 Springs Reserve are a taonga of the Rotoma claimants. They have rangatiratanga over them and act as kaitiaki of them.

2 That the finding that the geothermal resource is a taonga of the claimants is likely to be representative of the position of other claimants.

This proposed finding assumes that we have made the first proposed finding which we have not. At this stage our findings are confined to certain surface geothermal manifestations. They do not extend to the whole of the geothermal resource. The tribunal heard evidence from kaumatua and kuia in respect of a number of other geothermal fields in the Rotorua district. On some of these, for example, the Tikitere/Taheke geothermal resource, there are surface manifestations by way of hot pools and springs. It may well be that the position of those having rangatiratanga over such surface manifestations is similar to that of the claimants before us.

3 That article 2 of the Treaty requires the Crown affirmatively to protect the claimants' interests in both the benefit and enjoyment of the taonga and the mana or authority to control them.

In chapter 5 of our *Ngawha Geothermal Resource Report* we considered the Treaty principles relevant to a claim concerning the geothermal resource. What we said there is equally applicable to our findings in respect of the present claimants. For convenience we append a copy of our discussion of Treaty principles in the Ngawha report. There we have discussed, among other matters, the Crown obligation actively to protect Maori Treaty rights and also the tribal rights of self-regulation. We return to those matters in section 5 of this report.

4 That the claimants' interest in the resource is not confined by traditional or pre-Treaty technology or needs, but includes the development of the resource for economic benefit and by modern technology.

The tribunal understands that development of the Rotorua geothermal field is not contemplated. It is, if anything, already at maximum utilisation, if not overloaded. Nor are we aware of any proposals for the further utilisation of the underlying resource in the Rotokawa geothermal field. There are however proposals for a joint venture between certain of the Rotoma claimants and one or more electricity authorities to generate electricity from the Rotoma field. A resource consent under the Resource Management Act 1991 will be required if such a venture is to proceed.

As noted earlier the Rotoma claimants believe they can ensure their taonga is protected should the joint venture secure the right to a resource consent to utilise the underlying geothermal energy in the Rotorua field.

The question of development rights was the subject of considerable discussion in chapter 10 of the tribunal's *Ngai Tahu Sea Fisheries Report 1992*. There, the tribunal noted that it is by now a truism that Maori Treaty rights are not frozen as at 1840. All lay in the future and there would be developments that could not have been foreseen or predicted at that time. The generation of electricity from geothermal energy is surely a good example. In the Ngai Tahu sea fisheries claim the Crown agreed that inherent in the Treaty of Waitangi is a right to development.¹ The Crown made the point, however, that when tribes chose to undertake development of their commercial interest in the fisheries they were amenable to appropriate programmes of conservation and management techniques introduced by government from time to time. The tribunal noted that the Crown said nothing in this context as to any obligation on the Crown to consult with Maori before instituting any such measures.

In the present case the Crown submitted that the position regarding development has to be distinguished according to whether or not there is continued land ownership. It drew a distinction between the situation of Ngati Wahiao and Tuhourangi in the

Rotorua field and the Rotoma claimants. At Rotoma, Crown counsel said, the hapu there are able, because of their land ownership, to use modern technology to develop the field. But that, the Crown said, is permitted under the Resource Management Act. It was also submitted that the existence of any development right does not entitle Maori to exclusive development.

There can be no doubt that the Rotoma claimants have a Treaty right to develop the geothermal resource lying under their land. Whether they still retain an interest in the geothermal resource under the adjoining land owned by Tarawera Forests Ltd remains to be determined. They accept that a resource consent must be obtained and the principle of sustainability adhered to under the Resource Management Act.

The tribunal considers that the Rotoma claimants' rangatiratanga over the Waitangi Soda Springs taonga entitles them to priority in the granting of a resource consent to utilise the geothermal underground resource. This will best ensure that the integrity of the Waitangi Soda Springs is maintained, the more so as the claimants, between them, own a substantial part of the land overlying the geothermal field. Were priority not so accorded, there is a real possibility of their taonga being adversely affected. This is because the Resource Management Act 1991 does not require those administering the Act to ensure that the claimants' Treaty rights are fully protected (*Ngawha Geothermal Resource Report*). Whether or not a right to development may entitle Maori to an exclusive right will necessarily depend on the nature and extent of the particular resource and the development sought. Where priority is accorded Maori in terms of their Treaty rights, it could well be in a given case that no further right could be granted without infringing Treaty rights. The Crown's submission overlooks these considerations.

