WAIROA RIVER REPORT

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A REPORT COMMISSIONED BY THE WAITANGI TRIBUNAL

Wai 42

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SUMMARY

This report flags the issues pertaining to the ownership of the Wairoa River. It examines a number of areas which include:

- use of the river as a food resource
- use of the river as a transport route
- historic sites adjacent to the river
- a summary of legal issues pertaining to river ownership
- a discussion of the effect of the Tauranga Confiscation on the ownership of the river bed
- the effect of twentieth century usage on the river environment.

The ownership of river resources is far from clear. Legally perhaps the most important issue is whether or not the river is navigable. Although legislation includes a reasonably wide definition of navigable, the courts have tended to base their decision on whether or not the river was navigable for commercial proposes. There are indications that this definition is changing.

Use of the river by logging companies suggests that it is navigable. However progress upstream to the headwaters is hindered by McLaren Falls, so it may be that parts of Wairoa River are non-navigable. The distinction is important because the beds of non-navigable rivers are vested in riparian owners, some of whom are Maori. In the case of navigable rivers the situation differs because riparian owners lost the rights to the beds of navigable rivers under the provisions of the Coal Mines Amendment Act 1903. This in itself is a form of confiscation because there was no consultation or provisions for compensation. The lack of compensation for this confiscation applies to all owners of land adjoining navigable rivers be they Maori or otherwise.

Another argument is that the Wairoa was an iwi resource owned and utilised as an entity in itself, regardless of ownership of riparian land. It could therefore be claimed that the bed of the river was Maori customary land. Although the river is not specifically mentioned by the Tauranga District Lands Acts, it appears that customary title was extinguished by the confiscation of the Tauranga District in 1865. Some riparian owners may have subsequent been granted freehold title to riparian lands by the Commissioners Court in the 1870s and 1880s but due to the lack of adequate records it is unclear whether or not these grants included the river beds. If the river was navigable any riparian rights granted by the court would have been extinguished by the Coal Mines Act 1903. Legally, if the Wairoa River is non-navigable, riparian rights still exist and the adjacent river bed owned by the riparian land owners. Users of the river should take this into account. The assumption is made that aside from the river mouth, the Wairoa is non-tidal.

There are several related issues. Firstly this report notes that the Wairoa is still a significant cultural resource. Secondly it argues that current use of the river adversely affects that resource. The use of the river by other sectors of the community is indicative of loss of iwi control over the river. The report also notes that although recently local bodies have consulted Maori over the use of the river, in the past there was little consultation.
INTRODUCTION

Personal

My name is Rachael Willan. I graduated from Victoria University of Wellington with a Bachelor of Arts in Politics in 1995 and in 1996 with a Bachelor of Arts with Honours in History. During November and December 1995 I assisted Professor Alan Ward of the University of Newcastle, Australia in researching New Zealand’s involvement in Tahiti during World War Two. From January to April 1996 I worked for the Crown Forestry Rental Trust compiling a profile of Crown acquisition of Maori Land, 1900-1930.

The Claim-Wai 42

Wai 42 is a claim on behalf of Ngati Ranginui whanui. The claimants say that they have been prejudicially affected by the Crown’s acquisition of the Te Wairoa River. They ask that the river be returned to Ngati Ranginui iwi.

The Report

The Wairoa River lies the west of Tauranga City. It’s headwaters are in the Kamai ranges and from there the river winds it’s course through bush, forestry and farm land until it reaches the Tauranga Harbour at Bethlehem. The Wairoa is a popular site of both recreation and commercial enterprise. It has long been recognised that the river was one of the major freshwater sources in the Tauranga District. In 1872, Putman described the river as:

...about six miles to the Westward of Te Papa. It is a stream of considerable magnitude like the Wainamu -rapids obstruct further progress. It is both deep and rapid, as much as 10 fathoms having been discovered in places, while at the mouth where it widens into the harbour, it has only a depth of 2 feet 6 inches at low tide. The rise of water is 4 feet upon all ordinary tides, and 5 feet upon spring tides....

This report address a direction from the Waitangi Tribunal to investigate the ownership of the Wairoa River and other issues of relevance with regard to the river. Due to time constraints discussion of the issues is largely restricted to the ownership of the river. The report looks at other cases dealing with river ownership issues. It examines the effect of the Tauranga confiscations and the Commissioner’s Court on the ownership of the river. It also discusses the effect of government legislation on river ownership.

The first chapter of this report discusses the cultural significance of the Wairoa. Chapter 2 is a general overview of policy and judgements relating to rivers. The third chapter looks at the confiscation of Tauranga lands in 1865 and their effect on ownership of the river. The report

1 For further details see statement of claim.
highlights the fact that ownership of the Wairoa river is somewhat ambiguous. Chapter four is a brief summary of public works and environmental issues. The only major public work is the Tauranga Joint Generation Committee’s hydro-electric power scheme. This is covered in another report, “Hydro-Electricity in the Wairoa River Catchment: Land Acquisition”. That report is an in depth examination of the power scheme. It covers public works legislation and issues pertaining to the use of water for hydro-electricity. Interested parties are advised to consult that report.

All opinions unless otherwise stated are my own. To a large extent these opinions are a reflection of my skills and background. Therefore this report is mainly an historical narrative covering the relevant issues. Although this report cites traditional and hapu evidence it does not claim to speak for Maori.

Much of the source material focuses on Ngati Kahu hapu, the hapu most often associated with the Wairoa. Consequently, this Ngati Ranginui hapu is often mentioned in the body of this report. This is not meant to imply that the are the only group with a stake in the river. As Des Kahotea points out, ‘Ngati Kahu is one of a number of hapu who had settlements in the past orientated to the Wairoa river...’ It is acknowledged that other hapu such as Pirirakau and Ngati Hangarau, and indeed the whole of Ngati Ranginui may have an interest in the future of the Wairoa.

CHAPTER 1: THE SIGNIFICANCE OF THE WAIROA RIVER.

The ownership of rivers is the subject of several court cases and Tribunal hearings. The Tribunal has dealt with a specific river claim for the Mohaka River Report. Other reports such as the Pouakani Report have dealt with issues involving rivers. Prior to the advent of the Waitangi Tribunal the courts examined the ownership of the bed of the Wanganui River. This section of the report highlights issues raised in these and other related cases.

The Maori version of the Treaty of Waitangi guarantees protection of “toanga”. The term toanga undoubtedly includes rivers. In the Pouakani report the claimants stressed that the river was a toanga guaranteed protection under the Treaty of Waitangi. Likewise the Wairoa River is a toanga of the iwi of Tauranga Moana. The river banks are dotted with numerous historic sites, is a mahinga kai, (traditional source of food) and was an historical transport route for Tauranga iwi. To a large extent use of the river for these purposes continued after the Tauranga confiscation.

Historic Sites

There are many historic sites along the banks of the Wairoa River. Maori utilised the region well before European contact. There is archaeological evidence to support this statement. In 1988, the Historic Places Trust and Department of Conservation jointly documented hundreds of archaeological sites in the Wairoa catchment area, including pa and shell middens. Clearly, the area is historically important.

The river banks have long been occupied by local hapu. According to a report in a local paper there were once a number of Ngati Kahu pa sites near the current Wairoa marae:

There were once four pa sites surrounding our position on the bank. Potariwhi, the battle pa, the first pa built, Rotoparea whose chief was Ngakuruparera, Papuhalia Pa and Te Pura, now more commonly known as Wairoa Marae.

In addition to the historic sites on the river bank there are numerous legends of taniwha inhabiting the Wairoa. These legends further illustrate the river’s significance. In 1988, Ngati Kahu kaumatua, Albert Brown recounted the story of Aramarea, the guardian taniwha of Ngati Kahu. Brown said that as a result of the taniwha’s protection, “not one of [Ngati Kahu] has ever drowned in the river to this day”. In the preface to an archaeological report on the “Rualihi” Pa, Evelyn Stokes illustrates the traditional relationship between Ngati Ranginui iwi and the Wairoa river area.

