HE MAUNGA RONGO:
REPORT ON CENTRAL NORTH ISLAND CLAIMS
STAGE ONE

PART V

JULY 2007

The Waitangi Tribunal
141 The Terrace
WELLINGTON

The Honourable Parekura Horomia
Minister of Maori Affairs
Parliament Buildings
WELLINGTON

31 July 2007

Tena koe
E te Minita o nga Take Maori

Tena koe e te rangatira e noho mai na i te tunga tiketike a whakatutuki nei i nga wawata o to iwi Mäori. Kati tena tatou i runga i te ahuatanga o nga mate huhua puta noa i te motu mai Muriwhenua ki Murihiku whakawhiti atu ki Wharekauri. No reira nga mate haere atu ra, haere atu ra, oti atu. Tatou te hunga ora, tena koutou.

We have the honour of presenting you with Part V of our report on the claims of iwi and hapu of the central North Island region.

The Central North Island inquiry addresses concerns raised in over 120 claims from across three inquiry districts – Rotorua, Taupo and Kaingaroa – which were brought together in the largest inquiry ever undertaken by the Tribunal. The region covered by the inquiry stretches from the coastal Bay of Plenty, inland to Lake Taupo and eastwards across the Kaingaroa plains.

In Part V we address the claims relating to the importance of water and geothermal resources, which attracted the ancestors of the claimants to settle and prosper in the CNI region. We consider these claims in some detail by analysing the way both Maori and the Crown have conceptualised, claimed and utilised the resources of the CNI. In reviewing the story of the water and geothermal resources of the CNI we identified how Maori and the Crown have talked past each other on nearly all fronts. On the one hand, CNI Maori claim that these resources were taonga and that the Crown has actively sought to undermine their rangatiratanga over their taonga by appropriating the resources or the right to regulate them. On the other hand, the Crown claims the right to own and/or regulate the resources as part of its right to govern for the benefit of all New Zealanders. As our review in the subsequent chapters demonstrates, two world views and two systems of law and authority have clashed. Central to this story are the relevant Treaty principles, the legal issues concerning the ownership of water (whether in lakes, rivers or streams), fisheries, and geothermal resources, and the Crown's regulation of these resources.

We focus on Lake Taupō-nui-a-Tia as a case study, as this lengthy story so aptly demonstrates Maori and Crown interaction in respect of a major waterway, over issues such as the introduction of trout into an important indigenous fishery; the Crown's protection of public rights of angling access to the lake, and boating; the circumstances in which the Crown secured the use of the lake for hydroelectricity purposes; and the impacts on the environment – and Māori – due to the associated manipulations of the lake level.

We contrast that history with the story of other water resources such as springs, lakes, rivers and estuaries within the CNI. As in the Lake Taupo chapter we consider the effects of loss of ownership and rangatiratanga over these resources. In doing so we draw on specific case studies including the impacts of the Crown's environmental management regime on Lake Taupo, and rivers and wetlands within the CNI such as Hamurana and Taniwha Springs; the Puarenga Stream; the Kaituna River to the Maketu estuary; the Tarawera River and Matata estuary; and the impacts of forestry sites on land and water recources at Murupara.

Finally we consider the nature and extent of the CNI iwi and hapu interest in geothermal resources and the extent to which the Crown has recognised and provided for their customary rights and Treaty interests.

We uphold the claimants in their fundamental greivance that the root of all Treaty breaches in their rohe was the Crown's failure to give effect to the Treaty guarantee to Maori of tino rangatiratanga (autonomy), and their entitlement under Article 3 to the same rights and powers of self-government as settlers. In our view, Maori and the Crown's interactions over water and geothermal resources has come at the cost for Maori of the loss of authority and control over their natural resources.

The conclusion of the Part draws its themes and overall findings together.

We have made no general recommendations in respect of possible settlements. We prefer instead to leave it to the parties to negotiate settlements which represent their choices rather than ours.

Judge C. L. Fox

Presiding Officer

PART V

TE TAIAO: THE ENVIRONMENT AND NATURAL RESOURCES

Introduction

The Central North Island is endowed with many water and geothermal resources, which attracted the ancestors of the claimants to settle and prosper. They drew on the bounty of these waterways and geothermal resources and because of them they were able to make the CNI their home. We were told that just as the sea and its food provided those on the coast with a major source of protein, so it was with the waterways and aquatic life of the central North Island area. Many of the claims before us, therefore, relate to the importance of these resources in the cultural, spiritual and economic life of the iwi and hapu of the CNI. Any loss or degradation has been, and continues to be, keenly felt.

In this part we consider these claims in some detail by analysing the way both Maori and the Crown have conceptualised, claimed and utilised the resources of the CNI. In reviewing the story of the water and geothermal resources of the CNI we identified how Maori and the Crown have talked past each other on nearly all fronts. On the one hand, CNI Maori claim that these resources were taonga and that the Crown has actively sought to undermine their rangatiratanga over their taonga by appropriating the resources or the right to regulate them. On the other hand, the Crown claims the right to own and/or regulate the resources as part of its right to govern for the benefit of all New Zealanders. As our review in the subsequent chapters demonstrates, two world views and two systems of law and authority have clashed. Central to this story are the relevant Treaty principles, the legal issues concerning the ownership of water (whether in lakes, rivers or streams), fisheries, and geothermal resources, and the Crown's regulation of these resources.

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Finally we consider the nature and extent of the CNI iwi and hapu interest in geothermal resources and the extent to which the Crown has recognised and provided for their customary rights and Treaty interests.

In summary the chapters of this part are:

- Chapter 17 - Te Taiao: the environment and natural resources: Treaty principles and standards
- Chapter 18 - Lake Taupo-nui-A-Tia: Taupo Moana
- Chapter 19 - Rangatiratanga – kawanatanga: environmental management
- Chapter 20 - Ruaumoko/Ruaimoko and Ngatoroirangi: the geothermal resource of the Central North Island

Issues

Our key issues for this part are:

- Are the claimants' waterways, fisheries and geothermal resources of the Central North Island, taonga over which they exercised rangatiratanga?
- If so, did the Crown actively protect CNI iwi and hapu rangatiratanga over these taonga in the CNI so that they could continue to use and enjoy these resources in accordance with their own cultural preferences?
- What have been the impacts on CNI iwi and hapu of Crown acts, policies and omissions affecting waterways, fisheries and geothermal resources?

We turn now to consider the relevant Treaty principles and standards for the Crown's exercise of kawanatanga in respect of water and waterways (including fisheries), geothermal resources and the environment.

CHAPTER 17

TE TAIAO

THE ENVIRONMENT AND NATURAL RESOURCES

TREATY PRINCIPLES AND STANDARDS

> Statutory provisions for giving effect to the principles of the Treaty of Waitangi in matters of interpretation and administration should not be narrowly construed.... (New Zealand Court of Appeal)[1]

INTRODUCTION

Given the terrain and climate of the Central North Island (CNI), its waterways, fisheries and geothermal resources were of great value to its peoples. We were told that these resources were extensively used in accordance with their traditional practices, customs and laws. They were, it was claimed, prized as taonga over which they exercised rangatiratanga and kaitiakitanga. These resources were generally fundamental to the life of the CNI iwi and hapu, but the Crown, they contend, has not actively protected or provided for these taonga or the right of Maori to exercise their authority over them. The Crown, on the other hand, rejects these allegations.

We received much information from the claimants on the importance of water, waterways, fisheries and geothermal resources during this inquiry. Where we have sufficient evidence to make generic or preliminary findings we do so. Other claims we mention either as examples of points that are to be noted or as issues of particular concern to some claimants.

In all cases, and before we traverse the detailed history of CNI Maori and Crown interaction over these resources, it is important to establish what Treaty principles and standards apply to these types of claims and the relevant duties of the Crown and Maori that flow from them.

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[1] *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553, p 558

ISSUES

After considering the manner in which the parties argued the issues before us, we have identified the following issues for determination in this chapter.

- What are the relevant principles and Treaty of Waitangi standards applicable to the claims concerning taonga (prized properties or other items of value)?
- Are waterways, fisheries and geothermal resources taonga over which Maori exercised rangatiratanga?
- Was introduced English common law sufficient to recognise Maori customary or native title to such natural resources?

ISSUE 1 – THE PRINCIPLES OF THE TREATY OF WAITANGI

The first issue we consider is the relevant principles and Treaty standards applicable to claims to natural and physical resources and environmental management.

The Claimants' Case

The claimants generally look to the actual text of the Treaty of Waitangi and claim that under Article 2, the Crown guaranteed to protect 'taonga' (including their resources) and the exercise of their 'tino rangatiratanga' or authority over taonga.[2] The majority of counsel adopted the generic submissions filed by Mr Bennion or the submissions filed by Ms Feint on the principles applicable, namely rangatiratanga, the Crown's duty to actively protect Maori interests, and its duty to provide redress.

The generic submissions on the environment, presented by Mr Bennion for the claimants, briefly state the principles he contends are relevant to claims concerning the environment including natural and physical resources. These are listed as being:

1. The Treaty covered all natural and physical resources by explicit reference or by the term 'taonga'.
2. It provided for Treaty rights holders having self-management of resources so long as it was their wish and desire to do so.
3. Conservation measures must be applied [by the Crown] as a last resort and sparingly.

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[2] A Sykes and J Pou, Submissions in Reply to Crown Closing Submissions 3.3.133, p 37; J Kahukiwa and L Bunge, Closing Submissions for Ngati Rangitihi, 3.3.108, pp 22-23; K Feint, Closing Submissions for Ngati Tuwharetoa, 3.3.106, p 112

4. Where the Crown delegates powers, such delegation must accord with the Treaty.

5. Equitable 'set off' is required where conservation measures are applied to Treaty rights holders.[3]

The majority of claimants accept that there may be occasions where the Crown, exercising the kawanatanga which was part of the Treaty compact, may interfere in the rangatiratanga or with the property of Maori. But this power, they submitted, is constrained by a number of factors; we discuss these below.[4] The Tribunal was also referred to the need for the Crown to take an environmental justice approach in terms of its duty of active protection and its obligation to provide redress where claims are well founded.[5]

The Crown's Case

The Crown, for the purposes of the inquiry generally, submitted that Article 1 permits the Crown to undertake the complete governance of New Zealand. Crown counsel submitted that on the terms of Article 1, by the governance treated for and obtained, the Crown is the sovereign authority in New Zealand. Relying on Professor Hugh Kawharu's interpretation of the Maori text of the Treaty, the Crown submitted that *if* the Treaty means that the Crown promised to protect rangatiratanga, so did Maori promise to acknowledge and protect kawanatanga.[6]

The Crown submits that from the Treaty onwards, the relationship would be between the Crown and subject. Any conception of separate sovereignty or parallel governments does not fit within the Treaty. The Crown acknowledged, however, that it is obliged to exercise its powers honourably and in accordance with the protections promised in the Treaty.[7]

The Crown contends that tino rangatiratanga or the 'unqualified exercise of their chieftainship', means more than ownership of property rights. It connotes a degree of Maori control and management over what Maori own. 'It is rangatiratanga over the subject matter of Article 2 rather than over issues the preserve of Article 1.'[8] What this means, in the Crown's view, is that the debate is about how much 'self-management' is consistent with the Treaty and how this properly changes over time.

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[3] T Bennion, Generic Closing Submissions on Natural Environment and Resource Management Issues, 3.3.78, pp 10-11
[4] Bennion, 3.3.78, p 13
[5] Bennion, 3.3.78, pp 14-15
[6] Closing Submissions of the Crown, 3.3.111, part 1, p 21
[7] Crown closings, 3.3.111, part 1, p 21
[8] Crown closings, 3.3.111, part 1, p 22

Article 2I adds the further dimension by declaring that individuals would have all the rights and obligations of citizenship.[9] Striking the right balance between the rights of people to act as individuals and the exercise of chieftainship over the subject matter of Article 2 will always be a question of judgment over which there will be a range of reasonable views.

Therefore, it was contended, the Tribunal should take a less 'aspirational' and a less 'presentist' approach to the issues in this inquiry. This 'less than' approach was to be preferred to the approach reflected in earlier Waitangi Tribunal reports. Instead, this Tribunal should focus on practical and realistically achievable ways in which the Crown and Maori can or should meet each of their on-going Treaty obligations.[10]

From the Crown's perspective, Tribunal findings which address the contemporary realities of Government are the most persuasive and of the greatest assistance.[11] Quoting the Court of Appeal in the *Lands Case* (1987), the Crown submitted that the Tribunal must also apply the broad-based Treaty principles in a way that acknowledges that decisions must be assessed having regard to what was reasonable in the circumstances.[12]

The Crown acknowledges:

- That it has a duty to make informed decisions. But it argues there is not a standard duty to consult. Rather, whether the Crown should or should not consult, depends on the nature of the decision to be made. It must be judged on the particular circumstances existing at the time. The nature of the consultation will vary depending on the nature of the issues involved.[13]

- That the Crown has a duty analogous to a fiduciary duty, but that is different from a fiduciary duty known to the common law or in equity.

- That a right to development may be relevant, albeit in very limited form. The Tribunal should provide some delineation of the extent of the right.[14]

- That the principle of options is relevant as it exemplifies the tension that governments have felt for much of our history, namely, the exercise of chiefly power under Article 2 versus the rights of individual citizens under Article 2I.[15]

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[9] Crown closings, 3.3.111, part 1, p 23
[10] Crown closings, 3.3.111, part 1, p 23
[11] Crown closings, 3.3.111, part 1, p 24
[12] Crown closings, 3.3.111, part 1, p 24; and see *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641
[13] Crown closings, 3.3.111, part 1, p 28
[14] Crown closings, 3.3.111, part 1, pp 31-32
[15] Crown closings, 3.3.111, part 1, pp 35-36

- That the decision of the New Zealand Court of Appeal in the Ngai Tahu Whale Watch Case is relevant. According to the reference given the Crown accepts the view expressed in that judgment that:

> Statutory provisions for giving effect to the principles of the Treaty of Waitangi in matters of interpretation and administration should not be narrowly construed. We accept that s 4 of the Conservation Act requires the Marine Mammals Protection Act and Regulations to be interpreted and administered to give effect to the principles, at least to the extent that the provisions of the Marine Mammals Protection Act and Regulations are not clearly inconsistent with the principles. Further than that it is unnecessary to go in this case ….[16]

- That the Crown is responsible for the parameters of the local government legislation and the related Resource Management Act 1991 (RMA) within which decisions are made by local and regional councils. However, the Crown is not responsible for the particular decisions that are made by those entities.[17] The Crown considers sections 6 and 8 of the RMA to be consistent with Treaty principles. The combined effect is to give significant protection to Maori interests. It was contended that the Treaty itself requires a balancing of interests and that sections 6-7 of the RMA merely indicate the interests which must be balanced in the context of the RMA. In practice, many of the matters of national importance listed in section 6 are likely to be compatible and complementary to section 6(e) and (f).

- That the Treaty requires Maori interests to be given significant weight and protection, but the Crown submits that the Tribunal should articulate fairly a process of balancing interests that the Crown should use to be able to meet its obligations to Maori and other citizens. Its requests that the Tribunal explain and articulate the balancing processes should not be ignored, particularly in relation to the environment and future management of natural resources.[18] The Crown argues that it is unable to 'release itself from the obligations it owes all New Zealand citizens including Maori and so must include other interests in any balancing process.'[19] To quote from the Crown's submissions:

> The Crown says that a careful process of balancing is more consistent with the underlying values of reciprocity reflecting the unique relationship that flows from the Treaty of Waitangi than an approach that denies the elected government the ability to act except in extremely constrained and unusual circumstances. …
>
> The issue may be most pressing in 20th century issues and environmental issues where a decision which directly affects one Maori group may directly or indirectly affect a number of other interested groups, Maori and non-Maori around the country. The Crown is required to balance the various interests involved in such a

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[16] *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553, p 558
[17] Crown closings, 3.3.111, part 1, pp 52-53
[18] Crown closings, 3.3.111, part 1, pp 37-40
[19] Crown closings, 3.3.111, part 1, p 37

> decision. Where issues of significant national infrastructure are included (as with electricity), such a balancing process must occur by considering the relative interests in the national context.[20]

Crown counsel referred us to a number of Canadian Supreme Court decisions to emphasise the Crown's request that this Tribunal develop a Treaty standard or a framework of Treaty analysis that better reflects the multiplicity of factors and interests which a government must consider.[21] The Crown contrasted what it perceives to be the vagueness of the Tribunal approach to defined tests developed by the Supreme Court of Canada where it has reviewed the Canadian Government's legislative objectives for enactments or regulations that have the effect of limiting existing aboriginal rights affirmed in section 35(1) of the Canadian Constitution Act 1982.

Counsel submitted that the Treaty requires that Maori interests are given particular weight and protection by the Crown. It was contended that the present jurisprudence developed by the Tribunal to explain and analyse how the Crown should provide such protection, does not explain and articulate the balancing processes that the Crown must engage in. It contends that the Crown's obligation to undertake such processes cannot be ignored and that there is a need to develop and articulate them. This is particularly the case in relation to contemporary issues, such as those relating to the environment and future management of natural resources.[22]

The Claimants' Replies

A number of counsel made submissions in reply to the Crown. Mr Pou and Ms Sykes pointed out that the Crown's submissions on the Treaty articles are in effect that authority and control of natural resources and nga taonga katoa rests with the Crown and were ceded to the Crown as an aspect of kawanatanga.

The corollary of this, it was submitted, is that rangatiratanga from the time of the Treaty necessarily excluded any concept of authority, control, responsibility or stewardship in respect of natural resources and people which are taonga. This is, they say, the kind of solution proffered by the Resource Management Act 1991.[23] In summary this cannot be what was intended at the time of the signing of the Treaty and it certainly is not what the Treaty expressly declares.

Mr Taylor accepted the need for certain balancing of interests flowing from the partnership created between the Crown and Maori in relation to the Treaty of Waitangi.[24] However many of the matters protected by the Treaty are Maori property

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[20] Crown closings, 3.3.111, part 1, p 37
[21] Crown closings, 3.3.111, part 1, pp 38-40
[22] Crown closings, 3.3.111, part 1, p 40
[23] Sykes and Pou, Amended Submission, 3.3.133(a), p 36
[24] M Taylor, Generic Submissions for Political Engagement, Tourism, Geothermal, Claimant Specific in Reply to Crown Closing Submissions, 3.3.141, pp 24-25

rights so fundamental that there must be constraints imposed upon the manner in which the Crown can exercise its right to govern.[25]

Tribunal's Analysis and Findings on the Relevant Treaty Principles

By its preamble, the Treaty of Waitangi Act 1975 is declared to be an Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi. The Waitangi Tribunal has been established to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

Under section 5 of the Treaty of Waitangi Act 1975, and in exercising any of its functions, the Tribunal must have regard to the two texts of the Treaty set out in the Schedule 1. For the purposes of the Act, the Tribunal shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them.

By section 6 (1) of the Treaty of Waitangi Act 1975 the Tribunal is required to assess claims against the principles of the Treaty. That is our jurisdiction. It is a jurisdiction that is not in any way qualified other than by the Treaty of Waitangi Act 1975 itself. We cannot avoid that jurisdiction by watering down those principles; nor can we ignore the years of Waitangi Tribunal jurisprudence that has been devoted to environmental and natural resource management issues. We do not consider that the reports we refer to take an overly 'presentist' or 'aspirational' approach as many of them have resulted in quite significant settlements. These reports include the *Muriwhenua Fishing* and *Ngai Tahu Sea Fisheries* Reports. Alternatively, they have contributed to policy changes that have provided some relief for Maori claimants. Other reports such as the *Mohaka River Report* and the *Whanganui-a-Orotu Report* remain to be considered in negotiations but the compelling nature of their findings cannot be avoided and those findings are sometimes echoed by dicta in the superior Courts as we identify below. Therefore, we believe that it would be wholly unjustifiable in terms of the evidence before us to depart from that significant body of jurisprudence.

We also accept the arguments made by the claimants that the Treaty and its principles have an enduring, if not an eternal, role in our legal system. As one of the judges of the Court of Appeal stated in 1987:

> The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply. At its making all lay in the future.[26]

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[25] Taylor, Submissions in reply, 3.3.141, pp 25-29
[26] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 692 per Somers J

In identifying and discussing the principles of the Treaty of Waitangi, we are also mindful that we should not lose sight of the underlying unitary nature of the Treaty principles. These principles are all inextricably linked by the two texts of the Treaty itself, the circumstances within which the Treaty was signed and the rights and obligations of the Treaty partners to act towards each other reasonably and with the utmost good faith.[27]

In attempting to identify the Treaty principles relevant to the claims, we have been mindful of the comments made by the Privy Council in the *New Zealand Maori Council v Attorney-General* (1994) when the principles of the Treaty of Waitangi were described as:[28]

> … the underlying mutual obligations and responsibilities which the Treaty places on both parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty … With the passage of time, the 'principles' which underlie the Treaty have become much more important than its precise terms.

We turn now to those principles that the Tribunal considers are relevant to assessing claims to waterways, fisheries, and geothermal resources, namely:

- Partnership and Mutual Benefit with a resultant duty to consult
- Reciprocity-the Essential Compact: Kawanatanga (right to govern) for Rangatiratanga (autonomy/self-government)
- Active Protection of Lands, Estates and Taonga with duties analogous to fiduciary duties
- Active Protection of Rangatiratanga including in Environmental Management
- Options and Equity of Treatment
- Prejudice Requiring Redress

1. The Overarching Principles - Partnership and Mutual Benefit

The Waitangi Tribunal has previously said that New Zealand was founded on the basis of a Treaty that sought to give effect to the 'high ideals of justice' as contained in the instructions of 1839 from Lord Normanby to William Hobson.[29] Effectively, those

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[27] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, per 693 per Somers J who stated a breach of a Treaty provision must be a breach of the principles of the Treaty.
[28] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517
[29] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), pp 190-191

instructions required that Maori rights were to be protected during the settlement of the country. So it is that the twin motives of protection and colonisation are reflected in the Preamble and articles of the Treaty. The Muriwhenua Fishing Tribunal noted that:

> Both parties expected to gain from the Treaty, the Maori from new technologies and markets, non-Maori from the acquisition of settlement rights and both from the cession of sovereignty to a supervisory state power. For Maori, access to new markets and technologies necessarily assumes a sharing with the settlers who provide them, and for non-Maori, a sharing in resources requires that Maori development be not constrained but perhaps even assisted where it can be. But neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit. It ought not to be forgotten that there were pledges on both sides.[30]

Thus it was a basic object of the Treaty that two peoples would live in one country. In doing so they would mutually benefit from their relationship. The Treaty was the first step in forging the foundation for a partnership.[31] The Court of Appeal has described the relationship between Mäori and the Crown.[32] Arising from the principle of partnership were the reciprocal duties of the parties to act towards each other with reasonableness and the utmost good faith.[33] So long as the honour of the Crown was upheld, Maori were to remain loyal to the Queen and fully accept her Government. The Crown in return was actively to protect Maori interests.[34]

Duty to Consult

As we noted in Chapter 3 emerging from the principle of partnership, the Crown has a duty to consult Maori on matters of importance to them, and to obtain their full, free, prior, and informed consent to anything which altered their possession of those lands, resources, and taonga guaranteed to them in Article 2. The protection accorded to Maori rights in terms of the Treaty extends to the environment and natural and physical resources, first by its express terms in both the Maori and English texts and secondly by the principles of the Treaty. As a result the Crown was and is obliged to make informed decisions about the impact of proposed omissions, policies, actions, or legislation on Maori interests in the environment and natural resources.[35] Justice Thomas on this issue noted that:

> …. in fulfilling its duty to act reasonably and in good faith, the Crown is obliged to make informed decisions so that proper regard is had to the impact of the Treaty. Particular circumstances may require the Crown to consult with Maori. Consultation and co-operation may be necessary in some cases while in other cases

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[30] *Muriwhenua Fishing Report*, p 194
[31] *Muriwhenua Fishing Report*, pp 190-191, 194
[32] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664, 682, 693, 702-703, 715
[33] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664, 667, 673, 680-681, 682
[34] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664, 682, 715
[35] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 683

> the Crown may have sufficient information in its possession for it to act consistently with its obligations under the Treaty without specific consultation. See *New Zealand Maori Council v Attorney General,* supra, per Richardson J at 683. It also has been recognised, however, that it is not permissible for the Crown to try to limit the principles of the Treaty to just consultation. Since *New Zealand Maori Council v Attorney General,* it has been established that the principles require the active protection of Maori interests, and that to restrict this to consultation would be hollow. See *Ngai Tahu Maori Trust Board v Director General of Conservation,* supra, per Cooke P at 560.[36]

This is not, however, an open ended obligation requiring consultation in all cases for as Justice Richardson in the *Lands Case* stated:

> In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith.[37]

Although expressed in accordance with the contemporary language of "principles" we find that Justice Richardson's view would similarly apply to circumstances prevailing from 1840 to 1975. That is because such an obligation to consult would be consistent with the terms of the Treaty, its spirit, the nature of the relationship created by the Treaty between the Crown and Maori and by its broad objectives.[38] The test of what consultation is reasonable in the prevailing circumstances depends on the nature of the resource or taonga, and the likely effects of the policy, action, or legislation. In some circumstances, a lack of consultation with iwi and hapu over their interests will mean that the Crown cannot make an informed decision.[39] In other cases it can make an informed decision without consultation. In all cases the honour of the Crown to abide by the guarantees expressly given in the Treaty and in accordance with its principles requires that the Crown act honourably and that both parties act towards each other with the utmost good faith.

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[36] *NZ Maori Council v Attorney-General* 19960613 (Court Of Appeal CA78/96 13 June 1996)
[37] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 683
[38] See discussion on all these points in the *Muriwhenua Fishing* Report, pp 188-193
[39] Waitangi Tribunal, *Te Ika Whenua–Energy Assets Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 33; Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993) , p 42; Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), p 70

2. The Principle of Reciprocity – the Essential Compact or Bargain

The Crown, in exchange for the kawanatanga (governance) and the right to make laws for New Zealand, solemnly promised that Maori rights, including the right to exercise tino rangatiratanga (autonomy/self-government) over their whenua (lands), their kainga (estates), and their remaining taonga (including but not limited to forests and fisheries), would be protected. This is consistent with Sir Hugh Kawharu's evidence before the Kaituna River Tribunal when it grappled with the meaning of the Maori terms of the Treaty, noting that just as there is no exact equivalent in English for rangatiratanga, there is no exact equivalent in Maori for sovereignty.[40] The nearest one can get to rangatiratanga in English is to say it means 'all the powers privileges and mana of a chieftain' or 'chieftainness', in the widest sense.[41] Furthermore, it is essential not to lose sight of the quid pro quo of the Treaty; that the collective cession to the Crown of the power to govern was made primarily in return for the Crown's protection of each Chief's authority within the tribal domain.[42] Sir Hugh Kawharu's evidence was that:

> "…the major problem arising from the first Article turns on the issue of sovereignty, a system of power and authority (as would have been intended by the Colonial Office) that was wholly beyond the Maori experience, a network of institutions ultimately to comprise a legislature, judiciary and executive, all the paraphernalia for governing a Crown Colony.
>
> The Maori people's view on the other hand could only have been framed in terms of their own culture; in other words, what the Chiefs imagined they were ceding was that part of their mana and *rangatiratanga* that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death. It is totally against the run of evidence to imagine that they would wittingly have divested themselves of all their spiritually sanctioned powers – most of which powers indeed they wanted protected. They would have believed they were retaining their rangatiratanga intact apart from a licence to kill or inflict material hurt on others, retaining all their customary rights and duties as trustees for their tribal groups…;"[43]

We agree with this interpretation of what Maori would have understood by the Treaty. Therefore, given the Crown's superior knowledge as the drafters of the Treaty and given that this essential compact or bargain resulted in the Crown obtaining the right to govern, it could only do so by protecting Maori interests.[44] Justice Richardson in the *Lands Case* reiterated this point in the following way:

> There is, however, one paramount principle which I have suggested emerges from consideration of the Treaty in its historical setting: that the compact between the

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[40] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim*, 2nd ed (Wellington: Government Printing Office, 1989), pp 13-14
[41] *Kaituna River Report*, p 13
[42] *Kaituna River Report*, pp 13-14
[43] *Kaituna River Report*, pp 13-14
[44] *Muriwhenua Fishing* Report, p 232; and Waitangi Tribunal, *Mohaka River Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp 52, 63-65

> Crown and the Maori through which the peaceful settlement of New Zealand was contemplated called for the protection by the Crown of both Maori interests and British interests and rested on the premise that each party would act reasonably and in good faith towards the other within their respective spheres. That is I think reflected both in the nature of the Treaty and in its terms.[45]

It was a compact through which the Crown sought from the indigenous people legitimacy for its acquisition of government over New Zealand. Inevitably there would be some conflicts of interest. There would be some circumstances where satisfying the concerns and aspirations of one party could injure the other. If the Treaty was to be taken seriously by both parties each would have to act in good faith and reasonably towards the other.[46]

Consequently, neither the Crown's right to govern nor the guarantee of tino rangatiratanga can be absolute, for the existence of one depends on the other. It is in the nature of the partnership forged by the Treaty that the Crown and Maori should seek arrangements which acknowledge the wider responsibility of the Crown while at the same time protecting Maori tino rangatiratanga.[47] There was always to be room for two peoples, as both expected to gain from the Treaty. For Mäori, access to new technologies and markets, to a new economy, and for both a right to settled government or governments. The arrangement assumed a sharing of natural resources. Development of those resources was always going to lead to some modification of taonga. But the key was to ensure that both the Crown and Maori had the right to participate in how such development should proceed.[48] We turn now to consider the essential features of kawanatanga and rangatiratanga as these terms relate to the environment and natural resources.

Kawanatanga - Right to Govern

In this inquiry, the Crown has asked how it and its delegates should balance the competing interests involved with contemporary decisions in term of the environment and resource management and how Treaty interests should be integrated into this process.[49]

In response, the Tribunal has identified that the Treaty provided for the right to make national laws, including conservation and resource management laws. The Tribunal has previously determined that the Crown has a responsibility to ensure that proper arrangements for the conservation, control, and management of resources are in place.[50]

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[45] *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 680-681.
[46] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 663-664
[47] *Mohaka River Report*, p 65
[48] *Muriwhenua Fishing* Report, pp 194-195
[49] Crown closings, part 1, 3.3.111, pp 23-24, 40
[50] *Muriwhenua Fishing* Report, p 232; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p 131

This is a legitimate exercise of the Crown's governance role albeit that such legislation or regulations may constrain how people manage and use their property in certain circumstances.[51]

This expression of Article 1 is justified because the Crown is the only centralised body with the overview and capability necessary to assess the national status of New Zealand's environment and natural resources and to provide for all communities of interests whilst ensuring that its actions or those of its delegates are consistent with its obligations under the Treaty of Waitangi. That is why the Foreshore and Seabed Tribunal found that the Crown had the authority to develop policy in respect to the coastal environment. That Tribunal pointed out that the Treaty principles of reciprocity and partnership envisaged a future for all peoples, sharing resources and developing them. Therefore, in the balancing of interests required for a successful partnership, there was a place for all interests in the coastal environment.[52]

We think that the assessment by the Foreshore and Seabed Tribunal is an accurate reflection of Article 1 of the Treaty of Waitangi as regards the environment and natural resources generally. Logically it follows that a careful balancing of such interests is required so long as the Crown does so in a manner consistent with its Treaty obligations. Whether its actions have been Treaty consistent or not will turn on the facts of each case. The Tribunal has never defined all the circumstances when the Crown should engage in such a balancing exercise because it will vary in accordance with what is reasonable in particular circumstances[53] There is nothing novel in a judicial body such as this Tribunal taking a case by case view of the matter.[54]

However, we can assist the Crown by referring to what other Tribunals and the Courts have identified as circumstances where it would be legitimate for the Crown to undertake such a balancing exercise. In such circumstances, consultation with Maori should take place.[55] The Crown may need to balance its Treaty obligations to Maori against the needs of other sectors of the community:

- In exceptional circumstances such as war or impending chaos.[56] We would add public welfare and safety;
- For peace and good order;[57]
- For matters involving the national interest;[58]

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[51] Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 330
[52] *Report on the Crown's Foreshore and Seabed Policy*, p 131
[53] *Taiaroa v Minister of Justice* [1995] 1 NZLR 418
[54] See for example the *Whanganui River Report*, p 341; *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553, p 562
[55] Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: Legislation Direct, 1998), pp 106-107
[56] *Report on the Crown's Foreshore and Seabed Policy*, p 131
[57] *Muriwhenua Fishing Report*, p 232

- For situations where the environment or certain natural resources are so endangered or depleted that they should be conserved or protected.[59]

- Where Maori interests in natural resources have been fully ascertained by the Crown and freely alienated, and/or are not subject to contest between Maori.[60]

Where any of these circumstances prevail, the Crown may engage in balancing competing interests. But it ought not to undertake the balancing exercise without restraint. The Muriwhenua Tribunal's comments on the limitations on kawanatanga remain apposite:

> The cession of sovereignty or kawanatanga gives power to the Crown to legislate for all matters relating to "peace and good order"; and that includes the right to make laws for conservation control. Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike. …
>
> The right [to govern] so given however is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second…[61]

However, where none of the circumstances we identify above prevail, the Muriwhenua Tribunal was certain that the Crown has no right to determine for the tribes the wisest or best use of their fisheries resources for so long as the tribes regulate and enforce their own standards.[62] Furthermore, the concept of restrained governance is not a novel concept. The Crown is so constrained by many factors in other fields such as trade law. In the general human rights law field, to take another example, the Crown's actions are constrained by its domestic and international obligations.[63]

Reconciling Kawanatanga And Rangatiratanga

The impact of the previous findings listed above are two fold:

1. As regards Maori rangatiratanga over their property or taonga that they possess, the Crown's right to provide a regulatory regime for managing natural resources cannot override Maori property interests. The national interest in conservation and resource management including allocation of rights of access is not a reason for negating Maori rights of property. In a similar vein the national interest in

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[58] Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 285
[59] *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553, pp 560-561 regarding whalewatching that in the issuing of permits, the paramount consideration must be conservation or preservation and protection of whales; *Muriwhenua Fishing* Report, p 232 involving the right of the Crown to conserve fisheries.
[60] *Whanganui River Report*, p 341
[61] *Muriwhenua Fishing Report*, p 232
[62] *Muriwhenua Fishing Report*, p 232
[63] For example the requirements in the New Zealand Bill of Rights Act 1990 and the International Covenant on Civil and Political Rights

conservation and resource management cannot be used to override the property rights of other (non-Mäori) citizens. Conservation and resource management may have 'the effect of constraining private ownership' but cannot be used to deny its existence.[64] In the *Whanganui River Report* the Tribunal stated:

> … the Crown assumed the governance of New Zealand on the basis of a promise that Maori authority or rangatiratanga over their possessions would be guaranteed. It thus subscribed to a tenet of English law as old as the Magna Carta that private property interests are respected, and to a principle of colonial common law that dates at least from the 1600s that, upon British annexation of other lands, the same applies to the properties of the indigenous people.
>
> The principles are the same in the Treaty of Waitangi, but as it was expressed, Maori were guaranteed the 'rangatiratanga' over that which they possessed. … Applied to this claim, it means that the Whanganui River should be managed by the iwi …
>
> Maori rangatiratanga is not therefore to be qualified by a balancing of interests. It is not conditional, but was expressed to be protected, absolutely. It is rather that governance is qualified by the promise to protect and guarantee rangatiratanga for as long as Maori wish to retain it. [65]

In other words, Maori rangatiratanga over their property rights or interests was to be respected and provided for in governance.

2. As regards imposing constraints on Maori rangatiratanga or autonomy, including the exercise of authority over the use, allocation, development and management of their property and taonga, resource management laws may constrain Maori ownership or Treaty interests but only for the purposes of conservation.[66] Otherwise, Maori have a Treaty right to manage and to receive the benefits from their property or taonga – taonga being a broader category of interests than legal property.[67] If this were not so, there would be an assumption that total control over the environment and natural resources was ceded to the Crown upon the signing of the Treaty of Waitangi. The corollary of that would be that rangatiratanga from the signing of the Treaty excluded any concept of authority, control, responsibility or stewardship in respect of natural resources which are taonga. Instead, Maori would have a reduced Treaty right to be consulted and considered, the solution now found in the Resource Management Act 1991.[68] As in the Whanganui River Inquiry such an interpretation must be rejected. We agree with Mr Pou and Ms Sykes counsel for a number of claimants, that in continuing to argue this approach on what it must do to balance competing

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[64] *Whanganui River Report*, p 332
[65] *Whanganui River Report*, p 329
[66] *Muriwhenua Fishing Report*, p 232
[67] *Muriwhenua Fishing Report*, p 174
[68] *Whanganui River Report*, p 328

> interests, the Crown's position is tantamount to seeking a finding that the Treaty deprived Maori of their authority over their natural resources. But given the Treaty language that cannot be so.[69]

So, while we cannot be definitive about the circumstances where the balancing of interests may be appropriate, we can refer to the jurisprudence that demonstrates what approach the Crown should take before it embarks or causes its delegates to embark on any balancing exercise and what it should do during and after such a process. We list these matters and the authorities for their existence, to assist the Crown:

- Although the guarantees of the Treaty may be overridden in exceptional circumstances in the national interest, the national interest in conservation is not a reason for negating Maori rights of property. Resource management may have the effect of constraining private ownership but cannot be used to deny its existence.[70]

- Where the Crown is uncertain as to the nature and extent of any Treaty interest including any property interest, the Crown has a duty to ascertain the nature and extent of that interest before attempting to balance the interests of competing communities or users.[71]

- Maori ownership of, and rangatiratanga over, their taonga should not be negated by the requirement of balancing unless in the national interest.[72]

- The Crown may develop policies granting access to other users under certain circumstances, but the unilateral transfer or expropriation of ownership and control is contrary to the Treaty of Waitangi.[73]

- In matters of national importance, any expropriation of ownership or control by the Crown should only be done after the Crown has assessed whether there are options available to it other than the expropriation of Maori property or control.[74] Alternatively, if there is no other option the Crown must ensure that there is as little infringement as possible with its partner's Treaty rights.

- In matters of national importance, any expropriation of ownership or control by the Crown should only be pursued following full consultation with Maori, following a good faith attempt to obtain their consent, and following the payment of proper compensation. It should follow the development of a scheme for sharing any profits the Crown derives from the use or allocation of natural resources so that Maori receive a substantial benefit from the allocation of/in their resources.

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[69] *Whanganui River Report*, pp 328-329
[70] *Whanganui River Report*, p 330
[71] *Whanganui River Report*, p 332; *Aquaculture and Marine Farming Report*, p 69
[72] *Whanganui River Report*, pp 329-330
[73] *Report on the Crown's Foreshore and Seabed Policy*, p 131
[74] *McGuire v Hastings District Council* [2002] 2 NZLR 577,

- The Crown is obliged to provide for some system to enable Maori to exercise tino rangatiratanga over their resources or taonga in accordance with their own cultural and management preferences and in accordance with their own ways of life, albeit adapted in accordance with the right to develop.[75]

Rangatiratanga – Right to Autonomy

What then was the nature of the guarantee of rangatiratanga? The Tribunal has previously found that Maori were entitled to believe they retained their tino rangatiratanga, described in the *Muriwhenua Fishing Report* as telling:

> … of the exclusive control of tribal taonga for the benefit of the tribe including those living and yet to be born. There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual source of the taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property but over persons within the kinship group and their access to tribal resources.[76]

The Tribunal has noted in other reports that in the Maori worldview rangatiratanga is inseparable from mana. In the *Motunui-Waitara Report* it was stressed that rangatiratanga denotes mana, not only to possess what one owns, but also to manage and control it in accordance with one's own cultural preferences.[77] In the *Taranaki Report* the Tribunal defined "tino rangatiratanga" as autonomy:

> Maori autonomy is pivotal to the Treaty and to the partnership concept it entails. Its more particular recognition is article 2 of the Maori text. In our view, it is also the inherent right of peoples in their native territories. Further, it is the fundamental issue in the Taranaki claims and appears to be the issue most central to the affairs of colonised indigenes throughout the world. The international term of 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Maori words are 'tino rangatiratanga', as used in the Treaty, and 'mana motuhake', as used since the 1860s.[78]

We have fully discussed the concept of rangatiratanga or autonomy/self-government and what these terms for Maori mean at the local, regional and national levels in Part II of this Report. These terms mean more than stewardship or kaitiakitanga and they imply the need for greater forms of state recognition beyond mere references to Maori

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[75] *Taiaroa v Minister of Justice* unreported, 29 August 1994, McGechan J, High Court, Wellington, CP99/94, p 69
[76] *Muriwhenua Fishing Report*, p 181
[77] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 51
[78] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 5

customary values or concepts. Maori stewardship, for example, 'describes an ethic of ownership but not ownership itself, while rangatiratanga includes both'.[79] Rangatiratanga also includes the right to exercise authority over Maori taonga. Where Maori have suffered land or natural resource loss through the denigration or marginalisation of Maori autonomy or self-government, then there will inevitably be a breach of the Treaty of Waitangi, unless there were mitigating circumstances of the type mentioned above.[80]

Essentially in terms of the environment and natural resources, the Maori right to autonomy and self-government means that they have the right to govern and manage their own policy, resources and affairs, with minimum Crown interference but in accordance with the Maori duty to act reasonably and with the utmost good faith.

3. Principle of Active Protection of Lands, Estates and Taonga

The obligation of the Crown actively to protect taonga has consistently been recognised by the Tribunal and the Courts. In the *Mohaka ki Ahuriri Report* the Tribunal stated that the Crown has a duty actively to protect the lands, forests, fisheries, and other taonga.[81] In the Privy Council the nature and extent of this principle was described as follows:

> Foremost among those 'principles' are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.[82]

However, the Privy Council also pointed out that the Crown's obligation actively to protect a taonga may increase if that resource is in a vulnerable state:

> Again, if as in the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise for example, if the

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[79] *Whanganui River Report*, p 283
[80] *Whanganui River Report*, p 284
[81] Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), p 638
[82] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517

> vulnerable state can be attributed to past breaches by the Crown of its obligations and may extend to the situation where those breaches are due to legislated action.[83]

As the Muriwhenua Fishing Tribunal noted, the application of this principle at any particular point must depend upon the conditions then applying, the extent to which Maori have subsequently chosen to benefit in Western terms and the degree to which the tribal base remains preferred.[84]

Fiduciary Duties

This principle of active protection is said to create duties akin to fiduciary duties.[85] We reject at this time the Crown's argument that this duty is in some way less than the fiduciary duty known to the common law or equity. That is a matter still to be determined by the Courts in New Zealand. In the *Lands Case* it was accepted that features of the partnership relationship created by the Treaty were 'responsibilities analogous to fiduciary duties'.[86] In the *Broadcasting Assets Case* in the Court of Appeal, Justice Mckay for the majority of the judges understood by this:

> … that the relationship between the Treaty parties creates responsibilities analogous to fiduciary duties. The duty of the Crown is not merely passive, but extends to active protection of Maori people in the use of their lands and waters (and in this case one would add their treasures) "to the fullest extent practicable".[87]

Lord Cooke clarified in 1994 that this meant that the Treaty 'created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards each other.'[88] A full summary of the jurisprudence was provided by Justice Thomas when he observed:

> In the Treaty of Waitangi the Crown undertook the obligation to protect the Maori language in return for being recognised as the legitimate government of the whole nation by Maori. (See New Zealand Maori Council v Attorney General [1994] 1 NZLR 513, per Lord Woolf at 517).
>
> The Courts have further defined the obligation undertaken by the Crown. In 1987 it was held unanimously by a full Court of this Court that the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other. See New Zealand Maori Council v Attorney General [1987] 1 NZLR 641, at 664, 673, 681-682, 693, and 701. This fiduciary obligation has been reaffirmed by this Court in a number of subsequent decisions. See *Te Runanga o Wharekauri Rekohu Inc v Attorney General* [1993] 2 NZLR 301, at 304, *Ngai Tahu*

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[83] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517
[84] *Muriwhenua Fishing Report*, p 194
[85] *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) 305-306
[86] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) 664
[87] *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA) 591
[88] *Te Runanga o Wharekauri Rekohu Incorporated v Attorney-General* [1993] 2 NZLR (CA) 301, 304

> *Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553, at 561. No exhaustive definition of the content of the obligation has been attempted, but it has been affirmed that the duty on the Crown is not merely passive but requires the Crown to take active and positive steps for the protection of the Maori language. It is required to take affirmative action to redress past breaches. See *New Zealand Maori Council v Attorney General*, supra, at 664, 674, 693, 702, and 716-718; *Ngai Tahu Maori Trust Board v Director General of Conservation*, supra, at 560 and 561. In *New Zealand Maori Council v Attorney General*, supra, at 517, the Judicial Committee expressed the view that, if the Maori language is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligation. It may well require the Crown to take especially vigorous action for its protection[89]

Nothing has yet been determined by the superior courts in New Zealand to suggest that the duties analogous to fiduciary duties are inferior to the fiduciary duties known to the common law.[90] What is clear is that there are Treaty duties analogous to fiduciary duties imposed on the Crown actively to protect Maori interests. It is also clear that these are not absolute duties. The Crown can take or regulate resources or taonga in breach of the terms of Article 2 of the Treaty in certain circumstances as outlined above.[91] If it does so, it must act fairly and reasonably, and only after proper consultation and payment of compensation.[92]

The Extent of the Crown's Duty to Protect

The Crown can make laws regulating natural resources, so long as it does so by ensuring that Maori Treaty interests are protected. Where a resource or taonga has been rendered vulnerable due to previous omissions of the Crown to protect it then the Crown has a duty to restore the taonga. This may well require that the Crown take especially vigorous action for its protection. That is why the Privy Council noted that because the Maori language was in such a vulnerable state the Crown had a duty to provide for it in broadcasting.[93] But the Crown in carrying out its responsibilities actively to protect taonga is not required to go beyond what is reasonable in the prevailing circumstances.[94]

In some circumstances active protection may require exclusive access for Maori. In others it may require imposing environmental controls on other users as in the case of non-renewable resources (for example fisheries and geothermal resources) threatened by over-exploitation.

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[90] *Fenwick v Trustees of Nga Kaihautu o Te Arawa Executive Council & Ors* (HC, Rotorua, CIV-2004-463-847, 13 April 2006, Allan J) left open the issue

[91] See for example *Turangi Township Report*, p 285

[92] *Te Ika Whenua Rivers Report*, p 129-130; and see *Te Runanga o Te Ika Whenua Incorporated v Attorney General* [1994] 2 NZLR 20

[93] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517

[94] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 516-518

In situations where environmental controls are necessary because of the vulnerability, or scarcity, or the finite nature of the resources, and that vulnerability or scarcity arises from previous Treaty breaches, there may need to be an exemption for Maori from such controls.[95] Alternatively, there may need to be some priority given to Mäori when allocating use.[96] In other cases, Mäori may need special assistance or compensation to mitigate the impacts of Crown breaches.[97]

Where Maori proprietary interests and right to exercise rangatiratanga over natural resources have never been adequately acknowledged or protected by the Crown as in the case of geothermal resources, this must constitute a prima facie breach of the Treaty principle of active protection guaranteed in Article 2. So must any failure on the part of the Crown, under its power of kawanatanga, to provide a form of title that recognised customary and Treaty rights of Maori to their taonga.[98]

Furthermore, where taonga were acquired by the Crown without full tribal consent, or where the sole right to regulate or allocate natural resources was vested in the Crown by dint of the common law or statute, then any failure to protect Maori rights (sometimes inchoate) taken in accordance with English law and determined under those laws, rather than the Treaty, is also a prima facie breach.[99] This is because it is inconsistent with the principles of the Treaty that ownership of Maori taonga could be taken away from those entitled, sometimes without being heard and by the tacit application of presumptions of English law of which Maori knew nothing.[100] Likewise, for the Crown to rely on principles of the English common law to deprive Maori of their taonga, for example the presumption in common law that a lagoon or estuary is an arm of the sea, would be a breach of the Treaty principle to actively protect the property of Maori.[101] The reliance on the presumption of *ad medium filum* (the riparian owner owns a river to the centre line) was one of the reasons why the Crown acted in a manner inconsistent with the principles of the Treaty of Waitangi in relation to the Mohaka River.[102]

We see little difference in our approach, from that adopted by the Manukau, Mohaka, Te Whanganui a Orotu, Whanganui or Te Ika Whenua Rivers Tribunals. Our approach is also consistent with dicta from Lord Cooke who, as President of the Court of Appeal, commented that the vesting of the beds of navigable rivers in the Crown provided for by the Coal-Mines Amendment Act 1903 and succeeding legislation may not have been sufficiently explicit to override or dispose of the Maori concept of a river being a whole and indivisible entity. Cooke P added that in relation to smaller rivers, perhaps the

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[95] Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 272; *Preliminary Te Arawa Representative Geothermal Report*, p 30
[96] *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553
[97] Waitangi Tribunal, *Te Whanganui-a-Orotu Report on Remedies* (Wellington: Legislation Direct, 1998), pp 20-21
[98] *Whanganui River Report*, Chapters 9-10
[99] *Te Ika Whenua Rivers Report*, p 104
[100] *Mohaka River Report*, pp 49-50
[101] Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995* (Wellington: Brooker's Ltd, 1995), p 200
[102] *Mohaka River Report*, pp 34-38, 49-50

common law presumption *ad medium filum* might well be unreliable in determining what Maori have agreed to part with on the alienation of land.[103] As the Mohaka Tribunal noted, the Treaty allowed for a new way of doing things, and it incorporated the promise that Maori rights would not just be respected but would be actively protected. The Crown could not acquire land or other resources from Maori by sleight of hand, particularly resources of significance.[104]

In our view also, the Crown should not expect Maori to subsidise its duty of active protection. In other words, in cases of clear Treaty breach, CNI Maori should not be expected to contribute by the Crown or its delegates, to ameliorating the impacts of previous environmental mismanagement or failure to protect natural resources where those resources are of importance to Maori and where such a contribution would further erode their remaining finite resources, unless Maori expressly agree. A classic example is the contribution of Maori land for lake or river-side reserves for the purpose of ameliorating the impacts of land utilisation options permitted under planning and natural resource management laws. In circumstances where there has been Treaty breach, the Crown's contention that the most likely sustainable, long-term solutions should involve all members of the community, including Mäori, may need to be examined. The Crown should assess how best to address the issues by consulting Maori and without further impacting on Maori Treaty rights and interests if at all possible.

We conclude from our review that the principle of active protection with its attendant duties requires us in certain cases to measure the extent to which the Crown has discharged its duty actively to protect the taonga of the iwi and hapu of the CNI. In the chapters that follow we broadly consider a number of issues in relation to this principle and they are:

- Where the Crown has acquired natural resources that are taonga, we consider whether it did so after consultation, whether it obtained CNI Maori consent.

- Where the Crown appropriated Maori taonga to serve the national interest or for some other justifiable reason, we consider whether it acted as a matter of last resort, and whether it acted fairly, reasonably and after consultation and payment of compensation.[105]

- Where the Crown appropriated taonga in a manner inconsistent with the principles of the Treaty, we consider whether there is any remaining Treaty interest, its nature and extent and what the Crown's duty actively to protect means in this context.[106]

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[103] *Te Runanga o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, Cooke P
[104] *Mohaka River Report*, p 38
[105] Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), pp 58-60
[106] *Petroleum Report*, p 65

- Where a taonga has been desecrated or is in a vulnerable state due to Crown policies, practice, acts or omissions inconsistent with the principles of the Treaty of Waitangi, we consider what actions it would be reasonable for the Crown to take to mitigate the problem. That is because when taonga are abused through over-exploitation or pollution the claimants have argued that their values are offended. The Tribunal has previously found that in such circumstances an affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past. [107]

- Finally, we consider whether it is fair in Treaty terms for Maori to be expected to contribute to ameliorating the impacts of previous mismanagement or failure to protect natural resources.

4. Principle of Active Protection of Rangatiratanga in Environmental Management

The Tribunal has reported on a number of issues concerning the environment and natural and physical resources. It has considered Maori claims to rangatiratanga over ecosystems, people and communities, natural and physical resources which are taonga. The Tribunal has found many of these claims to have been well-founded.[108]

This jurisprudence suggests that there is an underlying principle in the Treaty that the Crown has a duty actively to protect the exercise of 'tino rangatiratanga' in environmental and resource management. Iwi and hapu were guaranteed the right to retain an effective degree of autonomy, authority and control over their environment including their natural and physical resources for as long as they wished to do so. In accordance with the solemn exchange for the right to govern, the Crown was and is obliged to provide some system for the expression of rangatiratanga over their taonga and Maori title to their natural resources. In relation to land the Waitangi Tribunal has previously stated:

> In the English text, the Treaty articles guaranteed to Maori the full, exclusive, and undisturbed possession of their lands for so long as they wished to retain them. The Maori text was clearer in guaranteeing to Maori the full authority of their lands. This clarified that Maori would not only possess their own land but decide and determine the laws affecting them; for example the forms of tenure and management.[109]

We consider this applies to all natural resources. Furthermore, the right to exercise rangatiratanga cannot be limited to resources owned by Maori but extends to matters

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[107] *Muriwhenua Fishing* Report, pp 180-181
[108] See generally the *Motunui–Waitara Report*; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (Wellington: Waitangi Tribunal, 1988); *Kaituna River Report*; *Te Whanganui-a-Orotu Report*
[109] *Taranaki Report*, p 21

both tangible and intangible that they value.[110] Thus any system should enable Maori to make provision for intangibles while managing their resources. This would include matters such as their own customs, values and relationships with natural resources as well as their laws, language and knowledge of their resources.

The Crown does not accept that it can or should 'provide for' the cultural and spiritual relationships of CNI hapu and iwi with their taonga and their natural environment.[111] It sees these relationships as personal to the iwi and not deriving from the Crown. Of course they are, but any resource management system that is developed should provide Maori with the opportunity to utilise their resources in accordance with their own cultural preferences. Otherwise the Crown is circumscribing how they should relate to such resources. That is why we cannot accept the Crown's view that it all it needs to do, in pursuing or implementing policies that impinge upon Maori relationships with their taonga, is to be sufficiently informed so as to take these matters into account and to thereby avoid or minimise prejudice to those relationships.[112]

What the Treaty calls for, is that the Crown actively protect the exercise of rangatiratanga (including customary law and values) in environmental and resource management, not reduce the duty of active protection merely to taking these relationships and values into account. There may well be views validly held by other sections of the community on how the Crown should incorporate Maori cultural and spiritual values in legislation such as the Resource Management Act 1991, and on whether such provisions are acceptable. But these are not views the Crown should base its policies upon. Rather it should focus on what system is needed to actively protect Maori rangatiratanga in resource management covering all matters of tangible and intangible value to Maori. Whether this is a system that gives full recognition to Maori Treaty rights over their resources, or that integrates the exercise of tino rangatiratanga, depends on the Crown and the iwi and hapu of the CNI while in negotiations. Whichever system is adopted, it is clear that Maori values, customs and law should be provided for as they are capable of adapting to meet the new circumstances of a combined society.[113]

Impact of Land Alienation on Rangatiratanga

We note the submissions made by the Crown that the key factor affecting Maori relationships with their natural resources or taonga was the alienation of abutting land, which 'incrementally and cumulatively' caused major dislocation to the claimants' relationships with their taonga. We do note that land alienation has restricted rights of access to waterways such as certain lakes, rivers and geothermal resources. But, and as we have found in previous chapters of this report, Maori customary rights and interests

[110] *Muriwhenua Fishing Report*, pp 179-181
[111] Crown closings, 3.3.111, part 2, p 466
[112] Crown closings, 3.3.111, part 2, p 466
[113] *Taiaroa v Minister of Justice* unreported, 29 August 1994, McGechan J, High Court, Wellington, CP99/94, p 69

in land were individualised under the Native Land legislation. The effects of that system, coupled with the application of presumptions of law and Crown legislation, made it possible for individuals to alienate tribal rights to many resources. Rights were transferred sometimes piece by piece, individual share by individual share, without any further reference to the hapu or iwi and sometimes without their knowledge. This could lead to a situation where the community was deprived of its tribal base. Tribal society and leadership, the very things embodied in the guarantee of rangatiratanga of the Treaty, were as a result severely undermined.

Land alienation by Maori is not, with respect, the issue. How the Crown should provide for a system of resource management that allows Maori to exercise their rangatiratanga over their taonga (whether owned or not) is really the crux of the matter. The emphasis here is on empowerment of rangatiratanga, not disempowerment. And such a system will have its constraints. For just like kawanatanga, tino rangatiratanga is not absolute and carries with it obligations. There are customary constraints such as the obligations tribes have internally to manage rights between hapu, and there are external rights that must be managed with neighbouring tribes. Then there are the obligations of kaitiakitanga or stewardship to maintain and protect resources so as to preserve a tribal base for succeeding generations.[114] As we discussed in Chapter 2, this is an onerous obligation, for nothing about tino rangatiratanga nor anything in Maori customary law, confers on Maori the right to destroy natural resources.[115] Then there are the obligations that Maori have as partners to the Treaty with the Crown. Maori have a duty of loyalty to the Queen, must fully accept her Government through her responsible Ministers, and provide reasonable cooperation.[116] They also have a duty to act in their dealings with the Crown with the utmost good faith, fairly and reasonably.[117] This all means that Maori must work with the Crown and they must consult and assist one another to devise arrangements for tribal control. It flows from this that they should aid one another in enforcing such a system and that they should furnish each other with information when called upon to do so.[118]

Even if any previous or current system required the devolution of environmental or natural resource management responsibilities to statutory bodies such as regional and local councils, the Crown cannot divest itself of its Treaty obligation actively to protect the tino rangatiratanga of the tribes and hapu of the CNI.[119] That is because it is the Crown's responsibility to provide for Maori rangatiratanga in environmental and resource management. It is also its duty to ensure the active protection of Maori taonga. It is the Crown that is responsible for developing the appropriate legislative regime capable of meeting its obligations under the Treaty of Waitangi. It is the Crown's

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[114] *Muriwhenua Fishing Report*, pp 180-181
[115] *Muriwhenua Fishing Report*, p 231
[116] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664
[117] *Te Runanga o Wharekauri Rekohu Incorporated v Attorney-General* [1993] 2 NZLR 301, 304
[118] *Muriwhenua Fishing Report*, p 231
[119] *Mohaka River Report*, p 69

responsibility that the Tribunal is focused on. Although the local government and resource management regime is now different, the words of the Mangonui Sewerage Tribunal remain apposite:

> All that Councils do, they must do according to the law, and it is the Crown, through Parliament, that provides that law. Indeed Maori bargained for 'the necessary laws and institutions' in the Treaty of Waitangi, but the question for us is whether the laws and institutions provided for, and the national criteria laid down for local administration, are necessary and proper having regard to the Treaty's terms.
>
> If they are not then it ought to be borne in mind, that Parliament retains the ultimate right to govern and can change the law. If Maori have suffered a loss in the interim, or could be prejudicially affected by some current scheme approved under the laws that conflict with the principles of the Treaty, Parliament has the authority to remedy the loss or amend the scheme. [120]

In chapters that follow we look at the examples given to us in evidence regarding the manner in which the local government and resource management regimes have affected the Treaty rights of the iwi and hapu of the CNI. We have weighed the evidence to consider whether in the context of the CNI, the Local Government legislation and the Resource Management Act 1991 are Treaty consistent. We have done so because other Tribunals have stated that the 1991 Act does not accord a priority to the protection of Maori resources and taonga; nor does it confirm Treaty rights in the exercise of rangatiratanga in resource management.[121] Indeed, and based on those reasons, they have found that the RMA was in breach of the principles of the Treaty of Waitangi.[122]

5. The Principles of Options and Equity

As we have outlined above, the Treaty envisaged the protection of tribal autonomy, culture and customs in exchange for the Crown's right to govern. This was the essential compact, bargain or exchange. But the Treaty also conferred on individual Maori the same rights and privileges as British subjects. In the *Muriwhenua Fishing Report*, the Tribunal noted that in relation to the two texts of the Treaty:

> Neither text prevents individual Maori from pursuing a direction of personal choice. The Treaty provided an effective option to Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds. That same option is open to all people, is currently much in vogue and may represent the ultimate in partnership. But these are options, that is to say, it was not intended that the partner's choices could be forced.

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[120] *Mangonui Sewerage Report*, pp 35, 41
[121] Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 154; *Te Whanganui-a-Orotu Report*, pp 158-159; *Te Ika Whenua Rivers Report*, p 142
[122] *Ngawha Geothermal Resource Report*, p 154; *Te Whanganui-a-Orotu Report*, pp 158-159; *Te Ika Whenua Rivers Report*, p 142

> (c) The historical record suggests Maori have consistently sought to uphold tribal ways against policies directed to amalgamation (see Ward:1974) but there is no certainty that that preference would be maintained if the forces of amalgamation were removed.
>
> (d) But the tribal right is also upheld. The individual, as a British subject, has the same rights (and duties) as anyone else in pursuing individual employment or gain. This may reduce the tribal need but does not necessarily displace it.[123]

Thus in some cases the Crown's Treaty obligations will be about protecting iwi and hapu customary rangatiratanga or autonomy/self-government over their property and taonga consistent with the Article 2 guarantee; and in other cases it will be about protecting CNI Maori in their individual property rights, basic human rights and fundamental freedoms.[124] The Treaty envisaged that Maori should be free to pursue either or indeed both options in appropriate circumstances.[125]

The principles of equity and equal treatment also arise from Article 3 of the Treaty of Waitangi. The principle of equity places an obligation on the Crown to act fairly towards CNI Maori by treating them equally, fairly and impartially vis-à-vis non-Maori.[126] In the *Foreshore and Seabed Policy Report*, the Tribunal noted that these principles included the right of Maori to equal protection under the law.[127] Therefore the Crown cannot adopt policies that result in the effective expropriation of Maori property (under either common law or statute law) whilst others' property of a similar type is not affected. Maori also have the right to exercise the option of having their property rights defined by the Courts. Taking away the right to go to court to have legal rights declared is a serious matter, and is a breach of the principles of equity and options.[128] In the context of the CNI, these principles are relevant to the introduction by the Crown of legislation vesting natural and physical resources in itself and/or vesting in itself the right to regulate access to those taonga.

It is also not consistent with the principle for the Crown to favour one Maori community over another. In the context of natural resource it would not be fair for example to vest property rights to a natural resource in one tribe without recognising the same or similar interest of another in the same or similar resource.[129] It would not be fair or impartial to provide for the rangatiratanga of one hapu or iwi in resource management without providing the opportunity for another to participate on the same level, all other circumstances being equal.

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[123] *Muriwhenua Fishing Report*, p 195
[124] Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 27
[125] *Tarawera Forest Report*, p 28
[126] Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 73; *Tarawera Forest Report*, p 28; *Report on the Crown's Foreshore and Seabed Policy*, p 133
[127] *Report on the Crown's Foreshore and Seabed Policy*, pp 133-134
[128] *Report on the Crown's Foreshore and Seabed Policy*, p 134
[129] *Report on the Crown's Foreshore and Seabed Policy*, p 134

6. Prejudice and the Principle of Redress

By section 6(1) of the Treaty of Waitangi Act 1975 we are required to determine whether the claimants have been prejudicially affected by any legislation or regulation, policy or practice, action or omission of the Crown inconsistent with the principles of the Treaty of Waitangi. Therefore, it is important to establish that prejudice has been established requiring redress. To be prejudicially affected the claimants must demonstrate that they have been restricted in the exercise or enjoyment of their rights under the Treaty. Among other grounds, it has been held that it is prejudicial to Maori if there is no recognition, protection or priority accorded to Maori Treaty interests in legislation, policy or actions of the Crown, over and above the general public interest, in resources including rivers, lagoons, shell fish beds, petroleum, geothermal resources and the coastal marine area.[130] It is also prejudicial for the Crown to appropriate, deny or fail to ascertain or acknowledge Maori Treaty rights, including claims to proprietary interests in natural resources or taonga.[131] It some circumstances it has been held to be equally prejudicial for the Crown to balance Maori interests against the interests of other citizens.[132]

In all these instances it is irrelevant whether or not the Crown considered it was engaged in a process of actively denying rights. If the effect is that it did prejudice Maori by matters listed in section 6 of the Treaty of Waitangi Act 1975, that is prejudice enough. The only question then is whether what was done was reasonable in the circumstances.

Once prejudice is established it is necessary to consider the Crown's duty to provide redress. A recent explanation of this principle is found in the *Crown's Foreshore and Seabed Policy Report*. There the Tribunal stated:

> Where the Crown has acted in breach of the principles of the Treaty, and Māori have suffered prejudice as a result, we consider that the Crown has a clear duty to set matters right. This is the principle of redress, where the Crown is required to act so as to 'restore the honour and integrity of the Crown and the mana and status of Māori'. Generally, the principle of redress has been considered in connection with historical claims. It is not an 'eye for an eye' approach, but one in which the Crown needs to restore a tribal base and tribal mana, and provide sufficient remedy to resolve the grievance. It will involve compromise on both sides, and, as the Tarawera Forest Tribunal noted, it should not create fresh injustices for others. [133]

It follows that redress should be based upon a restorative approach with its purpose being in Article 2 claims to restore iwi or hapu rangatiratanga over their property or taonga where the parties agree. In some circumstances restoration of tribal mana may

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[130] *Te Ika Whenua Rivers Report*, pp 138-139; *Whanganui River Report*, p 333 [seems to be wrong ref. Maybe pp 132-133?]; *Te Whanganui-a-Orotu Report*, pp 204-205; *Motunui–Waitara Report*, p 54; *Petroleum Report*, pp 65-67; *Ngawha Geothermal Resource Report*, p 154; *Aquaculture and Marine Farming Report*, p 76

[131] Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 279

[132] *Whanganui River Report*, p 329

[133] *Report on the Crown's Foreshore and Seabed Policy*, pp 134-135

require some other remedy. In others, the passing of legislation to recognise rangatiratanga, the return of land and some other form of redress may be sufficient to achieve this result.[134] Where there has been significant environmental damage, these measures may not be adequate. Sometimes there will be a need for a programme of restoration work.[135] This may require the joint efforts of a number of agencies working with Maori if that is what the parties agree to. If that is an option, new regimes may need to be developed for the joint management of significant tribal or hapu taonga.[136] There are a number of different ways the Crown and Maori could address restoration of taonga where the evidence warrants a joint approach. But that will depend on the facts of each case and is a matter best left for negotiation.

Environmental Justice

Our approach to environmental impacts is consistent with Mr Bennion's generic submissions for the claimants. Mr Bennion referred us to literature on environmental justice which is essentially about the fair or even distribution of environmental quality among people. In our view, this redress approach would require that the Crown or its delegates adequately assess and monitor environmental effects of Crown legislation, regulation, utilisation or action, policy or practice on the natural resources and other taonga of the claimants protected by the Treaty of Waitangi. The Crown states that because of the significant technological advances in relation to the identification, monitoring and treatment of pollution, at least in relation to waterways, it is in a better position to recognise the scale of the problems.[137] In doing so, we consider that the Crown should ensure that CNI Maori are not experiencing a disproportionate share of any negative environmental impacts resulting from previous or current Crown breaches of the Treaty of Waitangi. If they are, then the Crown or its delegates should give some priority to providing the remedies necessary to ameliorate those impacts.[138] In such

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[134] Waitangi Tribunal, *The Turangi Township Remedies Report* (Wellington: Brooker's Ltd, 1995), pp 13-14; *Whanganui River Report*, pp 343-344

[135] *Te Whanganui-a-Orotu Report*, pp 20-21

[136] See for example *Whanganui River Report*, p 343; *Te Whanganui-a-Orotu Report*, pp 207-208

[137] Crown closings, 3.3.111, part 2, p 470

[138] Environmental justice has been influenced by, is consistent with, or has itself influenced four distinct research strands, conceptualised as:
Environmental equity - exploring the links between health, morbidity, environmental conditions and socio-economic status.
Ecological justice – sometimes referred to within the sustainable development discourse. It concerns the fair distribution of environments among all the inhabitants of the planet. Ecological justice addresses the wider concern for responsible relations between humans and the non-human natural world.
Environmental human rights – asserting as fundamental human rights, the right to live in an environment free from pollution, and ownership rights to natural resources. Support for the assertion of these rights is to be found in the Earth Charter of the UN Environment Programme. This document underlines the importance of these human rights (and, by implication, environmental justice) but it also challenges conceptions of human rights which stress individual freedoms without acknowledgement of ecological responsibilities.
Ecological debt - developed to explain how the consumerism of developed countries is imposing direct environmental costs on less developed countries. The adjustment mechanisms to discharge that debt are being developed and worked through at the international level in relation to global climate change, the Kyoto protocol and carbon credits.

circumstances, CNI Maori should be able to enjoy environmental and natural resource protection for their taonga or waterways because the Crown has a duty actively to protect them. It also has a duty to provide redress where Maori have been prejudicially affected. The Crown has argued that the pollution and degradation of waterways or taonga used as examples in the CNI are currently being addressed in significant ways.[139] We discuss whether the evidence we heard demonstrates otherwise in Chapter 19. Here we note the standard is an important one and one we measure Crown actions against.

Finally, we note there is evidence of the scarcity or finite nature of some resources in the CNI. In some circumstances this has occurred as a result of historic Treaty breaches. There is also evidence that Maori are coping with environmental inequality and unfair treatment as we discuss in Chapter 19. In these circumstances, environmental justice theories support the Treaty principle that the Crown must restore, exempt, or provide special assistance to ameliorate the impacts of any controls the Crown or its delegates might need to impose. We have already discussed this above under the duty of active protection.

Issue 2 – Are Waterways, Fisheries and Geothermal Resources Taonga Over Which Maori Exercised Rangatiratanga?

We turn now to consider whether waterways, fisheries, and geothermal resources are taonga over which Maori exercised rangatiratanga.

The Claimants' Case

The claimants contend that the Treaty guarantees and protections cover these natural resources, with the English text referring to land, forests, fisheries and other properties and the Maori version referring to land, kainga (habitations or settlements), and taonga (being all things highly prized). The claimants contended that the term 'taonga' was a very broad one. It has been held to include physical resources. It also includes cultural matters such as language, and intangible values such as spiritual and cultural values.[140] It has been held to include koiwi (human remains) and treasures buried with koiwi, such as waka and whare.[141]

In relation to waterways, the claimants say that these resources remain their taonga, that they have never freely consented to their alienation either by land sales or otherwise, and that they continue to have the right to exercise rangatiratanga over them.[142] Legislation vesting the rights of ownership or regulation in the Crown or its delegates,

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[139] Crown closings, 3.3.111, part 2, p 470
[140] *Bleakley v ERMA* [2001] NZLR 213; and see *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513
[141] *Te Runanga o Atiawa v Kapiti District Council* unreported, Environment Court, W23/2002
[142] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 112-114 as an example.

or indeed in any persons other than Maori, without Maori consent, is inconsistent with the Article 2 guarantee of rangatiratanga in environmental management and thereby inconsistent with the principles of the Treaty of Waitangi.[143]

As far as their customary fisheries are concerned the claimants remain concerned with alleged historical Treaty breaches concerning the introduction of trout, the impact of trout on native species including kokopu, and alleged failures to protect habitat for indigenous species.[144]

In relation to geothermal resources, the claimants contend that these resources are taonga.[145] The nature and extent of their Treaty interest in these resources are extensive. They claim ownership in Treaty terms of the surface and subsurface manifestations on their land. Despite land alienation containing geothermal resources, they also claim the geothermal waters/fluids, energy and heat of the fields or systems that make up almost the entire Taupo Volcanic Zone, from Maketu to Tongariro.[146] They contend that there is no evidence of Maori willingly alienating these resources.[147] They argue that the sale of land did not result in Maori giving up their traditional ownership and rangatiratanga rights, nor any aboriginal title rights over their geothermal resources.[148] Alternatively, they argue that at the least they have maintained a Treaty interest in the same way that Maori retained an interest in petroleum.[149]

The Crown's Case

The Crown accepts that many natural resources are taonga and have been of significance or have been traditionally important for the claimants.[150] The Crown does not accept that the guarantee of rangatiratanga under the Treaty was an absolute one and reserves the right under Article 1 to appropriate Maori taonga for matters of national importance and/or allocate or regulate resources such as geothermal resources on the basis that it must balance competing interests in the management and utilisation of such resources.[151] It acknowledges that:

> The Maori understanding of taonga such as rivers, waterways, lakes, lagoons, harbours, bays and oceans has been covered in detail in a number of Tribunal reports that make it clear that such resources are often highly significant to Maori well-being and ways of life. The relationship exists beyond mere ownership, use, or

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[143] Feint, Ngati Tuwharetoa closings, 3.3.106, p 113
[144] See for example Feint, Ngati Tuwharetoa closings, 3.3.106, pp 166-175
[145] Taylor, generic submissions, 3.3.141, p 52
[146] M Taylor, Generic Closing Submissions re Political Engagement, Tourism, Geothermal, 3.3.67, pp 166-189; Taylor, generic submissions, 3.3.141, p 52
[147] Taylor, generic submissions, 3.3.141, p 52
[148] Taylor, generic closing submissions, 3.3.67, pp161-196; Taylor, generic submissions, 3.3.141, pp 52-53
[149] Taylor, generic submissions, 3.3.141, pp 53-55
[150] Crown closings, 3.3.111, part 1, p 5 on geothermal resources; Crown closings, 3.3.111, part 2, pp 469, 470, 472 on lakes and waterways
[151] Crown closings, 3.3.111, part 2, pp 472, 484-488, 498, 504, 509, 511-512

> exclusive possession; it concerns personal and tribal identity, Maori authority and control, and the right to continuous access, subject to Maori cultural preferences.[152]

As we have discussed above, the Crown submits that many of the underlying issues concerning the environment and natural and physical resources relate to patterns of land alienation. It was land alienation that resulted in fundamental restrictions on Maori rights of access to waterways, fisheries, and geothermal surface manifestations.[153] The Crown does not accept that Maori can claim a form of Treaty ownership of natural water within water bodies such as Lake Taupo and the Waikato River requiring that the Crown consult with them over the use of natural water for hydro-power development.[154] The Crown's view extends to the right to use, or the right to control access to the water/fluids of the geothermal fields or systems of the Taupo Volcanic Zone.[155] Flowing on from this, the Crown does not accept that Maori have the right to develop their waterways or geothermal resources for power development.[156] The Crown, while acknowledging that geothermal resources were traditionally of importance, does not go so far as to recognise that part of the Taupo Volcanic Zone from Maketu to Tongariro is a taonga of the claimants.[157] In terms of geothermal resources and other natural water bodies contained within private land we were reminded of the constraints on our jurisdiction under section 6(4)(A) of the Treaty of Waitangi, which prevents the Tribunal making any recommendations concerning the return of any private land or for the Crown to purchase any private land.[158] This means that if we were to find the claims to be well founded we would need to be careful how we frame any recommendations so as not to impact on private land owners and the rights that run with their land.

Tribunal's Analysis and Findings on Taonga and Rangatiratanga

The Treaty protected the land, estates, forests and fisheries of the iwi and hapu of the CNI. It also protected their taonga or matters they highly prized. Many natural resources not explicitly identified in the English text of the Treaty are captured by the term 'taonga katoa' in the Maori text. The exact definition of 'taonga' includes more than what is listed in the English text. In other Tribunal reports the term has been defined as something of inestimable value, 'whose worth is beyond the ken of man to calculate.'[159] In the *Te Ika Whenua Rivers Report* 1998, that Tribunal described 'taonga' as 'properties of special significance.'[160] The Ngawha Geothermal Resource Tribunal described 'taonga' as valued possessions or anything highly prized, often invested with the aura of spirituality and considered objects of guardianship, management and control

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[152] Crown closings, 3.3.111, part 2, p 469
[153] Crown closings, 3.3.111, part 2, pp 502-503
[154] Crown closings, 3.3.111, part 2, pp 486-487
[155] Crown closings, 3.3.111, part 2, p 500
[156] Crown closings, 3.3.111, part 2, pp 497-509
[157] Crown closings, 3.3.111, part 2, pp 497-503
[158] Crown closings, 3.3.111, part 2, p 498
[159] *Te Ika Whenua – Energy Assets Report*, p 13
[160] *Te Ika Whenua Rivers Report*, p 86

under the mana or rangatiratanga of the claimant group, hapu, or iwi.[161] In the *Muriwhenua Fishing Report* the Tribunal described the extent of the term as follows:

> All resources were 'taonga', or something of value, derived from gods. In a very special way Maori were aware that their possession was on behalf of someone else in the future. Their myths and legends support a holistic view not only of creation but of time and of peoples.[162]

Whether a resource falls into the definition of taonga protected by the Treaty, turns on the evidence of a particular case. That evidence is sourced to and depends on Maori law and tenure, cultural values and customary use.[163] We turn now to consider what the Tribunal and the Courts have found regarding whether water, waterways, fisheries and geothermal resources could be taonga protected by the Treaty.

Specific taonga

Water

All resources we are concerned with in this chapter of our report involve water. We were told many things about the importance of water as a taonga, including the following statement made on behalf of Ngati Makino:

> Water [wai] originates from the separation of Ranginui and Papatuanuku, and whichever form it takes on, [during] its descent from the realms of the sky father it is recognised by Maori as the everlasting regrets, longing and loss felt in the separation of the parents and their expansive and undying love for each other. So the sense in which water has its first importance is in that relationship between Rangi and Papa. The tears that fall from the sky become the nourishment of the land itself, on which all current existence depends.
>
> Wai sustains and is sustained by Papatuanuku. As the whenua [land] is nurtured by the wai-ahuru that protects the life within the placenta so the wai acts as a shelter for the human form that is nourished by the whenua. As Nga Roimata a Ranginui descend to settle on Papatuanuku, they gather in the many rivulets of her form, flowing through her and over her, bathing and nourishing the love that Rangi continues to yearn for.[164]

Water was thus the link to the deities of Maori creation for as the Tribunal in the *Muriwhenua Fishing Report* found, 'all resources were "taonga", or something of value, derived from gods.'

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[161] *Ngawha Geothermal Resource Report*, p 20
[162] *Muriwhenua Fishing Report*, p 179
[163] *Whanganui River Report*; *Te Whanganui-a-Orotu Report*
[164] A Sykes and M Armstrong, Opening Submissions, 3.3.21, pp 15-16

Waters that are part of a water-body such as a spring, lake, lagoon or river were possessed by Maori. In Maori thought, the water could not be divided out, as the taonga would be meaningless without it. Our views on this matter are consistent with the *Whanganui River Report* where the Tribunal stated:

> … Atihaunui held the river as a waterway, not a public road. It was in all respects a private, tribal waterway and access was controlled. It was also a fishery, and private fisheries are protected in English law just as they are protected in the Treaty of Waitangi.
>
> Included in that possessed was the water. The river would be meaningless without it. The river was a waterway. The whole river was a fishery. The water was the habitat of creatures to whom Maori were related, from fish to taniwha. The emphasis on water purity for ritualistic and other reasons was described … The water was treasured as the gift of Ranginui just as much as the land was respected as part of Papatuanuku.
>
> … Adopting the holistic thinking of Maori, water was an integral part of the river that they possessed. Though its molecules pass by, the river, as a water entity, remains. The water was their water, at least until it naturally escaped to the sea, at which point its mauri changed.[165]

We accept that where it can be shown on the evidence that CNI iwi and hapu can establish their waterways and geothermal resources to be taonga, then the waters cannot be divided out and must also be considered a component part of that taonga. The issue in relation to water is about the holistic nature of the resources in Maori custom and the relationships of the people with those resources. It is also about possession akin to ownership and the right to control access to the water.[166]

Estuaries, Lagoons

The Tribunal has found that Te Whanganui a Orotu was a taonga of immense importance to the hapu who lived on the banks surrounding it.[167] This finding was repeated in the *Rekohu Report* in relation to Te Whanga Lagoon on the Chatham Islands.[168] The Tribunal has pointed out that the Treaty promised to protect Maori and Moriori in the full, exclusive and undisturbed enjoyment of all those possessions that they prized; and estuaries, wetlands and lagoons are no exception.[169] We adopt this position in principle in relation to those wetlands, estuaries, and lagoons of the CNI.

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[165] *Whanganui River Report*, pp 262-263
[166] *Whanganui River Report*, p 338
[167] *Te Whanganui-a-Orotu Report*, pp 200, 204
[168] *Rekohu Report*, pp 277-278
[169] *Rekohu Report*, pp 277-278

Rivers and Streams

Judge H Carr in the Native Appellate Court 1944 regarding the Whanganui River captured the essence of what Maori understandings of a river resource were when he found that:

> It must be conceded that the pre-Treaty Maori never concerned himself with the abstruse question as to whether or not a river or lake was land covered by water. In many ways the mind of the Maori works inversely to that of the European. The Courts of the latter have laid it down to him that to possess the exclusive use of a lake or river he must own the bed thereof. To the Maori the water would be the predominating factor and the exclusive use of that water would carry with it everything below. If the land was below, then that land. If a taniwha was below, then that taniwha: and the Wanganui River was not an exception to the widely held belief as to fabulous reptiles inhabiting unfathomable depths and acting as tribal guardians. The water and the land underneath it was to the Maori indivisible…[170]

Over 45 years later, the Tribunal has accepted that Ngati Pahauwera viewed the Mohaka River as a living, indivisible entity. The Tribunal has reported on a number of claims relating to river systems that flow through or around the CNI including the Te Ika Whenua rivers, the Kaituna, and the Whanganui river, all of which involve complex rights and interests. In the Kaituna River Report, the Tribunal noted the interconnectedness of the river systems of the region to its lakes:

> … Lake Rotorua does not exist on its own. It is one part of a connected series of waterways that affect each other. The outflow of the lake is through the Ohau channel which leads into Lake Rotoiti, another beautiful body of water… . The outflow from Lake Rotoiti is the Kaituna River, a stretch of water that flows for about 50 km from Lake Rotoiti to the sea. It is famous for the trout pools in its upper reaches, the Okere Falls not far from Lake Rotoiti and for the rapids and waterfalls to be found as it makes its way to the Maketu Estuary… . This estuary is large and distinctive. … [The] Kaituna [River] and Maketu Estuary are one water system starting with Lake Rotorua. All parts, the lakes, the river and estuary should be protected.[171]

The same can be said of the many rivers and streams that feed into the other lakes of Rotorua and into Lake Taupo. This sense of interconnectedness was again traversed in the *Te Ika Whenua Rivers Report*. That report concerned the mana and tino rangatiratanga of the hapu of Te Ika Whenua over the Rangitaiki, Wheao, and Whirinaki rivers. The headwaters of these rivers are in the Urewera and the Kaingaroa Plateau. The claims related to the middle reaches of the river. The Tribunal spoke of the general importance of river systems to Maori of this district. It found that given the harsh, not very fertile land and severe climate, the iwi of Te Ika Whenua totally relied on their river system for sustenance. The iwi of Te Ika Whenua were identified as: Ngati Whare,

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[170] *Title to the Bed of the Wanganui River*, (1944) MAC Minute Book

[171] *Kaituna River Report*, p 5. Note the Tribunal did not consider the issue of whether the river should be re-directed through the estuary, a point that is examined in Chapter 19.

Ngati Manawa, Ngati Patuheuheu and Ngati Huinga Waka.[172] The Tribunal acknowledged the overlapping interests of Ngati Tuwharetoa, Ngati Tahu, Tuhoe, and Te Arawa to different reaches of these rivers. The Tribunal found that to Ika Whenua iwi, the rivers were like a life force, a taonga of inestimable value. The rivers were a part of the psyche of the Te Ika Whenua, and they formed a large part of the lives of the people. Therefore, they were regarded as taonga.[173] This finding is consistent with the Tribunal's finding that the Mohaka River was a taonga of Ngati Pahauwera,[174] and that the Whanganui River was a taonga of the Atihaunui people.[175]

In relation to the Waikato River, the Pouakani Tribunal found that it was a taonga of Tainui iwi and Ngati Tuwharetoa:

> The Waikato River is a taonga of the tribes of Tainui waka and Ngati Tuwharetoa. By various actions of the Crown, or worse by the Crown's failure to acknowledge Maori concerns about wahi tapu, fisheries, taha wairua … mahinga kai and other rights, the mana of these tribes has been devalued.[176]

The Pouakani Tribunal noted that the Waikato river was just as much part of the living space and traditional resources as the land. The river was also the source of fish, especially kokopu (native trout), tuna (eels), and koura (freshwater crayfish). The river was therefore a mahinga kai, a food gathering place. In local Maori terms it was, and still is, regarded as a taonga, a highly-prized resource, by the hapu who occupied its banks.[177]

Springs

An example of how springs are considered taonga comes from the *Te Ika Whenua Rivers Report,* where it was claimed that the springs feeding the rivers were taonga:

> The water from the puna wai [water of the spring] of a whanau is considered a taonga to that whanau as it carries the Mauri [life force] of that particular whanau. Of course all the waters of the puna wai find their way into the river and thereby join with the Mauri of the river. In essence then the very spiritual being of every whanau is part of the river. …In this sense the river is more than a taonga[;] it is the people themselves.[178]

From the CNI, Ngati Rangiwewehi presented evidence of the nature of two springs as taonga in the following terms: 'Suffice to say that Hamurana Springs and Taniwha Springs are entwined in our hearts and minds and culture as inseparable taonga of Ngati

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[172] *Te Ika Whenua Rivers Report*, p 3
[173] *Te Ika Whenua Rivers Report*, p 88
[174] *Mohaka River Report*, p 78
[175] *Whanganui River Report*, p 261
[176] Waitangi Tribunal, *The Pouakani Report 1993* (Wellington: Brooker's Ltd, 1993), para 16.5
[177] *Pouakani Report*, para 16.2, p 289
[178] *Te Ika Whenua Rivers Report*, p 13

Rangiwewehi.'[179] We also received evidence on the importance of the spring Te Wai U o Tuwharetoa at Kawerau which we disucss in detail in Chapter 19.

In terms of size alone, springs are clearly not on a scale with taonga such as the large lakes of the CNI, or the large rivers such as the Waikato River and the Tarawera River. Nevertheless, the Ngati Rangiwewehi traditional evidence demonstrates that springs, which are the source for many rivers, can be taonga of equal significance to the identity of a hapu or iwi, as the Whanganui River was and is to the lives and identity of Te Atihaunui a Paparangi.[180] And just as taonga such as rivers inclusive of waters may be owned in Treaty terms as found in the *Whanganui River Report,* then likewise the springs inclusive of waters which also feed rivers of importance can be owned.[181]

The only complication to that principle arises where land, within which a spring is located, has been alienated. In this regard, Ngati Rangiwewehi asked us to consider the impact of the Crown's purchasing policies and the use of the Public Works legislation resulting in the alienation of land containing Hamurana Springs and Taniwha Springs.[182] As we have described above in our section on Treaty principles, where Maori land was acquired by the Crown in breach of the principles of the Treaty of Waitangi including its duty actively protect to Maori land and natural resources, then Maori may still retain an interest in the natural resources contained within it. This is the result in the *Petroleum Report* when the Tribunal stated that an alternative Treaty interest arises in such cases:

> … whenever legal rights are lost by means that are inconsistent with Treaty principles. When it arises, there will be a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right. Most importantly of all, the Treaty interest creates an entitlement to a remedy for that loss additional to any other entitlement to a remedy.[183]

However, each case, the particular resource involved, and the alienation process that occurred, must be examined to ascertain whether the same principles apply. This is beyond the scope of our Stage One inquiry, but may be a matter that the parties can work on during negotiations.

Lakes

The Tribunal has dealt with one large inland lakes before, Lake Tutira. The Mohaka ki Ahuriri Tribunal recognised that this lake as a taonga along with its eel fisheries. This finding is consistent with the decisions of other Tribunals that similar water bodies such

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[179] N Bidois, Evidence for Ngati Rangiwewehi, April 2005, Document F3, re Hamurana Springs, p 5; M Thompson and R Bidois, Evidence for Ngati Rangiwewehi, April 2005, Document F2, re Taniwha Springs
[180] *Whanganui River Report*, p 341
[181] *Whanganui River Report*, p 340
[182] M Taylor, D Hall, and M Morrissey, Opening Submissions, 3.3.14, p 4; and M Taylor, Closing Submissions for Ngati Rangiwewehi, 3.3.79, pp 34-39
[183] Petroleum Report, p 65

as harbours and lagoons can be taonga protected by the Treaty.[184] A classic judgment consistent with our approach on the importance of lakes to Maori people can be found in *Re Omapere Lake* (1929) a decision of the Native Land Court.[185] In that case, Judge Acheson considered the customary title to the bed of a 1200-hectare lake in the Taitokerau district. After reviewing previous determinations by the Native Land Court recognising Maori title to lakes, the judge stated:

> … Maori custom and usage recognised full ownership of lakes themselves.
>
> The bed of any lake is merely part of that lake, and no juggling with words or ideas will ever make it other than part of that lake. The Maori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain. In fact, in olden days he would have regarded it as rather a grim joke had any strangers asserted that he did not possess the beds of his own lakes.
>
> A lake is covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as land covered by forest or land covered by a running stream.
>
> … it was taken for granted that the lakes were tribal property. Nor were the lakes regarded merely as sources of food supply or merely as places where fishing rights might be exercised.
>
> To the spiritually-minded and mentally-gifted Maori of every rangatira tribe, a lake was something that stirred the hidden forces in him. It was (and, it is hoped, always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a 'mauri or indwelling life principle' which bound it closely to the fortunes and the destiny of his tribe. Gazed upon from childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people. This feeling of kinship accounts for famous Maori saying[s], such as: -
>
> 'Tongariro is the Mountain
>
> Taupo is the Lake
>
> Tuwharetoa is the Tribe
>
> And Te Heuheu is the Man.'
>
> … To the Maori, also, a lake was something that added rank, and dignity, and an intangible mana or prestige to his tribe and to himself. On that account alone, it would be highly prized and defended.

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[184] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989); *Te Whanganui-a-Orotu Report*; *Rekohu Report*; and the *Whanganui River Report*

[185] Re Lake Omapere (Bay of Islands), Taitokerau Maori Land Court minute book 11, 1929, fol 253–278

Evidence examined by White concerning a number of large inland lakes including Lake Rotorua, Lake Rotoiti and Lake Taupo suggests that Te Arawa considered themselves to be owners of the lakes in Rotorua, and Ngati Tuwheretoa and their whanaunga considered themselves to be the owners of Lake Taupo.[186] They held these lakes in accordance with their own laws and customs. White's evidence notes the existence of a body of customary law pertaining to Maori ownership of lakes by one or more hapu. That body of law extended to how rights of management and use were allocated. This evidence suggests Maori saw themselves as owners and managers of these lakes including their fisheries, beds and waters. It also suggests that Maori controlled access and enforced their law on other hapu or iwi with no rights to the lakes.[187] White further concluded that lakes were imbued with great metaphysical importance and that they were to varying extents a componant of Maori identity.[188] If his evidence is added to the judgment in *Re Omapere Lake* (1929), which underscored that Maori saw lakes as whole entities, not as lake beds, then we conclude that lakes are be capable of being taonga protected by the Treaty of Waitangi. It would be illogical to conclude otherwise. In the Whanganui River Report the Tribunal has said as much although the emphasis there was on the River:

> The river system was possessed as a taonga of central significance to Atihaunui. … The river was conceptualised as a whole and indivisible entity, not separated into beds, banks, and waters, nor into tidal and non-tidal, navigable and non-navigable parts. Through creation beliefs, it is a living being, an ancestor with its own mauri, mana, tapu. To Atihaunui, it was their 'tupuna awa.'
>
> The river, ***like lakes***, swamps, and inshore seas, was no different from the land in that respect. These were all part of the people's inheritance. …
>
> The river was held by both the hapu and the people as a whole. [Emphasis added.][189]

The Crown has recognised this to be so before us in its acknowledgement that lakes generally may be taonga and that Lake Taupo specifically is a taonga of Ngati Tuwharetoa.[190] We make no findings in relation to the lakes included in the Te Arawa Lakes Settlement Act 2006 including Lake Rotorua and Lake Rotoiti, but rather note that the Crown has acknowledged in section 7 of that Act, that Te Arawa values the lakes and the lakes' resources as taonga. All of this suggests that it is now beyond doubt that lakes are capable of being taonga protected by the Treaty of Waitangi.

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[186] B White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series, 1998, Document A55, pp 96, 200
[187] White, A55, pp 250-252
[188] White, A55, p 250
[189] *Whanganui River Report*, p 261
[190] Crown closings, 3.3.111, part 2, pp 469, 472

Fisheries

The Tribunal has said that the Treaty of Waitangi obliges the Crown to provide for legislative recognition of Maori fishing grounds and fisheries and to confer upon those most closely associated with them certain rights of control.[191] That text of the Treaty would have conveyed to Maori people that they were to be protected not only in the possession of their fishing grounds, but in the mana to control them and then in accordance with their own customs and having regard to their own cultural preferences.[192] The Motunui Tribunal found that the Te Atiawa fishing reefs and the Waitara River constituted significant traditional fishing grounds of the Te Atiawa people.[193] The reefs extended for some 30-35 miles along the coast of north Taranaki. They were not only a source of food but also of tribal pride and prestige. Particular named parts of the reefs were regarded as the property of particular hapu.[194] All of this indicated that Te Atiawa exercised rangatiratanga over the reefs and the river.

In the *Muriwhenua Fishing Report*, customary fisheries were also recognised as a taonga:

> In the Maori idiom 'taonga' in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift-exchange, and is a part of the complex relationship between Maori and their ancestral lands and waters. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.
>
> This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.
>
> The Maori 'taonga' in terms of fisheries has a depth and breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future which colours their thinking, attitude and behaviour towards their fisheries.
>
> The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or 'belonging', but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a 'hurt' to the environment or to the fisheries may be felt personally by a Maori

[191] *Motunui-Waitara Report*, p 1
[192] *Motunui-Waitara Report*, p 51
[193] *Motunui-Waitara Report*, pp 6-7
[194] *Motunui-Waitara Report*, p 1

> person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.
>
> The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.
>
> This vision provided the mauri (life-force) which ensured the continued survival of the iwi Maori. Maori fisheries include, but are not limited to a narrow physical view of fisheries, fish, fishing grounds, fishing methods and the sale of those resources, for monetary gain; but they also embrace much deeper dimensions in the Maori mind, as referred to in evidence by Miraka Szazy in the context of spiritual guardianship.[195]

Although the Muriwhenua Fishing Tribunal was referring to sea fisheries, this same reasoning applies to freshwater fisheries because they are as important as sea fisheries. In the *Whanganui River Report* the Tribunal made several findings about the importance of fresh water fisheries: that the river was also a fishery and a habitat of creatures to whom Maori were related, from fish to taniwha; and as a taonga it was protected by the Treaty for its qualities as a fishery among other things.[196]

Geothermal resources

Previous Tribunals have found that geothermal resources are taonga. The Ngawha Geothermal Resource Tribunal had this to say about the resource:

> [R]egarding the unitary character of the geothermal resource[,] [s]ince the springs themselves lay within the territory over which Ngapuhi had always exercised unchallenged their rangatiratanga, it follows that in their view such rangatiratanga would have extended over the entire resource equally above and below the surface of the land and throughout the extent of its manifestation. This, we believe, was the position in 1840 and, the claimants say, it is still the case today. On all major counts, then, the Ngawha springs and the underground resource are a taonga for Ngapuhi.[197]

Of direct relevance to our inquiry is the *Preliminary Report on the Te Arawa Geothermal Resource Claims,* which found that the geothermal manifestations of Whakarewarewa, Rotokawa Baths, and Rotoma Waitangi Soda Springs were taonga.[198] That Tribunal went on to note that:

> It would be invidious for this tribunal to attempt a comparative evaluation of the value to the three groups of claimants of their respective taonga. We would again

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[195] *Muriwhenua Fishing Report*, pp 180-181
[196] *Whanganui River Report*, pp 262-263
[197] *Ngawha Geothermal Resource Report*, p 21
[198] *Te Arawa Representative Geothermal Claims Report*, pp 17-19

> stress that the value attached to such taonga is essentially for those having rangatiratanga and exercising kaitiakitanga over them to determine. But such value is not confined to, or restricted by, traditional uses of the taonga. It will include present day usage and such potential usage as may be thought appropriate by those with rangatiratanga over the taonga.[199]

The evidence before this Tribunal ranging across the Central North Island from Maketu to Tongariro was that all the hapu and iwi with geothermal resources within their territories consider them to be taonga protected by the Treaty.[200] As the amount of evidence on this topic is reasonably comprehensive, Chapter 20 explores the issue of what the nature and extent of the Maori Treaty interest is in relation to the geothermal resources of the CNI.

The Nature of Rangatiratanga Over Taonga Protected by the Treaty

Having found in principle that water, waterways, fisheries, and geothermal resources can be taonga, we turn now to consider how the Treaty protected them. The Treaty guaranteed Maori autonomy and self-government over what they possessed as taonga in 1840. In terms of the nature of the taonga we have described above, what Maori possessed were water resources.[201] The Tribunal has said:

> … that which was possessed was a water regime, consisting of bed, water, and contents, not merely dry land. The fact that the law that grew up in England distinguished between the ownership of land and the ownership of water in any water regime is not good ground for making that distinction here. The Treaty guaranteed whatever it was that Maori possessed, in the sense of using and enjoying, and what was possessed was a water resource. In the same way, fisheries were preserved, and of course, Te Whanga was a fishery too. There is no point to the guarantee if it is seen to apply only to the bed.
>
> As was explored in the *Whanganui River Report*, coupling 'possession' with the Crown's guarantee of 'ownership' at English law is an appropriate cultural equivalent.[202]

Therefore, the Treaty protected these taonga not as mere Treaty interests but as resources that Maori possessed. The closest expression known to English law to describe the nature and extent of their possession would be ownership. That ownership was expressed through Maori law and tenure as we discussed in Chapter 2 of this Report. These complex systems often involved intersecting rights and obligations. Maori were promised in the Treaty that they could exercise their own autonomy, authority and control over their taonga in accordance with their own cultural preferences.

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[199] *Te Arawa Representative Geothermal Claims Report*, p 19
[200] Taylor, generic submissions, 3.3.141, p 52
[201] *Rekohu Report*, pp 277-278
[202] *Rekohu Report*, p 278

The Maori tenure system included the concepts of rahui, tapu and noa. It was a system that recognised the overarching tribal control of resources and people. For example, in the case of long rivers or large inland lakes involving complex rights of many hapu and iwi, rights and interests were clearly defined. Those rights and the associated mana were passed down from generation to generation. They included the right to exercise rangatiratanga, autonomy and control over those parts of a river within one's sphere. Converse to that was a corresponding obligation to act as kaitiaki of a resource for the benefit of all other iwi and hapu of the river or lake. In the *Mohaka River Report*, the Tribunal noted evidence that Ngati Tuwharetoa claimed a special relationship with Ngati Pahauwera, because Ngati Tuwharetoa live on the upper reaches of the Mohaka river.[203] Evidence was given that if Ngati Tuwharetoa did things up-river that Ngati Pahauwera did not like, there would be consultation 'Maori to Maori'.[204] Consequently, agreements with other tribes concerning the use of parts of the rivers were negotiated.[205] That Tribunal heard evidence from the late Canon Wi Huata that the Mohaka River was traditionally known as Mohakaharara (peaceful joining) and that the river served as a unifying force.[206] Thus it was that maintaining inter-tribal relations, reconciling competing interests and maintaining the Mohaka River as a highway, were said to be the features of rangatiratanga. While the hapu had certain rights, the ultimate authority rested in the tribe, and issues which affected the tribe as a whole could only be resolved on a tribal level. None of this could be achieved without control. In this sense tino rangatiratanga was an inherited responsibility.[207] The Maori tenure system also recognised different sets of rights, some held exclusively by hapu or whanau, or individuals based on descent or through enterprise, and others held in common.[208]

Despite this complexity of intersecting rights and obligations, Maori viewed their resources as single indivisible entities. We have already referred to the Lake Omapere decision in relation to lakes. This is consistent with the views expressed in the *Whanganui River Report*. We adopt the reasoning of that Tribunal when it stated that:

> In Maori terms, the Whanganui River is a water resource, a single indivisible entity comprised of water, banks, and bed. There is nothing unexpected in that. It is obvious that a river exists as a water regime and not as a dry bed. The conceptual understanding of the river emphasises the Maori thought that the river exists as a single and undivided entity or essence. Rendering the native title in its own terms, then, what Atihaunui owned was a river, not a bed, and a river entire, not dissected into parts. …

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[203] *Mohaka River Report*, p 16
[204] *Mohaka River Report*, p 16
[205] *Mohaka River Report*, p 17
[206] *Mohaka River Report*, p 17
[207] *Mohaka River Report*, p 17
[208] *Mohaka River Report*, p 15

> … The Treaty guaranteed to Atihaunui the 'full exclusive and undisturbed possession of their… properties.' As earlier seen, that includes the river and that must include as well the property right of access to the river water.[209]

This approach to Maori tenure applies to all the natural resources we have considered above. It explains why the Tribunal in the *Te Ika Whenua Rivers Report* found that those iwi held a proprietary interest akin to ownership of the rivers as at 1840, according them full and unrestricted use and control of access to the waters of the rivers while in their tribal sphere of influence. We can see no reason to depart from this reasoning in relation to all other resources considered in this chapter. That is the nature of the guarantee of Maori rangatiratanga over their land and natural resources under the Treaty.

Issue 3 – The Common Law and Aboriginal Title

In this section we consider the third issues before us, namely was introduced English common law relating to water-bodies, fisheries and geothermal resources sufficient to recognise Maori customary or native title to those resources. This is to be compared to CNI Maori Treaty rights and interests which the Crown was obliged to recognise. To answer this question we analyse the nature of land estates in English law to lay the basis for a discussion on the additional common law rules pertaining to natural resources. These rules, along with the principles of the Treaty of Waitangi, determined how the Crown would respond to Maori natural resource claims.

We have previously discussed the nature of Maori customary tenure in Chapter 2 and Part III of this report. We note and draw upon the Tribunal's *Whanganui Report* which contains a full chapter on the interplay between Maori customary law and English common law. That Tribunal noted the following common law rules regarding English land tenure applied in New Zealand after 1840 to the extent relevant to the circumstances of the colony:

- All land is vested in the Crown;[210]
- All grants of transferable titles in fee simple came from the Crown;[211]
- Where land was purchased direct from Maori, the purchase was acknowledged in the form of a Crown grant;[212]
- Though the Crown grants land, it still retains the underlying or radical title;[213]
- The same applies if the land is appropriated for a public purpose;[214]
- The Crown's unappropriated lands are sometimes called waste lands;[215]

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[209] *Whanganui River Report*, pp 337-338
[210] *Whanganui River Report*, p 15
[211] *Whanganui River Report*, p 15
[212] *Whanganui River Report*, p 15
[213] *Whanganui River Report*, p 15
[214] *Whanganui River Report*, p 15

- The doctrine of tenure in English law was applied in New Zealand from the commencement of colonisation;[216]
- After early debates, it was also admitted that Maori held all land in New Zealand according to their customs and usages;[217]
- This was accommodated within the English legal framework by reference to established canons of colonial common law;[218]
- The land was still Crown land, but the Crown's radical title was held subject to Maori customary usages or native title until the Maori customary interest had been extinguished;[219]
- Subsequently, the Maori customary usage has been referred to as the aboriginal/native or customary title and it is said to be a burden on the title of the Crown;[220]
- The nature of aboriginal/native or customary title was ascertained by reference to Maori custom and Maori law and not English conceptions of land or other resources;[221]
- Native or customary title to land (as opposed to natural resources) was largely extinguished during the 19th century by a combination of purchase, expropriation, or grant of freehold title to those Maori determined as owners by the Native Land Court.[222]
- Thus, there were only two categories of land in early colonial law until 1865: Crown land (even though burdened with Maori customary title) and freehold land.[223]

These legal principles form the background to understanding the impact of the common law on Maori customary rights and interests to other natural resources. That is because the manner in which the common law recognised legal interests in natural resources other than land evolved from or enhanced the rights and interests of property owners.

The recognition of aboriginal/native or customary title or rights reflects the concern of the common law to protect property rights existing prior to the assertion of Crown sovereignty. The doctrine of aboriginal rights and its application in New Zealand law has been authoritatively stated by Lord Cooke when he was president of the New Zealand Court of Appeal:

> Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession

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[215] *Whanganui River Report*, p 15
[216] *Whanganui River Report*, p 15
[217] *Whanganui River Report*, p 16
[218] *Whanganui River Report*, p 16
[219] *Whanganui River Report*, p 16
[220] *Whanganui River Report*, p 16
[221] *Whanganui River Report*, p 16
[222] *Whanganui River Report*, p 16
[223] *Whanganui River Report*, p 16

or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective. It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes. It was so stated by Chapman J in *R v Symonds* (1847) NZPCC 387, 390, in a passage later expressly adopted by the Privy Council, in a judgment delivered by Lord Davey, in *Nireaha Tamaki v Baker* (1901) NZPCC 371, 384.

Chapman J also spoke of the practice of extinguishing native titles by fair purchase. An extinguishment by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power. See the fisheries case, *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 655; the Sealord case at p 306; the authorities mentioned in those two cases; and now further the judgments in the Canadian Federal Court of Appeal in *Eastmain Band v James Bay and Northern Quebec Agreement (Administrator)* (1992) 99 DLR (4th) 16 and *Apsassin v Canada (Department of Indian Affairs and Northern Development)* (1993) 100 DLR (4th) 504. It may be that the requirement of free consent has at times to yield to the necessity of the compulsory acquisition of land or other property for specific public purposes which is recognised in many societies; but there is an assumption that, on any extinguishment of the aboriginal title, proper compensation will be paid, as stated by Lord Denning, in delivering the judgment of a Judicial Committee of the Privy Council the other members of which were Earl Jowitt and Lord Cohen, in *Adeyinka Oyekan v Musendiku Adele* [1957] 2 All ER 785, 788.

The nature and incidents of aboriginal title are matters of fact dependent on the evidence in any particular case. Yet how they are decided or assessed tends to turn, not on the evidence only, but also on the approach of the Court considering the issue. At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law (see for instance Mabo v State of Queensland [No 2] (1992) 175 CLR 1, 89 per Deane and Gaudron JJ). At the other extreme they may be treated as at best a mere permissive and apparently arbitrarily revocable occupancy (see, throughout, the dissenting judgment of Dawson J in the same case). Viscount Haldane's phrase "a full native title of usufruct" in delivering the judgment of the Privy Council in Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399, 408, is one of the descriptions most frequently cited.

The Treaty of Waitangi 1840 guaranteed to Maori, subject to British kawanatanga or government, their tino rangatiratanga and their taonga, or in the official English version "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties . . .". In doing so the Treaty must have been intended to preserve for them effectively the Maori customary title, as mentioned in the fisheries case at p 655.[224]

[224] *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 23-24, per Cooke P

The nature and extent of the doctrine of aboriginal/native or customary title and whether it recognised rights in natural resources other than land over and above those protected by the Treaty of Waitangi is explored in this section. We do so because:

- If the common law did recognise some form of Maori native or customary title or rights in natural resources, then they may be legally enforced and the Crown should provide a legislative system to ensure that they can be fully enjoyed;

- If the common law did not support the existence of such rights, or where such rights and interests were extinguished by dint of the common law or statute, the issue then becomes what has the Crown done to protect the Treaty rights and interests of CNI Maori in these resources.

We turn now to consider the different categories of resources relevant to this inquiry. We note first that we will explore the common law as it relates to geothermal resources in Chapter 20 and do not propose to do so in this section.

Ownership of Water

The common law recognised no ownership in natural water. Water was regarded as a common resource. Rather, property in water could only be acquired by containment, otherwise known as the doctrine of capture. Therefore, a person who extracted water and contained it acquired an enforceable interest in it.[225] In the *Whanganui River Report* the Tribunal reflected upon this and noted that the Crown very soon assumed the role of controlling the use of natural water. It recalled that it:

> … is only by deeming provisions in statutes that the Crown has asserted the ownership of water for particular purposes of specific Acts. For example, by section 3 of the Municipal Corporations Waterworks Act 1872, all waters abstracted by municipal corporations for domestic supplies were deemed to be the property of and vested in the Crown.
>
> However, while ownership was uncertain, in early New Zealand, the Crown assumed the right to control and license private water uses by statute. Provincial laws from at least 1864 provided the legal authority for privately owned water-powered flourmills and sawmills to use water for power. Specific water rights for mining, irrigation, and hydroelectricity were established by statute, as with the Gold Fields Act 1862, Mines Act 1877, Public Works Act 1882, Water Supply Act 1891, and Water-power Act 1903. These, and their amendments, consolidated the Government's control over water, regulated potential conflict between farming, mining, and industrial interests, prevented monopolies, and assured public access or private usages.

[225] *Ferens v O'Brien* [1883] 1 QB 21

> Today, the Crown assumes the right to control, manage, and allocate water uses – in particular, under the Resource Management Act 1991 – but the legislation does not address the question of ownership.[226]

The common law and statutory approach to rights in natural water is to be contrasted to that of Maori who conceptualise water as an essential component of a water-regime or system which cannot be separated out from all the other components that make up that water system. This approach was clearly reflected in the evidence before us concerning Lake Taupo which we will review in Chapter 18. As with the Whanganui River, Maori native or customary title to a water-regime that falls into the category of taonga and their Treaty interest in it extended by necessary implication to the water of that regime or system. The water was as much a part of the taonga as was the bed, the adjoining banks or shores, the fisheries and the aquatic life.[227]

Water-systems, Lakes and Springs

The relevant English common law presumption was that non-tidal rivers and lakes were owned by adjoining property owners of land to the centre line, or to the centre point in the case of lakes unless captured within one land block, in which case rights of access were controlled by the land owners.[228] In the case of tidal reaches of rivers and in relation to the foreshore and seabed, the Crown was presumed to hold title.[229] Thus it could be said any land covered by water regimes, 'permanently or from time to time, was either Crown land or privately owned land.'[230] Sometimes, these presumptions at law could be rebutted and we explain this further below. The rules associated with each of these water regimes were adopted in New Zealand from the commencement of settlement.[231] We turn now to consider the law pertaining to each water-regime in detail.

Small Inland Lakes

Depending on the nature and size of a lake, different common law rules apply. If the lake was a small inland lake, there was a presumption that the title of a riparian owner extended to the middle line of the lake onto which the riparian land abuts.[232] Further, where a small lake is captured within the land of a single owner, the presumption is that the bed of the lake belongs to that proprietor.[233] A grant of the land in this latter situation is presumed to include the bed.[234] In such circumstances, it is difficult to argue for separate Maori customary title to the bed of a lake divorced from the land unless it

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[226] *Whanganui River Report*, p 21
[227] *Whanganui River Report*, pp 281-282
[228] *Whanganui River Report*, p 16
[229] *Whanganui River Report*, p 17
[230] *Whanganui River Report*, p 17
[231] *Whanganui River Report*, p 17
[232] *Strang v Russell* (1905) 24 NZLR 916, 925-926
[233] *Strang v Russell* (1905) 24 NZLR 916, 925-927
[234] *Laws of New Zealand*, Water Part III – Non-Tidal Waters page 68.

could be shown that the lake was specifically reserved.[235] Maori customary title was effectively extinguished by the issue of a Crown grant or a Native Land Court title to land. Once registered in the Land Transfer system the owner (Maori or otherwise) of the land surrounding the lake acquired an indefeasible title.[236] The tribe or hapu as customary owner was replaced by individual owners. We have discussed the impact of the process of individualisation in Part III of this report and concluded that individualisation of title was imposed on Maori in breach of the principles of the Treaty of Waitangi.

Large Inland Lakes

We turn now to consider what happened to large inland lakes prior to the enactment of any legislation vesting title in the Crown. The common law as it was introduced in 1840 recognised that where Maori could establish native or customary title to a lake, their title remained a burden on the Crown's radical title. A feature of Maori customary title was the notion that the lake was indivisible from its waters. If the lake was recognised as their lake in accordance with Maori custom then the tribe or tribes with primary associations with the lake controlled access to it and its waters in a manner akin to ownership. In terms of the practice of the Courts, we note the early decisions of the Native Land Court acknowledged the Maori world view of such water bodies and how indivisible they were in the minds of Maori. As we noted in section 2 of this chapter, one of the most eloquent judgments on the importance of lakes to Maori people can be found in *Re Omapere Lake*(1929).[237]

Whether the presumption of the Crown's common law radical title applied to the extensive navigable lakes and their waters in New Zealand was alluded to in *Strang v Russell* (1905) 24 NZLR 916 at 925 without being determined. In that decision the Court noted case law which established that in Ireland and England the soil of large lakes did not of common right belong to the Crown.[238] Whatever is the true position at law the history of the CNI has been one of the Crown initially resisting Maori native or customary title to the large inland lakes.[239] This occurred in 1910 when the Crown sought to prevent the Native Land Court inquiring into title applications filed by Te Arawa. The Court of Appeal underscored the right for Maori to make applications to the Native Land Court to have their title determined. This occurred in the famous case of *Tamihana Korokai v Solicitor-General* (1913) 33 NZLR 321 where the Court ruled that the Native Land Court had jurisdiction to hear applications from Maori for the ownership of lakes. When the Courts failed to uphold the Crown, it negotiated to secure

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[235] See for example *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 26 and 27 where the Court of Appeal recognised that such customary title may exist unless extinguished.
[236] *Strang v Russell* (1905) 24 NZLR 916, 925-927
[237] Re Omapere Lake (Maori Land Court, Bay of Islands, 1929, 11 MB 253 - 278 decision of Acheson J).
[238] See *Bristow v Cormican* (1878) 3 App Cas 641; and see also *Johnston v O'Neill* [1911] AC 552
[239] See Salmond to Attorney-General, 1 August 1914, Crown Law Office Opinions relating to Lands Department 1913-1915, cited in Alex Frame, Southern Jurist, 110.

title from Maori.[240] As a result, it moved in 1922 to conclude a settlement with Te Arawa over 14 Rotorua lakes. The Native Lands Amendment and Native Claims Adjustment Act 1922 was passed to give effect to the settlement. Section 22 vested the beds of 14 Rotorua lakes in the Crown 'freed and discharged from the Native customary title, if any' in exchange for an annuity and certain specific rights, including fishing rights.

The history of this matter and the Crown's acknowledged Treaty breaches concerning the Rotorua lakes have been resolved and settled by Te Arawa and the Crown. The enactment of the Te Arawa Lakes Settlement Act 2006, giving effect to a settlement deed dated 18 December 2004, records this agreement. The jurisdiction of Tribunal to consider the historical lakes claims as defined by section 13 of that 2006 Act has now been limited by the amendment to section 6 of the Treaty of Waitangi Act 1975. The Te Arawa lakes subject to the settlement are listed in section 11 of the 2006 Act as: Lakes Ngahewa, Ngapouri (also known as Opouri), Okareka, Okaro (also known as Ngakaro), Okataina, Rerewhakaaitu, Rotoehu, Rotoiti, Rotoma, Rotomahana, Rotorua, Tarawera, Tikitapu, and Tutaeinanga. The settlement includes the water, fisheries, and aquatic life in those lakes, but does not include the islands in those lakes or the land abutting or surrounding those lakes. It does not include the area above the bed of the lakes known as the Crown's stratum. The Crown's stratum is defined in section 11 of the 2006 Act as the space occupied by water, and the space occupied by air above each of the Te Arawa lakebeds listed above.

We cannot say any more regarding the large inland lakes in Rotorua which have been the subject of the Te Arawa Lakes Settlement 2006. Nor can we inquire into claims concerning the water, fisheries or aquatic life in those lakes. We can, however, inquire into the remaining Rotorua lakes. Title to most of these lakes was investigated by the Native Land Court as in the case of Lake Rotokauau owned predominantly by Ngati Rangiteaorere. Lake Rotokakahi is also in Maori ownership and is controlled by the Lake Rotokakahi Board of Control. We consider issues relevant to these lakes in Chapter 19.

In terms of Lake Taupo, whilst there has been a settlement of issues concerning the ownership of the lake bed and some of the beds of the large rivers that enter the lake, other issues remain. Those issues include the impacts of raising the lake and the management of the waters of the lake for hydropower generation. We discuss these issues in detail in Chapter 18.

In relation to those lakes that were captured within a land block alienated out of Maori hands as a result of unfair Crown purchase tactics, and/or by dint of the individualisation of land title system, we make no findings as that would require a block

[240] See Haughey "Maori Claims to Lakes, River Beds and the Foreshore" (1966) 2 NZULR 29 at 30 - 32 and Brookfield "Wind, Sand and Water: Accretion and Ownership of the Lake Bed" [1981] NZLJ 365 at 366 - 368.

by block analysis of what happened in each case. We will note the special case that was raised in evidence before us regarding Rotoiti Paku and discuss the environmental impacts on that lake in Chapters 19 and 20. We note that to the extent that the issues concern matters covered by the Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, they are settled and provide background only. However, the Act seems to contemplate new matters in relation to Wai 21 being raised pursuant to any amended pleadings.

Rivers and Streams

In general terms the legal regime relating to rivers and streams has developed as a mixture of common law and statute law. The Whanganui River Tribunal reviewed this area of the law in detail and we do not propose to revisit their findings. We do, however, adopt their analysis of the law and their findings.

As with lakes, the general presumption of law, and in the absence of evidence to the contrary, was that the bed of a non-tidal river or stream belonged to the owners of the lands abutting rivers or stream. This presumption, that the riparian owners own the bed to the middle line of the water (ad medium filum aquae) applied initially to all rivers and streams. At common law the presumption applied whether the river was navigable or non-navigable. The presumption has continued in terms of small streams and rivers. But the question became whether the presumption regarding the rights of riparian owners also applied to large navigable rivers used by the Crown for transportation.

Previous Tribunals have considered this issue in some detail.[241] The Whanganui River Tribunal noted the famous case of *Mueller v Taupiri Coalmines Limited* (1900).[242] This judgment from 1900 entrenched the view that the presumption of ad medium filum aquae could be rebutted at common law depending on the circumstances and the nature of the river. That case concerned the Waikato River and land that had been subject to confiscation by the Crown. In those circumstances the presumption of ad medium filum aquae could be displaced in favour of the Crown. While finding in favour of the Crown, one of the judges acknowledged the prior Maori ownership of the Waikato river up to the point of confiscation stating that:

> … the lands were Native lands, the owners of which were entitled to the full, exclusive, and undisturbed possession thereof guaranteed to them by the Treaty of Waitangi. These rights have from the time of the foundation of the colony been recognised by the Crown and the Legislature. "The Native Land Act 1862" recites the Treaty, and the rights of the Natives thereunder; and the whole of the legislation relating to Native lands up to the present day recognises the existence of these rights. These are also recognised by "The Native Rights Act 1865". …

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[241] *Motunui-Waitara Report*; *Kaituna River Report*; *Mohaka River Report*; *Whanganui River Report*; *Te Ika Whenua Energy Assets Report*; *Te Ika Whenua Rivers Report*
[242] *Mueller v Taupiri Coalmines Limited* (1900) 20 NZLR 89

> [it] is impossible to infer any dedication by the Crown [of a right of public user] so long as the soil in the river remained Native land and in the possession of the Native owners. To do so would be to assume that the sovereign power has not respected, but has improperly invaded, the Native proprietary rights.[243]

Consequently, prior to the confiscations it would have been possible to argue that any title that the Crown might assert to large navigable rivers was subject to Maori native or customary title. After this decision the Crown enacted legislation to deal with large navigable rivers. So for many years the issue of prior ownership was coloured by the statutory vesting of the beds of all navigable rivers in the Crown when it enacted section 14 of the Coal Mines Amendment Act 1903. Cooke P (as he was then) in *Te Runanga o Te Ika Whenua v Attorney-General* (1994) suggested that the Coal Mines Act 1903 and its amendments was insufficiently 'clear and plain' to extinguish Maori customary title to beds of large navigable rivers. He pondered:

> The vesting of the beds of navigable rivers in the Crown provided for by the Coal-mines Act Amendment 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept, although it is odd that the concept seems not to have been put forward in quite that way in the line of cases concerning the Wanganui River, the last of which was the decision of this Court in Re the Bed of the Wanganui River [1962] NZLR 600. Perhaps the approach which counsel for Maori argued for in that line of cases, emphasising the bed and the adjacent land more than the flow of water, is an example of the tendency against which the Privy Council warned in Amodu Tijani (at p 403) of rendering native title conceptually in terms which are appropriate only to systems which have grown up under English law. Similarly, as the Waitangi Tribunal bring out in their Mohaka River Report at pp 34-38, the ad medium filum aquae rule applied in the 1962 case is inconsistent with the concept and may well be unreliable in determining what Maori have agreed to part with.[244]

This view is to be contrasted with the position in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) where Justices Keith and Anderson took a different view, and suggested that section 14 of the Coals Mines Act was sufficient to extinguish title.[245] Clearly then if judges of this rank cannot agree, it is still an issue to be finally settled in law.

The Ownership of Springs at Common Law

With regard to the ownership of springs at common law, the resource is considered to be a water resource. As we have noted above, free flowing water was not capable of ownership. In the *Laws of New Zealand* the ownership of water resources is described thus:

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[243] *Mueller v Taupiri Coalmines Limited* (1900) 20 NZLR 89, 122-123
[244] *Te Runanga o Te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20, 26-27
[245] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA)

> In the case of unappropriated water, whether percolating through the soil, diffused as surface water, or flowing, or gathered in a pool or small lake, within one holding, unrestricted common law rights to use the water were incident to ownership of the land. Such rights were thought to be akin to proprietary interests, since the landowner alone had the right of access to the water and therefore to appropriate it. [246]

The result is that the springs are captured within the land and therefore, ownership runs with the land. If a spring is within the confines of a block, the owner as the proprietor of the land has the right to control access to that spring. As we have discussed in relation to lakes, the water itself could not be the subject of property until contained by the riparian owner or other person having access to it by consent of the proprietor. In such cases, any common law native or customary title in the springs may have been extinguished, although the Treaty rights and interests of the claimants remain.

We do not have sufficient evidence to make a general finding concerning all springs of importance to the CNI claimants, but we can say that in relation to two of the examples that were raised before us, namely Hamurana and Taniwha Springs, that serious issues have been raised regarding the manner in which the Crown acquired its initial interests in these resources. As we have noted in Part III, the fact that the land with the springs was alienated by direct Crown targeting of the land (as in the case of Hamurana) or by public works takings (as in the case of Taniwha Springs), has been the source of ongoing grievance for Ngati Rangiwewehi, who continue to mourn the loss of these taonga. The issues concerning the loss of springs are, therefore, land alienation issues.

No special consideration was given in early legislation to ensure that Maori could maintain their relationship with taonga such as these, or to ensure they could participate in the management of the springs despite the alienation of land. This is an example of the failure of the Crown's policies and legislative regimes to recognise and provide for Maori Treaty rights and interests. It would be fair to say that as a direct result of these systemic failings, the claimants, relationships with Taniwha and Hamurana Springs have been prejudicially affected in breach of the principles of the Treaty of Waitangi.

The Common Law – Lagoons and Estuaries

The position before 2006 was that by presumption of the common law, lagoons or estuaries were considered under the common law to be arms of the sea. As such, the common law presumption was that title was vested in the Crown unless the presumption could be rebutted.

However, the presumption at common law may have been rebutted in New Zealand after the decision of the Court of Appeal in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) which found that the Crown's radical title to the foreshore and seabed may be subject to Maori customary title. The Crown, however, moved quickly to settle

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[246] *Laws of New Zealand* "Water", Part II Inland Waters, para 39

the issues by enacting the Foreshore and Seabed Act 2004. The Act vests full legal and beneficial ownership of the foreshore and seabed in the Crown and deems such land to be "public foreshore and seabed." So it seems that the common law rules were not sufficient to displace Maori native or customary title until the enactment of this legislation.

The major concern of the claimants before us relates to the drainage of estuaries and lagoons, which they allege had significant effect on many Māori. We consider this further in Chapter 19.

The Common Law and Fisheries

It is now well established that prior to 1992, Maori native or customary title extended to include fishing rights and access to fisheries. This was recognised in *Te Runanga o Muriwhenua Inc v Attorney-General* (1990) by the Court of Appeal. In that case, the Court could not rule on the substantive questions of law pertaining to fishing rights but it did suggest that there was a real possibility that the view of the law, and in particular Maori customary fishing rights, provisionally taken by Greig J (Wellington, CP 743/88) will prove to be right. He had found that such rights did exist. The Court of Appeal further noted that the judgment of Williamson J in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 also recognised the existence of such rights. The Court of Appeal opined that in principle the extinction of customary title to land does not automatically mean the extinction of fishing rights.[247] The same position is held for both salt water and fresh-water indigenous customary fisheries. Therefore, Maori customary freshwater fishing rights remain intact.

However, a different position is taken by the Courts in New Zealand in relation to fishing for trout or other introduced species. In this respect the Court of Appeal has stated:

> We are satisfied that this legislative history demonstrates beyond doubt that the appellant and his hapu did not have a Maori fishing right to take trout in the Mangawhero river.
>
> Legislative control began with The Salmon and Trout Act 1867 before trout had been brought into New Zealand and in contemplation of their arrival. The preamble to that statute records that it was necessary that provision be made for the preservation and propagation of salmon and trout on their arrival. The parliamentary intent is apparent from the comprehensive regulation-making powers provided by s 2 and the power of protection provided by s 4. Close control for the management and protection of trout was supported by regulatory authority to prohibit or restrict fishing for any period in any river as considered necessary; to impose any conditions and restrictions in respect of trout fishing; and to regulate times, seasons and methods of catching. The need for legislative protection and

[247] *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 654-656

> control was brought out in the debates in Parliament and is manifested in the comprehensive regime that was provided for. Clearly it was intended that any fishing for trout would be done under that regime. There is no reference to Maori fishing in the statute but that was unnecessary given the nature, purpose and comprehensiveness of the statutory regime. The terms of the statute preclude attaching Maori fishing rights to the new species imported from abroad.
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> The pattern of regulations and Orders in Council governing trout support and reinforce that conclusion. The nature and extent of regulatory power and actual regulatory control is inconsistent with the existence of any Maori fishing right in respect of trout. In that regard the scheme and language of the 1888 and 1890 regulations for the Wanganui Acclimatisation District presuppose the exercise of total control over fishing for trout in the district. And the additional general regulations of 28 January 1879 and the Order in Council of 21 September 1886 protecting and in effect prohibiting taking trout except as allowed in terms of particular regulations, reflect the completeness of the statutory regime. In that regard there is no substance in the submission advanced by Mr Solomon that Mr McRitchie's hapu could have had a Maori fishing right in respect of trout in the Mangawhero river before regulatory controls were applied and which enured thereafter. There is no evidence that trout were liberated into the Mangawhero river before 1888 but, more importantly, the 1867 Act, in providing for the implementation of the fishing regime necessarily precluded any inconsistent rights from accruing and enuring.
>
> There is nothing in the subsequent legislative history to detract from those conclusions from the legislative regime which governed fishing for trout following their introduction into New Zealand. As well, the three sets of statutory provisions between 1908 and 1938 affecting particular Maori tribes in relation to trout fishing, perhaps most clearly reflected in s 28 of the 1921 – 1922 statute and s 68 of the 1931 Act, are only explicable as recognising that but for specific provisions of that kind the Maori tribes concerned would have no right to take trout from those waters.
>
> Finally, the Conservation Act 1987 provisions proceed on the same premise, namely that they provide for a comprehensive and exclusive code governing trout as sports fish. That is directly reflected in the provisions of s 26ZO which, while conferring on occupiers of adjoining land the right to take trout without a licence, require compliance with the terms and conditions specified in the applicable anglers notice.
>
> In summary, trout are and always have been part of a separate regime exclusively controlled by legislation and the only fishing rights are those available under those provisions.[248]

While Maori have no common law or statutory right to fish for trout or other introduced species, whether this should be the result in Treaty terms depends on the facts before us as they concern the fisheries of the CNI. We discuss this further in Chapters 18 and 19.

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[248] *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139, 153-154

We note at this point that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 provided for the full and final settlement of all claims based directly or indirectly on Maori rights and interests in commercial fishing whether based in the common law or the Treaty. The relevant definition of commercial fishing is in section 2 of the Fisheries Act 1983, meaning 'taking fish for sale'. This appears to apply to freshwater commercial fishing.[249] The Waitangi Tribunal, therefore, has no jurisdiction to consider claims relating to commercial fishing. The Tribunal may inquire into non-commercial Maori customary fishing, which is regulated under section 10 of the 1992 Act. It may also inquire into issues concerning access to fisheries.

Tribunal Findings on the Common Law and Aboriginal title

In answer to the question whether the English common law was sufficient to recognise Maori customary or native title to these resources, we conclude the answer must be that it should have been, given the nature of the doctrine of aboriginal title. However, to safeguard Maori rights, some formal recognition in legislation was needed to ensure their protection within the introduced legal order. This legislation should have acted to protect rather than defeat aboriginal title rights and prevent the application of competing common law rules such as the ad medium filum aquae rule and the arm of the sea doctrine. As we noted in Part III of this report, the failure of the Crown to recognise and provide for a form of title that would protect Maori rights and interests in these resources was a breach of the principles of the Treaty of Waitangi and contributed to the alienation of many resources. That was the case in relation to the waters of many small lakes, rivers, streams and springs. Land alienation outside the hapu or iwi resulted in the relationships with resources being severed. In relation to large inland lakes and rivers the issue of who can control access to the waters of these taonga remains a live one. We discuss this further in Chapters 18 and 19. We consider the issues concerning geothermal resources in Chapter 20. We note at this stage that the Crown did not recognise, and still has not recognised, the full nature and extent of Maori customary title to geothermal resources. Nor have the Courts made any final determination on the issues concerning those resources. In relation to fisheries, Maori customary fresh-water and sea fishing rights continue to exist, subject to the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, though they do not extend to the right to fish for trout and other introduced species. In relation to all these natural resources, the Treaty rights and interests of claimants remain, albeit modified if there has been an alienation or other extinguishment of their aboriginal or native title.

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[249] *Te Arawa Maori Trust Board & Ors v Attorney-General* (2000) CP 448-CO/99, CP 395/93 High Court (Anderson and Paterson JJ)

Conclusion

Our review above leads us to conclude that natural water, waterways, fisheries, and geothermal resources were and are capable of being taonga possessed by Maori and over which they exercised rangatiratanga as at 1840. As such these taonga and Maori rangatiratanga over them were protected by the Treaty, either explicitly as in the case of fisheries in the English text, or as taonga in the Maori text. In some circumstances Maori possession of natural resources will amount to something akin to ownership known and recognised in English law by the doctrine of aboriginal or native title. In other circumstances the native or customary title may amount to something less than full ownership but may still be recognised by the common law. In relation to all these natural resources, the Treaty rights and interests of claimants remain, albeit modified if there has been an alienation or other extinguishment of their aboriginal or native title. One of the continuing Treaty rights held by Maori is the right to exercise rangatiratanga in the management of their natural resources or taonga (whether they still own them or not) through their own forms of local or regional self-government or through joint management regimes at local or regional level.

Finally we note that a number of statutes impact on our jurisdiction in certain limited ways. These statutes are:

- Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005
- Ngati Awa Claims Settlement Act 1999
- Pouakani Claims Settlement Act 2000
- Ngati Turangitukua Claims Settlement Act 1999

In all respects we note that to the extent that we refer to matters covered by these statutes, we do so only to give background. The matters raised in the statutes have not contributed to the findings we have made concerning generic issues relevant to our inquiry.

To the extent that we have covered issues that may or may not be raised before other specialist forums, we have done so because the claims before us raise issues concerning the principles of the Treaty of Waitangi, which under the Treaty of Waitangi Act 1975, this Tribunal has exclusive jurisdiction to deal with.

In this Chapter we have found that:

1. The following principles of the Treaty must apply to the claims before us concerning water-bodies, including springs, rivers and lakes; fisheries and geothermal resources:

- Partnership and Mutual Benefit with a resultant duty to consult
- Reciprocity – the Essential Compact: Kawanatanga (the right to govern) for Rangatiratanga (autonomy/self-government)
- The Crown has a duty of Active Protection of Lands, Estates and Taonga with duties analogous to fiduciary duties
- The Crown has a duty of Active Protection of Rangatiratanga including in Environmental Management
- Options and Equity of Treatment
- Prejudice Requiring Redress

In the succeeding chapters we will apply these principles and our analysis of the common law to ascertain whether the claims before us are well founded.

2. That water-bodies such as springs, rivers and lakes, and other natural resources such as fisheries and geothermal resources can be taonga protected by the Treaty of Waitangi.

3. English common law should have been sufficient to recognise Maori customary or native title to these resources, given the nature of the doctrine of aboriginal title. However, to safeguard Mäori rights, some formal recognition in legislation was needed to ensure their protection within the introduced legal order.

4. Maori customary or native rights to indigenous freshwater and sea fisheries remain legally enforceable so long as there is compliance with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

5. Whether Maori customary or native title to natural resources has been extinguished or not, the claimants retain Treaty rights and interests in those resources they consider taonga, albeit in some cases modified. One of the continuing Treaty rights held by Mäori is the right to exercise rangatiratanga in the management of their natural resources or taonga (whether they still own them or not) through their own forms of local or regional self-government or through joint management regimes at local or regional level.

CHAPTER 18

LAKE TAUPO-NUI-A-TIA

Taupo Moana

> 'The Taupo-nui-a-Tia lake…belongs to us the Maori of Taupo – absolutely.'
>
> Ngati Tuwharetoa petition, 1913
>
> 'The bed of the lake known as Lake Taupo, and the bed of the Waikato River extending from Lake Taupo to and inclusive of the Huka Falls, together with the right to use the respective waters, are hereby declared to be the property of the Crown, freed and discharged from the Native customary title (if any) or any other Native freehold title thereto.'
>
> Native Land Amendment and Native Land Claims Adjustment Act 1926, section 14(1)

INTRODUCTION

Lake Taupo is frequently described by Maori and Pakeha alike as a jewel of the central North Island. It is of immense importance to the iwi who have lived for many generations around its shores, and who are its kaitiaki. But the lake and its waters also present an illuminative case study of the Treaty interaction between Crown and Maori over the ownership, use and control of waterways.

Before embarking on our discussion, we need to draw attention to some of the different terms used by the claimants and the Crown when referring to Lake Taupo and its waters. Ngāti Tuwharetoa have referred to 'the waterways of the Waikato-iti', defining them as 'the Tongariro River, Lake Taupo and the Waikato River'.[1] They have also referred to the 'Taupo waters' which they describe as being 'Lake Taupo and the Waikato River extending from Lake Taupo to and inclusive of the Huka Falls and the beds of rivers and streams flowing into Lake Taupo'.[2] The latter is somewhat broader than the term 'Taupo waters' as defined by the Native Land Amendment and Native Land Claims Adjustment Act of 1926 and the ensuing proclamation of 7 October 1926. The relevant section of the Act is reproduced at the head of this chapter; by the ensuing October proclamation parts of some tributaries were effectively excluded from the legal definition of the term 'Taupo waters'. Map 18.1

[1] K Feint, Closing Submissions for Ngati Tuwharetoa, 3.3.106, pp 107, 108, 112; C Winitana, Evidence for Ngati Tuwharetoa, 20 April 2005, Document E32, paras 29-30
[2] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 110, 115, 118; T Taiaroa, Evidence, Document E22, para 9

shows the Taupo waters as currently defined by the Deed of Agreement of 1992,[3] which bases itself on the earlier legislation and proclamation.

In this chapter we review how the Crown acquired the bed of Lake Taupo and some of the riverbeds that form part of this water system, and how it regulated the fisheries of these waters. We review the Crown's use of these waters for the development of a hydro-electricity infrastructure, in particular the raising of lake levels by means of the Taupo control gates. We also consider the responses of Taupo Maori to those actions, whether breaches of the Treaty have occurred, and whether Tuwharetoa and their whanaunga have suffered any prejudice.

ISSUES FOR DETERMINATION

There are three principal issues that need to be determined in this chapter but in order to answer the second and third issues we must consider a number of important related questions. The first two issues are:

1. **Are Lake Taupo waters and fisheries protected by the Treaty and did Ngati Tuwharetoa and their whanaunga exercise rangatiratanga over them?**

2. **If so, did the Crown actively protect the taonga of the Lake Taupo waters and its fisheries and the exercise of Maori rangatiratanga over them?**

As we have noted, in order to answer the second issue question we need to consider the following related questions.

- Did Ngati Tuwharetoa consent to the introduction of trout into Lake Taupo and its tributary rivers? What was the impact on Ngati Tuwharetoa of that introduction, and of the Crown assumption at the outset of the right to regulate the fishery?

- Why did the Crown embark on negotiations with Ngati Tuwharetoa about Lake Taupo in 1924? Were the Crown's negotiations with Maori about the Lake conducted, and concluded, in good faith?

- Were the 1926 Agreement and its enacting legislation 'fair and reasonable' in the circumstances and consistent with the Treaty?