5 That the Crown has failed to provide a system according the claimants' interest in the resource a sufficient priority and for permitting proper scope for the exercise of authority by the claimants in relation to the management of the resource.

The tribunal agrees that the Crown has failed to provide in the Resource Management Act 1991, a system or provisions according the claimants' interest in the geothermal resource a sufficient priority. This is because, as we have already stated, the local and regional authorities administering the Act are not required to act in a manner that is consistent with the principles of the Treaty. They may do so, but are not required to do so.

The tribunal also agrees the claimants should be afforded proper scope for the exercise of authority in relation to the management of the resource. While there are provisions in s33 of the Resource Management Act for the transfer of certain powers under the Act to iwi, this is at the discretion of the local authorities having the powers. They are not obliged to transfer any powers to iwi and in any event continue to be responsible for the exercise of any such powers. It is premature at this stage,

when unresolved questions as to the extent of various claimants' interests in the geothermal resource remain to be determined, for the tribunal to make any specific findings on these matters. Clearly there is a need for the Crown and iwi having an interest in the geothermal resource to hold discussions as to the ways in which better provision for iwi or hapu involvement in management of the resource might be secured.

6 That it would be contrary to the principles of the Treaty of Waitangi for the Crown to impose a system for resource rentals and itself to take benefit from the utilisation of the geothermal resources in the fields subject to claim without first determining and giving effect to the interest of the claimants.

This proposed finding focuses upon one type of royalty: resource rentals. The Crown distinguished these from the other type of royalty, environmental user charges, as follows:

- *Resource rentals* represent a return on an asset, paid by the people using the asset, to the owner of that asset or the body vested with ownership duties. These are calculated according to the economic rent available for use of that asset.
- *Environmental user charges* are a form of economic instrument, a way of achieving environmental outcomes by providing a primarily economic (price related) rather than a legal sanction to get users to change their behaviour towards the environment.

The claimants and the Crown take very different views of the Crown's entitlement to geothermal royalties under s360(1)(c) of the Resource Management Act 1991. By that provision the Governor-General may make regulations:

Prescribing the circumstances and manner in which holders of resource consents shall be liable to pay for the occupation of the coastal marine area, the bed of any river or lake which is land of the Crown, and the extraction of sand, shingle and other natural materials from lands of the Crown, and the use of geothermal energy.

The Resource Management (Transitional, Fees, Rents and Royalties) Regulations 1991 (SR 1991/206) have been made pursuant to s360(1)(c). Part III of the regulations, headed "Geothermal Rents and Royalties", establishes a two part system for payment to the Crown of rents and royalties for the use of geothermal energy. In essence, one part of the system preserves the pre-existing liability to 'rentals' of licensees and others who acquired their right to use geothermal energy under the Geothermal Energy Act 1953. The other part of the system applies to those who might be described as new users: those who obtain their original permission to use

geothermal energy under Part VI of the Resource Management Act 1991. The third schedule to the 1991 regulations specifies formulae to calculate the annual 'royalty' due to the Crown from those users.

The claimants argued that the Crown's statutory right to geothermal royalties is based on an assumption of ownership which is contrary to the claimants' claims and the Crown's obligations under the Treaty. Amongst their arguments in support of this view are:

- that the wording of s360(1)(c) of the Resource Management Act treats geothermal energy as an asset of the Crown along with such other properties as natural material from Crown lands; and
- that the separate provision in s360(1)(b) of the Act for fees chargeable by regional councils for the costs of managing geothermal resources reveals that the user charges authorised by s360(1)(c) are based on an assumption of Crown ownership of geothermal energy.

Acknowledging that resource rentals might be charged as a tool for environmental management or as a rental on the resource, the claimants' argument, in essence, is that in either case the Crown's receipt of them would be in breach of its Treaty duties: either the Crown would be receiving a benefit due to the claimants or charging the claimants themselves for the use of geothermal energy.

