WAIAU PA POWER STATION REPORT

WAITANGI TRIBUNAL 1978

REPORT OF
THE WAITANGI TRIBUNAL
ON
THE WAIAU PA
POWER STATION CLAIM

(WAI 2)

WAITANGI TRIBUNAL
DEPARTMENT OF JUSTICE
WELLINGTON
NEW ZEALAND

February 1978

Original cover design by Cliff Whiting,
invoking the signing of the Treaty of Waitangi
and the consequent development of Maori-Pakeha history interwoven in
Aotearoa, in a pattern not yet completely known, still unfolding.

National Library of New Zealand
Cataloguing-in-Publication data

New Zealand. Waitangi Tribunal.
Report of the Waitangi Tribunal on the Waiau Pa power station claim (Wai 2). 2nd ed.
Wellington, N.Z.: The Tribunal, 1989.
1 v. (Waitangi Tribunal reports, 0113–4124
"February 1978."
First ed. published in 1978 as: Report to Hon. Duncan MacIntyre, D.S.O., O.B.E., E.D., Minister of Maori Affairs, of the Waitangi Tribunal as to claims by (a) T.E. Kirkwood on behalf of the Waikato sub-tribes served by Whatapaka Marae, and (B) Manakau Harbour Action Association (by its chairman, Mrs M. R. McLarin) on behalf of the Waiau Pa community and the associated communities of Glenbrook, Karaka and Patumahoe.
ISBN 0–908810–08–3
1. Electric power-plants—New Zealand—Auckland. 2. Manukau Harbour (N.Z.)—Water-rights. I. Title. II. Series: Waitangi Tribunal reports;
621.31210993111 (333.9140993111)

First published February 1978 in photocopy format
by the Waitangi Tribunal
Department of Justice
Wellington, New Zealand
Second Edition 1989

Waitangi Tribunal Reports
ISSN 0113-4124
Waiau Pa Power Station Report (Wai 2)
ISBN 0-908810-08-3
Typeset, printed and bound by
the Government Printing Office
Wellington, New Zealand

REPORT TO

Hon. Duncan MacIntyre, D.S.O., O.B.E., E.D.
Minister of Maori Affairs

as to claims by:

(a) T. E. Kirkwood on behalf of the Waikato sub-tribes served by Whatapaka Marae

and

(b) Manukau Harbour Action Association (by its Chairperson, Mrs M. R. McLarin) on behalf of the Waiau Pa Community and the Associated Communities of Glenbrook, Karaka and Patumahoe.

Kenneth Gillanders Scott Chief Judge of the Maori Land Court	CHAIRPERSON
L. H. Southwick, Q.C.	MEMBER
Graham S. Latimer, J.P.	MEMBER

February, 1978.

THE PARTIES WHO APPEARED BEFORE THE TRIBUNAL, WITH THEIR COUNSEL OR THOSE REPRESENTING THEM, WERE AS FOLLOWS:

(a) Mr T. E. Kirkwood on behalf of the Waikato sub-tribes served by Whatapaka Marae	— Mr G. V. Hubble and Mr Peter Horsley
(b) The Manukau Harbour Action Association on behalf of the Waiau Pa Community and the Associated Communities of Glenbrook, Karaka and Patumahoe	— Mrs M. R. McLarin
(c) The New Zealand Electricity Department	— Mr W. Nicholson
(d) The Ministry of Works	— Mr R. J. Sutherland
(e) The Ministry of Agriculture and Fisheries	— Mr H. S. Gajadhar
(f) The Auckland Harbour Board	— Mr G. B. Chapman

THE FOLLOWING IS A LIST OF THE PARTIES UPON WHOM A NOTICE OF THE HEARING WAS SERVED:

1. The Commissioner of Works, P.O. Box 12041, Wellington.
2. The Commissioner for the Environment, P.O. Box 12042, Wellington.
3. The Director-General, Ministry of Agriculture and Fisheries, P.O. Box 2298, Wellington.
4. The Minister of Mines, Parliament Buildings, Wellington.
5. The General Manager, N.Z. Electricity Department, Private Bag, Wellington.
6. Commissioner of Crown Lands, Department of Lands and Survey, Auckland.
7. The Secretary for Mines, P.O. Box 6342, Wellington.
8. Messrs. Winstone Limited, P.O. Box 395, Auckland.
9. The Ministry of Works, P.O. Box 5040, Auckland.
10. The Department of Agriculture & Fisheries, Private Bag, Auckland.
11. The N.Z. Electricity Department, Private Bag, Otahuhu.
12. Mr T. E. Kirkwood, 11 Cliff Road, Papakura.
13. The County Clerk, Franklin County Council, Private Bag, Pukekohe.
14. The Auckland Harbourside Regional Council, P.O. Box 6787, Auckland.
15. The Auckland Regional Authority, Private Bag, Auckland.
16. The Auckland Harbour Board, P.O. Box 1259, Auckland.