Finally, our third major issue question relates to the Crown's control of Lake Taupo from 1941 to the present day for the purposes of hydro-electric development, a key concern and grievance of the claimants:

3. **What were the impacts of the Crown's control of Lake Taupo for hydro-electric development on the lake, its tributaries, and its people, and has the Treaty been breached in that respect?**

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[3] By the Deed of Agreement 1992 the beds of the Taupo waters have been returned to tribal ownership, and a management board has been established to administer them.

In addressing that issue, we have posed a series of related questions:

- Was the decision to erect the control gates and raise the lake levels consistent with the Treaty?
- What were the impacts of the control gates?
- Did the Crown provide an effective remedy or redress for the impacts in the 1940s?
- What further impact did the Crown's control of lake levels have after the 1940s?
- Did raising the lake levels affect the tributary rivers and the Waikato River?
- Now that it may be possible to rehabilitate affected land, are Tuwharetoa entitled to compensation if it can no longer be farmed because of other reasons?

Issue 1: Are Lake Taupo waters and fisheries protected by the Treaty and did Ngati Tuwharetoa and their whanaunga exercise rangatiratanga over them?

Introduction

In the opening chapter of Part V, we explained the Treaty principles relating to waterways and fisheries. The Treaty envisaged a partnership between the Crown and Maori in which both parties would exercise their due and appropriate authority and autonomy. It set up a Government (kawanatanga) for the new state of New Zealand, in which Maori would be protected in their continued exercise of their tino rangatiratanga. Article 2 of the Treaty made that guarantee for property, places, and people (and, as a result, ways of life). Fisheries were specifically guaranteed in the English version of Article 2, while all prized possessions (taonga) were specifically guaranteed in the Maori version of Article 2. We know from the writings of Chief Protector George Clarke, published in 1842, that, as counsel submitted, rivers and waterways were intentionally included in the Treaty guarantees:

> …e hoa ma, kua wareware pea koutou ki te pukapuka i tuhituhia ki Waitangi, i roto i taua pukapuka ka waiho nga kauri katoa, nga awa, nga aha katoa. Ma te tangata Maori hei aha noa atu ki a ia…
>
> …friends, perhaps you have forgotten that document which was written at Waitangi. In that document, all of the kauri, the rivers and everything else are left for the Maori to deal with as he wishes…[4]

With those points in mind, we turn to the specific question for our inquiry of whether the Taupo waters and their fisheries were taonga over which the claimants exercised tino rangatiratanga and, as such, protected by the Treaty.

[4] Te Karere o Niu Tireni, vol 1, no 7, July 1842, quoted in appendices to T Bennion, Generic Closing Submissions on Natural Environment and Resource Management Issues, 3.3.78(a)

The Claimants' Case

Ms Feint for Ngati Tuwharetoa submitted that just as with the Whanganui River, the claimants view their lakes and rivers (the 'Taupo waters' in their broad sense) as a taonga, consisting of the water resource as a whole.[5] The tangata whenua evidence in this inquiry, she contended, shows that CNI Maori viewed their rivers and lakes in the same way as Te Atihaunui viewed their river – as taonga, as tupuna, as whole entities.[6] She noted that the claimants presented evidence from the Hikuwai at the headwaters of the Waikato River at Lake Taupo all the way to Te Mataapuna, 'from whence the waters sprang'.[7] In reply submissions Ms Feint noted that it is inconceivable that as kaitiaki of the lake they would willingly give it up.[8] Ngati Tuwharetoa are ancestrally bound to the lake and unable to surrender their obligations to their taonga.[9]

The people regard their customary rights to waterways on the same basis as customary rights to land and resources.[10] Those rights were demonstrated by and included (inter alia) rights of passage, food gathering and harvesting, daily (ordinary) uses, and special, ceremonial uses.[11]

Ngati Tuwharetoa contend that the rights were not only rights of 'use', because the waterways were created by the ancestors for the benefit of their descendants, who had absolute rights of control and authority (tino rangatiratanga) over the water resources, and corresponding obligations to conserve, nurture, and protect the resources.[12] These rights included a right to the use of the water, to control access to the water, and to control any developments in the use of the water, specifically hydro-electricity.[13] Ms Feint submitted that the Tribunal should adopt the view of the Waitangi Tribunal in the Whanganui River Report when it noted that:

> In our view, their just rights and property in the river must include the right to license others to use the river water. The right to develop and exploit a water resource is conceptually no different from a right to develop and exploit the resources on dry land.[14]

She concluded by submitting that there can be no doubt that the waterways of Waikato-iti – the Tongariro River, Taupo-nui-a-Tia and the Waikato River– are taonga cherished by Ngati Tuwharetoa as the waters called forth by their tipuna Tongariro.[15] They possessed these and other lakes and rivers of the region, they were taonga, and thus Article 2 guaranteed their rangatiratanga over, and the possession of, their lakes and rivers.[16] The guarantee extended to what in fact Ngati Tuwharetoa possessed, in

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[5] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 107, 110
[6] Feint, Ngati Tuwharetoa closings, 3.3.106, p 107
[7] Feint, Ngati Tuwharetoa closings, 3.3.106, p 107
[8] K Feint, Submissions in Reply to Crown Closing Submissions, 3.3.142, p 36
[9] Feint, reply to Crown closings, 3.3.142, p 36
[10] Feint, Ngati Tuwharetoa closings, 3.3.106, p 108
[11] Feint, Ngati Tuwharetoa closings, 3.3.106, p 108
[12] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 108-109
[13] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 110-111
[14] Feint, Ngati Tuwharetoa closings, 3.3.106, p 111, quoting from Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 338
[15] Feint, Ngati Tuwharetoa closings, 3.3.106, p 112
[16] Feint, Ngati Tuwharetoa closings, 3.3.106, p 112

terms of their tikanga, and this was the water resource, not merely the beds of the lakes and rivers.[17]

In reply to the Crown on the issue of hydro-electricity, Ms Feint pointed out that the Ngati Tuwharetoa claim is not founded upon a right to generate hydroelectricity per se, but on the 'irrefutable principle that proprietary rights in a water resource must include the right to develop the resource'. She further submitted that while there is a compelling national objective in developing hydro-electric infrastructure, it cannot be assumed that the national interest gives the Crown unfettered rights to exercise its kawanatanga powers. The exercise of kawanatanga is qualified by the Crown's obligation to guarantee rangatiratanga. It was submitted that the Crown had a duty to obtain Ngati Tuwharetoa's agreement to the use of their taonga for such major development, and to explore ways in which Ngati Tuwharetoa's Treaty interests could be provided for.[18]

The hapu of the Hikuwai Confederation or Tauhara hapu of Ngati Tuwharetoa were separately represented by Mr Taylor and Ms Hall. They say they have always had the right in customary terms to manage their own affairs.[19] These hapu support Ms Feint's generic submission on the issues, adding that they at all times exercised rangatiratanga and control over their waterways, equating to a form of ownership.[20] This control included those aspects of Lake Taupo over which they exercised rangatiratanga.[21] They refer to Lake Taupo as Taupo Moana.[22] Other claimants from the Tauhara hapu were represented by Mr Te Nahu, who submitted that Lake Taupo was a taonga highly significant to the Tauhara hapu because it was and still is held in the highest regard as a symbol of who the Tauhara hapu are.[23] The same claim to rangatiratanga over those parts of the lake under their authority was also made.

Ngati Tutemohuta (claims clustered under the Nga Hapu a Tauhara Middle Charitable Trust) were represented by Mr Warren. He submitted that Ngati Tutemohuta were concerned about Crown policies, actions, omissions and legislation that impacted on their waters and other resources and which excluded them from the management of their environment.[24] Ngati Wheoro of Tuwharetoa claim interests on the western side of Lake Taupo and were independently represented by Mr Warren.

Other customary groups claiming an interest in Lake Taupo presented submissions. Ngati Hikairo, represented by Kensington Swan, with close links to Tuwharetoa, claim interests at the southern end of Lake Taupo. Te Takere o Nga Wai represented by Ms Sykes and Mr Pou, also presented evidence and submissions supporting the generic submissions of Ms Feint.

All the Tauhara hapu, Tutemohuta, Ngati Hikairo and Ngati Wheoro, and Te Takere o Nga Wai, adopted the generic submissions of Ms Feint on waterways and Lake Taupo, to the extent that they did not differ from their own specific submissions. Therefore,

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[17] Feint, Ngati Tuwharetoa closings, 3.3.106, p 112
[18] Feint, reply to Crown closings, 3.3.142, pp 40-41
[19] M Taylor, Opening Submissions, 3.3.15, p 3
[20] M Taylor and M Morrissey, Closing Submissions for Tauhara, 3.3.92, p 8
[21] Taylor and Morrissey, 3.3.92, p 10
[22] Taylor and Morrissey, 3.3.92, p 6
[23] H Te Nahu, Closing Submissions for the Tauhara Hapu, 3.3.89, p 29
[24] A Warren, Opening Submissions, 3.3.11, p 8

to them all, Lake Taupo was a taonga. Their submissions in relation to its fisheries were also consistent with Ms Feint.

In that regard, Ms Feint submitted that freshwater fisheries and species are a vital resource to CNI hapu and iwi, and they remain an integral part of the whakapapa and customary practices of those hapu and iwi.[25] The relative infertility of the lands around Lake Taupo meant that the freshwater fisheries were very important to the traditional economy.[26] These fresh water fisheries, Ms Feint contended, were regarded as taonga protected by the Treaty and they too were important in maintaining knowledge and customs.[27] That protection includes the fish, the fishing grounds, their significance to personal and tribal identity, and the fishery as a source of emotional and spiritual strength. Furthermore, Crown actions have polluted and degraded indigenous fisheries leading to a depletion of stocks and they have been undertaken without the consent of the hapu and iwi of Taupo.[28]

Ngati Raukawa claim that they have interests on the western side of Lake Taupo. The hapu who claim interests in the Taupo district call their ancestral rohe Te Pae o Raukawa.[29] Ms Tan noted that in Western Taupo there has been a lot of inter-marriage between Raukawa and Tuwharetoa.[30] This dates back to the marriage of Te Atainutai and Waitapu. Despite this inter-marriage, Ngati Raukawa say that each hapu maintained their own identity and acknowledge their whakapapa from their Ngati Raukawa and Ngati Tuwharetoa ancestors.[31] But because Raukawa was not named as a descent tipuna during the Tauponui-a-Tia application hearings (discussed in Parts II and III), this, she submitted, has led to the marginalisation of Ngati Raukawa interests in relation to Lake Taupo.[32] A consequence of this omission has been that the Crown has assumed that Ngati Tuwharetoa is the only iwi that needs to be consulted about the lake. In reply, Ms Tan pointed to a further example of Ngati Raukawa's 'marginalisation' by reference to the Crown's closing submissions, which did not acknowledge Lake Taupo as a taonga of any iwi other than Ngati Tuwharetoa.[33]

The Crown's Case

The Crown acknowledges the importance of Lake Taupo as a taonga to Ngati Tuwharetoa.[34] It has agreed with all claimants such as Ngati Tuwharetoa, that lakes and rivers are taonga, highly significant to Maori well being and ways of life.[35] The Crown has also accepted that the relationship between Maori and their taonga 'exists beyond mere ownership, use, or exclusive possession; it concerns personal and tribal identity, Maori authority and control, and the right to continuous access, subject to Maori cultural preferences'.[36] In addition, it accepts that there is a dimension of

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[25] Feint, Ngati Tuwharetoa closings, 3.3.106, p 166
[26] Feint, Ngati Tuwharetoa closings, 3.3.106, p 166
[27] Feint, Ngati Tuwharetoa closings, 3.3.106, p 167
[28] Feint, Ngati Tuwharetoa closings, 3.3.106, p 167-168
[29] K Tan, Closing Submissions for Ngati Raukawa, 3.3.80, p 16
[30] Tan, 3.3.80, p 17
[31] Tan, 3.3.80, p 17
[32] Tan, 3.3.80, p 97
[33] A Warren and S Clark, Submissions in Reply to Crown Closing Submissions, 3.3.135, 37
[34] Closing Submissions of the Crown, 3.3.111, part 2, p 472
[35] Crown closings, 3.3.111, part 2, p 469
[36] Crown closings, 3.3.111, part 2, p 469

personal and tribal identity to the relationship.[37] The parties, therefore, agree that the taonga were subject to Maori authority and control, that they were vital to the claimants' personal and tribal identity, and that Maori cultural preferences must be taken into account. This agreement between the parties is helpful.

The Crown also raised the impact of the Treaty of Waitangi Fisheries Claims Settlement Act 1992, noting that we have no jurisdiction in relation to commercial fisheries but acknowledging that we can consider issues relating to customary fisheries.[38]

The Tribunal's Analysis

Introduction

We do not think that there can be any criticism of the Crown's acknowledgement of the importance of Lake Taupo as a taonga to the claimants.[39] The historical record is clear that Ngati Tuwharetoa did consider it a taonga over which they exercised rangatiratanga. To some extent that makes our job easier. However, the Crown's submissions do not go so far as to recognise explicitly that the waters of Lake Taupo are also part of that taonga, and nor do they accept that the tribe has a proprietary interest in those waters. In this section of the chapter, therefore, we summarise some of the important and defining evidence of what Taupo Maori mean when they discuss Lake Taupo and its waters as taonga.

Whilst acknowledging that Lake Taupo is a taonga of Ngati Tuwharetoa, it is not so clear what the Crown can acknowledge in terms of Ngati Raukawa and any other iwi with interests around the Lake. That will depend very much on the outcome of further research, beyond that available for this Stage One Inquiry. For the purposes of this report, the Tribunal can only acknowledge that there are iwi and hapu with whakapapa from both Tuwharetoa and other tupuna bordering the Lake. If it is later shown that their interests extended into Lake Taupo through Raukawa or any other tupuna rather than Tuwharetoa, then our general analysis and findings below apply equally to them as distinct customary groups.

Consequently, although we refer only to Ngati Tuwharetoa below, we do so with that caveat. Upon that basis, our discussion and findings cannot be described as confirming that Ngati Tuwharetoa held exclusive rights in Lake Taupo as at 1840. However, our discussion and findings can be used by Ngati Tuwharetoa to confirm that they had a predominant interest and that they with their whanaunga held exclusive rights in Lake Taupo and its waters as at 1840. We turn now to explain why.

Lake Taupo and its Waters – the Taonga

We heard from Ngati Tuwharetoa that Lake Taupo-nui-a-Tia and the waters of its hinterland are part of the physical and spiritual sustenance of Ngati Tuwharetoa and

[37] Crown closings, 3.3.111, part 2, p 469
[38] Crown closings, 3.3.111, part 1, pp 60-62
[39] Crown closings, 3.3.111, part 2, p 472

their whanaunga who border the lake.[40] The imagery contained in the name is that of a tough black and yellow cloak that envelopes and protects.[41] We were told of the ancestor Tia and his followers, exploring inland after their arrival from Hawaiiki. Tia found this great body of water and camped beside it at Hamaria. The cliff face there resembled Tia's cloak and the name Taupo-nui-a-Tia was given to the lake.

Hapu around the lake have different stories about its creation. Mataara Wall shared his traditions with us, in which the lake was created by Ngatoroirangi.[42] Mr Winitana explained other Tuwharetoa traditions, in which the lake and rivers were created by Tongariro.[43] All accounts agree, however, that the taonga were created by the tupuna for their descendants.

The ancestral relationship between the Ngati Tuwharetoa claimants and the waters of Taupo and Tongariro are strong and intimate. Mr Chris Tamihana Winitana describes Taupo-nui-a-Tia as the spiritual womb of Ngati Tuwharetoa:

> Its waters are as amniotic fluid, life giving, cherishing, fundamental.
>
> Ko Taupo-nui-a-Tia.[44]

Mr Sean Ellison for Te Takere o Nga Wai provides a complementary perspective from the northern end of the lake. He spoke of the waters at the lake outlet and the spiritual links between lake and river. He described the journey from this world to the next. Mr Ellison told the Tribunal:

> According to tradition, when a member of Ngati Tuwharetoa dies, Horomatangi takes him or her around the shores of Taupo-nui-a-tia, entering the Waikato River at its headwaters, at Nukuhau. From there the spirit of the deceased follows the river to its mouth, and continues on to Rerenga Wairua, the departure place of the souls of the dead, and returns to Hawaiki. We of the Hikuwai stand at the gateway of the glistening sea of Taupo-nui-a-Tia – at the point of departure and the point of entry. Here we have our taniwha, our spiritual guardians, the energy centres of the land, the lake and the river, which interconnect with other energy centres throughout the extent of our mother lying here, Papatuanuku. The links and connections embraced within the term whanaungatanga are not limited solely to blood or biological ties.[45]

Mr Winitana expands on the spiritual attachment to the lake:

> My Inland Sea, my medicinal waters offered as a gift by My Mountain; the foam and spray maker of the wake of Te Reporepo. The emblem canoe of the tribe; the womb of my existence as the cherishing waters are to the embryo; the seat of my emotions that ripple and wave in the ceaseless lapping tides of survival; the mirror of my soul upon which I reflect; my waterpool that carves the face of the earth; that renews me, restores me, rebirths me; my lake that represents the pool of life, and I but one drop; enjoined forever.[46]

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[40] There are close and supportive relationships between the 25 hapu of Ngati Tuwharetoa and other iwi and hapu who claim manawhenua in the larger Taupo region. These include Ngati Raukawa, Ngati Maniapoto and Ngati Kurapoto. (See chapter 2)

[41] Tuwharetoa Maori Trust Board and Environment Waikato, '2020 Action Plan - Integrated Sustainable Development Strategy for the Lake Taupo Catchment', Document E5(b), p 2

[42] M Wall, Evidence for Ngati Tutemohuta, Document D1, p 5

[43] C Winitana, Evidence for Ngati Tuwharetoa, 20 April 2005, Document E32, pp 17-20

[44] Feint, Ngati Tuwharetoa closings, 3.3.106, para 19.90; and C Winitana, E32, para 35

[45] Sean Ellison, Evidence for Te Takere o Nga Wai, 28 February 2005, Document C25(a), para 70. Mr Ellison acknowledges the knowledge shared with him by Taxi Kapua.

[46] C Winitana, E32, para 11

The practicalities of this relationship are expressed in terms of customary rights and tikanga. Mr Winitana explained that each hapu living around the lake held overlapping rights that enabled them to use it for travel by canoe, which was the most effective form of travel at the time. They could also use their parts of it for the gathering and harvesting of plant and fish foods, and use the water for everyday uses as well as for healing and for religious rites.[47] The source of their authority and right to use the lake, its water, and its aquatic life was the fact that the Taupo waterways were created for the benefit of the tribe as the descendants of the ancestors.[48] This, the claimants believe, 'conveys absolute rights of control and authority over the resource, but also obligations to conserve, nurture and protect the resource'. [49] Mr Winitana is direct and succinct at this point: 'don't pollute it, don't abuse it, don't over-use it'.[50] As part of their authority and rights over – and spiritual, ancestral relationship with – these taonga, Ngati Tuwharetoa believe that they own the water, as a resource which flows through their streams and rivers.[51]

In the worldview of Central North Island Maori, as described to us by the tangata whenua witnesses and in technical evidence, waterways and fisheries were taonga, indivisible, and the subject not just of rights but of relationships (including a spiritual dimension).

Fisheries as Taonga

The importance of fisheries for the claimants was expressed before us by a number of witnesses. Both Mr Wall and Mr Winitana related to us the creation of fish in the lake by Ngatoroirangi, in which he cast shreds of his cloak into the waters. These origin traditions account for the absence of eels in the lake (the first feather turned into an eel but died), and the relationship between the native fish in the lake. First created was the koaro, and other fish 'such as the inanga, kokopu and koura whakapapa to the koaro'.[52] These fish are the kai rangatira of Tuwharetoa (the delicacies that the tribe is famous for).[53] The evidence of Messrs White and Johns and of Dr Doig draws on the Native Land Court and other written records to outline the historical fisheries and fishing practices in the lake and rivers.[54] We can supplement this material with Grace's published account based on written and oral sources.[55] From these books and reports, we note that a volcanic eruption in AD186 left the lake bereft of fish, leading Maori to reintroduce indigenous fish species to Lake Taupo. White ties this to the traditions of Ngatoroirangi, outlined to us by Wall and Winitana.

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[47] C Winitana, E32, para 40
[48] C Winitana, E32, p 16
[49] H Te Nahu, Opening Submissions, 25 January 2005, 3.3.16, p 108; and C Winitana, E32, para 30
[50] C Winitana, E32, para 29
[51] Petera Clarke, Evidence for Ngati Hineure, Ngati Te Urunga, Ngati Hineuru, Ngati Tutemohuta, Ngati Rauhoto of the Hikuwai Confederation of Ngati Tuwharetoa, 28 February 2005, Document D13, p 19
[52] M Wall, D1, pp 5-6
[53] P Otimi, Further Evidence for Ngati Tuwharetoa, 27 April 2005, Document E16(b), p 3
[54] See B White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series, 1998, Document A55; S Doig, 'Customary Maori Fishing Rights: an Exploration of Maori Evidence & Pakeha Interpretations', PhD Thesis, University of Canterbury, 1996, Document A51; L Johns and I Johns, 'Manawhenua Report Ngati Tutemohuta of North East Taupo – Pakira mai Te Awa o Te Atua ki Tauhara ki Tongariro', Document D39
[55] See J Grace, *Tuwharetoa: The History of the Maori People of the Taupo District* (Auckland, 1959, Reprinted 1992), Document A47

The scientific evidence of Mr Kusabs also supports the evidence of the claimants but he notes that there were only a limited number of fresh water species found in Lake Taupo. His evidence was that there is some confusion over whitebait because in Pakeha classificatory terms, there is only one indigenous whitebait species present; the koaro (Galaxias brevipinnis Gunther). In 1919, Reverend Fletcher said that two other whitebait species, kokopu and inanga, were also present, but this was because he confused the adult koaro with the kokopu. The juvenile koaro was confused with inanga. Kusabs says that kokopu and inanga were never present, but notes that Maori often applied different names to a species of fish at different stages of its development. The koaro was also known as the kowaro, kokopu, hawai (black kokopu), kakawai (black kokopu), rewai (a large kokopu) and inanga. The juveniles of the koaro were 'more commonly known as inanga'.[56] Grace used the names 'kokopu' and 'inanga' for the adults and juveniles of the same species of galaxiid as Kusabs when he used the name 'koaro'.[57] We accept that there were a variety of names, according to time and place, but that the main native species in the lake and rivers are known to Maori today as koaro, kokopu, inanga, koura (freshwater crayfish) and kakahi (freshwater mussels).

Although there were relatively few species in the lake, they existed in great numbers and were a very important part of the Ngati Tuwharetoa economy. Most fishing grounds, according to evidence in the Native Land Court, were close to shore (though the deeper parts of the lake were also fished). They were adjacent to particular kainga and beaches, and were under the authority, use, and management of hapu. Doig notes that customary authority was exercised over the lake and its fisheries in the same way as over land, and that the hapu interests were exclusive – others were allowed to fish, but only by permission.[58]

We had oral evidence from Mr Mataara Wall, who described how his hapu established kainga along the lakefront to use its resources, including native fish. He explained customary fishing techniques, and that every whanau along the eastern side of the lake had their own waka, which were used to fish and also for transport. Most of their permanent settlements were on the lakeshores because of the abundance of resources, but the people moved inland to the forests during winter to exploit those resources, moving back to the lake for spring and summer. With the clearing of the native forests, the introduction of Pakeha foods, and the sale of lands, this vital cycle declined.[59]

Tino Rangatiratanga over Taonga

The claimants in our inquiry described the nature of their tino rangatiratanga over the lake, its waters, and its fisheries. In their view, authority and customary rights were exercised over waterways as they were over the land and its resources. Mr Winitana spoke of the nature of Ngati Tuwharetoa's customary use rights over Lake Taupo waters and fisheries as follows:

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[56] I Kusabs, Evidence for Ngati Tuwharetoa, 22 April 2005, Document E27, pp 3-7
[57] Grace, A47, pp 510-512
[58] White, A55, pp 167, 170-172
[59] M Wall, D1, pp 16, 19

> Our customary practices involving our waterways were as defined as those which dictated land and forest utilisation. Each hapu around the lake and dissecting rivers held rights over the same. These rights allowed them to utilise the water resources in a number of generic ways:
>
> a. for travel by canoe, the most effective way to journey around the central plateau region
>
> b. for the gathering and harvesting of food resources such as the taking of kokopu, inanga, kakahi, koura and koaro
>
> c. for matters of daily usage such as drinking, washing, bathing, healing, swimming
>
> d. for matters of special ceremonial significance such as baptismal rites, war party rites, other karakia rites.[60]

Authority over the lake and its fisheries was exercised according to customary law, which included reciprocal arrangements with other iwi from outside the district. One such arrangement was with Ngati Porou. Mr Barrett gave us an example where Ngati Porou would come visiting with gifts of crayfish, and 'we would give them access to the lake to go out and fish koaro…They were bartering days, no money changed hands.'[61] It was no great stretch, therefore, for Tuwharetoa and their whanaunga to extend their customary authority to European anglers when they arrived in the district.

Tino rangatiratanga – and, in the English, exclusive possession – was guaranteed in the Treaty. Taupo Maori claimed 'ownership' of the lake, its water, and its fisheries once British law became established and their authority was questioned. When Maori authority was disputed by settlers in the early twentieth century, for example, the tribes put forward their claims in unequivocal language. In 1903, Wi Parata, speaking on behalf of all the Maori electorates, told the House that Maori owned rivers, lakes, seas, and fish, and that the 'water belongs to the Maori along with the fish that is in it'.[62] In 1905, Tuwharetoa petitioned Parliament:

> Let that Lake [Rotoaira] remain as a sanctuary for the beautiful fish of our ancestors, as all our (other) lakes and streams are now full of these Pakeha fish, (and) they have destroyed our fish which were assured to us by the treaty of Waitangi; and we are prevented by law, and punished, if we go to kill these Pakeha fish, even though the lakes and streams in which these fish live are our own property.[63]

In 1913, the tribe again petitioned Parliament, stating: 'The Taupo-nui-a-Tia lake, where these trout fish occur, belongs to us the Maori of Taupo – absolutely'.[64]

Under the Treaty, therefore, Tuwharetoa claimed legal ownership of their taonga – the lake, its waters, and its aquatic life. It was no light matter for Ngati Tuwharetoa and their whanaunga when the Crown and settlers began to introduce exotic fish and to assert a different law – common and statute law – and a different authority – that of the Crown – over the Lake Taupo waters in the late nineteenth and early twentieth centuries.

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[60] C Winitana, E32, p 20
[61] J Barrett, Evidence for Ngati Hikairo, 22 April 2005, Document E10, p 16
[62] Wi Parata, 30 September 1903, NZPD, 1903, vol 126, p 115
[63] T Walzl, 'Hydro Electricity Issues: The Tongariro Development Scheme', February 2005, Document E2, p 8
[64] quoted in G Park, *Effective Exclusion? An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912-1983* (Wellington: Waitangi Tribunal, 2001), p 217

In this regard Mr Wall told us, that over time, 'with the arrival of the Crown, trout and other foreign things, our responsibilities to care for the lake have been affected.'[65] For Maori people, this is a serious matter. Mr Otimi noted the decimation of Tuwharetoa's customary fisheries in the twentieth century, and with it the loss of food supplies, associated knowledge and ritual, and mana:

> The loss of knowledge is the loss of kaitiakitanga. The loss of those food resources is considered to be the fault of the hapu and the fault of the people as the kaitiaki of those taonga.[66]

Tino rangatiratanga carried with it the corresponding obligation to care for and conserve the taonga. Mr Smallman explained how his people are the kaitiaki for the Tongariro River, one of the Taupo waters:

> The role of kaitiaki is hard to describe in Pakeha terms, but it means something akin to being a caretaker over the land, waters and all our taonga (treasures). This role emanates from what I term the 'departmental gods', or kaitiaki who protect our taonga. Those kaitiaki watch over us, but we have to play our role too. As tangata whenua we are charged with the responsibility of protecting and caring for our taonga…We are, and always will be, kaitiaki of the mauri of the taonga. It is not an empty role, it is very much a tangible role, and it is the essence of our beings as tangata whenua. These rights were enshrined in the Articles of the Treaty. It is not the right of the Crown, its Agents or its vassals to diminish this right.[67]

Also, in the claimants' view, tino rangatiratanga was not limited to how they possessed, used, and managed the taonga as at 1840. They asserted legal ownership, as we noted above, and they also adapted their customary authority to include settlers, as the Treaty had envisaged. Further, the claimants argued that the leaders and experts of the tribe had always developed practices in the light of new or changing conditions, which Mr Winitana placed a great deal of importance on and equated with a right of development:

> Any attempt to minimise that utilisation by straight-jacketing it to perceived traditional usages would be hotly contended. We argue that our traditional knowledge base has always been time adjusted and tested, it is not a closed system. It has always been incumbent on our experts to ensure that we are undertaking our activities in the best possible way with the best available resources. Just as happened a thousand years ago when some of our ancestors arrived here to this new land and a new knowledge of living had to be worked through, so too will it happen a thousand years later with other new knowledges now available.[68]

The Tribunal's Findings

As a result of the evidence we heard, we find that Lake Taupo waters and fresh water fisheries were taonga, exclusively possessed by Ngati Tuwharetoa and their whanaunga and over which they exercised tino rangatiratanga as at 1840. Therefore, the Crown did have a duty to actively protect both the taonga, Lake Taupo waters and fisheries, and Ngati Tuwharetoa's rangatiratanga over them. That rangatiratanga consisted of:

- possession of the taonga;

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[65] M Wall, D1, p 16
[66] P Otimi, E16(b), p 3
[67] T Smallman, Evidence for Ngati Tuwharetoa, 26 April 2005, Document E31, pp 2, 4
[68] C Winitana, E32, p 16

- authority over the taonga;
- a cultural and spiritual relationship with the taonga; and
- responsibility to care for the taonga.

All of these things were guaranteed and protected by the Treaty.

Issue 2: Did the Crown actively protect the taonga of the Lake Taupo waters and its fisheries and the exericse of rangatiratanga over them?

Introduction

The answer to this broad question is enormously complex and requires first a consideration of events leading to the negotiations over Lake Taupo that occurred over the period 1910–1926. It also requires reviewing the nature of the interaction that took place between the Crown and Ngati Tuwharetoa in 1924–26 resulting in the enactment of the Native Land Amendment and Native Land Claims Adjustment Act 1926. This was the Act which vested the bed of Lake Taupo in the Crown, along with the bed of the Waikato River as far as the Huka Falls, and which enabled a similar vesting – by ensuing proclamation of the Governor-General – of the beds of the lake's tributary rivers and streams (or portions thereof). By the same legislation and subsequent proclamation, the Crown vested in itself the right to use and control the waters flowing over those various beds. We then must consider the Crown's control of the lake for hydroelectric purposes, and the impacts of its actions on the Taupo waters and on Ngati Tuwharetoa and their neighbours bordering the lake. We begin by giving a general summary of the arguments made by claimants and the Crown on the broad question above. We then move into the specific related questions at issue and relevant arguments made by the parties, followed by our anlysis and findings on the issues.

The Claimant's Case

As we noted above, Ngati Tuwharetoa contend that they have the right to control access to and use of Lake Taupo. They also contend they have proprietary rights to Lake Taupo waters. They argue that the harnessing of their taonga by the Crown for hydro-development and its resulting impacts on the hydrology of Lake Taupo was a breach of the principles of the Treaty of Waitangi. The resulting negative impacts on the rivers and waters of Lake Taupo and the surrounding lands, and the imposition of a foreign resource management system, have denigrated Maori rangatiratanga, Maori values and beliefs that were protected by the Treaty.[69]

Rather than actively protecting the tino rangatiratanga of Maori, as required by the Treaty, the Crown has through various actions, omissions and legislation removed from them their possession and control of their waterways. The claimants have not knowingly and willingly relinquished those rights to the Crown, as required by the Treaty. Despite the expropriation of Maori property rights in Lake Taupo waters, the

[69] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 107-111

claimants do not concede that Maori customary rights in water have been extinguished in terms of the Treaty and the law. [70]

The Crown's Case

To understand the Crown's position on this issue, one has to identify the different strands of argument made by the Crown. In general terms, not specifically dealing with Lake Taupo, the Crown believes that there is insufficient evidence before this Tribunal to conduct a comprehensive review of the Crown's regulation and delegation over lakes and waterways.[71] The Crown further contends that the subject of claims and evidence in this inquiry reflects the tension between the Crown's overall governance responsibility on behalf of the entire community (including Maori), and Maori concerns that rangatiratanga rights in respect of taonga be respected.[72] The Crown sees the tension between Article 1 Article 2 as calling for a balance to be struck.[73]

Consequently, the Crown argues that the guarantee of rangatiratanga is not an absolute one.[74] There are, it was submitted, often multiple interests in the natural resources of the CNI and any management regime must carefully weigh the competing interests.[75] The Resource Management Act 1991 achieves this.

The Crown has acknowledged that Lake Taupo is a taonga of Ngati Tuwharetoa.[76] It has stated that the claims relating to Lake Taupo are multiple and complex.[77] The Crown chose not respond to all issues detailed in the claimants' closing submissions. There are aspects that in the Crown's view could be dealt with in negotiations.[78]

The Crown points out that since 1926, when the Ngati Tuwharetoa Trust Board was created, there has been a relatively significant level of dialogue and consultation between the Crown and Ngati Tuwharetoa in relation to the Lake. On the Crown's side, this has often involved senior Ministers of the Crown.[79] But the Crown has not conceded that Ngati Tuwharetoa have a right to own or control rights of access over and use of natural waters.[80] Nor does it accept that Maori have a right at law to determine its use for the purposes of hydro-development. That right, it was contended, is vested in the Crown who allocates after carefully balancing all competing interests.[81] That is because the development of hydro-electricity in the Lake Taupo and Waikato River catchment has a substantial and compelling national interest objective, which justified, in Treaty terms, the infringement of Ngati Tuwharetoa's interests in the water resources of the region. The Crown contends that the issue of ownership of water is therefore not the critical issue. Rather, in the Crown's view the

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[70] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 109-114
[71] Crown closings, 3.3.111, part 2, p 469
[72] Crown closings, 3.3.111, part 2, p 465
[73] Crown closings, 3.3.111, part 2, p 465
[74] Crown closings, 3.3.111, part 2, p 465
[75] Crown closings, 3.3.111, part 2, p 465
[76] Crown closings, 3.3.111, part 2, p 472
[77] Crown closings, 3.3.111, part 2, p 472
[78] Crown closings, 3.3.111, part 2, p 472
[79] Crown closings, 3.3.111, part 2, p 472
[80] Crown closings, 3.3.111, part 2, p 485
[81] Crown closings, 3.3.111, part 2, pp 486-487

critical issue is how the Crown dealt with Ngati Tuwharetoa in relation to the development of the hydro-infrastructure.[82]

Further Questions

Before we can discuss whether or not the Crown has actively protected the taonga of the Lake Taupo waters and Ngati Tuwharetoa's rangatiratanga over them, we must examine a series of questions arising from Crown actions (or inactions) in respect of Lake Taupo and these are:

- Did Ngati Tuwharetoa consent to the introduction of trout into Lake Taupo and its tributary rivers? What was the impact on Ngati Tuwharetoa of that introduction, and of the Crown assumption at the outset of the right to regulate the fishery?
- Why did the Crown embark on negotiations with Ngati Tuwharetoa about Lake Taupo in 1924? Were the Crown's negotiations with Maori about the Lake conducted, and concluded, in good faith?
- Were the 1926 Agreement and its enacting legislation 'fair and reasonable' in the circumstances and consistent with the Treaty?

Did Ngati Tuwharetoa consent to the introduction of trout into Lake Taupo and its tributary rivers? What was the impact on Ngati Tuwharetoa of that introduction, and of the Crown assumption at the outset of the right to regulate the fishery?

Introduction

We begin our analysis with this question because the issue of customary fishing rights predates the 1926 Agreement between Ngati Tuwharetoa and the Crown. In many respects, this question became a defining moment in the history of Tuwharetoa and Crown relations.

In order to understand this point, we need to review the history of introduced fish species in Taupo waterways. It seems that in many ways, nineteenth-century settlers wanted to recreate a 'Britain of the South' after they arrived here, in which the game species (including sporting fish) of the home country would be transferred to the colony. It has been argued that they considered New Zealand's lakes and rivers to be virtually 'empty', because indigenous fish did not provide either acceptable eating or a sporting challenge. Consequently, they decided which species to introduce, and what laws would govern their management and the right to take them. In Taupo, the most important introductions would be trout and carp. By the introduction of trout, Lake Taupo and its tributaries has become a world famous angling water-system.

According to White, brown trout first became prolific at Taupo after the Hawkes Bay Acclimatisation Society released large numbers in 1892, with financial aid from the Government. They were well established by the end of the 1890s, and local hotels were promoting trout fishing in the lake and its tributaries. In 1900, the Government

[82] Crown closings, 3.3.111, part 2, p 472

was petitioned to release rainbow trout, in a petition signed by both Maori and Pakeha 'Taupo residents', because brown trout were too hard to catch for most anglers.[83] Again, there is uncertainty over the exact date of introduction. The Auckland Acclimatisation Society released rainbow trout in 1899, 1901, and 1902, but Burstall and Kusabs date its main introduction to 1903. Thousands of ova were released from 1905 to 1907, establishing rainbow trout as the dominant fish species in the lake. By 1911 anglers were coming from all around the world to catch them.[84]

The Claimants' Case

The claimants argued that Taupo waters and fisheries came to prominence between the Crown and Maori because of the Crown's introduction of imported fish (trout). Maori protested at the effects of that introduction on their fisheries but also charged anglers for access to the new fishery. In response to pressure from anglers and tourism development, the Crown sought to enter into negotiations with Ngati Tuwharetoa over access to Lake Taupo between 1924 and 1926.

In effect, the case for Ngati Tuwharetoa is that they had little choice but to incorporate trout into their customary way of life. Ngati Tuwharetoa claim they were not consulted over the introduction of exotic species into Lake Taupo waters. Once trout was introduced, the species aggressively, as a predator, reduced the customary fishery. Consequently, customary practices concerning the indigenous fishery were lost. In this regard, Ms Feint submitted that the introduction and management by the Crown and its agents of exotic fish such as trout has detrimentally affected the prevalence, quality and viability of customary fisheries.[85] Furthermore, the legislative framework that regulated customary fisheries cut across the ability of Maori to determine how they would control and use not only their customary fisheries but also the trout resource. It also diminished their ability to maintain their traditional customs for collecting indigenous species of fish and freshwater species.[86]

Ms Feint submitted that the Agreement between the Crown and Ngati Tuwharetoa regarding Lake Taupo completed in 1926 was contingent upon Maori maintaining secure access to fishing rights and negotiating rights of way to fishing grounds.[87]

The 1926 Agreement allotted the tribe a number of free licences to fish for trout. In the claimants' view, this point, and the fact that trout have been incorporated into Ngati Tuwharetoa's way of life, cannot be used to deny the negative impact of exotic fish on the tribe and on their taonga, the indigenous fisheries. Nor did it mitigate Tuwharetoa's loss of authority over the lake and its fisheries, which occurred following the Agreement and the unilateral action of the Crown in vesting the bed of the Lake (and the right to use the waters) in itself.[88] In reply to the Crown, Ms Feint submitted that the on-going benefits of the 1926 Agreement cannot justify the Crown

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[83] White, A55, p 173; for comment on the authenticity of this petition, see below

[84] Kusabs, E27, p 8; see also P Burstall, 'Trout Fishery – History and Management', in *Lake Taupo: Ecology of a New Zealand Lake* (Wellington: Science Information Publishing Centre, Deptartment of Scientific and Industrial Research, 1983), p 122

[85] Feint, Ngati Tuwharetoa closings, 3.3.106, p 169

[86] Feint, Ngati Tuwharetoa closings, 3.3.106, p 169

[87] Feint, Ngati Tuwharetoa closings, 3.3.106, p 170

[88] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 172-174

vesting title to the bed in itself, as this was not needed to ensure that access for anglers (the supposed point of the Agreement) could proceed.[89]

The 1926 Agreement led to more than the loss of ownership of the Lake bed, it led to a chain of circumstances that shut Ngati Tuwharetoa out of the decision making in relation to their access to indigenous fisheries and control of their resources.[90] While it is true that the Crown enacted legislation and regulations vesting the sole right to take whitebait, koura, or other fish indigenous to New Zealand exclusively in Maori, this was meaningless given that the Crown did not do enough to arrest the impact of trout on indigenous species or the decline of the indigenous fisheries.[91] Further, the Crown has been involved in key environmental changes that have damaged the claimants' customary fisheries and it did little to arrest those impacts as well.[92] Ms Feint submitted that this was a breach of the Treaty principle of active protection.[93]

The Crown's Case

The Crown argued first that there are parameters on what this Tribunal can consider in terms of fishing rights. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 provided for the full and final settlement of all claims based directly or indirectly on Maori rights and interests in commercial fishing. The relevant definition of commercial fishing is in section 2 of the Fisheries Act 1983, meaning 'taking fish for sale'. This applies to freshwater commercial fishing, as confirmed by the High Court in 2000. The Waitangi Tribunal, therefore, has no jurisdiction to consider claims relating to commercial fishing, or 'any enactment that relates to commercial fishing or commercial fisheries'. The Tribunal may inquire into non-commercial Maori customary fishing, which is regulated under section 10 of the 1992 Act.[94]

In terms of the Crown's statutory management and control over indigenous species, the Crown argues that the historical picture is complex. There is 'simply very little evidence relating to either the implementation of particular statutory powers of management or control over indigenous species, or of the practical outcomes of any such powers'.[95]

In terms of exotic species, the Crown notes that the participation of Ngati Tuwharetoa in the management and revenue of the trout fishing resource is the best known example of iwi participation in such arrangements. The history of this arrangement, however, has not been the subject of detailed evidence. The Crown submits, therefore, that such issues must remain matters for investigation in any future stages of the CNI inquiry.[96] It also notes, however, that considerable ongoing benefits have flowed to Tuwharetoa as a result of the 1926 Agreement (see below).[97]

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[89] Feint, reply to Crown closings, 3.3.142, p 36
[90] Feint, Ngati Tuwharetoa closings, 3.3.106, p 171
[91] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 169-175
[92] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 169-170
[93] Feint, Ngati Tuwharetoa closings, 3.3.106, p 174
[94] Crown closings, 3.3.111, part 1, pp 60-62
[95] Crown closings, 3.3.111, part 2, p 470
[96] Crown closings, 3.3.111, part 2, p 471
[97] Crown closings, 3.3.111, part 2, p 172

The Tribunal's Analysis

Jurisdiction

As we noted above, the Crown submitted that the Tribunal may inquire into Treaty claims regarding non-commercial Maori customary fishing, but that our jurisdiction is otherwise constrained by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. We deal with this submission in our findings below.

The Impact of Trout

In the evidence before this Tribunal, Taupo Maori immediately assumed control and use of introduced fish. The pattern for this was set before the introduction of trout, when the local head of the Armed Constabulary released goldfish in 1873, which Maori named morihana (Morrison) in his honour. The import was incorporated in the food supplies and customary fishing practices of local hapu, to the extent that it became, in the words of Ringakapo Asher Payne, 'a great delicacy of the Maori people'.[98] Merle Ormsby explained how her people used traditional methods to catch morihana in the Tokaanu River, and that it was so valued as to be incorporated into their rongoa (customary health practices).[99]

The introduction (by Pakeha) and incorporation (by Maori) of morihana set the pattern for the exercise of tino rangatiratanga over imported fisheries. Nor was this confined to any one time period. Maori have continued to fish for food throughout, and whenever there was a new introduction, it was incorporated into customary fishing if at all feasible (or palatable). McDowall, for example, reported that sailfin molly were introduced at Lake Taupo some time prior to 1970, and re-introduced in the 1970s, and that Maori caught this fish for food.[100]

But the most important introduction was the trout, which has established the lake and its tributaries as a world famous angling spot. In our view, there were three main (and fairly immediate) consequences for Maori from the introduction of trout:

1. The rapid growth of trout was only possible because the koaro were an abundant and easily accessible food source. Trout predation led to such a decline in this species that trout were in trouble by 1912, forcing the culling of trout to try to match its reduced food supply. By the early 1920s, this achieved a temporary recovery for trout, but trout declined again from 1927. The Department of Internal Affairs then introduced an alternative food supply, the common smelt, from 1934 to 1940. Smelt then became the most important food for trout.[101] The effect on koaro, which were critical to Maori food supply and culture, was permanent. The koaro cannot sustain any significant fishing today.

2. To replace the indigenous fish in their way of life, Maori began to incorporate trout into their food supplies and customary fishing practices (as they had already

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[98] R Payne, Evidence for Ngati Tuwharetoa, 26 April 2005, Document E41, p 9
[99] M Ormsby, Evidence for Ngati Hikairo, 25 April 2005, Document E49, pp 11-12
[100] R McDowall, *New Zealand Freshwater Fishes: a Natural History and Guide* (Auckland: Heinemann Reed, 1990), pp 260-261, 421
[101] McDowall, *New Zealand Freshwater Fishes*, pp 419-420; see also R Stephens, 'Native fish in the lake', *Lake Taupo*, p 114

done with the morihana). The customary adoption of trout was perhaps the slowest development, as trout were not at first very palatable to Tuwharetoa.[102] Smelt was added to the diet as well, under the generic name of inanga, although it also was not as prized as the juvenile koaro (because of its cucumber scent).[103] Mr Taiaroa explained to the Tribunal:

> In effect, our people have adapted their customary fishing practices to incorporate the trout. The evidence of our kaumatua and kuia indicates that for many, trout was a staple part of their diet when growing up. And the trout is now part of our culture to the extent that we have become known for serving trout to our manuhiri.[104]

Tereowhakakotahi Charles Wall pointed out the necessity of this, given the dominance of trout in the Tuwharetoa fishing grounds. The streams were 'packed with trout, which were an important part of our diet. I believe that before my time the same would have been true of the kokopu and the inanga and koura.'[105]

3. White points out that although acclimatisation societies and then government departments claimed legal control of the trout fishery, Tuwharetoa also controlled 'large parts' of it by their ability to control access. As the main landowners around the lake and along the riverbanks, the tribe began to guide anglers to the best fishing spots, and charge them for camping and access to fishing.[106] We consider this to have been a valid extension of customary practices, where hapu allowed others access to their fishery in return for an equivalent, as we noted from the evidence of Jock Barrett.[107] We will return to the charging of anglers below.

All three forms of the impact from the introduction of trout – reduction of Maori customary fisheries, the incorporation of trout instead of traditional fish species, and the profiting from Pakeha angling – brought Taupo Maori into a direct contest with the Crown for control and management of the waterways and their fisheries.

That is why the Ngati Tuwharetoa claim to this Tribunal focuses on the introduction and management of trout and its impact on what they called the 'kai rangatira' of Maori as a key grievance concerning their ability to control their waterways and fisheries.

The Crown, on the other hand, has queried whether there is sufficient evidence, including scientific evidence, for the Tribunal to reach a view on such matters.[108] The evidence before us from several fisheries experts accords with the position of the Crown that there is little scientific data on the impact of introduced fish on indigenous species. Nonetheless, the technical evidence we considered (from McDowall, Burstall, and Kusabs) is confident that trout predation was responsible for the massive decline of koaro in Lake Taupo and its tributaries. McDowall and Kusabs also note that competition from government-introduced smelt may have further depressed the numbers of that taonga, one of the kai rangatira of Tuwharetoa. Environmental

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[102] H Heke, 24 September 1902, NZPD, 1902, vol 122, p 605
[103] Grace, A47, p 512
[104] T Taiaroa, Evidence for Ngati Tuwharetoa, 26 April 2005, Document E22, p 4
[105] T Wall, Evidence for Ngati Hineure, Ngati Te Urunga, Ngati Hineuru, Ngati Tutemohuta, Ngati Rauhoto of the Hikuwai Confederation of Ngati Tuwharetoa, 28 February 2005, Document D18, p 3
[106] White, A55, p 174
[107] See above at p 11
[108] Crown closings, 3.3.111, part 2, p 471

degradation in later years had a significant impact on all species, but the experts seem to agree that the fate of the koaro was already sealed. McDowall points to studies indicating that trout can have a harmful effect on koura populations, and these were another taonga of the claimants.[109] We see no reason to doubt the assessment of these fisheries experts.

Their expert opinion conforms with the observations of many at the time, and indeed this situation was brought to the attention of the Government most urgently by Ngati Tuwharetoa. Therefore, we do not accept the Crown's submission that there is insufficient evidence about the impact of trout on the claimants' indigenous fisheries. Rather, there is compelling evidence about the issue and the Crown's knowledge of it, as our discussion in this section will show.

As early as the 1880s, the official reports of Alexander Mackay were tabled in Parliament, describing how the stocking of South Island lakes and rivers was interfering with Maori fishing and food supplies, in part because of the regulations preventing them from fishing in traditional manner and at traditional times.[110] In 1897, Rotorua Maori complained that they were losing their valued food supplies because of trout.[111] In 1902, the situation of Tuwharetoa was drawn directly to the attention of Parliament. During the debate on the Fisheries Conservation Bill, Hone Heke reported that:

> … complaints have been sent to me by the Native hapu residing on the borders of Lake Taupo. They allege that the introduction of fish into that water has resulted in the imported fish consuming the whitebait, koura, and kokopu. This also refers to the koura in Lake Rotorua …that has been the recognised result as far as the Natives are concerned. They also complain that the crayfish are being destroyed by the imported fish. The crayfish of Lake Taupo and Lake Rotorua are a very fine and delicate fish, and I think the Natives rightly complain. They further say they cannot acquire the taste of the imported fish, and that it is nothing at all compared with the delicacy and taste of the whitebait and the crayfish, which is the original fish of these waters. I would suggest for the consideration of the Acting Premier that some means may be afforded the Natives for the purpose of trying to decrease the number of the imported fish by allowing them to catch the fish.[112]

An unnamed MP then interjected that Maori should take out licences. Heke replied that that would not be a satisfactory solution. He described how Maori fished for trout in shallow and deeper water (using flies, nets, and a kind of seive).[113] What Taupo Maori wanted, in effect, was to be able to control both fisheries, conserving and rescuing their indigenous fish by culling trout.[114]

The issue was squarely before Parliament, because another MP read out a letter from Rotorua Maori, claiming that their fishing rights were protected by the Treaty, and that imported fish were killing off the indigenous fish in Lake Rotorua, and that they should be able to fish for the new species and sell them to Pakeha (as they were not good to eat). The Government response was that the right to fish for free was

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[109] McDowall, *New Zealand Freshwater Fishes*, pp 463-466; Kusabs, E27, pp 8-11

[110] Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, pp 894-895

[111] McDowall, *New Zealand Freshwater Fishes*, p 464

[112] Hone Heke, 24 September 1902, NZPD, 1902, vol 122, p 605

[113] Hone Heke, 24 September 1902, NZPD, 1902, vol 122, p 605

[114] Although culling was later undertaken, the Government's ultimate solution was to maximise the trout population and introduce an alternative food species for it in the 1930s (after the 1926 Agreement).

restricted to 'water bounded on both sides by the land of one owner', but even so, such owners needed to be required to obey regulations closing seasons.[115] This right to fish for free could have been extended to Maori, as Heke asked, but no action was taken on the matter.

Given Heke's report of Maori complaints in the CNI, it is surprising that the Ngati Tuwharetoa should have supported a petition in 1900, seeking the release of rainbow trout into their lake and rivers.[116] On closer examination, however, it appears that the only source for this petition is a 1937 paper by Cecil Whitney, who claimed to have circulated a petition among both Pakeha and Maori of Taupo, 'signed by everyone', asking the Auckland Acclimatisation Society to stock the lake and rivers with rainbow trout.[117] It may not have been an official petition to the Crown at all, and it was not reported in the AJHR for that year. Curiously, it was Whitney himself who funded the Auckland Society's first releases of rainbow trout for which he claimed to have arranged this petition.[118] Also, Walzl mentions that this Whitney is the fanatical angler who secretly released trout into Lake Rotoaira in violation of the Government's promise to Tuwharetoa. He claimed to have done it in 1900 and to have had the support of local Maori when he did so, which was strongly denied by Maori.[119] This casts considerable doubt on the reliability of Whitney's claim to have presented a petition with Maori support, especially given that petitions of 1905 and 1913 (see below) were to the opposite effect. In the absence of a more credible source, and in light of the countervailing petitions provided to us, we do not accept that Maori supported a 1900 petition for the release of rainbow trout.

In 1903, the year of the introduction of rainbow trout, the issue was before Parliament again. The Fisheries Conservation Bill of that year will be considered further below, when we assess the legislation governing fishing, but here we note Parata's plea that Maori Treaty rights be given expression by enabling them to fish for food without a licence, regardless of species. In response, several MPs recognised that there were Treaty rights affected by fisheries legislation, that native fish stocks had been impacted by introduced species, and that vital Maori food supplies had been damaged or destroyed. There were some suggestions that as a result, Maori should not have to pay for licences to fish for the new species, and that something could and should be done to conserve native fish stocks. Buchanan, for example, was sympathetic to Maori, whose native fish have been 'gobbled up to a very large extent by the imported trout, and we should help the Native race as far as we possibly can to conserve their fish good, and not to interfere, if possible, with their methods of fishing.'[120]

It was not inconceivable at the turn of the century, therefore, for Parliament to have acted on the Treaty guarantees with regard to fishing, to have done something to conserve native fish in the face of predation by introduced species, and to have

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[115] W R Monk, 24 September 1902, NZPD, 1902, vol 122, pp 606-608

[116] See above

[117] B Cooper, *The Remotest Interior: a History of Taupo* (Tauranga: Moana Press, 1989), pp 112-113

[118] R M McDowall, *Gamekeepers for the Nation: the Story of New Zealand's Acclimatisation Societies, 1861-1990* (Christchurch: Canterbury University Press, 1994), p 258

[119] Walzl, 'Hydro Electricity Issues: The Tongariro Development Scheme', E2, p 10

[120] W C Buchanan, 30 September 1903, NZPD, 1903, vol 126, p 119

recognised Maori fishing rights by reserving them free fishing for all species in all waterways.[121] But governments did not act on these possibilities.

We note in particular the concepts advanced by Field, MP for Otaki, who agreed with Parata that the provisions of the Treaty were:

> … too apt to be forgotten in the legislation of this Parliament. It is unmistakable that in that treaty there is preserved to the Natives the right to fish freely in all rivers, streams, and lakes of the colony for their food, and it is only right that the terms of that great treaty, under which the Natives practically gave up their lands to the Europeans, and which they regard and rightly regard as the Magna Charta of their rights and liberties so far as land is concerned, should be strictly adhered to. The Natives should undoubtedly have the free right to fish for native fish, at any rate, in the streams of the colony; and if it is true that the imported fish voraciously devour the native fish, then I am not sure the Natives ought not to be allowed to fish for imported fish in the same way as they do the native fish, without having to purchase licenses.[122]

Not all MPs agreed, but we are struck by the number who did. The Colonial Secretary declined to make the promise sought by Parata, but did say he would consider what had been said about licence fees. Nonetheless, nothing concrete came of this recognised opportunity to have acted in compliance with the Treaty. This was because, as the MP for Ellesmere put it, it was not impossible to eradicate trout but it was *undesirable* to do so.[123]

The acclimatisation societies proceeded instead to introduce rainbow trout in the lakes of the CNI. In relation to Lake Taupo and its tributaries, they did so with the support of the Government, and Tuwharetoa petitioned the Crown in 1905. Walzl has reproduced their petition:

> This is a prayer from us your petitioners, who are Maoris of Taupo in the Colony of New Zealand, praying (you) to prevent the (the introduction of) and not to rear European fish in our Lakes: (i.e.) in Rotoaira. Let that Lake remain as a sanctuary for the beautiful fish of our ancestors, as all our (other) lakes and streams are now full of these Pakeha fish, (and) they have destroyed our fish which were assured to us by the treaty of Waitangi; and we are prevented by law, and punished, if we go to kill these Pakeha fish, even though the lakes and streams in which these fish live are our own property.[124]

From this petition, it is clear that:

- Tuwharetoa believed that Pakeha fish were destroying the indigenous fish in Lake Taupo and its tributaries;
- Maori rights to the indigenous fish were protected by the Treaty;
- The lakes and streams were Maori property, and Tuwharetoa considered that this gave them rights over the Pakeha fish, especially since these were consuming the indigenous fish, but the Pakeha law prevented them from taking them, and punished them for doing so; and
- Tuwharetoa wanted these wrongs redressed.

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[121] 30 September 1903, NZPD, 1903, vol 126, pp 115-122
[122] W H Field, 30 September 1903, NZPD, 1903, vol 126, pp 119-120
[123] R H Rhodes, 30 September 1903, NZPD, 1903, vol 126, p 116
[124] Walzl, 'Hydro Electricity Issues: The Tongariro Development Scheme', E2, p 8

The issue was before Parliament again in 1908. The Stout-Ngata Commission reported that Te Arawa had 'suffered a grievous loss by the destruction of the indigenous fish' by trout. The Commission recommended free licences for the heads of Te Arawa whanau. Wi Pere told the House:

> No license should be required by a Maori to fish. A Maori should have a free rod and he should be allowed to go and fish in these streams when it suits him. I repeat that these pakeha fish are lean things and not fit to eat, and I should tell you that the only fish fit for food in this country are the inanga, the kokopu, and the tuna: these are relishable fish and good to eat; but the pakeha fish should be destroyed, and they should not be allowed to propagate, because they destroy the inanga, the kokopu and the tuna.[125]

The Government passed special legislation to allow up to 20 cut-price (5 shilling) licences for Te Arawa. Meagre as this was, it was more than was done for Tuwharetoa in response to their 1905 petition. But the Government did make its first concession to Taupo Maori. In response to their petition of that year, the Native Minister promised that Lake Rotoaira would be reserved for indigenous fish and no trout would be released.

In the absence of any remedial action by the Government in relation to Lake Taupo, Ngati Tuwharetoa petitioned the Crown again in 1913:

> (1) The Taupo-nui-a-Tia lake, where these trout fish occur, belongs to us the Maori of Taupo – absolutely.
>
> (2) Our native fish which originally abounded in this lake, such as our trout [kokopu or koaro, sometimes called 'native trout'], craw-fish, toitoi and inanga, and upon which we largely subsisted have now all been devoured by these trout fish.
>
> (3) The Pakeha had no right over our original fish which have thus been devoured by these trout, neither have the Pakeha any right over our lake itself…We now therefore entreat of your honourable Government to confirm the…resolution adopted by us so that it become a permanent law for our protection and the protection of our lake Taupo, so that Maori be not charged with licences for fishing.[126]

In 1913, the Tongariro Maori Council was authorised to allocate 20 quarter-price licences to its people (at a maximum of 5s each).[127] This may have been a response to the 1913 petition set out above, but Mr Taiaroa's evidence (from the Department of Conservation) is that it was a quid pro quo for easier Pakeha access to trout fishing on the river.[128] In the same year, the Government authorised culling to bring trout into line with its reduced food supply, but this was done to conserve food for trout, not Maori. The impact of trout on the koaro was brought home to us when we were told by Jock Barrett:

> When we would fish up the trout, we would find their bellies were full of Koaro. We would squeeze their bellies and the Koaro would come out! Babs Konui (Rawinia's Grandfather) would hit the roof, and say 'that's where all our kai went!''[129]

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[125] White, A55, pp 105-106, citing W Pere, 10 October 1908, NZPD, 1908, vol 145, p 1159
[126] Park, *Effective Exclusion?*, p 217
[127] Reserves and Other Lands Disposal and Public Bodies Empowering Act 1913, s 121
[128] T Taiaroa, Supporting Documents, E22(a), p 2
[129] J Barrett, E10, p 15

Recurring problems from over-predation led ultimately to the introduction of smelt in the 1930s, and the permanent near-destruction of the koaro. It was stressed in Parliament at the time that Tuwharetoa were not fishing for sport but from necessity. Without fish from their lakes and rivers, the tribe faced deprivation. This remained the case well into the twentieth century and was a very serious matter.

Other than the 1913 concession of licences and the temporary culling of trout, the Crown granted 50 free licences to the tribe as part of the 1926 Agreement, a year in which Parliament was again told that 'the pakehas' trout ate out the Maoris kouras and kokopus' in Lake Taupo.[130] These 50 licences replaced the 1913 arrangement, and were not additional to it. From 1922, after the secret release of trout in Rotoaira (noted above), Tuwharetoa were authorised to fish in that lake without having to pay for licences.[131] A principle of sorts was therefore established, that in some circumstances the Crown would authorise free trout fishing, but that those circumstances were fairly limited, and the Government was only interested in conserving trout, not native species.

The Tribunal's Findings

We find:

- that imported fish species were introduced to the Taupo waters without the consent of Maori and, to a large extent, against their wishes;
- that prior to 1926, the evidence supports the claimants' view that the introduction of trout led to a reduction of Maori customary fisheries;
- that Tuwharetoa were then forced to incorporate carp and trout into their customary fishing practices; and
- that those practices included the right to control access to the lake for angling purposes.

Tuwharetoa are still advancing their rights to continue these practices, a hundred years on, as we heard in the evidence of Petera Clarke:

> We found that we were unable to fish for these introduced species without a licence which is often economically beyond the reach of our hapu members. More to the point, we should not have to pay for the right to catch the introduced species which have devastated our customary food supplies. This affected not just the lake, but the rivers also. When we do what we customarily did for food, which is go fishing, we are now called poachers, because it is not our traditional fish which are here, but ones introduced without our consent.[132]

We find that the Crown was fully aware of the Treaty rights of Taupo Maori with regard to their fisheries, that it knew of the destructive impact of trout on those fisheries, and that it was made aware of the prejudice suffered by Maori as a result. Proposals were made, especially by the Maori MPs, for Governments to act on the Treaty guarantees, to do something to conserve native fish in the face of predation by introduced species, and to recognise Maori fishing rights by reserving them free

[130] White, A55, p 173
[131] We note this for completeness' sake, as Lake Rotoaira and its issues fall within the National Park inquiry
[132] P Clarke, D13, p 19

fishing for all species in all waterways. It made two limited responses – a handful of cheaper licences for Tongariro Maori and an agreement to exclude trout from Lake Rotoaira (which was not enforced). The Crown's actions, therefore, fell well short of what was possible in the circumstances. Governments chose to prioritise and protect trout and anglers over indigenous fish and Taupo Maori. In doing so, the Crown breached the Treaty principles of:

- partnership
  - (by failing to obtain the consent of Tuwharetoa and their whanaunga to the introduction of imported fish to their waterways,
  - by acting in partnership with Acclimatisation Societies instead, which failed to consult or work with Taupo Maori, and
  - by failing to respond to Tuwharetoa's clearly articulated rights and concerns in a fair and reasonable manner);
- active protection (by failing to protect the indigenous fishery, the fishing interests of Taupo Maori, and the Treaty rights of Taupo Maori);
- equity (by unfairly prioritising the interests of anglers over Taupo Maori); and
- options (by failing to protect the interests of Taupo Maori in their indigenous fisheries, while at the same time refusing to accept that they had Treaty interests in – and a right to use, profit from, and control – the new, imported species in their waters).

We turn next to examine the Crown's regulation of freshwater fishing in more detail.

Government Regulation of Freshwater Fishing in the Early Twentieth Century

A review of the historical evidence before us suggests that the following principles underlie the actions of the Crown in respect of freshwater fishing, common to officials, Ministers, and Parliaments of this period: –

- That the inland waterways of the colony were largely 'empty' of useful fish.
- That acclimatisation societies should be assisted and facilitated in stocking the 'empty' waterways with imported fish species, especially sporting fish.
- That freshwater fishing was more a sport than a commercial or subsistence activity, and one which generated important tourism revenues.
- That the government should therefore protect the interests of anglers, overseas anglers in particular, and foster the conditions for valuable tourism.
- That the government should regulate fisheries (the taking of particular species or of all fish in a fishery, the methods of taking, the seasons for taking, and the waterways in which the taking occurred) in order to manage and maintain the fisheries in the interests of recreational fishing and tourism.
- That management and maintenance should be financed in part by anglers, through the payment of licence fees for use by the relevant acclimatisation society or government department.

- That British game laws in respect of fishing rights, amounting to private property rights, should not be replicated in New Zealand.
- That the main reason for not replicating such rights was to keep fishing for sport affordable for all New Zealanders, and accessible to all New Zealanders; in other words, all New Zealanders should have access to freshwater fishing so long as they abided by regulations, and paid a cheap licence fee.

There were tensions in the practical operation of these principles. There was some disagreement over how far the sanctity of private property could in fact be set aside in favour of cheap access for all. There was also tension between the angling lobby, which favoured sport fishing, and the less influential Pakeha who wanted to catch freshwater fish (especially whitebait) for sale or consumption. There was also tension between those who wanted to keep fishing affordable for the ordinary New Zealander, and the promotion of tourism, which favoured higher fees. It is clear, from considering the parliamentary debates and the outcomes in legislation, that the predominant interest in the period was that of the sporting anglers. Their interests prevailed over all others, including Maori. When a Minister said in Parliament, 'We [MPs] are all anglers', it was hardly an exaggeration.[133]

Crown actions in the Taupo district, operating on the principles outlined above, resulted in the stocking of Lake Taupo and its tributary rivers with trout. Much of the initial work was done by Acclimatisation Societies, facilitated and assisted by the Crown. But from 1906 the control of Taupo fisheries was vested in the Department of Tourist and Health Resorts. The Department was responsible for employing rangers to enforce the laws and regulations governing fishing, and administered the fishing licences. Licences entitled the holder to fish anywhere in the country and the fees went to the Acclimatisation Societies, which worked with the Government to manage the fisheries. 'Management' largely consisted in annual releases of trout.[134] Internal Affairs and the Marine Department also had roles and input with regard to fishing, but the primary responsibility appears to have remained with the Tourist Department until 1926.

During that time, the Government continued to assert authority over the lake and fisheries, deciding to cull the trout (1913 to 1920) and then to experiment with introducing new food species (1920s). Maori had wanted to be the ones to manage the fishery and net excess trout, until they were satisfied that both trout and koaro were at acceptable numbers.[135] But instead, the Crown worked in partnership with the Acclimatisation Societies, bodies representing a settler interest-group, and not with the tribe. During the culling period, the licensing laws were not enforced and anyone could fish without fear of prosecution. From the 1920s, Internal Affairs resumed enforcement of licence fees and seasons. Although the Government and Societies did not agree on everything, they worked hand in glove to administer the Taupo fisheries for the benefit of anglers and tourists.[136]

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[133] W A Nosworthy, 13 August 1926, NZPD, 1926, vol 210, p 455

[134] Burstall, 'Trout Fishery', pp 123-125; T M Wilford, 24 September 1902, NZPD, 1902, vol 122, p 602; 13 August 1926, NZPD, 1926, vol 210, pp 451-457; R McDowall, *Gamekeepers*, pp 54-74, 96-115

[135] H Heke, 24 September 1902, NZPD, 1902, vol 122, p 605

[136] Burstall, 'Trout Fishery', pp 123-125

The legislative regime governing the stocking of inland waterways began in 1867, with the Salmon and Trout Act. Since this predated the introduction of these much-desired sporting fish, the Court of Appeal has determined that there was never a time in which trout per se were not subject to legislation and the authority of the Crown.

For Taupo, the introduction of brown trout in the 1890s took place under the 1884 amendment to that Act, and the Fisheries Conservation Act 1884. Broadly, these Acts established the primacy of trout as a species to be protected and propagated, giving the Government power to regulate open and closed seasons, the methods of fishing, the licensing of fishing (on payment of a fee), the appointment of rangers and the levying of fines for offences, and other quite far-reaching administrative powers. This was an assumption of authority over both waterways and fisheries.

Whilst regulation can be an appropriate exercise of kawanatanga, both Governments and Societies could have consulted Maori about the massive modification of their fisheries. In effect, this was a major interference with Maori property rights. As Parata asked Parliament in 1903, 'why do they [the Acclimatisation Societies] not ask the opinions of the Maoris?'[137]

In 1902, however, the courts found that the regulations governing licensing were in excess of what was allowed by statute.[138] The licences issued by Acclimatisation Societies were invalid. Further, occupiers of private property were entitled to fish without a licence, and had the power to delegate that right to whoever they wanted. Some MPs feared that this was a serious blow to angling, which in turn was considered a blow to the colony because of the significant numbers of tourists who came for that purpose.[139]

The resultant legislation is crucial to the claims before us, because it took away property rights possible to landowners in Britain and, according to the Court of Appeal, existing in New Zealand as well as at 1902.

The Fisheries Conservation Act 1902 was intended to strike a balance between the rights of landowners, who would still be able to fish on their land and prevent trespass on their land – though they would be expected to give access to anglers – and of the rights of poorer or ordinary New Zealanders to be able to fish in 'their' waterways.[140] The Act abolished the selling or leasing of fishing rights by landowners. Further, by giving landowners the right to fish for free only where a waterway was entirely contained within the property of a single owner, Parliament in effect removed this right from all Maori landowners abutting lakes and rivers. This was particularly important for Lake Taupo and its tributary rivers.[141] Maori were charging anglers for access, whose purpose was sport and recreation, and not the taking of fish for sale.

As we noted above, the provision of access to fishing in return for an equivalent was a customary practice, extended here to incorporate Pakeha anglers. Mr Barrett, it will be recalled, described how Ngati Porou came visiting with gifts of crayfish, in return for which the claimants granted them access to the lake to fish for koaro. 'They were

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[137] W Parata, 30 September 1903, NZPD, 1903, vol 126, p 115
[138] McDowall, *Gamekeepers*, p 70
[139] T M Wilford, 24 September 1902, NZPD, 1902, vol 122, p 602
[140] 24 September 1902, NZPD, 1902, vol 122, p 601
[141] Fisheries Conservation Act Amendment Act 1902, ss 4-6

bartering days,' he told us, and 'no money changed hands.'[142] In our view, it was a legitimate adaptation of this customary authority and practice for Tuwharetoa and their whanaunga to charge anglers for access to fish for trout.

The 1902 Act's infringement of Maori property rights was very significant and of permanent effect. It was incorporated in the consolidating Fisheries Act of 1908, except that the extremely limited definition of free fishing was enlarged to allow 'any person in lawful occupation of any land' to fish from that land without buying a licence.[143] This was not an unregulated right – landowners' right to fish was restricted to the prescribed seasons and methods.

We have already noted the prevailing ideology among settlers that private property rights in fishing should not be *created* in New Zealand. But there is little doubt that Maori already possessed such rights in both Maori and British law, and that they were guaranteed by the Treaty.

In theory, the new Act treated Pakeha and Maori alike by abolishing the ability of all riparian owners to sell or lease fishing rights. But the discussion in Parliament makes it clear that Pakeha landowners were permitting free access in any case; the law, in effect, was aimed at a property right being exercised by Maori.[144] Since the right was available under English law, it was obviously feasible for the Crown to have maintained and respected it. The dire predictions of the collapse of angling and tourism were clearly exaggerated, since both were thriving prior to and after the Act, even though Taupo Maori continued to run their own licensing system and charge anglers for access after 1902. But legal rights were now taken away, as Governments moved to end Tuwharetoa's and their whanaunga's practical control of Taupo fishing.

The licensing regime was further standardised in 1903, leading to quite an extensive discussion of Maori fishing rights and their objections to licensing. Wi Parata, who spoke for Maori of all districts in the absence of the other Maori MPs, made the following points:

- The Fisheries Conservation Bill does not provide for Maori fishing rights
- 'there is also a clause in the Treaty of Waitangi which assures to them the fishing rights in their rivers, lakes, and seas. Now, you pakehas come here, and the Minister brings in a Bill to license every one that goes fishing…'
- 'The water belongs to the Maori along with the fish that is in it.'
- Maori should not have to pay for a licence 'when the rivers belong to them and the fish belong to them'. Maori should have the right to fish in their own rivers for 'eels, whitebait, flounders, lampreys, **and all other fish'** (emphasis added).
- The acclimatisation societies hold meetings to discuss these questions 'but why do they not ask the opinions of the Maoris?'
- 'You bring in a Bill that is one-sided. There are two sides to every question, and to Bills also.' He has been sent to look after the rights of Maori – he is speaking on

[142] J Barrett, E10, p 16
[143] Fisheries Act 1908, s 90
[144] 24 September 1902, NZPD, 1902, vol 122, pp 601-602

behalf of all Maori of both islands, as the other Maori MPs are absent. He is sick of 'these one-sided Bills'.

- Maori do not care about trout – it is too dry – but they ought to be able to fish for their own maintenance. 'Instead of going to the butcher for mutton or beef, they catch the fish in their own rivers and live upon them. This custom has been handed down to them by their ancestors.' Maori should be 'exempt from the operation of this Bill when they desire to obtain food for themselves', and they should not have to pay for licences anywhere in New Zealand. 'That will bring the matter into line with the Treaty of Waitangi'.[145]

Parata's views were dismissed by the Government because the Bill did not require Maori to take a licence for fishing indigenous species, allowing the Government to claim that Maori rights were unaffected. This ignored the way in which regulation circumscribed the timing and methods of fishing (affecting indigenous as well as introduced species), and that Parata was in fact claiming a right to fish for all species, including introduced ones, without payment of fees. We have noted above that some MPs were sympathetic both to the need to conserve Maori food supplies, and the possibility of exempting Maori from the licensing system altogether. But no action was taken and the Bill was enacted without Parata's requested protection of Maori fishing rights.[146]

The Tribunal's Findings

First, in terms of the Crown's submission about our jurisdiction, we do not think that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 bears at all upon whether we can inquire into any customary right Maori may have to profit from permitting access across their lands for recreational fishing. This is because it is our view that this is not a commercial fishing right within the meaning of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Maori had the right, as an expression of their rangatiratanga, to extend their customary practice of allowing reciprocal access arrangements to Pakeha anglers, whose purpose was sport and recreation, and not the taking of fish for sale.

Secondly, in terms of the Crown's regulation of freshwater fishing, we find that the Crown eroded the claimants' rangatiratanga over their fisheries by legislation which:

- protected and facilitated the introduction of predatory salmonids, namely trout, in their waterways;
- required Maori to pay licence fees to fish for these species; and
- abolished the ability of Maori to engage in the exercise of their rangatiratanga and the adaptation of their customary fishing practices by providing access for European anglers to fish for trout in exchange for money. In other words, the Crown prohibited Maori from selling or leasing fishing rights and from controlling access to their taonga.

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[145] W Parata, 30 September 1903, NZPD, 1903, vol 126, p 115
[146] 30 September 1903, NZPD, 1903, vol 126, pp 116-122

We further find there was no agreement to, or compensation for, these legislative infringements of Treaty rights. In particular, Parliament could have done much to bring things 'into line with the Treaty of Waitangi', as Parata put it, by accepting proposals for Maori to fish for food without licences.

We find that by enacting this legislation, including but not limited to the Salmon and Trout Act 1867, the Fisheries Conservation Act 1902, and the Fisheries Act 1908, the Crown was in breach of the Treaty principles of:

- partnership and autonomy
  - (by failing to recognise Tuwharetoa's authority over their fisheries,
  - by failing to regulate the fisheries in partnership with them,
  - by failing to consult them about the abolition of some of their fishing rights,
  - by abolishing Treaty-guaranteed fishing rights without their consent,
  - by requiring them to take out and pay for a licence to fish in their own waters (again, without consulting them or obtaining their consent to this imposition),
  - by interfering with their customary methods of fishing, and
  - by depriving them at law of their tino rangatiratanga over access to their waterways and fisheries);

- active protection (by failing to protect Tuwharetoa's fishing interests and their authority over waterways and fishing); and

- options (by foreclosing on Tuwharetoa's choice to manage angling as a means of generating much-needed income and by restricting the tribe's fishing rights to indigenous species only).

Prejudice from these Treaty breaches was delayed, however, because the Crown found it difficult to curtail the claimants' tino rangatiratanga over their fisheries in practice. The introduction of imported fish, with its devastating impact, had been beyond the power of the claimants to prevent. Once the fish were established, it would have required the active agreement and cooperation of the Crown to have controlled trout and koaro levels in a way sustainable for both and in the interests of both Maori and anglers. We do not know if it would have worked because the Government refused to try it. Charging anglers and paying licence fees, on the other hand, were not matters on which the Government could immediately impose its will. The result was a decade or so in which Maori fishing rights and control of access were tolerated by the State, followed by negotiations for a settlement of the issue. This period was, in our view, a key 'lost opportunity' for Taupo Maori fishing rights, as we explain in the next section.

A Lost Opportunity: Taupo Maori Fishing Rights, 1910 to 1924

The response of Ngati Tuwharetoa to fishing legislation circumscribing their rights was to petition against it, as we have seen in 1905 and 1913, but also they simply ignored the legislation. In 1910, for example, the Government's Fisheries Inspector discovered wholesale 'poaching' by Maori and Pakeha at Taupo, with inland Maori coming with packhorses, spearing the trout, and taking away loads of fish. This was not in fact harming the fishery, but its management should, in the inspector's view, be

confined to the 'proper authorities'. Inspector Ayson thought that Maori should be 'treated liberally' in the matter of licences, but compelled to fish only during the prescribed season. He also reported that Maori landowners were charging anglers for the right to camp and fish. In fact, riparian landownership placed control of fishing in Maori hands, and Ayson recommended that the Government should purchase the margins of the lake and rivers as soon as possible.[147]

Ayson's report highlighted two themes that persisted for the next 16 years. Some Taupo Maori continued to defy the licensing regime and fish for trout without a licence, and they defied (in effect) the 1902 Act and its 1908 successor by charging anglers for fishing from the banks of their rivers and in the lake. They put up notices, issued their own licences or 'permits', 'cancelled' Government licences if anglers refused to pay for Maori licences, and offered hospitality in the form of camping facilities and guiding.[148] In effect, as Burstall notes, there were two licensing systems running side by side at Taupo, and the Maori one was the more powerful.[149] There was an apparently unsuccessful attempt to negotiate an arrangement in 1913, involving 20 cut-price licences for Tongariro Maori in return for free access for Pakeha fishing in their river. We have no details of this arrangement but it does not appear to have lasted.

By 1923 the situation was a 'long standing trouble' and source of 'irritiation' to anglers.[150] On the first theme, the Tourism Department reported in 1925 that for years it had 'turned a blind eye on natives fishing for food, and indeed have granted them a number of licences at a nominal fee'.[151] Some Maori continued to fish for food as customarily. On the second theme, pressure on the Government intensified from the angling community in the early 1920s. In response to a complaint from an angler about fishing charges on the Tongariro River, the Tourist Department's Rotorua officer reported that Maori were putting up notices charging 2/6 per day 'for fishing rights', and claiming to cancel anglers' official licences if they failed to pay. The Government had turned a blind eye to this kind of activity for years, but in November 1923 the Napier Acclimatisation Society warned the Government that Waitahanui hapu were about to lease 'sole fishing rights' to just one or two individuals. 'Can you help get water open for fishermen?', they asked.[152]

The Under Secretary for Internal Affairs visited Waitahanui and asked the local hapu not to lease the riverbanks to just one individual. In return, he promised to discuss with his minister and Maui Pomare how 'best the interests of the Maoris there could be conserved while meeting the convenience of anglers'. He discovered that the hapu were acting out of economic necessity. Their daily charge for anglers 'was divided among the tribe to buy food during the winter when work was unprocurable'.[153] Fishing for food, and charging anglers to do so for sport, was a means of survival for Taupo Maori. In December, the Waitahanui chief, Rameka, consulted the Government further on leasing. The Minister's reply was a virtual endorsement of their licensing

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[147] L F Ayson, 'Report on Fisheries of New Zealand', 10 June 1913, AJHR, 1913, H-15(b)
[148] T Taiaroa, Supporting Documents, E22(a), pp 1-19
[149] Burstall, 'Trout Fishery', pp 124-125
[150] T Taiaroa, Supporting Documents, E22(a), p 2
[151] White, A55, p 177
[152] T Taiaroa, Supporting Documents, E22(a), pp 2-3
[153] T Taiaroa, Supporting Documents, E22(a), pp 4-8

system. He advised that Maori should 'make no departure from the present practice of issuing permits to all anglers who apply for access to their properties for the purpose of fishing for trout in the Waitahanui River'. The Government, he added, wanted to settle the issue permanently, with an arrangement 'satisfactory' to itself, Maori, and anglers.[154]

From this point on, officials and Ministers began to consider the negotiation of a permanent agreement to secure Pakeha fishing access at Taupo (the subject of the next section of this chapter). Anglers and Acclimatisation Societies continued to press the Government in 1924, complaining that their licences supposedly entitled them to fish anywhere, but in fact did not. The complaints of the Wanganui Acclimatisation Society about camping charges on the Tongariro River led to a second investigation, this time by the local Maori Land Court judge, F Acheson. The judge reported that Tuwharetoa knew it was now illegal to sell their fishing rights, but that they claimed they were not in fact doing so. Acheson reported Tuwharetoa had no objection to people using the beds of the lakes and rivers, but riparian owners on the Tongariro River were anxious to restrict access in order to prevent over-fishing.[155] The camping charges were legal and he recommended caution in trying to 'curb the activities of the natives in this matter'. Taupo Maori were usually reasonable but would 'strongly object to any attempt to deprive them of rights which they possess over their own land'. Trouble arose, for example, when weekend visitors refused to shift their camps off Maori land when asked by the owners to do so.[156] Acheson's report accords with Ms Feint's submission that during this period, Tuwharetoa were in fact exercising legitimate property rights allowed to all landowners under the law.[157]

The question intensified when Maori threatened to take an angler (Colonel Grant) to court for trespass. Grant's lawyers appealed to the Government. The Secretary for Internal Affairs thought it 'imperative that some arrangement be come to, the present state of affairs being most unsatisfactory, both to the Government and visiting anglers'.[158] Despite Acheson's report, officials considered that Maori were in fact breaking the Fisheries Act 1908 with its abolition of private rights in fishing. They feared that bad publicity from visiting anglers would prevent future tourists from coming to New Zealand. The ideological opposition to game laws was also still powerful in the 1920s. Officials thought that Maori were defeating 'the whole intention' of the 1908 Act, 'which was passed with a view of protecting the fish, but at the same time with a view of preventing the repetition of the game and fish laws of the old country and enabling any person at a reasonable fee to fish for trout in any waters in the Dominion'. While Maori owned the banks and possibly the riverbeds, they had no rights in either the water or the trout.[159]

The Minister of Internal Affairs, the Minister of Marine, the Minister of Tourism, and the Native Minister all agreed that there should be a conference with Maori to resolve this issue. At the same time, the opinion of the Solicitor General was sought: were Tuwharetoa breaking the law? The Crown Law Office replied that a fishing licence

[154] T Taiaroa, Supporting Documents, E22(a), p 4
[155] White, A55, pp 174-175
[156] T Taiaroa, Supporting Documents, E22(a), pp 7, 9
[157] Feint, Ngati Tuwharetoa closings, 3.3.106, p 128
[158] T Taiaroa, Supporting Documents, E22(a), p 7
[159] T Taiaroa, Supporting Documents, E22(a), p 9

did not permit its holder to enter private land. The law officer distinguished between lake and river fishing in this respect. Maori landowners were charging a fee for fishing on the lake within 300 yards of shore, and had no legal right to make this charge. The bed of 'this large inland Lake is, in my opinion, vested in the Crown and the Maoris have no legal right to it. It may be that they have fishing rights over the Lake, but that is, in my opinion, the extent of their rights.' He suggested that the Department of Internal Affairs notify all anglers that these charges were without justification, that the Crown advised them not to pay, and would defend any action for trespass in respect of fishing on the lake. The law officer also suggested that the Crown do the same for fishing on the riverbanks, since the damages which any owner could recover for such a trespass would be nominal, and the cost of getting it would be much more than the sum awarded. Landowners would probably only get £1. But this was for people walking over the land, not camping on it.[160]

The Crown Law Office's recommendation – encouraging anglers to defy Maori, defending cases on their behalf, and relying on the costs preventing Maori from pursuing matter in the courts – was not followed because by then the Government planned to negotiate a solution and did not want to jeopardise its success.[161] We will discuss the negotiations and subsequent agreement in the next section.

The Tribunal's Findings

The Crown Law Office appears to have admitted that Maori property rights existed in 1924 but advised the Government on how to defeat them. In exercising these property rights, and also in operating their own system of licences or permits, Maori were not acting inconsistently with the Crown's kawanatanga powers. In our view there was no fundament incompatibility between kawanatanga and tino rangatiratanga in this respect. A dual licensing system may have been inconvenient to anglers, but inconvenience to sportsmen is not a reason for overriding Treaty obligations. In 1926, the Crown made Taupo angling subject to an extra and special licence in any case, which anglers also complained about.

Here, we note that the Crown was perfectly willing from time to time to share the responsibility of licensing sporting activities with the Acclimatisation Societies, which also at times received the fees. These interest groups evolved, as the Ngai Tahu Tribunal noted, into virtual local government bodies. They had no greater qualifications or particular expertise for their role than their participation and interest in hunting and fishing. No one could have argued that Tuwharetoa were less qualified than they to exercise licensing powers. In 1926, the Crown proved willing to share licensing *fees* with the tribe, and to accept a tribal board as the administrative means of doing so. Given its willingness to share sports licensing responsibilities with the Societies, we think it was conceptually simple for the Crown also to have shared licensing authority with a tribal board at this time. Its failure to do so, and its insistence that Tuwharetoa cease to exercise authority in this matter, then become issues of concern in light of the Treaty.

We will return to the details of the 1926 Agreement below. Here, we find the Crown to have been in breach of the Treaty principles of partnership and autonomy, by:

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[160] Crown Law Office opinion, 1 May 1924, cited in T Taiaroa, Supporting Documents, E22(a), pp 12-13
[161] T Taiaroa, Supporting Documents, E22(a), p 13

- failing to accord the same legal rights and autonomy to Maori tribes that it accorded to Acclimatisation Societies;
- failing to enter into partnership with tribal authorities to administer the licensing of fishing and access to Tuwharetoa's taonga for the purpose of fishing when the opportunity existed to do so; and
- tolerating a dual licensing system for many years but then bringing it to an end, when it could have legalised it or given legal powers of licensing to a tribal authority, and in doing so have provided for Maori autonomy, tino rangatiratanga, and rights to control access to their lake and their fisheries.

Why did the Crown embark on negotiations with Maori about Lake Taupo in 1924? Were the Crown's negotiations with Maori over Lake Taupo conducted and concluded in good faith?

Introduction

As we have seen, Taupo Maori were soon aware of the rapid destruction of their food supplies by trout, and sought to restrict or prevent their introduction. At the same time, they quickly appreciated the economic value of guiding anglers and charging them to camp and fish from lake and river banks. At the turn of the century, Parliament moved to maximise income from licensing of anglers, and to guarantee their access to the sport, by abolishing the rights of private landowners to sell or lease fishing rights.

In doing so, the Crown came swiftly into conflict with Taupo Maori, who continued to control and use their fisheries as they had from time immemorial. Hapu resisted paying licence fees (to which the Crown turned a blind eye) and renamed their own fees to anglers as charges for access and camping on private land. Two licensing systems ran side by side until the 1920s, when the Crown moved to extend its control over the nascent or blossoming tourist trade and obtain guaranteed access for the anglers who had paid its licence fees. This coincided with a policy on the part of the Crown to secure (or confirm) its ownership of lakebeds as opportunity arose.

The Government moved on the issue and it passed legislation in 1924, authorising it to negotiate with Maori for Pakeha access to the Taupo fisheries, and for the beds of the lake and its tributary rivers. Negotiations began two years later in April 1926, with a public meeting at Waihi attended by Ministers and a group of interested Maori, where a 'sketchy' agreement was reached on some points. In July of that year, Ngati Tuwharetoa leaders met with Prime Minister Coates in Wellington. An Agreement was signed on 26 July by the Prime Minister and by Hoani Te Heuheu on behalf of Ngati Tuwharetoa, arranging a right of way around the lake and along the rivers, and also vesting the beds of these waterways in the King.

The Agreement was embodied (and amended) in the Native Land Amendment and Native Land Claims Adjustment Act 1926. The negotiation process, the 1926 Agreement and legislation, Maori fishing rights, the virtual destruction of the indigenous fishery, the loss of the lake, and the Treaty-guaranteed exercise of tino

rangatiratanga and kaitiakitanga over these taonga, are all the subject of claim before this Tribunal.

The Claimants' Case

For Ngati Tuwharetoa, the Crown's statutory acquisition of Lake Taupo, Tuwharetoa's 'tribal emblem', was and is a heartfelt grievance, even though the Crown has taken some steps towards remedying its wrongful acquisition. Ms Feint submitted that the Crown acquired the beds of Taupo waters in 1926 in breach of its Treaty guarantee that Ngati Tuwharetoa could retain their taonga for so long as they wished. There was an element of compulsion in the 'agreement' entered into in July 1926, and Tuwharetoa did not willingly part with their taonga.

Rather, White's evidence is that the Crown would have passed legislation taking the lake anyway, and that this was known to Tuwharetoa at the time, making the arrangement a coercive one. Tuwharetoa 'agreed' because they wanted to at least secure a compensation deal to replace some of the revenue lost from anglers.

Tuwharetoa argued that they were consistent right up until 23 July 1926, in resisting the vesting of the beds of Taupo waters in the Crown. The newspaper report of the Waihi meeting of April 1926, Hoani Te Heuheu's telegram to the Prime Minister, and the resolutions passed on the eve of the 23 July meeting, all show that Tuwharetoa were determined not to part with the lake. Subsequent protests about Crown acquisition of the lake and tributary rivers were further evidence that Tuwharetoa did not wish to surrender their mana over their tribal taonga.[162]

As well as employing an element of compulsion, the claimants submitted that the Crown's conduct in negotiating with them was less than honourable in other ways. Tuwharetoa believed (and believe) that the arrangement was about a right of way for access to fishing and *preserving* their fishery. The Crown led Tuwharetoa to believe this, when its intention all along was to secure ownership of the lakebed. The surviving record of the April meeting at Waihi is Ngati Tuwharetoa believes to be particularly damning in this respect. Mr White stated in cross-examination that the Crown 'may not have been '*totally up front*' about its objectives'. But there was no overriding policy reason for acquiring the beds, which have now been returned without harmful consequences. Restoration of title has not prevented the public from enjoying rights of access, navigation and fishing, and indeed, Tuwharetoa have no desire to prevent them.

Despite the decisions of the courts in relation to the Rotorua lakes, and the Solicitor General's knowledge of how those decisions would continue to go, the Crown seems to have been driven by an attitude that Maori should not own waterways, simply because they were Maori. In the claimants' view, the colonisers' ideological objection to private control of access to game, another driving force, could have been achieved without owning the beds. It was more that the Crown saw Maori assertions of ownership of lakebeds as undesirable, and was determined to foil them, than that it *needed* to do so for any genuine or overriding policy purpose.[163]

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[162] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 117-129
[163] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 117-129

In Ms Feint's submission, a possible explanation is that the 1926 Agreement, which vested the beds and the right to use the waters in the Crown, was designed to remove beyond doubt the Crown's legal right to appropriate the waters (and parts of the beds) for its hydro schemes. Tuwharetoa believe that the Crown had already earmarked Lake Taupo and the Waikato River for hydro-electric schemes before taking the lake, as evidenced by the work of Hancock and Hay, and yet failed to disclose this or negotiate agreement to it in 1926. Hoani Te Heuheu and others later raised the question of whether the Crown had been negotiating in bad faith, and called upon it to rectify its omission in the 1940s by negotiating a fresh agreement with them.[164] The 1926 legislation conferred the 'right to use the waters' on the Crown but this had not been discussed with Tuwharetoa in 1926. In doing so, the Crown went beyond the Agreement and acted in breach of Treaty guarantees.[165]

When it insisted on taking the beds of Taupo waters, the Crown also breached the Treaty by failing to acknowledge and provide properly for Ngati Tuwharetoa's possession and customary ownership of the lake and rivers as whole, indivisible entities, and instead severed and took ownership of the beds. Further, the claimants argued that the arrangement was discriminatory in two ways. First, it was based on the Crown's determination that Maori should not earn an income permissible to any private property owner, by providing access to anglers and running fishing camps. Secondly, the right of way was confined to Maori land – Pakeha private land ownership was not disturbed. The claimants feel that racism may have influenced the Crown in securing these objectives.[166]

In Ms Feint's submission, subsequent problems with the Agreement include:

- The 1926 Act enabled the Crown to reserve areas from the beds for the use of Maori, and to exempt land from the right of way provisions. In 1927, the Trust Board requested exemption for 36 affected waahi tapu, pa, kainga, and other significant sites around the lake, but these became access ways because the Crown failed to reserve them.

- The lost fishing revenue was the only income for some Maori landowners, but the Crown failed to compensate private riparian property owners for 22 years. Indeed, the Trust Board had to pursue the Crown through the courts before it would honour its promise of compensation. When awarded, the compensation was much lower than what had been sought.

- The one-chain public right of way has altered from what was agreed (access by foot) and problems have arisen from a public perception that they are entitled to do whatever they like on the marginal strip, and in getting to it.

- Although the beds have been returned to Tuwharetoa, they have suffered harm during the period of their removal through the uncompensated construction of the hydro-electric schemes, and lost opportunities for tourism and development during the long period of non-ownership.[167]

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[164] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 130-133
[165] Feint, Ngati Tuwharetoa closings, 3.3.106, p 164
[166] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 117-129
[167] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 117-129

The 1926 Agreement and Fishing Rights

In the view of the claimants, the 1926 Agreement was supposed to secure Maori fishing rights and access to fishing grounds, as well as providing compensation for loss of the one-chain strip and their profitable control of Pakeha access. They were provided with a number of free fishing licences, while the 1926 Act in turn authorised the Crown to regulate Taupo fisheries. Maori rights to indigenous fish were first specifically reserved by the 1951 regulations, which gave them exclusive rights to take such fish. Little was gained from this, however, as imported fish were continually re-introduced and managed, steadily diminishing the indigenous species. The claimants' view is that the Crown did not manage the fishery in such a way as to ensure that the indigenous fish would be protected for present or future generations. Kusabs attributes the disastrous decline of the koaro to trout, and notes that numbers are too small now to be fished.

Partly as a result, Tuwharetoa have adapted their customary practices to include trout. The new fish is now part of their culture, their custom, and their fishery. They are concerned at what they consider to be the minimal share that their free licences allow them, and at changes to the legislation which greatly reduced their right to take smelt. Trout and smelt can never be an adequate substitution, nor a justification, for the loss or depletion of the indigenous fish species. Those species were vital to sustenance and also to the preservation of whakapapa and ways of life. Tuwharetoa can no longer fish for their kai rangatira, and this has been a serious prejudice arising from the Crown's failure to protect this taonga. The claimants seek the restoration of their taonga, and a greater share of the introduced species – trout and smelt in particular.[168]

The Crown's Case

The Crown began its submissions with Ngati Tuwharetoa's allegation that the alienation of Lake Taupo was coerced by the Crown. This, the Crown says, is a serious allegation and requires a commensurate standard of proof, which has not been met. The circumstances of the alienation are unclear and there is no definitive evidence.

The Crown accepts that in relation to the statutory acquisition of Lake Taupo a number of facts are known. It contends, however, that those facts do not establish the necessary standard of proof for such a serious allegation that the Crown acted in bad faith. The main problem with the evidence is the uncertainty about what happened in the key meeting in July 1926.[169]

The Crown considers the facts of the negotiations to be as follows:

- In 1924, special legislation was passed to empower the Crown to negotiate with the Maori owners of the land abutting Lake Taupo, which specifically mentioned the beds and margins.

- During the 18-month delay before the first meeting, northern Taupo hapu petitioned the Crown, stating their disagreement with any cession of the lake and its tributaries, and claiming that this was the proposal of the southern people.

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[168] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 166-177
[169] Crown closings, 3.3.111, part 2, p 475

- There is only one account of the Waihi meeting on 21 April 1926, which limits ability to know what really happened there, but we know that Te Heuheu spoke in favour of the Crown's proposal. A £15000 annuity was suggested, Coates offered 50 per cent of the fishing fees instead, and said that the Government was not interested in the lakebed, just fishing rights. There was agreement to work out the details at a later date.

- Five days later, Coates' memorandum to the Governor General detailed what had been agreed at Waihi, but his memorandum contradicts both the newspaper account and the later Agreement. It stated that the beds of all waters would be vested in the King, and did not mention fishing rights other than in connection with trout. The Crown notes as significant that the 1926 Act enshrined Tuwharetoa's customary fishing rights.

- On 29 April, Hoani Te Heuheu sent a telegram asking the Prime Minister to correct a report that the freehold of the lake and rivers was ceded to the Crown.

- On 21 July, 11 Tuwharetoa representatives met and agreed a set of resolutions. These conformed with Coates' memorandum with one exception – that the beds should **not** be vested in the King. The outcome of the meeting with the Crown, however, was a final agreement that vested those beds in the Crown.[170]

The question of whether or not the Crown acted in bad faith turns on what happened at the July meeting, the details of which, the Crown submits, are unknown.[171] After all, White concluded that he did not know what had made the Tuwharetoa representatives change their minds. His response to claimant counsel, who put it to him that an element of coercion must have been involved, was that this was speculation.[172] Ultimately, there is insufficient evidence to make out a bad faith allegation.[173] While White accepted that the status of the lake as a taonga reduced the likelihood of Tuwharetoa wanting to part with it, this also was not definitive. Nor can statements allegedly made to Te Arawa four years earlier, about taking *their* lake compulsorily, be relied on to assert that such comments were in the minds of Tuwharetoa or were made to Tuwharetoa. Mr White gave weight to the 1924 Act's reference to the beds, that they were going to be part of the negotiations.

The Crown concludes that the arrangements negotiated by Tuwharetoa, including the receipt of income for fishing, might as easily mean that they saw real advantage and agreed to the transfer of the lake. There is simply too much uncertainty to be sure, and the gap should not be filled by today's standards and expectations.[174]

The Tuwharetoa response to the 1926 Act does not support the allegation of coercion. Arthur Grace reported that the majority of interested Maori were 'fairly satisfied'. The evidence shows complaints about the rivers and fishing income, not about the vesting of the lakebed per se. Challenges from the Trust Board itself, using the example of metal extraction, were about getting half of the income to be derived from such

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[170] Crown closings, 3.3.111, part 2, pp 476-478
[171] Crown closings, 3.3.111, part 2, p 478
[172] Crown closings, 3.3.111, part 2, p 478
[173] Crown closings, 3.3.111, part 2, pp 478-479
[174] Crown closings, 3.3.111, part 2, pp 479-480

sources, not about the vesting of the bed itself. The board's concerns in 1927 related to the number of fishing licences, camping fees, the right of way, and compensation for owners of land abutting the rivers.[175]

The Crown also disputes that it acted in bad faith if it did not raise the issue of hydro-electricity generation during the negotiations. From 1903, the Crown has reserved to itself the sole right to use waters for electricity generation. Claimant counsel emphasised the 1903 surveying of Lake Taupo for hydro-electric purposes. The Crown submits that it is not clear whether this took place. Mr McBurney was unable to point to any evidence of mapping Lake Taupo to ascertain its storage potentials. The Crown, having passed the 1903 Act, was certainly aware of its rights and interest in electricity, but the absence of evidence about the 1926 negotiations prevents any conclusions about whether or not Tuwharetoa were aware of them. In reference to Hoani Te Heuheu's letter, the Crown submits that there is in fact no evidence of what was discussed in 1926, but it cannot be assumed that Tuwharetoa did not know of the Crown's rights in hydro-electricity. Nor are the Crown's intentions necessarily clear in 1926. Electricity generation had begun on the lower reaches of the Waikato River, but it is not clear that the technology existed at that time to contemplate the construction of control gates on the lake.

In summary, we do not know what was talked about, we do not know what the Crown intended with regard to the lake and electricity at the time, we do not know whether the Crown had the technology to contemplate control gates, but we do know that the Crown already had the sole right to use water for electricity generation. It is not possible, therefore, to conclude that the Crown knew it should have spoken to Tuwharetoa about hydro-electricity generation but chose not to do so.[176]

Further, the Crown denies that it discriminated against Maori when it confined the right of way to Maori land. The Crown understands that virtually all the riparian landowners were Maori, and therefore, in practical terms, there were no non-Maori to whose land the right of way could have applied.[177]

The 1926 Agreement and Fishing Rights

The Crown argues that, as a result of the 1926 Agreement, the participation of Ngati Tuwharetoa in the management and revenue of the trout fishing resource is the best known example of iwi participation in such arrangements. The history of this arrangement, however, has not been the subject of detailed evidence. The Crown submits, therefore, that such issues must remain matters for investigation in any future stages of the CNI inquiry.[178] It also notes, however, that considerable ongoing benefits have flowed to Tuwharetoa as a result of the 1926 Agreement. In the last year, the Board received about $800,000 from Lake Taupo revenues (including licence fees). The Board also receives 200 free fishing licences a year, which it distributes to 30 or so marae. The Board and DOC liaise about the fees and Tuwharetoa want them increased because they profit from them.[179]

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[175] Crown closings, 3.3.111, part 2, pp 480-481
[176] Crown closings, 3.3.111, part 2, pp 486-488
[177] Crown closings, 3.3.111, part 2, p 482
[178] Crown closings, 3.3.111, part 2, p 472
[179] Crown closings, 3.3.111, part 2, pp 483-485

The Tribunal's Analysis

Our analysis of the negotiations, agreement, and empowering legislation has been divided under the following headings and sub-headings:

- **Preparations to negotiate an agreement, 1924 to 1926**
  - Foreign ownership becomes an issue
  - Ownership of the bed of Lake Taupo becomes an issue
  - Was hydro-electricity also an issue?
  - The Native Land Amendment and Native Land Claims Adjustment Act 1924
  - The Government's proposed draft agreement, 1925
  - Delay in negotiations
- **The Waihi meeting, 21 April 1926**
- **The July 1926 meeting and the negotiation of the Agreement**
- **The Native Land Amendment and Native Land Claims Adjustment Act 1926**
- **Were the 1926 Agreement and its enacting legislation 'fair and reasonable' in the circumstances and consistent with the Treaty?**
  - What exactly was the £3000 annuity in return for or a payment for?
  - What did Tuwharetoa make a full, free, and informed agreement to?
  - Was there an element of compulsion?
  - Should the Crown have negotiated over hydroelectricity?
  - What were the impacts of the settlement on Ngati Tuwharetoa fisheries and fishing rights, and should the Crown have remedied damage to the indigenous fishery?
  - Were the annuity and the river compensation fair in all the circumstances?
- Did the Crown really need the lakebed?

Preparations to negotiate an agreement – 1924 to 1926

The negotiation of a comprehensive agreement to resolve overlaps or conflict between kawanatanga and tino rangatiratanga is, as a matter of principle, consistent with the Treaty. There was an opportunity, therefore, especially in light of Parliament's awareness of Maori fishing rights, for a Treaty-consistent outcome in 1924–1926.

In 1924 the issue of angler 'irritation' and Acclimatisation Society annoyance (described above) was complicated by the intrusion of two further issues: worries about foreign ownership; and a growing desire for the Crown to assert or acquire a clear legal title to the bed of Lake Taupo.

Foreign ownership becomes an issue

In 1924, the Government became concerned that ownership of riparian lands might end up in the hands of wealthy foreign anglers, who might prevent access for others. The profitability of recreational fishing for Maori depended on maximising the number of anglers paying their set access fees, in balance with conserving the fishery for their own and anglers' use. But multiply-owned Maori land was vulnerable to alienation, as we have noted elsewhere in this chapter. It was not inconceivable that the riverbanks and lake margins could be sold to anglers whose interest, unlike that of Maori, was in limiting access to a privileged few. According to explanations offered in Parliament in 1924 and 1926, this was a driving force behind the Crown's decision to negotiate.[180]

Claimant counsel has queried the validity of this 'foreigner scare'.[181] This is important because angler complaints and inconvenience had no noticeable effect on the tourism industry, which the Crown wanted to protect. The only real threat, if there was one, was the alienation of Maori land to anglers who could then restrict access. In our view, it is telling that the departmental records consulted for the report filed by Mr Taiaroa do not mention this threat at all.[182] One MP pointed out in 1926:

> It has been suggested by the Prime Minister that the banks of the river were in danger of being handed over to foreigners…Fishing has been going on in these rivers and lakes for a great number of years, and no foreigner has yet got in to take possession of the banks[.][183]

The only example given by Burstall is the wealthy fisherman Zane Grey, who was supposed to have been about to acquire much of the banks of the Tongariro River.[184] Darkie Downs explained to us that his father and his uncle, Hoka Downs, looked after tourists when they came to the Kowhai Flats area. They told him about the arrival of Zane Grey, the relationship that developed between guide and angler, and the opportunities that followed. Grey was a businessman and discussed development with Downs' family, giving them the opportunity to move into tourism, but it was also about forestry. The whanau set up a deal with Grey to log native forest on Pihanga. From this oral evidence, it appears that the relationship involved guiding, commercial opportunities, and development, but there was no mention of the possibility of Grey acquiring land or sole fishing rights.[185] This evidence is also a useful corrective to the complaints on file, showing the more positive relationships possible (though unreported) between Maori and anglers.

Ownership of the bed of Lake Taupo becomes an issue

According to White, the growing pressure over fishing rights and access became an opportunity to resolve the related but distinct question of ownership of the lakebed. Without this pressure, the ownership issue might otherwise have been left to lie. White concludes that there was no need for the Government to get title to the lakebed in order to solve the access problem, but that 'the opportunity was taken' to do so as

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[180] 1 November 1924, NZPD, 1924, vol 205, p 1047; 3 September 1926, NZPD, 1926, vol 211, pp 285-286
[181] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 119-120
[182] T Taiaroa, Supporting Documents, E22(a), pp 1-19
[183] A M Samuel, 3 September 1926, NZPD, 1926, vol 211, p 287
[184] Burstall, 'Trout Fishery', p 125
[185] W Downs, Evidence for Ngati Tuwharetoa, 26 April 2005, Document E29, pp 2-4

part of the Government's evolving policy that it, not Maori, should be the owners of lakebeds.[186]

At first, elements within the Government were wary of broaching the question. On 1 May 1924, the Crown Law Office had, as we described above, offered the opinion that the bed of Lake Taupo already belonged to the Crown. The Native Minister, Gordon Coates, decided not to go ahead with any kind of negotiation for the meantime, because it might give undue importance to the access question and 'might be the occasion for the Maori raising the larger issue of the ownership of the lake'.[187]

Fisheries Inspector Ayson recommended (as he had back in 1910) that the fishing/tourism issue should be resolved by obtaining the margins of the lake and rivers.[188] Officials favoured this solution, so long as payment did not recognise Maori claims to the lake, the trout, or the water:

> If it is shown that the Maoris will not give way unless they get some payment then it must be made quite clear that the payment itself does not recognise any legal rights of the Maoris to the trout or the lake or water running into such lake but that the payment is in exchange for an undertaking that no charge will be made by the Maoris or [by] persons leasing land from the Maoris.[189]

At some point, however, the Government decided to go ahead and include the ownership of the beds in the proposed negotiations. We have no evidence on why the views of Coates and officials either changed or were overruled. The 1924 Act authorised the Government to negotiate for (presumably the ownership of) the beds of the lake and its tributary rivers, but this was not explained in Parliament. This brought Lake Taupo into the ongoing struggle over whether, either as a matter of law or policy, the Crown should own the beds of New Zealand's large waterways.

Coates reminded Parliament in 1926 that 'for many years past there has been a dispute as to the ownership of the beds of the lakes. It has been the subject of discussion for the last fifty or sixty years: in certain cases it has been the subject of negotiation.' The Crown had always 'taken up the attitude' that lakebeds belonged to it, but 'the Maoris have hotly contested that claim'. There was a risk that this kind of dispute might end up in front of a Commission whose findings might 'involve the country in very heavy expenditure' (in other words, the Crown did not expect to win, and might have had to pay a very high price for the beds). Maori based their claim on the Treaty of Waitangi but the Crown 'has never admitted it'. Maori refused to accept the Crown's view, and the discussion had become so heated as to become a persistent and dangerous grievance on their part.[190] Other than the suggestion that the Crown had *always* claimed the beds, this summary appears to be accurate as far as it goes.

In terms of law, we note the arguments that can be mounted for and against who has title to large inland lakes, which we discussed in Chapter 17. Suffice it to note here that the common law admitted private ownership of lakebeds, including large lakes. There has always been the opportunity for the Crown to enact laws recognising Maori

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[186] White, A55, p 175
[187] T Taiaroa, Supporting Documents, E22(a), pp 14-15
[188] T Taiaroa, Supporting Documents, E22(a), p 14; L F Ayson, 'Report on Fisheries of New Zealand', 10 June 1913, AJHR, 1913, H-15(b), p 19
[189] T Taiaroa, Supporting Documents, E22(a), p 16
[190] JG Coates, 3 September 1926, NZPD, 1926, vol 211, pp 285-286

customary title to such lakes. Certainly, the approach adopted by the Native Land Court during title determination hearings has been that its statutes empowered it to decide Maori customary title to lakebeds. Between 1915 and 1929, the Native Land Court investigated the titles of Lakes Rotorua, Rotoiti, Waikaremoana, and Omapere. Conversely, the Crown Law Office took the position that the title of large lakebeds was vested in the Crown, and that Maori had (at most) fishing rights. Maori rights could be recognised by easements but not by freehold title to lakebeds.[191]

We need not traverse the detail of the contest over the Rotorua lakes, but we note a development of the Crown's view that if it did not, in fact, own the lakebeds as a matter of law, then it should do so as a matter of policy. It then fought Maori claims through the courts but arrived at negotiated settlements where possible. The immediate precedent was the 1922 settlement with Te Arawa, where the Crown extinguished Maori title ('if any') by legislation, in return for a tribal annuity.[192] This outcome must have been in the mind of the Government, when it decided to include the lake and river beds as a matter for negotiation at Taupo, after receiving a Crown Law Office opinion that it already owned the bed of Lake Taupo.

Was hydro-electricity also an issue?

One of the principal components of the claimants' case is that the Crown negotiated in bad faith, because it wanted undisputed control of the lake and its waters for hydro-electricity, but failed to disclose or negotiate agreement on that point.[193] Tuwharetoa have been of that view since the 1940s, when Hoani Te Heuheu first advanced it in response to the Crown's construction of the control gates. Otimi filed the Trust Board's copy of a 1944 letter from Hoani Te Heuheu to the Prime Minister. In that letter, the ariki wrote: 'I take it that the negotiations in 1924-'26 had no ulterior motive or aim. I take it that the use of Taupo waters for a new purpose, namely, hydro-electric power, opens up a new question and requires fresh negotiations with us.'[194] This was in effect a challenge to the Crown to prove that it had not deceived the tribe in 1926. Since then, Tuwharetoa have come to the view that the Crown was aware of the potential use of Lake Taupo for hydro power from 1904 onwards, and had that in mind (secretly) when it acquired the lakebed during negotiations that were supposed to be about access for angling.[195]

The Crown argued in reply, inter alia, that the Crown's state of knowledge and intentions were actually unclear in 1926. There was no evidence, the Crown argued, of a mapping survey of Lake Taupo for hydroelectricity purposes in 1903, nor of a 'long-term agenda' to use the lake for that purpose. It was also unclear whether the Crown possessed the control gate technology to contemplate regulating lake levels at that time anyway. In other words, we cannot know whether the Crown was contemplating the use of Lake Taupo for hydroelectricity, other than that it had reserved to itself the sole right to use water for that purpose in 1903.[196]

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[191] See White, A55, passim
[192] White, A55, passim
[193] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 130-133
[194] Hoani Te Heuheu to P Fraser, Letter dated 13 March 1944, Document E16(c)
[195] G Asher, Evidence for Ngati Tuwharetoa, 29 April 2005, Document E39, p 15; J Biddle, Evidence for Ngati Tuwharetoa, 26 April 2005, Document E33, p 7
[196] Crown closings, 3.3.111, part 2, pp 486-487

In light of these claimant and Crown submissions, we have reviewed the public record of the Crown's hydroelectricity plans with care. In doing so, we have relied mainly on the Public Works Department's annual reports. The Minister of Public Works reported to Parliament in 1904 that the Government had commissioned an expert report 'examining some of the most likely sources of power', which showed the 'vast possibilities ahead of us in the matter of the utilisation of our enormous water-powers, which are evidently amongst the colony's greatest natural resources'. He concluded: 'So many great and potential schemes lie ready to our hand that we are embarrassed by their number and variety.'[197] The department's superintending engineer, PS Hay, reported the outcomes of the survey, identifying the Waikato River as a key source of power, and Lake Taupo as the key to the potential Waikato schemes. One scheme could involve the Huka Falls, with a dam above the falls to keep the lake waters high. The Aratiatia rapids were also an important possibility, and using them would necessitate control of the lake outlet and control of the lake levels (keeping them high). Other sites on the river also involved regulating the flow from Lake Taupo.[198] We do not know whether control gate technology was contemplated for these various schemes, but the point does not appear to be a material one.

For the next few years, the Department monitored the rainfall, rise, and fall of Lake Taupo, and its total discharge into the Waikato River at various states of water level, with a view to using the Huka Falls in electricity generation. Monitoring was continuous from 1907 to 1911.[199] In 1910, the Government decided to take up with vigour the question of developing 'our abundant water-powers'. The Prime Minister promised Parliament that schemes would be developed until all centres were supplied with hydroelectric power, and 'our principal sources of power have been turned to commercial advantage'.[200] The Huka Falls, however, was too expensive and difficult to develop in the meantime.[201] Trial survey work was under way to see if Auckland's power needs could be supplied from Taupo. This involved comparing the relative advantages of Taupo and Kaituna.[202]

By 1917, surveys and preliminary investigations had confirmed that three key sources of power needed development in the North Island, one of which was the Waikato River.[203] The following year, the Chief Electrical Engineer confirmed that Kaituna was not a possibility, and instead proposed possible Waikato schemes.[204] Use of the Aratiatia Rapids required a dam that would back the water right into Lake Taupo, drowning the Huka Falls. The storage in Lake Taupo would need to be regulated to increase capacity. The other potential site was the Arapuni Gorge, which would (we infer) still rely on the storage capacity of the lake but involve no interference with it.[205]

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[197] W Hall-Jones, 'Public Works Statement', 28 October 1904, AJHR, 1904, D-1, pp xii-xiii
[198] P S Hay, 'Report on New Zealand Water-Powers, Etc.', 16 Sept 1904, AJHR, 1904, D-1(a), pp 4-5
[199] See the Annual Reports of the Chief Engineer, AJHR, 1907-1911, D-1
[200] R McKenzie, 'Public Works Statement', 15 November 1910, AJHR, 1910, D 1, p viii
[201] R McKenzie, 'Public Works Statement', 15 November 1910, AJHR, 1910, D 1, Appendix G, p 95
[202] R McKenzie, 'Public Works Statement', 15 November 1910, AJHR, 1910, D 1, Appendix H, p 100
[203] W Fraser, 'Public Works Statement', 1917, AJHR, 1917, D-1, p ix
[204] E Parry, 'Annual Report on Electrical Work and Power-Supply Undertakings by the Chief Electrical Engineer', 1 April 1918, AJHR, 1918, D-1, Appendix D, p 44
[205] W Fraser, 'Hydro-Electric Development. North Island Scheme', Report by Chief Electrical Engineer, 26 October 1918, AJHR, 1918, D-1(a), p 10

In the early 1920s, the Government decided to develop Arapuni instead of Aratiatia, with a view to having it ready by 1928. In addition, the Public Works Department had in mind in 1923 'a large number of available powers awaiting development when required'. These included six sites on the Waikato River, one of which was the Aratiatia Rapids.[206] The Department continued to list these 'waiting' sites of hydro power annually. Given that Coates was Minister of Public Works at this time, he must have been aware of his Department's published plans to develop hydro-electricity schemes involving the storage capacity and water levels of Lake Taupo when he negotiated the 1926 Agreement with Ngati Tuwharetoa.

The Crown's argument that it had no long-term agenda, and that its knowledge and intentions were in fact unclear in 1926, is not supported by the evidence. Despite the decision to go with Arapuni over Aratiatia, the storage capacity of Lake Taupo was a known issue in the 1920s. Immediately after the agreement, Ngati Tuwharetoa approached the Crown with a request that it use its resources and technology to lower the level of the lake. In 1927, Public Works Department engineers advised their minister: 'Any future Hydro-electric schemes involving a maximum lake level would be seriously affected by the permanent lowering of this level.'[207] We will consider the significance of this for the negotiations below.

The Native Land Amendment and Native Land Claims Adjustment Act 1924

The Crown set the parameters for the negotiations by legislation in late 1924. The annual 'washing-up' Act, the Native Land Amendment and Native Land Claims Adjustment Act, made it lawful for the Native Minister to negotiate with Maori *claiming to be the owners* of lands bordering on Taupo waters. For the purposes of the Act, these 'Taupo waters' were defined as all rivers and streams flowing into Lake Taupo, the lake itself, and the Waikato River from Lake Taupo to Huka Falls. The Native Minister was authorised to negotiate an agreement regarding the fishing rights in Taupo waters, and with regard to the beds and margins of Taupo waters. In terms of fishing rights, the agreement could include special fees for Taupo licences, and the appropriation of a 'definite proportion' (unspecified) of those fees to Maori, to be distributed among them or applied for their benefit by methods to be agreed upon. This gave quite a lot of scope for Maori to agree the content and method of financial compensation. Agreement about the margins was something officials had been urging, and was clearly related to the issue of access for fishing. The nature or purpose of an agreement regarding the beds, however, was not specified, nor was it explained in Parliament.

The methodology for the negotiations was prescribed in some detail. The Native Minister was to convene a meeting or meetings of people claiming to be owners. If satisfied that a substantial majority present at the meeting, *and in his opinion entitled to be there*, agreed to any terms, then they could be carried out despite minority dissent. A substantial majority of Maori present needed to be satisfied, however, that the terms were 'fair and reasonable'. The Minister also had to be satisfied that the terms were 'fair and reasonable in the interests of the Natives concerned, and also in

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[206] L Birks, 'Annual Report of Chief Electrical Engineer', 1923, AJHR, 1923, D-1, Appendix D, pp 71, 90

[207] quoted in T Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', February 2005, Document E1, p 19

the public interest'. If the agreement met that test, then the Minister could submit it to the Governor General for embodiment in an Order in Council and regulations.[208]

On this point Ms Feint submitted that the necessity for this Act was not clear: why did the Native Minister need legislative authority to negotiate? She drew the Tribunal's attention to a similar query in the departmental report supplied to Tuwharetoa by DOC, with its guess that the Act was to impress upon Tuwharetoa the seriousness with which the Government saw the issue.[209] This may be so, but we think that the legislation was necessary to put beyond doubt that a lawful agreement could be reached with people 'claiming to be the owners of land bordering Taupo waters', rather than people who were actually and legally the owners. This provision took away the need to deal with riparian owners, arrange successions, and get consent of all owners in the manner prescribed by the Native Land Acts. It also got around the fact that Maori were not the legally-recognised owners of the lakebed (in the Crown's view), and yet their agreement was being sought about the bed. Finally, it authorised the minister to act on the views of a majority and to set aside the wishes of a minority, rather like using the mechanism of a meeting of assembled owners. For all of these reasons, and to circumvent its own cumbersome title system and the rather meagre protections it contained, the provisions of the 1924 Act were necessary.

We note also that the Native Minister was vested with the sole authority to decide whether the meeting was made up of people entitled to be there – that is, the Native Minister would decide whether the people present were the rightful claimants. Nothing was prescribed about how the Minister would decide whether he was dealing with the right people or not. Again, this set aside any legal protections or due process available to riparian owners, and left everyone (whether owners or not) at the mercy of the Native Minister. The Minister was also the one who would decide whether there was a 'substantial majority', allowing him to act regardless of the views of a dissenting minority, even if they were riparian landowners with legal titles; nothing was prescribed about how majority approval should be ascertained.

These features of the legislation are of great concern to us in light of the need for the negotiations to be carried out in a Treaty-consistent manner. The Crown should not have thus set aside, without property owners' consent, the legal protections it had given to them. While we agree with the principle of dealing with the tribe, it should not have been done in a way that simply ignored decades' worth of private titles and legal rights. If the Crown was going to cut the Gordian knot, it should either have done so in a comprehensive way for all Tuwharetoa lands and resources, or alternatively it should have found a way to protect the interests that it had created while still negotiating with properly constituted tribal authorities. Nor should it have vested so much discretion in the Minister. Ngati Raukawa, who claim an interest in the lake separate from Tuwharetoa, argue that they were excluded from the 1926 Agreement because they failed to get ownership of abutting lands from the Native Land Court.[210] The 1924 Act, however, empowered the Native Minister to deal with anyone he considered to have a legitimate claim. We will return to this Ngati Raukawa claim when we consider the outcome of this Act at the 1926 Waihi meeting.

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[208] Native Land Amendment and Native Land Claims Adjustment Act 1924, s 29
[209] Feint, Ngati Tuwharetoa closings, 3.3.106, p 120
[210] Tan, 3.3.80

On the positive side, we consider that Parliament acted consistently with the Treaty when it required the Minister to make an agreement that he thought was 'fair and reasonable', in the interests of Maori and the public. As well, he had to be satisfied that a majority of Maori present also thought it was fair and reasonable. This was an important double constraint on the Minister's freedom of action, against which the resultant Agreement should have been and can now be measured. We also note that from the beginning, Parliament envisaged a share of the fishing fees going to Maori, and giving them the choice of distribution to individuals, or application for their general benefit, by means to be agreed with them – this gave scope for the recognition of tino rangatiratanga. Finally, there was nothing improper in the Crown's inclusion of the beds in the legislation, although we think its purpose should have been clearly set out. If the Crown wanted to negotiate about the beds then it was entitled to do so. What was important was that a fair and reasonable agreement be reached. We consider it axiomatic that such an agreement would involve proper process and some parity of bargaining power, resulting in a free and willing agreement on both sides.

The Government's proposed draft agreement, 1925

The detail of what the Government wanted was not to be found in the 1924 Act, but rather in the proposed agreement drafted in 1925 by the Attorney General (Francis Dillon Bell) and the Native Department. It was forwarded to Cabinet for approval in March 1926. This document is useful, as it provides a yardstick for the Tribunal to measure how far the Crown departed from its early objectives, and therefore the degree of negotiation and compromise that took place at the later meetings. The draft agreement vested ownership of the lakebed and riverbeds in the King, and set up a special licensing system for Taupo, with a sliding scale of fees. This would be a significant change from the then national licence regime. As part of the deal with regard to fishing rights, Tuwharetoa would get a share of free licences and half of the licence fees. In return, the Crown would get what Ayson had been requesting for years: guaranteed access for anglers to a one-chain strip along the rivers. The one-chain access to the lake, however, was broadened from licence-holders to the whole public. We note that this is the first time that public access was even mentioned. Previously, the entire debate among officials and in Parliament had been about anglers. Steamers and boats were already running on the lake, and if there was any kind of public access problem, then no one mentioned it in the records available to us.

The Government earmarked the money for distribution to property owners with land on the margins of the lake and rivers. This, presumably, was in recognition that they were the ones losing property rights in a strip of marginal land, and in the beds. The 1924 Act had left it to be agreed whether the funds would be paid out to individuals or applied more generally for their 'benefit', but this draft set out the Government's view of which way this should be decided. It also imposed clear Government control of the proposed Board via the ability to regulate its composition, duties, and procedure. Thus, if the Government's terms were agreed to, the tribal nature of the agreement would be narrowed to a tightly controlled Board distributing money to individual riparian owners.[211] The apparent intention to negotiate in the 1924 Act was reduced to only two points on which the Government was undecided – how many free licences

[211] T Taiaroa, Supporting Documents, E22(a), pp 20-23

Tuwharetoa would get, and how many Board members had to be members of the tribe.

Delay in negotiations

Coates issued a notice in December 1924, calling for a meeting of interested Maori to take place in February 1925. An outbreak of infantile paralysis led to a postponement, and after two more postponements (April and May), the Minister postponed it indefinitely.[212] The death of the Prime Minister was another reason for the delay. In the meantime, Maori continued to fish for food without licences, and to charge anglers for access to fishing. A fisheries ranger reported a wholesale and open defiance of the licensing law, and Maori belief that Coates' notice was actually about them having the right to fish without a licence. The Tourist Department wanted to prosecute them. For years, rangers had 'turned a blind eye on natives fishing for food', but now 'they are making matters too warm'. The head of the department advised prosecution, though noting that this would 'arouse a storm among the Natives'. Prime Minister Coates urged the Minister of Tourism, William Nosworthy, not to prosecute any Taupo Maori in case it jeopardised their perceived mood of readiness to settle.[213]

As well as fishing for food, Maori continued to charge anglers. In November 1925, the Under Secretary of Internal Affairs urged that the delayed meeting be held. Nothing could be scheduled for another four months, however, because all the Maori MPs were off at tribal meetings.[214] Some Taupo Maori became alarmed at the delay, and the possible outcomes of a negotiation. In March 1926, northern Taupo hapu sent a petition disagreeing with any proposal to cede the lake and its tributaries to the Crown, dissociating themselves from what they said was the wish of the southern chiefs, who had not conferred with them. In our inquiry, the Crown put some weight on this petition, noting that the Crown's intention to acquire the bed was clearly known to Taupo Maori prior to the negotiations, and possibly supported by some. Also in March 1926, F Dillon Bell, who wrote the draft agreement described above, urged Coates that it was urgent to settle the question of the bed of the lake and its tributaries, and to enable proper fees to be set for fishing – the 'Natives would be benefited, and a great advantage would accrue to Europeans'.[215] Coates agreed and a meeting was finally called at Waihi for 21 April 1926.

The Waihi Meeting, 21 April 1926

The April meeting at Waihi was the first of two negotiations meetings. Arguably, it was the more important of the two, as this was the public meeting where the Native Minister was supposed to satisfy himself that those present claimed to be owners of lands abutting the lake and rivers, and that a substantial majority of them agreed to a 'fair and reasonable' arrangement. The only official notes we have from this meeting are the Minister's introductory comments, which shed some light on how the Government's proposals were explained at the meeting. The emphasis was entirely on the complaints of anglers that they had to pay 'exorbitant fees'. So the Government considered it in the best interests of both Maori and Pakeha to negotiate an agreement

[212] T Taiaroa, Supporting Documents, E22(a), p 18
[213] White, A55, pp 176-177
[214] White, Supporting Documents, A55(b), Document 14
[215] White, A55, pp 177-178

in respect of *fishing rights in Taupo waters*, and 'so preserve such rights for both races' [emphasis added].[216]

The meeting was attended by Coates (Prime Minister, Native Minister, and Minister of Public Works), Maui Pomare, a 'large number' of Tuwharetoa, and various officials. The only record of the meeting found by White was an article in the *Evening Post*, according to which:

- Hoani Te Heuheu supported the proposed settlement.
- Ngahu Huirama claimed that a cession of all Maori rights over the lakes and rivers of the area would require an annuity of £15000, similar to the deal that Te Arawa got over their lakes.
- Coates replied that the Crown was not concerned with the ownership of the lake. 'All they wanted' was to secure to Maori some financial benefit from the lake's fishing attractions, because at present they got nothing and the Government wanted to ensure they got something. He rejected an annual payment of £15000 and offered instead 50 per cent of licence fees. In return, Maori would cede all their fishing rights 'in and over the Taupo waters'. Coates claimed that the payment to Te Arawa was not a payment for the beds of the Rotorua lakes, but for services in the Maori wars. 'Further the Government did not want to have anything to do with the bed of Lake Taupo which was quite a different matter from the question of the fishing rights in Taupo waters.'[217]

After this meeting, Coates met with the leaders of Tuwharetoa, where it was agreed that 'the Natives hand over to the Crown their fishing rights in and over Lake Taupo, in consideration of a perpetual annual payment of £3000, provided that should 50 percent of the license fees collected be more than £3000 then such larger sum should be paid'. It was also agreed that the details would be worked out at a later date, especially the question of rights in the streams and rivers flowing into Lake Taupo.[218]

Two other newspaper accounts are also significant. An undated story in the *New Zealand Herald* referred to a telegram from Wellington that fishing rights in the rivers were to 'fall into the hands of the Crown'. According to this source, Maori at the meeting were emphatic that it had *not* been agreed that fishing rights in the streams and rivers were to be ceded to the Crown. A *Hawkes Bay Herald* article stated that the freehold of the lake and a one chain reserve along all rivers was ceded to the Crown for £3000. This led Hoani Te Heuheu to telegram the Prime Minister on 29 April 1926: 'Please correct report of lake meeting appearing in *Hawke's Bay Herald* Monday morning wherein it states freehold lake and one chain reserve to all rivers conceded to Crown for £3000 as such. Reports incorrect and detrimental to our interests.' The Government's reply was merely that a date would be set for a meeting in Wellington to discuss details of the preliminary agreement reached at Waihi.[219]

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[216] N Bayley and T Shoebridge (assisted by C Dawson), 'Indexed Document Bank on Land Use in the Twentieth Century for the Central North Island Inquiry Region', April 2005, Document G1, Doc 110, 'Fishing Rights in Taupo Waters', p 2323
[217] White, A55, p 178
[218] White, A55, p 178
[219] White, A55, pp 179-180

In contrast to these accounts, we have the Native Minister's memorandum to the Governor General, setting out the agreement reached at Waihi and recommending an Order in Council be issued. We find this to be a very unusual document, given that the Government already considered a further meeting was still required to finalise the agreement, and that no Order in Council could in fact be promulgated. The terms were virtually identical to Dillon Bell's draft (see above), with only one significant exception – that £3000 would be paid annually to the Board for the 'general benefit of the Tuwharetoa Tribe', and if the amount of licence fees exceeded that sum, then half of the excess would also be paid to the Board. Remarkably, there was still a blank space left for the number of free fishing licences. At the end of this memorandum, Coates certified that a substantial majority of those present, and in his opinion entitled to be present, approved all of these terms, and he certified that they were fair and reasonable in the interest of Maori and the public.[220]

Other official documents cast great doubt on Coates' terms. Firstly, a departmental report, submitted to us by Te Hokowhitu a Rakeipoho Taiaroa, states that the meeting was six hours long and too short for more than a 'sketchy outline' to be agreed. With regard to the right of way provisions, the report suggests that the following resolutions were passed:

- Public access and right of passage over one chain around the lake
- Licence holders' access and right of passage over one chain on all other Taupo waters
- The erection of fishing camps will *not* be permitted on the one chain strip. (This was very important, because it meant that Maori could still generate income by charging for camping on their land, since no one could camp on the strip. Coates' account did not include this resolution, but instead stipulated that fishing camps already erected on the one-chain strip would not be excepted from the right of passage and access for anglers.)

Apparently, by the numbering of these resolutions on the document itself, there were other (unrecorded) ones.[221]

Secondly, the document put to Tuwharetoa at the July meeting stated that details about the makeup of the Board, the number of free licences, whether or not there would be camping on the one-chain strip, and the licensing of boating, were issues still to be agreed. The Government's admission that the camping issue had not been resolved is telling. The vesting of the beds, the creation of the one-chain strip, and the terms of the annuity, were all held to have been agreed on 21 April.[222] In contrast, there was correspondence from Arthur Grace and others after the April meeting, suggesting that their fishing rights in the rivers to required a separate settlement, and that agreement on the rivers had been left for later.[223]

Clearly, Coates' memorandum to the Governor General was simply a reproduction of the Government's original objectives, and was not accurate. The differences between

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[220] White, Supporting Documents, A55(b), Doc 17, pp 180-182
[221] T Taiaroa, Supporting Documents, E22(a), p 23
[222] Bayley and Shoebridge, G1, Doc 110, pp 2321-2322
[223] White, Supporting Documents, A55(b), Doc 17, pp 183-186

the scanty Government records of the 'sketchy' agreement and the *Evening Post* account are significant. There is also the 29 April telegram from Te Heuheu, denying that the freehold of the lake and a chain along the rivers had been ceded. This adds weight to the *Evening Post* account and the letters from hapu seeking a separate rivers settlement.

White was puzzled and alarmed by the differences between the accounts. He considers the claim in the *Evening Post* that Maori agreed to hand over their fishing rights to the Crown is 'confusing', because Coates did not mention fishing rights (except trout) as a subject of agreement, and instead stressed cession of the beds. It was 'possible' that Tuwharetoa did not agree to cede the beds of the lake and tributaries, although White thinks this 'unlikely when Coates's memorandum is considered'. If, however, the *Evening Post* account is correct, then Coates was 'duplicitous'. His claim that the Government had no interest in the beds was 'incredible', and his description of the Arawa annuity was 'at best a half truth'. The denial that the Crown wanted the beds, given that the Government was in fact set on acquiring title to the beds, at the only meeting held with 'anything close to a comprehensive representation of Ngati Tuwharetoa is alarming'.[224]

The explanation lies in the dilemma the Crown created for itself when it refused to admit Maori title to lakebeds, while nonetheless trying to make a settlement with Maori. Dillon Bell put this starkly to Te Arawa in 1922: 'I thought I had made it plain that the very basis of the agreement was that we did not admit you had anything to sell and therefore we had nothing to buy.'[225] The result was Coates' verbal gymnastics at Waihi, which precluded mutual understanding or agreement.

We agree with White's concerns. In light of the evidence and also of our discussion of the July meeting below, we conclude that there was no agreement in April to cede the beds, no agreement on the rivers, and no agreement on the key issue of camping. It is harder to say what *was* agreed, but there appears to have been loose agreement to a one-chain strip around the lake, public access, and angling in the lake. The Crown had agreed to a £3000 annuity for this access to fishing.

The July 1926 meeting and the negotiation of the Agreement

On 27 April 1926, the day after the meeting, Internal Affairs noted that the 'present intent of the Prime Minister is that certain of the principal Maoris affected will be brought to Wellington in order that he may show them the final proposals'. Also, the Crown Law Office and the Native Department thought that legislation was probably needed to validate the agreement. The 1924 Act intended the Order in Council to have the force of law, but it was desirable to 'put the matter absolutely beyond any question'.[226] On 19 July, Coates' secretary, Balneavis, reported that the Prime Minister had invited a 'representation of the Ngati-Tuwharetoa to meet with him in Wellington…to go into certain phases of the Government's proposals in connection with the fishing rights in Taupo waters which could not be dealt with at the recent Tokaanu meeting for the want of time'.[227]

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[224] White, A55, p 179
[225] White, A55, p 120
[226] T Taiaroa, Supporting Documents, E22(a), p 24
[227] T Taiaroa, Supporting Documents, E22(a), p 23

Tribal leaders met with the Prime Minister on 23 July. At this crucial meeting, a final agreement was negotiated, which was then drafted up by Ngata, Balneavis and Newton (the latter being a clerk of the Māori Land Court) and translated into Maori. The text in both languages was signed by Hoani Te Heuheu on 26 July, before being forwarded to the Prime Minister for his 'consideration and signature'.[228]

Here we compare the Government's proposals, the tribe's suggested changes, the final written Agreement, and the empowering legislation, in order to evaluate the claim that:

- the Crown negotiated in bad faith;
- that there was an element of compulsion;
- that there was no free and willing consent; and
- that the negotiations breached Treaty principles in both process and outcome.

The delegation was led by Hoani Te Heuheu and consisted of eleven rangatira of Ngati Tuwharetoa. The Crown notes White's statement that it left the tribe to work out its representation at this meeting internally. The Crown submits that this was appropriate, and that it was entitled to rely on the mana of the ariki and the other senior individuals who were present. Ngati Tuwharetoa do not challenge the representativeness of those who were present.[229] We accept this submission in respect of the lake. This means that there is still doubt about:

- what the 'majority' agreed to at Waihi;
- how the Native Minister decided whether the Waihi attendees were the correct people; and
- whether the Minister carried out his responsibilities properly under the 1924 Act in that respect.

Nonetheless, we accept that the leaders who attended the July meeting were the right people to finalise matters for Tuwharetoa in respect of the lake. With regard to particular rivers and their fisheries, however, these leaders themselves thought that separate compensation arrangements were necessary. River hapu took that view as well, leading to protest and dissent after the meeting.

On 21 July, five copies of the Government's proposals were handed to Hoani Te Heuheu. This document stated that the following points had been agreed at Waihi:

- The Government would pay £3000 a year to a Board for the general benefit of the Tuwharetoa tribe. If fishing licence fees exceeded that amount, then one-half of the excess would also be paid to the Board.
- The beds of all Taupo waters would be vested in the King as a public reserve.
- The public would have access to and right of passage over one chain around lake.

[228] Balneavis to Coates, 26 July 1926, in Bayley and Shoebridge, G1, Doc 110, p 2306
[229] Crown closings, 3.3.111, part 2, pp 482

- Fishing licence holders would have access to and right of passage over one chain along the rivers.