The Crown's view of its entitlement to geothermal royalties centres on its role in managing geothermal resources. It was said that the Crown does not claim to own those resources but has a legitimate interest in their management because:

- the control of external effects caused by particular users is of major importance to the sustainable management of geothermal resources and is best dealt with by public authorities;
- the licences granted by the Crown under the Geothermal Energy Act 1953 are contracts between the Crown and the users and the Crown could be exposed to liability for compensation for detriment caused to those users;
- Whakarewarewa is of such significance as part of New Zealand's national heritage.

The Crown also stressed that, especially in the context of a statutory system which gives priority to sustainable management, resource rentals as much as environmental user charges are economic tools to be used to attain that end. Finally, and in response to the concern that the Rotoma claimants could be charged a resource rental in the event of approval being given to their proposed development of the Rotoma

field, the Crown highlighted the ministerial power to remit royalties and suggested that past use of this power should be taken into account.

The tribunal has already found that the claimants have rangatiratanga over and act as kaitiaki of certain surface geothermal manifestations which are taonga. These interests are expressly guaranteed Crown protection by article 2 of the Treaty of Waitangi. Because of the complex nature of geothermal resources, as well as the limited evidence available about the possible extent of other interests in the geothermal fields subject to claim, we have refrained from characterising the claimants' interests as 'ownership' interests. However, in our view, whether or not geothermal resources are capable of ownership and whether or not others might also have an interest, the claimants' interests in the geothermal fields subject to claim are clearly of a beneficial nature. As such, it follows that they are entitled to appropriate recognition in any resource rental regime which might properly be established.

We further consider that, compared to the strength of competing claims which might be made to the benefit of resource rentals, the claimants' interests in the respective geothermal fields are entitled to priority. In our view, the claimants' Treaty guaranteed interests are superior to any differently-based claim which might be made by other citizens. As for the Crown, the only other contender for resource rentals and at present the only possible recipient of them, we are not persuaded that its management interest in geothermal resources is of such a nature as to justify its receipt of the extent of royalties authorised by the Resource Management Act. Because the Act devolves to regional councils such a degree of responsibility for the management of geothermal resources, and so comprehensively authorises the councils' recoupment of administrative and management costs, the tribunal considers the Crown's entitlement to resource rentals under the Act is based upon an erroneous and unjustifiable assumption that it 'owns' geothermal resources.

7 That it would be contrary to the principles of the Treaty of Waitangi for the Crown to permit the Bay of Plenty Regional Council to notify a management plan in respect of any geothermal field the subject of claim without determining and giving effect to the claimants' beneficial interests in the field and their right to exercise authority in relation to the field to the fullest extent reasonably practicable.

Section 65 of the Resource Management Act provides for the preparation of regional plans (other than coastal marine areas), by a regional council in the manner set out in the first schedule to the Act. Under s66, the regional council is required to prepare any such plan in accordance with the provisions of Part II and ss30 and 32 of the Act. Clause 3 of the first schedule requires the regional authority to consult with the tangata whenua of the area who may be affected, through iwi authorities and tribal runanga. Clause 5 and subsequent clauses prescribe the procedures to be

followed once the authority has prepared a proposed plan.

The finding sought is expressed in general terms as relating to a regional plan in respect of any geothermal field the subject of claim. The evidence before us however related principally to a proposed Rotorua geothermal plan in the course of preparation by the Bay of Plenty Regional Council. The Whakarewarewa village and Rahui trust land lie within the Rotorua geothermal field.

In essence, the claimants contend that the promulgation of such a plan is premature, as there are outstanding land and related claims which could have a bearing on the nature and extent of the rights of various claimants in the Rotorua geothermal field including their right to exercise authority in relation to the field. Until such rights are ascertained, it is said, the regional council is unable to make an informed decision on a proposed plan. Only when this information is available to the regional council and to claimants having an interest in the field, can appropriate consultation take place between the parties. There appears, however, to be no provision in the Resource Management Act restricting the right of the regional council to promulgate a proposed regional geothermal plan before this information is available. Should a proposed plan be promulgated without this information, claimants' Treaty rights may well be breached and they are likely to be detrimentally affected.