Following the invasion and settlement of Tauranga Moana by Ngai-ta-rangi, a tribe of Mataatua

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8 Timescan, 26 April 1988. [B1]
9 Ibid.
The Wairoa river plays a significant part in several traditional histories. The Takitimu, (of whom Ngati Ranginui are descended) tradition notes iwi with claims to the river fought each other. The account is similar to the taniwha legend:

Ranginui, a son of Tamateapokaiwenua, had undertaken an exploration of the North Island eventually leading his people back from Patea-Taiaha to Taurangi, occupying Puke Whanake on the West Bank of the Wairoa River. The wives of Ranginui were Kurapori and Urutomo. Disagreements occurred between Ranginui and Ngai Marama people who had previously occupied the region, resulting in the Ngai Marama being driven from here and unfortunately no tradition remains of their whereabouts.¹⁰

The incident is also recounted in Hare Piahana’s account of Ngati Ranginui history:

During the period when Ranginui occupied the pa at Pukewhanake (his wife was Urutomo) there lived in Taungarau a tribe called Ngamarama. Coming originally from Tamaki, Auckland, to Hauraki some spread to Matamata while others crossed the hill to Tauranga and lived at a pa on the eastern bank of the Wairoa River near where Peterehema now is. On one occasion the children from Ranginui’s Pa went out swimming in the Wairoa River at the same time that the children from the Ngamarama did likewise. A quarrel developed, some the Ranginui children were drowned by the Ngamarama children which caused warfare between the two tribes. Ngamarama were defeated and fled to the bush around Akeake and Taunui where their land stronghold was at Ruakiri in that area. Later that pa was attacked by the Ranginui and Ngamarama was defeated and killed and Taungarau belonged to the people of Ranginui by conquest.¹¹

Clearly, the river plays an important part in Ngati Ranginui history.

**Mahinga Kai-Food Gathering.**

In addition to being historically important the river is a source of food and material for traditional cultural practices. As Antoine Coffin points out, there is evidence that river is a rich source of food. He says that the:

...Wairoa River and Harbour [sic] margin is Ngati Kahn’s traditional food gathering area. All year round members of the hapu fish the river for tuna, mullet, herrings flounder, kahawai ...¹³

As the extract illustrates, the river is still used by that hapu as a food source. Further to this issue he also states that:

Ngati Kahn as kaitiaki of the Wairoa River for hundreds of years have eked out a living. At the

¹² Evelyn Stokes, Te Raupatu... vol 2, p.27.
¹³ Coffin, p.27.
time of European arrival, Ngati Kahu were among the most affluent people in this country having access to a wide range of resources- offshore and harbour fishing grounds, eeling pools in the river, fertile horticultural lands and forests further up the river. Over time much of these resources have been depleted but Ngati Kahu remains still enhancing many traditional and cultural activities. Fishing waka paddling, swimming as well as ceremonial activities such as tangihanga, hura kohatu, hi and kapa haka are still active. There is a need to preserve and protect these activities and uses for the survival of Ngati Kahu's traditions and identity.

Even after the confiscation the river was important for the production of food. According to Stokes in 1875:

Maoris on the Wairoa River owned a flour mill where they ground wheat that they had grown themselves.

There is also evidence that the chief Hori Ngatai planned to use the river for a flour mill. It is unclear whether or not this is the same mill. Ngatai’s plans appear to have been constructed during a later period than Stokes’ example. Steven Oliver in *The People of Many Peaks* says that:

[a]t Whareora Ngatai became a highly successful farmer and for years was the largest producer of wheat and maize in the Tauranga district. By 1888 he was planning a mill on the Wairoa River, west of the town settlement.

Des Kahotea also comments on the important relationship between Maori and the natural environment. He demonstrates that the natural environment was an important traditional source of food and that it is still a significant cultural resource.

The culture of the tangata whenua of Tauranga reflects its natural environment. The various marine and fresh water ecosystems were the mainstay of the tribal economy before Pakeha domination with colonisation. It remained this way until a recent generation became absorbed into the economy for cash or wages, rather than dependent on self produced or natural food sources.

Traditional management of this resource was integrated into cultural values and socio-religious belief system. A rahui (ritual sanction) was a common form. This resource had a system of ownership through specific rights of exploration. As it was a major prehistoric food resource and diet there is a strong tradition of conflict in Tauranga with the competition for the resource.

As there is no longer any economic dependence on the natural environment as food resource, it has assumed an important role in the area of cultural values and practice as a tradition of diet.

This food resource is a source of traditional culture and identity for families and hapu who exploit their local natural resource. It is an important status for ceremonial meals (local seafood resource) and identity. A contributing factor to the lessening of sea-food in the diet has been the decline of natural stocks through commercial exploitation and the degradation of the environment.

Clearly both before and after the confiscations the Wairoa River was an important source of food. Currently it is still an important resource.

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14 Coffin p.27.
The River as a Transport Route

In addition to use as a food source the river was also an important transport route. Coffin notes:

The Wairoa River by ancient tradition has been a transportation route to the Kaimai's and outlying areas of which waka were the principle vehicle. Ngati Kahu possesses outrigger waka which are used for ceremonial and recreational activities. These waka are essential in maintaining the affinity Ngati Kahu has with the river.18

During the nineteenth century, Pakeha also used the river for transport. Evelyn Stokes notes that a timber company, G.A. Gamman and Co, transported timber down the river at Omanawa to a jetty at the river mouth.19 Stokes also notes that:

[i]n 1915 the Tauranga Rimu Company was formed to mill bush between Oropi and Omanawa. This mill was at Tauriko (a name formed by a contraction of a company name), on the Wairoa River. Logs were hauled to the mill by tram and the sawn timber placed on punts and towed down the river to Tauranga ...20

As this extract illustrates that in addition to traditional usage by Maori the river was used by Pakeha for commercial purposes.

Summary

The significance of the river can be summarised as follows:

• there are numerous historic sites on the river banks, indicative of long term habitation
• the river was a traditional source of food
• although local hapu are no longer economically dependant on it the river remains an important cultural resource
• the river was a transport route for both Maori and Pakeha

18 Coffin, p.28.
19 Stokes, Tauranga County, p.273.
20 Ibid. p.275.
CHAPTER 2: RIVER OWNERSHIP ISSUES

Traditional Usage

The preceding chapter notes that traditionally, the river was an important resource and that to some extent the use of this resource continues. The Waitangi Tribunal discussed traditional rights of ownership in the Kaituna River claim. The report stated that:

... traditional rights of ownership carry with them the free and uninterrupted right to fish the river, the estuary and the sea, together with the use and enjoyment of the flora adjacent to it... 21

The tribunal also concluded that, "these traditional rights continued uninterrupted until this day." 22 In the Mohaka River report the Tribunal said:

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. 23

These findings undoubtedly have some bearing on the ownership of the Wairoa River as the same issues also pertain to this case.

The River Bed

In addition to traditional rights of usage, there are also ownership issues concerning the bed of the river. During the twentieth century, the Crown gave local authorities the right to construct power schemes on the river. This action rests on the assumption that the Crown owns the river bed. While there is no indication of any land having been taken from the bed of the Wairoa, the Tauranga Joint Generation Committee took some land from the bed of the neighbouring Mangapapa River. 24 While researching the power scheme the author found no evidence of riparian owners having been compensated for this acquisition. The Crown probably assumed ownership of the river bed by means of confiscation. It is uncertain whether this was by way of the either the Tauranga Confiscation or the Coal Mines Act of 1903.

Article Two of the Treaty of Waitangi affirms Maori customary ownership and enjoyment of lands and fisheries. 25 Rivers were an essential part of Maori customary law. Under customary law ownership of a river is established by usage of natural resources. As the Waitangi Tribunal notes in the Manukau Report:

Maori Customary Law is the antithesis of English Common Law which considers the harbours [and the beds of navigable rivers] as belonging to the Crown. The Maori people believe the Treaty of Waitangi promised them that Maori customary law would prevail. 26
Consequently the most important questions are; was customary title to the river bed extinguished? If so, when did this occur?

A number of claims have dealt with issues regarding rivers. This section of the report examines these issues.

**River Bed Ownership in the Courts**

For the most part of the twentieth century the courts assumed that title to land adjoining a river included title to the bed of the river. Therefore, the courts assumed that the *ad medium filum aquae* rule applied whereby acquisition of land also included the acquisition of the river to its mid point. For example, in the case of *Re the bed of the Whanganui River* the Court of Appeal ruled that:

> rights in relation to the river were directly connected to ownership of the adjacent land and there were no tribal rights of fishing or navigation which were paramount to Riparian rights.

In 1950, however, a Royal Commission judgement on the ownership of the Whanganui River bed, alleged that until the advent of Coal Mines Act 1903, the river bed belonged to local Maori as customary owners.

In the case of *Re the bed of the Whanganui River* the courts used British common law principles when adjudging ownership of the Whanganui River. The Tribunal points out that:

> ...[i]n the case of the rivers the *ad medium filum aquae* rule is used, that is, the riparian owners own the land to the middle line of the river. This issue is whether a portion of the river adjacent to land sold, with or without relevant fishing rights, is also sold. Most interpretations suggest that sale of Maori freehold land on a river bank also included any rights to the river bed and fisheries.