Still to be settled, according to the Government, were administrative details about the Board, how many free licences should be granted to the tribe and who would allocate them, and the licensing of boating on the lake and rivers. The Government suggested that there should be 40 free licences, the same as agreed with Te Arawa. Also, the Government proposed that Internal Affairs permit and control erection of fishing camps on the one chain, charge rent for their use, and add this income to the pot as part of the 50-50 principle. This latter point was, if the departmental records are correct, a reversal of a resolution from the Waihi meeting.[230]

We have two surviving records of Tuwharetoa's position in response to these proposals. The first is alterations in handwriting on the Government paper. Apart from changes regarding the Board, the tribal leaders wanted 100 free licences, to be allocated on the recommendation of the Board. They also crossed out the section allowing the Government to run fishing camps on the one chain and charge fees for them. They replaced it with a requirement for the Government to exclude public access from all Maori kainga or settlements on the one chain.[231]

The second document is a typed paper entitled 'Resolutions passed at a meeting of the Representatives of Ngati Tuwharetoa held in Wellington, 21 July 1926'. This accepted, rejected, or altered the Government's proposals as follows:

- The £3000 annuity was specified as *'for their fishing rights in Lake Taupo only'* [emphasis added], a very significant change to the Government's wording of this provision.

- The beds of Taupo waters will *not* be vested in the King (the word 'not' is underlined).

- The public should have access to and right of passage over one chain around the lake (no change).

- Licence holders should have access to and right of passage for one chain along the other Taupo waters (no change).

- Certain areas should be excluded from time to time from public access on the recommendation of the Board (a new proposal).

- 50 free licences be allocated on the recommendation of the Board (the number '100' is typed on the document but has been crossed out and changed to '50', presumably indicating a last-minute concession to the Government's much lower suggestion (40).)

- Erection of fishing camps will not be permitted on the one chain (a rejection of the Government's proposal).

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[230] Bayley and Shoebridge, G1, Doc 110, pp 2321-2322
[231] Bayley and Shoebridge, G1, Doc 110, pp 2319-2320

- The Minister of Internal Affairs should licence all boats or launches plying for hire (the word 'boats' was added).[232]

The proposed changes were significant. Specifying that the annuity covered fishing rights in the lake only, and therefore (by implication) not the beds nor the fishing rights in rivers, is a position from which the tribe has never departed. Further, the vesting of the beds in the Crown was so firmly rejected that the word 'not' was underlined. The Government's one-chain proposal was accepted, but the tribe wanted to be able to recommend exceptions to public and licence-holder access. This would have been a substantive change to the narrow exceptions specified in Coates' memorandum to the Governor General. At some point, however, the tribe cut its request for free licences in half, presumably to bring it more into line with the Crown's much lower figure.

On Friday 23 July, the Tuwharetoa delegation met with the Prime Minister. The only record we have of the meeting is the written Agreement itself.[233] White was not able to locate any minutes or accounts of what happened. The only measure we have for how far the parties compromised their positions, and which won the most concessions, is to compare the Tuwharetoa resolutions with the Crown's original proposals and the final Agreement. The Government did not accept Tuwharetoa's proposed wording that the £3000 was for fishing rights in Lake Taupo only. It did, however, accept that the owners of lands abutting the rivers *may* be entitled to separate compensation because they could no longer charge anglers for the use of their land for camping *and fishing* (an important concession, given the supposed illegality of such charges). This was to be resolved by the appointment of a tribunal to ascertain what compensation (if any) should be paid to riparian owners. The Agreement also left it open to determine what form the compensation should take. These are new provisions and there is no way of knowing whether they were proposed by the Crown or the tribe, nor how acceptable this particular compromise was to either side. On its face, it was a major concession to Tuwharetoa.

The Government insisted on keeping the clause vesting the beds of all Taupo waters in the King as a public reserve. It also insisted on keeping the power to have fishing camps on the one chain, and to charge rents for them, but now there could be compensation for Tuwharetoa riparian owners for this loss of income. Presumably that was necessary before the tribe would agree to this provision, and to the reservation of one chain along all the rivers. As the Government had originally proposed, the camping revenues would be added to the pot for the 50-50 split, and also fines derived from poaching (a new provision). The Prime Minister later explained that the Government wanted Tuwharetoa to have as much vested interest as possible in unofficially policing poaching.

The Government agreed to Tuwharetoa's request to be able to exempt some land from the one-chain rule, and did not prescribe what kinds of land – instead, the Agreement empowered the Board to make recommendations to the Minister of Internal Affairs. As this power was recommendatory only, everything would depend on the

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[232] Bayley and Shoebridge, G1, Doc 110, pp 2316-2317; White, Supporting Documents, A55(b), Doc 12, pp 174-175

[233] The following analysis is taken from the text of the 26 July Agreement, White, Supporting Documents, A55(b), Doc 17, pp 201-203

Government's case-by-case agreement, which the claimants argue was ultimately withheld (see chapter 10). The Government also agreed to a maximum of 50 free licences, which was an increase from its proposal of 40, but a significant compromise from the tribe's original desire for 100. As noted above, we do not know when Tuwharetoa lowered their typed request for 100 to 50.

Finally, a sting in the tail, a new provision was put at the end of the Agreement. This specified that legislation would give effect to the Agreement, and would include such provisions of the earlier Te Arawa lakes legislation 'as may be applicable'. This turned out to be especially significant. Some features of the Te Arawa legislation (the Native Land Amendment and Native Land Claims Adjustment Act 1922) proved particularly controversial in the 1926 Act. These include the qualification that native title to the beds, 'if any', was extinguished, and the vesting of the right to use the waters in the Crown. On the positive side for Tuwharetoa, it also included the reservation of their right to catch indigenous fish. Although we have no account of the July meeting per se, we have evidence about whether or not the meaning of this provision was explained to Tuwharetoa. In 1946, a tribal deputation met with the Prime Minister and stated categorically that the right to use the waters was never discussed with them, but simply turned up in the legislation.[234] In the absence of any countervailing evidence, we think it pretty clear that for this provision at least, Tuwharetoa had no knowledge of the exact wording of the 1922 Act and what it might mean to the substance of their own Agreement with the Crown.

The Native Land Amendment and Native Land Claims Adjustment Act 1926

Section 14 of the Native Land Amendment and Native Land Claims Adjustment Act 1926 gave effect to the July Agreement. Using the wording of the 1922 Arawa legislation, the beds of Lake Taupo and the Waikato River (to the Huka Falls), *together with the right to use the respective waters*, were 'hereby declared to be the property of the Crown, freed and discharged from the Native customary title (if any) or any other Native freehold title thereto', except for any unalienated islands. The Governor General could reserve any portion of the bed or any Crown lands on the borders for the use of Maori, and could vest management and control of it in the Board.

The right to fish for and catch for their own use any indigenous fish in the lake was reserved to Maori – such fish could be sold with the consent of the Board, otherwise anyone selling fish could be fined. This also came from the Te Arawa legislation, and was not part of the Agreement. It was in keeping with the Minister's opening remarks at Waihi, where he referred to the Government's intention to preserve the fishing rights of both races. But what it reserved in practice remained to be defined (and circumscribed) by regulations and later legislation. There was no marginal strip and no rivers in the Te Arawa legislation, so the rest of the 1926 Act did not draw on it, other than the sections relating to the Board.

Other changed or new features in the 1926 Act included:

- Instead of the Board recommending exemptions for parts of the strip, the Governor General could simply exempt any portion or limit public use in any way.

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[234] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 118

- The Governor General could, by Proclamation, declare the bed of any river or stream flowing into the lake, or a portion of the bed, to be Crown land 'and thereupon…freed from the customary or other title of Natives, and the Crown shall have the right to use and control the waters flowing over such bed.' The one-chain reserve would only apply to such rivers. Again, this was a significant departure from the Agreement. The right to use and control the waters had not been specified, nor was this wording ('use and control') taken from the Te Arawa legislation. While potentially favourable to some Maori, who might now get to keep part or all of their riverbeds, the reverse would fall unfairly on those who did not.

- The rights of owners were restricted, because they lost the power to alienate or deal with the land (reserved as a strip) in any way without the consent of the Government. It appears that only licence-holders could use the strip along the rivers; in other words, owners appear to have lost the right to camp or fish on the strip themselves, unless they took out a licence. As far as we can tell, this restriction was not contemplated in the Agreement, and it was certainly not spelled out in it.

- The maximum of 50 free licences could be exceeded with the agreement of the Governor General in Council, which was a change potentially favourable to the tribe.[235] The 20 cut-price licences allocated in 1913, on the other hand, were abolished. We do not know whether this was discussed, although it was certainly not explicit in the Agreement.[236]

On balance, these changes were so significant as to have required the specific agreement of Tuwharetoa. We do not think that the Crown could rely on the clause permitting the use of 'applicable' material from the Te Arawa legislation to make changes to the substance of what had been signed. It might be said that no one owns water under British law, but the Crown was vesting in itself the right to use the water under colour of an agreement with the tribe. Since legislation was needed to put matters 'absolutely beyond any question',[237] we think it should have done so rather than introducing substantial changes that had not been agreed. Such an outcome was not contemplated when the 1924 Act instructed the Native Minister to reach a 'fair and reasonable' arrangement with the consent of the majority.

We turn next to our findings on whether the 1926 Agreement and its enacting legislation were fair and reasonable in the circumstances and consistent with the Treaty.

Were the 1926 Agreement and its enacting legislation fair and reasonable in the circumstances and consistent with the Treaty?

The answer to this question turns on what the Crown acquired from the 1926 Agreement and Act. It acquired:

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[235] All of the above provisions are contained in the Native Land Amendment and Native Land Claims Adjustment Act 1926, s 14

[236] Native Land Amendment and Native Land Claims Adjustment Act 1926, s 17

[237] T Taiaroa, Supporting Documents, E22(a), p 24

- the right to fish in Lake Taupo and its tributaries for its licensed anglers
- sole authority to license that fishing
- legal ownership of the beds of Lake Taupo and the Waikato River (to the Huka Falls)
- through the one-chain strip, physical control of public access to the lake
- through the one-chain strip, physical control of (and guaranteed) access to the rivers for anglers, and the sole right to profit therefrom (via licences, camping fees etc)
- the right to use the waters
- legal ownership of the riverbeds when it chose to assert it by Proclamation. (Unlike for the lake, the Crown Law Office opinion cited above was that legal ownership of these river beds had been vested (in Pakeha law) in riparian owners, so this was now taken from them and vested in the Crown.)

What exactly was the £3000 annuity in return for or a payment for?

Due to the Crown's reticence on what rights Tuwharetoa actually possessed prior to 1926 (and were therefore being acquired), this question has to be answered quite narrowly. In the Agreement (as enacted and expanded by the 1926 Act), the Crown appears to have acquired the rights and powers outlined above. But what exactly did Tuwharetoa understand themselves to be conveying to the Crown, and what exactly was the Crown paying them for?

Firstly, because the Crown never conceded that Tuwharetoa owned the lakebed, and the legislation simply asserted that if there was a native interest then the Crown title was discharged from it, the money cannot have been intended as a payment for the bed. When the 1926 Act was debated in Parliament, one MP, puzzled by this, asserted that the Crown must either own lakes as of right, or it must pay the Maori owners for them.[238] The position had not changed since Dillon Bell's bald statement to Te Arawa in 1922: 'I thought I had made it plain that the very basis of the agreement was that we did not admit you had anything to sell and therefore we had nothing to buy.'[239]

Nor was the money a payment for the riverbeds, which the Crown did admit that Maori owned. These were to be taken seriatim by proclamation – the Crown might take parts or none. They could not be counted as 'sold' by this Agreement. No money was ever paid to their legal owners for the loss of their title ad medium filum aquae. Nor was the annuity in compensation for these riparian owners' loss of riverbank income. Any income lost as a result of no longer being able to charge anglers for camping or access on the riverbanks was to be the subject of separate compensation. Although the courts later doubted that the Act had in fact executed this intention, the Agreement is clear on the point.[240]

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[238] A M Samuel, 3 September 1926, NZPD, 1926, vol 211, p 287
[239] White, A55, p 120
[240] White, Supporting Documents, A55(b), Doc 17, pp 197-199

What we are left with, by default, is the Crown's reservation of and exclusive powers over the one-chain strip. The annuity could be considered a kind of rent, although the details remained to be settled – exceptions to the one-chain reservation were possible, but these would neither lower nor increase the 'rent'. Also, Maori were in effect agreeing to some kind of transfer or sharing of fishing rights. Exactly what was given up or retained in that respect is unclear. The legislation reserved for Maori a right to fish for indigenous species in the lake (but not the rivers), and this was further defined and altered by regulation and subsequent legislation. The exclusivity (or not) and parameters of the fishing rights being conveyed or retained are entirely opaque in the Agreement, and further complicated by legislation and regulation.

Ultimately, we think that the annuity must have been understood by Ngati Tuwharetoa as a payment for securing:

- the European right to fish;
- the virtual alienation of the one-chain strip; and
- the Crown's exclusive right to *profit* from *both* in terms of the lake (via sole licensing and exclusive rights over the strip) but not the rivers (where separate compensation 'may' be due). The Crown then shared this profit with the tribe, by allocating them 50 per cent of any excess over £3000.

Finally, and informally, the Government intended the 50-50 part of the annuity to encourage Tuwharetoa to act as unofficial rangers in policing the licensing laws, although it could not be considered a payment for that in legal terms.[241]

As a result, although the Crown declared itself to own them, it has never paid the tribe for the bed of the lake or the right to use its waters.

The Tribunal's Findings

The Crown vested in itself by statute the ownership of the bed of the lake and the right to use its waters, without paying the tribe for either of these property rights. The Crown's failure was compounded by its later refusal to compensate the tribe when new or additional uses for the lake and its waters, beyond those of fishing and access, were contemplated by the Crown. These failures, given the importance of the resource and its value to the claimants, must be considered breaches of the Treaty of Waitangi and its principles of partnership and active protection.

What did Tuwharetoa make a full, free, and informed agreement to?

It appears from the evidence that for Tuwharetoa, this was an agreement about fishing rights. Although the Trust Board did not protest the ownership of the beds after signing the Agreement, it clearly believed that Tuwharetoa had not given up their tino rangatiratanga over the lakes. From time to time, 'new' or additional uses arose, such as the extraction of gravel from the bed or the generation of hydroelectricity from controlling the waters. When that happened, Tuwharetoa insisted either that they were entitled to half the revenue on the 50-50 principle (an entitlement which could only

[241] J G Coates, 3 September 1926, NZPD, 1926, vol 211, p 286

have come from ongoing rights in the taonga), or that their consent was required and fresh negotiations needed to secure it.[242]

Apart from this view of the leadership, it seems clear that those present at the Waihi meeting did not agree to surrender mana or ownership of the lakes. The 'majority' still felt that way after the July meeting, according to WR Ngahana, although Grace reported that the majority had accepted the Agreement.[243] The oral history of Tuwharetoa, as put to us at our hearing in Turangi, is that the people did not intend to give up their mana over the lake, and were confused and angry at the Crown's insistence that they had done so.[244]

The beds, banks, and fishing rights in the rivers, in fact everything to do with the rivers, was probably the biggest sticking point in 1926. The Tuwharetoa leadership won its main concession from the Crown in July on that issue, but the hapu most affected continued to fight afterwards.[245]

The Tribunal's Findings

In summary, the most that can be said about the 1926 Agreement is that the Crown acquired more than Maori wanted to convey, or indeed knew they had conveyed. That act of acquisition, therefore, was in breach of the Treaty.

This is partly because of the changes to the Agreement when it was enacted in legislation, especially the Crown's assertion that it had the right to use the waters of the Lake. Moreover, the Act included a provision reserving to 'Natives' the right to catch indigenous fish, but also providing for that right to be circumscribed in various ways.

It should be remembered, in respect of the indigenous fishery, that there is no mention in the Agreement (nor any of the surrounding documentation) that Tuwharetoa agreed to Crown control of that fishery. They did accept the Crown's sole right of licensing trout fishing by accepting free licences and the reservation of the one-chain strip, but there is no evidence that they intended to give up any of their other fishing rights. The Crown's inclusion of that part of the Te Arawa legislation in the 1926 Act can be seen as an appropriate reservation of rights, but it can also be interpreted as an assertion of authority and potential restriction of rights that had not been contemplated or intended by Tuwharetoa. The discussions had all been about the rights of anglers and licence-holders. This was especially significant in later years when, as White describes, the Crown restricted the right to take indigenous fish by regulation and in the 1981 legislation (see below for details).[246] Thus, the Crown gave itself powers that had not been agreed, and which were used ultimately to the detriment of Taupo Maori rights over their indigenous fisheries, in breach of the plain meaning of Article 2 and of the Treaty principles of partnership and active protection.

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[242] White, A55, pp 188-190; Hoani Te Heuheu to P Fraser, E16(c)
[243] White, A55, p 182
[244] P Otimi, Evidence for Ngati Tuwharetoa, 27 April 2005, Document E16, p 17; G Asher, E39, pp 15-16
[245] White, A55, pp 182, 187-194
[246] White, A55, pp 195-198

Was there an element of compulsion?

The Crown was most concerned about allegations that it had negotiated in bad faith, and had coerced agreement to the alienation of Lake Taupo. For the Crown, the key fact was that Tuwharetoa leaders signed the agreement. There is no way of knowing why they changed their minds and compromised on their original resolution that the beds *not* be vested in the King. The details of the Crown and claimant arguments are provided above. The Crown's argument turns on the lack of records for the July meeting. Without any record, it is simply not possible to say that the Crown used the same tactic with Tuwharetoa that it (allegedly) did with Te Arawa, by threatening to take the lake if agreement was not reached.

The claimants, on the other hand, are convinced that their leaders would not willingly have relinquished their taonga. The evidence of George Asher, for example, is that:

> Ngati Tuwharetoa have always maintained that the 1926 agreement had been reached for the purpose of ensuring anglers had access to fish in the Lake. How the negotiations moved on from arrangements to secure public access to the fishery to vesting the title in the Crown is not entirely clear. I have no doubt that Ngati Tuwharetoa were opposed to any suggestion that the title to the Lake be vested in the Crown. Why the delegation that went to Wellington, led by Hoani Te Heuheu, signed an agreement agreeing to vest the beds of all Taupo waters 'in the King as a public reserve' is a mystery. My assessment is that an element of coercion was involved. I am quite certain that Hoani Te Heuheu and his chiefs would never have willingly given up our taonga to the Crown. These leaders would have been very aware of the power of the Crown to pass legislation taking the Lake, whether they agreed or not. It is likely therefore that faced with that eventuality, they agreed to a compromise that saw some benefit for the tribe in the form of compensation for the access arrangements.[247]

Comparing this to the 'agreement' reached over Rotoaira, Asher concludes: 'it cannot be said that that sort of 'agreement' is one willingly entered into by parties with equal bargaining power.'[248]

We agree with the Crown that we cannot know what transpired at the meeting, with two exceptions. Firstly, we rely on the evidence of Hoani Te Heuheu in 1944, and of the Tuwharetoa delegation to the Prime Minister in 1946, that hydro-electricity and the Crown's right to use the waters were not discussed at the meeting.[249] We see no reason to doubt that evidence. Secondly, the Crown points us to the Agreement itself as the record of the meeting. We can place that document in context because we have the evidence to compare the initial positions of the Crown and tribe, to determine which made concessions, and the nature or degree of those concessions, at the July meeting. Our discussion above shows that the Crown only made one major compromise. It agreed to separate compensation for riverbank owners (although we note that it did not pay up for 20 years and until litigation forced it to). The Crown also made two small compromises: the number of free licences (increased by ten); and a proposal for Tuwharetoa to recommend exceptions to the right of way.

Tuwharetoa agreed to public and licence-holder access via a right of way, which was the Crown's primary fishing objective. In terms of their resolutions, the tribal leaders gave way on all of their major objections:

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[247] G Asher, E39, pp 15-16
[248] G Asher, E39, p 16
[249] Hoani Te Heuheu to P Fraser, E16(c); Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 118

- the ownership of the beds of the lake and rivers;
- their desire to still control and profit directly from camping (which was transferred to the Crown – a major concession given the history cited above);
- the number of free licences (100 reduced to 50); and
- the inclusion of the rivers in the deal.

The Crown made one major concession but all the other big concessions were made by the tribe. Even without knowing exactly what happened at the meeting, this has to raise concerns about whether there was an even playing field for negotiations, or a fair and reasonable outcome.

We accept the Crown's submission that there is insufficient evidence to conclude that it negotiated in bad faith, threatened to take the lake, or coerced the Tuwharetoa leadership. How, then, to account for the unequal outcome? The scenario put to us by the Crown is that the tribe may have simply thought the fishing money a good deal and signed up willingly.[250] The context does not allow such an optimistic reading of events. For such a taonga as Lake Taupo, so central to tribal identity, livelihood, and ways of life, there must be very clear evidence of willingness to give it up. On the contrary, all the evidence leading up to 23 July was that the tribe was determined never to relinquish it. Subsequent to 26 July, the evidence is that the tribe either believed that it had ongoing rights with the Crown in the lake, or that it had not willingly relinquished such rights.

In light of how the Crown responded to Tuwharetoa's challenges over fishing rights prior to 1926, we do not think it a genuine prospect that the Crown would have simply taken the lake by legislation if no agreement could be reached. Whether Tuwharetoa thought it a possibility in 1926, we have no way of knowing. The Crown certainly contemplated a general legislative taking of all lakes from time to time. A more realistic prospect in 1926, based on what the Crown Law Office and the Tourist Department wanted to do, was a series of prosecutions of Maori fishing without licences, at the same time as the Government defended court cases against anglers who trespassed on Maori land. In terms of legislation, something akin to the 1902 or 1908 Acts was possible, further restricting the fishing rights of Maori landowners. There were thus clear and obvious sanctions available if no agreement was reached. This forms the inevitable context of the negotiations and the signing of the Agreement. In any case, coerced or not, the tribal leaders did not willingly or knowingly give up all rights in their waterways, as we have noted. One thing is certain; there was an element of compulsion when the Crown simply rewrote important parts of the Agreement in the 1926 Act, without the consent of the tribe. Doing so by legislative fiat is coercion, plain and simple. We have already noted our concern about this action of the Crown.

The Tribunal's Findings

The material point is not whether Tuwharetoa were actively coerced at the July meeting, but whether they knowingly or willingly conveyed what the Crown claimed

[250] Crown closings, 3.3.111, part 2, p 479

to have acquired, and whether (as required by the 1924 Act) there was a fair and reasonable outcome. The Treaty test for this is clear. The Treaty provided for the claimants to possess and have the fullest possible authority over their properties, fisheries and taonga, unless or until they made a voluntary cession of them. The Crown's vesting of the lakebed and riverbeds in itself, as a result of the 1926 Agreement, does not meet that test. We find that, on balance, the tribe did not make a free, informed, and willing cession of the beds of the Taupo waters to the Crown. We also find that it did not made a free, informed, and willing cession of its rights over the indigenous fishery and over the waters of the lake and rivers to the Crown. By vesting rights of ownership or of exclusive use and possession in itself without a full, free, informed, and willing cession by Taupo Maori, the Crown breached the plain meaning of Article 2 of the Treaty, and the principles of partnership, autonomy, and active protection.

Should the Crown have negotiated over hydroelectricity?

The claimants' allegations of bad faith include the Crown's failure, as they put it, to disclose its interest in the lake for hydroelectricity purposes, or negotiate agreement with them for such a use of its waters. Did the Crown deceive the tribe in 1926? Hoani Te Heuheu raised this issue with Prime Minister Fraser in 1944, after the construction of the control gates. He wrote that the use of the lake and rivers for hydroelectric power:

> …raises a very important issue. We feel strongly that this issue should be faced without delay. The 1924 Act authorised the Native Minister to negotiate with us for an agreement in respect of the fishing rights in Taupo waters, beds and margins. Those negotiations took place but no mention was made of future use for hydro-electric power.
>
> The 1926 Act declared the bed of the Lake (Taupo) together with the right to use the waters, to be the property of the Crown.
>
> [Description of annuity]…Again there was no mention of using Taupo's waters for hydro electric power. I now beg to ask on behalf of the Tuwharetoa people what the Government proposed to do in this matter. I take it that the negotiations in 1924-'26 had no ulterior motive or aim. I take it that the use of Taupo waters for a new purpose, namely, hydro-electric power, opens up a new question and requires fresh negotiations with us. It will be seen how vitally question No 1 above [re Parliament carrying out the Treaty] affects question No 2 [re Lake Taupo]. If Parliament in its 1926 legislation has omitted to protect our full rights as owners of Lake Taupo, I take it that Parliament will now be bound in honour to rectify that omission and that you on behalf of your Government will give us an assurance to that effect before you leave for England.[251]

On 9 September 1946, a Tuwharetoa deputation told the Prime Minister, other ministers and officials:

> It is sufficient for us to point out that the right to use Taupo waters for Hydro-electric purposes was never discussed during the negotiations of 1926, and no such right was conferred on the Crown in the final agreement reached in Wellington on the 23 July 1926.
>
> The subsequent legislation, however, appears to have conferred such a right if that is the meaning to be inferred from the following provision in the Act 'together with the right to use the respective waters'.

[251] Hoani Te Heuheu to P Fraser, E16(c)

> We claim now that if Parliament failed to protect our full rights as owners of Lake Taupo in its 1926 legislation, Parliament itself will now be bound in honour to rectify that omission.
>
> We appeal to you therefore as Head of the Government to give us an assurance that this will be done, and the question of using Taupo Waters for Hydro-electric power or any purpose other than fishing, is a new matter requiring fresh negotiations with us.[252]

We have already found above that the Crown was interested in Lake Taupo for hydroelectricity purposes in 1926. It was an immediate interest, as the Government's decision not to lower the lake in 1927-28 was based in part on the concern that any 'future Hydro-electric schemes involving a maximum lake level would be seriously affected by the permanent lowering of this level'.[253] It must have been in the mind of Gordon Coates at the time he negotiated the Agreement. In those circumstances, the Crown was obliged to raise this with the tribe and to negotiate their agreement for its right to use their waters for this purpose, a right it gave itself in the legislation despite the fact that it had not obtained it by free and informed agreement.

In Treaty terms, the Crown needed to establish a regime in which both kawanatanga and tino rangatiratanga could be exercised in respect of the lake. Such a regime would have involved, as the tribe noted in 1944 and 1946, fresh negotiations and agreement over new uses of (and benefits from) their taonga. This would have been so, under the Treaty, even if the tribe had made a willing cession of the lakebed in 1926, and had given an informed and true consent to the Government inserting its right to use the waters in the empowering Act (which it did not).

James Biddle put it like this:

> The Crown knew very early on, from the beginning of the twentieth century, that it was going to use our lake and rivers for hydro generation. We had no say in the decision. As owners of the resource, we should have struck a partnership. Instead, we have been excluded from the benefits. We've always had a relationship with the Crown, from the mountains to the lake Tuwharetoa have conceded a great deal for the benefit of the nation. The Crown should have acknowledged our contribution and reciprocated in accordance with its obligations. We expected a fair deal.

A fair deal is precisely what the tribe did not get on this point. There was still an opportunity, however, for the Crown to rectify this Treaty breach and negotiate a genuine agreement in 1939, when it sought to actively control the levels of the lake for hydro-electric purposes. If the Crown had made the kind of agreement in 1926 that Hoani Te Heuheu believed in, a partnership where each new use or benefit would be negotiated and compensated, then matters would have been rectified at that point. The quality of the relationship between the Crown and Tuwharetoa leaders, and the recognition of ongoing tino rangatiratanga over the lake, were the important things. We will revisit this matter below, when we evaluate Crown actions in 1939 and its response to Tuwharetoa concerns in the 1940s.

The Tribunal's Findings

We are left with the question of whether the Crown acted in bad faith in 1926. First, the evidence is decisive that the right to use the waters for hydroelectric purposes was

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[252] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 118

[253] District Engineers to Engineer-in-Chief, 28 March 1927, quoted in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 19

not discussed with the Tuwharetoa leaders or agreed to by them at the crucial meeting. Although the Crown is correct that we have no record of the discussions, one side to the agreement asserted with vigour that this matter was not raised. The other party to the agreement – the Government – promised to look into it but did not dispute the assertion or produce evidence to the contrary in 1946 (or after).[254] In that circumstance, we may rely on the evidence of the Tuwharetoa leaders who were present at the meeting.

Secondly, rather than raising the matter and obtaining agreement, the Government relied on a clause that parts of the 1922 Te Arawa legislation could be included if applicable. As we have found above, this clause ought not to have been constructed in such a way as to give the Crown material, additional powers that had not been specifically discussed and agreed.

In these two circumstances, we think the Crown did not act with that scrupulous honour and fairness required of it in negotiating agreements and acquiring or extinguishing rights, and that it therefore breached the Treaty principles of partnership, reciprocity, good government, and active protection.

What were the impacts of the settlement on Ngati Tuwharetoa fisheries and fishing rights, and should the Crown have remedied damage to the indigenous fishery?

Here, we return to Tuwharetoa's fishing claim, discussed above. One MP, Samuel of Ohinemuri, mistakenly believed that the annuity was in part a compensation settlement for the destruction of the indigenous fishery in the lakes and rivers. He told the House that he had no objection to satisfactory terms having been made with Taupo Maori for their fishing rights in the lakes and rivers, because under the Treaty of Waitangi:

> they were entitled to the fish in the lakes and the birds in the forests…as we have taken the native food out of the lakes by the introduction of imported fish, which are very ravenous and which feed on the indigenous fish, it is only right that we should compensate them for this loss and also for any infringement of property rights. The Government has wisely done so. Having compensated the Natives for something that they owned…[255]

But Samuels was the only MP to think that the settlement included compensation for the loss of the indigenous fishery. He was mistaken on that point. This issue had been before Parliament on and off since 1902, so there was no excuse for the Government to have ignored it. During the debate on the Agreement, Pomare again reminded the House that 'the pakehas' trout ate out the Maoris' kouras and kokopus'.[256] The free licences, said the Prime Minister, were for the tribe to fish for food.[257] It was clear that in times of hardship, such as crop failure or the Depression of the 1930s, fishing could literally be the only thing between Tuwharetoa and starvation.[258]

In sections above, we found that the Crown was aware of the devastating effects of introduced fish on Taupo fisheries from 1902, but failed to remedy the situation or

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[254] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 119-120
[255] A M Samuel, 13 August 1926, NZPD, 1926, vol 210, pp 452-453
[256] M Pomare, 3 September 1926, NZPD, 1926, vol 211, p 289
[257] J G Coates, 3 September 1926, NZPD, 1926, vol 211, p 286
[258] Walzl, 'Hydro Electricity Issues: The Tongariro Development Scheme', E2, p 11

provide the tribe with a viable alternative. The 1926 Agreement was a pivotal opportunity to remedy matters. The annuity could have been expanded to cover compensation for it. We note here that the Trust Board, in the first eight years of its operation, had to spend £8000 (on average, a third of the annuity) just in buying food for the people, when it was supposed to be applying the money for longer term benefits and development.[259] The 50 licences could easily have been increased to give the tribe greater fishing capacity. WR Ngahana asked that the Agreement be amended to give every member of the tribe a free fishing licence, or at least for a licence for a nominal fee.[260] In 1927, the Trust Board made the same appeal, asking the Government to supply licences to all members of the tribe at a nominal fee, possibly 10s. The Government responded that this would not be in Tuwharetoa's interests, since they would ultimately get a half-share of licence fees, although the circular logic of this escapes us.[261]

Further, the tribe could have been trusted like the Acclimatisation Societies to help administer and manage the licensing system. We think, at the least, that the Crown could have followed the Stout-Ngata Commission's recommendation for Rotorua, and ensured that the head of every whanau had a licence.[262] This is especially so because the reservation of the one-chain strip took away Tuwharetoa's surviving private fishing rights. Under the 1908 Act, they had at least been able to fish without a licence from their own riverbanks, but this right was now taken away from them.[263] This was a major blow to their fishing rights, and it is not clear to us that this aspect of the Agreement was discussed or understood at the time. The Government refused to agree that compensation for the loss of this right should be added to the separate compensation for riverbank owners.[264] Given the Government's refusal also to budge on wider licensing of the tribe, we do not think that Tuwharetoa's fishing rights were properly protected, nor an appropriate equivalent reserved to them for their loss of their indigenous food source.

Further, White described how the tribe's ability to take even indigenous species was circumscribed by regulations from time to time. In particular, after the Department of Internal Affairs introduced smelt as a new food source for trout, it became the only abundant indigenous fish in the lake. Maori fished for large quantities of smelt, causing tension as the authorities feared that they were taking food away from trout. Ultimately, the Government regulated against the taking of smelt, which was challenged in court by the prosecution of Ngawaka Wall in 1975.[265] In 1981, Parliament amended the 1926 Act so that Tuwharetoa only had the right to take fish indigenous to the lake, which excluded smelt. According to Koro Wetere, this provision was introduced at the request of the Tuwharetoa Trust Board. The wording of the Act was changed to replace 'Maori' with 'Tuwharetoa', which may have been the point of the Board's request.[266] In any case, without further evidence we cannot

[259] Powerpoint Presentation (Tuwharetoa), Document E54 [has no pagination]
[260] White, A55, p 182
[261] White, A55, p 189
[262] White, A55, p 105
[263] White, A55, p 191
[264] White, A55, p 192
[265] White, A55, pp 195-198
[266] 25 September 1981, NZPD, 1981, vol 441, pp 3651-3652; 16 October 1981, NZPD, 1981, vol 442, p 4200

address this matter fully, other than to say that the restriction on taking smelt has become a significant grievance to some hapu.[267]

Tuwharetoa have been left with a lasting and very powerful grievance. They consider that the Crown reserved for them an indigenous fishery that was already worthless. Many witnesses described their distress at being unable to fish for their original food. Habitat change has intensified the loss. Paranapa Otimi explained the loss thus:

> Your mana is degraded when you go and place the food on the table and you know that some of the food that should be there isn't. The tables may be groaning under the weight of the good placed on them but that is not the issue. The issue is that no matter how much food there is, the kai rangatira has not been provided because it is no longer there. Our mana is belittled. Te Heu Heu no longer has the korero or knowledge that he is the source of the fresh water koura.
>
> …The loss of knowledge is the loss of kaitiakitanga. The loss of those food resources is considered to be the fault of the hapu and the fault of the people as the kaitiaki of those taonga.[268]

The Crown is yet to remedy this lasting wrong to the Tuwharetoa people.

The Tribunal's Findings

We find the Tuwharetoa claim that their indigenous fisheries – their kai rangatira – have been virtually destroyed through actions of the Crown to be well founded. From 1902, Parliament was repeatedly informed that introduced species were destroying valuable indigenous fisheries on which Maori depended for food. Parliament was informed about Maori in general and Tuwharetoa in particular. There was some acknowledgement in Parliament that Maori Treaty rights were being thus eroded. Nonetheless, successive Governments protected the interests of anglers over Maori. Parliament and Governments made it clear that they considered food for trout more important than food for the Crown's Maori citizens. A balancing of interests could have seen greater Maori control of the respective levels of trout and indigenous fish, as was requested by Heke for Tuwharetoa in 1902. We do not know whether the koaro and trout could have been managed sustainably together, as the Government gave up in the 1930s and introduced smelt to the lake as a replacement food for trout. Maori had to take third place to anglers and trout. The Crown's knowledge of a situation repeatedly brought to its attention, without remedy, was a serious breach of the Treaty.

The failure in 1926 to remedy the wrong, or provide a full fishing equivalent to what had been lost, entrenched the breach. We accept the Tuwharetoa evidence that they have suffered significant prejudice from this infringement of their taonga and recommend that the Crown now settle this claim as part of forthcoming negotiations.

The Tribunal's Findings in terms of broader fishing rights

The Muriwhenua Tribunal defined Maori fisheries, as confirmed and guaranteed by the Treaty, to be broader than any particular species or spot; Maori fisheries included the general right to fish in a place, fishing ground, or locality, and to expand that right as time, circumstances, and technology permitted. The Muriwhenua Tribunal was looking mainly at sea fisheries and their findings are even more apt for the relatively

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[267] H Karaitiana, Evidence for Tauhara Hapu, 22 April 2005, Document E8 and appendices
[268] P Otimi, E16(b), p 3

confined waters of Lake Taupo and its tributary rivers. There, the facts of our inquiry show that hapu fished every part of the lake, took different species at different fishing grounds and at different times of the year, and did not see their activities as limited to fish indigenous to the lake. Indeed, Taupo Maori themselves had introduced their kai rangatira to the lake at some point after the volcanic eruption that rendered aquatic life in the lake extinct. The introduction of trout was incorporated into their fishing practices, by necessity (given the speed with which the new species reduced the availability of the old). Smelt were introduced even later to help feed the trout, and these also were incorporated in tribal fishing.

The Court of Appeal has found that no customary right subsists in trout as a general proposition, because its introduction and taking has been regulated by the Crown from the beginning.[269] We accept that this is the law as it has developed in New Zealand. The Crown legislated the introduction of trout in Tuwharetoa's fishery in such a way that the tribe could never have asserted an *exclusive* interest in trout. Whether that law, however, was consistent with the Treaty of Waitangi is another issue. We note the facts of our particular inquiry, that the Crown turned a blind eye in those early years to Maori fishing for trout at Taupo, which was permitted without enforcing the Crown's licensing regime. Taupo Maori clearly felt they had the right to take this introduced fish, and they have incorporated it into their customary practices to the extent that it is now a key element of their manaakitanga, as the Tribunal found when it visited Tuwharetoa marae. When the Crown decided that it would no longer tolerate Taupo Maori fishing for trout without licences, this became part of the wider discussions and negotiations of 1924-26, around ownership and control of the lake, tributary rivers, and access by non-Maori to these fisheries.

As part of the agreement reached in 1926, Tuwharetoa received 50 free licences per annum to fish for trout, and a share of the revenue generated by trout fishing (from fees and fines) over and above the base sum of £3000. These agreed arrangements were not static – in the 1940s, the tribe was accorded the exclusive right of fishing (including trout) in Lake Rotoaira, and in recent times the number of free fishing licences has been increased to 200. On one view, this could be interpreted as the conferment of rights by Parliament. We do not see it that way, as Parliament claimed that it was enacting the results of a negotiated agreement, in which both sides acted from an assumption of rights and authority. The Court of Appeal noted these arrangements for Tuwharetoa and considered them exceptional.[270] In our view, the fact that the law sees them as exceptional, and that Parliament assumed sole authority over trout, its introduction, and its regulation, without consideration of the impact on Tuwharetoa, is a significant breach of the Treaty.

Maori were confirmed and guaranteed in the exclusive possession of their fishery, for so long as they chose to retain it. Even more, their tino rangatiratanga (full authority) over it had been guaranteed. Their fishery included a right to fish for any and all species, and taking advantage of any and all developments, in Lake Taupo and its tributary rivers. The Crown's kawanatanga powers did not extend to the introduction of new species into that fishery without agreement, especially as it became known that the new species would have a significant and deleterious impact on the indigenous fish. Counsel for Nga Rauru submitted that the Crown recognised a different principle

[269] *McRitchie v Taranaki Fish and Game Council*, (CA) [1999] 2 NZLR 139
[270] *McRitchie v Taranaki Fish and Game Council*, (CA) [1999] 2 NZLR 139

when it negotiated agreement with the Urewera tribes for the introduction of imported fish to their waterways.[271] The same principle should have been followed in Taupo. The fact that it was not, and that the Crown asserted a power to restrict fishing of the new species to those who had paid it for licences, was in breach of its Treaty commitments.

Further, the harmful effect of the trout on the indigenous fish, the kai rangatira of the hapu who had tino rangatiratanga over the fishery, compounded the original breach. To an extent, the Crown mitigated the breach by turning a blind eye to Maori trout fishing, and then by recognising at least a share of the fishery via free licences and a proportion of the revenues in 1926. This mitigation was slight at first in practice as well as principle. Tuwharetoa complained early that the number of licences was woefully inadequate. A genuine equivalent to their lost fishing rights was not secured to them by the Agreement. Further, there were some years before the fishery generated revenue over and above the £3000 negotiated in the agreement. There is no doubt that today, however, the fishery generates a significant income for the tribe.

To an extent, therefore, the Crown has recognised the tino rangatiratanga of Ngati Tuwharetoa in its arrangements for the trout fishery, both in 1926 and in the more recent agreement of 1992. But the Muriwhenua Tribunal was of the view that no explanation of the Treaty fisheries guarantee of 'full, exclusive and undisturbed possession' would ever be sufficient to render the word 'exclusive' to mean 'non-exclusive'. We endorse that view, and also its rider that 'nothing restricted the negotiation of alternative fishing arrangements' – as long as there was willing consent from both parties.[272] We acknowledge that as a result of a negotiated agreement in 1926, modified in 1992 (as will be discussed below), Tuwharetoa share the benefit of the fishery with the local and central authorities that regulate it. We do not, however, have evidence or arguments on whether they share equally or sufficiently in the benefits. It is clear that while they share in the benefits to an extent, they are excluded from any real or meaningful authority over the fishery, which we take to be the habitat and ecosystem (of Lake Taupo, its tributaries, and the Waikato River to the Huka Falls), the right to fish there, and the fish themselves (both indigenous and introduced). Taupo Maori do not make the decisions about fish, nor do they have an equal voice with those who do make the decisions.

On balance, it seems to us that the Crown has done well to acknowledge that Tuwharetoa should benefit from the fishery, and to have negotiated an agreement which gave some recognition to their rights and some ongoing benefit to the tribe. But we do not think that this recognition has gone as far as it ought, and it has been at a high price – the legal ownership of the beds, the waterway, and the whole taonga itself. Nor are we convinced that the benefits have been as great as they might, though our evidence is incomplete on this point. Authority and control over fishing – the essence of tino rangatiratanga – has not been balanced appropriately with the powers of kawanatanga. There, the history has clearly been one of Crown assumption of control, Maori resistance, irregular Crown toleration of that resistance, and then a negotiated agreement that ended Tuwharetoa authority decisively, but without their full and free consent. It is incumbent on the Crown to put that matter right today, and

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[271] A Sykes and J Pou, Closing Submissions for Nga Rauru o Nga Potiki, summary, 3.3.97(a), pp 124, 233-235, 280-284

[272] *Muriwhenua Fishing Report*, Wellington, GP Publications, 1988, pp 202, 211

we trust that the restoration of tino rangatiratanga over the fisheries of Lake Taupo and its tributaries will be a significant component of any Treaty settlement negotiations.

Were the annuity and the river compensation fair in all the circumstances?

On the face of it, Tuwharetoa received an annuity half the size of Te Arawa's in 1926. We have no information on how the figure was determined. We know from the *Evening Post* that £15000 was requested. We also know from the Crown's draft agreement that it originally planned to make the whole annuity half of the licence fees, so the £3000 minimum was an improvement on that position. The sum was not indexed to inflation, and it did not exceed £3000 until 12 years later (1938). It increased every year until it reached £9068 in 1960 and £12000 in 1962.[273] We have no other figures in evidence before us, although the Crown submitted that it is now a very valuable annuity, worth $800,000 last year. In the absence of further evidence, we are not in a position to say how the annuity measured up to tribal needs as compensation for their surrender of the right to charge anglers, and virtually their rights of ownership over the one-chain strip. We note, however, that the principles governing the annuity were consistent with the Treaty. It provided the tribe with ongoing benefit, derived from sharing the various lake revenues 50-50 with the Crown. In terms of revenue from fishing (unlike control of fishing, as explained above), there was a good balance between kawanatanga and tino rangatiratanga. The payment of the annuity to a tribal board was also in keeping with the Treaty.

Compensation of riverbank owners for their more particular loss of income was a long-delayed affair. After litigation, there was a special hearing of claims in November 1948, some 22 years after the Agreement was signed. White states that £71,900 was claimed, and £45,600 was awarded. In the absence of further evidence, it is not possible for us to reach a view on whether there was a satisfactory process or outcome for these claimants.[274]

Did the Crown really need the lakebed?

Finally, we need to address the question raised by claimant counsel, as to whether the Crown really needed to acquire the lakebed to meet its policy objectives. The Crown offered no submissions on why public policy or the national interest required public ownership of lakes, other than to note the generation of hydroelectricity as an important factor. The Solicitor General who in essence shaped the Crown's lake policy in the early twentieth century, JD Salmond, argued that the Crown had to guarantee public rights of access, navigation, and fishing. This was why Maori could not be allowed to own lakes or lakebeds, even if they did so in custom. It was unreasonable to suppose, he argued, that the Treaty of Waitangi intended to exclude the public from enjoyment of lakes.[275]

As noted above, we found no record of any problem or complaint about public access or navigation and boating. Steamers and boats were operating on the lake, which was being used by the public for recreation according to the manners of the time. If Maori

[273] White, A55, p 196
[274] White, A55, p 194
[275] White, A55, pp 110-111

obtained freehold title to lakebeds, the public right of navigation/boating would persist unaltered under British common law, as it did in Britain with privately owned lakes. What was really at issue in 1926 was the third public 'right' – fishing.

The 1926 Agreement provided for all three features of public use. Public access to the lake was guaranteed by the one-chain strip. Navigation/boating on the lake was assumed to be in full force, and could be regulated by licensing and payment of fees under the Agreement. Tuwharetoa would get half the proceeds from public navigation, once revenues exceeded the base annuity of £3000. Access for fishing was a primary point of the Agreement, and was clearly secured for both the lake and rivers by the reservation of the one-chain strip. Why then, with all three forms of public use guaranteed and regulated by the Agreement, did the Crown need to own the lakebed?

This brings us inescapably back to hydroelectricity. In 1903, the Crown had given itself the sole right to use water for hydroelectricity, subject to any other lawful rights. This did not mean, however, that it could simply enter a privately owned waterway and start generating electricity. The Attorney General, Francis Dillon Bell, a driver of the Taupo settlement, had warned Cabinet in 1922 that Maori ownership of the Rotorua lakebeds 'would raise very serious difficulty in the matter of fishing and *possibly of the user of water for electric light and other purposes*'[emphasis added].[276] Hence the Rotorua legislation gave the Crown the right to use the waters in 1922, and this was transcribed in the Taupo legislation in 1926. The lakebed and riverbeds would have other uses, such as the extraction of metals or as sites for hydroelectricity structures. These were all useful for the public, and legislation prescribed the manner in which private 'land' could be taken for each particular use, and that compensation was necessary. There was no principle in New Zealand law that the Crown should simply take private property because in the future it might want to put parts of it to use for the public good from time to time.

Summary of Findings on the Negotiations and Acquisition of the Lakebed and Waters, and Regulation of the Indigenous Fishery

The Crown and Ngati Tuwharetoa agree that Lake Taupo-nui-a-Tia and its rivers are taonga that were in the possession and under the authority of the claimants as at 1840. We agree with that position and we come to this finding based on the evidence of the intensity of the Maori association with the lake and its environs, and of their use and exercise of exclusive authority over the Taupo waters and fisheries.

We have asked why the Crown embarked on negotiations with Maori about Lake Taupo in 1924? In light of the evidence and also of our discussion of the July 1926 meeting above, we conclude that there was no agreement in April 1926 to cede the beds of Lake Taupo and the Waikato River (to the Huka Falls). There was also no agreement on the rivers and the key issue of camping. It is harder to say what *was* agreed, but there appears to have been loose agreement to a one-chain strip around the lake, public access, and angling in the lake. The Crown also agreed to a £3000 annuity for this access to fishing.

As far as the meeting in July 1926 is concerned, we are persuaded that the position put in 1946 by the Ngati Tuwharetoa tribal deputation who met with the Prime Minister

[276] A Frame, *Salmond: Southern Jurist* (Wellington: Victoria University Press, 1995), p 128

and who stated categorically that the right to use the waters was never discussed with them, but simply turned up in the legislation, is the closest reflection of events. In the absence of any countervailing evidence, we think it pretty clear that section 14 of the Native Land Claims Adjustment Act 1926 vesting the right to use the waters of Lake Taupo and the Waikato River (to the Huka Falls) in the Crown was inserted without Tuwharetoa's knowledge. There were other important changes to the Agreement written into the 1926 Act, which should have been put to Tuwharetoa for discussion and consent before their enactment. The fact that the Crown did not do so was an outcome not contemplated when the 1924 Act instructed the Native Minister to reach a 'fair and reasonable' arrangement with the consent of the majority of Taupo Maori.

Furthermore, the Agreement cannot be considered a payment for ownership of the beds of either the lake or the rivers, nor for the 'right to use the waters', which was inserted in the legislation without Tuwharetoa's knowledge or consent. Neither were agreed to at the Waihi meeting in April, yet the sum of £3000 *was* agreed at that meeting, and was not increased as a result of the leadership's apparent capitulation on ownership of the bed three months later.

As a result, although the Crown declared itself to own them, it has never paid the tribe for the bed of the lake or the right to use its waters. This failure was compounded by its later refusal to compensate the tribe when new or additional uses, beyond those of fishing and access, were being implemented by the Crown. The key one, of course, was the use of the lake as a massive reservoir to store water for hydroelectricity. These failures, given the importance of the resource and its value to the claimants, must be considered breaches of the Treaty of Waitangi and its principles.

Fundamentally, these taonga are now only partly in the possession or under the authority of the claimants, after a hiatus of 65 years in which they were neither. The alienation of these taonga came about in 1926 without a full, free and willing cession, which is in serious breach of Treaty principles. There were some positive outcomes for Tuwharetoa from the 1926 arrangements, and we have noted those. Overall, the July Agreement and its empowering legislation, the Native Land Amendment and Native Land Claims Adjustment Act 1926, were arrived at in a manner inconsistent with the Treaty and are themselves in breach of the Treaty in the particulars outlined above. In 1924, Parliament required that the negotiated settlement be 'fair and reasonable in the interests of the Natives concerned, and also in the public interest', and this standard was not met.

We conclude that there was no overriding necessity for the Crown to own the lakebed in 1926 as a matter of public policy or in the public interest. The public rights of access, navigation, and fishing were all secured or confirmed by the 1926 Agreement. If the Crown wanted to use the waters in future for hydroelectricity or the beds for various purposes, then this was something to be negotiated and compensated for when the need arose. Tuwharetoa expected nothing less, as they made clear when metal extraction and hydroelectricity became issues after the Agreement.

While we are not prepared to state that the Crown's negotiations with Maori over Lake Taupo were conducted, and concluded, in bad faith, we do find that the outcome was a breach of the Treaty's guarantees of tino rangatiratanga and property rights. It was also a breach of the principles of active protection of taonga, and of partnership and autonomy. The Crown breached these principles of the Treaty of Waitangi by enacting legislation without explicit Maori consent to the vesting in itself of the bed of

Lake Taupo and the Waikato River (to the Huka Falls), the right to use the waters, and the right to control and regulate the indigenous fisheries.

The Crown has also failed to actively protect the indigenous fisheries taonga of the claimants or to remedy the serious and avoidable damage that has been done to their kai rangatira, with important economic, cultural, and spiritual prejudice. Also, at least until the enactment of the Treaty of Waitangi Fisheries Claims Settlement Act 1992, it has made no provision for Ngati Tuwharetoa to exercise rangatiratanga over their fishery. Rather, it actively deprived Taupo Maori of their tino rangatiratanga by legislation and by policies which vested control in the Crown and its agencies. Further, the Crown actively deprived Taupo Maori of their tino rangatiratanga over the introduced fisheries in their waters, despite the opportunity to work in partnership with tribal bodies in licensing and fee-collecting, as it did with Acclimatisation Societies. The provisions of the 1926 Agreement in terms of free licences, while commendable, did not go far enough to compensate for the harm to the indigenous fishery or to provide a full and fair return on the replacement fishery.

Have the Treaty breaches been mitigated by the return of the beds?

The Crown did not need to insist on the vesting of the beds and to put the tribe through 65 years of distress and anguish, before finally returning the beds in 1992. We note, however, that under a 1992 Deed of Agreement, the beds have been returned to tribal ownership and a management board has been established to administer those beds. The board comprises eight members, half of whom are appointed by the Minister of Conservation in consultation with the Minister of Local Government, with the remaining half appointed by the Tuwharetoa Maori Trust Board. As far as it is practicable, and where not inconsistent with the deed, the management board is required to act as if it were an administering body under the Reserves Act 1977 and the beds of the Taupo waters are to be managed as if they are a reserve for recreation purposes under section 17 of that Act. Other salient features of the deed include agreements that:

- The bed of Lake Taupo vests in the trust board and is held in trust pursuant to the Maori Trust Boards Act 1955 for its beneficiaries.
- The trust board holds the lake title in trust for the common use and benefit of all the peoples of New Zealand.
- Title to the beds of the Waikato River extending from Lake Taupo to and including Huka Falls and of the rivers or streams flowing into Lake Taupo vests in the trust board and is held in trust for the members of the Ngati Tuwharetoa hapu who adjoin the rivers and streams, and in trust for the common use and benefit of all peoples of New Zealand.
- The people of New Zealand continue to have freedom of access to Taupo waters for recreational use and enjoyment, research and associated activities but subject to conditions and restrictions that the management board considers necessary for the protection and well-being of the beds of Taupo waters and the control of the public using them.

- The trust board may grant leases or licences (with the agreement of the board of management) in respect of parts of the beds of Taupo waters. Where such a lease or licence is entered into, half of the revenue is to be paid to the Crown and half to the trust board, which is to hold the money for charitable purposes as authorised by the Maori Trust Boards Act 1955.

- The beds of Taupo waters are acknowledged to be land belonging to Ngati Tuwharetoa, and the trust board shall have all the rights (including all Maori customary rights not inconsistent with law or the deed), and shall be subject to all the responsibilities and restrictions, of a land owner.

- The Crown retains control of Lake Taupo as a harbour under the Harbours Act 1959 and the Lake Taupo Regulations 1976.[277]

The actual revesting of the bed of Lake Taupo in Ngati Tuwharetoa Trust Board occurred by way of an order of the Maori Land Court in 1993. In December 1999, the title of the beds of several rivers and streams flowing into Lake Taupo have also been transferred from the Crown to Ngati Tuwharetoa through the Tuwharetoa Maori Trust Board. The vesting agreement relates to what are referred to as 'Taupo waters', being Lake Taupo and the Waikato River (to the Huka Falls) and the beds of rivers flowing into Lake Taupo.

To the extent that ownership of the beds of the lake and tributary rivers has been 'revested in Ngati Tuwharetoa to preserve and enhance its tribal mana and rangatiratanga'[278], the Treaty breaches enumerated above have been partially rectified. The Deed of Agreement explicitly reserves the ability of Taupo Maori to file and pursue claims under the Treaty of Waitangi Act.[279] Further, it was the intention of the signatories that nothing in the deed would 'prejudice' any claims. It was not, in other words, envisaged as a settlement of such claims. We think that the return of the legal ownership of the beds is an important beginning to settling grievances, remedying prejudice, and restoring a Treaty relationship between the Crown and Taupo Maori, but that more is needed to compensate Taupo Maori and restore their Treaty authority and rights.

In particular, the Crown's use of Lake Taupo and its waters for hydro-development, and the associated impacts on the hydrology of the lake, ancestral land, wahi tapu, geothermal taonga and the indigenous fisheries, continues to fester and needs to be addressed by the parties in negotiation, a matter to which we turn next.

[277] Deed of Agreement, 28 August 1992, in White, Supporting Documents, A55(b), pp 205-211
[278] Deed of Agreement, 28 August 1992, in White, Supporting Documents, A55(b), p 206
[279] Deed of Agreement, 28 August 1992, s 3.6, in White, Supporting Documents, A55(b), p 206

Issue 3: What were the impacts of the Crown's control of Lake Taupo for hydro-electric development on the lake, its tributaries, and its people, and has the Treaty been breached in that respect?

Introduction

The legal authority of the Crown to pursue hydroelectricity development was first prescribed in statute by the Electrical Motive Power Act 1896 which gave the government the authority it needed to investigate the waterways of the country for the purposes of electrical supply. In 1903, the Crown enacted the Water-Power Act. Section 2 of this Act vested in the Crown the sole right to use the waters in lakes and rivers for electricity generation, subject to any other lawfully held rights. This right to generate electricity from water was continued under section 306 of the Public Works Act 1928, although the legislation continued to specify that it was subject to any other lawfully held rights.

At the time the 1903 legislation was before Parliament, Hone Heke, the member for Northern Maori remarked:

> It would not be proper for a Bill like this to take away from Maori owners the use of water-power on their lands. There is no telling what use even the Maoris may desire to put such water-power for themselves … the sweeping provision of ss (1) is going too far …. It is an attempt to take away Native rights.'[280]

The Tribunal in its *Ika Whenua Rivers Report* noted that the Minister of Works replied to Heke, assuring him that any 'vested interests held by the Natives or others would be preserved, and if required under subsection (2) would have to be paid for'.[281] This was a reference to the Act's wording that the Crown's right would be 'subject to any rights lawfully held'.[282] That wording was reproduced in section 306(1) of the Public Works Act 1928. The issue of Maori and Crown rights vis-à-vis water, waterways, and hydro-electricity, remained a live one between 1903 and 1928. As we have noted, the Government acted to resolve the issue for Taupo waters in 1926 when it legislated for itself the power to use those waters. The similar concerns of Heke in 1903 and of Hoani Te Heuheu and Tuwharetoa in the 1940s show how Maori viewed this matter at the time, and are an essential element of what was reasonable for the Crown to have done in the circumstances.

We are concerned in this section of our report with the Waikato River Hydro Scheme, which has been described as one of the most intensive developments of water power in New Zealand.[283] It uses Lake Taupo as a massive reservoir. The control gates across the outlet of Lake Taupo at the top of the Waikato River act like 'a tap to turn on and off the water flowing through the gates' and down stream through the seven power stations and eight dams situated on the river. The construction of the Lake Taupo control gates occurred over the period 1940-1941 and they were fully operational by October 1941.[284] The control gates enabled the Crown to control the lake's level, which it maintained at a high level for much of the 1940s and beyond,

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[280] White, A55, p 17
[281] quoted in Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: Legislation Direct, 1998), p 43
[282] quoted in *Te Ika Whenua Rivers Report*, p 43
[283] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 7
[284] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 464

and during seasons when the lake was normally lower. The result was that some land was flooded directly, while other areas became waterlogged and swampy due to increased groundwater. This, and the Crown's alleged refusal to act in partnership with Tuwharetoa over controlling the lake level, resulted in many claims before this Tribunal (which are addressed in this section of the report).

The Tongariro Power Development Scheme (TPD) falls mainly in the Waitangi Tribunal's National Park Inquiry District but we did hear issues concerning the effects of the TPD on the Tongariro River and of the construction of the tailrace. The Scheme diverts the headwaters of the Whanganui River through Lake Rotoaira and into Lake Taupo itself. In September 2006, the National Park Tribunal clarified that it intends to deal with all TPD issues arising in its inquiry district, including where the effects and impacts extend beyond the district.[285] That being the case, and given that we have not considered all evidence in relation to the TPD, we will leave those matters to the National Park Tribunal for inquiry and reporting.

As the Crown has noted, these are large hydro-electricity schemes with complex and large scale infrastructure. They are also of considerable national importance, a point accepted by Ms Feint for Tuwharetoa.[286]

The Claimants' Case

We heard many witnesses from the entire circumferance of Lake Taupo who were concerned about the impacts of hydroelectric development on Lake Taupo and its waters. Ms Feint submitted that this evidence demonstrated the spiritual, environmental, economic and social impacts of the schemes on Tuwharetoa and their whanaunga bordering the lake. These included:

1. Spiritual

    - Harm caused to the waters by mixing the natural flows from the moutain to the sea;
    - The death of the taniwha Matawhero as the Waikato river was diverted to build the control gates;
    - The loss of taonga;
    - The loss of wahi tapu; and
    - The loss of cultural knowledge.[287]

2. Environmental

    - The raising of the lake level;
    - The holding of the lake level high for a sustained period over the years 1941-1947 and, as a result, raising the water table and thus impeding drainage;

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[285] Tribunal Directions, 8 September 2006, Wai 1130, 2.3.48
[286] Crown closings, 3.3.111, part 2, pp 484-485; Feint, reply to Crown closings, 3.3.142, p 40
[287] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 143-145

- Low lying land would be waterlogged;
- Similar effects seen in NIWA graphs for the 1960s and 1970s;
- Levels over the last decade have been held close to the natural mean although there is some seasonal variation due to lake controls;
- Levels of the lake have flattened gradients of the rivers, slowing those rivers down, causing silting and or floooding. These impacts were recorded for more than twenty rivers flowing into the Lake, including the Karatau, Waihora (north western side of lake) as well as the Hatepe, Waitahanui, Tauranga-Taupo and the Tongariro;
- Lakeshore erosion;
- Flooding of land leading to lost use for cropping and farming; and
- Flooding and destruction of geothermal resources.[288]

3. Social and Economic

- Loss of food resources (and accompanying lifestyle);
- Loss of employment on whanau farms;
- Damage to both subsistence and development farming;
- Outward migration in search of work; and
- Damage to communities and a whole way of life.[289]

For these effects, Tuwharetoa and their whanaunga claim that they have never been adequately compensated. Instead, the Crown limited its liability by enacting the Lake Taupo Compensation Claims Act 1947 which set the level at which the compensation would be provided as 1177 feet, the Crown accepting that land below the 1177-foot level must be 'regarded as virtually sterilized' in terms of its future use.[290]

There were 404 claims for compensation totalling £380,000, based on the assumed lake control at 1179 feet. The Compensation Court awarded £38,500 of damages, while £67,575 was paid out in negotiated settlements. This meant a total of £106,075 was paid out. Ms Feint submitted that the shortfall between the total amount claimed and that paid out 'presumably' resulted from the statutory setting of the lake level at 1177 feet.[291] This resulted in 163 claims totalling £42,246 being withdrawn for lands above this level. The rest of the shortfall of £117,918 presumably occurred in connection with the 89 claims that were settled for £65,575 instead of the £185,493

[288] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 145-155
[289] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 155-156
[290] Feint, Ngati Tuwharetoa closings, 3.3.106, p 159
[291] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 159-160

that orginally made up the full claims.[292] The compensation regime was not adequate given that the high water tables for extended periods of time have rendered much land bordering the lake unusable for nearly 30 years.[293] The compensation round in 1960 was also not adequate.

In relation to the Tongariro Power Development (TPD) Ms Feint has submitted that the public works takings for the construction of the Tokaanu tailrace, plugging geysers that erupted during the construction, constructing the tailrace over the urupa Waiariki, and the diversion of the sacred Tokaanu River from its natural course (degrading the mauri of the river), were all actions in breach of the principles of the Treaty of Waitangi.[294] The effects of the TPD are felt particularly by those living along the edge of the Tongariro River and the Tokaanu Stream. Claimants allege that the streams flow more slowly, that siltation of the stream is resulting in increased loading at the mouth. They also note that water-logging and potential flooding is occurring on land at Tokaanu.[295]

Counsel for Ngati Hikairo were concerned with impacts on Tokaanu B2L ('Te Pahiko'), a land block affected by the TPD and by the increased water level of Lake Taupō. They claim that Te Pahiko is now partially submerged. They also allege that the Tokaanu Stream is affected. They contend that Mr Hamilton's evidence that the flow of the stream would adjust when lake levels dropped again did not sit alongside their experience and was therefore hypothetical. They received no compensation for these effects and they seek redress.[296]

The Crown, Ms Feint submitted, incorrectly states that there is no evidence before the Tribunal on the TPD, when there was significant evidence from Arthur Grace, other tangata whenua witnesses and Environment Waikato on the lower Tongariro River, the Tongariro delta and the Tokaanu tailrace.[297]

The Crown's Case

The Crown notes that for the period from 1941 to the 1960s, when the the lake was often held at a higher than natural level for long periods, leading to damage to land and the ability to use land, this has been compensated by previous Compensation Commissions.[298] There is no evidence of Maori owners being treated in a discriminatory manner by the statutory compensation process pursuant to the Lake Taupo Compensation Claims Act 1947.[299] The Crown submitted that the Tribunal cannot properly determine whether the level set pursuant to the legislation of 1177 feet (and thus the yard stick for compensation) was unreasonable or substantively unfair. The Crown notes that there was consultation with Ngati Tuwharetoa on the legislation.[300]

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[292] Feint, Ngati Tuwharetoa closings, 3.3.106, p 160
[293] Feint, reply to Crown closings, 3.3.142, p 42
[294] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 161-165
[295] R Wakefield, Closing Submissions for Ngati Hikairo, 3.3.64, paras 5.11, 5.14-5.13
[296] Wakefield, 3.3.64, paras 5.3-5.8, 5.15, redress at para 8.1
[297] Feint, reply to Crown closings, 3.3.142, p 43
[298] Crown closings, 3.3.111, part 2, p 488
[299] Crown closings, 3.3.111, part 2, p 490
[300] Crown closings, 3.3.111, part 2, p 490

The Crown further submitted that there can only be limited compounding adverse effect today caused by the control gates. There were a number of other factors, including tectonic subsidence and land drainage developments which could also contribute to environmental change.[301] The Crown emphasised that changes to the lake surrounds are complex responses to a number of different processes, including crustal movement and deformation, the impact of winds on lake levels, variations in rainfall, changes in land use and inefficiencies in the drainage systems.[302]

The Crown noted that in planning the control gates system, the Public Works Department had not appreciated the damage that a sustained period of a high lake level would do to the surrounding land. The Crown noted that Mr Hamilton said that the Public Works Department had acted reasonably according to the standards of the time.[303] The Crown acknowledges that an emphasis was put on economic considerations at the time. Nonethless, the Crown submitted that the good faith and reasonableness requirements of the Treaty were met in these circumstances.[304]

The Crown did not really deal with the issues concerning the Tongariro Power Development Scheme. It submitted that these issues should be left to the National Park Inquiry.[305] This is because the relevant research for the TPD is on the National Park Record of Inquiry and that Tribunal has commissioned further research on the environmental impacts of the TPD.[306]

The Tribunal's Analysis

We have discussed above the Crown's desire to regularise public access to the lake, its negotiations with Ngati Tuwharetoa in 1926, and the passing of legislation which vested the bed of Lake Taupo and the right to use its waters in the Crown. We turn now to the history of interaction between the Crown and Ngati Tuwharetoa as it concerns hydro-development. In particular, we are concerned with changes to the levels of Lake Taupo and the impacts of these changes on the claimant iwi.

Before proceeding with our substantive analysis, we note the disagreement between the Crown and claimants over whether TPD issues should be considered in this inquiry. Although we heard evidence on some matters, both evidence and submissions were fragmented and partial. Also, the National Park Tribunal, as we noted above, has signified its intention to deal with all TPD matters, including those where the effects fall outside its district. In these circumstances, we will leave the TPD issues raised in our inquiry for determination in the National Park inquiry.

Our analysis in this part of the chapter focuses on the following questions:

- Was the decision to erect the control gates and raise the lake levels consistent with the Treaty?
- What were the impacts of the control gates?

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[301] Crown closings, 3.3.111, part 2, p 489
[302] Crown closings, 3.3.111, part 2, pp 454-455, 489-490
[303] Crown closings, 3.3.111, part 2, p 490
[304] Crown closings, 3.3.111, part 2, p 490
[305] Crown closings, 3.3.111, part 2, p 378
[306] Crown closings, 3.3.111, part 2, p 379

- Did the Crown provide an effective remedy or redress for the impacts in the 1940s?
- What further impact did the Crown's control of lake levels have after the 1940s?
- Did raising the lake levels affect the tributary rivers and the Waikato River?
- Now that it may be possible to rehabilitate affected land, are Tuwharetoa entitled to compensation if, for other reasons, it can no longer be farmed?

In addressing these questions, the Tribunal has been assisted by substantial bodies of evidence. Contained within the documentary evidence are some gaps and some surprises, especially in relation to minimum lake levels. Detailed evidence compiled by historian Tony Walzl gives us insights into the information held by government and the debates which took place within government agencies in the led up to the 1939 decision to install control gates, and in the 1940s when the Crown addressed claims for compensation and for damage.[307] Detailed evidence is provided by Tūwharetoa claimants, and by Walzl, about meetings between the Crown and Tūwharetoa in the 1920s, in October 1939 and in September 1946.

Substantial hydrological data, complete with time series, graphs, tabulations and analyses has been provided by a number of hydrologists.[308] Evidence by Horace Freestone, prepared to assist resource consent hearings on an application by Mighty River Power, draws on data banks and archives built up by the Public Works Department, the New Zealand Electricity Department and its successors.[309] The hydrological records are currently maintained by Opus International, consultants for Mighty River Power. A number of other expert witnesses provided evidence relating to Lake Taupo, and David Hamilton assisted the Tribunal by providing an overview and evaluation of the hydrological evidence.[310]

Levels of Lake Taupo, recorded from 1905 onwards, have been recorded in different ways, related to different bench marks and to different datum levels. The controlled maximum lake level, central to the present discussions, is a convenient example. When the level was set in 1939 it was to be measured as 5 feet on the gauge in Lake Taupo Harbour, or 1177 feet above minimum sea level.[311] This figure of 1177 feet

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[307] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1; also supporting documents, E1(a), vol 2

[308] These include: Freestone, Evidence, Document H29; G Hancox, Evidence, Document H31; D Hicks, Evidence, Document H32; C Bromley, Evidence, Document H34; R Henderson, Evidence, Documents I49 and J3. See also Eser and Rosen, 'Effects of Artifically Controlling Levels of Lake Taupo, North Island, New Zealand on the Stump Bay Wetland', Document I11

[309] Freestone's evidence in Doc H29 was presented to the Waikato Regional Council Hearing Committee which considered an application by Mighty River Power for authority to continue the operation of the Taupo-Waikato hydro system from 2001 onwards. See Environment Waikato Regional Council, 'Mighty River Power Taupo-Waikato Consents Decision Report', 29 August 2003, Document H28

[310] D Hamilton, 'Lake Taupo Hydrology Review', July 2005, Document I35. Mr Hamilton was also questioned at some length by Counsel and Tribunal during the CNI 1200 Week Nine Hydrology Hearing

[311] The more formal way to describe 'minimum sea level' is as 'Tidal Chart Datum' for a particular port. The zero of the chart datum is often the level of the Lowest Astronomical Tide (LAT). Because tides vary from place to place, the zero on the chart datum for each port is different. The 1953 Moturiki datum was established as a way of standardising land elevations over a larger area to a mean sea level (MSL) at a particular place. Moturiki being the site of a tidal water level gauge at the entrance to Tauranga Harbour was the datum applied at Lake Taupo.

converts to 358.75 metres. In 1953 the Moturiki datum, based on mean sea level, was adopted and the hydrological records have been adjusted accordingly. The difference is substantial: 358.75 metres becomes 357.39 metres, an adjustment of 1.36 metres. We simplify the technical discussions below: whenever we cite material in feet, it is with reference to the Lake Taupo datum used by the Ministry of Works in 1939; all references given in metres have been converted to the Moturiki datum which is currently used by all agencies involved in power generation, environmental management or research.

In addition to the technical evidence, we have evidence from the claimants as to the immediate and longer term effects of the construction of the control gates and of the subsequent changes to the lake and groundwater, which we will consider in each section.

Before considering the impacts of the changes to the lake, however, we must first address the question: was the decision to erect the control gates and raise the lake levels consistent with the Treaty?

WAS THE DECISION TO ERECT THE CONTROL GATES AND RAISE THE LAKE LEVELS CONSISTENT WITH THE TREATY?

The Claimants' Case

The claimants acknowledged that the power to erect the control gates and raise the lake levels for the purposes of electricity was legal, in the sense that the Crown had vested such power in itself by the Water-Power Act 1903, and had done so more specifically for Lake Taupo in the 1926 legislation. Although the Crown acted within the law, the claimants allege that it breached Treaty principles. If, as Hoani Te Heuheu wrote to the Prime Minister in 1944, the Government did not intentionally deceive the tribe in 1926, then the use of the Taupo waters for electricity was a fresh matter requiring their negotiated consent. The Crown's use of the claimants' taonga in this manner without their consent, and its failure to investigate or address the tribes' claim about it in 1944–46, was in breach of the Treaty.[312]

Also, the Government failed to consult Tuwharetoa adequately about its decision to control and raise the lake level. On this matter, the claimants allege that:

- The Government failed to seek their permission to change their taonga in this way;
- The Public Works Department carried out only cursory investigation of the likely impacts on lakeshore and low-lying lands, which were known to mainly belong to the claimants;
- The Government falsely assured the claimants that the change would not affect them, when Tuwharetoa raised concerns about it;
- The Government of the day accepted that it had a responsibility to warn people who might be affected, to provide them with good information, and to prevent damage where possible; and

[312] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 110-114, 129-134, 164-165

- The Public Works Department may have deliberately concealed the likely impacts, a view to which ministers came later, while likely problems seemed obvious to the tribe and in the 'lay' opinion of the Minister of Internal Affairs and of the Native Department.[313]

Finally, the claimants allege that there was no need to raise the lake level in any case. Appropriate alternatives were possible but there is no evidence that the Government investigated them before making its decision. When Tuwharetoa hired experts to do so in the mid-1940s, their alternative proposals came too late and may have been uneconomic by then. In any case, given the expert agreement that the lake has been held at natural levels for the last decade without significant problems for power generation, it is self-evident that the raising of the lake was unnecessary.[314]

The Crown's case

The Crown agreed with the claimants that it had vested in itself the sole right to use waters for electricity purposes generally (the Water-Power Act 1903) and specifically for the Taupo waters (in 1926). It argued, however, that the evidence is insufficient to establish that it did so without consent in 1926. If the claimants are correct on that matter, then why was it not raised in 1939 when the tribe first learned of the Government's intention to actively control the lake for that purpose? Why was it not raised in 1941 when the control gates were erected? Why was it not raised until 1944–46?[315]

Further, the Crown argued that its actions in 1939–41 were entirely consistent with the Treaty. Its kawanatanga right to govern included the power to develop major resources such as hydro-electrical power in the national interest. Its obligation was not to seek permission to do so but rather to compensate anyone adversely affected. Nonetheless, the historical evidence established that there was in fact an ongoing dialogue between the Government and Tuwharetoa before the gates were built, consisting of a meeting in 1939 and subsequent correspondence. During those discussions, the Public Works Department made an honest mistake. Its officials did not realise the damage that a sustained period of high lake levels would do to surrounding land. The department acted reasonably by the standards of the time, and 'the good faith and reasonabless requirements of the Treaty were met'.[316]

The Tribunal's Analysis

The first generation of Government power stations came on stream between 1915 and 1930.[317] Electric power production and the growth of manufacturing proceeded apace.[318] Attention was firmly directed to the potential of the Waikato River as a

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[313] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 134-142
[314] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 158-160
[315] Crown closings, 3.3.111, part 2, pp 485-487
[316] Crown closings, 3.3.111, part 2, p 490
[317] Coleridge was commissioned in 1915. Arapuni on the Waikato River, and Tuai, the first of the Waikaremoana power stations, were commissioned in 1929. J E Martin, *People, Politics and Power Stations: Electric Power Generation in New Zealand 1880-1990* (Wellington: Bridget Williams Books and Electricity Corporation of New Zealand, 1991), pp 145-171
[318] J L Hewland, 'Manufacturing in New Zealand', *New Zealand Geographer*, vol 2, pp 207-222. Hewland underlines the production revolution triggered by the little electric motor.

hydrological system and a survey of the river from Arapuni to Lake Taupo was commissioned in 1933. Control of the level of Lake Taupo was seen as the main storage device in a scheme submitted by Frederick Kissel, Chief Electrical Engineer, in 1939.[319] The environmental implications of raising the lake level were noted in an internal round of memos. The Assistant Engineer of the Public Works Department, for example, alerted his District Electrical Engineer:

> There are low lying areas to the South and South East of the lake which will be affected by high water levels and further investigation will be required to determine the extent of the flooding and effect on drainage, and possibly some roads will require deviation or raising.
>
> With regard to the effect on fishing, of an increased range of water level, I am advised that a rise of water level makes little difference, but that a lowering improves for a time the condition of the fish, after which a shortage of feed will occur. Generally speaking, it would appear that an increased range of water level will not much effect trout fishing in the lake.[320]

The District Electrical Engineer referred this material to his superior in Wellington and the reply came back from the Chief Electrical Engineer on 2 Feb 1939 to 'proceed with all speed possible'.[321]

In spite of the detailed correspondence and consultations within the Government offices, no record has been produced that Tuwharetoa was consulted or that the implications for Tuwharetoa were considered in the context of these new proposals to vary the lake level. The possibility of flooding was recognised and elaborated on in reports made by district office to head office but the investigations set in train by head office were desultory:

> No very comprehensive survey should be attempted, but rather a few spot levels should be taken to indicate the relation of land to any proposed future lake level.
>
> The points that should be examined are,-
>
> 1. The highway and bridge at Waitahanui.
>
> 2. The road between Tokaanu and Waihi Pa.
>
> 3. The area containing cottages between Waihi and Tokaanu, and the township of Tokaanu itself.[322]

A level was to be run across from Tokaanu to the Tongariro River:

> A few spot levels only should be necessary for this purpose. A check should be made of the level of the cultivated lands near Tauranga Taupo and Waimarino Streams and also the road bridges at these two points.[323]

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[319] Martin, *People, Politics and Power Stations*, p 145

[320] 13 Dec 1938, EA to DEE, AANU W5159-Box 46-21/53/1 pt.1, ANZW, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 57; also supporting documents, E1(a), vol 2, pp 653-656. The field studies and the local reports were done by Engineering Assistants, Jenks and Wallace, and the reports sent to the Chief Electrical Engineer in Wellington were written by Anderson, the District Electrical Engineer.

[321] 2 Feb 1939, CEE to DEE AANU W5159-Box 46-21/53/1 pt.1, ANZW, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 58; also supporting documents, E1(a), vol 2, pp 651-652

[322] 2 Feb 1939, CEE to DEE, AANU W5159-Box 46-21/53/1 pt.1, ANZW, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 58; also supporting documents, E1(a), vol 2, pp 651-652

[323] 2 Feb 1939, CEE to DEE, AANU W5159-Box 46-21/53/1 pt.1, ANZW, cited by Walzl, in Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 58; also supporting documents, E1(a), vol 2, pp 651-652

In a follow-up memo, the Chief Engineer stressed that it 'should be clearly understood that the information obtained is strictly confidential. No decision has yet been reached as to the maximum lake level and I think it would be advisable not to give any information in the meantime, regarding any levels taken.'[324]

The media of the day were more informative and more even handed. *The Napier Daily Telegraph* weighed up the effects of higher water levels at Lake Taupo:

> Although a high level of Lake Taupo is desired in the interests of hydro-electrical supply it is claimed that a low lake level is beneficial in the Taupo district, to prevent flooding of land on the shore of the lake, which has value for farming purposes.[325]

The avoidance of flooding was also a matter of concern to Māori. In August 1926, after the passing of the Native Land Claims Adjustment Act 1926, but before the proclamation of 7 October 1926 vesting tributary rivers (or sections thereof) in the Crown, Arthur Grace wrote to the Right Honourable JG Coates:

> In the event of a settlement [about the rivers] being arrived at there is one point that must be made quite clear, and that is the question of controlling the floods. For during the winter months the Tongariro floods very severely, and it is only by repairing the Banks etc that we have been able to check it in the past. Therefore if we lose control of the banks, who is going to guard our properties from floods and damages?[326]

He went on:

> … if the floods are allowed to get the better of us, our work will all be in vain, and can only end in disaster. I suppose about 6000 acres of real good river flats will be affected. So that this is a very important point, which cannot be overlooked.

A later article in *The Napier Daily Telegraph* again evidences Māori interest in water levels, especially in the wake of the 1926 floods:

> A correspondent at Tokaanu, has written stating that the fact that Lake Taupo is going down to its old level is important to Maori owners of land round the lake shores, because it enables them to re-cultivate some of the finest land in New Zealand, which since 1926 has been covered with water. In the year 1920 to 1922, milking cows were grazed on that land, and this year it has again been dry enough to farm.[327]

The newspaper correspondent concluded that if the lake level was raised for the benefit of electrical supplies, there would be a corresponding flooding of first class land on the lake shores.

As preparations continued the information about economic benefits and construction details became more specific and the likely environmental impacts were marginalised. Walzl reproduces a memo compiled by the Secretary of Treasury for his Minister to present to Cabinet. The Secretary of Treasury noted the existing electricity shortage and set out the proposal in these words:

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[324] 19 May 1939, CEE to DEE, AANU W5159-Box 46-21/53/1 pt.1, ANZW, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1,note 62; also supporting documents, E1(a), vol 2, p 647

[325] 1 May 1939, *Napier Daily Telegraph* cited by Walzl in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 60; also supporting documents, E1(a), vol 2, p 648

[326] A Grace to JG Coates, 6 August 1926, in Bayley and Shoebridge, G1, Doc 110, pp 2298-2299

[327] 1 May 1939, *Napier Daily Telegraph* cited by Walzl in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 60; also supporting documents, E1(a), vol 2, p 648

> The proposals to control the level of Lake Taupo will materially assist in overcoming this shortage. At the present time the water available for generating units is at its lowest during the winter months, and it is during these months that the demand reaches its peak. The proposed expenditure should make it possible for the water to be stored in the Lake during the summer and thereby have this water available when it is most valuable. The advantage so gained would be cumulative in that as further stations are erected on the Waikato River, each station would obtain the benefit of this additional water.
>
> The supply of electrical energy is, at the present time, one of the most profitable enterprises undertaken by the State and the expenditure is reproductive. It is understood that if the scheme is proceeded with, £5,000 only will come to charge this financial year, and as provision for this amount has been made to the Public Works estimates, Treasury will raise no objections to the scheme and the recommendation from the Public Works Dept. is submitted for the favourable consideration of Cabinet. Very little commitment of sterling is involved.
>
> It is understood that the Internal Affairs Department concurs in the proposals, but it would be desirable to advise the Native Department and take precautions against possible claims by natives.[328]

When Cabinet received the proposals, questions were asked, not about the implications for Maori but about the impact that the scheme would have on fishing. Further information was requested and a decision was delayed while it was sought. In the meantime, Ngati Tuwharetoa had been alerted about the plans and formed a deputation of Maori and landowners to meet with the Minister of Internal Affairs to discuss the intentions of Government with regards to lake levels. When they met on 17 October 1939, the Minister informed the group that he had visited the area and had been reassured by the Engineer of the Public Works Department:

> I see no reason to be in any way alarmed about the matter. I do not think, from the discussions I have had with the engineer, there will be damage of any account by flooding. I myself have been concerned about that aspect. The engineers consider there will be no danger of anything taking place which would interfere with the residents or with the production from the land.[329]

Mr John Asher from Ngati Tuwharetoa was not reassured:

> I want you to appreciate this, the Public Works Department is in the habit of doing things first and then leaving others to clean up the mess. I hope it won't be a case of that in respect of the levels of the lake which is a very vital matter to the Maori owners of land adjacent. If the lake levels rise it will be detrimental to the Maori owners and not to anyone else.[330]

Mr Asher's plea did not fall on deaf ears. Eight days later the Minister of Internal Affairs wrote to his colleague, the Minister of Works, asking him to visit Tokaanu and Taupo in person:

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[328] 16 Aug 1939, Sec to Treasury to Min Finance, AANU W5159 21/53/1 pt.1, ANZW, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 71; also supporting documents, E1(a), vol 2, p 640

[329] 17 Oct 1939, Deputation to MIA, AANU W5159-1/53/1 pt.1, ANZW, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 72; also supporting documents, E1(a), vol 2, pp 615-633

[330] 17 Oct 1939, Deputation to MIA, AANU W5159-1/53/1 pt.1, ANZW, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 72; also supporting documents, E1(a), vol 2, pp 615-633. Mr John Asher is simply named as Mr Asher in the minute. We know from other sources that the Mr Asher named is almost certainly Mr John Atirau Asher (1892-1966) who was correspondence secretary for Mr Alfred Grace, Secretary of the Tuwharetoa Maori Trust Board when it was formed in 1926s. Mr John Asher was a significant leader and negotiator for Tuwharetoa and was himself Secretary of the Trust Board from 1959 to 1964. 'John Atirau Asher', *1921-1940*, vol 4 of *The Dictionary of New Zealand Biography* (Auckland: Auckland University Press; Wellington: Department of Internal Affairs, 1998), pp 20-21

> I am not an engineer and, consequently, am not able to estimate the flooding and damage that may be caused by the raising of the lake. I can, I think, claim to have some practical knowledge of what the effect would likely be of raising the level of a huge inland sea, such as Taupo. More particularly do I feel the possibility of the Tokaanu end of the lake suffering pretty badly by the raising of the lake. It seems to me that a goodly part of the township and a large area of native land would be affected, resulting in many claims being made by the Maoris for compensation for their loss. Together with this aspect, there is the Maori Land Development Scheme to the left of Lake Taupo which comes prominently into view in an inspection. Most of this land, which is being drained under the scheme, will be also involved. If the water which will be let loose by the raising of the lake does not actually flood the area, it will undoubtedly cause the land to become waterlogged.
>
> I am not in a position to give any information of damage likely to be caused in the upper reaches of the rivers running into the lake, but I should say there is a strong likelihood of considerable sluggishness being created in the rivers emptying into the lake. In places of virile running rivers, there might by meandering sluggish water, tending to the flooding of low-lying lands during the periods of heavy rain.[331]

Included in this memorandum was the suggestion that the scheme could be modified to enable the flood gates to lower the lake when additional water was not needed.[332] When the Minister of Works responded he replied that the alternative engineering proposal would be 'difficult and expensive work besides interfering with existing fishing conditions in the locality.'[333] He then added that 'levels have been taken all over the low lying lands' and reassured his colleague:

> 1. No cultivated lands will be affected.
>
> 2. With the surface drainage proposed at Tokaanu township, no damage will be sustained from lake water up to the controlled level, and it seems certain that ground water conditions will be more favourable than they have been for many years in the past.
>
> 3. The native land which is proposed to develop near the Waimarino Stream east of the Tongariro River, is sufficiently high to be immune from any damage by lake waters if adequate drains are provided to convey swamp water to the lake. The lowest ground in the area is approximately 3 feet above the controlled water level.
>
> The comparatively narrow strip of grass land on the banks of the Tongariro River is at all times subject to immersion when the river is in high flood. Under lake control the number of occasions on which the river will overflow will probably be increased but only to a slight extent.[334]

On 20 December 1939, Cabinet approved the proposal to build the control gates and raise the lake level to provide storage for the Waikato power stations.

It is clear from the above discussion that the following issues about Cabinet's decision must be addressed:

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[331] 25 Oct 1939, MIA to MW, AANU W5159-Box 46-21/53/1 pt.1, ANZW, cited by Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, footnote 73; also supporting documents, E1(a), vol 2, pp 609-611

[332] 25 Oct 1939, MIA to MW, AANU W5159-Box 46-21/53/1 pt.1, ANZW, cited by Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, footnote 73; also supporting documents, E1(a), vol 2, pp 609-611

[333] c Nov 1939, MW to MIA, AANU W5159-Box 46-21/53/1 pt.1, ANZW, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p44, para 116

[334] c Nov 1939, MW to MIA, AANU W5159-Box 46-21/53/1 pt.1, ANZW, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p44; also supporting documents, E1(a), vol 2, p 612

- Was hydro-electric development necessary in the national interest and how should kawanatanga and tino rangatiratanga rights have been exercised over the Taupo waters?
- Did the Crown consult Tuwharetoa leaders and people, and make the decision in partnership with them?
- Were there alternatives to raising the lake levels and did the Government consider them?
- Did the Public Works Department take reasonable to steps to ascertain the likely effects of raising the lake levels, and did the Government respond adequately to Tuwharetoa's expression of concern?

Was hydro-electric development necessary in the national interest and how should kawanatanga and tino rangatiratanga rights have been exercised over the Taupo waters?

The parties to our inquiry agreed that hydro-electric development was necessary in the national interest.[335] In 1943, a deputation of Tuwharetoa leaders told ministers: 'The Maori people as a whole were very sympathetic towards the Crown and fully appreciated that the major project of hydro-electricity came first, despite their selfish interests'.[336] On the other hand, this did not mean that Maori should not be protected from any adverse effects. Mr Asher wrote in 1940: 'Whilst we appreciate the immense importance of any hydro-electric undertaking, we owners at the same time are entitled to any measure of protection affecting any lands that may be adversely touched upon'.[337] The Treaty principles of good government and active protection required no less. In the words of Prime Minister Fraser the same year, no Government should 'stand by and have injustices imposed on private citizens because of Government operations'.[338]

Fundamentally, hydro-electric development was necessary in the national interest. For that reason, the Government had given itself the authority to control the use of water for electricity, subject to other lawful rights. As we noted above, Heke argued in 1903 that Maori had such rights over their waters, to which the Government replied that if so, its legislation preserved those rights and required the Crown to purchase them.[339] The issue was debated for the next thirty years, but in our view the Government included the right to use the Taupo waters in its 1926 legislation precisely because the matter had to be put beyond legal doubt. Tuwharetoa, not having made an informed or willing cession of their rights over the waters, challenged the Crown to negotiate and obtain such a cession in 1944–46.

In the late 1920s, Tuwharetoa leaders approached the Government with repeated requests for it to lower the level of the lake. The tribe wanted to improve and develop the horticultural capabilities of the rich lands abutting the lake. The Government

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[335] Crown closings, 3.3.111, part 2, pp 484-485; Feint, reply to Crown closings, 3.3.142, pp 39-41
[336] quoted in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 78
[337] quoted in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 45
[338] quoted in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 104
[339] *Te Ika Whenua Rivers Report*, p 43

refused these requests because, inter alia, it wanted to keep the lake level high for future hydro-electricity projects.[340] The District Engineers advised in 1927: 'Any future hydro-electric schemes involving a maximum lake level would be seriously affected by the permanent lowering of this lake.'[341] The Under Secretary of Public Works accepted this advice, informing the Minister that any enhancement of conditions at Tokaanu and the southern end of the lake (by lowering it) would be offset because 'the value of the lake in connection with further extensions of hydro-electric development along the Waikato would be much reduced, and the cost of works at the next probable development would be much increased'.[342]

Tribal leaders had no choice in the 1920s but to negotiate with the Government, which was the only body with resources to carry out the physical modification required to lower the lake. The partners did not negotiate as equals: Tuwharetoa asked and the Crown said 'no'. During this process, there is no evidence that the tribe grasped the fact that the Crown intended to use and control the waters for the purpose of hydro-electricity. It was not until the mid-1940s that tribal leaders asserted that the Crown could not use their waters in this way without agreement.[343] The Minister of Public Works, G Anderson, did cite hydroelectricity in announcing the Government's decision not to lower the lake. He informed the Tuwharetoa Trust Board in 1927 that 'any permanent lowering of the lake would have a prejudicial effect on future hydro-electric development'.[344]

The Crown has queried why Tuwharetoa did not raise this issue prior to 1944, if, in fact, the tribe believed that such a use of their waters required a fresh negotiated agreement. In particular, why did the tribe not raise the issue in 1939, when it became very clear that the Crown claimed not merely the right to use the waters, but the right to control the level of the waters for hydro purposes?[345]

We have no information on this point. As far as we can tell from the documentary evidence, tribal leaders did not raise it with the Government in 1939. At that point, discussion between the Treaty partners focused on the impacts of the proposal to control the lake, not the question of whether the Crown had authority on its own to exercise that control. The issue was first raised by Hoani Te Heuheu in 1944. He informed the Prime Minister that there had been 'no mention of using Taupo's waters for hydro electric power' in the negotiations of 1926:

> I now beg to ask on behalf of the Tuwharetoa people what the Government proposed to do in this matter. I take it that the negotiations in 1924–'26 had no ulterior motive or aim. I take it that the use of Taupo waters for a new purpose, namely, hydro-electric power, opens up a new question and requires fresh negotiations with us. It will be seen how vitally question No 1 above [re Parliament carrying out the Treaty] affects question No 2 [re Lake Taupo]. If Parliament in its 1926 legislation has omitted to protect our full rights as owners of Lake Taupo, I take it that Parliament will now be bound in honour to rectify that omission and that

[340] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 17-20
[341] quoted in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 19
[342] quoted in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 19
[343] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 14-119
[344] GJ Anderson to PA Grace, 9 May 1927, in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', supporting documents, E1(a), vol 2, p 773
[345] Crown closings, 3.3.111, part 2, p 487

you on behalf of your Government will give us an assurance to that effect before you leave for England.[346]

As we discussed above, the same claim was advanced by a Tuwharetoa delegation in 1946, at a meeting with the Prime Minister, other ministers, and officials. Any use of their waters for other than fishing, argued the tribe, required new negotiations and a fresh agreement. The Prime Minister promised to look into their allegation that this matter had not in fact been agreed in 1926.[347] We have no evidence that this promise was carried out.

In our view, the waters of Lake Taupo were and are a taonga of Tuwharetoa. Pre-existing rights to use the waters for electricity generation were explicitly preserved in 1903 (and 1928) alongside the Crown's grant of authority to itself. The claimants and Crown are incorrect when they state that this legislation gave the Government the sole right to control the use of waters for electricity, as both Acts included a standing qualification.[348] Maori authority over their taonga and properties included the right to control their use, and that right was not extinguished by the Water-Power Act 1903 and subsequent public works legislation. Rather, the Crown had to acquire the right from Maori. This it recognised in 1926 but did so in a underhanded manner that breached Treaty principles and failed to extinguish the right by free and informed consent. Although the enacting legislation may have extinguished the Maori right at law, Ngati Tuwharetoa did not accept that in 1944–46. A reasonable Treaty partner, acting in good faith, would have accepted that it had not properly or sufficiently acquired the right it claimed, and would have negotiated and acquired it by agreement at that time. The tribe intended to act reasonably, and to put the national interest above its 'selfish interests', so an amicable agreement could surely have been reached.

Did the Crown consult Tuwharetoa leaders and people, and make the decision to erect the control gates in partnership with them?

The tribe's claim to continuing authority over their lake and over the Crown's proposed use of it for hydro-electricity was not accepted in 1939–1946. The Treaty partners did not negotiate and arrive at an agreement, as they had in 1926. Rather, Tuwharetoa were left in the position first of asking the Crown whether they would be protected from any consequences of its decision to build the control gates, and then of seeking compensation or a reversal of that decision.

In addition to the need to obtain a free, informed, and unambiguous consent to the use of their waters for hydro-electricity, the Crown was also obliged to consult Ngati Tuwharetoa over any environmental modification that would have a significant effect on them. Prime Minister Fraser noted in 1943 that people should have received 'sufficient warning of what was likely to happen', that they should have been informed of whether the lake would rise, and that no flooding should have come as any surprise.[349] We think that, as well as warning and informing people of its intentions, the Government was required to consult the Maori people concerned and obtain their view on its proposal to raise the lake levels. In the mid-1940s, Tuwharetoa

[346] Hoani Te Heuheu to Fraser, E16(c)
[347] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 118-119
[348] The Water-Power Act 1903, s 2; the Public Works Act 1928, s 306
[349] *The Dominion* 30 June 1943, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 174; also supporting documents, E1(a), vol 2, p 693. Cf *Hawkes Bay Herald Tribune,* 6 July 1943

commissioned expert research and advice on whether there were other ways of achieving the desired water flows for electric power.[350] This could have been done earlier, had people had sufficient notice of the Government's intentions. Instead, Tuwharetoa met with the Government after learning of its intentions (but before they were set in stone) and received ministerial assurances that there would be absolutely no effects on them. These assurances proved so at variance with the truth that the Government later pondered how it could have been so mistaken.[351] Genuine consultation requires sound information for informed choices, which was very clearly lacking in this instance.

Were there alternatives to raising the lake levels and did the Government consider them?

As we will see below, research later in the 1940s indicated that the same amount of water power could be supplied without having to raise the lake levels. By the time Tuwharetoa received this expert advice, the alternatives were (in the opinion of some) prohibitively expensive because of the investment already made in the existing control gates.[352] We have no way of judging whether these alternatives were affordable or workable back in 1939–41. The evidence before us, from Mr Walzl's assessment of the documentary record, is that the Government did not consider or investigate any alternatives to siting the control gates where they did and raising the lake levels in the manner consequent on that decision.[353] In our view, given the claimants' requests in the 1920s and 1930s that the lake level be lowered, the Government had sufficient notice that a proposal to do the opposite would be a matter of concern to Tuwharetoa. If alternatives existed – and the evidence from the time is that they did – these should at least have received serious consideration. Further, the technical evidence is clear (as we will explain below) that the lake did not need to be kept at such high levels in the 1940s in order to supply the hydro requirements of the time. Ultimately, the damage done to Ngati Tuwharetoa and their taonga was unnecessary and avoidable.

Did the Public Works Department take reasonable to steps to ascertain the likely effects of raising the lake levels, and did the Government respond adequately to Tuwharetoa's expression of concern?

The evidence recited above is clear that the Public Works Department did not take reasonable steps to ascertain the likely effects of raising the lake levels, despite a warning from its district officers that some areas would be flooded. Inadequate research was carried out: 'No very comprehensive survey should be attempted,' were the instructions, 'but rather a few spot levels should be taken to indicate the relation of land to any proposed future lake level'.[354] On the basis of such inadequate investigation, the Department advised ministers that there would be no impact whatsoever on Maori, a view that was communicated officially to Tuwharetoa. Asher warned that the Department had a history of creating messes and leaving them for others to clean up, and the Minister of Internal Affairs was sufficiently worried to

[350] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 113-120
[351] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 40-45, 104-105
[352] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 108-120
[353] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 31-45
[354] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 32

query what seemed to him – as a layman – would be obvious detrimental effects arising from the Government's plans.[355] The Native Minister later accused the Public Works Department of having been 'very far from candid in its description of the probable effect of the works'.[356] The Prime Minister, however, preferred to think that there had been some dreadful mistake or incompetence.[357] Either way, ministers (despite reasonable doubts) accepted Public Works' advice and conveyed false or uninformed promises and assurances to Tuwharetoa.

The Tribunal's findings

In our view, the Crown failed to act in partnership with Tuwharetoa and their whanaunga in accordance with the Treaty and its own undertakings in 1926. It ought to have consulted the tribe and obtained their agreement to its use of their taonga for the generation of hydro-electricity. Similarly, its proposal to erect control gates and raise the lake level should have been the subject of full consultation with the tribe, on the basis of sound information, and reasonable alternatives should have been researched and considered. In particular, knowing of Tuwharetoa's desire to lower (rather than raise) the lake level, the Crown was obligated to determine whether its power needs could be met without having to raise the lake level. Research from the mid-1940s suggests that there were alternatives, but they do not appear to have been considered at all in 1939–1941. Finally, the Government did not take reasonable steps to ascertain the likely effects of raising the lake levels, nor did it respond adequately to Tuwharetoa's expressions of concern. Although we acquit the Crown of bad faith, we do note views from the time of both ministers and of Tuwharetoa that the Public Works Department had a history of concealing the truth of the impacts of its projects.

We find these actions and omissions of the Crown to have been in breach of the principles of the Treaty. We conclude that the decision to erect the control gates and raise the lake levels was not arrived at in a manner consistent with the Treaty.

WHAT WERE THE IMPACTS OF THE CONTROL GATES?

We turn now to consider evidence of the actual impact of the control gates on the lake, its mauri, its shores, its abutting lands, and its people.

The Claimants' Case

The claimants argued that the erection of the control gates and the subsequent keeping of the lake at high levels for sustained periods, including in seasons when it would not normally be high, had very serious impacts on them, their lands, and their taonga.

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[355] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 31-45

[356] Native Minister to Under Secretary, 17 January 1944, quoted in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 108

[357] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 104-105

Spiritual and Cultural Impacts

In the claimants' view, the nature of the impacts were metaphysical as well as physical, including:

- Interrupting the natural flow of water out of the lake, damaging the mauri and causing spiritual impurities;
- Damaging the very identity of the people, which is bound up with the free flow of the Waikato River out of the lake;
- The death of the taniwha Matawhero;
- Damaging or destroying wahi tapu, including urupa;
- Damaging or destroying taonga;
- Loss of cultural knowledge associated with the lost wahi tapu and taonga; and
- Harm that comes with inability to carry out kaitiakitanga.

The claimants note that, although some of these concerns may not have found their way into the written record, the evidence of their kaumatua is that they were and are deeply felt by the people.[358]

Physical Impacts

The technical evidence showed that the lake levels were raised as a result of installing the control gates. Not only were they raised, but the Crown held the lake at a high level almost year-round from 1941 to 1947. This caused inundation, erosion, siltation and sluggishness in rivers, and the raising of groundwater levels. Also, the claimants argued, the technical evidence established that the lake had been held higher than normal, and in seasons when it would not normally be so high, for much of the time from 1947 to 1971. It was not until after 1987 that it was finally allowed to revert to a fairly normal level. The physical impacts of keeping the lake so high included flooding, erosion, loss of access, transformation of arable land and pasture into swamp, and destruction of lakeshore geothermal features. Other possible causes, such as tectonic subsidence, were merely 'red herrings'. The evidence of Eser and Rosen, for example, showed the ruination of land due to waterlogging over a 17-year period, which was too short for tectonic subsidence to have been an appreciable factor.[359]

Social and Economic Impacts

The claimants argued that the technical and tangata whenua evidence demonstrated the severe effects of keeping the lake so high for so long. Key lakeshore lands, vital to the communities of the time for growing the crops necessary for their subsistence, were rendered unusable. Also, land being developed for pastoral farming was significantly damaged. Demographic statistics and the oral evidence both showed that the blow to farming was significant and long-term. Many people had to leave their

[358] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 144-146
[359] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 146-151

farms or communities to seek work elsewhere. It is beside the point to argue that the effects on the land were not permanent – it was and is beyond the resources of the tribe to clear and drain the affected land so as to bring it back into production.[360] Further, communities were damaged by the inability of people to remain on their lakeside lands: 'This outflow of the iwi's most precious resource – people – would in turn have undermined the social and cultural fabric of nga hapu o Ngati Tuwharetoa'.[361]

The Crown's case

The Crown suggested that there was (and is) a complex interaction between lake levels, tectonic subsidence, natural siltation, wind erosion, wave action (as a result of wind), and artificial control via the gates. The Tribunal must be assured that damage has been caused by Crown actions and not by some natural occurrence. The lake was never kept higher than it sometimes reached in nature, and the historical evidence showed signficant flooding and high levels prior to 1941. Much lakeshore land was already swampy and marginal prior to the Crown's intervention. Nonetheless, the technical evidence showed that damage arose because the lake was kept constantly high in 1941 to 1947, and less so (though still higher than usual, and unseasonably) until 1971. From 1987, the lake has been kept at close to normal (pre-1941) levels. As a result, any physical damage – especially from the extreme years of the 1940s – has long since abated.[362]

The Tribunal's analysis

We received considerable technical and tangata whenua evidence on the impacts of artificially controlling Lake Taupo, which has enabled us to reach firm conclusions on the points raised by the parties.

The Technical Evidence

Hamilton gives us a succinct overview of the role of Lake Taupo in the Waikato River power generation scheme and the operation of the control gates.[363] The intention of the works was to use the lake as a very large storage reservoir, to store water during summer and autumn and to use it for power generation during winter when the demands for electricity were greatest. Water stored in Lake Taupo, and released in a controlled manner could be used, in succession, for each of the power stations on the Waikato River (figure 18.1). Arapuni, commissioned in June 1929, was already in action when the Lake Taupo gates were built; the remaining seven stations, beginning with Karapiro, were commissioned from May 1947 onwards.

[Figure 18.1 The Waikato River and the cascade of hydro lakes.]

The storage capacity of a lake, from an electricity generation perspective, is governed by the minimum and maximum control levels. Hamilton uses data provided by Freestone to identify the operational parameters which were chosen by the engineers

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[360] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 151-157
[361] Feint, Ngati Tuwharetoa closings, 3.3.106, p 157
[362] Crown closings, 3.3.111, part 2, pp 454-457
[363] Hamilton, I35

and confirmed by the decision-makers in 1939 (table 18.1)[364]. The engineers were aware of the maximum and minimum lake levels for the period 1905 to 1939 and selected maximum and minimum control levels that were inside these figures. They went on to compare the recorded lake level range (1905 to 1939) with the 'design level range' which was the difference between the maximum and minimum control levels. The 'general level of lake' was the mean lake level for the period 1905 to 1939.

Table 18.1 Key levels for Lake Taupo and the Taupo Control Gates[365]

	Feet (local datum)	Metres(Moturiki datum)
Maximum flood level (1909)	1178.1	357.72
Maximum control level	1177	357.387
'General level of lake'/ mean level	1175	356.72
Minimum lake level (1915)	1172.3	355.96
Minimum control level	1172	355.85
Recorded lake level range (1905-1939)	5.8	1.77
Design lake level range	5	1.53

The capacity of Lake Taupo, calculated by multiplying the surface area by the operating range, is 611km^2 times 1.53 metres or 935Mm^3. Our calculation from the data in table 18.1 is that 40 per cent of that capacity is obtained by raising the lake above the general lake level and 60 per cent by lowering the lake below the general lake level. The construction work carried out in 1940 and 1941 was evenly balanced between the control gates which would enable the lake level to be raised, and work intended to facilitate the release of water from the lake and allow the lake level to be lowered. Construction costs were carefully estimated in a June 1939 memo from Engineer Anderson to the Chief Electrical Engineer, Kissel, in the Department of Public Works. £89,300 would be needed to create a river diversion and construct the concrete barrage which would contain the sluice gates. £74,100 would be used to lower the river from Shand's Rapids to the lake outlet and cut an outlet channel through the shallow area of the lake[366]. The Annual Reports on Public Works, made to

[364] See Hamilton, I35, table 5.2, p 20; and Freestone, H29, table 14.4, p 61

[365] Measurements rounded to two decimal places except for Maximum control level. The figures for 'General lake level' are for 1905 to 1939 and are taken from an internal memo, from District Engineer Anderson to Chief Electrical Engineer Kissel on 14, June, 1939, reproduced in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', supporting documents, E1(a), vol 2, p 637. The figure for the mean from 1905 to 2001 is from Hamilton, I35, table 6.1, p 25. The remaining figures are from Hamilton, I35, table 5.2, p 20

[366] 'Control of Lake Taupo' Anderson to Chief Electrical Engineer, 14 June 1939, reproduced in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', supporting documents, E1(a), vol 2, pp 637-639

Parliament for the years 1939, 1940, 1941 and 1942 confirm that the work was carried out as scheduled and control of Lake Taupo became effective on 4 September 1941[367]

The nature of the work done is specified in some detail in the Department of Public Works' files but the magnitude of the changes at the lake outlet is not immediately clear. The Freestone evidence, presented to a resource consent hearing in 2003, draws on the design specifications used in 1941 and time series data from 1905 to 2000. The design specifications, summarised in table 18.1, suggest that the outlet was lowered by 11 centimetres. Elsewhere in the same document Freestone considers the regime which would operate should Environment Waikato decline the resource consent and require the applicant to fully open the control gates. In this situation, he demonstrated to the consent hearing, the lake would drop by about 1.2 metres and continue to operate at a lower level (figure 18.2). The difference between 11 centimetres and 1.2 metres is substantial, a matter of considerable surprise which caused us to check and recheck the evidence. The Tribunal questioned Mr Hamilton about this during Week Nine Hydrology hearings.[368] The evidence by Freestone stood up under scrutiny by Hamilton and it stands up under scrutiny by the Tribunal. From this we are able to reconcile the difference between the figure 18.1 evidence and the figure 18.2 evidence. The conclusion we reach is important. Our interpretation is that there was a modest deepening and a substantial enlargement of the outlet in 1940 and 1941. The engineers had, in this way, created a capacity to raise the lake by four feet above the general lake level and to lower it by three feet below the general lake level. The maximum control level was eventually set at two feet above the general one.

[Figure 18.2 Lake Taupō showing the uncontrolled level since 1905 (simulated after 1914), the controlled level since 1941 and the 'no consents' level since 1941]

The new regime for lake levels which was initiated when the control gates became operational in September 1941 was based on simplistic assumptions. Correspondence in the files created by the Public Works Department provides a window of insight.[369] The engineers had access to reliable time series data on lake levels from 1904 onwards and directed their attention to a very narrow range of parameters: the recorded maximum (1178.1 feet, in 1909); recorded minimum (1172 feet in 1915); and a 'general lake level' of 1175 feet. From this they made the assumption that a controlled maximum of 1177 feet was well within the natural range and would provide a margin of safety should heavy rains occur at a time when the lake was already at the controlled maximum. Land above 1180 feet would, they believed, be unaffected; land between 1177 and 1180 feet would be 'to some extent affected' but 'the total area is small, amounting to a few hundred acres, much of which would not be capable of development in any case'.[370]

The control gates and the lake level regime operated within these parameters between 1941 and 1946 (figure 18.3). The new seasonal regime, with a build up of water in

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[367] AJHR, 1940, D-1, p 65; AJHR, 1941, D-1, pp xiii, 28; AJHR, 1941, D-1, pp 22-35; AJHR, 1942, D-1, pp 12, 14; AJHR, 1943, D-1, p 3

[368] Hearing Transcript, Week 9, Wellington, 8 August 2005, 4.1.10, pp 3-53, especially pp 23-39

[369] EiC to USND, 10 November 1939 and Wood to USND, 17 November 1939 in AANU W5159 Box 46 21/53/1 pt 1 ANZW, cited by Walzl, 'Hydro Electricity Issues: The Tongariro Development Scheme', E2 notes 86 and 87; also supporting documents, E1(a), vol 2, pp 613, 634

[370] Wood to USND 17 November, 1939 in AANU W5159 Box 46 21/53/1 pt 1 ANZW, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 88; also supporting documents, E1(a), vol 2, p 614

summer and autumn and a run down in winter did not, however, take effect. Lake levels were held close to the controlled maximum over extended periods of time, in winter and spring as well as summer and autumn, between December 1941 and June 1946. Lake Taupō was awash, with water far in excess of that needed to operate the Aratiatia power station. Environmental impacts were felt around the lake margins and in the lowlying areas adjacent to the lake and the rivers that flowed into it. There were complaints from fishermen, landowners and residents, Māori and non-Māori. Claimant evidence summarised by Hamilton[371] (and set out in more detail below), evidence compiled by Walzl from archival records, newspapers, and reports of site visits by Cabinet Ministers, as well as evidence from maps and air photos collated by Fitzpatrick et al, are all in accord about the nature of the damage done.[372]

[Figure 18.3: Lake Taupo lake levels 1941 to 1947]

Beaches and fishing rocks around the lake were submerged and widespread flooding occurred. After previous flood events the waters had receded and the land dried out. This was no longer the case. Flooding and subsequent waterlogging were most extensive around the southern end of the lake where Tokaanu Native Township and the Tokaanu and Korohe Development Schemes were adversely affected. The Tauranga Taupō Development Scheme was similarly affected when the stream, unable to release all of its water into the lake, overflowed its banks. Māori settlements adjacent to the western shores of the lake had smaller areas of flat land and were more than proportionally impacted by the rises in lake level. Waihi, for example, suffered from a reduction in coastline, flooding of its marae site, and loss of hot springs used for bathing and cooking purposes.[373] Waihaha, also on the western shore, is the subject of a detailed case study, complete with maps, prepared by Kirkpatrick et al[374]. Lake levels rose, the water backed up the Waihaha River and overflowed, land became waterlogged and the problems persisted to the detriment of ecology, production, community life and sacred places.

The Crown argued that changes to the lake surrounds are complex responses to a number of different processes, including crustal movement and deformation, the impact of winds on lake levels, variations in rainfall, changes in land use and inefficiencies in the drainage systems.[375] We have assessed the evidence before us on the nature and magnitude of each of the following factors:

- the tectonic subsidence
- the impact of winds
- rainfall variations

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[371] Hamilton, I35, table 9.1

[372] Walzl, reports in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1 pp 49-100; and R Kirkpatrick, K Belshaw, and J Campbell, in 'Land based Cultural Resources & Waterways & Environmental Impacts (Rotorua, Taupo & Kaingaroa) 1840 – 2000', 17 December 2004, Document E3, chapters 3 and 12

[373] Walzl reports in detail in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, paras 158-179

[374] Kirkpatrick, Belshaw and Campbell, E3, chapter 12. See especially Figure 12.5 on p 535 which maps the reduction in the amount of productive land at Waihaha 3B from 1910 to 1945 to 2002

[375] Hancox, H31; and Freestone, H29 provide the detailed discussion and analysis and Hamilton in I35 provides a summary and evaluation. We were greatly assisted by the estimates given for the order of magnitude of these processes as they operate at Lake Taupo. Hancox estimated that the order of magnitude for changes produced by the tectonic processes is 6 to 10mm per year. Variations in lake levels caused by winds and seiching are in the order of 10mm to 20mm.

- wave action
- changes in land use
- changes in the efficiency of drainage
- changes in lake level
- changes in the volume of water held for storage

Our conclusion is that two components in particular have combined to cause the environmental impacts which were most acute during the period from 1941 to 1946: namely, that modest changes in the lake level (in the order of 400 to 600 centimeters) have combined with substantial changes in the volume of water held for storage over the five-year period. The result of these two factors was a marked rise in the water table levels in areas surrounding the lake. The impacts of this rise in water table were felt well above the controlled level of the lake.

The critical relationship between the lake level and groundwater

The nature of the interplay between lake levels and groundwater is crucial to our understanding so we examine it here in some detail. The relationships between groundwater levels are simple in concept but complex in practice. Groundwater is a reservoir of water lying below the surface of the land and an important component of the hydrological cycle (figure 18.4). [376] Closer to the surface is a zone of aeration where soil and rock contain both air and water. Below this is a zone of saturation where pore spaces are filled with water and air is excluded. The water table is the surface which marks this separation.[377]

[Figure 18.4 The water table and zones of saturation and aeration in relation to rivers and lakes]

Groundwater is replenished by precipitation and percolation through the soil, especially in winter and early spring when evaporation is lowest and there is a surplus in the soil/water budget.[378] Because groundwater moves slowly, the level of the water table tends to follow the surface of the land. Groundwater returns to the surface by flowing into streams, rivers or lakes or directly into the sea. Most commonly, groundwater is discharged into rivers and lakes. If, however, the water levels in rivers and lakes are raised by floods or engineering works the discharge may be halted or even reversed. Groundwater levels close to the river or lake may be raised as a result of recharge, while those above the recharge level may build up because water added by precipitation is unable to drain away. Patterns of discharge and recharge are

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[376] See, for example, C G Elliott, *Engineering for Land Drainage: A Manual for the Reclamation of Lands Injured by Water* (New York: J Wiley, 1912); C S Fox, *A Comprehensive Treatise on Engineering Geology* (London: The Technical Press Ltd, 1935), especially chapters 8 and 17; R C Ward and M Robinson, *Principles of Hydrology* (London and New York: McGraw-Hill, 1975), especially chapters 5, 6 and 7. For a comprehensive New Zealand overview see M R Rosen and P A White eds, *Groundwaters of New Zealand* (Wellington: New Zealand Hydrological Society, 2001), especially White, Clausen, Hunt, Cameron and Weir in chapter 6 on groundwater-surface water interaction, and Hunt on the Waikato in chapter 14

[377] H J de Blij and P O Muller, *Physical Geography of the Global Environment* (New York: Wiley, 1993); A H Strahler and A N Strahler, *Modern Physical Geography* (New York: Wiley, 1992)

[378] This is the situation in temperate countries, including New Zealand. It does not apply in the tropics where the seasonality is different. Ward and Robinson, *Principles of Hydrology*, p 189, and figure 6.10, p 190

complex, depending on the nature of the soils and the rocks, the elevation of the land surface and the seasonality of precipitation and evaporation.

The interplay between lake levels and groundwater levels helps us to explain why the claimants suffered the damage reported between 1941 and 1946. Three reasons can be identified. Firstly the lake was raised to a level beyond that needed to provide a steady supply of water for the Arapuni power station. Secondly the lake was held at a higher than average level for longer than was necessary. Thirdly, as a follow-on from item two, the lake was not lowered at the end of winter and the beginning of spring when groundwater discharge is essential for agricultural and pastoral farming. The Crown had the capacity to control the maximum and the minimum lake levels, and it had a responsibility to monitor the impacts of the new control regime and adjust its operation accordingly. The operation of lake controls could have been fine tuned and adjustments to lake levels could have been made without jeopardising the wartime needs for electricity.

The problems did not cease at the end of the Second World War. Further and more localised damage, related to high lake levels, flooding and shoreline erosion, was associated with flood events in 1952, 1957, and 1958. The impacts relating to the high water table have not, for the most part, been researched or monitored. There are two important exceptions brought to us as evidence. Eser and Rosen, from the School of Biological Sciences at Victoria University and the Institute of Geological and Nuclear Sciences at Taupo, carried out a detailed study of the effects of artificially controlling lake levels on the Stump Bay wetlands to the south of Lake Taupo.[379] They report on the specifics of the relations between surface water and groundwater and the interplay between rainfall, transpiration and lake levels: if the lake is held at a higher level the area of swamp increases; if the lake level is lower the area of swamp decreases. Their figure 6 used evidence from air photos to map the extent of wetlands in 1941, before the lake was controlled, and in 1958 when the next run of air photos was taken.[380]

The map prepared by Kirkpatrick et al as part of the Waihaha case study in their report to the Tribunal provides parallel evidence for the smaller lowlands on the western side of the lake (figure 18.5). The small area of farmland, mapped in 1910, is much reduced by 1945 and even further reduced in 2002. Land under cultivation has diminished; parts of it have become waterlogged and parts of it have reverted to bush and regrowth. Some lands adjacent to the lake were abandoned as a result of flooding during the period of uncontrolled lake levels in the decades immediately following 1941; others, a little further distant, were abandoned as a result of rises in water tables which began in the 1940s and extend through to the present day.

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[379] Published in the *New Zealand Journal of Marine and Freshwater Research*, vol 34, 2000, pp 217-230 and entered into the record of documents as Eser and Rosen, I11

[380] The air photos were in each case part of a national aerial mapping schema, not triggered by events at Lake Taupo. We have checked the records to see if either years experienced exceptional rainfall. We have annual rainfall records, and 30 year average rainfall figures, for Chateau Tongariro in the Lake Taupo catchment. The annual average rainfall there was 2914mm. The annual figure for 1941 was 2994mm, a little moister than average but within 5 to 10 per cent of the annual average. The situation in 1958 is less clear cut and may or may not have impacted on the air photo evidence. The annual rainfall for 1958 was 3199mm, still within the 10 per cent band, but it included a major flood event in February, 1958. Sources: New Zealand Meteorological Service (1941 and 1958) *Meteorological Observations*, Misc Publication 109 and New Zealand Meteorological Service (1973) *Rainfall Normals for New Zealand for the Period 1941-1970* Misc Publication 145, Wellington; and Freestone, H29 table 6.1

[Figure 18.5 Changes in amount of productive land. Waihaha 3B, 1910-1945-2002]

Holding the lake high out of season and all year-round

The seasonality of the new regime is of particular interest. Eser and Rosen, Henderson and Hamilton using daily lake level data provided by the Electricity Corporation of New Zealand, now Mighty River Power, have graphed the seasonal patters of lake levels: Eser and Rosen compare the January to December pattern for 1906 to 1940 with that for 1942 to 1996; Henderson disaggregates it for each of the six decades from the 1940s to the 1990s; Hamilton provides a graph which compares the monthly mean lakes levels pre control (1905 to 1941), control 1941 to 2005, and includes, in addition, the plot for 1941 to 1947 (figure 18.6).[381] We know from other sources, including figure 10.3, that lake levels were higher from 1942 to 1946 than they were in subsequent years. The same figure also shows that lake levels fell sharply during the 1946 drought. The inclusion of data for 1947 has almost certainly muted the contrast between the levels for the early 1940s, compared to those for 1905 to 1941. Figure 18.6, nonetheless, highlights two things; the impacts in the early 1940s and the ongoing change in seasonality. The plot for 1941 to 1947 shows not only high lake levels, but also the fact that these lake levels were at their highest during the October to January period which is of prime importance for farm and garden operations. Comparison of the plots for pre control and control phases shows that lake levels under the new regime have been higher than normal from October onwards each year.

[Figure 18.6 Lake Taupo monthly mean lake levels pre-control, post control and 1941-1947]

The overall outcome

The existence of this substantial and sustained body of water, close to the maximum operational level between 1941 and 1946, had a major impact on the land areas surrounding the lake and on the streams which feed into the lake. Extensive areas to the south and east of the lake which were cultivable prior to 1941, or which had the potential to be drained and developed for agriculture or forestry, became permanent swamps and wetlands. Small but fertile areas on the steeper western shore, including Waihaha, became boggy and unsuitable for crop growing.[382] A high proportion of the lands and settlements most affected were Māori. The same evidence and a similar assessment suggests that changes in lake level and the seasonality of lake storage combined to create changes in the activity and the accessibility of geothermal features close to the lake shore. Māori who had strong cultural links to lake shore and to geothermal features were doubly affected.

We are less certain in our assessment of changes relating to wave action around the lake shores, and shifts in the position of the river flowing across the Tongariro delta. The interplay between ongoing physical processes and human intervention is not clearcut. There is a strong possibility that these were affected by changes in lake levels and the new seasonality of the lake regime. However, in this situation the onus was on the Crown to respond to public complaints by initiating a process of

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[381] Eser and Rosen, I11; Henderson, I49; Hamilton, I35

[382] See Kirkpatrick, Belshaw and Campbell, E3, chapter 12, especially figure 12.15 which maps the amount of productive land in each of the years 1910, 1945 and 2002

monitoring and research. This did not become part of the Crown's working agenda in the initial phase of operation. Māori complaints were received and entered into the files but there is little evidence that they were listened to or acted on. Electric power generation was high priority for the government of the day and the common responses to problems reported were framed in terms of damage and compensation.

The Tangata Whenua Evidence

Environment and culture and tribal identity are interwoven in Lake Taupo waters. The Maori world view considers the lake and its waters holistically as one system: wahi tapu and wahi taonga are part of the fabric of environment and spirituality.[383] Tuwharetoa reminded the Tribunal that the moana, Taupo-nui-a-Tia, is an emblem of the tribe and then ask:

> If our *kaumatua* of old were to come back to the lake today, what would they say to the old places they knew? How would they *karakia* to the *mahinga kai* that have been inundated as a result of the raised lake levels? How would they salute the *tupuna* residing in the rocks that have been drowned? How would they commune with their dead ancestors whose burial places have disappeared beneath the water? They would not feel on familiar territory. They would feel the dislocation, the disruption of the natural order of things, brought about by changing Taupo-nui-a-tia from a great natural lake to a hydro storage reservoir, with the many resulting effects on the surrounding lands and waterways.[384]

The concern of Ngati Tuwharetoa is not only with the mauri of each lake and river, but also with the unnatural interference with the manipulation of water levels or the unnatural mixing of waters with different mauri. There is, Tuwharetoa suggest, confusion and disorder and disruption which affect every element:

> For instance, as well as the water itself, the water sustains insects and microbia all of which have their own *mauri*. The different types of stones on the lakes and riverbeds all have their own *whakapapa*. The many components of a healthy waterway work together to keep the waters clean, and enable us to sustain ourselves[385].

A significant portion of wahi tapu and wahi taonga are located in the lake, close to the lake shore, in or close to the rivers that flow into the lake. The birthing stone, within the lake at Hallet's Bay, is cited as one of the wahi tapu which is now covered by water[386]. The dark coloured rock Te Pueaea, basking place of the ancestral Gods, is also submerged[387]. Loss of taonga, be they mahinga kai or wahi tapu, puts the knowledge base relating to these taonga at risk: if the physical site is lost, the legends, the karakia, and in some cases the waiata which are associated with them, may not

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[383] T A C Royal (ed) and M Marsden, *The Woven Universe: Selected Writings of the Rev. Maori Marsden* (Otaki: Estate of Rev. Maori Marsden, 2003)

[384] Ngati Tuwharetoa, 'Cultural Effects of Mighty River Power's Resource Consent Proposals – Issues Statement of Ngati Tuwharetoa', Document E5(a), p 2

[385] Ngāti Tūwharetoa, 'Cultural Effects of Mighty River Power's Resource Consent Proposals', E5(a), p 3

[386] Ngāti Tūwharetoa, 'Cultural Effects of Mighty River Power's Resource Consent Proposals', E5(a), p 6

[387] Sir John Grace, in his book *Tuwharetoa: The History of the Maori Paople of the Taupo District* (Wellington: Reed, 1959), describes how Ngatoroirangi left four of his ancestral gods in the lake (p 67) and adds: 'there is a very dark-coloured rock situated just offshore, a mile northward of the Motutere promontory. It is called Te Pueaea and to it, at certain times of the year, come the four gods from their subterranean homes, to bask in the sun. The old-time Taupo Māori says that this rock turned red whenever disaster threatened Ngati Tuwharetoa or when the death of a prominent chief of chieftainess was to take place. Since the raising of the lake level for hydro-electric purposes the rock has been submerged.'

survive. Knowledge lost during the decades between the 1940s and the 1980s is proving very difficult to recover in the 1990s and the twenty-first century.

A number of kaumatua, including Arthur Grace, James Hemi Biddle, George Asher, Ringakapo Asher Payne and John Asher gave evidence about the impacts of raising the lake level in 1941.[388] At this point we set out the evidence relating to the land, the water table, and geothermal features.

Ringakapo Asher Payne was teaching at Tokaanu when the control gates became operational and lake levels began to rise. She described the impacts at the southern end of the lake thus:

> Many of the places where our people used to grow crops turned into swampland as the water table rose and the water seeped through. My family's maara became swamps instead: the land behind the school where my mother grew food is ruined, and so is the land on the other side of the Tokaanu river.[389]

Some of the impacts were more immediate, in the years between 1940 and 1945. Others happened after the big flood of 1958. Mrs Payne continues:

> The Te Rangiita family land at Waiotaka was ruined too, even before the 1958 flood they left their home. There were a number of other families who were dairy farming who had to leave their farms. At the turn into Korohe, the land on both sides of the road is ruined. Hautu 1B7 is absolutely ruined. Alongside the Waimarino stream is ruined, the old people had good crops in there.[390]

John Asher, nine years old at the time, described the aftermath of the 1958 flood:

> After the flood the dairy farm very quickly turned to extensive swampland. As a youngster I recall going into the swamp with my grandmother and other kuia to help cut and collect flax for kete and mat making, however this activity finally had to be curtailed as the swamp became overgrown and it was too difficult and dangerous to wade through the wet to get to the flax. I don't recall any effort being made by the authorities to reinstate the farm after the flooding, and it was accepted that the land was lost for farming. Now the land is completely useless and overgrown with willows, toetoe, flax and other scrubby bushes and scrub, and is inaccessible. Several years ago an attempt was made to drain the swamp by opening some drains, without success.[391]

James Biddle, brought up at Korohe near the southern end of the lake, told the Tribunal about maara kai, the food gardens which he described as essential to the community. Each family had its own plot but the work was done collectively and the produce used to feed the whanau and community and supply the marae. When the lake levels rose they had to move their planting grounds to higher land.[392]

Arthur Grace described the impact which the raising of the lake level had on the Tongariro River delta:

> All around this area the people used to grow crops to survive. When they raised the lake it forced a lot of our people to leave their noho. Those places were wonderful crop-producing places, but when the lake was raised it became too wet and they had to shift up to higher

[388] A Grace, E26; J Biddle, E33;G Asher, E39; R Asher Payne, E41; J Asher, E45
[389] R Asher Payne, E41, para 36
[390] R Asher Payne, E41, para 39
[391] J Asher, Evidence for Ngati Tuwharetoa, 27 April 2005, Document E45, para 8
[392] J Biddle, E33, paras 5-7

> ground and the ground was nowhere near as good. The soil on the flats was peaty. They lost out a lot what with the combination of high river and lake levels. Even pine trees have died because the ground is so wet.[393]

The relationship between lake levels, groundwater and floods a matter we have already discussed.

In addition to the impact on land, residences, and farming, the claimants also described the loss of geothermal features vital to their culture and way of life. Charles Wall and Emily Rameka, for example, told us of the Taharepa hot spring and how it was ruined by rising lake levels.[394] Paranapa Otimi described the loss of ten hot springs at Waihi:

> When the Crown raised the lake level, many of the geothermal areas, the fire lifeblood of the Hapu, disappeared. Springs used for centuries to feed, heal and sustain the tribe were lost. Our practices of upkeep and caretaking role for centuries was now gone. Turumakina lost our ability to sustain ourselves.[395]

Maria Nepia is a present day resource manager for Ngati Tuwharetoa who consulted carefully with these and other kaumatua and built up a composite picture. She summarises:

> Fluctuating lake and river levels have caused erosion and inundation of land. Our people reported that large areas of land had become swamp since the Taupo control gates were installed during the war. This is something that has personally affected many of our people as their land has become uncultivable as a result. Siltation has also been a problem in the Tongariro delta area due to decreased flows down the Tongariro River.[396]

Ms Nepia emphasised: the destruction of wāhi tapu and wāhi taonga; the damage to the mauri of the lake by artificial raising of its level and the mixing of waters; loss of Tūwharetoa knowledge of the environment; the need for Ngāti Tūwharetoa, as kaitiaki, to be involved in decision making; and the need for an integrated and holistic approach to environmental management.[397]

The Tribunal's Findings

We find that the Crown held the lake at its maximum control level for almost the entire time from 1941 to 1946. This involved keeping the lake at 1177 feet (two feet higher than average), a level occasionally reached or surpassed in nature but not at all common as a sustained level or in certain seasons. As a result, Maori lakeshore blocks, wahi tapu, geothermal taonga, residences, cropping lands, and development farm lands, were all subject to inundation, erosion, and a rise in groundwater that turned taonga and farmland alike into swamp. As the claimants argued, this had profound social, cultural, economic, and spiritual consequences for them.

We note, however, that some matters in the claimants' evidence related to the effects of the TPD rather than to the control gates and the raising of the lake. In particular, the

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[393] A Grace, Document E26, para 27

[394] Emily Rameka, Evidence for Waipahihi Marae, Ngati Hineure, Ngati Te Urunga, Ngati Hineuru, Ngati Tutemohuta, Ngati Rauhoto of the Hikuwai Confederation of Ngati Tuwharetoa, February 2005, Document D26; T Wall, Evidence, D18

[395] Paranapa Otimi, Further Evidence for Nagti Tuwharetoa, 27 April 2005, E16(a), p 4

[396] M Nepia, Evidence for Ngati Tuwharetoa, 20 April 2005, Document E5, para 12.2

[397] M Nepia, E5, paras 12.1-12.6

mixing of waters (and harm to the mauri) was caused by the TPD, not the control gates. In terms of the change to the mauri of the lake from artificial control of its level, we do not accept the claimants' argument in its entirety. They were themselves seeking to substantially lower the lake by artifical means for the decade or so before the Crown's installation of the control gates. The key point, perhaps, is that this was a price the tangata whenua were willing to pay to develop their lands. They had no say in the effects on their taonga when the Crown decided to do the opposite of lowering the lake. Thus, the decision was not made in partnership with them. It may be that some interference with the mauri of the lake was essential in the national interest (of hydro-development). Again, that was a matter to be agreed, not imposed, and after all other options had been fully explored.

We turn now to the question of whether the Crown remedied this damage or provided fair and proper redress for it.

Did the Crown provide an effective remedy or redress for the impacts in the 1940s?

The impacts described above were soon brought to the Crown's attention, with widespread public concern and complaint from Māori and non-Māori alike from 1942 onwards. The native township of Tokaanu was the most visibly affected.[398] Ministers of the Crown listened, visited the sites affected and were fulsome in their acceptance of fault. Prime Minister Fraser, for example, was very specific in his statement to *The Dominion* on 30 June 1943:

> The Prime Minister, Mr. Fraser, said it was the duty of the Government to look into the matter to see whether a mistake had been made. From his own point of view it was a question whether the people got sufficient warning of what was likely to happen from the damming of the lake. 'If the people were informed that the lake would not rise then it was a bad engineering forecast and bad administration' continued Mr. Fraser. 'I do not mince matters. The job was not handled well, and I say that right out. The conclusion was arrived at that the areas would not be flooded. The dam was put in, the lake rose, and the sections were flooded and a good deal of harm resulted. I have nothing to say in extenuation of such lack of foresight. When people's houses and premises were flooded it came unexpectedly to the people and to me. No Government will stand by and have injustices imposed on private citizens because of Government operations. It would be intolerable to allow them to continue.[399]

Claims for compensation were lodged and a number of these were dealt with on an ad hoc basis in 1942 and 1943. Money was spent to obtain a new site for Tokaanu, shift buildings which were at risk, build a protective wall at Waihi and pay compensation to some of those most visibly affected.[400] Officials were not convinced that these arrangements were robust and sought approval for special legislation, which was executed in the Finance Acts of 1944 and 1945, and in the Lake Taupo Claims Compensation Act of 1947. In this section, we will address the question of whether

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[398] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, paras 180-253

[399] *The Dominion*, 30 June 1943, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 174; also supporting documents, E1(a), vol 2, p 692. Cf *Hawkes Bay Herald Tribune,* 6 July 1943

[400] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, para 294. Compensation was paid to Māori claimants from vote Public Works under the authority of the Public Works Act 1928 and via the administration of the Native Land Court.

these Acts, the compensation process and its outcomes were consistent with the Treaty.

The Claimants' Case

The claimants suggested that the Crown accepted responsibility for the harmful effects of its actions in the 1940s, but did so in such a way as to provide insufficient compensation and no effective remedy. First, Tuwharetoa wanted to save their cultivable and development lands instead of getting compensation. The tribe researched alternative engineering options but officials were not prepared to give them serious attention, preferring the lesser cost of paying compensation. Given that modern power needs can in fact be met from a lower lake level, the claimants could not account for why their proposals in the 1940s were not taken seriously. Secondly, the claimants argued that the compensation paid by the Crown was woefully inadequate, in light of the harm that had been suffered, the degree to which it could have been avoided, and the profit that the Government was making from using their taonga. The 1947 Compensation Court found that there had been serious physical impacts from raising the lake, causing significant economic harm, so that, at least, was in the claimants' favour. But there was little understanding of other kinds of harm and the resultant compensation was less than generous.[401]

In particular, the claimants suggested that the Lake Taupo Compensation Act 1947 set the lake level at 1177 feet. Counsel cited the historical evidence of Mr Walzl:

> …. the insistence that there could be no responsibility for any damage to land over 1177 feet, (the level at which the lake had been controlled), meant that impacts on land, that in one way or another had arisen from there being more water held in the lake for longer periods, were not acknowledged. Dozens of claims and thousands of pounds worth of damage were ignored. In fact despite the acceptance of claims and the provision of assistance at Waihi and Tokaanu, the attitude of officials was often to blame Maori for the predicament in which they found themselves suggesting that they had built too close to the water or were using the higher water levels as an excuse for poor farming.[402]

As a result, the claimants only received £38,500 in damages from the court and £67,575 in out-of-court settlements, a total of £106,075 from the £380,000 originally sought. Not only was this inadequate, but compensation was assessed according to land values and for individual owners without taking any account of:

- its cultural or spiritual value;
- the impact on geothermal springs and rivers;
- damage to taonga, wahi tapu, and places of great significance;
- the impact on communities; and
- the impact on the claimants' whole way of life.[403]

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[401] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 159-161
[402] Feint, Ngati Tuwharetoa closings, 3.3.106, p 161
[403] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 160-161, 165-166

The Crown's Case

The Crown made brief submissions on these points. As a general proposition, it suggested that, prior to the Resource Management Act, management of the environment did not usually recognise or take into account Maori values or interests 'in a manner now regarded as important and necessary'.[404] It also stated that it had a responsibility, where its actions impinged upon the cultural and spiritual relationships of iwi with their taonga, to inform itself and take that relationship into account so as to avoid or minimise prejudice to it.[405] The Crown did not comment, however, on whether or not it failed to compensate Tuwharetoa for cultural, spiritual, and intangible harm arising from the raising of the lake, or whether that would have been regarded as 'important and necessary' in the circumstances of the 1940s.

Rather, the Crown argued that the Government's response was swift and sympathetic and that appropriate compensation was paid, given that the effects of flooding have been exaggerated and much of the affected land must have been marginal anyway.[406] The Tribunal 'cannot now properly determine whether the level set pursuant to the legislation of 1177 feet (and thus the yardstick for compensation) was unreasonable or substantively unfair'.[407] The historical evidence was that affected Maori and Pakeha were treated alike, that the compensation was determined according to due process, that it was fair and substantial, and that the majority of Maori owners had received it.[408]

The Tribunal's Analysis

In order to answer the question as to whether the Crown provided either an effective remedy or effective redress, we will be considering:

- Tuwharetoa's attempt to seek an overall remedy rather than compensation or protective works, involving lowering the lake while preserving the capacity for hydro power;
- The Crown's mix of remedy and redress provided in its 1947 compensation process;
- Whether compensation was limited to claims for damage below 1177 feet;
- Whether the parameters set for compensation were fair in the circumstances and enabled the Crown to comply with the Treaty; and
- Whether the compensation process and its outcome was fair in the circumstances and compliant with the Treaty.