INTRODUCTION

The matter which gives rise to the claims now before the Tribunal arises from a proposal of the New Zealand Electricity Department to construct a 1400mw Power Station consisting of four 350mw units on a site close to Waiau Pa on the south-western shores of the Manukau Harbour. The primary fuel for the station would be natural gas from the Maui field with oil used as a standby fuel in the event of failure in the gas delivery system. The Tribunal understands that there has been considerable investigation into the finding of an appropriate site for the station and that the Waiau Pa site was chosen as the best alternative.

The station would require the adoption of a system of condenser cooling which, according to the New Zealand Electricity Department, would have to have an acceptable impact on the Manukau Harbour. The two cooling systems said to be most applicable to the site are:

(a) a cooling pond, in which case about 560 ha of intertidal land would be required, or

(b) mechanical draught cooling towers.

The evidence placed before the Tribunal indicates that the New Zealand Electricity Department originally favoured a cooling pond, but the land area for the Power Station site was chosen so as not to preclude the adoption of a forced draught cooling system.

THE CLAIMS

The Tribunal has two claims before it in respect to the proposed Thermal No. 1 Power Station at Waiau Pa. Both claims are dated 1 February 1977 and the first is signed by Mr T. E. Kirkwood on behalf of the people of the Waikato sub-tribes. In this claim the Tribunal is asked to consider the action proposed by the New Zealand Electricity Department in proposing a Power Station at Waiau Pa and it is contended in the claim that many aspects of the proposal contravene the principles of the Treaty of Waitangi.

The second claim is addressed to the Tribunal on behalf of the Waiau Pa community and associated communities of Glenbrook, Karaka and Patumahoe. These claimants ask to be associated with the claim addressed to the Tribunal by the Whatapaka Marae and sub-tribes of the Waikato. This claim states that for social and cultural reasons, and for the preservation of natural food resources, the claimants recommend that the projected Auckland Thermal No. 1 Power Station cannot be acceptably sited at Waiau Pa, or anywhere on the Manukau Harbour.

The claims come before the Tribunal in accordance with the provisions of Section 6 of the Treaty of Waitangi Act 1975. The section provides:

> 6. *Jurisdiction of Tribunal to consider claims*—(1) Where any Maori claims that he or any group of Maoris of which he is a member is or is likely to be prejudicially affected—
>
> (a) By any Act, regulations, or Order in Council, for the time being in force; or
>
> (b) By any policy or practice adopted by or on behalf of the Crown and for the time being in force or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
>
> (c) By any act which, after the commencement of this Act is done or omitted, or is proposed to be done or omitted, by or on behalf of the Crown,—
>
> and that the Act, regulations, or Order in Council, or the policy, practice, or act is inconsistent with the principles of the Treaty, he may submit claim to the Tribunal under this section.

The claims fall for consideration by the Tribunal under Section 6(1)(c).

The Tribunal is directed by Section 6(2) of the act to inquire into every claim submitted to it, and in terms of Section 6(3), if it finds that any claim submitted to it under Section 6 is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action to be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

A recommendation in terms of Section 6(3) of the Act may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

Section 7(1) of the Treaty of Waitangi Act 1975 provides that the Tribunal may refuse to inquire into a claim if it considers:

(a) The subject-matter of the claim is trivial; or

(b) The claim is frivolous or vexatious or is not made in good faith; or

(c) There is in all the circumstances an adequate remedy or right of appeal, other than the right to petition Parliament or to make a

complaint to the Ombudsman, which it would be reasonable for the person alleged to be aggrieved to exercise.

Section 7(2) provides that in any case where the Tribunal decides not to inquire into or further inquire into a claim it shall cause the claimant to be informed of that decision, and shall state the reasons therefor.

