

# The Mohaka River

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(Wai 119)  
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The Honourable Minister of Maori Affairs  
Parliament Buildings  
WELLINGTON

**Te Minita Maori**

Tena koe e te rangatira

We bring to you the tribunal's report on the Mohaka river claim. The report is the first from Ngati Kahungunu and from the area of the East Coast. The tribunal has joined all the claims from Wairoa to Wairarapa into a common inquiry so that the tribunal's investigations can be carried out more effectively, by ensuring that everyone has the opportunity to be heard and that unnecessary duplication of effort is eliminated.

It has been necessary for the tribunal to give urgency to Ngati Pahauwera's claim to have their tino rangatiratanga over their part of the Mohaka river recognised, because the Minister for the Environment is required to decide whether a conservation order should be made over the Mohaka river. We wanted the minister to be able to make his decision in the light of the tribunal's report which provides relevant background material, findings and recommendations.

It is necessary to find a balance between Ngati Pahauwera's ownership of and right to control their taonga the river, the use of the river by others and the Crown's responsibility to manage the river in the interests of conservation. We are confident that Ngati Pahauwera and the Crown will find this balance.





## Chapter 1

# Introduction

### 1.1 Te Tono a te Iwi (The Claim)

This claim concerns the tino rangatiratanga of Ngati Pahauwera over the Mohaka river. It was brought by the late Ariel Aranui, tribal leader, for himself and on behalf of Ngati Pahauwera. The Mohaka river claim forms part of a wider claim relating to tribal lands in Hawke's Bay and Wairarapa. It has been severed from the wider claim and been accorded urgency by the Waitangi Tribunal at the request of the claimants. The Planning Tribunal has recommended to the Minister for the Environment that a national water conservation order be placed over the Mohaka river. The claimants say that their tino rangatiratanga over the river confirmed and guaranteed in article 2 of the Treaty of Waitangi has never been relinquished. They allege that the making of a water conservation order without their consent would usurp their rangatiratanga and would be a breach of the principles of the Treaty.

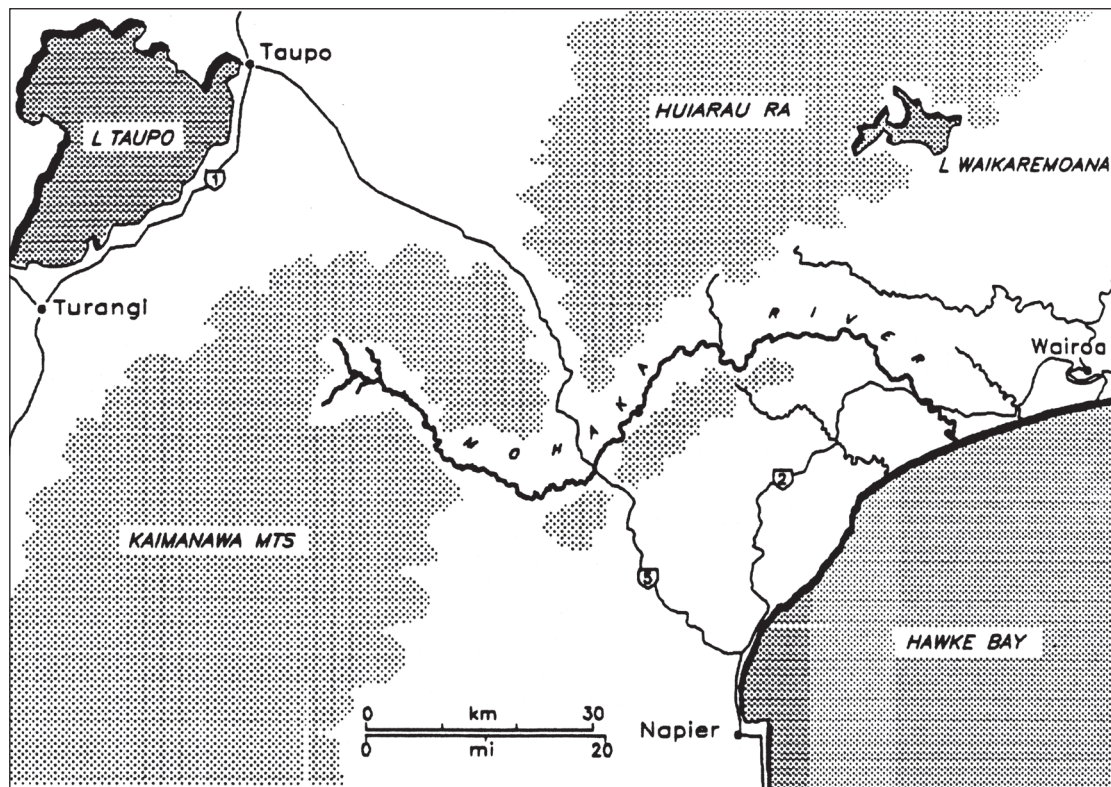
The Mohaka river has its headwaters in the central ranges of the North Island, the Kaweka and Kaimanawa ranges (see map 1.1). It flows into Hawke Bay, approximately 48 kilometres north of Napier. It is fed by several major tributaries.

Ngati Pahauwera's claim relates to the lower reaches of the river as it flows through their traditional tribal territory from the Te Hoe river junction to its mouth. They claim that the river, including its waters, bed and fisheries, is a taonga of Ngati Pahauwera. In particular they place great emphasis on the role the river plays in their tribal identity.

The claimants say that the Crown through legislation, in particular the Water and Soil Conservation Act 1967, has failed to recognise and give effect to their rangatiratanga over the Mohaka river. They claim that this legislation is inconsistent with the principles of the Treaty because it fails to recognise tribal authority and provide appropriate mechanisms for its exercise. Detailed proposals for how this could be achieved were not submitted to the tribunal in the context of this hearing, but the claimants sought a finding that the relevant statutes failed to provide for rangatiratanga, in breach of the Crown's Treaty obligations, and that new forms of authority for regulating use of waters and other natural resources need to be devised.

### 1.2 The History of the Claim

In October 1987 the Minister of Works and Development received an application from the Hawke's Bay Acclimatisation Society and the Council of North Island Acclimatisation Societies for a water conservation order in respect of the Mohaka river. The application was made under section 20A(1) of the Water and Soil Conservation Act 1967. It did not relate to the whole



**Map 1.1** Location map of Mohaka river

of the Mohaka river system but to a significant portion of it, from its headwaters down to just below the Te Hoe river junction, and including all contributing rivers and streams above that point. In its original form the acclimatisation societies' application did not directly affect Ngati Pahauwera, as their traditional river rohe extends downstream from the confluence of the Mohaka and Te Hoe rivers and then out to the sea.

In May 1989 the Minister for the Environment appointed a special tribunal to consider the application under s33A of the Soil Conservation and Rivers Control Act 1941 and submissions from interested parties were received. In July 1989 the special tribunal held public hearings in Napier where representatives of Ngati Pahauwera sought an adjournment. Ngati Pahauwera expressed their view that there had been inadequate consultation with them and that a prior issue, "possession and control of the river and its waters", had yet to be determined by the Waitangi Tribunal.<sup>1</sup> The special tribunal agreed to an adjournment and the hearing resumed in November 1989. Ngati Pahauwera did not give evidence but made written submissions following the hearing.

In January 1990, Ariel Aranui filed a claim with the Waitangi Tribunal on behalf of himself and the Ngati Pahauwera people. In their statement of claim, the claimants recorded their objection to the making of a conservation order prior to the issue of rangatiratanga over the river being decided by this tribunal.

In March 1990, the special tribunal issued a draft conservation order. It held that the Mohaka river had certain outstanding features, that those features should be protected and that hydro-electric power development, other than small dam construction on tributaries, was not compatible with conservation of the river system's waters. The special tribunal declared that in addition to outstanding scenic characteristics and amenities the river contained "outstanding spiritual and cultural values to the tangata whenua over the whole river system" (A36:101).<sup>2</sup> It was at this point that Ngati Pahauwera's interests in the river were directly affected.

In response to the draft national conservation order two objections were lodged with the Planning Tribunal, one from Electricorp in April 1990 and the other from Ngati Pahauwera at the end of May 1990. Electricorp objected on the basis that the draft order would restrict any hydro-electric development which Electricorp might consider necessary or desirable. Ngati Pahauwera objected on the ground that the proposed order would undermine their status as tangata whenua having control and management of the river.

From October 1990 the Planning Tribunal set about its task of considering the objections by way of public inquiry. Ngati Pahauwera requested that the Planning Tribunal inquiry be postponed until the Waitangi Tribunal had had the opportunity to report on the Treaty claim. At judicial conferences in October 1990 and September 1991 the Planning Tribunal declined claimant requests for deferment and it announced, in March 1991, that its inquiry would commence on 30 September 1991. Three days before the commencement of the inquiry Ngati Pahauwera appealed to the High Court against the Planning Tribunal's decision not to postpone its proceedings. The Planning Tribunal inquiry began as scheduled on 30 September 1991, despite renewed claimant application for a stay. On 17 October 1991 the High Court dismissed the claimants' appeal against the decision to proceed.

On 18 September 1991 counsel for Ngati Pahauwera applied to the Waitangi Tribunal for severance of the river claim from the rest of the wider land claim, which had been filed in April 1990, so that the river issues could be given an urgent hearing. Although the Crown opposed urgency, the tribunal was satisfied that there was:

a very real possibility of injustice to Ngati Pahauwera if the draft conservation order is confirmed before this Tribunal has considered and reported on the present claim.<sup>3</sup>

The application for urgency was granted and the claim was set down for hearing in April and May 1992.

### **1.3 Planning Tribunal Inquiry**

The Planning Tribunal inquiry was held between 30 September 1991 and 29 January 1992. Its report and findings were released in March 1992. After a comprehensive review of the statutory context and the evidence presented the Planning Tribunal concluded that the draft conservation order should be confirmed, but with amendments. The area of the river to which the order would apply was reduced to the upper reaches above the Napier-Taupo road, the Mokonui gorge and all tributaries except for a small part of the

1.4

lower Te Hoe river. Allowance was made for low dams at Raupunga and the Te Hoe junction.

The Planning Tribunal summarised Ngati Pahauwera's objection to the draft order as the iwi's assertion that the Mohaka river is a tribal taonga, that Ngati Pahauwera claim te tino rangatiratanga of the river, and that their rangatitanga was guaranteed by article 2 of the Treaty of Waitangi. In Ngati Pahauwera's view the making of the order would be inconsistent with their rangatiratanga and a breach of the Crown's Treaty promise to protect it.

The Planning Tribunal rejected the view that it has the authority to give effect to the Treaty of Waitangi under the Water and Soil Conservation Act or could recognise that Ngati Pahauwera have rangatiratanga in respect of the river. In amending the draft order the Planning Tribunal deleted the original reference to the river's spiritual and cultural values for tangata whenua.

#### **1.4 Waitangi Tribunal Hearings**

The first hearing of the Mohaka river claim was in Wellington on 15 April 1992, when opening submissions were presented by counsel for the claimants and the Crown. The claimants were represented by Sian Elias QC, assisted by Eugenie Laracy. Brendan Brown, briefed by the Crown Law office, appeared as senior counsel for the Crown with Harriet Kennedy from Crown Law as junior counsel.

The second hearing began at Mohaka on 4 May 1992. It continued for three days at Mohaka, until Wednesday 6 May. During that time the tribunal received written and oral evidence from 33 members of Ngati Pahauwera. Submissions were also received in support of Ngati Pahauwera from other river iwi with a similar affiliation for their awa: Tainui for Waikato; Atihaunui-a-Paparangi for Whanganui; Ngati Pikiao of Te Arawa for Kaituna; and Ngati Tuwharetoa for the Upper Mohaka.

The hearing recommenced the following day at Napier, finishing on Tuesday 12 May. Evidence was heard from other Ngati Pahauwera members and from expert witnesses on behalf of Ngati Pahauwera. Following the conclusion of Ngati Pahauwera's evidence the Crown presented its evidence.

Final submissions from counsel were presented at a further hearing at Napier on 5 June.

#### **1.5 Notice to Crown**

On 19 June the tribunal issued a memorandum advising counsel that although the tribunal had given the preparation of this report the highest priority, it was unlikely to be completed before the end of July. However the tribunal's consideration of the claim had progressed to the point where it could say that it would be making recommendations which if accepted would affect the proposed water conservation order. Crown counsel were requested to advise the Minister for the Environment accordingly.

**References**

- 1 See statement of claim dated 29 January 1990, appendix one
- 2 Planning Tribunal “Report on the Mohaka River Draft Water Conservation Order 1992”, appendix A, p 101
- 3 Waitangi Tribunal Direction, 12 November 1991, record of proceedings, 2.53





## Chapter 2

# Mohaka te Awa Ngati Pahauwera te Iwi

### 2.1 Te Whakaeke

The tribunal travelled to Mohaka in May 1992 to hear the claimants present their evidence on their marae and to see the river. The hearing gave us the opportunity to listen to Ngati Pahauwera tell of their own relationship with the river, and allowed the claimants to hear the professional evidence and argument presented by their witnesses and counsel, and by the Crown. The ope, which included the tribunal and the Crown, was solemnly welcomed onto the marae, where gathered to the right of their whare tipuna, Te Kahu-o-te-Rangi, were the descendants of Kahungunu and Pahauwera. Present on the paepae, and in support of kaupapa and tono, were rangatira from other iwi with a similar attachment for their awa (see above page 4). Formal speeches on the marae atea followed the kawa of Ngati Pahauwera, with kaumatua Tom Spooner opening the proceedings. Each whaikorero was accompanied by waiata which related to Ngati Pahauwera, to their whakapapa, to their whenua or to their awa.

Following the powhiri the tribunal moved into the whare porotiti, the round meeting house, named after Rongomaiwahine, a renowned tipuna of Ngati Kahungunu. Here more speeches were made in a more relaxed fashion, as is customary when moving from the marae atea into the peaceful and tranquil arena of the whare. Speakers from Ngati Pahauwera drew on the traditions of their people to outline the history of their tipuna and their relationship with their lands and their waters.

### 2.2 The Oral Traditions

The people identified themselves to us by whakapapa, whakatauki and waiata. These contain the histories of the tribe, the stories of their origins and the relationship their ancestors formed with the lands and waters of Ngati Pahauwera:

Mai ra ano, i te wa o kui ma, o koro ma, ko nga korero tuku iho me whangai ki a ratou i ata tohia hei kawē i nga ahuatanga e hangai ana. Ko nga karakia, ko nga whakatauki, ko nga whakapapa, ko nga tohutohu, ko nga tauparapara, ko nga pepeha, ko nga ruri, ko nga apakura, ko nga pao ara, nga waiata o te ao Maori, me tuku ki tena, ki tena o ratou me ata tohi mo tenei mahi tapu.

From time immemorial the oral traditions have been passed on to those specially selected and who were appropriate to be the transmitters of karakia, of proverbs, genealogy, and songs . . .<sup>1</sup>

Central to their identity as a tribe and their relationship with the river and with the land was the following whakatauki:

2.3

Ko Tawhirirangi te maunga  
Ko Mohaka te awa  
Ko Kahu-o-te-Rangi te tangata  
Ko Ngati Pahauwera te iwi

Tawhirirangi is the mountain  
Mohaka is the river  
Kahu-o-te-Rangi is the chief  
Ngati Pahauwera are the people

While Ngati Pahauwera have in the past been divided into a number of hapu and whanau, each with slightly different rights and each with their distinct territories, this whakatauki sums up the special features of tribal identity which they all share. As members of Ngati Pahauwera, their mountain is Tawhirirangi, their ancestor is Kahu-o-te-Rangi and their river is the Mohaka.

**2.3 Te Iwi o Ngati Pahauwera (The Ngati Pahauwera People)**

According to the genealogical tables produced by witnesses, Ngati Pahauwera are the descendants of Tamatea-Arikinui-mai-Tawhiti, of the Takitimu waka, and their genealogy descends through the generations to Tureia, Te Huki, Puruaute and Te Kahu-o-te-Rangi. Traditionally the origin of Ngati Pahauwera has been traced to Te Kahu-o-te-Rangi: "When the head of Te Kahu was being cured, the fire blazed up and burned the beard, hence the name Pahauwera [burnt beard]" (A25(a):14).

**2.3.1 *Nga hapu o Ngati Pahauwera***

While the main hapu of the Mohaka people is Ngati Pahauwera, there are, and were, other hapu populating the locality, living under the mana of Ngati Pahauwera. The hapu who make up Ngati Pahauwera were described by a claimant witness, Charlie King:

There were perhaps eleven or twelve hapu here. The main ones were Ngati Kura, Ngati Kurahikakawa, and Ngati Kapekape. They were the majority. Then comes Ngati Paikea, Ngaiterau, and other hapu in their midst. Now, when we go anywhere, there is only one hapu, Ngati Pahauwera. (B27:6)

Claimant researcher Cordry Huata explained:

It should be noted at this point that the hapu of the name Ngati Pahauwera could aptly be known as Ngati Kahuterangi, leaving the umbrella group to be known as Ngati Pahauwera. Hapu under the umbrella include Ngati Purua, Ngati Paikea, Ngati Tuhemata, Ngati Huki, Ngati Rauiri, Ngati Kaihaere, Ngati Tangopu, Ngati Kapekape, Ngai Taane, Ngati Kura, Ngati Paroa, Ngati Hineku and others. (A14:5)

Written evidence prepared by the late Canon Wiremu Te Tau Huata for submission to the Planning Tribunal, and presented to us by his daughter Ngatai, indicated that:

Some of the sub-tribes of our tribe are Ngai Te Rau, Ngati Paikea, Ngati Pahauwera, Ngati Kapekape, Mawete and Popoia. (B12:3)

**2.4 Te Rohe (The Place)**

While these hapu may have had different rights to resources within the Ngati Pahauwera rohe, together they formed the tribe and together they shared a



territory which was familiar to them all. The following proverb delineates this territory, where Ngati Pahauwera settled and over which they exercise their rangatiratanga:

Maungaharuru ki uta, Tangitu ki te moana

From Maungaharuru inland to Tangitu to seaward

Cordry Huata described the boundaries of their ancestor Te Kahu-o-te-Rangi as extending:

from the sea at Pukekaraka to Puketitoti down to the Waiau river. It is here that he met Te Kapua . . . a chief from the Urewera who said, "This is as far as you go" (this is our boundary).

Te Kahu o te Rangi took up his axe and began to make his mark on the bark of the tawai (birch) trees and up onto Te Haroto, and down into Puketitiri and down through the Te Wai o Hingaanga stream to the sea. There is a rock here a taniwha (a water monster) its name is Moremore and it belongs to the chiefs from Heretaunga the Tareha, the Karaitiana, the Tomoana and others.

From the sea to the east the boundary then continues until it meets again at Pukekaraka. Out in the sea is a rock (a demon rock) its name is Tangitu, it is a fishing ground. From there he looked shoreward to Maungaharuru, a mountain which abounds with pigeon. (A14:appendix 16b)<sup>2</sup>

It was the occupation and control of this territory which set Ngati Pahauwera apart from their neighbouring tribes.

## 2.5 Te Awa o Mohaka (The Mohaka River)

Central to this territory is the river. The Mohaka river is personified and glorified in many ways in the oral traditions of the Pahauwera people, in chants, in waiata, in whakatauki and in other ways. The following is a waiata which Pahauwera use frequently in reference to the origins of their river:

I timata mai ia i tawhiti pamamao  
Ki te mau mai i tona kupu  
Ko ona wehenga, ko te Taharua i Poronui  
Ko Te Ripia ki Ahimanawa  
Ko Te Makahu i Kaweka  
Ko te Waipunga i Kaingaroa  
Ko Matakuhia i Tarawera  
Ko haere mai ma waenganui  
O Turanga-kumu-rau  
Ko Te Titi o Kura  
Ka huri ki te tairawhiti  
I te taha o Maungaharuru  
Ka puta mai ko Te Hoe i Huiarau  
He aha ra te mea nei? He aha ra te mea nei?  
He taniwha? He tipua? He tangata? Hei!  
Kahore! Ko te awa o Mohaka  
E huri ana ra, e koki ana mai,  
E piko ake nei, e rere atu ra  
Ki te marae o Pahauwera  
I te ngutuawa o Te Ika a Maui  
Ki a Tangaroa, ki a Paikea  
Te Kai-tiaki o Pahauwera e

2.6

It begins in the far distance to bring its message;  
It offshoots (tributaries) are Taharua at Poronui,  
Ripia at Ahimanawa, Makahu at Kaweka,  
Waipunga at Kaingaroa, and Te Matakuhia at Tarawera.  
It then flows down between Turanga-kumu-rau and Te  
Titi-o-Kura, turning eastward along the side of  
Maungaharuru, emerging at Te Hoe in Huiarau.  
What is this thing? A taniwha? A giant? A man?  
No! It is the Mohaka River! It twists and turns  
And flows on to the marae of Ngati Pahauwera at the  
mouth of Te Ika a Maui — to Tangaroa (the God of the  
sea) and to Paikea (a taniwha), the guardian of  
Ngati Pahauwera.<sup>3</sup>

The waiata which identifies Ngati Pahauwera and their connection with the river is:

Kahungunu, te tipuna  
Te Huki, Te Kahu-o-te-Rangi  
Puruaute, me Tureia  
Anei ra o matou tipuna  
Ko Mohaka ra te awa  
Tawhirirangi nei te maunga  
Ko te iwi Pahauwera e  
Haruru ana te moana  
Haruru ana te whenua  
Au, au, aue, ha  
No reira au, au, aue, ha  
Kahungunu, the [founding] ancestor,  
Te Huki, Te Kahu-o-te-Rangi,  
Puruaute and Tureia are our ancestors.  
Mohaka is the river, Tawhirirangi is the mountain  
And the people are [Ngati] Pahauwera.  
The sea rumbles, the land rumbles au, au aue ha.<sup>4</sup>

Mrs Wiki Hapeta stated in her oral evidence that:

The people of this house [Rongomaiwahine] belong to the river.<sup>5</sup>

Many of Ngati Pahauwera are said to be descended from Mawete, Popoia and Paikea the names of three taniwha said to be in the Mohaka river. Evidence on the taniwha was given by George Hawkins, Charlie King (B27), Maraea Aranui (B1), and Toro Waaka (B8:2).

Many witnesses said, “Ko Pahauwera te awa, ko te awa ko Pahauwera (Pahauwera is the river, the river is us)”.<sup>6</sup> As Professor James Ritchie, an expert witness called by the claimants, said in answer to a question from the tribunal, “the river is a tipuna, an ancestor”.<sup>7</sup>

## 2.6 The River as Their Taonga

Ngati Pahauwera claim that the Mohaka river is their taonga. Cordry Huata defined taonga as treasures, precious and prized property o nga iwi Maori. Nga maunga and nga awa are regarded as being taonga representing the spiritual and physical mana of the iwi and for food resources providing for the sustenance of the iwi (B14:5). Ramon Joe expressed it this way:

As old Father Thames is to the Londoner  
As the Ganges is sacred to the Indian

As the Jordan is spiritual to the Palestines  
So is the Mohaka all these things to Ngati Pahauwera

Ngati Pahauwera's relationship with the river is something well understood by the other tribes who were represented at the hearing. When Ngati Pahauwera travel to another region, this link with the river is one of the key elements identifying them.

For instance when you travel into another tribal area and if your tribe is there with you, a Maori will always identify himself — my mountain, my river and the man. That is the way of identifying ourselves. It is poetical, it is terrific, who else does it like that? To Maori a river becomes a very, very important thing. (A25(a):399)

The sense that a taonga is passed to the present generation from those gone before, and will be passed on to following generations, was stressed by many of the witnesses. It is an essential characteristic of a taonga, and applies not just to the river itself but to the many benefits that the river provides the tribe. These too, because they come from the river, are regarded as taonga.