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[404] Crown closings, 3.3.111, part 2, p 465
[405] Crown closings, 3.3.111, part 2, p 466
[406] Crown closings, 3.3.111, part 2, p 472
[407] Crown closings, 3.3.111, part 2, p 490
[408] Crown closings, 3.3.111, part 2, pp 456-457, 490-491

Remedy rather than redress: Ngati Tuwharetoa seek to lower the lake

Ngati Tuwharetoa moved to widen the debate in the mid-1940s. 'Rather than merely seeking compensation,' reports Walzl, 'Ngati Tuwharetoa were exploring ways to bring an end to lakeside flooding.' They took Ministers of the Crown to visit the localities most affected, they pointed out that compensation arrangements were narrowly construed, and they urged the Government to consider alternatives. To support these face to face discussions, Ngati Tuwharetoa commissioned Grant and Cooke, Registered Surveyors and Civil Engineers from Auckland, to investigate and report on the alternatives. The field work was done by Mr Glanville and reported by Grant and Cooke in January and October 1945, and used by Tuwharetoa in attempts to enter into informed dialogue with Government. Grant and Cooke looked at the positives and the negative of the work done by the Government Engineers. They confirmed that the engineering work was well done and the control gates correctly positioned but underlined the problems which resulted when the lake was held near the maximum controlled level for sustained periods of time as happened between 1941 and 1944:

> Thus long seasonal stretches of low water had altogether disappeared with the result that the low-lying areas had become waterlogged and completely useless even if they had not been completely inundated.[409]

The Consultant Engineers confirmed the Tuwharetoa position, articulated in 1926 when the tribal Trust Board first made an approach to the Crown. The consultant report recommended that the lake be lowered by three feet and the controlled operational maximum be set at 2ft on the lake gauge. 'This would give sufficient fall to the drains and streams,' wrote Grant and Cooke, 'to enable areas to be farmed that were practically useless.' In the months that followed they identified the engineering work that would be needed to maintain the same hydraulic gradient as far as the Huka Falls and provide the full volume of water for the Waikato power stations. When Grant and Cooke reported in October 1945, they balanced these expenses against the savings in compensation and the benefits from the farmlands which could be restored and the swamps which could be drained[410]. Armed with this report, Ngati Tuwharetoa was well equipped to engage in dialogue with its Treaty partner.

Ngati Tuwharetoa was intent to widen the options; Public Works officials, however, preferred to stay with the status quo and pay compensation. No changes were made: lake levels remained close to the maximum control level through 1944 and 1945, and claims for damage continued to come in. Legislation was drafted and the Compensation Court was established by the Finance Act (No 3) 1944.[411] Claims were lodged in large numbers but the Compensation Court was slow to meet. In September 1946, Ngati Tuwharetoa met with the Prime Minister, Ministers and officials to ask

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[409] Summary report in *New Zealand Herald*, 13 January 1945. Compare extracts from 'Report on damaged lands surrounding Lake Taupo', in USPW to MW, AANU 7740 W 5159 21/53/11 pt 2, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 193; also supporting documents, E1(a), vol 2, pp 676-67

[410] Extracts from 'Report on damaged lands surrounding Lake Taupo', AANU W5159-Box 47-21/5311 pt.4, ANZW, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, note 193; also supporting documents, E1(a), vol 2, pp 676-67

[411] The Compensation Court would be made up of the Chief Justice of the Supreme Court (or alternate) and the Chief Judge (or alternate) of the Native Land Court. Claims were to be lodged within 12 months (later extended to 16 months), Walzl in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, para 334

that claims be heard, and to urge Government to consider the alternatives. Referring to the Grant and Cooke option which would allow the lake to be lowered without impacting on its use for electricity, they submitted:

> We, the Natives, definitely assert that in preference to erosion claims, we would rather have a scheme somewhat of this nature adopted, not only to preserve our ancestral lands, but to be of ultimate benefit to the national wealth of the country[412].

In other words, Tuwharetoa considered their capacity to contribute to the farming economy to be just as important in the national interest as the capacity of their taonga to generate electricity.

The Minister of Internal Affairs, WE Parry, thanked the tribe for what he called their 'constructive idea', which could enable money to be spent on saving their land and keeping it in production instead of on compensation for damage. The Prime Minister noted that the question of whether the lake could be kept at a lower level, without compromising hydro power, was a highly technical question that he would refer to officials. Parry promised that it would not be 'brushed aside'.[413] The proposal was put forward again in 1947, by a different set of engineers, who thought it 'economic' but at the cost of destroying the Huka Falls.[414]

The General Manager of the Hydro-Electric Department, F Kissel, investigated these proposals and rejected them. He thought them uneconomic and considered that lowering the lake would also harm rivers and fisheries. The most important consideration, as far as we can tell, was that the Government considered hydro-electricity so important in the national interest, and the maximum control level to be within the bounds of what had been natural, that there was insufficient reason to change the status quo. The question of whether a more natural seasonal rhythm could be restored without compromising power does not appear to have been considered.[415]

The alternative advocated by Tuwharetoa, therefore, was not accepted and the maximum control level remained unchanged through the 1950s. The Government turned from an overall remedy (restoring a lower lake level and more natural, seasonal levels) to a mix of remedy (flood protection) and redress (compensation for damage). Claims came in during 1945 and 1946, and a compensation process was established with a special court that sat and made awards in 1947. Major flood damage occurred in 1952, 1957 and 1958: more claims were made and compensation paid.[416] We turn now to the question of whether the primary 1947 compensation process provided either effective remedy or effective redress for the impacts described above.

A Mix of Remedy and Redress: the Crown's Compensation Process, 1947

In 1944, the Government began the compensation process by enacting section 34 of the Finance (No 3) Act, which established a special court to hear claims relating to the

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[412] 9 September 1946, Deputation to Prime Minister, MAI W2459-19/3/1 part 2, cited by Walzl, in 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, notes 194, 195; also supporting documents, E1(a), vol 1, pp 137-152

[413] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 117-118

[414] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 123

[415] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 119-125

[416] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 445-529

taking or injurious affection of land arising from the installation of the control gates and the raising of the lake. A special court was necessary to combine (predominantly) Maori-owned and Pakeha-owned land in one process. As we described in Chapter 9, Maori and general land were normally subject to different processes and courts. The special court would look at both, with the Chief Justice or a Supreme Court judge and the Chief Judge or a judge of the Maori Land Court as its members.

Some 400 claims for compensation were received during the 16–month period following the passing of the Finance (No 3) Act 1944.[417] The claims were for lands affected by the public works and ranged from £5 to £33,000. The Minister of Works was concerned that 'damages are being sought not only for lands that are said to be inundated but also for lands lying at various higher levels which are stated to be affected by the raising of the sub-surface water'.[418] This became a key issue for the process and for the claim issues raised in this Tribunal. As the Crown argues, its lawyers reached an agreement with the claimants' lawyers in 1947, that the maximum control level of the lake should be taken as 1177 feet.[419] This level was then set in stone by legislation (the Lake Taupo Compensation Claims Act). Any setting of a higher level in the future had to be gazetted and compensated. The claimants in our inquiry argued that the 1177-feet figure was a cut-off one for lands affected and that damage to land above that level was not compensated. This, they maintained, ignored the serious effects of raising the groundwater levels and turning prime farmland (above 1177 feet) into swamp.[420] We turn now to address that question.

Was compensation limited to claims for damage below 1177 feet?

The claimants based their argument on the evidence of their historian, Mr Walzl, who argued that the Government refused to accept any liability for damage to land above the 1177 feet level.[421] After reviewing the documents cited by Mr Walzl, it is our view that this is not correct. The Government was aware of the problems of waterlogged land above its maximum control level. Its officials accepted that land below 1177 feet 'must for the future be regarded as virtually sterilized – ie available for little but rough grazing at irregular periods the occasions and lengths of which will not be known in advance so as to enable a regular farm programme for their use to be adopted'.[422] Such lands, the Crown solicitor concluded, would never again be usable for buildings or agriculture. Above that level, however, there had been occasional flooding but also, more importantly, there were lands 'which are stated to be affected by raising of the sub-surface water'.[423]

The Crown solicitor instructed the Government's valuers to consider the situation of land between 1177 and 1178 feet, which might be subject to flooding. He also asked

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[417] Land Purchase Officer to Under Secretary Public Works 12 Feb 1947, in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', supporting documents, E1(a), vol 1, pp 476-479. Compare *Rotorua Maori Post*, 25 November, 1947.

[418] Minister of Works to Prime Minister, 18 March 1947, in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 2, p 668

[419] Crown closings, 3.3.111, part 2, p 491; Lake Taupo Compensation Court decision, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, pp 320a, 707

[420] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 159-160

[421] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 126, 191

[422] quoted in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 125

[423] quoted in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 122

them to evaluate the effects of the 1177-feet level on land above it in terms of creating or aggravating bogginess, damage from the raising of the water table, and drainage.[424] Many of the claims lodged with the special Compensation Court related to land above the 1177-feet mark.[425]

Some of the claims filed in the 1940s, however, were based on actual or potential damage from an idea that the lake had been controlled at its maximum possible level (1179 feet). We accept the evidence that the functional level of the lake in the 1940s was 1177 feet. The claimants' and Crown's lawyers agreed at the time on a 1177-feet figure and that any higher levels in future would need to be notified and compensated. This agreement was based on the Government's information to the claimants that it had controlled the lake at that level. The claimants in our inquiry state that 163 claims (for £42,246) had to be withdrawn as a result. Those claims were based on calculations of damage that had (or would have) arisen from a lake level of 1179 feet.[426] We lack information on the nature and extent of those claims but, on the face of it, they cannot all have been valid because the lake was not actually controlled at that level.

Nonetheless, heavy weather during the period did take the lake above 1177 feet – the system was designed to hold and retain this additional water. The graphs show that there were a number of such events in the 1940s (see figures 18.2 and 18.3). It seems to us, therefore, that it may have been unfair to rule out all claims for damage just because the lake was not deliberately kept above 1177 feet. Keeping it at the maximum control level left Maori landowners at the mercy of the weather, in a way that they would not have been if the lake had been controlled at a more natural (and seasonal) level.

It is clear, however, that the Compensation Court could (and did) consider claims for damage to land abutting the lake, based on the lake having been kept for sustained periods at a level of 1177 feet. In doing so, it was not limited to considering damage below the 1177-feet mark. How far the waterlogged state of land, and of damage, above that level was actually caused by keeping the lake so high was something that then had to be proven to the court. Due to a lack of evidence before us (especially about the out-of-court agreements), we do not know to what extent high groundwater levels and flooding over the 1177-feet level were actually taken into account in the compensation arrangements that followed.

What other parameters were set for assessing compensation and were they reasonable in the circumstances?

The claimants argue that 'compensation was assessed according to land valuations, without any account being taken of its spiritual or cultural value, or the impact on

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[424] 'Instructions for Valuers', Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 2, pp 704-705

[425] Lake Taupo Compensation Court decision, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, pp 319a-339a

[426] Lake Taupo Compensation Court decision, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, pp 320a, 338a-339a; Chief Land Purchase Officer to Under Secretary, 1 September 1947, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 2, p 698b

geothermal springs or rivers, and without considering the impact on a way of life'.[427] At first, the Finance (no 3) Act 1944 set up a compensation process that, although it had a special court, was limited to considering the usual kinds of 'injurious affection' contemplated in the public works legislation (see Chapter 12). This limited the court to calculating any diminishment in value of the land affected. Other kinds of damage and harm could not be considered.[428]

The Native Department was rightly concerned about this situation. The Under Secretary advised his minister that 'Maoris will suffer a great deal of loss which could not be awarded to them as compensation on the principles mentioned'.[429] This included various kinds of personal damages, such as lost commercial opportunities. In particular, considering the claimants' argument, the Department was concerned about the loss of geothermal features, losses to the community that could not be encompassed by the title system, and the loss of vital historical and cultural associations with ancestral lands and taonga.

First, there was the example of the loss of a house at the highly prized ancestral settlement of Tokaanu, which could not be compensated just by providing a house somewhere else:

> Even if the Government gives him [a Tokaanu homeowner], as it will be submitted it should, the freehold of his new house, subject to his paying now or over a period of years the difference in value between the new and the old house, he may lose a very great deal. The Maori has a great attachment to his land. It has belonged to his people, his hapu, or his family for generations. It is his and the compulsory taking of his home removes from him all the traditions and loyalties belonging to his home.[430]

Secondly, there was the loss of hot pools at Waihi 'apparently irremediably', which was a 'communal loss, but the principle would compensate only the owners of the particular piece of land, and as owners of that land'.[431] In other words, the individualised title system would not allow for the proper compensation of communal rights (see Chapter 8). Also, individual owners of the titles could only be compensated for land, not for loss of the hot pools.

The Public Works Department did not agree. It opposed 'claims of a personal nature' and missed the point entirely about the claimants' way of life and the historical and cultural value of land and hot pools injuriously affected. 'I can see little distinction,' wrote the Under Secretary with regard to the Tokaanu housing example, 'between the Native claims in respect of the dwelling houses and the claims of a European on the same account.'[432] Nor could he see why communal losses could not be compensated under the ordinary system. Acting on the Native Department's concerns was 'unnecessary' and would create an unfortunate precedent.

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[427] Feint, Ngati Tuwharetoa closings, 3.3.106, p 160
[428] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 110
[429] quoted in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 110
[430] Under Secretary to Native Minister, 22 November 1944, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, p 92
[431] Under Secretary to Native Minister, 22 November 1944, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, p 92
[432] Under Secretary to Minister of Works, 24 November 1944, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 2, p 717

Nonetheless, the Native Department's views indicate that the Crown was aware in the 1940s of the issues that have led to today's claim before this Tribunal, that its compensation failed to take proper account of geothermal features, cultural and spiritual elements, and harm to the claimants' way of life. That knowledge was not limited to the Native Department and Minister. From other statements and actions regarding Waihi and Tokaanu in the 1940s, the Government of the day was clearly both capable of understanding Maori concerns about the vital importance of their communal hot pools and their historical and cultural associations with their ancestral land, and of taking them into account when trying to rectify problems from raising the lake levels. The claimants themselves, in meetings with officials and ministers, and also Maori members of the Government (such as E Tirikatene) kept raising these matters and getting at least some attention and response to them.[433]

In those circumstances, the Governments of the 1940s should have been capable of acknowledging and taking such matters into account when setting parameters for compensation. If they failed to do so, it was unreasonable in the circumstances and in breach of the Treaty.

Given its knowledge of matters at Waihi and Tokaanu, and the advice of the Native Department cited above, the creation of a special compensation court was an opportunity for the Government to step outside the normal public works process and set up a Treaty-compliant process. The Native Department won some success in 1945, when section 36 of the Finance (no 2) Act extended the right of compensation:

> a person shall be deemed to have been injuriously affected by reason of the aforesaid acts within the meaning of this subsection if he has suffered an injury by reason of anything which would have been a tort if it had been done without statutory authority.[434]

The Native Minister was concerned that the court might interpret this section too narrowly and he warned the Minister of Works that the legislation would be amended to 'give effect to the real intention of the government' if that happened.[435] Everything then depended on whether this amendment would in fact meet the Native Department's concerns, and how the court applied its jurisdiction in evaluating the claims.

Was the compensation process and its outcome fair in the circumstances and compliant with the Treaty?

The claimant position is that they received £38,500 in damages and £67,575 in negotiated settlements. This represented a payment of £106,075 out of an initial claim for £380,000, with a shortfall of £269,898.[436] There are some problems with these figures. First, the amount of £38,500 was an error in a Maori Land Board document, reproduced in Mr Walzl's report.[437] The correct figure is £35,800.[438] Secondly, that

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[433] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 60-63 (for hot pools), 70-81, 84-86, 109, 111 (for the importance of historical and cultural associations with ancestral land and taonga)
[434] Finance (no 2) Act 1945, s 36
[435] Native Minister to Minister of Works, 12 December 1945, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, p 709
[436] Feint, Ngati Tuwharetoa closings, 3.3.106, p 160
[437] Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 129
[438] Lake Taupo Compensation Court decision, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, p 339a

sum is the total amount of compensation awarded by the court and agreed in out-of-court settlements. The court awarded £15,994 in damages and it recorded negotiated agreements to the amount of £19,824, which together made up the 'approximate' total of £35,800 in compensation. In its decision, the court noted that negotiated settlements had reduced the amounts claimed by £67,575, the figure which Ms Feint mistakenly believed to have been awarded.[439]

Thirdly, the exact sum claimed initially is unclear. Ms Feint cites the figure of £380,000, which came from a 1947 memorandum by the Minister of Works.[440] In Parliament, Mr Bloodworth suggested that that figure was an estimate of what the claims might be worth if paid in full, a suggestion that was not contradicted by the Government.[441] In September 1947, the Chief Land Purchase Officer stated that there were 389 claims from Maori, involving roughly 28,000 acres and claiming for £269,766.[442] We rely on the thinking of the time, that if paid in full the claims could have been worth around £380,000. The actual compensation, at about one-tenth of that figure, raises questions about the fairness of the outcome.

Unfortunately, we lack comprehensive evidence on how the court arrived at its awards, how and why it rejected certain claims, and the basis of agreement between the parties in their out-of-court settlements. This makes it difficult for us to comment on the fairness of the process or its outcomes. Why, for example, did the Native Affairs Board lodge a claim for £19,632 in respect of the Tokaanu development scheme and settle it out of court for £5,360? The original claim was on the basis that land had or would become unsuitable for farming if the lake was held at the incorrect 1179-feet level.[443] Does that explain the massive reduction in the amount agreed? Or were other factors at work? We have no way of knowing.

In terms of how the court interpreted its jurisdiction, it appears from the available evidence that it concentrated mainly on damage to farmland, loss of access, drainage, and future prospects of subdivision for commercial development.[444] According to the Crown solicitor in the case, A Currie, personal damages (possible under the Finance (no 2) Act 1945) were only awarded once, for Claim 382. Otherwise, the court concentrated on damage to land.[445] Claim 382 was made by Barnett Otene for £562, for loss of stock and boats when 'water was let flow from the control gates without warning'.[446] The claim was settled by agreement between the parties for £360.[447] If

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[439] Lake Taupo Compensation Court decision, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, pp 321a-339a

[440] Feint, Ngati Tuwharetoa closings, 3.3.106, p 160; Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 121

[441] T Bloodworth, 26 September 1947, NZPD, 1947, vol 278, p 632

[442] Chief Land Purchase Officer to Under Secretary, 1 September 1947, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 2, p 698b

[443] T J Hearn, 'Taupo-Kaingaroa Twentieth Century Overview Land Alienation & Land Administration: 1900-1993', Document A68, pp 375-376

[444] This conclusion is based on a review of primary documents in Hearn, Supporting Documents, A68(f), pp 1-181, 253-378

[445] Currie to Registrar, 30 January 1948, Hearn, Supporting Documents, A68(f), p 292

[446] Solicitor for the Claimants, Claim to Compensation under the Public Works Act 1928 and the Finance Act (no 3) 1944, 1946, Hearn, Supporting Documents, A68(f), p 86

[447] Lake Taupo Compensation Court decision, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, p 337a

Currie was correct, then the Native Department's amendment had had almost no effect, and the intention of the Government was in fact defeated.

In terms of geothermal features, the court examined evidence and decided:

> some differences of opinion have been shown to exist as to the effect, if any, the raising of the lake level has had on sites of thermal activity, but on the evidence the Court is not justified in attributing to the rise in the lake level the variations in thermal activity which have been described and which are common in other districts of thermal activity.[448]

We do not have the evidence on which the court relied in coming to this decision. In his closing submission, the Crown solicitor argued that the issue was one of commercial value. Had the hot springs and geyser potential for commercialisation? The answer, in his view, was 'no'. They were used for cooking (and, presumably, other personal uses) but that was neither here nor there. In any case:

> Apparently thermal activity moves from spot to spot and from pool to pool. The outlets get blocked and break out in fresh places…The actual pools come and go. The thermal activity is there all the time and can be achieved by boring, but no one at Tokaanu has shown any wish to put down a bore, but are content to follow the hot water from pool to pool.[449]

The claimants' solicitor argued that the Tokaanu hot pools were used by the community for cooking. The geyser was a valuable tourist attraction that had played every fifteen minutes until the lake level was raised and had not played since.[450] The court appears to have accepted the Crown's arguments, although we have no information as to the reason.

The claimants in our inquiry were adamant that many remarkable and specific surface manifestations, in the form of hot pools and springs, were damaged or destroyed by the raising of the lake.[451] Such also was the view of the Native Department and Public Works Department at the time. Both departments accepted, for example, that compensation was due for the lost hot pools at Waihi.[452] As a result of the court's decision, the claim about the destruction of the only geyser at Tokaanu (for example) was rejected, despite the Government's acceptance beforehand that geothermal features at that township had been damaged.[453]

Although we do not know exactly what the court of 1947 was relying on, the evidence available to us is that geothermal features were in fact changed (in some cases permanently) by the raising of the lake over such a long and intensive period. Mr Bromley of the Institute of Geological and Nuclear Sciences submitted that changes in lake levels affect lakeshore and nearby hot springs, geysers, and other such features through inundation, erosion, and rises in groundwater. Such changes can be

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[448] Lake Taupo Compensation Court decision, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, p 321a

[449] Legal submissions, 1947, Hearn, Supporting Documents, A68(f), pp 318-319

[450] Legal submissions, 1947, Hearn, Supporting Documents, A68(f), p 280

[451] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 152, 154

[452] Under Secretary to Native Minister, 22 November 1944, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, p 92; Under Secretary to Minister of Works, 24 November 1944, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 2, p 717

[453] Lake Taupo Compensation Court decision, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, p 339a (rejected Claim 69); Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 127, 162-163

permanent, even if lake levels revert to their original state.[454] Dr Severne's evidence was to the same effect, although she noted that higher lake levels could improve as well as damage some springs.[455] Mr Hamilton accepted their expertise and concluded that hot springs were affected by the raising of the lake, especially during the sustained high levels of the 1940s.[456] The Crown did not refute this evidence. Mr O'Shaughnessy, for Environment Bay of Plenty, accepted under cross-examination that if new geothermal features spring up elsewhere, that does not negate the loss of special hot pools and taonga to Maori.[457] We agree. Compensation was certainly due for the loss of such taonga and the impact of their loss on the claimants' culture, heritage, and way of life.

It is also clear, from the evidence available to us, that the Native Department concerns of 1944 were well founded. There is no suggestion from any of the records about the compensation and the reasons for its award, that the impact on communities rather than individual title-owners was considered, or that any account was taken of the cultural and historical significance of land and places.[458] This was a major flaw in the process and helps to account for the very small amount of damages awarded.

Finally, we note questions about the nature of the compensation and its effectiveness. Many awards were based not on compensating for damage but on prevention or rectification of damage. They were earmarked for the moving of buildings, facilities for drainage, building protective walls, and other such activities. It was noted at the time that the court only had power to award money as compensation, so its stipulations as to how that money should be spent (even where it was noting agreements between parties) were of no legal effect. The money was paid first to Maori Land Boards, not claimants. We have no comprehensive evidence on its ultimate fate. The available evidence suggests that some of it was held by the boards for many years, that some awards were too low to pay for the recommended protective works (which were not done), and that some of it was paid out to individuals.[459] Hearn suggests that the Maori Land Court had to get involved, titles had to be sorted out, and sums for survey liens and rates arrears deducted, before individual owners got payments. Awards on the development scheme blocks were divided between owners and the Native Department.[460] We are not able to gauge the results with any certainty.[461]

The Crown argued that there is no evidence of any discrimination between Maori (the great majority affected) and Pakeha.[462] The Crown also submitted:

> In relation to the 1947 compensation commission Mr McBurney is of the view that the majority of the money was paid to Maori land owners. He is not aware of what proportion of

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[454] Bromley, H34
[455] C Severne, Brief of Evidence for Ngati Tuwharetoa, 15 April 2005, Document E7
[456] Hamilton, I35, pp 42-43
[457] Hearing Transcript, Week 8, Rotorua, 11-15 July 2005, 4.1.9, p 387
[458] Hearn, Supporting Documents, A68(f), pp 1-181, 253-378
[459] Hearn, Supporting Documents, A68(f), pp 1-181, 253-378; see also Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1; and P McBurney, 'Scenery Preservation & Public Works Takings (Taupo-Rotorua) c. 1880s-1980', revised version, 26 April 2005, Document A82(b)
[460] Hearn, A68, pp 376-377
[461] Hearn, Supporting Documents, A68(f), pp 1-181, 253-378; McBurney, A82(b), pp 356-361
[462] Crown closings, 3.3.111, part 2, p 491

> the money was paid to Maori owners in 1960. In summary considering the compensation for the lake levels Mr McBurney considers that the Crown responded in an appropriate manner to the claims for damage with regards to lake levels. McBurney considers that the compensation process followed the due process procedure.[463]

We have reviewed the evidence on which this submission is based. First, the Crown's argument that McBurney believed the majority of money was paid out to the owners was based on the following cross-examination:

McKechnie	In relation to the 1947 compensation, are you aware of how much of that was paid to Maori landowners?
McBurney	In relation to which?
McKechnie	The '47 compensation.
McBurney	No. But I think the feeling I had was that there was a majority of Maori landowners. Hmm.[464]

We do not consider that this exchange can support any certainty that the majority of money was paid to the owners. Mr McBurney's report does not come to this conclusion.[465]

Secondly, the Crown relies on McBurney's evidence to conclude that it responded appropriately to claims for damage, both in terms of compensation and in terms of following due process. In his report, McBurney states that the payment of compensation followed due process and was appropriate and 'substantial' but still only, by his calculation, 25 per cent of what had been claimed. Sometimes, however, even due process failed to arrive at a fair result.[466]

We agree with the Crown's submission that due process was followed, although we are not sure of the extent to which Tuwharetoa were actually in control of their own case. They appear to have received a fair hearing. The Compensation Court followed proper procedure but it may not have interpreted its jurisdiction entirely correctly. We note the Crown solicitor's view that its section 36 jurisdiction was only applied to one claim out of some 380. We also note the legal tangle left in its wake, where some of its decisions related to land blocks rather than owners, some required works that it did not have authority to order, and all had to be carried out by Maori Land Boards unsure of their exact responsibilities. There is no suggestion, however, that the claimants were treated unfairly by the court. It simply failed, as the Native Department feared it would, to give weight to (and pay compensation for) matters of great spiritual and cultural significance to the claimants. The legislation governing jurisdiction should have explicitly provided for this. In that respect, Tuwharetoa's claim before this Tribunal is well founded.

What was the economic impact on Tuwharetoa and their whanaunga?

The claimants argue that farmland immediately abutting the lake was damaged or rendered unusable, while more distant land became waterlogged and (to an extent)

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[463] Crown closings, 3.3.111, part 2, pp 491-492
[464] Hearing Transcript, Week 5, Turangi, 2-6 May 2005, 4.1.6, pp 135-136
[465] McBurney, A82(b), pp 343-373
[466] McBurney, A82(b), pp 348, 372-373

unusable. This had a disproportionate effect on them because their settlements, kainga, best agricultural lands, and (as a result) many of their wahi tapu, were close to the lakeshore. The Native Department at the time confirmed that not all things were equal and that Tuwharetoa could not simply substitute other, less rich, less valued, less historic, and fundamentally less useful land for what had been lost or impaired. This very matter, the Under Secretary informed the Minister, must be able to be taken into account in arranging compensation and alternative sites of residence.[467] We do not have the full minutes and proceedings of the Compensation Court on our Record and we lack technical evidence and interpretation on how far, in economic terms, the compensation (or protective works) provided fair redress.

The economic impact was greatest on two fronts: first, much prized crop-growing land necessary for the subsistence economy was either lost or damaged; and secondly, the land development schemes necessary for Tuwharetoa's development in the Pakeha economy were seriously affected. For both points, we have observations from officials and tribal leaders of the time, the evidence of tangata whenua witnesses in our inquiry, and the findings of the 1947 compensation inquiry. The court held in 1947 that the raising of the lake, with consequent 'banking up of streams leading into the lake', had caused inundation, erosion of lake shores and river banks, and impeded drainage so as to 'convert otherwise dry land into damp or boggy areas'.[468] This had been shown to have affected 'large farming areas' in the development schemes, the Crown had acknowledged it, and the claims had been settled. The effects on farmland were not, in the court's view, a matter of major contest. Rather, the parties differed on how far potential residential and camp sites had been affected, and whether geothermal features had been changed as a result of raising the lake.[469]

In our view, this is decisive. As Ms Feint notes, both tribal leaders and the Native Department explained the problems with cogency. She cites the Chairman of the Waihi Pah Committee, Wiri Mariu, who wrote to the Minister of Works in 1945:

> Taking the majority of the Tuwharetoa Tribe living around the lake, their cropping lands are under water or rendered useless, and has interfered greatly with the means of living and has to depend on buying potatoes when they can due to shortage at the present time, and that is an unknown thing here before the lake was interfered with.[470]

In 1944, the Under Secretary of the Native Department observed with regard to Waitahanui:

> At Waitahanui the whole of the agricultural and grazing land of the Maoris has been soured and rendered useless. The principle wanted by the Public Works Department [compensation for diminished value] would probably give the full value of that land, but would allow nothing for the fact that the Maoris have no similar area in the district, can obtain no similar area

[467] Under Secretary to Native Minister, 22 November 1944, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, pp 90-92
[468] Lake Taupo Compensation Court decision, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, p 320a
[469] Lake Taupo Compensation Court decision, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, pp 320a-321a
[470] Quoted in Feint, Ngati Tuwharetoa closings, 3.3.106, p 155

> because there is not one, and for some years have had to and for all time will have to purchase vegetables, milk etc. at considerable cost and inconvenience from Taupo.[471]

The Crown's challenge to this evidence is mainly that there was natural flooding before 1941, and these lands must therefore have been more marginal than the claimants would have us believe.[472] The historical evidence is clear, however, that Tuwharetoa and their whanaunga were able to maintain their traditional lifestyle around the lake prior to 1941. The keeping of the lake at a sustained high level from 1941 to 1947 changed this position and had immediate as well as long-term effects. The Crown concedes that the lake was kept at high levels on a fairly sustained basis for thirty years (through to the end of the 1960s).[473] The ability for land to really start recovering – or at least to be available for salvaging – must surely have been, by the Crown's own reasoning, very restricted before the 1970s. The evidence of Stephen Asher suggests that families had to leave their farms and did not return, and that clearing the scrub and draining the land again was simply not economic.[474]

After reviewing the evidence, we accept the submission of Ms Feint:

> The land represented future opportunity as well, and when it was rendered unproductive, any possibility of future development was ruled out. Some of the land affected was already under development schemes, but was abandoned and is now considered uneconomic to develop. The loss of an ability to sustain the communities through the loss of land is likely to have been a contributing factor in the drift of outward migration from this period onwards. In cross-examination, Walzl drew the link with the outflow of Tuwharetoa from the rohe, noting that according to Pool & Sceats there was disproportionate migration in this period, as Tuwharetoa people were forced off their lands and into the cash economy, where they went to the towns and cities to find work. This outflow of the iwi's most precious resource – people – would in turn have undermined the social and cultural fabric of nga hapu o Ngati Tuwharetoa.[475]

Were there mitigating factors?

The events described here would have resulted in more severe hardship for Tuwharetoa in the 1940s and 1950s especially, but for the employment opportunities that opened up in the cities, in hydro-electric construction, and in forestry.[476] Martin notes that Maori were employed in substantial numbers in central North Island hydro projects.[477]

Many Māori families, and many young men and young women, migrated out of the rural areas surrounding Lake Taupō during these decades. The environmental damage was felt immediately, the economic flow-on effects were perhaps mitigated until the

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[471] Under Secretary to Native Minister, 22 November 1944, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, p 92

[472] Crown closings, 3.3.111, part 2, pp 488-490

[473] Crown closings, 3.3.111, part 2, p 489

[474] Asher, E45, pp 2-4

[475] Feint, Ngati Tuwharetoa closings, 3.3.106, p 156

[476] See full discussions in T Kukutai, I Pool and J Sceats, 'Central North Island Iwi: Population Patterns & Trends', April 2002, summary, Document A44(a); G Butterworth,'From Country to Town: Maori Migrations, 1930s to 1970', in Malcolm McKinnon (ed), *New Zealand Historical Atlas: Ko Papatuanuku e Takoto Nei* (Auckland: Bateman, 1997), plate 91; M F Poulson and R J Johnston, 'Patterns of Maori Migration', in R J Johnston (ed), *Urbanisation in New Zealand: Geographical Essays* (Wellington: Reed Education, 1973), pp 150-174; D I Pool, 'The Rural-Urban Migration of Maoris: a Demographic Analysis', *Pacific Viewpoint*, 7, 1, 1966, pp 88-96

[477] Martin, *People, Politics and Power Stations*, p 147

1980s when significant numbers of Tūwharetoa outmigrants became unemployed in the wake of restructuring. Their agricultural lands, abandoned in the 1940s and 1950s, were not there for them to fall back on. In social and cultural terms, however, communities were profoundly affected, their relationship with their ancestral land and taonga damaged, their viability weakened, and their ability to farm some of their better quality land was compromised. Even if there were jobs available elsewhere, this does not lessen the Treaty breach or the prejudice suffered as a result of it.

The Tribunal's Findings

It was not inevitable that the use of Lake Taupo for hydroelectricity would become a question of compensation for damage. Tuwharetoa accepted that hydro-electricity was a matter of national importance, but considered their own communities and their potential contribution to the farming economy to have the same weight. They sought a way (which the Government had not sought in 1939) to use the Taupo waters to the same effect for electricity without having to raise and keep the lake at the maximum control level. Engineers proposed various solutions, which the Government rejected as uneconomic and possibly harmful to other interests. We are not satisifed that what the Minister of Internal Affairs called the tribe's 'constructive idea' was given due consideration. Nonetheless, alternatives to raising the lake were not accepted, so it became a matter of limiting or rectifying damage and paying compensation. In the absence of detailed technical evidence on the merits of the different schemes proposed in the 1940s, we make no finding of Treaty breach in respect of the Government's rejection of them.

As noted above, we are unable to say with any certainty exactly what happened to the compensation and the proposed remedial work, nor to determine whether the payment of a mere £35,800 was fair in terms of the immediate damages suffered. In our preliminary view, the payment was far too low in comparison with what was being claimed, with what those claims were probably worth in 1947, and with what the Government was making from the use of Tuwharetoa's taonga. We note the view of both the Native Department and Mr Bloodworth in the Legislative Council that the Government's profit from using the Taupo waters was far in excess of what was being claimed in compensation for the damage it had caused. Bloodworth pointed out that the Government was saving enormous amounts of money and coal by using Lake Taupo, while the Department noted the Crown's profit on top of that:

> It should also be remembered that the increased revenue obtained – by the Government from controlling the Lake is said to approximate £800,000 per annum. It is suggested that in these circumstances compensation should be full and adequate as promised by the Prime Minister, and that personal damage satisfactorily proven to the special Court should be compensated. [478]

In other words, the Government could afford to be fair and even to be generous. In our preliminary view, it was not.

We also find the Crown in breach of the Treaty for not ensuring that the court gave full compensation for personal damages, despite its intention (in the Finance (no 2) Act 1945) that it do so.

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[478] Under Secretary to Native Minister, 22 November 1944, Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', Supporting Documents, E1(a), vol 1, p 92; see also T Bloodworth, 26 September 1947, NZPD, 1947, vol 278, p 632

Ultimately, compensation and protective works (if the former actually reached its intended recipients and if the latter were actually carried out) were not sufficient remedy or redress. Significant parts of the claimants' most valued, better-quality farmland was compromised beyond their ability to rectify it. Families had to abandon their farms; the tribe and its communities around the lake were weakened; and jobs elsewhere did not really make up for that. The Treaty guaranteed the right of Maori to maintain their traditional lifestyle, to engage fully in the Pakeha farming economy, or to do both and walk in two worlds. Because Tuwharetoa's southern development schemes and better arable land were so close to the lakeshore, their ability to benefit from this Treaty principle of options was foreclosed by the Crown's decision to raise the lake level and keep it high for long, sustained periods. They suffered significant social and economic harm as a result. Part of the tragedy is that this was avoidable; the lake has not been kept so high since the 1980s, and the consensus of expert evidence is that it never needed to be in the first place.

We find too that geothermal features ought to have been included in the compensation but were not. We find the Crown in breach of the principles of the Treaty for not rectifying the court's award on that point.

In addition, we find that the Crown knew of, should have compensated, and should have taken special care to remedy where possible, the harm to Tuwharetoa in respect of the enormous spiritual and cultural value to them of their ancestral land, wahi tapu, and taonga. We find that the Crown was aware of damage to Maori communal rights and practices, to Maori communities and their livelihoods, and ultimately to their whole way of life. In failing to compensate for those kinds of harm, and in failing to remove or rectify the cause of that prejudice, the Crown breached the principles of the Treaty.

Overall, the Crown's acts of omission were unreasonable in the circumstances and in breach of the Treaty principles of partnership, reciprocity, active protection, and options. The claimants have suffered significant prejudice.

What further impact did the Crown's control of lake levels have after the 1940s?

The Parties' Cases

Claimants and the Crown did not make detailed submissions on the post-1940s effects of controlling the level of the lake. Broadly, they agreed that the facts were as follows:

- Lake levels were maintained at a higher-than-natural level for most of the time, including out of season, from the 1940s to 1971; and
- Lake levels have been held at a fairly natural level since 1987.[479]

The main difference between the parties is the claimants' contention that the damage inflicted in the 1940s was long-term and, in effect, permanent because they were not in a position to do anything about it when (or if) land became recoverable.[480] The

[479] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 147, 158, 164; Crown closings, 3.3.111, part 2, pp 455, 489
[480] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 142-156

Crown, on the other hand, submits that any effects of flooding or a higher water table have 'long since abated'.[481] Also, the parties disagree about the second round of compensation in the 1960s as a result of fresh flooding. The Crown argues that the compensation was fair and sufficient to cover all damage to property, but that there is insufficient evidence to determine whether it was actually paid to the intended recipients.[482] The claimants contend that the compensation was for exceptional flooding, not for the continued holding of the lake at an unnaturally high level for sustained periods of the year and for decades. That, they argue, has never been compensated. Ngati Tuwharetoa have never been compensated for the true value of their land in a cultural – let alone an economic – sense, and nor has their loss of wahi tapu ever been remedied. In their view, the damage to their way of life has been significant and remains to this day, without compensation.[483]

The Tribunal's Analysis

In our view, the damage was greatest, and the losses sustained by the claimants were most acute, during the period 1941 to 1946 but the impacts did not end there. The evidence relating to the actions of the Crown between the 1950s and the 1980s, however, is sparse compared to that presented to us for the 1920s, 1930s and 1940s. Nevertheless, we do have detailed data series on lake levels, some important simulations, and commentaries on these by Freestone, referred to above and reproduced in figure 18.2. Figure 18.7, also provided by Freestone, is a useful supplement to figure 18.2, as we focus on lake levels and the decisions and actions which were important during the extended period of operation from 1946 through to the present day. Figure 18.7 plots lake levels from 1905 to 2000 and adds, for convenient reference, the maximum and minimum control levels[484].

[Figure 18.7 Lake Taupo actual water level record (1905-2000) and the original design maximum and minimum control levels (levels in metres Moturiki datum)]

Was the 1960 compensation full and fair in the circumstances?

In the Government's view, all compensation for keeping the lake at 1177 feet was completed in the 1940s. Only exceptional flooding, taking the lake above the maximum control level, required fresh compensation. A combination of high lake levels and floods in 1952, 1956 and 1958 did in fact result in more damage to lands and property and further rounds of compensation claims. The Compensation Court of 1960, however, confined claims to the 6½ months in 1956–57 in which the Government had kept the lake above the maximum control level.[485]

Some of the facts about the resultant compensation are established in the reports of Mr Walzl and Mr McBurney. There were 266 claims for a value of £146,016, which was reduced to £95,549 at the hearings in 1960. The total compensation awarded

[481] Crown closings, 3.3.111, part 2, p 457
[482] Crown closings, 3.3.111, part 2, pp 489, 491-492
[483] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 157-160, 164
[484] Figure 10.4 is taken from Freestone, H29, figure 10.1, prepared for Mighty River Power and presented in 2002 at the Waikato Regional Council Resource Consents Hearing in respect of the Waikato Hydro System. A similar figure is available in Hamilton, I35, figure 5.1
[485] Decision of the Lake Taupo Control Compensation Court, 30 November 1960, McBurney, Supporting Documents, A82(c), pp 2280-2281

(including claims settled by agreement) was £28,651. Of that sum, £4,651 was interest payable on damage dating back to 1956, so that the compensation itself was only some £24,000.[486] The money was paid to the Maori Trustee for distribution to the owners, minus £822 paid directly to lessees. The Maori Trustee deducted £5021 for costs and expenses. A further £292 was deducted for payment to two European claimants.[487] In addition, the claimants' costs were 'very heavy' (in the view of the Crown's solicitor), due to the number of claims (and witnesses), the cost of surveys for evidence, and the legal fees. The Court awarded them £5000, which left a claimed shortfall of £6000.[488] Assuming that that shortfall had to be paid directly or indirectly from the compensation, this means that the Maori owners received as little as £16,516 (just over 10 per cent of their original claim). The Crown's Land Purchase Officer thought this a 'satisfactory' result for the Government.[489] As Crown counsel notes, however, we cannot be sure that this sum eventually made it from the Maori Trustee to the correct people.[490] Stephen Asher's evidence was that his whanau did eventually receive their compensation, years too late to save their dairy farm.[491]

According to the court, the explanation for the disparity between the amount claimed (£146,016) and that awarded (£28,651) was the nature of the claims themselves. First, according to a strictly economic view of land (by which standard this court judged it), the land was not very valuable even before it was flooded or made swampy. Secondly, many of the claims were actually for unremedied damage from the lake having been at the (1947) maximum control level, or from river flooding, or from 'neglectful' failure to fix or clear drains and to drain affected areas. The court blamed the failure to rehabilitate lands in part on the Maori owners or occupiers for having done 'little to help themselves', but also on the Government's failure to monitor the situation or to provide technical assistance and advice.[492] The Government does not appear to have acted on the court's view that it should be providing technical assistance to Maori. From the evidence available to us, high groundwater levels would have persisted anyway, for at least a decade after the court's decision, making rehabilitation of the land difficult.

In the language of the day, the Lake Taupo Compensation Court was expressing the Crown's Treaty duty of active protection. It called for greater 'supervision' of Maori farmers to ensure that the necessary drainage was carried out, and for the Government to provide both technical expertise and assistance to ensure that it could actually be done.[493] Further, the Crown's solicitor in the case advised the Government to take a more proactive role. He suggested that much closer monitoring of lake levels was possible and that Maori should be assisted and compensated on the spot, instead of both sides having to await lengthy and expensive litigation. Ever since 1947, he

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[486] McBurney, A82(b), p 369

[487] Memorandum for Maori Trustee, 8 November 1962, McBurney, Supporting Documents, A82(c), p 2246

[488] AJ Quill to Commissioner of Works, 9 June 1961; and Lake Taupo Control Compensation Court, Memorandum as to Costs, 31 May 1961, in McBurney, Supporting Documents, A82(c), pp 2254-2258

[489] Chief Land Purchase Officer to Commissioner of Works, 3 February 1961, McBurney, Supporting Documents, A82(c), p 2267

[490] Crown closings, 3.3.111, part 2, p 491

[491] Asher, E45, pp 3-4

[492] Decision of the Lake Taupo Control Compensation Court, 30 November 1960, McBurney, Supporting Documents, A82(c), pp 2283-2285

[493] Decision of the Lake Taupo Control Compensation Court, 30 November 1960, McBurney, Supporting Documents, A82(c), pp 2283-2284

argued, officials must have known what land and people were likely to be affected by raising the lake further, and what the effects were likely to have been.[494]

The Ministry of Works' response to this advice was that it was naïve. First, the Commissioner argued that not all the effects of raising the lake (or of flooding) could be foreseen. He agreed that 'some good purpose might have been served' if engineers and valuers had inspected the properties and damage while the lake level was actually above the maximum, but dismissed it as a waste of their valuable time. It was better to wait and see what claims would actually be made by the owners. Secondly, 260 of the 266 claims had related to Maori land in multiple ownership. In a damning indictment of the Crown's title system (see Part III), he argued that this fact alone made it 'quite impracticable to settle most of these claims by negotiations either before or after the claims were received'. To save itself the bother, the Commissioner suggested that if the lake ever had to be raised above the maximum level again, it should just be kept there and compensation paid once and for all.[495] Unofficially, it was noted that given the enormous disparity between the original claims and the amount eventually paid, it was much better for the Crown to wait and battle it out in court.[496]

We do not have sufficient evidence to determine whether a fair process or a fair outcome was achieved in terms of compensating Maori owners of particular properties in 1960.[497] We are not in a position to determine whether immediate damage to their property was fairly compensated. We note, however, that our findings for the 1940s compensation also apply to this second round, insofar as the 1960s compensation did not cover the full cultural and spiritual impact of loss of wahi tapu and of ancestral land. The 1960 court judged the affected land as follows: 'in most cases where land is now claimed to be valueless or of little value, it probably had no great value before the 1956/57 raising of the lake'.[498] This way of looking at the value of land was reflected in its low compensation awards. As we noted above, the Native Department in the 1940s had been very concerned that the unique value of this ancestral land to Taupo Maori would not be taken into account in compensation. The Department's concerns were justified, equally in 1960 as in 1947. In our preliminary view, low compensation (around 10 per cent of what had been claimed) based on a narrow, Eurocentric valuation, was both a known risk (and therefore avoidable) and inconsistent with the Treaty.

The claimants' view of the value to them of their land, and the uselessness of swapping it for monetary compensation, had been reiterated to the Government in 1957. Concerned that the lake levels might be raised even further by diverting rivers into Lake Taupo for that purpose, 164 members of Ngati Tuwharetoa petitioned the Crown:

> Our principal settlements, housing sites and cultivations are situated along the edges of Lake Taupo so that any further raising of the Lake Levels will deprive us of much if not all of such

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[494] AJ Quill to General Manager, NZED, 17 January 1961, in McBurney, Supporting Documents, A82(c), pp 2276

[495] Commissioner of Works to Controller and Auditor General, 6 July 1961, McBurney, Supporting Documents, A82(c), p 2250

[496] File Note, Ministry of Works, 30 June 1961, McBurney, Supporting Documents, A82(c), pp 2252

[497] See Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, pp 157-178; McBurney, A82(b), pp 356-373; McBurney, Supporting Documents, A82(c), pp 2245-2348

[498] Decision of the Lake Taupo Control Compensation Court, 30 November 1960, McBurney, Supporting Documents, A82(c), p 2285

> amenities. If these are lost to us no amount of compensation will make good such loss as our lands are more important to us and our coming generations than money which [can] be frittered away. We have lost enough lands through the original raising of the Lake Levels so that we are definitely opposed to losing any further lands.[499]

Finally, we note that Mr Stephen Asher gave us an important example of how land which is now technically recoverable is still overgrown with scrub, inaccessible, and needs active draining before the effects of the 1950s flooding can be rectified, even if the water table is no longer so high anymore.[500]

Was the lake still controlled at a high level after the 1940s?

A number of factors converged in the late 1950s and 1960s to encourage more careful research and investigation into optimum systems for the management of active storage of water in Lake Taupō. By 1958, when there was a major flood, the New Zealand Electricity Department (NZED) had a very large investment in dams and generating equipment on the Waikato River. The flood triggered a review and report, and the report made officials aware of the need for flood management schemes.[501] Around the same time, plans were being drawn up to divert waters from the upper Tongariro and upper Whanganui Rivers into the Lake Taupō catchment.[502] Designed to increase the capacity of the Waikato power stations, the Tongariro Power Development (TPD) posed challenges in terms of water control and water management and triggered more intensive hydrological research. Within NZED new engineering skills were developed to plan new generating plants and integrate the various components of the national electricity supply system. As each new power station was planned – be it coal fired, gas fired, geothermal or hydroelectric – there was a reassessment of which stations would be base load facilities, and which would be used to meet peak demand at particular times of the day and particular seasons of the year.[503] Large data banks were built up and NZED specialists were able to engage in comprehensive monitoring and systems analysis. The role of hydroelectric power could now be considered in the context of overall generating capacity.

The primary objectives in the 1960s, 1970s and 1980s were to maximise the benefits from water and to minimise the risks for plant and equipment. Flood control schemes, for example, were implemented in 1961 and refined in 1975. Freestone comments that 'the rules were developed from extensive computer modelling and were tested using real hydrological data'.[504] The primary object was to ensure the safety of the dams and hydraulic structures within the Waikato River system. The secondary objective, to be achieved if possible, was downstream flood relief.[505] No evidence has been presented

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[499] 1957 petition, quoted in Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, p 161

[500] Asher, E45

[501] There are references to the review in Freestone, H29, para 7.2, but the report is not referenced or brought into the record of documents.

[502] Detailed evidence of this will be presented to the National Park Inquiry. See Walzl, 'Hydro Electricity Issues: The Tongariro Development Scheme', Wai 1130, Document A8 and Wai 1200 E2 which has been made available to both inquiries

[503] Martin, *People, Politics and Power Stations*, see especially pp 172, 286-310; *New Zealand Official Yearbook 1983* 'Historical Development of Electricity Supply', pp 547-555

[504] Freestone, H29 para 7.3 and table 11.1 Timeline of major events and actions affecting the Taupō/Waikato catchment.

[505] Freestone, H29, para 7.3

to us of consultation with Māori, or consideration of environmental effects on Lake Taupō or its surrounds.

The construction of the TPD was carried out between 1964 and 1983.[506] The scheme diverts water from the upper Tongariro and upper Whanganui Rivers through a series of canals and power station into Lake Rotoaira. From here it passes through the Tokaanu Power Station into the south end of Lake Taupo.[507] Power is generated at Rangipo and Tokaanu but the primary intent of the diversions is to generate additional power in each of the stations on the Waikato River.[508] The diversions have the capacity to increase the flow of water into Lake Taupō by some 30m^3/second which is equivalent to some 19 per cent of the annual inflow into Lake Taupo.[509] The diversions have increased the flow of water through Lake Taupo without raising the lake level. A Tongariro Offset Agreement, operational from 1977 onwards, includes provision to stop the flow of 'foreign water' into Lake Taupo whenever the lake level is in danger of rising to the maximum control level.[510]

Substantial discussions were held with iwi, especially Ngāti Tūwharetoa, in advance of construction, since the canals and the structures would impinge on Māori owned land, and the town of Tūrangi would be substantially enlarged to house construction facilities and workers[511]. The impacts of these, and the nature of the discussions with iwi, are considered in detail in the Waitangi Tribunal's *Turangi Township Report, 1995, Turangi Township Remedies Report, 1999* and the *Whanganui River Report, 1999* and are being addressed further in the National Park Inquiry.[512]

Within NZED during the 1960s, there were reassessments of the most appropriate maximum operating levels for the lake. Freestone, in a summary diagram (figure 10.8) and in text discussion, provides important but partial insights.[513] For reasons which are not reported, the maximum control level of 357.387 meters was replaced by 'informal inhouse operating procedures that provided for constrained operation prior to that level being reached'.[514] Questions can be posed but we do not have evidence at this point: did NZED make this move in response to Māori concerns; or to minimise compensation claims; or to protect dams and structures on the Waikato River? We do not know the reasons but we know from the Freestone evidence that the maximum operating level was lowered to 357.24 m.

[Figure 18.8 History of Lake Taupō level control as presented by Freestone]

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[506] Martin, *People, Politics and Power Stations*, pp 220-234

[507] The Western Diversion was completed in 1971 and the Eastern Diversion in 1979. See Martin, *People, Politics and Power Stations*, pp 220-234; Hamilton, I35, section 4.4; Freestone, H29, section 8; Walzl, 'Hydro Electricity Issues: The Tongariro Development Scheme', E2

[508] Martin, *People, Politics and Power Stations*, pp 222-225; Walzl, 'Hydro Electricity Issues: The Tongariro Development Scheme', E2, paras 25-31

[509] Hamilton, I35, p 17

[510] 'Foreign water refers to water that would not normally flow into the catchments of Lake Taupō and the Waikato River. Hamilton, I 35, para 4.6. See also Freestone, H29, paras 8.9-8.11

[511] Martin reports on the first formal meeting with the Tuwharetoa Trust Board and Māori landowners in October 1955. Further meetings followed as plans, and the needs for Māori owned land, became more specific. Martin, *People, Politics and Power Stations*, pp 223-226

[512] The *Turangi Township* Reports are Wai 84, the *Whanganui River Report* is Wai 167 and the National Park Inquiry is Wai 1130

[513] Freestone, H29, section 14 and figure 10.9

[514] Freestone, H29, para 14.2

The major flood in February 1958 triggered a careful assessment of risks in relation to the seasonality of intense rainfall events. The hydrologists were aware that the two largest flood events, in Feb 1907 and in Feb 1958, were both related to tropical cyclones.[515] From this it was assumed that the risks were greatest in summer and a split level operating regime was introduced in November 1968. The maximum operating level would continue at 357.25 from April to December but would be lowered to 357.10 from January to March when the risk of tropical cyclones is greatest.[516] A more recent flood event, in July 1998, was comparable in magnitude to the February floods of 1907 and 1958. The hydrologists reassessed the risks and the costs and asked that the 2003 resource consent for the maximum operating level revert to a single level of 357.25.[517] The importance of the two step operating regime which lasted from 1968 to 2003 is two fold: on the one hand it demonstrated a willingness to adjust lake levels on the basis of scientific observation and analysis; on the other hand, for the period from November 1968 to August 2003, summer operating levels did not exceed 357.10 m.

The combined effect of these adjustments (ie the informal, inhouse operating procedures, the flood rules and the split level operating maximum) can be seen in figures 18.2 and 18.8. Lake Taupō had become an increasingly controlled lake and, from the 1970s onwards, the controlled level of the lake is comparable in some ways to the natural level of the lake had there been no control gates and no enlargement of the lake outlet. Figure 18.2 does, however, remind us that the lake was controlled closer to the maximum controlled level and the capacity to lower the lake by means of the enlarged lake outlet was underutilised. The seasonality of the controlled regime remained an important feature.

The Tribunal's Findings

Fundamentally, we accept the evidence of our expert hydrologist, Mr Hamilton, and the agreement between the parties that the lake was held unnaturally (and unseasonably) high for sustained periods, with subsequent flooding and waterlogging of land, from 1941 to 1971. The Government has held the lake at a more natural level (though still controlled) since 1987.

We also accept the claimants' evidence that some of the effects of the flooding and the higher water table have been permanent, in an economic, cultural, and spiritual sense. We have already found that geothermal taonga were destroyed, wahi tapu were damaged, destroyed, or rendered inaccessible, the tribe's way of life was affected, and farmable land was rendered unusable in the 1940s. This situation was then exacerbated by the number of decades in which the lake was kept at high levels for sustained and unseasonable periods. Farmable land remained unusuable for a long time as a result and now requires capital and active 'rehabilitation' to reverse the longterm effects of flooding and high groundwater, even where the groundwater itself may finally have reverted to more pre-1941 levels.

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[515] Freestone, H29, ss 6, 10 and 14, especially para 14.5

[516] Freestone, H29, in figure 10.9, our figure 10.6 above, adjusts the figure of 357.24 to 357.25.

[517] This was approved by the consent authority which agreed to a maximum control level of 357.25m and a minimum control level of 355.85m. There were, as before, provisions for the lake level to go above the maximum control level for flood protection reasons. See Environment Waikato, H28, pp 76-91

The claimants' evidence that they have suffered cultural, spiritual, and economic harm was only challenged by the Crown in terms of the latter point. We make no findings on whether compensation for flood damage to particular properties in the 1960s was adequate. We lack sufficient evidence on the point. Our broader finding – that the claimants suffered cultural, spiritual, and some economic harm that has never been compensated – stands. In many ways, as Tuwharetoa explained to the Crown in 1957, no monetary compensation would have been enough. The land was a taonga and some of it also contained wahi tapu and other taonga. Money 'that can be frittered away' was no substitute for the loss of those taonga. The compensation court's judgement of the land as of 'no great value' before it became waterlogged was inappropriate and avoidable in the circumstances. Had the great cultural and spiritual value of their ancestral taonga been taken into account, we find that the court could never have awarded such low compensation to Ngati Tuwharetoa as it did in 1960. Both the Native Department (in the 1940s) and Ngati Tuwharetoa (in the 1950s) reminded the Government of the great value of this ancestral land to Taupo Maori. This advice was ignored. We find the Crown in breach of the Treaty principle of active protection.

Also, from the evidence available to us, the compensation was paid to the Maori Trustee for distribution to individual owners. In our view, compensation ought not to have been made as payments to individuals that could be 'frittered away'. Part of the compensation should have taken the form of a sizable capital injection to remedy (as far as possible) the effects of keeping the lake too high. The Crown's Treaty duty of active protection required it to – at the very least – have followed the advice of the Lake Taupo Compensation Court. It ought to have monitored the situation and provided assistance and technical advice to Maori, so that their land could be drained and rehabilitated where possible. In our view, the effectiveness of such assistance would have been limited by the long period at which the lake was kept unnecessarily high. Even so, had such assistance been provided to the Asher whanau, for example, they might not have needed to abandon their dairy farm.

Secondly, the Crown solicitor advised that the Government should act at once when it took the lake above the maximum control level, providing assistance and compensation on the spot. The fact that this could not be done because, in the Government's view, its title system made it impossible to find or negotiate with the legal owners, demonstrates the serious prejudice to Taupo Maori arising from Treaty breaches identified in Part III of this report. Here, we find the Crown in breach of the Treaty for failing to compensate Maori in such a manner that the core problem was actually remedied, despite advice at the time that it could have done so.

Further, in the claimants' view, the whole situation was fundamentally unnecessary because the Crown could have pursued other policies that kept the lake level lower, without harming the national interest in electricity. We have already found that part of their claim to be well founded. The technical evidence is that the lake was held higher than necessary for the operation of Arapuni in the 1940s and for the Waikato system from the 1950s onwards.

The claimants argue that they could have been better – if not fully – compensated for their loss in the 1940s and again in subsequent decades. We agree. The Treaty breaches of the 1940s were compounded by the ongoing failure to actively protect Tuwharetoa's taonga and interests in subsequent decades, and by the failure to compensate them appropriately for avoidable losses.

Did raising the lake levels affect the tributary rivers and the Waikato River?

Tributaries

In terms of the tributary rivers, we received too little evidence for more than a very broad view to be reached. In his technical evidence, Mr Hamilton argued that holding the lake at high levels for sustained (and sometimes unseasonable) periods would have had the effect of reducing water flows and increasing siltation, which in turn would have resulted in rivers flooding.[518] Eventually, in his view, river flows would return to 'normal' when the lake was kept at more natural levels. Mrs Merle Ormsby of Ngati Hikairo gave evidence of just such an impact on the Tokaanu Stream, resulting in two forms of prejudice: first, her community lost their beach and the ability to collect kakahi; and, secondly, her whanau had to move off their farm. They received no compensation for either loss.[519] Under cross-examination, Mr Hamilton agreed with counsel for Ngati Hikairo that the Tokaanu Stream would have been one of the tributaries affected by siltation and flooding as a result of the Crown's control of lake levels.[520] There were other contributing factors, such as the diversion of water for the TPD. In Mr Hamilton's evidence, the Tokaanu Stream would gradually have adjusted to the now lower habitual lake level.[521] In Mrs Ormsby's evidence, her whanau's land has not recovered.

The Tribunal's Preliminary Findings on Tributaries

Although we lack detailed and systematic evidence on the effects of raising Lake Taupo on its tributaries, and of how often and to what extent claimants were affected, we accept the generic point that flooding and waterlogging undoubtedly happened for a significant period of time. We also accept the Ngati Hikairo submission that the Tokaanu Stream is an example of how raising the lake level contributed to loss of (or damage to) their taonga. We make preliminary findings that the Treaty principle of active protection, and the property guarantees of Article 2, have been breached in respect of Lake Taupo's tributaries. We are not in a position to determine the frequency or duration of the breach, other than to say that it must have been common during the period 1941–1971. As with other problems arising from the Crown's control of lake levels, it appears that there were longterm effects that now require active rehabilitation to correct (if they can now be corrected). We are not in a position to judge the degree of prejudice, without systematic evidence of particular events. Parties should discuss the specifics in their negotiations.

The Waikato River

The upper and middle portions of the Waikato River, from the lake outlet to Waipapa, are included in the Central North Island inquiry district. Two sorts of environmental impacts are potentially important: those relating to the control gates and the flows of water through Lake Taupo; and those relating to the construction of dams and the

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[518] Hamilton, I35, pp 30-31, 44
[519] Ormsby, E49, pp 12-15; Wakefield, 3.3.64, pp 49-51
[520] Cross-examination of David Hamilton, Hearing Transcript, Week 9, Wellington, 8 August 2005, 4.1.10
[521] Cross-examination of David Hamilton, Hearing Transcript, Week 9, Wellington, 8 August 2005, 4.1.10

creation of artificial lakes in the Waikato valley. We deal with the first issue in this chapter.

The evidence brought to the Tribunal in relation to the Waikato River is less extensive than that relating to Lake Taupo. But we can say that there are two types of downriver impacts that we would identify: those relating to the creation of hydro lakes and those resulting from changes in the river flow. The construction work involving dams and roads and construction sites, and the dams and the diversions themselves, had obvious physical and spiritual impacts on the landscape, the wahi tapu, and the wahi taonga.[522]

There is evidence, contained in the files of the Public Works Department and reported by Walzl, that fluctuations in the flow of the Waikato River in the period following the completion of the control gates had impacts on farms and gardens downstream. In February 1952, for example, Mr J Teriki informed the Department of Public Works that his potato crop had sustained heavy damage because of flooding which he linked to the operation of the control gates. Mr Werahiko, who lived close to the river at Ohaki Pa near Mihi Bridge, made a similar complaint: District Engineer Caldwell investigated, found the evidence was credible and suggested compensation.[523] Other examples, however, show that the significant modification of the river itself, rather than high lake levels, were to blame. These include the impacts on Ngati Whaoa, who point to the construction of the Ohakuri Dam which opened in 1962. As a result of those developments, Ngati Whaoa land at Te Paraki was affected by flooding including the flooding of a sacred cave.[524] There was evidence concerning Orakei Korako where families were moved off land that was to have been submerged.[525] This evidence was traversed at length by witnesses for claimants from Ngati Tahu and Ngati Whaoa. It was clear to us that the modification of the river has had more impact on the claimants than the control of lake levels.

Nonetheless, Dr John McConchie, a geomorphologist from Victoria University, has provided Environment Waikato with a substantial report on the effects of hydro-electric operations on the Waikato River which we have considered.[526] Our conclusion, based on the hydrological evidence provided by Freestone and Hamilton, the historical evidence contained in Walzl's report, and the research results and the arguments advanced by McConchie, is this: there was, in the 1940s and the 1950s, a significant amount of flooding caused by ill-considered control of lake levels. This flooding impacted on the Waikato Valley.[527]

As a result during the period 1940–1950, erosion processes were accelerated and small fertile areas of land close to the river were damaged because the river was badly regulated and lake levels were too high to allow for flood mitigation. McConchie

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[522] P Staite, Evidence for Ngati Whaoa, 28 February 2005, Document C28 para 21; and Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, para 421

[523] For Teriki see Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', E1, para 445 (for Teriki), paras 448-452 (for Werahiko)

[524] M Sharp, Closing Submissions for Ngati Whaoa, 3.3.59, pp 42-43

[525] Hearing Transcript, Week 5, Turangi, 2-6 May 2005, 4.1.6, p 241

[526] J McConchie, Evidence (Hydrologist) re Waikato/Taupo Hydro System, Document H33, Evidence prepared for the Mighty River Power consent application to Environment Waikato.

[527] McConchie would use the word 'uncontrolled' to characterise the operation of the gates during this period, where we have used the phrase 'ill-considered controls'. Water flows were more erratic than they had been prior to the 1940s and less controlled than they were from the late 1960s onwards, H33

argues that 'periods of erosion usually coincide with periods of spillage, when the dams cannot hold any more water'.[528]

By the 1970s, however, the Waikato River as a whole was a much more controlled system and flood mitigation measures were in place. The risks of erosion and flooding in the controlled situation were less than they had been prior to 1941 and considerably less than they were in the immediately post 1941 situation. From the erosion perspective, the completed electricity system has had a 'positive geomorphic effect'.[529] Floods still occurred, but the impact was less serious. Therefore, the impact for landowners abutting the river has been mitigated, but the cultural and spiritual effects and the associated harm to the mauri of the waters has not. We do not have systematic evidence as to whether or how far Maori groups affected by these problems have been compensated.

The Tribunal's Preliminary Findings on the Waikato River

In the absence of detailed evidence and submissions, we make a preliminary finding that Maori tribal groups living alongside the Waikato River (in our inquiry district) have been affected by flooding and river problems caused in part by the Crown's control of lake levels. In our preliminary view, they have suffered prejudice.

NOW THAT IT MAY BE POSSIBLE TO REHABILITATE AFFECTED LAND, ARE TUWHARETOA ENTITLED TO COMPENSATION IF IT CAN NO LONGER BE FARMED BECAUSE OF OTHER REASONS?

Introduction

One of the major issues debated before us was the question of contemporary management of the ecology of the Taupo waters. Inevitably, that question carries significant implications for the management of land abutting the waters. In particular, a key problem is the clarity of the lake water, which has deteriorated in recent years. We received evidence on the cause of that deterioration, in which the focus was the flow of nitrates into the lake as a result of human habitation. We did not, however, receive firm evidence on how the changes to the lake's ecology arising from control of lake levels and from throughput of water (the TPD) have affected water purity. Ultimately, if the Crown is correct that the effects of controlling the lake at a high level (1941–1971) have abated, then it should now be possible to rehabilitate affected land. Active assistance from the Crown would, it appears, be required. But the question is complicated by the vital issue of water purity. If nitrates from land-use are the key cause of its deterioration, then responsible environmental management requires restrictions on that use. Tuwharetoa and their whanaunga now face the prospect that they will not be allowed to use land that can be rehabilitated, as well as much other land near the lake. Treaty issues arise in terms of the principle of active

[528] McConchie, H33, para 16.3(d)

[529] McConchie, H33, para 15.23, McConchie notes that there is more water moving through the system since the Tongariro diversions have been in place but argues convincingly that this is more than balanced by 'controlled energy dissipation'.

protection – of the lake and of tino rangatiratanga over it and abutting ancestral land – and of redress (remedying past breaches).

The Claimants' Case

The claimants argue that they want the waters of their taonga – Lake Taupo – to be kept pure and pristine. They also want to ensure that outcome by assuming their Treaty-guaranteed right to manage and control the lake. Further, they submit that they have always supported development and been willing to do their share in the national interest, but that they have paid a disproportionately high share of the costs for a disproportionately low share of the benefits. Much of their lakeshore land, still waterlogged or overgrown with scrub as a result of the Crown's control of lake levels, cannot now be rehabilitated without capital. If rehabilitated, that land could be used for a variety of purposes, including tourism. Further, other land has been tied up in forestry or proposed reserves with the result that 46 per cent of their lake lands remain undeveloped. Private landowners, on the other hand, have benefited from farming development, tourism, and residential development around the lake. Tuwharetoa will not be able to do the same, they argue, if present land-use is locked down permanently in order to prevent new sources of nitrates from polluting the lake. The tribe wants to ensure water purity but objects to paying the main price for it, while others continue to profit from historical development facilitated by the Crown.[530]

The Crown's Case

The Crown accepts that water resources such as Lake Taupo are vitally important to tangata whenua but argues that they are vitally important to others as well. The claimants have been consulted in the development of proposed land-use limitations and their interests have been taken into account.[531] The problem cannot be solved without an approach that involves all land-users, including the claimants. The Crown notes the evidence of George Asher, that the policy is still a proposal and that Tuwharetoa have been fully consulted on it and are in discussions with the Government and local authorities.[532] Technological advances have improved the monitoring of pollution and the identification of its causes, so that correct actions can now be taken in a way that would not have been possible earlier. Sustainable, longterm solutions require all members of the community to own the problem and share in solving it.[533]

The Crown concedes, however, that much Tuwharetoa land was tied up in proposed reserves from the 1960s to the 1980s, with the objective of preserving water purity. In its view, there was significant consultation with and agreement from some Maori owners, and it is not clear that any land was ever alienated from Maori ownership per se. The Crown does not accept that Tuwharetoa have paid a disproportionate price for protecting water purity.[534]

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[530] Feint, Ngati Tuwharetoa closings, 3.3.106, pp 115, 210-213, 238-240
[531] Crown closings, 3.3.111, part 2, p 437
[532] Crown closings, 3.3.111, part 2, pp 497-498
[533] Crown closings, 3.3.111, part 2, p 470
[534] Crown closings, 3.3.111, part 2, pp 496-497

The Tribunal's Analysis and Findings

In terms of land affected by the Crown's control of lake levels, the issue appears to us to be very clear. We have evidence from Stephen Asher, Merle Ormsby, Dulcie Gardiner, and others that their land has not recovered from the effects of the raising of the lake.[535] According to our technical witness, David Hamilton, groundwater levels, siltation of rivers and rivermouths, and other impacts ought to have recovered gradually when the lake levels were brought back to a more natural regime (from 1987). But the claimants have pointed to instances where this cannot happen without active rehabilitation, which (as they submit) is uneconomic.[536] Their evidence is supported by the specific studies of Eser and Rosen (Stump Bay) and of Dr Kirkpatrick (Waihaha), that the water table is still higher than it should be in some areas.[537] This may be in part because although the lake is now held at a more natural level, it is still held unseasonably high in spring and early summer, the crucial months for land recovery. In any case, the claimants may now be limited in the use that they could put such land to, even if they could afford to drain and restore it, in order to protect water purity.

In our view, the Crown's Treaty obligation is clear. The principle of redress requires it to remedy past breaches. It ought to assist Maori to rehabilitate affected lakeshore properties, just as it ought to have done in the 1960s (which was, in part, the view of the compensation court of that time). Every decade that goes by without such assistance compounds the Treaty breach and the prejudice. But rehabilitation may be a pointless exercise if land use (rightly) must be restricted to secure the quality of the lake waters. That is a decision for Ngati Tuwharetoa, in partnership with the Crown (which must actively protect their interests.) But having deprived Tuwharetoa and their whanaunga of the use and enjoyment of this ancestral land by its unnecessary raising of the lake, the Crown is obligated to provide fair redress. In our view, if the decision is made in partnership that land use must be restricted, the Crown should compensate the claimants for what will then become permanent deprivation of the use and enjoyment of this taonga.

We make no comment here on the broader issue of development and water purity vis-à-vis Tuwharetoa's other lands abutting the lake.

Summary of Findings relating to the Crown's Control of Lake Taupo for Hydro-Electric Development

We have said in this section that we leave matters associated with the Tongariro Power Development scheme (TPD) for inquiry and reporting by the National Park Tribunal. Our focus here, under issue 3, has been allegations about Crown acts or omissions in relation to the construction of control gates at the outlet of Lake Taupo and to regulation of the lake level, for the purposes of generating electric power.

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[535] See Asher, E45; Ormsby, E49; D Gardiner, Evidence for Ngati Tuwharetoa, 22 April 2005, Document E25

[536] Feint, Ngati Tuwharetoa closings, 3.3.106, p 249

[537] See Eser and Rosen, I11; and Kirkpatrick, Belshaw and Campbell, E3, p 535

Both the Crown and claimants agreed that hydro-electric power development was necessary in the national interest. Our analysis and findings therefore focused on issues arising in the following seven areas:-

Kawanatanga and rangatiratanga

We noted that the Crown had initially given itself the authority to control the use of water for electricity, subject to other lawful rights. Maori authority over their taonga and properties included the right to control their use, and that right was not extinguished by the Water-Power Act 1903. Indeed, the Government specifically acknowledged in 1903 that if Maori had any such rights, then the legislation introduced that year preserved them and required the Crown to purchase them. In our view, the Government arrogated to iself the sole right to use the Taupo waters in its 1926 legislation precisely because the matter had to be put beyond legal doubt. We are not persuaded that Ngati Tuwharetoa had made an informed or willing cession of their rights over the water for any purpose other than fishing.

In Treaty terms, the Crown needed to establish a regime in which both kawanatanga and rangatiratanga could be exercised in respect of the lake. Such a regime would have involved fresh negotiations and agreement over new uses of (and benefits from) tribal taonga. This would have been so, under the Treaty, even if the tribe had made a willing cession of the lakebed in 1926, and had given an informed and true consent to the Government inserting its right to use the waters into the empowering Act (which it did not).

We found that the Crown failed to act in partnership with Ngāti Tuwharetoa and their whanaunga as required by the Treaty and the Crown's own undertakings in 1926. It ought to have consulted those iwi and hapū affected and obtained their agreement to its use of their taonga for the purpose of hydro-electric power generation.

The design and consultation phase

In assessing Treaty compliance in this phase, we looked at the adequacy or otherwise of the Crown's consultation with iwi and hapu, and the adequacy or otherwise of its assessment of the potential impact of raising the lake level.

With regard to consultation, we believe that the Crown's proposal to erect control gates and raise the lake level should have been the subject of consultation with the iwi and hapu concerned. Full discussion of the measures that were proposed, and reasonable alternatives, should have formed part of the consultation. In particular, knowing of Ngāti Tuwharetoa's desire to lower, rather than raise, the lake level (to make land available for agricultural production), the Crown was obligated to determine whether its power needs could be met without raising the lake level. To the contrary, however, it had apparently already decided in 1927 that 'any permanent lowering of the lake would have a prejudicial effect on future hydro-electric development' and told Ngati Tuwharetoa so.[538] It did not shift from that view.

With regard to the assessment of potential impact, we are of the opinion that the Government did not take reasonable steps to ascertain the likely effects of raising the lake levels, and nor did it respond adequately to Tuwharetoa's expressions of concern. Although we acquit the Crown of bad faith, we note views from the time, of both

[538] GJ Anderson to PA Grace, 9 May 1927, Walzl, Supporting Documents, E1(a), p 773

ministers and of Tuwharetoa, that the Public Works Department had a history of concealing the truth of the impacts of its projects.

We found these actions and omissions of the Crown to have been in breach of the principles of the Treaty and we concluded that the decision to erect the control gates and raise the lake levels was not arrived at in a manner consistent with the Treaty.

The construction and initial operation phase

The construction of the control gates took place over the period 1940-1941 and they were fully operational by October 1941. Close scrutiny of the evidence reveals that during the construction period there had been a modest deepening and substantial enlargement of the outlet from Lake Taupo. The engineers had, in this way, created a capacity to raise the lake by four feet above the general lake level *and to lower it by three feet below the general lake level*.[539] Despite this the Crown, convinced that it needed to raise the lake level to generate power, held the lake at the maximum control level, set at two feet higher than the general lake level, for almost the entire time from 1941 to 1946. It also held the lake higher than the general lake level for unseasonably long periods in the years after that. As a result, Maori lakeshore blocks, wahi tapu, geothermal taonga, residences, cropping lands, and development farm lands, were all subject to inundation, erosion, and a rise in groundwater that turned taonga and farmland alike to swamp. As the claimants argued, this had profound social, cultural, economic, and spiritual consequences for them.

The claimants also asserted adverse effects stemming from a change to the mauri of the lake, which they said resulted from artificially controlling the water level. We do not entirely accept their arguments, since they themselves had been seeking to lower the lake by artificial means, in the period leading up to the installation of the control gates – a price there were evidently willing to pay to develop their lands. They had no say, however, in the effects on their taonga and its mauri when the Crown decided to do the opposite and raise the lake level. We consider that changing the lake level was a matter to be agreed, not imposed.

Engineers proposed various solutions to the problem of flooding, which the Government rejected as uneconomic and possibly harmful to other interests. One such report, commissioned by Ngati Tuwharetoa in 1945, showed that the lake level could be considerably lowered without losing generating capacity. The report balanced the cost of some additional engineering work needed against the savings that could be made in compensation and the benefits from being able to reclaim swamped and waterlogged land for productive use. We are not satisfied that this constructive proposal was given due consideration. Instead, the Crown focused on protective works and on paying compensation. However, in the absence of detailed technical evidence on the merits of the different schemes proposed in the 1940s, we make no finding of Treaty breach in respect of the Government's rejection of them.

Compensation

With regard to compensation, our preliminary view is that the amount paid was far too low in comparison with what was being claimed. We note here the opinion of both the Native Department and a member of the Legislative Council that the Government's

[539] It will be recalled that 'general lake level' is the term used for the mean lake level during the period 1905 to 1939

profit in using the Taupo waters was far in excess of what was being claimed in compensation for the damage caused. We also find the Crown in breach of the Treaty for not ensuring that the court gave full compensation for personal damages, despite its intention (in the Finance (no 2) Act 1945) of doing so. Further, we find that geothermal features ought to have been included in any assessment of compensation, but were not. We find the Crown in breach of the principles of the Treaty for not rectifying the court's award on that point.

We find that the Crown knew of, should have compensated, and should have taken special care to remedy where possible, the harm to Ngāti Tuwharetoa in respect of their ancestral land, waahi tapu, and taonga. We also find that the Crown was aware of damage to Māori communal rights and practices, to Māori communities and their livelihoods, and ultimately to their whole way of life. In failing to compensate for those kinds of harm, and in failing to remove or rectify the cause of that prejudice, the Crown breached the principles of the Treaty.

Overall, we find that the Crown's acts of omission were unreasonable in the circumstances and in breach of the Treaty principles of partnership, reciprocity, active protection, and options. The claimants have suffered significant social and economic prejudice.

Impact post-1940

We accept the evidence of our expert hydrologist, Mr Hamilton, and the agreement between the parties that the lake was held unnaturally (and unseasonably) high for sustained periods, with subsequent flooding and waterlogging of land, from 1941 to 1971. We also accept the claimants' evidence that some of the economic, cultural and spiritual effects of the flooding and the higher water table have been enduring.

Since 1987, the Government has held the lake at a more natural (but still controlled) level. Farmable land now requires capital and active rehabilitation to reverse the longterm effects of the flooding and waterlogging, even where the groundwater itself may finally have reverted to nearer pre-1941 levels.

We make no findings on whether compensation for flood damage to particular properties in the 1960s was adequate. We lack sufficient evidence on the point. However, both the Native Department (in the 1940s) and Ngati Tuwahretoa (in the 1950s) reminded the Government of the great value of this ancestral land to Taupo Maori. In addition, some of it contained wahi tapu and other taonga. The compensation court's judgement of the land as of 'no great value' before it became waterlogged was therefore inappropriate.

Further, the Crown's duty of active protection required it, at the very least, to have monitored the situation with regard to flooding and waterlogging and to have provided assistance and technical advice to Maori, so that their land could be drained and rehabilitated where possible. In addition, the Crown solicitor advised the government that when the lake was taken above the maximum level, it should act at once and provide assistance and compensation on the spot. The fact that this was not done because, in the government's view, its own title system made it impossible to find or negotiate with the legal owners, demonstrates the serious prejudice to Taupo Maori arising from Treaty breaches identified in Part III of this report.

We find the Crown in breach of the Treaty for failing to compensate Maori in such a manner that the core problem of water damage could be remedied, despite advice at the time that it could have done so. We also reiterate our finding, above, that the whole situation was fundamentally unnecessary because the Crown could have pursued other policies that kept the lake level lower, without harming the national interest in electricity.

The Treaty breaches of the 1940s were compounded by the ongoing failure actively to protect Tuwharetoa's taonga and interests in subsequent decades, and by the failure to compensate them appropriately for avoidable losses.

Effects on tributaries and the Waikato River

Although lacking detailed and systematic evidence of the full impact on tributaries, we accept the generic point that flooding and waterlogging undoubtedly happened for a significant period of time. We also accept the Ngati Hikairo submission that the Tokaanu Stream is an example of how raising the lake level contributed to loss of (or damage to) their taonga. We make preliminary findings that the Treaty principle of active protection, and the property guarantees of Article 2, have been breached in respect of Lake Taupo's tributaries. We are not in a position to determine the frequency or duration of the breach, other than to say that it is likely to have been common during the period 1941-1971, nor to judge the degree of prejudice. It appears, however, that there were long-term negative effects which now require active remedial work, wherever such rehabilitation is possible.

And in the absence of detailed evidence and submissions on the Waikato River, we make a preliminary finding that the tribal groups living alongside the river (within our inquiry region) have been affected by flooding and river problems caused in part by the Crown's control of lake levels. It is our preliminary view that they have suffered prejudice.

The possibility of land rehabilitation

The claimants' evidence is that their land has not recovered from the effects of raising the lake level. Despite the opinion of our technical witness, Mr Hamilton, that there should have been a gradual recovery after 1987 (since when the lake has been operated in accordance with a more natural regime), the claimants' evidence is supported by studies that show the water table to be higher than it should be in some areas. This may in part be because the lake still tends to be held unseasonably high in spring and early summer, which are crucial months for land recovery.

In our view, the Crown has an obligation to assist Maori to rehabilitate affected properties, and every decade that goes by without such assistance compounds the Treaty breach and the prejudice.

However, we observe that Maori may now be limited in the use to which they could put any such rehabilitated land, because of growing concerns about protecting water purity in the lake. This is an issue that Ngati Tuwharetoa must address, in partnership with the Crown (which must actively protect their interests). But in our view, if the decision is made in partnership that land use must be restricted, then the Crown

should compensate the claimants for what will then become permanent deprivation of the full use and enjoyment of this taonga.

We make no comment in this chapter on the broader issue of development and water purity in relation to Tuwharetoa's other lands abutting the lake.

SUMMARY OF FINDINGS FOR CHAPTER 18

Agreements between the Crown and claimants

- The Crown and Ngāti Tuwharetoa agree that Lake Taupo-nui-a-Tia and its rivers are taonga that were in the possession and under the authority of the claimants as at 1840.
- The Crown and claimants agree that hydro-electric power development was necessary in the national interest.

Treaty Breaches

- The Crown eroded the claimants' rangatiratanga over their valuable freshwater fisheries at Taupo, particularly by protecting and facilitating the introduction of trout into their waterways, without agreement with Māori or compensation to them.
- Also in breach of the Treaty, it failed to accord the same legal rights and autonomy to tribes that it accorded to acclimatisation societies, and failed to enter into partnership with tribal authorities to administer the licensing of fishing and access to their Lake.
- In 1926, despite Crown negotiations with Ngāti Tuwharetoa, and despite an Agreement being entered into between the Crown and the iwi (which the 1924 Act had indicated should be 'fair and reasonable'), we find that Lake Taupo, including its bed, was alienated from the iwi without their full, free and willing cession. This was in serious breach of the plain meaning of Article 2 of the Treaty, and the Treaty principles of partnership, autonomy and active protection.
- The 1926 legislation, ostensibly giving effect to the Agreement entered into by the Crown and Ngāti Tuwharetoa, in fact contained significant changes. Perhaps the most far-reaching of these were that the Crown, by this Act, vested in itself the right to 'use and control' the Taupo waters, and to control and regulate the indigenous (as well as the introduced) fishery. Ngāti Tuwharetoa had not given their consent to any such changes.
- The annuity which the Crown agreed to pay to the new Tuwharetoa Trust Board at this time was for control of commercial boating and public fishing (including access, and the letting of campsites), and cannot be considered a payment for the loss of ownership of either the Lake or the rivers, or for the right to 'use and control' the Taupo waters. The Crown has never paid the tribe for the bed of the lake or the right to use its waters.

- Neither in 1926 nor subsequently, did the Crown negotiate with the iwi the right to use their waters for hydro-electricity purposes, nor did it compensate the tribe, then or later, for this use.

- To the extent that ownership of the beds of the lake and tributary rivers has been revested in Ngāti Tuwharetoa, some of the above Treaty breaches have been partially rectified.

- The Crown failed to actively protect the indigenous fisheries of Taupo iwi and hapū. There has been limited recognition of Ngāti Tuwharetoa rangatiratanga in Crown arrangements for the trout fishery but they are still excluded from a real or meaningful authority over the Taupo fishery as a whole (including the habitat and ecosystem, the fish, and the right to fish).

- With regard to raising the lake level for hydro development, the Government failed to give serious consideration to alternative solutions; its impact-assessment was inadequate; and its consultation with Taupo iwi and hapū was deficient. We find these acts and omissions to have been in breach of the principles of the Treaty, and conclude that the decision to erect the control gates and raise the lake levels was not arrived at in a manner consistent with the Treaty.

- The Crown knew of the harm caused to Ngāti Tuwharetoa in respect of the flooding or waterlogging of their ancestral land, waahi tapu, and taonga. It should have properly compensated them and, where possible, taken special care to remedy the damage. We find that the Crown's acts of omission in this context were in breach of the Treaty principles of partnership, reciprocity, active protection, and options.

- We also make a preliminary finding that the Treaty principle of active protection, and the property guarantees of Article 2, have been breached in respect of Lake Taupo's tributaries.

Prejudice

- Taupo iwi and hapū lost much of their indigenous fishery, resulting in serious economic, cultural and spiritual prejudice. In its place, they acquired only a limited stake in the replacement (introduced) fishery. The provision of a number of free licences to Taupo Māori, and a provision for ongoing economic benefit to the tribe from the fishery, while commendable, did not go far enough.

- Raised lake levels over extended periods, and at unseasonable times, resulted in Māori lakeshore blocks, waahi tapu, geothermal taonga, residences, cropping lands, and development farm lands all being subject to inundation, erosion, and a rise in groundwater that turned taonga and farmland alike into swamp.

- Some of the economic, cultural and spiritual effects have been enduring, even where the groundwater itself has perhaps finally reverted nearer to pre-1941 levels.
- The Crown's view that it was difficult to provide compensation and/or assistance to affected Māori (because of problems associated with its own title system and with multiple ownership), demonstrates the serious prejudice arising from Treaty breaches identified in Part III of this report.
- In our view, the Crown has an obligation to assist Māori to rehabilitate affected properties, and every decade that goes by without such assistance compounds the Treaty breach and prejudice.
- If the decision is made, by Taupo Māori and the Crown in partnership, that the pastoral use of rehabilitated land must be restricted to protect the quality of the lake's water, the Crown should compensate the claimants for what will then become permanent deprivation of the full use and enjoyment of this taonga.
- It is our preliminary view that tribal groups living alongside the Waikato River have suffered prejudice from flooding and river problems caused in part by the Crown's control of the level of Lake Taupo.

CHAPTER 19

RANGATIRATANGA – KAWANATANGA ENVIRONMENTAL MANAGEMENT

> According to Māori, from Rangi and Papa came Wainui. Wainui is the Spiritual Guardian of all the waters of this world, whether it is sea, fresh or lagoon waters, that is Wainui. My ancestors say in the time when mountains could roam, the waters would converse.'
>
> – Tamati Kruger, evidence, C21(d), p 32

INTRODUCTION

The Tribunal made it clear from the commencement of this stage one inquiry that it did not intend to conduct a full investigation into environmental change in the Central North Island inquiry region from 1840. Instead, the inquiry focused on the management of natural resources.

On that basis, this chapter returns to the general theme of the entire report, namely the consistent demand from CNI iwi and hapu for recognition of their tino rangatiratanga over their taonga. This Treaty guarantee assured to Māori the right to exercise their autonomy by managing their own affairs, policy, and resources within the minimum parameters necessary for the proper operation of the State.

In this chapter we refer to issues raised by claimants concerning both historical and current resource management regimes. In particular, we focus on evidence of the claimants', the Crown, and the two regional councils in the CNI in relation to lakes, natural water, rivers, streams and their movement into wetlands and estuaries. In relation to the latter, we note the effects of the Foreshore and Seabed Act 2004 and the restrictions on our jurisdiction in relation to the coastal area. However, we have traversed material concerning these areas where they form part of our discussion on impacts from river works.

ISSUES

Taking into account the submissions from the parties and the nature of the evidence remaining for consideration, we have reduced the main issues for determination in this chapter to the following:

1. To what extent has the Crown provided for Māori rangatiratanga in the environmental management of waterways?

2. What has been the prejudice to Māori, if any, of any failure to provide for Māori rangatiratanga in environmental management of waterways?

Unsurprisingly, many of the environmental issues raised by the claimants deal with water and waterways, fisheries and geothermal resources. The location of the waterways, lakes and springs referred to in this chapter can see seen in map 19.1 on page 23.

ISSUE 1 – TO WHAT EXTENT HAS THE CROWN PROVIDED FOR MĀORI RANGATIRATANGA IN ENVIRONMENTAL MANAGEMENT OF WATERWAYS?

Allegations about the loss of authority and control over natural resources, and over water resources in particular, are central concerns for the claimants. The Crown acknowledges that many of the claimants' concerns relate to Crown regulation of the natural environment and issues such as environmental degradation and pollution.[1] We turn to the detail of their respective positions on this issue.

The claimants' case

The claimants broadly allege that the Crown has failed to actively protect their rangatiratanga in resource management and that this has impacted on their ability to manage and protect their taonga. Thus, the Crown has not enabled them to make decisions about the allocation of rights to access and use natural resources they consider to be taonga protected under the Treaty of Waitangi, nor to make such decisions regarding the general management of those resources. The claimants contend that, at least until the Resource Management Act 1991 (RMA), only limited provision was made for Māori rangatiratanga in environmental management in the CNI. Mr Bennion submitted that because Māori interests in the environment were simply not considered in legislation prior to 1977, it goes without saying that the delegations of power under it also failed to consider the Māori interests under the Treaty. [2] We were referred by various counsel for the

[1] Closing Submissions of the Crown, 3.3.111, part 2, p 434
[2] Bennion, generic closings, 3.3.78, p 18

claimants to examples where the delegation to local and regional authorities had failed to address the claimants' concerns leading to significant prejudice.

In terms of the RMA, Mr Bennion acknowledged that there was widespread consultation with Māori preceding the enactment of the legislation and that the RMA contains provisions which accord Māori issues a high level of standing.[3] There are, for example, provisions that require local and regional councils to consult Māori when preparing regional and district policies and plans. There are provisions requiring similar consultation in terms of coastal planning. The Department of Conservation manages the coastal marine area and the Minister of Conservation retains significant responsibilities in terms of the coastal environment.[4] But, he also submitted that the RMA fails to comply with the Treaty principles in a number of important respects.[5] We deal with those arguments in our analysis below.

Ngati Tutemohuta alleged that the Crown in continually excluding them from the management of the environment has been, and continues to be, in breach of the principles of the Treaty of Waitangi. It was contended that the Crown has allowed the ongoing exclusion of Māori from legislation concerning the environment and the delegation of authority to local government. This has marginalised Ngati Tutemohuta's effective participation in environmental management.[6] Other claimants pointed to the general failure to recognise their Treaty rights in water-resources or taonga over which the Treaty guaranteed Māori rangatiratanga.

The Crown's case

The Crown concedes that undoubtedly the pre-Resource Management Act environmental management regimes did not generally recognise or take into account Māori values and interests in a manner now regarded as important and necessary.[7]

The Crown does not accept that the RMA is deficient in terms of the principles of the Treaty. It says that the guarantee of rangatiratanga is not an absolute one.[8] In its view, there are often multiple interests in natural resources within the CNI and any management regime must necessarily carefully weigh these competing interests.[9] The Crown contends that the current resource management regime contains important provisions recognising that weight should be attached to

[3] Bennion, generic closings, 3.3.78, p 18
[4] Bennion, generic closings, 3.3.78, p 20
[5] Bennion, generic closings, 3.3.78, p 20
[6] S Clark and A Warren, Closing Submissions for Ngati Tutemohuta and Karanga Hapu, 3.3.84, p 151
[7] Crown closings, 3.3.111, part 2, p 435
[8] Crown closings, 3.3.111, part 2, p 465
[9] Crown closings, 3.3.111, part 2, p 465

Māori values and interests in environmental decision-making. Therefore, there is no proposal to substantially amend that legislation by, for example, amending section 8 as recommended by previously by the Waitangi Tribunal.[10]

In the Crown's view the RMA, the Conservation Act 1987 and the Local Government Act 2002 provide a more comprehensive basis for the consideration of Māori interests in taonga such as lakes and waterways than the pre-1991 resource management regime.[11]

The Crown submitted that the delegation of powers and functions to subordinate entities of government is complex. Crown counsel pointed to the system in place from the inception of the colony, the creation of provincial governments and the eventual complex system of local government that emerged and proliferated prior to the local government reorganisation of 1989.[12] The Crown argued that the Local Government Amendment Act 2002 provided for Article 2 rights and Māori representation in local government. The Crown contended that the current RMA scheme struck an appropriate balance in terms of meeting its obligations under the Treaty with its responsibilities to provide for resource management and the needs of other New Zealanders. In its view, greater participation of Māori in local government would address, in a practical manner, many of the concerns Māori have about the RMA.

Third party submissions

Both the Environment Waikato and Environment Bay of Plenty submitted that it is the responsibility of the Crown to take account of the principles of the Treaty of Waitangi. Ms Chen, for Environment Waikato pointed to section 4 of the Local Government Act 2002 and contended that it clarifies the position. Section 4 of the Act provides:

> Treaty of Waitangi
>
> In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes.

It was also submitted that in all environmental management issues regional councils are guided by the overriding purpose of the RMA as set out in section 5: requiring the sustainable management of natural and physical resources.[13] We

[10] Crown closings, 3.3.111, part 2, pp 465-466
[11] Crown closings, 3.3.111, part 2, p 470
[12] Crown closings, 3.3.111, part 2, p 467
[13] Chen, Waikato Regional Council Closings, 3.3.112, p 5

note that the regional councils acknowledge that they must have specific regard to those matters listed in sections 6-8 of the RMA, but, and as Ms Chen submitted, these matters are taken into account when decisions are evaluated against this guiding principle.[14] In other words the ability of the regional councils to recognise Māori rangatiratanga in resource management or any Māori ownership interests in natural resources protected by the Treaty is limited by the legislative framework of the RMA.

The Tribunal's analysis on the provision made for Māori rangatiratanga in environmental management

We agree with Mr Bennion in his generic submissions for the claimants that the Crown has not provided for Māori rangatiratanga in environmental management. We start here by referring to chapter 2 where we set out the nature of the relationship Māori enjoyed with their natural resources and their management of them before 1840. We also considered this issue in chapters 17 and 18 in terms of springs, lakes, fisheries and some of the rivers of the CNI. In chapter 20 we examine the relationship Māori had with geothermal resources and their management of them. In summary, and for the purposes of this chapter, we know that at 1840 the iwi and hapu of the CNI exercised their own authority, management and control in accordance with tikanga over:

- The surface of land and its many resources;
- All things on the land – forests, plants and wild-life resources;
- All waterbodies - by way of controlling access to the natural waters, fisheries, water bird life and other taonga;
- All geothermal resources.

After the signing of the Treaty of Waitangi in 1840, the Crown had a duty actively to protect Māori rangatiratanga in the environmental management regime of the time.

Prior to the Resource Management Act 1991

The Crown has conceded that pre-RMA environmental management regimes did not generally recognise or take into account Māori values and interests in a manner now regarded as important and necessary.[15] Although this concession is qualified, it is sufficient for our purposes. We do not find it necessary therefore to undertake a full review of the legislative regime that formed the legal framework

[14] Chen, Waikato Regional Council Closings, 3.3.112, p 5
[15] Crown closings, 3.3.111, part 2, p 435

for the management of natural resources from 1840 to 1991 when the RMA was enacted. We merely summarise aspects of the regulatory framework as it related to the management of water resources and discuss relevant statutes in detail when we consider the various case studies provided in evidence.

We know that from at least 1873 with the Timber Floating Act, the Crown has gradually assumed control over waterways. We also know that even at that time there was Māori protest on the grounds that some were fearful that their rights over those affected streams would be 'taken by the Queen or by the Government.'[16] From 1880, numerous general and local statutes were passed gradually displacing Māori property rights and interests in waterways and the coastal zone.[17] Land Drainage Boards, River Boards, Harbour Boards and a range of other local government authorities exercised powers delegated to them by the Crown. Authorised by empowering legislation, these bodies proceeded to modify a number of the major waterways of the CNI. We discuss some of these statutes, including the Soil and Conservation and Rivers Control Act 1941, below.

On occasion there was some concession to Maori concerns where Maori-owned land was affected by a proposed drainage or river work, or where the land was appropriated under the public works legislation. The Crown did on occasion provide some representation on local management boards. Representation on the boards was invariably shared with other members of the community and appointment did not depend on an iwi or hapu mandate. We discuss the examples relevant to our case studies below. There was also the opportunity for Maori involvement in some local government administration as we discussed in Part II of this report, and later under the Māori Social and Economic Advancement Act 1945.[18] There were, of course, the specific iwi statutory boards such as the Te Arawa Māori Trust Board and the Tuwharetoa Māori Trust Board established to deal with the benefits of natural resource settlements. But these entities had no district-wide powers to manage all iwi or hapu resources. There does seem to have been some interaction through the Native Affairs Department and there is evidence that Māori were consulted but that evidence is limited, and raises more questions than answers, as we discuss below.

So no statutes of general application made any adequate provision either for iwi and hapu representation, or their customary rights and interests. Overall there seems little doubt that there was limited recognition given in the general environmental regulatory regime prior to 1991, of the right of CNI iwi or hapu to freely determine the form of local self-government they wished to use to manage

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[16] A Ward, *Rangahaua Whanui, National Overview,* Vol II, Waitangi Tribunal, New Zealand, 1997, p 351
[17] A Ward, *Rangahaua Whanui, National Overview,* Vol II, Waitangi Tribunal, New Zealand, 1997, pp 352-353
[18] A Ward, *Rangahaua Whanui, National Overview,* Vol II, Waitangi Tribunal, New Zealand, 1997, chapter 20

the allocation and utilisation of their resources. As a result they were forced to participate in an environmental resource management regime that reduced their rangatiratanga to little more than a consultative role. This led to significant prejudice, as their views were marginalised in general environmental management in favour of a process that balanced their interests against those of other users.

The Town and Country Planning Act 1953 and the Counties Act 1956, likewise made no provision for such matters until after the Māori Land March in 1975.[19] It was only after the review of the Act in the 1970s, that the Town and Country Planning Act 1977 included section 3(1)(g) recognising 'the relationship of Māori people, their culture and traditions with their ancestral land,' as a matter of national importance. It was a similar story with the Water and Soil Conservation Act 1967, which nationalised all uses of natural water, a matter we return to below. That statute did not make any express provision for Māori cultural and spiritual values and relationships with their waterways, but the High Court decision in the *Huakina Development Trust v Waikato Valley Authority* (1987) imported recognition of those values into that regime. This decision had little time to become embedded, however, before the major local government and resource management law reform process of the 1980s.[20]

The RMA along with a number of other statutes such as the Conservation Act 1987 and the Environment Act 1986 were the results of that review. The RMA is, with the local government legislation, the primary legislation that we are concerned with in this chapter of our report. As noted by the Whanganui River Tribunal:

> Between 1986-1991, Parliament reviewed all legislation for the protection and use of New Zealand's natural resources. A new legislative framework was established for the management of natural resources, and changes were made to the way that management decisions are made and carried out. The legislative package is principally represented in the Environment Act 1986, the Conservation Act 1987, and the Resource Management Act 1991.[21]

The Whanganui River Report contains, in chapter 10, a full discussion of the nature of the different statutes enacted as a result of the resource management law reforms. We do not propose to traverse those details in full again. Rather we adopt the analysis therein provided while noting that there have been some amendments to the legislation relevant to the claims before us since that report. Where required, we address those in the analysis that follows. The only Act we consider in detail in this section, is the RMA.

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[19] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 92
[20] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188
[21] Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 309

Before we move to that analysis, we note that there was broad consultation with Māori regarding the RMA. During the reforms, two papers released by the Ministry for the Environment are worth mentioning here. The first specifically advised that 'the Government has agreed that the Resource Management Act Law reform was 'not the place to resolve ownership grievances, and that issues of Māori ownership of resources were not to be dealt with in the review.'[22] The second paper released in December 1988 noted that there should be 'substantial recognition of the special interests of tangata whenua in water.'[23] This concern for Māori interests in natural water does not seem to have found its way into the RMA legislation other than in the most general of ways. Rather the Crown's rights, founded in the Coal-mines Act Amendment Act 1903, the Water and Soil Conservation Act 1921 and the Geothermal Energy Act 1953, were preserved by the clause that would become section 354 of the RMA. Therefore, while issues of ownership of water resources were in theory pushed to the side and left unresolved, the Crown preserved its monopoly over the right to regulate the use of these resources and any benefits that derive from the management of them.

The Resource Management Act 1991

As we discussed in chapter 17, subject to the overriding and legitimate exercise of the Crown's authority under Article 1 of the Treaty of Waitangi, the position of the Māori Treaty partner with respect to the management of waterways is quite different to that of other New Zealanders. The Crown's duty is to reflect this special position in legislative terms. The Crown can not assume that under its Article 1 power it has the sole right to manage the natural environment, either through a centralised or delegated form of resource management. To the extent that any legislative framework is enacted that does not reflect this, such regime can not be consistent with the principles of the Treaty of Waitangi.

We turn to consider the RMA. On its face, there has been some attempt made by the Crown to explicitly provide for Māori values and relationships with respect to their natural resources. The most relevant parts of the RMA for our purposes being:

- The Part II provisions of the RMA;
- The consultation provisions regarding plans and policies; and
- Section 33 and the joint management approach

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[22] Ministry for the Environment, *Directions for Change: A Discussion Paper* (1988) p 15
[23] Ministry for the Environment, *People, Environment and Decision-Making : The Government's Proposals for Resource Management Law Reform* (December 1988) pp 23-24

The issue then is the sufficiency of these provisions to meet the standards necessary for the RMA to be consistent with the principles of the Treaty of Waitangi by providing for Māori rangatiratanga over their natural resources.

The Part II provisions of the RMA

The purpose of the RMA is set out in section 5 of the Act as follows:

> '(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> > (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> >
> > (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> >
> > (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.'

Under section 6 of the RMA, in 'achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for seven matters of national importance:

> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
>
> (e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
>
> (f) The protection of historic heritage from inappropriate subdivision, use, and development

(g) The protection of recognised customary activities.'

Under section 7 in 'achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga:

(b) the ethic of stewardship:

(c) the efficient use and development of natural and physical resources:

(d) the efficiency of the end use of energy:

(e) the maintenance and enhancement of amenity values:

(f) Intrinsic values of ecosystems:

(g) repealed.

(h) maintenance and enhancement of the quality of the environment:

(i) any finite characteristics of natural and physical resources:

(j) the protection of the habitat of trout and salmon.

(k) the effects of climate change:

(l) the benefits to be derived from the use and development of renewable energy.'

Finally, in section 8 of the RMA provides that:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

We accept the submissions made by Ms Chen for Environment Waikato that sections 5, 6, 7 and 8, set out a hierarchy of priorities and values to be considered during procedures under the RMA and we discuss them more fully in chapter 20 of this report. All persons exercising powers and functions under the RMA are to be guided by the express purpose of the RMA as set out in section 5. That is the sustainable management of natural and physical resources. They must also have regard to matters listed in sections 6-8: all factors listed contributing to an evaluation that must be done to fulfil the principle purpose of the RMA in

section 5. In the process priority goes to matters of national importance in section 6 over matters listed in section 7 and 8.[24]

It is now settled law that those exercising powers under the RMA are not required to act in a manner consistent with the principles of the Treaty of Waitangi. Rather they must engage in balancing each of these factors. Thus, all matters listed in 6-8 are evaluated one against the other. In chapter 17 we considered whether such an approach to Treaty rights is inconsistent with Treaty principles and concluded, as the Whanganui River Tribunal did, that it is not.[25]

Furthermore, and again as Ms Chen points out, there is case law that suggests that section 8 does not give rise to any obligation on a decision maker under the RMA to consider additional obligations, beyond those listed in section 6(e) and 7(a) of the Act.[26] Thus principles such as the partnership principle with its accommodation between kawanatanga for rangatiratanga, its mutual benefit and reciprocity can not be weighed in the balance, only those matters listed in sections 6-8 can. We also note the tendency in the legislation to overlook the fact that the kaitiakitanga listed in section 7 can only exist where there is rangatiratanga as they are inextricably linked.

The consultation provisions regarding plans and policies

We note that the RMA splits responsibilities for national, regional and local policy development and planning between the Minister for the Environment and the Minister of Conservation, regional councils and district councils. In chapter 20 we review the extent to which planning documents under the RMA reflect (if at all), Māori Treaty rights and interests by reference to issues concerning geothermal resources.

In preparing a regional policy statement or plan, Clause 3(1)(d) of the First Schedule of the RMA requires local authorities to consult with tangata whenua through iwi authorities and tribal runanga. There are two obvious tensions arise from this approach. These are:

- How to deal with unstructured and under-financed groups not aligned with an iwi authority or tribal runanga. We note here that we were impressed with the amount of effort that both Environment Bay of Plenty and Environment Waikato have made in developing consultation processes with Māori. Environment Bay of Plenty, for example, had identified that there were 35 iwi groups within their region alone, most of who were under-resourced and

[24] *Ngati Maru Iwi Authority Inc v Auckland CC* (Baragwanath J, C, Auckland AP18-SW01)
[25] *Whanganui River Report*, p 329
[26] *Waikanae Christian Holiday Park v Kapiti Coast DC* (Mackenzie J, HC, Wellington CIV2003-485-1764)

unable to participate in the initial planning processes of the Council.[27] This was recognised as early as 1993. The common theme in the evidence before us was the very real challenges Māori face in effectively participating in RMA processes. It is clear that this continues to be a problem, even for hapu as organised as Ngati Kurauia at the Southern end of Lake Taupo;

- The extent to which consultation may raise expectations amongst Maori that some enforceable recognition of the principles of the Treaty of Waitangi, including the guarantee to Māori of rangatiratanga, in the management of their resources will follow. Inevitably, due to the circumscribed nature of the RMA, Māori will be disappointed and disillusioned and blame those at the coal face, regional and district councils, when the real problem is the legislation itself. Essentially the problem remains that plans and policies can only reflect what the RMA authorises and, as our study in chapter 20 demonstrates, that is not sufficient to ensure that Māori Treaty rights and interests are protected. The systemic problem is the RMA legislation, not the adequacy or otherwise of the consultation processes adopted.

We also note the duty that section 35A imposes on local authorities to keep and maintain a record of the contact details for iwi authorities and any groups representing hapu; the planning documents recognised by them and the areas of their region or district over which one or more of them exercise kaitiakitanga. Again this is a useful tool, however, recognition of iwi planning documents does not mean that the document can be implemented. In addition, section 66(2A) of the RMA requires local and regional councils to take into account relevant planning documents recognised by an iwi authority lodged with them, but only to the extent that its content has a bearing on resource management issues of the region.

Section 33 and the joint management approach introduced under the RMA Amendment Act 2005

The RMA does contemplate the possibility of a transfer of powers (never used in the CNI) to iwi authorities or runanga under section 33. There is also the possibility of negotiating a joint management agreement under the RMA Amendment Act 2005 (section 4 and section 36B of the RMA). We discuss the advantages of the joint management process in more detail below, but see this as a further mechanism that can be used to enable hapu and iwi to exercise some role in the management of their taonga. We note that where this is contemplated there needs to be some careful consideration given to funding Māori participate in such arrangements. That is because, as Mr Warren for Ngati Tutemohuta, has pointed out, the overwhelming evidence is that while Māori do not shirk from

[27] EBOP closing submissions, 3.3.114, pp 6 - 7

their responsibilities and obligations, they lack the resources both economic and human to assume such a role without support.[28] That aside, the continued exclusion of Māori from any meaningful decision making role under the RMA must be addressed and there is no doubt that these provisions could be used.

The Tribunal's findings on whether the RMA provides for Māori rangatiratanga

Based on our discussions in this chapter and chapters 17, 18 and 20, we begin by rejecting the Crown's contention that the RMA is consistent with the principles of the Treaty of Waitangi. In doing so we accept the submissions made by Mr Bennion, that while the RMA is an advance on previous legislation it still fails to accord with Treaty principles. It fails in the following important respects:

- During the reforms of the 1980s, the Crown indicated that ownership issues were not to be dealt with by the RMA. But the Crown then preserved its rights to control access to natural water, which it promptly delegated to regional or district councils. It also preserved its rights conferred by the Coal-mines Act Amendment Act 1903. Thus, while the section of the Coal-mines legislation vesting ownership in the Crown of all beds of navigable rivers was repealed, as was section 21 of the Water and Soil Conservation Act 1967, section 354(1) of the RMA provides that the Crown's rights conferred by these statutes continue. So the Crown's position has never been diminished by the RMA. Conversely, the Māori position has been diminished. Their rights and interests have not progressed much further than where they were pre-1991. We take this view because section 6 simply indicates that the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga is a matter of national importance. Other than broadening the category of taonga that may be considered, this provision takes Māori little further than the Town and County Act 1977. Furthermore, taking into account kaitiakitanga as listed in section 7 does not recognise that in order to exercise kaitiakitanga, there had to be rangatiratanga. If that may not be taken into account when considering the meaning of kaitiakitanga and its relevance to the RMA matter what is left? The answer has to be Māori cultural and spiritual values. This again takes Māori no further than was recognised in the *Huakina Development Trust* (1987) High Court decision. Finally, in terms of section 8, all that can be considered may be restricted to those matters listed in Part II. Therefore, we ask what has been gained? The only answer must be perhaps a greater right to be consulted. Although not as sophisticated, that was already a feature of the pre-1991 regime.

[28] Warren, Ngati Tutemohuta closings, 3.3.84, p 154

- The Crown's justification for these lack of gains for Māori is this is that there are a multitude of groups with interests in many of these resources and only it or its delegates may fairly and independently determine rights of allocation and use. Furthermore, only it or its delegates should be responsible for their management. The arguments are absolutist in the sense that they rely totally on Article 1 of the Treaty of Waitangi and the right to govern. We reject such a contention on the basis that the Treaty right to govern in Article 1 was also subject to the guarantee in Article 2 of protection for what Māori possessed and the exercise of rangatiratanga over those possessions. We discussed the full extent of the Treaty guarantees in chapter 17.

- There is no requirement on regional or district councils when making decisions under the RMA to give effect to Māori concerns because they are Treaty rights-holders. Contrast that with the requirement to give full expression to the purpose of the RMA as set out in section 5. An example of the approach they must take comes from the decision in *Te Runanga o Ati Awa ki Whakarongotai Inc v New Zealand Historic Places Trust* (W050/2003) where the majority of the Environment Court found at paragraph 84 that:

> We cannot see any way in which the principles of the Treaty of Waitangi, the principles of s 7, or the principles of s 6 can be applied in a manner which would cause us to set to one side the all embracing community thrust of s 5, aimed as it is in the present case, at a living community suffering extraordinary difficulties and grief as a result of substandard arterials.

- While we recognise, in certain circumstances, the need to provide for all communities, an approach that can set aside Māori concerns in the manner described above is not acceptable. In our view alternative options would need to be explored first before a proposal got to the point where it became a contest between competing interests.

- The RMA fails to deal with the key issue of contested ownership of these resources. As Mr Bennion pointed out, the RMA itself does not recognise or allow those exercising powers under the RMA to recognise situations where ownership of resources is contested by Māori.[29] A consent authority, for example, can not use this information to refuse an application for a resource consent. Rather, all a consent authority needs to assess is whether such access is consistent with the sustainable management of the resource and the other requirements of the RMA.[30] In other words, the consent authorities may not act in a manner consistent

[29] Bennion, generic closings, 3.3.78, p 18
[30] Bennion, generic closings, 3.3.78, p 19

with the principles of the Treaty of Waitangi, because they must act in accordance with the RMA statutory regime.[31] In this respect we point to the evidence concerning geothermal resources which we discuss in detail in chapter 20.

- As we discuss below and in chapter 20, the RMA fails to deal with historical issues. It does not look backwards in any substantial way. As a result, the historic degradation, damage or pollution of a taonga cannot be raised as more than background during RMA resource consent processes. Nor can a consent authority consider the historical issues concerning how an iwi or hapu has lost their ownership of a resource or taonga.[32] There is no requirement for consent authorities to consider how Māori have been placed historically in terms of these resources. While they may do so, they are not required to do so by the RMA.

- We note the option for transfer of power under section 33 of the RMA. But it has never used in the CNI. We also note while a local authority may agree to enter into a joint management agreement under the RMA Amendment Act 2005 (section 4 and section 36B of the RMA) it is not required to do so. Herein lies the problem for Maori: decisions to enter joint management arrangements are at the discretion of a local or regional authority. This subordinates iwi or hapu rangatiratanga because they can not expect that such decisions will be made or reviewed in accordance with Treaty principles. Such agreements could only ever operate in a manner consistent with the RMA, which as we have explained is deficient in Treaty terms.

- As we note in detail in chapter 20, consultation with Māori in the resource consent process is not a statutory requirement under the RMA unless they are recognised landowners who may be affected by the grant of a consent. (See section 36A of the RMA). Rather, consultation is a matter left to the discretion of the staff of the consent authority or the applicant for the consent. While we note the decisions of the Environment Court and the High Court suggesting that it would be good practice to engage in such consultation, it is unlikely that the failure to consult (given the new section 36A of the RMA), could now be used as the basis for rejecting a resource consent application.[33]

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[31] Bennion, generic closings, 3.3.78, p 19
[32] Bennion, generic closings, 3.3.78, p 19
[33] See EBOP, closings, 3.3.114, p 9 and Environment Waikato, closings, 3.3.112, pp 4-5

ISSUE 2 – WHAT HAS BEEN THE PREJUDICE TO CNI MAORI, IF ANY, OF ANY FAILURE TO PROVIDE FOR MAORI RANGATIRATANGA IN ENVIRONMENTAL MANAGEMENT OF WATERWAYS?

We have considered a number of examples to ascertain whether there has been prejudice to CNI Māori because the Crown has failed to adequately provide for Māori rangatiratanga in resource management. In the main this turns on how the Crown has delegated powers and responsibilities to local authorities and other statutory bodies charged with managing natural resources considered taonga by the claimants.

As we noted above, the right of Māori to exercise their autonomy by managing their own policy, resources, and affairs, within the minimum parameters necessary for the proper operation of the State, extends to their waterways. We turn now to the evidence that points to:

(a) historical difficulties that Māori have faced under the pre-1991 resource management regime

(b) ongoing difficulties for iwi and hapu leading to prejudice under the RMA due to the failure of the Crown to provide for the rangatiratanga of CNI Māori in resource management.

The Management of Lakes

The health of the Central North Island lakes has been a matter of widespread concern to claimants, to government agencies, to district and regional councils and to residents and recreational users. The major activities that have dominated the economic life and landscape of the Volcanic Plateau have each had impacts on water quality. We do not intend to undertake an exhaustive analysis of the environmental impacts on the lakes within the CNI, but rather to adopt the University of Waikato researchers' list as a summary overview:

- the conversion of hill and riparian forests to pastoral agriculture has resulted in run-off, washing animal waste, sediment and fertiliser residues into waterways;
- urbanisation, including tourist development, has added to the pressures, especially on Lakes Taupo and Rotorua. Waste water, especially from sewerage systems, is leaching unnecessary amounts of nutrients into the lake;
- Large-scale afforestation, with single species of trees, has increased sediment discharge during the land development phase. Wood processing industries have increased the flow of toxic and non-toxic wastes into lakes;

- lakes have been overfed with nutrients to the point that eutrification sets in, oxygen is depleted, water clarity lessens and there are possibilities of toxic algae bloom.[34]

We are also aware that there is significant dialogue between iwi, central government and local government in this context and that special management arrangements have been adopted for Te Arawa. However, that does not allow the Crown to escape from the primary point, as put by the claimants, that at the end of the day the damage has been done and it is the Crown that has a Treaty responsibility to rectify it. The burden of rectification should not be transferred to Māori. We agree with the conclusion reached by Kirkpatrick, Belshaw and Campbell:

> Environmental legislation such as the Resource Management Act, and better management practices from local and regional councils, have gone some way to arresting the trend of environmental degradation. However, this is at the time when Te Arawa and Tuwharetoa are about to emerge as players in the region. They are likely to be unfairly handicapped in their efforts to develop their own resources as they are forced by restrictive legislation to pay the price of unchecked development … through most of the twentieth century[35].

Large-scale economic developments in agriculture, forestry, tourism and hydroelectric power generation have brought prosperity to the nation, to the region, and to the cities and towns within the region.[36] But these same developments, together with residential and holiday home developments, have impacted massively on the quality of the water in the lakes. The Crown acknowledges the problems and states that it is aware of the different sources of pollution in the Rotorua Lakes and its tributaries. It notes that these matters are now the subject of catchment-wide mitigation measures.[37] But it remains the Crown's view, that the best way of dealing with these issues is through RMA processes, 'given the reality of on-going land use in the Rotorua area.'

The Rotorua lakes

The significance of the Rotorua Lakes to Te Arawa is well documented and need not be rehearsed here.[38] We have repeated some of the traditional history concerning the lakes in chapter 1.

However, as an example of the environmental concerns raised before the Tribunal in terms of the historical management of the lakes, we refer to issues raised by

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[34] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, chapter 3
[35] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 147
[36] See sections 10.2.12 and 10.4.1 (4) above
[37] Crown closings, 3.3.111, part 2, p 460
[38] For example, see Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 130

Ngāti Hurungaterangi, Ngāti Taeotu and Ngāti Kahu. D Shaw has described their history at Ngapuna in *Ngapuna: The Past Outlook for the Future*, a monograph produced in 1990 for the Ngapuna combined marae committee.

The claimants relied on the evidence provided in the *Land-Based Cultural Resources and Waterways and Environmental Impacts* (Rotorua, Taupo and Kaingaroa) 1840-2000 report.[39] Ngapuna is situated on the southeastern side of Lake Rotorua. It is sited on alluvial land, near the Puarenga Stream.[40] This stream is one of the largest streams flowing into Lake Rotorua.[41] The Puarenga Stream runs through the Whakarewarewa Village and is the stream where children dive for coins thrown by tourists. Environmental issues effected the water catchment around Ngapuna include the impact of farming developments; wood processing industries, and urban and industrial expansion.

The claimants allege that the surrounds of the Ngapuna marae, the suburban community where many Ngapuna residents live, the Puarenga stream, the Ngapuna wetlands, beach and swimming holes, and the Ngapuna geothermal sinter flats have all been affected by the mismanagement of the immediate water catchment. This mismanagement has resulted in adverse impacts from domestic, forestry and industrial waste disposal. Kirkpatrick et al identify the following historical causes:

- Rotorua municipal sewage scheme in the 1950s, 1960s and 1970s;
- run off from Whakarewarewa Forest spray irrigation from the 1980s and 1990s;
- run off and leaching into groundwater from the old municipal dump site and the new municipal dump site;
- discharge from the Waipa sawmill and the Peka and Ngapuna industrial parks; and,
- run off and air pollution from State Highway 5 and State Highway 30.[42]

The legislative history for water management forms the backdrop to the claimants' concerns. Basically, the claimants allege that they have been prejudiced by the historical failure of the environmental legislation to deal with Māori issues. This factor, combined with the low level of environmental

[39] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, chapter 4
[40] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 157
[41] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 154
[42] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3 pages 148-196 and especially figures 4.1,4.2,4.3,4.5,4.12,4.13, 4.14 and the photographs provided in figures 4.6, 4.7, 4.8, 4.15, 4.16, 4.17, 4.18, 4.19, 4.20, 4.21, 4.22. See also table 4.1 which logs complaints relating to McAlpines sawmill and drain 1998-2002

awareness, poor zoning requirements and land use choices and minimal legislative protection has adversely affected their cultural way of life. The impact was particular felt at Ngapuna, which was once predominantly rural and comprised largely Māori land.[43] Subsistence production was an important part of the lives of the claimants until 1965.[44] We were advised that many Māori left Ngapuna as a result of land sales following the partition of the Māori land at Ngapuna. The Ngapuna lands were once to be included in the Ngapuna Consolidation Scheme. Difficulties with the scheme meant that it was never finalised.[45] The object of the combined partition was to provide house sites with titles that could be registered. The scheme was approved by the Māori Land Court in 1961 and finalised in 1965.[46] Despite many leaving, a number of Māori residents obviously remained to face the impacts of development.[47]

In the late 1960s the decision was made to locate the Rotorua municipal sewage scheme to Ngapuna.[48] Sewerage was pumped directly from these works into the Puarenga Stream, which itself flowed into Lake Rotorua, pursuant to a water right.[49] There was widespread concern that Lake Rotorua was eutrophic and that the metropolitan sewerage scheme would continue to contribute to the problem.[50] In the 1960s Lake Rotorua was famously described as an 'unflushed toilet'.[51]

Reports commissioned in the 1970s, resulted in proposals for modifications to the existing sewage system for Rotorua which would reduce the amount of treated effluent and discharge it by a new pipeline, not into Lake Rotorua, but into the Kaituna river.[52] The pipeline scheme was the subject of claims to the Waitangi Tribunal, which reported on the claims in the Kaituna River Report (1989) and recommended that land-disposal options be considered as an alternative.[53] The Tribunal considered the impact of pumping effluent into the Puarenga Stream. Their comments bear repeating here:

> … At present the treated effluent from the City's Waste Water Treatment Plant is discharged to the Puarenga Stream and enters the lake at the bay a short distance away. He noted the acid conditions of the bay and that the phosphorus discharge from the plant appeared to be largely removed as the stream water flowed across it. A reduction in

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[43] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 180
[44] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 180
[45] See 132 Rotorua MB 188-199; 132 Rotorua Minute Book 259-260; 116 Rotorua Minute Book 41-51
[46] See 132 Rotorua MB 188-199; 132 Rotorua Minute Book 259-260; 116 Rotorua Minute Book 41-51; Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 180
[47] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 181
[48] Don Stafford, *The New Century in Rotorua* (1988), p 311
[49] *Kaituna River Report*, para 7.18-7.19; Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 181
[50] Don Stafford, *The New Century in Rotorua* (1988), pp 311-312
[51] Don Stafford, *The New Century in Rotorua* (1988), p 311
[52] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, pp 166-167
[53] *Kaituna River Report*, para 7.18-7.19

> coliform bacteria was also attributed to a die-off in Sulphur Bay waters. In brief, the potential of the treatment plant effluent in terms of its nutrient concentration to lake waters is reduced by the passage of the effluent through that bay. We noted also that for those same reasons Sulphur Bay does not support fish or plant life. It is associated with thermal activity, has a visibly cloudy appearance and is not used by the Māori people or the general public for recreational or food-gathering purposes. … [54]

The eventual outcome was that the Crown subsidised a spray irrigation system, which removed liquid effluent, not into the lake or the Kaituna River but into the Whakarewarewa pine forest.[55] The water right authorising the Rotorua District Council to discharge treated city effluent into the Whakarewarewa Forest was granted on 23 September 1988 by the Bay of Plenty Catchment Board under the Water and Soil Conservation Act 1967 for a period of 12 years expiring on 31 October 2000.[56] The Rotorua District Council was granted a resource consent under the RMA to continue this scheme.[57] This solution was sound in concept and, for the most part, protected Lake Rotorua from further discharge for a period of time.[58] It seems however, that intensive spraying in the forest has subsequently caused leakage of nutrients via the Puarenga stream.[59] As we note below, this has required further work on a new proposal to divert water from Lake Rotorua via a wall from the Ohau Channel direct to Okere falls into the Kaituna River. The irony does not escape us, given the Tribunal's role in the past.

Another contributor to the environmental concerns of the claimants has been the impact of the Waipa State Sawmill set up in 1939 by the New Zealand Forest Service. This operation, as more trees were milled in the 1960s, 1970s and 1980s, expanded to become a very large-scale operation.[60] From the 1950s to the late 1980s pentachlorophenol (PCP) was used, in large quantities, for timber preservation with the result that the Waipa site became one of the most contaminated in New Zealand.[61] Soil and dust were contaminated, and contaminated groundwater migrated towards the Waipa stream, a tributary of the Puarenga stream.[62] There were arguments before us regarding the accuracy of the measurement of contamination involved, but that does not detract from the point that some contamination occurred.[63] It was not until 1991 that government and the Forestry Corporation banned the use of PCPs. The Forest Corporation began to remove contaminated dust, and intercept contaminated groundwater, from

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[54] *Kaituna River Report*, para 7.16
[55] Waitangi Tribunal, 1984 *Kaituna River Report,* pp 27-29 and Parliamentary Commissioner for the Environment, 1988, *Environmental Management and the Principles of the Treaty of Waitangi*, pp 48-54
[56] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 166
[57] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 167
[58] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 166
[59] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 167
[60] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 172
[61] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 173
[62] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 174
[63] National Task Group report cited in Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 174

1993 and has thus mitigated to an extent some of the problems.[64] During resource consent hearings Māori, including the Whakarewarewa Māori Committee, have publicly expressed concern about the impact of this on the health of their communities.[65]

Around the mid-1960s, the Rotorua County Council zoned substantial portions of the Ngapuna as industrial.[66] Industrial development has continued at Ngapuna in the Peka and Puarenga industrial parks, and sawmills have continued to operate close to residential areas.[67] Water discharge consents under the RMA, for a number of industries to discharge waste water into the drains and streams which run through residential areas, adjacent to the children's playground, and eventually into the streams and wetlands, were raised as continuing issues.[68]

Aside from the Ngapuna and Puarenga Stream examples, other claimants particularly from Ngati Rangiteaorere, Ngati Hinekura, Ngati Te Takinga, Ngati Rongomai, Ngati Rangiunuora, Ngati Makino and Ngati Tamakari raised issues concerning the management of the lakes. Te Ariki Morehu told us about his frustration at the management practices of statutory authorities during their various and many historical attempts to deal with nitrates, weed, and other pollutants entering Lake Rotoiti via the Ohau Channel from Lake Rotorua.[69] He also told us about the works at Okere falls.[70] He alleged that this had occurred with minimal tangata-whenua participation.[71] Mr Whata-Wickliffe raised similar concerns about the management of the lakes and tributaries.

Nutrient loading in the lakes has been an ongoing concern. The largest nutrient inputs into Lake Rotorua by 1991 were runoff from pastoral farms, septic effluent and urban runoff.[72] Lake Rotoiti has also been affected as the waters flow discharge from Lake Rotorua via the Ohau Channel.[73] The land use patterns around the Rotorua Lakes have contributed to the problem. Moves to retire land to protect against nutrient loading were discussed before us. As early as the late 1970s, the local authority in Rotorua had implemented a policy of encouraging the 'retirement' of land around some Rotorua lakes, so that water run off from the land would not carry nutrients into the lakes.[74] According to Kirkpatrick et al, and

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[64] Environment Bay of Plenty media release October 2004, cited in Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 176
[65] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 178
[66] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 180
[67] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 180
[68] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 180-182
[69] Te Ariki Morehu, B 52 also see Don Stafford, *The New Century in Rotorua* (1988), pp 311-314
[70] Te Ariki Morehu, B 52 and see also Don Stafford, *The New Century in Rotorua* (1988), pp 342-343
[71] Te Ariki Morehu, B 52
[72] R C Donaldson et al, *Lakes Overview Report 1991*, BOPRC, 1991, pp 12-18 as cited in Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 140
[73] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 140
[74] *Kaituna River Report*, p 21

as an example of what measures have been taken, 16km of fencing around Lake Rotoiti has been erected around the water's edge and 22,000 re-vegetation plants have been planted.[75] This scheme has not been implemented without its critics, and some of the evidence before us, from Mrs Fenwick for example, raised historical concerns regarding the limited participation of tangata-whenua in decisions affecting the lakes and the burden on Māori landowners to contribute land to the schemes.[76]

There was, however, insufficient technical evidence to take many of the issues raised by the claimants before us any further at the Stage One level. Furthermore, we note that historical issues concerning the lakes are now 'settled' by the Te Arawa Lakes Settlement Act 2004 and given the new management regime that has been introduced, it is unlikely that future management issues will need to be addressed any further in the near future. That does not preclude the parties from researching the effects of historical pollution and its management on specific communities such as Ngapuna for the purposes of negotiations.

Nevertheless, there are other issues raised in this chapter concerning matters that, in our view, are not settled by the Te Arawa Lakes Settlement Act 2004. By section 11 of that Act, 'Te Arawa lakes' means:

(a) Lakes Ngahewa, Ngapouri (also known as Opouri), Okareka, Okaro (also known as Ngakaro), Okataina, Rerewhakaaitu, Rotoehu, Rotoiti, Rotoma, Rotomahana, Rotorua, Tarawera, Tikitapu, and Tutaeinanga;

(b) includes the water, fisheries, and aquatic life in those lakes;

(c) but does not include the islands in those lakes or the land abutting or surrounding those lakes.[77]

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[75] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 145

[76] Fenwick, evidence, F21, pp 7-8

[77] The Te Arawa Lakes Settlement Act 2004 settles the following historical claims: — (1) …(a) every claim (whether or not the claim has arisen or been considered, researched, registered, made, or notified on or before the settlement date) that Te Arawa (or a representative entity) had at, or at any time before the settlement date, or may have at any time after the settlement date, and that — (i) is founded on a right arising — (A) from te Tiriti o Waitangi (the Treaty of Waitangi) or its principles; or (B) under legislation or at common law (including aboriginal title and customary law); or (C) from fiduciary duty; or (D) otherwise; and (ii) arises from, or relates to, acts or omissions before 21 September 1992 — (A) by, or on behalf of, the Crown; or (B) by or under legislation; and (b) every claim to the Waitangi Tribunal, to the extent that — (i) paragraph (a) applies to that claim; and (ii) the claim relates exclusively to Te Arawa (or a representative entity), including Wai 240 (Te Arawa lakes claim); and (c) every other claim to the Waitangi Tribunal, to the extent that — (i) paragraph (a) applies to that claim; and (ii) the claim relates to Te Arawa (or a representative entity), including — (A) Wai 275 (Tahunaroa and Waitahanui Blocks claim); and (B) Wai 363 (Tuhourangi Taonga Tukuiho claim); and (C Wai 675 (Lake Okataina and Surrounding Lands claim); and (D) Wai 791 (Volcanic Interior Plateau claim); and (E) Wai 837 (Ngati Whaoa Rohe claim); and (F)Wai

The Schedules to the Deed of the Settlement of the Te Arawa Lakes Historical Claims and Remaining Annuity Issues, and Schedule 1 (Part 1) deal with a number of relationships including protocols between the Te Arawa Lakes Trust with the Department of Conservation, the Minister of Fisheries and the Minister for the Environment. These protocols do not override the RMA or restrict the ability of the Crown to interact with or consult any persons including iwi, hapu, marae, or whanau or other representative of tangata whenua.[78] Finally, the protocols refer to the rivers and streams flowing into and out of any one of the Te Arawa Lakes, but these references are not sufficient to exclude our jusridiction in terms of these tributaries given the precise definition of the Te Arawa Lakes in section 11.

We particularly note the establishment of the Rotorua Lakes Strategy Group comprised of representatives from the Bay of Plenty Regional Council and the Rotorua District Council. Pursuant to section 48 of the Te Arawa Lakes Settlement Act 2004, the Group is deemed a permanent joint committee within the meaning of clause 30(1)(b) of Schedule 7 of the Local Government Act 2002. The Group is a permanent committee and must not be discharged unless each organisation agrees to the Group being discharged. Under section 49 of the 2004 Act, the purpose of the Group is to contribute to the promotion of the sustainable management of the Rotorua lakes and their catchments, for the use and enjoyment of present and future generations, while recognising and providing for the traditional relationship of Te Arawa with their ancestral lakes. Under section 51(5), the trustees of the Te Arawa Lakes Trust have the right to attend any meeting of the Group; but do not have the right to attend meetings of the Bay of Plenty Regional Council or the Rotorua District Council merely by reason of their status as members of the Group. We recognise the important developments under the Te Arawa Lakes Settlement Act 2004, but these developments do not prevent the application of the RMA with all its attendant systemic issues discussed above in section 1 of this chapter. Furthermore, neither the 2004 Act nor the Deed settles all aspects of claims concerning water resources outside of

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911 (Ngati Tahu and Ngati Whaoa Lands and Resources claim); and (G) Wai 918 (Lake Rotorua and Rotorua Airport claim); and (H) Wai 936 (Ngati Rangiteaorere Lake Rotorua claim); and (I) Wai 996 (Ngati Rangitihi Inland and Coastal Land Blocks claim); and (j) Wai 1103 (Ngati Hinemihi Te Ariki and Punaromia Land claim). (2) However, Te Arawa lakes historical claims does not include — (a) a claim that a member of Te Arawa, or an iwi, hapu, group, family, or whanau referred to in section 12(1)(c) may have that is founded on a right arising as a result of being descended from an ancestor who is not a Te Arawa ancestor; or (b) any claim that Te Arawa has or may have to the extent that the claim does not arise from or relate to all or any of the Te Arawa lakes, the 1922 arrangements, or the annuity, including (but not limited to) any claim relating to — (i) the land abutting or surrounding the Te Arawa lakes; or (ii) the islands in those lakes; or (iii) resources not related to those lakes; or (iv) Crown acts or omissions not arising from or relating to those lakes; or (v) the Ohau Channel between Lakes Rotorua and Rotoiti; or (c) a claim that a representative entity may have to the extent that the claim is, or is based on, a claim referred to in paragraph (a) or paragraph (b). (3) Subsection (1)(a) is not limited by subsection (1)(b) or (c).

[78] Deed of Settlement of the Te Arawa Historical Claims and Remaining Annuity Issues, dated 18 December 2004, Schedule 1, Attachment B to all protocols

the lakes.[79] We have, therefore, focused later in this chapter on a number of case studies concerning natural water and waterways or bodies from the Rotorua district.

However, we turn now to consider the impacts of the Crown's failure to provide for Māori rangatiratanga in the management of Lake Taupo and the impacts of Ngati Tuwharetoa as the owners of riparian lands around the Lake.

Lake Taupo: The 'proposed Taupo Basin Reserves Scheme' and the current proposed variation under the RMA

The claimants' case

Ms Feint for Ngati Tuwharetoa told us about the Taupo Basin Reserve Scheme,[80] which evolved out of the 1960s government policy to review and restrict land use around the shores of Lake Taupo in order to protect Lake Taupo from the increasing nitrification of the lake.[81] Parcels of land proposed and designated as reserves under this scheme are shown in map 19.2 on page 27. The Scheme was ultimately never implemented. But the case for Ngati Tuwharetoa was that the scheme was effectively in operation for a period 'nigh on twenty years' and that this caused prejudice to Māori landowners by restricting their ability to use their lands.[82] The Tuwharetoa Trust Board backed the scheme because rates would be deferred on Māori-owned land.[83] However, an important condition of their consent was that if the owners wished, the proposed reserve zoning designation would be lifted, or there would be an exchange of land (rather than sale) acceptable to the owners.[84] Ms Feint contended that the Crown's assurance that it would not take Māori land for the Taupo Lakeshore Reserves Scheme compulsorily was crucial to the Trust Board's support for the scheme.[85]

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[79] Te Arawa Lakes Deed of Settlement was signed on 18 December 2004

[80] In relation to this example we heard evidence from the George Asher, Evidence for Ngati Tuwharetoa, 29 April 2005, Document E39; Stephen Asher, for Ngati Tuwharetoa, 27 April 2005, Document E45; David Chrystall, Evidence for Waihaha, 25 April 2005, Document E44; Dulcie Gardiner, Evidence for Ngati Tuwharetoa, 22 April 2005, Document E25. We also heard evidence from Robert Petch for Environment Waikato, Evidence on Allegations of Nitrate Emissions into Lake Taupo, 6 July 2005, Document H27. We were referred to evidence from Peter Crawford, 'Report on Proposed Lakeshore Reserves', Taupō County Council, 1989, annexure 3, to S Asher, Evidence, E45. Mr Peter McBurney referred to the issues in 'Scenery Preservation and Public Works Takings (Taupō-Rotorua) c. 1880s-1980', revised version, Document A82(b). We have also considered the Taupō and Taumarunui County Councils Proposed Lakeshore Reserve Scheme Lake Taupō, special report, 1981.