The Tribunal has decided that these claims do not fall within the provisions of Section 7. In fact the Tribunal observes that it was impressed with the sincerity of those who filed the two claims before it, and who appeared in support of those claims. The Tribunal is satisfied that the evidence placed before it by all of those who appeared, either to support or to oppose the claims, was of sufficient moment to warrant a careful inquiry.

Since the Tribunal heard the claims, it has received a letter from the New Zealand Electricity Department advising that it is not now intended to proceed with the "pond alternative". The Department has also advised the Tribunal that the question of a "combined cycle plant" is expected to be "resolved shortly". The Tribunal has also noted that an application for water connected with cooling towers has not yet been addressed to the National Water and Soil Conservation Authority.

The Tribunal was advised during the hearings that the Auckland Harbour Board resolved on 14 December 1976 as follows:

> "That in the event of a power station being established in the Waiau Pa area, then the Board, having regard to the added harbour protection arising from the use of cooling towers, would condition its approval to the use of this system instead of harbour cooling ponds."

In addition the Tribunal was advised that the Auckland Regional Water Board resolved on 27 April 1977 as follows:

"(a) That the Board believes that it has a responsibility to give consideration to the wider implications of any works for which an application for a water right has been received,

(b) That, in exercise of that responsibility the Board advise the National Water and Soil Conservation Authority that, in any event, but based on the limited information available to it, the Board considers that cooling ponds would have unacceptable implications for both the Manukau Harbour and adjacent land and should be abandoned.

(c) That, subject to (a) and (b) above, the Tribunal recommendations be adopted and that the National Water and Soil Conservation Authority be advised that, without sufficient information as to all relevant matters, the Board could not recommend that a water right should be granted."

For the sake of clarity it is pointed out that the "Tribunal" referred to in the foregoing resolution was the Special Tribunal constituted by the Auckland Regional Water Board from among its own members to consider the Crown application for a water right and objections to it. In adopting that Tribunal's recommendations, the Auckland Regional Water Board passed the above resolution for the purposes of its report and recommendation to the National Water and Soil Conservation Authority in terms of Section 23(2) of the Water and Soil Conservation Act 1967.

The appreciation of these two Boards of the need to protect the waters of the Manukau Harbour is helpful to the Tribunal in its assessment of the claims before it.

The significance of the matters which are referred to in the letter addressed to the Tribunal by the Electricity Department and in the resolutions of the Auckland Harbour Board and of the Auckland Regional Water Board will be further appreciated if it is noted that the proposals for the Auckand Thermal No. 1 Power Station called for alternative means of cooling. The first of these was by the construction of what are described as "cooling ponds" and the second by the construction of what are described as "cooling towers". It is clear that the second alternative is that which would be relied upon by the New Zealand Electricity Department.

The cooling pond which was advocated would have occupied an area of seabed approximately seaward of Waiau Pa. Michael Francis Larcombe, a witness called by the New Zealand Electricity Department and who had made a considerable study of the potential ecological impact of the Auckland Thermal No. 1 Power Station, said that the large pond cooling system would have a major adverse ecological impact upon the Manukau Harbour because it would require the destruction of a large area of inter-tidal habitat of very high ecological value. The siting of the cooling pond in the inter-tidal area near Waiau Pa would mean the destruction of all edible shellfish within the pond area.

This Tribunal is concerned with the construction of the Power Station to a limited extent only. In terms of Section 6 of the Treaty of Waitangi Act, the Tribunal considers claims by any Maori or any group of Maori people that he or they are likely to be prejudicially affected by any act proposed by the Crown. The claims are brought before the Tribunal on the general grounds that the act is inconsistent with the principles of the Treaty of Waitangi.

Article 2 of the Treaty of Waitangi in its English text as contained in the First Schedule to the Treaty of Waitangi Act 1975, reads as follows:

> "Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Pre-emption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf."

BACKGROUND

The substance of the claims is that if the scheme in one form or another is undertaken that the claimants and those whom they represent will be or are likely to be prejudicially affected, in that a substantial continuing food supply will be adversely affected and as a consequence prejudice will result. The Tribunal is directed to measure the claim to ascertain whether it is inconsistent with the principles of the Treaty of Waitangi.