That this can occur is the result of the critical omission in Part II or elsewhere in the Resource Management Act, of a requirement that local and regional authorities administering the Act are to act in a manner that is consistent with the principles of the Treaty of Waitangi (*Ngawha Geothermal Resource Report*). The tribunal is mindful of the views of Mr Gow of the Ministry for the Environment, who considered it a matter of urgency that a proposed plan for the Rotorua geothermal field be notified. Claimants' counsel advised that the claimants have no difficulty with the general proposition that better decision-making is promoted by planning. But their concern is that if the planning process is not set on the tracks properly to begin with, further Treaty breach and exacerbation of community strains will be inevitable.

The tribunal is strongly of the view that the real urgency is not for an immediate promulgation of the proposed plan but rather that appropriate legislative action should be taken by the Crown which will ensure that any such plan will incorporate and protect the Treaty rights of the tangata whenua in the Rotorua geothermal field. Only when this has been done should a proposed regional geothermal plan be promulgated.

The Crown has, through the medium of the Resource Management Act, delegated the day to day administration and management of the geothermal resource, and other natural and physical resources, to local and regional authorities. The Crown has done so without first ensuring that the full interest of Maori in the geothermal resource, and the extent of its Treaty obligations to protect such interests, are first ascertained.

As a result, if legislative and other appropriate action is not taken to correct the position, it is virtually certain that a regional geothermal plan will fail adequately to protect Maori Treaty rights in their geothermal taonga. As a consequence claimants are likely to be prejudicially affected.

8 That the Resource Management Act is in breach of the Treaty in not retaining in the Crown a power to perform its Treaty guarantee in relation to the geothermal resource.

We have held in the *Ngawha Geothermal Resource Report* that if the Crown chooses to delegate to local and regional authorities extensive powers to manage and control natural and physical resources, it must do so in terms which ensure that its Treaty duty of protection is fulfilled.

Mr Gow, in discussing the Resource Management Act, said:

The Act does, however, provide for an unprecedented range of Maori and Treaty interests to be considered in the making of resource allocation and management decisions. Maori and Treaty interests are not paramount, and need to be weighed against other matters of similar importance, but the combined effect of all the provisions is powerful and unprecedented in resource law.

Mr Gow's candid admission that Maori and Treaty interests are not paramount, and need to be weighed against other matters of similar importance, reveals a mind-set which fails to appreciate that the Crown's Treaty obligations to Maori, actively to protect their taonga is more than a matter which needs only to be weighed against other matters "of similar importance". The Treaty is a solemn and fundamental compact between the Crown and Maori. By article 2 the Crown guarantees to Maori their rangatiratanga over their taonga for so long as they wish to retain them. The Crown has resiled from this Treaty obligation by requiring those making decisions relating to Maori rangatiratanga to do no more than "take into account" the principles of the Treaty. As a consequence, the Crown's Treaty duty of protection may, but need not be, honoured. If it is not honoured, the claimants' interest in their geothermal taonga is placed in jeopardy against their wishes and in breach of the Treaty.

Recommendations Sought

The claimants seek three recommendations. We consider each of these in turn. The recommendations we consider appropriate at this stage of the proceedings are recorded in the next and final section.

1 That the Crown should impose a moratorium on the grant of resource consents in relation to the geothermal fields the subject of claim.

By way of an alternative, counsel for the claimants proposed that:

1A That the Crown use its power under s140 of the Resource Management Act to set up a regime, at least for the time being, to deal with geothermal consents.

It was suggested that this procedure would not cause great practical difficulties as a number of the fields were said to be quite small.

As to the first proposal, we note there is no provision in the Resource Management Act empowering the Crown to impose the suggested moratorium. Legislation would be necessary to suspend, or authorise the suspension of, the grant of resource consents in relation to geothermal fields, the subject of claim, pending the resolution of such claims. It appears to the tribunal that such a power would be desirable to ensure that Treaty rights of claimants in the geothermal resource were not adversely affected by the grant of consents before those rights had been determined.

The tribunal has doubts about the suitability of the exercise by the Crown of its powers under s140 of the Resource Management Act to call in a 'proposal' (undefined) of national significance, on the ground that it is, or is likely to be significant in terms of s8 (Treaty of Waitangi). If it was thought preferable that all resource consents relating to the geothermal resource should be dealt with at ministerial level rather than locally, it is likely a special process tailored to the particular characteristics of the geothermal resource, would need to be devised. This alternative proposal, and its implications, was not sufficiently discussed by the parties before us to enable us to come to an informed conclusion. We prefer the proposal for a moratorium.