### 2.6.1 *Mahinga kai*

Much of the oral evidence we heard at Mohaka clearly indicated the value and importance of the Mohaka river to Ngati Pahauwera as a wahi mahinga kai and larder. Many witnesses gave graphic accounts of various types of fishing at the mouth of the Mohaka river, in the estuary and further up the river.

Kahawai was often spoken of as being the most highly prized, sought after and succulent of fish. The kahawai of Mohaka is celebrated in the whakatauki by Tureia, contained in the evidence of the late Canon Huata:

He mao kahawai o te wahapu o te awa o Mohaka, e kore a muri e hokia.

A kahawai from the mouth of the Mohaka will not return . . .

It was Tureia who said . . . there is a day for the kahawai who having reached the mouth of the Mohaka River will not return. Nowadays, when any misfortune is imminent, the kahawai shoal at the mouth of the Mohaka. They do not return to sea. We also use this analogy in farewelling departed people. (B12:2)

Ramon Joe gave a demonstration of how to catch kahawai with a reti board, a fishing aid peculiar to Ngati Pahauwera. Many witnesses had been taught in their younger days by their elders to use the reti board at the mouth of the river.

Kahawai was supplemented by other fish – snapper, mullet, herrings, gurnard, whitebait (in season), and eels.

Native Land Court evidence indicated that the claimants' tipuna had rights to pa tuna (eel weirs) in the river and its tributaries (C6:2). These records show how the river was extensively used particularly for these pa tuna. They could at times be very substantial structures sometimes crossing the entire course of the river. We have historical evidence of these being used on the Mohaka, and on the Waikare to the south of the Mohaka, up until the 1860s (see below, p 32). In contrast to usage on rivers like the Whanganui, the use of large pa tuna seems to have largely disappeared by the late nineteenth

2.6.2

century. Many of these eel weirs fell into disuse when Ngati Pahauwera returned to the land following the disruption of war in the 1840s and again in the 1860s.

Among the other traditional resources procured from the river and adjacent forest and shoreline were birds, rats, timber, firewood, fruit of the kiekie, medicinal plants, dye made from mixing river clay and pigeon oil, and puha. Timber was washed down the river and used for firewood, for building and for canoes (B8:4).

The river continues to be of major economic importance to Ngati Pahauwera. The claimants undertook a survey of river use by Ngati Pahauwera families. This survey, undertaken by Ann La Porta and reviewed by BERL economist Kel Sanderson, showed a very substantial ongoing dependence on the river (A25(a):306-308). On the basis of this survey, La Porta and Sanderson concluded that fishing from the river was worth about \$62,600 per year, with families fishing on average 2.8 times a week. The collection of firewood was valued at a further \$16,300 for the 16 families involved.

In participating in this survey, Ngati Pahauwera were very reluctant to place a monetary value on their use of the river. The fish, the eels, the wood and other resources which played an essential part in their lives were seen as gifts from the river not as commodities that could be valued in cash terms.

2.6.2 *Hangi stones*

Of special significance to Ngati Pahauwera were hangi stones obtained from the Mohaka river. Flooding dislodges the stones so that they periodically become available. Four types of hangi stones were known and used by Ngati Pahauwera:

- taupunga – a greyish type also used as sinkers;
- opunga – a whitish, trachyte rock, also used for weapons and sinkers;
- poutama – a pink type, obtained mainly from the top of the Mohaka river; and
- kowhaturi/kowhatumakauri – a black/blue type. (A14:64)

The Ngati Pahauwera whakatauki “Mohakaharara, taupunga, opunga” refers to the different types of hangi stones which will not break when fired – a symbolic reference to the unity within Ngati Pahauwera, notwithstanding their differences. Frequently the hangi stones are given as koha to other marae. As Ann La Porta observed, “they are a gift from the ancestors to the present and future generations” (A24:27). Ngati Pahauwera were especially concerned that gravel extraction and other activities on the river were destroying these stones and thereby limiting the tribe’s ability to hand these on to the generations to come.

2.6.3 *Water*

Water, Toro Waaka told us, is of paramount importance to Ngati Pahauwera:

Our spiritual origins began amidst water and darkness . . . Our primal parents were Ranginui and Papatuanuku. Their children caused

them to separate and in grief, the tears of Ranginui fell upon Papatuanuku. These tears were absorbed by Papatuanuku and channelled through underground waterways or tomo . . . The spiritual use of the water included healing and tohi rights. (B8:2)

The spirituality and healing properties of the waters of the Mohaka were described by Charlie King:

Ngati Pahauwera is at the beginning of the river, at the river mouth here and out to sea. To us, those who stand on the marae, that is the spirit which is upon us. Our sacred mountain, the river of Mohaka, Ngati Pahauwera are the people.

The spirituality of the river, the mana, the sacredness and the authority relates to Ngati Pahauwera solely. The life of the river we do not want interfered with, lest it be lost. It must be left to flow onward, in the way that it did in the days of the elders. If they were here they would be at the river as it flows onward. (B27:6)

And:

For some families, if they become ill, they go down to [the water] falls for spiritual cleansing. It is not something that affects all of Ngati Pahauwera. Only some of the ones from [the place called] Kahungunu go there . . . It is said that it has healing powers. (B27:10)

Cordry Huata referred to the river “as the source that quenches the thirst, and as the healing waters”;

Mohaka Tomairangi hei whakamakuku  
Mohaka te wairoa

When the river is referred to as a source of healing, it is usually the spiritual reawakening that is being spoken of. (A14:65)

The late Canon Huata spoke of the healing powers of the river for the body and mind, as well as for the spirit:

Now those other streams that run into the Mohaka River. What of those? They told us that they were the waters that Ngati Pahauwera bathed in, to heal their bodies, to heal their minds, and to cleanse their spirits. In other words to purify. (B12:5)

Ramon Joe, Wiki Hapeta and George Hawkins referred to ritual bathing and healing powers of the water.

At least five of the claimants had lost family in the river. As Ramon Joe said, “Although their beloved ones were taken by the river, they still love it”. Wi Derek Huata stated:

The river is a taonga that we as kaitiaki know we have to preserve. Our ancestors taught us to respect the river and if we respected the river, the river looked after us. If the river is desecrated, it will affect the very deep beliefs we have about the river. That is our Taniwha, the life force of the river, our respect for the river. (A25(a):411)

The evidence of the late Ariel Aranui stated:

To the Maori water is the essential ingredient of life, a priceless treasure left by ancestors for the life sustaining use of their descendants. The descendants are in turn, charged with a major kaitiaki (stewardship) duty, to ensure that these treasures are passed on in as good a state or indeed, better, to those following. (A25(b):314)

Professor Ritchie described Ngati Pahauwera as having a right, both under common law and under the Treaty, to “the undisturbed security of their central

2.7

beliefs regarding water and the practices which flow from them” (B5:Ritchie:3).

## **2.7 Archaeological Sites on the River**

Detailed evidence given by Ramon Joe, and illustrated by a map, demonstrated substantial occupation and settlement of the Mohaka river and its tributaries (B7).

An archaeological survey carried out for the Department of Conservation by Susan Forbes in 1989 recorded 13 pa sites, eight village areas or papakainga, four pit sites, wahi tapu, urupa, and a number of historical sites, associated with the lower Mohaka river (A15).

A further survey of the upper Mohaka river, from Kakariki flats to the Te Hoe river, prepared by Pam Bain of the Department of Conservation recorded 37 sites – 10 pit sites, two papakainga, eight pa, one midden, two findspots, 10 areas of pits and terracing, and five historic sites.

This survey reveals a pattern of permanent settlement concentrated around river crossings and the close association of the tangata whenua with the Mohaka river (A26:10).

## **2.8 The River as a Highway**

The Mohaka river was an important part of a traditional network of Maori tracks and waterways (see map 3.3). River people used it for transport and communications and for longer journeys between Mahia, Ahuriri, Here-taunga and Taupo. The river was open for all to use with the permission of the rangatira for the iwi who exercised jurisdiction over it between defined points across its line of flow (B28:5). The right to travel down the river was freely available to members of Ngati Pahauwera and, subject to permission, available to members of other tribes. However given the extent that the river was the tribe’s larder, travel up and down the river was not without complications. Eel weirs could be constructed from one bank to the other and interference with these would create significant major problems. Once rivers were used for transporting timber in European times, balancing the different uses of the river became a major issue of negotiation. Resolving issues of competing use on the river and balancing the relationships between the different hapu involved were matters that involved the exercise of tribal control, rangatiratanga.

## **2.9 Rights to the River**

Evidence on the nineteenth century uses of the Mohaka river and general aspects of river tenure was presented by Fergus Sinclair, on behalf of the Crown (C6). Most of the evidence specifically relating to the Mohaka came from Native Land Court minutes of the 1903 partition hearing of the Mohaka block (north side), when rights to pa tuna were claimed as evidence of interest in individual pieces of land associated with them. One of the most striking features of these eel pa were their antiquity. According to Iterahana,



a pa tuna he could remember had been constructed “in Tureia’s day”, another was made for Tamatikai, while yet another was made by Paikea (C5(a):361).<sup>8</sup> Eels were an important and highly esteemed food for Maori and pa tuna were particularly prized possessions. Recitals in the Native Land Court of ancestral rights to resources in the Mohaka abound with references to eel weirs, such as this one from Rewi Poukupenga, cited by Mr Sinclair:

Te Umuti a mahinga and kainga by the river. Mouru & my hapu Purua lived there together. Te Mahia a mahinga by the river, of the same two hapu. Papaotewhenua was their pa tuna near Te Umuti, Potaka a bird place belonging to all the uri of Pakateahu. Te Hinaki a Kotiki kainga and mahinga of uri of korau. Pakihikura, kainga & mahinga of uri of Korau and of Te Uta so was Tamureraha. Taweromanu a pa tuna of ‘Hineira & Ngaitangapopu, Toka-atiki a pa tuna of mine ie of ‘Pura. Totara a pa tuna near Te Arakanihi, it belonged to ‘Tangopu, ‘Hiniaio & ‘Mouru, that is the end of the eel weirs . . . (C5(a):404)<sup>9</sup>

The complexity of the customary system of rights is demonstrated in this testimony where pa tuna were held by different hapu based on descent and where some mahinga kai rights were held in common. Different rights were also shared by the inhabitants of a single kainga as Erina Te Rawharatua explained in his evidence: “Each hapu had separate cultivations but we lived in the same kaingas”. They also had separate pa tuna (C5(a):3).

Individual rights to use or to have access to river and land resources were inherited from ancestors or acquired through enterprise.<sup>10</sup> Mr Sinclair cited evidence of an attempt to claim an eel weir and to place a rahui on it as a means of trying to acquire land (C6:10).

While Mr Sinclair was reluctant to come to conclusions from the limited amount of material he had viewed he considered that rights to land and to the river were “part and parcel of the same tenurial regime which applied on land” (C6:19). We do not see this as in conflict with the evidence presented by the claimants. In viewing the Mohaka as a taonga, the claimants are not saying that their rights to the resources of the river were different from those to the resources of the land. Mr Sinclair however appears to be stressing the importance of hapu rights, defined by user rights to particular resources on land and in the river:

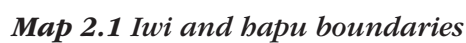
it is obvious that the hapu within Ngati Pahauwera possessed a fairly strong sense of their separate identity throughout the nineteenth century. (C6:18)

Because of the importance of these hapu rights, he advised caution in accepting the claimants’ view that the river was ‘owned’ by the tribe holistically.

While individual hapu did exercise user rights to specific resources along and in the river, these rights should not be equated with Maori customary ownership of the river or of the land as a whole. In relying upon rights and use of occupation to determine relative interests of individual persons, the Native Land Court in 1903 was dealing with blocks of land which had already been awarded to 10 grantees as trustees for hapu or persons named and registered by the court. In these cases, it was the claims of rival hapu that were being contested. The overarching tribal control of the resource was

## 2.10 Rangatiratanga: Ngati Pahauwera and Other Tribes

If Ngati Tuwharetoa did things up the river that Ngati Pahauwera didn't like, there would be consultation 'Maori with Maori'. (C14:28)



16



Toro Waaka described the complex use rights existing between Ngati Pahauwera and other iwi on the river:

I was able to learn and observe the relationship between the river and tangata whenua on all areas of the river as well as learn about the inter-relationships between the tribes along the river. This inter-relationship between the tribes is evident in whakapapa which shows continuous inter-marriage and occupation between the tribes from the early periods of settlement. This inter-marriage continues today . . .

He went on to outline how relationships between tribes were dealt with often in a diplomatic fashion with agreements and treaties reached between them to resolve conflicts and to apply an overall control of the resources:

As well as inter-marriage there were treaties and agreements made between the tribes in terms of uses of land or parts of the rivers. There were also peace treaties, one such treaty was the agreement between Rakaipaaka and Tuhoe.

Another pact was between Ngati Hinepare and Pahauwera, the whakatauki is: Manahou ki uta. Pahauwera ki te moana.

This pact illustrates an agreement regarding uses in relation to the coastal areas and the hinterland. Ngati Hineuru also had an agreement which allowed them to fish at the river mouth at certain times when the kahawai was running.

In return, Pahauwera had access to hinterland areas when food on the coast was scarce. Hence the Ngati Pahauwera whakatauki:

Tangitu ki te moana, maungaharuru ki uta. (B8:1,8)

The unifying function performed by the river was described by the late Canon Huata:

Mohaka's proper name is Mohakaharara, not Mohaka by itself. This is a peaceful joining, a noble joining. It remains as a unifying force within Ngati Pahauwera, to unify the tribes. The people of Mohaka's belief is that it binds us together . . .

In the end it is the river, it is the river which joins us. (B12:5)

## **2.11 Mana and Rangatiratanga Over the River**

Intertribal relations, reconciling competing interests and maintaining the river as a highway were the features of rangatiratanga. While hapu had certain rights, the ultimate authority rested in the tribe, and issues which affected the tribe as a whole could only be resolved on a tribal level. None of this could be achieved without control. Like land or the Mohaka itself, rangatiratanga was an inherited responsibility. Canon Huata said:

Authority, or absolute authority of the Mohaka River belongs to Ngati Pahauwera. Why? We were told by our forebears. We did not seek it, nor battle for it, but the mana of the river belongs to Ngati Pahauwera. Hence this is the essence of what has been said that the absolute authority of the Mohaka River belongs to Ngati Pahauwera. (B12:6)

So fundamental was this aspect of inheritance that despite the Crown's increasing role in management of national resources and despite the impact of the alienation of much of the surrounding land, Ngati Pahauwera still see themselves as having 'control' over the river:

We always talk about our river, the control of it, and its spirituality. These are the waters of sustenance.

Even though administration of the river and the land has passed into pakeha hands, we retain the control. It is these treasures (ie the land and the river) that rests the mana. This is what we are fighting for. We know that this is where our salvation is. The control of the river has been our mana from way back. It came from our ancestors and down through the generations. Even though these things have been taken, we stand firm (in our belief). Tawhirirangi is the mountain, Mohaka is the river, etc, etc.

Our ancestors discovered the mana. They found the mana in the hills, in the rivers, and that is why we battle for their return. We are doing things from the perspective of truth. There are two aspects of truth—being true to something wrong, and being true to something right.

From ancient times right down until now, Ngati Pahauwera have been and are the guardians of the river. That is why we are fighting for our river . . .

The time has come when we must listen to the teachings of our forebears about the mana of the river Mohaka . . . It is we of Ngati Pahauwera who have stuck to our principles on the control of the river. It is best that administrative control of the river be returned to us. If our mana over our mountains, our river, our genealogy is taken, this is a way of subjugating the Maori people . . .

The good thing is, we are not talking war. We are instead weeping for our lands and for our river. (B12:6-7)

Cordry Huata described Ngati Pahauwera's rangatiratanga over the Mohaka river as follows:

From way up the river to the mouth the 'mana' of the river is with different hapu who are linked with Ngati Kahungunu. But from at least Te Hoe down to the mouth, it is Ngati Pahauwera (the iwi) . . . 'Mana' is more than pride. It may be inherited but it must be maintained. It is a strong positive feeling, that shows individual and tribal strengths, and it is about maintaining those strengths.

It is Ngati Pahauwera iwi who have 'rangatiratanga' over the river from at least Te Hoe. 'Rangatiratanga' denotes 'mana', 'wehi', and 'ihi'. The right to have interests and to make decisions, in terms of the river, someone must have it. Ngati Pahauwera (the iwi) have it over the Mohaka. Pahauwera have the right to decide what is right for them and the river. 'Rangatiratanga' is a birthright. (B14:15)

Tureiti Moxon said that:

Tino Rangatiratanga can be understood as meaning 'full authority, status, and prestige with regard to their possessions and interests'. Mana is the personalisation of that authority.

From the Maori signatories point of view the Treaty affirmed Tino Rangatiratanga and therefore affirmed a social, economic and cultural base from which Maori could continue to develop and self determine the future on Maori terms with Maori resources.

A central feature of Tino Rangatiratanga in this Mohaka region at that time was the Mohaka River with its supply of fish and hangi stones with its many uses already described by previous speakers.

Rangatiratanga of a river as a 'spiritual, subsistence' and economic base can be a tremendous heritage and resource. This would have continued for Ngati Pahauwera if the Treaty and its promises had been honoured. However . . . Government neglect of Maori Sovereignty in terms of Article 2 occurred. (B13:1-2)

According to Charlie King:

The word rangatiratanga is one which Ngati Pahauwera favours. That is the mana, the essential force, that they speak of in respect of their river. That is the spirit of them all and the power, essential force and awe. Their rangatiratanga is the Mohaka River.

[Mana] is the psychic force within us. What is the essential element of mana? To us, it is not us. We say that it is the culmination of the story of the river. To me our mana is derived from the river. Without that heritage of the river we are nobody. To us the river is spiritual in all things. People go and talk to the river. (B27:3-4)

In these ways Ngati Pahauwera speak of the nature of rangatiratanga as they see it, defining something they consider they have inherited from their tipuna, something they see as passing to their descendants.

## **2.12 Ngati Pahauwera's Relationship With the Mohaka**

The Crown accepted that Ngati Pahauwera have a "strong spiritual and cultural association with the Mohaka", commenting that "it is really inevitable that this should be so" (C17:11). There can be no doubt also that Ngati Pahauwera had customary rights to the river, and this was not challenged by the Crown. The river was so essential a part of the tribe's food gathering, of its means of communication and of its mana as a tribe that it must be regarded as a possession, as guaranteed under article 2 of the Treaty of Waitangi. Because of the immense value of the river as a spiritual and physical force in the life and well being of the tribe, it was also a taonga of the tribe. While the hapu of Ngati Pahauwera had proprietary rights to eels weirs along the river and to various cultivations and mahinga kai along its banks, these were subject to the rangatiratanga of the tribe as a whole. This rangatiratanga amounted to more than simply ownership of the river and its resources. It included the ability to control those resources in a manner determined by the tikanga, the customs, of the tribe itself to ensure their protection for present and future generations.

The questions raised by the Crown as to whether through the Treaty Ngati Pahauwera relinquished their control over the river, or through land sales lost title to the river, are left to subsequent chapters.

## **2.13 Treaty Protection for Ngati Pahauwera**

In Maori terms, the kaupapa (underlying principle) of all the claims made to the Waitangi Tribunal is the Treaty itself. Maori people have come to regard the Treaty as a taonga, as a solemn token of covenant, as 'he kawenata tapu' (a sacred covenant) and as a bringing together of Maori custom and English law. Maori people believe the Treaty is always speaking for justice and must continuously function as the rod by which is measured any body of New

Zealand law which affects them. The Treaty is the foundation document of the nation.

At the time of the signing of the Treaty of Waitangi, Ngati Pahauwera were living at Nukutaurua on the Mahia peninsula. Like people from the Heretaunga and other neighbouring districts, they had migrated there in the late 1820s in search of security from raiding parties from Taupo and the Waikato who were partly armed with muskets. At Mahia they participated in the flax trade and, from the late 1830s, in whaling. They procured firearms and other trade goods.

Prominent in the wider Ngati Kahungunu community that formed at Nukutaurua was Te Hapuku, a Te Whatu-i-apiti chief, who married the daughter of an old Ngati Pahauwera chief, Poututu and who was also a distant relative of the young Ngati Pahauwera chief, Paora Rerepu (A14:13; A25(a):22). Te Hapuku had signed the 1835 Declaration of Independence in the north in 1838. Major Bunbury therefore was anxious to obtain his signature to the Treaty when he anchored off the Tuki Tuki river in Hawke Bay, on 23 June 1839.

Te Hapuku was initially evasive, then alleged that Ngapuhi were now slaves through the Treaty. Bunbury however assured him that the British Government would not “lower the chiefs in the estimation of their tribes” and that his assent “could only tend to increase his consequence”. Moreover “whether he signed or not, British authority was a fait accompli”. A Ngapuhi chief present advised signing which Te Hapuku did (A14:12).<sup>12</sup>

Although Ngati Pahauwera chiefs and people did not participate in the signing, they identified themselves with Te Hapuku and others who did, and accepted the rights and obligations of the Treaty.

The late Canon Huata said:

Ngati Pahauwera holds fast to the spirituality of the Treaty. They have always wanted the Treaty. Let me say there was discord between the Anglican Church and Ratana – the Anglican Church were the first church in Mohaka but that church disintegrated upon the advent of Ratana and his policy on the Treaty of Waitangi. Ngati Pahauwera split and went to Ratana, and it is my firm belief that Ngati Pahauwera went in their support for the Treaty. Even though some do not support the Ratana movement, they retain their belief (in the Treaty). One of the strengths of the Ratana movement was their adherence to the Treaty of Waitangi. (B12:7)

To Ngati Pahauwera, the Treaty promised security from traditional foes and unruly Europeans on the beach. Following the signing of the Treaty and the spread of Christianity and peace they began to return to their former settlements (A14:6; A24:13; A25(a):22; C4:4). In 1847 the missionary William Williams noted in his journal that Mohaka had “now become important having all its inhabitants back from Table Cape” (C4:5).<sup>13</sup> An entry in his journal, 30 October 1849 states:

Reached Mohaka . . . It was quite an animascene on our approach. The village is situated on a picturesque spot on the bank of

the river surrounded by a high cliff on the opposite bank. We were hailed in the native style & had a long string of natives to shake hands with us. Old Poututu the chief of the place harangued me in a very good speech which was the more pleasing because I had always regarded him as a native upon whom little impression would be made. He has embraced Christianity now more than eighteen months & goes on well. And indeed all the people of the village show that they are well attended to by the teacher.<sup>14</sup>

After their return to Mohaka, Ngati Pahauwera, in order to obtain the benefits of peace, trade and Christianity, aligned themselves with the land selling tribes who cooperated with the colonial government. From their perspective, the Treaty laid the foundation for the peaceful co-existence of two peoples, each with its own system of authority. British sovereignty, in other words, was not unlimited and indivisible but was qualified by rangatiratanga.

Furthermore Ngati Pahauwera would have felt assured that the promises of the Treaty would secure to them the Crown's protection of their rangatiratanga and would allow them to participate further in the western world. While the Treaty's promise to protect their rangatiratanga applies to their relationship with all their resources, it has a special application to the Mohaka river. So central to their existence as a river people, the river would have been seen as the cornerstone of the Treaty's guarantee of their tribal identity.