The Tribunal finds that these claims are well-founded. The Tribunal considered evidence in support of and in opposition to the claims on 7, 8 and 9 June 1977 and at the conclusion of the hearings invited Counsel to make submissions to it. The last of these was received in mid-October 1977. Shortly after this date the Tribunal noted that the Government has

stated that it is not proceeding with its proposals at Waiau Pa. The Tribunal nevertheless makes this report in terms of Section 6(3) of the Treaty of Waitangi Act 1975.

The claims are concerned with the impact of the Electricity Department's Power Station on the fish which form an important food resource for the claimants and others. Very detailed evidence covering the fish in the Manukau Harbour was presented to the Tribunal. The Tribunal was impressed by this evidence, not only as presented to it by the claimants and their supporting witnesses but also from the several Government departments and local authorities concerned. All were helpful.

At the outset the Tribunal accepts that the areas of the Manukau Harbour adjacent to the Waiau Pa locality have been used by the Maori people as customary fishing grounds for centuries. The Tribunal is aware of the significant part which fish have played and still play in the life of the Maori as a food. It is only necessary to refer to "The Coming of the Maori" by Sir Peter Buck, at page 85:

> "The native foods enumerated to Toi by Raru, a Tamaki woman of the first settlers, were as follows:
>
> Ika moana (sea fish)
> Ika wai whenua (fresh water fish)
> Pipi moana (sea water shell fish)
> Manu (birds)."

Having acknowledged the importance of fish as a food, it is pertinent to observe the matters referred to in "The costly struggle to harvest the sea" by F. D. Ommanney in 1964:

> "In 1883 Thomas Henry Huxley, one of the greatest scientific minds of his time, expressed an opinion that man has held about the sea for many centuries. "I believe," he said, at the Fisheries Exhibition in London, "probably all the great sea-fisheries are inexhaustable; that is to say, that nothing we do seriously affects the number of fish." Yet today, some eight decades later, Huxley's words, so bright with confidence at the time, have a ring of hollow irony for man has at last begun to realise that the sea, for all its seemingly infinite plenty, has its limits as a source of food."

Doubtless the need to conserve New Zealand's valuable fisheries was in the minds of the Legislature when it introduced the Territorial Sea and Exclusive Zone Act 1977. This Act when it is fully in force will enable control to be exercised as it may be necessary in territorial seas and internal waters as those terms are defined in the Act, because Section 7 provides:

> "Bed of territorial sea and internal waters vested in Crown—Subject to the grant of any estate or interest therein (whether by or pursuant to the provisions of any enactment or otherwise, and whether made before or after the commencement of this Act), the seabed and subsoil of submarine areas bounded on the landward side by the low-water mark along the coast of New Zealand (including the coast of all islands) and on the seaward side by the outer limits of the territorial sea of New Zealand shall be deemed to be and always to have been vested in the Crown."

It may be thought that this Act is irrelevant to the matters in issue before the Tribunal, and in a sense it is. Nevertheless it does demonstrate that the Legislature found it necessary to introduce it to enable specific functions and powers to be exercised by it with impunity. It may also be that the Act was considered necessary because there is no common law right beyond

mean low-water mark. But having made these observations, the Tribunal observes that the Territorial Sea and Exclusive Zone Act 1977 in no way affects or purports to affect any existing customary fishing rights.

During the course of the hearings the Manukau Harbour Control Act 1911 was discussed. This is a local Act vesting the control and management of the Manukau Harbour in the Auckland Harbour Board for various stated purposes. It was passed to enable these various functions and powers to be exercised by the Harbour Board, but again customary fishing rights existent at the time of its passing were left inviolate. This Manukau Harbour Control Act is no unique or single piece of legislation. It is similar in all respects to the Gisborne Harbour Board's Amendment Act 1929, the Sumner Borough Land Vesting Act 1929 and others of a like nature.

From an acceptance of the importance of fish as a food to the Maori: that the Maori people have fished in the Manukau Harbour for centuries: that Article 2 of the Treaty of Waitangi confirms and guarantees fishing rights: that although legislative action of various kinds exists in regard to the ownership of the seabed: customary fishing rights are in no way disturbed by them: the Tribunal turns to consider the evidence before it. It has been studied with care and the Tribunal believes that it will be helpful if it comments broadly on that evidence by considering the questions of ecology and of fish life in the area for the purpose of enabling it to assess the impact of any proposal on fish life.