2 That the Crown and the claimants should negotiate for recognition of the claimants' beneficial interests in the resource and to achieve a mechanism for their exercise of authority in its management.

The tribunal has already found that article 2 of the Treaty requires the Crown actively to protect the beneficial interest of Maori in the geothermal resource. This is not merely a matter of negotiation. In these proceedings the tribunal is making findings on the basis of the proven interest of each of the three sets of claimants in their taonga comprising the surface pools and springs over which they have rangatiratanga and of which they are the kaitiaki. If by this proposed recommendation the claimants are referring to their interest in the underlying geothermal resource, we note the extent of this has yet to be determined and is the subject of various claims yet to be heard. Should the claimants prefer to negotiate these matters directly with the Crown that is essentially a matter between them and

the Crown.

3 That in the meantime the Crown should not impose a system of resource rentals upon the claimants in relation to the geothermal resource and should pay to the claimants such proportion of any resource rental obtained from non-Maori as may be agreed between the claimants and the Crown. That failing to reach agreement between claimants and the Crown within six months, either party may bring the claim back to the tribunal for urgent consideration.

The first part of the proposed recommendation would forestall the imposition of any resource rentals upon the claimants in the near future. We observe that such a prospect is possible with regard to the Whakarewarewa claimants but highly unlikely for the Rotokawa Baths and Rotoma claimants unless, in the case of Rotoma, the necessary resource rentals for development of that field are granted speedily.

The second part of the proposed recommendation, relating to the negotiation of a payment to the claimants of a share of the resource rentals obtained by the Crown from non-Maori, also appears to have a very limited potential effect, and then only for the Whakarewarewa claimants. This is because, in the Rotorua area, only the Bay of Plenty Area Health Board is presently paying a royalty and it relates to the use by the Rotorua and Queen Elizabeth hospitals of energy from the Rotorua field. The royalty is fixed, pursuant to licences granted under the Geothermal Energy Act 1953 and regulations, at a rate of 55 cents per gigajoule. The collection of the royalties imposed in 1986 upon small users of the Rotorua field was suspended in 1992 pending the outcome of the royalty review being conducted by the Ministry for the Environment.

References

- 1 "The Ngai Tahu Sea Fisheries Report 1992" (Wai 27) 5 WTR (Wellington) pp 253-254

Section 5

Findings and Recommendations of the Tribunal

Introduction

In the preceding section we have considered and expressed our views on the findings and recommendations sought by the claimants. We now state the tribunal's findings and recommendations on the various issues before us at this stage, in the light of relevant Treaty principles. Many of the issues raised in these claims are substantially the same as those which were before us in the Ngawha geothermal claim, except that the Ngawha claim also involved a land claim. Accordingly, the Treaty principles which we found to be applicable in the Ngawha claim are for the most part equally applicable here. Before stating our findings, it is desirable that we should record the relevant Treaty principles. They are taken from chapter 5 of the *Ngawha Geothermal Resource Report* (see appendix 1) and should be read in the light of that chapter.

Relevant Treaty Principles

Two broad principles are applicable to the claims before us.

The *first* is that the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. This principle, which derives directly from articles 1 and 2 of the Treaty includes the following concepts:

- the Crown obligation actively to protect Maori treaty rights.
- the tribal right of self-regulation.
- the duty to consult.

Crown duty of active protection

The duty of active protection applies to all interests guaranteed to Maori under article 2 of the Treaty. Among these, natural and cultural resources are of primary importance. There are several important elements including the need to ensure:

- that Maori are not unnecessarily inhibited by legislative or administrative constraints from using their resources according to their cultural preferences.
- that Maori are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms.

Te Arawa Representative Geothermal Claims

- that the degree of protection to be given to Maori resources will depend upon the nature and value of the resource. In the case of a very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori, 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. The taonga of the Whakarewarewa, Rotokawa Baths and Rotoma claimants, referred to in our first finding below, fall into this category. The value attached to such taonga is essentially a matter for Maori to determine.
- that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.