#### References

- 1 An ancient quotation. This concept was expressed by Ramon Joe, B2:1
- 2 From the collection of Arapata Hapuka
- 3 B4; Translation provided by the Waitangi Tribunal
- 4 *ibid*
- 5 Oral evidence of Wiki Hapeta, 4 May 1992
- 6 Oral evidence of George Hawkins, 4 May 1992
- 7 Oral evidence of Professor Ritchie, 9 May 1992
- 8 Wairoa minute book 12, 16 March 1903
- 9 *ibid*, 27 March 1903
- 10 See also *The Te Roroa Report 1992* (Wai 38) (Brooker and Friend Ltd, Wellington, 1992) p 13
- 11 *ibid*
- 12 Claudia Orange *The Treaty of Waitangi*, (Wellington, 1987) pp 81-82
- 13 William Williams journal, vol 3, undated entry, Alexander Turnbull Library, Wellington
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## Chapter 3

# The Mohaka Purchase and the Crown's Assumption of Riparian Rights

### 3.1 Ngati Pahauwera's Customary and Treaty Rights Over the River

At the time of the Crown purchase of the Mohaka block in December 1851 the mana and rangatiratanga over the lower Mohaka river at least as far as the Te Hoe confluence was held by Ngati Pahauwera and confirmed and guaranteed by article 2 of the Treaty of Waitangi. While their rangatira controlled the river, individual family groups and hapu occupying adjoining land had customary rights to use its resources such as water, fish and hangi stones. The duty of preserving and protecting the purity of the water and wahi tapu devolved on Ngati Pahauwera. Historically land sales and confiscation disrupted the relationship between the river and the people. Alienation from the land led to an alienation from the river (cf B28:10). Ngati Pahauwera's customary and Treaty rights were eroded.

This chapter examines whether or not Ngati Pahauwera disposed of any of their customary and Treaty rights in the river when they sold land on the south bank to the Crown in December 1851. The following chapter examines the same question in respect of land on the north bank of the river which was subdivided and sold through the Native Land Court. For the purposes of this claim we do not need to consider whether or not the sales themselves were fair and proper and whether sufficient land was reserved for Ngati Pahauwera's present and future needs. These issues are the subject of a further claim.

### 3.2 Crown Land Purchase Policy

As early as 1848 blocks of land in Hawke's Bay were being leased from local Maori chiefs for sheep grazing in spite of the express prohibition on squatting in the 1846 Native Land Purchase Ordinance (C2:8).<sup>1</sup> Governor Grey's land purchase policy was to exercise the Crown's exclusive right of pre-emption to purchase extensive blocks of land ahead of the needs of settlers as quickly and as cheaply as possible, that is before settlement had enhanced its value. In the Wairarapa and Hawke's Bay he was anxious to purchase land being illegally leased by squatters before the chiefs fully realised the advantages of leasing rather than of selling.<sup>2</sup>

In December 1850, Donald McLean, who had been successfully negotiating purchases for Grey in Taranaki, Wanganui and Rangitikei, met very large assemblages of Maori at Waipukurau and Ahuriri to negotiate the purchase

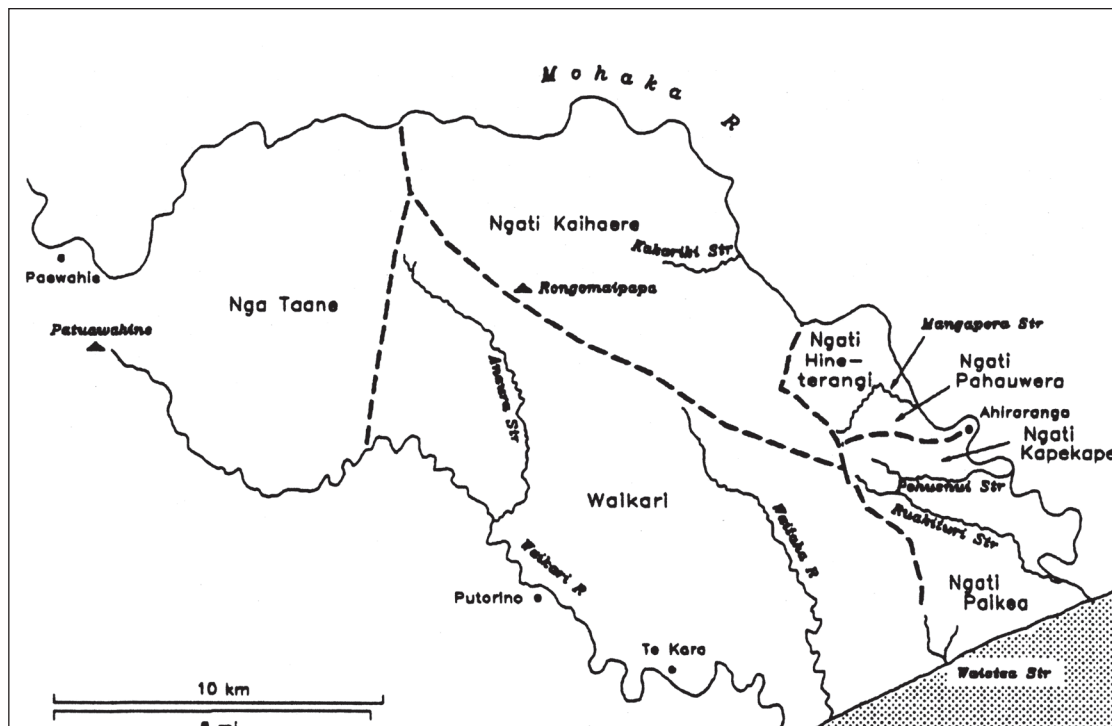


3.3

of the Waipukurau and Ahuriri blocks (C2:22ff; C4:7). McLean was an able, experienced negotiator, “expert at arousing the cupidity of Maori owners” (A56:7) but, in his early dealings, careful to gain the consent of the hapu in open meetings.<sup>3</sup> Although he regarded himself as a “sort of protector of the Maori” (A56:4), he saw no conflict between his public duties as land purchase commissioner and his private ambition to acquire a great pastoral estate (A56:3). In Hawke’s Bay he worked under considerable pressure to execute Grey’s land purchase policy and to satisfy both settler demand for cheap land and chiefly ambitions to participate in the market economy and acquire European wealth and settlers. Prominent among the land-selling chiefs in Hawke’s Bay was Te Hapuku who virtually assumed “the role of Crown land agent in chief” in the Mohaka purchase.<sup>4</sup>

### 3.3 Waikare and Mohaka Chiefs Offer Land to McLean

In April 1849, three Waikare chiefs had asked Governor Grey to visit them to discuss whether he was disposed to permit Pakeha to settle in the district. For 15 years, the writer said he had been considering having white people, and some cows, sheep, horses and goats that he might see “in what consists the wealth of the White people”.<sup>5</sup> Soon after he arrived at Ahuriri, McLean was offered land by three northern Hawke’s Bay Maori. They were: Te Aotea, a chief of Te Wairoa who invited McLean to visit his settlement; an unidentified man from Wairoa; and a Mohaka chief, Paora Rerepu, “a quiet sensible young man well disposed to the English” who seemed anxious that McLean visit his place (C4:8).<sup>6</sup>



**Map 3.2** Deed plan of Mohaka block 1851

Source: DOSLI, Wellington



With a view to extending the coastal frontage of the Ahuriri block further north, McLean stopped a night at Mohaka on 27 January 1851 where Paora Rerepu's offer was repeated. McLean told them that "as the interior of the river was sold the freshets would soon reach the Sea which they construed into a partial assent".<sup>7</sup> Proceeding on to Wairoa, McLean informed the people there of his intention to purchase only one side of the Wairoa river and ascertained that the southern bank could "be easily purchased".<sup>8</sup> After visiting Turanga, he stopped at Mohaka on his way back to Ahuriri to resume negotiations. On 5 March local Maori assembled and "fully agreed to sell their claims to the south side of the Mohaka on to Waitaha, retaining the north side on to Waihua" at his suggestion "for themselves which will be a good river boundary", McLean agreed to the purchase.<sup>9</sup> On the morning of 6 March, "the Natives of Waikare arrived and offered to sell from Waitaha to Moiengiengi", that is the block immediately to the south of the Mohaka block and on both sides of the Waikare river.<sup>10</sup> At Waikare on 7 March, he received a further offer of land which extended the boundary on to the Waipapa stream. From Ahuriri on 14 March he reported to Grey that he had:

obtained an extension of the Ahuriri block towards the Mohaka river, including several thousand acres of land, which from being bounded by the Mohaka river, will save a great expense in surveying.<sup>11</sup>

Clearly during the course of these negotiations both McLean and the local Maori regarded rivers as suitable block boundaries. Furthermore river boundaries to McLean were a means of reducing the cost of surveys and ensuring that both the local Maori and incoming settlers would have access to water.

As yet the inland boundaries of the blocks being offered were undefined. On 1 April 1851, Paora Rerepu informed McLean that:

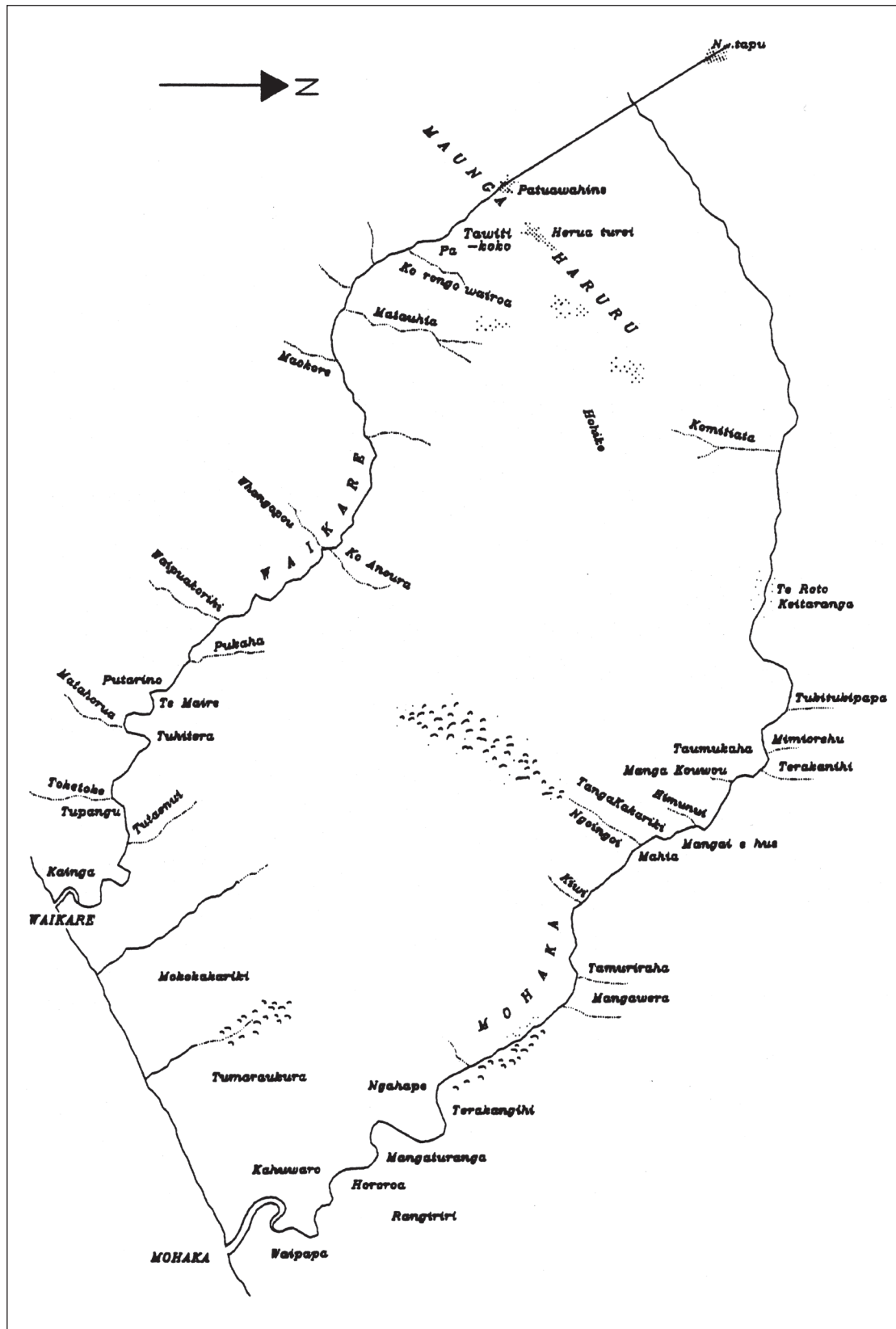
all the people have gathered and agreed that Mohaka at Waikari to be given to you . . . at Waikari is the boundary that finishes with you going on to Maungahururu and falling off at Mohaka.<sup>12</sup>

The offer of the Waikare-Moeangiengi land had been withdrawn and the Moeangiengi Maori had withdrawn from the sale (C4:19). The Mohaka Maori retained land north of the Mohaka river which McLean reckoned extended as far as the Waihua river. The Waikare Maori retained their land to the south of the Waikare river extending presumably to the Moeangiengi river (ibid). McLean could now procure a survey of the block lying between the Mohaka river and the Waikare river.

### **3.4 McLean Procures a Survey**

In May the external boundaries of the Mohaka block were surveyed by Robert Park, chief government surveyor in Hawke's Bay. As the boundaries were almost entirely defined by rivers and the coast, he completed his work in just over three weeks (C4:21). In a brief report to McLean he described the Mohaka block as follows:

The Mohaka block is distant about 21 miles from the Ahuriri block and . . . from 80,000 to 90,000 acres. On the Southeast it is bounded



Map 3.1 Hapu boundaries within the Mohaka block

Source: A14:27a

by sea, the distance from Mohaka southwards to Waikari being about 7 miles-all cliff . . . The southern boundary is formed by the Waikari River along which it runs to its source, about 16 miles, to a place called Patuawahine on the Maungahururu range from thence down to the Mohaka 2 miles farther. On the West and North by the Mohaka River following it until it joins the sea, the whole distance may be 30 miles.<sup>13</sup>

Park's survey plan delineates these external boundaries and various place names between Mohaka and Te Rotokakaranga on the Mohaka river and Waikare and Patuawahine on the Waikare river. The inclusion of place names should have helped the vendors understand exactly what land they were selling, for to them place names were "the survey pegs of memory".<sup>14</sup> There is no indication on either the deed plan or the "1852 Bousfield map" of Hawke's Bay land purchases that any part of the Mohaka river was included in or excluded from the sale (see maps 3.2 and 3.3).<sup>15</sup>

### 3.5 Deed of Sale

On 2 December 1851, McLean held a korero with 150 Maori assembled at Waikare. On the following day, he proceeded on to Mohaka and noted in his diary that Maori were "collecting from different places". On 4 December, he noted that they were "gathering in considerable numbers from the interior of the Mohaka".<sup>16</sup> The deed of sale was "handed round by Paora Rerepu" and the boundaries of the block were "fully explained" to the assembly. In the evening it was handed to the Mohaka teacher, Hori "to be read publicly to the Natives after prayers". On 5 December, after McLean called the chiefs together to discuss details concerning payments by instalments, the contents of the deed were fully explained and the deed was signed (C4:31–33).

The original deed together with an undated English translation are held by the Department of Survey and Lands Information (DOSLI), Wellington. A copy of the deed dating from 1859 is in the McLean papers in the Alexander Turnbull Library. The deed was published in H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand*. A translation of the deed which Stephanie McHugh, a Crown researcher, considered was probably prepared by McLean between December 1851 and February 1852 is held in the Civil Secretary's papers at National Archives, Wellington. A translation of the original held by DOSLI was made by William B Baker, an interpreter with the Native Land Purchase Department between 1861 and 1865. This was also published in Turton's deeds. The Crown commissioned a translation of the deed by Maaka Jones (C4(a):134). On behalf of the claimants the deed was translated by Poihipi Mahuika (B20).

For the purposes of this claim, we are particularly concerned first with the wording in respect of the northern boundary, and secondly in respect of the sellers' lament and farewell to ancestral lands.

In the Maori text of the deed the boundaries of the land (Nga rohe o te whenua) are described as follows:



Ka timata te rohe ki te ngutu o Waikare ka haere tonu te rohe i roto o te wai o Waikare puta noa ki Patu wahine ki raro iho o Maungahururu ka tae ki reira ka haere tonu i runga i te ruritanga o Paka te kai ruri o Paora Rerepu o te Poihipi o Hungahunga o Maremare o Hohepa o etahi atu o matou puta noa ki Paiwahie ara ki te wai tonu o te awa o Mohaka ka waiho tonu te rohe i roto o te awa o Mohaka puta noa ki te Moana tae noa ki Waikare.

The 'McLean translation' states:

The boundary commences at the mouth of the Waikare river and the boundary continues in the waters of Waikare on to Patuwahine close under Maungahururu when it reaches there it goes on the line surveyed by Mr Park the surveyor, by Paora Rerepu by te Poihipi by Hungahunga by Maremare by Hohepa that is to the waters of the river Mohaka and the boundary continues in the waters of the Mohaka till it reaches the sea and thence along the sea to Waikare. (C4:36)

The Baker translation does not differ significantly from this translation, and the Jones translation does not differ in sense (C4:36).

Mr Mahuika however commented that there would appear to be several interpretations possible in respect of the Maori words "i roto i te wai". These were "into the River" or "across the River" or "up" the river (B20).

Yet the interpretation in English of the words "i roto i te wai" in the Waipukurau deed, 4 November 1851 was "in the course of" and in the Ahuriri deed, 17 November 1851 "in the".<sup>17</sup>

Mr Mahuika interpreted the words "i roto o te awa", which appeared in a published notice dated 22 October 1851, as "up the river" but interpreted the phrase "i roto o awa o Mohaka" in the 1851 deed as "bounded by the Mohaka River" (B20).

At the hearing, Rameka Cope, an adviser on tikanga Maori to the Waitangi Tribunal, gave evidence on the meaning of the deed. It appeared to him that the deed was written in either Ngapuhi or Taranaki dialect, not in the lingua franca of Ngati Pahauwera. He had doubts that if the words used in the document were read to the people they would in fact have understood them. The phrase "i roto o te wai" literally means "in/within the water". To him it was a clear indication of where the boundaries were. From a Maori perspective, it was not unusual for the terms such as "in the water" or "in the river" to be used as the water boundary could move (C10:1–3).

The various interpretations offered by Mr Mahuika and Mr Cope of the words "i roto o te awa o Mohaka" did not help us in any way to resolve the problem of ambiguity in the deed over the northern boundary of the Mohaka block. It would seem that the most likely translation is "in the waters of the Mohaka", that is the 'McLean translation'. Just what this may have meant to McLean himself and Ngati Pahauwera will be discussed in the following section.

The section in the deed bidding farewell to the land and describing in general terms what was being sold is as follows:

3.6

Kua oti i a matou te hurihuri te korero te tino wakaaro te mihi te tangi te poroporoaki te tino tuku rawa i enei whenua o a matou tipuna tuku iho ki a matou ara nga whenua katoa ki roto o enei rohe kua oti nei te wakaahua e te Makarini e mau nei te ahua ki te pukapuka ruri e piri nei ki tenei wakaaetanga hei whenua pumau atu na matou i tenei re e witi ana me nga awa me nga roto me nga wai me nga kohatu me nga rakau me nga mea katoa o aua whenua ki a Wikitoria te Kuini o Ingarini ki nga Kingi Kuini ranei o muri iho i a ia ake tonu atu.

The 'McLean translation' states:

We have fully considered talked over resolved wept bade adieu and everlasting farewell and for ever given up these lands of our ancestors descended to us that is all the lands within the boundaries now mentioned to us by Mr McLean and the likeness of which is shown on the plan attached to this deed, as a sure and certain land from us under the shining sun of this day with all its rivers, lakes, waters, stones, trees and all and everything connected with the said land to Victoria the Queen of England or to the Kings or Queens who may succeed her for ever and ever. (C4:37)

The Baker translation differs only slightly, substituting "a lasting possession" for "a sure and certain land", "minerals" for "stones" and "timber" for "trees". The Jones translation does not differ from the 'McLean translation' in sense (C4:37). Mr Mahuika thought the most appropriate translation of the word "awa" in the Maori version was "streams" not "rivers" since the two rivers had already been referred to (B20).

In Mr Cope's opinion "awa" referred to those rivers (streams) that dissect or pass across the land that had been purchased. He also expressed the opinion that no Maori would have had the words in this section of the deed recorded unless they were physically leaving the locality of their land (C10:6,9).

Mr Butterworth considered that this section of the deed was an attempt by McLean to create an absolute transfer of title to land that would be explicable in Maori cultural terms using metaphors of the tangi. Referring to Mr Mahuika's translation of awa as streams rather than rivers, he did not believe that awa could be stretched to include the major river system (B21:14).

The Mohaka deed was clearly modelled on earlier McLean deeds. The wording of the lament and farewell was similar to that in the Waipukurau deed and was to become a standard clause in later deeds for Crown purchases.<sup>18</sup> To the historian Wilson there was "a poetical picturesqueness" about it that was "peculiarly appropriate both to the Maori and Highlander McLean".<sup>19</sup> There could be no doubt that McLean was the author.<sup>20</sup> As the lament was a standard clause introduced by McLean, it is we think of limited if of any relevance in determining the external boundaries of the block of land being sold.

### 3.6 Was Any Part of the Mohaka River Sold?

The point at issue between the Crown and the claimants was whether Ngati Pahauwera disposed of any of their customary and Treaty rights in the



Mohaka river in the 1851 sale. Both the Crown and the claimants agreed that the river was a boundary. But did this mean, as the claimants maintained, selling land south of the river, but no part of the river itself? Or was it, as the Crown submitted, an absolute transfer of ownership of half of the river?

The claimants rejected the notion that they had sold any part of the river:

Some say we sold part, we don't think so. Our people didn't understand, no one would sell yourself. We would not sell, yes we share. (C7:41)<sup>21</sup>

Cordry Huata maintained that:

The Mohaka River has never been sold by Ngati Pahauwera. The 1851 sales deed states that the boundary of the sales went 'i roto o te awa', (into the water) . . . Ngati Pahauwera understanding of the sale, if it was a valid sale, is that they had only sold the land, not the water or the river bed. Thus Ngati Pahauwera maintains that they are the owners and kaitiaki of the river. (A14:65)

Ms Elias submitted that the deed itself was wholly consistent with no interest in the river being conveyed. The boundary was described as going into the waters of the river for the very good reason that a river was an excellent but shifting boundary and would "save a great expense in surveying".<sup>22</sup> Paora Rerepu in April 1851 had said the boundary was agreed upon by "all the people gathered . . . falling off at the Mohaka".<sup>23</sup> Te Hapuku, in June 1851, had described the boundaries as "right through to Waikari on to Mohaka".(C4:23) In none of the contemporary documents was there any suggestion of the acquisition of the river itself (C14:48–49).

The Crown disputed the claimants' view that no part of the Mohaka river was conveyed to the Crown in the 1851 deed of sale. On the contrary, the deed placed the northern boundary of the block sold in the river and transferred the southern half of the river to the Crown.

Mr Brown submitted that:

the law in New Zealand is that where a parcel of land is bounded by a non-tidal river, it is presumed that the registered proprietor of the land owns the bed of the river to the central line of the river—the principle known as *ad medium filum aquae*. (A54:5–6)

And that the applicability of that principle was determined by the Court of Appeal in *Re the Bed of the Wanganui River* [1962] NZLR 600 in circumstances which, counsel submitted, were "peculiarly material" to the Mohaka claim. (A54:6)

In reference to the claimants' contention that the vendors did not sell any part of the Mohaka river, only land on the south bank, Mr Brown stated that:

The Crown does not comprehend the assertion that ownership of the River is separable from riparian ownership. (A54:7)

In support of this view he referred to Toro Wakaa's interpolation to his written evidence regarding trouble arising from the one fishing on the other's side of the river (B8:7). He also referred to claimant evidence distinguishing a Maori side of the river from a Pakeha side (C17:46–47

& interpolation). He concluded that all the evidence on the deed (the Maori version and English translations) “pointed to the boundaries of the block being in the river itself” (C17:50).