Ecology is a term coined roughly 100 years ago from two Greek words that mean "the study of the home". It was "of the home of the fish" that the claimants spoke so convincingly. They are conscious now, and the Tribunal is satisfied so were their ancestors, that wherever one looks—on land, along the shore or in the sea—living things have their proper place. This is clear even when one walks over the Waiau Pa area. The evidence before the Tribunal satisfies it that whilst the balance of an organism with its environment allows some flexibility for change, that same change is in itself critical. The Tribunal accepts that as the habitat changes, so will the life it harbours. The water in the Waiau Pa area is a comparatively slow moving tidal back-water, despite which it has all the essential characteristics which the Tribunal believes should be preserved so far as is reasonably possible. It is tidal in that it ebbs and flows into the Tasman Sea. But by its nature it differs from the open sea in that it is a reservoir of life, filled in different parts and at different times with thousands of millions of animals, animal organisms and plants, some so small that they cannot be seen by the human eye. These tiny, passively floating and weak-swimming organisms, the plankton, form one of the lowest links of the food chain, but yet a vital link. Together with the nekton they make up the oceanic plankton-nekton biome. In that respect such factors as light, pressure, *temperature, salinity,* and *oxygen content* of the water determine the make-up of the various plant and animal communities. Though the potential of these communities in deeper outer waters as a source of food for mankind is currently the subject of vast research as was outlined to the Tribunal, their importance in the harbour waters is recognised by the claimants now and has been so recognised by generations of their kin-groups long before the date of the signing of the Treaty of Waitangi on 6 February 1840. Moreover whilst recognised as a cornucopia they have been assiduously preserved and conserved down to the present time by the Maori people.

The Tribunal was particularly impressed by the witnesses who spoke of the interdependence of communities of life within the waters, and of the

need to preserve the status quo. That there has been already a deterioration due to pollution from fresh stream flooding, agricultural use of the inland areas and from other man inspired activities, is beyond doubt. There was some evidence of a decline in produce from the sea waters which could well be attributable to these activities.

The community centred around the humblest clumps of sea grass shelters many species of minute animals, numerous algae, protozoa and bacteria. Clinically, there are communities within communities. None are entirely independent. Some may appear to be self-sufficient but most require a connection with communities elsewhere. To take an example from the evidence, a scallop bed must have a suitable sea bottom, the necessary amount of salts in the water, and what is most important, the correct temperature. In addition the bed needs circulating water that brings to the scallops food from other nearby communities.

The expert witnesses and the lay witnesses told the Tribunal that most if not all of the communities in the waters of the Manukau Harbour which ebb and flow to and from the vicinity of the Waiau Pa, blend gradually into each other. One witness said of this: "Virtually the whole harbour area can be considered as one large fishing ground . . . .". Other evidence stressed: "The fishing is rich and varied. At the Heads in deeper open water, rock lobster is taken and there are prolific beds of large green mussels." "Around the inner parts of the harbour there are many good areas for the taking of flounder and grey mullet."

The striking fact is that none who appeared before the Tribunal minimised the great importance of the sea beds covered, uncovered, or partly both, as fisheries. The Tribunal is satisfied that it was demonstrated beyond doubt that shallow sheltered inlets like Manukau Harbour are important marine ecosystems: that they are important as nurseries for young life be it fish, crabs, scallops, mussels, or other fish life: that in addition the high productivity in these sheltered shallow waters (or environments) produces a considerable amount of organic material which when washed out of these areas onto the off-shore shelf forms part of the food chain for plankton and bottom living animals, which in their due turn form a basic food supply for flat fish, schnapper, gurnard, shark and the like: that in addition the mudflats nurture abundant tenthic fauna and so a plentiful food supply for juvenile fish: finally that there is an extensive measure of interdependence between the whole of the sheltered nursery areas of the Manukau Harbour and the ocean fisheries.

The Tribunal has reached the conclusion that the proposals of the New Zealand Electricity Department, be the proposal in the form of a "pond" or of "cooling towers", will cause damage to the waters of the Manukau Harbour. The extent of this damage will be considered in greater detail in regard to subsequent matters but at this stage the Tribunal believes that there must be recogition of the fact that a valuable source of food, which given a fair chance is capable of providing protein for generations to come, should not be endangered to such an extent that its future is put in jeopardy.