A Court of Appeal decision on the ownership of the river ruled that there was no evidence that river ownership rights were separate from land ownership rights. Applying this assumption, the court claimed that the Coal Mines Act 1903 vested the bed in the Crown. As the river bed was not customary land the court claimed that the ownership of it would otherwise have been vested in riparian owners under the *ad medium filum aquae* rule. One judge said:

> ...I have come to the firm conclusion that if s.14 of the Coal-mines Act Amendment Act 1903 had not been passed, the effect of successive investigations of title by the Maori Land Court would have been to have vested the title to the bed of the river, wherever the banks had been the subject of a certificate of title, followed by a Crown grant, in the riparian owners to whom such a such grant was made *usque ad medium filum aquae*...[emphasis in original]

Therefore the decision ruled that:

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Wellington, Department of Justice: Waitangi Tribunal, 1984, p33,
27 New Zealand Law Reports (1955) 419.
only those Maoris who were owners of riparian blocks in 1903, or their successors in title could set up claims for compensation. 32

The court dismissed the claim that the river was a tribal resource in its entirety.

The Whanganui River decision was based primarily on the ownership of riparian lands. It did not take into account cultural and spiritual values attached to the river. The claimants voiced this issue in a petition to the Minister of Maori Affairs:

[The Government and the Courts do not understand that to the people of Whanganui the river is sacred. Their ritual involved and still involves a blessing with water to take away sin, with the Traditional Karakia. When the government took away title to that land it took away more than it realised. We want title to the bed restored to us to reserve the sacred symbolic right to the River. This is far more important to us than any question of money, because what was done was a direct attack on religious ritual and custom and such an attack is forbidden by law. What we seek to be returned is the title and we are prepared to give full rights of navigation and use of the River if our title is to be restored 33]

Two of the claimants, Titi Tihu and Hikaia Amohia noted that the transfer of ownership rights in the Coal Mines Act without consultation or compensation was a breach of the principles of the Treaty of Waitangi. 34

Until recently, the Courts viewed the Coal Mines Act (and its successor Acts) as the authority on river ownership. The Act contained some crucial provisions that differentiated between the ownership of navigable and non-navigable rivers. Section 14 (1) states:

[slave where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and, without limiting in any way the rights of the Crown thereto, all minerals including coal, within such bed shall be the absolute property of the Crown. 35]

Section 14 (2) defines the terms “Bed” and “Navigable,” it stipulates:

[for the purpose of this section-
“Bed” means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:
“Navigable river” means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks or to the public for the purpose of navigation by boats punts, or rafts; but nothing herein shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers. 36]

This Act vested the beds of navigable rivers in the Crown. Riparian owners of non-navigable rivers still had rights to half the river bed. This assumption of ownership was continued in subsequent legislation. Section 261 of the Coal Mines Act 1979 also vested beds of navigable rivers in the Crown. The definition of “navigable” was however, condensed to exclude the

33 Petition presented to the Hon. Duncan McIntyre at the Ngapuwaiwaha Marae, Taumarunui on Saturday 20 December 1975, AAMK 869/209 7/6/188, Whanganui River Claim, National Archives, Head Office, Wellington.
34 Ibid.
35 Coal Mines Act Amendment 1903, No.80, section 14 (1).
36 Ibid, 14 (2).
beneficial use to residents. Currently, Crown ownership of navigable rivers is included in section 354(1) of the Resource Management Act 1991. This Act includes the ownership rights conferred in the 1979 Act.

Clearly the ownership of river beds pivots on whether or not a river is navigable. This report has already noted that the Wairoa river was a transport route for both Maori and Pakeha. However the definition of a navigable river is unclear. In a legal submission for the Pouakani Report, Graeme Austin notes that in previous cases the legal definition hinges around commercial use of the river. If the river was not used by commercial vessels the river was deemed non-navigable and it’s bed vested in riparian owners. In the Wairoa’s case there was commercial use by timber companies but the issue requires a legal opinion.

Since the Whanganui River case the emphasis has shifted away from riparian ownership and towards recognition of iwi customary usage. Recent Tribunal recommendations suggest that traditional ownership of river resources carry more weight than previously. The Waitangi Tribunal has challenged the Crown’s right to beds of navigable rivers. In the Mohaka River Report, the Tribunal declared that in 1903 (the time of the Coal Mines Act) the Native Land Court did not consider iwi ownership of the river. The report notes that:

> [w]hile 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 19 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 not under consideration.

As the Mohaka River Report notes, under European law alienation of land invariably led to alienation from the river. In this case, claimants argued that the sale of the Mohaka blocks included only the land and not the river.

During the Mohaka hearing, the claimants pointed out that a 1950 Royal Commission investigating title to the Whanganui River which concluded that the Whanganui River had been owned by Whanganui Maori as part of a tribal estate. Apparently, the commission demonstrated that the ad medium filum aquae issue can be disposed of if it is shown that the agreed boundary did not go into the centre of the river. The Mohaka claimants summarised this argument is summarised as:

> 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, and that the pursuit of fishing demanded weirs, results in an accumulation of circumstances more significant than those that have been held sufficient to rouse the presumption of ownership to the beds of English rivers.

Therefore if an iwi proved fishing rights, the ad medium filum rule could be overridden. The report cites the following case:

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37 Coal Mines Act 1979, No. 21, section 261.
40 Waitangi Tribunal, Mohaka River Report, p.34.
41 Ibid, p.36.
In King vs Morison [1950 N.Z.L.R. p.247, 254] the Supreme Court noted that the presumption may be rebutted by showing that at the time of the sale of the land, the vendor had no intention of parting with the bed to the middle of the river.42

The Tribunal concluded that:

[In 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 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 was also reflecting the prevailing assumption that New Zealand was a colony of settlement inhabited by an indigenous people without settled or social and political organisation it was the beginning of a process of contravening customary land and water rights into land titles and water rights derived from the Crown and of dispossessing Ngati Pahauwera of a toanga 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 of the area to Pakeha settlement.43

The Tribunal recommended that river ownership should take into account the special circumstances surrounding the colonisation of New Zealand and the Treaty of Waitangi. The Tribunal concluded that:

[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 flum aquae rule the presumption would on the facts have been rebutted in any event the Crown was not entitled to rely on the ad medium flum 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 toanga off Ngati Pahauwera without their knowledge would we think have been clearly unjust and in breach of article 2 of the Treaty.44

The assumption in this case is that the river was an important resource and Maori would never have intentionally sold it. In the case of the Wairoa River there is considerable evidence that the river was an important food and transport route for Tauranga Maori. Therefore it is also doubtful as to whether Maori would have chosen to alienate the Wairoa River.

Another issue arising from this claim was Crown ownership of navigable rivers. The Tribunal saw this as a Treaty breach because:

[In 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 have been a clear breach of article 2 of the Treaty because ownership would have been appropriated without the consent of Ngati Pahauwera and without compensation.45

In summary of the issues the Tribunal said of the Crown's role in the Mohaka River claim:

...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 of Ngati Pahauwera. The resultant prejudice is all too clear.46

The crucial point is that the Crown passed legislation regarding river beds, extinguishing

43 Ibid, p.38.
44 Ibid.
46 Ibid, p.77.
customary title without consent. With regard to this issue, the Tribunal, in its *Pouakani Report* made the following recommendation:

> [furthermore, we consider the conflict between Maori rights, the Crown and the public interest in general, over the ownership and use of rivers has implication far beyond the scope of claims before this tribunal. We therefore recommend that the Crown give urgent attention to addressing these matters in the national interest.]

Graeme Austin concludes his submission for the *Pouakani Report* by noting the complexities of river ownership. He says that:

> [at common law the Crown’s prerogative rights to the beds of rivers extend only as far as the tide ebbed and flowed. Such as the Crown holds at common law are subject to public rights such as navigation and fishery. The Crown holds as trustee for the public. When compared with the common law, s261 of the Coal Mines Act 1979 appears confiscatory.]

In other rivers and other parts of rivers the *ad medium filum aquae* [emphasis in original] applies. A riparian owner is vested of the bed of the river to its mid point. That presumption may be rebutted in a number of instances including where the bed of the river is reserved or expressly or impliedly in the original grant and where the circumstances preclude its application. It has been suggested that the *ad medium filum* rule may be rebutted by “comparatively slight evidence”. Rights to navigate non-tidal waters may exist independently of the ownership of the soil of the river bed.

The original predecessor of s,261 of the Coal Mines Act1979 was enacted shortly after the Court of appeal decision of *Mueller vs Taupiri Coal Mines Ltd*. Therefore, the *ad medium filum aquae* rule was rebutted in favour of the Crown, but the stretch of the river had been used extensively for commercial navigation.

The extent of the Crown’s rights to the beds of rivers in New Zealand is uncertain. English authorities are unhelpful due to the specialised meaning of “navigable” at common law. In New Zealand the Browns rights to river beds under s261 depend on the meaning of “navigable” within that section. Controversy surrounds whether the term imports a requirement that the river be used for economic purposes or whether causal use by very small boats is sufficient for the provision to operate. One writer has preferred the latter approach and has suggested that with the modern development of jet boats, more rivers are today navigable than was contemplated when the section was originally enacted.