Crown researcher Fergus Sinclair suggested that information about Maori land tenure contained in Native Land Court minutes and other sources demonstrated that:

It was common for Maori to rely upon the exercise of rights to waterways—i.e. rights loosely approximating proprietary rights—as evidence of their entitlement to the adjacent land . . . [and] that the elements of river tenure were part and parcel of the same tenurial regime which applied to dried land. (C6:19)

In his final submissions, Mr Brown contended that the vendors must have understood they were parting with half of the river because in terms of Maori customary law, “ownership” of or exercise of rights in relation to a section of a river was associated with “ownership” and/or occupation of the adjoining land (C17:44).

An incident on the Waikare river on 4 April 1855 is also relevant. Some 50 people assembled at Waikare to receive the second payment by instalment for the Mohaka block from McLean. The following day McLean explained the Crown’s understanding of the Waikare river boundary to the assembled Maori:

we discussed the propriety of their removing their pigs off[f] the English side of the river also of allowing a passage for timber and boats through the Waikare where they put up eel cuts that stop the passage. I explained to them that half of the river were theirs and half the white peoples but if the white people would tell them when they wanted to take down timber as Mr Donaldson promised he should do they on their part agreed to send two Natives to clear a passage for rafts or boats. Pikai or Tohu Tohu a wild looking savage man of the old race but from all I can learn a straightforward just man assented to all that was proposed.<sup>24</sup>

Ms McHugh observed that McLean’s explanation of the boundary was accepted without question or comment by the assembly. In her opinion, it was significant that the grievance which prompted it was on the side of the settlers and it was possible that Maori understanding might have been incomplete. It was equally possible that the Waikare Maori understood themselves to have sold half of the river but had continued to use the whole width without perceiving that this might have created difficulties (C4:59–60). Ms McHugh concluded that:

Their initial understanding of the nature of the river boundaries of the block may have been indistinct, but this matter received further explanation in 1855. The vendors did not apparently object to McLean’s explanation that they had retained half of the river and half had been given over to the pakeha. (C4:94)

Ms Elias submitted that it was absurd to suggest that Ngati Pahauwera had any understanding of legal presumptions attached to ownership of riparian



lands which were not in accordance with the Maori perception of taonga. The river was a natural boundary and understood in that sense (C14:54).

Mr Butterworth considered that:

McLean was a man of decided views and one aspect part of these views was a clear perception of riparian rights. Indeed it may have been a major concern of his. (B21:5)

Yet with respect to the river boundary he concluded:

There is an ambiguity because the boundary is placed in the water but there is no suggestion that it went into the middle of the river or that people were selling the river in the sense of the river bed and water.

Given the holistic cast of Maori thought, the notion that their river could be divided into fractions was beyond their experience.

There is little doubt that McLean wanted to create this ambiguity so that he could later claim to the Waikare people 'that half the river was theirs, and half the White people's' . . . The local people apparently accepted the compromise of allowing a passage for timber and boats. It does seem that given Polynesian traditions of hospitality and courtesy that they may simply not have disputed the issue with McLean. At the time of signing what Ngati Pahauwera would have believed they were giving was a user-right of access to water stock and to use the river for fording and for transport; this would fit well into Maori customary practice. (B21:13)

Ms Elias questioned whether McLean had any developed notion of riparian rights. For example she submitted that the concept was hazily understood by Samuel Locke, another Hawke's Bay land purchase agent. Similarly it would be hazily understood today. McLean's written record was consistent with his desire to secure rivers as boundaries. The Waikare incident was "wholly consistent with an absence of any understanding on the part of the Maori" that half the river had been sold. Their actions were inconsistent with such a sale. The result achieved was not the application of the riparian concept but a sensible regime for cooperation, for example, with regard to timber floating and eel weirs (C14:49, 54–55).

McLean's need to explain the situation as he understood it, so very soon after the signing of the deed, suggests to us that there had been no consensus over this issue back in 1851. The 1855 discussion at Waikare seems to indicate that the sellers did not understand the English common law presumption that the owner of land on the banks of a river also owns the bed of the river to the middle line (the *ad medium filum aquae* rule). It is questionable whether McLean himself had more than a general notion of this rule. We note that as late as 1874 McLean answered a question in parliament relating to reclaimed land, in terms of the standard clause in his deeds of sale bidding farewell to the land not in terms of the relevant English common law presumption.<sup>25</sup> He regarded Crown title to foreshores and rivers as explicitly derived from deeds of sale, not through the *ad medium filum aquae* principle. We reject Mr Butterworth's suggestion that McLean was

3.7

deliberately vague about the rule in order to impose this principle on the sellers. Such a fraudulent action does not accord with what we know of his character.

The sellers' apparent assent to McLean's plan of action to allow timber to be taken down the river cannot be taken to be an acceptance of the *ad medium filum* rule. Rather it would seem to be an agreement to implement a specific course of action suggested to remedy a particular problem over the river. The action proposed would not have brought home to the Waikare Maori the practical reality of the rule. They were not being asked to remove their eel weirs from the other side of the river as should have been the case if McLean was insisting on dividing the river into Maori and Pakeha halves. By making the request that he made and by seeking the chiefs' approval McLean could be seen as acknowledging the tribe's rangatiratanga over the river.

We think that the only reasonable conclusion is that the deed was ambiguous in its reference to the river boundary. That ambiguity must we think be resolved in favour of Ngati Pahauwera. Such a resolution is in accord with the *contra proferentem* rule that when a document is ambiguous the words are to be interpreted against the party who drafted it or whose document it is. Applying the rule does we think produce a just result because Ngati Pahauwera should not be deprived of their taonga unless all or part of the river was clearly and unambiguously included within the terms of the deed. Because the Crown, through its agent McLean, did not make this clear, the Crown must accept the consequence that the river was not included.

Applying the *contra proferentem* rule is also consistent with the approach which this tribunal has taken to the closely analogous issue of the interpretation of any ambiguous provisions in the Treaty itself:

In the case of the Treaty of Waitangi it is important to note that with very few exceptions, the Maori version of the Treaty was signed by the Maori chiefs. We believe that where there is a difference between the two versions considerable weight should be given the Maori text since this is the version assented to by virtually all the Maori signatories. Moreover, this is consistent with the *contra proferentem* rule that, in the event of ambiguity, a provision should be construed against the party which drafted or proposed that provision.<sup>26</sup>

For these reasons we conclude that, because no part of the river itself was unambiguously included within the terms of the deed, the proper construction of the deed is that no part of the river was sold along with the land on the south bank.

### 3.7 *Ad Medium Filum Aquae* Presumption

Having stated our conclusion on what was sold, we must now consider the applicability of the *ad medium filum aquae* rule to the 1851 sale. As Mr Broubmitt, this principle is that as a matter of common law ownership of land adjoining a non-tidal river also includes with it ownership of the bed

of the river to its mid-point. If the bank of the river is sold then this portion of the river bed is also sold. Mr Brown argued that when the southern bank of the Mohaka was sold, so also was the river bed to mid-stream. The 1962 decision of the Court of Appeal in *Re the bed of the Wanganui River* was relied on to support this proposition. This decision marked a decisive point in a long running dispute between Whanganui tribes and the Crown over the ownership of the Whanganui river. The Court of Appeal was asked to determine who owned the river prior to 1903 when s14 of the Coal Mines Amendment Act 1903 declared all navigable rivers—which clearly included the Whanganui—to have been the property of the Crown from 1840. Was the river owned by the tribe and thus still customary Maori land, since it had neither been sold to the Crown, nor investigated by the Native Land Court to determine title? Or had the river passed into Crown ownership through the application of the *ad medium filum* rule, and then into European hands as land was eventually sold?

After seeking (and adopting) an opinion of the Maori Appellate Court provided in 1958, the Court of Appeal held that as a matter of customary law the river bed had been held by the tribe in exactly the same way as other land within the tribal boundaries: just as the tribal lands were parcelled out among the hapu with boundaries demarcated and defended so too was ownership of sections of the river bed. There was no overarching tribal ownership of the bed of the river as distinct from ownership of sections of it by the separate hapu or other sub-tribal groups who owned the adjoining land. Rights in relation to the river were directly connected to ownership of that adjacent land and there were no tribal rights of fishing or navigation which were paramount to riparian rights. Customary ownership of the river bed was therefore consistent with the application of the *ad medium filum aquae* presumption, and titles issued by the Native Land Court to riparian owners included the adjacent river bed *ad medium filum aquae*.

Before us, the Crown understandably relied on the decision of the Court of Appeal to counter the claimant submission that the 1851 purchase did not include the river at all. According to the Crown's submissions, the Court of Appeal decision, and the Maori Appellate Court opinion on which it relied, effectively disproved the argument that in Maori customary law "there exists a separate and distinct ownership in relation to the river from what might conveniently be described as riparian ownership" (C14:45). Accordingly, sale of land on the banks of the river must have been understood by Ngati Pahauwera as including the sale of at least a portion of the river.

Counsel for the claimants, while acknowledging that the decision in *Re the Bed of the Wanganui River* may be binding in law until over-ruled (A38:44), described it as "a dead end" (A38:7) and challenged the basis of the decision on the grounds that:

- the Maori Appellate Court, whose opinion was relied upon by the Court of Appeal, had received less extensive evidence than had the 1950 Royal Commission on the Whanganui River which concluded that the Whanganui river had been owned by Whanganui Maori as a tribal estate (C14:44);

- the Maori Appellate Court had based its reasoning on the absence of any tribal claim to the river when Native Land Court titles were applied for and on the fact that no claim to the river had emerged until the 1938 proceedings (C14:33);
- the Court of Appeal decision dealt only with the river bed and did not address other aspects of the river, notably its waters. This meant that the Maori perception of the river as a whole and indivisible entity, not separated into bed, banks and waters, was not taken account of. In view of the evidence on the separate identity of rivers and their mauri, specific investigation of native custom was called for (A38:44); and
- the Court of Appeal had stated in 1955 that evidence that eel weirs were situated in parts of the river not adjacent to settlement areas would be sufficient to rebut the *ad medium filum* presumption. The Maori Appellate Court had subsequently determined that the ownership of eel weirs was not restricted to those whose land was immediately adjacent. Nevertheless in 1962 the Court of Appeal discounted the effect of such evidence on the application of the riparian presumption (C14:34).

Ms Elias submitted that as a matter of English law the *ad medium filum aquae* presumption was readily rebuttable (C14:35). The 1950 commission stated that the principle that the boundary goes to the middle of the river may be rebutted if it can be shown by the surrounding circumstances that that was not the intention when the land bounded by the river was sold:

In general, it can be said that in the conveyance of land bounded by river the *ad medium filum* presumption may be rebutted by proof of surrounding circumstances in relation to the property in question which negative the possibility of any conveyance boundary having been the intention . . . the conveyance ought not to be construed as passing any portion of the river to the grantees. (A44:9)<sup>27</sup>

Examples of surrounding circumstances in the Whanganui river were:

The fact that the river was the “larder” of the Maoris settled on the banks of the river, the natural features of the river, and the fact that the settlement as a whole depended upon the river, and that the pursuit of fishing demanded weirs results in an accumulation of circumstances more significant than those that have been held sufficient to raise the presumption of ownership to the beds of English rivers. (A44:12)

There are parallels between these circumstances and the evidence we heard about Ngati Pahauwera and their river.

The commission also noted the situation where a vendor of riparian land reserves fishing rights in the adjacent water and thereby retains ownership of the bed of the river or stream to the mid point:

In English law if, on the sale of riparian lands, the vendor reserves fishing-rights that accompanied his right *ad medium filum* of a stream, the reservation could rebut the presumption that his purchaser acquired the bed of the river *ad medium filum*. If such an owner had erected weirs while he was the owner and reserved the

right to use those weirs, the ownership of the soil would still remain with him. (A44:12)

In *The King v Morison* [1950] NZLR 247, 254, the Supreme Court noted that the presumption may be rebutted by showing that, at the time of sale of the land, the vendor had no intention of parting with the bed to the middle of the river.

It is we think significant that the Court of Appeal was in 1962 concerned with the operation of the Native Land Court in extinguishing Maori customary title and awarding Native Land Court titles. The court did not address the question of the sale of customary land to the Crown as was the case with Ngati Pahauwera in 1851. That fact alone reduces the relevance of the court's decision to this claim. It must also be remembered that the court in 1955 had confirmed that the presumption of *ad medium filum* is rebuttable if it could be shown there were circumstances to exclude it:

the question of whether the presumption has been rebutted is always a question of the intention of the grantor to be collected from the language used with reference to the surrounding circumstances.<sup>28</sup>

There is no evidence that Ngati Pahauwera intended to dispose of any customary and treaty rights in the river in the 1851 sale of the Mohaka block; nor that the English common law on the ownership of riparian lands was explained to them before they signed the deed.

Although the land on the southern bank of the Mohaka did not pass through the Native Land Court, it was the Crown's position that when Ngati Pahauwera sold land on the southern bank of the river, they would have understood that they also sold the adjoining bed of the river to the middle line. Mr Sinclair's evidence suggested that customary rights to the river were clearly linked to the land and to exercise river rights it was necessary retain the land. If the land rights were sold, the sellers would automatically have understood that they relinquished their river rights as well. We do not think this to have been the case. The river with its many pa tuna was such a significant resource and taonga of the tribe that it is inconceivable that the vendors of the Mohaka block would have understood that the sale of riparian land carried with it all riparian rights. We think therefore that customary and associated land and river rights and the *ad medium filum aquae* rule were sufficiently not alike for Ngati Pahauwera to have understood the latter.

Ngati Pahauwera would have thought that all they were relinquishing to the Crown was the right to use and occupy land on the south bank and access to the river for water and transport. Notwithstanding the Crown's submission that it could "not comprehend the assertion that ownership of the River is separable from riparian ownership" (A54:7), we agree with the dictum of Mr Justice Hay in *Morison* that "the right to the bed of the river is not inseparably bound up for ever with the right to the land, and an owner may retain one and part with the other".<sup>29</sup> As we have already stated, it is our view that Ngati Pahauwera had no intention of relinquishing rangatiratanga over the Mohaka at the time of the land sale to McLean. The language of the



deed of sale and the surrounding circumstances demonstrate that Ngati Pahauwera neither understood nor intended that the sale would alienate any portion of the river.

After the 1851 sale however Ngati Pahauwera continued to use the river and exercise rangatiratanga over it. This confirms the conclusions that they did not knowingly and willingly sell part of it or understand the *ad medium filum aquae* rule. Many years were to elapse before the Crown or settlers began to assert riparian rights over the river. Consequently there was no recorded protest from Ngati Pahauwera over the application of the rule.

In the light of the Crown's land purchase policy and practice, it seems to us that the Crown's imposition of riparian law on a people who had had little direct contact with Pakeha or previous experience of land selling was essentially the assertion of colonial power in disregard of Maori customary rights and interests under the Treaty. It would also reflect the prevailing assumption that New Zealand was a colony of settlement inhabited by an indigenous people without settled law or social and political organisation. It was the beginning of a process of converting customary land and water rights into land titles and water rights derived from the Crown, and of dispossessing Ngati Pahauwera of a taonga on which they depended for their livelihood and tribal identity. Far from carrying out its fiduciary duty to protect Ngati Pahauwera's customary and Treaty rights in the river, the Crown's overriding concern was to facilitate the opening up of the area to Pakeha settlement.

The sale of land to the Crown was not a customary transaction; it was a new concept, something that came with the Treaty. The Crown had a duty to explain fully the particular as well as the general nature of the sale in terms that Ngati Pahauwera could understand. The placing of a boundary in the river, separating the lands of the Crown from those of the tribe, was a novel concept and one that did not fit easily into tradition. If the Crown had wanted to acquire ownership of any part of the river, it had a duty to spell out in detail to Ngati Pahauwera the exact nature of the transaction. The Treaty allowed for new ways of doing things, but it incorporated the promise that Maori rights would not just be respected but would be actively protected. The Crown could not acquire land or other resources from Maori by slight of hand, particularly resources of such significance as the Mohaka.

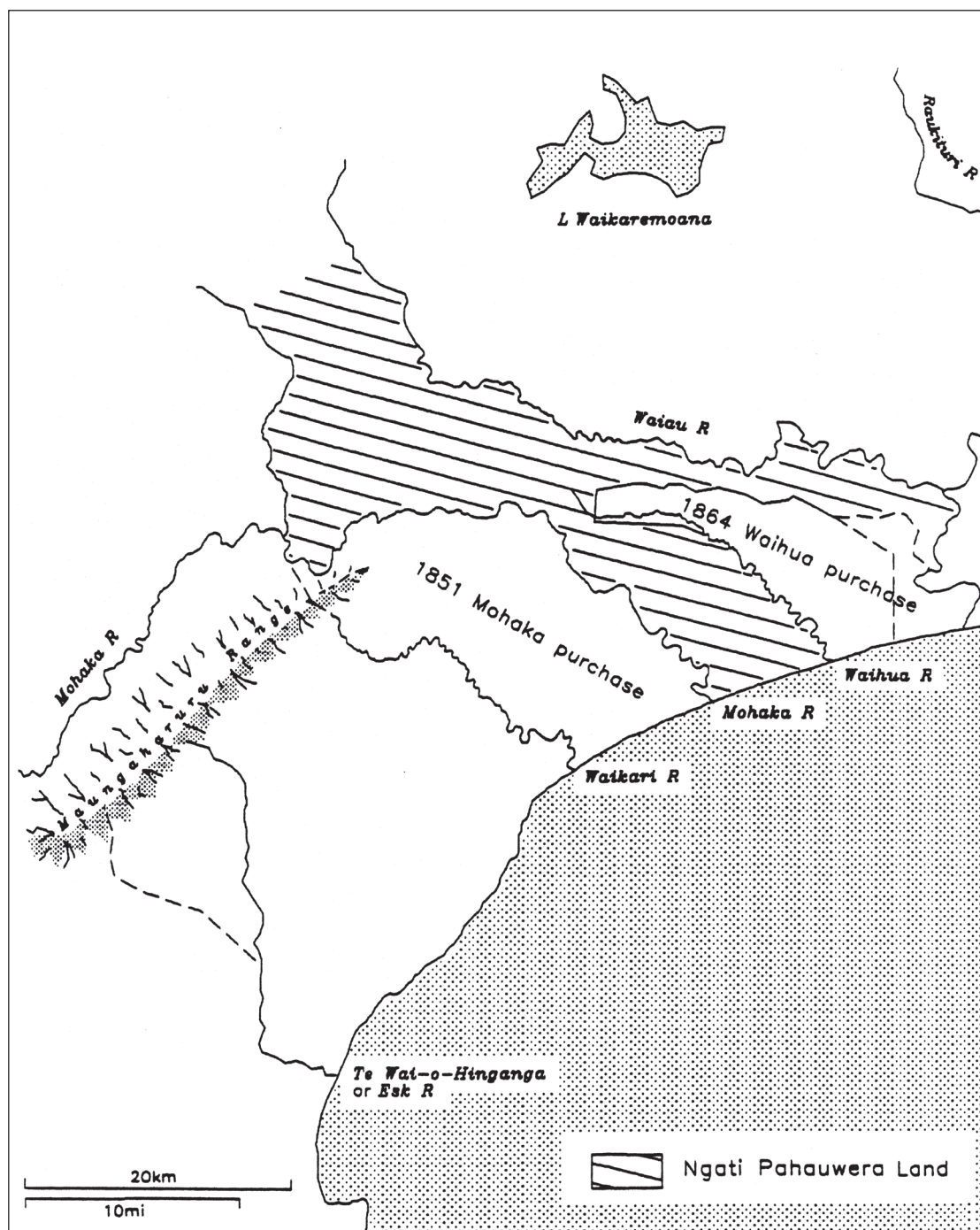
In summary therefore we conclude that no part of the river was included in the 1851 sale and that, even if the Crown had been entitled to rely on the *ad medium filum aquae* rule, that presumption would on the facts have been rebutted. In any event the Crown was not entitled to rely on the *ad medium filum aquae* rule, an English common law presumption which would have been known to few if any settlers in this country in 1851. To rely on such an esoteric rule to acquire a taonga of Ngati Pahauwera without their knowledge would we think have been clearly unjust and in breach of article 2 of the Treaty.

#### References

- 1 J G Wilson and others, *History of Hawke's Bay* (Wellington 1939) p 193
- 2 James Rutherford, *Sir George Grey, KCB, 1812–1898: A Study in Colonial Government* (London, 1961) p 182ff

- 3 *Dictionary of New Zealand Biography* (DNZB), I:M11
- 4 *ibid*:T28
- 5 Te Poihipi & others to governor-in-chief, G7/6/61; A21(d):827
- 6 McLean journal entry, 7 January 1851; A21(e):1241
- 7 *ibid* 28 January 1851; C4(a):80. As Stephanie McHugh, a Crown researcher, pointed out, the meaning of McLean's metaphor is rather obscure. In her opinion it was likely he was referring to the Ahuriri block, implying perhaps that once an inland area of the river had been sold the coastal stretch would follow (C4:12).
- 8 *ibid*, 29 January 1851; C4(a):81
- 9 *ibid*, 5 March 1851; C4(a):74
- 10 *ibid*
- 11 AJHR 1862 C-1, p 309; A5(a)
- 12 MS Papers 32 McLean Folder 675c; C4(a):136
- 13 Park to McLean, 7 June 1851, CS1, 1852/177; A21(d):785
- 14 *The Te Roroa Report 1992* (Brooker and Friend Ltd, Wellington, 1992) page 50
- 15 According to the historian J G Wilson, Park prepared a map of Hawke's Bay from the Mohaka river to Porangahau dated December 1851. The original in the Lands and Survey Office, Napier, was destroyed in the 1931 earthquake and a tracing in Wilson's possession was used to make a copy to replace it (Wilson, *History Of Hawke's Bay*, pp 202–203; C4:25). This copy is presumably the 1852 Bousfield map now held by Dosli in Napier which shows the Mohaka Block as consisting of about 85,700 acres and records more place names up both the rivers than were included on the survey plan; also existing pack tracks, and on the south side of the Mohaka mouth, the whaling station (J D H Buchanan, *The Maori History and Place Names of Hawk's Bay*, p 199)
- 16 McLean journal, 4 December 1851; A21(e):1370
- 17 H H Turton *Maori Deeds of Land Purchases in the North Island of New Zealand*, vol II (Wellington, 1877) pp 487 & 491
- 18 For example, the *Te Roroa Report 1992* p 38
- 19 J G Wilson et al, *History of Hawke's Bay*, p 196
- 20 J G Wilson *The Founding of Hawkes Bay* (Napier, 1951) p 24
- 21 Oral evidence of George Hawkins, 4 May 1992
- 22 McLean to Grey, AJHR 1862 C-1, p 309; A5(a)
- 23 MS Papers 32 McLean Folder 675c; C4(a):136
- 24 McLean journal, 6 April 1855, C4(a):98
- 25 *Ngai Tabu Sea Fisheries Report 1992* (Brooker and Friend Ltd, Wellington, 1992) p 167–168
- 26 *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9) reprint (Brooker and Friend, Wellington, 1991): 180–181; see also *Report of the Waitangi Tribunal on the Muriwhenua Claim* (Wai 22) (Waitangi Tribunal Division, 1988) p 188; *The Ngai Tabu Report 1991* (Wai 27) (Brooker and Friend, Wellington, 1991) p 223
- 27 AJHR 1950 G-2
- 28 *In Re the Bed of the Wanganui River* [1955] NZLR at page 438
- 29 *The King v Morison* [1950] NZLR 247, 254





**Map 4.1** Crown purchases 1851 and 1864

Source: A29:25

## Chapter 4

# Sales of Land on the North Bank of the River

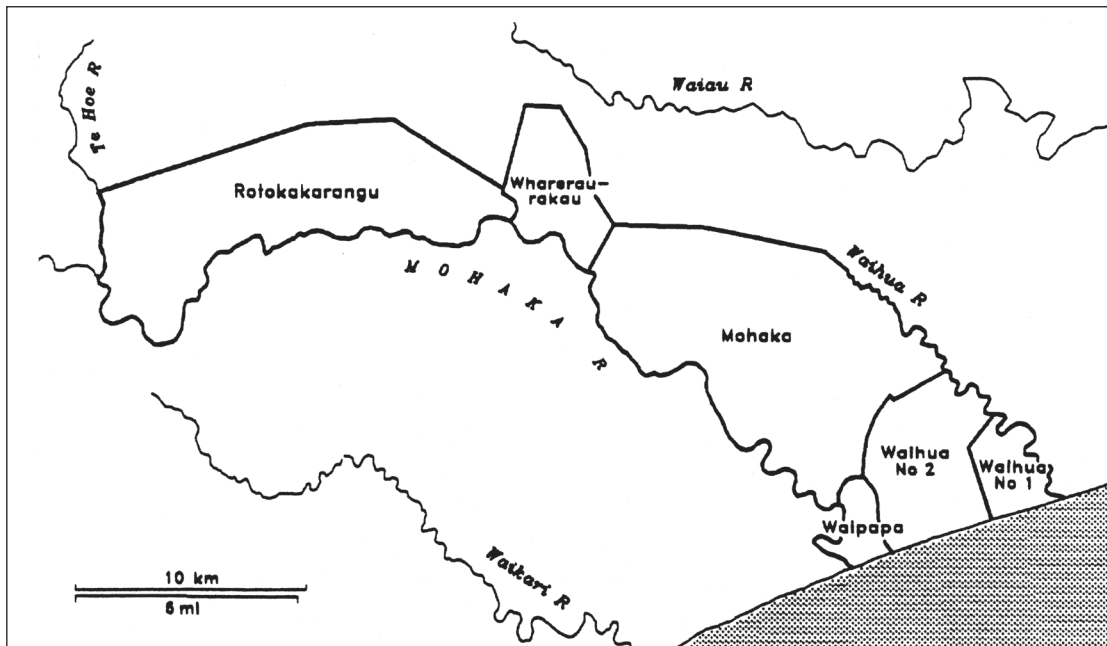
### 4.1 Introduction

Further sales of Ngati Pahauwera land on the north bank of the Mohaka river proceeded in two main phases: first, the 1865 purchase of the Waihua block by Samuel Locke for the Crown; and secondly, the slow, piecemeal sales of subdivisions of land that were investigated and determined by the Native Land Court. The Waihua block was on the north side of the Waihua river outside the claim area and need not concern us here. In effect, its sale confined Ngati Pahauwera to a strip of land on the north side of the Mohaka river only nine kilometres wide at the coast (A29:10–14; C5:27).