Peter Farb, an eminent ecologist, has said: "New Zealand has been the scene not of a single ecological explosion, but of burst after burst of destruction". With this statement before it, the Tribunal considers the evidence put before it that the Waiau Pa area is an area favoured by large numbers of both exotic and indigenous birds. This is not at all surprising since it has long been recognised that most species of birds that are numerous constitute in themselves, and are living examples of, ecological

success. Birds, in their turn and in their way, have an important part to play in a balanced structure of life. Nothing was said about what biological benefits a population of birds might obtain through sociality, but it does seem logical from what was said generally that the larger the colony, the greater the visual and auditory stimulus to breed. On the other hand it may be that in unity there is obviously strength and protection against attacks by other birds or small predators. The super-abundance of marine life of itself may encourage birds and hence there is substance in the claim that damage to the marine life will have an effect on the birds.

The Tribunal leaves this aspect of the matter by observing that the evidence clearly demonstrates that the Maori, both in the past and today, has shown an impressive ecological insight. He is conscious of the need to conserve and preserve what is there and this is exemplified by his teaching the growing generations his ancient customs, practices ad procedures of fishery. This is being done by the elders of the Waiau Pa, not only, as the Tribunal was told, in the interests of the Waikato-Maniapoto peoples but also in the interests of the fisheries of New Zealand generally.

Turning from ecology to fish, they tend naturally to congregate in the areas where their particular food is most abundant. From the evidence, the Tribunal believes that this is the primary reason why both sea-bed and surface-dwelling fish are more plentiful close to the coasts, or in tidal reaches such as Manukau Harbour (which incorporates the Waiau Pa locality.) It is in these areas where plankton and food from the bed are most readily available, rather than out in the deep sea.

But as the evidence discloses, the deep sea fish come to the in-water fish and Waiau Pa is noted for this occurrence. Predatory fish, by the same token, tend to follow the schooling fish which are their normal prey, and do here.

The distribution of fish, as with shellfish, depends upon the food available in different localities. The Tribunal's understanding of the testimony was that those which prefer a soft diet will generally be found on muddy bottoms, while those which prefer a harder diet (cockles etc.) will seek out a sandy bottom. Both classes of bottom are to be found in the vicinity of Waiau Pa.

Whilst the evidence satisfied the Tribunal that the Maori is a conservator in fishery, he is at times somewhat conservative in the matter of statistics. For example, it was shown that during January 1975:

15 bags of mussels
10 bags of pipis
2 bags of scallops

came from Clarks Beach area which is handy to Waiau Pa.

There also was evidence—unchallenged in broad principle—that over and above the nursery fish, a large variety of adult fish are also found in the shallow tidal area in the vicinity of Waiau Pa. These included flatfish, grey mullet and trevalli as well as kahawai, kingfish, schnapper, piper, parore, sharks and rays. It was established to the Tribunal's satisfaction that most fish are taken by net fishing in the shallower inshore areas, while line fishing is popular in some of the deeper channels about the perimeter of the tidal banks. No finite figures were supplied as to the number of fishermen—commercial or amateur—as for the immediate vicinity of Waiau Pa. However one aspect of the appeal of Manukau Harbour was described in this way:

> "During recent years between 150 and 200 fishermen annually have obtained commercial fishing licences from the Department for use on Manukau Harbour. However, only about one eighth of that number operate on what could be considered a full-time, majority living basis. The harbour appears to offer considerable scope to pensioner folk to devote time to supplementing their normal income."

The evidence, again uncontradicted, establishes that while many areas of the Manukau Harbour are popular resorts for amateur fishermen, the Waiau Pa area is the major source of supply for not only the local Maori people but also for their kinfolk at Turangawaewae and other centres of Maori influence and that it has been so for generations past.

Water temperature was discussed wth the Tribunal but there was no mention of a thermocline in the Manukau Harbour. There is probably none since the water mass is neither sufficiently large nor sufficiently deep. But it was said that smaller bodies of water vary more widely in their seasonal temperatures than do the oceans, although very seldom do they reach that of the surrounding air. There was no precise evidence as to the fluctuation of temperature which fish generally, or the species of fish with which we are here concerned, can tolerate, but from what was said the Tribunal thinks it fair to draw the conclusion that a tolerance is capable of assessment, provided any temperature change is not too sudden. Obviously, however, fish eggs and young fish would be more sensitive to any temperature fluctuations than would adult fish.