[81] K Feint, Closing Submissions for Ngati Tuwharetoa, 3.3.106, p 210

[82] Feint, Ngati Tuwharetoa Closings, 3.3.106, p 210

[83] Feint, Ngati Tuwharetoa Closings, 3.3.106, p 211

[84] Feint, Ngati Tuwharetoa Closings, 3.3.106, p 211

[85] Feint, Ngati Tuwharetoa Closings, 3.3.106, p 211

Ms Feint pointed out that while lands were never taken for the scheme, the property rights of landowners were affected by the placing of the 'Proposed Lakeshore Reserve' designation over the land.[86] This, combined with rural zoning, prevented the owners developing the land even though it was not officially reserved. Attempts made by landowners at Waihaha underscored how difficult it was for the residents to have such designations lifted.[87] Ms Feint pointed out that it has been large scale development permitted by the Crown or its delegates that have contributed to the environmental issues concerning the lake, yet Tuwharetoa were being asked to fix these problems by surrendering their ancestral lands round the lake. Hence, she contends that this scheme was an example of Ngati Tuwharetoa being expected to shoulder the burden of environmental protection for Lake Taupo. [88]

The Crown's case

The Crown, in response, has argued that environmental protection of Lake Taupo is a complex issue and is subject to considerable, ongoing commitment by regional and central government.[89] The Crown acknowledges that Tuwharetoa and other Māori are major landowners in the catchment, owning 110,627 hectares or 41% of the land there.[90] This excludes the lake-bed itself. The Crown notes that nitrogen is the primary pollutant of Lake Taupo.[91] It contends that nitrogen output levels are highest from urban and pastoral land but are low from forestry and undeveloped land. Of the pastoral land, 47% of the farms are owned by Tuwharetoa and other Māori land owners and the remaining farms are split equally between Crown and private interests.[92] Tuwharetoa owns 55% of the forestry land in the catchment. Forestry, the Crown submits, is important in the ongoing environmental management of the area. The Crown notes that Mr George Asher considered that the Crown investment in the Lake Taupo and Lake Rotoaira Forest Trusts has had the 'greatest positive impact' on the Lake and waterways of the catchment.[93] Of the undeveloped land in the catchment, 67% is owned by the Crown and is principally Department of Conservation land. The balance, a third, is owned by Ngati Tuwharetoa and other Taupo Māori.[94]

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[86] Feint, Ngati Tuwharetoa Closings, 3.3.106, p 211
[87] Feint, Ngati Tuwharetoa Closings, 3.3.106, pp 211-212
[88] Feint, Ngati Tuwharetoa Closings, 3.3.106, p 210
[89] Crown closings, 3.3.111, part 2, p 491
[90] Crown closings, 3.3.111, part 2, pp 491-492, citing G Asher, Further Evidence on the Evidence of R Perch (Environment Waikato), 4 August 2005, Document I47
[91] Crown closings, 3.3.111, part 2, p 492
[92] Crown closings, 3.3.111, part 2, p 492
[93] Crown closings, 3.3.111, part 2, p 492
[94] Crown closings, 3.3.111, part 2, p 492

In these circumstances initiatives to reduce nitrogen levels will target land with high nitrogen outputs, as a result Ngati Tuwharetoa and other Māori land owners' pastoral interests were and are going to be affected.

The Crown argued that the Taupo Basin Reserves Scheme, although covering a large amount of land at its inception, was subject to a process of consultation, in which Ngati Tuwharetoa was deeply involved.[95] The Lakeshore reserves proposal, as initially envisaged, did not eventuate.[96] Little land was alienated with only one example being recorded, namely 17 acres at Waitahanui taken to retire a rating debt rather than as an acquisition for the reserves scheme.[97] The Crown submits that the scheme was not a 'land grab' as contended in evidence for the claimants but was rather intended to preserve the water quality and health of Lake Taupo, a significant taonga for Tuwharetoa and a considerable national asset.[98] The Crown contends that there were significant difficulties in quantifying the area of land where reserve designations were used and the length of time they remained in place. The area of land was significantly less when the proposed reserves zoning regulations were placed over the land. Of the 18,601 hectares targeted for the scheme in 1984, only 5,500 hectares by that time had been gazetted. It is not known how much of this land was Māori land.[99]

The Crown also submitted there was limited prejudice caused by the scheme because:

> There is no evidence Māori land was taken;
>
> The area of land originally proposed to be included in the scheme was significantly reduced when the proposed reserves zoning designations were placed over the land;
>
> The Taupo County Council's Rates Remission and Postponement Act 1970 was enacted to assist owners where there were large rate demands and the land could not be developed due to the reserve designation;
>
> The zoning designations can be changed, as the evidence of Mr Chrystall demonstrated.
>
> Finally the Crown considers there is insufficient evidence before us to substantiate the claim that the designations prevented the development of Tuwharetoa lands, and saw the iwi carrying a disproportionate share of the burden.[100]

The Crown made only limited comment on the Environment Waikato Nitrates policy to be incorporated into planning documents under the RMA. The Crown

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[95] Crown closings, 3.3.111, part 2, pp 492-493
[96] Crown closings, 3.3.111, part 2, p 493
[97] Crown closings, 3.3.111, part 2, p 493, citing McBurney, Crown Cross-Examination, Crown Transcript of Week 5 Hearing at Hikurangi Marae, Turangi, 2-6 May 2005, 4.1.6, p 136
[98] Crown closings, 3.3.111, part 2, p 494
[99] Crown closings, 3.3.111, part 2, p 495
[100] Crown closings, 3.3.111, part 2, pp 495 - 496

considered that given the poor water quality of Lake Taupo, protective measures are necessary. An approach that involves all land users was the only viable method, given the nature of the challenges faced to improve water quality.[101]

Environment Waikato submissions

The issues concerning the proposed Taupo Basin Reserve Scheme were historical issues so were not the subject of any direct response from Environment Waikato. It did make submissions on its proposal to vary its regional plan to reduce nitrate emissions and we discuss those submissions below.

The Tribunal's analysis regarding the management of Lake Taupo

As we noted in chapter 18, all parties agree that Lake Taupo is a taonga of Ngati Tuwharetoa. We found that Ngati Tuwharetoa's Treaty rights extended to a right to the use and control of access to 'Taupo waters' and to rights to develop those waters. As we have found, Ngati Tuwharetoa and their whanaunga possessed the lakes and rivers of their region as taonga and Article 2 guaranteed their rangatiratanga over, and possession of them. In the our analysis that follows we first consider the origins and impacts of the Taupo Basin Reserves Scheme on Ngati Tuwharetoa which was a feature of land use planning prior to the RMA. In the second part of our analysis we discuss the current nitrate policy under the RMA adopted by Environment Waikato to ascertain its effects, if any, on Ngati Tuwharetoa and their relationship with their lands and Lake Taupo. Finally, we assess what the implications of these different policies and schemes have been for Ngati Tuwharetoa's exercise of their rangatiratanga.

Origins and nature of the Taupo Basin Reserves Scheme

The Taupo Basin Reserves scheme followed widespread concern expressed by the public and a local council in the 1950s and early '60s about the state of the lake's water and surrounding countryside. The Taupo County Council sent a deputation to meet with the Hon Mr Seath with the proposals 'designed to preserve the natural beauties and attractions of Lake Taupo by creating reserves along the lake.[102] It was proposed scheme required that land around the lake and some of its tributaries would be reserved. Following a report from Taupo County Council in 1964 and a central government 'Officials Report' in 1966, central and local government initiated the Taupo Basin Reserves Scheme in 1968.[103] The

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[101] Crown closings, 3.3.111, part 2, p 496

[102] Interdepartmental Officials Committee Report 1966; in BAFK 1466/259b, ANZA, Document Bank: 1929-150

[103] Peter Crawford, Report on Proposed Lakeshore Reserves, Taupo Country Council, 1989, p 16, in Stephen Asher, evidence, E45 annexure; Peter McBurney, Scenery Preservation and Public Works Takings (Taupo-

purpose for such a scheme was to preserve the water quality of Lake Taupo.[104] This would prevent further sediment and nitrate loading in the lake. Both problems were a direct outcome of large-scale developments and of farming practices, including the clearing of the bush and the establishment and fertilising of pasture.[105] The Crown and Māori were the largest landholders around the lake and its tributaries.

Cabinet moved on the proposal by appointing an 'Officials Committee on Lake Taupo Reserves, which included the Department of Māori Affairs. The Committee recognised that the county's proposal 'was likely to be strongly opposed by the owners of Māori land involved.'[106] In fact, Ngati Tuwharetoa's concerns regarding the scheme were publicly aired at the Pritchard-Waetford Committee of Inquiry charged with investigating Māori land use in June 1965.[107] This did not stop officials from moving to identify land available for the reserves scheme. The *Taupo Times* reported in March 1966 that the investigations into the Taupo reserves were the biggest ever undertaken by a Cabinet sub-committee, 'with thousands of maps, aerial photographs, plans, and reports being considered'.[108]

The Cabinet sub-committee received the report of the Officials Committee in early 1966. The 18 page report noted that the Taupo scheme was 'desirable and practicable, and that the Taupo County Council should be commended for its foresight and imagination in initiating the proposal.'[109] The Officials Committee identified 38,000 acres for inclusion in the scheme.[110] By far the greatest area of non-Crown land earmarked for the reserves belonged to Māori.[111] Though there is dispute about how much land was eventually included, all parties before us agree that a significant proportion of the total land identified for the proposed reserves was Māori land or Crown land.[112] The break down identified by officials before the scheme was implemented was as follows:

- 22,000 acres Māori land;

Rotorua) c.1880s-1980, A82(b), pp 220, 222, 233, 248. Crawford includes Ngati Tuwharetoa as one of those who initiated the scheme, but McBurney's far more detailed account clearly excludes the iwi.

[104] Committee on Lake Shore Reserves – Report to the Taupo County Council (March 1964), I1 Appendix II

[105] Committee on Lake Shore Reserves – Report to the Taupo County Council (March 1964), I1 Appendix II; McBurney, 'Scenery Preservation and Public Works Takings', A82(b), pp 238-239

[106] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 222 citing Minutes of Inaugural Officials Committee Meeting, 18 February 1965, BAFK 1466/259b, ANZA

[107] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 230.

[108] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 232

[109] Interdepartmental Officials Committee Report 1966; in BAFK 1466/259b, ANZA, Document Bank: 1927-1950 as quoted in McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 233

[110] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 234

[111] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 237

[112] Interdepartmental Officials Committee Report 1966; in BAFK 1466/259b, ANZA, Document Bank: 1939, as quoted in McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 237

- 12,810 acres Crown land and reserves;
- 2,530 acres Freehold land;
- 660 acres of State forest land;
- Total – 38,000 acres.[113]

Thus it can be seen that the success of the scheme would depend on the co-operation of Māori landowners.

There was an additional concern that the land around the greater Lake Taupo area was the largest undeveloped area of land in the country at the time and demonstrably capable of higher production.[114] The Committee recommended a number of matters including the setting up of a study group to consider future use of undeveloped land on the eastern side of Lake Taupo and that the Government should guide development along the lines of 'preferred use' to be recommended by the group.[115] The Committee finally recommended that:

(a) No special controlling authority be set up.

(b) The reserves set aside be administered by the Department of Lands and Survey and by the local authorities in accordance with the policy for the administration of other reserves.

(c) A policy based on the Government's decision on the Taupo County Council's proposals be laid down for the protection of the Taupo basin;

(d) A committee to be called the Taupo Basin Coordinating Committee, be set up comprising representatives of the interested Government Departments and local authorities with power to co-opt and to be responsible to the Minister of Internal Affairs, is to ensure that effective liaison is maintained and to advise the Government on any steps necessary to maintain adherence to the policy laid down.[116]

The Cabinet approved the scheme in principle in October 1966.[117]A publicity leaflet about the Lake Taupo Reserves Scheme was circulated at the time and it

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[113] Interdepartmental Officials Committee Report 1966; in BAFK 1466/259b, ANZA, Document Bank: 1939, as quoted in McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 237
[114] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), pp 220, 229
[115] Interdepartmental Officials Committee Report 1966; in BAFK 1466/259b, ANZA, Document Bank: 1927-1950
[116] Interdepartmental Officials Committee Report 1966; in BAFK 1466/259b, ANZA, Document Bank: 1927-1950; and see Publicity Leaflet, Lake Taupo Reserves Scheme, I1
[117] Publicity Leaflet, Lake Taupo Reserves Scheme, I1

included a summary of the scheme and the recommendations of the Officials Committee approved in principle by the Cabinet.[118]

It is apparent from the official report that the Crown promoted the idea of using designations to control development. A note from the Taupo County Engineer, G B Burton in his report *An Environmental Study of the Lake Taupo Catchment* indicating that this was done.[119] We also know that Taumarunui and Taupo Councils moved to limit urban development and designate several thousand acres as lakeshore reserve. David Chrystall told us that the designations imposed 'compromised the whole question of 'voluntary negotiation' for land and that once reserve designation was part of a district scheme, acquisition became 'enforcement by statute'.[120]

We also know that Ngati Tuwharetoa held a hui in 1967 to discuss the scheme. The hui expressed concerns about the Crown's power to compulsorily take the land: 'uppermost was the thought that the Government could use a proclamation to obtain the land.'[121] It was reported at the time that there was a general feeling that the iwi should retain its tribal lands, and a suggestion for creating a Māori reserve was not strongly supported.[122] Certainly, the prospect of using these powers was not far from the minds in the Taupo County Council.[123] Ngati Tuwharetoa did eventually agree to the reserves plan only on certain conditions.[124] McBurney notes that Ngati Tuwharetoa expected:

> '… the land to be set aside as "proper reserves, for all time, for the use of the people and with adequate roading." Once again Tuwharetoa asked that suitable areas be earmarked for subdivisions. The Trust Board expressed a preference for afforestation rather than land development for farming on both the eastern and western shores of the lake. They also gave approval for the provision of a marina at Tokaanu … the Trust Board representative councillor L E Grace, stated that the Māori owners now felt that they could negotiate in the required land transfers.'[125]

The next event relevant to our inquiry occurred in June 1968, when the Reserves Study Group, proposed by officials in 1966, completed its report. It recommended the creation of solid forestry zones to the north and south of the lake, with a solid farming zone to the south-east.[126] These recommendations

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[118] Publicity Leaflet, Lake Taupo Reserves Scheme, I1
[119] I1, Appendix IV, p 14
[120] Chrystall, Evidence, E44, p13
[121] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 242, citing Taupo Times, Tuesday February 21 1967, in BAKF 1466/259b, ANZA. Document Bank: 1923
[122] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), pp 241-242, citing Taupo Times, Tuesday February 21 1967, in BAKF 1466/259b, ANZA. Document Bank: 1923
[123] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 243
[124] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), pp 243-244
[125] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), pp 243-244
[126] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 244

appear to have been rejected. However, the Cabinet did eventually agree to the establishment of the Taupo Basin Coordinating Committee.[127] Ngati Tuwharetoa Māori Trust Board and Māori landowners were represented on the Committee.[128] During the initial meeting of this committee participants were told that the Government had no intention of using its powers to acquire land by way of compulsory acquisition.[129] Two sub-committees dealing with roading and river reserves were also established. Māori were not represented on either of these committees.[130]

As McBurney notes, it would take years to acquire lands for the scheme. In many cases, however, acquisition of the land was unnecessary as both the Taupo County Council and the Taumaranui County Council could impose a reserve designation in their district schemes over the land under the Town and County Planning legislation. This allowed the councils to identify land as 'proposed lakeshore reserve', which restricted owners' use of the property without either local or central government having to buy or arrange an exchange for the affected land, or compensate the owners.

We note that as early as 1970, Ngati Tuwharetoa began expressing concerns that the scheme was not progressing in the manner they had contemplated. On 7 September 1970 the full Taupo Basin Coordinating Committee met in Wellington and agreed to permit Mr R Feist, legal representative for Ngati Tuwharetoa, to attend for the Tuwharetoa Trust Board. He raised the Board's fears that 'procedures under the Town and Country Planning Act would defeat the stated policy of negotiation and agreement in the designation and acquisition of Māori land for reserves.' He continued:

> In many cases, no objections had been lodged to the proposed district scheme as the Māori owners had expected that negotiations would eventually be open to them. Reference was made to five appeals now before the Town and County Planning Appeal Board which had been adjourned by consent of the Taupo County Council. Should these appeals be unsuccessful would the negotiation and agreement procedure be later available to his clients? They could abandon their appeals on the basis that the final decision would be arrived at by negotiation.[131]

Assurances were given that the land would not be taken by compulsion, but that 'a pre-requisite to the reserves scheme was that local authorities were required to

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[127] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), pp 244-248
[128] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 248
[129] McBurney 'Scenery Preservation and Public Works Takings', A82(b) p 248, quotes PJ O'Dea, secretary of Internal Affairs and chairman of the Taupō Basin Co-ordinating Committee, speaking at the inaugural meeting, December, 1968
[130] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 249
[131] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 261, citing Minutes of the Taupo Basin Co-ordinating Committee Meeting, 7 September 1970, p 4 in BAFK 1466/260a, ANZA, Document Bank: 1994

produce district schemes under the Town and Country Planning Act.'[132] The Government had stipulated that no negotiations were to take place until the district schemes had been completed.[133]

Thenceforth, the issue of the designations continued to plague Māori landowners. McBurney cites many examples of objections from Māori landowners of several blocks affected by the designations. This includes one objection in 1984, from Hepi Hoani Te Heuheu, Rangikamutua Downs and Huri Maniapoto, as trustees of the Tauranga-Taupo block, to the 'proposed lakeshore reserve' designation being applied to a part of that block.[134] The claimants before us also cite examples of Māori land owners discovering that their land had been designated proposed lakeshore reserve with no notification, and, failing in their attempts to negotiate alternatives with the councils involved.[135]

Failure to respect and provide for the rangatiratanga of Ngati Tuwharetoa

We note that the case for Ngati Tuwharetoa reflects their general concern that their resources have been targeted by the Crown and that this scheme was another example of many previous initiatives in which the Crown focused on their property to further national objectives.

Ngati Tuwharetoa now say that there were elements of coercion involved for their leadership at the time when they agreed to the Lake Taupo Reserves Scheme. The evidence indicates that Tuwharetoa Trust Board had little choice but to agree to the scheme, the alternative was complete loss of control of their taonga. Mr Stephen Asher's evidence, for example, was that the Taupo County Council and the Crown deliberately excluded Ngati Tuwharetoa when developing the Taupo Lakeshore Reserve scheme. When the iwi became aware of what was proposed there was a 'very strong' belief that it was strategically necessary to support the scheme otherwise the Crown would simply take the land it wanted. Support remained conditional and reluctant, offered on the basis of:

- No compulsory acquisition of land under the Public Works Act,
- A rating exemption, which included writing off unpaid rates,

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[132] Minutes of the Taupo Basin Co-ordinating Committee Meeting, 7 September 1970, p 4 in BAFK 1466/260a, ANZA, Document Bank: 1994-1995 as referred by McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 262

[133] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 262

[134] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), pp 273-274

[135] See, for example, David Chrystall, Evidence, E44, p 13, or Dulcie Gardiner, evidence, E25, p 7.

- If owners wished to develop land then the reserve designation would be lifted or land acceptable to the owners would be provided in exchange. [136]

It was Mr Stephen Asher's evidence that the Taupo County Council designated areas of Māori land 'proposed lakeshore reserve' and left this designation in place despite the scheme not being proceeded with when it was unnecessary to do so. In his view, the council did not honour its undertaking to remove the designation on request. The results were twofold:

- For the Māori owners the designation inhibited development. If they did succeed in having the designation removed the land became rateable and therefore immediately a cost, but was still not able to be developed because of the 'very restrictive' rural zoning.[137] Attempts to change the zoning were costly and unlikely to succeed, as the lakeshore reserve had priority and the council's district scheme was restrictive in nature.

- The Taupo County Council and Crown effectively gained the lakeshore reserve without ever having to pay for it. No money was provided to acquire or lease the land, or compensate the owners, yet the reserve designation, the potential rates burden and the rural zoning meant the owners were unable to use it.

Waihaha is an example of the impact of the proposed reserves scheme. Mr David Chrystall, an architect and town and country planner, was approached to do some work on behalf of the Waihaha landowner. In particular, Mrs Hariata Cairns wished to improve her house. He discovered that some of the land on Waihaha 3B2 had been designated 'proposed lakeshore reserve' by the Taumarunui County Council. None of the shareholders in the Waihaha block had been notified.[138] In addition to the reserve designation, the zoning of the land was rural.[139] Some of the land on the lakeshore was designated residential but most of that area was swamp-land and could not be used.[140]

Mr Chrystall told us of his long struggle to help the Māori landowners at Waihaha to have the 'Proposed Lakeshore Reserve' designation and underlying rural zoning lifted. His evidence demonstrates how difficult it was for Māori to have the designation removed and how confusing the process was.[141]

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[136] S Asher, Evidence, E45, pp 8-9
[137] S Asher, Evidence, E45, p 9
[138] Chrystall, Evidence, E44, p 13; McBurney 'Scenery Preservation and Public Works Takings', A82(b), p 281
[139] Chrystall, Evidence, E44, pp 13-14
[140] Chrystall, Evidence, E44, p 13
[141] Chrystall, Evidence, E44, pp 13-18

In 1971 a formal objection to the designation was filed for the owners and submissions were presented to the Taumaranui County Council. In December 1973, the decision of the county was released disallowing the objection, and leaving a three-chain reserve designation along the lakeshore with the rest of the block zoned rural.[142] An appeal was lodged in February 1974 and heard in December 1975 by the Town and Country Planning Appeal Board. On discovering that the County Council had not considered all material made available by the owners or the Ministry of Works, the Appeal Board adjourned the hearing and encouraged the parties to resolve the matter by negotiation.[143] Attempts to reach a settlement failed.[144] In 1976, the county made application for the Appeal Board to reconvene the hearing on the grounds that agreement was not possible.[145] According to Mr Chrsytall the Appeal Board, it seems, declined to do so, preferring to make the district scheme operative with Waihaha 3B2, 3C and 3E2 excluded.[146]

Mrs Gardiner gave a further example of the impact of the Taupo Lakeshore Reserve scheme on Māori landowners. After returning to Turangi in 1983 they applied for building consent to put a tomato hothouse on their property. They discovered that a section of their land next to their whanau papakainga was proposed lakeshore reserve. The reserve section is 4 or 5 kilometres away from the lake and behind Maunganamu.[147] As a result they were not able to build the hothouse. The Gardiners had no notification of the 'Proposed Lakeshore Reserve' designation being applied to their land.[148]

McBurney suggests that from the mid-1970s widespread opposition and lack of money combined with the Reserves Act 1977, which made acquisition of Maori land more difficult, to defeat the Taupo Basin Reserves scheme.[149]. In 1978 the Taumarunui County Council deleted the reserve designations it had made because of lack of progress with the scheme.[150] A 1989 report by Peter Crawford, planning and inspection manager at the Taupo County Council, found that the rates relief had resulted in owners having no incentive to use the land. Additionally, many members of the public were under the impression that land designated 'proposed lakeshore reserve' was publically owned, though in fact it remained private land. [151] Crawford also concluded that the Council had not dealt with owners 'promptly and fairly', and recommended that compensation be

[142] Chrystall, Evidence, E44, p 14
[143] Chrystall, Evidence, E44, p 17
[144] Chrystall, Evidence, E44, p 18
[145] Chrystall, Evidence, E44, p18
[146] Chrystall, Evidence, E44, p18
[147] Gardiner, Evidence, E25, p7
[148] Gardiner, Evidence, E25, p7
[149] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), p 322-333
[150] Crawford, in S Asher, Evidence, E45, Annexure 3, p16
[151] S Asher, Evidence, E45, Annexure 3, p17

paid.[152] This was not done. In 1989, the Taupo County Council finally abandoned the scheme.

Although the Taupo Lakeshore Reserves scheme was never fully implemented, the de facto form of the scheme existed for twenty years, preventing Ngati Tuwharetoa from using their land. The impact of the scheme was felt for a long time afterwards. Many Māori land owners, Stephen Asher told us, think that the lakeshore reserve scheme is still in place, and consequently believe that the use and development of their land is restricted. In his view, the Crown and the local authority have failed to dispel this belief. [153]

Ngati Tuwharetoa say they always understood that the owners were to have the right to have designations lifted. But, as we have seen from the Waihaha example that was probably never going to be possible given the requirements concerning district schemes. In this community, Māori landowners found themselves unable to use or develop their land because of the joint effects of the reserve designation and rural zoning.[154] McBurney documents in detail the history behind the sale of land at Waitakanui Spit for non-payment of rates.[155] The Māori Land Court ordered the sales but we note and agree with McBurney that there was no need to order the sale of prime lakeside lands to meet the unpaid rates. These lands were to be sold to the Crown and included in the Lake Taupo Reserves Scheme. We consider the impacts for the owners such as Mr Harvey Karaitiana were unfortunate and extremely unfair.

The claimants say that the conditions under which Ngati Tuwharetoa engaged with and initially approved the 'Proposed Lakeshore Reserve scheme' were not honoured and as a result their rangatiratanga over their taonga and their lands was undermined. On our reading of the evidence we agree with them. In the end, it is not how much land alienated that is the issue here it is the fact that their lands were subjected to these designations for such a lengthy period. That is the issue that the Crown must confront.

The RMA and 'control' by Environment Waikato

Even though the Lake Taupo Reserves Scheme was finally abandoned in the 1980s, concerns regarding the clarity of Lake Taupo continued. By 1997, there were anxieties that lake-clarity was continuing to be compromised by the ever-increasing levels of nitrate flowing into the lake. In that year, local citizens formed a Lakes and Waterways Action Group to advocate for the protection of

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[152] Crawford, in Asher, Evidence E45, annexure 3, p17, 19
[153] S Asher, Evidence, E45, p 11
[154] Feint, Ngati Tuwharetoa Closings, 3.3.106, p 213. Stephen Asher, Evidence, E45, p 9 notes that the rural zoning underlay the reserve designation, so that the land was doubly bound.
[155] McBurney, 'Scenery Preservation and Public Works Takings', A82(b), pp 308-317

the lake. In 1998 the Lake Taupo Accord was signed by Ngati Tuwharetoa, Government and Environment Waikato.[156] We have listened to and read the scientific submissions relating to the waters of Lake Taupo. We are not convinced that nitrogen levels alone are the reason for the changes in lake clarity and water quality. Both have been profoundly influenced by the implementation of the Tongariro Power Development project, with a consequent inflow of sediment, and by changes in the seasonality of lake levels and the impact of this on the microbiology of the lake. Nitrogen levels are a simple parameter, attractive from the perspective of economic and physical planners. Research programmes, designed to measure and reduce nitrogen levels, are soundly based but narrowly construed: they overlook other important dimensions of the problem.

Be that as it may, in 2000 an issues and options paper was developed for managing water quality in Lake Taupo.[157] This formed the basis of much discussion with the public and Ngati Tuwharetoa.[158] The Taupo-nui-a-Tia 2020 project began in 2001, supported by the Tuwharetoa Māori Trust Board, Government, Taupo District Council, and Environment Waikato 'for the purpose of supporting community values for the future.'[159] This began with a three-year project (2001-2004) funded by the Ministry for the Environment to develop a long-term plan for the sustainable development of the Lake Taupo catchment. The project addressed 14 different community values for the catchment, including a sub-set of values related to water-quality.[160] Consultations were held with iwi and community groups, including the Tuwharetoa Māori Trust Board and the Lakes and Waterways Action Group.

As a result of this initial project, the 2020 Joint Management Group was formed to consult more widely and prepare a *2020 Taupō-nui-a-Tia Action Plan*.[161] The project brought together the Tuwharetoa Māori Trust Board, Environment Waikato, Taupo District Council, Department of Conservation, Department of Internal Affairs and the Lakes and Waterways Action Group.[162] We note that the plan was signed by the Ariki Tumu Te Heuheu and asserts the values of the Ngati Tuwharetoa (as distinct from those of the community) in the following terms:

> The hapu of Ngati Tuwharetoa assert their tino rangatiratanga over Taupo-Nui-A-Tia and will collectively sustain and protect the Mauri of the tribal taonga.[163]

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[156] Petch, Evidence, H27, pp 14-15
[157] Petch, Evidence, H27, p 13
[158] Petch, Evidence, H27, p 15
[159] Petch, Evidence, H27, p 15
[160] Petch, Evidence, H27, p 15
[161] Tuwharetoa Moari Trust Board and Environment Waikato, *2020 Taupo-nui-a-Tia Action Plan*: *an Integrated Sustainable Development Strategy for the Lake Taupo Catchment*, Document E5(b)
[162] *2020 Taupo-nui-a-Tia Action Plan*, E5(b), appendix 2, pp 59-84
[163] Petch, Evidence, H27, Annex 8

According to the evidence we heard, Environment Waikato appears to acknowledge that Ngati Tuwharetoa is the 'iwi with mana whenua in the Lake Taupo catchment.' It acknowledges that 'generations of Ngati Tuwharetoa have lived within the Taupo rohe and developed tikanga and kawa that reflect a special and unique relationship with the environment.'[164] It notes that Ngati Tuwharetoa holds title to the bed and the tributaries of the lake and that 'accordingly Ngati Tuwharetoa are the kaitiaki of the lake.' [165] However, nothing was given to us in evidence indicating that Environment Waikato acknowledges the 'rangatiratanga' of Ngati Tuwharetoa with respect to the lake, as we noted above, to do so would take their role beyond that prescribed by the RMA.

Ms Maria Nepia an employee of the Ngati Tuwharetoa Trust Board, explained that Ngati Tuwharetoa have a strong desire to be involved in decision-making and policy development. She referred us to their Environmental Iwi Management Plan and she noted that it developed from a strong frustration at being excluded from decision-making.[166] Ms Nepia referred us to the issues Ngati Tuwharetoa identified in their Iwi Management Plan regarding the inadequate implementation of the principles of the Treaty of Waitangi by statutory authorities; occasions when consultation was superficial and the aspirations of nga hapu o Tuwharetoa were not given appropriate recognition; the reduction of Treaty principles in legislation to consultation rather than partnership; and a lack of partnership between Ngati Tuwharetoa and local and regional authorities.[167] The involvement of Ngati Tuwharetoa in the 2020 project was critically important to the tribe as it 'brought about the development of key tribal planning documents and the way to meaningfully implement them'.[168] But Ms Nepia continued:

> The downfall to 2020 Taupo-nui-a-Tia Action Plan is that it is a non-statutory document within the meaning of the Resource Management Act 1991, so it is only through the good will and commitment of the authorities that the Plan can be implemented. Added to that difficulty is the ongoing issue of lack of capacity within the tribe to get involved at this next step of implementation.[169]

Ms Nepia's evidence is consistent with the statutory scheme of the RMA and with the evidence given by Environment Waikato. In this respect, Mr Robert Petch (Manager of Resource Information Group) told us that it was the responsibility of Environment Waikato (not Ngati Tuwharetoa) 'to control the use

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[164] Petch, Evidence, H27, p 11
[165] Petch, Evidence, H27, p 11
[166] Maria Nepia, Evidence for Ngati Tuwharetoa, 20 April 2005, Document E5, p 4
[167] M Nepia, Evidence, E5, p 5
[168] M Nepia, Evidence, E5, p 6
[169] M Nepia, Evidence, E5, p 6

of land for the purpose of maintaining and enhancing water quality in Lake Taupo.'[170]

The 2020 Action Plan recognises the interests of Ngati Tuwharetoa and their right to exercise their rangatiratanga as kaitiaki of Lake Taupo. However, Environment Waikato remains bound by the RMA in their ongoing management of the Lake. Nitrogen is seen as the primary culprit affecting water quality, and Environment Waikato have determined that the magnitude of the problem is too great to be solved by voluntary restraint. It is now proposing that restraints on existing use of land be enforced to prevent escalation of the problem. It has proposed a variation in the regional plan which will control land use and nitrogen flows; and that the Crown, Environment Waikato and Taupo District Council will each contribute to a public fund of $81.5 million. $67.5 million of this will be set aside for permanent nitrogen reductions, either by land purchase and conversion to forestry, or by direct purchase of nitrogen, where land cannot be purchased.[171] The scheme will also support activities such as research, education and advice.[172] A consultative draft of the Proposed Regional Plan Variation 5 – Lake Taupo Catchment was released in September 2004. The process of public notification and submission, and any reference to the Environment Court is expected to be completed by the end of 2007.[173]

Mr Petch advised that in undertaking its statutory role, 'Environment Waikato alone cannot solve all the issues raised by Ngati Tuwharetoa relating to the lake, its future management, and the wellbeing of future generations of Ngati Tuwharetoa.'[174] What it has attempted to do is 'mitigate the impacts of its policies on Ngati Tuwharetoa and on the rest of the community' to the extent possible within the RMA and through the application of public funds.'[175]

In our view the next section of Mr Petch's evidence demonstrates the limitations of the Crown's delegations to local authorities as he makes it clear that Environment Waikato will only deal with matters that they are required to deal with under the RMA. So, and after three years of work, Ngati Tuwharetoa's concerns regarding land use and the impact on the Lake are being subsumed into the RMA process. The following evidence demonstrates that Ngati Tuwharetoa's rangatiratanga is almost irrelevant to the process of planning with far-reaching implications for their future land development options. Mr Petch told us:

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[170] Petch, Evidence, H27, p 8
[171] Petch, Evidence, H27, p 25
[172] Petch, Evidence, H27, p 13
[173] Petch, Evidence, H27, p 21
[174] Petch, Evidence, H27, p 8
[175] Petch, Evidence, H27, p 8

Environment Waikato has identified matters that are part of its responsibilities under the RMA. These include:

- The purpose of the RMA – to promote the sustainable management of natural and physical resources, as set out in section 5;
- Matters of national importance in section 6;
- Having particular regard to the matters outlined in sections 7 and 8; and
- Matters relating to the discharge of contaminants in section 15.

Environment Waikato has taken into account all of these matters in drafting a Variation to the Proposed Waikato Regional Plan for the Lake Taupo catchments. Fundamentally, it is those provisions in Part II of the RMA that are most relevant to the concerns raised by Ngati Tuwharetoa in this process.

Section 30 of the RMA describes the functions of councils. This provides the mandate for Environment Waikato to undertake the Protecting Lake Taupo Project.

Environment Waikato has recognised there are significant costs to the rural community of ongoing restrictions on nitrogen leaching. In reaching a judgement on the preferred policy approach, the key provision is section 32 of the RMA. This requires Environment Waikato, before notifying the Taupo [Regional Plan] Variation, to prepare an evaluation report which:

- Examines the extent to which each objective in the Variation is the "most appropriate" way of achieving the purpose of the Act;
- Examines whether, having regard to their efficiency and effectiveness, the policies and rules in the Variation are the "most appropriate" for achieving the objectives; and
- Takes into account:
    i. The costs and benefits of the policies and rules; and
    ii. The risk of acting or not acting if there is uncertain or insufficient information about the state of the Lake and the extent and impact of nitrogen discharges to the Lake.

Environment Waikato acknowledges the special issues generated by the policy approach that is required by such a sensitive and precious taonga as Lake Taupo. Some of the issues identified by Ngati Tuwharetoa are beyond the scope of the RMA to manage fully and would likely fail a section 32 analysis for effectiveness and efficiency.

As understood by Environment Waikato, one of the key points of contention for Ngati Tuwharetoa in relation to the protection of the Lake's water quality, is the history of land development in the catchment, and the alleged actions and inactions of Government that have led to the current land use activities carried out by Ngati Tuwharetoa on its extensive and varied land-holdings in the catchment.

> Throughout the past five years, Environment Waikato has been clear that the issues generated due to the history of Ngati Tuwharetoa land development in the catchment, and their relationship to future social, cultural and economic well-being of the iwi, are a matter for discussion between Ngati Tuwharetoa and the Crown.
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> Environment Waikato is aware that placing nitrogen restrictions on all land in the catchment means that traditional land development options that increase nitrogen are constrained and potential future income from these types of development is foregone. For instance, land that is currently farmed as a dry stock farm (moderate nitrogen leaching), may have been intended to be converted into a dairy farming operation (high nitrogen leaching potential). Under the Proposed Variation, this is only possible if the proposed nitrogen increase is offset by a corresponding decrease elsewhere in the catchment. A landowner under this regulatory regime would incur additional costs if they wished to pursue this development opportunity.
>
> The section 32 analysis prepared by Environment Waikato explores a wide range of alternative policy and method approaches. I set out some of the matters assessed and justification for the policy approach chosen in the following sections of my evidence.
>
> Overall, Environment Waikato believes that the preferred policy approach in the Proposed Variation has taken into account Part II matters to the extent appropriate by a Local Government agency, and it is set up for a robust and transparent debate through the First Schedule process of the RMA, which begins when the Variation is notified on 9 July 2005.[176]

Environment Waikato intended to put in place a variety of mitigation measures in respect of their proposed variation. It was proposed that an independent commissioner endorsed by Ngati Tuwharetoa would be appointed to assist with decision making on cultural matters during the public hearing process for the proposed variation to the plan under the RMA.[177] It was also proposed that a place would be created for a representative of the tribe to sit on the joint committee to administer the public fund. Ultimately, decisions regarding these matters are vested in the regional and local authorities and the Environment Court under the RMA. Ngati Tuwharetoa does not have the authority to make these decisions. As Ms Feint pointed out, this lack of power places the iwi is in the invidious position of seeking to protect the lake, but having to oppose Environment Waikato's proposed variation because of the inequitable impacts its enforcement of the status quo in terms of land use will have on Ngati Tuwharetoa.[178]

George Asher reflected Ngati Tuwharetoa's perception of that the policy confirms the historical intentions of the Crown to maintain its 'public good' investment in the lake. His evidence was that the Crown's policies concerning land use form part of the long story of Crown intervention in the Ngati

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[176] Petch, Evidence, H27, pp 8-10
[177] Chen, Waikato Regional Council Closings, 3.3.112, p 24
[178] Feint, Ngati Tuwharetoa Closings, 3.3.106, p 115

Tuwharetoa rohe. He noted that a 'consistent thread' in this story has been the use of Ngati Tuwharetoa's resources in the name of the 'national interest' and, by implication, not Ngati Tuwharetoa's interests.[179] Pointing out that environmental protection is an important current policy direction for local and regional councils, Mr Asher expressed his concern that this will impact disproportionately on Ngati Tuwharetoa. As he put it:

> Tuwharetoa land owners will be penalised in the further utilisation of their lands without acknowledgement of the fact that they are not the main contributors to the problem, and indeed those who will benefit will be those who have alienated our ancestral lands and used them to create the unstable environmental conditions that are now being the focus of control and regulation.
>
> While the imposition of Crown policy has contributed to the significant loss of Ngati Tuwharetoa's ancestral land, the vast area of land that remains in its undeveloped state within the Rohe may have limited future utility. The scenario is based on the existing priority placed on environmental management and the demonstrated reluctance of regulatory authorities to make special provision for land that has been affected by historical anomalies. It is unlikely that, under these conditions, such lands will fulfil the expectations of owners to provide a viable economic base for future owners.
>
> As an alternative Ngati Tuwharetoa's future wellbeing may be determined more effectively by unlocking the shackles that prevent us from exercising our capacity to control, manage and obtain access to key taonga or resources associated with our ancestral land. Ngati Tuwharetoa have been greatly prejudiced by the imposition of statutes and policy that has limited or denied our customary rights to water, geothermal, fishery and tourism resources.[180]

The Tribunal's findings on prejudice of the Taupo Basin Reserve Scheme (pre and post-RMA)

The proposed Taupo Basin Reserve Scheme resulted in uncertainty as to the nature and extent of Ngati Tuwharetoa land development rights, and those of other Māori landowners, around Lake Taupo. After 20 years of confusion and ambiguity, much land around the lake remained undeveloped despite some forestry development. We can not know for sure whether there is a direct link between the reserve scheme and the under-development of land, but we can say that the planning process did not assist or enable land development. Rather, the adoption of policies in preparation for the implementation of the reserves scheme, resulted in Ngati Tuwharetoa shouldering a disproportionate share of the burden of environmental protection. The expectation that Ngati Tuwharetoa and other Māori landowners should assume this responsibility has continued under the RMA. Ngati Tuwharetoa now find themselves facing possible impacts from another regional land use policy with long-term effects. The restrictions proposed may reduce the opportunities for Tūwharetoa landowners to participate in new

[179] G Asher, Evidence, E39, p 19
[180] G Asher, Evidence,E39, pp 22-23

economic activities now opening up for them. We refer, in particular, to the conversion of low productivity sheep farms to high productivity dairy farms. In keeping with the concepts of ecological justice this would seem to be an unjust result and one that is not consistent with the guarantees of the Treaty and the obligation on the Crown to respect the tino rangatiratanga of Ngati Tūwharetoa over their taonga. Given that Māori are major landowners around the lake, they will have to carry the main burden of lake restoration from their own resources or from the quantum of any cash settlement which they negotiate from the public fund.

The Crown's continued expectation that Ngati Tuwharetoa must assume, along with other New Zealanders, the challenges of addressing the water-quality of Lake Taupo is not consistent with its Treaty of Waitangi guarantees. When it asserted control over the Taupo district those guarantees extended to Ngati Tuwharetoa and Ngati Raukawa. Article 2 guarantees to them their property rights and the Crown has an obligation to provide for Ngati Tuwharetoa rangatiratanga in the management of its taonga, including the waters. Historical land use policies and major public works developments have impacted on the lake. The Crown has been one of the main developers in the Lake Taupo catchment. Challenges that have been created should lie with the Crown not Ngati Tuwharetoa.

For the Crown to argue that Ngati Tuwharetoa have the right to participate in the special committees and groups established to implement the new nitrates policy as proposed in the Variation to the Regional Plan is also not an adequate response. These entities are ad hoc and piecemeal responses and do not address the issue of how Ngati Tuwharetoa rangatiratanga should be legally recognised in the RMA legislative regime. This form of participation is unsatisfactory because there is no guarantee that Ngati Tuwharetoa's concerns will be given adequate weight in Treaty terms. At the same time Ngati Tuwharetoa's ability to use their lands around the lake is being restricted.

Conclusion

The evidence presented for the claimants indicates again that the current RMA regime is incapable of assuring Ngati Tuwharetoa rangatiratanga over their taonga, Lake Taupo. They have no control over the process, have no meaningful decision making role under the RMA and are not able to engage or negotiate a consent with those charged with exercising responsibilities under the RMA.

Management of Natural Water and Springs

A number of claimants asserted that as at 1840 they possessed the water and water resources within the CNI, guaranteed protection by the Crown under the Treaty of Waitangi. The fundamental cultural and spiritual significance of water was summed up for us by one witness who describing in this way: 'ko wai au? I am water, I am spirit.'[181] Nearly all claimant submissions concerning springs, rivers, and streams, asserted that the Crown's regulation of waterways through environmental legislation and delegation to local authorities has meant that they cannot exercise rangatiratanga over those water resources.[182] The examples we refer to come from the Rotorua District and we focus here on the claims of Ngati Rangiwewehi as they provided a large amount of evidence on the issues that have broadly affected all claimants with similar taonga.

The claimants' case

Ngati Rangiwewehi say that they continue to own and exercise rangatiratanga over the water resources of the Hamurana Springs/Kaikaitahuna River resource, and the Taniwha Springs/Awahou River resource.[183] Mr Taylor contended that as the circumstances of these alienations were in breach of the Treaty then the claimants still have a proprietary interest in the springs.[184] He argued that the evidence of the claimants demonstrated that they regarded the springs as their taonga over which they exercised rangatiratanga, ownership and control.[185] Mr Taylor submitted that the manner in which Ngati Rangiwewehi exercised rangatiratanga over these water resources was analogous to the manner in which the Tribunal found Whanganui River to be a taonga.[186] As in that case, the manner in which Ngati Rangiwewehi owned, managed, used and controlled these resources was an entirely holistic one. He submitted that they managed the water, the bed and banks, and the resource within, as one united resource.[187] Mr Taylor submitted that the Te Arawa Lakes Settlement Deed does not settle claims to these water resources or their tributaries that flow into the lakes covered by the Settlement.[188] As the land within which these springs were located was alienated in breach of the Treaty of Waitangi, the claimants seek a number of findings: for the return of the land; for compensation for land alienation; for compensation for the environmental effects on the Awahou River; and for the cancellation of

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[181] S Eillison, Evidence for Te Takere o Nga Wai, 28 February 2005 (Maori), C25; and S Eillison, Evidence for Te Takere o Nga Wai, 28 February 2005 (English), C25(a)
[182] See for example R Boast and L Macpherson, Closing Submissions for Ngati Hineuru, 3.3.63 para 38.22.
[183] M Taylor, Closing Submissions for Ngati Rangiwewehi, 3.3.79, pp 33-34
[184] Taylor, Ngati Rangiwewehi closings, 3.3.79, pp 33-34
[185] Taylor, Ngati Rangiwewehi closings, 3.3.79, pp 34-35
[186] Taylor, Ngati Rangiwewehi closings, 3.3.79, p 35
[187] Taylor, Ngati Rangiwewehi closings, 3.3.79, pp 35-36
[188] Taylor, Ngati Rangiwewehi closings, 3.3.79, p 41

resource consents to extract water. They also seek a finding that Ngati Rangiwewehi own the water of these resources.[189]

The Crown's case

The Crown suggests that the focus, in evidence, on Hamurana and Taniwha fails to recognise there are many springs still in Māori ownership.[190] The Crown notes the example of Fairy Springs Land Trust (Māori Land), and the CFRT (LHAD) mapping which records many springs that appear to be on Māori land.[191]

The Crown contends that there were no public works elements to the Hamurana Springs claim.[192] We take this to imply that the Crown believes the land at Hamurana was taken by fair means. The Crown further submitted: that the public works acquisition of land at Taniwha Springs satisfied the requirements for such acquisitions; that the owners were compensated $4200 plus interest; and that the owners had legal representation during negotiations.[193] It submits that there is no evidence of bad faith. The Crown contends that there is no ongoing Treaty obligation of the Crown arising from this public works taking.[194] It notes that Mr Flavell advised that there are ongoing discussions with the council concerning water extraction.

The Tribunal's analysis of the management of water and springs

To claim these springs, Ngati Rangiwewehi started in the usual manner by describing who they were and their relationship to the resources within their tribal domain. We were told that there are seven hapu of the iwi: Ngati Kereru; Ngati Ngata; Ngati Te Purei; Ngati Rehu; Ngati Tawhaki; Ngati Whakakeu; and Ngati Whakaokorau.[195]

We were told that Ngati Rangiwewehi is based primarily in and around the former 42,747 acre block known as Mangorewa Kaharoa.[196] However, they also claim interests in a large number of other blocks, including south to Pukeroa Oruawhata, into Lake Rotorua including Mokoia, east to Ohau Taupiri and up to the coast at Te Puke.[197] According to Kere Cookson-Ua:

> Most of the lands within Ngati Rangiwewehi's domain were covered in bush and forest. The ngahere was a rich source of food and played an integral role in the lives of Ngati

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[189] Taylor, Ngati Rangiwewehi closings, 3.3.79, pp 39-40
[190] Crown closings, 3.3.111, part 2, p 553
[191] Crown closings, 3.3.111, part 2, pp 552-553
[192] Crown closings, 3.3.111, part 2, p 374
[193] Crown closings, 3.3.111, part 2, p 378
[194] Crown closings, 3.3.111, part 2, p 378
[195] T U Flavell, Evidence for Ngati Rangiwewehi, April 2005, F41, p 5
[196] Flavell, evidence, F41, p 5
[197] Flavell, evidence, F41, pp 6-9

> Rangiwewehi. The fresh water springs and rivers within Mangorewa Kaharoa also provided sustenance for the local inhabitants the most popular of which being eels, kokopu, inanga, toitoi, koura, and towards the end of the ninetieth century, trout. Today there are a number of historic sites in and around Hamurana and Taniwha Springs including kainga, urupa, mahinga kai, and traditional pa sites.[198]

In this part of the report, however, we are principally concerned with the claims to Mangorewa Kaharoa, situated on the northern shores of Lake Rotorua, which went through the Native Land Court in 1882. The application for title investigation was filed by Ngati Rangiwewehi. There were a number of competing claimant hapu and iwi including Waitaha, Tapuika and Ngati Pikiao and Ngaiterangi. The bulk of the block was awarded to Ngati Rangiwewehi.[199]

We note that Cookson-Ua described the Ngati Rangiwewehi relationship with the waters in their territory in following terms:

> Water has traditionally been viewed as treasured resource throughout the geothermal lakes district. … Freshwater springs can be utilised in a variety of ways as well. This has certainly proved to be the experience of those living around Awahou. The employment of freshwater was used for the endowment of tapu or mana. Protecting people by practices involving the use of water is common and forms part of the fabric in Māori society. A well known whakatauki which indicates the special quality of water is … "Me pewhea? Me kawe rawa ia ki te wai, kia wehe te tapu, ka takakau au" or "What is there to do? Naught else but to be taken to the waters to remove the tapu, and thus set me free."[200]

Thus water on its own can be taonga and is often referred to this way. This approach is consistent with our views on the nature of taonga as we set out in chapter 17.

Hamurana Springs

These springs are situated at the northern end of Lake Rotorua. As we noted in Part III of this report, the Mangorewa Kaharoa block was partitioned and Hamurana Springs Reserve containing approximately 86 acres falls within the boundaries of Mangorewa Kaharoa No 1 block awarded to the Crown in 1896. Within this block are 15 freshwater springs with one of the most famous being Puna-i-Hangarua. These springs supply the Kaikaitahuna River belonging to Ngati Okotahi. This was the home of the female taniwha Hinerua. [201]

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[198] K Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', Document G12, p vi
[199] M Kawharu, R Johnson, V Smith, R Wiri, D Armstrong, and V O'Malley, "Nga Mana o Te Whenua o Te Arawa Customary Tenure Report", Part 1, G2, pp 236-237
[200] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 63
[201] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 4

There were numerous kainga on this part of the Mangorewa Kaharoa block as identified by Stafford and repeated in evidence before us.[202] One of the larger ones was at Ngahuapiri. This settlement and extensive cultivation area was east of the Kaikaitahuna River.[203] However, the Kaikaitahuna settlements spread along the banks of the river and around the various springs.[204] The area was well populated. Ngahuapiri, for example, was visited by Sir George Grey in December 1849. He described it as the largest settlement on the north side of the Lake Rotorua.[205] Equally important to Ngati Rangiwewehi history was the area adjacent to the Pekapeka spring, one of the series of springs on the Kaikaitahuna River. According to Stafford this was a settlement area of 'Ngati Okotahi, where Hikairo, the great Ngati Rangiwewehi chief, spent much of his time.'[206]

Taniwha Springs

Taniwha Springs are located within Part Mangorewa Kaharoa 6E3 No 2 (Pekehaua Puna Reserve). This block is approximately 2.5 kilometres from the township of Ngongotaha on the northwestern side of Lake Rotorua. There are 16 springs within this block and they are known as the Taniwha Springs. Warouri and other adjacent springs are the major water for the Awahou Stream.[207] Awahou marae is on this river.

As we noted above, it was the lair of the taniwha, Pekehaua. According to tradition, Pekehaua would 'emerge from his liar (the spring) to waylay, kill and eat any unwary travellers passing through the area' but he was eventually killed by the chief Pitaka.[208] The Awahou Stream runs through Taniwha Springs into Lake Rotorua. According to Stafford, the settlement of Awahou is now the headquarters and main marae of Ngati Rangiwewehi.[209] He states that the people of Awahou were, in the main, 'supporters of the Waikato King movement and later the Hauhau forces during the land wars of the 1860s and early 1870s.'[210] He notes that at the 'conclusion of the wars the people built a large house specifically for Te Kooti's use whenever he visited the district.'[211]

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[202] Flavell, evidence, F41, pp 10-22
[203] D M Stafford, *Land Marks of Te Arawa*, vol 1 (Auckland: Reed Books, 1994), pp 55-56
[204] Stafford, *Land Marks of Te Arawa*, vol 1, p 28
[205] Stafford, *Land Marks of Te Arawa*, vol 1, pp 55-56
[206] Stafford, *Land Marks of Te Arawa*, vol 1, p 83
[207] Stafford, *Land Marks of Te Arawa*, vol 1, p 83
[208] Stafford, *Land Marks of Te Arawa*, vol 1, p 70
[209] Stafford, *Land Marks of Te Arawa*, vol 1, p 19
[210] Stafford, *Land Marks of Te Arawa*, vol 1, p 19
[211] Stafford, *Land Marks of Te Arawa*, vol 1, p 19

Hamurana and Taniwha Springs as taonga

From the evidence presented to us on customary gathering and fishing, the video footage, and oral testimonies, it is clear to us that the Taniwha and Hamurana Springs were taonga of great significance to Ngati Rangiwewehi upon which they depended for sustenance as the springs supplied the Awahou and Kaikaitahuna rivers. They were held in accordance with custom and tikanga Māori. For example, the relationship with these water resources is retold to each generation through the stories of Ngati Rangiwewehi settlement, through haka and waiata and through the accounts of the taniwha who dwelt in their depths. In this last respect we note that their tribal pepeha/proverb identifies those features of the landscape that are important to their identity including the waters of Pekehaua.[212] According to Stafford this taniwha lived:

> … deep within Te Waro-uri a major spring within the junction of the Hamurana and Central Rds near Te Awahou. This and other adjacent springs contribute the major water supply to Te Awahou stream. The same name, Pekehaua, was also often applied to a fortified pa site overlooking the spring and more immediately to the east. The pa is, however, perhaps more accurately, Pukerua.[213]

Hamurana Springs was the home of the female taniwha Hinerua.[214] Cookson-Ua records that the 'fresh water springs at Taniwha and Hamurana are connected by an underground waterway which were traversed by both taniwha' who maintained the links between the springs by meeting from time to time.[215] There are stories of other taniwha still present at Awahou.[216]

The taniwha stories represent for Māori both the nature of the resources and what they possessed. Ngati Rangiwewehi possessed the springs, including the waters and their links with other waterways, and the lands associated with the springs. As we heard in the evidence, the findings of the *Whanganui River Report* remain apposite – namely that Ngati Rangiwewehi possessed water resources and the waters of the springs were central to those resources. Thus through stories, haka and song, the influence of Ngati Rangiwewehi over these springs has been recorded from ancient times to the present and for future generations. We are in no doubt that they were and remain taonga that should have been protected by the Crown in accordance with the guarantees of the Treaty of Waitangi.

The result of the actions of the Crown and the Rotorua County Council with regard to Hamurana and Taniwha Springs is that the claimants lost their lands and taonga. The alienation of land and water resources as a result of Crown actions,

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[212] Flavell, evidence, F41, pp 5, 7
[213] Stafford, *Land Marks of Te Arawa*, vol 1, p 83
[214] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 4
[215] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 4.
[216] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 61

whether by dint of the common law or by statute, is a feature of the many of the claims before us. The loss of these two springs provides important examples of the impacts of such loss. We suggested in Part III that alienation of the land upon which these springs are situated was an issue that should, after further research, be addressed by the parties in negotiations.

In terms of Hamurana Springs, we have found in Part III that the land within which these springs were located was expressly targeted by the Crown for acquisition in breach of the principles of the Treaty of Waitangi. We also discussed the impact on the claimants in Part IV in terms of the loss of tourism potential from the Hamurana Springs. The springs had potential to be used in this and other ways for the benefit of the iwi had they remained in Māori ownership.

Taking of the Taniwha Springs under the Public Works Act

Ngongotaha has been serviced by a public water supply since 1924.[217] Urban growth in this area led to demands for more water. Other sites were considered but the Taniwha Springs option was chosen.[218] The County Council took part of the Pekehaua Puna Reserve (0:3:36.6 acres) also known as Mangorewa Kaharoa 6E3 No 2, effective from 22 December 1966.[219] This was done under the Public Works Act 1928.[220] Road clearance took place; a pump site was located at the site; and the operation commenced in November 1967.[221] We discussed in Part III the systemic breaches of the public works legislation and we referred to Taniwha Springs as an example of the issues concerning that legislation. Although some compensation was paid, it was paid after the event and consultation with Ngati Rangiwewehi as a tribal body also occurred after the event.

Extraction of water under the Counties Act 1956 and the Water and Soil Conservation Act 1967

It is at this point that a further problem was created for Ngati Rangiwewehi. The Rotorua County Council had authority to declare a water supply area for the purpose of constructing waterworks under section 226 of the Counties Act 1956. The legislation authorised the Council's extraction of the water from the springs. Under section 265 water-works were defined as 'including all streams and waters and all rights appertaining thereto and all land'. In 1967 under the Water and Soil Conservation Act 1967, the Crown moved to nationalise the use of natural water by assuming the right to allocate its use. It instituted a comprehensive scheme for

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[217] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 47
[218] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 47
[219] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, pp 48-49
[220] New Zealand Gazette 1966 No 82, p 2228; and Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 47
[221] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 49

the management of natural water, which effectively rendered null and void all the former common law rights of riparian owners to control access to water on their land.[222] The purpose of the Act was described in the long title as follows:

> An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land and for ensuring that adequate account is taken of the needs of primary and secondary industry, water supplies of local authorities, fisheries, wildlife habitats and all recreational uses of natural water.

The most important section of the 1967 Act for our purposes in terms of Taniwha Springs was section 21(1), which provided:

> Except as expressly authorised by under this Act … or as expressly under any other 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 hereby vested in the Crown subject to the provisions of this Act.

In terms of Taniwha Springs, existing uses were preserved by section 21(2) of the Water and Soil Conservation Act 1967.[223]

Ngati Rangiwewehi say that the Crown has failed to provide a water management regime that recognises Ngati Rangiwewehi's continuing Treaty interest in these their springs and their rangatiratanga over this taonga. Ngati Rangiwewehi claim they were not adequately consulted regarding the impact of water extraction on their remaining springs and the Awahou River.

The Waitangi Tribunal has already found that the Water and Soil Conservation Act 1967 breached the Treaty of Waitangi.[224] We do not propose to detail those findings again here. What we can say is that in this context, there was some consultation with one owner of the land prior to the land being taken.[225] We note he was told that the draw off would not affect the main spring and that the pump station would not detract from the scenic value of the area.[226]

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[222] *Glenmark Homestead v North Canterbury Catchment Board* [1978] 1 NZLR 407 (CA) pp 412-413
[223] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 59
[224] Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed (Wellington: GP Publications, 1996) para 5.5.3, p 66 and the *Whanganui River Report*, p 274
[225] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 48
[226] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, p 48

The 1967 Act, even though repealed, continues to influence the current law. This is reflected in section 354 of the RMA, which provides:

> Crown's existing rights to resources to continue
>
> (1) Without limiting the Acts Interpretation Act 1924 but subject to subsection (2), it is hereby declared that the repeal by this Act or the Crown Minerals Act 1991 of any enactment, including in particular— …
>
> (b) Section 21 of the Water and Soil Conservation Act 1967; …
>
> shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

The primary basis for the control of water now falls squarely under sections 14-15 of the RMA. Effectively all takings, use, damming, diversion, or discharge require a resource consent unless it is expressly authorised by a rule, regional plan, or is for domestic purposes (section 14(1)-(3)) or is an existing lawful activity (section 20). Only a regional council can issue consents. Thus Environment Bay of Plenty is now charged with the function of making decisions regarding the waters of the springs.

Mr Flavell told us that Ngati Rangiwewehi were in discussions with the Rotorua District Council regarding the springs. We note that a resource consent application from the Rotorua District Council to take further water from Taniwha Springs was made in 2004 to Environment Bay of Plenty. We do not know the outcome of the RMA process but we do know that Ngati Rangiwewehi expressed frustration at having to work through the process.[227]

The Tribunal's findings on prejudice to Māori with regard to water and springs (pre and post –RMA)

Nothing in the evidence prior to 1970 suggests that Ngati Rangiwewehi (as an iwi) were adequately consulted, in Treaty terms, about the management of the Taniwha Springs. This demonstrates the flaws in the legislation of that period. There was no requirement to produce evidence that tangata whenua had been consulted before an existing right was confirmed or a new water right granted under section 21 of the 1967 Act. It contained no provision requiring decision-makers to act consistently with any existing Māori Treaty interest in such

[227] See Ngati Rangiwewehi Video and see Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources', E3, p 163

resources and it did not provide for their right to manage them. Our findings, therefore, are consistent with those made in the *Whanganui River Report*.[228]

In situations such as Taniwha Springs, the legislation that permitted the continuation of water rights without consultation with Māori was also in breach of the principles of the Treaty of Waitangi because the Rotorua County Council and the Bay of Plenty Catchment Board were not able to consider the significance of these springs to Ngati Rangiwewehi. Water has been extracted from their taonga without their consent, impacting on their ability to care for the springs and the Awahou River.[229] Thus the delegation of powers to these statutory bodies was inconsistent with the principles of the Treaty of Waitangi, leading to serious prejudice for Ngati Rangiwewehi.

In terms of Hamurana Springs, the ability of Ngāti Rangiwewehi to exercise some degree of control over them was lost with the alienation of the land. But, we consider that due to previous actions of the Crown the iwi continue to have a historical Treaty interest in Hamurana Springs and these should be recognised in any water management regime. They clearly have rights and interests in Taniwha Springs.

This brings us back to the problems with the RMA we have already identified and discussed. In particular, the way in which historical Treaty issues are not generally matters that a consent authority can have regard to. Furthermore, for as long as section 8 of the RMA remains deficient in Treaty terms, it is unlikely that the impacts of water extraction on Ngati Rangiwewehi, their relationships with these taonga, and any environmental effects on the remaining Taniwha Springs, can ever been addressed in a manner consistent with the guarantees of the Treaty of Waitangi. These issues should be revisited during negotiations and the possibility of the joint management agreement considered.

Management of Rivers, Streams, Wetlands

A number of allegations have been made in relation to pollution of rivers, streams and wetlands. In chapter 17 we discussed how beds of large navigable rivers became vested in the Crown under the Coal-mines Act Amendment Act 1903. However, a number of claims also concerned the impact of Crown policies on non-navigable rivers and streams. We merely note here that the question of whether a river is defined as large 'navigable' river is complex.

As we noted in chapter 17, ownership of non-navigable rivers and streams (as with navigable rivers) was governed by the ad medium filum rule. The rule

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[228] *Whanganui River Report*, p 274
[229] Cookson-Ua, 'Peke-Haua Puna Reserve and Hamurana Springs Reserve', G12, pp 63-64

recognises that title to the centre line of a river or stream vests in riparian owners of lands abutting rivers and streams. Counsel for Ngati Rangitihi pointed to the use made by the Crown of section 110 of the Land Act 1892 when the Crown sold lands abutting foreshore, rivers, lakes, or streams wider than 33 feet. Under this legislation the Crown could set aside a one-chain strip as a reserve to be vested in the Crown. The reserves were meant to preserve public access to these areas.[230] The claimants alleged the Crown used this legislation to gain ownership of sections of the Tarawera and Rangitaiki Rivers based on the ad medium filum rule. In this regard they refer to the basis for the grant to Environment Bay of Plenty Catchment Commission of the right to remove shingle and sand from the Tarawera and Rangitaiki Rivers in 1963.[231] The fact that Māori may have competing aboriginal title rights was not considered.[232]

The claimants' case

A number of claims addressed river and drainage works carried out without consultation with Māori or with their consent. A number of the drainage schemes referred to in this section of the chapter are illustrated in figure 19.1 on page 63. Counsel for Ngati Whaoa raised the issue with regard to the wetlands in the Waiotapu Valley, where that drainage scheme created 'a farmer and dairy cow platform' on land alienated from Ngati Whaoa.[233] Ngati Rangitihi rasied similar concerns in relation to the Rangitaiki Land Drainage Scheme and its impacts at Matata.

Tapuika's concerns related to the drainage and river straightening of the Kaituna River and the impacts on the Maketu Estuary. Tapuika claim that the Crown has ignored Tapuika as tangata whenua in its management of this environment.[234] The same concerns were expressed by Te Ahi Kaa Roa of Maketu. Counsel contended that following the diversion of the Kaituna River tangata whenua experienced significant impacts, including: erosion of the beach; decline in shell fish populations; changes to the estuarine vegetation; and silting up of the estuary itself.[235] Counsel submitted that they wish to have their right to exercise self-government at the iwi and local level recognised so that they may make the decisions pertaining to the way the river and estuary is managed.[236]

The Crown's case

The Crown has chosen not to reply on general issues concerning the ownership of rivers and streams. It has chosen to deal with river issues either as environmental

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[230] Closing submission for Ngati Rangitihi, 3.3.62, para 42.9
[231] Closing submission for Ngati Rangitihi, 3.3.62, para 42.10
[232] Closing submission for Ngati Rangitihi, 3.3.62 para 43.6
[233] Closing submission for Ngati Whaoa, 3.3.59, p 49
[234] Wihapi, evidence, B21, paras 21 – 31
[235] Closing submission for Te Ahi Kaa Roa o Maketu, 3.3.75, p 21
[236] Closing submission for Te Ahi Kaa Roa o Maketu, 3.3.75, pp 7-12

concerns or as part of its response to the evidence from the University of Waikato discussed in chapter 16 above. It has not responded to the detail of every allegation of every claimant raised in evidence, noting that there is smply insufficient research available for the Tribunal to consider them in the context of a stage one inquiry.

The Crown did make submissions on the Kaituna Basin and the modification of the Kaituna River for flood protection purposes. The Crown submitted that the case study in the Kirkpatrick report was a 'narrow and fairly selected inquiry of local Government records and interviews with some tangata whenua still living in the area.'[237] The Crown contended that benefits from the scheme were important and that there was little evidence for Kirkpatrick et al to suggest that tangata whenua did not seek the benefits of the scheme.[238]

The Tribunal's analysis regarding claims to the Kaituna River to Maketu

The claimants have relied primarily upon the report of Kirkpatrick, Belshaw and Campbell from the University of Waikato for the CNI Inquiry which examines the alleged prejudice suffered by Māori as a result of the impact of environmental change. The authors were commissioned by the Crown Forest Rental Trust. They consulted with the claimant iwi, jointly identified a number of environmental concerns and carried out ten case studies based on existing scientific reports, cartographic resources, claimant observations and their own field observations.[239] The completed report, *Land-Based Cultural Resources and Waterways and Environmental Impacts (Rotorua, Taupo and Kaingaroa) 1840-2000* is a substantial but selective document, strongly supported by maps, graphs, tables, cartographic representations and photographs.[240]

The University of Waikato report came under intense scrutiny by the Crown, by other interested parties and by the Tribunal itself during this inquiry. Evidence of this scrutiny can be found in the transcripts of hearings and the various closing submissions. Even though some criticisms can be levelled at the methodology adopted by the University team, there are aspects of the report that provide useful evidence highlighting issues raised by the claimants. In chapter 18 on Lake Taupō-nui-a-tia and chapter 20 on geothermal resources we have referred to the report as a source of evidence. In this chapter we use the report as it relates to the drainage of wetlands and the straightening and diversion of the Kaituna River in

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[237] Crown closings, 3.3.111, part 2, p 458
[238] Crown closings, 3.3.111, part 2, p 458
[239] Kirkpatrick R, Belshaw K and Campbell J *Land-Based Cultural Resources and Waterways and Environmental Impacts (Rotorua, Taupo and Kaingaroa) 1840-2000*, E3. The report is supported by a comprehensive document bank at E3(b).
[240] Kirkpatrick et al, evidence, E3

it flows through the fertile lowland areas adjacent to the Maketū estuary and the Bay of Plenty Coast. We also draw on other evidence available to the Tribunal.

We note the implications of the Foreshore and Seabed Act 2004 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, for our jurisdiction. We refer to the estuaries and the fisheries only as background to the essence of the claims before us, namely that the Crown's delegation of authority to local authorities was inconsistent with the principles of the Treaty of Waitangi. We turn now to the two examples from the inquiry region where major river diversion and drainage work have been completed with significant effects.

The nature of the Kaituna River system to Maketu

The Kaituna River runs from the outlet from Lake Rotoiti, at Okere Falls to the coast at Maketu. It is a relatively short river being only 51.5 km (32 miles in length). The river falls quite rapidly to the coast but the gradient decreases considerably around Te Puke.[241] Although the river is short, its catchment is relatively large with six tributaries of some significance.[242] These are the Mangorewa, Waiari, Raparapahoe, Parawhenua, Ohineangaanga and the Kopura.[243] A useful description of the river comes from the 1970s, after some modification, but before the major developments in the 1970-1990 period:

> For the first 16 miles [25.75 km] the river flows through a gorge, deeply incised into the soft ignimbrite rock which is characteristic of this area. At Mungarangi bridge 15 miles [24.1 km] from the sea the river emerges onto a narrow flood plain which gradually widens. Downstream of the Matai bridge, nine river miles [14.5 km] from the sea, the river flows out onto the Kaituna basin, a low lying swampy area of 16, 000 acres [6478 ha] near Te Puke. The river follows a tortuous course through this swampland until it enters the sea at Te Tumu through a cutting in the sand-hills made in 1957. Formerly the river flowed parallel to the coast for a further 21.4 miles [3.6 km] to the east through Maketu Estuary to enter the sea at the township of Maketu.[244]

Māori settlement was concentrated at the upper reaches of the river around the Rotorua lakes. On the lower reaches it was concentrated along the flood plains, the mouths of the tributaries, the swamps or wetlands, and the Maketu Estuary. These were the habitats in which the indigenous flora and fauna tended to be most diverse and rich. Geoff Park expands:

> The high importance of lowland swamps in the traditional Māori landscape was multifaceted. They watered and gave access to vast areas of country, birds were attracted to them for food, native fish that came to spawn. Dominating the swamps were rushes,

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[241] Kirkpatrick et al, evidence, E 3 p 423
[242] Kirkpatrick et al, evidence, E 3 p 424
[243] Kirkpatrick et al, evidence, E 3 p 424
[244] Kaituna River Major Scheme: Lower Kaituna, Vol 1 Report (Whakatane) Bay of Plenty Catchment Commission (1970) p 3 as cited in Kirkpatrick et al, evidence, E 3 p 423

> reeds, flax and kahikatea, or white pine. Mature fruiting kahikatea were a seasonal mecca for birds and people. Waikākā (mudfish), a traditional delicacy for presentation at feasts, hibernated during the summer drought beneath kahikatea roots. They and myriad indigenous fish species such as inanga, kōaro and kōkopu migrated through the estuaries and lagoons.[245]

The claimants before us associated with the various reaches of the Kaituna River from its upper reaches to the Maketu Estuary are Ngati Pikiao (Ngati Tamakari, Ngati Te Takinga, Ngati Rangiunuora, Ngati Hinekura, Ngati Rongomai), Waitaha, Ngati Makino, Tapuika, Ngati Whakaue, Tuhourangi, Ngati Rangiwewehi, Ngati Whakahemo, Ngati Pukeko, Ngai te Rangi, Ngati Puku o Hakoma and Ngati Pukenga.

As noted above, a number of these claimants have raised issues concerning the management of the river and the estuary. We have selected this evidence as an example of the manner in which the delegation to local and regional authorities has impacted on the rights and interests of the claimants under the Treaty of Waitangi in their rivers, streams and estuaries.

Kaituna River: the upper reaches as a taonga

The river drains both Lakes Rotorua and Lake Rotoiti, in addition to the area between Okere Falls and the sea.[246] In 1984, the Waitangi Tribunal dealt with claims concerning the Kaituna River filed on behalf of Ngati Pikiao (including some of the hapu and iwi listed above).[247] With regard to the upper reaches that Tribunal recorded the evidence of Mata Morehu who described the course of the Kaituna River from Lake Rotoiti downstream.[248] He spoke of Te Wai-i-rangi (a lovely clear pool from which the river flows on into a green tunnel of vegetation) as a place where tapu was lifted; and he spoke of burial caves that line the river in the steep gorges through which it runs.[249] That Tribunal heard evidence about the importance of the river for collecting raw materials and the use of its waters for weaving. [250] The Tribunal was left in no doubt that the river was a taonga owned by the claimants at 1840 and that it had been owned for many generations.[251]

We note here the position of Environment Bay of Plenty with regard to their approach to the Kaituna River system. They told us that under the RMA, the regional council intends to implement a strategy to manage the Rotorua and Rotoiti lakes, Kaituna River and the Maketu Estuary.[252] In 2005 it applied for a

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[245] G Park, *Effective Exclusion?* Waitangi Tribunal, Wellington (2001), p 19
[246] Kirkpatrick et al, evidence, E 3 p 424
[247] *Kaituna River Report,* p 7
[248] *Kaituna River Report,* p 10
[249] *Kaituna River Report,* p 10
[250] *Kaituna River Report,* p 10
[251] *Kaituna River Report,* p 31
[252] EBOP closing submissions, 3.3.114, p 12

consent to construct a diversion wall to divert nutrients from Lake Rotorua down the Kaituna and away from Lake Rotoiti to prevent eutrophication of Rotoiti.[253] We were told:

> The nutrient laden water from the lakes descends down the river system irrespective of whether the wall is installed, but the wall will result in less of the nutrients being diverted into Rotoiti. Due to the turbulence and continual movement of water along the Kaituna River, the nutrients will not result in algae blooms occurring in the river or estuary. If this wall is not put in place, the eutrophication of Rotoiti will result and in turn the Kaituna River and eventually the Maketu Estuary will become contaminated with blue/green algae blooms.[254]

With the establishment of the Rotorua Lakes Strategy Group, the Te Arawa Lakes Trust now has a voice in the management of the lakes and the catchments of the lakes but they can not influence the RMA process. In addition, we note that all Māori concerned about the impacts of the proposal on the Kaituna River to Maketu would need to participate in the RMA consent process for their views to be heard. The problem is that the RMA hearing process can only take their views into account rather than give effect to the principles of the Treaty of Waitangi. This is not what the Treaty guaranteed to Māori, and given they have Treaty rights and interests in the waters it seems to us that there are real issues here about the equity of the situation.

Kaituna lowlands as a taonga

The Kaituna lowlands were one of those locales where transformation of wetlands took place very early in colonial history. The environment of this lowland area stands in strong contrast to the inland areas on the Central North Island. This portion of the inquiry district is more temperate, has a longer growing season, and is more bountiful in terms of biological resources. Kirkpatrick et al, drawing on Land Information New Zealand sources, described the lower Kaituna plains as an amalgam of riverine and coastal environments.[255] The area was subject to periodic flooding and was very swampy before it was drained for farming.[256] Soils were either recent alluvium, which was fertile, or peat soils formed under swamp conditions. The area was flat and low-lying and the Kaituna River had very little gradient. The Kaituna River thus followed a meandering course through the swamps to the Maketū Estuary.[257]

The lower Kaituna River and the Maketū Estuary were bountiful areas for Māori and as a consequence were well populated with the majority of marae located on

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[253] EBOP closing submissions, 3.3.114, p 12
[254] EBOP closing submissions, 3.3.114, p 12
[255] Kirkpatrick et al, evidence, E 3 p 422
[256] Kirkpatrick et al, evidence, E 3 p 422
[257] Kirkpatrick et al, evidence, E 3 p 422

better drained sites closer to the river or the estuary.[258] This location of kainga and settlements ensured that the river remained the 'locus of Māori community life' until at least 1944 (the beginning of the post-war urban migration).[259] These areas were part of an extensive ecosystem of grass plains, swamps and tidal flats. The swamps and the smaller streams within the swamps were rich habitats for freshwater fish and for bird life, and the tidal areas were home to a vast array of birds, saltwater fish and other coastal marine life.

Eels were an especially important part of the resource base. Don Stafford has recorded the importance of this resource as described to him by informants:

> To think of the Kaituna River is to think of eels. The name itself comes from the prolific supply of eels it carries – and the value that they have had for the Māori, as a food supply for more than six hundred years. They were specialists at taking eels and centuries of experience had taught them just where, when and how to fish the Kaituna. There wouldn't be a square metre of the river they hadn't examined in years past, and all the prime eeling places were individually named and jealously guarded by those claiming authority over them.[260]

Inanga (whitebait) provided similar, but much more seasonal, bounty. Whitebait catches through until the 1930s were legendary and were often recorded in photographic collections and on postcards.[261]

The swamps and forests of the Kaituna lowlands were important sources of materials for meeting houses and for the raranga and tukutuku which were part of the interior artwork. They were also sources of material for rongoa, important for traditional healing. There were wāhi tapu and wāhi taonga within the swamps and wetlands and the river itself contained wāhi tapu. Kirkpatrick et al report:

> The meandering waters of the Kaituna also held tremendous spiritual value for the Tapuika people. One extremely important waahi tapu was a bend in the river that was the resting place of the Tapuika taniwha, Te Mapu. Tapuika oral traditions refer to the kuia, Tuparahaki and the role she had in persuading Te Mapu to leave, thereby forging the Parawhenuamea Stream & other tributaries as he departed.[262]

We heard evidence from several witnesses on the importance of the low-lying areas of the Kaituna River. The late Te Keepa Marsh provided detailed evidence for Tapuika regarding the lands and waters radiating out from the area near Rangiuru towards the Maketū:

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[258] Kirkpatrick et al, evidence, E 3 pp 427-432
[259] Kirkpatrick et al, evidence, E 3 p 434
[260] D Stafford, *Pakiwaitara o Te Arawa – Stories of Rotorua as told to Don Stafford* (1999), p 68
[261] See for example the postcard reproduced in Kirkpatrick et al, evidence, E 3 p 438
[262] Kirkpatrick et al, evidence, E 3 p 425

> … Tapuika's understanding was that they were one with the land, forests and waters. As descendants of the God Puhaorangi, Tapuika maintains the belief that they represent the link between the heavens and the earth.
>
> Tapuika's knowledge of the environment within the Takapu led to rotational land use, moving from various pa (wa kainga) according to the seasonal cycle of the stars, moon, sun and wind.[263]

Mr Marsh detailed the seasonal cycle, punctuated by the positioning of celestial objects and the flowering of marker plants such as the pohutukawa. He described an annual movement of people and changing activities. This included: bird catching in the forest until Mātāriki; movement down to the māra lands for cultivation and planting; then to the coastal areas for fishing and kaimoana; back to the māra for harvesting and food storage; before returning to the forests when the kiore and manu "were fat from the berries" and ready to harvest. The relationship that Tapuika had with their reach of the river and wetlands was spiritual as well as physical and biological, Mr Marsh elaborated:

> The rivers, streams and wetlands within the Takapu o Tapuika were an important source of food, building materials, clothing and dyes. However, the relationship between the hapu of Tapuika and its waterways was not solely constrained to food gathering and other uses but also incorporated an intrinsic connection with the mauri of the waterways and the tribal kaitiaki or taniwha whose rangatiratanga over the streams and rivers provided further evidence of Tapuika's mana over the Takapu.[264]

The evidence continued and is more specific in relation to some of the sacred places:

> The Parawhenuamea stream is a marsh stream named after the Goddess of Freshwater. It is said to be carved by the taniwha Mapu as he left his lair on the Kaituna River and made his way up the Pakipaki to join the colony of taniwha there. In the waiata *Tenei Te Aroha* the Parawhenuamea was referred to as 'te pukaitanga o nga taniwha' and was held in great respect by the hapu that lived around its environs. [265]

Mr Marsh identified the main swamp marshes and wetlands by name and then explains why they are so important:

> In traditional times the swamps played an important role as the 'ate' or liver that filtered and cleansed the water through the plant life that grew in the swamps. During the waipuke the swamps or repo would absorb the floodwaters and control the silt that swept into the streams and tidal estuaries.[266]

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[263] Te Keepa Marsh, evidence, H 23, p 8
[264] Te Keepa Marsh, evidence, H 23, p 10
[265] Te Keepa Marsh, evidence, H 23, p 11
[266] Te Keepa Marsh, evidence, H 23, p 13

The Kaituna River Tribunal also heard evidence from Ngati Pikiao of the importance of the River and the Maketu Estuary for fishing.[267] The Tribunal stated:

> Kai moana (food from the sea) has great significance for the Māori. It is almost as unthinkable for a Māori to entertain guests without seafood as it is for a European to offer a meal that has no meat. Maketu and the Kaituna River have been a rich source of fish, shellfish, eels, fresh-water crayfish (koura) and many other kinds of food. The estuary has been important for this purpose for generation after generation.[268]

The tributaries of the Kaituna were identified in evidence and associated with particular iwi. Waitaha for example, referred in their tribal pepeha to Raparapaahoe.[269] The Ohineanganga Stream was used for battle rites and waahi tapu.[270] The Waiari River was identified as a boundary between Waitaha and Tapuika.[271] But both iwi often moved in and out of their respective territories, probably due to their kin-relationships through their respective ancestors Tia and Hei.[272] Mr McCausland also identified pa on the Waiari to the mouth of the Kaituna River.[273]

Ngai Te Rangi and, particularly its hapu Ngai Tukairangi, also claim traditional interests at Te Tumu.[274] They acknowledge that Te Arawa occupied Maketu, east of the Kaituna River but they assert rights from Papamoa to Te Tumu. We are not in a position to confirm issues of mana whenua, but we agree with counsel that the evidence on the CNI inquiry does records their interests in this area.[275] Ngati Whakahemo, Ngati Pukeko, Ngati Puku o Hakoma, Ngati Pukenga, Waitaha, Makino, and Tapuika, not to mention the Te Arawa toa claimants, also overlap with these interests.

The Tribunal's findings regarding the management of the Kaituna River

After reviewing the evidence we were left in no doubt that the Kaituna River from Okere falls to Maketu was a taonga of immeasurable value, possessed at 1840 and over which Māori exercised rangatiratanga. As a river system, it remains a taonga to this day.

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[267] *Kaituna River Report,* pp 36-37
[268] *Kaituna River Report,* p 7
[269] McCausland, evidence, B54, p 7
[270] McCausland, evidence, B54, p 21
[271] McCausland, evidence, B54, p 15
[272] McCausland, evidence, B54, p 15
[273] McCausland, evidence, B54, pp 30-31
[274] Palmer, Ngatai, Reeder, evidence B29, B32, F99, F19
[275] Ngai Te Rangi and Ngai Tukairangi, 3.3.68, pp 3-11

Impact of swamp drainage

The Kaituna lowlands in the 1880s and 1890s were prepared for cultivation to support the development of farm settlement. In the lower Kaituna environment this involved drainage as well as tree felling and fencing. Lands were sold, some settler drains were dug and some farms were created.[276] For many potential settlers, however, the drainage challenge was beyond the resources or the technology available to them. George Bolton, writing about the adjacent Te Puke swamp, describes the problems faced in the 1880s:

> I found three rivers flowed into the swamp and lost themselves in it and that our drainage operations would be the drainage of these three rivers. I made up my mind that if we drained that swamp we would be draining not only our 5,000 acres and the 6,000 acres we could buy, but we would also be draining 9,000 or 10,000 acres besides for the benefit of other people.[277]

The first drainage board, the Te Puke Land Drainage Board was constituted under the Land Drainage Act 1893 and its district covered lands west of the Kaituna River.[278] The Land Drainage Act 1893 defined a watercourse over which the Board's powers should be exercised as 'a passage through which water flows.'

The Tumu-Kaituna Drainage Board was constituted under the Land Drainage Act 1904.[279] Its district covered the Kaituna wetlands.[280] It elected its first board in 1906 and used the provisions of the Local Bodies Loans Act 1908 to set about raising funds to create and maintain drains. Together the drainage boards exercised jurisdiction over a combined area of 19,531 (7907ha).[281]

The Crown then passed the Land Drainage Act 1908. Under section 17 of this Act, such bodies were given extensive powers to undertake river diversion and drainage works. Under section 2 of the 1908 Act, a drain included 'every passage, natural watercourse, or channel on or underground through which water flows continuously or otherwise, except a navigable river.' A watercourse was defined as 'all rivers, streams, and channels through which water flows.' The two drainage boards operated from 1910 until 1950, laying drains and widening, deepening and/or straightening rivers; bush was felled, swamps were drained, peat was burnt, and pastures were established.[282]

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[276] Kirkpatrick et al, evidence, E 3 pp 441-444
[277] S G Taylor, *The Story of Te Puke*, Te Puke Times, 1969, p 49 as cited in Kirkpatrick et al, evidence, E 3 p 443
[278] New Zealand Gazette, 1895, 31 October, No 79, p 1711, as cited in Kirkpatrick et al, evidence, E 3 p 444
[279] New Zealand Gazette 1906, 12 April, No 29, p 1008, as cited in Kirkpatrick et al, evidence, E 3 p 444
[280] Kirkpatrick et al, evidence, E 3 p 444
[281] Kirkpatrick et al, evidence, E 3 p 444
[282] Kirkpatrick et al, evidence, E 3 p 447

Impact of drainage and flood control works

As a consequence of the drainage work farmers in the newly created farming districts began to experience damage from flooding. Floods were a frequent occurrence but the swamps were no longer present to absorb the floodwaters. Some 16 flood events were recorded for the Kaituna between 1907 and 1959 and were beyond the mandate or the capacity of the drainage boards to contain.[283] Farms were flooded, livestock were drowned, pastures destroyed and houses and fences damaged. It seems that the river breached at Te Tumu during the 1907 flood.[284]

From the 1920s onwards government legislation and government loan finance supported a round of river engineering works to prevent flooding of farms and homes. A Kaituna River District was created in 1921 under the provisions of the River Boards Acts of 1908 and 1913. Under the Act, powers were granted to carry out river works to prevent flooding. Under section 73 of the 1908 Act, the legislation applied to all rivers and streams including navigable rivers. Around 1924 a cut called 'Ford's Cut' was proposed for Maketu**.** A diversion was established near Te Tumu with the intention of changing the course of the river so that instead of flowing in the existing loop that ran close to the coast it would flow directly into the Maketu estuary.[285]

Five years later the Kaituna River District Act 1926 was passed. That Act provided for the establishment of a River Board for the Kaituna District with broad general powers under the Land Drainage Act 1908 and for:

- Effectively preventing or minimizing the flooding of the district either by surface water or floods and freshes in the Kaituna River or any of its tributaries; or

- Improving the land in the district by lowering the surface level of the water of the Kaituna River or any of its tributaries.[286]

The new River Board was given extensive special powers to:

- At any time divert wholly or in part any drain, stream, or river, or close up any outlet or inlet to or from the same, or make any fresh outlet or inlet to or from the same.

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[283] Kirkpatrick et al, evidence, E 3 p 450
[284] Kirkpatrick et al, evidence, E 3 pp 450-452
[285] Kirkpatrick et al, evidence, E 3 p 452
[286] Kaituna River District Act 1926, s 3

- From time to time make, maintain, alter, or discontinue in, on, over, through, or across any land within the district such overflow or other channels, as it may consider necessary or the purpose of carrying out its operations. …

- Purchase any low-lying, tidal, or waste land, whether within the river district or within three miles of the boundaries thereof, that can, in its opinion, be advantageously reclaimed in the course of its operations, and may reclaim the same.

- Order the occupier, or in case there is no occupier, then the owner, of any land on the bank of any river or stream within its jurisdiction to remove anything whatsoever, whether in such river or stream or (except in the case of buildings) within half a chain from the nearest margin of such river or stream, which obstructs or impedes the free flow of such river or stream, or damages or is likely, in its opinion, to damage the bed or banks thereof, or which has constricted or will be likely, in its opinion, to constrict the channel of such river or stream in such manner as to impede the free flow of the water. For the purposes of this paragraph the jurisdiction of the River Board shall extend for the space of one mile beyond the up-stream boundary of the district.[287]

The Te Arawa Trust Board contributed funds to the scheme, as recorded in the Kaituna River District Act 1926. During the period 1925-1958 portions of the river-bed were dredged and stop banks were built. Evidence from historical maps reproduced in Stokes, 1980 and Johnson and Vercoe, 1981, shows that the river mouth continued to migrate between Te Tumu in the west and Maketu in the east but was still discharging at the Maketu site in 1944.[288]

The works undertaken to this point were sufficient to minimise the impacts of minor floods but were ineffectual in the face of major floods such as one in July 1951, which inundated 6,000 hectares of farmland and led to a demand for larger and more decisive action.[289] On 2 February 1957, the Te Tumu Cut was made through the sand hills at Te Tumu, allowing the river to enter the ocean, thus shortening the river's course by 3.6km.[290] However, within two days high seas had closed the cut and a second cut was made. The river has continued flowing via this course to the sea ever since.[291] Predictably these works had major impacts on the Maketu Estuary.[292]

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[287] Kaituna River District Act 1926, s 4
[288] Kirkpatrick et al, evidence, E 3 pp 451-453
[289] Kirkpatrick et al, evidence, E 3 pp 450-453
[290] Kirkpatrick et al, evidence, E 3 p 453 and see Don Stafford, *The New Century in Rotorua* (1988), p 302
[291] Don Stafford, *The New Century in Rotorua* (1988), p 303
[292] Kirkpatrick et al, evidence, E 3 p 453

According to the New Zealand Drainage and River Board Review in 1953, 'with the emphasis on increased food production, the farmers of the district have carried out intensive land drainage where such was possible, and made their lands as fully productive as possible.'[293] What we do not know is whether this work was done with the assistance of the drainage boards. The two boards were dissolved and their powers and functions were transferred to the Kaituna River Board in 1950.

The responsibilities of the Kaituna River Board were transferred to the Tauranga County Council in 1959 by an amendment to the Kaituna River District Act 1926. The council retained responsibility under the 1926 Act and became the Western Bay of Plenty District Council on 1 November 1989. The Council now exercises functions under the Kaituna River District Act 1926, a local Act, to the extent that it does not conflict with the RMA.

River control passed to the Catchment Boards under the Soil Conservation and Rivers Control Council established under the Soil Conservation and Rivers Control Act 1941. By 1970 new government structures were in place and the Crown, under the terms of the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967 was willing to provide loans and subsidies for major flood control schemes.

The lower Kaituna major scheme

By 1970, the scene was set for larger and more expensive engineering works to take place in the lower Kaituna catchment. The Bay of Plenty Catchment Commission, with the support of the Soil Conservation and Rivers Control Council and the Ministry of Works, responded to farmers and ratepayers seeking flood protection and better drainage for low-lying farmlands.[294] The intention, as stated in the plan, was to protect lands adjacent to the river against a hundred-year flood from the Kaituna and its tributaries and to provide improved drainage for some 5,600 ha of farmland. Work was done in stages, as government subsidies were negotiated and a series of contracts were tendered, between 1970 and 1992.[295] The machinery used was very large compared with that used in the earlier periods. The impacts on the river and the adjacent landscape were massive. One contract alone, tendered in 1982, involved the excavation of more than 740,000 m^3 of material and the construction of some 6.9 kilometres of stopbanks.[296] One of the first projects was a diversion at Te Tumu that allowed

[293] Braithwaite R ed *New Zealand Drainage and River Board Review 1953* (Hamilton, NZ Land Drainage and River Board Association) p 43, as cited Kirkpatrick et al, evidence, E 3 pp 447-448
[294] Kirkpatrick et al, evidence, E 3 pp 455-456
[295] Kirkpatrick et al, evidence, E 3 pp 455-458
[296] Kirkpatrick et al, evidence, E 3 p 457

the river to flow more directly to the ocean by blocking the entrance to the loop on which Ford's cut was located.[297]

When Environment Bay of Plenty (the successor to the Bay of Plenty Catchment Commission) published its *Asset Management Plan* in 2003 it summarised the current state of river control and drainage work in the Kaituna area. These included 69 km of stop banks, 88 km of canals and drains, six pump stations and a mole structure at the river mouth. The value of these assets was estimated at $28,500,000.[298] These works created a new physical and political landscape, modifying the river system and creating a partnership between the Crown and the local authority, funded by the Crown and by ratepayers. All benefited, but Māori were marginalised in the process. We turn now to explain why.

The Maketū Estuary

A key component of the river works was the construction of Te Tumu cut and the diversion of the Kaituna River directly into the ocean, bypassing the Maketū estuary. The various changes to the path of the lower Kaituna River discussed in this section of the chapter are shown in figure 19.2 on page 65. There have, as a result of these engineering works, been impacts on the ecology and the productivity of the estuary. The Crown was aware that this work would have impacts on the estuary when it gave the authority and the finance for the Kaituna River Board to proceed with this work in the 1950s.[299] In a 1948 report held in the files of the Ministry of Works, prepared by Engineer Andrew Murray for the Kaituna River Board, Murray warns that:

> If the whole of the Kaituna River flow were diverted through this [cut] the harbour and fishing grounds of Maketu, so much prized by the Māori would be eliminated. That would have to be paid for in compensation for this effect would be difficult of assessment, but it would be considerable.[300]

Māori concerns were explicitly recognised and known by the Ministry of Works. Andrew Murray's advice was, however, overridden. When H A Acheson of the Soil Conservation and Rivers Control Council reported in 1953 he presented the case for the diversion of the river into the ocean at Te Tumu. Acheson foresaw the possibility of 'deterioration to Maketu boating and fishing' but put forward the counter proposition:

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[297] Kirkpatrick et al, evidence, E 3 p 456
[298] Kirkpatrick et al, evidence, E 3 pp 464-465
[299] Kirkpatrick et al, evidence, E 3 p 460
[300] Murry *A Preliminary Report on Control of te Kaituna River* (1948) (Public Works Department, Hamilton,) p 4, NZ Archives, Auckland, PWD, BAAS A 269 60A

> …there is every possibility that the establishment of the Tumu outlet will, in the years to come, enable the reclamation of the Maketu Estuary adding about 550 acres to the farming land. [301]

Evidence given to Tortell in 1984 suggests that the Kaituna River Board preferred the advice of their own consulting engineer but were put under pressure by the Ministry of Works engineers to accept the advice given by Acheson.[302]

The Kaituna River Board proposal, reworked to include Te Tumu cut, was approved by the Soil Conservation and Rivers Control Council and the government subsidy was confirmed. Work on the diversion was carried out in February 1956. The Kaituna River was shortened by 3.6 km and Te Tumu cut was made permanent. The movement of the Kaituna river water through the estuary ceased as did the tidal flushing of salt water. Inevitably, this had an impact on the coastal ecology. We accept the evidence for the claimants and Kirkpatrick et al that the effects on the fisheries, the mauri of the waters and amenity values of the river to the estuary were great.[303]

The changes brought about by this new configuration were clearly evident by the 1980s. The level of public concern rose to the point where the Commission for the Environment appointed Terry Loomis, a Social Anthropologist to undertake a social study. In addition, Philip Tortell documented public opinion, reviewed all available information and initiated a process of public consultation.[304] Māori values and Māori concerns were included in both documents.[305] This exercise in research and public consultation coincided with the hearing of the Waitangi Tribunal claim, Wai 4, brought by Ngāti Pikiao to address environmental issues in the upper Kaituna catchment.

The nature of the environmental impacts is clear from the Tortell report. Research based insights and a wide range of community, visitor, local and central government perspectives were drawn together and a clear consensus emerged.[306]

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[301] This is a direct quotation from Acheson A R (1954) *Kaituna River Board: Flood Protection and Drainage Scheme,* unpublished report #297,980 from the Soil Conservation Engineer in Wellington to the Kaituna River Board, summarised in Tortell P (1984) *Maketu Estuary: Environmental Issues and Options*, Commission for the Environment, Wellington, page 28. Kirkpatrick et al and the Bay of Plenty Catchment Commission date this report as October 1953, Tortell as 1954.

[302] Tortell P (1984) Maketu Estuary, page 4. The 3:1 subsidy for river control works, provided by the Soil Conservation and Rivers Control Council on the advice of the Ministry of Works engineers, may or may not have been part of the pressure in this instance. Cf Waitangi Tribunal (1984) Kaituna River Claim Report

[303] Kirkpatrick et al, evidence, E 3 p 471

[304] The Commission at this point was headed by Ken Piddington.

[305] Loomis T (1984) *Maketu Estuary Issues and Options Report: Social Investigation for the Commission for the Environment,* The Social Research and Development Trust, Auckland; Tortell P (1984) *Maketu Estuary: Environmental Issues and Options*, Commission for the Environment, Wellington

[306] Tortell P (1984) *Maketu Estuary: Environmental Issues and Options,* Section 2.2 Effects on Maketu residents and visitors. Tortell, p 14, also reports that residents drew attention to a 1978 study by Ken Murray who found a marked decline in numbers of shellfish "particularly pipis, large green mussels, blue mussels

There had been a substantial build up of sand in the tidal estuary and pollution had reached levels that made to swimming in the water or eating the shellfish unsafe. There had been significant changes to the ecology and many of the species important in the past could no longer be found. Both recreational and commercial fishing had declined, the recreational environment has deteriorated and fewer visitors were coming for day trips or overnight stays. The impacts were felt by all residents and were very evident to holiday visitors who had been coming to Maketū on a regular basis.

Loomis and Tortell worked carefully to ensure that Māori were included in the consultation process. They succeeded in this and a number of the impacts reported reflect concerns about customary use and kaitiakitanga; and water quality and its impact on kai moana and manaakitanga. For example:

> The decline in shellfish meant that residents could not obtain the seafood essential to augment family budgets, particularly in the lower-income households. Furthermore, it had been taken as an affront to customary rights which Māori people had enjoyed in obtaining kai moana from the estuary. Kai moana was not simply a cultural frill. It was an important ingredient in communal feasts, an important aspect of resource control and had deep spiritual significance as a link between the people, their ancestors and the land.[307]

Pamia Pecotic expressed the feeling of many Maketū Māori:

> In my childhood we lived off whitebait, pipi, fish and various varieties of seafood and water fowl contained in the estuary. Now we must hunt for the shell beds and be satisfied with crabs only. [308]

A kaumātua, recalling the titiko (estuarine mud snails) and the pipi which were bountiful in former times stated:

> …for many Pakehas shell-fish are just an appetiser. But for us, with some potatoes kumaras and other things, it is often the main course. [309]

Tortell expanded by linking the concerns shared by Māori during his research at Maketū with the evidence being presented by their whanaunga to the Waitangi Tribunal sitting at Mourea in the upper Kaituna:

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and rock oysters" and were bitter that no action had been taken when this documentation was available for some time.

[307] Tortell P (1984) *Maketu Estuary: Environmental Issues and Options*, p 13

[308] Loomis T (1984) *Maketu Estuary Issues and Options Report,* page 29 and Tortell P (1984) *Maketu Estuary: Environmental Issues and Options*, page 13

[309] Loomis T (1984) *Maketu Estuary Issues and Options Report,* page 29 and Tortell P (1984) *Maketu Estuary: Environmental Issues and Options*, page 14

> Traditionally it is part of the mana of a community to be able to look after its manuhiri (visitors) in a gracious manner by offering them plenty of kai as well as aroha. If the hosts could not give such a gift, their mana suffered and they were whakama (embarrassed). It was a situation not merely of emotional discomfort, but of spiritual and political degradation which no Māori individual or community wished to fall into. The degradation of available kai moana at Maketu had placed the people of Ngati Whakaue, Ngati Pikiao and other Arawa tribes from further inland in just such a predicament….[310]

Tortell, building on the Loomis research and working with an advisory group which included the Bay of Plenty Catchment Commission, Tauranga County, Ministry of Works, and Wildlife Service, summarised the results of consultation and literature search and then prepared a set of options for future action. The options were three: one was to maintain the outlet at Te Tumu; the second was a partial return of the river to the estuary; the third was a total return of the river to the estuary.

The Bay of Plenty Catchment Commission then drafted proposals for the release of river flow back into the estuary. Due to financial constraints, the matter was referred to the Crown to provide assistance.[311] Ministers considered this request and in 1988 the Department of Conservation was directed by Cabinet to develop a strategy for the restoration of the health of the Maketu Estuary.[312]

A restoration strategy was approved by Cabinet, the Bay of Plenty Regional Council and Western Bay of Plenty District Council, and finally the Maketu community, at a meeting convened by the Hon Peter Tapsell, the MP for Eastern Māori.[313] He later recorded that the Cabinet approved in principle restoration strategies set out by the Department of Conservation and had agreed to provide substantial funding to have some controlled river flow returned back into the estuary (subject to regional and local authorities paying a share for monitoring).[314]

The Department of Conservation then made to applications for water rights. The first would allow 800,000m^3 of water per day (at a maximum rate of 20m^3 per second) to be diverted, by way of a flap-gated diversion control structure, from the Kaituna River into the Maketu Estuary, via Ford's Cut.[315] A maximum initial flow of 2m^3 per second was proposed. The second application sought to (a) take natural water from the Kaituna River, (b) discharge natural water containing waste onto land and (c) to divert natural water as part of certain proposed sand

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[310] Tortell P (1984) *Maketu Estuary: Environmental Issues and Options*, page 14
[311] *D Paterson v Bay of Plenty Regional Council & the Minister of Conservation* (Unpublished A 54/94) p 11
[312] *D Paterson v Bay of Plenty Regional Council & the Minister of Conservation* (Unpublished A 54/94) p 11
[313] *D Paterson v Bay of Plenty Regional Council & the Minister of Conservation* (Unpublished A 54/94) p 11
[314] Bennett, evidence, F 24(a), p 47
[315] *D Paterson v Bay of Plenty Regional Council & the Minister of Conservation* (Unpublished A 54/94) p 1

dredging and split stabilisation works.[316] The Bay of Plenty Regional Council granted the first application but considerably reduced the amount of water that could be diverted from the requested 800,000m^3 per day to just 100,000 m^3 each tidal cycle. An appeal was lodged with the Planning Tribunal. Hearings were held under the Water and Soil Conservation Act 1967 and the appeal was dismissed.[317] The new diversion gates were opened in June 1996, and have operated as approved and, along with other portions of the Kaituna River, are monitored by Environment Bay of Plenty.

Māori response to the river works: the Te Tumu cut and its impact

There was major concern from local Māori, recorded in a letter to the Hon A T Ngata, about the transfer of authority to the Tauranga Harbour Board in 1924. This letter was signed by 66 Māori residents from Maketu objecting to their moana coming under the 'mana' of the Tauranga Harbour Board.[318] They objected on the basis that:

- The area was a famous and revered as the final resting place of Te Arawa Waka;
- There were urupa used from ancient times present at Maketu;
- There were fisheries upon which Māori depended, such as fish, pipi, mussels, paua, kina, and eels.
- That the anchoring stones of the Te Arawa Waka were present in the estuary and were under the care of Pakeha who had become part of the Māori community.[319]

We have no evidence of what became of this protest. We refer to it to point out how maintaining local autonomy and some control over the estuary was important to Māori resident at Maketu.

In 1927, the Kaituna River Board took out a loan of £4,000 for the purpose of 're-establishing and safeguarding' the 'old natural outlet of the Kaituna River under the protection of the Maketu Bluff and securing the Outfall Channel continuously in its reopened course, and for lowering the level of the Kaituna Channel'.[320] The

[316] *D Paterson v Bay of Plenty Regional Council & the Minister of Conservation* (Unpublished A 54/94) p 1
[317] D Paterson v Bay of Plenty Regional Council & the Minister of Conservation (Unpublished A 54/94). We note that at this hearing Ngai Te Rangi stated that they wished to maintain the benefit of a river outlet at Te Tumu. Therefore, it appears that maintaining a flow at Te Tumu is important to them, but we can not know for sure.
[318] Bennett, evidence, F24(a), pp 4-6
[319] Bennett, evidence, F24(a), pp 4-6
[320] New Zealand Gazette, 1 September 1927, No 62, p 2819

Te Arawa Trust Board donated £1,000 towards the project.[321] Kirkpatrick et al did not know if the works were completed.[322]

However, an examination of the relevant law indicates that the works must have been done. Section 34 of the Kaituna River District Act 1926 records this future contribution; its purpose; and the benefits that flowed to Te Arawa on payment of the money; namely an exemption from any rates to meet the costs of the outlet scheme. The Act records:

> On Payment Of £1,000 By Arawa District Trust Board Towards Maketu Outlet [Māori] Lands Owned By Members Of Arawa Tribe Not To Be Rated
>
> Inasmuch as the River Board has in progress a certain scheme of operations (hereinafter in this section referred to as the outlet scheme) for the diversion of the outlet of the Kaituna River so as to reopen the old outlet at Maketu of that river, which said old outlet was entirely closed in or about the year nineteen hundred and seven by the action of natural forces and has since remained closed: And inasmuch as the Arawa District Trust Board (being the Board constituted under the provisions of section twenty-seven of the Native Land Amendment and Native Land Claims Adjustment Act 1922, and hereinafter in this section referred to as the Trust Board) has undertaken to pay by way of contribution towards the cost of the outlet scheme the sum of £1,000 (hereinafter referred to as the said contribution):
>
> (1) Upon and after payment by the Trust Board to the River Board of the said contribution, or of that sum which together with any sum or sums paid by the Trust Board to the River Board makes up the amount of the said contribution, the River Board shall not make on any Native any demand of payment of any rate whatsoever made and levied in respect of the outlet scheme by reason of the fact that such Native is the owner or occupier of any Native land or of any share or interest therein, notwithstanding that such Native land or any part thereof may have been included in any classification made in respect of the outlet scheme pursuant to the provisions of this Act or in any separate rating-area; but this subsection shall not be construed to exempt from payment of rates any owner or occupier (other than a Native) of any Native land or any interest therein.
>
> (2) If the River Board shall raise a special loan in respect of the outlet scheme, any rate made and levied as security for such loan shall be so calculated as to yield a sufficient sum annually after allowing for the exemptions provided for in subsection one of this section.
>
> (3) The said contribution or any part thereof, as and when received by the River Board from the Trust Board, shall be expended by the River Board solely in or towards the furtherance of the outlet scheme and not otherwise.
>
> (4) For the purposes of this section the term "Native land" shall have the meaning ascribed to it by section two of the Native Land Act 1909; and the word "Native" shall mean a member of the Arawa Tribe or a descendant of a member of that tribe.

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[321] Kirkpatrick et al, evidence, E 3 p 451
[322] Kirkpatrick et al, evidence, E 3 p 451

It appears that the Te Arawa Trust Board was involved because a number of Māori land titles were the subject of the Maketu Consolidation Scheme and were vested in the Te Arawa Trust Board.[323] However, once the full impacts of diversion became apparent, it seems that the Board regretted having been involved in the scheme. In 1984 they told researchers for the Commission for the Environment:

> In the early days the Trust Board voted to contribute funds toward the drainage works in the lower Kaituna River, including the Te Tumu Cut. In light of subsequent effects on the estuary it now believes it was misled into believing the cut would benefit the local landowners. Today, as always, the Trust is bound to support the interests of their beneficiaries. It stands behind the local Ngati Whakaue and Ngati Pikiao people in their request that the estuary and their traditional kaimoana be restored as guaranteed in the Treaty of Waitangi.[324]

In 1994, the Planning Tribunal recorded that Maketu Maori put their concerns regarding the migration of the river mouth towards Maketu to the government.[325] The Planning Tribunal noted that between 1922 and 1926 the newly-formed Kaituna River Board work on Ford's Cut was implemented by (Mr Ford being the then owner of the land concerned), in an attempt to direct the river back into the estuary.[326] In the short term the diversion appeared successful, until the river broke out at Te Tumu in 1928.

However, the local Māori people do not appear to have supported the major cut in 1957. We note that Stafford records the events surrounding the Te Tumu cut made in 1957 and states:

> … the Māori people were concerned that their pipi beds, which had provided a rich source of food for centuries, would disappear once the lagoon and its flow of salt and fresh water dried out. However, despite the protestations, plans went ahead, on the basis that the 16,000 acres of farmland to be protected from flooding was of more consequence than the Maketu lagoon.[327]

We do note that after an extensive search Kirkpatrick et al were unable to find any evidence that Tapuika or any other Māori of Maketu, other than (perhaps) the Te Arawa Trust Board, were consulted over the Te Tumu Cut.[328] This is important because a number of these iwi associated with the Lower Kaituna and Maketu

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[323] McRae, evidence, F 16, Anexures
[324] T Loomis Maketu Estuary Issues and Options Report : Social Investigation (Commission for the Environment, September 1984)
[325] *D Paterson v Bay of Plenty Regional Council & the Minister of Conservation* (Unpublished A 54/94) p 8
[326] *D Paterson v Bay of Plenty Regional Council & the Minister of Conservation* (Unpublished A 54/94) p 8
[327] Don Stafford, *The New Century in Rotorua* (1988), pp 301-303
[328] Kirkpatrick et al, evidence, E 3 p 469

area were not listed as hapu represented by the Te Arawa Trust Board under the Native Land Amendment and Native Land Claims Adjustment Act 1922.

The Tribunal's analysis with regard to the management of the Kaituna River (Pre-RMA)

In our view there were benefits, principally relief from flood events, to be gained from the river and drainage work undertaken by the Crown and its delegates. We note that some compromise between Māori and European over the management of the Kaituna to Maketu was necessary. European settlement was welcomed by Māori (at least in the early years of contact) and it was contemplated by the Treaty of Waitangi. Both parties were to mutually benefit from it. But on our view of the evidence, the actions taken with respect to the Kaituna to Maketu had such major implications for the cultural way of the life of Māori, that a partnership in development terms was required. In such situations the affected iwi and hapu should have been fully involved in all decisions made so that options that had the least impact on their way of life, and their Treaty rights and interests, could have been more fully explored.

However, we find that whether the actions of the Crown or its delegates were legally authorised by common law under the ad medium filum aquae rule, the arm of the sea doctrine; or the Land Act 1892; or the Coal-mines Act Amendment Act 1903; or the myriad of local government statutes passed to authorise various bodies to undertake drainage and river control works; the Crown failed to provide for rangatiratanga or self-government of the iwi associated with the Kaituna River system to Maketu from 1880 to 1991. They have not had a meaningful role in its management, although, as was the case in the 1920s, they clearly had a desire to be intimately involved in the management of their river system to Maketu. This has led to serious prejudice for the iwi and hapu concerned including:

Undermining Māori rangatiratanga

In 1984, the Kaituna River Tribunal noted the almost total lack of consideration given to Māori values and beliefs, let alone Treaty rights and interests, by central and local authorities charged with responsibility for managing the river and the proposals to discharge effluent into the river.[329] We agree, and note that this case study is an example of the negative impact the Crown's delegation of powers over river and drainage works to local authorities has had on Māori rights and interests. In this case, there has also been a substantial and unquantifiable impact on the mauri of the river and the estuary as a result of the policies, legislation and initiatives in the lower Kaituna districts. All these interventions were made under

[329] *Kaituna River Report,* pp 21-26

the authority of statutory schemes for which the Crown was responsible and with minimal acknowledgement of Māori rights and interests.

This case study is yet another example of the failure of the resource management regime prior to the RMA to recognise and provide for Māori rangatiratanga in the management of water resources. At 1840, Māori possessed the Kaituna River from Okere Falls to Maketu in a manner akin to ownership. They held it in accordance with their culture and customary law.

As a stage one inquiry we have not been able to consider the extent of continuing Māori ownership of land bordering the river. Nevertheless, whether Māori continue to own land or not, the Crown guaranteed that their right to exercise rangatiratanga in the management of taonga such as this river system would be protected under the Treaty of Waitangi.

On the evidence before us, between the 1880s, when settlement and drainage began, and the 1920 the Crown did not take such Māori interests into account in any significant way. The Provision for such interests was not made in any of the relevant legislative schemes that were used to manage the Kaituna River and estuary. Although there appears to have been some consultation with the Te Arawa Trust Board on some aspects of the works completed at the Maketu Estuary, there was limited or no consultation with iwi such as Ngai Te Rangi, Tapuika, Waitaha, and the Māori residents of Maketu directly affected. In the 1950s there were easily identifiable Maori communities and organisations that the Crown could have consulted. For example there were people at the Ngati Whakaue Marae in Maketu, and other marae important to Ngai Te Rangi, Waitaha and Tapuika could have been identified. There were Māori committees established under the Māori Social and Economic and Social Advancement Act 1948 still in existence at the time. However, none of these bodies had any statutory authority with respect to the river or the estuary.

Waahi tapu and waahi taonga

River and drainage work has had a major impact on waahi tapu and waahi taonga within the Kaituna River and within the swamps and forests of the Kaituna lowlands. The largest and most visible actions were those that took place between 1970 and 1992 when major engineering works took place to deepen and straighten the Kaituna River. Kirkpatrick et al record:

> These works were to be the start of a series of activities that drastically modified the river course from State Highway 2, to the ocean. The magnitude of the task is perhaps reflected in the use of the massive Rapier W90 walking dragline … The extent of the modification of this stretch of the river is shown in … composites of survey plans produced in conjunction with the scheme. As the figures show, together with the diversion at Te Tumu, many kilometres have been removed from

> the path of the river. Amongst the most critical of these was the destruction of Te Mapu's corner, the waahi tapu where Te Mapu was lured away by Tuparahaki.
>
> There were activities also upriver from the State Highway. For example, Contract K. 15 (1983) was for the clearing of willows along both sides of the 10.5 km of river up to the Maungarangi Bridge. This area saw channel straightening and stopbanking take place although it was designed to provide a lower level of protection than the lower stretches of the river.[330]

Te Keepa Stewart Marsh, in particular, provided evidence about the nature and spiritual importance of these taonga. We note, further that although Māori landowners were entitled to compensation under the Land Drainage Act 1908, Māori were not entitled to compensation for loss of their fisheries or eel weirs.[331]

Loss of culture and custom

Drainage work resulted in swamps being cleared and replaced by farmland, and channel works and stopbanks have increased the river flow as has the Te Tumu cut. The tangible losses suffered by iwi and hapu as a result of these initiatives include loss of access to mahinga kai, destruction of wetlands and forests and deterioration of the Maketū Estuary. Cultural losses include visual separation of community from river by the stop banks, destruction of eeling sites, and loss of amenity for swimming and family gatherings. There are also losses such as those described below:

> Most important, however, has been the spiritual damage that has been done in the measures to improve and maintain the agricultural productivity of the lower Kaituna area. The bends in the river were home to important taniwha. These have been virtually destroyed, particularly in the area coastward of the State Highway. The loss of waahi tapu as a result of the works does not appear to have been taken into account in the planning of the drainage and protection schemes.[332]

All of these, together, impact on tribal identity and tribal mana. We are in no doubt that it was inevitable that the mauri of the river and the estuary system would be diminished, and that diminishing resources and government regulation would undermine the kaitaiki role of tangata whenua. We are also in no doubt that as the supply of foods important for manaakitanga was curtailed the mana of the people came under adverse and negative pressure.

In the closing submissions for Environment Bay of Plenty, Tapuika's claims to lack of consultation relating to the Kaituna River Scheme (pursuant to the Kaituna River District Act 1926) were noted. In response counsel contended that, as the regional council was not in existence at the time it should not be held

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[330] Kirkpatrick et al, evidence, E 3 pp 457-458
[331] *Hone Te Anga and Others v The Kawa Drainage Board* (1914) 35 NZLR 1139; 16 GLR 696
[332] Kirkpatrick et al, evidence, E 3 p 471

responsible for the acts of another separate and distinct legal entity.[333] Who, then is responsible? The answer must be the Crown, who enacted the defective legislative scheme in the Kaituna River District Act 1926.

The Tribunal's findings on prejudice with regard to the management of the Kaituna River (pre and post-RMA)

This case study points to the problems we identified in Part II of this report, namely that before the advent of the RMA the Crown had not adequately addressed the right of Māori to autonomy and self-government at the local, regional and national level. While the Te Arawa Trust Board may have been an important model of regional self-government for its time, consultation with them was never going to deal with the concerns of all the hapu and iwi directly affected. A more localised form of self-government was needed with some link to a regional body. There was also a need to provide a legal connection between such structures and the local government and resource management framework.

To some degree this has now been achieved by the establishment of the joint Rotorua Lakes Strategy Group and the Joint Maketu Estuary Steering Group. There is no doubt in our view, that the re-introduction of the Kaituna River into the Maketū Estuary in 1996 was, for Te Arawa tangata whenua, a significant sign a new relationship with the Crown and its statutory delegates was possible. To continue to strengthen this relationship more needs to be done at a local level to include Ngati Makino, Tapuika, Waitaha, Ngai Te Rangi and other iwi with rights and interests in the lower reaches of the Kaituna River. For instance, Mr Wihapi told us that the concerns of Tapuika regarding the use and management of the Waiari Stream (a tributary of the Kaituna River) for effluent disposal are still being marginalised. He advised:

> The local Councils' take water from the Waiari stream without consulting us. More water is to be taken for the developments in the Papamoa area. In addition effluent from the Te Puke township is discharged into the Waiari stream from the local Council's sewerage scheme. In respect of the Kaituna itself we are facing a proposal by Mighty River Power to establish a hydro electric power station on the river.[334]

It is also clear that despite all the work done to increase the level of Māori participation in the RMA consent process, the Treaty rights of tangata whenua are only one set of matters that must be taken into account during the hearing of a resource consent. If tangata whenua concerns, including the historical issues that have prejudiced their interests, are to be fully addressed in the RMA consent process, all those exercising powers and functions under the RMA should be

[333] EBOP closings, 3.3.114, p 14
[334] Wihapi, evidence, B21 p 8

required to act in a manner consistent with the principles of the Treaty of Waitangi. This would require an amendment to the RMA. In the interim, and as a minimum, a joint management agreement over the lower reaches of the Kaituna River to Maketu should be a point of discussion in negotiations.[335]

The Tribunal's analysis with regard to the management of Te Awa o Te Atua - Tarawera to Matata

The nature of the Tarawera River system from Tarawera to Matata

The Tarawera River is part of the Tarawera Lake system (an interconnected series of seven small and medium sized lakes formed through volcanic action). Lake Tarawera from which the river originates, is the largest of the lakes. According to Environment Waikato:

> Lake Tarawera is generally believed to be fed by five other lake catchments within the Lake Tarawera system. Lake Rotokakahi (Green Lake) drains into Lake Tarawera via Te Wairoa Stream, while Lake Okareka does so via the Waitangi Spring and over ground via a man-made overflow structure. Lakes Tikitapu (Blue Lake), Okataina and Rotomahana have no visible outlets, but are believed to drain by sub-surface flow to Lake Tarawera. Lake Okaro drains via a surface flow into Lake Rotomahana. Part of the water draining from Lake Rerewhakaaitu is understood to flow through the crater basin to Kaue Springs and then into Lake Rotomahana.[336]

The Tarawera River begins at the Lake Tarawera outlet. The river is fed by a number of tributaries as it flows northeast. It then enters a subterranean chamber before existing at the Tarawera Falls where it drops 65 metres into the Tarawera Valley. It continues on a reasonably steep gradient to Kawerau and then quickly fans out through undulating country to exist at the Pacific Coast, just east of Matata.

As the Tarawera River meandered to the coast, it once bounded the large Rangitaiki swamp. The Ngati Awa Tribunal noted that the:

> … vegetation there was mainly raupo, flax, and rushes, with ti-tree and cabbage trees on the higher ridges. The swamp provided Māori with food; in particular, eels, fish, and birds. (The drainage of the swamp uncovered the remains of many eel weirs in the old watercourses.) The swamp also provided Māori with flax and raupo, allowed easy movement within the Ngati Awa territory, and offered a place of refuge. The higher land in the swamp and the land along the river banks also provided places for the cultivation of kumara, potatoes, maize, wheat, and melons, and a flour mill operated at Matata before 1900.[337]

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[335] See sections 4 and 36A of the RMA as inserted by the Resource Management Amendment Act 2005
[336] Eastern Bay of Plenty, Tarawera Catchment Plan (2004), p 26
[337] *Ngati Awa Report*, section 9.4

It was at Matata harbour that the rivers Tarawera and Rangitaiki flowed into the sea.

The Tarawera River system to Matata as a taonga

Te Awa o Te Atua (Tarawera River) was named by Ngatoroirangi after the Te Arawa Waka landed at Matata.[338] We have previously outlined the different stories associated with these events in full in Part I of this report. But in summary, we also know that after beaching here, Ngatoroirangi advised Tamatekapua to seek assistance of Toroa, captain of the Mataatua Waka. After Toroa completed the appropriate karakia, Te Arawa was released and headed west back to Maketu. According to some, this was when Toroa and Tamatekapua decided that Te Awa o Te Atua would be the boundary between Mataatua and Te Arawa.[339] We heard a slightly different version of these events from witnesses for Ngati Rangitihi.[340] Mr Henare Pryor, among others, told us their oral history surrounding this event.[341] What is agreed is that Ngatoroirangi travelled the river to Ruawahia/Tarawera thus underscoring the importance of the river and its name.

Thus the river has always been important to the tribes of Te Arawa Waka. In this latter respect, Mr Tipene Marr listed various places on the river commencing from Lake Tarawera to the sea, including: Tapahoro – pa site at the headwaters; Te Waipuna a Mokonuiarangi; Te Tuahu a Rangiaohia; Te Kahao o Rongomai; Te Auheke o Tionga and Te Taketake a Tu (above and below the Tarawera Falls); Te Awa a Kaipara; Maungawhakamana; Tumutara – Ngahuia Pa; Te Whanautanga a Tuhourangi (birthplace of Tuhourangi); and Otaramuturangi urupa at Matata.[342] Mr Marr noted that the Rangiaohia marae of Ngati Rangitihi was built in 1899, and then rebuilt in 1927.[343]

We were told about the use made by Ngati Rangitihi of the Tarawera River and its wetlands as a fishery and as a travel route inland.[344] Mr Patterson's evidence indicated that the wetlands on the lower reaches of the Tarawera were considered as major source of food and resources for tangata whenua.[345] We saw its beauty through their eyes when we were shown the video prepared for this inquiry. Most travel was by walking tracks with Onepu Springs being an integral part of the journey.[346] Particularly important was the harbour at Matata as a fishery and as a port. The harbour was deep enough for large ships to enter. Mr Morris Raureti

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[338] Marr, evidence, F15, p 5; Potter, evidence, B3 pp 9-10
[339] McCausland, evidence, B54, p 4
[340] Potter, evidence, B3 p 10
[341] Pryor, evidence, B17, p 3
[342] Marr, evidence, F15, p 5
[343] Marr, evidence, F15, pp 4 -5
[344] M Raureti, evidence, B16 pp 1-2
[345] Paterson, evidence, B2, pp 7-8
[346] Potter, evidence, B 3, p 28

born in 1935 was told of earlier times when there was a harbour fed by the three rivers flowing into its tidal reaches.[347] These were the Tarawera, the Rangitaiki and the Orini.[348] Mr Henare Pryor reiterated the historic importance of the harbour lost at Matata.[349]

A representative from Ngati Tuwharetoa, Te Atua Reretahi also claimed the river as a taonga to Matata and expressed similar concerns.[350] The relationship of Ngati Tuwharetoa ki Kawerau with the area was previously explored by the Ngati Awa Tribunal in the following way:

> At Matata is Otaramuturangi (now threatened by erosion following a road cutting), and we were referred to a number of other sites from there to Otamarakau, where Tuwharetoa was born. There, the remains can still be found of his birthplace, the pa of his grandmother, Hine te Ariki. In the inland hill country, we were shown Whakahoro, Pukemaire, and the cave at Otari. We passed also Matatu, Huratoki, Whakaparau (on Maungawhakamana), Otuhoepu, Nokonoho, and Te Takangaoapa in the Tarawera valley and surrounding hills.[351]

Ngati Tuwharetoa's relationship with the river and Matata, along with those of Ngati Awa was recognised by the Ngati Tuwharetoa Ki Kawerau Cross-Claims Tribunal.[352] In that Tribunal's view, that the Crown should also recognise Ngāti Rangitihi 'as tangata whenua in and around Matatā alongside Ngāti Tūwharetoa ki Kawerau and Ngāti Awa.'[353]

The Tribunal's findings regarding the management of the Tarawera River

We were left in no doubt that the Tarawera River system to Matata, was a taonga of great significance to a number of hapu and iwi of the Central North Island including Tuhourangi, Ngati Rangitihi, Ngati Tuwharetoa ki Kawerau and Ngati Awa. What is clear is that Māori possessed the river system, in a manner akin to ownership as at 1840 and that they exercised rangatiratanga over it. Much has taken place since ancient times and boundaries have ebbed and flowed. Therefore we recognise that there were a number of iwi with interests in the Tarawera River to Matata but we are not in position, and nor is it necessary, to make any decisions on mana whenua for the purposes of this stage one inquiry. What is more important is that all agree that the river was an important taonga over which at the least the tribes above exercised rangatiratanga over those reaches of the river where they exercised rangatiratanga, mana and authority.

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[347] M Raureti, evidence, B16 p 2
[348] Patterson, evidence, B1, p 17
[349] Pryor, evidence, B17, p 4
[350] Olson, evidence, B24, pp 4-5
[351] *Ngati Awa Report*, section 9.10.1
[352] *Ngati Tuwharetoa Ki Kawerau Settlement Cross Claims Report*, section 4.9
[353] *Ngati Tuwharetoa Ki Kawerau Settlement Cross Claims Report*, section 4.9

Impact of drainage and flood control works

Ngati Rangitihi raised concerns regarding the Rangitaiki Drainage Scheme. This scheme was introduced in 1910 in order to drain the wetland that made up the plains so that the area could be used for farming. It entailed making a 'cut' at Thornton to divert the Rangitaiki River straight into the sea (1914) and the diverting the Tarawera River away from the Matata Lagoon so that it could flow directly into the sea (1917).[354] The major concern for Ngati Rangitihi is the impact of the scheme on the river and the loss of a viable harbour at Matata, which has affected livelihoods in some cases. They allege that the decisions affecting them were not made with their consent or with regard to their rangatiratanga.[355]

We heard limited independent evidence on the impact of the Scheme on Ngati Rangitihi, but we note that the Ngati Awa Tribunal commented generally on its impacts on Ngati Awa. That Tribunal noted that the Rangitaiki Swamp was bounded by the Tarawera River to the west and the Whakatane River to the east. Running through the middle was the Rangitaiki River, which had 'tortuous access to the coast', and so spread across the land as it slowly wends its way to the ocean. All three rivers, but especially the Rangitaiki, were prone to flooding, and the area had a number of lagoons, some very deep. The Tribunal noted that the flooding of the swamp caused many problems for the local Māori. They stated that 'in 1870, Donald McLean was told of the problems that recent floods caused the 'Whakatane people'. In 1891, Māori living next to the Rangitaiki and Whakatane Rivers and at Matata lost their potato crops, and the flood rose to two and a half feet in their maize fields.'[356]

The drainage of the Rangitaiki Swamp resulted in the loss of a valuable food resource but it also brought relief from flooding.[357] Systematic drainage work began in 1910, assisted by the 1894 declaration of a Rangitaiki River Land Drainage District. The District comprised roughly the area between the Tarawera and Whakatane Rivers and extended from a mile north of Te Teko to the sea.[358] In 1910, the Rangaitaiki Land Drainage District was abolished and the powers of the Drainage Board were vested in Minister of Lands.[359] The Ngati Awa Tribunal records that:

> Between 1894 and 1910, the settlers attempted to drain the land. There is also some evidence that Māori attempted to drain their land and create roads during this period, and

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[354] Potter, evidence, B7, p 30
[355] Closing submissions for Ngati Rangitihi, 3.3.62 para 43.9
[356] *Ngati Awa Report,* para 9.4
[357] *Ngati Awa Report,* para 9.4
[358] *Ngati Awa Report,* para 9.4
[359] Rangitaiki Land Drainage Act 1910

> by the early twentieth century some had extensive cultivations. However, the attempts were not successful, and in 1910 the Government took over the drainage scheme and passed the Rangitaiki Land Drainage Act. The project became a major public work, and many drains were cut through the land to allow the water to flow quickly to the sea, including, in 1914, a channel to provide the Rangitaiki with a direct outlet. In 1915, J B Thompson, the chief drainage engineer, estimated that 75 percent of the area was permanently free from flooding and workable in all seasons, although the drains needed to be made deeper before the land could be considered permanently drained. The work nevertheless continued for many years, and 40 years later the scheme was still struggling with the flooding of the rivers. Although the quality of the land did not live up to initial expectations, the area is now excellent dairy farmland. However, the drainage meant the destruction of the lagoons and the wetlands and, with them, the food that they provided.[360]

The Ngati Rangitihi claimants allege that the cuts to the two rivers, Rangataiki and Tarawera, were actions undertaken and completed without their active participation and consent. They contend that as there was no statutory requirement to consider Māori values and concerns, let alone their Treaty rights, these matters were given limited consideration. They have particularly focused on the cuts to the rivers and the impact on the former Matata habour. Mr Paterson, for example, told us that leaders of Ngati Rangitihi travelled to Rotorua to protest the proposals to divert the Rangitaiki to the sea.[361] We do not know the history behind this meeting or the outcome but we do know that the cut was made in 1914.

We also know that the cut for the Tarawera River was made 3 years later in 1917. The claimants also point to the Rangitaiki Land Drainage Act 1956 Act, which set up a Board with power to make bylaws and undertake drainage work.[362] Ngati Rangitihi note that this Act made no provision for Māori representation or participation of any significance such as to give effect to their rangatiratanga.

Once the river cuts were made the harbour turned into what is now called the Matata Lagoon.[363] Although it is a remnant of what it once was, both Mr Henare Pryor and Mr Morris Raureti told us that tangata whenua continued to use the 'lagoon' as a coastal fishery. The tide would bring saltwater fish into the lagoon. When the tide receded, the people could fish for eels and whitebait on the rivers.[364] This fishing activity was still happening at Matata at least while the older witnesses Patricia Rondon, Henare Pryor, Morris Raureti and Clem

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[360] *Ngati Awa Report*, para 9.4
[360] *Ngati Awa Report*, para 9.4
[361] Paterson, evidence B1, p 5
[362] See generally Patterson, evidence, B1
[363] Paterson, evidence, B1, p 6
[364] M Raureti, evidence, B16 p 2

Huriwaka were young. Both Mr Pryor and Mr Raureti told us about the range of fishing activities that took place. Mr Huriwaka told us:

> I lived in Matata during the depression – I cannot remember a day of being hungry – we used to go back and get breakfast from the river, hunting, fishing and eeling … This was until the rivers got dammed and the fresh water wasn't drinkable.[365]

So life continued, but in 1954 further change occurred when the Tasman Pulp and Paper Mill began production.[366] All claimants from Kawerau and Matata who gave evidence before us have recorded adverse impacts on the water quality of the Tarawera River and the Matata Lagoon from this time. There now seems little doubt that the authority of the Tasman Pulp and Paper Enabling Act 1952, enabled the mill to discharge waste at unacceptable levels into the Tarawera River. The Ngati Awa Tribunal noted that these discharges were responsible for 'killing all fish life downstream' and that in 1966, 'the Government required the mill to filter and monitor its waste-water.'[367] The claimants allege that the pollution in the Tarawera River prompted the Rangitaiki Drainage Board and the Bay of Plenty Catchment Board to undertake further work at Matata, with the erection of a floodgate between the start of the Tarawera River and the Lagoon.[368] We were told by Environment Bay of Plenty that they have investigated every complaint made about the operation of the Mill and have been involved in two prosecutions.[369] We do not know whether those prosecutions related to any discharges into the Tarawera River.

The Tribunal's findings regarding the management of the Tarawera River (pre and post-RMA)

This case study points again to the problems with the legislation for the management of waterways prior to the RMA in 1991. Major modification to the Tarawera River took place under a legislative regime that did not recognise Māori cultural values, or their relationships with the river. The failures to address these issues had major implications for the cultural way of the life of Māori. It is clear to us that this is another instances where development ought to have been undertaken in partnership with hapu and iwi. As we noted above, in such situations the affected iwi and hapu should have been fully involved in all decisions made so that options that had the least impact on their way of life, and their Treaty rights and interests could have been more fully explored.

As with the last example concerning the Kaituna to Maketu River system, the need for an amendment to the RMA is apparent given that the Mill continues to

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[365] Huriwaka, evidence, B4, pp 5-6
[366] Potter, evidence, B7, p 30
[367] *Ngati Awa Report*, para 9.10.1
[368] Paterson, evidence, B1, p 9
[369] EBOP closing submissions, 3.3.114, p 16

discharge contaminants into the Tarawera River. While we acknowledge the work of Environment Bay of Plenty in monitoring the conditions of the mills resource consent process, there are ongoing Treaty issues and historical issues for tangata whenua that need to be addressed. Under the current regime this can not be done. In the interim, and as a minimum, a joint management agreement over the lower reaches of the Tarawera (Kawerau to Matata) should be a point of discussion in negotiations and it should include all iwi with an interest in the river.[370]

Management of the Murupara Log Yard soil and water contamination

As noted by Kirkpatrick et al, hydro-electricity schemes (Aniwhenua, Wheao, and Matahina Dams), afforestation (Kaingaroa and Matahina Forests), and land clearing for agriculture have contributed greatly to significant environmental changes.[371] The Waitangi Tribunal has previously reported on the impacts of the hydro-development of the rivers of the Kaingaroa in the *Te Ika Whenua Rivers Report* so we do not propose to traverse those issues again.

The claimants' case

The evidence on Murupara was led for Ngati Haka-Patuheuheu. Ngati Manawa are currently in negotiations but did maintain a watching brief. Ngati Whare did not appear before us. The claimants relied on the evidence of Kirkpatrick et al to highlight their concerns regarding the pollution of waterways in their districts over which they claim rangatiratanga.

The Crown's case

The Crown has conceded that a number of the case studies presented to this Tribunal involved the discharge of pollution at a level now regarded as quite unacceptable by Māori and the wider community.[372] That Māori values were adversely affected is not denied.[373] But the Crown contends these problems are now being addressed in significant ways. Its submissions thus turn on how the issues are being addressed.[374] We explore this issue further below.

The Tribunal's analysis with regard to Murupara water and soil contamination

The Murupara example is a smaller more localised issue nevertheless it brings issues relating to water and soil pollution into sharp focus. In this case there is a single agency responsible, pollution took place over five decades, and recent attempts to clean up the site concerned have been only partially successful.

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[370] See sections 4 and 36A of the RMA as inserted by the Resource Management Amendment Act 2005
[371] Kirkpatrick et al, evidence, E 3 p 244
[372] Crown closings, 3.3.111, part 2, p 435
[373] Crown closings, 3.3.111, part 2, p 435
[374] Crown closings, 3.3.111, part 2, p 435

In the decade after World War II Murupara was selected by the Crown as the site for a large pulp and paper mill, which would process wood from the Kaingaroa forests.[375] Despite the protests of Ngāti Manawa that they would lose their valuable river flats, the land was taken under the Public Works Act 1928.[376] The mill did not eventuate but the land was retained and became the site for a rail head and logging yard.[377] Up to one million net tons of logs pass through the Murupara yards each year on their way to the pulp and paper mill at Kawerau[378].

There has been extensive pollution of land on and adjacent to the Murupara log yard caused by the logs stored on the site.[379] Pollution from the site has entered the Wairohia stream which contains wāhi tapu associated with burial practices. The stream runs into the Rangitaiki River and thus enters the entire catchment from that point to the sea.

Attempts have been made, during the 1990s, to clean up the site by means of settling ponds but these are only a partial success. Soil and water are still polluted, the site is visually unattractive and the wāhi taonga flax beds are overgrown with blackberry and other weeds.[380] We note the issues concerning this site will be addressed in more detail by the Urewera Tribunal.

The Tribunal's findings with regard to Murupara water and soil contamination (pre and post-RMA)

Representatives of the claimants expressed concerns regarding the condition of their waterways, the diminishing traditional eel fisheries and the health of the people.[381] It seems to us that given the extent of the afforestation in this area, further research should address environmental effects from the industry on waterways and the health of the people.

SUMMARY OF KEY CHAPTER FINDINGS

As we noted above, the Treaty of Waitangi envisaged that Maori would continue to exercise their autonomy by managing their own policy, resources, and affairs, within the minimum parameters necessary for the proper operation of the State. In answer to the question to what extent did or has the Crown provided for Maori rangatiratanga in environmental management the answer must be that it did not

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[375] Fitzpatrick et al, evidence, E 3 p 283
[376] Fitzpatrick et al, evidence, E 3 p 283
[377] Fitzpatrick et al, evidence, E 3 p 283
[378] Fitzpatrick et al , evidence, E3, p 283 and figure 6.11
[379] Fitzpatrick et al, evidence, E 3 p 283
[380] Fitzpatrick et al, evidence, E 3 p 246, field visits and photographic evidence by Kataraina Belshaw 14 October 2003, pp 284-285
[381] Kirkpatrick et al, evidence, E 3 p 246

do so prior to 1991 to any significant degree and has not adequately done so since 1991.

While the RMA is an advance on the earlier legislative regime, as is the Act's amendment of 2005, the RMA is still inadequate in Treaty terms. We discuss the initiatives that the Crown has taken in terms of enacting the Bay of Plenty Regional Council (Māori Constituency Empowering) Act 2001 and the Local Government Act 2002 in more detail in chapter 20. We note, here that the initiatives were an advance on the previous local government regime. However, the evidence is that Māori representation is still too limited. CNI iwi and hapu groups still have no direct right to attend meetings of councils or consent hearings other than as members of the public, applicants or concerned parties. In particular, participation is not based on tribal or hapu representation and can not have any meaningful effect on outcomes under the RMA. The evidence of Ms Raewyn Bennett and Mr Tipene Marr before us, both of whom were Councillors on Environment Bay of Plenty, was that there were too few Māori on the council and that their views were often marginalised. But, no matter how many Māori are represented on local or regional authorities; they are bound to give effect to the statutory scheme of the RMA in the manner we have described above. Not even the Joint Rotorua Lake Strategy Group can influence the RMA process.

In short, Māori in the Central North Island have suffered major environmental disadvantage as a result of not being adequately recognised in the resource management process. Increasing the level of Māori representation in local government does not address the issue of how to ensure decisions made under the RMA are Treaty-consistent. Only a further ammendment to the RMA will enable that those exercising powers and duties under the RMA to act in a manner consistent with the Treaty. This would address past problems and ensure that present activities, done under resource consents, do not impinge on the Treaty rights and interests of the claimants. Our view is that an amendment is necessary to section 8 of the RMA and we return to this point in chapter 20.

In this Chapter we have examine two issues:

1. To what extent has the Crown provided for Maori rangatiratanga in the environmental management of waterways

2. What has been the prejudice to Maori, if any, of any failure to provide for Maori rangatiratanga in environmental management of waterways?