The subdivisions and sales through the Native Land Court system included both blocks with river frontages and inland blocks. For the purposes of this claim, we are not concerned with whether these subdivisions and sales were fair and equitable, but with whether they demonstrated an intention on Ngati Pahauwera's part to dispose of their customary rights in the river and to relinquish their rangatiratanga over the river as well. We need also to consider whether there were individuals and hapu with interests in the river who were excluded from the titles awarded by the court and did not consent to the sales; and whether the Crown was in breach of the article 2 protection of Ngati Pahauwera rangatiratanga over the river in allowing these subdivisions and sales to proceed and in presuming that the *ad medium filum aquae* rule applied.

### 4.2 The Native Land Court System

Before considering the sales, we shall briefly explain the Native Land Court system through which they were conducted. The court was established after the governor handed over full responsibility for native affairs to his ministers and parliament enacted the 1862 and 1865 Native Land Acts. The object of the Native Land Acts, as Henry Sewell explained, was two-fold: to bring the great bulk of Maori land in the North Island "within the reach of colonization" and to detribalize the Maori and amalgamate them into the European social and political system. The chief instrument for achieving this object was the Native Land Court which was set up to investigate and determine titles to native land. Ultimately, it was hoped, the court would individualise titles and Maori would own land in the same way as Europeans.<sup>1</sup>



**Map 4.2** *Native Land Court blocks*

*Source: A29:29*

In practice the court adopted the ten-owner rule by which not more than ten names could be entered on certificates of title. To protect the interests of other rightholders, an amendment Act was passed in 1867. Under section 17 of this Act the court was bound to determine interest according to native custom and to ascertain the interest of the applicant and every other person or tribe who might be interested in the land. Should more than ten be interested, their consent had to be gained to put a selected ten on to the certificate of title. The court had to satisfy itself that these requirements had been met as it thought fit. The names of all persons interested in the land had to be registered in court. A certificate of title, however, could be made out to a tribe and names and relative shares determined later.

No portion of land could be alienated except by lease for a term not exceeding 21 years unless it had been subdivided. A majority of owners had to consent before any such subdivision took place. The ten grantees were expected to be trustees for all the others registered. If persons were not registered, they were not entitled to claim any interest. Titles to land on the north side of the Mohaka river were initially investigated and determined under s17 of the Native Land Act 1867 (C5:36–37).

### 4.3 Native Land Court Investigation of Titles

In 1866, Paora Rerepu asked George Worgan to survey lands on the north bank of the Mohaka for the purpose of passing them through the court and leasing a sheep run to the local storekeeper, John Sim. With an order from McLean, Paora Rerepu had obtained food and other goods from Sim to supply Hauhau prisoners and people, and he needed money to pay his debts, but his right to lease the land was disputed by other claimants. Sim claimed to have leased 40,000 acres and offered McLean a share or mortgage. But in

1868 he filed for bankruptcy leaving Ngati Pahauwera owing Worgan £230 for the survey (C5:27–33).

The need to lease land probably prompted an application to the court to divide off the Mohaka block (A29:30). Other reasons were the need to resolve disputes over title and a wish to participate in the cash economy (C5:10,36). Judge Munro presided over the hearing at Wairoa in 1868. Paora Rerepu was the main witness, it apparently having been agreed that he should conduct the case (C5:34). Ngati Pahauwera, he said, derived their title from Kahungunu; claimants had arranged among themselves the ten names to be listed on the title.

Certificates of title were ordered under s 17 of the 1867 Act as follows:

Mohaka block	22,355 acres	10 grantees	131 names
Waipapa block	1,290 acres	10 grantees	11 hapu
Whareraurakau block	3,310 acres	10 grantees	2 hapu

(A29:appendix C: 1–4, 6)

Apparently the intention was to lease Mohaka, sell Whareraurakau and retain Waipapa.

Each of these three blocks bordered the Mohaka river on its north bank but there was nothing in the certificates of title or on the annexed survey plans (A25(a):39,42,47) to show that any part of the river was included or excluded in the subdivisions. Nor is there any reference in the court record to the English common law presumption that riparian lands carried with them riparian rights. The questions of who had interests in the river and whether they intended them to be partitioned by the court did not arise.

Under the *ad medium filum aquae* rule however the Crown could presume that from the time certificates of title were awarded for these subdivisions, each subdivision extended into the middle of the river. This would have meant that those named on the certificate of title and registered by the court would have been the trustees and beneficial owners of their respective part of the river. None of the evidence we heard suggests to us that this was the intention of those who applied for the subdivision; nor was it the understanding of those named on titles and registered by the court. Ngati Pahauwera at this time still lived in a Maori district where there were few settlers or officials and where their customary use rights and rangatiratanga over the river still prevailed. We therefore think that it was most unlikely that they had any knowledge or understanding of the *ad medium filum aquae* rule or any intention to subdivide their river rights.

#### 4.4 Subdivision and Sale of Rotokakarangu

In 1873 a lease was negotiated for 60,000 acres of valuable timber and good grazing land fronting the river in the vicinity of Rotokakarangu. The lessee then requested the government to take over the lease and negotiate a purchase and McLean approved (C5:45–46). In 1875 the Native Land Court ordered a memorial of ownership under the Native Land Act 1873 for Rotokakarangu, 19,792 acres, for 41 named owners (A25(a):36; A29:54 & appendix H). This met the new statutory requirement that all those with

4.5

interests be named on the memorial. The following year 151 acres were cut off at the eastern end for six minors (Rotokakarangu 1); the remaining 19,641 acres were awarded to 35 adults (A25(a):36–37; A29:54).

There was little permanent settlement in this area and in 1877 the Crown acquired the majority of shares from 30 of the owners in four sessions (A29:54,57,59). According to Mr Sinclair, there were sound strategic and economic reasons for the sale. European activity in the area would help create a buffer between the Urewera and Ngati Pahauwera tribes and facilitate the participation of Ngati Pahauwera in the cash economy (C5:52).

In 1880, the Crown applied to the court to have its interests determined. The court ordered that 2,805 acres be cut off for five non-sellers (Rotokakarangu 2). The remaining 16,684 acres were vested in the Crown (A25(a):37; A29:59). The Crown thus acquired 20.4 kilometres of river frontage below the Te Hoe confluence. Rotokakarangu 2 was further subdivided and sold in portions to the Mossmans between 1914 and 1977. By 1920 all the Rotokakarangu river bank had passed out of Maori hands (C7:6–10).

Once again there is no evidence that any part of the river was mentioned in court or included in the deeds of sales or annexed survey plans. Nor is there any evidence that the sellers intended to dispose of their river rights or understood that the sales of land adjoining the river carried with them riparian rights. Despite these sales Ngati Pahauwera continued to exercise their customary rights to mahinga kai and tino rangatiratanga over adjacent sections of the river.

When clearfelling commenced in the late 1880s, the logs for milling were floated down the river to where a sawmill had been built at the mouth (A25(b):46). At the turn of the century, fencing posts were also being sent down the river and exported. River transport of posts continued to the late 1920s. According to Mr Thomson the experts who actually guided the posts down the river to Mohaka were Ngati Pahauwera (A29:appendix A, p 5). They do not seem to have opposed the practice of timber floating on the Mohaka. As many of their pa tuna ceased to be maintained after the 1860s (C7:53), they had little cause to object to timber floating and continued to share the use of the river with Pakeha.

#### 4.5 Other Subdivisions and Sales of Land on the North Bank

Rotokakarangu was the last extensive block purchase by the Crown from Ngati Pahauwera. Other blocks of land on the north bank of the Mohaka acquired by the Crown through the slow, piecemeal Native Land Court process of subdivision and partition of interests were as follows:

##### 4.5.1 *Mohaka block*

In naming the ten grantees for the Mohaka block and registering the names of 131 others in 1868, the court had relied on the single testimony of Paora Rerepu. It had not seen fit to investigate whether their interests were determined in accordance with native custom nor to ascertain whether any person or tribe had interests as s17 of the Native Land Act 1867 required. Subsequently there were many complaints about non inclusion in the title



and many unsuccessful attempts to be included (A25(a):44–45; A29:32; C5:54). Although the ten grantees were expected to be trustees for all the registered shareholders, complaints suggest that after the block was leased and the survey paid for, rents were not always cooperatively shared.

Applications were made for further subdivisions to obtain some control over the land and a share of the rent (A29:30–37; C5:55–57). Partition orders were made in 1884, 1889 and 1896 but were annulled by the Native Land Claims Adjustment Act 1901 (C5:59). In 1903 the block was partitioned into 55 subdivisions with a total of 190 shareholders. Nine groups of claimants claimed descent from different ancestors. Because of the intractable nature of their differences, the court did not investigate and determine title in accordance with native custom but relied mainly on recent occupation and the relative position of owners (C14:17).

Only 22 of the subdivisions had river frontages. Under the English legal presumption of riparian rights, each of these subdivisions carried with it all riparian rights. Consequently those awarded shares in subdivisions located inland would be divorced from the river and, by riparian law, denied customary rights of use and Treaty rights of rangatiratanga over taonga. Yet there is no evidence that Ngati Pahauwera intended to dispose of their river rights through partition or that the court explained riparian rights to them. Clearly they did not understand that they had relinquished these rights; indeed, as we shall see in the next chapter, they continued to exercise them.

Of the 22 subdivisions with river frontages, 16 were partitioned between 1914 and 1925 and six were sold between 1920 and 1928. Some shares were acquired in six subdivisions by 1925 and in seven during 1927–1929. As an upshot of the 1925–1941 consolidation scheme five river frontages were returned, all of which were later to become Crown forest land or scenic reserve. Out of a total river frontage of 20.6 kilometres, the Crown purchased or took for public works or acquired a part interest in 10.5 kilometres before the consolidation scheme was completed. As a result of consolidation, 4.8 kilometres was awarded to or retained by Ngati Pahauwera. Since 1941, 2.6 kilometres has been purchased by the Crown and 0.4 kilometres by a private purchaser (C7:16–39). By our calculations Ngati Pahauwera retained only 11.9 kilometres of river frontage on the north bank.

#### **4.5.2 *Subdivision and sale of the Whareraurakau block***

Although it was proposed to sell this block, the sale did not eventuate and instead the block was leased in 1879 for 21 years. As a preliminary to subdivision for five groups of owners in 1903, a list of owners was compiled. Although four of the named grantees did not belong to the two named hapu, it was recognised that they or their successors had a valid claim to be included.

Three of the five subdivisions had river frontages. One was sold to Ann Mossman in 1914. The Crown purchased all the shares in another by the end of 1915, and 76.3 percent of the shares in the northern part of a third before June 1915. By further acquisitions of shares and partitions, the Crown acquired the southern part of the third and two more inland subdivisions between 1915 and 1919. A 100 link-wide river frontage was declared river

4.5.3

reserve; the rest was used for grazing and, in 1974, state forest. The two remaining Maori subdivisions with river frontages were sold to the Crown for state forest in 1973. Thus 2.4 kilometres of the river bank was sold privately in 1914; 1.1 kilometres to the Crown in 1918 and the remaining 0.8 kilometres in 1973 (C7:11–15).

4.5.3 *Subdivisions and sales in Waipapa*

From 1868 to 1899, Waipapa was a hapu trust and papakainga land. A seven acre site at Te Kahika was leased by Paora Rerepu, probably for a store, in 1874, and a line run by Paramena of Ngati Kura cut off 700 acres leaving only 500 acres for Ngati Pahauwera. An application for subdivision was made in 1876. The block was put through the court again in 1896 to apportion the shares of the 11 hapu listed in 1868, the enquiry being limited to these 11 only. An appeal against this was heard in 1899 on the grounds that Ngati Pahauwera had not been able to arrange what hapu were entitled and what were not. Four hapu admitted by aroha had no right. The court cancelled the trust listed by hapu and replaced it with a list of names, leaving their relative interests undefined (A25(a):33–34; A29:47–49; C5:84–89). A partition order was made in 1906, the block was resurveyed in 1913 and 171 titles were shown on the survey plan (A29:50). As a result of partition there was a total of 28 subdivisions, plus two acres identified as Maori roadway and three acres identified as “balance” areas with river frontages (C7:40).

A local police constable purchased two acres one rood with river frontage and on sold it to the Crown in 1912. The Crown later sold this land reserving a one chain strip along the river bank.

Part of one subdivision at the river mouth was sold to a Pakeha sometime before 1919. As a result of the consolidation scheme the Crown was awarded the subdivision furthest up the river adjoining the Mohaka block, and apparently used it for Maori land development. Since consolidation, the Crown has taken river bank land for the northern abutment of a new bridge, a loss of 20 metres (C7:40–43).

In the course of his research for the Crown, David Alexander found:

[no] weighting given to the river by Ngati Pahauwera in partition or sale dealings between 1912 and 1929. (C7:53)

He further found that:

The Maori Land Court has felt itself called upon to express an opinion on the river in only one instance. In that case (Mohaka A38) it followed the case law of the time and recognised *ad medium filum aquae* rights. (C7:55)

Mr Alexander’s evidence confirms our conclusion that Ngati Pahauwera had no idea when they subdivided and sold land on the north bank that the *ad medium filum aquae* rule applied. As in the case of the 1851 sale there is no evidence that they intended to dispose of any customary or Treaty interests in the river or that they understood that they had done so. Survey plans of subdivisions did not include any part of the river. Land titles referred to land and appurtenances. Obviously Ngati Pahauwera did not regard their river as an appurtenance. In applying the *ad medium filum aquae* rule to lands on the north bank of the Mohaka river after the Native Land Court had



determined title, the Crown was once again using the rule as a legal instrument to dispossess Ngati Pahauwera of their customary and treaty river rights.

Because titles to land on the north bank of the Mohaka river were issued by the Native Land Court, the Court of Appeal decision in *Re the Bed of the Wanganui River* is directly relevant here. As discussed previously, the court, in that case, emphasised that it accepted the Maori Appellate Court's opinion on the nature of customary ownership of the Whanganui river bed and also made clear that its reasoning and final conclusions were dependent on that opinion.

It is our view however, based on the evidence of Ngati Pahauwera's relationship with the Mohaka river and the nature of the river rights exercised by them, that there was, and still is, a distinct tribal relationship with the river, imbued with important spiritual and cultural values. We do not accept that as a matter of customary law the bed of the Mohaka river was owned by the hapu, whanau or other sub-tribal groups occupying the adjacent land as distinct from the iwi as a whole. We accept the claimants' submission that:

the river was a taonga and object of veneration, incapable of occupation in the sense of habitation. Use rights may well have been possessed by individual hapu or whanau but the river itself is clearly identified as a Tribal taonga with a life force of its own which makes individualisation of 'ownership' unthinkable. (C14:36)

Accordingly we find that Ngati Pahauwera, by later invoking the Native Land Court procedure on a sub-tribal basis, could not have intended to dispossess themselves of their tribal ownership and control of the river.

#### **4.6 The Social and Economic Consequences of Subdivision and Sale**

The Crown emphasized the extent to which subdivisions and sales through the Native Land Court system were intended to facilitate Ngati Pahauwera's participation in pastoral farming and the procurement of secure Crown titles in place of customary land rights.

Mr Sinclair contended that the purpose of subdivisions under s 17 of the Native Land Act 1867 was to make explicit the existence of any trust relationship and identify the beneficiaries. No sale could take place without at least a majority of owners assenting (C5:38).

In respect of Waipapa, Mohaka and Whareraurakau he stated:

the boundary was verified and the owners according to native custom were ascertained. A measure of security was thus conferred upon those who were deemed to have a proprietary right. The owners were also better placed to obtain an income from leasing of portions they did not use to any great extent . . . The land also became inalienable except by lease. A majority of owners could apply to have the land subdivided and sell their share but they could not sell the interests of any minority dissentients . . . such an award preserved the 'tribal' character of the land. Far from subverting the exercise of 'rangatiratanga' this type of grant gave it a real opportunity to continue. But while the law court protect[ed] the boundaries and provide[d] some safeguards against improvident dealings, it

could not preserve the quality of relationship between owners. The history of these lands in the later nineteenth century is marked by disputes among the proprietors. Against this background, the people came to court, this time with the intention of separating or privatising their respective interests. What they desired was the consolidation of their scattered ancestral rights on the land into a clear title to discrete blocks suitable for sheep farming.

If the role of the court were to be described in a phrase, it would not be unreasonable to say it had performed an essentially protective service in relation to these three blocks. (C5:97)

Mr Brown, in his final submissions, submitted that:

To this day extensive acres . . . remain in Maori ownership with associated rights to the river. (C17:52)

The relevance of the land on the north bank to the claim, he submitted, arose from the sales of four blocks—Rotokakarangu, Waipapa, Mohaka and Whareraurakau. A very thorough report on these transactions had been presented by Mr Sinclair, and Mr Brown referred us to the conclusions we have just cited. He emphasised that the transactions had to be considered on their merits and that it was not legitimate to assume that because there were difficulties with some other transactions there must have been with these. The opposite was the case. He had asked Mr Butterworth whether any of the four sales in issue was a breach of the Treaty and Mr Butterworth was unable to point to any such breach (C17:53).

The evidence on post 1903 land transactions presented by Mr Alexander seems to us to throw doubt on Mr Sinclair's conclusions. The native land legislation and the Native Land Court process largely accomplished what settler governments intended, namely the subdivision and partition of interests which facilitated either Crown and private purchases, or the fragmentation and individualisation of Ngati Pahauwera interests (C7:6–45). Subsequently these scattered interests had to be consolidated to provide individuals with farm holdings. Claimant evidence indicated that in the long run these holdings were generally too small to be economic. As Ms Elias submitted:

The Native Land Acts did not provide a proper vehicle for Tribal ownership. (C14:36)

In addition, once the tribal title to land had been individualised, the application of the *ad medium filum aquae* rule made it possible to alienate tribal rights to the river piece by piece, individual share by individual share, without any further reference to the tribe. All of this was in contravention of the tribe's treaty right to control the resource. The combined effects of the native land legislation and the *ad medium filum aquae* rule were to deprive Ngati Pahauwera of much of their tribal base. Many were forced to move away from Mohaka in search of jobs. Tribal society and leadership, the very things embodied in the guarantee of rangatiratanga in article 2 of the Treaty, were severely undermined.

Several claimant witnesses spoke of the social problems they were encountering such as high levels of unemployment and an increased dependence

on a subsistence lifestyle which were partly the outcome of partition and sale of land on the north bank. Tureti Moxon said:

Unemployment means subsistence lifestyle. Many therefore depend on the river for their food, bathing and washing. Without our right-ful relationship to the river, the community could not be sustained at all. (B13:5)

She emphasised the long term social impact of the Native Land Acts and “pres-sured land sales” on Ngati Pahauwera:

without the mana and potential of resource development from river and land Ngati Pahauwera were left to struggle with the remnants of river and land. (B13:3)

This struggle “meant poverty, low morale, unemployment, a high crime rate. A sense of hopelessness developed beneath the normal good will and pride of many Ngati Pahauwera” (B13:4). Economic conditions forced many away from Mohaka.

A case study of the adult population of Mohaka and Raupunga carried out by Tureti Moxon in April 1992, revealed that a total of 70 percent were unemployed. That figure rose to 85 percent if seasonal, part-time and ACCESS scheme figures were added:

A direct consequence of these deprivations has been an ever wid-ening sense of despair and negative behaviour. The fruits of this are often drunkenness, domestic violence, and child neglect. Coupled with low self-esteem this can often result in forms of psychological violence. Humiliating, apathy-producing dependence on the state is the chief characteristics of many life styles. (B13:5)

She believed that:

If our rangatiratanga over the river is recognised . . . we will be able to sustain our life and begin to rebuild a corporate resource base and offer real hope for the development of Ngati Pahauwera people today and for future generations. (B13:6)

#### 4.7 **Summary**

We conclude that, as on the south bank, the *ad medium filum* presumption is rebutted. The decision of the Court of Appeal in *Re the Bed of the Wanganui River* is distinguishable on the facts because the evidence before this tribunal leads us to a different conclusion on the question of tribal ownership of the river.

Indeed we note that Mr Justice Turner in the Whanganui river case said that:

If it could be or had been shown to be probable that those who owned the bed of the river according to such [tribal] customs were different from those who had claimed investigation of title of the riparian lands; if it could be shown that in the investigation of title to riparian lands the owners of the bed had taken no part, and that they had not participated in the resultant grants of riparian free-holds; then I for myself might have been disposed . . . to agree that those entitled to the enjoyment of the bed had had it taken from them, without being heard, by the tacit application of a presump-tion of English law of which they knew nothing.<sup>2</sup>

Were we to be wrong in our conclusion on the relevance of the Whanganui river case, the question would arise of whether the Crown's reliance on that decision amounts to a breach of the principles of the Treaty. Is the Crown in breach of its Treaty guarantees under article 2 when it continues to rely on the application of a legal presumption to deprive Ngati Pahauwera of their ownership and control of the Mohaka river without their full knowledge and consent?