From the evidence it seems that there are broad zones of temperature, each with its own kind of fish which grows best within its limits. Those who gave evidence before the Tribunal left unquestioned the suitability of zone temperature related to the class of fish and class of shellfish taken—each class being thoroughly acceptable to the taker and consumer alike.

As the Tribunal comprehended the evidence, the same is true of the organisms on which fish feed, and so the conslusion is inescapable that any significant change in the water in which a fish swims is likely to have serious consequences for the entire fish population and its supporting life communities. The balance of life in water is a precarious one.

From the evidence, the Tribunal is satisfied that for the people from Waiau Pa, the princial fishing ground is that area of the harbour whence the intended cooling ponds would be situated. The cooling ponds, if built, would occupy 560 ha, a significant portion of the fishing area. Any loss of fishing area is serious in this harbour because of what has already taken place, but when a number of factors are taken into account the seriousness of the loss becomes more significant. Activity in other areas of the harbour, including that in and around the Auckland International Airport, has forced a movement of fish away from other areas, including the Airport area, towards the Waiau Pa area. In the broad vicinity of that area but outside of the Waiau Pa fishing area the Hangaora Bank is not suitable for fishing because there are incipient dangers arising from currents. The same type of currents characterise the Hikihiki Bank. Then the waters in the vicinity of the Auckland International Airport have been lost for all practical purposes for fishing though occasionally they are line fished from small boats anchored off-shore. All of this underlines the great importance of the waters in the vicinity of the Waiau Pa.

A significant extract in the evidence before the Tribunal reads as follows:

"The Manukau Harbour must be considered as a biological and hydrological unit. The major adverse ecological impact of the cooling pond should be considered along with previous similar impacts and assessment of effects. Previous reclamations in the harbour (almost entirely of neap intertidal areas) have been numerous and their total area large, a fact not referred to in the impact report. At least 50 reclamations totalling over 1050 hectares have already been carried out in the Manukau, removing some 15% of the neap tidal flats. Serious pollution affects large areas of the north-eastern Manukau including at least 600 hectares of neap tidal flats (a further 10%). Thus some 25% of the particularly rich and biologically productive neap tidal flats have already been destroyed, irreversibly changed or seriously polluted. If the cooling pond is constructed this could rise to 40%.

All estuarine harbours are known to be sensitive ecosystems and the Manukau Harbour is particularly vulnerable because of the long residence time of the water, the "locked-in" sediments and the extensive clean sand flats which have a high sensitivity to fine silts and clays and increased nutrients. The Manukau Harbour is one of the most valuable natural assets of the Auckland region and should not be put at risk by the cooling pond proposal for advantages which are temporary and obtainable by a better-proven and far more environmentally acceptable alternative."

From all of this evidence, taking all of the factors raised in it into account, the Tribunal is satisfied that the loss of some 560 ha to "cooling ponds" would be such as to create a serious prejudice to those now using the area for fishing purposes.

If the cooling ponds were abandoned, however, and were replaced by a "cooling tower" system, the Tribunal was left in the position where there was no sufficient material put forward to permit the formulation of a firm view as to the likely impact of the "blow-down" of water from the tower system. The evidence established nevertheless that there would be chemical discharge associated with such a "cooling tower" system, and two extracts from the evidence read as follows:

"The nature of the discharges which will result from these processes will not be known before design work is completed."

"Detailed knowledge of chemical discharges proposed and the effect on the harbour ecosystem will be required when water rights are applied for."

It would seem reasonable to assert therefore that the actual effect or the likely effect of continual discharge of "blow-down" water from the "cooling tower" system is capable of resolution. The chemical content of any discharges may be capable of resolution but it is obvious enough that no sufficient work has been done to reach a final conclusion.

It is clear, however, that although the establishment of a "cooling tower" system would not require the taking of an area of the harbour such as would be needed for "cooling ponds", the discharge *could* well occasion damage to the fish and the vast multitude of fish life in its various types and stages of development in the waters.

The Tribunal believes from the evidence adduced that the waters in the Waiau Pa area are too important from so many points of view associated with fishing and fish life to permit of any situation to arise whereby damage is likely to occur. Clearly enough the likelihood of damage would

need to be studied in great depth and because that has not been done , the Tribunal believes that it is justified in reaching the conclusion that were "cooling towers" established, the likelihood of prejudice must be seen in the light of there being no evidence to the contrary.