Tribal right of self-regulation

The tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga. Thus:

- the Treaty guaranteed tribal control of Maori matters, including the right to regulate access of tribal members and others to tribal resources; and
- the cession of sovereignty or kawanatanga enabled the Crown to make laws for conservation control and resource protection, being in everyone's interests. These laws may need to apply to all alike. But this right is to be exercised in the light of article 2 and should not diminish the principles of article 2 or the authority of the tribes to exercise control. In short, sovereignty is said to be limited by the right reserved in article 2.

Duty to consult

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

We refer next to the *second* Treaty principle applicable to this claim.

The Principle of Partnership

This principle was firmly established by the Court of Appeal in the *New Zealand Maori Council* case where it was authoritatively laid down that the Treaty signifies a partnership and requires the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith.

While the needs of both cultures must be provided for and compromise may be necessary in some cases to achieve this objective, the Treaty guarantee of rangatiratanga requires a high priority for Maori interests when proposed works may impact on Maori taonga.

Tribunal Findings

- 1 (a) The hot pools known as the Rotokawa Baths are a taonga of the Rotokawa Baths claimants. They have rangatiratanga over them and act as kaitiaki of them.
- (b) The hot pools and springs and other geothermal surface manifestations within the Whakarewarewa claimants' land at Whakarewarewa village, including the Rahui trust land, are taonga of the Whakarewarewa claimants. They have rangatiratanga over them and act as kaitiaki of them.
- (c) The Waitangi Soda Springs which rise in the Waitangi no 3 Springs Reserve are a taonga of the Rotoma claimants. They have rangatiratanga over them and act as kaitiaki of them.

We note that until further research is undertaken into land sales and related matters, the extent of the various claimants' interests in the geothermal resource cannot be determined.

- 2 Article 2 of the Treaty requires the Crown actively to protect the claimants' respective interests in both the benefit and enjoyment of their taonga and the mana or authority to exercise control over them. Failure to afford such protection constitutes a breach of Treaty principles.
- 3 The degree of protection to be given to the claimants' taonga will depend upon the nature and value of the resource. The value to be attached to their taonga is essentially a matter for the claimants to determine. Such value is not confined to, or restricted by, traditional uses of the taonga. It will include present day usage and such potential usage as may be thought appropriate by those having rangatiratanga over the taonga. In the case of a highly valued, rare and irreplaceable taonga of great spiritual and physical importance, such as the taonga of the claimants, 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.

- 4 The Crown's right to manage, or oversee the management of, geothermal resources in the wider public interest must be constrained so as to ensure that the claimants' interest in their respective taonga is preserved in accordance with their wishes. The tribunal is unaware of any exceptional circumstances or overriding public interest which would justify any other conclusion which might leave it open for the claimants' interest in their taonga to be harmed or rendered ineffectual.
- 5 The Crown cannot avoid its Treaty duty of active protection of the claimants' taonga by delegation to local or regional authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of geothermal resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.
- 6 We repeat here our finding in chapter 8 of the *Ngawha Geothermal Resource Report*, that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi. The tribunal further finds that the claimants have been, or are likely to be, prejudicially affected by the omission and in particular, by the absence of any provision in the Act ensuring priority is given to the protection of their taonga and confirming their Treaty rights, in the exercise of their rangatiratanga and kaitiakitanga, to manage and control them as they wish.
- 7 The tribunal finds that the claimants' interest in the resource is not confined by traditional or pre-Treaty technology or needs, but in appropriate cases includes the development of the resource for economic benefit and by modern technology. In particular, the tribunal finds that the Rotoma claimants have a Treaty right to develop the geothermal resource lying under their land. The tribunal further finds that their rangatiratanga over the Waitangi Soda Springs taonga entitles them to priority in the granting of a resource consent to utilise the geothermal underground resource, as this will best ensure that the integrity of the Waitangi Soda Springs is maintained.
- 8 The tribunal finds in respect of the provisions for the payment of resource rental or royalties that it would be contrary to the principles of the Treaty for the Crown to impose a system of royalties or resource rentals and itself to take benefit from the utilisation of the geothermal resources in the fields

subject to claim without first determining and giving appropriate effect to the interest of the claimants.