Foreshadowing Ngati Pahauwera's claim before the Waitangi Tribunal by nearly thirty years, but unable at that time to invoke Treaty principles, counsel for the Maori applicants in *Re the Bed of the Wanganui River* submitted:

it would be unjust to allow the title to the bed of the river, not even the subject of a claim before the Maori Land Court by those who owned it, to pass to riparian owners by the application of a legal presumption unknown to Maori, and a mere creature of English law.<sup>3</sup>

We agree. It is inconsistent with the principles of the Treaty that ownership of the bed of the Mohaka river was taken away from those entitled to it, without being heard and by the tacit application of a presumption of English law of which they knew nothing.

#### References

1 Wai 38 A19:annexure 1: 23

2 *In Re the Bed of the Wanganui River* [1962] NZLR 600, 625

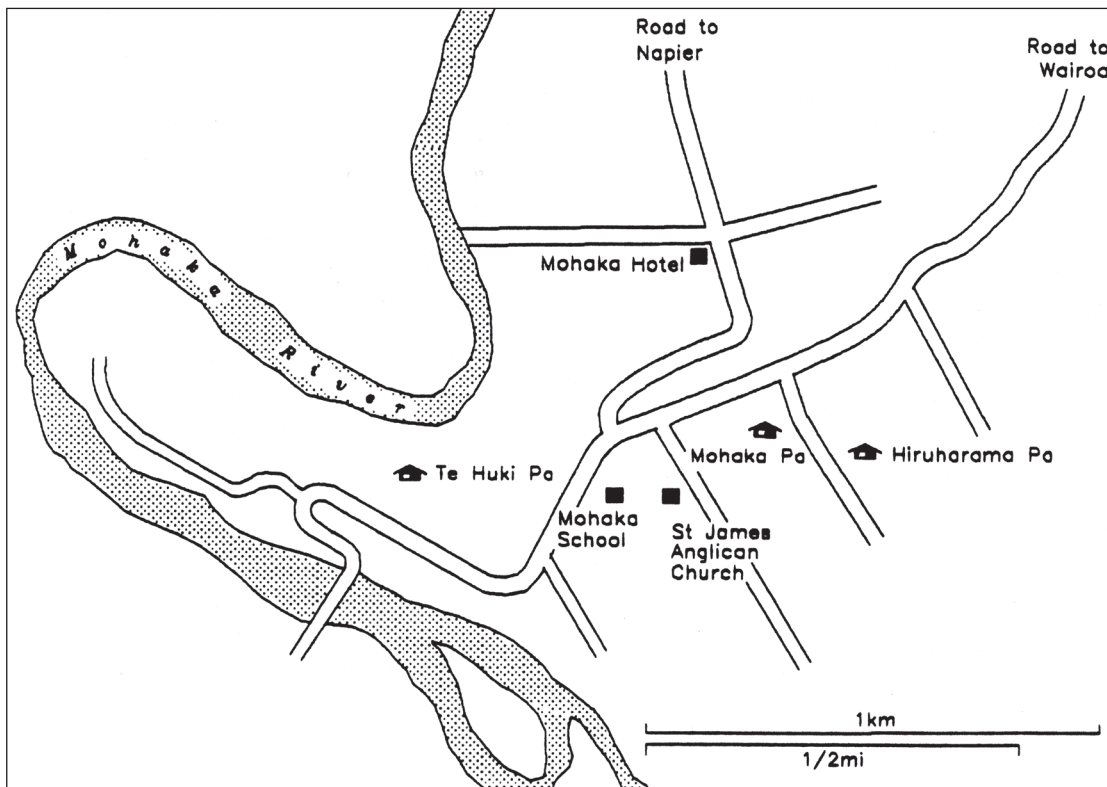
3 *ibid* at 624–625

## Chapter 5

# The Erosion of Ngati Pahauwera Rights Over the River

### 5.1 Sharing the River With the Settlers

After their return from Mahia in the 1840s, Ngati Pahauwera concentrated their settlement on the north side of the river and Pakeha settled on the south side. These two sides came to be known as the Maori and Pakeha sides respectively. As long as the Mohaka remained a frontier settlement Ngati Pahauwera shared the use of the river with their neighbours. Far from relinquishing any of their mana or control over the river, they were using their mana or control to invest in the future development of a resource and for the benefit of a people. With settlement and development on the river, there had to be, and indeed was, collaboration and co-operation.



*Map 5.1 Post 1840 pa sites*

*Source: C19*

One of the first Pakeha settlers at Mohaka was A F Henrici, a shipwright by trade who appears to have built a schooner for a whaler called Joseph Carroll. The advent of whaling at Mahia and Waikokopu brought others to the area. McLean in December 1852 noted the desire of whalers from Wairoa and Table Cape to purchase small blocks of land on the south bank of the Mohaka river (A29:22; C4:51; C5:16).

By mid 1853 a whaling station was operating out of Mohaka and boats were being manned by Maori from Mohaka (C4:53). While many Mohaka families are descended from whalers, whaling was not nearly as economically important at Mohaka as it was at Mahia (A29:22). John Snodgrass in 1854 advised McLean that the owner of the whaling station would not be continuing that year, "owing to the Maoris being unwilling to go after whales any longer".<sup>1</sup> They found cultivating their land paid much better (C4:54).

The missionary James Hamlin noted in 1855 that a "few whites are located on the southern bank of the Mohaka".<sup>2</sup> Two large sheepruns were taken up on the south side of the river: the Mohaka run of 9000 acres near the mouth of the river, by Robert Riddell in 1855; and the Springhill run of 11160 acres, some five or six miles up river, being farmed in 1859 by Alexander Allen in partnership with Robert Riddell. Francis and Ann Bell took over the Mohaka station in 1866. By the late 1860s John Lavin was farming 9028 acres of Springhill and John Sim a small part of it.<sup>3</sup> By 1869 Mohaka consisted of a large Maori population and a few white settlers.

Robert Park, in his 1851 report, commented on "a regular traffic between Mohaka and Ahuriri carried on by the natives when they have produce for sale", and noted the commercial value of these crops to the Maori.<sup>4</sup>

The production of crops, such as potatoes, pumpkins, melons, corn and fruit, enabled Ngati Pahauwera to participate in the cash economy. Advertisements for John Sim's Mohaka store in 1877 ventured the words, "Native Produce bought for cash".<sup>5</sup> By the last quarter of the nineteenth century many of Ngati Pahauwera were turning to sheep farming (C5:77-81).

Pakeha settlement on the south side saw the establishment of a ferry service for crossing the river at Mohaka. The southern landing was located close to the local hotel and the license to run the ferry was originally held by the local publican and storekeeper, John Sim, until the contract was won by A F Henrici in 1867 (C5:25-26).

Settlement also saw the establishment, from at least 1859, of a Napier to Wairoa coastal shipping service for the coastal settlements of Hawke's Bay, with Mohaka one of the landing places.<sup>6</sup>

Ngati Pahauwera participated in this coastal service. In 1864 James Grindell described how, on leaving Mohaka, he, Donald McLean and their party:

took passage for Napier in the 'Sailors Bride', a small decked boat belonging to the natives. [*Hawkes Bay Herald* 26 November 1864; A24:31]

Ngati Pahauwera also provided river transport for the Pakeha settlers with "all produce having to be sent in canoes down and all supplies in the same precarious way up the river" (A24:31). Canoes were used to bring down



bales of wool from farms upriver to Mohaka, where wool stores had been established, to meet the shipping service (B8:6; A25(b):46).

The evidence we heard on coastal shipping and river transport is relevant to the provision in section 14 of the Coal Mines Amendment Act 1903, that the bed of a navigable river has always been vested in the Crown, presumably with the intention of ensuring that the Crown had control of the bed for mining purposes. This provision was re-enacted in s261 of the Coal Mines Act 1979 and incorporated in s354 of the Resource Management Act 1991. In s261 of the 1979 Act a navigable river is defined as:

a river of sufficient width and depth (whether at all times or not) to be used for the purpose of navigation by boats, barges, punts or rafts.

In his opening submissions, Mr Brown referred to the divergence of judicial opinion on the meaning of ‘navigable’ and suggested that it might be necessary for the tribunal to refer the question to the High Court for determination. In his closing submissions he submitted that four factors were relevant:

- whether the river was navigable for commercial and economic purposes or only for recreation;
- whether the river was once more navigable than it is now; and
- whether it was necessary for the river to be navigable for its whole or a greater part of its length; and
- in both directions (C17:55–56).

In his submission:

one only needs to have the opportunity to fly over the river to see that it was not in any real sense a commercially navigable river, at least not for significant distances. (C17:55)

Evidence had been given that a canoe could only go up as far as Rotokakarangu and that the river was much impeded with rapids and large blocks of stone (C4:24); also that schooners could only enter the mouth of the river prior to the 1931 earthquake (B8:6).

Ms Elias contended that it was unclear whether or not the Mohaka came within the legal definition of a navigable river. If the provisions in the Coal Mines Act 1979 did apply, then Ngati Pahauwera could claim against the Crown for its failure to carry out its fiduciary duty to protect their interests in the river. The Coal Mines Act provision was “expropriatory and inconsistent with the principles of the Treaty”. The “failure to provide an effective system in which possible legal rights can be recognised” was also a breach of Treaty principles (C14:42).

On the evidence, it appears to us that the Mohaka is not a navigable river in terms of the legislation. If, however, it were argued that the Mohaka is a navigable river deemed to have always been vested in the Crown, this would we think be a clear breach of article 2 of the Treaty, because ownership would have been appropriated without the consent of Ngati Pahauwera and without compensation.



## 5.2 Cooperating With Government in the Exercise of Rangatiratanga

George Thomson, a claimant researcher, stated that the Pakeha who settled on the south side of the Mohaka river having paid for Crown titles to land “tended to assume that British law would prevail there”. It appeared, however, that Ngati Pahauwera “had no such assumption”. Rather there was some evidence to show that Ngati Pahauwera “continued to assume that their mana would remain on both banks of the Mohaka, no matter what changes there were to some aspects of land tenure there” (A29:appendix A: 9).

A letter from the Maungaharuru sheep farmer, Philip Dolbel, to the *Hawke's Bay Herald* in 1862 described a series of runanga or council meetings to adjudicate on matters arising on the south bank between Maori and Pakeha (ibid). Significantly, about this time other Ngati Kahungunu communities were setting up their own runanga rather than accepting the new institutions being introduced by the government.

Further evidence of the continued exercise of authority by Ngati Pahauwera was an incident in 1862 when two Pakeha on their way through Mohaka were stopped, as the local runanga had stipulated that there be no Sunday travelling. The runanga also prohibited alcohol on the north side of the river (ibid).

A report dated 9 June 1862 from the civil commissioner, Lieutenant Colonel A H Russell of Napier, indicated that northern Hawke's Bay still lay largely beyond the reaches of government. The Maori, it appeared to him, were “anxious to receive European law”, though it would deprive them of power which they had “hitherto used without control, but not without discretion”. He found the district “little known and much neglected”:

The conduct of some of the Europeans who have located themselves in the Mohaka and Wairoa Districts, would almost lead one to suppose that that they were the barbarous, and the Maoris the more civilized, people-scenes of drunkenness and outrage are described in which men have taken part whose education and position should have led to a very different line of conduct and bring the moderation and forbearance of the Natives into very strong contrast. The evils have now been greatly lessened by the Natives, who have interdicted the introduction of spirits to their own side of the Mohaka where there is no European land . . . . Several Europeans are located upon the banks of the Mohaka, on land purchased from Government, who take no part in the excesses of which I have spoken, but are anxious they should cease.<sup>7</sup>

To bring about better control, Russell looked to the introduction of the new government institutions, namely resident magistrates and district and village runanga. Among the chiefs he desired as assessors was Paora Rerepu of Mohaka, “whom they stated to be the greatest man upon the Coast by birth and whom they are unwilling to lose even temporarily from among them” (C5A:771).

Mr Sinclair had difficulties with Mr Thomson's evidence about Ngati Pahauwera's continued authority. In response to the problems of the comparatively lawless state of Pakeha society at Mohaka and alcohol, Paora

Rerepu “cast the onus of maintaining civil order upon the government” (C5:19). The correspondence on alcohol illustrated “the chiefs’ respect for the rule of law and their desire that the Government should assume responsibility for its enforcement, at least when Europeans were involved” (C5:21). Mr Thomson, in the opinion of Mr Sinclair, went too far in stating that there was some evidence to show that Ngati Pahauwera continued to assume their mana would remain on both banks of the river.

A request from Paora Rerepu for permission to run a ferry on the river was seen by Mr Sinclair as “a tacit acknowledgement of the government’s authority over the river” (C5:26). Claimant counsel suggested that it could have been merely an application for government subsidy and not because Paora Rerepu believed he needed permission from the government to run the ferry himself.<sup>8</sup>

Similarly a request from Toha of Wairoa for a ferryman on the Waihua river, which the superintendent of Hawke’s Bay referred to Paora, was explained by Mr Sinclair as having been prompted by a wish on the part of the superintendent to diplomatically “avoid any friction between the two chiefs” (C5:24).<sup>9</sup> Ms Elias suggested that the tenor of the correspondence was more in accordance with Crown concern to defer to Paora Rerepu in an area where he had authority. The government recognised his rangatiratanga by seeking his permission. His response was to assent to the ferry (C14:15).<sup>10</sup>

As further evidence against Mr Thomson’s view that Ngati Pahauwera continued to exercise authority over the river Mr Sinclair pointed to the “absence of any record of protest” over any European uses of the river which seemed surprising given the immense spiritual importance of the river and Mr Thomson’s suggestion that Maori “rangatiratanga” prevailed on either side of it (C5:15–16). But, as we have seen, Ngati Pahauwera were willing to share the use of the river and use should not be confused with control. As Mr Sinclair himself conceded the control of the river does not seem to have been tested in the nineteenth century (C5:15).

Ms Elias pointed out that the resources of the river were bountiful and sharing was consistent with Maori cultural precepts and with the exercise of rangatiratanga (C14:12). Sharing the river was beneficial to both parties and Ngati Pahauwera felt no need to protest at the use of the river by Pakeha. It was:

important to recognise that Maori cultural precepts of hospitality and sharing are not to be seen as a relinquishment of ‘ownership’ but as an exercise of rangatiratanga. (C14:16)

In our view the different stances adopted by the Crown and the claimants over the introduction of British law and law enforcement in the Mohaka district and over the continuation of Ngati Pahauwera’s authority need to be considered in their historical framework. Before the East Coast wars, Mohaka was what the historian James Belich has described as a “Maori zone” and Ngati Pahauwera were predominantly independent. A government official or magistrate visiting Mohaka was, to use Dr Belich’s words, “an invited guest whose attributes supplemented, but did not replace, those of its host”. The introduction of British law was far from comprehensive, lacked coercive

backing and “worked only when the Maoris let it—0a discretion they exercised very selectively”. A “fascinating syncretic system of social constraint” was emerging, “but it did not indicate real British control”.<sup>11</sup>

After Te Kooti’s April 1869 raid on Mohaka and the massacre of over 60 Maori and seven settlers, and the destruction of Te Huki pa while Paora Rerepu and other warriors were on an expedition to Waikaremoana, “the tide of Maori autonomy” began to turn. Through land alienation in the early twentieth century, it gradually ran out.<sup>12</sup>

Mr Thomson’s evidence fits nicely into Dr Belich’s framework. “With the end of open fighting”, Mr Thomson said:

Ngati Pahauwera found that the rules had been changed and the goal posts shifted.

However, local authority over much of the community remained. The very real power of kaumatua (elders), and rangatira, (chiefs) over the Ngati Pahauwera community was reflected more by the absence of a Pakeha policeman stationed at Mohaka from 1865 to 1910, than in positive evidence. (A29: appendix A: 9)

Mr Thomson further stated:

There is no evidence to suggest that Ngati Pahauwera would have agreed to give up authority over the river . . . in the 1850’s, Ngati Pahauwera’s values and beliefs were those of Maori custom. Those norms may have been modified for some, . . . from the 1850’s to the 1920’s by such things as the introduction of the British legal system. However, I have seen no evidence to suggest that by 1930 such modification . . . was general, to the point of a change of stance on rangatiratanga.

Ngati Pahauwera had positive reasons to think that they retained the mana, due to them being . . . the definite numerical majority within the lower valley, able to pursue a lifestyle primarily founded on their own values. Because of this majority and lifestyle, the use and control of the river was an unquestioned part of the way of life. (A49:3–4)

In reference to the erosion of Ngati Pahauwera tino rangatiratanga since the 1850s, Mr Thomson pointed out that:

Much of the erosion was piecemeal and indirect . . . [and] may have been aided by the declining economic base of Ngati Pahauwera and its leadership, and the diminishing of customary resources. (A49:5)

Notwithstanding this, it seems clear to us that the sale of land on both sides of the river was not understood by Ngati Pahauwera to be a relinquishment of rangatiratanga over the river.

Ngati Pahauwera cooperated extensively with central and local government, including great sacrifice in war from 1864 on:

Whether this co-operation can be construed as agreement to diminish their rangatiratanga and whether kawanatanga can be seen by Ngati Pahauwera as legitimately overruling tino rangatiratanga over the river in any way, are open questions. They must remain open questions while there is little evidence available to answer them. (A49:5)

Not only did Ngati Pahauwera serve with government forces in the east coast wars from 1864 to 1872, but when the First World War broke out in 1914

they resolved to gather funds and send men to the front. Five men from Mohaka served in the first Maori contingent of 1914, three local men were decorated and mentioned in despatches for their war services, and at least four were killed or died of wounds or disease. There are 38 other names of Maori on the Mohaka world war memorial. In the Second World War at least 21 Ngati Pahauwera served overseas and at least five were killed.

Perhaps however a greater insight to this particular dimension can be gained from the now classic exhortation by the Reverend Henry Wainohu (a member of Ngati Pahauwera who served as chaplain) to his Maori soldiers prior to the night attack on Gallipoli:

Whatever you do, remember you have the mana, the honour and good name of the Maori people in your keeping this night. Remember our people far away in our native land are watching you, waiting eagerly, anxiously to hear how you have behaved yourselves in battle. In a few minutes perhaps many of us may be dead. But go forward fearlessly, with but one thought. Do your duty to the last and whatever comes never turn your backs to the enemy. Go through with what you have to do, to the very utmost of your powers. (A29:28)

From the evidence we have heard on Ngati Pahauwera's attitude and contribution to central government and the war effort, the following things become obvious. During nearly all of the last century, Ngati Pahauwera had an implicit trust in the word of the Crown and believed their rights and property would be protected. That trust was not seriously questioned by them until now. There are many signs and symbols that testify to the high regard that the people and for the Crown's word. These things are dotted around the perimeter of their marae and testify to loyal service and commitment made in the past by the Pahauwera iwi to the Crown and nation.

For the tribe, co-operation between Ngati Pahauwera and the government was the politics of reciprocity and partnership, not the politics of assimilation and subjection. As the Waitangi Tribunal has stated in the *Ngai Tahu Report 1991*:

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

This concept is fundamental to the compact or accord embodied in the Treaty. Inherent in it is the notion of reciprocity . . . .<sup>13</sup>

In this context we accept the claimants' view that Ngati Pahauwera did not relinquish any of their tino rangatiratanga over the Mohaka river (A49:7). Ngati Pahauwera is entitled to and must rely on the honour of the Crown to act reasonably and in good faith as a Treaty partner and respect their rangatiratanga.

Supporting evidence for this view is to be found in the lack of any reference to river rights in the long history of Ngati Pahauwera complaints and petitions to the Crown. Most of these concerned the alleged inadequacy of the payment for the Mohaka block, the lack and loss of reserves, and exclusion from titles, leases and sales. These grievances are the subject of another claim and only concern us here in so far as they show that the issue of control over the river did not come up until the Crown imposed the water

5.3

use regime and assumed authority to take land for public works and gravel extraction (C14:12).

### **5.3 Soil Erosion, River Pollution and the Imposition of a River-Use Regime**

Professor Ritchie's evidence indicated that Ngati Pahauwera set great store on the purity of fresh water (B28:2). The first serious threat to the quality of the water in the river came with the removal of large tracts of lowland forest for timber and pastoral development.

The main method of land clearance for farming was bush and scrub cutting, followed by fire (A29:111). The Maori in pre-European times burnt large areas of lowland and upper catchment forest adjacent to their settlements, either accidentally or for cultivations, and for hunting and ease of communication. In the second half of the nineteenth century, European settlers removed much of the remaining lowland forest for timber and pastoral development (B17:13). Some areas of the cleared land proved too erosion prone and/or too infertile for farming and were left to rejuvenate into scrub. Toro Waaka said that:

Indiscriminate clearing contributed to problems of erosion which affected water quality. This impacted on fish and eel stocks as well as being detrimental to our ocean kaimoana. (B8:6)

Ramon Joe said that one effect of the erosion caused by Pakeha land clearance was scouring which came down the river and caused the mouth of the river to become narrower, contributing to making it no longer navigable. He claimed if the mouth of the river had remained navigable, Mohaka would be what Wairoa is today.<sup>14</sup>

As early as 1906 government geologists warned that unabated clearfelling, exacerbated by high rainfall, would result in major erosion (A29:111). Major floods on the Mohaka were recorded in 1897, 1910, 1914, 1924, 1935, 1936, 1938, 1985(2) and 1988 (Cyclone Bola) (ibid). In 1924 a government forest adviser and the local farmers union recommended tree planting on "poor land between Waikare and Mohaka" (A29:112).

No evidence was found of any action by settlers or local authorities or government to prevent or control soil erosion or flooding prior to the passing of the Soil Conservation and Rivers Control Act 1941. Presumably the Mohaka river lay outside of river control schemes initiated by the Hawke's Bay County Council between 1877 and 1910 and the Hawke's Bay River Controls Board between 1910 and 1950.<sup>15</sup> In 1950 responsibility for soil conservation and rivers control was taken over by the Hawkes Bay Catchment Board, established in 1944 under the 1941 Act.<sup>16</sup>

In the Mohaka area no government action was taken to start forest planting until 1950. Moreover large areas of the Mohaka catchment in scrub or bush were cleared for grass or forestry as late as the 1960–1985 period.

Catchment board grants for soil conservation were available to all land owners and within the Mohaka catchment several property owners undertook soil conservation works under the grant scheme.



In 1987 the government announced a five year phase out of these grants. Mr I C Brown, special projects officer for the Hawke's Bay Regional Council, told us:

There is no doubt that a lot of good soil conservation work was carried out under the grant scheme. The scheme, however, also had many deficiencies. Many landowners, including many within the Mohaka, were not enticed by the grants. Secondly, the provision of grants came at a time when there were other often conflicting government policies (ie Land Development Encouragement Loans). (B18:1)

### **5.3.1 The Water and Soil Conservation Act**

In 1967 the Water and Soil Conservation Act was passed and introduced wide-ranging controls over the use a land owner could make of his or her land by vesting all rights to natural water in the Crown. Section 21 of the Act gave the Crown the sole right, with limited exceptions, to dam rivers or streams, to use natural water, to divert natural water, or to discharge natural water or waste. Any person or organisation wishing to use or control water, other than for domestic or fire fighting purposes, had to apply to a regional water board for a water use right.

The Water and Soil Conservation Amendment Act 1981 made provision for national water conservation orders for the protection or preservation of outstanding rivers, lakes and streams. The relevant criteria to be taken into account when considering an application for a water conservation order are contained in s20B(6) which refers to:

- (a) All forms of water-based recreation, fisheries, and wildlife habitats;
- (b) The wild, scenic, or other characteristics of the river, stream or lake;
- (c) The needs of primary and secondary industry, and of the community; and
- (d) The provisions of any relevant regional planning scheme and district scheme.