CONCLUSION

The Tribunal has already indicated that it finds the claims presented to it to be well-founded. Considering the words of Article 2 of the Treaty of Waitangi and after weighing the evidence adduced to it with considerable care, the Tribunal finds as follows:

(a) If the New Zealand Electricity Department were to proceed to erect a Power Station with a cooling pond occupying some 560 ha of water in the vicinity of Waiau Pa in accordance with its proposals, then the claimants would be prejudicially affected.

(b) If the New Zealand Electricity Department proceeded in the establishment of its Thermal Power Station to use cooling towers as explained to the Tribunal in evidence, then the Tribunal is left in doubt as to the consequences because of the fact that it has no satisfactory evidence that the operations of such towers would not prejudice the claimants. It therefore finds that were the Department to proceed, further detailed study would be necessary to establish beyond doubt that no prejudice would occur.

Section 6(3) of the Treaty of Waitangi Act 1975 provides that if the Tribunal finds that any claim submitted to it is well-founded, it may ..... recommend to the Crown that action be taken to remove the prejudice.

In the face of the finding of the Tribunal that the claimants would be prejudicially affected in one area, namely should a "cooling pond" be established, and that the question as to whether or not there is prejudice or likely to be prejudice in the case of the "cooling towers", cannot be resolved, the Tribunal turned its mind to whether or not it should, in this report, recommend to the Crown that action be taken to remove any prejudice.

1. The first matter that the Tribunal notes in this regard is as already indicated, namely that the Government has now said it is not proceeding with its Thermal Plant at Waiau Pa. As has been stated above, however, the Tribunal felt it proper to report on its findings in respect of the question of prejudice.

2. The Tribunal is, however, also empowered to make any recommendations to the Crown. In the circumstances it is unnecessary to recommend that any prejudice be removed by not proceeding with the Power Station, or even to recommend that further study be undertaken and opportunity be given by way of further claim to test the position should "cooling towers" be installed when the Government has already indicated that it is not its intention to proceed.

Were the Tribunal to proceed with a recommendation it would be necessary for it to resolve the law in a number of areas. These include particularly the question revolving around whether or not customary fishing rights have been extinguished since 1840.

Prior to the Government's announcement that it was not intending to proceed at Waiau Pa with its Power Station project, the Tribunal had considered with care the submissions of Counsel and particularly those of Mr Peter Horsley, Counsel for Mr T. E. Kirkwood on behalf of the people

of the Waikato sub-tribes. Members of the Tribunal have already spent considerable time themselves in independent research.

The Tribunal is satisfied that a conclusion can be reached on the law but in view of the Government's decision not to proceed with its project at Waiau Pa, the Tribunal believes that this is not the case for it to express its view on the law, particularly when the facts are such that for the purposes of making a report, apart altogether from any recommendation, recourse to the current state of the law is unnecessary.

SEALED with the seal of the Waitangi Tribunal this 27th day of February, 1978, in the presence of:

..... CHAIRMAN

..... MEMBER

..... MEMBER

LIST OF REPORTS OF THE WAITANGI TRIBUNAL

Wai–1	Fishing Rights (Hawke)	March 1978
Wai–2	Waiau Pa Power Station	February 1978
Wai–4	Kaituna River	November 1984
Wai–6	Motunui—Waitara	March 1983
Wai–8	Manukau	July 1986
Wai–9	Orakei	November 1987
Wai–10	Waiheke Island	June 1987
Wai–11	Te Reo Maori	April 1986
Wai–12	Motiti Island	May 1985
Wai–15	Fishing Rights (Te Weehi)	May 1987
Wai–17	Mangonui Sewerage	August 1988
Wai–18	Fishing Rights (Lake Taupo)	October 1986
Wai–19	Maori 'Privilege'	May 1985
Wai–22	Muriwhenua Fishing	June 1988
Wai–25	Maori Representation (ARA)	December 1986

AVAILABLE FROM:

Waitangi Tribunal
Department of Justice
Wellington
NEW ZEALAND

AND

Government Print
Wellington
NEW ZEALAND

V. R. WARD, GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND—1989

93967A—89C