Clearly, the issue of river bed ownership is extremely complex and hinges on the definition of navigable. As Austin points out the definition of navigable is a contentious legal issue. The current definition may include recreational usage. As the next chapter demonstrates the Wairoa River case is complicated by the Crown confiscation of 1865.

Natural Water

Another issue is the ownership of natural water. The Resource Management Act vests ownership of natural water in the Crown as conferred by section 21 of the Water and Soil Conservation Act 1967. The Act gave Regional Water Boards power to grant water rights of the use of natural water. Section 21 says:

> [except as expressly authorised by or under this Act...the sole right to dam any river or stream, or to divert or take natural water or discharge natural water or waste into any natural water is, or to

48 Austin, p.467.
use natural water is hereby vested in the Crown subject to the provisions of this Act... 50

In a report for the Te Ika Whenua Energy Assets claim, Geoff Bertram notes that water rights hearings were not compulsory until the Crown passed the 1967 Act. 51 The Crown’s legislative of ownership of natural water, assumes that Maori did not customarily own natural water. This claim is based upon legal definitions of river resources which separate the river bed and water. Maori perceptions of the environment may not view the bed and water as separate entities. This issue requires further investigation including the consideration of oral evidence.

Other Factors

As well as the legislative measures, other factors complicate ownership rights. The most obvious examples are confiscation and public works acquisitions. As the Manukau Report states:

[the act of omission began last century with policies that led to war and the confiscation of tribal territories. It was continued in this century by a failure to give adequate protection or recognition of Maori rights in the acquisition of lands or the proposal of major works.]

This statement could also be applied to the Wairoa River. As the proceeding chapter will demonstrate, most of the land on the banks of the Wairoa was affected by the confiscation of Tauranga lands in 1865. Land was either confiscated by the Crown or returned to Maori during the 1870s and 1880s. Secondly, there have been public works involving the river. The most significant is a series of hydro-electric power stations. 53 The effect of this scheme on the river environment is outlined in chapter four. There are also other incidences of public works adjacent to the river, some of these are covered in chapter four. Another issue is pollution of the river with is also dealt with in chapter four.

Summary

The issues can be summarised as follows:

• as a toanga of Tauranga iwi ownership of the river is protected and guaranteed under Article 2 of the Treaty of Waitangi

• traditional usage of the river continues in spite of loss of legal title to the river

• it is unlikely given the importance of the river to local Maori that that they would have intentionally given up ownership of the river.

• in other cases the courts used British common law principles to demonstrate the riparian ownership of river beds

52 Waitangi Tribunal, Report of the Waitangi Tribunal on the Manukau Claim, p.74.
53 I have covered the issues pertaining to these schemes in my report on the hydro schemes, for more information this report should be consulted.
British common law is problematic when one considers the special circumstances of Maori customary ownership.

Ownership of river beds hinges on the navigable/ non-navigable distinction.

Under the provisions of the Coals Mines Act 1903, customary ownership of the beds of navigable rivers was vested in the Crown, this is a form of confiscation in itself.

The beds of non-navigable rivers are vested in riparian owners.

There is some evidence that the Wairoa is navigable but this requires further investigation.

Natural water is owned by the Crown.

The confiscation of Tauranga lands in 1864 impacts on the ownership of the river.
CHAPTER 3: THE TAURANGA CONFISCATION AND ITS EFFECT ON THE OWNERSHIP OF THE RIVER

This section of the report demonstrates how the confiscation affected the ownership of the river bed. It also highlights opposition to the extension of the confiscation to the west (sometimes called the north or true left) bank of the river.

The Confiscation

Perhaps the most significant event affecting the ownership of the Wairoa was the confiscation of Tauranga lands in 1865. After the battle of Te Ranga, the Crown confiscated large tracts of Maori land. Originally the Crown intended to confiscate the whole district, some 250,000 acres. However during peace negotiations between the Crown and "Ngaiterangi" on 6 August 1864, Governor Grey decided to confiscate only one quarter of all the land, 50,000 acres between the Wairoa and Waimapu rivers. To compensate "friendly" chiefs who owned land with the confiscation boundary the Crown decided to purchase the block North of the Wairoa River. This was all the land between Nga Kuri a Wharei and the Te Puna River, the land that became known as the Katikati and Te Puna blocks. The remaining land made up the 50,000 acre confiscated block. During the 1870s and 1880s, the Tauranga Commissioner's Court returned some land within the confiscated block to local hapu. Some of the returned land was located on the banks of the Wairoa.

From the 1880s, land tenure on the banks of the Wairoa has resembled a patchwork quilt, made up of squares of Crown confiscations, European and Maori land. Therefore it is difficult to ascertain the ownership of the Wairoa. Many questions hinge upon the acceptance or rejection of riparian ownership rights attached to land adjoining the river. The confiscation further complicates the issue as the Order in Council of 18 May 1865 effectively extinguished customary title for the whole of the Tauranga district. Furthermore, it is unclear whether or not the awards make by the Commissioners Court included riparian rights to the river bed.

The Effect of Confiscation on Customary Title

According to Evelyn Stokes, the confiscation extinguished Maori customary title. She says:

[while a great deal can be said about the nature of various transactions in this period, the important and fundamental issue is that, by the Order in Council 18 May 1865, all the people of Tauranga Moana were dispossessed of their lands by confiscation under the New Zealand Settlements Act 1863. This meant that customary or traditional title, papatipu, was extinguished for the whole area described in the Tauranga District Lands Act 1868.]

54 “Ngaiterangi” is an ambiguous, nineteenth century sources do not appear to have recognised the existence of other iwi in Tauranga District and may have lumped all people of Tauranga Moana under the one label.

55 For further discussion of the confiscation, see Evelyn Stokes “Te Raupatu O Tauranga; the Confiscation of Tauranga Lands, A Report Prepared for the Waitangi Tribunal, University of Waikato, Hamilton 1990.

56 Jordan says that Nga Kuri a Wharei is approximately where the road from Katikati meets the road from Waihi Beach. E T Jordan, Katikati in legend and in history, Katikati 1989 p.54

57 New Zealand Gazette, 1865, p.187 [A1].

58 Stokes, Te Raupatu... vol.1, p.145
She also notes that:

[b]ecause the whole Tauranga District was confiscated and thereby became Crown Land, there was no investigation of title to “customary land” (papatipu) by the Native Land Court. 59

While this may be the case several other points should be noted. Firstly, the Wairoa River Bed is never specifically mentioned as part of the confiscation. The area stipulated in the Tauranga District Lands Act 1868 does not specifically mention the river but it is within the confiscation boundary. The Act says:

All that land estimated to contain two hundred and fourteen thousand acres known as the Tauranga Block: Bounded on the North-east by sea from Ngakuri-a-whare point to Waimekei Creek in the South-east by a line from the mouth of the Waimekei Creek to Otara from thence to Otawawainuku from thence to Putiki on the South-west by a line from Putuki to the summit of the watershed of the dividing range of hills between the East Coast and the Thames Valley and thence following the said watershed northward from the summit of the Arolia Mountain to Ngakuri-a-whare Point.

Together with the Island of Tuhua or Mayor and such portions of Motiti or Flat Island as shall be adjudged to belong to Ngaiterangi Tribe or to individual members thereof. 60

The Order in Council of 18 May 1865 also does not specifically mention the river. 61

Another issue is the use of the river by local iwi for food, transport and other cultural purposes after the confiscation. Evelyn Stokes demonstrates that in the late nineteenth century there were a number of settlements on the confiscated block. There were kainga at Peterehema, Portipori and Puakekoni and Pa at Poteriwhi and further up in the Kamai ranges. 62 This is probably the pa at Kaimai built by Hori Tupaea in 1864. 63 Post-confiscation Native Reserves granted to local Maori were mainly in the vicinity of those villages around the river mouth. 64 As chapter one demonstrates, these villages continued to use the river as a source of food and cultural resources after the confiscation.

There is also the land returned to Maori during the confiscations. Unfortunately the remaining records of the Tauranga Commissioner’s Court do not stipulate whether block boundaries included the river bed. The Commissioners were empowered to bestow Crown grants and consequently those blocks returned became Maori freehold land.

The blocks returned to Maori by the Commissioners Court, bordering the Wairoa River were Paengoroa 2, Tauwharawhara, Kaimai, Mataihetu, Kumikumi 2, Portipori and Waimau 2. Also included were allotments 538 and 537 in the Parish of Te Papa which were reserves designated for local hapu. 65 Most of these blocks were on the western side of the river. Most of the eastern side of the river was part of the confiscated block. In addition, the Crown confiscated 5,000 acres on the west bank of the river. The table below shows those hapu who were awarded blocks within the Wairoa catchment.