In the context of the Ngati Pahauwera claim to exercise tino rangatiratanga over the river, the role of the 1967 Act and its 1981 amendment is twofold: on the one hand it governs the granting of water conservation orders; and on the other it controls the granting of water use rights. There may well be occasions when these two functions are in conflict, reflecting the multiple and potentially contradictory purposes of the Act.

The Act makes no reference to the principles of the Treaty of Waitangi or to Maori interests and judicial response on their relevance has been variable. The present position is that, as a result of decisions in the High Court and the Planning Tribunal, the Treaty is relevant to one of its purposes, the granting of water use rights, but not to another, the granting of water conservation orders. The High Court held in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 that evidence concerning the Treaty and an iwi's traditional relationship with natural water was admissible in relation to the granting of a water use right. Conversely, recognition of the Treaty or its principles in the context of water conserva-

tion orders was clearly considered by the Planning Tribunal to be outside the ambit of the Act:

the Planning Tribunal has no authority to give effect to the Treaty of Waitangi or any other treaty except to the extent that it has been incorporated into the laws of New Zealand; . . . the Treaty of Waitangi has not been incorporated into the Water Act . . . .

The Planning Tribunal certainly has no authority now to grant or refuse Ngati Pahauwera iwi rangatiratanga of the river; nor to recognise that they have that status in respect of it.(A36:31)

The claimants advanced two arguments in relation to the Act: first, to the proposed conservation order itself, and secondly, to the statutory process under which it was made.

While several claimant witnesses acknowledged that the order would protect the river's natural features, the claimants were unanimous in opposing it on the ground that it represented a denial of Ngati Pahauwera rangatiratanga over the river (C14:63–64). In their view Ngati Pahauwera, not the Planning Tribunal or the Minister for the Environment, should make the decisions affecting the river's use and protection. The problem was that the Act made no provision for the exercise of any authority by Maori or for their participation in decision-making. Ms Elias submitted that there was no imminent threat to the river which would justify such an order in Treaty terms and that it would have the effect of substantially compromising the future exercise of Ngati Pahauwera rangatiratanga (C14:63–64). The making of a conservation order on the basis of a recommendation which fails to take account of the Treaty or Ngati Pahauwera's relationship with the river would, she submitted, constitute a fresh Treaty breach (A38:2).

In addition, Ms Elias claimed that the manner in which the Planning Tribunal had conducted its inquiry and made its recommendation was in breach of the Treaty. In particular she submitted that:

- Ngati Pahauwera's interests were not taken into account;
- the matter was dealt with under the Water and Soil Conservation Act 1967 despite the imminent implementation of the Resource Management Act 1991 which, she claimed, would have permitted some consideration of Ngati Pahauwera concerns;
- the claimants were denied the opportunity to participate properly in the Planning Tribunal inquiry because legal aid was not available to them (ibid).

The Crown's defence of the Act was based on the relationship between kawanatanga and rangatiratanga in the Treaty and the argument that the cession of kawanatanga gave the Crown a "higher authority".

## **5.4 Rangatiratanga and Kawanatanga and the Mohaka River**

### ***5.4.1 The claimants' stance***

In her opening submissions, Ms Elias cited a number of statements in Waitangi Tribunal reports and court decisions to establish that the Treaty was a guarantee of protection "of a distinctive Maori identity and authority within the New Zealand enterprise". The Crown had an obligation to protect



rangatiratanga, a concept “inextricably linked with mana” which conveyed “protection not only in possession but in the mana to control in accordance with Maori customs and preferences”.

The Crown’s power of kawanatanga must not be exercised to impinge upon the Maori interest beyond any extent justifiable in Treaty terms. That extent would “vary according to the taonga in issue”. The Crown was obliged to protect taonga to the fullest extent reasonably practicable. The Crown’s freedom to govern, in accordance with the kawanatanga ceded to it, was “not to be fettered unreasonably” but what was “reasonable must be assessed against the background of Treaty seriousness, other community interests and options for compromise” (A38:32–35 and interpolation).

#### **5.4.2 The Crown’s stance**

Mr Brown submitted that the concepts of rangatiratanga and kawanatanga in the Treaty were linked and the Treaty must be read as a whole in order to understand what was contemplated by the parties. Sir Robin Cooke, President of the Court of Appeal, had referred to the difficulties in interpretation arising from the differences in the Maori and English versions of the Treaty, and summarised their relationship in this way:

In brief the basic terms of the bargain were that the Queen was to govern and Maoris were to be her subjects; in return their chieftainships and possessions were to be protected but sales of land could be negotiated.<sup>17</sup>

Mr Brown further submitted that:

The cession of kawanatanga gave the Crown a ‘higher authority’ and the right to make laws for peace and good order. Whatever rights were guaranteed to Maori under Article II are therefore subject to the rights of the Crown under Article I . . . .

The Crown has a duty and a right not only to control and manage natural resources in the national interest, but to govern for the whole of New Zealand. The powers of the Crown to make a water conservation order are consistent with that duty. The exercise of those powers is within the authority implicit in kawanatanga. (A54:8–11)<sup>18</sup>

The tribunal’s jurisdiction under s6 of the Treaty of Waitangi Act was not to look at rangatiratanga in isolation but rather at the Treaty as a whole, the language in both texts, the circumstances at the time of its signing and how those factors apply today (A54:12).

Addressing the question of kawanatanga, Mr Brown said:

On the question of natural resources kawanatanga includes the rights to make laws for conservation control, and in the wider public interest. (C17:26)

He submitted that the Waitangi Tribunal in the *Muriwhenua Fishing Report* had subscribed to the propositions that in pre-Treaty times, tino rangatiratanga was held:

only for as long as the tribe could maintain it against the ambitions of others. The Queen promised peace and . . . the Queen’s authority had to be supreme. (C17:28)<sup>19</sup>

And, in the *Ngai Tabu Report 1991*:

The concept of a national controlling authority with *kawanatanga* . . . or the power to govern or make laws, was new to Maori . . . . But the supremacy of this new form of control was clear. The Queen as guarantor and protector of the Maori interests . . . had performed an overriding power. (ibid)<sup>20</sup>

Mr Brown concluded that:

The imposition of a water conservation order over the Mohaka River, should one be made, will not be a breach of the Principles of the Treaty. The power, and perhaps duty, of the government to make such an order for the conservation and preservation of the river is in the interests of all persons and is therefore in keeping with '*kawanatanga*'. (C17:28–29)

In the Crown's view it was not a legitimate response to assert that the tribe's *mana* or *rangatiratanga* was being diminished or ignored by a water conservation order:

Because that action is taken in the national interest, regardless of the personal or tribal interests of Maori or Pakeha or any other race. It is a necessary incident of *kawanatanga* . . . .

From a practical point of view, too, there is no viable alternative to a water conservation order if an important natural [resource] such as the Mohaka River is to be effectively preserved . . . .

in terms of the management and control of rivers as significant natural resources, there is no *practical* alternative to their being subject to governmental control and hence a necessary feature of the exercise of *kawanatanga*. (C17:31–32)

Mr Brown did however acknowledge that the Crown's Treaty obligations "may not have been adequately reflected" in the Act (C17:60). He did not elaborate on this deficiency but suggested that Ngati Pahauwera had not been prejudicially affected in any material way by the making of a water conservation order and that any former inadequacy in the Water and Soil Conservation Act 1967 regarding Crown recognition of its Treaty obligations had been remedied by the provisions of the Resource Management Act 1991.

#### **5.4.3 Claimants' response**

Ms Elias responded to the Crown's stance on article 1 of the Treaty and the principle of *kawanatanga* in respect of the draft conservation order by submitting that:

[it] has profound implications for the application of the Treaty. What the Crown seeks is the Tribunal's imprimatur to a substantial Treaty gloss: that the Treaty deprived Maori of authority over natural resources and over their own society . . . .

it is inconsistent with the Treaty language and contemporary understanding of it. It invites dissection of the political, legal and economic world into areas exclusively the concern of the Crown as a matter of responsibility . . . .

the Treaty itself does not identify any areas of exclusive concern . . . .

there is no area of Maori interest under the Treaty which as a topic is of no interest to New Zealand society generally. That is a consequence of the fact that the Treaty was entered into to secure a place for two peoples within one land: . . . The Treaty did not set out to partition the country to separate the races physically and give Maori

and non-Maori their own territories. The ‘lands’, ‘forests’ and ‘fisheries’ guaranteed to Maori are all natural resources in which the country as a whole has an ultimate residual interest in the sense that the common enterprise, New Zealand . . . benefits from utilisation and conservation of these resources. On the Crown argument, therefore, the Treaty is a dishonest document on its face because despite the Article II promise of rangatiratanga and ‘full exclusive and undisturbed possession’ authority and control of those resources passed by Article I to the Crown on the signing of the Treaty, leaving only rights of ownership. (C14:20–21)

## 5.5 Treaty Findings

### 5.5.1 *The words of the Treaty*

In applying the Treaty to the evidence in this claim we are required to have regard to the English and Maori texts set out in the first schedule to the Treaty of Waitangi Act 1975.<sup>21</sup>

In the pre-amble to the English text, the Queen expressed her anxiety to protect the just rights and property of the chiefs and tribes and to secure to them the enjoyment of peace and good order. In the Maori text, which all but 39 of the approximately 540 chiefs signed, the Queen desired to preserve to them their chieftainship and their land and maintain peace and quiet living.

In article 1, the chiefs of the Confederation of the United Tribes and the separate and independent chiefs ceded to Her Majesty absolutely and without reservation the rights and powers of sovereignty. In the Maori text they gave absolutely to the Queen for ever the government of all their land. The Maori word used for government was a missionary coined word, *kawanatanga*. A closer Maori equivalent to the word sovereignty would have been *mana*, but no chief in 1840 would have relinquished his *mana* to the Queen.

In article 2 of the Treaty, the Queen confirmed and guaranteed to the chiefs and tribes and their respective families and individuals “the full exclusive and undisturbed possession of their Land and Estates Forests Fisheries and other properties”. In the Maori text, the Queen agreed to protect the chiefs, the sub-tribes and all the people in the unqualified exercise of chieftainship (*te tino rangatiratanga*) over their lands, their villages and all their treasures (*taonga*).

In article 3, the Queen extended to “the Natives of New Zealand” her royal protection and imparted to them all the rights and privileges of British subjects. In the Maori version the Queen protected all the ordinary people of New Zealand and gave them the same rights and duties of citizenship as the people of England.

### 5.5.2 *Rangatiratanga and Kawanatanga*

For assistance in determining the Treaty rights of Ngati Pahauwera to *mana* and *rangatiratanga* over the Mohaka river, we have reviewed references to the principle of *te tino rangatiratanga* in previous Waitangi Tribunal reports. These reports have established that the Crown does have a power and a duty to manage natural resources in the interest of conservation *but* that these

rights are qualified by the tribe's *te tino rangatiratanga*. The tribunal has noted in other reports that from the Maori viewpoint *rangatiratanga* is inseparable from *mana*. In the *Motunui-Waitara Report* (for Te Atiawa) for example, it was stressed that *rangatiratanga* denotes *mana*, not only to possess what one owns, but to manage and control it in accordance with the preference of the owner.<sup>22</sup>

In the same report the tribunal thought the Maori text of the Treaty conveyed to Maori people that, amongst other things, they were to be protected not only in the possession of their fishing grounds (the subject matter of the Te Atiawa claim), but in the *mana* to control them in accordance with their own customs and having regard to their own cultural preferences.<sup>23</sup> The same understanding would have applied to their *taonga*. It must be remembered that the Maori text guarantees to the Maori people the possession and control of all their *taonga*.

In the *Ngai Tahu 1991 Report* the tribunal followed the *Muriwhenua Fishing Report*, which considered that:

Maori understood the cession of sovereignty in terms of some distal relationship . . . the Maori chiefs were trying to preserve a form of autonomy that did not amount to complete sovereignty but a kind of local self-government in Maori districts . . .

*Tino rangatiratanga* . . . refers not to a separate sovereignty but to tribal self management on lines similar to what we understand by local government.<sup>24</sup>

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

First, authority or control, since without it the tribal base is threatened. Secondly, the exercise of that authority must recognise the spiritual source of the *taonga*; thirdly, the exercise of authority was not only over property but over persons within the kinship group and their access to tribal resources.<sup>25</sup>

In addition the *Ngai Tahu Sea Fisheries Report* emphasised that an important element in *rangatiratanga* is trusteeship.<sup>26</sup>

To use the words of the Ngai Tahu tribunal:

While *rangatiratanga* is best defined in its own context, there are some principles of general application . . . *Rangatiratanga* includes management and control of the resource and reciprocal obligations between those who actually harvest the resource.<sup>27</sup>

We think that *rangatiratanga*, applied to the Mohaka river, denotes something more than ownership or guardianship of the river but something less than the right of exclusive use. It means that the *iwi* and *hapu* of the *rohe* through which the river flows should retain an effective degree of control over the river and its resources as long as they wish to do so.

But what of Mr Brown's contention that the *kawanatanga* of the Crown implies a "higher authority" and a duty and a right to control and manage natural resources in the national interest?

Undoubtedly the Crown does have a right and duty to make laws for the conservation of natural resources. But this need not be inconsistent with the exercise of rangatiratanga.

In the *Muriwhenua Fishing Report* the tribunal said:

The cession of sovereignty or kawanatanga gives power to the Crown to legislate for all matters relating to 'peace and good order'; and that includes the right to make laws for conservation control. Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike.

But the tribunal immediately went on to say:

The right so given however is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second.<sup>28</sup>

We consider that this statement correctly describes the relationship between kawanatanga and rangatiratanga, particularly in this claim where it relates to a natural resource of undoubted significance to Ngati Pahauwera, and for so long regarded by them as a taonga over which they exercise rangatiratanga. In such a situation we consider that in Treaty terms the Crown cannot assert a "higher authority" to the exclusion of the tribal interest.

As we have said earlier, the exchange of sovereignty for the guarantee of rangatiratanga created a partnership between the parties requiring each to act in good faith toward the other. In the context of this claim we take that to mean that the parties are bound to recognise the interests of each other in the river.

In the public interest the Crown has a responsibility to ensure that proper arrangements for the conservation, control and management of the river are in place. That responsibility, however, must recognise the Treaty interest of Ngati Pahauwera by seeking arrangements which allow for the exercise of their tino rangatiratanga over the river. It is in the nature of the partnership that Crown and Maori seek arrangements which acknowledge the wider responsibility of the Crown but at the same time protect tribal tino rangatiratanga.

Accordingly, we think that the Crown's statements on kawanatanga must be qualified. As the tribunal has pointed out in the *Ngai Tahu Sea Fisheries Report*, "the right to govern" which the Crown acquired under the Treaty, "was a qualified right".<sup>29</sup>

We cannot accept the suggestion made by Mr Brown that the issues raised by this claim are "novel or radical" (C17:3). Arguments about riparian ownership and separate ownership of the river bed have been raised in the courts before. Arguments about the application of the Treaty to water resources, and the rights of the Crown, have been addressed previously. As Ms Elias submitted, the Crown's arguments had been considered and rejected in the Native Land Court, both by Chief Judge Fenton in the *Kauwaeranga* judgment and by Judge Acheson in the *Lake Omapere* decision. In the *Lake Omapere* case, the Crown's contention that the ownership of the bed of the lake passed by the Treaty of Waitangi to the



5.6

Crown was rejected with the court emphasising that in 1840 it would have been impossible for the Crown to assume a right of ownership, dependent as the early settlers were on the Treaty of Waitangi. In view of the importance of the lake to Ngapuhi and the circumstances of the signing of the Treaty, it was held that:

it is unreasonable to suppose that the Natives at the time of the Treaty intended to give up Lake Omapere or its bed to the Crown, and that it is equally unreasonable to suppose that the Crown at the time of the Treaty intended to claim the lake or its bed in opposition to the Natives. (C14:21)<sup>30</sup>

Equally we find that Ngati Pahauwera's acceptance of the Treaty cannot be seen as an intention on their part that any part of the Mohaka river should pass to the Crown; nor that this was what was intended by the Crown at the time of the Treaty. On the evidence before us it can reasonably be assumed that had Ngati Pahauwera been asked whether, by the Treaty, the control and authority of the Mohaka river would pass to the Crown, they would have emphatically replied in the negative.

### **5.5.3 Our conclusions**

The Water and Soil Conservation Act 1967 was in breach of the letter and principles of the Treaty to the extent that it conferred on central government exclusive control over the waters of the Mohaka. We make this finding on the basis that Ngati Pahauwera rangatiratanga over the Mohaka river was never relinquished, either by sale of the adjacent land or by operation of a common law riparian presumption. The assumption by the Crown of exclusive rights of control, without Ngati Pahauwera's consent, constituted a Treaty breach.

## **5.6 Recognition of Treaty Principles by the Planning Tribunal**

Under the 1967 legislation, the special tribunal which drafted the national water conservation order for the Mohaka river in 1990 recognised Maori spiritual and cultural values in a limited way (see above p 3).

The Planning Tribunal, in contrast, rejected all Ngati Pahauwera representations concerning the recognition of rangatiratanga and other Treaty principles. It also rejected the suggestion that Ngati Pahauwera be appointed kaitiaki of the Mohaka river on the ground that the 1967 Act gave regional water boards the exclusive authority to grant authorisations in respect of rivers. It concluded that it could not take into consideration spiritual and cultural values (A36:32–35).

Ms Elias was particularly critical of these conclusions. She asked us to assess whether the Planning Tribunal's recommendation was arrived at in accordance with the principles of the Treaty (C14:62).

Mr Brown submitted that, while the Waitangi Tribunal could properly consider the legislation under which the Planning Tribunal operated, it lacked jurisdiction to review the conduct of the Planning Tribunal's inquiry or the contents of its report. He disputed Ms Elias's contention that the Planning Tribunal was the Crown or its agent. Accordingly its decisions fell



outside our jurisdiction, which under s6 of the Treaty of Waitangi Act 1975 is limited to a review of the actions of the Crown or its agents.

We agree with Mr Brown that the Planning Tribunal is neither the Crown nor the agent of the Crown. Therefore, although we have the power to review the legislation under which the Planning Tribunal operates, we do not have the power to review its actions under that legislation.

## **5.7 The Role of the Hawke's Bay Regional Council and the Resource Management Act 1991**

In 1987 the functions, powers and duties of the Hawke's Bay Catchment Board and Regional Water Board under the 1941, 1967 and other related Acts were taken over by the Hawke's Bay Regional Council. In 1988 the regional council adopted a water and soil resource management plan for the Mohaka river catchment, prepared by the catchment board (see B18(a)). The plan concludes with a set of water and soil management objectives and policies concerned with soil conservation, water quality, river erosion and flooding, gravel extraction, fisheries, recreation, physical, historical and cultural values. In contrast to the 1941 and 1967 Acts and the 1981 Amendment, the regional planning scheme recognised the principles of the Treaty of Waitangi and provided for the relationship of iwi Maori and their culture and traditions with their ancestral land. It defined Maori issues as follows:

The need for greater recognition of the traditions, cultural values and physical requirements of the Maori people.

The need to foster the development of Maori land and resources according to the needs and aspirations of the people (B17:appendix D, p 41).

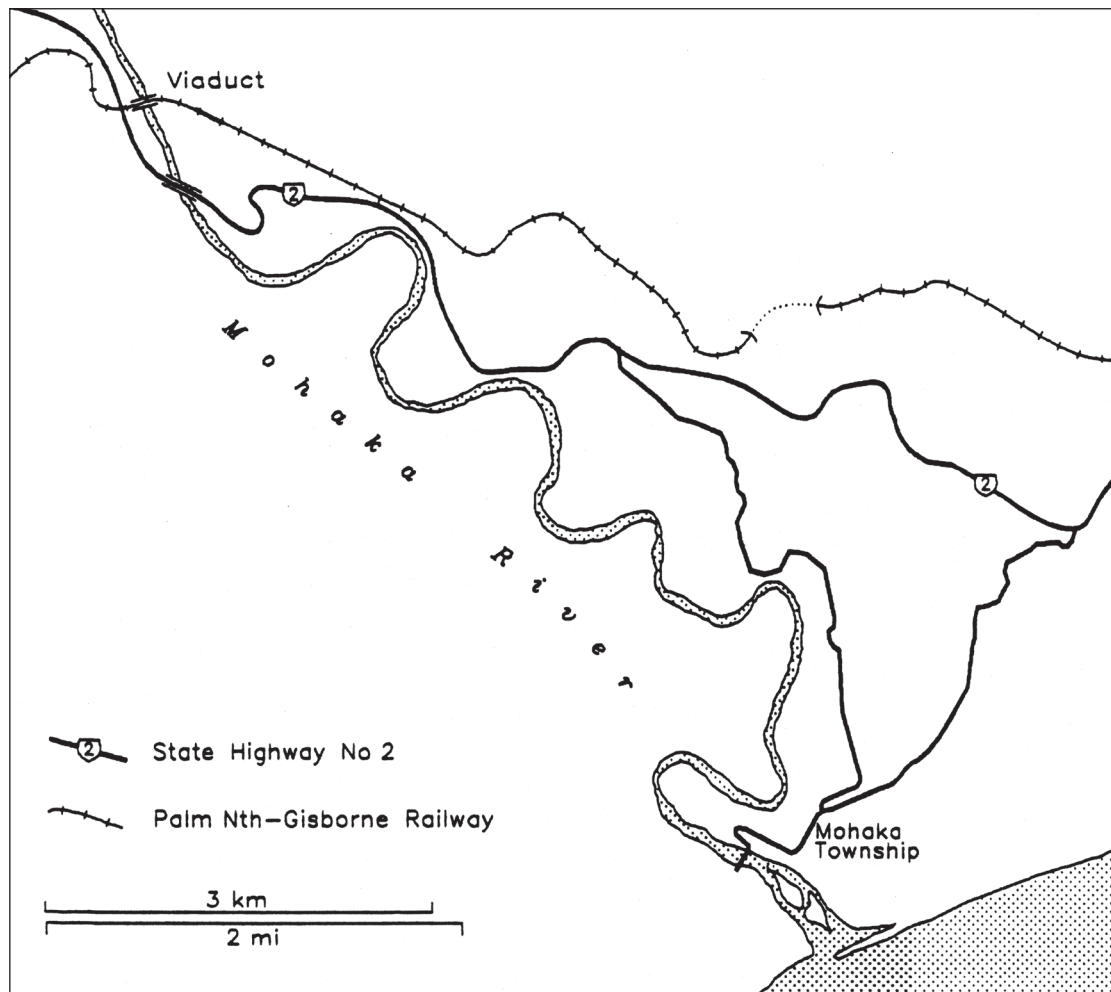
There is no evidence before us, however, that any representatives of the iwi or hapu of the rohe through which the Mohaka river flows participated in the planning process or were effectively consulted by the regional council.

### **5.7.1 The Resource Management Act**

The Resource Management Act, which came into force on 1 October 1991, restated and reformed the law relating to the use of land, air and water and made specific provisions for the protection of Maori interests. In contrast to the Water and Soil Conservation Act 1967, it requires "all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources," to "take into account the principles of the Treaty of Waitangi" (s8). It also recognises that the "relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga" is a matter of "national importance" (s6(c)) and that all persons exercising powers and functions under the Act shall have particular regard to "Kaitiakitanga" (s7(a)), meaning the exercise of guardianship (s2).

Issues in this claim concerning Ngati Pahauwera's rangatiratanga over the lower reaches of the Mohaka river clearly fall within the scope of these three provisions in the Act. So do the "provisions for making water conservation orders that recognise and sustain outstanding amenity or intrinsic values afforded by waters in their natural and other states".<sup>31</sup> Such a water conserva-

5.7



**Map 5.2** Roads and railways in the Mohaka district

tion order may provide for the protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori (s199(2)(c)). It may also provide for the protection of characteristics which are considered to be outstanding for recreational, historical, spiritual, or cultural purposes (s199(2)(b)(v)).