- 9 The Crown, through the medium of the Resource Management Act, has delegated to regional councils the power to make regional plans without the full interest of the claimants in the geothermal resource, and the extent of the Crown's Treaty obligations to protect such interests, being first ascertained. As a consequence, it is virtually certain that a regional geothermal plan, such as that proposed to be publicly notified on or about 1 July 1993 by the Bay of Plenty regional council in respect of the Rotorua geothermal field, will fail adequately to protect Maori Treaty rights in their geothermal taonga. Such failure on the part of the Crown is inconsistent with its Treaty duty to protect the claimants' interest in their taonga. As a consequence, claimants are likely to be prejudicially affected by such breach of duty.

Recommendations Pursuant to s6(3) of the Treaty of Waitangi Act 1975

The tribunal's recommendations relate to our foregoing findings concerning the Resource Management Act 1991.

- 1 We reiterate our *recommendation* in chapter 8 of the *Ngawha Geothermal Resource Report 1993*, that an appropriate amendment be made to the Resource Management Act 1991 providing 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 the principles of the Treaty of Waitangi. We believe there is an urgent need for such an amendment.

Unless and until this is done, the claimants are likely to be prejudicially affected by the omission of such a provision in the Act, and will have no assurance that priority will be given to the protection of their geothermal taonga or recognition of their Treaty rights, in the exercise of their rangatiratanga and kaitiakitanga, to manage and control them as they wish.

- 2 We further *recommend* that the Crown, as a matter of urgency, should impose a moratorium on the grant of resource consents, or the notification or making of regional plans, or the imposition of royalties or resource rentals under the Resource Management Act 1991, in relation to geothermal fields or geothermal resources within any such field which are subject to claims under the Treaty of Waitangi Act 1975, until the hearing and determination, or other disposition of such claims.
- 3 We further *recommend* that early discussions take place between the Crown and claimants upon the matter of royalties and resource rentals generally

Te Arawa Representative Geothermal Claims

including the entitlement, should the Crown contemplate the re-imposition of royalties or resource rentals, of the claimants and other Maori having an interest in geothermal resources to a share of any such royalties or resource rentals.

Should the Crown and the claimants fail to reach agreement within six months of the date of this preliminary report on the matters referred to in our third recommendation, either party may bring the claims back to the tribunal for urgent consideration.

In accordance with s6(5) of the Treaty of Waitangi Act 1975, the director of the tribunal is requested to serve a sealed copy of this report on:

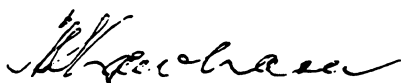
- (a) Mr Hiko Hohepa for the Rotokawa Baths claimants,
Mr Anaru Rangiheuea for the Whakarewarewa claimants,
Mr Joseph Malcolm for the Rotoma claimants;
- (b) Minister of Maori Affairs,
Minister of Justice,
Minister for the Environment,
Minister of Conservation;
- (c) Solicitor-General;
- (d) Ms S Elias QC (counsel for the claimants),
Ms D Edmunds;
- (e) Bay of Plenty Regional Council.

Waitangi Tribunal Reports

Dated this 24th day of *June* 1993



G S Orr, presiding officer



I H Kawharu, member



J R Morris, member



W M Taylor, member



Te Arawa Representative Geothermal Claims

Appendix

Ngawha Geothermal Resource Report 1993

Chapter 5

Treaty Principles

5.1 Introduction

5.1.1 If the tribunal finds that any claim submitted to it under s6 of the Treaty of Waitangi Act 1975 is well-founded it may recommend remedial action by the Crown. Before it can find a claim to be well-founded the tribunal must be satisfied:

- that the claimant has established a claim falling within one or more of the matters referred to in s6(1) of the Act,
- that the claimant has been or is likely to be prejudicially affected by any such matters, and
- that any such matters were or are inconsistent with the principles of the Treaty.

All three elements must be established before the tribunal can find a claim to be well-founded.

In previous reports the tribunal has formulated various Treaty principles which it considered applicable to the particular claims under consideration. The Court of Appeal, notably in the *New Zealand Maori Council* case already referred to (3.14.5) has also formulated certain Treaty principles. Not all principles are relevant to any given claim. In the present case we believe two leading principles are applicable to the claims in respect of the Ngawha geothermal resource. We consider each in turn.