Table 1: Claims to Blocks in the Wairoa River catchment region.

59 Ibid p.141.
60 Schedule, Tauranga District Lands Act 1868, 32 Vic, No.35.
61 New Zealand Gazette, June 27, 1865, p.187.
62 Evelyn Stokes, A History of Tauranga County, Figure 7.3 p. 92.
63 Steven Oliver and Alister Matheson, “Hori Tupaea”, in Orange (Ed) The People of Many Peaks, p.340.
64 Stokes, Te Raupatu Vol. 1, Appendix Nine, p.275.
As Stokes points out the ownership the blocks in the upper Wairoa proved difficult to determine. She gives the following example:

[when claims for the Kaimai Block were held in 1881 the following hapu were presented as claimants by Te Mete Raukawa: Ngati Mauri, Ngati te Rau, Ngati Rangiaia, Te Patungaherere, Ngati Motai, Ngati te Apunga, Ngati Takaha. Another group of claimants by Te Mete Raukawa: Ngati Te Apunga, Ngati Takaha. Another group of claimants included Ngaituwhiwhia, Ngati Makamaka, Ngati Kuku, Ngati Maki, Ngati Kuraroa, Ngati Tamapou, Ngati Mauri and Ngati Kahu. A third group of claimants comprised Ngati Hinerangi, Ngati Tokotoko, Ngati Kirihika, Ngaitamawhariua, Ngati Kirihika, Ngati Tu, Ngai Tai. This example indicates how complex the land claims were with each hapu trying to establish greater claims over everyone else in forest lands which traditionally all had shared.]

Obviously traditional land tenure in the upper Wairoa was far from clear. Stokes’ suggestion that hapu traditionally shared the forest lands supports the argument that the river and its riparian lands were an iwi resource.

If one rejects claims of iwi use of the whole of the river, it could be argued that the Commissioners Court gave block owners riparian rights to half the river bed under the ad medium filum aquae rule. If this is the case then legally riparian ownership was extinguished.

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66 Ibid p.162
by the Coal Mines Act 1903. This Act did not recognise the Treaty of Waitangi, nor did it provide for compensation of owners. It should also be pointed out that some blocks such as Paengoroa 2, are still in Maori ownership.\textsuperscript{67}

It is unclear as how McLaren Falls and the hydro schemes affect the river’s navigability.\textsuperscript{68} Further investigation of the term “navigable” is probably needed for a definitive answer on this issue. However if the upper Wairoa is non-navigable, then the bed adjoining those blocks of land currently in Maori ownership should still be Maori land.

If one accepts the concept of the river as a separate entity customarily owned by an entire iwi, the crucial event is the 1865 confiscation. The Treaty clearly guarantees customary ownership of toanga such as rivers and the Tauranga District Lands Acts extinguished customary title which was guaranteed by the Treaty of Waitangi. This concept was probably never considered by the Commissioner’s Court and the Crown assumed title. Therefore it appears that the river bed should be grouped with other land within the confiscation boundary as part of the Tauranga raupatu.

**Disputed Boundaries**

The Wairoa became the disputed boundary of the Tauranga confiscation. Contemporary evidence demonstrates the controversial nature of the confiscation. As Stokes points out:

\[\text{[Initially this was intended to be the land lying between the Wairoa and Waimapu rivers, but insufficient land was available for farms promised to military settlers and the additional area was retained west of the Wairoa.}\textsuperscript{69}\]

This extension of boundary caused further conflict between the government and some local hapu. The dispute highlights the compulsory nature of the confiscation and notes that one hapu in particular did not wish to give up land adjoining the river.

In 1866, government surveyors argued that the required 50,000 acres could not be found between the Waimapu and Wairoa rivers. The Crown decided to confiscate land to the west of the Wairoa. On 19 April 1866, Fredrick Whitacker declared that the confiscation boundary was to extend from the Wairoa towards Te Puna.\textsuperscript{70}

Pirirakau, a hapu of Ngati Ranginui opposed the Crown’s confiscation of their land on the west bank. Surveyors had their tents broken into and instruments stolen. Wiremu Tamihana of Ngati Haua attempted to mediate between Pirirakau and the Crown. He wrote to Civil Commissioner Clarke:

\[\text{[This is a request of mine to you. When I arrived here I heard that you were living in trouble, the reason, because the survey has crossed this side of the Wairoa and other places of Tauranga, that is the places which the Natives have agreed should be surveyed. I have heard that the surveys have reached those places, and that the chain has been taken twice on this side of the Te Wairoa, and twice on another place. Now do you hearken. I agree to their sending back the chain. This is a decided word of mine to you. Stop your work let it cease at Te Wairoa and at Waimapu on the other}\]

\textsuperscript{67} For further details see R Willan, “Hydro- Electricity…”

\textsuperscript{68} For further details see the photographs included in the document bank accompanying this report. Document, 14.

\textsuperscript{69} Stokes Te Raupatu... Vol.1, p.3

\textsuperscript{70} Whitacker, memorandum, 10 April 1866, in Appendices to the Journal of the House of Representatives A 20 1867, enclosure no. 3, in item 64.
Clarke explained to Hon. J C Richmond that:

Shortly after W. Thompson’s [Wiremu Tamihana Te Wahora] return from Wellington, I received the enclosed letter from him requesting that the surveys on the north side of the Wairoa might be stopped, a step which I could do in the face of the arrangement made by His Excellency the Governor and Mr Whittaker with the Tauranga Natives on his late visit, i.e., that if 50,000 acres, to be confiscated could not be obtained between the Wairoa and Waimapu rivers then the deficiency was to be made up on the North bank of the Wairoa.71

Of the confiscation of surveyor’s tools Clarke claimed that:

[The Act is a deliberate one, and had been in contemplation and the subject of runanga for some days previously. Its object - to stop the surveys on the north bank of the Wairoa, on the grounds that the land belonged to them, that they were no parties to the Tauranga surrender, and that the Ngaiterangi had no right to cede their territory.72

This extract clearly outlines the grievance. Pirirakau resented giving up their lands on the river bank and had never agreed to Grey’s confiscation.

Pirirakau resistance also prompted commentary from James Mackay, Civil Commissioner for the Thames area. Mackay suggested that some Pirirakau lands be allocated to other hapu, he said that:

[Their lands are principally between Te Puna and Wairoa, and I would suggest that a portion of these should be given to those friendly Natives who have lost land in the block of 50,000 acres before mentioned.73

The government saw Pirirakau as the aggressors in the dispute. However Hon G Graham put forward another view, he claimed that:

...the Natives wished to go on in the most friendly way, and had made cultivations outside of what they knew to be the boundary of the confiscated lands, a distance he believed, of twelve miles from the town of Tauranga. The government then attempted to survey the land which they had settled on, a land near to which with good management might easily have been obtained for 2s 6d an acre.75

Seen in this light, Pirirakau resistance to the extension of the confiscation boundary can be viewed as the hapu defending their property.

During a meeting with Mackay and Clarke at Motuhoa on 31 October 1866, some local chiefs agreed to extend the confiscation boundary beyond the eastern bank of the river. Mackay says:

I then proposed to give back the 5,000 [an area in excess of the 50,000 acres confiscation, located on the north bank] and to make the Ruangarara Stream and Te Puna River the inland boundary of the last named block, and leave those of the Waimapu and east Wairoa as surveyed to include 38,000 acres.

After some discussion my suggestion was unanimously assented to. Maungapohatu, the old and principal chief of the Pirirakau, consented on behalf of that hapu, and was exceedingly pleased that

71 Copy of a letter from W. Tamihana Te Wahora to Mr Clarke, Ibid, item No. 28.
72 Clarke, Civil Commissioner to Hon. J C Richmond, 20 September 1866, Ibid, item No.28.
73 Clarke to Richmond, 25 September 1866, Ibid, item, No.30.
74 Mackay to Rolleston, 25 September 1866, Ibid, item, No. 29.
75 New Zealand Parliamentary Debates, 1867, p978.
that a reserve of 300 acres being made for himself and his people at Popeha and Waikaraka.

The Pirirakau people did not attend the meeting, and did not answer my notice of the 27th October.76

The agreement was later legitimated by the Tauranga District Lands Acts. Pirirakau, however reiterated that they would not consent to the confiscation. On 6 November Mackay met with the hapu who made it clear that they did not want to give up their land.77 A letter to Clarke and Mackay reiterates the Pirirakau viewpoint:

...we will not agree to (or consent to give) the land from Te Wairoa extending to Waipapa. We will not consent to the money these words are true: No, for the money, No for the rebellion. Desist from your disputing (do not contend the point) stop where you are. This is a true word by the tribes of the Wairoa extending to Waipapa.78

Mackay estimated that the confiscated land on the north west bank would amount to 9,000 acres.79 However the final amount confiscated was approximately 5,000 acres.