Public notification of applications for water conservation orders is required to be served on the relevant iwi authorities (s204(c)(iv)).

Had the application for a water conservation order over the Mohaka river been heard under the Resource Management Act 1991, rather than the Water and Soil Conservation Act 1967, the Planning Tribunal would have been obliged to take the Treaty into account and Ngati Pahauwera's relationship with the river would have been relevant. In the event the Planning Tribunal hearing commenced one day before the Resource Management Act came into effect.

Under the Resource Management Act, local authorities are responsible for the management of river and associated resources and for approving con-

sents for uses in these areas. As noted above, these authorities are required to take into account the Treaty when exercising any functions or powers under the Act. We think that this is appropriate. The Crown is entitled to devolve its duties under the Treaty, through carefully worded legislation, to another authority. Nonetheless, it cannot divest itself of its Treaty obligation actively to protect rangatiratanga over taonga.

The question of whether the Act is consistent with the principles of the Treaty was not argued in detail before us. We therefore express no opinion on that question.

## **5.8 Public Works, Gravel Extraction and the Crown Assumption of Control Over the River**

### ***5.8.1 Public Works***

The transition from Ngati Pahauwera sharing the river with European settlers to losing control over the river was initiated by the building of the first bridge in the Waipapa block by the Wairoa County Council in 1895. Up till then the river crossing had been by ferry. The crossing of the river by the old Mohaka coach road entailed the definition of a legal road on the riverbank. Perhaps because a ferry crossing subject to the vagaries of river conditions was involved, a substantial stretch of the riverbank (approximately 410 metres in length) had been defined as legal road. In 1918 approximately 150 metres of the road along the riverbank was stopped, as part of a series of road alignments through the Waipapa block. It appears that the stopped road was incorporated into the adjoining subdivisions, resulting in Waipapa 5, 6, 7 and 11 gaining a river frontage and Waipapa 4 having its frontage increased (C7:40).

In the 1920s the Department of Public Works began to construct the East Coast railway. Initially it thought that the new roading needed to provide access for railway line construction might also provide a new main route. Furthermore it was suggested that the railway viaduct across the river might serve as a road bridge. But as no date was fixed for the construction of the viaduct this idea was discarded. The Wairoa County Council, by arrangement with the department, undertook to form the road on the north side of the river.

To link this road with the proposed bridge the Public Works Department took a 20 metre length of riverbank frontage in August 1921. The bridge was completed and opened to traffic in December 1922.

In 1926 about 40 metres more of riverbank frontage was taken for the Mohaka viaduct. During 1927–28 test bores for the pier foundations were drilled in the riverbed. Foundation work was completed just before the great depression and the closing down of railway construction. After work commenced in 1936 the viaduct was completed and a goods service between Napier and Wairoa commenced in August 1937 (C7:30).

Before the Public Works Act was amended in 1928 there was no obligation to pay compensation for land taken. In the event compensation for the lengths of river frontage taken in 1921 and 1926 was incorporated into the calculations made when land was exchanged and consolidated in the 1930s.

Mr Alexander was unable to find any record of consultation between the Public Works Department and the Maori owners at the time the land was taken (C7:33).

In 1931 a further 460 metres of riverbank frontage was taken for a road deviation to avoid a double crossing of the railway. Mr Alexander was unable to discover if the compensation provided for in the Public Works Amendment Act 1928 was paid. If not, he was of the opinion that it would have been included in the calculations at the time of consolidation (C7:35).

In 1930 some 134 metres of riverbank frontage was taken to extract gravel downstream from the state highway bridge to form the bed of the railway and the Kotemaori and Raupunga station yards. Compensation of £33 was paid because the 1928 legislation had abolished the right to take land without compensation. Mr Alexander wondered why the department took the land instead of arranging a right of way or lease (C7:35).

As part of a deviation associated with a new bridge over the Mangaturanga stream, approximately 140 metres of state highway 2 fronting the Mohaka river was closed. In December 1961 the Maori Land Court vested the river frontage in the Maori owners of the adjoining land who paid the Crown £10 as compensation (C7:36).

In the 1970s when the Mohaka river road bridge was replaced by the present bridge, additional land (involving approximately 137 metres of riverbank frontage in addition to the 20 metres previously taken) was taken on the northern bank. This land was taken from Mohaka block A31B2. At the same time a portion of the old road (with some 13 metres of riverbank frontage) which had ceased to be used, was closed and vested in the Maori owners of adjoining land (Mohaka block A33B). It appears that this transaction was taken after sufficient agreement had been reached with the owners (C7:34).

Ngati Pahauwera clearly benefited from improvements in road and rail transport and communications. Nevertheless in taking land for these purposes under the Public Works Act and apparently without any negotiations with Ngati Pahauwera, the Crown was ignoring their rights of rangatiratanga.

### **5.8.2 Gravel extraction**

A far more serious threat to Ngati Pahauwera's river rights was the extraction of gravel which appears to have commenced before 1930 (see C7(a):270). The Mohaka river has become the principal source of gravel for the Hawke's Bay, Gisborne and Taupo areas. Access to the riverbed was usually from the north bank, that is the Maori side. Records showing the quantities taken since 1963 are held by the Hawke's Bay Regional Council and show that the total extraction has been increasing.

Shingle has been extracted from ten stretches of the river between its mouth and the Te Hoe river confluence:

Old Coach Road	between	Waipapa 2B and A19(approx)
Mohaka Hotel		Waipapa 92A and A33
Kuru Joe's		Mohaka A62B and A65
Wainohu's	at	Mohaka A23
Adsett's	between	Mohaka A39 and A42B

Waihapi's		Mohaka A34 and A35
Patuwahine	at	Mohaka B28
Willowflat		Rotokakarangu Crown Block
Haliburton's		Rotokakarangu Crown Block
Te Hoe Confluence		Rotokakarangu Crown Block
(B16; B18(a); C7:50).		

We were given very helpful evidence about the extent of gravel extraction by Mr D J McBryde from the Hawke's Bay Regional Council. Mr McBryde produced details of the amount of gravel extracted since 1963. Over this time an average of approximately 32,500 cubic metres has been extracted each year.

Mr McBryde also told us that the royalty payable to his council on such gravel as was not required for central or local government purposes has been adjusted from time to time but has been constant in real terms at approximately \$1 per cubic metre in 1992 dollar values.

In answer to our questions Mr McBryde also acknowledged, very fairly, that because only a small percentage of the gravel extracted is used for private purposes and the royalties received by his council are therefore only a few thousand dollars each year, the council would not be materially prejudiced by the loss of the royalty income.

We think it only reasonable that Ngati Pahauwera should be compensated for the loss of gravel from a river which, we have found, was never sold by them to the Crown, and in respect of which they have never relinquished their rights of rangatiratanga. This compensation should be quantified in terms of the amount of gravel extracted since 1963, being the period for which records are available. In addition, gravel should not be extracted from the river in the future without the approval of Ngati Pahauwera. It must be a matter for them whether they are prepared to agree to the continued extraction of gravel and, if so, on what terms.

## **5.9 Recreational Activities and the Draft Water Conservation Order**

In 1979, as a result of extensive consultation and as a precursor to the Water and Soil Conservation Amendment Act 1981, the Minister of Works and Development and the Minister for the Environment adopted a set of policies to ensure the protection of rivers or sections of rivers which have outstanding wild, scenic or other natural characteristics. In 1982 a draft of the national inventory of wild and scenic rivers was prepared to give effect to the joint ministerial policy statement. This draft was released for public comment and finalised in 1984.

The Mohaka river from its source to the sea is listed in the National Inventory of Wild and Scenic Rivers (NWASCO 1984) as being of national importance with outstanding scenic and recreational characteristics (B17).

The river offers a wide variety of recreational experiences provided in a diverse landscape. It is accessible from state highways and local roads at some points but very isolated elsewhere.



The upper reaches are a popular starting point for canoeing and rafting trips, with stretches for novices and experts. From just above its confluence with the Waipunga river to Willow Flat, the river is of outstanding value for recreational canoeing. The river is considered to be one of the better whitewater rivers in the North Island, and six commercial companies operate rafting trips of one to two days duration. Parts of the river are also used by a rafting club of 200 to 300 members from the Hawke's Bay area. The lower reaches of the river are used for jetboating, although only on an informal basis.

Its headwaters and middle reaches have been assessed as being one of 23 nationally important recreational angling rivers in New Zealand. It is a nationally important trout fishery.

Swimming represents only a minor use of the river, and river tramping activities are not common in the catchment but are known to occur.

Recreational use has increased markedly since the 1950s. The relative value to recreational users of rivers in New Zealand was surveyed and analysed in 1981. The survey found the Mohaka river to be of "high" but not "exceptional" recreational value along with 93 other New Zealand rivers. The application for a national conservation order in 1987 (see above p 1) was first and foremost sought by recreational users without consultation with Ngati Pahauwera and to forestall any attempt by Electricorp to site three dams on the lower Mohaka river for hydro-electric development early in the next century (cf C15).

#### References

- 1 MS Papers 32 McLean Folder 582; C4(a):121
- 2 Hamlin to Sec CMS 31 March 1855 at WTU Micro MS Coll 4, reel 52; C4:54
- 3 Miriam MacGregor, *Early Stations of Hawke's Bay* (Wellington, 1973)
- 4 AJHR 1862 C-1, p 314; A5(a)
- 5 *Wairoa Free Press* 14 July—19 December 1877; A29:22
- 6 S D Waters, *Richardsons of Napier: A century of coastal shipping 1859–1959*, Richardson and Company Limited Napier, 1959
- 7 AJHR 1862 E-9; C5(a):770
- 8 Cross-examination on 12 May 1992
- 9 *ibid*
- 10 *ibid*
- 11 James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland, 1986) p 303
- 12 *ibid*, p 302
- 13 *The Ngai Tahu Report 1991* (Wai 27) (Brooker and Friend Ltd, Wellington, 1991) p 236
- 14 Oral evidence, 5 May 1992
- 15 Kay Mooney *History of the County of Hawkes Bay* part four, pp 6–94
- 16 *ibid*, p 86
- 17 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 663
- 18 *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9) (Waitangi Tribunal Division, 1987) p 134



- 19 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (Muriwhenua Fishing Report) (Waitangi Tribunal Division, Wellington, 1988)
- 20 *The Ngai Tabu Report 1991* (Wai 27) (Brooker and Friend Ltd, Wellington, 1991) p 236
- 21 For an interpretation of the Maori text we refer to that which appears in I H Kawharu (ed) *Waitangi: Maori & Pakeha Perspectives of the Treaty of Waitangi*, Appendix, pp 319–321
- 22 *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6) (Waitangi Tribunal Division, Wellington, 1983) p 51
- 23 *ibid*
- 24 *The Ngai Tabu Report 1991* (Wai 27) (Brooker and Friend Ltd, Wellington, 1991) p 232–233; see also *The Ngai Tabu Sea Fisheries Report 1992* (Wai 27), “a form of limited self government” p 100
- 25 *Ngai Tabu Sea Fisheries Report* p 111
- 26 *ibid*
- 27 *ibid*, p 100
- 28 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (Waitangi Tribunal Division, Wellington, 1988) p 232
- 29 *Ngai Tabu Sea Fisheries* p 269
- 30 Native Land Court decision on *Lake Omapere*, p 24
- 31 Ministry for the Environment, “The Resource Management Act, Kia Mia Matiratira, A Guide for Maori” 1991, p 27



## Chapter 6

# Conclusions and Recommendations

### 6.1 Principles of the Treaty

Our jurisdiction is clearly set out in section 6 of the Treaty of Waitangi Act 1975. Under sub-section (1) of that section Maori may submit a claim to the tribunal if prejudicially affected by legislation or a policy, practice, act or omission of the Crown which is inconsistent with the principles of the Treaty. The tribunal then inquires into the claim (sub-section (2)) and if it finds that the claim is well-founded may make a recommendation to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future (sub-section (3)). That recommendation may be in either general or specific terms (sub-section (4)).

Accordingly, before we have power to make any recommendations, we must be satisfied that the present claim is well-founded in that Ngati Pahauwera are, or are likely to be prejudicially affected by past or present legislation, policies, practices, acts or omissions which were or are inconsistent with the principles of the Treaty.

Claimant counsel in opening submissions relied on alleged breaches of the following five Treaty principles:

- The concept of Treaty evolution.
- The Treaty balancing of competing interests.
- The Treaty guarantee of protection for Maori.
- The affirmative obligation of the Crown to protect taonga to the fullest extent reasonably practicable.
- The duty of the Crown to take positive steps in reparation once grievances are established.

We think however that for the purposes of this report it is the fourth of these principles which is crucial. Others are likely to be more relevant to the land claim. The principle that the Crown must actively protect Maori property interests to the fullest extent reasonably practicable was clearly recognised in 1987 in the landmark *Maori Council* decision by all the judges of the Court of Appeal, albeit in slightly differing terms. The following passages demonstrate this:

Mr Justice Cooke:

Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support that

proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. It should be added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.<sup>1</sup>

Mr Justice Richardson:

In article 2 the English text uses the emphatic words of recognition and obligation "confirms and guarantees" – by the Queen to the Maori of "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties" so long as they wish to retain them – and the emphatic expression "yield" – by the Maori to the Crown of "the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate". The Maori text employs somewhat different language but in relation to land the same two concepts are present: the agreement by the Crown to protect Maori rights and by the Maori to "give to the Queen" the land "the person owning" it is "willing to sell".<sup>2</sup>

Mr Justice Somers:

The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply. At its making all lay in the future. Now much, claimed to be in breach of the principles and of the Treaty itself, lies in the past. Those signing the Treaty must have expected its terms would be honoured. It did not provide for what was to happen if, as has occurred, its terms were broken.

It is this feature which I think dominates most discussions about the Treaty and which is at the heart of s9 of the State-Owned Enterprises Act. The primary provision of the Treaty relevant to the present case appears to me, as I have said, to be the guarantee of the full exclusive and undisturbed possession of the property of the Maori of whatever kind so long as they wish to retain it. Breaches of this undertaking have occurred.<sup>3</sup>

Mr Justice Casey:

The Waitangi Tribunal has discussed those principles of the Treaty it saw as relevant to the particular claims it had under consideration. Some of its insights are valuable, and this concept of an ongoing partnership can be detected in the Manukau claim in relation to that harbour, and in the Te Atiawa claim. At p 61 of that decision the Treaty was described as "the foundation for a developing social contract". In both cases the Tribunal used this approach to modify exclusive rights to fisheries recognised in the Treaty. At p 95 of the Manukau decision, it drew a number of conclusions, the first being that the Treaty obliges the Crown not only to recognise the Maori interest specified in it, but actively to protect them.

I concur in thinking that this is a principle to be rightly drawn from a consideration of the Treaty provisions in the light of the surrounding circumstances.<sup>4</sup>

Mr Justice Bisson:

The Maori chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their

trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the manner in which their existing rights would be guaranteed and in particular guaranteed down to each individual Maori the full exclusive and undisturbed possession of their lands which is the basic and most important principle of the Treaty in the context of the case before this Court.<sup>5</sup>

Accordingly there can be no doubt that it is a principle, and indeed a very important principle of the Treaty, that the Crown is obliged to protect Maori property interests to the fullest extent reasonably practicable.

But, far from actively protecting the interest of Ngati Pahauwera in their property the Mohaka river when it was reasonably practicable to do so, the Crown has actively undermined that interest through promoting legislation and adopting practices which have given no or quite inadequate recognition to the position of Ngati Pahauwera. The resultant prejudice is all too clear. It follows that the claim is well-founded and that we have jurisdiction to make recommendations to the Crown.

We also note that, in the present claim, it would not be necessary to go beyond the wording of the Treaty to establish a breach of the Crown's obligations. For the reasons discussed earlier in this report, we consider that there have been a series of breaches by the Crown of its specific Treaty obligations to permit the continued exercise of te tino rangatiratanga over taonga and to guarantee the retention of properties for so long as a tribe wished to retain them. These breaches of the literal wording of the Treaty would we think be enough in themselves to establish a breach of the principles of the Treaty because (subject again to the gloss of reasonable practicability) we agree with the statement of Mr Justice Somers in the *Maori Council* case at page 693 that "a breach of a Treaty provision must in my view be a breach of the principles of the Treaty".

## **6.2 The Costs of Bringing the Claim**

Ngati Pahauwera have succeeded in large part in establishing their claim. It should we think follow that they be reimbursed by the Crown for their reasonable costs and disbursements of bringing the claim to the extent that these exceed any contribution from the tribunal and the Crown Forest Rental Trust. We have no doubt that these costs and disbursements have represented a significant burden on an impoverished people, particularly because legal aid was not available under the provisions of the Legal Aid Act 1969, and the necessity for an urgent hearing prevented consideration of an application for aid under the Legal Services Act 1991 after that Act came into force on 1 February this year.

The Crown, somewhat to our surprise, opposed the making of any recommendation for the payment of Ngati Pahauwera's costs and disbursements on the ground that there was no justification for seeking an urgent hearing. We cannot agree. It was quite foreseeable that the report by the Planning Tribunal would be completed early this year and would be likely to impact on the Ngati Pahauwera claim to the river, as was the prejudice which would

6.3

result to the tribe if a water conservation order was then made before this tribunal had considered the claim. It was therefore entirely appropriate that an urgent hearing should be sought.

### 6.3 Conclusions

For the reasons which we have discussed, we have reached the following conclusions on the claim.

- The Mohaka river was a taonga of Ngati Pahauwera when the Treaty of Waitangi was signed in 1840 and remains so today.
- The river was, when the Treaty was signed, a property of Ngati Pahauwera for the purposes of article 2 of the text in English.
- Ngati Pahauwera did not, by signing the 1851 deed, relinquish te tino rangatiratanga over the river.
- The wording of the deed was capable of differing interpretations in its reference to the river and the resultant ambiguity should be resolved in favour of Ngati Pahauwera so as to exclude the river from the sale.
- The parties to the deed would not have intended that the purchase of the land on the south bank would carry with it ownership of the adjacent half of the bed of the river and accordingly the principle of *ad medium filum aquae* did not apply.
- Whether the position after 1851 is analysed in terms of the text of the Treaty in Maori and te tino rangatiratanga or in terms of the text in English and the relevant legal principles the result is the same – Ngati Pahauwera did not under the deed transfer ownership of the bed or waters of the river.
- Ngati Pahauwera did however by the sale and by their conduct implicitly confer on Pakeha non-exclusive use rights to the river, subject to te tino rangatiratanga guaranteed to Ngati Pahauwera under the Treaty.
- When land was sold on the north bank the boundary was the river bank and Ngati Pahauwera did not sell any interest in the river itself. Again Ngati Pahauwera did not relinquish te tino rangatiratanga over the river and the *ad medium filum* presumption did not apply. Ownership of the adjacent half of the river bed was not transferred. The earlier grant of non-exclusive use rights was however reinforced.
- All statutory provisions which assumed that the Crown owned the river bed and waters, or appropriated such ownership to the Crown, or conferred exclusive control over the waters on central and/or local government, were therefore in breach of the letter of the Treaty and the principle that the Crown must actively protect the property of Maori to the fullest extent reasonably practicable.
- Similarly removal of gravel and hangi stones without the approval of Ngati Pahauwera was in breach of the letter and the principles of the Treaty and should not be permitted to continue.
- Although legislation which confers jurisdiction on the Planning Tribunal may be reviewed by the Waitangi Tribunal, the actions of the Planning



Tribunal cannot be reviewed because they are not actions by or on behalf of the Crown.

- Ngati Pahauwera were justified in seeking an urgent hearing of their claim to the river and, having succeeded on the main points of their claim, should be reimbursed for the substantial costs and expenses which they have incurred in taking the claim to a hearing.

## **6.4 Recommendations**

In the light of our conclusions, we make the following recommendations:

- The Crown should enter into discussions with Ngati Pahauwera as a Treaty partner with a view to reaching agreement on the vesting of the bed of the river from the Te Hoe junction to the river's mouth in Ngati Pahauwera and on a regime for the future control and management of the river.
- Adequate funds should be made available by the Crown to Ngati Pahauwera to enable them to engage the necessary professional and related administrative services to pursue their negotiations with the Crown.
- A water conservation order should not be made unless and until discussions between Ngati Pahauwera and the Crown result in an agreement on a regime for the control and management of the river, in which event the order should incorporate that agreement.
- Ngati Pahauwera should receive compensation for the past removal of gravel from the river, that sum being based on the estimated royalties which would have been payable since 1963.
- Any removal of gravel or hangi stones in the future should require the approval of Ngati Pahauwera.
- Ngati Pahauwera should be reimbursed for their reasonable costs and disbursements of bringing the claim.

In the event that an agreement cannot be reached within six months of the date of this report, leave is reserved to both Ngati Pahauwera and the Crown to seek from the tribunal more detailed recommendations as to the future control and management of the river.

## **6.5 Concluding Comments**

Unfortunately it has been necessary to hear this claim and to prepare this report as a matter of urgency in order that it may be considered by government, together with the report of the Planning Tribunal, before a decision is reached on what if any water conservation order should be made. The necessity for urgency has regrettably meant that the Mohaka river claim has been severed from the Mohaka land claims which will be dealt with as part of the Wairoa ki Wairarapa land claims. The separate hearing and reporting of the river from the land claims has compartmentalised subjects of inquiry which are closely related and which, from Ngati Pahauwera's perspective, are one and indivisible.

Having said this, we must acknowledge the high quality of the research which was carried out and the submissions which were made for both Ngati Pahauwera and the Crown. In preparing this report we have been greatly assisted by the research and the submissions of both parties.

The conclusions which we have reached and the recommendations which we have made should not be seen as a radical or unprecedented extension of the rights of Maori. On the contrary our findings are we believe consistent with long-standing precedents in this country such as the *Lake Omapere* decision to which we have referred. The approach we suggest also appears consistent with the recent agreement between the Crown and Ngati Tuwharetoa over Lake Taupo.

It is also interesting to note that the High Court of Australia, in its recent landmark decision in *Mabo v State of Queensland* (1992) 66 ALJR 408, arrived, through the application of general legal principles and in the absence of a treaty corresponding to the Treaty of Waitangi, at the conclusion that the claimants had a valid claim because their title to their land had survived the Crown's acquisition of sovereignty. The decision illustrates the developments in recent years in legal thinking about the rights of indigenous peoples under both common and international law.

We also point out that it should not be assumed that conclusions identical or even similar to those which we have reached in this, the first claim of its kind to be considered by the tribunal, will be reached in the other river claims which await consideration by the tribunal. The outcome of those claims will turn very much on the evidence presented in their support.

Finally, we urge Ngati Pahauwera and the Crown, as Treaty partners, to enter negotiations as soon as possible in terms of our recommendations. We are confident that the outcome of such discussions will be an agreement which recognises the legitimate interests in the river of both Ngati Pahauwera and the other citizens of this country and which demonstrates that the Treaty of Waitangi can be made to work in a sensible and realistic way in its application to a beautiful river which is both an undoubted taonga of Ngati Pahauwera and a great asset to the country as a whole.

#### References

- 1 New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, at 664
- 2 *ibid* at 681
- 3 *ibid* at 692
- 4 *ibid* at 702
- 5 *ibid* at 715

DATED at Wellington this 5<sup>th</sup> day of November 1992

*W M Wilson*

W M Wilson, presiding officer

*M A Bennett*

M A Bennett, member

*Mary B Boyd*

M B Boyd, member

*N K Hopa*

N K Hopa, member

*Georgina M Te Heuheu*

Georgina M Te Heuheu, member