In relation to issue one we found:

- That after the Treaty of Waitangi the Crown had a duty to actively protect Maori rangatiratanga over their waterways in the environmental management regime of the time;

- That prior to the Resource Management Act 1991 the regime, save for localised exceptions and the special provision made in the Town and County Planning Act 1977, the Crown did not generally provide for Maori rangatiratanga in resource management;

- That the Resource Management Act 1991 is not a regime consistent with the principles of the Treaty of Waitangi because:

  - it fails to Address Maori customary rights, Treaty interests or their historical relationship in and with natural water and other waterways that are taonga to CNI Maori;

  - its procedures, save for certain sections discussed in detail in this chapter and chapter 20, fail to assure Maori of anything more than the right to be consulted in certain circumstances;

- That what CNI Maori seek is not recognition of their absolute rangatiratanga and right to autonomy over their waterways, but rather the right to negotiate their resource management arrangements in accordance with the principles of partnership and the Treaty of Waitangi;

- That an amendment to section 8, or the insertion of some new provision in the Resource Management Act 1991, is the only mechanism that can assure Maori that their rangatiratanga can be appropriately considered in RMA processes;

- That many waterways of the CNI are important taonga guaranteed to CNI Maori by the Treaty of Waitangi. Due to the failure of the Crown's general resource management regimes from 1840 to 2005, CNI Maori have been seriously prejudiced in a number of ways and we considered particular case-studies to demonstrate this.

- These case studies concerned the management of lakes, springs, rivers, wetlands and estuaries.

CHAPTER 20

RUAUMOKO / RUAIMOKO AND NGATOROIRANGI

THE GEOTHERMAL RESOURCE OF THE CENTRAL NORTH ISLAND

Among the first immigrants who came from Hawaiki to New Zealand, was the chief Ngatoroirangi (heaven's runner or the traveller in the heavens). He landed at Maketu on the East Coast of the North Island. Thence he set off with his slave Ngauruhoe for the purpose of exploring the new country. He travels through the country: stamps springs of water from the ground to moisten scorched valleys; scales hills and mountains, and beholds towards the South a big mountain, the Tongariro (literally "towards South"). He determines on ascending this mountain in order to obtain a better view of the country….

Then he ascends the snow-clad Tongariro; they suffered severely from the cold, and the chief shouted to his sisters who had remained upon Whakaari, to send him some fire. The sisters heard his call and sent him the sacred fire they had brought from Hawaiki. They sent it to him through two Taniwhas (mountain and water spirits living underground), Pupu and Te Haeata, ***by a subterranean passage to the top of Tongariro***. The fire arrived just in time to save the life of the chief, but poor Ngauruhoe was dead when the chief turned to give him the fire. On this account the hole, through which the fire made its appearance, the active crater of Tongariro, is called to this day after the slave Ngauruhoe; and the ***sacred fire still burns to this very day within the whole underground passage between Whakaari and the Tongariro***; it burns at Motou-Hora, Oka-karu, Roto-ehu, Roto-iti, Roto-rua, Roto-mahana, Paeroa, Orakei-korako, Taupo, where it blazed forth when the Taniwhas brought it. Hence the innumerable hot springs at all the places mentioned.[1] [Emphasis added]

Iwikau Te Heuheu 1859

Hochstetter reflects in 1859: 'This legend affords a remarkable instance of the accurate observation of the natives, who have thus indicated the true line of the chief volcanic action upon the North Island'.[2]

[1] Ferdinand von Hochstetter, *New Zealand: Its Physical Geography, Geology, and Natural History: with Special Reference to the Results of Government Expeditions in the Provinces of Auckland and Nelson* (Stuttgart: J G Cotta, 1867), p 391 as quoted in Evelyn Stokes, *The Legacy of Ngatoroirangi: Maori Customary Use of Geothermal Resources* (Hamilton: University of Waikato, 2000), Document A56, pp 23-24. Stokes adds that Whakaari or Whaikari is White Island, Motou-Hora is Whale Island and Oka-karu is near Kawerau.

[2] Hochstetter, *New Zealand: Its Physical Geography*, p 391. Hochstetter stayed for five days with T S Grace and the latter may have assisted him with proper names at the point where he wrote up his journal for each day.

Introduction

It is certainly not without significance that the Crown chose to give the name 'Waiariki' to the Māori Land Court district and the Māori Electoral District that encompass a large part of our Central North Island inquiry region – waiariki being warm baths or pools, heated by geothermal activity. It is well known that geothermal activity of the CNI enabled Maori to live and thrive in environments that would otherwise be cold and inhospitable. The hot waters provided heating, cooking and bathing facilities; recreational amenities; and a multiplicity of healing and therapeutic uses. Hot springs, pools and geysers close to and under larger lakes and rivers provided essentials and amenities for those who established permanent settlements close by. Geothermal features located inland, away from rivers and lakes, provided regular resting places for people who travelled inland on a seasonal basis.

Issues relating to the nature and extent of the Maori interest in the geothermal activity of the region feature in a significant number of claims before us. This chapter is concerned with such issues generally. Claims based on lost development opportunities from the utilisation of geothermal features for tourism and the subterranean geothermal resource for power generation are considered in more detail in the development part of this report (part IV) while overarching land alienation issues have been considered in part III. It should also be noted that the Waitangi Tribunal has already inquired into a number of issues concerned with geothermal resources, in particular the 1993 reports: *Ngawha Geothermal Resource Report* and the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*. The extent to which these reports are relevant to the claims before us is examined in this chapter.

The evidence of Maori interaction with the geothermal activity of the CNI inquiry region before this Tribunal is comprehensive and we have therefore been able to make detailed generic findings concerning the nature and extent of the Maori interest in the legacy of Ngatoroirangi.

Definitions

We list here the following definitions used in this Chapter. We use variously the terms (a) Taupo Volcanic Zone (TVZ), (b) the subterranean geothermal resource, and (c) the common underlying heat and energy or heat flow to describe what we understand to be the features of the Taupo Volcanic Zone. We use the term geothermal fields to describe the 17 hot water, heat and energy systems of the CNI. And we use the term geothermal surface resources, to describe those features such as geysers, hot pools, mud pools, fumaroles and sinter deposits that all form part of the bundle of rights attached to land ownership.

The major link between water and geothermal activity is vitally important to understanding the manner in which the Crown has classified geothermal activity for management purposes. The Crown recognises that water is a key to the operation of the geothermal fields and has vested regional management in the Environment Bay of

Plenty and Environment Waikato. We note that in the Deed of Settlement signed in September 2006 between the Crown and approximately one half of Te Arawa (the Affiliate Hapu and Iwi), the parties define the subterranean geothermal resource as including energy and water. The definition of the geothermal resource in the deed is 'the geothermal energy and geothermal water located in the Rotorua Region Geothermal System', but does not for the purposes of the deed include 'any geothermal water and geothermal energy above ground on land that is owned by the Crown'.[3] Schedule 3 lists the description of the 12 geothermal fields which make up the Rotorua Regional Geothermal System. These are listed as: Rotoma; Taheke-Tikitere; Rotorua; Horohoro; Waikite-Waiotapu-Waimangu; Reporoa; Atiamuri; Te Kopia; Orakei-Korako; Ohaaki/Broadlands; Nga Tamariki; and Rotokawa.[4] Furthermore, we note that the historical account in the Deed of Settlement states:

> The geothermal resource has always been highly valued and treasured by the Affiliate Te Arawa Iwi/Hapu, who consider it a taonga over which they have exercised rangatiratanga and kaitiakitanga. …
>
> Despite the loss of lands containing geothermal surface features the geothermal resource was, and still is, central to the lifestyle and identity of Affiliate Te Arawa Iwi/Hapu. For example, hot pools and ngawha were, and are, used for cooking, bathing, heating and medicinal purposes.[5]

The Deed provides for a non-exclusive Geothermal Statutory Acknowledgement comprising:

> a) A description of the Geothermal Resource
>
> b) A reference to the text of the statement by the Affiliate Te Arawa Iwi/Hapu of their cultural, spiritual, historical, and traditional association with and the use of the Geothermal Resource, the text of which is set out in Part 2 Schedule 3;
>
> c) An acknowledgement by the Crown of the Statement of Association;
>
> d) The other matters required by this Deed; and
>
> e) Any appropriate provisions to enable the Settlement Legislation to refer to the Statement of Association.

All of Te Arawa have a similar interest in what has been called in the Deed the 'Rotorua Region Geothermal System', whether they have settled their claims or not. That is because they have a shared history, shared whakapapa, shared customary use and reliance on the geothermal resource, and a shared interest through their combined status as the Te Arawa Confederation of Tribes. Their interests held in the Rotorua Region Geothermal System are similar to those of other tribes of the Rotorua region who appeared before this Tribunal. In terms of the Kawerau area we note that the

[3] C Linkhorn, Crown Deed of Settlement with Affiliate Te Arawa Iwi/Hapu, 29 August 2006, 6.1.9, part 1, p 137
[4] Linkhorn, Crown Deed, 6.1.9, part 2, p 164
[5] Linkhorn, Crown Deed, 6.1.9, part 1, p 41

interests of Ngati Tuwharetoa ki Kawerau in the geothermal taonga of that place are recognised by sections 45 and 46 of the Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005. These sections also provide a definition of what is meant by the term the Kawerau geothermal system:

> Interpretation
>
> In this subpart—
>
> geothermal energy and geothermal water— (a) have the same meanings as in section 2(1) of the Resource Management Act 1991; but (b) for the purposes of paragraph (a), do not include any geothermal energy or geothermal water above the ground on land that is not owned by the Crown
>
> geothermal statutory acknowledgement means an acknowledgement made by the Crown under section 46 in respect of the geothermal energy and geothermal water located in the Kawerau Geothermal system on the terms set out in Schedule 5.16 of the deed of settlement
>
> Kawerau Geothermal system means the geothermal system within the boundary generally indicated on SO 61730 South Auckland Land District.
>
> 46 Geothermal statutory acknowledgement by the Crown
>
> The Crown acknowledges the statements made by Ngati Tuwharetoa (Bay of Plenty) of their particular cultural, spiritual, historical, and traditional association with, and use of, the geothermal energy and geothermal water located in the Kawerau Geothermal system as set out in Schedule 5.16 of the deed of settlement.

We note that neither of the examples from the Affiliate Te Arawa Deed of Settlement, nor the Ngati Tuwharetoa (Bay of Plenty) Settlement Deed precludes at this stage, our jurisdiction concerning claims in the Rotorua district or claims from other tribes concerning the Kawerau area.

The Nature of the subterranean resource – the Taupo Volcanic Zone

The Taupo Volcanic Zone (TVZ) is an active volcanic zone created by the collision of two earth crustal blocks and the subduction of the Pacific Plate in relation to the Indian/Australian Plate. The zone extends from White Island offshore in the Bay of Plenty, through the Rotorua and Taupo lakes to Tongariro and Ruapehu.[6] Lake Rotorua was formed by a volcanic eruption some 100,000 years ago; Lake Taupo was formed by an eruption 22,000 years ago and modified by a much more recent eruption

[6] G J Cox and B W Hayward, *The Restless Country: Volcanoes and Earthquakes of New Zealand* (Auckland: Harper Collins, 1999), pp 40-41; Cole 1990, pp 445-447

around 180 AD, which breached the lake outlet and scattered volcanic ash over the Volcanic Plateau and places as far afield as Hawkes Bay.[7]

Within the TVZ are some 17 major geothermal fields where surface water penetrates deep into the earth, is heated by encounter with magma which has intruded into the fractured crust of the TVZ, and emerges as boiling water or steam.[8] The pressures within TVZ have increased the temperature of rocks below the surface, and fractures within the rocks allow surface water to penetrate deep into the earth. Each of these 17 geothermal fields has its own unique combination of surface features including hot springs, mud pools, geysers, fumaroles and sinter deposits.[9]

Cox and Hayward summarise present-day scientific understanding of the Taupo Volcanic Zone in these words:

> The Taupo Volcanic Zone is home to 17 major geothermal fields, including all those in New Zealand that discharge boiling water. These occur here because in this area the crust reaches a temperature of at least 350° C at a depth of less than 5 km. Ground water infiltrating from above is heated (but due to the pressure at this depth does not boil), then driven upwards by convection, often along faults in the crust. At shallow depths the water boils, and a mixture of steam and water is formed, which finds its way to the surface by whatever routes are available to it. Hot springs are more likely to occur in valleys, steam fumaroles on hillsides. However, virtually every geothermal system has unique characteristics that have a major influence on its surface appearance.[10]

There are three scales of geothermal activity which help us to understand the features within the TVZ: at macroscale, geothermal activity is often related to earth crustal processes and correlates with earthquake activity; at regional scale, it is part of a set of 17 nested geothermal fields situated within the TVZ; at local level, there are the particular fields with a range and diversity of surface features – the visible signs of the subterranean geothermal resource, the TVZ.

Scientists from the Institute of Geological and Nuclear Sciences have considered the make up and dynamic of the TVZ.[11] Scientists agree that geothermal activity

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[7] G Hancox, Evidence on the Taupo/Waikato Hydro System, Document H31, paras 4.4-4.8, p 7; fig 3, p 33

[8] Cox and Hayward, 1999, pp 40-41; Cave, Lumb and Clelland, 1993

[9] Houghton, Lloyd, Keam and Johnston, 1989; Cave, Lumb and Clelland, 1993, pp 13-28

[10] Cox and Hayward, 1999, p 40. These authors, along with Fry, use the spelling fumerole. We have followed other authors, and the *Concise Oxford Dictionary*, spelling it as fumarole.

[11] We have drawn on a range of sources for this summary overview: basic texts such as A N Strahler and A H Strahler, *Modern Physical Geography* (New York: J Wiley & Sons, 1987); J Soons M Selby (eds), *Landforms of New Zealand* (Auckland: Longman Paul, 1982), especially chapter 12 by J Healy, CG Vucetich, WA Pullar, *Stratigraphy and Chronology of Late Quaternary Volcanic Ash in Taupo, Rotorua, and Gisborne Districts,* (New Zealand, DSIR, New Zealand Geological Survey, Bulletin 73, 1964), MA Mongillo and L Clelland, *Concise Listing of Information on the Thermal Areas and Thermal Springs of New Zealand* (Wairakei and Wellington: DSIR Geothermal Report No.9, October 1984), PM Riddolls, *New Zealand Geology* (Wellington: DSIR, 1987), MP Cave, JT Lund and L Clelland, *Geothermal Resources of New Zealand* (Wellington, Resource Information Report 8, Ministry of Commerce, 1993); Cox and Hayward, *Restless Country: Volcanoes and Earthquakes of New Zealand* (Auckland: Harper Collins, 1999); Hancox, H31; C Bromley, Evidence on the Waikato/Taupo Hydro System, Document H34; Environment Bay of Plenty at www.ebop.govt.nz/ and Environment Waikato at www.ew.govt.nz/enviroinfo/geothermal (accessed 24 July 2007)

originates deep within the earth's crust. Concentrated geothermal heat may be associated with molten igneous material and may, from time to time and in spectacular fashion, reach the surface in the form of molten lava or volcanic ash.[12] Geothermal heating and volcanic activity are both associated with the pressures generated by the movement of the large tectonic plates which form the surface of the earth. Cox and Hayward, for example, describe New Zealand as a restless country and attribute earthquakes, and the volcanic activity which is so marked in the Taupo Volcanic Zone, to the collision between the Pacific Plate and the Indo-Australian Plate.[13] The outcome of this collision, in the area below the North Island, is the subduction of the Pacific Plate and the generation of intense heat below the Taupo Volcanic Zone (figure 20.1). Hancox also showed this visually and vividly in a cross section showing the subduction zone under the CNI and its relationship to the TVZ.[14] 'The Taupo Volcanic Zone', writes Hancox, 'is a zone of active volcanism, extensional faulting earthquakes, high geothermal heat flow, and tectonic deformation'.[15]

Figure 20.1: Plate tectonics and volcanism (Source: Stokes in Doc 56, figure 2, page 5)

Much of this knowledge is, however, recent. In particular, the theory of plate tectonics was not developed until the late 1960s (although based, it is true, on earlier ideas). Using these insights, Western scientists have been able to provide an explanation for the link between different geothermal fields within a volcanic zone.

The Nature of the Maori claims before the Tribunal

The primary claims of CNI Maori in respect of the geothermal resources are: (1) that Maori possessed these resources in a manner akin to ownership; (2) that the Crown guaranteed to protect their taonga and their right to exercise rangatiratanga over these taonga and to manage them in accordance with their own cultural preferences; and (3) that as an incident of their ownership they are entitled to develop or to receive benefits from its use.[16] We discuss below the (much earlier) Maori understanding of the TVZ in more detail. For now we note that the geothermal resource which Maori claim as taonga comprises three aspects:

- The geothermal surface features form part of the bundle of rights that run with land. Maori have different terms for the varying aspects of the resource as it is brought to the surface. These are waiariki (in Rotorua the term means '"chiefly waters'" to honour Ngatoroirangi)[17], a warm bath or hot water pool; ngawha, a hot

[12] Strahler and Strahler, *Modern Physical Geography*, chapter 14, especially pp 249-250
[13] Cox and Hayward, *Restless Country*
[14] Hancox, H31, captions to fig 2, p 32
[15] Hancox, H31, captions to fig 2, 3 on pp 32, 33
[16] M Taylor, Generic Closing Submissions on Political Engagement, Tourism, and Geothermal, 3.3.67, pp 166-168
[17] Wiremu Maihi Te Rangikeheke as quoted in P Maxwell, 'He Taonga i Tuku Iho: The Maori use of the Geothermal Resource', Document A17, pp 2-3

boiling water or mud pool; and puia, a geyser or cone- shaped stemming feature.[18] They also used other by-products from the resources as we explain below. In relation to these features underground heat, generated by nuclear or tectonic processes, is transferred to the surface of the earth wherever rock formations allow groundwater to penetrate deeply enough to come in contact with heated rock. Such transfers are, by comparison with volcanic activity, steady, much less spectacular and much more sustained. A range of surface features including hot pools, mud pools, geysers, fumaroles and sinter deposits are created where heated water or steam reaches the surface. Variations in activity level are related to the supply of groundwater, rather than changes in the underlying rock temperature. As heated water seeps through rocks, a range of minerals are dissolved and brought to the surface producing a distinctive water chemistry and habitats that support a unique combination of plants, animals and micro-organisms.[19] The main surface features that we received some evidence on were: geothermal seeps at Maketu, Matata; hot springs at Moutohora/Whale Island, Awakeri, Waitangi Soda Springs, Kaingaroa (Te Puna Takatahi a Ngatoroirangi and others), Onepu springs on the Tarawera River, Manaohau, Pukehinau, Tarawera Springs (Napier-Taupo road), and Mangakino.

- The geothermal water or fluids and geothermal heat and energy located in the geothermal fields. Scientists make a distinction between surface geothermal features, such as hot pools or geysers, and the larger geothermal fields of which they are part. The geothermal fields include two main components that are relevant to the claims. These are the underground material containing heat or energy and the groundwater circulating through the heat source; and the surface features where heat and energy are released. The geothermal fields of the TVZ that claimants or their evidence refer to are: Kawerau/Putauaki/Tarawera; Rotoma/Tikorangi/Puhipuhi; Rotorua including Tikitere/Taheke and Rotokawa/Mokoia Island; Atiamuri; Horohoro; Waikite-Waiotapu-Waimangu; Reporoa; Te Kopia; Ōrākei Kōrako; Ngatamariki; Mokai; Ohaaki/Broadlands; Rotokawa; Wairakei-Tauhara; Horomatangi; Tokaanu-Waihi-Hipaua; and Tongariro-Ketetahi.

- The subterranean resource which is the Taupo Volcanic Zone.

We were told that for CNI Maori geothermal activity was central to their ways of life. As we discuss below, these claims are based on a number of factors. The late Dame Evelyn Stokes brought together traditional Maori settlement patterns and scientific evidence in a number of publications.[20] Two of her maps, presented in her monograph

[18] Maxwell, A17, p 66 and Glossary of Maori Terms
[19] See geothermal information on Environment Waikato website, www.ew.govt.nz/enviroinfo/geothermal/
For information specifically regarding geothermal organisms, see
www.ew.govt.nz/enviroinfo/geothermal/geobiodiversity.htm (accessed 19 July 2007)
[20] Stokes, *Legacy of Ngatoroirangi*, A56; Malcolm McKinnon (editor), with Barry Bradley and Russell Kirkpatrick, *Bateman New Zealand Historical Atlas: Ko Papatuanuku e Takoto Nei* (Auckland: David Bateman in association with Historical Branch, Dept. of Internal Affairs, 1997), Plate 92 'Bay of Plenty: Pumice, Pines and Power, 1920s to 1980s'; see also E Stokes, 'Maori Values in Geothermal Areas', Paper presented to Nature

published in 2000, are especially helpful in this context. The first of these, prepared by DSIR scientists Mongillo and Clelland, shows the TVZ and the geothermal systems, hot springs and volcanoes (see map 20.1). Alongside that Stokes places another map, drafted for the *New Zealand Historical Atlas,* which shows marae in relation to geothermal fields and hot springs (map 20.2). The close physical relationship between Maori settlement patterns and geothermal features is clearly evident. At the time of colonisation, CNI understanding of the geothermal resource through day to day observation and use, on top of knowledge inherited over generations, was likely to have been considerably in advance of that of most newly-arrived settlers and politicians.

[Map 20.1: Taupo Volcanic Zone. Source: Mongillo and Clelland, 1984 reproduced in Stokes, 2000 figure 3 page 8]

[Map 20.2: Marae in relation to principal geothermal fields. Source: Stokes, 2000 figure 4, page 9, reproduced in *New Zealand Historical Atlas*, plate 92]

We were told that Maori depended on the heat, energy and the water of their geothermal resource to sustain their way of life in a climate that was quite different from that of their Pacific homelands. This is what they claim as their taonga and while other components of a geothermal system may influence the nature of the geothermal fluid or water, the temperature of a field or the number of surface manifestations, it is the water, the heat and the energy that mattered most to Maori. That is what was their taonga. And where it emerged they lived or gathered - and when it moved, they moved. This is the point that Maori of the CNI understood through their stories of Ngatoroirangi. Furthermore, their taonga is what they say it is.

Issues regarding geothermal activity

In chapter 17, we explained that the Tribunal has previously found that geothermal resources owned by Maori can be taonga and that the Crown has a duty to actively protect Maori interests in those taonga.[21] Here we ascertain whether that is true in the context of the claims argued before us and what the consequential nature and extent is of the Maori interest in the geothermal fields and underlying common heat and energy system (the TVZ).

Mr Taylor for the claimants noted that in the Final Statement of Issues for the CNI Inquiry, we indicated that generic issues already considered would not be revisited. The Tribunal lists the issues dealt with in the *Preliminary Report on the Te Arawa*

Conservation Council Seminar, 1981, Document A12; E Stokes, 'Public Policy and Geothermal Energy Development: the Competitive Process on Maori Lands', 1987, Document A13; E Stokes, 'Maori Issues at Orakei Korako', 1988, Document A16; E Stokes, 'Wairakei Geothermal Area: Some Historical Perspectives', 1991, Document A20; and E Stokes, 'Rotokawa Geothermal Area: Some Historical Perspectives', 1994, Document A48

[21] Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 134-135; Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p 33

Representative Geothermal Resource Claims in that category. But Mr Taylor is correct that the Te Arawa Geothermal Tribunal did not make findings on all issues of concern in the CNI Inquiry.[22] Mr Taylor submitted, and we agree, that the issue of ownership of the TVZ, is a generic issue that is still to be considered.[23]

A further issue yet to be determined is whether breaches of the Treaty by the Crown in respect of the alienation of land within which there is geothermal activity, means there remains a continuing Maori interest in the fields and the subterranean resource (TVZ)[24] Mr Taylor invited us to consider the claims to continuing ownership of the fields and the TVZ on the basis that this is a touchstone issue; for many CNI Maori the TVZ is a fundamental resource, at the heart of their history and identity.[25] He argued that the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims Report* provided no adequate analysis of the issue of ownership under the Treaty.[26] Furthermore, the Kaingaroa and Taupo claimants, and many claimants from Rotorua were not parties to the previous Te Arawa Geothermal Inquiry.[27] In addition, Mr Taylor contended that there have been significant developments in Treaty jurisprudence since the Tribunal's previous Geothermal Reports, in relation to taonga which, he submitted, are virtually indistinguishable from the geothermal taonga. The *Whanganui River Report* is one such development of key importance.[28] Mr Taylor argued that many of the additional issues of control such as those under the Resource Management Act 1991 need to be revisited to assess the adequacy of the Crown's response to the previous Geothermal Reports.[29] He submitted, therefore, that the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* should not limit the scope of this inquiry. [30]

Conversely, the Crown rejects any Maori claim to ownership of the fields and the TVZ, arguing that no customary rights can exist to the geothermal fields and the TVZ given that all land in the CNI has either been alienated, or a Crown grant or Native Land Court title has been issued for it. The Crown says that there has been limited fresh evidence on geothermal matters since the Ngawha and Te Arawa Geothermal Inquiries in 1993 so there is no basis for this Tribunal 'greatly to expand or supplement' the findings of those earlier Tribunals.[31]

We do not agree. A substantial body of evidence now exists covering the entire CNI from Maketu-Matata to Tongariro which was not available to previous Tribunals. Regarding the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims,* we agree with Mr Taylor that neither the Taupo nor the Kaingaroa

[22] Taylor, generic closings, 3.3.67, p 166
[23] Taylor, generic closings, 3.3.67, pp 166-168
[24] Taylor, generic closings, 3.3.67, p 166
[25] Taylor, generic closings, 3.3.67, p 163
[26] Taylor, generic closings, 3.3.67, p 164
[27] Taylor, generic closings, 3.3.67, p 163
[28] Taylor, generic closings, 3.3.67, p 163
[29] Taylor, generic closings, 3.3.67, p 164
[30] Taylor, generic closings, 3.3.67, pp 163-164
[31] Closing Submissions of the Crown, 3.3.111, part 2, p 497

claimants (nor indeed many of the Rotorua claimants) had an opportunity to participate so have not previously had their geothermal issues heard. We agree also that Ngati Whakaue and other hapu of Te Arawa affected by the findings in the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* did not have the full nature and extent of their interest in the Rotorua district geothermal fields and the TVZ dealt with in that report and that that issue should be the subject of generic findings by this Tribunal. Accordingly, these claims will be considered here.

Before we identify the questions for determination, we must note that our findings, which are generic to the claimants before us, may in the Rotorua region also relate to areas of overlapping interests held by the Affiliate Hapu and Iwi of Te Arawa who have settled their claims with the Crown by way of a Deed of Settlement (the Deed) dated 30 September 2006. In terms of numbers between those who have settled and those who have not, these groups are evenly split and there is often no clear demarcation between their geographical boundaries.[32] As a result, those who are part of the Affiliated Hapu and Iwi of Te Arawa and their spheres of tribal influence, are interspersed with, are connected to, and in some cases form part of, the spheres of influence of the Te Arawa claimants before us. We heard or received evidence concerning nearly all the geothermal fields and major geothermal springs of the Rotorua district. Some of the evidence covers the spheres of influence of a number of the Affiliate Iwi/Hapu. None of our findings are designed to ignore or exclude their interests. They are generic, based on the evidence before us. Some of that evidence was filed by individuals but most of it was from representatives of iwi and hapu who have not settled their claims. Because we must inquire into all claims under section 6 of the Treaty of Waitangi Act 1975, whether on behalf of iwi, hapu, whanau, or individuals, we have reported on all generic aspects of claims including those of individuals from hapu or iwi who may be members of the Affiliate Hapu and Iwi of Te Arawa who have settled their claims.

Key issues

Taking the above matters into account and after considering the Statement of Issues and the evidence and submissions of the parties before us, we consider that we can reduce the questions for us to determine in this part of the report to three main issues. Those issues are:

- Are geothermal resources, the geothermal fields and the subterranean resource (TVZ) taonga of CNI Maori over which they exercised tino rangatiratanga, and did they possess those resources in a manner akin to ownership as at 1840?

[32] Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004); Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 112

- When the Crown asserted control over geothermal surface features, the geothermal fields and the subterranean resource (TVZ), to what extent, if at all, did it recognise and provide for Central North Island Maori customary rights and Treaty interests?

- Have CNI Maori been prejudiced by the Crown's failure to acknowledge, and provide for their customary rights and Treaty interests in the geothermal resources, the geothermal fields and the subterranean resource (TVZ)?

ISSUE 1: ARE GEOTHERMAL RESOURCES, FIELDS AND THE SUBTERRANEAN RESOURCE (TVZ) TAONGA OF CNI MAORI OVER WHICH THEY EXERCISED TINO RANGATIRATANGA, AND DID THEY POSSESS THOSE RESOURCES IN A MANNER AKIN TO OWNERSHIP AS AT 1840?

The sharing of Maori knowledge was an important feature of Maori and European interaction during the early colonial years of New Zealand's shared history. The early history of the cultural interaction over geothermal resources, the geothermal fields and the TVZ demonstrates that many Maori and Europeans began their relationships with each other on a positive basis as Maori guided European travellers through the wonderland of the interior volcanic plateau. So we consider what was known of the geothermal surface features, the geothermal fields and the subterranean resource (TVZ) from both the Maori and European worldviews of the early colonial period. In doing so we consider whether the geothermal surface features, the geothermal fields and the TVZ of the CNI were possessed by Maori as at 1840 and whether they considered them taonga over which they exercised rangatiratanga as guaranteed by the Treaty of Waitangi. Finally, we consider the impact of the Crown's eventual regulation and control of geothermal surface features, the geothermal fields and the subterranean geothermal resource (TVZ).

The claimants' case

Mr Taylor presented the generic submissions on geothermal resources to the Tribunal. He began by describing the primary claims of CNI Maori in respect to geothermal taonga as follows:

- Ownership of the underlying geothermal resources of the CNI as a whole, as a taonga, in the same manner that the Te Atihaunui a Paparangi iwi were found to own the Whanganui River in the Tribunal's *Whanganui River Report*;

- Claims for the return of particular geothermal surface features which have been wrongly alienated from CNI Maori.[33]

The following rights are also claimed:

- Preferential development rights of geothermal resources, including protection of their own surface manifestations of the resource;

- Control or greater control of geothermal resources, including protection of their own land surface manifestations of the resource;

- Rights to determine and receive the revenue generated by the use of geothermal resources by third parties, and to be free from any charging regimes themselves.[34]

Mr Taylor submitted that if ownership is found, then the above rights are incidents of ownership due to Maori but currently denied by the Crown.[35] If outright ownership is rejected, the above rights are still claimed but will depend on:

- The fact that Maori still retain an interest in the geothermal resource through retention of portions of thermally active land and surface features; and

- The fact that much of the land in the CNI containing geothermal resources has been wrongfully alienated from Maori.[36]

Primary arguments based on possession akin to ownership

Mr Taylor for the claimants submitted that the geothermal resources, over which the CNI sits, are taonga protected by the Treaty of Waitangi. They are an important cultural link to their past, as well as being of central importance to their community and their way of life.[37] The claimants' evidence demonstrates a broad range of customary use of the resource including for washing, for birthing and bathing of new born infants, for burial and preparation for burial, for therapeutic properties, healing and medicine, for heating, for preparation of kumara for planting after the winter, for food preparation, cooking, and scalding for food preservation and for utu or ritual killings.[38] Mr Taylor noted this intensity of customary use.[39] He submitted that though

[33] Taylor, generic closings, 3.3.67, p 161
[34] Taylor, generic closings, 3.3.67, pp 161-162
[35] Taylor, generic closings, 3.3.67, p 162
[36] Taylor, generic closings, 3.3.67, p 162
[37] Taylor, generic closings, 3.3.67 paras 601-603, p178; M Raana, Evidence for Ngati Whakaue, 22 April 2005, Document F62; and M Douglas, Evidence for Ngati Whakaue, 22 April 2005, Document F63
[38] R Perenara, Further Evidence for Ngati Rangitihi, 28 February 2005, Document C42; M Ormsby, Evidence for Ngati Hikairo, 25 April 2005, Document E49, pp 10-11; G Ransfield, Evidence for Ngati Whakaue, 22 April 2005, Document F25; R Haira, Evidence for Ngati Wahiao, 22 April 2005, Document F27; J Donovan, Evidence for Ngati Whakaue, 22 April 2005, Document F31; D Whata-Wickliffe, Evidence for Ngati Tamakari, 22 April 2005, Document F37, pp 38-42; T Kereopa, Evidence for Ngati Whakaue and Ohinemutu Village, 22 Apr 05, Document

the specific use of the resource may have varied from place to place, extensive use was made of the resource wherever it was found, to the extent that it 'formed a central part of Maori life.'[40] He noted that the late Dame Evelyn Stokes, in identifying factors for permanent Maori settlement, included as an important factor ***access to geothermal heat***.[41]

In addition to physical uses, there was also the spiritual and cultural significance of the geothermal taonga and the people's identification with them.[42] Mr Taylor stressed the spiritual and cultural association with the entire TVZ through the story of Ngatoroirangi. Ngatoroirangi is one of the key ancestors to most iwi of the CNI, being the tohunga of Te Arawa Waka and an early explorer of the region. The accounts of his exploits locate the coming of the subterranean geothermal resource within the whakapapa of the iwi and hapu of the CNI. This is an essential feature of the stories concerning him and it is fundamental to claiming rights in geothermal resources.[43] Mr Taylor submitted that just as land is secured by ancestral rights due to the discovery or exploits of tupuna (ancestors), so is the right to geothermal activity.[44] Thus it was through Ngatoroirangi that the people of the region acquired the geothermal system of the Taupo Volcanic Zone.[45] It is through Ngatoroirangi's exploits, and through the long use and occupation of sites by Maori in and around geothermal sites in pursuit of geothermal heat, that ownership and the right to use and manage the whole of the TVZ within the CNI is claimed. The nature of the interest this has given rise to can be seen as a 'claim to the resource to the exclusion of outsiders.'[46]

Mr Taylor argued that the story of Ngatoroirangi demonstrates that Maori knew the subterranean nature of the fields and the TVZ, particularly the aspect of the story where Ngatoroirangi called upon his sisters to bring him warmth. Either they (in some stories) or Ngatoroirangi's taniwha (in other stories) came from Hawaiiki, stopping at White Island (Whakaari) before moving on to Tongariro 'via a subterranean passage' leaving a trail of waiariki and geothermal features as they stopped at Kawerau, Rotorua, Waiotapu, Ōrākei Kōrako, Te Ohaaki and Taupo. This, argued Mr Taylor, shows a Maori understanding of what scientists describe as the TVZ.[47] Mr Taylor then submitted that it is a fundamental feature of the story of Ngatoroirangi that before he arrived, the whenua (land) was in place without the geothermal waters. Geothermal

F51, pp 3-4; M Raana, Evidence, F62; M Douglas, F 63; A McRae, Evidence for Ngati Whakaue, 22 April 2005, Document F71; and B Bonnington, Evidence for Ngati Whakaue, 22 April 2005, Document F72

[39] Taylor, generic closings, 3.3.67, p 178
[40] Taylor, generic closings, 3.3.67, p 178
[41] E Stokes, A56, p 49, referred to in Taylor, generic closings, 3.3.67, p 178
[42] Taylor, generic closings, 3.3.67, p 178
[43] Taylor, generic closings, 3.3.67, p 180
[44] Taylor, generic closings, 3.3.67, pp 180-181
[45] Taylor, generic closings, 3.3.67, p 181
[46] Taylor, generic closings, 3.3.67, p 181
[47] Taylor, generic closings, 3.3.67, p 183

activity was therefore separate in creation to the whenua itself.[48] This is consistent with the Maori creation story and we discuss our views on this further below.

Mr Taylor contended that what CNI Maori possessed in Treaty terms were geothermal taonga, and that means the whole of the geothermal resource. Although there may have been specific rights in relation to the use and control of particular fields or features, 'the common Maori conception, the common [Maori] reliance, and the common descent mean that those Maori with a geothermal interests [sic] were possessed of the whole of the geothermal resource in the region, being the Taupo Volcanic Zone.'[49]

Mr Taylor then considered whether a geothermal resource passed with the sale of land. This turned on whether geothermal taonga were considered separate from the land or not. Mr Taylor contended that the underlying geothermal resource (TVZ) was a taonga, separate and unique in itself. This was not inconsistent with Maori thought. All of nature's resources were interlinked in Maori mythology, but all were also separate resources. The fisheries, the birds of a particular forest, a particular maunga, were all separate taonga. He opined that it is in 'the nature of resources, of value, and of human beings, that all things have a separateness at this level.' Relying on the *Whanganui River Report,* Mr Taylor contended that separateness plays no real part in the assessment of taonga. The only questions that should be asked are what was the taonga and was it alienated?[50] He submitted that in the *Whanganui River Report*:

> … The Tribunal found that there was no contemplation that the river was sold with the riparian land. It was not in Maori's contemplation, nor within their system of belief. That river is regarded as having its own mauri, its own value, its own origin. Though it flows through the land, and is obviously accessible from any land beside it which is sold, this access did not mean according to the Report that the rights to the river had passed with the land. The river was not wholly dependant or enclosed within the land.[51]

Using that line of argument, Mr Taylor contends that land sales merely granted access to geothermal surface features and 'such use rights as clearly go with it.'[52] Granting of access did not diminish rangatiratanga over the resource, as often the grant of access to a taonga will imply terms of permission or access under the control of kaitiaki of the resource.[53] Granting of access did not equal the abandonment of control.[54] What this means is that while the land with surface manifestations may have been sold, that did not alienate Maori rights to control, develop and exploit the underlying geothermal fields.[55] As the Whanganui Tribunal found, the grant of access by land sales did not diminish the property, control or rangatiratanga of the tribe.[56] Therefore,

[48] Taylor, generic closings, 3.3.67, p 183
[49] Taylor, generic closings, 3.3.67, p 183
[50] Taylor, generic closings, 3.3.67, p 184
[51] Taylor, generic closings, 3.3.67, p 185
[52] Taylor, generic closings, 3.3.67, pp 185-189
[53] Taylor, generic closings, 3.3.67, p 185
[54] Taylor, generic closings, 3.3.67, p 185
[55] Taylor, generic closings, 3.3.67, p 185
[56] Taylor, generic closings, 3.3.67, p 186

it is a question of fact what rights were granted to third parties. The separateness or otherwise of the taonga in practical terms is an aspect of this assessment of fact, along with the intention of the parties and such other things.[57]

Mr Taylor contended that the Maori customary right to the fields and the subterranean geothermal resource (TVZ) may be recognised by the common law as it has never been expressly extinguished.[58] Under the common law, 'plain and clear language' is required to extinguish aboriginal title, and the language in the various statutes passed to vest control of access and management in the Crown since 1840 have not met this test for extinguishment.[59]

Alternative arguments – based on a majority Treaty interest

Mr Taylor noted the Te Arawa Geothermal Tribunal recognised that there was likely to be an additional Treaty interest in the geothermal fields and the subterranean resource (TVZ) wrongfully alienated from Maori as a result of breaches of the Treaty. That Tribunal deferred assessment of this until such time as more general claims to loss of land were assessed.[60] Taylor stated that there have been serious and systematic breaches of the Treaty in the CNI region which have led to the large scale loss of land containing geothermal features or fields.[61] He submitted that as a result of the remedial interest identified by the Te Arawa Geothermal Tribunal, we would be justified in finding that Maori have an interest in the geothermal fields and the subterranean resource (TVZ) which ought to be characterised as being the majority interest.[62] He submitted the following factors to justify this approach:

- Most Maori who held geothermal land have sought to retain a foothold in that land. This not only symbolises but is in fact the reality of the importance of geothermal activity to CNI Maori;

- There is evidence that the Crown particularly targeted some lands with geothermal surface features for purchase or compulsory acquisition and those resources should be handed back to the traditional owners.[63]

He stressed that the claimants in support of the generic submissions were not seeking a legal finding of legal ownership, rather their claims were to the geothermal resource entire in accordance with the requirements of the Treaty of Waitangi.[64] The Tribunal should follow the approach in the *Petroleum Report* and find that Maori continued to

[57] Taylor, generic closings, 3.3.67, p 186
[58] Taylor, generic closings, 3.3.67, para 662-664, p 193
[59] Taylor, generic closings, 3.3.67, para 662, p 193
[60] Taylor, generic closings, 3.3.67, p 189
[61] Taylor, generic closings, 3.3.67, p 189
[62] Taylor, generic closings, 3.3.67, p 190
[63] Taylor, generic closings, 3.3.67, p 190
[64] M Taylor, Generic Submissions for Political Engagement, Tourism, and Geothermal, Claimant Specific in Reply to Crown Closing Submissions, 3.3.141, pp 52-53

have a 'Treaty interest'.[65] An example of where this finding could be made relates to the Wairakei/Tauhara geothermal field in Taupo and the Tauhara Middle No 1 purchase.[66] Mr Taylor also submitted that where there is evidence of 'a particularly targeted approach by the Crown to alienating particular surface features or geothermal fields', then those resources should be handed back to Maori.[67]

The Crown's case

Primary arguments based on possession akin to ownership

The Crown accepts that the geothermal resources were 'traditionally' of importance to Maori for a range of purposes, including cooking, bathing and medicinal, and that these resources are still of importance to the present day.[68]

The Crown contends that the Ngatoroirangi legend, reflecting the inter-linking of the subterranean resource as a whole, is not a sufficient ground for a valid Treaty claim to Maori ownership of the TVZ.[69] The Crown states that many of the subsurface resources across the region are only linked at a very deep level and are not connected through a hydraulic link.[70] (Presumably this is an explicit rejection of the concept of a subterranean passage through which the sisters or taniwha of Ngatoroirangi travelled to bring geothermal fire to Aotearoa.) Second, the Crown implies that any claim to customary ownership based on the story should also be rejected as the Ngatoroirangi story is a blend of myth and legend. A claim to customary ownership requires proof. Due to the manner in which the claims have been conceptualised to this Tribunal, it is too difficult to separate customary law from the matrix of history, legend and memory.[71] The contents of customary law can be elusive in this context and, to some extent, are 'vulnerable to subjective and varying interpretations'.[72] The implication is that it is too difficult to identify the nature and extent of customary rights to geothermal surface features, the geothermal fields and the TVZ such as those based on the many variations of the Ngatoroirangi story.

The Crown submits that any Maori rights are tied to the ownership of the surface land. This is consistent with the concept of the resource being a 'holistic whole.'[73] The Crown also rejects any notion that Maori can claim any common law aboriginal title or rights to the TVZ. That is because by the creation of a Crown grant or Crown derived title such as those gained through the Native Land Court, all common law aboriginal title over that land was extinguished. Where the subterranean geothermal

[65] Taylor, generic submissions, 3.3.141, pp 53-55
[66] Taylor, generic submissions, 3.3.141, p 55
[67] Taylor, generic closings, 3.3.67, para 654, p 190
[68] Crown closings, 3.3.111, part 2, p 497
[69] Crown closings, 3.3.111, part 2, p 498
[70] Crown closings, 3.3.111, part 2, p 498
[71] Crown closings, 3.3.111, part 2, p 498
[72] Crown closings, 3.3.111, part 2, p 498
[73] Crown closings, 3.3.111, part 2, p 501

resource is currently manifest on private property, the indefeasibility mechanisms of the Land Transfer Act would have operated to extinguish any common law aboriginal title to such land. In such cases, the terms of the original Crown purchase deeds (or private purchase deed) would thus be irrelevant.[74] It is the issue of the Crown grant or new form of title derived from the Crown that is sufficient to extinguish aboriginal title. Furthermore, to the extent that the Crown became the legal owner of certain lake and river-beds, it also gained control of the subterranean geothermal resource and access to it.

But, the Crown argues, the issue of legal ownership cannot and should not be decided in this jurisdiction.[75] Such issues are complex and may be dependent upon evidence relating to specific sites.[76] The Tribunal, the Crown submitted, is not a court and well understands that it cannot make binding legal determinations.[77] The practice and procedure of the Tribunal reflects its statutory function and the type of evidence which comes before it.[78] It is not designed primarily to hear the detailed legal arguments that would be involved in common law aboriginal title or rights claims. Issues relating to such title are best left to the courts.[79]

The Crown contends that most of the transactions (e.g. Rotorua, Wairakei, Tokaanu) occurred relatively late in the nineteenth century. By that time CNI Maori would have a clear understanding that the alienation of land containing geothermal surface features, and the geothermal fields would result in a complete transfer of all or any rights of ownership in the resource found in that land, as well as to the land itself.[80]

In terms of the Treaty claim to ownership, the Crown referred to the generic submissions for the claimants on geothermal resources, noting that the claimants made extensive reference to the *Whanganui River Report* in support of their claim to the whole resource.[81] The Crown contends that the nature of the subterranean geothermal resource, albeit water, is fundamentally different from a river resource and the findings of the *Whanganui River Report* accordingly do not apply.[82] The Crown states that the subterranean geothermal resource is manifest across a wide land mass, much of which is today in private ownership under the provisions of the Land Transfer Act. Many of the features of the subterranean geothermal resource are located in the subsurface, without ready access, and are not contained in a single channel (as the Whanganui River is).[83] The Crown opines that the Whanganui River is, and was, often the boundary between different pieces of land. In contrast to the Whanganui River, there has been no real evidence of attempts by CNI Maori to claim

[74] Crown closings, 3.3.111, part 2, p 501
[75] Crown closings, 3.3.111, part 2, p 498
[76] Crown closings, 3.3.111, part 2, p 502
[77] Crown closings, 3.3.111, part 2, p 502
[78] Crown closings, 3.3.111, part 2, p 502
[79] Crown closings, 3.3.111, part 2, p 502
[80] Crown closings, 3.3.111, part 2, p 504
[81] Crown closings, 3.3.111, part 2, p 502
[82] Crown closings, 3.3.111, part 2, p 502
[83] Crown closings, 3.3.111, part 2, p 502

or retain interests in geothermal resources in land alienated by them.[84] The Crown asserts that Maori have consistently held on to some key geothermal lands in recognition that alienation of the lands in which the subterranean resource is manifest would lead to loss of rights to use and control the resource.[85] The evidence in the Whanganui River Report is otherwise, according to the Crown. There, sale of land adjacent to the River did not necessarily result in the original Maori landowners no longer using the River, or continuing to claim ownership of it.[86]

The Crown submitted to us that 'many of the geothermal resources in the CNI region are contained within privately owned land'. Because of that, section 6(4A) of the Treaty of Waitangi Act 1975 affects any recommendations we might make. In answer to the question on the extent of private land interests involved, Crown counsel noted that Map Book Part II provides some basis for answering the question. Crown counsel also noted that some geothermal lands, for example Kuirau Park, are in local authority ownership.[87]

Crown response to alternative arguments – based on a majority Treaty interest

The Crown informed us that it has rejected the findings of the Tribunal's *Petroleum Report* which contended for an ongoing Treaty interest in the petroleum resource. The Crown also does not accept the notion of Maori having preferential development rights in relation to the geothermal resource, or to Maori having veto rights over use and development of that resource by non-Maori third party users.[88]

The Crown submits that the claim made that Maori have lost through land alienation access to and use of many geothermal resources needs to be put into perspective.[89] The Crown identifies the following lands with geothermal surface features remaining in Maori ownership: Ohinemutu; Whakarewarewa Village; Mokoia Island; Rotokawa Baths; within the east Lake Rotorua Geothermal Field – there is Maori owned land; Tikitere; Waitangi Soda Springs; Mokai (Tuaropaki Trust); Ohaaki; Ōrākei Kōrako; Waipahihi; Maori land at Tokaanu and Maori land at Waihi.[90] Maori shareholders in Tarawera Forests Ltd also have interests in the Rotoma geothermal field now owned by Tarawera Forests Ltd.[91] The Crown contends that CNI Maori have continued to enjoy traditional use of those geothermal surface features for which they can control access by virtue of retaining land in which they are manifest.[92] The point here is that,

[84] Crown closings, 3.3.111, part 2, p 502
[85] Crown closings, 3.3.111, part 2, p 502
[86] Crown closings, 3.3.111, part 2, pp 502-503
[87] Crown Transcript of Crown Closings, Hearing Week 10, 7-9 November 2005, 4.1.11, p 117; and see Environment Waikato, 'Proposed Waikato Regional Plan: Proposed Variation No.2: Geothermal Module', 12 June 2004, Document H2(j)
[88] Crown closings, 3.3.111, part 2, p 503
[89] Crown closings, 3.3.111, part 2, p 497
[90] Crown closings, 3.3.111, part 2, pp 497, 509
[91] Crown closings, 3.3.111, part 2, p 509
[92] Crown closings, 3.3.111, part 2, p 509

according to the Crown, Maori have not been significantly or seriously prejudiced by previous Crown actions in terms of its historical purchasing or acquiring of any other lands.

Tribunal analysis on geothermal resources, the geothermal fields and the TVZ, as taonga and the exercise of rangatiratanga

To resolve the different positions taken by the Crown and Maori, we must return to first principles. This requires considering how Maori conceptualised geothermal activity and how they expressed their rangatiratanga over it. We need to do so because in answering the question of whether geothermal surface features, the geothermal fields and the TVZ are taonga protected by the Treaty, it is the Maori conception of these resources that must determine their status as taonga and the question must be asked in the context of the social and cultural framework of Maori.[93] We do not rely solely on modern commentaries, but also look to other evidence including early colonial accounts of the Maori relationship with geothermal features. During the inquiry we were presented with a substantial body of evidence on traditional iwi and hapu understandings and use of geothermal features, heat and energy of the CNI region. We turn to consider all of this evidence to ascertain whether the hapu and iwi of the CNI may claim the geothermal resources, the geothermal fields and the TVZ as a taonga. We also consider whether they traditionally exercised rangatiratanga over those resources and whether they possessed them in a manner akin to ownership as at 1840.

Creation

To establish their claim to geothermal activity within the TVZ as taonga, the claimants began with an explanation of creation. Chris Winitana explained to us the role of whakapapa in the worldview and tribal identity of this region, thus setting the scene for the traditions we will discuss below:

> We are a race of oral tradition. As a result our ancestors perfected the art of genealogical recital as a way of summarising vast amounts of historical information. The names in recitals to do with our spiritual creation lore are descriptive cosmogenic signposts which seek to holistically capture from spiritual to physical (as opposed to just the physical) the essence of creation at that point in time.[94]

We are able to extract, from the larger set of traditions recounted by Mr Winitana and other claimants, a set of nested stories which trace the lineage of geothermal activity. The foundation story involves the separation of the primal parents Ranginui and Papatūānuku, the grief of the parents which follows the separation, and the emotional and physical stress suffered by Ruaimoko, the baby of the family. One of the other

[93] Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 26
[94] C Winitana, Evidence for Ngati Tuwharetoa, 20 April 2005, Document E32, para 7, p 3

children, Rakahore, the father of bedrock and stone, found a solution which satisfied some but not all of the family. Mr Winitana begins by setting out the problem:

> After the separation of Ranginui and Papatūānuku by Tāne-tokorangi, Tāwhirimatea warred with his brothers. Ruaimoko the baby of the family was still suckling at the breast of Papatūānuku. She kept him close to her (he pōtiki piripoho) out of fear that he may be hurt in the battles that consumed the earth. At the same time, she and Rangi still grieved for each other because of their separation. As a result their tears flowed and threatened to flood the world. Io-the-compassionate advised Tāne to turn his mother over so that Rangi would no longer have to look upon her face, be reminded of their separation, and produce a new flood of tears. With the aid of Tangaroa and Tāwhirimatea, Papatūānuku was indeed turned over to Muriwaihou ki Rarohenga. As the brothers were undertaking their mammoth task, Ruaimoko, their younger, implored them to retrieve him from his mother's breast so that he might join them. He did not want to be left by himself for all eternity.[95]

Mr Winitana then outlined the solution and the consequences:

> After much discussion, the brothers decided the following; Ruaimoko would be left with their mother to placate her in her time of loneliness and sorrow; one of the brothers Rakahore (the father of bedrock and stone) imbued the sacred 'ahi tāmou' heat into the bedrock of Papatuānuku that the pair would at least be warm and comfortable in their new position. Ruaimoko, of course, disagreed with the arrangements and vowed to take revenge on his brothers by shaking the world and causing earthquakes to devour their offspring.[96]

Nesting inside this primary story is a second set of stories. Creation is not yet complete and as the family grows in number the interplay between family members continues, causing the creation of geothermal water, energy and heat:

> Later on, Tāne-te-waiora married Hine-tu-pari-maunga and produced Pūtoto (magma) and Parawhenuamea (water). Pūtoto went on to produce lava and other volcanic fires sourced back to the original heat imbued into the bedrock of Papatūānuku.
>
> The younger sister of Mahuika (the goddess of the fire of man), whose name was Hine Tapeka, was assigned by Tāne to oversee the hidden fire children (lava) who bubbled deep with the core of the earth. However, the heat often became so intense, that Ruaimoko was caused to move about in discomfort and in the process he produced earthquakes. His movements weakened the fabric of the earth's crust, giving escape routes to Te Ahi Tapu a Tapeka (the sacred fire of Tapeka) and geothermal and volcanic activity was born to the world. The vents are today seen as the volcanoes that erupt, the geyser blowholes, the mud pools and the hot water springs of the land. They are controlled by Hine-puia. She opens and closes them to release the pressure built up from Ruaimoko's movements.[97]

Lava flows and volcanoes, geysers and mud pools and hot springs, are the visible signs of this cosmic whakapapa. Thus it is no surprise that there are many stories that relate how volcanic mountains moved and waned across the land. In one story, for example, war was waged between Taranaki and Tongariro over the mountain

[95] C Winitana, E32, para 48, p 22
[96] C Winitana, E32, para 48 continued, p 22
[97] C Winitana, E32, paras 49, 50, pp 22-23

Pihanga.[98] These stories all point to the connectedness of the mountains with geothermal fire and energy of the TVZ, a matter Stokes records:

> The connectedness of the volcanic phenomena of the Taupo Volcanic Zone is also recognised in other versions of this story that after this great fight several mountains moved north. These include Tauhara, the forlorn lover at the northern end of Lake Taupo, still pining for his love Pihanga, visible at the south end of the lake behind Turangi. Others include Maungakakaramea (Rainbow Mountain), Tarawera, Putauaki (Mount Edgecumbe) and several lesser volcanic cones. All these volcanoes are prominent landmarks and have become sacred mountains for local hapu, and land in the Taupo Volcanic Zone. Some versions of the story also include the volcanic islands of the Bay of Plenty: Tuhua (Mayor Island), Whakaari (White Island), Te Paepae o Aotea (Volkner Rocks) and Moutohora (Whale Island).[99]

The Tribunal's findings

In the creation story, Papatuanuku (the earth) lived before becoming pregnant with Ruaimoko – who clearly came after. He would for all eternity remain unborn because of the deeds of his brothers. So the Earth was imbued with magma and other heat conductors and in this way Ruaimoko was given heat and energy to ease his discomfort. Therefore, this story (sometimes described as myth or legend) tells us that in the Maori mind, the creation of geothermal activity followed the existence of the Earth and land and that since the creation they have been valued as a major source of energy and heat. The Maori relationship with geothermal activity is, thereby, conceptualised as an ancient one. Furthermore, Maori link to the creation of resources by personifying them and by establishing whakapapa to Papatuanuku, Ranginui and their children. This point was captured by the Whanganui River Tribunal when it noted that:

> By whakapapa, Maori link also to the gods, and since the gods produced not only people but all life-forms, and even things that have a force of their own – the mountains, rivers, wind, and rain – Maori see themselves as related to these things in a personal way. [100]

From the CNI, this point was well made in evidence for Ngati Whakaue of Ohinemutu:

> Ngati Whakaue as are other Maori tribes are descended from Rangi (the sky father) and Papa (the earth mother) who so long ago were separated by their children. Ngati Whakaue accept again like other Maori that the sky and earth are complementary to each other and are therefore inter-related. There is recognition of the children of Rangi and Papa as deities in control of the different aspects of our world.[101]

So in Maori thought, they relate in the same personal way to the gods of creation. The story illustrates the manner in which the major tribes of the CNI conceptualised and explained creation. It also explains how geothermal activity originated. We turn to

[98] Stokes, *Legacy of Ngatoroirangi*, A56, pp 69-70
[99] Stokes, *Legacy of Ngatoroirangi*, A56, p 70
[100] *Whanganui River Report*, p 35
[101] Ngati Whakaue, 'Ohinemutu Geothermal Use & Ngati Whakaue', Document A23, p 7

consider how Maori say the resources were transported to Aotearoa, New Zealand and how their relationship with the resource evolved.

The Arrival of geothermal activity

More immediate in time and in location to the stories of creation is the third set of nested traditions. The Ngatoroirangi stories link with Hawaiki and transport the creation stories with the coming of geothermal activity to the CNI. Ngatoroirangi was a specialist navigator and priest of the Te Arawa canoe who came from the islands of the Pacific (Rangiatea), arrived in Aotearoa and explored the central interior of the CNI. One of the first written accounts of his story was recorded from Wiremu Maihi Rangikaheke (notable Chief of Ngati Kereru, Ngati Rangiwewehi):

[ORIGINAL ACCOUNT]

Aa, ka uu atu a Hinemoa ki Mokoia. Ko to tino waahi i uu ai ia he waiariki, ko Waikimihia te ingoa. He waiariki hoki te ingoa ki nga taangata o Roto-rua, he wai wera, he wai mahana te ingoa ki nga iwi atu ra rawa; he wai nohoanga tangata. Kei runga atu hoki o te waiariki ra te kaainga o Tuu-taanekai.

Ko te take o te ritenga o teenei ingoa o te waiariki, koia teenei toona ritenga. E kore teenei mea te wai wera e tae mai ki teenei motu, ki Aotea-roa nei i teeraa atu o te rangatira, o te tohunga. Na Ngaatoroirangi anake i karanga atu ki Hawaiki, ka haria mai e oona tuaahine. Koia ka toro haere i teenei motu. Ko te nohoanga o Nga-toro-i-rangi i karangatia ai kia haria mae te wai wera nei ko Tongariro, maunga hukarere i Taupoo ra. Oti ra, me aata koorero e au. I muri rawa iho i eetahi mahi tohunga a Ngaatoro-i-rangi i te whitinga mai ki teenei motu ka haere atu ia ki Taupoo. Ka kite atu i a ia te tini maunga ra e tuu mai ana, he mea raarangi tonu te tuu. Ko nga ingoa o eenei maunga ko Tonga-riro, ko Ngauruahoe, ko Pare-te-tai-tonga, ko Ruapehu. He maunga ikeike eenei, ngaro katoa ai i te hukarere. Na, ko te mea i whakataetae ai te maia nei ko ti piki atu ki nga keokeonga o eenei maunga. Ka tae atu raatou koo oona mookai ki te take o nga maunga nei, ka karanga atu ia, “hei konei koutou noho ai. Me tino piki atu au ki runga i nga maunga nei, kei kore he tangata hei pikipiki i eenei maunga, kei mana rawa atu te haupapa o eenei maunga, aa, ka kaha rawa atu te hautopenga o te maatao ki te tangata. Engari, e hoa ma, ki te tae atu au ki runga i eenei maunga takatakahi ai, me taku tohu ano, ka ora te tangata me te kai. Ki te kore au e tae atu, ka mate te tangata me te kai”. Ka ako iho ia ki nga hoa, “I muri i a au, kaua e kai ake kia eke atu au ki runga i te tihi o te tuatahi o nga maunga nei, aa, kia kite koutou i te putanga whakareretanga mai o taku tohu ki runga ki teenei maunga. Ko te tohu teenei i a au i ruinga, e puta mai nga whatitiri me nga uira, me nga ua. Ka kite koutou ka ngaro haere nga hauhunga o runga i nga maunga nei, hei reira koutou moohio ai kua pau te mana o eenei maunga, ka nui ake tooku.” Ka mutu eenei kupu, ka piki atu ia. He tino ata ka piki atu teenei tohunga. Mo runga noa mai te raa ka noho waenganui ia e piki ana. Poutuu maaroo noa te ra, ka nui te maunga nei ki muri, ka iti ki mua i a ia. Ka puta mai te matekai ki oona hoa, ka mahara hoki, “Ee, kua mate too taatou hoa i te mana o te maunga nei.” Ka titiro ake hoki oona pononga ki te rangi. Me runga i nga maunga nei, aanoo te hukarere ka makere iho i te rangi, poouri kerekere aa. No reira i moohio ai oona pononga kua mate too raatou ariki.

Kai ana ratou i te kai mo oo ratou puku. Kai rawa ake, kua eke rawa a Ngatoro-i-rangi ki te tihi o Tonga-riro. Eke rawa ake kua huupaitia i te maaeke. Huia ruatia e too raatou kainga i te kai ka kino nui rawa te kaha o te maaeke ki a ia, ka ngaro rawa ia i te hauhunga ki raro. Kua

poouri toona ngaakau, kua wareware raatou ki aana kupu tuatahi. No te mea kua takahia aana kupu e aana pononga, kua puta mai te riri o te aroha o te atua ki a ia, ka whakatahuritia toona ngaakau ki te ora.

Ka whakatika ake ia ki runga, ka ahu toona ngakau me toona mata ki Hawaiki, ka puaki toona reo ki oona tuupuna, "E kui ma, e-e! Haria mai he ahi mooku. Ka mate au i te maaeke," Kotahi anoo aana kupu, ko te rua. Teenei rawa ano nga kuia ra te haere mai nei kei runga i te kare o wai. Taa rawa mai te manawa kei Whakaari. Kei rera e kaa ana te ahi a nga kuia ra.

Heoi anoo, ka toro haere ki teenei motu. Peenei anoo na, kua tae atu oona kuia ki a ia me te mau atu anoo i te ahi moona.

Kite rawa ake ia, e puta ake ana i roto i te maunga, ka puia. Ehara! Kua pau te kaha o te hauhunga, kua ora rawa ia. Na, me kaua oona hoa i kai, e kore e nui te maaeke ki teenei motu. No konei i meinga ai teenei mea te wai wera he wai-ariki, no te mea, na te tino ariki teenei mea i karanga, i tae mai ai ki teenei motu ngiha ai. Koia i peeneitia ai toona ingoa he wai-ariki; kaore, he wai wera kee te ingoa.

[ENGLISH TRANSLATION]

So Hine-moa landed at Mokoia. The exact place she landed at was a hot spring named Waikimihia. The people of Roto-rua use the term 'chiefly-water', while other people call it hot-water or warm-water. Hot, but a place where people bathe. Tuu-taanekai's home was above that hot spring.

The origin of this name 'chiefly-water' is as follows: thermal water did not come to Aotearoa because of any other chief or priest, but by Ngatoro-i-rangi alone, who called for it and it was brought by his sisters. And so it spread in this island. The place from which Ngaatoro called for the hot-water was Tongariro, the snow-covered mountain yonder at Taupoo. Well then I had better tell the whole story.

Immediately after performing certain priestly rites on crossing to this island Ngatoro-i-rangi proceeded to go to Tau-poo. He found many mountains standing there in a line. These mountains' names are Tonga-riro, Pare-te-tai-tonga, and Ruapehu. They are lofty mountains all of them hidden by snow. Now the thing attempted as a challenge by this hero was the climbing to the top most peaks of these mountains. He and his servants reached the base of the mountains and he called out, "You remain here. I must climb these mountains lest no man climb them and the power of the ice of the mountains be increased, and the destructive power of the cold over mankind become all powerful. But my friends, if I reach the tops of these mountains and tread there together with my sign, man and food will triumph. If I do not reach there man and food will perish."

He instructed his companions, "After I leave do not eat until I have climbed to the peak of the first of the mountains and you have seen the sudden appearance of my sign above this mountain. The sign that I am on top will be thunder and lightning and rain. When you see that the snow of the mountains is hidden you will know that their power is exhausted and that my power is greater". His words ended off and he climbed. He left early morning. When the sun was on high he was halfway up. When the sun was at the Zenith most of the mountain was behind him and a small part only lay ahead. His companions became hungry and thought, "Oh our companion has been killed by the power of the mountain". His servants looked by to the sky and all was dark. So his servants "knew" that their lord was dead.

> They ate food for their bellies. At the very time they were eating, Ngatoro-i-rangi had reached the peak Tonga-riro. As he topped the mountain he was smitten by the cold. Doubled up by their eating the food, the cold was very severe upon him. His heart was troubled because they were not attentive to his first words, because his words had been trampled upon by his servants the wrath of the god came forth against him. Presently his head was buried beneath the snow and the god felt compassion for him and turned his heart towards life.
>
> He stood up and turned his heart and his face towards Hawaiki and spoke to his ancestors, "old ladies bring me some fire. I am dying of cold". He spoke once and twice and then the old ladies were coming across the surface of the water. They only took breath at White Island. There the fire of the old ladies is still burning. Then it spread onto this island like this the old ladies coming to him and bearing fire for him. He saw it appearing from the mountain and steaming. Lo, the power of the frost abated and he was restored. Now, if his friends had not eaten, cold would not be severe in this country. It is from these circumstances that hot pools are called "chiefly-water" because the thermal water was called here by the high chief and arrived and spread here. That is why it is called chiefly water and not hot water.[102]

Ballara, Stokes and Maxwell between them have identified numerous versions of the Ngatoroirangi story.[103] Parallel versions of the same story, in Maori and in English, are available in the *Maori Oral History Atlas*, published in 1990 by the New Zealand Geographic Board.[104] Although accounts vary, these stories have a consistent focus on Ngatoroirangi as the reason for the origins of geothermal activity and energy in Aotearoa. The story of Ngatoroirangi is still being told today. Mr Winitana recounts the Tūwharetoa tradition best known to him:

> When [our ancestor Ngatoroirangi] arrived at these parts he ascended Tongariro. He reached the summit and was overcome by a snow blizzard. Knowing that he would most certainly perish in the storm, he invoked his ancestors Te Pupu and Te Hōata, the elders of the fire clan of Hine-tapeka, to come to his aid. He implored Kautetetū to produce the fire born of friction that he needed to save his life. He called to his sisters Kuiwai and Haungaroa, who were still in the homeland Hawaiki, and they sent their fire ancestors to help their brother. Te Pupū and Te Hōata traveled underground with their precious gift and at different places along their route emerged to ensure they were traveling in the right direction. These places became geothermal or volcanic spots and include Whakaari [White Island], Tarawera, Paeroa, Ōrakei-kōrako, Wairākei, Taupō, Tūaropaki and Tokaanu. The fire emerged at the summit of Tongariro and the old priest was saved.[105]

Iwikau Te Heuheu in 1859 also used the Ngatoroirangi story to describe the coming of geothermal fire and energy to Aotearoa and he added other names to the places where those who brought geothermal activity stopped, namely: Motou-Hora (Whale Island)

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[102] Wiremu Maihi Te Rangikaheke, GNZMMSS 115, pp 74-85, translation from Biggs, Cullen and Lane, *Readings from Maori Literature*, (Auckland: University of Auckland, 1980) as quoted in Maxwell, A17, pp 2-7. See also R Boast, 'The Hot Lakes: Maori use and Management of Geothermal Areas from the Evidence of European Visitors', Document A24, pp 23-25.

[103] A Ballara, 'Tribal Landscape Overview c.1800-1900 in the Taupo, Rotorua, Kaingaroa and National Park Inquiry Districts', Document A65, pp 63-69; Stokes, *Legacy of Ngatoroirangi*, A56, pp 36-37; Maxwell, A17, pp 2-12

[104] *He Korero Purakau mo nga Taunahanahatanga a ngo Tupuna: Place Names of the Ancestors: a Maori Oral History Atlas* (New Zealand Geographic Board, 1990), pp 30-37

[105] C Winitana, E32, para 52, p23

at Whakatane, Okakaru, Rotoehu, Rotorua, and Rotomahana.[106] His use of the story is discussed further below. Mataara Wall of Ngati Tutemohuta recounted the story from the northeastern shores of Lake Taupo about Ngatoroirangi's discovery of Tauhara Maunga and the proverb "Mai i te Awa-o-te-Atua ki Tauhara, mai i Tauhara ki Tongariro." (From Te Awa-o-te-Atua to Tauhara to Tongariro).[107]

Ngatoroirangi was and still is venerated in Maori thought. Places were named after him such as Te Ōhaaki o Ngatoroirangi (the Legacy or Bequest of Ngatoroirangi) associated with Ngati Tahu and Ngati Whaoa. Te Arawa sing to honour him at places such as Ohinemutu.[108] He, and Tia, are revered by Tuwharetoa as the ancestors responsible for the discovery and settlement of Lake Taupo. Indeed the Te Heuheu dynasty directly descend from him.[109] At Ohinemutu, Ngati Whakaue evidence is that:

> The inter-relationship between the environment and the people has continued from the time Ngaterorirangi [sic] sought warmth from his sisters in Hawaiki until today this very incident again translated into song and poetry in a moteatea very widely known throughout this region.
>
> Part and parcel of Ngati Whakaue's environment is the geothermal resource that exists in Ohinemutu which has been used traditionally for domestic and cultural purposes since our forefather's [sic] arrival.[110]

The Tribunal's findings

We find that from the stories we have evidence on, no matter how much they vary, Ngatoroirangi is recognised by all the major CNI iwi and hapu for bringing the geothermal activity to Aotearoa. The Ngatoroirangi stories are consistent on this point.

The stories demonstrate that in the CNI, Maori thought that at the time of his arrival the whenua (land) was in place without the geothermal waters, heat and energy of the Taupo Volcanic Zone. It was Ngatoroirangi who called to his sisters for geothermal activity to be brought to Aotearoa. As a result, one must conclude that Maori conceived the arrival of geothermal activity as separate in time from when the land was created. It emerged in Aotearoa through the specific and deliberate acts of Ngatoroirangi, as Mr Winitana explains:

> These histories reaffirm our position that it is through the specific and deliberate acts of our blood ancestor Ngātoroirangi that the geothermal resources of the region came into existence.

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[106] Hochstetter, *New Zealand: Its Physical Geography*, p 391; see also Stokes, *Legacy of Ngatoroirangi*, A56, pp 23-24. Stokes adds that Whakaari or Whaikari is White Island, Motou-Hora is Whale Island and Oka-karu is near Kawerau.
[107] M Wall, Evidence for Ngati Tutemohuta (English), Document D1 and (Maori) D1(a), p 5
[108] Ngati Whakaue, 'Ohinemutu Geothermal Use & Ngati Whakaue', A23
[109] P Otimi, Evidence for Ngati Tuwharetoa, 27 April 2005, Document E16
[110] Ngati Whakaue, 'Ohinemutu Geothermal Use & Ngati Whakaue', A23, p 8

> As his descendants we enjoyed the full breadth of his geothermal legacy to us: that enjoyment was unhindered and unquestioned for numerous centuries until the arrival of the colonialist.[111]

Maori saw geothermal activity as separate in creation from the whenua, as it came later. It is this difference which creates the distinction between land and geothermal activity, carrying as they do two different histories of creation and arrival. In this respect, the submissions made by Mr Taylor that the subterranean geothermal resource is considered by Maori to be separate from the land, and the submissions made by the Crown that the geothermal resources are 'holistically considered part of the land', are both partially correct. Both sit with what the evidence of the Ngatoroirangi stories demonstrates. Namely, that the traditional Maori conception of the geothermal activity is that it is unitary in nature. This is consistent with the findings of the Ngawha Tribunal.[112] It is separate from the land or other resource before its manifestations emerge as energy, heat, water or mud from the surface. At the point of their emergence (either below or above the surface) access to the subterranean geothermal resource becomes linked to the resource into which it emerges, which may be land, or river, or a lake.

Ballara explains this tendency in Maori thought to separate out resources from land, even though normally those resources may also be land:

> There was a tendency in Maori thinking to separate the land from the resources it bore, regarding each as a different kind of property. This was to become a problem in days of land sales, when Europeans including Crown officers, when purchasing lands assumed they had brought the resources along with the land. Thomas Chapman, then based on Mokoia, Rotorua, and a frequent sojourner at Te Ngae, recorded an incident in which he sent one of his 'lads' to square off some large, loose stones for building purposes which were lying on land purchased by the mission. 'A party came and desired him to leave off trespassing upon those stones. "but you have sold the land" – Yes, but we did not sell the stones.'[113]

The Ngatoroirangi stories, therefore, illustrate the manner in which the major tribes of the CNI conceptualised and explained how the geothermal activity was transported to Aotearoa, New Zealand and how their relationship with it has evolved. As has been observed in the *Maori Oral History Atlas*, Ngatoroirangi's 'exploits on the mountains of the central North Island establish the depth of early knowledge of the geology of the volcanic and geothermal regions'.[114]

Ngatoroirangi –travelling across the CNI

In relation to the Mataatua Waka, to which Ngati Awa, Ngati Haka Patuheuheu and Tuhoe relate, Te Hau o Te Rangi Tutua and Joe Mason of Ngati Awa have in the past recorded the linkages through Toroa (captain of the Mataatua Waka). It seems that Ngatoroirangi instructed Tamatekapua to seek Toroa so as to free the Te Arawa waka

[111] C Winitana, E32, para 54, pp2 3-24
[112] *Ngawha Geothermal Resource Report*, pp 20-21
[113] Ballara, 'Tribal Landscape Overview', A65, p 253
[114] *He Korero Purakau mo nga Taunahanahatanga a ngo Tupuna*, p35

at Te Awa o te Atua (Tarawera River) by reciting a karakia still used today.[115] Maxwell concludes that in this way the traditions 'relating to Toroa of the Mataatua canoe, Tamatekapua and Ngatoroirangi of the Te Arawa canoe are bound together by their respective deeds.'[116] We also have the connection of Ngati Tuwharetoa ki Kawerau to Ngatoroirangi. Tuwharetoa, was a direct descendant of Ngatoroirangi from whom Ngati Tuwharetoa take their name. He was born at Otamarakau but was taken to Waitahanui near Kawerau when very young. The late Dame Evelyn Stokes and Maxwell highlight the commonalities of the traditions and affirm the importance of the local variations. Stokes notes:

> Most of the traditions from Mataatua, Te Arawa and Tuwharetoa sources ascribe the origin of geothermal activity in the Taupo Volcanic Zone to the exploits of Ngatoroirangi, and his sisters Kuiwai and Haungaroa, aided by the atua Te Pupu and Te Hoata (or Te Haeata).[117]

Some versions of the Ngatoroirangi story have the sacred fires being carried by the taniwha, Pupu and Te Haeata; others by Ngatoroirangi's sisters Kuiwai and Haungaroa. In some cases they are called to provide help from Hawaiki, in other cases they are already closer at hand, on Whakaari/White Island. Some of the traditions say that they travelled underground and brought fire to the surface whenever they came up to see where they were; in other cases they travelled above the surface of the land, dropping fires as they journeyed.[118]

The Ngatoroirangi story crosses the Kaingaroa Plains to Ngati Manawa where the evidence of the Kawharu report describes Ngatoroirangi's impact on the lands in that district:

> During his travels throughout the country including the famed journey from Maketu to Tongariro, he named several places in Kaingaroa including Wairapukao, the spring Te Puna Takatahi a Ngatoroirangi, which is near Wairapukao (on the southwest boundary of the Kaingaroa No 1 block), Tokatoka, Kowhatuwhakairi and Pokapoka (Opotiki Minute Book (OMB) 1 1878:132, 134, 159, 181). Ngati Manawa traditions today state that it was Ngatoroirangi's sisters who named these places. According to traditions recorded by Stafford, Ngatoroirangi also named Te Awa a (o) te Atua, now known as the Tarawera River (Stafford 1967: 21).[119]

Based on his Mataatua sources, Best records that while Ngatoroirangi's sisters, Kuiwai and Haungaroa crossed the Kaingaroa Plains, the latter took a long time to complete a meal there. Thus the name for the area became "Kainga-roa-a-Haunga-roa.[120] The sisters travelled on past Ti whakaawe in Kainga-roa ('enchanted ti trees

[115] Maxwell, A17, pp 12-13
[116] Maxwell, A17, p 13
[117] Stokes, *Legacy of Ngatoroirangi*, A 56, p 23
[118] Stokes, *Legacy of Ngatoroirangi*, A56, pp 17-38; Maxwell, A17, pp 2-13
[119] M Kawharu and R Wiri, 'Te mana whenua o Ngati Manawa: A Report Commissioned by Te Runanga o Ngati-Manawa', I63, p 16. Kawharu also mentions another spring in the Kaingaroa lands named Te Puna a Maru, (p16 fn 2)
[120] Best E, *Tuhoe,* 1977 as quoted in Stokes, *Legacy of Ngatoroirangi,* A56, p 25

which ever recede as strangers advance') and Te Puna-takatahi a Ngatoroirangi.[121] A sequel to the story recounted by Grace has the sisters Kuiwai and Haungaroa, travelling across the Kaingaroa Plains toward Tauhara, in search of their brother Ngatoroirangi, who had returned to Maketu in the Bay of Plenty:

> Now, one of the gods that Ngatoroirangi brought from Hawaiki was Horomatangi. It came to the god's notice that Kuiwai and her sister were in the vicinity of Tauhara Mountain so this deity decided he would go to Taupo and direct the new arrivals to the Bay of Plenty. He dived into the sea off White Island and travelling underground, emerged from the waters of Taupo. As he came to the surface he blew pumice and water high into the air. From above the lake he saw Kuiwai and her party in the distance … In order to advise Kuiwai and her sister where Ngatoroirangi could be found, the god went back into his tunnel and exhaled his breath with such force that he caused the Karapiti blowhole. The white steam rose straight and high into the heavens and then turned in the direction of Maketu. Kuiwai observed this and knew where to find Ngatoroirangi.[122]

The Karapiti blowhole was at Wairakei, and Horomatangi is the name of the geothermal system under Lake Taupo. The importance of Horomatangi continues in the minds of Ngati Tuwharetoa as demonstrated by reference to Mr Jim Maniapoto's evidence when he told us:

> Motutaiko was the island pa site ... linking with the Horomatangi Reef (kaitiaki of Tuwharetoa) and the underworld, which links our lake with the volcanic passage from Hawaiki. According to our people, a whirlpool appears north-west of the island and this is our entry into the geothermal passage back to Hawaiki.[123]

Another mention of Horomatangi comes from Mr Winitana who told us that Horomatangi was one of the water guardians in Lake Taupo. He recounted how Horomatangi (the taniwha guardian) is the male spouse of Hurukareao another entity that lives in the Tokaanu stream and thermal pool area. He then recited the genealogy for the different taniwha thus again demonstrating the tendency in Maori thought to continue the very personalised relationships that Maori have with their resources.[124]

The Tribunal's findings

This evidence demonstrates that in Maori thought there are fundamental linkages in the Ngatoroirangi story between the three districts of Rotorua, Kaingaroa and Taupo converging via 'the geothermal passage' to Hawaiki and those same linkages bind the the geothermal fields and the subterranean geothermal resource to the people through whakapapa or genealogy. Given the links between Ngati Raukawa, Te Arawa and Ngati Tuwharetoa we believe that the same linkage to the geothermal surface features, the geothermal fields and the TVZ of the CNI can be made. The Ngatoroirangi story cements their relationships with the geothermal resource of the CNI and with each

[121] Best E, *Tuhoe,* 1977 as quoted in Stokes, *Legacy of Ngatoroirangi,* A56, p 25
[122] Stokes, 'Wairakei Geothermal Area', A20, p 2
[123] H (Jim) Maniapoto, Evidence for Ngati Tuwharetoa, 26 April 2005, Document E34, p3, para 15
[124] C Winitana, E32, para 39, p 20

other. Mr Ellison comments on the wider connections: "These stories are merely examples of the vast number of connections between the people of the CNI.[125]

In addition, the Horomatangi aspect of the Ngatoroirangi story further demonstrates that Maori see the subterranean geothermal resource as both separate to the resource from which it emerges (in this case Lake Taupo) but also part of it, once it emerges (in this case, Horomatangi becomes a kaitiaki or guardian) linking Ngati Tuwharetoa back through the subterranean geothermal passage to Hawaiki.

Establishing rights in tikanga terms to geothermal surface features, the geothermal fields and the TVZ

We have previously discussed the nature of Maori tenure and how rights and interests in resources were allocated in Chapter 2 of this Report. The methods for acquiring rights include relationship building as well as discovery; ancestry, conquest, gift or inheritance and/or occupation. Maori would lay claim to land and resources using one or more of these grounds for title. That modus of asserting mana and establishing rights to land, with an emphasis on occupation because of the weighting accorded it by the Native Land Court, is recorded in that Court's early minute books from the mid to late nineteenth century, and examples of this are discussed in detail in Chapter 2 and Chapter 9.

The different stories of Ngatoroirangi and his exploits or those of his sisters, brother or taniwha were used in the Native Land Court to establish rights to lands with geothermal surface features and the geothermal fields. Ngati Tuwharetoa, amongst other reasons, claimed their interests in Kaingaroa No 1 block based on Ngatoroirangi's travels in that district along with occupation rights.[126] During the Pokuhu block hearings in 1881, prized red ochre (kokowai) pits were referred to and one witness for Ngati Pou claimed that the mana had passed from Ngatoroirangi to Tuwharetoa and that Pou had inherited it from his father Tuwharetoa. He went on to say, 'It was through Ngatoroirangi that Tuwharetoa obtained his right to this land.' Under cross-examination he accepted that Ngati Rangitihi ancestors also descended from Ngatoroirangi. It seems that both Ngati Rangitihi and Ngati Pou accepted that the mana of the land originated with Ngatoroirangi.[127]

Another example comes from the Rotorua district and relates to Tikitere, a large field of geothermal activity lying under the Rotorua-Whakatane highway, about three miles east of the Te Ngae junction.[128] It also relates to the Rotokawa baths lying next to Lake Rotokawa.[129] The mountain ranges behind these geothermal features are known

[125] S Ellison, Evidence for Te Takere o Nga Wai, 28 February 2005, (English), C25(a), para 66, p 37
[126] Kawharu, I62, pp 73-74
[127] Whakatane Native Land Court Minute Book 1, 1881, fol 253, 241, 222, 238, as cited in M Kawharu, R Johnson, V Smith, R Wiri, D Armstrong, and V O'Malley, 'Nga Mana o Te Whenua o Te Arawa Customary Tenure Report', Part 1, Document G2, pp 348-350
[128] Maxwell, A17, p 56
[129] Maxwell, A17, p 56

as the Whakapoungakau Ranges. It was here that the sisters and the younger brother of Ngatoroirangi rested on their way to save him.[130] It was here that the sisters lost their younger brother Tanewhakaraka whom they never saw again and the name Whakapoungakau (hearts rendered full of sadness) speaks to the love of their brother whom they lost. They also left waiariki and ngawha here for him as an act of love. Tanewhakaraka stayed on in this area and he was named as one the main ancestors from whom rights and interests in land were established before the Native Land Court.[131] The principal conductor for the Ngati Rangiteaorere and Ngati Uenukukopako tribes, Tamati Hapimana, opened the case, naming Tanewhakaraka as one of the ancestors he was claiming under. He said:

> My name is Tamati Hapimana. I live at Mokoia. I belong to Ngati Uenukukopako. [I] know the whole of this land now before the court and I claim it. My claims are ancestry, conquest, protecting it and occupation.
>
> I have three ancestors through whom I claim this land
>
> 1. Uenukukopako
> 2. Rangiteaorere
> 3. Tanewhakaraka[132]

Maxwell was convinced this was the same Tanewhakaraka that was the younger brother of Ngatoroirangi. It was because of his relationship with Ngatoroirangi, that his descendants were able to claim rights and interests in lands containing geothermal surface features and geothermal fields. Mr Winitana explains:

> Our genealogy annotated at the head of this document tells us that we are direct descendants of Ngātoroirangi. He called up the fire and caused the geothermal activity. He did this so that he might live. He benefited to the optimum degree in bringing the fire here: it saved his life. Our seamless worldview that is holistic in nature tells us that his benefit is our benefit. The very reason he climbed the Tongariro range was with our benefit in mind; and that was to claim these lands for us, the generations unborn. The legacy, to give us a place to stand forever, is real for we have lived here uninterrupted for many hundreds of years. By exactly the same token any spin-offs of his ascent to the summit, motivated as he was to bring benefit to his offspring, are also naturally ours by right.[133]

The Tribunal's findings

The evidence in this section demonstrates that the stories of Ngatoroirangi, his exploits and those of his sisters and younger brother were used in some cases as the basis for the iwi and hapu of the CNI to assert their mana and/or claim inherited rights to land where the subterranean geothermal resource had emerged. Whether such

[130] Maxwell, A17, p 56
[131] Maxwell, A17, pp 56-58
[132] Rotorua Native Land Court Minute Book 4, fol 301, as quoted in Maxwell, A17, p 58
[133] C Winitana, E32, para 56, p24

claims were upheld is not the point, rather it is the fact that the story was used in this way which is our focus. The Ngawha Geothermal Tribunal noted that the use of such beliefs, 'whether allegory, myth or history' can serve to impart ownership rights, certainly on the basis of discovery and subsequent unbroken occupation and control over whatever resource was regarded as essential for the people's well-being.[134] Stokes in her work on Wairakei has a section entitled 'Māori use and occupation' where she comments on what occupation means in the context of geothermal sites such as Wairakei:

> Occupation rights were maintained by periodic use of the land and resources, visits for various purposes such as fishing, birding, using hot pools, gathering fern root or other edible products, digging and processing kokowai. In other words, ahi kā was sustained by recognition of such uses and did not necessarily imply continuous occupation.[135]

The Maori word for the term 'occupation' is 'ahi kā' literally keeping the fires burning on the land. This calls to mind the expression used by Iwikau Te Heuheu that the fires of the subterranean passage as at 1859 'still burn to this very day' on land held under his mana. In our view the customary evidence provides strong support for a finding that all the ingredients for CNI Maori claims to lands with geothermal surface features, the geothermal fields and the TVZ, the geothermal fields and the TVZ are present.

There is nothing new or presentist in recognising such an approach, as the Native Land Court minutes are replete with people recounting their claims by reference to such stories of the ancestors, described by the Crown as 'myth and legend.' Therefore, the notion that it is too difficult to separate customary law from the matrix of history, legend and memory, as submitted by the Crown, must be rejected because it is not the historical certainty of the story that is important, rather it is the use made of it over many generations.[136]

While we agree that the Ngatoroirangi stories have been 'vulnerable to subjective and varying interpretations', it is hardly novel to observe that there are variations in oral traditions. What is more remarkable is the universal knowledge of the stories in CNI. They are hardly artefacts of a long-gone past. Nothing was clearer to us than their central importance till the present in the history and worldviews of the peoples of the CNI, and their claim to the resource. Variations in the stories by no means negate their significance as a way of claiming rights and interests to natural resources. Rather the stories portray the following essential points:

- Ngatoroirangi, with other ancestors such as Tia, discovered the land;

[134] *Ngawha Geothermal Resource Report*, pp 148-150
[135] Stokes, 'Wairakei Geothermal Area', A20, p 12
[136] Crown closings, 3.3.111, part 2, p 498

- Ngatoroirangi called for geothermal fire which was brought to him by various actors. The resource therefore follows the creation of the land and can emerge from land, lakes, rivers or the sea;

- Ngatoroirangi or other actors in the stories were ancestors of many of the claimant hapu and iwi of the CNI;

- As a result of his exploits, these claimant hapu and iwi permanently settled the lands around the geothermal activity he provided;

- They settled and became dependant on the geothermal fire and energy, water and steam that he discovered;

- They used his legacy of geothermal heat, water and energy as the basis for asserting their mana over land.

Other tribes of the region such as Ngati Pukenga, Ngati Maniapoto, Ngai Te Rangi and others may use different stories to explain the nature and extent of the geothermal resources in their areas but for the majority of the Central North Island claimants this, in its various forms, is the story that they claim gives them possession or ownership of the TVZ.

Maori understandings of the geothermal fields and the Taupo Volcanic Zone

We now look to what the stories tell us about the extent of the Maori interest in the geothermal resource. In our view, the relationships between localised surface geothermal features within the geothermal fields, the subterranean geothermal fields, and the more fundamental earth shaping processes (TVZ) are as clearly evident in the Te Arawa, and Tūwharetoa traditions as they are in the evidence of the scientists travelling the region during the period 1840-1860.[137] In this respect Mātauranga Maori and western science as understood in that period were, we believe, in substantial accord. Our recognition of this consistency of approach, we stress again, is not a presentist view of these Maori traditions of the Ngatoroirangi stories. There is evidence that early scientists acknowledged and remarked upon the similarity of the views of iwi and hapu of the Central North Island to what was known to western science about the geothermal activity of this region. Here we are talking about both the surface and subsurface features that manifest on land and under lakes and rivers, the energy, heat, waters/fluids within the geothermal fields and the subterranean resource (TVZ) being the common heat and energy system or flow.

To illustrate this crucial point, we refer to an encounter that took place in March or April of 1859. The Austrian Geologist, Ferdinand von Hochstetter, carrying out field

[137] Note that Mataatua's interest in Whakaari and Bay of Plenty is through Ngati Awa and Tuhoe. Mataatuawho also refer to Ngatoroirangi as outlined in Maxwell, A17, pp 10-18

explorations in the Waikato and Central North Island districts, visited Lake Taupo and stayed at the T S Grace mission house at Pukawa on the south west shore of the lake and had extended conversations with Iwikau Te Heuheu Tukino III[138]. Hochstetter was a careful listener as well as a skilled field scientist. He established a strong rapport with Iwikau Te Heuheu and engaged in a conversation which explored the commonalities of their respective worldviews. Hochstetter noted that 'the natives have very correctly brought the hot springs directly in connection with the still active volcanoes, though they have clothed their conceptions in the garb of legend'. Hochstetter then recounts the legend of Ngatoroirangi as he heard it from Te Heuheu:

> Among the first immigrants who came from Hawaiki to New Zealand, was the chief Ngatoroirangi (heaven's runner or the traveller in the heavens). He landed at Maketu on the East Coast of the North Island. Thence he set off with his slave Ngauruhoe for the purpose of exploring the new country. He travels through the country: stamps springs of water from the ground to moisten scorched valleys; scales hills and mountains, and beholds towards the south a big mountain, the Tongariro (literally "towards south"). He determines on ascending this mountain in order to get a better view of the country….

As Hochstetter recounts Te Heuheu's story:

> Then he ascends the snow-clad Tongariro; they suffered severely from the cold, and the chief shouted to his sisters who had remained upon Whakaari, to send him some fire. The sisters heard his call and sent him the sacred fire they had brought from Hawaiki. They sent it to him through the two Taniwhas (mountain and water spirits living underground, Pupu and Te Haeata, ***by a subterranean passage to the top of Tongariro***. The fire arrived just in time to save the life of the chief, but poor Ngauruhoe was dead when the chief turned to give him the fire. On this account the hole, through which the fire made its appearance, the active crater of Tongariro, is called to this day after the slave Ngauruhoe; and the ***sacred fire still burns to this very day within the whole underground passage between Whakaari and the Tongariro***; it burns at Motou-Hora, Oka-karu, Roto-ehu, Roto-iti, Roto-rua, Roto-mahana, Paeroa, Orakei-korako, Taupo, where it blazed forth when the Taniwhas brought it. Hence the innumerable hot springs at all the places mentioned.[139] [Emphasis added]

Hochstetter reflects: 'This legend affords a remarkable instance of the accurate observation of the natives, who have thus indicated the true line of the chief volcanic action upon the North Island'.[140]

The story is illustrative of early CNI Maori observations of the nature and extent of the subterranean geothermal resource, the geothermal fields and its surface manifestations, even if the detail as to how it all linked together was not scientifically known. What is more, Maori knew as much as any western scientist in the field at that time. They, along with scientists of western origins, have increased their knowledge with the introduction of new technology. We agree with Professor Boast when he

[138] Christian Gottlieb, 'Ferdinand von Hochstetter 1829-1884', *Dictionary of New Zealand Biography,* vol.1 (Wellington, Department of Internal Affairs and Bridget Williams Books, 1990), pp 199-200; J H Grace, *Tuwharetoa*: *the History of the Maori People of the Taupo District* (Dunedin: Reed, 2005), p 407
[139] Hochstetter, *New Zealand: Its Physical Geography*, p 391; see also Stokes, *Legacy of Ngatoroirangi*, A56, pp 23-24.
[140] Hochstetter, *New Zealand: Its Physical Geography*, p 391.

pointed out that the Ngatoroirangi story tells us that Maori saw the whole of the resource for what it was – that ultimately at the magma level it was an indivisible or common system:

> The obvious point is that the various areas of thermal activity in the Rotorua – Taupo region were seen as manifestations of a single interconnected resource or system. The concept of subterranean fires or tunnels linking the various thermal areas points to a clear understanding that a single geothermal resource existed brought from the ancestral homeland of Hawaiki.[141]

The evidence of Maori association to fields and the TVZ is also readily apparent to Environment Waikato who have recently divided the geothermal resources, the geothermal fields and the TVZ within their region into management units known as geothermal systems. The Environment Waikato's Regional Policy Statement contains this acknowledgment:

> A geothermal system is an individual body of geothermal energy and water not believed to be hydrologically connected to any other in the upper few kilometres of the Earth's Crust. At lower depths, it is accepted that there is a common heat source, and ***this is consistent with Maori understanding of the geothermal resource***. In some cases there is no doubt over the near-surface hydrological separation between particular geothermal systems. A geothermal system may have several heat upflows supporting separate geothermal fields that are linked to each other by sub-surface lateral flow. A geothermal system may support an isolated hot spring, a group of surface features, or several groups of features. Alternatively, there may be no visible expression at the surface.[142] [Emphasis added]

Maori knowledge of the common heat and energy system and the impact of groundwater includes an understanding of the connection between springs in a geothermal field. In relation to the waiariki at Rotokawa, Maxwell notes the Ngati Uenukukopako (from whom several claimants are descended even though the hapu itself is not represented as a claimant before us) had a good understanding of the geology of the geothermal activity, a body of knowledge that emerged from 'generations of not only useage, but also keen obervation [sic].'[143] In this respect he quotes Hiko Hohepa whom he describes as a 'tohunga whakapapa of Te Arawa':

> … te korero o matou na kuia, na koroua, ka mea mai ratou, ko nga wai i raro i te whenua, e rere mai ana i nga moana o Okataina, o Okareka, ko era moana, ka rere mai te wai, ka ua ana, ka kii nga roto i te wai, ana ka rere i raro i te whenua, nga wai o nga moana i runga o Whakapoungakau. Ana ka rere mai ana ki Rotokawa ko ratou e mea mai ana, ka wera nga wai.
>
> In relation to the old peoples understanding of the fluctuations of water temperature, the fact that when it rains the water of the waiariki get hotter, if it doesn't rain the water gets colder. … the old people said that the water under the land flowed from Lakes Okataina and Okareka.

[141] R Boast, 'Geothermal Energy: Maori and Related Issues Resource Management Law Reform', Document A19, pp 15-16
[142] M Brockelsby, Evidence on Allegations and Issues Raised on Performance of EW, 6 July 2005, Appendix, Document H26(a), 'Waikato Regional Policy Statement Proposed Change No.1: Geothermal Section as amended by decisions 12 June 2004', p 295
[143] Maxwell, A17, p 77 (and see p 82 re Mr Hohepa's credentials)

> When it rains, these Lakes fill with water and flow under Whakapoungakau, coming to Rotokawa that causes the waiariki to become hot.[144]

This accords with the scientific view that variations in activity level are related to the supply of groundwater, rather than changes in the underlying rock temperature. Whether scientifically the water table was affected at Lake Rotokawa in quite the way described by Mr Hohepa is not known to this Tribunal, but the value of the commentary from him is that Maori obviously associated the changes in temperature with an increase in ground water. This is consistent with the Crown's acknowledgment that a degree of Maori knowledge about the interconnectedness of geothermal springs is apparent.[145] In fact, it was unusual for Maori not to give a name to the surface manifestations on their land. This practice or custom was described by one early traveller wending his way through the Paeroa Ranges in the area of influence claimed by Ngati Whaoa, Tuhourangi, and Ngati Tahu:

> All springs or body of springs, are Christened as the maoris [sic] called it – these are Christened Kopia.[146]

We heard evidence that we understand will be more fully dealt with in the National Park Inquiry, linking that knowledge to Tongariro, whence the call for help from Ngatoroirangi came. Merle Maata Ormsby told us about the Ketetahi Springs on Mount Tongariro. They were widely known by Ngati Hikairo for their therapeutic and healing qualities. Mrs Ormsby spoke of Amoroa Nikora who had a good understanding of the springs, going there regularly even in her ninties. She was the last tipuna the claimant knew of with a good understanding of the springs.

> The last tipuna that I know with a good understanding of the springs was a kuia called Amoroa Nikora. She was well into her 90s when she died and she used to go up to the Springs regularly. She used to walk up to the springs from the bottom of Tongariro where she lived, even into her 90s. She based her wellness on her ability to walk up to the Springs. …
>
> The last year of her life when she could no longer make the journey up to the Springs, she was taken up there by helicopter. Her family organised this trip for her because of her strong feelings for that place, and her yearning to be there. The thermal pools in Tokaanu were not the same for her. I think this is because of their different mineral properties, but it is also because of the long and important history that is associated with Ketetahi for our people. [147]

At Whakarewarewa, to cite another example, Ngati Wahiao can name every hot pool, mud pool, geyser, fissure, and stream, knowing how they are connected to each other and 'their respective function, the daily physical associations' – all of these things, we were told, providing 'a rich tapestry of knowledge, understanding and commitment, which for our people over time strengthens our identity' – who they are, where they

[144] Maxwell, A17, pp 77-78
[145] Week 10, Day 1, Transcript, p 118, (Crown Transcript of Crown Closings, Hearing Week 10, 7-9 November 2005, 4.1.11)
[146] Boast, 'The Hot Lakes', A24, p 121
[147] M Ormsby, Further Evidence for Ngati Hikairo, 22 July 2005, Document I10, p 14, para 12.3

are and why.[148] This degree of knowledge was well documented for most of the major geothermal fields of the CNI, as our review below demonstrates.

The Tribunal's findings

In our view, the story of Ngatoroirangi illustrates that CNI Maori knew that at some point far underground, their geothermal fields emerged from the common heat and energy system or flow – the TVZ. They depended on its geothermal fluid, waters and heat and energy across the various geothermal fields of the CNI because that heat and energy was needed to sustain their ways of life. The evidence of their settlement patterns and the accounts of early Pakeha travellers accord with our view. Maori possessed what they held as at 1840 and that had to be geothermal surface features, the geothermal fields and the subterranean resource (TVZ).

The nature of the rights and interests - rangatiratanga, kaitiakitanga and customary law

We have already described generally the nature and significance of rangatiratanga (autonomy and control) in Chapter 17 and 19, which looks at the connotation of the term for environmental and resource management. In terms of Maori rangatiratanga over geothermal surface features, the geothermal fields and the TVZ, the evidence before us is that CNI Maori exercised a high degree of autonomy and control over the geothermal resources and fields within their spheres of influence and 'jealously' guarded them.[149] When the first European travellers worked their way through the region, the manner in which Maori exercised their rangatiratanga, autonomy and control was understandably not well apprehended, but the nature and extent of the control still emerges from some of that evidence of early encounters. An example comes from Bidwill in his *Rambles in New Zealand*, published in 1841.[150]

> I accordingly went to a place where they pointed out three men sitting gravely; the one in front was the chief. He was a remarkably fine man, upwards of six feet high, and very strongly built – a complete giant. He was very handsome …. He did not appear in a particularly good temper, and after about five minutes' talk he suddenly arose from his seat, and began to walk up and down, and stamp, talking all the time with great animation. He at last worked himself into a most terrible pitch of fury, at which I only laughed. The cause of complaint was my having ascended Tongadido [sic]. … He could not help saying, however, that if he had thought that I could have gone up the mountain, he would have prevented my ever trying, and requested me not to tell any other Pakihas [sic] of it on any account.[151]

Dieffenbach, the first western-trained scientist to live and work in New Zealand, during 1839-1841, found on visiting Taupo that because of Bidwill's unauthorised

[148] H Te Hau, Evidence for Ngati Wahiao, 22 April 2005, Document F77, para 1, pp7-8
[149] Ballara, 'Tribal Landscape Overview', A65, pp 256-259
[150] Boast, 'The Hot Lakes', A24, p 34
[151] J Bidwill, Rambles in New Zealand (1841) as cited in Stokes, *Legacy of Ngatoroirangi,* A56, p 54

climb of Tongariro, Te Heuheu Mananui had issued instructions forbidding anyone else ascending it.[152] Dieffenbach explained:

> We could not persuade the natives to allow us to ascend the principle cone, which we might have accomplished in four hours. The head chief of the Taupo tribes, Te Heu Heu, was absent on a war excursion to Wanganui, and before he went he had laid a solemn "tapu" on the mountain, and until his return they could not grant us permission to ascend it. This "tapu" was imposed in consequence of a European traveller of the name of Bidweil having gone to the top without permission, which had caused great vexation, as the mountain is held in traditional veneration, and is much dreaded by the natives, being, as they tell you the "backbone of their tupuna", or great ancestor, and having a white head, like their present chieftain.[153]

Maori in this example are clearly controlling, managing and protecting Mount Tongariro through direct action (actively preventing climbs) and through customary law (the use of tapu).[154] Mana and rangatiratanga are clearly at play here. The mana to stop people climbing the mountain coupled with the imposition of customary law as an element of rangatiratanga. With this control came inherent responsibilities to act as kaitiaki of the Mountain for future generations to value and enjoy.[155] Therefore, autonomy, authority, customary law and kaitiakitanga are all essential elements of rangatiratanga.[156] This view of the matter is again consistent with the views of the Ngawha Geothermal Tribunal who stated that:

> As was to be accepted later by the Maori Land Court, recognition of 'title', in precontact times, was based on the twin factors of discovery or conquest, and occupation. One without the other would have been insufficient. A tribal or sub tribal group that could successfully assert and sustain such a claim would be regarded as exercising their 'mana whenua' (literally authority over the land). Having first secured a domain for itself, a group would then set about ensuring its political integrity and its survival. The effectiveness of its organization to achieve these ends would in turn be proportional to the effectiveness of its rangatiratanga in all relevant spheres of social action. Thus the care for and fostering of resources was an integral part (but only a part) of rangatiratanga, and where resources were clearly demarcated, the rangatiratanga in respect of them could equally well be described as kaitiakitanga (guardianship).[157]

In terms of Maori customary law, Boast considered that Maori uses of geothermal surface features were carefully regulated by a linked body of rules and concepts 'which need to be thought of as nothing less than Maori customary law of resource management.'[158] Based on his analysis of early accounts from European travellers, Boast argues that rights to use the pools at Ohinemutu, for example, had been allocated according to a recognised framework, with pools being designated for certain purposes and some people, but not others, having certain rights.[159] Dr John

[152] Ernest Dieffenbach, *Travels in New Zealand*, 2 Vols (London: John Murry, 1843), vol I, p 347, as quoted in Boast, 'The Hot Lakes', A24, p 46
[153] Dieffenbach, *Travels in New Zealand*, vol I, pp 339-340, as quoted in Boast, 'The Hot Lakes', A24, p 46
[154] Boast, 'The Hot Lakes', A24, pp 58-59
[155] H Te Hau, Evidence, F77, para 19, p 8
[156] *Ngawha Geothermal Resource Report*, pp 2, 18
[157] *Ngawha Geothermal Resource Report*, p 20
[158] R Boast, 'Maori Customary Use and Management of Geothermal Resources', Document A27, p 1
[159] Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, p 1

Johnson (the first colonial surgeon) recorded Maori information at Ohinemutu in 1847 about the allocation of property rights, some springs being communal for the benefit of the hapu or iwi and others belonging to families.[160] Boast argues that there was a ranking of use rights which can be discerned in the early contact sources.[161]

Shades of this customary law and kaitiakitanga in practice can be discerned from the evidence of Hiko Hohepa who Maxwell records as follows:

> Ae he tika tonu tena korero, he tapu nga waiariki nei ki a matau, Koira pea tetahi, kaua te tangata e mau kakahu ka kuhu atu ana ki roto i te wai. Kaua e horoi kakahu i roto i te wai. Kaua e tukuna nga tamaraki kia haututu haere i runga i te wai. Koira katoa nga mea tapu o nga waiariki … He pai noa iho te kai … Mehemea, he mate to te wahine, kaua e kuhu atu ki roto i te wai … Mai raano era tikanga … kia pai te noho i roto i nga waiariki, na te mea kare kau te tangata e mau kakahu ana … kia pai te noho.
>
> That[']s right, these waiariki are tapu. For instance people aren't allowed to wear clothes in the water. You don't wash clothes in the water. Children aren't allowed to muck about. All these are tapu things in the water. Although its alright to eat in them. Women who are menstruating must not bathe in the water. These customs are old, and handed down to us. Another is respect the nudity of other bathers.[162]

The evidence we have reviewed that considers how rangatiratanga was exercised, suggests that there were three layers of Maori rights and interests in relation to the geothermal resource - namely:

1. Over geothermal surface features, the geothermal fields and the TVZ that form part of the bundle of rights akin to those associted with land ownership;

2. Over the specific fields;

3. Over the subterranean resource being the underlying common heat and energy system known as the Taupo Volcanic Zone.

In relation to the first layer, the particular hapu or iwi associated with the land and geothermal surface features are the principal holders of rights of rangatiratanga exercising authority and control over access to the geothermal resource and they are the kaitiaki or stewards of them. Within this layer and by the operation of customary law, use rights were allocated, the complexity of which requires further research beyond the scope of this inquiry.[163]

In relation to the second layer of rights, they attach to the geothermal fields and again the particular hapu or iwi associated with the geothermal fields are the principal holders of rights of rangatiratanga exercising authority and control over access to the

[160] Boast, 'The Hot Lakes', A24, pp 58-59
[161] Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, p 90
[162] Maxwell, A17, pp 76-77
[163] Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, p 92

geothermal surface features and the geothermal fields and they are the kaitiaki or stewards of them. Within this layer and by the operation of customary law, use rights were allocated, the complexity of which requires further research beyond the scope of this inquiry.[164]

In relation to the third layer, they attach to the subterranean resource - underlying common heat and energy system of the TVZ. The latter is what all the iwi and hapu CNI share because they all depend on the presence of the TVZ to sustain their fields and geothermal surface features, the geothermal fields and the TVZ.

The rights and interests within these three distinct layers are not in conflict but are mutually compatible. We agree with Boast that at this level:

> It is possible, indeed likely, that the Ngatoro-i-Rangi narrative had not only the purpose of explaining the origin of the hot springs and other geothermal features: it also had a *political* purpose. The Ngatoro-i-Rangi account seems to be principally developed amongst Arawa and Tuwharetoa (although it seems to be well known to Ngati Awa as well). The story links the origin of geothermal energy not, of course, simply to any ancestor, but specifically to an Arawa-Tuwharetoa ancestor. The hot springs were a legacy to, and in the broadest sense the patrimony of, all iwi associated with the Arawa canoe: a kind of national property.[165]

This political aspect of the resource relates to their rangatiratanga and autonomy over it. Such an approach is consistent with the views of the Ngawha Geothermal Tribunal who found that the Ngawha Springs, being discovered by an important ancestor, are of immense value not only to the claimant hapu of Ngawha but to all of Ngapuhi.[166] The Ngawha Geothermal Tribunal referred to the unitary character of the geothermal resource (in the circumstances of that claim) and they noted that since the springs lay within the territory over which Ngapuhi had always exercised unchallenged rangatiratanga, it followed that the iwi would have considered that their rangatiratanga extended over the entire resource equally above and below the surface of the land and throughout the extent of its manifestation.[167]

We can see no difference between the way in which Maori conceptualised the geothermal resource and that in which they conceived a river system. Each has some unitary character to it. Equally, what Maori believed they possessed in terms of Maori customary law, in both cases, was a taonga – the river system or the geothermal system. CNI Maori believed they possessed the geothermal surface features and geothermal fields within their tribal domains. Collectively that authority and control extended over the the subterranean resource, the underlying common heat and energy system or flow (TVZ). While there were specific rights in relation to the use and control of particular fields or features, 'the common Māori conception, the common Māori reliance, and the common descent' mean that those Maori with a geothermal

[164] Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, pp 90-91Resources', A27, p 92
[165] Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, pp 90-91
[166] *Ngawha Geothermal Resource Report*, pp 21, 146
[167] *Ngawha Geothermal Resource Report*, pp 8, 21, 27, 147

interest were possessed of all geothermal surface features, the geothermal fields and the TVZ within the CNI.[168] In other words, every iwi and hapu with original interests through links with Ngatoroirangi have ancestral rights and associations in the taonga as a whole. How they were then allocated depended on the exercise of customary law, and different rules applied to protect the resources.

The Tribunal's findings

The evidence thus demonstrates that different iwi and hapu held different parts of the underlying common heat and energy system where it appeared in the geothermal fields and/or at surface level. Within each sphere of influence, just as with a river system, they exercised the different hapu and iwi of the CNI rangatiratanga and kaitiakitanga responsibilities.

In Chapter 17, we discussed how such overlapping iwi and hapu interests were negotiated in the context of the Mohaka River system between Ngati Tuwharetoa and Ngati Pahauwera. Both at the intra- and inter-iwi level, the Maori system of tenure recognised that rights of occupation and use were often divided among iwi, hapu, whanau and on occasion individuals. But the right of control and authority was solely reserved to the hapu or iwi who exercised rangatiratanga or autonomy.[169] The evidence from the CNI is that different whanau, hapu and iwi became acknowledged as the iwi or hapu with rangatiratanga or mana whenua over their geothermal surface features and the geothermal fields in their area, but collectively they possessed and exercised rangatiratanga over the subterranean resource (TVZ).

Therefore we find that at 1840 when the Treaty was signed the Crown guaranteed that in exchange for kawanatanga it would protect CNI Maori in the exercise of their tino rangatiratanga and authority at the regional level over the entire underlying common heat and energy system known as the Taupo Volcanic Zone. It also guaranteed to protect the autonomy and authority of the individual iwi and hapu residing at the district level in the exercise of their tino rangatiratanga over the specific geothermal resources and fields of that Zone.

Do CNI Maori describe geothermal resources, the geothermal fields and the TVZ as taonga?

We have discussed in Chapter 17 the nature of taonga, noting that the term has been summarised to mean anything highly prized. In addition, we noted that the Ngawha and the Te Arawa Geothermal Tribunals in 1993 found that geothermal resources may be taonga protected by the Treaty of Waitangi. Those Tribunals came to their respective views based on the manner in which Maori would have conceptualised the

[168] Taylor, generic closings, 3.3.67, para 622, p 183
[169] J Metge, *The Maoris of New Zealand* (London: Routledge and K Paul, 1967), p121

resource. We can see no divergence in the evidence before us to demonstrate that Maori in the CNI held any different understanding of the nature of taonga.

From our review above, clearly Maori believed that geothermal resources, the geothermal fields and the TVZ, their fields and the subterranean resource (TVZ) were important, highly prized and protected as taonga. Many of the witnesses before us confirmed their importance in the CNI by referring to them as taonga.[170] From the Taheke area we have the following statement in the evidence reflecting the unitary nature of the taonga:

> The people have always assumed ownership of the resource and acted accordingly. Ownership is based on occupation of the lands, their development and consequent productivity. Ken Eru, the chairman of the block maintains that the below surface resource belongs also to them. The water is used for bathing, the sulphur manifests itself on the surface but has its origins below and everything that grows has sustenance from below the surface.[171]

In terms of surface manifestations we have one of the most important statements of how that aspect of the taonga was perceived. Hiko Hohepa described the waiariki at Rotokawa as 'he taonga waiariki' in the following terms:

> … Te taonga he mea tino nui, i roto i te whakaaro o te tangata, he taonga tera. Kare kau ke he mea tua atu i te taonga, nga waiariki nei, na he taonga, he mea nui, i roto, he painga mo te tangata, nga waiariki nei ne, ko te painga ana oranga, he oranga mo te tinana i roto i nga waiariki, me ahua mate katoa, kei roto i nga waiariki nei na.
>
> A taonga is something great, within the thoughts of people, that[']s a taonga. There is nothing greater than a taonga, these hot pools are taonga, a great thing in our minds, because of their goodness is health, health for the body, for all sorts of complaints, health lies in these hot pools.[172]

The Tribunal's findings on geothermal resources, the geothermal fields and the TVZ as taonga

We find that geothermal surface features, the geothermal fields and the TVZ, their fields and the subterranean resource (TVZ) are taonga. To adopt the expression of Mr Hohepa they are something great, within the thoughts of the people. Charlotte Severne, a researcher and expert on the geothermal surface features, the geothermal fields and the TVZ of the Taupo region described the geothermal fields within the Ngati Tuwharetoa rohe as representing a number of taonga relating to Ngatoroirangi's legacy.[173] Witnesses for Te Takere o Nga Wai linked the tangata whenua to the geothermal taonga through whakapapa to Ruaumoko/Ruaimoko and Ngatoroirangi.[174] It is clear that the people of the CNI describe their geothermal surface features, the

[170] For example, G Rangi, Evidence for Ngati Tuwharetoa, 27 April 2005, Document E37, p 4
[171] Maxwell, A17, p 53
[172] Maxwell, A17, p 76
[173] C Severne, Evidence for Ngati Tuwharetoa, 15 April 2005, Document E7, p 3
[174] G Rameka, Evidence for Te Takere o Nga Wai, 9 March 2005, Document D28

geothermal fields and the TVZ both surface and subsurface and the underlying common heat and energy system as taonga.

Customary and spiritual significance

We received overwhelming evidence relating to the customary and spiritual significance by CNI iwi, hapu and whanau who used geothermal activity and see themselves as the custodians or kaitiaki of their geothermal surface features, the geothermal fields and the TVZ, their fields and the subterranean resource (TVZ). Geothermal activity was a source of considerable social cohesion for whānau, hapu and iwi. After 1840, geothermal activity also attracted travellers from afar who came seeking enjoyment or healing and thus provided local residents with important opportunities to exercise manaakitanga, initially for Maori but later for travellers from many other lands.

The evidence relating to customary and spiritual significance comes to us from two very different cultural perspectives. On the one hand there is the evidence of kaumātua and kuia of successive generations, who have told their stories to the Native Land Court, to researchers such as Paora Maxwell, Evelyn Stokes, Bruce Stirling, Kawharu et al, Richard Boast, and Jonathan Mane-Wheoki, or directly to the Tribunal.[175] On the other hand there are written accounts provided by scientists, tourists and residents, over a period of 150 years, from a variety of European perspectives. These have been presented to the Tribunal and interpreted for us by present day scholars: Boast and Stokes have, again, been particularly helpful and perceptive.[176] Stokes has recorded the use of pools as wahi tapu, some as burial places and others associated with particular chiefs or tohunga.

The customary uses of geothermal activity in areas which became important for tourism in the nineteenth and twentieth centuries have been reported in some detail in evidence to the Tribunal which considered the Te Arawa Representative Geothermal Resource Claims and reported in 1993.[177] Issues concerned with tourism and geothermal power generation have already been considered in part IV of this report.

Stokes pointed out that in general the favourite site for permanent Maori settlement was one within easy reach of forest, water in a river or lake, cultivable land and geothermal heat.[178]

We turn here to considering evidence about those geothermal surface features, the geothermal fields and the TVZ which are particularly rich and which were and are well used by CNI Maori. We begin with Tongariro in the south west and then move

[175] Maxwell, A17; Stokes, *Legacy of Ngatoroirangi*, A56; Stokes, 'Maori issues at Orakei Korako', A16; Stokes, 'Wairakei Geothermal Area', A20; and Boast, 'The Hot Lakes', A24; Boast, 'Maori Customary Use and Management of Geothermal Resources', A27
[176] See, especially, Stokes, *Legacy of Ngatoroirangi*, A56; and Boast, 'The Hot Lakes', A24
[177] *Te Arawa Representative Geothermal Resource Claims*
[178] Stokes, *Legacy of Ngatoroirangi* A56, p 49

progressively towards the north east to Whakaari. We have relied on physical descriptions of the different geothermal manifestations discussed below taken from the Environment Waikato and Environment Bay of Plenty websites merely to assist the reader to locate the resource and understand its modern day features. (Some of these manifestations have been modified since the 1800s.) We have identified who claims geothermal taonga where that is known; but none of our comments should be taken to exclude any other or more dominant interests that other hapu or iwi may have to the geothermal fields or springs we discuss below.

Tongariro - Ketetahi

Edward Jerningham Wakefield (son of Edward Gibbon Wakefield) travelled to Taupo in 1841, later describing his journey in *Adventure in New Zealand* (1845). He recorded that when his party reached Lake Rotoaira they stayed at the lakeside village of Tukituki. He described what Boast considers to be Ketetahi in the following terms:

> Half-way up the steep N.E. face of this mountain, a boiling spring juts out, which is considered by the natives a sovereign remedy for some diseases: they travel from all parts to benefit by its healing qualities; Watanui, the head chief of the Ngatirakawa tribe, is stated to have obtained here a wonderful cure.[179]

The mountain was obviously important to Ngati Tuwharetoa as the evidence above concerning the tapu placed on it by Te Heuheu demonstrates. Stokes records that in the Ngati Tuwharetoa perspective, the ariki family of Te Heuheu, the paramount chief, and the mountain Tongariro are inextricably linked.[180]

We can also see, from the evidence recording Wakefield's observations, that Ketetahi Springs were important for their curative properties. This is consistent with Merle Maata Ormsby's evidence when she told us about these Springs. They were widely known by Ngati Hikairo for their therapeutic and healing qualities.[181] We note that Maori have ownership of the small piece of remaining land within which the Ketetahi Springs are located.

Environment Waikato - According to Enviroment Waikato the Tongariro geothermal system also includes the Tongariro summit craters and the nearby Te Maari craters. The Tongariro geothermal system has: three to five acid geysers; hot springs and pools, steam and gas vents, fumeroles, mud pools, sulphur deposits and a hot stream.

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[179] Edward Jerningham Wakefield, *Adventure in New Zealand, From 1839 to 1844: With Some Account of the Beginning of the British Colonization of the Islands* (London: John Murray, 1845), as quoted by Boast, in 'The Hot Lakes', A24, p 44
[180] Stokes, *Legacy of Ngatoroirangi* A56, p 53
[181] J Barrett, Evidence for Ngati Hikairo, 22 April 2005, Document E10, p 7

Tokaanu - Waihi - Hipaua

This area on the southern shores of Lake Taupo was a favoured one for Maori settlement: soils were fertile; lake and river resources were close at hand and geothermal activity more than counterbalanced the rigours of cold winters. Te Rapa, on the shores of Lake Taupo, between modern Waihi and Tokaanu Township, was the home of the ariki Te Heuheu Mananui. Early Pakeha explorers like Bidwill, who visited in 1839, and Dieffenbach, who followed in 1841, were both favourably impressed with the resources and the village.[182] The famous artist George French Angas arrived in Te Rapa in October 1844 and famously depicted life there, including the use of geothermal surface features, the geothermal fields and the TVZ.[183] In 1846 Te Rapa, with Te Heuheu Mananui and perhaps as many as 60 other people, was buried in landslide debris from Hipaua, the geothermal slopes behind the village.[184]

[Map 20.5: Tokaanu District: The Maori Landscape. Source: Waitangi Tribunal 1995: Turangi Township Report p 131]

Waihi - Hipaua

At Waihi, given that Tuwharetoa was a direct descendant of Ngatoroirangi, the importance of his exploits cannot be overlooked as every aspect of life has some connection to his legacy. For example, the cliffs and the steam that rise above Waihi are known as Hipaua, the entranceway to the Goddess of Geothermal Fire. The whare tupuna at Waihi is actually named after her and holds the illustrious name Hine Tapeka.[185]

The southern shores of Lake Taupo are also marked by a multiplicity of smaller geothermal features, each one locally named and locally important to particular whanau and hapu. Maori settlement has concentrated at points on the lake shore where there is more geothermal activity. Paranapa Otimi explained the seasonal dynamic to the Tribunal:

> In the old days with the onset of winter the snowline would reach the lake and Tūwharetoa Hapu would come to live during the winter months because the geothermal resource Te Ahi Tamou could sustain hundreds of people. Houses were built to accommodate them some of which still stand today. Dried fish, preserved birds, pits of stored vegs, raised pigs poultry and even Hapu milking cows were shared communally during Te wa o te Hotoke (the cold season). Even up to the late 1940s and 1950s Waihi village would grow with hundreds of people living there during this time of the year. As spring would arrive people would move back to their Hapu areas around the lake resowing crops, planting Hapu gardens and fishing various areas of the lake.[186]

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[182] C Severne, 'The Tokaanu-Waihi Geothermal System', PhD thesis, University of Auckland, 1999, Document H16, p 11
[183] Stokes, *Legacy of Ngatoroirangi,* A56, pp 52, 58-60
[184] Stokes, *Legacy of Ngatoroirangi,* A56, pp 53, 61-63
[185] P Otimi, Further Evidence, Document E16(a)
[186] P Otimi, evidence, E16(a), para 15, pp3-4

Mr Otimi went on to name and describe thirteen geothermal sites in the immediate vicinity at Waihi.[187] We set these out in table form below.

Geothermal sites close to the lake shore at Waihi

Name of site	Role of the resource
Rotopotakataka	a spring for sacred rituals of food
Te Kiri o Pahau	healing spring for ailments and recovery from battle wounds
Te Korua	a hollow of water used for bathing only
Ngapuauaki	bursting boiling water, used for food and run-off for bathing
Waihi Te Korua	hot and cold spring for healing, medicinal and bathing purposes
Waihiparehopu	captured rising waters used as cooking and bathing spring
Te Rorohi	a bathing pool for relaxation before sleeping
Te Paraki	a cooking and bathing pool
Te Pakihi o Te Oinga	the bathing pool where Te Oinga beautified herself
Waihi Kahakaharoa	a trench of rising geothermal water used for bathing
Te Tuki	the beating waters used for bathing
Paraki Tuarua	Nanny Wiki's bath used to cook and bathe
Whakatara	a bathing place for high born, [and] our visitors

Waihi Kahakaharoa was a major congregating area where at least 30 people could bathe at one time and enjoy each other's company. Mr Otimi added that these sites are all in an area half a kilometre long and approximately 100m wide.

Environment Waikato - Today there remain several geysers, sinter deposits and other natural features. This system has several geysers, sinter deposits, hot springs and pools, steaming cliffs, fumaroles, steam vents and seepages.

Tokaanu

As we noted above, in 1859 Hochstetter visited and wrote that there were more than 500 puia still in the area.[188] We have previously noted in Part IV of this report that in the 1870s, the Government of the day was interested in the tourist potential of

[187] P Otimi, Further Evidence, Document E 16(a),para 17
[188] Hochstetter, *New Zealand: Its Physical Geography*, cited by Stokes, *Legacy of Ngatoroirangi*, A56, p 75

geothermal areas. The Hon W Fox visited Tokaanu as part of his larger research project, searching out possibilities. Tokaanu, with a group of "active and quiescent springs", caught his attention:

> The Native village which bears that name is erected in the midst of them, and they are used for the various purposes of bathing, cooking, and other domestic uses, by a population of two or three hundred…
>
> A fine clear creek of cold water, five or six yards wide, runs through the settlement, on both shores of which are many *puias* and *ngawhas,* some violently boiling and others of various degrees of heat and ebullition.[189]

Fox reported to the Premier; his report was printed and tourism was promoted by Pākehā entrepreneurs, George Blake in the 1880s and William Strew in the 1890s. Each provided accommodation for adventurous tourists crossing from Lake Taupo to the Whanganui River. *Willis's Guide Book* in 1894 described Tokaanu as an outpost on the new tourist route and highlighted the geothermal wonders: geyser, puia, ngawha and mud volcanoes were the chief local attractions:

> Te Korokoro a te Poinga (The Throat of Te Poinga) …is a caldron of constantly boiling water of about ten ft. in diameter at top. The sides, which are formed of pink sinter, are undermined …. The boiling water is always rolling in and out of the cavity. At intervals of about a minute, the water bursts up in a great dome the whole width of the caldron, from three to five ft. high ….[190]

The use and enjoyment of the geothermal surface features, the geothermal fields and the TVZ in Tokaanu here has remained an important feature of Maori life since traditional times. Merle Ormsby and Dulcie Gardiner, in evidence to the Tribunal, describe some of the customary uses which continued through until the 1930s and 1940s. Mrs Ormsby shares some of her memories of growing up in Tokaanu: Hinekapa, she recollects, was a pool used by men and women to warm up after catching morihana (carp) in the river, and Te Mimi o Taara was a pool where she used to bathe and wash her hair:

> This pool was unique because the minerals in it were different. Whatever the minerals were in this pool, it would cause our hair to come out beautiful and shiny as if we had used shampoo.[191]

Mrs Ormsby told the Tribunal that they were still using Te Mimi o Taara up until 1979 but added that 'as the lake levels were raised the surrounding area became wet and soggy, making access difficult'.[192] Other pools were used for domestic cooking and for hui and others again were used for hot baths whenever people had any sort of

[189] Letter from the Hon W Fox to the Hon the Premier, 'Hot Springs District of the North Island', 1 August 1874, AJHR, 1874, H-26, p 1
[190] G F Allen, *Willis's Guide Book for New Routes for Tourists* (Whanganui: A D Wills, 1894), pp 117-118, as quoted in Stokes, *Legacy of Ngatoroirangi*, A56, p 73
[191] M Ormsby, evidence, I10, para 12.6, p 14
[192] M Ormsby, evidence, I10, para 12.6, p 14

aches and pains. 'The hot pools were a way of life for us', says Mrs Orsmby, 'All the hapu benefited from the geothermal resources, the geothermal fields and the TVZ'.[193]

Mrs Gardiner gave similar evidence and added that each family had its own thermal pool. She used the example of her Koro to describe the relationship between geothermal activity and gardening:

> Koro Kuru had his māra over where the Ministry of Works have now put their power development. That area is called Matahina. He used to come over here to tend to his māra which was his pride and joy …. Koro Kuru had special māra because of the geothermal activity underneath and he was able to grow corn, kumara, kamokamo and melon. He also had raupo houses, one to store his vegetables and the other for him to stay in if he had to stay overnight because he had not completed all the mahi. He also had his own thermal pool there …. Koro Kuru's māra, raupo whare and puia are now completely lost because of the canal.[194]

> My whānau was very reliant on māra kai. We grew our own pumpkins and potatoes and if we got a warm spot in Tokaanu we would grow kumara. We didn't buy potatoes, kumara, pumpkins, onions and corn. We grew them. It was a joint whanau mahi. It was extremely important that we had an annual māra. Each year the whānau would get together, my mother and her adopted siblings…and they would decide which family plot the māra would be grown for that year.[195]

It is clear, from the evidence provided by Mrs Gardiner and Mrs Ormsby that the geothermal heat and energy in the pools and in the soil sustained a way of life and supported high quality garden cultivation in an environment that would otherwise have been far from hospitable.

Horomatangi

We have previously reviewed the story of Horomatangi and his role in the Ngatoroirangi stories above. At Hirangi, we were told about Horomatangi by Mr Winitana and Mr Maniapoto. Horomatangi was the god or taniwha associated with Ngatoroirangi.

Map 20.6: Taupo Moana and Horomatangi reef. Source: Stokes, 2000 figure 6, page 40.

He is also associated with the reef and whirl-pool that, Mr Maniapoto told us, links Ngati Tuwharetoa through the geothermal subterranean passage back to Hawaiki. There is an early account of this field. Hochstetter was told about it when he visited in 1859:

> Horomatangi is said to be an old man and as red as fire. Thus the natives assert to have seen him. He lives in a cave on the island Motutaiko in the lake. There he watches the passing canoes, dashing forth from his lurking-place as soon as he espies one. He churns up the water

[193] M Ormsby, evidence, I10, paras 12.8-12.10, p 15
[194] D Gardiner, Evidence for Ngati Tuwharetoa, 22 April 2005, Document E25, para 14
[195] D Gardiner, evidence, E25, para 15

> in mad surges bubbling up like the big spout Pirori near Tokanu; together with the water he throws up large stones, which falling upon the passing canoes upset them. He devours whatever comes within his reach; carrying on his work of treachery and destruction both in fine and bad weather. The natives point out a place, situated almost in the centre of the lake between the island Motutaiko and Te Karaka Point, as chiefly dangerous, avoiding even in the finest weather to venture here too close to the heart of the evil spirit. Even when the general surface of the lake appears smooth, the water on this spot is in boiling commotion; in stormy weather it appears as one large patch of foam. The canoes passing over it are said to be turned from their course. These phenomena being real matters of fact, the observer might be tempted to suppose the existence of a spouting submarine spring at that place, or even of submarine volcanic eruptions.[196]
>
> Horomatangi has moreover special relatives, the Kaukapapas, distinguished by peculiar attributes, and on that account held in great esteem. To Toko of Oruanui, a village north of Lake Taupo, is said to be such a Kaukapapa, often disappearing suddenly, reappearing at Lake Rotorua, and returning with equal suddenness. In like manner Te Ihu at Tapuaiharuru is reported as being able to live with Horomatangi under water in the cave on the Island Motutaiko … Such and a great many similar stories are in vogue about the lake.[197]

Only recently, Stokes notes, active fumaroles have been identified and photographed on the bed of Lake Taupo in the vicinity of Horomatangi Reef, which is thought to be the main vent for the great Taupo eruption about 200 AD.

Environment Waikato - According to Environment Waikato, Horomatangi's Reef is a pristine geothermal system on the bed of Lake Taupo. The Horomatangi Reef overlies an underwater geothermal system on the bed of Lake Taupo, with two distinct hydrothermal vent areas producing hot water and gases. Hydrothermal chimneys up to 30cm tall have been built up by thermophilic micro-organisms. This field was recently discovered according to Environment Waikato.

Tauhara - Wairākei

Tauhara-Wairākei is one of the largest and most spectacular geothermal fields in the Taupo Volcanic Zone.[198] The geothermal manifestations are all part of one field.[199] The area covers Wairakei Valley, Waiora Valley, Waipuwerawera Valley, Tauhara North, Tauhara South, Onekeneke Valley. [200] There were springs within the Onekeneke Valley and the small Waipahihi stream that runs from the springs to the lake. We note that heading east on the Napier Taupo Road is Tarawera Springs, a

[196] Hochstetter, *New Zealand,* 1867, p 331, as quoted in Stokes, *The Legacy of Ngatoroirangi*, A56, p 67
[197] Hochstetter, *New Zealand,* 1867, pp 381-2, as quoted in Stokes, The Legacy of Ngatoroirangi, A56, p 68
[198] G W Grindley, *The Geology, Structure, and Exploitation of the Wairakei Geothermal Field, Taupo New Zealand* (Wellington: Department of Scientific and Industrial Research, 1965); M P Cave, J T Lumb, and L Clelland, *Geothermal Resources of New Zealand*, Resource Information Report 8, Wellington, Energy and Resources Division, Ministry of Commerce, 1993; Cox and Hayward, *Restless Country*, p 40
[199] C Severne, evidence, E7, p3
[200] C Severne, evidence, E7, p3

taonga for Ngati Hineuru and a highly valued resource to both Ngati Tuwharetoa and Ngati Kahungunu.[201]

In the vicinity of the current Taupo township, kainga were associated with geothermal activity in this area.[202] Stokes notes that the principal centres of Maori settlement were at Waipahihi (where there were hot springs); at Nukuhau and Tapuaeharuru (the outlet of the Waikato River), and on the riverbank at Patuiwi and Otumuheke (also a geothermal area).[203]

[Map 20.7: Wairakei – Tauhara Geothermal Areas. Source: Stokes, 2000 figure 19, page 130]

[Map 20.8: Wairakei-Tauhara Place Names. Source: Stokes, 2000 figure 20, page 131]

Tauhara Maunga

Tauhara Mountain above Taupo township has a number of geothermal surface features. Mrs Rameka told us that her people lived on the mountain but eventually moved to the lower valley to be closer to the surface geothermal features of this area.[204] This accords with the account of George Cooper who accompanied Governor Grey in the summer of 1850-1851. He reported that the land base around Tauhara was 'covered nearly to the top with patches of cultivations, cleared from amidst the timber with which the mountain is clothed.'[205]

The story of Ngatoroirangi pervades the landscape of Tauhara. A waiariki called Taharepa was named after him to honour his descent from Mount Tauhara on his way south to Tongariro. At the lake edge, near Waipahihi Village, Ngatoroirangi built a Tuaahu (altar) on the water's edge, calling it Taharepa. Taha means 'the side or margin' and repa means 'flax cloak - garment.' It was here he scattered threads, performing the religious rites necessary to create inanga or kokopu. Taharepa hot spring was named after this event.[206]

According to the claimants, Taharepa should have been included within the Waipahihi reserve. The full name for this area is Waipahihi a Tia (the squelching water of Tia) named while Tia moved south-east after his arrival at Lake Taupo in order to avoid

[201] Stokes, *Legacy of Ngatoroirangi*, A56, pp 149-151
[202] Stokes, *Legacy of Ngatoroirangi*, A56, p 129
[203] Stokes, *Legacy of Ngatoroirangi,* A56, p 73
[204] J Rameka, Evidence for Waipahihi Marae, Ngati Hineure, Ngati Te Urunga, Ngati Hineuru, Ngati Tutemohuta, Ngati Rauhoto of the Hikuwai Confederation of Ngati Tuwharetoa, February 2005, Document D25, pp2-3
[205] George Sissons Cooper, *Journal of an Expedition Overland from Auckland to Taranaki by way of Rotorua, Taupo, and the West Coast: Undertaken in the Summer of 1849-50 by His Excellency the Governor-in-Chief of New Zealand* (Auckland: Williamson & Wilson, 1851; Christchurch: Kiwi Publishers, 1999), p 254 as cited in B Stirling, 'Taupo-Kaingaroa Nineteenth Century Overview Project', Document A71, vol 1, p 426
[206] Taharepa Hot Spring – Report for the Tauhara RMA Committee

Ngatoroirangi.[207] Near Taharepa water squelched up from under his feet, hence the name.[208] Waipahihi was reserved from the purchase of the Tauhara Middle block.