Clearly, Pirirakau resistance demonstrates that the hapu did not wish to give up land on the north west bank of the Wairoa. Furthermore, only one chief and not the whole hapu gave consent to the extension of the confiscation boundary. This has several implications for the ownership of the river. Most importantly, if the ownership of the river is determined on the basis of riparian rights it illustrates opposition to the confiscation of riparian lands.

Similar arguments could be framed for other hapu with land adjoining the river. Although these hapu negotiated with the Crown, they also lost land. They had no choice but to give up their land. It is doubtful, given the importance of the river resource that if any hapu had had a choice they would have given up any land adjoining the river.

Compensation

In 1981 the Tauranga Moana Maori Trust Board Act was awarded $250,000 in compensation for the confiscation of Tauranga lands.80 Like the 1867 and 1868 Acts the Act refers to the general Tauranga area but does not specifically mention the Wairoa River.81 The compensation appears inadequate given the extent of confiscation. As a number of historians have noted, the lack of adequate compensation for the Tauranga raupatu under the provisions of the Tauranga Moana Maori Trust Board Act is an ongoing grievance of Tauranga Maori.82

Summary

The important issues pertaining to confiscation are:

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76 Mackay to Richmond, A.J.H.R. A 20, 1867, No.40.
77 Ibid.
78 Tribes of the Wairoa to Waipapa to Mackay and Clarke, 3 November 1866, Ibid, enclosure 3 in No. 40.
79 Mackay to Colonel Hamilton, 7 November 1866, Ibid, Enclosure 7.
81 The schedule refers to the land as mentioned in the Tauranga District Lands Act 1868, the schedule is quoted above.
82 See Stokes, Te Rapatu... Vol 1, see also reports by Vincent O'Malley and Hazel Rizebourough for the Crown Forestry Rental Trust.
• the confiscation extinguished customary title for the whole of the Tauranga District and there was no investigation of customary title by the Native Land Court

• the Commissioner's Court revested some riparian blocks in Maori ownership but it is unclear as to whether these wards included riparian rights to the river bed

• if the awards included any riparian rights and the Wairoa is navigable, owners lost riparian rights under the provisions of the Coal Mines Act

• if the river is non-navigable, riparian rights may still apply

• compensation for confiscation of the river bed appears inadequate, given the size of the payment and scale of confiscation.
CHAPTER 4: THE TWENTIETH CENTURY

This chapter outlines issues relative to twentieth century usage of the Wairoa River. The chapter is only a brief summary of these issues as the report mainly focuses on ownership of the river. Nevertheless, these are important issues that should be considered. Many of these issues are being dealt with in other claims. These issues demonstrate the extent to which control of the river has shifted from hapu to other sectors of the community. While prior to the advent of the Resource Management Act 1991, there was little consultation over the use of the river, reports presented to local bodies such as those written by Des Kahotea and Antoine Coffin indicate that this situation is changing.

Public Works

As one of the main rivers in the Tauranga district the Wairoa is the site of a number of public works. For example Stokes notes that a bridge was constructed across the river as early as 1885.

In 1906 the Omanawa Bridge was closed indefinitely because it was unsafe. Settlers in the area transported their goods by boat on the Wairoa River. A new bridge across the Wairoa River was also needed but the old one constructed in 1885 was not replaced till a ferro-concrete structure was completed in 1916.83

The bridge remains an issue of contention. In 1988 Ngati Kahu kaumatua Albert Brown told a local paper of his hapu’s desire for the Tauranga County Council to return 56 hectares either side of the Wairoa River bridge.84

Some public works have violated historic sites on the river banks. Coffin’s report points out that excavation works at Pukewhanake are an example of degradation of historic sites.85 The report also notes that historic sites are not protected and that the hapu want resource management protection for these sites or the option of a covenant.86 Des Kahotea’s report for the Tauranga District Council also notes the destruction of Pukewhanake Pa and several other public works. He says that:

Ngati Kahu has been affected in the past with the construction of the railway and State Highway 29 through their land. Their Pa Whakaheke was used as a borrow for fill for the railway line. The realignment of State Highway 2 encroached on the Marae area and this has created problems of noise and access with the use of Marae as traffic densities have increased.

The Pa at Pukewhanake was used as a borrow for the State Highway 2 realignment near the bridge of the Wairoa River. Human bones from burials on Pukewhanake were deposited on the road and Ngati Kahu elders placed them in the hapu cemetery.87

In addition to smaller scale public works such as the bridge, there was the larger scale power projects. A Ministry of Agriculture and Fisheries report outlines the development and extent of the schemes.

83 Stokes, ...Tauranga County, p.219.
84 Timespan, 26 April 1988 [B1]
85 Coffin p.13.
86 Ibid.
87 Des Kahotea, Tauranga Urban Growth Strategy Cultural Resource Inventory; Features of Significance to the Maori Community (tangata whenua): A Report for the Tauranga District Council, p.59.
The Wairoa is the largest catchment in the Tauranga district and it is also one of the most extensively modified mainly for hydro-electric power generation. In 1915 a powerhouse was completed on the Omanawa River, to supply electricity to Tauranga city. This was followed by the construction of a dam and powerhouse at the confluence of the Mangakarengorengo and Mangapapa Rivers and resulted in the formation of lake McLaren. For many years, water passed through McLaren Falls powerhouse and then travelled unhindered for 19 km to Tauranga harbour. More recently, the Wairoa has been diverted by means of a canal from the first powerhouse to Ruahihi powerhouse about 5 km downstream. Shortly after the Ruahihi scheme was commissioned in 1981, the canal collapsed and more than a million cubic metres of liquid mud and rubble poured into the Wairoa River. The canal has since been repaired and recommissioned in June 1983; the river is recovering much more slowly. The collapse occurred after data collection for this survey was completed, and it is not known exactly much it has affected the popularity of the trout fishery.

Headwater development in the Wairoa catchment was expanded considerably in the 1970s with the construction of two powerhouses on the Mangapapa, and the diversion of the Opuiaki, Omanawa and Mangapapa Rivers and the Ngatuhoa Stream into one canal feed the uppermost powerhouse. In total, there are five powerhouses operating in the Wairoa catchment and a total of 13 tributaries have been dammed or diverted. Collectively, the station provide just over 44 MW of electricity.

As a result of the hydro electric development, flow regimes in the Wairoa catchment have been drastically altered. Below the Lloyd Mandeno powerhouse the Mangapapa River holds water for all the headwater diversions, and of the diverted rivers only two receive a compensation flow, the Opuiaki River (0.28 m³/s) and Ngatuhoa Stream (0.14 m³/s). However, the Wairoa itself is subject to the largest fluctuations. Normally flow in the Wairoa immediately above the Ruahihi powerhouse is between 1-2 m³/s owing to a small compensation flow from the Mangakarengorengo River (0.04 m³/s) and minor stream inflows. In addition, a water right has been granted to canoeists and rafters for recreational purposes; 12m³/2 from McLaren Falls for 6 hours on 26 days per year (Fagar and Fagar 1981). This together with minor fluctuations due to power demand, obviously causes quite large changes in the flow of the Wairoa.

The Ministry's report discusses the results of a Tauranga Acclimatisation Society survey during the 1979-1980 fishing season on fishing in the Tauranga region. The report noted that the Wairoa was the most heavily fished catchment area with 57 per cent of respondents having fished there.

Hydro-electric development in Tauranga has been concentrated on one river catchment, the Wairoa. Since 1914, 13 tributaries on the Wairoa, Omanawa, and Mangapapa systems have been dammed and diverted to supply five power stations (Richmond 1983). As a result, the society estimates that up to one quarter of its fishing water have been lost because flows and lack of public access.

The report concluded by noting that:

...the magnitude of the hydro-electric development means that the Wairoa will probably continue to be an average fishery at best.

In addition to the lack of public access and detrimental effects on fisheries, the power schemes took Maori land for the power stations. Power authorities are empowered with the right to divert natural water for power generation purposes.

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89 Ibid, p.10.
90 Ibid, pp.10-11.
91 Ibid, p.22.
92 See R Willan “Hydro-electricity in the Wairoa River Catchment...”.
However, perhaps the most detrimental effect of the power schemes was the Ruahihi Canal collapse. The Ministry of Works' report on the canal failure outlines the extent of the collapse. The committee's chairperson noted:

On Sunday 20 September 1981 a major engineering failure occurred when a section of the canal supplying the Ruahihi power station collapsed, destroying 600 m of the canal formation, and spilling more than a million cubic metres of liquid mud into the Wairoa River.93

The event of the collapse of the canal alarmed nearby residents. A summary of the Ministry of Works' report says:

Witnesses A and B were both alerted by a sudden noise which was sufficiently unusual to cause the latter's children (living about 1.3 km away from the failure) to run inside. Shortly afterwards these and other witnesses saw brown sludge flowing down the valley of Ivy Creek.