The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga

5.1.2 In the *Ngai Tahu Sea Fisheries Report 1992* the tribunal saw this principle as

Te Arawa Representative Geothermal Claims

are better seen as inherent in or integral to this basic principle. Specifically we refer, in the context of the present claim, to:

- the Crown obligation actively to protect Maori Treaty rights
- the tribal rights of self-regulation
- the rights of redress for past breaches
- the duty to consult

The Ngai Tahu sea fisheries tribunal elaborated as follows:

Implicit in this principle is the notion of reciprocity - the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands, forests, fisheries and other valuable possessions for so long as they wished to retain them. It is clear that cession of sovereignty to the Crown by Maori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Maori land but of much more, including fisheries.

Rangatiratanga was confirmed and guaranteed by the Queen in article 2. This necessarily qualifies or limits the authority of the Crown to govern. In exercising sovereignty it must respect, indeed guarantee, Maori rangatiratanga - mana Maori - in terms of article 2.

The Crown in obtaining the cession of sovereignty under the Treaty therefore obtained it subject to important limitations upon its exercise. In short, the right to govern which it acquired was a qualified right.¹

Crown duty of active protection

The duty of active protection applies to all the interests guaranteed to Maori under article 2 of the Treaty. While not confined to natural and cultural resources, these interests are of primary importance. There are several important elements including the need to ensure:

- that Maori are not unnecessarily inhibited by legislative or administrative constraints from using their resources according to their cultural preferences
- that Maori are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms
- that the degree of protection to be given to Maori resources will depend upon the nature and value of the resource. In the case of a very highly valued rare

and irreplaceable taonga of great spiritual and physical importance to Maori, 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. The Ngawha geothermal springs fall into this category. The value attached to such a taonga is essentially a matter for Maori to determine.

- that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.

Tribal right of self-regulation

5.1.4 The tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga. The tribunal in the *Motunui-Waitara Report 1983* put it this way:

"Rangatiratanga" and "mana" are inextricably related words. Rangatiratanga denotes the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences.

We consider that the Maori text of the Treaty would have conveyed to Maori people that amongst other things they were to be protected not only in the possession of their fishing grounds, but in the mana to control them and then in accordance with their own customs and having regard to their own cultural preferences.²

In discussing this concept the tribunal in the *Muriwhenua Fishing Report 1988* said:

In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government.³

By way of elaboration, the Muriwhenua tribunal emphasised (among other matters) that:

- the Treaty guaranteed tribal control of Maori matters, including the right to regulate access of tribal members and others to tribal resources.
- the cession of sovereignty or kawanatanga enabled the Crown to make laws for conservation control and resource protection, being in everyone's interests. These laws may need to apply to all alike. But this right is to be exercised in the light of article 2 and should not diminish the principles of article 2 or the authority of the tribes to exercise control. In short,

sovereignty is said to be limited by the right reserved in article 2.⁴

Crown duty to redress past breaches

If failure by the Crown to protect the rangatiratanga of a tribe or hapu results in detriment to Maori there is an obligation on the Crown to make redress. This was recognised by Mr Justice Somers in the *New Zealand Maori Council* case.⁵

Duty to consult

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

We turn now to the second Treaty principle applicable to this claim.

The Principle of Partnership

This principle was firmly established by the Court of Appeal in the *New Zealand Maori Council* case where it was authoritatively laid down that the Treaty signifies a partnership and requires the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith.

The basis for the concept of the partnership was stated by the Muriwhenua tribunal:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of partnership.⁶

While the needs of both cultures must be provided for and compromise may be necessary in some cases to achieve this objective, the Treaty guarantee of rangatiratanga requires a high priority for Maori interests when proposed works may impact on Maori taonga.⁷

References

1. "The Ngai Tahu Sea Fisheries Report 1992" (Wai 27) 5 WTR (Wellington) p 269
2. *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6)(*The Motunui-Waitara Report*)(Wellington, 1983) p 51

Waitangi Tribunal Reports

3. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22)(*Muriwhenua Fishing Report*)(Wellington, 1988) p 187
4. Above n 3 pp 230-232
5. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. p 693
6. Above n 3 p 192
7. *See Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (Wai 17)(*Mangonui Sewerage Report*)(Wellington, 1988) p 60

ISBN 1-86956-219-4



9 781869 562199