Another aspect of the Ngatoroirangi story can be found in the name of the dining room at Waipahihi Marae. It is named Kuiwai, after one of the sisters who brought geothermal fire to Aotearoa.[209]

Stokes notes that by 1874 Hon. W Fox travelling in the area described the small Waipahihi stream as 'a warm stream a yard or two wide crosses the road and meanders to into the lake'.[210] He also noted that if followed inland on the 'Maori track a narrow gorge is reached, in which the small stream expands into two 'considerable pools' [Onekeneke] varying in depth from a few inches to several feet.[211]

Jocelyn Rameka and Mataara Wall are among those who provided evidence from Waipahihi. Mrs Rameka explained the use of springs: one hot spring was used for cooking, the cold spring for drinking water and the third spring for bathing.[212] The Waipahihi geothermal stream was once the major supplier of hot water for Waipahihi and it was used for bathing, washing, and cooking. The hot water was once hot enough to be harnessed for washing dishes and pots in the marae kitchen. Mataara Wall explains that use:

> Ngawha were such an important resource for our people and many of our ancestors created permanent settlements close to ngawha because of the obvious benefits of cooking and bathing. We continue to use some of the water from these streams today ....[213]

Wairakei

In relation to Wairakei, (Te Huka and Karapiti),[214] Geoffrey Rameka gave evidence to the Tribunal which underscored the importance of this area in spiritual as well as practical terms. Ruaimoko/Ruaumoko, the youngest child of Ranginui and Papatuanuku, had a hand in its creation.[215] It was one of the staging places where Kuiwai and Haungaroa surfaced to maintain direction as they brought life-giving fire from Hawaiki to Ngatoroirangi on Tongariro maunga.[216] As we noted above in some stories, it is where Horomatangi blew with such force that he created the Karapiti Blowhole.[217]

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[207] Grace J as cited by Stokes in *The Legacy of Ngatoroirangi,* p 31
[208] Grace J as cited by Stokes in *The Legacy of Ngatoroirangi,* p 31
[209] J Rameka, evidence, D25, para 5, p 2
[210] Stokes, *Legacy of Ngatoroirangi,* A56, p 149
[211] Stokes, *Legacy of Ngatoroirangi,* A56, p 149
[212] J Rameka, evidence, D25, para 6, pp 2-3
[213] M Wall, evidence, D1, para 95, p24
[214] Stokes, 'Wairakei Geothermal Area', A20, p 27
[215] G Rameka, evidence, D28, para 12, pp8-9
[216] G Rameka, evidence, D28, para 15, p 9
[217] Stokes, *Legacy of Ngatoroirangi*, A56, p 132

These legends, Mr Rameka emphasised, are crucial pieces of tribal history and form 'the basis of who we are and what we are all about'.[218] For the tangata whenua the geothermal surface features and the field of Wairākei are an integral part of their identity. They claim that through their whakapapa the people are very closely related to the geothermal surface features, the geothermal fields and the TVZ at Wairakei. And they value them as taonga which they respect and revere.[219] Mr Rameka went on to tell the Tribunal that these were geothermal resources regularly used by his ancestors and he added that, generally, they were 'welcoming and accommodating of others who wished to partake of the wonders and therapeutic properties of a number of streams'.[220]

Professor Evelyn Stokes carried out a comprehensive study of the evidence relating to customary uses of Wairākei geothermal area, drawing on accounts by Pākehā visitors and the records of evidence in the Native Land Court records.[221] As she notes, Maori customary use of this area is explored in the Native Land Court which met in April 1868 dealing with the Oruanui Block, and in March 1872, August 1877 and 1881-1882 dealing with the Wairakei Block.[222] Stokes notes the presence of Ngati Tuwharetoa interests in the area when she adds:

> The geothermal resources of Wairakei were used by several tribes of northern Tuwharetoa. There was little permanent settlement on the Wairakei Block in the nineteenth century. People came from the large settlements around Taupo lakeshore and Waikato riverbank above Huka Falls, and bush margins at Oruanui. They lived in temporary encampments at Wairakei while they processed kokowai (red ochre), dug for fern root and fished for kokopu…[223]

Given the nature of the customary evidence led before the Native Land Court it would also be fair to say that people with whakapapa from Ngati Maniapoto, Ngati Raukawa and Te Arawa were also claiming interests. That evidence from the Minute Books was summarised by Stokes in the following way:

> In summary, the resources of Wairakei which were most highly valued were kokowai and the therapeutic and healing properties of the hot pools, in particular Matarakukia and Te Kiriohinekai. Most of the hot pools, geysers and fumaroles had Maori names, often associated with ancestors, and were wāhi tapu.[224]

Charlotte Severne noted that:

> … Kokowai (red ochre), a valued mineral that is a by-product of geothermal activity, was processed at Wairakei and traded extensively throughout the motu. Kokowai was dug up and processed at Okurawai (Taupo Minute Book 01 pg 65) and along Kiriohinekai Stream and its

[218] G Rameka, evidence, D28, para 16, p 9
[219] G Rameka, evidence, D28, para 17, p 10
[220] G Rameka, evidence, D28, para 20, p 11
[221] E Stokes, *Wairakei Geothermal Area: Some Historical Perspectives* (Hamilton: University of Waikato, 1991), and available to the Tribunal as Stokes, 'Wairakei Geothermal Area', A20
[222] Stokes, 'Wairakei Geothermal Area', A20, pp 12-15, 26-55
[223] Stokes, 'Wairakei Geothermal Area', A20, p 15
[224] Stokes, 'Wairakei Geothermal Area', A20, p 19

> source the Piroriori Spring in the Wairakei Block (Erueti Tarakainga Taupo Minute Book 1 pg 226-240). Kokowai was a valuable commodity used in the ceremonial exchanges and cemented tribal relationships (Stokes 1991).[225]

Kokowai or red ochre was used as a source of red colouring for painting and dye work.[226] Wairakei was thus an important geothermal field for Taupo Maori, and Geoffrey Rameka reflected:

> Consider if you will, Wairakei being the centre of your universe. For my tipuna, this was often the case, for it contained:
>
> a) a fully equipped and insulated home surrounded by gullies and hills;
>
> b) a kitchen containing a variety of heated cooking pools and pits;
>
> c) a laundry containing water of varying temperatures;
>
> d) a bathroom with a variety of pools and streams to suit individual needs;
>
> e) a health clinic comprising a variety of rongoa in the form of pools, streams and vegetation, where old bones were regenerated and young ones repaired; and
>
> f) a factory where kokowai was processed and used for trade with other tribes.[227]

Environment Waikato - Environment Waikato describe this field as marked by hot springs and pools, fumaroles, steaming ground, mud pools, craters, hot seepages, and a rare mud geyser and sinter terraces. It also covers Waiora Valley. The Craters of the Moon (Karapiti) geothermal area is part of this geothermal field.

Mangakino

The use of springs at Mangakino did not feature at all in the evidence before us. That evidence may feature further in the King Country Inquiry.

Environment Waikato - Mangakino has no natural surface features remaining. After the creation of Lake Maraetai, the hot springs are now underwater (including one that produced sinter).

Mokai

Mokai is approximately 25 km north-west of Taupo. The Mokai geothermal field sits firmly within the Ngatoroirangi tradition: kuia interviewed by Stokes in the course of

[225] C Severne, evidence, E7, p 4
[226] Stokes, *Legacy of Ngatoroirangi*, A56 p 136
[227] G Rameka, evidence, D28, para 19, p10

her research described the hot springs as children of Kuiwai and Haungaroa, sisters of Ngatoroirangi.[228]

[Map 20.9: Maori Settlement on Pouakani Block. Source: Mokai: Pouakani Report, Waitangi Trribunal (1993) Map 3.2, page 39]

Stokes discussed the Mokai area as attractive for settlement due to its proximity to the areas of bush around Titiraupenga.[229] The same point was made by the Pouakani Tribunal after reviewing the Native Land Court records:

> With its proximity to forests, swamps, cultivable land and geothermal resources, clearly the Mokai area was an attractive place in the relatively harsh climate and sterile pumice country north and west of Lake Taupo. The other significant group of settlements were those strung out along the bush margins of Titiraupenga.[230]

Compared to Wairākei or Rotorua, the Mokai field is less spectacular at surface level.[231] Located out of sight of the Waikato River or Lake Taupo, it received much less attention from European travellers. Ensign Best and Ernst Dieffenbach were there, however, in April 1841: Dieffenbach recorded four larger and three smaller "tufas", warm ground used for cooking food, and a complete volcanic range of miniature hills".[232] They recorded that they visited the puia Ohineariki and the Tuhuatahi group of springs.[233] There were also the Parakiri springs in this area.

A succinct entry in the Waikato Minute Books of the Native Land Court clarifies the importance of the geothermal resources at Mokai: "All bathe", said Hitiri Te Paerata, "but I am the owner".[234] According to Stokes, he was 'emphatic that the hot springs were just as much part of the resources and living space of the people as the forest and cultivations.'[235] Werohia Te Hiko responded, claiming the springs for Ngati Wairangi. It seems the parties negotiated an agreement over Ohineariki and Parakiri, with Te Heuheu reporting as much to the Native Land Court.[236] All three hot springs remain in Maori ownership.[237]

The dependency on geothermal surface features, the geothermal fields and the TVZ of this field continued into the twentieth century. We were told that the tangata whenua at Mokai exercised ownership and their whanaunga from Raukawa, Tūwharetoa and

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[228] Stokes, *Legacy of Ngatoroirangi*, A56, p 89
[229] Stokes, *Legacy of Ngatoroirangi*, A56, p 79
[230] *Pouakani Report*, p 43
[231] R W Henly, J W Hedenquist, and P J Roberts, *Guide to the Active Epithermal (Geothermal) and Precious Metal Deposits of New Zealand* (Berlin: Gebruder Borntraeger, 1986), see especially chapter 9 by Henly, 'Mokai Geothermal Field'
[232] Cited by Stokes, *Legacy of Ngatoroirangi*, A56, section 5.3, p89. Tufas is the transliteration, and the plural, which Dieffenbach used for ngawha or hot springs.
[233] Stokes, *Legacy of Ngatoroirangi*, A56, pp 89-90
[234] Waikato Native Land Court Minute Book 27, fol 145, cited by Stokes, *Legacy of Ngatoroirangi*, A56, p 92
[235] Stokes, *Legacy of Ngatoroirangi*, A56, p 92
[236] Stokes, *Legacy of Ngatoroirangi*, A56, p 92
[237] Stokes, *Legacy of Ngatoroirangi*, A56, p 93

Tainui visited and enjoyed the hot pools.[238] Mr Huirama William Te Hiko (kaumatua of Ngati Raukawa) told us about life at Mokai as he was growing up. It was then a kainga with wharenui.[239] He remembered the hot baths being used for bathing and as rongoa (for health) purposes by the 'old people' when he was young. The baths were called Hineariki.[240] He also remembers the stern warnings he received about the dangers of the geyser area and after noting his view that the Crown wanted the geysers because of the money that can be made, he stated '…if you have mana over the geysers, you have mana over the money.'[241]

There are at least two blocks of land still held in Maori ownership at Mokai, Tuaropaki and Waipapa. Mr Te Hiko gave us some history of these blocks and their development by the Department of Maori Affairs.[242] He then explained that the Tuaropaki block is now administed as Maori land by an ahu whenua trust. It seems that the seclusion and a lack of spectacular scenery seems to have saved Mokai from the attentions of entrepreneurs or government officials for many years. The land has generally remained in Maori ownership.

Environment Waikato - Today, hot springs, mud pools, steaming ground, seepages form part of this field. There are present, sinter-depositing chloride springs and a rare mud geyser. It is noted that the Tuaropaki Trust owns part of the land overlying the Mokai geothermal system.

Rotokawa

[Map 20.10: Ngati Tahu Place Names. Source: Stokes, 2000 figure 20, page 80]

Leaving Tauhara and heading towards Rotorua, Lake Rotokawa (Bitter Lake) is a 'particularly important resource, both for its geothermal activity and the bird life'.[243]. The main area of surface geothermal activity is on the northern shore of the lake.[244] The cave, Rua Hoata, famous for its red ochre rock drawings, was located here.[245] It was destroyed when a large section of the riverbank collapsed in 1987. Early pakeha visitors to the area recorded numerous geothermal features here, including sulphur deposits, hydrothermal eruption craters, acid lake, surface alteration, sinter deposits, warm and steaming ground, mud pools and hot and warm springs.[246]

[238] See for example Huirama Te Hiko, Evidence for Ngati Raukawa, 28 February 2005, Document D10; Brian Hanaura Jones from Tuwharetoa in Doc E46. The relationships are complex, some of those who came from further afield may also have held ownership rights.
[239] H Te Hiko, D10, pp 5-8, 28-30
[240] H Te Hiko, D10, p 36
[241] H Te Hiko, D10, pp 36-37
[242] H Te Hiko, D10, pp 34-36
[243] Stokes, *Legacy of Ngatoroirangi*, A56, p 119
[244] Stokes, *Legacy of Ngatoroirangi*, A56, p 124
[245] Stokes, *Legacy of Ngatoroirangi*, A56, p 127
[246] Stokes, *Legacy of Ngatoroirangi*, A56, p 125

The importance of the geothermal resources, at Lake Rotokawa was well traversed in the evidence before the Native Land Court. After analysing the evidence before the Court, Stokes notes the extensive use of the resources here and the large number of kainga in this vicinity.[247] Boast quotes this example, from the evidence given by Hera Peka who stated:

> I went first [to Lake Rotokawa] from Ohake [Ohaaki] … We went there to burn kokowai and take ducks at Rotokawa. We stayed at Te Takapou and from there we went to Te Ripo a kainga where kokowai was prepared. We came by canoe, from Ohake. When we got to Te Ripo, Parekawa and Peahama stayed there burning kokowai. The kokowai was got at Te Kupenga. We left there and came on to Ngawapurua, then the canoe was dragged overland [ie from the Waikato River] to Rotokawa, and in the morning the lake was worked. It was always worked in the early morning. Having finished working the lake we went on to Ngawapurua to make huahua, Whilst there we lived on Putere (fern root). Te Pou was the putere ground there. Te Whakatuapiki was the ngawha (hot spring) in which the putere was cooked – it is close to ngawapurua – from there we came to Takapou and on to Ohake and from thence after some time to Hapua in the Tutukau Block – it is a large kainga.[248]

Customary uses included cooking, gathering kokowai, ritual bathing of warriors, and health and medicinal purposes.[249] Poihipi te Kume under cross-examination claimed that 'all the land is ngawha. A ngawha is water too hot to stand in. A waiariki is water hot enough to allow it to be used for bathing. A ngawha is a natural formation. Waiariki are generally formed baths – artificially.'[250] When asked whether there were ngawha or waiariki away from [Lake Rotokawa] he said 'Yes, on the hill side among the manuka. On the Parariki stream there are ngawha – no waiariki.'[251] He was then asked 'My witness says this waiariki is between Otawarauhuru and Te Rua Hoata on the banks of the Waikato – do you know this?' and his answer was 'I have never been along the banks of the Waikato so could not see it.'[252] Hare Matenga referred to the Parariki stream (between Tauhara North and Kaingaroa No 2 blocks), noting kainga (villages) and whare (houses) along the banks. He spoke of the ngawha and waiariki that had been used since ancient times in this vicinity. He also spoke of another waiariki on Kaingaroa No 2 being 'a made one' and he concluded … That was why the kainga was occupied because of these waiariki and the cultivations mentioned.[253] These descriptions accord with the area of Rotokawa as it is known today within the

[247] Stokes, *Legacy of Ngatoroirangi*, A56, pp 119-129
[248] Taupo Native Land Court Minute Book 10, as cited in Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, pp 57-58
[249] Stokes, *Legacy of Ngatoroirangi*, A56, p 127
[250] Taupo Native Land Court Minute Book 10, fol 203, as cited in Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, p 58
[251] Taupo Native Land Court Minute Book 10, fol 203, as cited in in Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, p 58
[252] Taupo Native Land Court Minute Book 10, fol 203, as cited in in Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, p 59
[253] Taupo Native Land Court Minute Book 10, fol 244-245, as cited in in Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, p 59

Tauhara North 1 Block and Kaingaroa No 2 – Te Kupenga, opposite Te Toke.[254] This block has recently been repurchased by customary owners.[255]

Stokes notes that along this stretch of the Waikato River there is much geothermal activity.

> Some hot springs well up from the bed of the Waikato and can be detected by bubbles of gas and moving pumice fragments. These are associated with rua taniwha, homes of taniwha, protective beings, who can be found in most rivers. The taniwha of Te Ohaaki, for example, has his home in a cave, now flooded by Lake Ohakuri, beside the marae. He travels to the ngawha, Ohaaki Pool, and on occasion joins other taniwha of Taupo Moana, … Several rua taniwha are associated with the rhyolite outcrop and Waikato river bed, up-stream of Nihoroa. One was associated with an ancestor who was drowned there and became a taniwha.[256]

Environment Waikato – The Maori land owners of the Tauhara North No 1 with the Department of Conservation are caring for the geothermal lake, the geothermal Parariki Stream, and the hot springs by the Waikato River. There are springs in this system along the Waikato River which are affected by river level fluctuations from hydro-electric generation.

Ōrākei Kōrako

Ōrākei Kōrako (Place of Adorning) is located in a scenic valley on the Waikato River, between Mihinui and Atiamuri. Here there were geothermal features on both sides of the river; and the surface features included geysers as well as hot springs.[257] Ōrākei Kōrako was an important site for early Maori settlement. Ōrākei Kōrako has a long history of Maori use with documented sites of habitation scattered throughout the area. For example, in the Fletcher and Galvin study conducted in 2002, the authors were able to identify over 80 features and sites of cultural significance, including numerous pa, kainga, cultivations, bird and rat snaring places, as well as important caves and urupa.[258]

In the early years of European contact, Ōrākei Kōrako was established as a regular stopping place for travellers moving between Rotorua and Taupo. The route from Rotorua followed the Paeroa Range to Te Kopia, before crossing the Waikato River at Ōrākei Kōrako.[259] Ngati Tahu ran a ferry operation at this point.[260] A number of European travellers visited in the nineteenth century and left a published or manuscript record. Among them were Taylor, Bidwill, Best and Dieffenbach in the

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[254] Stokes, *Legacy of Ngatoroirangi*, A56, p 95
[255] P Clarke, Evidence for Ngati Hineure, Ngati Te Urunga, Ngati Hineuru, Ngati Tutemohuta, Ngati Rauhoto of the Hikuwai Confederation of Ngati Tuwharetoa, 28 February 2005, Document D13, p20
[256] Stokes, *Legacy of Ngatoroirangi*, A56, p 127
[257] Stokes, 'Maori issues at Orakei Korako', A16, pp 1-10; Stokes, *Legacy of Ngatoroirangi*, A56, section 6.1, p 98
[258] P McBurney, 'Scenery Preservation & Public Works Takings (Taupo-Rotorua) c. 1880s-1980', revised version, Document A82, p 374, as cited therein
[259] McBurney, 'Scenery Preservation & Public Works Takings', A82, p 375
[260] Stokes, *Legacy of Ngatoroirangi*, A56, p 105

1840s; Hochstetter in 1859; and Tinne and Kerry-Nicholls in the 1860s and 1870s. William Fox reported to the Premier and to Parliament in 1874, on the results of his survey of the Hot Springs Districts of the North Island, writing:

> It presents one of the most remarkable groups of hot springs and fumaroles in the lake country or anywhere in the world, and is capable of varied adaptation to sanitary purposes … The principal open waiariki, or bath, is a very remarkable one. It lies immediately beneath a Native village which crests the high bank on top of extensive old fortifications.[261]

Hochstetter also described the visual impact of the geothermal resources and the Maori village within the geothermal area in vivid prose, counted 76 points where geothermal activity was evident, and drew a sketch map which was (in his words) 'but a faint illustration of the grandeur and peculiarity of the natural scenery at Ōrākeikōrako'.[262] Taylor's prose is more subdued but he is especially helpful for us when he describes the papakainga and the manner in which customary uses are embedded in the geothermal landscape:

> At Ōrākeikōrako, on the Waikato, the boiling springs are almost innumerable; some of them shoot up a volume of water to a considerable height, and are little, if at all, inferior to the Geysers of Iceland. A village is placed in the midst of them; the reason assigned for living in such a singular locality was, that as there is no necessity for fires, all their cooking being done in the hot springs, the women's backs are not broken with carrying fuel, and further, from the warmth of the ground they were enabled to raise their crops several weeks earlier than their neighbours; but as a counterbalance for these advantages, many fatal accidents occur from persons, especially strangers and children, falling into these fearful caldrons …263

The settlement was at one stage huge but two events in the late 1890s impacted on the community forcing people to leave. The first was a major eruption of the Rahurahu geyser (known to Europeans as 'The Terrific'). Evidently the explosion of the geyser was of such force and its 'volume sound and force were so appalling that the Natives fled the place.'[264] The second was the re-routing of the main road to Taupo.[265] Urbanisation also had its impact later. Ngati Tahu moved and left only a small number of people to act as kaitiaki for Ōrākei Kōrako.

Kahurangi Te Hiko, in her evidence to the Tribunal, remembered Ōrākei Kōrako as it was when she grew up there in the 1920s, living in the house of her koro and kuia. She told the Tribunal about their large gardens where they grew riwai, kumara and other vegetables. Mrs Te Hiko remembered her mother, Herapeka, and her kuia, Hae Hae, using the hot pools to cook, to clean and to bath in. Hot pools were also used for

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[261] Stokes, 'Maori issues at Orakei Korako', A16, p4; Fox, AJHR, 1974, H-26, p3
[262] Hochstetter, *New Zealand: Its Physical Geography*, pp 395-396
[263] R Taylor, *Te Ika a Maui or New Zealand and its Inhabitants: Illustrating the Origin, Manners, Customs, Mythology, Religion, Rites, Songs, Proverbs, Fables, and Language of the Natives; Together with the Geology, Natural History, Productions, and Climate of the Country, its State as Regards Christianity, Sketches of the Principal Chiefs, and their Present Position* (London: Wertheim McIntosh, 1855), pp 223-224
[264] Stokes, 'Maori issues at Orakei Korako', A16, p 8
[265] McBurney, 'Scenery Preservation & Public Works Takings', A82, p 375

health purposes. 'The pools were a source of spiritual cleansing and would be used to ease any aching muscles and bones', she added.[266]

The image provided for us, by Pākehā visitors and by Mrs Te Hiko, is that of a Maori way of life integrating the resources of river, soil, hot pools and geothermal heat. We are also aware, from these same sources, that the resources and the hospitality of whanau were shared with tourists and visitors on a communal basis. Between the 1870s and the 1930s, travellers and tourists were provided with simple accommodation, good food, the enjoyment of hot pools and interpretation of the geothermal landscape, all at modest cost.[267]

Environment Waikato - In 1961, Lake Ohakuri was formed for hydro power generation. This raised the Waikato River level by 18m at Orakeikorako, flooding approximately 200 alkaline hot springs and 70 geysers. That part of Orakeikorako that has survived this event is managed for the Maori land owners as a tourist attraction. The system is now protected from further development. Thirty five active geysers and around 100 hot springs remain, plus mud pools and sinter deposits.

Ōhaaki - Broadlands

This geothermal area, known to Maori as Te Ōhaaki o Ngatoroirangi (the Legacy or Bequest of Ngatoroirangi) underlies the Waikato River in the Reporoa basin. Its geothermal features were described by travellers, including Taylor in 1845, but generally; given their remoteness from lakes and mountains, they escaped the attention of tourist and health spa developers. Occupation had been seasonal but following the devastation of villages at Lake Tarawera in 1886 the population of Ōhaaki increased and became more permanent.[268] The customary evidence presented in the Native Land Court suggests that the Ōhaaki Broadlands area was a kainga and a place to come to during seasonal migrations, and that is how ahi kā was exercised here.[269] The applications were strongly contested but the nature of the customary use was clearly evident. The ngawha here were used for cooking and bathing and the steeping of mats. The customary occupation of the area was evidenced by place names and stories, and the identification of pools, cooking areas and urupā. [270]

The land block associated with Ohaaki is Tahorakuri. As Stokes noted, it comprised all the land from Aratiatia to a point about 5 kilometres upstream from Ōrākei Kōrako.[271] The title was first investigated by the Native Land Court in 1887 and the

[266] Kahurangi Te Hiko, , Evidence, 28 February 2005, D11, paras 20-25
[267] Stokes, 'Maori issues at Orakei Korako', A16, pp 4-12
[268] Stokes, *Legacy of Ngatoroirangi*, A56, p 112
[269] Stokes, *Legacy of Ngatoroirangi*, A56, p 112
[270] W Hall, Evidence for Ngati Tahu, 15 April 2005, Document G10, pp 106-108
[271] Stokes, *Legacy of Ngatoroirangi*, A56, p 108

entire block was awarded to Ngati Tahu.[272] Ngati Whaoa claim they have traditional rights here as well.[273] During the 1880s, lands on the east bank of the Waikato River from Reporua were purchased from Ngati Tahu.[274] This land passed into European hands and became known as Broadlands. In 1899 the remaining part of Tahorakuri block was partitioned into four sections: Waimahana, Te Ohaaki and Kaimanawa in the east and Waikari in the south east.[275]

The principal surface feature here was the Ohaaki Pool. Edward Earl Vaile, who purchased 53,000 acres of land at Broadlands in 1906, lived there for more than three decades and wrote *Pioneering the Pumice*. He describes the Ōhaaki Pool used by his Maori neighbours across the river:

> The Ohaki natives possess a wonderful great boiling pool with a beautiful lacework pattern around the edges — the most handsome pool in the whole thermal area. They have led the overflow into two useful baths in which the temperatures can be controlled. It is a peculiar fact that a heavy southerly wind causes the water to fall below the outlet and the overflow ceases. When first I saw this I thought something was about to happen, but the Maoris assured me there was nothing unusual about it. They also have a 'champagne' pool (that is one which will effervesce when sand is thrown into it), numerous small cooking pools, and a beautiful sulphur cave.[276]

All the geothermal resources of the area were utilised until the 1960s. For example, Mrs Hurihanganui told us that during her grandmother's time at Ohaaki, the elders would tap into the side of the riverbank and drain the spring water into a spa created with rocks.[277] Tony Mark Reihana, giving claimant evidence for Ngāti Tahu told us 'at Ohaaki our ngawha were used for bathing, cooking and washing and some ngawha were used for ailments'.[278]

Stokes combines a wider range of evidence to give us an overview of the configuration of settlement and customary use in relation to the geothermal features.[279] Small kainga are located close to bathing pools on the river bank and cooking holes (umu) in the hot ground a little further distant from the river. Deeper

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[272] Taupo Native Land Court Minute Book 6, fol 289-355; Taupo Native Land Court Minute Book 7, fol 30-31, as quoted in Stokes in , *Ohaaki: A Power Station on Maori Land,* (Hamilton: Te Matahauariki Institute, University of Waikato, 2004), p 53

[273] P Staite, Evidence for Ngati Whaoa, 28 February 2005, Document C28

[274] W Hall, Evidence, G10, p 53

[275] 12 Taupo Native Land Court Minute Book, fol 264-382 & 13, Taupo Native Land Court Minute Book, fol 1-223, as quoted in Stokes in *Ohaaki: A Power Station on Maori Land,* p 53

[276] E E Vaile, *Pioneering the Pumice* (Christchurch: Whitcombe & Tombs, 1939), p 16, In his book, Vaile promoted himself as the pioneer farmer who identified and overcame problems of cobalt deficiency ("bush sickness") and opened the way for others to follow. His biographer, Tony Nightingale, is more realistic and points out that the research work was done by B C Aston, a Soil Scientist with the Department of Agriculture. Vaile, it seems, was more outstanding as an observer and writer than he was as a farmer. See T Nightingale, 'Vaile, Edward Earle, 1869-1956', *Dictionary of New Zealand Biography (1901-1920),* vol 3, (Auckland: Auckland University Press and Bridget Williams Books, Department of Internal Affairs, 1996), entry V 1, pp 545-546

[277] T Hurihanganui, Evidence for Ngati Whaoa, 28 February 2005, Document C30, para 29 (no page numbers)

[278] T M Reihana, Amended Evidence for Ngati Tahu, 11 March 2005, Document C15(a), para12, p 4

[279] Stokes, *Legacy of Ngatoroirangi*, A56, p 108-119

holes containing mud or hot water, in areas more dangerous to access, were used as urupā. Stokes continues:

> … At Te Ohaaki the main thermal area is near the marae. The big ngawha, now known as the Ohaaki pool, is of considerable historical interest to Ngāti Tahu … There were also ochre beds in the thermal area here. Mud and hot water from selected spots in this area had special curative powers … (one) place of special significance was Te Ana a Rangipatoto, from which a white substance was extracted…[280]

Environment Waikato - Historically, there were alkaline hot springs and bathing pools at Ohaaki. Some of these springs and a sacred cave were flooded when the river level was raised to fill Lake Ohakuri for the hydro-electric power scheme in 1961. The Ohaaki Ngawha (boiling pool) is the dominant remaining natural feature of the field. Before the area was developed, the large Ohaaki Ngawha with its clear, pale, turquoise-blue water and extensive white sinter terrace was described as "the most handsome pool in the whole thermal area".

Reporoa

According to Hiko Hohepa, Reporoa was where the sisters of Ngatoroirangi travelled, leaving warm waters and boiling pools.[281] Stokes notes that there were springs at Orangikereru (Golden Springs), on the Waiotapu River near Reporoa.[282]

Environment Waikato - The features of this system include hot springs and pools, steaming ground, sinter deposits, mud pools and seepages. Two springs are still depositing sinter at the Reporoa Geothermal System. The outflows of two springs are still depositing sinter.

Atiamuri

Mr Mataara Wall refers to Atiamuri, describing its legendary history associated with the ancestor Tia. Ngati Tahu lived here at the pa of Pohaturoa.[283] As we noted above, they also had kainga at Orakei Korako, Ohaaki, Reporoa, Aratiatia and Rotokawa.[284] Huirama William Te Hiko described Atiamuri as occupied by Ngati Whaita, who had a pa at Ongaroto.[285] In evidence before us, Ms Kim Te Tua referred to 'Atiamuri Aniwaniwa Hauru' and Ohakuri as famous for their steaming hot waiariki. She told us that because of the water being hot, koura and tuna were easy to catch in hinaki in the Waikato at Niho-o-te-Kiore. Later she mentions that Poaka had mud pools in an area west of Maroanuiatia.

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[280] Stokes, *Legacy of Ngatoroirangi*, A56, p 116
[281] Maxwell, A17, pp 7-10
[282] Stokes, *Legacy of Ngatoroirangi*, A56, p 95
[283] Stokes, *Legacy of Ngatoroirangi*, A56, p 95
[284] Stokes, *Legacy of Ngatoroirangi*, A56, p 95
[285] Te Hiko, D10

Atiamuri was of strategic military importance to both Maori and Pakeha during the early years of European settlement. Stirling refers to early accounts of 'hot springs just across the river' at Atiamuri. It seems that desire to acquire hot springs may have been the reason for the Crown buying a nearby reserve. At the Tauponuiatia hearings, Tuwharetoa claimed Atiamuri as falling within their sphere of influence. Stirling refers to Ihakara Kahuao as cutting the area out as a reserve for his hapu after it was surveyed, in the early 1880s. Hira Rangimatini, believing a reserve between Atiamuri and Te Niho-o-te-Kiore of 600 acres was to be given to Ihakara Kahuao, told Bryce that the area was a permanent settlement and cultivation of his people. Ihakara Kahuao was awarded 200 acres at Atiamuri. Stirling describes the subsequent history of the Atiamuri reserve as 'unknown', with no title or other information available.

Environment Waikato - Atiamuri geothermal system contains three chloride springs. Three hot alkaline chloride springs were known, but only two are depositing sinter at present. These are known as the Whangapoa Springs. In the arm of Lake Atiamuri, another small hot spring was flooded when the lake was filled in the 1960s. South of the two main hot springs is an explosion crater approximately 20 m in diameter and approximately 10 m deep. There are various other hot springs, mud pools, hydrothermal eruption craters, and extensive ancient sinter deposits scattered throughout the farmland. The land surrounding the Whangapoa Springs was gifted by Carter Holt Harvey to the Department of Conservation after 2000.

Ngatamariki

There were hot springs at Ngatamariki and Orangimanauhea on the track from Wairewarewa kainga of Ngati Tahu to Orakei Korako.[286] This field now falls within the vicinity of the Pt Tahorakuri A2 block. Tahorakuri went through the Native Land Court as part of the Tauponuiatia hearing in 1886-87. In 1930, 41 of the partitions it had been divided into were amalgamated in order to facilitate the sale of part of the block to Perpetual Forests Ltd. The newly re-joined block was then split into two; the Maori owners kept 2537 hectares and Perpetual Forests got the rest, known as Pt. Tahorakuri A2, which included Ngatamariki.

Environment Waikato – Ngatamariki is considered to be a highly dynamic area and since 1995 some springs have formed, others have dried up, and there has been a hydrothermal eruption. There are two large alkaline-chloride pools surrounded by bubbling acidic pools and numerous springs and pools and there are six areas of sinter-depositing springs. One spring has dense brilliant white calcite sinter 2m wide, for 5m along its outflow. In late 1998, a new geyser appeared at Ngatamariki after a bank collapsed and blocked a natural upwelling of geothermal fluid.

[286] Stokes, *Legacy of Ngatoroirangi*, A56, p 95

Te Kopia

During the early years of European contact, the route from Rotorua to Taupo followed the Paeroa Range to Te Kopia and then on to Ōrākei Kōrako. Hochstetter was one of the early travellers and he described springs along the base of the Paeroa fault, including the 'great fountain Te Kopiha'.[287] Frederick Tiffen travelling through to Rotomahana, stayed the night at Te Kopia where there was an 'old hut or two' and several springs.[288] He said of the springs:

> These springs were situated on a rough flat and a person had to walk very carefully about them or there is a good chance of sinking into some soft matter or other, perhaps scalding … All springs, or body of springs, are Christened as the maoris [sic] called it – these are christened Kopia …[289]

This field is in the vicinity of the Rotomahana Parekarangi area. This block was one of the first Rotorua blocks investigated by the Native Land Court in 1882.[290] The block was claimed by a number of hapu and iwi.[291] Ngati Whaoa specifically identified Te Kopia.[292] Ngati Whaoa claimed ancestral rights based on the travels of their ancestor Maaka, a brother to Tia and Tamatekapua and an uncle of Ngatoroirangi.[293] On arriving at Paeroa and Waiotapu, Maaka settled and acquired rights to the area.[294] Both Tuhourangi and Ngati Whaoa were awarded land in the area by the Court.[295] The land was also subject to claims from other iwi including Ngati Tahu. In evidence before us, we were told that Te Kopia is considered to be a taonga by Ngati Whaoa.[296]

Environment Waikato - The geothermal area of the reserve has steaming cliffs and ground, craters, a mud geyser, hot springs, sinter deposits and fumaroles. These features are found in the scenic reserve administered by DOC. Te Kopia Mud Geyser erupts a column of grey muddy water 5 to 10 metres high as a single shot accompanied by a loud bang. These eruptions occur every 10 to 30 minutes when the *geyser* is active.[297]

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[287] Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, p 39
[288] F J Tiffen, letter, MS3786, ATL (typescript) as cited in Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, pp 36-37
[289] F J Tiffen, letter, MS3786, ATL (typescript) as cited in Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, pp 36-37
[290] Kawharu et al, G2, p 372
[291] See for example Kawharu et al, G2, p 373
[292] Kawharu et al, G2, p 389
[293] Kawharu et al, G2, pp 278-279
[294] Kawharu et al, G2, pp 278-279
[295] Kawharu et al, G2, pp 412-413
[296] P Staite, Evidence, C28, p22
[297] Environment Waikato, www.ew.govt.nz/enviroinfo/geothermal/fieldsmap/tekopia.htm (accessed 24 July 2007)

Whangairorohe

This geothermal field is within the vicinity of the Rotomahana Parekarangi block first investigated by the Native Land Court in 1882.[298] As noted above this block was claimed by a number of hapu and iwi of Te Arawa.[299] However, the area of the block near the Paeroa ranges was subject to claims by Ngati Whaoa, Tuhourangi and Ngati Tahu. Ngati Whaoa claimed on the basis of their numerous cultivations, mahinga kai and geothermal resources of the Paeroa ranges. They named Whangairorohe on the Waikato river during the hearing.[300] Tuhourangi, Ngati Whaoa and Ngati Tahu were awarded land in the area by the Court.[301]

Environment Waikato - The geothermal field contains several hot springs. A hot spring perched on a cliff and some springs in the bed of the Waikato River as a feature here. Extensive sinter deposits indicate that the system was once more active. [302]

Waiotapu - Waikite - Waimangu/Rotomahana

This field is within the vicinity of the Paeroa East block and the Rotomahana Parekarangi blocks. The Paeroa East block was first investigated as to title in 1881. It was reheard in 1882 and partitioned in the same year.[303] The block comprising 79,820 acres was situated between the Rotomahana Parekarangi block and the northern Kaingaroa No 1 and 2 blocks.[304] Kawharu notes that the Paeroa East block included the valuable sites of Maungakakaramea and the Waiotapu Thermal Valley running down to the Waikato River, though it did not include the Paeroa range, which was later included in the Rotomahana Parekarangi block.[305] Ngati Whaoa and Ngati Tahu claimed separate interests. Tuhourangi were also claiming land in this area. It was within this area that Maaka, Ngati Whaoa's eponymous ancestor settled with others from the Te Arawa waka.[306] Ngati Whaoa claims were based on ancestry and constant occupation. Ngati Whaoa were eventually awarded the bulk of the Paeroa East block.[307] However there were other iwi claiming interests including Ngati Rangitihi, Ngati Tahu and Tuhourangi.

Waiotapu

Waiotapu lies approximately 5 kilometres south of Rainbow Mountain Scenic Reserve. Ms Teressa Hurihanganui discussed the importance of these geothermal sites for Ngati Whaoa. They were used for specific ailments and purposes, traditional

[298] Kawharu et al, G2, p 372
[299] Kawharu et al, G2, p 373
[300] Kawharu et al, G2, p 390
[301] Kawharu et al, G2, pp 412-413
[302] Environment Waikato, , www.ew.govt.nz/enviroinfo/geothermal/fieldsmap/whangairorohea.htm, (accessed 24 July 2007)
[303] Kawharu et al, G2, p 364
[304] Kawharu et al, G2, p 364
[305] Kawharu et al, G2, p 364
[306] Kawharu et al, G2, p 364-365
[307] Kawharu et al, G2, pp 370-371

cooking processes, and tourism. She claimed that her tipuna had an in-depth knowledge of geothermal networks.[308] She noted that in 1890, Miriata and Aporo developed a Hostel at a geothermal site in the Waiotapu Valley. This was specifically to cater for the tourist trade and Aporo sold samples of the minerals produced from the geothermal activity. He would charge a toll for people travelling to Waiotapu.[309] There is some recognition of this in the work of Stokes.[310] Mr Walter Pererika Rika for Ngati Whaoa told us the geothermal areas of Waiotapu and Kakaramea (Rainbow Mountain) were used for cooking, bathing and medicinal purposes. Here there were hot pools for cooking, bathing and medicinal purposes.

Environment Waikato - The Waiotapu geothermal area has five known geysers, hot springs, mud pools, fumaroles, craters, and steaming ground. Several hot springs deposit sinters. Two of the springs are unique in New Zealand for very different reasons. The first, Champagne Pool, is a large spring approximately 30 metres wide, which is actively growing two hectares of sinter terrace. The second, Hakareteke Geyser, is the only sinter-depositing geyser with acidic waters in New Zealand. According to Environment Waikato this field is possibly connected to the Waikite and Waimangu fields.

Kakaramea – Rainbow Mountain

Mount Kakaramea was named for its source of kokowai (red ochre), a valuable resource in itself.[311] As noted above, Mr Rika for Ngati Whaoa told us the geothermal areas of Waiotapu and Kakaramea (Rainbow Mountain) were used for cooking, bathing and medicinal purposes. The mountain was located on the Paeroa East 1A West block awarded to the Crown by the Native Land Court in 1887 as part of the partitioning of Paeroa East.[312] Under the Scenery Preservation Act 1903, Rainbow Mountain was first gazetted as a scenic reserve in 1903.[313]

Waikite

In 1845, Donald Mclean was an early visitor to the area noting that he had to pass through a kainga (village) named Paeroa, which lies between Rainbow Mountain and Waikite Valley.[314] Ngati Whaoa and Tuhourangi claimed this area during the Native Land Court investigation into the customary ownership of Rotomahana Parekarangi.[315] Ngati Tahu contested the claims made by Ngati Whaoa.[316] The Native

[308] T Hurihanganui, Evidence, C30, paras 26-29 (no page numbers)
[309] T Hurihanganui, Evidence, C30, para 29 (no page numbers)
[310] Stokes, *Legacy of Ngatoroirangi,* A56, pp 105-106
[311] W Rika, Evidence for Ngati Whaoa, 1 March 2005, Document C26, p 3
[312] McBurney, 'Scenery Preservation & Public Works Takings', A82, pp 204-205
[313] McBurney, 'Scenery Preservation & Public Works Takings', A82, pp 204-205
[314] Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, pp 33-34
[315] Kawharu et al, G2, pp 372, 386
[316] Kawharu et al, G2, p 390

Land Court made an award in Tuhourangi and Ngati Whaoa's favour to the Paeroa ranges.[317]

Environment Waikato - Waikite field may be connected to the Waiotapu and Waimangu fields. Waikite has hot springs, geysers, warm lakes, craters and sulphur deposits. The sinter now present around the Manuroa Spring extends for more than 1m wide around the pool edges and in thick deposits along the outflow channel. Manuroa is believed to have the largest volume of outflow of all sinter springs in New Zealand.

Rotomahana - Waimangu

Early visitors to this area crossed Lake Tarawera to arrive at Rotomahana. Dr Johnson travelling in the area in 1847 was one of the early Europeans to see the Pink and White Terraces, describing them as 'the most singular scenes that imagination can picture'.[318] Johnson called the Terraces Wakataroa and Wakatarata.[319] He noted steaming cliffs, alum found in crevices of rocks, evidence of habitation and he wrote:

> After passing onwards fo[r] about three hundred yards, we came to a more extended piece of ground, comparatively free from springs, and the natives had erected some huts, and formed wai ariki, and hot plates, as at Ohinemutu, for their use when they reside here in the winter, which they do for the sake of warmth, and this comfort they may assuredly can enjoy to any extent that may suit their feelings.[320]

We discuss the importance to Maori of tourism in this area in Part IV of this report. What is important to note here is the obvious and dedicated use of the resource at a time well before tourism became focused on Lake Rotomahana. Maori were coming here during the winter for the heat. When Mount Tarawera erupted on 10 June 1886, the Pink and White Terraces were destroyed and Lake Rotomahana exploded. The eruption opened the earth along a 17 kilometre line and it formed the seven craters that make up the Waimangu Volcanic Valley.[321]

This field falls within the Rotomahana Parekarangi-Tarawera-Ruawahia area. Tuhourangi applied to have the first of these blocks investigated by the Native Land Court in 1882. Due to the size of the block (230,000 acres) there were many competing claimants to the block including Ngati Rangitihi. A rehearing of the block took place in 1887, at a time when, according to Kawharu, Tuhourangi and Rangitihi 'were still in mourning following the Tarawera eruptions'.[322] The block stretched from the boundaries of the Pukeroa Oruawhata and Rotorua Patatere blocks in the north, south to the Waikato River in the vicinity of Ōrākei Kōrako and across the Paeroa Range. It spanned from the Horohoro bluffs in the west across to the Tarawera and

[317] Kawharu et al, G2, p 412
[318] J Johnson 'Notes from a Journal' as quoted in Boast, 'The Hot Lakes', A24, pp 62-63
[319] J Johnson 'Notes from a Journal' as quoted in Boast, 'The Hot Lakes', A24, p 63
[320] J Johnson 'Notes from a Journal' as quoted in Boast, 'The Hot Lakes', A24, p 63
[321] Environment Bay of Plenty, www.ebop.govt.nz/publications/main/html/main_135.html (accessed 24 July 2007)
[322] Kawharu et al, G2, p 372

Rerewhakaitu lakes in the east.[323] Tuhourangi and Rangitihi both received awards to the area around Lake Rotomahana.[324] Kawharu et al referring to evidence before the Native Land Court states that the witnesses called the White Terrace, Te Tarata, and the Pink Terrace, Otukapuarangi.[325] Stokes completed a comprehensive review of the features that were part of this area and what remains.[326]

Environment Bay of Plenty – There are surface geothermal features and activity present at Waimangu, on the western shore of Lake Rotomahana, and the southern shore of Lake Tarawera.[327]

Tarawera – Kawerau

Mount Tarawera and the Tarawera River

Maori occupation of the region by Ngati Rangitihi and Tuhourangi has been well documented. A major Tuhourangi settlement, Te Wairoa, was a place of central importance during the early years of Maori and European contact as guides took travellers to view the geothermal resources of the region the most famous of which were the spectacular Pink and White Terraces. Dr Johnson in 1847 on his way to Rotomahana described crossing Lake Tarawera from Ruakareo (Te Wairoa) in a canoe to reach a small village (Kouto) situated at the mouth of the stream by which the warm water of Lake Rotomahana flowed out into Lake Tarawera.[328] Stokes notes that there were geothermal areas located at Te Ariki, the isthmus between Lakes Tarawera and Mahana.[329]

As we discussed above the wondrous formations of the Pink and White Terraces and many other geothermal features both at Tarawera and Rotomahana were destroyed following the Tarawera Eruption of 1886. We note the many stories of Ngatoroirangi as he travelled from Te Awa o Te Atua (Tarawera River) to Mount Ruawahia-Tarawera and where he fought the taniwha (in some stories) or tohunga /priest (in others) of that maunga.

We also noted that Lake Rotomahana was captured within the Rotomahana Parekarangi Block. Mount Tarawera, Lake Tarawera and the head waters of the Tarawera River, were caught up in the Ruawahia block hearings of the Native Land Court in 1891.[330] Ruawahia was the name given to the central peak of Mount

[323] Kawharu et al, G2, p 372
[324] Kawharu et al, G2, p 412
[325] Kawharu et al, G2, p 423
[326] Stokes, *Legacy of Ngatoroirangi,* A 56, pp 154-163
[327] Environment Bay of Plenty, *Proposed Regional Plan for the Tarawera River Catchment* (Whakatane: Bay of Plenty Regional Council, 1995) Chapter 17: 'Geothermal Resources', www.envbop.govt.nz/media/pdf/ProposedTaraweraPlan_v1.pdf (accessed 24 July 2007), p 193
[328] J Johnson 'Notes from a Journal' as quoted in Boast, 'The Hot Lakes', A24, p 62
[329] Stokes, *Legacy of Ngatoroirangi,* A56, p 154
[330] Kawharu et al, G2, p 415

Tarawera.[331] There were three in total. Ngati Rangitihi claimed that Ruawahia was wahi tapu, a site of significance for them and that 'all the descendants of Ngati Rangitihi were buried on their maunga'.[332]

The Ruawahia block was estimated to be 20,000 acres. Ngati Rangitihi lodged the claim for this block claiming interests based on mana, ancestry (take tupuna), bravery (take toa), and permanent occupation. The counter claimants were Tuhourangi.[333] The Crown awarded all interests in the Ruawahia block to Ngati Rangitihi.[334]

> On the importance of the Tarawera River for Ngati Rangitihi, David Potter told us about the many uses that Ngati Rangitihi made of the resources from Mount Tarawera to Kawerau, an area they shared with Tuhourangi and a number of other iwi.

Mr Reuben Perenara of Ngati Rangitihi noted that his people used geothermal resources for medicinal purposes; cooking and food preparation; central heating; washing clothes; bathing; products; and as greenhouses for kumara production. He told us that Ngati Rangitihi placed considerable value on the use of geothermal resources within the inland part of their rohe for heat and that it influenced their settlement patterns. He stated that 'geothermal warmth was vital to our people, enabling them to settle, thrive and develop a large population.'[335] For example cooking in ancient times was extremely laborious and time-consuming. 'In the geothermal areas, food could be cooked in pools of boiling water or steam holes, so fires were not always needed.' He then repeated evidence based on early observations regarding the manner in which food was cooked and grown using geothermal resources:

> 4.6 For example, kumara, potatoes, or taro would be placed in a specially made basket (tukohu) and a platted string at the top of the basket would be pulled to close the opening. The basket would then be placed in the parekohuru (boiling spring), and tied to a peg in the ground near the edge of the hole. After a quarter of an hour or so, the tukohu would be lifted out and placed in a hangi, and left to steam for a short time. Food cooked in these hot springs was very nice to taste. The preferred method of cooking food such as meat, birds, or fish in the geothermal areas, was generally by steaming. …
>
> 4.8 Geothermal resources were also an important source of heat for our people who would build special huts for winter, erected on warm ground. Geothermal heat had important agricultural applications, for example the use of geothermally heated 'greenhouses'. Early in the spring, baskets of kumara would be placed in natural hot houses, created by geothermal heat. The kumara would be left for a month or six weeks to grow out. By the time the weather was sufficiently warm the kumara were then planted in rows. By this method, a month or six

[331] Kawharu et al, G2, p 415
[332] Kawharu et al, G2, p 421
[333] Kawharu et al, G2, pp 415-416
[334] Kawharu et al, G2, p 425
[335] R Perenara, Evidence, C42, pp 6-8

> weeks in the growth of the plant was gained. Kumara grown in the vicinity of the hot springs areas were apparently very fine in quality and flavour.[336]

Environment Bay of Plenty - Remnants of the spectacular geothermal surface features, of this area remain. Hot Water Beach at Mount Tarawera and a number of other geothermal features are scattered around the area. Two warm springs are found in the Mangakotukutuku and Waiaute Streams. Environment Waikato completed a thermal infra-red survey between the Tarawera River Lake Outlet and Kawerau which indicated that thermal 'anomalies' occur almost continuously to the Mangakotukutuku Stream confluence with the Tarawera River.[337]

Kawerau/Bay of Plenty[338]

David Potter told us about the many uses that Ngati Rangitihi made of the resources from Lake Tarawera along Te Awa o Te Atua to Kawerau.

> 'The Tarawera River was our road inland as far as Onepu Springs, which was almost the halfway point when travelling to and from our inland Pa at Lake Tarawera. It was a day's journey to Onepu and another on to Lake Tarawera. Mostly travelling was done on foot between Matata and Onepu following a route out through Awakaponga and then along the edge of the hills (to stay clear of the swamp) to Onepu. The geothermal area at Onepu was very popular with Ngati Rangitihi because we could bath in the hot pools and cook our food in the boiling water springs. The only other area where we could bath in warm water was at the pink and white terraces at Lake Tarawera. Both these areas were used for the Tohi rite, where the newborn baby is given its first bath and named.'[339]

Stokes notes there is evidence that there was geothermal activity in 1944 along the Tarawera River for about 9 km in length around the Onepu Springs.[340] She quotes the following evidence:

> Several groups of springs on different fractures [fault lines] may be included in this extensive area, within which occur hot and boiling springs, mud pools and volcanoes, steaming ponds discharging by warm springs, sinter sheets, sulphur-bearing patches, fumaroles, collapse holes empty or filled with milky water, and other phenomena similar to those of other better-known hot springs of the Taupo-Rotorua graben. Indeed, the impression gained is that this Ruruanga-Onepu area is one of the more active of the whole region (McPherson 1944, p 70)[341]

We refer now to the story of Tuwharetoa. Through the evidence of Tomairangi Kiira Lance Fox we learnt how 'Te Wai U o Tuwharetoa', a fresh water spring, got its

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[336] R Perenara, Evidence, C42
[337] Environment Bay of Plenty, www.envbop.govt.nz/media/pdf/ProposedTaraweraPlan_v1.pdf (accessed 24 July 2007), p 193
[338] We have referred above to the Crown's settlement with Ngati Tuwharetoa ki Kawerau regarding their historical Treaty claims, and the fact that we have no jurisdiction to inquire into those claims. We heard evidence however from Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi in respect of their amended claim Wai 21(a), which was specifically excluded from the settlement..
[339] D Potter, 'Te Manawhenua of Ngati Rangitihi', Document B7
[340] Stokes, *Legacy of Ngatoroirangi,* A56, p 216
[341] Stokes, *Legacy of Ngatoroirangi,* A56, p 216

name. It is named after Tuwharetoa (a direct descendant of Ngatoroirangi, and from whom Ngati Tuwharetoa take their name). The young Tuwharetoa moved to the Kawerau area with his parents, soon after his birth, and the story as told to us is repeated below:

> A very young Manaia (Tuwharetoa) was once left in the care of his grandparents Waitaha Ariki Kore and Hine te Ariki at Waitahanui Pa, while his parents Hahuru and Mawake Taupo were visiting relatives in the surrounding areas Putauaki, Tuhepo, Otamarakau, Omataroa. They were away for quite some time, Manaia started crying for nourishment. Hine te Ariki instructed Waitaha Ariki Kore to fetch some water from a certain area to feed the child. She had an intimate knowledge of the area that she had used as her playground.
>
> He went in to the upper reaches of the gully, to a rocky outcrop and struck the rock with his taiaha to produce beautiful clear spring water.
>
> He filled his calabash (hue) and took the water back to Hine te Ariki who in turn, fed it to young Manaia. The baby's crying stopped. That spring is known as "Te Wai U o Tuwharetoa" – (The life giving water of Tuwharetoa) as it has the same temperature and was likened to mother's breast milk.[342]

The story continues to 'Te Kete Poutama' at Waitahanui Pa just west of Lake Rotoiti Paku:

> Waitaha Ariki Kore and Hine te Ariki then moved inland to Te Rotoiti Paku and established another Pa there called Waitahanui Pa. The lake and the geothermal resources (Ngawha's for bathing, cooking) and the abundance of kai, made this area ideal for the establishment of a principal Pa.[343]

Stokes notes that the famous Tuwharetoa spring was at Otakaora.[344] Mereheeni Helen Fox described Te Wai U o Tuwharetoa as an ancestral spring noting that it is situated on her Maori land owned by her whanau. She told us that:

> Te Wai u o Tuwharetoa ancestral spring's output or volume of water is approximately 1 million gallons per 24 hours. This water flowed into what was once a beautiful lake called Rotoitipaku, with the Okararu a big hot boiling pool. This lake together with Waitahanui Pa and the surrounding hills, a valley is full of Maori lore and traditions. About 3 to 4 chains down from the ancestral spring is where Tohia o te Rangi took on single-handed a marauding tribe from Tuhourangi, Rotoiti who had killed Te Rama Apakura of Tuwharetoa at Waikamihi at Umuhika, this side of Matata. The odds were unfortunately too great for Tohia, and he fell too great for Tohia, and he fell to the numerous taiaha. This particular spot is called Otakaora but is now submerged by the rise of water created by the blockage of its natural course to the Tarawera river by the Tasman Company.[345]

Lake Rotoitipaku was by all accounts a significant resource. As the lake fed by Te Wai-ū-o-Tūwharetoa it was a wāhi taonga for iwi and a significant mahingakai and

[342] Tomairangi K L Fox, Evidence for Ngai Tamarangi, Ngati Tuwharetoa, and Tasman Pulp and Paper Mill, 7 February 2005, Document B25, para 9(b), p 6
[343] Tomairangi K L Fox, Evidence, B25, p 7
[344] Stokes, *Legacy of Ngatoroirangi,* A 56, p 217
[345] John Henry Fox, Testimony, as quoted by Mereheeni Fox, Evidence, Document B42, pp 5-6

geothermal resource for those who lived close by. This general area was once home to some 300 people who lived together and enjoyed these local resources.[346] Clem Park told us about Lake Rotoiti Paku with its mud pools, ngawha and terraces of silicate.[347] He stated:

> I will tell you about Rotoitipaku. Rotoitipaku was a lake of wonder. At the northern end the water was cool and clear. At the southern end of the lake, there were mud pools, ngawha and terraces of silicate surrounded by the boiling water. Into this Te Wai-u-o-Tuwharetoa flowed.[348]

Wayne Huia Peters remembers using Lake Rotoitipaku for food, and play.[349] He told us what Rotoitipaku meant to him:

> Like everyone, I developed a love for the place. Not only because it provided food and was our playground, but this lake and whenua had a wairua that I could finally understand. Our lake, whenua, our kaitiaki, our tipuna, we were all the same – I was them, they were me.[350]

Albert Te Rito remembered the lake as a source of eel and carp and crayfish and the lake and its surrounds as an area rich in food, birds and eggs. There were hot springs for multiple uses and warm ground used to sprout kumara for early planting.[351]

Environment Bay of Plenty - This field is about 19-35 square kilometres at 500 metres depth. Natural thermal activities include hot springs, seepages, steaming ground and hot ground. According to Environment Bay of Plenty, the heat sources of the Kawerau field are probably Putauaki (Mt Edgecumbe) and the vicinity of Mount Tarawera.[352]

Awakeri

Maxwell records that on their journey inland, the sisters Kuiwai and Haungaroa rested at places like Awakeri, also known as Puukahu.[353] The latter literally means boil up.[354] Awakeri is a more modern name. The Springs were captured in the 300 acre block known as Rangitaiki Lot 12. Until 1935, there were kainga on the land, the people cultivated crops and their dead were buried there.[355] The original pools were described as holes in the ground, fed by both the large ngawha and also the cold spring. The

[346] Evidence prepared by Mr Te Rito for Wai 46 and Wai 21 and quoted by Kirkpatrick, Belshaw and Campbell in Doc H37, pp 305-306
[347] C Park, Evidence, Document B36
[348] C Park, Evidence, B36, p 2
[349] W Peters, Evidence, Document B38, para 9
[350] W Peters, Evidence, B38, para 9 (no page numbers)
[351] Evidence prepared by Mr Te Rito for Wai 46 and Wai 21 and quoted by Kirkpatrick, Belshaw and Campbell in Doc H37, pp 305-306
[352] Environment Bay of Plenty, www.envbop.govt.nz/media/pdf/ProposedTaraweraPlan_v1.pdf (accessed 24 July 2007), p 201
[353] Maxwell, A17, p 23
[354] Maxwell, A17, p 23
[355] Maxwell, A17, pp 23-24

temperature was regulated by adjusting the water from the ngawha with the water from the waipuna, being fed into it.[356]

Environment Bay of Plenty - These hot springs are comprised of weak mineralised bicarbonate/chloride waters.

Matata

There were hot springs at Matata where Ngati Awa, Ngati Rangitihi, Tuwharetoa ki Kawerau, Ngati Makino and Ngati Awa claim is within their sphere of influence.

Whakaari – White Island and Moutohora (Whale Island)

Within the Mataatua traditions 'the interconnectedness of scattered occurances of geothermal activity was well understood. The links between Ruawahia (Tarawera) Putauaki (Edgecombe) and Whakaari (White Island), for example, were discussed in evidence before the Waitangi Tribunal hearing the Ngati Awa claims.

There is evidence from Maxwell and Stokes that links Ngati Awa with the Ngatoroirangi story. First, Ngatoroirangi named Whakari or White Island as he travelled by on his way to Moehau.[357] Whakaari means 'that which is made visible'. It was on Whakaari where Ngatoroirangi's sisters or taniwha stopped to rest before continuing on to Tongariro. Secondly, Ngatoroirangi is the name of the one of the mountains on the North West of the Island.[358] Finally, Maxwell refers to waiata sung by Ngati Awa recalling the Ngatoroirangi tradition.[359] The Ngati Awa Tribunal noted there is evidence that Whakaari was used by Ngati Awa into the twentieth century along with Te Whanau-a-Te-Ehutu from Te Kaha.[360]

Maxwell discusses the Ngati Awa use of Moutohora (Whale Island). This island was a permanent settlement, and was valued for a number of its natural resources including the ngawha at Waiariki (Sulpher Bay).[361] The ngawha were used as a heat, energy and water resource.[362]

In the Ngati Awa Report, that Tribunal referred to Nga Moutere o Rurima consisting of four outcrops 19 kilometres off Whakatane Harbour which were owned by Maori land owners. Mr Potter also described the geothermal resources, on the Rurima Islands administered by Ngati Awa with the Department of Conservation.[363] Mr Potter

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[356] Maxwell, A17, p 24
[357] Maxwell, A17, pp 14-15
[358] Maxwell, A17, p15
[359] Maxwell, A17, pp 10-11
[360] See *Ngati Awa RaupatuReport*, p 113-114, and see Maxwell, A17, pp 15-18, Stokes Legacy of Ngatoroirangi, p 207-211.
[361] Maxwell, A17, pp 19-21
[362] Maxwell, A17, pp 19-21
[363] *Ngati Awa Raupatu Report*, p 114

claimed that Ngati Rangitihi transported products from the geothermal resources on these islands to Matata:

> The Rurima Islands have a geothermal area that has become less and less active since 1963. It was a source of sulphur which Ngati Rangitihi used for medicine. The sulphur was powdered and mixed with shark oil and honey. The mixture was then either eaten as a medicine or applied as an ointment to sores. This was a standard remedy for other skin problems as well as a cure, the use of which dated back many hundreds of years. It was still used as a remedy by the old people in Matata up till the 1950s.[364]

Environment Bay of Plenty - On Whakaari the field is marked by hydrothermally altered ground, high temperature, fumaroles, solfatara, sulphur and silica residue deposits, acidic hot water flows, hot ground. On Moutohora there is also hydrothermally altered ground, fumaroles, sulphur deposits, silica residues, solfatara, acid hot water seeps and steaming ground.

Horohoro

The Horohoro geothermal field is located about 15 km southwest of Rotorua City. This field is within the area claimed by Ngati Whakaue and Ngati Raukawa.[365] Kawharu notes that these hapu claimed on the basis of ancestry, occupation and their dead buried on the land.[366] Witnesses stressed that their main basis for claiming in terms of ancestry was the whakapapa connections they had to Kearoa, the wife of Ngatoroirangi.[367]

Environment Waikato - Horohoro Geothermal System has extensive old sinters and many hydrothermal eruption craters, but currently there are only two hot springs depositing small sinters in this field. No boiling springs or geysers have been known at this site. Horohoro is a naturally waning geothermal system with very extensive old sinters, dried up spring basins and big explosion craters.

Rotorua Geothermal Field

The Tribunal has been provided with an abundance of material relating to the customary uses of the geothermal resources at Rotorua. In this portion of the report we will focus on Ōhinemutu and Whakarewarewa, the two villages closest to present day Rotorua, which are now deeply involved in tourist activity. Richard Boast and Dame Evelyn Stokes have each carried out extensive research into the writings of early European visitors and have reported in detail.[368] Paora Maxwell, of Ngati Rangiwewehi, provides complementary material based on oral evidence collected

[364] D Potter, Evidence for Ngati Rangitihi, 7 February 2005, Document B3
[365] Kawharu et al, G2, pp 412-413
[366] Kawharu et al, G2, p 381
[367] Kawharu et al, G2, p 381
[368] Boast, 'The Hot Lakes', A24; and Boast, 'Maori Customary Use and Management of Geothermal Resources', A27; Stokes, *Legacy of Ngatoroirangi*, A56

from kaumātua in 1991. Mr Maxwell combines academic skills with traditional knowledge and networks and responded with relish to the challenge of 'going from one hot pool to the next, talking to people'.[369]

Dr Jonathan Mane-Wheoki, a Ngapuhi academic and Art Historian with close links to the Maori arts and crafts community including the weavers and carvers at Rotorua, has provided a detailed report which is specific to Ngati Wahiao and Whakarewarewa.[370] Dr Mane-Wheoki worked closely with Ngati Wahiao kaumātua, examined the records of the Rotorua hearings of the Native Land Court and acknowledges the work done by Peter Waaka in a 1982 thesis and Richard Boast in a 1992 report to Te Puni Kokiri.[371]

One publication, written by Makereti Papakura who was born in Whakarewarewa in 1872, occupies a special niche in New Zealand scholarship. Makereti grew up to become Guide Maggie Papakura, married an English visitor and went to live in a country home near Oxford where she enrolled at Oxford University to study for a degree in Anthropology.[372] She returned to Whakarewarewa in 1926 to seek the approval of her kuia and koroua to present a thesis on Maori customary knowledge, and to carry out the interviews and the fieldwork needed for the task. Her work was completed and awaiting examination when she died suddenly in April 1930. Her supervisor and mentor T K Penniman and her kaumātua joined forces to prepare the thesis for publication in London in 1938 with the title *The Old-Time Maori.*[373] Dr Ngahuia Te Awekotuku, who wrote the introduction which sets the scene for a 1986 edition, reflects:

> *The Old-Time Maori* emerged not from the erudite ponderings of an amateur historian writing within the kauri walls of his villa on raupatu land; rather, this work came, quizzically, from the faraway cloisters of prestigious Oxford – and the pen of a Maori woman who 'should have known her place'. ….Makereti's ethnography offers a rare vision of community and culture – unprecedented and unmatched, even to this very day.[374]

These resources, some specific to Ōhinemutu or Whakarewarewa and some reporting on a wider spectrum of geothermal areas, were expanded and made complete for the purposes of the Tribunal by the oral and written evidence presented by kaumātua. In the paragraphs which follow we concentrate, first, on Whakarewarewa, in the valley some 4 to 5 km inland from Rotorua, and secondly on the evidence relating to

[369] Maxwell, A17, section II 'Ngamihi (Acknowledgements)'
[370] J Mane-Wheoki, *Ngati Wahiao and Whakarewarewa: a People, a Place, a History and a Heritage,* part 1 of a report for Ngati Wahiao in support of Wai 282 entered in to the Wai 1200 Record of Documents as Document A53
[371] Mane-Wheoki, *Ngati Wahiao and Whakarewarewa*, A53, p iv. There are citations to P Waaka (1982) Whakarewarewa: *The Growth of a Maori Village'* MA thesis in Anthropology, University of Auckland (1982) and RP Boast, *Maori Customary Management of Geothermal Resources: A Report to Te Puni Kokiri on Behalf of FOMA Te Arawa,* November 1992
[372] See N Te Awekotuku, 'Makereti: Guide Maggie Papakura 1872-1930', in in *The old-time Maori* (Auckland: New Women's Press), 1986, pp v-xi
[373] M Papakura, *The old-time Maori, by Makereti, sometime chieftainess of the Arawa Tribe, known in New Zealand as Maggie Papakura,* (London: Victor Gollanz Ltd, 1938)
[374] Te Awekotuku, 'Makereti: Guide Maggie Papakura 1872-1930', x-xi

Ōhinemutu and Tawera, on the shores of Lake Rotorua adjacent to what is now the downtown area of Rotorua city.

We note that in evidence given to the Te Arawa Representative Geothermal Claims Tribunal, the Whakarewarewa claimants stated that they well understood the Rotorua geothermal field. They claimed that allocation of iwi, hapu and whanau rights in geothermal resources and the geothermal field at Rotorua had long been successfully managed according to the rules of Maori customary law.[375] The Tribunal found that Ngati Wahiao and their close relations Tuhourangi between them have rangatiratanga over the land occupied by them at Whakarewarewa and over their highly valued taonga of which they are, and have been for more than a century, the kaitiaki.[376] The Tribunal also noted the interests of Ngati Whakaue in the geothermal resources at Ohinemutu were acknowledged by other claimants, but the extent of the Ngati Whakaue claims in the geothermal resources, of Whakarewarewa now in Crown control was a matter that was still to be heard and, therefore, it offered no comments on Ngati Whakaue ownership or exercise of their mana.[377] We considered this issue in Part III of our report.

Whakarewarewa

The thermal valley at Whakarewarewa, inland from Ōhinemutu and what is now the Rotorua city centre, has long been a significant thermal resource. Mita Taupopoki, in his evidence to the Native Land Court in the 1880s, described the importance of the area for resources such as tawa berries, raupo and kokowai.[378] Dr Mane-Wheoki summarises the evidence of continued customary use of the Whakarewarewa geothermal amenities; 'the ngawha for bathing, healing and cooking – and the resources – raupo, flax, pigments and mud' from the period of early settlement onwards. He adds that foodstuffs gathered elsewhere in the rohe of Ngati Wahiao were brought to Whakarewarewa for baking and processing.[379] It is clear from this combined evidence that the area was regularly visited for bathing, food preparation and resource extraction. There were also special pools where the dead were prepared for burial and there were burial places in caves in the valley.[380]

Peter Waaka's research carried out in the 1980s, suggests that permanent settled occupation by Ngati Wahiao took place in the 1860s and 1870s and was subsequently boosted when Tuhourangi relatives, displaced by the Tarawera eruption in 1886, were invited to move here.[381] Regular seasonal visits and resource use thus gave way to

[375] *Te Arawa Representative Geothermal Claims*, p 4
[376] *Te Arawa Representative Geothermal Claims*, p 8
[377] *Te Arawa Representative Geothermal Claims*, p 14
[378] Waaka *(Whakarewarewa: the Growth of a Maori Village)* has worked through the Minute Book evidence and is quoted extensively by Maxwell, A17, pp 85-94
[379] Mane-Wheoki, *Ngati Wahiao and Whakarewarewa*, A53, para 2.6, pp20-21
[380] Dr Mane-Wheoki, drawing on a range of sources, documentary and oral, is very specific about the names of ancestors who were buried and the names of the places where the burials took place.
[381] P Waaka as quoted in Maxwell, A17, pp 85-90

permanent settlement and sophisticated development of the waiariki for heating, cooking and healing purposes. Mita Taupopoki described to the Land Court the ways in which the waiariki waiora, the healing waters, became popular for invalids and tourists from the 1870s onwards.[382]

Makereti Papakura, writing in Oxford in the 1920s, drew on her memories of growing up in Whakarewarewa in the 1870s and 1880s. Whakarewarewa village was their primary home but they still returned to their former home at Parekarangi during the seasons for planting and harvesting potatoes and other foods which could not be grown in the geothermal area. Makereti described methods of cooking in these words:

> In parts of the geothermal district, food was cooked in the boiling or steam holes. At Whakarewarewa where I lived with my koroua Maihi te Kakauparaoa and his sister Marana who brought me up, we never had any fires at all. All the food was either boiled or steamed. Kumara, potatoes, or taro would be placed in a tukohu, a basket made for this purpose from the leaves of the toetoe (pampas grass), and the plaited string at the top would be pulled, so closing its mouth. This would then be placed in the parekohuru (boiling spring), and the end of the string would be tied to a peg in the ground near the edge of the hole. After a quarter of an hour or so the tukohu would be lifted out and placed in a hāngi, or natural steam oven dug and prepared in the ground, and left for about ten minutes to steam. The basket of kumera or potatoes could also be rinsed through the boiling hole and put into the steam hole straight away without boiling. Food cooked in these hot springs was very nice to taste. Meat, birds, or fish were generally steamed and tasted good.[383]

Huia Te Hau, in evidence to the Tribunal given in 2005, underscored the sustained relationship between Ngati Wahiao and the geothermal resources, the geothermal fields and the TVZ at Whakarewarewa:

> Our mythology and legends are rich with examples of humans, gods and the thermal elements – the pursuit of Hatu Patu by the bird woman Kurungaituku who met her fate in a boiling pool in Whakarewarewa is a particular favourite. The names of every hot pool, mud pool, geyser, fissure, stream and in the thermal valley, how they are connected to each other and their respective function, the daily physical associations - all of these things provide a rich tapestry of knowledge, understanding and commitment, which for our people over time strengthens our identity - who we are, where we are and why. Naturally in our time, all of this comes with inherent responsibilities to care for what we have and ensure its sustainability for the future generations to value and enjoy.[384]

Huia Te Hau told the Tribunal that the resources at Whakarewarewa had long provided the peoples with 'life's basic needs, warmth and comfort and an economic base'. Life has changed in recent times, improvements have been made, but many traditional features of daily life continue. Huia Te Hau elaborates on the continuities of customary use in the contemporary world:

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[382] Maxwell, A17, p 85. Ngahuia Te Awekotuku, *The Sociocultural Impact of Tourism on the Te Arawa People of Rotorua*, PhD thesis, University of Waikato, 1981, Document A46, provides a detailed account and analysis of the evolution of tourist activity.
[383] Papakura, *The Old-Time Mäori,* pp 165-166. See also Boast, 'The Hot Lakes', A24, pp 102-103
[384] H Te Hau, Evidence, F77, para 19, pp 7-8

> Our ancestral meetinghouse, Wahiao remains the principal gathering place, in the heart of the village. It is central to our identity. It is surrounded by smaller whare (Little Wahiao) and some modern homes, shops and the Catholic and Anglican Church houses.[385]

Huia Te Hau describes the dynamic which is familiar to those who come, from many parts of the world, to visit as tourists:

> The real life in the pa occurs in the Rahui. The Rahui is a specially designated area of the village that consists of approximately 2.3 acres of volcanic reserve where the thermal resource provides for the hapu's daily needs – steam and boiling hot water for cooking and a copious flow of crystal clear mineral from the main reservoir Parekohuru for bathing in and also for laundering. Traditional bathing and cooking practices are the daily norm at Whakarewarewa. A wholly interactive experience that keeps people connected to each other and to their natural world even though most homes are fitted out with state-of-the-art cooking, washing and cleaning appliances.[386]

This is the economic base, what Huia Te Hau calls the tourist product. But here is another contemporary and ongoing dynamic, hidden from the tourist gaze. Again Huia Te Hau elaborates:

> The thermal waters of the region are regarded as nga waiariki - the waters of the gods. Each day the numbers in the village swell at bathing time in the morning and in the evening as tribal members return briefly to bathe. The bathing ritual is unique to the Iwi of the volcanic plateau, but none more regular and socially interactive than the baths at Whakarewarewa. Bathing protocol is strictly adhered to, ensuring respect, modesty and personal safety. We all bathe together. The bathing temperatures are regulated by the wind and the availability of the copious streams of hot water, to people's liking. We only use what runs over the surface of the ground. There are no thermal bores anywhere in the pa, never have been. Bathing in the Rahui does not take place usually during the day, as this is the time for when the tourists come to visit.[387]

Cooking and other customary uses continue on a communal basis:

> In separate area[s] in the Rahui, the cooking is done in steam hangi pits or in the boiling pools set-aside for this purpose. These communal kitchen facilities are used everyday. Food cooked in this manner is convenient, cost effective and never fails. Steamed puddings, casseroles, meats and vegetables, seafood. Absolutely delicious. There are separate hot pools for preparing food (especially wild game, pigs, poultry). There are times during the day when the main pool Parekohuru is used for the preparation of weaving materials – harakeke, kiekie.[388]

Ōhinemutu

The Revd W R Wade, Superintendent of the Mission Press, visited Rotorua in 1842. He describes Ōhinemutu as a place where hot springs were used for cooking and bathing and where the warmth of the ground was used to assist the propagation of kumara:

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[385] H Te Hau, Evidence, F77, paras 4-5, p 3
[386] H Te Hau, Evidence, F77, para 6, pp 3-4
[387] H Te Hau, Evidence, F77, para 8, p 4
[388] H Te Hau, Evidence, F77, para 11

> [Ohinemutu], the largest of the Rotorua pas, is situated on a peninsular projection, which may be said to be the very seat of the principal boiling springs. The houses of the natives stand on ground which is almost everywhere warm, and in some places hot: and the springs at their doors, or just at hand, serve as ever boiling pots, in which they easily cook their food. Indian corn has been seen, placed with care in a calabash, quietly stewing in a still corner: and potatoes or kumara are readily let into or drawn out of the boiling water by means of baskets constructed for that purpose.[389]

Wade goes on to describe the manner in which geothermal heat is used to counter the cold winters and assist the cultivation of kumara in a structure equivalent to a green house:

> If you go into the houses erected on warm spots, after the doors and windows, or apertures so-called, have been shut, you are instantly reminded of the highest temperatures of English hot-houses. This warmth is both grateful and useful to the natives, particularly in the winter season. Early in the spring they place their kumaras in baskets, in these natural hot-houses, leaving them for a month or six weeks to grow out. The weather by that time being sufficiently warm to allow their being planted out in prepared beds, the plants are then put into the ground in rows, and sheltered from the winds and morning frosts, by broom twigs, about three feet long, placed upright, so as to form a screen along the rows.[390]

John Johnson, the Colonial Surgeon, visited in January 1847 and wrote a series of articles in *The New Zealander*. Johnson was especially interested in the medicinal uses of the hot pools:

> There is no doubt however, but they possess valuable medicinal qualities both for internal use, and external application, as the Natives cure many diseases by simple immersion in them, but I should imagine that the uniform heat is the most active agent in the cure. However an accurate analysis…would throw light on their use in specific diseases, and it would be desirable that such should be made under the auspices of Government.[391]

Hochstetter, the Austrian geologist, was in Rotorua in April 1857. A keen observer of earth processes, he was most impressed by the dynamics of the 'hundreds of vents of multiple form and shape' which 'bubble, gush and steam'. He went on to describe the customary uses associated with these features:

> The natives have separate bathing springs, separate cooking springs, and others in which they do their washing. In places, where merely hot steam emerges from the ground they have erected vapour baths (Turkish baths), built huts for the winter on the warm sinter flats of the

[389] W R Wade, *A Journey in the Northern Island of New Zealand* (Hobart: Rolwegan, 1842), pp 144-145. Portions of Wade's account are reproduced by both Stokes and Boast.
[390] Wade, *A Journey in the Northern Island of New Zealand*, pp 144-145
[391] J Johnson, 'Notes from a Journal Kept During an Excursion to the Boiling Springs of Rotorua and Rotomahana, by way of the Waikato and Waipa Countries, in the Summer of [1846-1847]', section published in *The New-Zealander*, 20 November 1847. Johnson's reports, published in a widely read Auckland newspaper at a time when Parliament met in Auckland, did much to raise the interest of settlers and government in the potential of Rotorua as a tourist resort and health spa.

> spring deposit …. The whole atmosphere in and around Ohinemutu is always full of steam and sulphurous gases.[392]

These historic accounts are complemented by the memories of the Ngati Whakaue kaumātua and rangatahi who gave evidence to the Tribunal in 2005. Grace Ransfield,[393] Joseph Donovan[394], Tuhipo Kereopa[395], Miki Raana[396], Lori Paul[397], Miriama Douglas[398], Alfie McRae[399] and Brett Bonnington[400] shared their stories of growing up in the geothermal world which was Ōhinemutu. Grace Ransfield reminded the Tribunal of the hazards of living with ngawha and the need for children to learn at an early age about walking through the ngawha areas of the village.[401]

Collectively these speakers made it very clear that customary uses continued on into the contemporary world. Miki Raana, for example, described the customary uses for pools and springs:

> These were used in traditional times for the easing of pain, cooking, heating, washing, bathing, and plant preparation. Ngati Whakaue used traditional management methods to regulate the use and utilisation of these springs and pools.[402]

He adds that the geothermal source provided heating as well as steam cooking facilities for homes and for local marae as well as bathing facilities. He himself is one of the guardians/caretakers of a family bath known as the 'Rangihaupapa'.[403] Miriama Douglas gave similar evidence:

> I can remember as a child in Ohinemutu that we constantly used the geothermal resource for cooking, bathing and cleaning and on various occasions for kumara preparation, heating and medicinal purposes.[404]

Alongside these practical roles, the geothermal surface features, the geothermal fields and the TVZ provided a strong social role. Tuhipo Kereopa remembers vividly:

> There used to be an open-air bath opposite Constance Te Kiri's in Ohinemutu. I enjoyed bath time as a child as it was a great social time. It was a chance to find out from extended whanau

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[392] Hochstetter wrote in German in 1864. Boast, 'The Hot Lakes', A24, p 80 uses the translation provided by Dr Charles Fleming in 1959. Stokes uses an alternative translation of the same passage, in *Legacy of Ngatoroirangi*, A56, p 176
[393] G Ransfield, F 25
[394] J Donovan, F 31
[395] T Kereopa, F 51
[396] M Raana, F 62
[397] L Paul , F 75
[398] M Douglas, F 63
[399] A McRae, F 71
[400] B Bonnington, F 72
[401] G Ransfield, Evidence, F25, para 7, p 3
[402] M Raana, Evidence, F62, para 1.6, p 2
[403] M Raana, Evidence, F62, para 1.8, p 3
[404] M Douglas, Evidence, F63, para 1.9, p 3

> what was going on. Our family couldn't afford to go [to] the movies, but our cousins could. We used to get a scene-by-scene account of the movie showing at the local cinema.[405]

Joseph Donovan identified three strands to the ongoing social dynamic between people and geothermal source. These are his words:

- Geothermal life is part of belonging to Ohinemutu Village. It forms part of the daily life of the residents.
- The resource is more than just water for bathing. It is essential to the health and well being of the villagers, especially the kaumatua. The ability to soak and relax in the waters is part of their health lifestyle.
- There is a culture and way of doing things, which is based around the waters. It involves a communal and shared lifestyle. You have to share and that dictates the protocols for use. As a member of the village community, I have come to understand what the rules are. Leave things as you find them; do not be wasteful and think about your neighbours needs.[406]

The development of tourism since the 1880s, and the growth of Rotorua City since World War II, may have impacted on communal bathing on a larger scale but customary uses continue at the hapu and whānau level. Lori Paul told the Tribunal:

> Our whanau own the ngawha on our property. It is communally owned by all of us. It is not owned by the public of Rotorua. We have fully used the ngawha across many generations. In my lifetime – at least 4 generations. Our use of the ngawha is customary and current. I wish to keep this aspect of my whanau's lifestyle alive for my grandchildren.[407]

The kaitiaki roles of the customary managers are clearly evident. Brett Bonnington spelt out the ways in which the geothermal resources, and the geothermal field are harnessed and coordinated in the contemporary world:

> The big ngawha, which is full of boiling water, is used for cooking koura, crayfish and scalding wild pigs and game stock. The smaller ngawha is used for boil-ups, steam pudding, brawn (pig's head). We cook in big pots, it usually takes 3 – 4 hours depending on what's being steamed.[408]

He adds that ninety per cent of the cooking in winter is done through the ngawha and goes on to describe the dynamic of the larger link ups:

> This is the cooking system we use when we are catering for marae or village functions. Once a week (Wednesday) we will have an Ohinemutu get-together where the village residents will donate food, which will be cooked in the ngawha and lifted at about 6.30pm. The village is all

[405] T Kereopa, Evidence, F51, para 11, pp 3-4
[406] J Donovan, Evidence, F31, para 6, pp2-3
[407] L Paul, Evidence for Ngati Whakaue, 22 April 2005, Document F75, para 8
[408] B Bonnington, Evidence, F72, para 4, p 2

> able to attend and discuss the week's events. The menu will depend on what is being donated – from wild pork to oysters.[409]
>
> These ngawha are a backup to the 3 marae situated in the village and we will often help each other to cater for outside hosted functions.[410]

Moving round the lake towards Kuirau, Grace Ransfield talked about cooking koura in the hot water running from the ngawha on the Arataua at the mouth of the Utuhina stream and on the shores of Lake Rotorua.[411]

Kuirau - Tarewa Pounamu

Boast notes that Wade in 1838 went from Ohinemutu to visit 'a valley of hot springs at no great distance.' Boast is of the view that this was Kuirau or Kuiarau where there is a boiling lake.[412] This land is situated within the junction of Ranolf Street and Lake Road. Here Wade noted that:

> In some places there were holes, from which steam constantly issued; and though nothing but steam was to be seen, you might hear the water boiling and bubbling at a furious rate. These holes are a singular convenience to the natives, who lay from top or other litter over them so as to condense the steam, and then place their garments at the top to get rid, by an easy process, of all vermin; as animal life is speedily destroyed by the sulphurous vapour.[413]

At the Kuirau Park, and after a long period of dormancy in 1989-2001 geothermal activity has increased with hot and boiling outflows revitalising cooler and non-flowing springs.[414] It was claimed before us that in modern times there was a large waiariki called Papatangi, lying in Kuirau Park and a ngawha on the side of the road popular with chidren. These, it was claimed, were popular bathing pools.[415]

Ngatarewa Pounamu or Tarewa involves land bordering both sides of the present Tarewa Road, following the course to the Utuhina River between Lake Road and Old Taupo Road.[416] We know there was a settlement at Tarewa during early colonial times because Hochstetter described it in 1859, and the numerous hot springs he found there.[417] There are naturally surfacing ngawha throughout the vicinity and we heard evidence of how they are cared for by different whanau as their personal taonga. The ngawha aound the marae were and are used for cooking and bathing. Grace Ransfield spoke about baths that adjoin the Tarewa Pounamu Marae and another at the Raharuhi

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[409] B Bonnington, Evidence, F72, para 6, p 3
[410] B Bonnington, Evidence, F72, para 7, p 3
[411] G Ransfield, Evidence, F25, para 3, p 2
[412] Stafford, *Landmarks of Te Arawa*, Vol 1, p 41
[413] Wade, *Journey in the Northern Island of New Zealand*, as cited by Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, pp 29-30
[414] DA Gordon (EBOP), BJ Scott and EK Mroczek (Institute of Geological and Nuclear Sciences), *Rotorua Geothermal Field Management Monitoring Update: 2005* (Environment Bay of Plenty, June 2005), p 61
[415] Maxwell, A17, p 83
[416] Stafford, *Landmarks of Te Arawa*, Vol 1, p 57
[417] Hochstetter as quoted in Stokes, *Legacy of Ngatoroirangi*, p 173- 176

homestead.[418] The bathing facilities at Tarewa Pounamu Pa would be used by tourists with Contiki Tours. The money gathered would go towards bath maintenance as distinct from marae maintenance.[419] Ngawha were also used to heat the marae.[420]

To sum up this area of Ohinemutu, Kuirau and Tarewa, we refer to the translated words of the late Hamuera Mitchell (Snr) and his evidence to the Waitangi Tribunal in February 1993:

> Ko Hamuera Taiporutu Mitere ahau!
>
> … I am the kaumatua of these Ngati Whakaue's and we adhere to these principles. I wish to say that my vision is failing, and my hearing is likewise failing, please bear with me in any omissions because of my failing faculties…otherwise my name Sir is Hamuera Taiporutu Mitchell. …[Track 2] I live here sir, this is my home, this is my marae out here in Te Papaiouru, I was born here and I grew up here, my wife is from Ngati Whatua. I am one of those few people, privileged to have seen and lived with the elders the koeke, the people who had all the knowledge and information and I am their descendant. … [Track 3] This house Sir is our Whare Tapere, where we come to entertain ourselves, our whare runanga where we have conferences, our whare puni where we sleep from time to time, and our whare wananga where we hold our historical deliberations. … This Sir, is the fourth building named after Tamatekapua, the first building was built on Mokoia. … that was about 1872 when the first building was built. In 1894 a second one was built, I don't know the time of the third, and now we are in the fourth building here. All the effigies around the walls Sir are of our ancestors, some of them were carved with modern steel chisels and others with stone chisels. The stone chiselled carvings were brought over from Mokoia. The original floor of this house was mother earth. It was not till later that we were blessed with timber to put down a timber flooring. Otherwise whilst it was only the earth we laid fern down and slept on that and the place was quite warm. … [Track 6] …That whole lake is how we get the name Te Ure o Uenukukopako. Pull all the subtribes of that lake together, we call them Te Ure o Uenukukopako. I'm talking about the Ngati Whakaue here, it's safe to say that almost 90% of that is thermal. In the winter, you could see the steam rising along the lakeshore, and people used to come along the lakeshore, and if they want a bath, just dig a hole in the sand. I myself used to do that (as a child). That's why I say the majority is all thermal. [Track 7] From Wharenui there we get on to the block. You hit the Puarenga Stream. That is the stream coming through the Whakarewarewa region. From the Puarenga to the Utuhina Stream on the western side of Rotorua. The landing between those two streams is what they call the Pukeroa Oruawhata block is almost 100% thermal, us here in Ohinemutu. It is an area comprising 4000 acres, of which 3000 acres have been disposed of which leaves a balance of 1000 acres, which Ngati Whakaue donated for the benefit of the town. And that is where I think you have heard we have minor controversies with the government and their handling of our reserves, haven't been quite satisfactory. Now I'll pass on to the Ohinemutu block…We're at Ohinemutu now, this comes from Ihenga who lost his daughter here, she was only a child, she came out the back here and told her father she was going to see her relations in Ngongotaha, but did not return. Ihenga sent his people out half east and half west. The group that went west, found her body just past Ngongotaha they found her entrails on a stump at Hakaikuku. When they examined the human entrails they decided it was hers. The people came back to their chief and he just broke down and sobbed for his daughter then he exclaimed (I may not be quite right

[418] G Ransfield, Evidence, F25, paras 4 , 6, pp 22-23
[419] G Ransfield, Evidence, F25, para 8, p 3
[420] G Ransfield, Evidence, F25, para 9, p 3

but it will be close enough), o e hine mutu kau ta taua noho tae. That's how you get that name Ohinemutu. Well we are the descendants of course. Now I'll come back to Ohinemutu proper. The area of Ohinemutu extends from the catholic church to the Utuhina bridge. That is Ohinemutu. It was a very virile and still very virile today. And in those days there were no roads, just ordinary footpaths. The homes were back to back, I would say the population then was around 800, that's how close it was. We are the descendants today, and you won't see so many in Ohinemutu for the simple reason we had to comply with firstly the Borough and then City Council. [Track 8] … I'll get down to the ngawhas here, we lived here. We just lived…I would say it was one of the most populated Maori quarters in NZ, because we were only separated by wire fences, and some times no fence at all it was like a boarding house. And that's how… I remember some of those places back then, I remember my home over here had three houses on it. My home over here had two houses on it. That's how they were back to back, you could hear them chattering in the morning like cockatiels. That's how Ngati Whakaue was in those days, and this place is 100% geothermal. All along the lakeshore was geothermal… we would go fishing for morihana ah kanga [sic], we had no clothes, (no pakehas around in those days aye), and we would catch a few and tie them on a string, we would be shivering then we would dig a hole in the mea by the lake and the water would come up and we'd be warm. If we wanted to cook our fish straight away, we'd dig another hole, and cook our breakfast. [Track 9] That's how we were in the old days, we lived it we spoke it we sang it and we slept in it. Right over here, that's why it's called Te Papaiouru, a Papa is a slab of stone. Ouru is a ngawha that's one boiling over there. That's why they call it Te Papaiouru. We used to sleep right in front here where it was warm, we would put our mattress there in those days, it was warm, the whole place was warm. I'll take you around quickly after we finished here, you'll have to leave your shoes on, otherwise you'll scald your feet. Now, we regarded Ohinemutu specially, with great faith and sincerity that we treated our pieces of land and our of course ngawhas with decoration…, we even treated them like persons at times. We would speak to them, quite often the ngawha would change in the degree of heat, it would be quite cold, so we speak to them, and say "ata e koro, hei tamata koe i tenei ata" and it would come back and say "hei ano apopo koe ka hoki". I can hear Bishop Kingi, he's always talking to them every morning… But we've got hot pools all over the place in Ohinemutu. That's how we feel about them, that's how we feel about them today. Very rarely, do we dispose of any of our lands here. Very very rarely. There may only be about two or three sections that have gone. We try to retain them. Sometimes the elders are from Ngapuhi, we never see them and then we hear that they have disposed of it. So we buy them back. That's how we are. We are very very close in that respect. Ngati Pikiao has their own …. The next closest would be the Whaka people. They're in the same position. But we often cooked in ours, we used our hotpools for medicine I myself, I was standing naked, when I was born my gran used to take me down to the hot pool, and she would scrape my feet and they would be straightened by these… that's how I got the hundred yards at the high school. That's how we were and that's how we are now. And we always used our ngawhas for cooking and we always had rows (arguments) over our ngawhas. Its just the way we felt, we respected our ngawhas very very much. Even now, trying to keep people away from here, they come down right in front of Mr Bishop Kingi's place. I don't know where they're from Ngapuhi or Ngati Whatua, but they're strangers to me. That's the way it is happening everyday. That's the way Ngati Whakaue was brought up, and still is today. [Track 10] We leave Ohinemutu, over the river a place called Koutu. About 200 acres. Same thing applies there, but the strength of hotpools there would be 40 to 50%. Another piece of land over there called Haumaipihi owned by Mr Kingi. A very venerated place in that, our guardian Whakaue, that's where he always rested [at the hospital] when he would fly around Rotorua, he was what they call an "atua" and the people feared him and still respected him, because he was to save my people at certain types of tribal wars. I don't know whether you seen at the hospital the frame there all in concrete. So Bishop Kingi is a descendant of that man. From there to Koutu and from Koutu to Kaora?? [inaudible]. That's where the geothermal finished. The ngawhas come and they go. They're very

> temperamental. We look after them, we would be worried if they didn't come back. We used them when I was a child, for health purposes, cleansing, cooking. We use them today, every day. We have songs, waiatas for our ngawhas here. [ELDERS SINGING WAIATA] Mr Mitchell continues…"Ko kohue ki te Ruapeka, Te Ruapeka is shown here, that is a thermal pool, we all bathed there in those days hence this song was created for that particular place. Now we'll sing another one". [ELDERS SINGING WAIATA] Mr Mitchell continues…Now Muruika, that's where the church is, that's sacred ground there. From there right to the point, that's Muruika. Its 100% thermal, it's a place where chiefs have been buried, its unique, we have a chief buried there at the moment. Some relation of Mr Kingi. Ihaia Pipi is buried there, right on a hot spring called Te Rina. They have names, all the pieces here in Ohinemutu. The other one is over here Te ??[inaudible] o te Matua, that's him with the Angel. [ELDERS SINGING WAIATA] Mr Mitchell continues… Just to show you just how much we regard our springs, that we even composed songs for them. These are the songs… That's our chief there with the angel there. When we go around, I'll show you all these spots. [Track 11] If you want me to go through the different pieces of ground here in Ohinemutu, I know them all, I know their ancestral names, would that be of use to you people? I think we'll leave them till we go around. Ko pirangi au ki te whakatai, mea, Kua pou taku hou. Ka pu te ruha, kua pou taku hou. (J Malcolm). Mr Chairman, The speaker suggests we take time out to look at these sites. It would give him a rest.[421]

Environment Bay of Plenty - Environment Bay of Plenty describes the Rotorua area's natural features as numerous hot and boiling springs, geysers, bubbling mud pools, fumaroles. Steaming ground, sinter deposits, solfatara and geothermal vegetation.[422]

The Council notes that the Tarewa Group of Springs ceased activity by November 1981. But the springs have now refilled and resumed boiling and overflowing. During the many years of dry and cold inactivity these vents became filled in with soil and debris, which progressively camouflaged the true nature of these holes. Because these holes were dormant, and had been so since 1940s to 1960s, building development was allowed to proceed. As a result of these springs resuming, boiling overflows have affected houses at Tarewa.[423]

East Rotorua Geothermal Field - Mokoia - Karamuramu and Rotokawa

We turn now to that part of the Rotorua geothermal field known as East Lake Rotorua. This field is thought to include the springs on Mokoia Island and the Rotorua Lake Rotokawa (as opposed to Rotokawa in the Taupo district) and the Rotokawa Baths.[424] Te Arawa own most of the land over this field, including the bed of Lake Rotorua.

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[421] Transcripts Wai 153 Te Arawa Geothermal Claim Hearings (1993) J7
[422] Environment Bay of Plenty, , http://www.ebop.govt.nz/Water/Geothermal/Geothermal-Resource.asp (accessed 24 July 2007)
[423] *Rotorua Geothermal Field Management Monitoring Update: 2005* (Environment Bay of Plenty, June 2005), p 61
[424] *Te Arawa Representative Geothermal Claims Report*, p 2

Mokoia

Te Motutapu a Tinirau or Mokoia Island has been the place of much history for the iwi and hapu of the area, and in particular Ngati Uenukukopako, Ngati Rangiwewehi, Ngati Whakaue and Ngati Rangiteaorere. This history is captured by Kawharu who concludes that in sum, 'following Uenukukopako's conquest, his mana was established and maintained through his sons at Mokoia and on the mainland around Lake Rotorua between Kawaha and Weriweri.'[425] We refer to this evidence merely to establish the long Maori presence on the island without adopting a view as to whether this analysis is correct in mana whenua terms.

Along with the traditional history, which includes battles fought with Ngapuhi when thery raided the district prior to 1840, Boast has provided accounts of early Europeans travelling through the Rotorua district and commenting on Mokoia.[426] Wade, for example, noting the Maori use of the hot spring on Mokoia, wrote:

> The natives had ingeniously divided the pool of water into two compartments, connected with each other by a narrow channel, and each having an outlet to the lake. It was so contrived that they could always keep the larger compartment as a constant warm bath, regulating its temperature by letting in hot or cold water, as required. I only saw one old woman comfortably sitting in it; but Mr Chapman informed me that he had seen it crammed full, with about fifty naked natives, men, women, and children, thus keeping up their … warmth on a cold evening.[427]

He must be referring here to Tutanekai and Hinemoa's Pool, Waikimihia. Mokoia is a Maori Reservation administered under Te Ture Whenua Maori Act 1993 and is held by trustees for the common use and benefit of Ngati Whakaue, Ngati Uenukukopako, Ngati Rangiwewehi and Ngati Rangiteaorere. The reservation trustees administer the surface pools and springs on Mokoia.[428]

Rotokawa (Rotorua)

According to Maxwell, Rotokawa baths or Waikawa lying next to Lake Rotokawa was the hub of Ngati Uenukukopako life.[429] People have always lived around the baths that are found here and at Karamuramu a series of baths and ngawha on the lake shore.

> Hiko Hohepa remembered the waiariki at Rotokawa as gathering places where the old people talked about everything from community politics, the traditions of the people, naming of the

[425] Kawharu et al, G2, pp 51-55
[426] Boast, 'Maori Customary Use and Management of Geothermal Resources', A27; and Boast, 'The Hot Lakes', A24
[427] Wade, *Journey in the Northern Island of New Zealand*, as cited by Boast, 'Maori Customary Use and Management of Geothermal Resources', A27, pp 28-29
[428] *Te Arawa Representative Geothermal Claims*, p 2
[429] Maxwell, A17, p 74

stars and everyday life events.[430] Rotokawa was considered particularly good for arthritis, whewhe (boils) skin dieases and aiding the healing of broken bones.[431]

The Rotokawa Baths are part of the former Whakapoungakau Pukepoto block awarded to Ngati Uenukukopako and Ngati Rangiteaorere in 1882.[432] The southern portion was subdivided into nine allotments. Rotokawa baths lie in Whakapoungakau 15 or Kakahoroa. The Rotokawa baths are still in Maori ownership as a Maori reservation administered under Te Ture Whenua Maori Act 1993 for the benefit of Ngati Uenukukopako, Ngati Rangiteaorere and Te Roro o te Rangi.[433] But the lake was lost to the Crown to address survey costs.[434]

Environment Bay of Plenty - There are hot springs along the east coast of Mokoia Island, with minor silica sinters. There are also warm seeps along the eastern shore of Lake Rotorua.[435]

Tikitere

As noted above, Tikitere (called Hells Gate in 1885 by George Sala, the famous reporter) is a large field of geothermal activity lying on the Rotorua-Whakatane highway, about three miles east of the Te Ngae junction.[436]

Tikitere is the name for the entire geothermal valley. The people of the valley say that since the time of Tanewhakaraka (younger brother of Ngatoroirangi), Tikitere has been occupied by his descendants and those who intermarried with Ngati Rangiteaorere.[437] It has been, they say, a place of permanent settlement and the waters were used for bathing, cooking, and medicinal purposes.[438] We had evidence of European encounters with the people of this settlement and the geothermal resources of this field around 1840.[439] Governor Grey for example, was moved to propose a hospital at Tikitere during his visit in 1846. This was due to the vast numbers of natives who visited the area for the benefit of the warm sulphur baths for the cure of 'scrofula and other cutaneous diseases.'[440] Thomas Henry Smith (Resident Magistrate) 1848 described watching Maori make a 'bath by digging a hole between two streams, one being hot, the other being cold, and diverting the water to the hole to regulate the temperature.'[441]

Here there were waterfall baths such as Te Mimi o te Kakahi or Kakahi falls, ngawha such as Te Hinu of oily consistency, Te Korokoro springs (the throat with gurgling

[430] Maxwell, A17, p 74
[431] Maxwell, A17, p 75
[432] *Te Arawa Representative Geothermal Claims*, pp 2-3
[433] *Te Arawa Representative Geothermal Claims*, p 3
[434] *Te Arawa Representative Geothermal Claims*, p 2
[435] Environment Bay of Plenty Website
[436] Maxwell, A17, pp 56, 67
[437] Maxwell, A17, p 60
[438] Maxwell, A17, p 60
[439] Maxwell, A17, pp 61-64
[440] Cecil Watt Comp 'Tikitere', pp 5-6, DSC Appendix R, as cited in Maxwell, A17, p 62
[441] Maxwell, A17, p 63

sounds like a death rattle), and the hot lakes Waikare (rippling waters) reputed to be the biggest single area of hot water in any geothermal area in the district.[442] There are also cold water springs and streams in this area, many of them named.

Mr Whata-Wickliffe described the Whakapoungakau Springs (Hells Gate). He claimed they were used by Te Takinga and Rangiteaorere. The claimant would bathe there as a child. They also used the springs for cooking.[443] Mr Horace Barney Wiringi Meroiti for Ngati Tuteniu also expressed their interests in Tikitere thermal area.[444]

Ngati Rangiteaorere used these resources for economic benefit by guiding visitors or providing them with the opportunity to access the resources. As owners they maintained this practice until the present although for a twenty year period during the twentieth century the land was leased to outsiders.[445] They have also mined the sulphur in the past.[446]

Environment Bay of Plenty - Here there are hot boiling springs (both acid sulphate and chloride bicarbonate), gas discharges, fumeroles, steaming ground, solfatara and sulphur deposits. It is noted that hydrothermal explosion craters exist here.

Rotoiti - Rotoma - Rotoehu

During the Preliminary Te Arawa Geothermal Inquiry, the surface manifestations of geothermal activity within the rohe of the hapu of Ngati Pikiao were presented as part of the Ngatoroirangi story. These manifestations were to be found on Rotoiti 15, Rotoma Inc, Matawhaura, Waitangi No 3, Waitangi No 2, Rotoiti Central Basin including the bed of Lake Rotoiti, Taheke, Paehinahina Mourea, Manupirau baths, Taheke No 8C, Ruahine-Kuharua, and Puaretu Reservation.[447] We also heard from Ngati Te Takinga and Ngati Rangiteaorere. From the evidence we did receive within this broad area, the prominent geothermal features for the claimants are discussed below.We

Rotoiti-Mourea-Taheke

Hochstetter in 1859 recorded geothermal features at Tikitere, Karapo, Te Korokoro, Te Waikari, Te Tarata, Harakeke, Ngunguru, Tihipapa, Papakiore, and Ruahine. At Ruahine he noted Maori use of the hot steam vents for cooking and described the area thus:

[442] Maxwell, A17, pp 68-69
[443] D Whata-Wicliffe, Evidence, F37
[444] H Meroiti, Evidence for Ngati Tuteniu, Document F95
[445] Maxwell, A17, pp 63-66
[446] Maxwell, A17, p 71
[447] D Rangitauira, Ngati Hinekura Closing Submissions, Paper 3.3.72, p 45

> Ruahine has the appearance of an active crater. Its crater-like basin lies on a hillside sloping towards Rotoiti; on its floor boils black mud, which is spattered several feet high in the air by the rising and bursting steam bubbles. The column of steam rising here is designated by the natives Te Whata kai a Punikirangi, i.e. as the place where food is hung up for Punikirangi. Yellow masses of flowers of sulphur adhere to the variegated beds of clay. Black muddy water flows out of the mud pool. The valley in front of the basin, however, is covered with sulphur and sinter incrustations, from which steam rises from more than a hundred small vents. Here, too, the greatest caution is needed not to break through into boiling mud. The natives use the vents emitting pure steam for cooking.[448]

At the south-western end of Lake Rotoiti, is Mourea Paehinahina, once an amalgamation of the Mourea, Paehinahina and Whakapoungakau No 3 blocks. The land has been known by several different titles: Taheke Papakainga, Mourea Papakainga, Tikitere Development Block and Paehinahina.

It is now known as Paehinahina Mourea. We were told that this broad area includes a geothermal field capable 'of generating enough power to source the whole of Rotorua.[449]' It has many ngawha, waiariki and puia, including the Manupirua Springs, on the southern shores of Lake Rotoiti, within the original Paehinahina Mourea block.

The Manupirau Springs are considered to be waiariki that Kuiwai and Haungaroa left in their path on the way to save their brother Ngatoroirangi. After reviewing the evidence before the Native Land Court, Maxwell notes there were several pa in the immediate vicinity of Manupirua, the main two being Paehinahina and Pukeko pa.[450] There were large plantations of kumara at and around Manupirua in pre-European times.[451] It was highly regarded for its curative properties.[452] Gilbert Mair came to live at Manupirua and eventually the baths became a popular tourist attraction.[453] Access is only possible by boat or waka.[454]

We were also told about the Papakiore springs used by many hapu from the 1800s.[455] Papakiore was used as a bathing place, cooking ngawha and healing pool.[456] It was popular for medicinal properties and healing injuries. The waters and muds were famous for healing skin ailments. In the vicinity is Tihipapa, a valuable cooking area. Both these cooking areas were used by the people of Rakeiao marae.[457]

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[448] F Hochstetter, Geologie von Neu-Seeland, Wien, 164: English Translation CA Fleming (ed), Geology of New Zealand, Government Printer, Wellington, 1959, as cited by Boast A24, pp 80-81.
[449] Rex Morehu, F 28, p 2
[450] Maxwell, A17, p 38
[451] Maxwell, A17, p 39
[452] Maxwell A17, p 39
[453] Maxwell, A 17, p 40
[454] D Whata-Wickliffe, Evidence, F37, p 39
[455] D Whata-Wickliffe, Evidence, F37, p 40
[456] D Whata-Wickliffe, Evidence, F37, p 40
[457] Maxwell, A 17, p 46

The Ruahine Springs are located east of Papakiore.[458] The puia or geyser here is called Ruahine's cauldron.[459] The mud was used for aches and medicinal purposes.[460]

Other geothermal areas were used for bathing (Paramena); footbath (Manuaute); bathing pool on the waters edge of Lake Rotoiti (Te Rei, Parengarenga); and the two ngawha Otutarata, and Waihunuhunu.[461] The Waihunuhunu and the Terei Baths, just west of the Manupirua springs, were known for their curative properties. They too can only be accessed by waka or boat.[462]

Mr Whata-Wickliffe spoke of the Tumoana Point Springs near Te Takinga Pa. The geothermal feature here is below the sandy surface and still visible today.[463] Tumoana Springs have been used for bathing by Mr Whata-Wickliffe and his whanau since he was young.[464] We note that Mr John Fenwick told us that his whanau own this block and that it has 'sand beaches on either side and is geothermally active under foot.[465]

Other springs important to Ngati Te Takinga were described by Mr Whata-Wickliffe. These were Wairau Springs used from the 1800s by various hapu.[466] There are also the Waitupapaku Springs used from the 1800s to cleanse Ngati Te Takinga's dead after battle. Today it is known for spiritual encounters that occur there.[467]

Mourea Koutu is the land that runs from Mourea to the delta where the Ohau Channel flows into Lake Rotoiti. Erana Waiomio told us Te Takinga Marae is situated within this area.[468]

Okere - Ruahine - Kuharua

This block was an amalgamation of two blocks and lies on the north-western arm of Lake Rotoiti.[469] The Kuharua block is directly to the east of Te Weta Bay. The block is associated with Kahumatamomoe (son of Tametekapua and nephew of Ngatoroirangi).[470] Maxwell records that Mr Whata-Wickliffe can remember warm water seeping out of the base of the cliff.[471] Geothermal activity is still visible.[472] The

[458] Maxwell, A 17, p 46
[459] Maxwell, A17, p 46; D Whata-Wickliffe, Evidence, F37, p 40
[460] D Whata-Wickliffe, Evidence, F37, p 40
[461] Maxwell, A17, pp 46-48
[462] D Whata-Wickliffe, Evidence, F37
[463] D Whata-Wickliffe, Evidence, F37, p 40
[464] D Whata-Wickliffe, Evidence, F37
[465] J Fenwick, Evidence, F 20, p 3, and F 20(a)
[466] D Whata-Wickliffe, Evidence, F37
[467] D Whata-Wickliffe, Evidence, F37
[468] E Waiomio, Evidence, F74, p 1
[469] Maxwell , A17, p 54
[470] Maxwell, A17, p 54
[471] Maxwell , A17, p 54
[472] Maxwell , A17, p 54

Ruahine block provides yet another reference to the sisters of Ngatoroirangi.[473] The Onepu Stream flows through this block.[474]

Taheke

Taheke has geothermal lands. According to Kawharu within the Taheke block lived a number of hapu and iwi, including Ngati Te Takinga, Ngati Hinerangi, Ngati Rangiunuora, Ngati Hinekura and Kawiti.[475] Ngati Makino, Ngati Rongomai and Ngati Parua also have traditional interests.[476] In 1910, after a special commission was established to investigate complaints regarding the ownership determinations, the Taheke block was partitioned into Pungarehu, Mourea Papakainga, Kaokaoroa, Waiatatuhi, Pukahukiwi, Te Karaka No 1 and 2, Taheke papakainga, Wainui, Te Akau, and Kohangakaeaea.[477]

Taheke 8C and associated blocks include geothermally active land.[478] It is mined for sulphur and the people have always assumed ownership of the resource and acted accordingly.[479]

On the north-eastern side of Lake Rotoiti, there are the Taheke Springs around the Onepu Stream on the original Taheke block. This stream joins the Kaituna River flowing to the sea. According to Maxwell, when people wanted a bath, they would 'just dig a hole in the Onepu Steam and climb in.'[480] The water in the stream is warmed by fumaroles from below. An alum pool was used for medicinal purposes and the hot steam bores were used for cooking.[481] Waiariki called Te Kuirau, Te Ponui and Waikite were used in this area.[482] At Te Kuirau, Maxwell records that Mr David Whata (Wickliffe) remembers camping expeditions there. They would arrive at Kuirau and 'the first thing the old people would do was to have a 'tangi' for their dead and then we would set up camp.'[483]

Environment Bay of Plenty – At Taheke there are fumaroles, silica residue pans, sulphur deposits and solfatara, acid sulphate springs and pools and geothermal vegetation. In Lake Rotoiti there are gas bubbles, and hot lake sediments.

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[473] Maxwell , A17, p 54
[474] Maxwell , A17, p 54
[475] Kawharu et el, G3 pp 687
[476] Kawharu et el, G3 pp 687, 694-698
[477] Kawharu et el, G3 pp 698
[478] Maxwell, A17, pp 52-53
[479] Maxwell, A17, p 53
[480] Maxwell, A 17, p 50
[481] Maxwell, A17, pp 51-52
[482] Maxwell, A 17, pp 50-51
[483] Maxwell , A17, p 51

Rotoma - Rotoehu - Tikorangi

The Waitangi Tribunal in the *Preliminary Te Arawa Representative Claims Report* was in no doubt of the strength of the evidence demonstrating that Ngati Pikiao and other hapu of Te Arawa 'for very many generations' exercised rangatiratanga rangatiratanga over the principal surface manifestations within this area, including the Waitangi Soda springs, and to occupy the land overlying a substantial part of the Rotoma geothermal field.[484] Some of the hapu with interests in the same region are those that have appeared before us:, Ngati Tamakari, Ngati Rangiunuora, Ngati Hinekura, Ngati Rongomai, Ngati Tutaki-a-Koti and Ngati Makino.

Tikorangi is the name of a large geothermal field south of Lake Rotoma which has large sulphur deposits used traditionally for medicine.[485] The land blocks associated with the field are Rotoma Incorporation, Matawhaura and Rotoiti 15.[486] Sulphur deposits are found throughout this area and were mined by the owners.[487] There are springs and sulphur deposits on Matawhaura, Rotoiti 7 and the Tautara blocks.[488] Matawhaura land block takes its name from the sacred mountain in this area.[489]

The Waitangi Soda Springs located between Lakes Rotoma and Rotoehu are in this vicinity. These springs are located within the Waitangi No 3 Maori Reservation created in 1912.[490] Waitangi has been a waiariki enjoyed by its owners as a bathing place and as a source of medicinal benefits, the waters for which are obtained from the neighbouring ngawha.[491] Birthing women used the pool for relief and this practice continued at least into the first half of the twentieth century, with one of the claimants, David Whata-Wickliffe, being born there.[492] The Springs are held by Ngati Rangiunuora and Ngati Kawiti.[493] Ngati Tutaki-a-Koti have lands in the area, as do Ngati Makino, Ngati Pikiao including Ngati Tamakari, and a number of other hapu.[494] According to Stafford these springs are of great significance to the people of Rotoehu and surrounding areas.[495] There are two major geothermal springs, Ngarongoiri and Reihana; the Waiwhero Stream adds fresh water, and the combined shallow Waitangi Soda Pool flow discharges into Rotoehu.[496] There are also the Otei springs which are situated south-east of the Waitangi Soda Springs.

Environment Bay of Plenty – The large geothermal field on the Southern side of Lake Rotoma was called Tikikorangi by its Maori owners. It is also known as the Tikorangi

[484] *Preliminary Te Arawa Representative Claims Report*, p 9
[485] Maxwell, A17, p 31
[486] Maxwell, A17, p 31
[487] Maxwell, A17, p 31
[488] Maxwell, A17, p 36
[489] Maxwell, A17, p 36
[490] Maxwell, A17, pp 32-53
[491] Maxwell, A17, pp 32-53
[492] Maxwell, A17, p 35
[493] Maxwell, A17, p 32
[494] P Raharuhi, Evidence, B34; p 3; D Whata-Wickliffe, Evidence, F37 pp 38-39
[495] Stafford, *Landmarks of Te Arawa*, Vol 2, p 129
[496] Stafford, *Landmarks of Te Arawa*, Vol 2, p 129; Maxwell, A 17, p 33

Volcanic dome. There are warm springs at Waitangi, Rotoma eastern shores and Otei. There are sulphur and silica residue, pans, solfatara and hydrothermally altered ground, fumaroles and geothermal vegetation. In the Rotoma Puhipuhi area there are warm springs and hydrothermally altered ground.

Maketu

We end at this place where the phrase that binds Te Arawa and Tuwharetoa begins – Mai Maketu ki Tongariro (from Maketu to Tongariro), representing the spread of those who trace their descent and heritage to Te Arawa Waka and the story of Ngatoroirangi. Before us a number of iwi and hapu claimed interests or are recorded as having interests in the Te Arawa 'corridor' to the coast including Tapuika, Waitaha, Ngati Pukeko or Pukuohakoma, Ngai te Rangi, Ngati Makino, Ngati Whakaue, and Ngati Rangiwewehi.

Environment Bay of Plenty – There are warm springs that merge as seeps into marshy ground.

The Tribunal's Findings on CNI geothermal resources, the fields and the TVZ

Geothermal taonga, and all its surface and sub-surface manifestations, continue to be part of the cultural and spiritual identity of the claimants and of many CNI Maori. On this land they continue to use the resources and practise their associated customs. The resource remains a source of spiritual, physical and emotional sustenance. The tenacious grip they have maintained over many of these resources across the region, as the Crown acknowledges, coupled with the extensive evidence of Maori knowledge and use demonstrates that they consider the surface manifestations and underlying heat and energy system of the TVZ to be a taonga over which they continue to exercise rangatiratanga. The evidence presented to this Tribunal, covering a more extensive area and drawing on a greater volume of scientific and customary evidence, substantiates and is in accord with the claimant evidence presented but not fully dealt with in the Te Arawa Geothermal Inquiry. We find, therefore, that the geothermal resources, the geothermal fields and the TVZ are taonga protected by the Treaty of Waitangi. Geothermal activity is, for the iwi and hapu within the CNI, a taonga of great cultural, spiritual and economic importance.[497] For them it has long been a form of energy and a source of heat that allowed them to live in what would otherwise have been harsh conditions during winters. That form of energy was central to their way of life and well-being; they harnessed it for a range of activities and in some cases regulated and manipulated it, including adjusting the temperature of adjacent pools. It is clear also that reliance on geothermal activity and the exercise of rights was in many cases incorporated into normal patterns of seasonal movement. In this sense, the

[497] *Ngawha Geothermal Resource Report*, para 7.61, p 136; *Te Arawa Representative Geothermal Resource Claims*

pattern of establishment and exercise of rights to the geothermal resource was no different from the establishment and exercise of rights in any other natural resource.

We come to these findings based on the rights that CNI Maori can establish through Maori customary law by virtue of the creation stories and the more specific Ngatoroirangi stories. We also base it on the considerable commonality of customary and spiritual significance shown in the selection of examples discussed above. We note in this regard that geothermal activity not only gave a strong sense of identity for iwi living in the Central North Island, they also provided a multiplicity of practical uses regulated by tikanga or customary rules that protected the resource from degradation.

Reading and listening to that evidence we could not help but be struck by the notion that there is here a continuity of Maori relationships, of shared values and use, and of law and custom and the exercise of authority over the geothermal surface features, the geothermal fields and the subterranean resource known as the TVZ, that has remained unbroken for hundreds of years. We cannot escape the conclusion that the mana of the tribes in the Central North Island is inextricably interwoven with the resources which they believe were provided by Papatuanuku, Ruaimoko/Ruaumoko and the other deities of creation through the gift to Ngatoroirangi. The geothermal surface features, the geothermal fields and the TVZ, were without doubt as at 1840, possessed in accordance with CNI Maori customary law and tenure. Such law and tenure was based on intense associations with the resource, an extensive accumulated knowledge of its behaviour, and the varying characteristics of different surface and sub-surface manifestations – as with every other aspect of Maori knowledge of the natural world with which they claimed a close relationship. It was characterised also by an emphasis on relationships, whether through the sharing with others of access to particular pools or streams – binding visitors into relationships through shared obligations - or through widespread trade in associated by-products such as kokowai (red ochre). The development of customary law in respect of geothermal activity underlines their enormous importance to the ways of life of the majority of the iwi and hapu of the region. These iwi exercised rangatiratanga over the resources through Maori customary tenure and law and they have a continuing responsibility to act as kaitiaki. They exercised their authority over: the various surface and sub-surface features in the CNI; the 17 fields; and the subterranean geothermal resource (the TVZ, which largely falls within the CNI inquiry region). The evidence we have reviewed that considers how rangatiratanga was exercised, suggests that there were three layers of Maori rights and interests in relation to the geothermal resource - namely:

- Over geothermal surface features that form part of the bundle of rights akin to those associated with land ownership;

- Over the specific fields;

- Over the subterranean resource being the underlying common heat and energy system known as the Taupo Volcanic Zone.

In relation to the first and second layers, the particular hapu or iwi associated with the land, geothermal surface features and fields are the principal holders of rights of rangatiratanga exercising authority and control over access to the resources. Within these layers and by the operation of customary law, use rights were allocated, the complexity of which requires further research beyond the scope of this inquiry.[498]

In relation to the third layer of rights, they attach to the subterranean resource - underlying common heat and energy system of the TVZ. The latter is what all the iwi and hapu CNI share because they all depend on the presence of the TVZ to sustain their fields and geothermal surface features. In addition, all the iwi and hapu of the CNI hold this collective right by virtue of their common history, whakapapa and reliance on the discovery of the resources by Ngatoroirangi. As we found above, the Ngatoroirangi stories are held in common by Ngati Manawa, Te Arawa, Ngati Tuwharetoa and those claimants before us from Tuwharetoa ki Kawerau.[499] As some of the thermal areas fall into areas claimed by Ngati Raukawa, Ngai Te Rangi, Ngati Awa, Ngati Haka Patuheuheu and Tuhoe, there are connections that require their interests also to be recognised.

We find that in 1840 the iwi and hapu of the CNI exercised rangatiratanga and kaitiakitanga responsibilities over the use and enjoyment of all their geothermal surface features, the geothermal fields and the TVZ**.** In accordance with the Whanganui River jurisprudence, central North Island Maori possessed these resources as taonga over which they exercised rangatiratanga at 1840.[500] In customary terms the rights to geothermal taonga were divided into three layers of rights. The first two layers required that the Crown recognise the rangatiratanga of the hapu and iwi who act at the local level as kaitiaki of the different fields and surface features; and the other layer requires some recognition of all the iwi and hapu with original interests in the subterranean geothermal resource (TVZ). Therefore, the Crown was under a Treaty duty to protect these taonga and to provide for the exercise of Maori autonomy over them, at the national, local and regional level.

[498] Boast, 'Maori Customary Use and Management of Geothermal resources', A27, p 92
[499] Maxwell, A17, pp 27-106; M Kawharu and R Wiri, 'Te Mana Whenua o Ngati Manawa', Document I62, pp 16-17
[500] Taylor, generic submissions, 3.3.141, p 52

ISSUE 2: WHEN THE CROWN ASSERTED CONTROL OVER GEOTHERMAL SURFACE FEATURES, THE GEOTHERMAL FIELDS AND THE SUBTERRANEAN RESOURCE (TVZ), TO WHAT EXTENT, IF AT ALL, DID IT RECOGNISE AND PROVIDE FOR CENTRAL NORTH ISLAND MAORI CUSTOMARY RIGHTS AND TREATY INTERESTS?

Introduction

As European settlement proceeded in the nineteenth century, and visitor reports were published in New Zealand and abroad, the geothermal taonga of the Central North Island attracted significant tourism interest. As discussed in Part IV of this report, tourism and mining of deposits such as sulphur were identified as development opportunities from an early period. Later in the twentieth century the prospects of utilising geothermal energy for purposes such as heating and power generation (in the same way that Maori had used the geothermal taonga of the region for centuries, albeit with enhanced technology) attracted considerable interest. The Crown's authority over the TVZ and the rights to manage access to it largely took hold after the Second World War as a result of growing interest in utilising geothermal energy for electric-power generation. We discussed that in detail in Part IV and here we turn our minds to the steps the Crown took to acknowledge and protect CNI Maori proprietary interests in geothermal surface features, the geothermal fields and the TVZ

We have found that the geothermal resources, the geothermal fields and the TVZ were taonga over which iwi and hapu exercised rangatiratanga as at 1840. We turn now to consider how the Crown has dealt with Maori interests in these resources.

The Claimants' case

As we noted above, Mr Taylor for the claimants argued that the TVZ was a taonga. In this section we turn to his argument that:

- There is no evidence that the iwi and hapu of the Central North Island have ever knowingly and willingly alienated their subsurface fields or the TVZ;
- They never gave up rangatiratanga over these taonga where they sold land.[501]

[501] Taylor, generic submissions, 3.3.141, p 52

What Was Granted in Land Sales

In considering what was granted in land sales Mr Taylor submitted that to Maori ways of thinking, there were two taonga. The first was the taonga of the surface features, the second was the taonga of the underlying geothermal resource.[502] When Maori sold land containing a geothermal resource, they sold the taonga being the surface features.[503] Thus Maori sold aspects of the resource, the geothermal manifestations on the land.

But Mr Taylor contended that they could not have sold any more than this because Ngatoroirangi's legacy was the chain of geothermal action, the interconnected system equating to the TVZ.[504] This was sacred to Maori and remains so today. It is, Mr Taylor submitted, shallow in more senses than one to suggest that the sale of a geothermal feature, or even a number of them, meant alienation of the fields and the subterranean resource (TVZ).[505] This result flows because there was no understanding of the ability to commerically exploit the fields and the subterranean geothermal resource when land was sold. In the circumstances when most land was sold in the CNI, this was simply not a matter Maori considered. If Maori had been asked, they would have said: you can have the land, but not the underground resource.[506]

Did Maori believe or have any understanding that they were selling part of this with the land? Mr Taylor submitted they did not.[507] Relying again on the Whanganui River Report, he argued that a willingness to share does not amount to an extinguishment.[508] On sale, Maori were clearly granting access, but it is a leap without foundation to say Maori were in the same transaction giving away the control right to the underground, interconnected resource of which they were clearly aware.[509] Mr Taylor noted the reliance on the Whanganui River Report is not based on whether the geothermal resource was similar or the same as the Whanganui River. Rather, the Report ought to be considered in terms of the principles it provides, and their applicability to the current situation, rather than to 'distinctions as to the exact nature of each of the resources'. On the basis of that report, there remains an unacknowledged Maori proprietary interest in the geothermal fields of the CNI.

Retention of Rangatiratanga

Mr Taylor went on to argue that every expectation of Maori would be that when they sold land, Maori retained their rangatiratanga and ownership over the subsurface resource.[510] The separation of authority and use is not unknown to Maori as this was

[502] Taylor, generic closings, 3.3.67, p 186
[503] Taylor, generic closings, 3.3.67, p 186
[504] Taylor, generic closings, 3.3.67, p 186
[505] Taylor, generic closings, 3.3.67, p 186
[506] Taylor, generic closings, 3.3.67, p 188
[507] Taylor, generic closings, 3.3.67, p 186
[508] Taylor, generic closings, 3.3.67, p 186
[509] Taylor, generic closings, 3.3.67, p 187
[510] Taylor, generic closings, 3.3.67, p 187

inherent in their land tenure system which recognised individual use rights under the mana and authority of the hapu or iwi.[511] Furthermore, and to use an example put to Associate-Professor Richard Boast, a witness for the claimants, Mr Taylor considered whether, hypothetically, in selling geothermally active land near Ohinemutu, Ngati Whakaue would have thought they were giving away rights to others to exploit the geothermal energy to the detriment of their home resources at Ohinemutu. Boast's answer and Mr Taylor's contention would be no, they would not.[512] Similarly the Te Arawa Geothermal Tribunal held that where significant surface features were retained by Maori, they had a right to expect management of the resource to protect those features.[513] The only logical and principled basis for those responses, Mr Taylor submitted, must be because Maori retained rangatiratanga and possession over the underlying geothermal resource.[514]

Today the preponderance of Maori opinion is that Maori still own their fields and the subterranean resource the (TVZ). Thus if they were asked whether they sold these taonga, they would say 'never'. This relates to the 'continuing centrality of these taonga to Maori, and their connection' to them.[515] Maori are saying, effectively, that 'we did not sell the underground resource when we sold land.'[516]

Mr Taylor considered that any geothermal energy being tapped is generally well underground. Maori were aware of and treasured their fields and the subterranean resource. The subterranean resource is removed from any individual surface feature which Maori may have sold.[517] This lends support to the view, that Maori would not have understood or believed they relinquished their control over their fields and the subterranean resource.

Mr Taylor did concede that there may be a point where if all land was sold, then a tribe will have no further interest in a geothermal field. But, he submitted, the fact that most tribes with an original interest in the subterranean resource (TVZ) have continued to work hard to retain at least some physical access to their fields and through to the subterranean resource, is a sign of their continuing rangatiratanga.[518] Therefore, in accordance with the Whanganui River jurisprudence, customary ownership of the resource remains in Treaty terms with CNI Maori.[519]

In reply to the submissions of the Crown, Mr Taylor contended that the claimants did not seek a finding of legal ownership from this Tribunal.[520] Rather they want the Tribunal to find that they owned the geothermal resource in accordance with the

[511] Taylor, generic closings, 3.3.67, p 187, and see Chapter 2 of this Report
[512] Taylor, generic closings, 3.3.67, p 187
[513] Taylor, generic closings, 3.3.67, p 188
[514] Taylor, generic closings, 3.3.67, p 188
[515] Taylor, generic closings, 3.3.67, p 188
[516] Taylor, generic closings, 3.3.67, p 188
[517] Taylor, generic closings, 3.3.67, pp 188-189
[518] Taylor, generic closings, 3.3.67, pp 188-189
[519] Taylor, generic submissions, 3.3.141, p 52
[520] Taylor, generic submissions, 3.3.141, p 52

principles of the Treaty and that their ownership has not been extinguished in a Treaty compliant manner.[521] The claimants did not conceed that legal ownership passed to the Crown or any other person, or that Maori do not retain legal ownership of the resource as customary title.[522] If the Tribunal finds that CNI Maori owned the geothermal resource, and have not alienated it in accordance with the Treaty, then the Tribunal should make a recommendation that the legal title of CNI Maori to the geothermal resources should be confirmed by statute.[523]

Mr Taylor referred to the impact of any Tribunal recommendations on private land. He contended that as the geothermal resource is a water resource it cannot be owned at common law so any findings and recommendations of the Tribunal cannot affect any private land owners and, consequentially section 6 (4A) of the Treaty of Waitangi Act 1975 does not impinge on the Tribunal's jurisdiction.[524] In addition, geothermal taonga are not specifically included within the definition of land under the Land Transfer Act 1952, although it does include water and water courses. He also noted that in terms of the Land Transfer Act any supposed geothermal ownership must be modified by the common law regarding water and other underground resources travelling in undefined channels. That is, the ownership of supervening land gives a right to tap those resources, but does not give a specific property right in that resource. This right to tap has already been regulated by the Crown, which receives royalties for access, a benefit that Maori should receive.[525]

Alternative Argument

Mr Taylor submitted that if the Tribunal does not find that CNI Maori no longer possess the geothermal fields and the Taupo Volcanic Zone, then the Tribunal should apply the approach of the Petroleum Tribunal. It should find, that where geothermal resources were contained within lands alienated due to acts or omissions of the Crown in breach of the principles of the Treaty of Waitangi, then Maori retained a residual interest in those taonga.[526] The Tribunal should follow the approach in the *Petroleum Report* and find that they continued to have a '"Treaty interest"' in their fields and the subterranean resource (TVZ).[527] An example of where this finding could be made relates to the Wairakei/Tauhara geothermal field in Taupo and the manner in which the Crown was responsible for the alienation of the associated land-block, the Tauhara Middle No 1.[528] Mr Taylor also submitted that where there is evidence of a particularly targeted approach by the Crown to facilitate Maori 'alienating particular surface features or geothermal fields', then those resources should be handed back to Maori.[529] Mr Taylor noted that the Te Arawa Geothermal Tribunal had indicated that

[521] Taylor, generic submissions, 3.3.141, pp 52-53
[522] Taylor, generic submissions, 3.3.141, p 53
[523] Taylor, generic submissions, 3.3.141, p 54
[524] Taylor, generic submissions, 3.3.141, pp 62-63
[525] Taylor, generic submissions, 3.3.141, p 63
[526] Taylor, generic closings, 3.3.67, para 651, p 189
[527] Taylor, generic submissions, 3.3.141, pp 53-55
[528] Taylor, generic submissions, 3.3.141, p 55
[529] Taylor, generic closings, 3.3.67, p 190

there was likely to be an additional Treaty interest arising from the geothermal resources wrongfully alienated from Maori as a result of breaches of the Treaty of Waitangi.[530] He contended that we would be justified in finding that as a result of this remedial or residual interest, Maori have an interest in the underlying common heat system, the Taupo Volcanic System, which ought to be characterised as being a majority interest.[531]

Right to manage and obtain benefits from the use of the geothermal resources, the geothermal fields and the TVZ

Mr Taylor essentially contended that the Crown failed to adequately recognise and provide for Central North Island Maori interests for most of the nineteenth and twentieth century. It failed to acknowledge their underlying title to the geothermal resource, or to direct profits to Maori accordingly.[532]

First, the Crown did this by assuming that on land alienation, the Maori interest in geothermal surface features, the geothermal fields and the TVZ, and their fields went with it. But, Mr Taylor submitted, the alienation of land was not sufficient to demonstrate that they had freely alienated the fields or the TVZ.[533] What they alienated, he argued, were the taonga, being the surface manifestations.[534] Mr Taylor stressed that Maori did not sell their fields or the TVZ.[535] In addition, where Maori retained significant surface features, they had a right to expect to control and manage access to the geothermal fields. That is what the Tribunal found in the *Preliminary Te Arawa Representative Geothermal Claims Report*.[536] If the ownership rests with Maori, then revenue derived from access to it can be deemed an incident of their ownership. On the other hand, if the notion of outright ownership is rejected, Mr Taylor argued that Maori nevertheless retain an interest in the resource and therefore still may claim a right to benefit financially.[537]

Secondly, the Crown has passed various statutes dealing with the geothermal resources of the CNI which have effectively appropriated the right to use, and control access to, and to derive revenue from the resource.[538] The Geothermal Energy Act 1953 followed by the Resource Management Act 1991 have taken away the most significant incidents of ownership. This is an appropriation of the rights of use, control and profit for the benefit of the Crown and if that is so, then this Tribunal must find a Treaty breach.[539]

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[530] Taylor, generic closings, 3.3.67, p189
[531] Taylor, generic closings, 3.3.67, p 190
[532] Taylor, generic submissions, 3.3.141, pp 65
[533] Taylor, generic closings, 3.3.67, pp 186-189; Taylor, generic submissions, 3.3.141, p 52
[534] Taylor, generic closings, 3.3.67, p 186
[535] Taylor, generic closings, 3.3.67, p 186
[536] Taylor, generic closings, 3.3.67, p 188
[537] Taylor, generic closings, 3.3.67 para 567, pp 161-162
[538] Taylor, generic closings, 3.3.67, pp 190-193
[539] Taylor, generic closings, 3.3.67 para 664, p 193

Mr Taylor contended that the Treaty right to the fields and the subterranean resource may be recognised by the common law as it has never been expressly extinguished.[540] Under the common law, 'plain and clear language' is required to extinguish aboriginal title, and the language in the various statutes passed to vest control and management over access to the geothermal fields and the subteranean resource (TVZ) since 1840 have not met this test for extinguishment.[541] On that basis there remains an unacknowledged Maori proprietary interest in the fields and the subterranean resource (TVZ). He argues further that even if these statutes extinguished Maori rights in the common law, that constitutes a breach of the Treaty.[542]

The Tribunal should grant relief by way of a recommendation that the Crown should return the use and control of access to, and profit from the geothermal fields and the suterranean resource (TVZ) to Maori.[543]

Mr Taylor pointed out that the most of the claimants had no knowledge of the programme for review of the allocation of geothermal energy by the Crown as announced by Crown counsel. The claimants, therefore, seek a finding from this Tribunal that CNI Maori ought to be heavily involved in this review, and that the Treaty right ought to be taken into account.[544] At the very least they should be consulted about the review.[545]

The Crown's Case

As we noted in our discussion on issue one of this chapter, the Crown rejects all claims to ownership of the TVZ by Maori whether based on the Ngatoroirangi story, the Treaty of Waitangi, or the common law doctrine of aboriginal title. This, it was submitted, is consistent with the concept of the resource as a holistic whole.[546] Therefore, if the land was sold, so was exclusive right to the field and the subterranean resource [TVZ]. We turn to the Crown's response to the claimants regarding the issue of what was sold on when land was alineated or a a title to the land derived from the Crown was awarded.

The Crown submits that any rights to use geothermal resources are tied to the ownership of the surface land. This is consistent with the concept of the resource being a 'holistic whole.'[547] The Crown also rejects any notion that Maori can claim any common law aboriginal title rights to the geothermal resource [the Taupo Volcanic Zone]. That is because by the creation of a Crown grant or Crown derived title such as gained through the Native Land Court, all common law aboriginal title

[540] Taylor, generic closings, 3.3.67 paras 662-664, p 193
[541] Taylor, generic closings, 3.3.67 para 662, p 193
[542] Taylor, generic closings, 3.3.67 para 663, p 193
[543] Taylor, generic closings, 3.3.67, pp 193-196
[544] Taylor, generic submissions, 3.3.141, p 64
[545] Taylor, generic submissions, 3.3.141, p 64
[546] Crown closings, 3.3.111, part 2, p 501
[547] Crown closings, 3.3.111, part 2, p 501

over that land was extinguished. Where the geothermal resource is currently manifest on private property, the indefeasibility mechanisms of the Land Transfer Act would have operated to extinguish any common law aboriginal title to such land. In such cases, the terms of the original Crown purchase deeds (or private purchase deed) would thus be irrelevant.[548] It is the issue of the Crown grant or new form of title derived from the Crown or through the Native Land Court process that is sufficient to extinguish aboriginal title. Furthermore, to the extent that the Crown became the legal owner of certain lake and river-beds, it also gained control of the associated geothermal fields and acess to the geothermal fields and the subteranean resource via the land.[549] That is because as the legal owner of a lake or navigable river, it controlled access to those resources (at least in the legal sense). Legislative assertions of control and ownership of lake and river beds would not have been affected by the Water Power Act 1903 or the Geothermal Energy Act 1953. Those regimes apply irrespective of land ownership.[550]

What was granted in land sales

The Crown submitted that there is no evidence to suggest that upon alienation Maori owners believed they retained interests in the geothermal fields or the subterranean resource separate from rights to land.[551] Therefore, the claim made that Maori would not have sold land adjacent to land retained, had they known that management of the sold land would not be retained and that other users may have a detrimental effect on the geothermal resources in the land so retained can not be sustained.[552] In this respect the Crown quoted Boast who has recognised that generally Maori retained ownership of surface [geothermal] features and that there was evidence indicating that Maori 'thought use rights regarding geothermal areas to be closely linked to land use rights in general.'[553] Boast was also unaware of any written record of complaints or contentions from Maori that they had retained interests in the geothermal resource independent of the land itself being alienated.[554]

The Crown further contends, and in contrast to the facts established in the *Whanganui River Report*, that there has been no real evidence of attempts by CNI Maori to claim or retain interests in geothermal resources in land alienated by them. Rather, the Crown contends, Maori have consistently held on to some key geothermal lands in recognition that alienation of the lands in which the resource is manifest would lead to a loss of rights to use and control.[555] So where they sold, Maori would have known that the sale of the land containing the geothermal manifestations would, and did,

[548] Crown closings, 3.3.111, part 2, p 501
[549] Crown closings, 3.3.111, part 2, p 506
[550] Crown closings, 3.3.111, part 2, p 506
[551] Crown closings, 3.3.111, part 2, p 504
[552] Crown closings, 3.3.111, part 2, p 504
[553] Crown closings, 3.3.111, part 2, p 505
[554] Crown closings, 3.3.111, part 2, p 505
[555] Crown closings, 3.3.111, part 2, p 502

result in the right to use those manifestations and the resource being given to the purchase.[556]

Continuing rangatiratanga

The Crown argued that the Ngatoroirangi legend does not provide any basis for validly saying that Maori believed that they retained an interest in the right to control the use of the [geothermal] resource in the land alienated.[557] Furthermore, that Maori retained some key geothermal sites, (e.g Ohinemutu, Mokoia Island, Whakarewarewa, Tikitere and Waihi) is a clear indication that they knew alienation would give rise to a surrender of all rights of control and/or access to and use of geothermal surface features, the geothermal fields and the TVZ associated with land ownership.[558] Maori may well have expected to retain some spiritual connection to the subterranean resource generally (post alienation), but that does not and cannot equate with a belief in a right to retain some degree of control over it.[559]

The Crown also challenged the view that Maori held knowledge about the 'interconnectedness of springs within the same field' because such knowlede was not available until 'the necessary scientific advancements had been made.'[560] In response to oral questioning by the Tribunal, Crown counsel did acknowledge a degree of Maori knowledge about the interconnectedness of geothermal springs 'at a broader level', but maintained that having such an understanding about springs within the same field is 'a distinct and separate matter and does require some significant understanding of the subsurface geology.'[561] In any event, the Crown argued, it is highly unlikely that it was within the contemplation of any of the parties that subsequent use would negatively impact on the geothermal surface features, the geothermal fields and the TVZ or fields in the lands retained by Maori.[562] The Crown noted that to the extent that competing uses of the geothermal fields subsequent to the alienation would have impacted on any Maori rights on the lands retained in their ownership, that is a matter for a central regulatory body to deal with, namely the Crown or its delegates.

Crown's response to alternative arguments

The Crown informed us that it has rejected the findings of the *Petroleum Report* which contended for an ongoing Treaty interest in the petroleum resource. The Crown also does not accept the notion of Maori having preferential development rights in

[556] Crown closings, 3.3.111, part 2, p 503
[557] Crown closings, 3.3.111, part 2, p 504
[558] Crown closings, 3.3.111, part 2, p 504
[559] Crown closings, 3.3.111, part 2, p 504
[560] Crown closings, 3.3.111, part 2, p 503
[561] Week 10 day 1 transcript p 118 (Crown Transcript of Crown Closings, Hearing Week 10, 7-9 November 2005, 4.1.11)
[562] Crown closings, 3.3.111, part 2, p 503

relation to the geothermal resource, or to Maori having veto rights over use and development of the resource by non-Maori third party users.[563]

We repeat the Crown's submission that the claim made that Maori have lost access to and use of the geothermal resource through land alienation, needs to be put into perspective.[564] The Crown identifies the following lands with geothermal resources, remaining in Maori ownership: Ohinemutu; Whakarewarewa Village; Mokoia Island; Rotokawa Baths; Maori land within the east Lake Rotorua Geothermal Field; Tikitere; Waitangi Soda Springs; Mokai (Tuaropaki Trust); Ohaaki; Ōrākei Kōrako; Waipahihi; Maori land at Tokaanu and Maori land at Waihi.[565] Maori shareholders in Tarawera Forests Ltd also have interests in the Rotoma geothermal field now owned by Tarawera Forests Ltd.[566] The Crown contends that CNI Maori have continued to enjoy traditional use of those geothermal resources which they can control access by virtue of retaining land in which they are manifest.[567] The point here is that Maori have not been significantly or seriously prejudiced by previous Crown actions in terms of its historical purchasing or acquiring of any other lands.