Witness D has a mental image of water pouring smoothly over the top of fill A in a thin sheet. Within a minute he reached a position where he could see mud "fuming" down the bed of Ivy Creek.

Witness E reported that as water poured through the breach some part of Ruahihi Road alongside the forebay was still intact but was progressively collapsing and being carried away by the outrush of water. This was some minutes after the power station tripped out.94

Neither this report nor Beca Carter Hollings and Ferner's "Ruahihi Hydroelectric Power Scheme: Report on Remedial Works to Restore Power Generation", contain environment impact reports on the collapse of the Ruahihi Canal.95 Des Kahotea has noted the effect of the canal collapse on Ngati Kahu:

Ngati Kahu were disturbed by the collapse of the Ruahihi dam on the river where the ecology of the river they are familiar with was greatly changed by becoming shallower in depth.96

Further research may uncover more evidence on the environmental effects of the canal collapse.

**Fisheries Resources**

As Chapter One notes, the Wairoa River was a traditional source of fishing resources. The fishing resources of the river have been altered by twentieth century activities. The power schemes were not the only factors to affect fish stocks. The Ministry of Agriculture and Fisheries noted that by the end of last century local rivers were populated by introduced fish species. The report noted that:

Trout liberations began in the early 1880s with the release of two shipments of brook trout from the South Island. By 1886 these liberations had resulted in many reports of large brook trout being seen throughout the district. However subsequent introductions of brown trout (1886) and rainbow trout (1893) caused the brook trout populations to disappear. Releases of brown and rainbow trout have continued to the present day and most of Tauranga's rivers and streams contain mixed brown and rainbow trout fisheries.97

97 Richardson, Tiernay and Unwin, p.11.
According to Coffin, Ngati Kahu are opposed to this introduction of foreign trout species.\(^{98}\) Coffin’s report also notes the effect of modern industry and commerce on the river’s fishing resources:

> At present fish stocks are not as plentiful as they have been in the past. Ngati Kahu’s rangitiratanga and manawhenua has been mostly ignored as overfishing, commercial interests and pollution threaten the well being of fish stocks and in turn the people of Ngati Kahu.\(^{99}\)

Clearly there has been little consultation about the use of fisheries resources.

**Commercial Uses**

Ngati Kahu cite the use of the river for commercial purposes as another area where there has been little consultation.

Any commercial use of the Wairoa river and harbour margins must be agreed to by Ngati Kahu and other affected hapu. Boating, canoeing, rafting as well as commercial fishing such as selling and whitebaiting have been identified as commercial activities for profit. Ngati Kahu does not agree to commercial fishing or activities on the river and river mouth but would agree to activities set up by hapu or as joint venture with other hapu iwi or outside interests.\(^{100}\)

It should be noted that the nature of any future consultation is largely dependant on a finding on the ownership of the river.

**Recreational Use**

Several issues arise from the recreational use of the river. Ngati Kahu believe that power boats compromise the safety of their waka which currently operates on the river. Therefore, they believe that the use of power boats on the river is unacceptable.\(^{101}\) The hapu also note that they wish to assist other authorities in providing a safe swimming environment for all river users.\(^{102}\)

**Pollution**

There is some indication of pollution of the river. A regional council report notes that in 1992 the Department of Health adopted guidelines on suitable enterococci levels in bathing waters. According to the report, “[p]resence of enterococci in rural areas shows the presence of warm blooded animal faecal pollution”.\(^{103}\)

In 1992, the Bay of Plenty Regional Council carried out a survey of bathing sites on selected rivers in the Bay of Plenty. Two sites in the Wairoa river were sampled for purity; one at Bethlehem and the other below McLaren Falls dam. Both sites exceeded the Department of

\(^{98}\) Coffin, p.30.

\(^{99}\) Ibid, p. 27.

\(^{100}\) Ibid, pp.29-30.

\(^{101}\) Ibid, p.29.

\(^{102}\) Ibid.

Health's enterococal guidelines for bathing waters. The McLaren Falls site was at the lower end of a list of sites that exceeded a median guideline of 33 enterococci per 100ml. The site at Bethlehem showed evidence of more pollution, it exceeded the sample limit of 63 enterococci per 100ml but met the long-term median guideline of 33 per 100ml. The Bay of Plenty Regional Council concluded that these two sites were probably effected by agricultural runoff.

The regional council also surveyed the river for metal deposits in late 1994 and early 1995. On the whole the regional council found that the river contained acceptable metal concentrations for drinking water. The Wairoa had among the lowest levels of metal concentration of all rivers flowing into the Tauranga Harbour. Coffin points out the significance of development for Ngati Kahu. He notes that:

"The Wairoa river and Harbour have borne the toll of the pollution and modification through development and commercial enterprise. Ngati Kahu seeks a strong indication by authorities towards the preservation and restoration of the Wairoa Rivers [sic] resources."

The effect of pollution on other hapu in the catchment area should also be noted.

Other Issues

Coffin’s report notes activities that may affect the natural and physical character of the Wairoa river. The report notes that:

These activities may include and not restricted to:

- road building and improvements especially Station Road and State Highway 2
- construction of temporary or permanent structures (sheds, barns, houses, leanto, ramps, jetties, launching areas or similar structures). NOTE [emphasis in original]. At present all new or relocated dwellings shall be sited in a location where the building or any part of the building will be visible from any point on the eastern bank of the Wairoa River... This only relates to dwellings.
- removal or excavation of any material from river and harbour bottom, river banks or areas in close proximity
- excavations which may affect the natural and physical character in any way, eg drains, holding pools etc.
- dumping or removing of any material into the Wairoa River, banks, harbour margin or in close proximity...
- land intensive production on river banks.

Other potential pollutants are weeds and introduced animal species. Coffin notes that introduced pests cause damage to the environment. In addition to the animal pests weeds threaten to take over the banks of the river.

The Ministry of Agriculture’s report on fishing notes pollution caused by industrial and agricultural activity. The report says that:

104 Ibid, p.32. [J-01]
105 Ibid.
106 Joanne Deely, Natural Environment Regional Monitoring network Metals in the Bay of Plenty Rivers 1994-1995, Environment BOP Environmental Report 95/12, Figure 3.8, p.31. [G-1]
108 Coffin, p.22.
Additional activities which affect Tauranga's rivers and streams include effluent disposal (from freezing works, sewage systems, diary factories and fruit processing plants) and channel relocation/flood protection schemes, mainly on the lower Kaituna River. Forest Service plans to create exotic forests in the Kaimai Mamaku Forest Park may have negative implications for those watercourses in the Tauranga district which begin in this native forest catchment area. Activities associated with planting, tending and harvesting exotic and native timbers are likely to downgrade both water quality and quantity in headwater streams.\textsuperscript{112}

Clearly modern land and river uses affect the water quality of the Wairoa river. The Tribunal has dealt with similar issues in the Manukau Report where it said that:

In the Manukau the tribal environment of the lands and fisheries has been and continues to be severely prejudiced by compulsory acquisitions, land development, industrial development, reclamations, waste discharges zonings, commercial fishing and the denial of traditional harbour access.

The omission of the crown to provide adequate protection against these things is contrary to the principles of the Treaty of Waitangi.\textsuperscript{113}

This recommendation should be taken into account when considering the Wairoa River.

In summary it could be said that the twentieth century resource management issues-covered in this section, highlight the fact that local iwi have lost control of the Wairoa River. This is one consequence of the loss of ownership of the river.

The river is without doubt a toanga of local hapu. The Maori version of the Treaty of Waitangi guarantees Crown protection of toanga.\textsuperscript{114} Pollution, the destruction of historic sites and alteration of the river through public works have altered the environment of a culturally significant river. These actions have failed to recognise the mana of those hapu who occupy and own land beside the river.

\section*{Summary}

Issues pertaining to Twentieth Century use include:

\begin{itemize}
  \item public works have altered the river environment
  \item commercial and recreational activities also affect the river
  \item there is some evidence of water pollution
  \item in the past there was little consultation with Maori over use of the river, this is gradually changing
\end{itemize}

\textsuperscript{112} Richardson Teiflley and Unwin, p10-11.
\textsuperscript{113} Waitangi Tribunal, \textit{Manukau Report}, p. 74.
\textsuperscript{114} For further information see, Orange, \textit{The Treaty of Waitangi}, p. 257.
MAIN CONCLUSIONS

It is unclear when exactly Maori lost title to the Wairoa River bed. The most probable scenario is that the 1865 confiscation alienated the river bed. Due to the river's importance as a source of food and as a transport route it may have been viewed as belonging to the entire iwi, regardless of the hapu inhabiting the river banks. However, further evidence is needed to support this claim. Oral evidence would be of assistance. Therefore it stands to reason that at least until 1865, the river bed was customary land.

It is debateable as to whether the Commissioner's Court awards included riparian rights to half the river bed. If these rights were conferred, owners may have lost them by way of confiscation under the Coal Mines Act.

If title to the river was alienated through either of these measures, compensation paid to Maori under the Tauranga Moana Maori Trust Board Act appears inadequate.

Ownership is clearly dependent on the navigable/non-navigable distinction. The issue requires a legal opinion. If the Wairoa is not navigable it is likely that half of the bed of the river accompanying Maori land is also Maori land.

Twentieth Century use of the river paid little attention to the rights of local Maori as tangata whenua. There is considerable evidence that local Maori, Ngati Kahu in particular, valued the Wairoa as a food and cultural resource even though they are no longer economically dependent on it. As the hapu most closely associated with the river Ngati Kahu appear to have been adversely affected by the loss of control over the river. However as Pirirakau resistance demonstrated other hapu were also affected. The Wairoa is undoubtedly a significant resource for the whole of Ngati Ranginui iwi. The impact of confiscation and exploitation of this resource on the whole iwi should be considered.
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APPENDIX ONE: STATEMENT OF CLAIM
WHEREAS claims have been filed with the Waitangi Tribunal under PC 27 filed on 29th October 1986, PC 36 filed on 1st December 1986 and amended on 20th May 1987 and PC 40 filed on 20th January 1987.

AND WHEREAS the subject matter of those claims is virtually the same AND WHEREAS it is expedient to combine those claims as well as PC 92 AND WHEREAS it is appropriate in combining the claims aforesaid to file an amended claim AND WHEREAS by authority of the various claimants under the claims aforesaid the claimants hereto should sign for and on behalf of Ngati Ranginui and all its subtribes.

NOW THEREFORE the claimants namely ANARU KOHU, ALEX TATA, MATIU TARAWA, MAURICE NGATOKO, MANU TE PERE, HENARE RAHIRI, TAMEHANAREWITI, ALBERT BROWN, THOMAS McCUSAULD, and HENARE TEKOARI on behalf of themselves and on behalf of Ngati Ranginui whanui claim:

THEY are prejudicially affected by the following acts of the Crown:

1. the wrongful dispossession of lands of Ngati Ranginui confiscated as a result of Order in Council dated the 18th May 1865 which lands are described in full in the Schedule to the Tauranga District Lands Act 1867 and which confiscation was authorised by the New Zealand Settlements Act 1863 and the said Tauranga District Lands Act 1867.

2. the passing of the Tauranga Moana Trust Board Act 1981 which enabled an unjustified payment in full and final settlement of lands confiscated as referred to in 1. hereof.

3. the Crown through its judiciary failing to accept as part and parcel of New Zealand domestic law the Treaty of Waitangi.

4. the passing of legislation into law since 1840 which have affected Māori (and therefore the claimants) such that Ngati Ranginui have undergone a process of cultural deprivation in adapting to the Westminster system of central and local government the lack of recognition given to Māori by this system having resulted in the breakdown of cultural and social patterns as well as values.
5. the Crown wanting to dispose of the land and buildings of the former Katikati Railway Station without assuring that the same should pass to Ngati Ranginui or any of its subtribes in partial reparation of the confiscation of certain other tribal lands as are generally referred to in 1. hereof.

6. the transfer of lands claimed by Ngati Ranginui pursuant to the State Ownership Enterprises Act 1986 or the policy of the Crown to do so.

7. the acquisition of the Te Wairoa River.

AND that such acts or policy or practice and authorising or relevant Acts or regulations are inconsistent with the principles of the Treaty of Waitangi.

BY way of redress the claimants seek recommendations from the Tribunal:

1) to fully restore the untrammelled use and control guaranteed by the Treaty of Waitangi of all lands confiscated by the Crown pursuant to its acts policies and omissions (past and present) where it is possible with any decision of such like to form the basis of any agreement which can be consulted on between the claimants and the Crown for the final approval by the Tribunal (not unlike the Court of Appeal's recent decision) so that where land is given it is part and parcel of a recognition of any geographical significance to the tribes of Tauranga and where compensation is in the form of money that it represents an equitable redress for 122 years of deprivation.

2) to repeal the Tauranga Moana Trust Board Act 1981 and to settle all claims in accordance with 1) hereof before submitting, if necessary, a new Act to represent the fair and reasonable expectations of the tribes of Tauranga.
3) to seek an early and urgent implementation of the Treaty of Waitangi as part and parcel of domestic law in New Zealand.

4) to reverse any process of assimilation by the Crown to unequivocally give a public assurance that the tribes of Taurang will be consulted on all matters affecting them and will be listened to by both central and local government.

5) to recommend that no lands forming part and parcel of assets to be transferred from the Crown to the State Enterprise Corporations be transferred without full consultation with Ngati Ranginui who should have the final power to veto.

6) the return of the ownership of the Te Wairoa River to Ngati Ranginui.

WE seek the following:

1. To have a researcher investigate this claim and report before it is heard.

2. To have a researcher appointed to report on the history of the claim.

3. To request the Tribunal to appoint Counsel to assist us and nominate JOHN DAVID RANGITAUIRA of Rangitauira & Lake, Solicitors, P O Box 1693, Rotorua.

4. To amend and to replace the claim PC-27 by this claim.

5. To reserve in favour of the claimants to further amend by way of inclusion or exclusion any other matters affecting Ngati Ranginui.

6. That the claim be heard at Judea Marae, Tauranga, or any other Marae nominated by the claimants.

THE following persons are to receive notice:

The Solicitor-General
Minister of Lands
Tauranga City Council
APPENDIX TWO: DIRECTION COMMISSIONING RESEARCH
WAITANGI TRIBUNAL

CONCERNING
the Treaty of Waitangi Act 1975

AND
the Tauranga raupatu claims

EXTENSION TO DIRECTION COMMISSIONING RESEARCH

1 Pursuant to clause 5A(1) of the 2nd schedule of the Treaty of Waitangi Act 1975, Rachael Willan of Wellington was commissioned on 29 March 1996 to prepare a research report for Wai 215 the deadline for which was 9 August 1996.

2 An extension to the deadline has been agreed to and the new completion date is 30 September 1996.

3 The Registrar is to send copies of this direction to:

Rachael Willan
Claimants
Claimant Counsel
Solicitor General, Crown Law Office
Director, Office of Treaty Settlements
Secretary, Crown Forestry Rental Trust

Dated at Wellington this 19th day of July 1996.

Chief Judge E T Durie
Chairperson
Waitangi Tribunal
OFFICIAL

WAITANGI TRIBUNAL

CONCERNING

the Treaty of Waitangi Act 1975

AND CONCERNING

the Tauranga raupatu claims

DIRECTION COMMISSIONING RESEARCH

Pursuant to clause 5A(1) of the second schedule of the Treaty of Waitangi Act 1975, the Tribunal commissions Rachel Willan, of Wellington to complete research reports for this claim covering the following matters:

(a) the acquisition of land for the Katikati railway station and circumstances surrounding the recent disposal of the land and railway buildings.

(b) the ownership of the Wairoa river and any other issues of relevance with regard to the river.

(c) an analysis of the Maori Land Information Office block histories of certain blocks identified in the Wai 362 statement of claim, and any further research deemed necessary:

  Oropi 1 and 2
  Weraroa
  Lots in the Parish of Te Papa
  Otauna
  Moukunui

(d) an account of the taking of land under the Public Works Act from the following blocks, with special emphasis on land taken for power stations and other electricity purposes:

  Omanawa
  Kaimai no.3
  Whaitikuranui
  Paengaroa

Page 2. This commission ......................
This commission commences on receipt of written confirmation of the commissionee's acceptance of the terms and conditions of the commission.

The commission ends on 9 August 1996 at which time one copy of each report will be filed in unbound form together with an indexed document bank and a copy of each report on disk.

The report may be received as evidence and the commissionee may be cross examined on it.

The Registrar is to send copies of this direction to:

Rachel Willan
Claimants
Counsel for Claimants
Solicitor General, Crown Law Office
Director, Office of Treaty Settlements
Secretary, Crown Forestry Rental Trust
Director, Te Puni Kokiri

Dated at Wellington this 29 day of March 1996.
APPENDIX THREE: MAPS.
WAIROA RIVER AND TRIBUTARIES

Ngamuwhine River
Te Ahuru Stream
Rataroa Stream

Mangakarengorongo River
Ohourere Stream

Powerhouses
1 Ruahihl
2 McLaren Falls
3 Lower Mangapapa
4 Lloyd Mandeno
5 Omanawa Falls

Source: Hydro-electric development in the Wairoa River Catchment Fisheries Report