Crown's position on the right to manage and obtain benefits from the use of the geothermal resources, the geothermal fields and the TVZ

The reason that the Crown has not asserted ownership of the geothermal surface features and the geothermal fields is because it treats them as analogous to water and thus it is subject to the same legislative framework.[568] We discussed that framework in Chapter 19. Prior to the Geothermal Energy Act 1953, these were treated as water resources and were regulated accordingly. The Crown makes a distinction between water resources which are not, under common law, capable of being owned, and mineral resources such as petroleum and gold.

The Crown claims it has 'retained a legitimate Article 1 interest' – firstly, because it has an interest in the allocation and management of resources generally; and secondly, because the geothermal resource being a significant energy source.[569] The ability to regulate property rights and other interests is a well established element of kawanatanga.[570] The Crown notes that the current Resource Management Act 1991 regime used to regulate access and use to geothermal taonga, is not inconsistent with existing property rights as a matter of custom. Citing the Chief Justice in *Ngati Apa et al v Attorney-General* (2003), the Crown acknowledges that the legislation does not effect any extinguishment of such property.[571] The Crown states that geothermal

[563] Crown closings, 3.3.111, part 2, p 503
[564] Crown closings, 3.3.111, part 2, p 497
[565] Crown closings, 3.3.111, part 2, pp 497, 509
[566] Crown closings, 3.3.111, part 2, p 509
[567] Crown closings, 3.3.111, part 2, p 509
[568] Crown closings, 3.3.111, part 2, p 500
[569] Crown closings, 3.3.111, part 2, p 500
[570] Crown closings, 3.3.111, part 2, p 501
[571] Crown closings, 3.3.111, part 2, p 501; and *Ngati Apa et al v Attorney-General* [2003] 3 NZLR 643, para 76

resources have a wide range of values, including cultural, scientific, tourism and energy-related.[572] It suggests that for that reason, there is a legitimate Crown role in conserving and managing the resource.[573]

In terms of the current management regime, the Resource Management Act (section 14 and Part II, including sections 6, 7, and 8) expressly provides for and recognises Maori values in relation to decision-making concerning natural resources.[574] The Crown does not think that it is necessary or desirable to amend the RMA generally to provide for a greater degree of recognition or acknowledgement of Maori values.[575] However, it is prepared, in principle, to make available some geothermal assets as settlement redress and/or to negotiate suitable statutory acknowledgements which provide recognition for Maori values in relation to specific geothermal sites.[576] There are substantial private third party interests in the geothermal resources of the CNI, whose use of the resources make an important contribution towards the nation's electricity needs. The Crown does not believe it feasible or desirable, in policy terms, to change the current regime.[577]

The Crown notes that the Local Government Act 2002 and the RMA are designed to allow local bodies to implement policies that are particularly attuned to the requirements of particular districts.[578] The Crown submits that the evidence from Regional Councils shows that the Crown is not in breach of the Treaty through the current regulatory framework that is in place.[579]

While noting that the geothermal resources of the CNI are managed by regional councils under the RMA, the Crown submitted that the nature of the resource and the diverse range of interested parties means that central regulation is vital.[580] It illustrates this with reference to its decision, in the 1980s, to close bores within 1.5 kilometers of the Pohutu geyser in the Whakarewarewa Valley. The Crown contended that given the nature of the decision and the multiple parties whom it affected, it was an appropriate decision for it to take exercising its kawanatanga rights and a type of decision that only central government, or a local authority operating under delegated powers, would be capable of efficiently taking.[581]

Importantly, the Crown accepts that it has some Treaty responsbilities to protect customary use of geothermal resources by CNI Maori.[582] The Crown submits that section 14(3)(c) of the Resource Management Act 1991 gives some expression to the

[572] Crown closings, 3.3.111, part 2, p 498
[573] Crown closings, 3.3.111, part 2, p 498
[574] Crown closings, 3.3.111, part 2, p 508
[575] Crown closings, 3.3.111, part 2, p 508
[576] Crown closings, 3.3.111, part 2, p 508
[577] Crown closings, 3.3.111, part 2, p 508
[578] Crown closings, 3.3.111, part 2, p 510
[579] Crown closings, 3.3.111, part 2, p 510
[580] Crown closings, 3.3.111, part 2, p 510
[581] Crown closings, 3.3.111, part 2, pp 511-512
[582] Crown closings, 3.3.111, part 2, p 510

Crown's Treaty responsibilities.[583] It also accepts that it has a responsibility to protect geothermal resources in the sense of ensuring that there is a sustainable management regime. Conversely, the Crown does not accept that it has a positive obligation to foster CNI Maori commercial development of geothermal resources.[584] Rather the Crown's view is that redress following a negotiated settlement will provide greater opportunity to commercially develop resources should Maori consider it appropriate.[585]

The Government has embarked on a sustainable development programme of action for water. This is being coordinated by the Minister for the Environment and the Minister of Agriculture and Forestry. A key issue, counsel adds, is to provide investment certainty for energy developers.[586] The Crown has submitted that work is currently underway on a programme to address geothermal allocation. This is being done jointly by the Minister of Energy and the Minister for the Environment. The anticipated reporting date for that work was June 2006.[587]

The Tribunal's Analysis on control of the geothermal taonga and whether it provided for CNI Maori rights

We have found in section 1 above, that in 1840 the iwi and hapu of the CNI exercised rangatiratanga and kaitiakitanga responsibilities over the use and enjoyment of all their geothermal resources, the geothermal fields and the TVZ**.** In accordance with the Whanganui River jurisprudence, Central North Island Maori possessed these resources as taonga over which they exercised rangatiratanga at 1840. In customary terms the rights to geothermal taonga were divided into three layers of rights. The first two layers required that the Crown recognise the rangatiratanga of the hapu and iwi who act at the local level as kaitiaki of the different fields and surface features; and the other layer requires some recognition of all the iwi and hapu with original interests in the subterranean geothermal resource being the TVZ. Therefore, the Crown was under a Treaty duty to protect these taonga and to provide for the exercise of Maori autonomy over them, at the local, regional and national level. That was the Treaty standard that the Crown had to meet and we now turn to consider whether it was able to do so.

In this section we consider how the Crown dealt with Maori interests in geothermal surface features, the geothermal fields and the TVZ after 1840. There are two distinct phases of Crown actions that are relevant to Issue Two before us. The first relates to the period 1840-1950, when geothermal resources were considered as water resources to be dealt with in accordance with the common law rules on land alienation and

[583] Crown closings, 3.3.111, part 2, p 510
[584] Crown closings, 3.3.111, part 2, p 509
[585] Crown closings, 3.3.111, part 2, pp 509-510
[586] Crown closings, 3.3.111, part 2, p 500
[587] Crown closings, 3.3.111, part 2, p 500 [Note: The Draft New Zealand Energy Strategy was released in December 2006 and is available at www.med.govt.nz/upload/43136/draft-energy-strategy.pdf accessed 24 July 2007]

water. In our review of the evidence which follows we consider the impact of land alienation and whether as a result Maori retained possession and rangatiratanga over their geothermal taonga, including the Taupo Volcanic Zone. The second phase relates to the period 1950-2006 when the Crown has expressly legislated to control access to and use of geothermal taonga. We deal with these two phases below before we resolve the issue of what the Crown did and has done to provide for Maori interests in the geothermal waters/fluid and energy of the Taupo Volcanic Zone.

Crown management 1840-1950

Before we can consider whether the Crown acted consistently with the Treaty of Waitangi we note how the Crown perceived the resource. During the early years of European settlement, the assumption was that the law recognised that those 'who owned land on which were located geothermal springs' could use them and develop them as they wished.[588] As the Crown's policies and actions were based on that assumption, there was in effect uncontrolled use and development of the geothermal resources and some geothermal fields from 1840-1950.

Any legislation passed during this period affecting land, minerals, water or water courses, did not directly address how rights of access to geothermal surface features, the geothermal fields and the TVZ should be allocated. Therefore, it seems that the only law in existance was the common law and we turn now to consider that law. We do so because, the Crown under the Treaty of Waitangi had a duty to protect Maori geothermal taonga and their exercise of authority over them. If there was no statutory law in place that did this, we must consider whether the common law did so. If it did not, we must conclude that the Crown failed to adequately provide for Maori rights under the Treaty of Waitangi.

The Common law - geothermal taonga

As we have noted in Chapter 16, by virtue of section 1 of the English Laws Act 1858, the laws of England as existing on 14 January 1840, and 'so far as applicable to the circumstances of the colony', were deemed to apply to New Zealand. The unique nature of geothermal taonga in New Zealand would seem to indicate that there was an opportunity to develop different rules to the general common law rules on water, or minerals. Boast points out that there were and are very few geothermal resources in England and as a consequence, there appears to be limited English case law dealing with the ownership of geothermal resources either as a water resource or otherwise. There certainly is no case law dealing with geothermal surface features, the geothermal fields and the TVZ on the same scale as those of the TVZ.[589] That is to be compared to Maori tikanga or customary law system, which had developed by 1840 a solid understanding of these taonga with its three layers of customary rights and

[588] R Boast, 'The Legal Framework for Geothermal Resources: A Historical Study', Document A21, p 33
[589] Bennion, 'New Zealand Law & the Geothermal Resource', A18, p 3

interests, and regulations concerning its use. The Maori system was quite capable of being used as a management regime and as a mode for allocating rights and interests in the resources. It, could have formed the basis for the common law to be applied in New Zealand. But it was not and the Crown did not move to provide for an alternative by giving effect to such rights and interests in legislation.

That means we need to analyse whether the common law, as imported, protected Maori rights and interests. There appear to be two aspects of the common law that potentially may apply to geothermal resources, the geothermal fields and the TVZ:

- The common law rules relating to the taking and use of water, energy resources and minerals;

- The common law rules of aboriginal or customary rights.

The question here is to what extent the common law rules concerning water resources and/or native or aboriginal title applied given that they only did so 'in so far as they were applicable to the circumstances of the colony.'

Common law on minerals, water, energy resources

Boast points out that geothermal resources are an energy resource analogous to petroleum and natural gas, so the common law rules applicable to such resources may apply.[590] If that is the case, the effect of those rules on the right to use and access geothermal resources may remain the same as for water, namely there is no ownership until it is contained.[591] To add to this mix, geothermal fluid usually contains minerals in solution and may produce the minerals kokowai (red ochre) and/or sulphur. The law that may apply if geothermal resources were classified as a mineral is that ownership of minerals in land is part of the estate in land. But mineral ownership is also severable from the surface land title depending on how the land was transferred when alienated.[592] In the *Petroleum Report* the Tribunal summarised the law in this way:

> Under common law, minerals generally belonged to the owner of the land in accordance with the maxim *cuius est solum eius est usque ad coelum et ad inferos* ('to whom belongs the soil it is his, even to Heaven, and to the middle of the earth'). Dating back to thirteenth-century Europe, this rule had become accepted doctrine in English law by the sixteenth century, and has been applied consistently by the New Zealand courts in determining the ownership of natural resources. Minerals as an attribute of the land likewise belonged to the landowner. When the land was conveyed so, too were the subsurface resources unless surface and mineral rights were deliberately and explicitly separated in the instrument of conveyance. The only exceptions to this rule, until the twentieth century, were gold and silver, which, as the most 'excellent products of the soil; were deemed to remain subject to the ownership of the Crown

[590] Boast, 'The Legal Framework for Geothermal Resources', A21, pp 34, 42
[591] Boast, 'The Legal Framework for Geothermal Resources', A21, pp 42-43
[592] Boast, 'The Legal Framework for Geothermal Resources', A21, pp 34, 44

> as the most 'excellent person in the realm' – an understanding which was formalised in the Case of Mines in 1567. Since the 1930s, however, the *ad coelum et ad inferos* rule has been abrogated in New Zealand in respect of minerals deemed to be of particular importance. These include petroleum.
>
> … The doctrine of capture is also pertinent to a consideration of the ownership of petroleum under the common law. Petroleum, rather than remaining in situ like metals or coal, migrates flowing towards areas of low pressure such as drill sites….Under the common law, a landowner is unable to prevent a neighbour from draining the waters from under his or her land, providing that the means of abstraction (pumps and drills) remain within the neighbour's property.[593]

Boast and Bennion have argued that the common law has never developed a body of rules to deal with property rights in geothermal taonga such as those that exist in the CNI. They agree that any attempts to find and rely on common law principles (outside the doctrine of aboriginal title) tend towards the view of the Crown that geothermal taonga are essentially a water resource.[594] The common law rule relating to natural water is that no one can own it unless the water is contained, at which point a property right is created. This is referred to as the doctrine of capture - as explained by the Petroleum Tribunal. Aside from that general rule there are a number of associated rules regarding the rights of land owners to control access to natural water within or running on their land. The question then becomes what that means in terms of geothermal taonga. Boast's view is that the rules relating to (1) surface water, and (2) percolating water or ground water are the closet to draw upon when looking for the applicable law.[595]

Effectively, and as with cold water springs, the geothermal springs and other geothermal resources within a land block come under the control of the owner of the land.[596] Any landowner can, therefore, draw off as much geothermal water/fluid or heat as he or she likes without regard to other land owners and without regard to whether or not his or her neighbour has sufficient geothermal water/fluid or heat to meet his or her needs.[597] What does happen in such cases is that the sinking of a bore which brings water and/or steam to the surface of the land' – creates a property right for the owner of the land or person to whom access has been granted, regardless of whether it impacts negatively on the owners of adjoining land.[598] As Boast points out, in terms of geothermal waters or fluid, the 'common law in its pure form gives no right of priority and no protection to existing users.'[599]

Where the geothermal resources, are running streams, and if the rules concerning water apply, land owners acquired the right to:

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[593] Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), pp 19-20
[594] T Bennion, 'New Zealand Law & the Geothermal Resource', Document A18, p 3; Boast, 'The Legal Framework for Geothermal Resources', A21, p 34
[595] Boast, 'The Legal Framework for Geothermal Resources', A21, p 34
[596] *Halsbury's Laws of England,* vol 49, para 370-373
[597] *Halsbury's Laws of England,* vol 49, paras 413-414; and Boast, 'The Legal Framework for Geothermal Resources', A21 p 37
[598] Maxwell, A17, p4
[599] Boast, 'The Legal Framework for Geothermal Resources', A21, p 37

- Continuance of the natural flow both as regards quantity and quality, so upstream users could not take, use or pollute it to the extent that the natural quality and quantity of the water is impaired;
- Reasonable use of the water for ordinary or primary purposes (such as watering stock); or the landowner's domestic wants and the general and usual requirements of their property; and
- Reasonable use of the water for extraordinary or secondary purposes provided they are connected with or are an incident to the land.[600]

Where geothermal surface features emerge from the bed of a lake or river, the law on lakes and rivers may apply with all the attendant issues of ownership of the bed of navigable rivers and large inland lakes. As we discussed this in Chapters 17, 18 and 19, we do not propose to deal with those issues again. Where they emerge from the seabed, the law as now understood by the Foreshore and Seabed Act 2004 applies and settles Maori claims to the bed of the sea but issues ramain regarding whether it settles their claims to the subterranean resource (TVZ).

But the uncertainty about which common law rules concerning minerals and/or water applied and the extent to which they applied to the circumstances of New Zealand was not considered by the Crown during the early years of the colony. Instead it assumed that the key to access, management and use of geothermal resources lay in land ownership and water law. But while the owners of the land could control access to geothermal surface features that could not grant them ownership of the hot water fields. [601] We return to this theme below.

The Common law doctrine of aboriginal title

In comparison to the uncertainty regarding the extent to which the common law rules concerning energy resources, minerals, and water apply to geothermal surface features, the geothermal fields and the TVZ in New Zealand, the common law rules relating to aboriginal or customary title seem to us to be much more certain and would apply "in so far as they were applicable to the circumstances of the colony." The common laws of aboriginal title have been considered in a number of judgments of the Court of Appeal including *Te Runanga o Muriwhenua v Attorney-General* (1990) and *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* (1994).[602] We note that this latter decision was not available to the two previous Geothermal Tribunals when they reported in 1993. The decision has added to the Tribunal's understanding of how the doctrine applies in New Zealand. The most important statement of the common law doctrine of aboriginal title comes from the *Te Ika Whenua* decision, recently approved and cited by the Court of Appeal in the *Ngati*

[600] *Halsbury's Laws of England,* vol 49, para 403 and vol 14 para 191
[601] *Halsbury's Laws of England,* vol 49, para 414
[602] *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641 and *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20.

Apa and Others v Attorney-General (2003).[603] In the *Te Ika Whenua* Case (1994), Cooke P stated:

> Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective. It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes. It was so stated by Chapman J in *R v Symonds* (1847) NZPCC 387, 390, in a passage later expressly adopted by the Privy Council, in a judgment delivered by Lord Davey, in Nireaha Tamaki v Baker (1901) NZPCC 371, 384.[604]

This means that the common law was capable of recognising Maori rights in land and water. The issue is whether that could extend to recognition of Maori ownership rights in geothermal surface features, to the geothermal fields and the TVZ. Although we do not have to decide the issue definitively, we do note that in the *Ngati Apa* Case (2003) Elias CJ recognised that 'the existence and content of customary property is determined as a matter of custom and usage of the particular community.'[605] Therefore, the full nature and extent of the customary rights to geothermal surface features, the geothermal fields and the TVZ should only have been for Maori to determine according to their customary law and cultural preferences. But, and as always, nothing is as clear cut as it should be. We note in this regard, the decision of the Court of Appeal was considered in some detail by the the Foreshore and Seabed Tribunal. Although dealing with the foreshore and seabed, the Tribunal's conclusion is worth noting. They considered submissions made by Dr Paul McHugh who argued that it is unlikely that any common law court would be prepared to recognise the full nature and extent of Maori customary rights under the doctrine of aboriginal title. We mean in this regard that given that the common law recognises no ownership of natural water, then it is unlikely that it will recognise Maori have an exclusive proprietary interest in the hot water fields and the TVZ, rather it is more likely to recognise that Maori held a bundle of non-exclusive customary rights short of exclusive ownership. That Tribunal stated:

> On the fundamental question of the common law's ability to recognise customary rights equating to ownership, there is an internal logic to the 'bundle of rights' position endorsed by Dr McHugh. As well, the legal underpinnings of that position put it on a different 'plane' from the criticisms that were made of it by claimant counsel. In essence, the logic of the 'bundle of rights not qualified ownership' position is that the law cannot recognise for indigenous people what it does not recognise for the sovereign power. It is a variant of the legal maxim: you

[603] *Ngati Apa and Others v Attorney-General* [2003] 3 NZLR 643, 655-656
[604] *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 23-24 and emphasis on 'water' was added.
[605] *Ngati Apa and Others v Attorney-General* [2003] 3 NZLR 643, 656

> cannot give what you do not have. Against that position, the only judicial authority providing strong support for the 'qualified ownership' position in connection with the foreshore and seabed is Justice Kirby's judgment in the Yarmir r case. The statutory context for his argument is, however, significantly different from the common law context in which the New Zealand High Court would be operating. Accordingly, we are of the view that it would be a bold New Zealand High Court judge who would decline to follow the approach of the majority in Yarmirr. Further, since the issue would likely find its way to the ultimate New Zealand court – now the Supreme Court – there would need to be a majority of bold judges in that court before the conclusion contended for by the claimants could be declared part of the common law of New Zealand. Overall, we consider it unlikely that the law would be so declared. Accordingly, we consider it more likely that a 'bundle of rights' approach would be adopted by the High Court to conceptualise the nature of customary rights in the foreshore and seabed.[606]

That may or may not also be the case in terms of geothermal taonga, and that would depend on whether the common law Courts agreed that Maori customary rights to geothermal surface features, the geothermal fields and the TVZ, should be constrained by narrow common law understandings of water resources or whether they should be conceived in accordance with Maori understandings of their taonga and the customary law associated with them.

The Relevance of the common law

We consider that if the common law doctrine of aboriginal title was and is not capable of recognising the full nature and extent of Maori rights and interests in geothermal resources, the geothermal fields and the TVZ, then the Crown did nothing and has continued to do nothing about this. We consider, if that is the case, that this would be an omission that would leave the Crown in breach of the principles of the Treaty of Waitangi. That is because, the duty on the Crown to actively protect Maori taonga and the exercise of rangatiratanga over that taonga, does not turn on whether or not the common law could recognise such matters. It turns on the Treaty of Waitangi and the Crown's duty to actively protect taonga and the exercise of Maori authority over taonga. It seems to us that it was entirely possible during the 19th century once European settlers started to move into the CNI, for the Crown to develop a legal framework to give full expression to Maori customary rights and Treaty interests in geothermal resources, the geothermal fields and the TVZ. In fact under the Treaty it should have done so. As we have already found, provision should have been made for customary rights not just for land, but for taonga such as geothermal surface features and geothermal fields. In our view, such titles would have ensured the protection of these taonga. However, and as we have shown in Parts II, III and IV of this Report that was not done. Instead the Crown set about instituting a system that would convert Maori customary rights in land to a title derived from the Crown.

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[606] *Report on the Crown's Foreshore and Seabed Policy*, para 3.3.4

It is now well established that Maori rangatiratanga over their taonga cannot be taken away by the tacit application of a presumption of English law of which they knew nothing.[607] Converting customary title to land is one thing. Allowing the result of that conversion to extend to the hapu/iwi customary rights over geothermal resources, the geothermal fields and the TVZ is quite another. To take such an approach is an example of the tendency to conceive Maori customary rights to resources in line with western concepts of property against which the Privy Council warned in *Amodu Tijani v Secretary, Southern Nigeria* (1921).[608] If on the issue of a Native Land Court title all the customary rights held by hapu and iwi in their geothermal taonga were converted, that would be an additional breach of the Treaty of Waitangi because the evidence of continued customary use indicates that Maori did not consent to such a result. We turn to examine the impact of the Native Land title system on Maori customary rights to geothermal resources, the geothermal fields and the TVZ.

The Survival of customary rights in geothermal taonga

In cases where there was no alienation of customary land from 1840-1865, iwi and hapu of the CNI should have had their aboriginal title in land and their rights to geothermal taonga protected. That is what, the common law should have secured to them in terms of their land as outlined in *R v Symonds* (1847).[609] That is what the Treaty definitely secured to them along with the guarantee of rangatiratanga. But one of the limitations of the doctrine of aboriginal title is that such title to land may be extinguished, by legislation and by various other means such as the issue of a title derived from the Crown.[610] So once the Native Land Court investigated Maori customary rights to land issuing a new form of title or memorial of ownership, the situation became complex. The point in time this occurred for iwi and hapu varies for, and as we discussed in Part III of this Report, a memorial under the Native Land Act 1873 may not have extinguished customary title to land. However, once freehold title was issued, customary rights to the land were extinguished.[611]

As we know, nearly all customary land in the CNI was investigated and title eventually issued in fee simple. At that point the exclusive rights of the hapu and iwi to control access to all the geothermal taonga within their tribal territory changed.[612] We come to this view because of the decision in *Ngati Apa* Case and the explanation by the Chief Justice when she stated:

> From the beginning of Crown colony government, it was accepted that the entire country was owned by Maori according to their customs and that until sold land continued to belong to them (see the opinions as to the nature of native tenure collected in 1890 NZPP G1, and the authorities cited to the same effect by Stout CJ in Tamihana Korokai v Solicitor–General at p

[607] Waitangi Tribunal, *TheMohaka River Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 50
[608] *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) 403
[609] *R v Symonds* (1847) [1840-1932] NZPCC 387
[610] *Ngati Apa and Others v Attorney-General* [2003] 3 NZLR 643
[611] *Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 365
[612] *Ngawha Geothermal Resource Report*, p 22

341). Originally Crown purchases were required to extinguish Maori ownership and free the land for settlement under subsequent Crown grant. Subsequently, statutes provided authority for other modes of extinguishing Maori customary title.

[38] The land became subject to the disposing power of the Crown by Crown grant only once customary ownership had been lawfully extinguished. In R v Symonds Martin CJ said at p 394 of the 1841 Ordinance that it:

". . . everywhere assumed that where the Native owners have fairly and freely parted with their lands the same at once vest in the Crown, and become subject wholly to the disposing power of the Crown."

[39] Similarly, under successive Land Acts beginning with the Imperial Waste Lands Act 1842, land was able to be disposed of by the Crown only when freed from Maori proprietary interest. So too, when the New Zealand legislature was empowered in 1852 to make laws for the sale of waste lands they were defined as those lands "wherein the title of Natives shall be extinguished" (s 72 of the New Zealand Constitution Act 1852). The Land Act 1877 defined the "demesne lands of the Crown" (estates in which could be granted by the Crown) as "all lands vested in Her Majesty wherein the title of the aboriginal inhabitants has been extinguished" (s 5). After the establishment of the Native Land Court (effectively from 1865) the principal manner in which customary title was extinguished was through the operation of the Court in investigating ownership and granting freehold titles.

[40] The Native Lands and Maori Lands Acts from 1862 until enactment of Te Ture Whenua Maori Act were a mechanism for converting Maori customary proprietary interests in land into fee simple title, held of the Crown. Only such land could be alienated by the Maori owners to private purchasers. The explicit policy of the legislation was "to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown" (Preamble to the Native Lands Act 1865). The statement is further legislative acknowledgement that Maori customary property is a residual category of ownership not dependent upon title derived from the Crown.[613]

We take this to mean that Maori customary property falling into a residual category of ownership can survive and coexist with title derived from the Crown. Therefore, despite the issue of a Native Land Court title for the land, it is arguable that Maori customary rights in geothermal taonga remained and coexisted in the following way:

- In relation to the first and second layer of customary rights held exclusively by hapu and iwi at the local level, their ability to control access to their geothermal taonga and their fields was modified once land title was issued. That is because that title was converted to a title and held by individual owners of the hapu. With that title individuals from the hapu obtained title to the land and all that runs with it. But in our view, the grant of title to land to an individual was not a grant of title to the geothermal fields and the TVZ. That is because the claimants' customary rights to geothermal resources were only modified to the extent that the right to control access vested in individuals of the hapu rather than the collective. The customary rights in the geothermal taonga, held at the hapu or iwi level, remained. The only difference once a Native Land Court title was issued and later registered, was that the landowner had to consent before hapu members could access their

[613] *Ngati Apa et al v Attorney-General* [2003] 3 NZLR 643, 657

taonga where it emerged from the land. One can see in the customary evidence outlined in section 1 of this chapter, that the rights of the hapu and iwi continued to be asserted and the customs associated with the geothermal surface features forming part of the bundle of rights associated with land ownership continued and coexisted with land ownership. The evidence is that individual Maori land owners recognised that geothermal surface features on their land were taonga of the collective, to be managed in accordance with hapu and iwi customs. In some cases the pools and other surface features are considered whanau taonga, as they were before the Native Land Court. In other cases, these taonga are used by the entire hapu or iwi as communal bathing, or cooking places even though the geothermal resources feeding these sites now emerge from the private land of individuals of the hapu. Alternatively, the Native Land Court itself, or the Maori land owners, recognising the hapu or iwi interests in these ngawha or waiariki set aside such areas as Maori reservations held for the common benefit of the hapu or iwi, as on Mokoia Island.

- In relation to the third layer of rights, there is no effect on the collective hapu and iwi rights to the subterranean geothermal resource. Their customary rights remain and they continue to share those rights by virtue of their common history, or whakapapa to Ngatoroirangi.

The result is that the exclusive right to control access to geothermal surface features, the geothermal fields and the TVZ associated with land and the geothermal fields previously vested in the local hapu/iwi, is modified but other aspects of their customary rights and modes of ownership over these geothermal taonga remain. Consequently, where in accordance with Maori custom and tikanga access is still being exercised, and the relationship with the taonga is extant, even though the land is owned by individuals, then we think their customary rights to those resources were not extinguished. Their customary rights and the hapu/iwi rangatiratanga continued. We come to this result because we are talking about Maori land which was previously customary land. The title the owners hold is really a legal artifice. The majority of owners of the land, are and never have stopped being members of a hapu or iwi associated in accordance with tikanga Maori to the land previously held under the full authority and control of the hapu. The owners are the descendants of those who held the land communally and in accordance with custom.

The land is a taonga tuku iho (inherited treasure). The importance of land as a taonga tuku iho is recognised in the Preamble to the current Te Ture Whenua Maori Act 1993. In the same way, the geothermal surface features that emerge from that land are taonga. Both land and geothermal surface features are therefore protected by the Treaty of Waitangi, and their retention by Maori is an expression of continuing Maori rangatiratanga and authority.

We therefore conclude that it is possible to argue that customary rights to geothermal resources, the geothermal fields and the TVZ were not extinguished by the conversion

of Maori customary title to Maori freehold land title capable of registration under the Land Transfer system.

[Map 20.11: Remainging Maori freehold land in relation to geothermal fields in the Taupo Volcanic Zone. Based on information from *A Guide to Geothermal Development*, (Wellington, Te Puni Kokiri, nd), figure 3; Stokes, *The Legacy*, A56, figure 3, p 8]

If our view of the law is different to one that would be reached by the Courts, then so be it. Such a result would mean that there is no legal protection for Maori customary rights to their geothermal taonga. That result would indicate that the Crown by omission, has failed to protect CNI Maori rights in breach of the principles of the Treaty of Waitangi. The Crown's obligation in terms of article 2 of the Treaty of Waitangi is to provide for and protect Maori rights over all their taonga.

Impact of sales of Maori land

We generally concur with the Crown's submissions, that as a result of purchase, the owner of private land is entitled to exclude all access and that the local iwi and hapu rights to geothermal surface features, that form part of the bundle of rights on the sale of that land have been effectively excluded by the sale. Once a Crown grant or title was issued and registered, title was transferred to a grantee outside the kin group. This was sufficient to pass both the land and access to the geothermal surface features that run with land.

However that does not mean that CNI iwi and hapu gave up their customary rights or their Treaty interests to the underlying fields or the suberranean resource (TVZ). On our view of the law, Treaty jurisprudence and the evidence in the CNI, there is much force to Mr Taylor's view that CNI hapu and iwi did not, and could not, understand that on sale, gift or issue of a Native Land Court title, they were giving up such taonga or their rangatiratanga over them. Had they been asked they would have stated, 'of course not.' We would add that it would not be consistent with the Treaty of Waitangi for their customary rights to be extinguished in this way.

By recognising that CNI Maori can claim customary rights and Treaty interests to the geothermal fields and the TVZ, we also recognise that those rights could not interfere with the rights of private land owners. We discuss this further below.

The Significance of previous geothermal Tribunal reports

The claimants, through submission from Mr Taylor have asked this Tribunal to decline to follow the Ngawha Geothermal Tribunal on the point that Maori lost their their proprietary interest in their fields and the TVZ upon land sales. We note first that that Tribunal had this to say about the impact of the Native Land Court process:

> … the simple act of awarding title and naming individual owners has generally dissolved in one stroke the rangatiratanga and kaitiakitanga over the land and its resources. It has exposed individuals to the responsibilities of being both owners and trustees of the tribal heritage at the same time without, however, requiring them to be accountable to beneficiaries, and without protecting them from their own possible prodigality and loss of their community's means of survival.
>
> In the present case there has been the added consequence of the owners failing to be informed of the implications of the separation in law of the springs from the underground resource, further undermining their value system and regard for their taonga. …
>
> Where customary land tenure had been part and parcel of tribal political organisation with chiefs and elders holding rights of administration for the tribal good, individualisation of title through the Maori Land Court gave unfettered rights to those fortunate enough to be named as owners. It would seem from the record that there was comparatively little desire to exercise rangatiratanga and kaitiakitanga over land in general whenever alienation was in prospect. As against that, however, there has also been a clear intention to retain trusteeship over the springs, at least on the Parahirahi block. The intention has been steadfast over at least two generations to date and underlined by a continuous stream of petitions and protests, not over the comparatively vast acreage surrounding the springs acquired by the Crown, but certainly over the four acres of the five acre Parahirahi C block containing the springs themselves.
>
> The sense of rangatiratanga and kaitiakitanga held by the descendants in the land would appear to be further demonstrated by their acts of occupation of the Crown's four acres (until evicted) and by their deliberate setting up of a management committee for the one acre Parahirahi C1 block instead of allowing a further diminution of trusteeship through succession to deceased owners.[614]

Here the Ngawha Geothermal Tribunal is acknowledging the change or modification that occurs once a Native Land Court title is issued. That title circumscribes the ability of the hapu or iwi to control access to geothermal resources. But on our reading of its report, the Ngawha Geothermal Tribunal was not saying that all aspects of rangatiratanga were diminished. The exercise of Maori rangatiratanga or right to autonomy does not depend on the ownership of land. There are political and managerial elements to rangatiratanga or autonomy that continue despite the loss of land. Nor does the sale result in loss of rangatiratanga over the fields and the TVZ.

What is clear in terms of land is that there has been a modification of hapu and iwi autonomy, authority and control over that land. Of course we would need to undertake a block by block analysis to know for sure, but in the circumstances of the CNI there has been no evidence of any significance in this Stage One inquiry pointing to a desire on the part of iwi or hapu (as opposed to individual land owners) to willingly part with their springs or other surface features. There has been evidence of sharing of these taonga by some hapu/iwi such as Ngati Whakaue by gifting lands for the benefit of the Rotorua township. There is also a pattern of land alienation where individual Maori are selling their undivided shares in land which are then partitioned in favour of the Crown or private purchasers in order to secure the Crown or third party interests in a thermal area. We also have examples in the evidence that often the Maori sellers did

[614] *Ngawha Geothermal Resource Report*, pp 22, 25-26

not appreciate the import of the sales of their shares. We discussed the general pattern of land alienations in Part III. We cite specific examples concerning geothermal resources below. Contrary to that pattern of individual land alienations, is the obvious desire on the part of CNI hapu or iwi, steadfast in effect, to retain their geothermal surface features and their geothermal fields and to resist alienation of those resources. So we do not believe that our view is substantively different from the Ngawha Geothermal Tribunal on the issue of the impact of a Native Land Court title or sale.

Fundamentally too, the facts before us are different from those before the Ngawha Tribunal. On the facts before the Ngawha Geothermal Tribunal it was only concerned with the subsurface components of one geothermal field. In that situation:

> The tribunal considers that once ownership of a significant part of the geothermal components, such as the surface hot springs and pools and other manifestations, are severed from that of other surface components, as has occurred in the Ngawha region, no one owner of some only of the surface components can validly claim the right to use and control the whole of the resource in and under the geothermal field. The present day owners, whether private or public, of the alienated surface of the geothermal resources, in Parahirahi B block and the Tuwhakino block must necessarily have the right to use and control at least the surface components on land owned by them (subject always to any statutory provisions affecting them). Counsel has recognised that rights "might have been shared." If he was implying that rights in the alienated surface components continued to be shared following their being vested in separate individual Maori owners, we cannot agree. Once severed and separately owned, the right to use and control the surface component no longer lay with the previous owners. …
>
> In so far as the Maori owners of such alienated land previously held rangatiratanga over it and the geothermal resource on and under such land they necessarily lost such rangatiratanga and the associated rights of control when they disposed of the land.[615] (emphasis added)

This finding turns on the facts of that case where there had been significant severance of ownership over surface hot springs and pools and other manifestations. We agree that in those circumstances the local iwi or hapu rights may be diminished over surface manifestations and ultimately a geothermal field where all land has been sold and no further ownership of land remains. We note that as the new landowners acquire all rights that run with land eventually the hapu or iwi customary rights in their geothermal taonga may have diminshed to such an extent that they disappear completely in relation to that one field.

But the situation is different in the CNI where we are talking about a multiple number of fields which, while all separate, all depend for their sustainability on one common heat system, called the Taupo Volcanic Zone. We cannot, therefore, accept the Crown's position that 'rangatiratanga' over the fields and the TVZ was lost on sale, alienation or grant of a Native Land Court title in the CNI.

[615] *Ngawha Geothermal Resource Report*, pp 96-97

In this important respect, because the facts before us are different, we can come to a different conclusion to the Ngawha Geothermal Tribunal and its findings on rangatiratanga over the subsurface resource. The Tribunal stated the following:

> A critical question is whether the sub-surface components of the resource are capable of ownership. Our view on this topic cannot be in anyway definitive. As we have indicated, at 1840 and prior to the vesting of ownership of various parts of the field in separate owners, various hapu held rangatiratanga over the whole of the resource by virtue of their management and control of the land surface of what is now known as the geothermal field and of the hot springs and pools on the land. But since the alienation of part of the resource in the form of surface components and of the land on which they are situate, neither the hapu of Ngawha nor the trustees of the Parahirahi C1 Maori reservation have any right, or indeed power, to exercise management or control over such surface components for they no longer have rangatiratanga over them. Nor indeed do they have any right to access them.
>
> As to the underground component of the "resource" there are problems in sorting out the various elements. Is it realistic for instance to segregate out ownership of the underground geothermal fluid from all the components which go to produce it? As we have seen from the scientific evidence the geothermal system is highly complex with many inter-related components. If, however, the subsurface geothermal fluid is isolated from the remainder of the underground components of the resource for the purpose of considering the question of ownership, the tribunal considers that once ownership of the surface components has been severed there is no basis for allocating the right of ownership of or rangatiratanga over the whole of the sub-surface geothermal fluid to the owner of only one set of hot springs or pools. No one such owner or group of owners can validly claim the exclusive right to manage and control the underground fluid or, in all circumstances, to exercise a veto over its extraction and use. The question of what degree of protection should, however, be given to the highly valued taonga comprising the hot springs and pools in the care and trusteeship of the trustees of the Parahirahi C1 Maori reservation and the adjoining Crown-owned recreation reserve pools, should they be returned to Maori ownership, is considered later….[616]

We note here that the Ngawha Geothermal Tribunal stated that its view was not the last word on the matter of the extent to which Maori can claim ownership of subsurface geothermal fields or systems. We agree that a geothermal field is a complex system but there can be no doubt that it is the underlying heat, energy and water that is essential to that system and that is what Maori in the CNI valued. We discussed this fully in section 1 of this chapter. The facts are different in the CNI from those that were before the Ngawha Tribunal. We refer here to the number of fields and the TVZ, the customary and continuous dependency of CNI Maori on the resource from ancient times to the present day, and the nature and the extent of Maori ownership of land in or around and/or over the geothermal resources, where they emerge from the land, rivers or lakes.

We also note that our findings are consistent with those of the Tribunal's *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, which preferred to leave the issue of ownership and control of the of the geothermal fields (and, by implication the TVZ) unanswered until further research had been undertaken into land

[616] *Ngawha Geothermal Resource Report*, pp 97-98

sales.[617] That Tribunal was comprised of the same members who sat to hear the Ngawha Geothermal Resource claim.

By comparison, we have come to our findings based on further research made available for the CNI inquiry which the earlier Tribunal did not have access to. Although detailed block history reports have not been completed for us, there is enough information available to be certain that CNI Maori have retained a foothold in the land sufficient to maintain their Treaty rights including their rangatiratanga to the underlying TVZ recognised. That is because CNI Maori interests are intra-iwi in nature, are layered, are communal and depend not just on the emergence or manifestation of the geothermal resource at one place at one field, but at a multitude of places across a range of fields through the tribal districts of Taupo, Rotorua and to a degree in Kaingaroa. This is to be compared to the situation among Ngapuhi where the resource considered by the Ngawha Geothermal Tribunal was principally one field over which most of the land had been alienated and where there was not the same dependency on the surface features and the sole field.

We note further, that the Ngawha Geothermal Tribunal could not, even in the situation where there had been such intense land loss, disregard the hapu interest in the subsurface resource. It found that the claimants before it, while no longer retaining an exclusive interest in the sub-surface geothermal resource, necessarily retained a substantial interest in the resource.[618] The Tribunal continued:

> The preservation of their taonga, the Ngawha hot springs, necessarily depends on the preservation and continued integrity of the underlying resource which manifests itself in their hot springs and pools. It is totally unrealistic to isolate or divorce their interest in the Ngawha hot springs from the geothermal resource which finds expression in them.[619]

Therefore, when we consider the CNI we are certain that in situations where hapu or iwi at the local level have lost their land through land sales or otherwise, they will have retained a substantial interest, amounting to a priority interest in their geothermal taonga if the loss of land was a result of Crown actions inconsistent with the principles of the Treaty. We would go so far as to say that even where a hapu or iwi no longer have any springs or surface features under their control, if their land was lost in breach of the principles of the Treaty, they also retained their collective iwi and hapu rights in the TVZ.

In this respect our findings are only slightly different to those of the Petroleum Tribunal. Here we recall that the Crown has not accepted the findings of the *Petroleum Report.* While that is a matter for the Crown, it cannot be a matter that determines the relevance of the report's content for this Tribunal. But we note that there are differences. First the Petroleum Tribunal did not have sufficient customary evidence available to it, given that it was an urgent inquiry, to be able to make

[617] *Te Arawa Representative Geothermal Claims*, p 33
[618] *Ngawha Geothermal Resource Report*, p 134
[619] *Ngawha Geothermal Resource Report*, p 134

findings about petroleum being a taonga and therefore subject to article 2 rights and obligations.[620] Instead they treated the Maori customary interest in petroleum as an incident of land ownership and therefore subject to the equality guarantees in Article 3 of the Treaty and/or alternatively as a right to development.[621] In the context of the CNI, by contrast, we have been presented with a large body of evidence that geothermal resources, the geothermal fields and the TVZ are taonga. Even so we still find value in the Petroleum Tribunal on the issue of land loss. It noted that there had been alienation through a number of acts and omissions of the Crown inconsistent with the Treaty including:

- pre-Treaty transactions;
- pre-1865 Crown purchases;
- raupatu;
- Crown acquisition facilitated by the Native Land Court processes;
- takings under the public works legislation;
- takings for survey liens.[622]

The Petroleum Tribunal concluded that there were many circumstances in which the purchase of Maori title, or its acquisition by other means, breached the principles of the Treaty. The Tribunal stated:

> …we think it reasonable to posit that much, perhaps most, Māori land was lost in circumstances that were inconsistent with the principles of the Treaty. Certainly the Tribunal's *Taranaki Report* is a basis for reaching such a conclusion in respect of that district. It is on these bases that we conclude that, prior to the passing of the Petroleum Act in 1937, a significant proportion of the petroleum interests that belonged to Māori were alienated in a manner that gives rise to a Māori Treaty interest.[623]

In the CNI there is evidence of exactly the same patterns of land alienation, as we have discussed in Part III of this report.

We can add to the list of the Petroleum Tribunal, the Thermal Springs Act 1881 and its amendments. In Part III we considered the evidence of the targeted nature of Crown purchasing in terms of geothermal resources and the strategic use of the Native Land Court during this period 1881-1950. In this respect we particularly considered the impact of the Thermal Springs District legislation. That Act and its amendments unambigously reflected the policy of targeting by authorising the Governor to

[620] *Petroleum Report*, pp 42-43
[621] *Petroleum Report*, pp 43-44
[622] *Petroleum Report*, p45
[623] *Petroleum Report*, p 56

proclaim localities in which there were considerable numbers of ngawha, waiariki, or hot or mineral springs, lakes, rivers or waters.[624] Once such an area was proclaimed only the Crown could negotiate with CNI Maori for the purchase of lands with such features within these districts.[625] This was a form of pre-emption. We have discussed how as regards certain land blocks, the Crown set about acquiring as many individual interests as it could under the protection of this legislation so as to secure its interests in a block with geothermal features, for example the Whakarewarewa Geothermal Valley discussed fully in Part III.[626] We further note the response of Maori to the targeting of the resources by the Crown and the use of the Native Land Court in the partitioning process. Ngati Wahiao and Ngati Whakaue, for example, were outraged at the result of the Court hearings leading to the alienation of the Whakarewarewa Geothermal Valley in favour of the Crown.[627]

The Thermal Springs Act and its amendments were followed by the Scenery Preservation Act 1903 which again targeted Maori land with geothermal features. This Act authorised the issue of proclamations over land for the purpose of scenery preservation. In such areas there could be no private sales of land. The legislation was amended several times and depending on the state of the enactment, it could be used for the compulsory acquisition of land. We have discussed the impact on CNI Maori of this legislation in Chapter 12 of this report. Maori concerns about the Scenic Preservation legislation are recorded in a petition from Haupeta Hautehoro (of Rotorua) and about 100 others objecting to the compulsory taking of Maori land for scenic purposes. The petition stated:

> The Maori lands that will be taken under this 'Scenery Preservation Act' are, the famous places, the lands containing thermal springs, the famous pas, the canoe landing places of former days, the sites of famous whares, the sacred shares, the bird snaring places of olden time, that is to say all such places as are understood by this Act as likely to be much frequented by the Tourists of the World who visit here. …[628]

In our discussion in Part III of this report we reviewed some of the evidence we received on targeting by the Crown of lands with geothermal features within the CNI and concluded that the practice of targeting, including the imposition of a form of Crown pre-emption for the purchase of land with geothermal features was in breach of the principles of the Treaty of Waitangi and the Crown's duty to act reasonably and in good faith.

Findings on the impact of Crown control prior to 1950

The geothermal resource was a taonga protected by the Treaty. Prior to 1950, rights to use geothermal resources, the geothermal fields and the TVZ were controlled and

[624] Thermal Springs Act 1881 s 2
[625] Thermal Springs Act 1881 s 5
[626] See also S Quinn and D Alsop, 'The Ngati Wahiao Tribe's Involvement in Tourism in the Whakarewarewa Geothermal Valley', Document A40, pp 72-74
[627] Quinn and Alsop, A40, pp 42-72, and see further Chapter 10 regarding Ngati Whakaue
[628] Copy on TO 1. 1904/191/12, cited in Boast, 'The Legal Framework for Geothermal Resources', A21, pp 24-25

regulated via the common law relating to water or energy resources and statute law relating to waterways. We have discussed the impact of the common law above and the water statutes in Chapters 17, 18 and 19. Essentially, the Crown left the regulation and control of access to geothermal resources to landowners, because the Crown linked control of access and use of geothermal resources to land and water. To the exent that it did not provide a title system to protect Maori rights in their geothermal taonga then by omission the Crown was in breach of the principles of the Treaty of Waitangi.

We find that there may be some protection to be found through the doctrine of aboriginal title. It is possible to argue that as at 1840 CNI Maori held customary rights to all land in the CNI and to all geothermal resources, the geothermal fields and the TVZ. Following the issue of a Native Land Court title and its registration under the Land Transfer system, the customary ownership of iwi and hapu to all land within their districts was converted to a title derived from the Crown. Their exclusive right to control access to their geothermal taonga was modified. Access became the responsibility of the individual hapu land owners. But all other aspects of the hapu or iwi customary rights over their their fields and the TVZ remained. That is because Maori land owners continued to act collectively and in accordance with tikanga and custom. Access was and is still being exercised over geothermal taonga under the authority of the hapu and iwi even though the Maori land is held by individuals of the hapu. Therefore, we find that customary rights held by CNI local hapu and iwi in geothermal fields and the TVZ remained, even where some of that land was sold. But where land was sold, all rights to geothermal surface features that form part of the bundle of rights of land ownership had gone. Such sales were not, however, sufficient to extinguish the hapu or iwi customary rights to the geothermal fields, and the TVZ, being the water/fluid, heat and energy system or flow. To the extent that the application of the common law by the Courts may reach a different conclusion on the law, then that points again to a failure of the Crown to provide a system of title that would protect Maori customary rights in their geothermal taonga and their exercise of authority over them.

If eventually the hapu or iwi sells or loses all their Maori land over a geothermal field, their rights in all the geothermal resources in that sole field may have largely diminished. However, even in such cases they may still have a significant interest, amounting to a priority interest in the field if the land was acquired by the Crown or others in circumstances inconsistent with the principles of the Treaty of Waitangi. Groups who fall into this category include Ngati Whaoa and other iwi who lost geothermal lands from the Paeroa and Southern Rotomahana Parekarangi areas. Geothermal sites lost include Te Kopia, Mount Kakaramea and Waiotapu.

Although there have been land sales throughout the CNI, we consider that our findings mean that because the iwi and hapu of the CNI have retained sufficient Maori land in and around the geothermal fields to establish that they have never relinquished their rangatiratanga over the TVZ, Maori customary rights remained intact during this

period. As we noted above, this is because CNI Maori interests in the TVZ are intra-iwi in nature, are layered, are communal and depend not just on the emergence or manifestation of the geothermal resource at one place at one field, but at a number of places across a range of fields through the tribal districts of Taupo, Rotorua and to a lesser degree in Kaingaroa. This is in contrast to the Ngawha situation where the resource considered was principally one field over which most of the land had been alienated.

Therefore, and despite some of the land being alienated, or despite the conversion of their customary land title by a Native Land Court title (as opposed to their customary rights to their geothermal taonga), the claimants continued to have ongoing customary and Treaty interests over their geothermal resources, their geothermal fields overlaid by or within the vicinity of their Maori land and the TVZ.

Even if that is not correct at law, it is certainly the position in terms of the Treaty of Waitangi. CNI Maori possessed in 1840, a taonga. That taonga was the geothermal fluid or waters and energy system, and any surface alienation of part of that taonga, including access to subsurface elements of the resource that ran with land ownership, cannot detract from that. In Treaty terms, Maori title remains and the Crown cannot and should not rely on technical common law rules relating to land and water to justify failing to acknowledge and provide for that interest. For that in itself is a breach of the Treaty of Waitangi. In finding this, we recognise that Maori rights could not interfere with the rights of a private land owner.

So if we ask the question when the Crown asserted control of the geothermal resource in this region, to what extent, if at all, did it recognise and provide for Central North Island Maori Treaty interests, we have to refer to its practice of targeting geothermal lands owned by the CNI Maori for acquisition by the state. During that process it did not actively seek to provide a sytem that recognised Maori customary rights in their geothermal taonga. Rather the introduction of the Native Land Court system by converting Maori customary title to land to a title derived from the Crown facilitated land alienation. While this had the effect of creating serious prejudice for those hapu and iwi who sold or lost thermal lands, their Treaty rights in the geothermal fields and the TVZ continued.

If the Crown had acted consistently with the Treaty, it should have recognised and provided for CNI Maori customary rights and Treaty interests in their geothermal taonga. It did not do so and that is an omission in breach of the principles of the Treaty of Waitangi.

Finally, we accept the submissions from Mr Taylor, that under circumstances where thermal lands were acquired by the Crown in a manner inconsistent with the principles of the Treaty of Waitangi during the period 1840-1950, such land with geothermal resources and the geothermal fields still in Crown ownership as opposed

to private ownership, should where at all possible be the subject of negotiations between the parties for their possible return.

Crown regulation and control after 1950

Prior to 1953, there was no state regulation of geothermal energy. New Zealand engineers had visited Italy in the 1920s and 30s to observe the technology developed there to use geothermal energy to generate electric power, but were initially cautious and directed their attention to hydo-electric power. There was thus no degree of urgency before the end of the Second World War for the Crown to regulate. By 1945, the need to explore alternatives to water for electricity generation became urgent, due in part to concerns to avoid power shortages, in the North Island in particular. Legislation controlling the exploitation of water-power (Water-Power Act 1903) and petroleum (Petroleum Act 1937) was already in force, but the search for alternative energy resources led officials first to uranium, which had exploded onto the scene during the war. Small amounts of uranium had been found on the West Coast of New Zealand, so in 1945 the Labour Government moved to nationalise it. When reading the Parliamentary debates on the nationalisation process, one can discern a genuine political consensus around the need to develop such alternative sources of power.

Where political parties differed, it was usually over the vexed issue of the rights of land owners. On one view, it was considered that land owners should be allowed to exploit natural resources on their own land for their personal benefit. The converse view was that resources should be nationalised to be regulated by the state. For our part, either approach or a combination could have been used to meet the national interest while protecting Maori interests. But, while the Labour Government was in power, a clear state preference for nationalisation of energy resources became a policy that dominated the legislation passed during the period 1945-1949. The first major statute passed was the Atomic Energy Act 1945 dealing with uranium. The second and more controversial was the nationalisation of coal under the Coal Act 1948. In relation to the 1948 Act, speeches from the National opposition focused on the State appropriating private property and/or not paying adequate compensation.

Debates on the possibilities of geothermal power commenced around 1947. Here we recall Boast's evidence that in 1947, when the Hon R Semple, Labour Minister of Works and Minister in Charge of the State Hydro-Electric Department, presented his Annual Report to Parliament he began by explaining the severe difficulties the country faced in terms of adequate supplies of electricity.[629] These difficulties were being aggravated by the impact of the war on obtaining plant and skilled labour, and were exacerbated by two very dry summers straining the resources, it was claimed, of the existing system past breaking point.[630] In particular this had reduced the power available from Lake Taupo.[631] It was at this point that Semple raised the possibility of

[629] Boast, 'The Legal Framework for Geothermal Resources', A21, pp 56-57
[630] Boast, 'The Legal Framework for Geothermal Resources', A21, pp 56-57
[631] Boast, 'The Legal Framework for Geothermal Resources', A21, p 57

geothermal power.[632] As the technology for geothermal development was still in its infancy, a further visit to Italty was made, this time by officials from the State Hydro-Electric Department and the Ministry of Works, including the Commissioner of Works, to learn about the operation of the only geothermal plant operating – the Lardarello plant.[633] After their return, and a change of Government, the first trial bores were put in place at Wairakei. By 1952, 17 bores were in existence at Wairakei. Only two of the 17 bores failed to yield steam, thereby underscoring its potential.[634]

Rather than reverse the policy of nationalisation pursued by the Labour Government of the preceding years, in 1952 the National Minister of Works, introducing and discussing the Geothermal Steam Bill, promoted the centralisation of the right to regulate access to geothermal resources, the geothermal fields and the TVZ, rather than leaving control in the hands of landowners. The Minister advised Parliament that due to the potential of the Wairakei field: 'It will be seen we are on the verge of a wonderful development in New Zealand. Its prospects are excellent.'[635] Boast's view is that the Geothermal Steam Bill was sold to Parliament as a result.

Nationalisation of geothermal energy as an energy resource was considered important because the National Government did not believe that anyone in the private sector had the incentive or the money needed to invest in the industry on the scale necessary to commence power generation of sufficient capacity to meet national demands. In large measure that was because geothermal technology was still in its infancy and therefore its potential in the market still lay in the future. For the Government, there had to be opportunities, it argued, for it to develop geothermal energy without restriction. But, the barrier the Government confronted were the common law rights of landowners. The National Government's dilemma was their fundamental philosophical position that such rights should not be eroded. The tension between the twin ideologies had played itself out during the passage of the Petroleum Act 1937 over which National had led a storm of protest, especially from Maori as discussed in the Tribunal's *Petroleum Report*. Similar sentiments concerning the rights of private landowners were expressed by the National Opposition in Parliament during the passage of the 1947 and 1948 legislation, though there is no specific Maori criticism to be found in the Parliamentary debates.

We cannot be sure what the motive was for not vesting full ownership of geothermal energy in the Crown to obtain a state monopoly (as it did with petroleum, uranium and coal) but we can be sure of the fact that it adopted the framework used for water, namely aspects of the Water-Power Act 1903 which we have previously discussed in Chapter 18.

[632] Boast, 'The Legal Framework for Geothermal Resources', A21, pp 57-58
[633] Boast, 'The Legal Framework for Geothermal Resources', A21, p 58
[634] Boast, 'The Legal Framework for Geothermal Resources', A21, p 58
[635] Boast, 'The Legal Framework for Geothermal Resources, A21, p 59

There is no evidence that the Crown consulted Maori in any significant way on the proposals for geothermal power generation and the use of their taonga, the geothermal surface features and the geothermal fields. The traditional owners of the Wairakei-Tauhara field, for example, were not consulted regarding either the testing or eventual extraction of geothermal energy at Wairakei. Granted they were not the legal owners of Wairakei lands by this stage, but they still had customary associations that warranted some acknowledgment. They still held some Maori land within the vicinity and they were the customary owners of the underlying geothermal heat and energy. Had the Crown consulted Maori the nature and extent of their customary interest could have been identified.

The Geothermal Steam and Energy legislation

By section 2(1) of the Water-Power Act 1903, but subject to any rights lawfully held, the 1903 Act vested in the Crown 'the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power.' It did not vest ownership in the Crown.

The framework used in the Geothermal Steam Act 1952 had a similar purpose to the Water-Power Act 1903. But it was different to the 1903 Act, because it did not preserve any existing legal rights to generate electricity. Conversely, it did not expressly extinguish any existing ownership rights. This is very important because it means that the customary or aboriginal title of the claimants to the underlying heat and energy system of the TVZ remained, albeit modified yet again.

The Act gave the Crown the sole right to 'take, use and apply geothermal energy for the purpose of generating electricity'.[636] The power of the Crown to generate electricity was to be through the use of geothermal steam.[637] Geothermal steam was defined in section 2 as 'steam, water, water vapour, and every kind of gas, and any mixture of all or any of them, that has been heated by the natural heat of the earth.' Extensive powers were given to the Governor General to take and use the resource, to set up infrastructure for taking and using geothermal energy, to enter onto private land to conduct surveys and tests, and to take any land necessary for the taking, use or application of geothermal steam for generating electricity.[638] The Governor-General had the power to grant licenses. He also had the power to proclaim geothermal steam areas within which no person could sink a bore without the written consent of the Minister.[639] The aim was to protect the areas which the Crown had selected for electricity generation.[640] There was no mention of Maori rights and interests in the 1952 Act. Outside the geothermal steam areas, land owners were free to sink bores

[636] Geothermal Steam Act 1952 s 3. See J V Lawless, J T Lumb, L Clelland, D Kear, and S R Drew, *Geothermal Energy for New Zealand's Future* (Wellington: DSIR Bulletin 229, 1981), has a chapter on legal aspects of using geothermal energy, pp 36-37
[637] *Ngawha Geothermal Resource Report*, p 122
[638] Geothermal Steam Act ss 4-7
[639] Geothermal Steam Act ss 8-9
[640] Boast, 'The Legal Framework for Geothermal Resources', A21, p 73

wherever they liked.[641] Within the geothermal steam areas existing bores could continue to be used unless the Minister, having regard to the public interest, directed otherwise.

The following year this Act was repealed and the Geothermal Energy Act 1953 was enacted. It seems that the reason why this Act was so quickly revisited was because it only vested in the Crown the right to use geothermal steam for the generation of electricity, whereas other industrial uses of geothermal steam and heat were being explored or contemplated.[642] The government was also anxious to regulate the use of steam bores, and to ensure that tourist attractions were not damaged. As a result, the Crown needed broader powers to use and regulate the use of geothermal resources,.[643] Interestingly, the reasons that may have led to a review of the legislation involved two plans to use geothermal resources on Maori land - at Kawerau for a forestry mill, and at Orakei-Korako for a heavy water plant.[644] In both cases, the Maori land owners were attempting to control access to geothermal resources on their land or within the vicinity thereof.[645]

The Geothermal Energy Act 1953 gave the Crown the sole right to tap and use geothermal energy. When it was introduced as a Bill there were no debates or questions raised regarding Maori issues.[646] The 1953 Act dropped the term geothermal steam for geothermal energy, defining geothermal energy as:

> … energy derived or derivable from and produced within the earth by natural heat phenomenon; and includes all steam, water, and water vapour, and every mixture of all or any of them that has been heated by geothermal energy, and every kind of matter derived from a bore and for the time being with or in any such steam, water, water vapour, or mixture.[647]

With this broader definition, section 3 of the Act vested in the Crown the right to take and use geothermal energy upon the following terms:

> Notwithstanding anything to the contrary in any Act, or in any Crown grant or certificate of title or lease or other instrument of title in respect of any land within the territorial limits of New Zealand, the sole right to tap, take, use, and apply geothermal energy on or under the land shall vest in the Crown, whether the land has been alienated from the Crown or not.[648]
>
> All alienations of the land from the Crown made after the commencement of this Act, whether by way of sale or lease or otherwise, shall be deemed to be made subject to the reservation of

[641] Boast, 'The Legal Framework for Geothermal Resources', A21, p 73
[642] Hon Mr Goosman, 25 November 1951, NZPD, 1951, vol 301, p. 2469
[643] Hon Mr Goosman, 25 November 1951, NZPD, 1951, vol 301, p. 2469
[644] Martin, *People, Politics and Power Stations: Electric Power Generation in New Zealand, 1880-1998* (Wellington: Electricity Corporation of New Zealand and Historical Branch Dept. of Internal Affairs, 1998), pp 257-260.
[645] *Ngawha Geothermal Resource Report*, p 123
[646] Boast, 'The Legal Framework for Geothermal Resources', A21, p 76
[647] Geothermal Energy Act 1953, s 2
[648] Geothermal Energy Act 1953, s 3(1)

> the sole right of the Crown to tap, take, use and apply geothermal energy on or under the land, and subject to the provisions of this Act.[649]

Again the 1953 Act did not expressly extinguish any existing rights, leaving any customary or aboriginal title of the claimants to the geothermal energy of the TVZ intact along with their Treaty rights. The Act, did, however, give extensive powers and rights to the Crown. It authorised the Governor-General by proclamation to set aside geothermal energy areas (s4); authorised the Minister to issue licences and prevented anyone from sinking any bore, or tapping, taking, using or applying geothermal energy for any purpose without such licence unless exempted (s9); authorised the Governor General to take land necessary for the tapping, taking, use and application of geothermal energy under the Public Works Act 1928 (s7); authorised the charging of a resource rental specified in licences (s10); and authorised the Minister to close bores (s12). Authority was given to enter property and to drill geothermal wells (s6) Notice had to be given of any intention to sink bores within any geothermal energy areas. Offences were defined and penalties laid down (s15).[650]

In the *Ngawha Geothermal Resource Report*, the Tribunal recited the following useful summary of the import of this aspect of the legislation vesting control of the right to regulate access to geothermal energy:

> The purpose of the Geothermal Energy Act 1953 (and its predecessor, the Geothermal Steam Act 1952[)] was to put geothermal resources on a similar statutory footing to electricity generation from *water*. As noted by Boast, the legislative framework therefore links geothermal resources with water, rather than with other *energy* resources such as petroleum, coal or uranium. Interestingly, the legislation does not vest the ownership of the geothermal resource in the Crown – as the Petroleum Act 1937 currently does with regard to petroleum – but instead treats it as an energy resource akin to water. The fact that water itself is an energy resource highlights the conceptual difficulties of adequately categorising geothermal water (particularly in view of its mineral content).
>
> In essence, the Act appears to be based on an assumption that the geothermal resource is analogous to groundwater, so that common law rights in respect of groundwater were of some relevance. S.3 becomes operative at the very point when the resource, considered in this sense, becomes a property right – namely at the point of abstraction. Leaving aside the limited exceptions outlined above [provided for in s9], it was necessary under the 1953 Act to obtain a licence from the Crown before abstracting geothermal fluid (and at that point obtaining property rights in the fluid). In that sense, the Act did not simply vest use and management rights in the Crown while leaving property rights unaffected. Its intent, rather, was to make the existence of private property rights in the resource dependent upon obtaining a licence from the Crown.[651]

In parliament, the Crown's right to control and license geothermal energy was justified on grounds of maximising the use of geothermal steam, by siting industries

[649] Geothermal Energy Act 1953, s 3(2)
[650] Geothermal Energy Act 1953, s 9(1)(b)
[651] *Ngawha Geothermal Resource Report*, pp 125-126

within a limited area; and of the Crown's right to recover costs, because of the 'considerable amount' it had spent exploring the Wairakei field.[652]

There were compensation provisions in section 13 of the Act for any person with land injuriously affected or who suffered any damage from the exercise of powers conferred by the Act. No compensation was payable in respect of geothermal energy unless, at the commencement of the Act it was of actual benefit to the owners or occupiers of the surface land. (s14) The Ngawha Geothermal Tribunal thought this provision was inspired by 'the common law's view [that] landowners' rights could require compensation for loss of the right to appropriate geothermal energy.'[653]

Issues concerning Maori customary rights and Treaty interests in the geothermal resources (waters/fluid, heat and energy) were never addressed in the legislation. Maori interests were clearly not considered by the Crown, unless it was to find ways of avoiding them, as in the Kawerau and Ōrākei Kōrako examples. There were, however, exemptions to the prohibitions against taking or using geothermal energy in section 9 of the 1953 Act. These exemptions included prior use and the right to sink bores, or tap, take, use or apply geothermal energy for any domestic purpose whatever (including cooking, heating, washing, bathing). The Ngawha Geothermal Tribunal thought this provision adequately recognised pre-existing use of geothermal energy by Ngapuhi for domestic purposes.[654]

We note that the position we adopt must be different because the situation pertaining to the customary use of geothermal surface features and geothermal fields in the CNI is different. While we agree that CNI Maori rights to take for these domestic purposes were permitted, the extensive nature of the use of geothermal energy for cooking, heating, washing and bathing by Maori across the CNI indicates that the resource was much more than a resource used for domestic purposes, it was a resource that people depended on to sustain their way of life. From the evidence before us, it is clear that one cannot reduce the Maori relationship with their taonga, the geothermal surface manifestations, to 'domestic uses.'

In addition, the section 9 exemptions did not adequately recognise CNI Maori customary rights and Treaty interests to use their geothermal resources for customary purposes in accordance with their own tikanga and cultural preferences, as opposed to domestic purposes. As a result the legislation did not accord an appropriate priority to these rights so as to prevent neighbouring domestic uses from impacting on their enjoyment of their taonga.

[652] Hon Mr Goosman, 25 November 1951, NZPD, 1951, vol. 301, 1953, p 2469
[653] *Ngawha Geothermal Resource Report*, p 125
[654] *Ngawha Geothermal Resource Report*, p 137

Delegation to local authorities and the management of geothermal surface resources, and geothermal fields

The first relevant amendment to the Geothermal Energy legislation for our purposes was the Geothermal Energy Amendment Act 1966. This added a new dimension by delegating to local city councils powers under certain empowering Acts, to construct and operate any geothermal works without licences[655] and by authorising the Minister to delegate to councils the power to issue licences to other users, subject only to any conditions the Minister might impose in accordance with such delegation.[656]

Under an amendment in 1969, the definition of geothermal energy was changed to exclude water at temperatures less than 70ºC.[657] This made it possible to exploit the resource without controls and ensured that use could continue of any geothermal resources under this temperature without the need for a license. Further provision was made for the payment and recovery of rentals as a debt due to the Crown.[658] This latter provision was modified by the Ministry of Energy Act 1977.

The 1966 amendment to the Geothermal Energy Act 1953 was closely followed by the enactment of the Rotorua City Geothermal Energy Empowering Act 1967. The purpose of this Act was to 'enable the Rotorua City Council to make provision for the conducting of geothermal works, controlling the sinking of bores, tapping, use and application of geothermal energy.' The Act authorised the Council to conduct such works, and to carry out inspections of these works or any private works. It provided for the Council to regulate and control the sinking of new bores by the registration and issue of licences and it provided for a charge for the supply by the Council of any geothermal energy.[659] Extensive powers to make bylaws regulating new and existing use were also granted and numerous offences were created.[660]

In 1968, the Minister acting under section 9A of the Geothermal Energy Act 1953 as amended in 1966, delegated his power of licensing to the Rotorua City Council.[661] That delegation was revoked on 6 October 1986 for the reasons explained below.[662] Essentially it was revoked because the Rotorua regional geothermal field was by 1986 in a state of rapid depletion due to overuse by domestic users, and conservation measures were needed.

We received no evidence that Te Arawa was consulted about the Rotorua City Geothermal Energy Empowering Act 1967.

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[655] Geothermal Energy Amendment Act 1966 s 2 inserting after s 3, s 3A of the Geothermal Energy Act 1953
[656] Geothermal Energy Amendment Act 1966 s 3 inserting after s 9, s 9A of the Geothermal Energy Act 1953
[657] Geothermal Energy Amendment Act 1969, s 2(b)
[658] Geothermal Energy Amendment Act 1966 s 4 repealing and substituting a new s10 of the Geothermal Energy Act 1953
[659] Rotorua City Geothermal Energy Empowering Act 1967
[660] Rotorua City Geothermal Energy Empowering Act 1967, ss 7-8
[661] *Rotorua Geothermal Users Association v Minister of Energy (*1987) (Unpublished CP 543/86, High Court, Heron J), p 4
[662] *Rotorua Geothermal Users Association v Minister of Energy (*1987) (Unpublished CP 543/86, High Court, Heron J), p 4

The Water and Soil Conservation Act 1967

The next major statute affecting the geothermal resources and the geothermal fields of the Central North Island was the Water and Soil Conservation Act 1967. This statute nationalised all private rights in water and modified the common law regime of riparian rights.[663] This Act, subject to a number of statutes, vested the sole right to dam any river or stream or to divert or take natural water, or discharge natural water or waste into natural water in the Crown.[664] Section 2 of the 1967 Act defined natural water as 'all forms of water including … geothermal steam'. All persons wishing to take or divert or discharge into natural water were required to obtain a water right from a Regional Water Board.[665] An amendment in 1981 specified that water, steam or vapour heated by geothermal energy whatever its temperature were all natural water. This confirmed the result in a judgment of the Court of Appeal where the link between the Geothermal Energy Act 1953 and the Water and Soil Conservation Act 1967 was considered. In *Keam v Minister of Works and Development* [1982] the Court of Appeal found that section 2 covered both geothermal water and steam.[666] Therefore, the right to take and use geothermal energy became subject to the grant of a water right under the Water and Soil Conservation Act 1967.

The Water and Soil Conservation Amendment Act 1981 was intended to put it beyond doubt that where there is a conflict between the 1953 and the 1967 Acts, the 1967 Act was to prevail.[667] Thus applicants wishing to develop geothermal resources and the geothermal fields needed: a licence under the Geothermal Energy Act 1953; and a water right issued by the Regional Water Board under the Water and Soil Conservation Act 1967. This two stage process was in practical terms then imposed

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[663] Boast, 'The Legal Framework for Geothermal Resources', A21, p 88
[664] Water and Soil Conservation Act 1967 s 21(1)
[665] Water and Soil Conservation Act 1967 ss 21(3)-24
[666] *Keam v Minister of Works and Development* [1982] 1 NZLR 319, 325 - The facts of Keam relate to the management of geothermal resources within the CNI during the period 1967-1991. The case concerned an application by the Minister of Works and Development under section 23 of the Water and Soil Conservation Act 1967 for a right to take geothermal water (up to 2500 cubic metres per day, for up to a five years) for test purposes from an underground geothermal reservoir at Rerewhakaaitu, southeast of Rotorua. It was intended that if the tests showed that geothermal energy was available, the Minister of Energy would supply it under s 11 of the Geothermal Energy Act 1953 to the owner of the site, E T Ramsey Ltd, for running a timber processing plant. The Authority under the 1967 Act granted the application but there was an appeal to the Planning Tribunal by Dr Keam who had spent some time studying the Waimangu geothermal field. The essence of what the Planning Tribunal found was quoted by Lord Cooke when he was in the Court of Appeal:

'The draw-off of hydrothermal fluid could adversely affect the natural thermal activity in the Waimangu area. It is not a certainty that that would happen; merely a possibility. The thermal activity there has certain unique features (already mentioned); it is not as yet affected by artificial influences; and it is a tourist attraction.
Our conclusion from the evidence and submissions is that the benefit which may follow from the exercise of the right sought is not sufficient to justify the detriment which might be caused to the scenic and natural features of the Waimangu thermal area; that those features are of sufficient public importance that they should be preserved from the possibility of affection by the draw-off of hydrothermal fluid which would be authorised by the right sought. We do not say that the scenic and natural features of the Waimangu thermal area must be forever protected and that no rights should be granted to take hydrothermal fluid from the area. But if it is desired to explore the energy potential of the Waimangu/Waiotapu area, then we would expect that a comprehensive plan of exploration would first be prepared and that a decision to explore would not be made without full evaluation of the likely environmental consequences' (7 NZPTA 11, 17, cited in [1982] 1 NZLR 320).
[667] *Keam v Minister of Works and Development* [1982] 1 NZLR 319, 321

by the Minister who would require applicants to acquire a license and obtain a water permit.[668] Furthermore, anyone diverting or discharging geothermal resources into natural water needed to obtain a water right.

But the legislation did not impose any requirement on the Regional Water Boards to consult traditional Maori land owners. There was no direction in the legislation for joint management options to control the use of geothermal water/fluids as defined in the 1967 Act. There was no requirement to consult with Maori regarding the management and protection of geothermal water. There was no special representation provision made for them on the Boards. In this way, the Crown further appropriated the proprietary right of Maori to control the use of geothermal energy, although not expressly extinguishing their customary right. Their Treaty rights, of course, remained intact.

So when the High Court found in the *Huakina Development Trust v Waikato Valley Authority Case* (1987) that Maori values could be imported into the Act's interpretation as a matter to be considered before granting a water right,[669] it came as a great surprise to the average local government official. The High Court also suggested that the Treaty of Waitangi itself could be used as a guide to the interpretation of the 1967 Act. The problem with the Act was that it provided no adequate list or range of factors that the Regional Boards should consider when making decisions on applications for water rights. So while it was possible after 1987 to mount arguments based on Maori cultural and spiritual values in cases before consent authorities and on appeals (in relation to geothermal energy applications or in opposition to such applications), that victory was rendered nugatory due to the Labour Government's process of local government restructuring and resource management law reform.

Impact of the Geothermal Energy Act 1953 and associated legislation

With the passage of the Geothermal Energy Act 1953, the stage was set for geothermal power to be harnessed and the building of power stations to proceed. No private landowner in New Zealand could from this point control access to geothermal energy or acquire a property right in it by capture, until the requirements under the Geothermal Energy Act 1953 were met. Nor was compensation payable for the loss of these rights. Individual Maori land owners along with all citizens of New Zealand continued to own their land but lost this feature of their property rights. They received no compensation for the loss.

The effect of the legislation on CNI Maori landowners was disproportionate. That is because a significant amount of land within or over geothermal fields of the CNI was still Maori land. Alternatively, it was Crown land or public land with geothermal resources. In such cases, and as we discussed above, some CNI Maori have a

[668] Boast, 'The Legal Framework for Geothermal Resources', A21, p 91
[669] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188-228

significant, if not priority interest in geothermal resources and or the geothermal fields where their land was lost due to past Crown actions in breach of the principles of the Treaty of Waitangi.

The Geothermal Energy Act 1953 and the Water and Soil Conservation Act 1967 affected CNI Maori customary rights and Treaty interests in geothermal resources and the geothermal fields in the following way:

- The legislation took away from individual Maori land owners their right to control access and their ability to receive any benefits from the control of access. Effectively the individual Maori land owners were replaced by the Crown. As a consequence the rights of the individual hapu members and the rights of the hapu and iwi to access their taonga were thereby consequentially diminished;
- It also took away from the hapu and iwi the right to control the use of the taonga itself and as a consequence the hapu or iwi lost the opportunity to receive any benefits from the ownership of the resource once it could be developed for geothermal power. This was done in 1953 by the Crown appropriating the right to control access thereby making the existence of private property rights in the resource dependant upon obtaining a licence from the Crown. This approach was confirmed by the Water and Soil Conservation Act 1967 and the 1981 amendment which required Regional Water Boards to determine water right applications for the taking and use of geothermal resources thereby controlling resource allocation.

Thus the appropriation of the right of access and control to geothermal energy under the 1953 Act has had a disproportionate effect on Maori land owners, their whanau, and their hapu/iwi.[670]

In addition, the section 9 exemptions did not adequately recognise CNI Maori customary rights and Treaty interests to take and use their geothermal resources for customary purposes with their own tikanga and cultural preferences, as opposed to domestic purposes. As a result the legislation did not accord an appropriate priority to these rights so as to prevent neighbouring domestic uses from impacting on their enjoyment of their taonga.

The subsequent delegation to local authorities and regional water boards did not impose any requirement on these bodies to consult with CNI Maori. There was no direction in the legislation for these bodies to jointly manage, control and use geothermal energy with local Maori. There was no requirement to consult with them regarding the management and protection of the main geothermal surface manifestations in their region.

[670] *Petroleum Report*, pp 63-64

Findings on the impact of the Geothermal Energy Act 1953 and associated legislation 1953-1991

We have found that geothermal resources, the geothermal fields and the TVZ were taonga possessed in Treaty terms as at 1840. Maori customary rights and Treaty interests have never been expressly extinguished. The sale of land or conversion of customary title to a Crown derived title in land has not extinguished those customary rights. Irrespective of ownership of land, the Maori customary rights to the geothermal fields and the TVZ have continued. Even if the ordinary Courts come to a different view of the law, the Treaty rights of the claimants have not been affected, and continue.

The history shows that the Crown has asserted the right to control and regulate the resource without adequately addressing the customary rights and Treaty interests of CNI Maori and this has left serious present day management and control issues still to be resolved. These issues involve the right of the claimants to maintain management oversight over the resource, to be consulted over its use, and to have access to revenue deriving from that use.

We find therefore that when the Crown asserted control of geothermal resources and geothermal fields in this region, it did nothing to recognise and provide for CNI Maori customary rights and Treaty interests.

We agree with the Crown that there were sound policy reasons for the Crown wishing to explore and develop alternative sources of energy such as geothermal energy at a time when it appears New Zealand was facing an electricity crisis. We also accept that the circumstances of the time were such that it was reasonable for the Crown to take the lead in the development of the geothermal industry. That is because only the Crown at this point had the expertise and the knowledge about the full potential of geothermal power and only it could develop it. That is an appropriate exercise of the Crown's kawanatanga role under Article 1 of the Treaty of Waitangi

But the Crown's rights were constrained. First, its taking the lead in development of the geothermal industry was subject to discussing the matter with Maori of the Central North Island, the customary rights holders of the largest zone of geothermal activity in New Zealand. Secondly, its right to control access and manage geothermal resources, "in the wider public interest" in the circumstances of the early 1950s, was constrained by the need to ensure that the rights and interests of CNI Maori in their taonga were preserved in accordance with their wishes.

Maori customary rights and their Treaty interests in geothermal taonga were fundamental rights. It is the job of this Tribunal to review Government actions, including legislative actions which may breach these fundamental rights.[671] The Crown, over the years 1953-1966, does not seem to have appreciated the extent to

[671] *Petroleum Report*, p 60

which it had an obligation to protect these fundamental rights was an omission in breach of the principles of the Treaty of Waitangi. The Crown should have known, or made a good faith attempt to find out what the extent of the Maori rights and interests were. Its Treaty duty in a matter which was of the greatest interest and importance to central North Island Maori was to consult. As we have demonstrated, there was an enormous amount of evidence available to it, had the Crown investigated, which established the Maori association with geothermal surface features, the geothermal fields and the TVZ beyond mere domestic uses. As we have noted, that association was also one known of and visible well beyond the Central North Island. Nor can the Crown be excused for its actions in 1953 on the basis that there was no protest about the legislation. The fact that the four Maori MPs did not say anything probably indicates nothing more than that they were party-aligned MPs by this stage in a Labour opposition philosophically committed to a programme of nationalisation.[672] Maori directly affected by attempts to use Maori land for geothermal development did at this time raise concerns at Kawerau and Orakei-Korako. Instead of attempting to understand those concerns, the evidence which we discuss below demonstates that the Crown simply attempted to circumvent them.

Once geothermal power was developed, then another opportunity to involve Maori was available at the point when the Crown considered delegation to local authorities and regional water boards. When it did not do so it failed to provide for the tino rangatiratanga of CNI Maori in environmental management. It did not include CNI Maori in the decision making process, either through joint management regimes or through special representation measures on these bodies. This also was in breach of the Crown's obligations to provide for the exercise of Maori rangatiratanga over their natural resources.

By the 1980s the Crown had a further opportunity to address Maori issues and did not do so. It did not take the opportunity to provide for Maori rights when it amended the Water and Soil Conservation Act in 1981 to explicitly provide for Maori Treaty interests in the Water and Soil Conservation Act 1967 and the Geothermal Energy Act 1953. This was a failure to acknowledge and provide for Maori customary rights and their Treaty interests in geothermal resources, the geothermal fields and the TVZ. It was also a breach of the Crown's duty to actively protect Maori taonga and Maori rangatiratanga in resource management because again there was no attempt to develop joint management regimes or provide for special representation on these bodies.

We find that it was not reasonable in the circumstances of the time to impose the Geothermal Energy Act 1953, and statutes delegating aspects of its powers to local councils:

- Without significant consultation with CNI Maori before the enactment of any of the legislation relating to geothermal resources, the geothermal fields and the TVZ;

[672] Boast, 'The Legal Framework for Geothermal Resources', A21, pp 71, 81

- Without the Crown informing itself of the nature and extent of Maori interests in the geothermal resources, the geothermal fields and the TVZ. Although the right to generate electricity is not a aboriginal title right or a Maori Treaty right per se, the exercise of the Crown's kawanatanga power to develop the industry was only possible by appropriation of CNI Maori customary and Treaty interests to control access and use;
- Without providing for Maori rangatiratanga over their geothermal resources, the geothermal fields and the TVZ in resource management.

If the Crown had consulted or informed itself of the Maori interest, the evidence available to us suggests that the Crown would not have acted:'

- Without exempting Maori land owners from the effects of the legislation; or
- Without considering a range of legislative options that would meet the public interest in developing geothermal power generation without the state needing to assume total control. There was no reason why, for example, a number of alternatives could not be considered. One such alternative could have been a joint arrangement with CNI Maori, giving them management responsibility with the Crown and/or a local authority, and sharing the royalties and licence fees from the private and state utilisation of geothermal resources, the geothermal fields and the TVZ; and
- Without providing for the customary rights and/or priority interest in geothermal surface features and the geothermal fields of the TVZ. This could have been done either at local or regional level through Tribal Trust Boards and Tribal Committees constituted under the Maori Economic and Social Development Act which were operative in 1953 or their successors such as the District Maori Councils, or any other modern expression of local and regional CNI Maori representation; and
- Without compensating CNI Maori for the appropriation of the right to regulate, manage access and use the geothermal energy of the Taupo Volcanic Zone.

The Crown's regulatory regime is such that the Crown did not until the Resource Management Act 1991, expressly provide for Maori rights and interests. Consequently, we find that: under the Crown's regime, Maori were only ever able to respond to applications for water rights under the Water and Soil Conservation Act 1967 or licences under ther Geothermal Energy Act 1953, even if they owned the land. There was nothing in the early legislation that gave them the right to obtain a water right or licence, in order to protect their taonga. Rather the grant of such licences or water rights were dependant on a specified end use. In this way, and although they were often the owners of land upon which the geothermal heat and energy system could be accessed, they were debarred from the process of managing and protecting the resource and they were debarred by section 14 of the Geothermal Energy Act 1953 from receiving any compensation for access to the resource where it emerged from their land. They were also unable to ensure that neighbouring uses did

not impact on their use and enjoyment of their taonga for customary purposes. Under the legislation the only ability of Maori to endeavour to protect their taonga was to object to and if needs be appeal the grant of water rights to others and this legislation did not specifically recognise the Maori interests in the resource either in terms of kaitiaki, Treaty interests or customary rights.

We turn to consider what happened to Maori rights and interests following the enactment of the Resource Management Act 1991 and Local Government reforms.

The current regime: the Resource Management Act 1991 and the Local Government Act 2004

Understanding of Maori cultural and spiritual values increased as the Waitangi Tribunal heard and reported on the Motunui, Kaituna and Manukau claims and following the High Court decision in the *Huakina* Case. So when the Crown commenced its local government and resource management reforms of the 1980s, the opportunity existed for the Crown to reconsider its approach to the regulation and control of geothermal surface features, the geothermal fields and the TVZ in the CNI by recognising and providing for CNI Maori customary rights and Treaty interests. We turn now to consider the statutory schemes that were introduced as a result of the reforms.

The RMA and Local Government Statutory Scheme

In 1991, the Water and Soil Conservation Act 1967 and the substantive provisions of the Geothermal Energy Act 1953 were repealed and the Resource Management Act (RMA) enacted. The 1991 Act unified and reformed dispersed legislation on land, air, and water use and brought together the responsibilities of most central government agencies. Planning responsibility was delegated to regional and district councils. These bodies are now deemed to be body corporates pursuant to section 12 of the Local Government Act 2002.

The RMA continues the previous regime whereby water permits (previously water rights) are required from (now) Regional Councils for any take, diversion and/or use of geothermal fluids, steam, heat (s14) and the discharge of such into water and in some cases air. In addition the RMA introduced a new authority for regional councils to guide and regulate the taking and use of geothermal resources by way of Regional Policy Statements and Regional Plans. These can contain objectives, policies and rules relating to the taking and use of geothermal resources, and discharge of contaminants to water, air and land. Regional Plans classify the taking and use of geothermal resources into permitted, controlled, discretionary, non complying, and prohibited activities. They also have policies which guide the allocation and use of the subterranean resource and which may touch upon the role of Maori in relation to their geothermal taonga.

We turn now to analyse both the Local Government and RMA statutory schemes to determine to what extent if at all, the Crown recognised and provided for Central North Island Maori customary rights and Treaty interests in geothermal resources, the geothermal fields and the TVZ.

Local Government legislation

The Crown acknowledges that local government legislation for most of the 20th century did not contain provisions on how the Crown's Treaty of Waitangi obligation to protect Maori rangatiratanga was to be implemented, so it has been unnecessary to examine various local government enactments in detail.[673] The reforms of the 1980s did not improve the nature of the local government legislation in this respect. In fact, according to Dr Jane Kelsey this was a deliberate decision taken by the Government of that time.[674] Whether or not that is correct, clearly from a review of the statutory scheme, it has only been in this century that some change to this position has occurred with the enactment of the Local Government Act 2002.

The Local Government Act 2002 attempts, we were told, to address the manner in which the Crown's Treaty obligations are to be addressed by local government. The Crown submits that in enacting this legislation it has acted in good faith by ensuring that local authorities engage with Maori and that Maori interests and concerns form part of the decision making process.[675] In this way it has attempted to provide for Maori Treaty interests. We note that section 4 provides that:

> In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Maori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Maori in local authority decision-making processes.

Section 14 (d) provides that a local authority should provide opportunities for Maori to contribute to its decision-making processes. This measure is complemented by section 81 providing that a local authority must:

> (a) establish and maintain processes to provide opportunities for Maori to contribute to the decision-making processes of the local authority; and
>
> (b) consider ways in which it may foster the development of Maori capacity to contribute to the decision-making processes of the local authority; and
>
> (c) provide relevant information to Maori for the purposes of paragraphs (a) and (b).

There are principles governing consultation with Maori under section 82 and in section 77(c) where local authorities are making significant decisions in relation to

[673] Crown closings, 3.3.111, part 1, p 53
[674] J Kelsey, *A Question of Honour: Labour and the Treaty, 1984-1989* (Wellington: Allen & Unwin, 1990), p 186
[675] Crown closings, 3.3.111, part 1, p 55

land or a body of water, they must take into account the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.

The Local Government Act 2002 cannot be considered in isolation from the Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001 and the Local Electoral Act 2001. These statutes provide for the establishment of Maori wards or regional council Maori constituencies.

According to the Crown, local government and related resource management legislation has reflected the 'philosophy that it is preferable for decisions affecting the local community to be made by that community with the Crown setting the legislative parameters within which those decisions are to be made.'[676] We consider that while these new measures are an important advance on the previous local government legislation, nearly all still reflect the Crown's preference for promulgating provisions that do not accord Maori a priority in decision making, but rather reduce their Treaty rights to one of a number of factors that decision makers must take into account. This effectively means that just as with the RMA on issues of central concern to Maori, such as those concerning their geothermal surface features the geothermal fields and the TVZ, the Crown has not recognised and provided for their Treaty right to tino rangatiratanga or autonomy in resource management.

The Resource Management Act 1991

The repeal of Water and Soil Conservation Act 1967 and most of the Geothermal Energy Act 1953 did not affect the Crown's existing rights to conrol access to geothermal resources.[677] The Crown remained vested with the sole right to take, use, control and manage water and geothermal water (which it then delegated to regional councils). This result was explained to the Ngawha Geothermal Tribunal in the following way.

> The reform recognised that several iwi had lodged claims with the Waitangi Tribunal relating to the ownership of geothermal surface features. The Government agreed that the Resource Management Law Reform was not the appropriate place to resolve ownership grievances, and that issues relating to Maori ownership of resources would not be dealt with in the reform. The Government also agreed to continue the vesting of the sole right to allocate the resource with the Crown until those issues were resolved. Other provisions in the Act were designed to ensure that the interests of Maori were adequately provided for. (B43:5)[678]

For our purposes the next relevant section of the RMA is Part II, which sets up a hierarchy of matters that must be accorded priority in the interpretation and/or in the exercise of powers under the RMA. Section 5 provides that the purpose of the RMA is to promote the sustainable management of natural and physical resources. Sustainable

[676] Crown closings, 3.3.111, part 1, p 53
[677] Resource Management Act 1991, s 354
[678] Mr Lawson, B43:5 as cited in *Ngawha Geothermal Resource Report*, p 128

management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.[679]

Matters of national importance are listed in section 6, requiring that, to achieve the purpose of RMA set out in section 5, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga

f) The protection of historic heritage from inappropriate subdivision, use and development

g) The protection of recognised customary activities.[680]

Decision-makers exercising powers under the RMA must also have regard to a number of other matters listed in section 7. That latter section provides that in

[679] Resource Management Act 1991, s 5(2)
[680] Resource Management Act 1991, s 6 as amended by Amendment Act 2003 and 2004

achieving the purpose of the RMA, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to a number of matters including: kaitiakitanga; the ethic of stewardship; and the protection of the habitat of trout and salmon. Finally, under section 8, and again to achieve the purpose of the RMA, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

In Part III of the RMA duties and restrictions regarding the use and development of natural resources are spelt out. Directly relevant is section 14(1) which provides that no person may take, use, dam, or divert any water (other than open coastal water); or heat or energy from water (other than open coastal water); or heat or energy from the material surrounding any geothermal water unless the taking, use, damming, or diversion is allowed by the RMA. Under section 14(2) no person may take, use, dam, or divert any open coastal water; or take or use any heat or energy from any open coastal water, in a manner that contravenes a rule in a regional plan or a proposed regional plan unless expressly allowed by a resource consent or allowed by section 20A (certain existing lawful activities allowed). There are exceptions to these restrictions and they include under section 14(3)(c) the taking, daming or diversion of geothermal water, where the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment.[681] Aside from the exceptions listed in section 14(3) including (3)(c) described above, the management and allocation of rights to use geothermal resources and the geothermal fields are provided through two planning tools under the RMA, namely: (1) regional policy statements and plans; and (2) resource consents. Section 15 of the RMA prohibits the discharge of contaminants into water unless permitted in a plan, resource consent or regulations made under the RMA.

Part IV deals with the functions of regional councils and district councils. Under section 30 regional councils have responsibility for the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including the control of the taking or use of geothermal energy and the control of discharges of contaminants into or onto land, air, or water and discharges of water into water. Under section 33 there are provisions for a regional or district council to transfer any one or more of their functions, powers, or duties under the RMA to an iwi authority. This provision has still never been used, despite the RMA being in effect for over 15 years.

[681] Resource Management Act 1991, s 14(3) (c). Section 2 defines geothermal energy as energy derived or derivable from and produced within the earth by natural heat phenomena; and includes all geothermal water. Geothermal water means water heated within the earth by natural phenomena to a temperature of 30 degrees Celsius or more; and includes all steam, water, and water vapour, and every mixture of all or any of them that has been heated by natural phenomena.

Part V contains the provisions dealing with national and regional policy and planning documents. Section 62 of the RMA sets out what the contents of such regional policy statements should be. The list includes identifying the significant resource management issues for the region and the resource management issues of significance to iwi authorities in the region. Regional plan must state the objectives for the region; the policies to implement the objectives; and the rules (if any) to implement the policies. They may also include the information that should be attached to resource consent applications.[682] Furthermore, sections 61 and 66 require that in preparing or changing regional policy statements and plans regional councils must take into account any relevant planning document recognised by an iwi authority and lodged with the council, to the extent that its content has a bearing on resource management issues of the region. There are provisions within the regional policy statements for both Environment Bay of Plenty (EBOP) and Environment Waikato that deal with the resource management issues of significance to iwi authorities in the region and including how they relate to geothermal surface features, the geothermal fields and the TVZ. We discuss these below.

Part VI of the RMA deals with resource consents. The RMA makes it clear that a resource consent is needed to do anything prohibited by sections 14 and 15 (s87). Applications must follow the form required by the Act (s88). There is a public notification process, a submission process, and there are special provisions dealing with regional council hearings and their decision making powers. A number of geothermal fields in the TVZare monitored in accordance with resource consent conditions under the RMA including Ohaaki which we discuss below and the Mokai field. Heritage and water conservation orders are provided for under the RMA and there was a suggestion in the *Ngawha Geothermal Resource Report* that they could be used for the purpose of protecting significant geothermal sites.[683] There are transitional arrangements made for licences and water rights granted under the Geothermal Energy Act and the Water and Soil Conservation Act 1967. These previously awarded rights are deemed consents under the RMA. (ss 386-387)

Regulations can be made under section 360(1)(c) prescribing the amount, methods for calculating the amount, and circumstances and manner in which holders of resource consents shall be liable to pay for the use of geothermal energy. The RMA (Transitional, Fees, Rents and Royalties) Regulations 1991 (SR 1991/206) requires that these payments be made to the Crown for rent and royalties for the use of geothermal energy. These payments are made to regional councils under the RMA who then pay them to the Crown pursuant to section 359 of the RMA.

The Crown has acknowledged that the RMA which governs the regulation of geothermal resources and the geothermal fields is not inconsistent with any existing customary property rights. Citing the Chief Justice in the *Ngati Apa* Case (2003), the Crown acknowledges that the legislation does not affect any extinguishment of such

[682] Resource Management Act 1991, s 67
[683] *Ngawha Geothermal Resource Report*, p 132

property rights.[684] We are therefore of the view that neither the Geothermal Energy Act 1953, the Water and Soil Conservation Act 1967 or the Resource Management Act 1991 have extinguished CNI Maori customary rights to the geothermal waters/fluid heat and energy within the Taupo Volcanic Zone. It has certainly not extinguished their Treaty interests.

National management of the geothermal resource in practice under the RMA

There is no national policy statement on geothermal resources, and the Crown has given no indication that it intends to promulgate one. Consequently, beyond the general requirement of Part II of the RMA there is no national guidance from the Crown on the nature and extent of iwi and hapu interests in geothermal resources, the geothermal fields and the TVZ and how these should be provided for. The impact of that has been that there is no clear understanding in the proposed regional policy statements and plans on how to effectively provide for and recognise iwi and hapu interests in the management of geothermal resources. The situation is aggregated by the fact that any promulgation of a national policy statement or set of guidelines now would come almost too late.[685] We examine these documents further below but basically the situation is that all the RMA procedures leading to the major regional policy statements and plans becoming operative have been completed.

We note further that Mr Dickie for Environment Waikato in answer to written questions has identified this omission by the Crown.[686] He has also told us the Crown has not provided any informal guidance or guidelines to regional councils to assist with their statutory obligations to manage geothermal surface features, the geothermal fields and the TVZ while at the same time, taking into account the rights and concerns of tangata whenua.[687]

For a senior official from one of the most important Regional Councils involved in the management of geothermal resources, to acknowledge this indicates that the failure to promulgate a national policy statement has been a serious omission on the part of the Crown. It is both serious and unfortunate because the Minister under section 45 of the RMA can have regard to anything significant in terms of section 8 (Treaty of Waitangi) of the RMA. By failing to develop a national policy statement in accordance with the procedures of the RMA within a reasonable time, the Crown has missed yet another opportunity to recognise and adequately provide for the customary rights of CNI Maori and their Treaty interests in the geothermal resource.

This has had a prejudicial effect for CNI Maori given that Environment Waikato, with 80% of the nation's geothermal resources within its region, has been delegated the

[684] Crown closings, 3.3.111, part 2, p 501; and *Ngati Apa et al v Attorney-General* [2003] 3 NZLR 643, para 76
[685] B Dickie, Response to questions from R Boast, Document I23, p 7
[686] Dickie, response, I23, p 7
[687] Dickie, response, I23, p 7

responsibility to manage these resources. The regional council has already completed an intensive consultation and hearing process on its own regional policy statement and plan.[688] The same is true for EBOP, with a large percentage of the remaining geothermal resources of the CNI in its region. Its planning process is also well underway with its Regional Policy Statement now being operative and its Proposed Water and Land Plan being subject to the appeal process outlined under the RMA.

It seems that instead of opting for the national policy statement approach, the Government has embarked on a sustainable development programme of action for water. As a component of this review, we were told by Crown counsel that the Crown has commenced work on a programme to address geothermal allocation. This was being done jointly by the Minister of Energy and the Minister for the Environment. The anticipated reporting date for that work was June 2006.[689] That became December 2006.

Reference to the Ministry for Economic Development website indicates that there is limited public information on this programme, though a Ministry of Economic Development Note on Existing and Potential Geothermal Resources, provides some information on the use of geothermal resources and the geothermal fields for electricity generation. This information is intended to supplement the Ministry's project to identify potential waterbodies of national importance in relation to existing and potential hydro generation but the full report is not on the website.[690] The importance of the TVZ in the upper North Island is identified in this note. The author/s note that geothermal power generation accounts for approximately 7% of New Zealand's total electricity generation. At a threshold of 230GWh per annum, the Wairākei, Ohaaki and Mōkai geothermal fields are considered nationally important in terms of existing electricity generation. The author/s suggest that significant additional contribution to New Zealand's generating capacity could be achieved by access to and development of further fields. The author/s suggest that delays and uncertainties in the resource consent process and subsequent compliance costs act as the biggest obstacles to investment. Their table reproduced below shows a summary of potential electricity generation by geothermal field. The table is based on opportunities deemed to have a high to medium probability of progressing by 2025. It is derived from information collected by East Harbour Management Services in their 2002 report *Availabilities and Costs of Renewable Sources of Energy for Generating Electricity and Heat*.

[688] Dickie, response, I23, p 7
[689] Crown closings, part II, 3.3.111, para 10.4, p 500. The Ministry for the Environment advise that the task will be addressed as part of the upcoming New Zealand Energy Strategy. See www.med.govt.nz/upload/43136/draft-energy-strategy.pdf
[690] P Clarke, evidence, D13, Annex D

Table : Potential Electricity Generation (with a High to Medium Probability of Proceeding by 2025) by Geothermal Field

Rank	Geothermal field name	Potential additional capacity (MW)	Potential electricity production (GWhp.a.)	% of GWhp.a.	Nationally important at a threshold of 230GWh?
1	Kawerau	357	2,810	26.8%	Yes
2	Rotokawa	303	2,390	22.8%	Yes
3	Wairākei	182	1,430	13.6%	Yes
4	Ngātamariki[2]	140	1,104	10.5%	Yes
5	Mōkai	97	770	7.3%	Yes
6	Tauhara	70	550	5.2%	Yes
7	Mangakino[3]	65	512	4.9%	Yes
8	Ngāwhā	64	500	4.8%	Yes
9	Rotomā	35	280	2.7%	Yes
10	Tikitere-Tāheke	10	80	0.7%	No
11	Horohoro	9	70	0.7%	No
TOTAL		1,332	10,496	100%	

As this information notes, at a threshold of 230GWh per annum, the Kawerau, Rotokawa, Wairākei, Ngātamariki, Mōkai, Tauhara, Mangakino, Ngāwhā and Rotomā geothermal fields are considered nationally important in terms of potential electricity generation. Note that the Wairākei field is considered nationally important in terms of both existing and potential electricity generation.

The relevance of this note and its appearance on the Ministry for Economic Development's website is that it demonstrates that the Crown clearly understands the potential of the geothermal fields within the Taupo Volcanic Zone. Yet to date there have been no significant discussions with all the iwi and hapu of the CNI (with the exception of the Affiliate Te Arawa Hapu/Iwi) over the nature and extent of their interests in geothermal surface features, the geothermal fields and the TVZ or their potential development. The Crown should know that the iwi and hapu of the CNI are vitally interested in the use of their geothermal taonga. We can point for instance, to evidence from Mr Peter Clarke for the Hikuwai Confederation demonstrating how keen they are to be involved in the development of their fields, subject of course to their conservation values:

> 9.1 Geothermal was always a taonga of ours and it is one that we've never sold. The manner in which the hot water of Onekeneke Stream was used for the purposes of the Waipahihi community is representative of how our kainga were often sited near geothermal resources to take advantage of the benefits that the resources gave.

> 9.2. We should have the right to exploit and develop that resource without having people tell us what we can and cannot do with it. We should also not have to pay any privilege for exploiting rights which are traditionally ours.
>
> 9.3. We understand that the Crown charges for rights to exploit geothermal, and that the use of our Tauhara geothermal is already locked up … through various agreement and/or policies of the Crown and local government.
>
> 9.4. There have been investigations of power generation … at the Tauhara field, near to Tauhara Maunga. We understand that this has taken place on Crown land, and that monitoring or test wells have been dug but capped. If it is developed under present plans we will get nothing. I attach marked "D" a brief note sourced from the Ministry of Economic Development's website which indicates that the Tauhara field has the potential to produce 550 GWh per annum, which is 5.2% of the additional potential geothermal generation nationally. This is said to be nationally significant. We believe we should be the ones developing these, our traditional resources. We look forward to a situation where we regain these rights and are able to enter joint ventures and likes to make real economic gain for our people.[691]

We consider that the failure to address the full nature and extent of Maori rights and interests in geothermal resources, in a national policy statement has been a lost opportunity to provide for such rights and interests. We turn now to consider in detail what the Crown's failure to address this issue at the national level has meant for CNI Maori at the local and regional level.

Regional management of geothermal surface features, the geothermal fields and the TVZ in practice

As we noted above, Environment Waikato and Environment Bay of Plenty manage all natural water resources of their respective regions straddled by the CNI Inquiry District. They do so through the development of their regional policy statements and plans and through the administration of the resource consent process. They also play the most significant roles in the coordination and monitoring of geothermal resources, the geothermal fields and the TVZ.[692] Both these regional councils were represented before us and assisted us greatly in understanding their policies and rules for the management of access to geothermal surface features, the geothermal fields and the TVZ. We discuss each of the regional councils in turn.

Eastern Bay of Plenty Regional Council

We considered the actual management of geothermal surface features and the geothermal fields by EBOP. Here the Tribunal was referred to EBOP Proposed

[691] P Clarke, evidence, D13, pp 19-20

[692] For a detailed overview of Environment Waikato's involvement in planning for geothermal development see Environment Waikato, 'Geothermal Resources', www.ew.govt.nz/enviroinfo/geothermal/index/htm, accessed 12 July 2007

Regional Policy Statement.[693] The EBOP classifies geothermal fields with different protection ratings.[694] These areas are listed as follows:

- Geothermal Protection Level I

  Complete preservation of the natural, intrinsic, scenic, cultural, heritage and ecological values of the following the geothermal fields:

  Waimangu/Rotomahana/Tarawera

  Whaakari/White Island

  Moutohora Island/Whale Island

- Geothermal Protection Level II

  Protection and rehabilitation of the natural, intrinsic, scenic, cultural and heritage values by increasing the geothermal field pressures and the appropriate conservation management of surface features:

  Rotorua

- Geothermal Protection Level III

  The use (including abstraction) of geothermal resources listed hereunder and excluding those in Geothermal Protection Levels I and II, shall not be authorised unless the adverse effects of the activity can be avoided, remedied or mitigated to comply with the principles of sustainable management as determined by a regional plan, or a resource consent application process, and there are no adverse effects on Geothermal Protection Levels I and II geothermal resources: Kawerau; Lake Rotoiti; Rotokawa/MokoiaIsland; Tikitere/Ruahine;Taheke; Rotoma/Tikorangi; Rotoma/Puhipuhi; Papamoa/Maketu; Matata; Awakeri; Pukehinau; Manaohau[695]

In terms of the allocation of the use of the resources, one of the EBOP regional policies is to permit the use and development of a geothermal field provided that the field's potential, qualities, attributes and values are sustained having regard to a number of matters including 'iwi kaitiaki principles and taonga' of a field.[696] Other than through the general provisions in the Regional Policy Statement complying with sections 6, 7, and 8, the only substantive policy recording Maori interests is included in compliance with section 62 to take into account resource management issues of concern to iwi. This is done by EBOP as follows:

[693] P Cooney, Environment Bay of Plenty Regional Policy Statement, Document I21
[694] Cooney, EBOP Regional Policy Statement, I21, pp 130-135
[695] Cooney, EBOP Regional Policy Statement, I21, p 135
[696] Cooney, EBOP Regional Policy Statement, I21, p 136

Geothermal Resource

The geothermal resource is of considerable importance to the iwi and hapu of the region. The resource has a long history associated with the well-being and identity of the iwi, hapu and people of the region. It can generally be described as a taonga of the tangata whenua, having been gifted by the atua, Ruaumoko, and tohunga Ngatoroirangi of Te Arawa waka. It is considered that it was not alienated or sold even when the overlaying land was sold. Much of the resource lies beneath Maori-owned land and other parts of the resource underlie lakes also claimed as not being subject to sale or alienation.

Claims to the resource relate to rights which constitute what is commonly known as ownership of the resource. The Resource Management Act has changed the presumptions to ownership of the resource, with the rights to allocate resource consents being delegated to Environment B.O.P.

The issues are:

- The exercise of kaitiakitanga should apply to geothermal resources, especially those whose surface features have been traditionally used by iwi and hapu.
- Recognition that Maori claims to geothermal resources include involvement in the management of those resources.
- The importance of geothermal resources for the tangata whenua that have historical association with geothermal fields has not been fully recognised.
- It is not always recognised that the tangata whenua with mana whenua over a geothermal site, exercising their rangatiratanga, determine the kaitiaki of that site.[697]

This section of the regional policy statement merely recounts what CNI Maori identify is important to them without obliging the Regional Council to do much more than have regard to these matters in accordance with the RMA. There are passing references to geothermal features being taonga and kaitiakitanga, but the only other major reference to Maori are the provisions such as those in Proposed Change No 1 complying with sections 6, 7 and 8 of the RMA.[698] We were also referred to the Iwi Consultation Guidelines checklist for geothermal resources:[699]

[697] Cooney, EBOP Regional Policy Statement, I21, pp 70-71
[698] Cooney, EBOP Regional Policy Statement, I21
[699] B O'Shaughnessy, Bay of Plenty Regional Consents and Compliance Section – Iwi Consultation Guidelines – September 2002, Document H41, 6.7.0, (no page numbers).

Type of Application	Consultation with Iwi	Written Approval
Rotorua – bore	No	No
Rotorua – Surface feature	Yes	Yes
Other High temperature fields –taonga	Yes	Yes
Other High temperature fields	Yes	No
Warm water fields	No	No
Warm water fields - taonga	Yes	Yes

We do not know how the EBOP decides which geothermal resources are taonga and which are not. Given that all geothermal surface features, the geothermal fields and the TVZ are taonga then a new categorisation system may be needed. The categorisation system is evidence that regional and local officials still do not understand the nature and extent of Maori customary and Treaty interests in the geothermal surface features, the geothermal fields and the TVZ of the region.

The second planning document we were referred to was the Rotorua Geothermal Plan. We were told it was 'developed at the request of iwi for the primary purpose of protecting the taonga that was Whakarewarewa thermal area'.[700] However in cross-examination that view was challenged by claimants.

Mr O'Shaughnessy listed the following features of the Rotorua Geothermal Plan designed to continue the success of bore closures during the late 1980s to revive the resource after unsustainable extraction:

- Maintaining level of permitted extraction at 1992 levels;
- Compulsory reinjection of all extracted geothermal fluid so as to maintain the mass in the geothermal aquifer which in turn maintained the hot water outflow to springs and geysers of both Whakarewarewa and other taonga area including Kuirau Park, and Government Gardens/Ngapuna.
- specific protection to be afforded to geothermal surface features which although taonga had historically been poorly treated.
- provision for Maori to manage the geothermal resource with the areas of Ohinemutu and Whakarewarewa.[701]

In the plan and after noting the findings of the Waitangi Tribunal in the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, EBOP identifies that despite that Tribunal's preliminary findings made to the Crown, there has been no directive from the Crown to EBOP to implement or give practical effect

[700] O'Shaughnessy, H41, para 6.1
[701] O'Shaughnessy, H41, para 6.2

to the Waitangi Tribunal's recommendations. Therefore, and in its own words EBOP considers:

> Environment B.O.P. is obliged to operate under the Resource Management Act 1991 and could be considered to have compromised its duties if it did not exercise its function to protect what is an extremely vulnerable resource. The responsibilities and liabilities of managing the Rotorua geothermal resource currently lies with Environment B.O.P. Environment B.O.P. will seek to be able to deliver the Rotorua geothermal resource to any future manager in a condition that is sustainable for future generations. Environment BOP will operate to carry out any directions from the Crown on this matter.
>
> Notwithstanding resource ownership negotiations, and in accordance with the directions set out in the Resource Management Act 1991 and the Bay of Plenty Proposed Regional Policy Statement, Environment B.O.P. will seek to establish a partnership of management relationship with Tangata Whenua.[702]

But this relationship between tangata whenua and the EBOP is primarily to deal with the geothermal resource and the hot pools and springs and other geothermal surface manifestations within the Whakarewarewa and Ohinemutu areas of the Rotorua field.[703] The purpose of the partnership is to oversee any matters that tangata whenua of these villages and EBOP consider require attention including the registration and protection of geothermal taonga, the determination of who has the right to claim geothermal use rights under section 14(3)(c) of the RMA, and the resolution of the concerns and matters of importance to tangata whenua raised at a meeting with Te Arawa representatives held on 15 July 1993.[704] This meeting is recorded in the Second Schedule to the Rotorua Geothermal Plan as follows:

> Geothermal Meeting with Te Arawa Representatives:
>
> 15 July 1993
>
> At this meeting staff of Environment B.O.P met with representatives of those Te Arawa iwi that have mana whenua, and exercise Rangatiratanga, over areas of Rotorua geothermal resource. From that meeting, the following concerns and matters of importance to Te Arawa were noted:
>
> (a) Te Arawa supports the concept of sustaining the mauri of the Rotorua Geothermal Resource (RGR) and requires that the Rotorua Geothermal Regional Plan follows the sustainable management principles of the Resource Management Act, as those principles are in general accord with the geothermal kaitiakitanga principles of Te Arawa;
>
> (b) Te Arawa require that the Waiariki of the geothermal field be respected. The field is to be sustained at a level that ensures the good health and protection of the mauri of the field and its features for present and future generations;

[702] P Cooney, Environment Bay of Plenty Rotorua Geothermal Plan, Document I22, p 28
[703] Cooney, EBOP Rotorua Geothermal Plan, I22, p 28
[704] Cooney, EBOP Rotorua Geothermal Plan, I22, p 29

(c) Te Arawa will define what geothermal taonga are;

(d) Te Arawa will identify the respective iwi or hapu of Te Arawa that are kaitiaki to specific areas of the Rotorua geothermal field;

(e) The respective Rotorua iwi or hapu of Te Arawa that are the kaitiaki of geothermal taonga will identify and name their taonga, or not, as they wish. Te Arawa will provide Environment B.O.P with the location and name of taonga they wish identified;

(f) Te Arawa require that named taonga are to be respected, protected and referred to by their given Maori names throughout all planning documents;

(g) Te Arawa understands that Environment B.O.P has no jurisdiction to determine ownership of the field. Te Arawa acknowledge that Environment B.O.P is obligated by the Resource Management Act to allocate geothermal resource available for use;

(h) Te Arawa require to be involved in the administration and management of the Rotorua geothermal resource as management partners in accord with the principles of the Treaty of Waitangi;

(i) Te Arawa require that the Rotorua Geothermal Regional Plan provides for the self-regulation and self-management of geothermal surface manifestations on land owned by Te Arawa iwi as they have rangatiratanga over them and are kaitiaki of them. Te Arawa are to give guidance as to whether the concerns and matters of importance noted are complete with respect to the plan.

Other than recording what Te Arawa wanted there is little further mention of Maori interests in other geothermal resources. Te Arawa are certainly not accorded a priority in the Rotorua Geothermal Plan. For example, according to Rule 12.3.3(b)(ii) every new and existing resource consent granted to authorise the abstraction of geothermal water, heat or energy from the Rotorua geothermal field shall be subject to restrictions where the geothermal aquifer decreases and remains low.[705] In terms of section 14(3)(c) new bore extraction of geothermal water from the Rotorua geothermal field is deemed to have an adverse effect on the environment by virtue of Rule 13.5.3(b)(iii) of the Rotorua Geothermal Regional Plan.[706] In such cases, the development is classified as a discretionary activity requiring that Rotorua Maori have to apply for a land use consent.[707] How this rule was arrived at is explained by reference to section 6(b), and is referenced to a proposition that the Rotorua field is of international importance and that it is at risk.[708] Reference is also made to Maori issues in the following manner:

The need to respect and protect geothermal features as taonga is a matter of deep concern for Te Arawa people. For over 600 years Te Arawa iwi have been resident in the Rotorua area, in

[705] Cooney, EBOP Rotorua Geothermal Plan, I22, p 74
[706] Cooney, EBOP Rotorua Geothermal Plan, I22, p 83
[707] Cooney, EBOP Rotorua Geothermal Plan, I22, p 83
[708] Cooney, EBOP Rotorua Geothermal Plan, I22, p 83

> particular Ngati Wahiao/Tuhourangi and Ngati Whakaue. It is a matter of urgency that geothermal taonga and the mauri of geothermal water be protected and respected.
>
> In the absence of definitive information regarding which features require protection, the default suggested is to regard all geothermal features as having qualities worthy of protection until information proves otherwise.[709]

The only other mention of Maori is a repeat of the matters concerning the partnership relationship with Te Arawa that might be explored.[710]

At the city council level, the Rotorua District Council exercises a number of related functions such as the grant of land use consents. The Rotorua District Plan names Ōhinemutu, Whakarewarewa and Ngapuna (all geothermal areas) as papakainga of special importance and identifies ways in which the Council might work with tangata whenua to preserve their special character. One way that councils might work with tangata whenua is by the use of Section 33 of the RMA which makes provision for functions and powers to be transferred **from councils to iwi**. Another is to develop plans and strategies in partnership.[711] Consultation between the District Council and Te Arawa continues and the Council, though recognizing the principle of rangatiratanga, has not expressed a preference at this stage. In short, no transfer of powers to Te Arawa has occurred.

Environment Waikato

Environment Waikato is responsible for the policy and regulatory aspects of the geothermal surface features and the geothermal fields in the Waikato Region (including Taupo) by virtue of section 30 of the RMA. The region contains 80% of New Zealand's geothermal resources, 15 large high-temperature fields, called 'systems' in this region, which are being managed and used for different purposes.[712]

Mr Brockelsby for Environment Waikato told the Tribunal that the Regional Council recognises that its functions and duties, as set out in section 30 of the RMA must be balanced with its duties and responsibilities specified in sections 6, 7, and 8 of the RMA.[713] He claimed that the geothermal policy documents produced by the council aim to achieve a balance in developing resources while also protecting them for future generations.[714] In terms of achieving this balance, emphasis is given to categorising different geothermal systems to identify the character, features, and future use of the systems.[715] The Regional Council recognises that geothermal resources in the region

[709] Cooney, EBOP Rotorua Geothermal Plan, I22, p 79
[710] Cooney, EBOP Rotorua Geothermal Plan, I22, p 127 – monitoring the plan
[711] Rotorua District Council *Proposed District Plan*, section 5 'Maori Development', pp 5.5-5.6, 2 April 1996, www.rdc.govt.nz/NR/rdonlyres/AEC5CC55-DE9E-4DF1-B350-D42F433F6B67/0/Part05_MaoriDevelopment.pdf, accessed 10 July 2007
[712] M Brockelsby, evidence, H26, p 21
[713] M Brockelsby, evidence, H26, p 7
[714] M Brockelsby, evidence, H26, p 7
[715] M Brockelsby, evidence, H26, p7

are taonga to tangata whenua.[716] In recognition of the status of tangata whenua under the RMA and 'its obligations under section 8 to take account of the principles of the Treaty of Waitangi', Environment Waikato has 'taken particular care to ensure' that tangata whenua are 'appropriately involved in any policy or regulatory process affecting natural resources.'[717]

In considering applications for development, Environment Waikato places 'a strong emphasis on consultation' and is concerned to see whether an applicant has included provision for a system management plan to ensure that adverse effects on the resources are mitigated.[718] At the time of our hearing, its policies in relation to geothermal resources and the geothermal fields or systems were to be found in:

- The Waikato Regional Policy Statement : Proposed Change No 1 and Geothermal Section (dated 12/6/2004);

- Proposed Waikato Regional Plan : Proposed Variation No 2 : Geothermal Module (dated 12/6/2004).[719]

Very importantly, Mr Brockelsby stated that Environment Waikato recognised that Maori in general were vitally interested in the future of geothermal resource management in the region.[720] He told us that a full round of consultations with Maori and the public, submissions and hearings have been held in relation to the RPS Proposed Change No 1 and the Proposed Plan Variation No 2 in accordance with the requirements of the RMA.[721] He advised that a draft of these documents was sent out to approximately 100 iwi and hapu groups prior to public notification. In addition, Environment Waikato asked parties to indicate whether they wished to be specifically consulted and only one group did – Ngati Karauia of Tokaanu.[722] Written comments were provided from Ngati Kurauia, Tuaropaki Trust, and the Trustees of Tauhara North 3B Trust.[723] We were provided with the documents sent by these bodies and we note that they drew attention to their ownership of the underlying geothermal systems and the need for development where sustainable:

- Ngati Kurauia in 2000 had planned on completing a management plan but it seems financial contraints led to a delay.[724] Mr George Asher sent an email to Environment Waikato not foreclose future geothermal development options for the Tokaanu-Waihi field given the regional council declaration of the status of the field as a Limited Development System in the Proposed Waikato Regional

[716] M Brockelsby, evidence, H26, p7p8
[717] M Brockelsby, evidence, H26, p7p8
[718] M Brockelsby, evidence, H26, p7p8
[719] M Brockelsby, evidence, H26, p 19
[720] M Brockelsby, evidence, H26, p 20
[721] M Brockelsby, evidence, H26, p 20
[722] M Brockelsby, evidence, H26, p 20
[723] M Brockelsby, evidence, H26, p 20
[724] George Asher, letter to Blair Dickie, undated, cited in M Brockelsby, Evidence on consent compliance for the Ohaaki Power Station, 29 July 2005, Document I27, Attachment

Plan. The hapu wanted to maintain an opportunity to find a path forward for development within the field and to enable an appropriate effects-based policy to be developed in tandem with the tangata whenua consultation and scientific investigation.[725] The concerns expressed were supported by the Rotoaira Forest Trust, a major landowner in the field.[726]

- The Trustees of Tauhara North 3B Trust wrote to Environment Waikato claiming they are the rightful owners of Lake Rotokawa and surrounding lands.[727] The trust wanted to utilise its geothermal resources including sulphur deposits and the field within its lands and Lake Rotokawa currently administered by the Department of Conservation. They wanted the Rotokawa system to be classified as a Development System because there have been ongoing development activities for extraction of sulphur and drilling of geothermal wells.[728]

- Tuaropaki Trust as representatives of the seven Mokai hapu consider they are the rightful owners of the Mokai resource, as it is a taonga (treasure), the title to which has never been legally extinguished.[729] The Trust was concerned about the "short timeframe" for submissions on geothermal policy documents. It noted the additional restrictions placed upon itself in terms of its use of the Mokai field and then expressed concern about the resource consent process, citing costs of compliance.[730]

Environment Waikato cited in evidence its attempts to work with Ngati Kurauia to develop a hapu management plan for Tokaanu-Waihi-Hipaua, following the hearings on the Proposed Regional Plan.[731] The project did not proceed although Environment Waikato set aside a budget for it.[732] Dickie stated that the potential for s33 transfer of functions was also canvassed during these negotiations, with the hapu building capacity for the monitoring of the resource and the Regional Council responsible for the enforcement of consent conditions.[733] A Hapu Management Plan was to developed and would be given effect by a change to the regional plan to incorporate the relevant provisions of the Hapu Management plan through a full First Schedule RMA process.[734] Why this did not proceed is not stated but the evidence of Mr George Asher indicates that Ngati Kurauia was in some financial difficulty causing a delay.[735] We note in this context the substantial costs of preparing such a Management Plan.

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[725] Asher, cited in Brockelsby, evidence, I27, Attachment
[726] Asher, cited in Brockelsby, evidence, I27, Attachment
[727] Trustees of Tauhara North 3B Trust, letter to Blair Dickie, 19 May 2003, cited in Brockelsby, evidence, I27, Attachment
[728] Trustees letter, cited in Brockelsby, evidence, I27, Attachment
[729] Tuaropaki Trust, letter to Blair Dickie, 23 May 2003 cited in Brockelsby, evidence, I27, Attachment
[730] Tuaropaki Trust, cited in Brockelsby, evidence, I27, Attachment
[731] Dickie, response, I23, pp 4-5
[732] Dickie, response, I23, p 5
[733] Dickie, response, I23, p 5
[734] Dickie, response, I23, p 5
[735] Asher, cited in Brockelsby, evidence, I27, Attachment

We were then referred to the Proposed RPS Change No 1 – Geothermal Section.[736] This is the regional council's attempt to allocate the geothermal resources and the geothermal fields in a way that 'enables use and development while protecting the extent and variety of features and characteristics region-wide.'[737] The policy seeks to categorise certain systems for certain purposes as opposed to 'trying to meet mutually incompatible demands within all fields'.[738] In this manner a type of hierarchy is created with some systems targeted for development and others to have a more protected status. Affirming this, Mr Dickie for Environment Waikato told us:

> The geothermal system is the primary management unit used, (not field). Of the 15 large hot geothermal systems of the Taupo Volcanic Zone, seven have been identified for development, two for limited development, four for protection of their outstanding surface features and two as research systems as there is uncertainty as to whether they are hydraulically connected to protected systems.[739]

Five categories of geothermal system are identified based upon the system-size, vulnerability of surface features to development, and existing uses.[740] These categories are important as different rules apply to their use and management and they are:

- **Development Systems** – systems where there are few vulnerable surface features or where existing features are significantly impaired and there is no known connection with other field types. There are seven development fields in the Environment Waikato region – including from the CNI Ohaaki, Mokai, Rotokawa, Ngatamariki, Tauhara, Wairakei. Mr Brockelsby told us that the Proposed Plan variation seeks to achieve integrated management of each system by limiting extraction to a single operator.[741] This being premised on Environment Waikato's view that multiple operators in the same geothermal system ultimately lead to competitive extraction of fluid which is inconsistent with the sustainable management of the geothermal resource.[742]

- **Limited Development Systems** – systems where there are significant geothermal features that would be adversely affected by large scale development but where smaller-scale uses are unlikely to adversely affect those features. These include Atiamuri, Tokaanu-Waihi-Hipaua;

- **Protected Systems** – systems where only sustainable use can occur. They include Te Kopia, Horomaitangi, Oreikeikorako, Tongariro and Waikite-Waiotapu-Waimangu as these are geothermal systems that require particular care to ensure that any use of the geothermal resource is sustainable and has

[736] Environment Waikato, 'Waikato Regional Policy Statement: Proposed Change No 1: Geothermal Section', 12 June 2004, Document H2(i)
[737] M Brockelsby, evidence, H26, p 21
[738] M Brockelsby, evidence, H26, p 22
[739] Dickie, response, I23, p 8
[740] M Brockelsby, evidence, H26, p 22
[741] M Brockelsby, evidence, H26, p 23
[742] M Brockelsby, evidence, H26, p 23

no discernible effect on significant natural geothermal characteristics because either:

1. The system supports a substantial number of surface features that are moderately to highly vulnerable to the extraction of fluid; or

2. The system is largely or wholly within a National Park or a World Heritage Area; or

3. There is evidence of a flow of subsurface geothermal fluid to or from a system described in 2.

- **Research Systems** – systems where there is insufficient information to identify them as Development, Limited Development or Protected Geothermal Systems. In such a system, takes may be allowed if it can be demonstrated that they will not threaten significant geothermal features in that system or the natural characteristics of the system. This includes geothermal systems yet to be discovered. The only example we know about is Reporua.

- **Small Systems** – systems where there may be limited takes that do not threaten significant surface features, existing uses, and other natural and physical resources.[743] The systems in the CNI are Waitetoko (Taupo) and Motuopa (Lake Taupo) and Whangarorohea and Ngakuru in the Rotorua District.

The Proposed RPS Change No 1 identified five geothermal management issues and five management objectives with respective policies and methods.[744] The Proposed Plan contains a rule regime for each category of geothermal system.[745]

We were told that the Council seeks to promote the sustainable management of the regional geothermal resources and the geothermal fields through this hierarchy of systems and the applicable rules. With respect to development systems, it is promoting sustainable management through a strong policy preference to reinject taken fluid back into the same system from which it was taken.[746] It also requires the remedy or mitigation of adverse effects on surface features.[747] As an added precaution it demands a staged development of systems to recognise that information critical for the management of each system will be gained through exploitation and to ensure that systems are not over-exploited from the outset.[748] We have already noted that it limits development of the fields to one operator.[749] Environment Waikato also requires each

[743] Environment Waikato, 'Waikato Regional Policy Statement: Proposed Change No 1', Document H2(i), p 10
[744] M Brockelsby, evidence, H26, p 22
[745] M Brockelsby, evidence, H26, p 22
[746] M Brockelsby, evidence, H26, p 23
[747] M Brockelsby, evidence, H26, p 23
[748] Dickie, response, I23, p 8
[749] Dickie, response, I23, p 9

system operator to prepare a system management plan that details how the system will be managed.[750] It also requires the establishment of an independent peer review panel for each development system to oversee the management of the system and advise Environment Waikato in relation to the exercise of the consent.[751] This is a cost and management liability risk saving measure.[752] The management of the consent is the only responsibility maintained by the regional council.[753]

There is only limited recognition of Maori rights in the RPS. In the Overview of the RPS Change No 1, it is recorded that a number of iwi of the region including Te Arawa, Ngati Tuwharetoa, Ngati Raukawa and Ngati Tahu regard it as critical that the ahi kaa and kaitiakitanga relationship of Maori have with geothermal resources and fields be recognised and supported. Consequently, Policy One of the RPS is expressed as follows:

> Ensure that the relationship of tangata whenua as Kaitiaki with characteristics of particular geothermal systems, fields and surface features is recognised and provided for, once specific resource management matters of traditional and contemporary cultural significance have been identified by tangata whenua.
>
> **Implementation Methods**
>
> 1. In consultation with tangata whenua:
>
>   i. identify the characteristics of the Regional geothermal resource significant to Maori
>
>   ii. identify threats to these characteristics
>
>   iii. provide strategies for avoiding, remedying, or mitigating these threats.
>
> 2. Support, and where appropriate, facilitate, the development of hapu/iwi geothermal management plans.
>
> 3. Through regional plans, district plans and the consideration of resource consent applications, ensure that the geothermal characteristics valued by tangata whenua are recognised.[754]

The next document we were referred to was the Regional Plan which notes the Ngati Raukawa worldview based on Maori cosmology, their requirement that development does not compromise their cultural and spritual values and their demand for formal partnership arrangements with Environment Waikato.[755] Ngati Tuwharetoa considers Environment Waikato has a duty to protect its taonga for as long as they wish it. The

[750] M Brockelsby, H26, p 23
[751] Dickie, response, I23, p 10
[752] Dickie, response, I23, p 10
[753] Dickie, response, I23, p 10
[754] Environment Waikato, 'Waikato Regional Policy Statement: Proposed Change No 1', Document H2(I), p 7
[755] M Brockelsby, evidence, appendix, H26(a), Waikato Regional Plan, pp 22-23

active protection they demand applies to their mountains, lakes, rivers, lands and geothermal taonga.[756] There does not appear to be a section on Te Arawa. Again this section of the Plan merely recounts what CNI Maori identify is important to them without obliging the Regional Council to do much more than have regard to these matters in accordance with the RMA.

The Regional Plan states that there is no clear process to define the relationship between tangata whenua and the natural and physical resources of the region.[757] Environment Waikato is clearly struggling with Maori claims at this point because it then announces that this leads to uncertainty and unnecessary costs for resource consent applicants, Council, tangata whenua and the community. It also hinders, it claims, the ability of tangata whenua to give effect to kaitiakitanga.[758] The Plan then lists the methods the Council will adopt to give effect to its responsibilities under the RMA. Most of the measures are only about consultation, information sharing, identifying important sites, supporting and encouraging the development of iwi management plans, raising awareness and education, and facilitating involvement in RMA processes.[759] The possibility of the transfer of powers under section 33 of the RMA in relation to natural resources identified as being of special value to tangata whenua is recognised.[760] Such a transfer has not yet happened.

We were also referred to the Regional Plan Proposed Variation No 2 known as the Geothermal Module. This module in its Background and Explanation Section recognises that concepts of protection and development are compatible with the views of tangata whenua, who regard geothermal resources as taonga. These taonga have, the Regional Council acknowledges, metaphysical characteristics, and their management is based on a set of beliefs about the relationship of humans to the natural world.[761] It refers to the Ngatoroirangi story.[762] The only mention thereafter relates to the identification of particular geothermal surface features and specific geothermal management matters of traditional and contemporary cultural value.[763] The Variation No 2 then sets out the rules for the taking and use of geothermal water, energy and heat and discharges within the different systems. It lists permitted activities and discretionary activities requiring resource consents. The matters that the Council considers for discretionary activities include the extent to which the cultural values of tangata whenua are recognised, including their kaitiaki role with the geothermal resource.[764]

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[756] M Brockelsby, evidence, appendix, H26(a), Waikato Regional Plan, p 31
[757] M Brockelsby, evidence, appendix, H26(a), Waikato Regional Plan, p 34
[758] M Brockelsby, evidence, appendix, H26(a), Waikato Regional Plan, p 34
[759] M Brockelsby, evidence, appendix, H26(a), Waikato Regional Plan, pp 37-40
[760] M Brockelsby, evidence, appendix, H26(a), Waikato Regional Plan, p 40, 2.3.4.24
[761] Environment Waikato, 'Proposed Waikato Regional Plan: Proposed Variation No 2: Geothermal Module', 12 June 2004, Document H2(j), p 7
[762] Environment Waikato, 'Proposed Waikato Regional Plan: Proposed Variation No 2', H2(j), p 7
[763] Environment Waikato, 'Proposed Waikato Regional Plan: Proposed Variation No 2', H2(j), p 25
[764] Environment Waikato, 'Proposed Waikato Regional Plan: Proposed Variation No 2', H2(j), p 29

Clearly from this review, the Regional Councils and others charged with responsibilities under the RMA are providing what the legislative scheme requires in terms of meeting Maori demands for recognition of their Treaty interests in the geothermal resources. This is not a matter that Regional Councils can do much about. We were, in fact, impressed with the effort they have put into complying with the legislative regime especially around its iwi consultation requirements. Conversely we are not impressed with the consistency of the legislative regime under which they operate.

Conclusions and findings on local government, the RMA and geothermal surface features, and geothermal fields

The RMA has been in effect for some years since the Geothermal Tribunals heard geothermal claims in 1993 and recommended amendment to the RMA. It is now well established that the primary purpose of the RMA under section 5 dominates the manner in which powers and duties are exercised. Section 5 has been described as the touchstone of the Act and all matters listed in sections 6, 7, and 8 are considered subservient to the purpose of the RMA.[765] Matters of national importance under section 6 are ranked higher than matters under sections 7 and 8.[766] The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga is listed as a matter of national importance. Matters in section 7, including kaitiakitanga, rank lower and section 8 only require decision makers to take into account the principles of the Treaty of Waitangi, rather than give effect to them.

While it may be argued that mention of these limited matters and their ranking is sufficient to elevate Maori and their concerns above other sectors of the community during the RMA process, clearly that has not been the experience of the claimants before us. This is simply because the RMA does not provide for Maori self-government or the exercise of some joint management role with the Crown and or its delegates (regional councils) over Maori natural resources. As a result the Tribunal is still being asked to inquire into claims based on the inadequacy of the RMA to protect Maori Treaty rights and interests.

In looking at the RMA regime when it was in its infancy, the Ngawha and Te Arawa Geothermal Tribunals concluded:

> The Crown has, through the medium of the Resource Management Act, delegated the day to day administration and management of the geothermal resource, and other natural and physical resources, to local and regional authorities. The Crown has done so without first ensuring that the full interest

[765] P Milne, *Management of Water under the Resource Management Act 1991* (Brookers Resource Management Law), p 8
[766] Milne, *Management of Water under the Resource Management Act 1991*, p 11

> of Maori in the geothermal resource, and the extent of its Treaty obligations to protect such interests, are first ascertained.[767]
>
> It is readily apparent that the Resource Management Act is a very considerable improvement on the Geothermal Energy Act 1953 in terms of its concern to ensure that consideration is given to Maori interests in geothermal resources. But … we consider the Act fails adequately to ensure that Maori Treaty rights in geothermal resources are protected.[768]

The Tribunal found in both cases that section 8 of the Resource Management Act 1991 was not Treaty compliant and should be amended.[769] That both these Tribunals came to the same recommendations indicates to us that at least until 1993 the provisions of the RMA and how it recognised Maori rights to exercise authority over their geothermal resources was not Treaty-consistent. By 1999, the Whanganui River Tribunal was unable to come to an alternative conclusion on the RMA, stating instead:

> Maori rangatiratanga is not therefore to be qualified by a balancing of interests. It is not conditional but was expressed to be protected, absolutely. It is rather that governance is qualified by the promise to protect and guarantee rangatiratanga for as long as Maori wish to retain it. We do not therefore accept that the Crown's right or duty to control and manage resources overrides Atihaunui ownership of, and rangatiratanga over, the river. The effect of that is to negate, largely if not wholly, that guaranteed to Atihaunui.
>
> This finding follows previous Tribunal opinion. Though it has been considered that the guarantee may be overridden in exceptional circumstances in the national interest, the national interest in conservation is not a reason for negating Maori rights of property. In similar vein, the national interest in conservation does not negate the property interests of other citizens, even without the benefit of protective Treaty covenants. Resource management may have the effect of constraining private ownership but cannot be used to deny its existence.
>
> We disagree with Crown submissions that section 8 of the Resource Management Act provides for recognition and implementation of the Crown's Treaty duties. It does not require those with responsibilities under the Act to give effect to Treaty principles but only to take them into account. This is less than an obligation to apply them. When ranked with the competing interests of others, this means that guaranteed Treaty rights may be diminished in the balancing exercise that the Act requires.[770]

By 2005, our review of the RMA has merely confirmed the findings of previous Tribunals. The Crown has still not ascertained the full nature and extent of the Maori customary rights and Treaty interests in the geothermal surface features, the geothermal fields and the TVZ of the CNI, and the extent of its Treaty obligations to protect such rights and interests. This is despite the view expressed by the Te Arawa Geothermal Tribunal that because the Crown had not done so in 1993, legislative amendment was needed because it was virtually certain that any future planning instruments would fail to adequately protect Maori Treaty interests.[771] Add to this the

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[767] *Te Arawa Representative Geothermal Claims*, p 27
[768] *Ngawha Geothermal Resource Report*, p 143
[769] *Ngawha Geothermal Resource Report*, pp 145-147; *Te Arawa Representative Geothermal Claims*, p 35
[770] *Whanganui River Report*, pp 329-330
[771] *Te Arawa Representative Geothermal Claims*, pp 27-28

failure to promulgate a national policy statement on geothermal surface features, the geothermal fields and the TVZ, the prejudice to Maori is indeed great as regional and district councils struggle to understand what the nature and extent of the Maori customary and Treaty interests and interests are. In this circumstance those rights may easily be eroded. The legislative scheme of the RMA is deficient without some guidance from the Crown through the development of a national policy statement recording the nature and extent of Maori rights. That is because the Act on its own does not accord CNI Maori sufficient protection to ensure that their customary rights and their Treaty interests and interests are provided for. If action is not taken soon, Maori may have limited ability to reclaim their rangatiratanga over geothermal surface features, the geothermal fields and the TVZ as the resource is allocated to other users or it expires due to overuse.

We are much concerned by the Crown's candid admission, firmly stated to us, that it will resist any recommendation from this Tribunal suggesting any amendment to the RMA generally.[772]

We note that the Mohaka ki Ahuriri Tribunal held that a failure to follow recommendations of the Waitangi Tribunal is an action or omission in breach of the Treaty of Waitangi. In this case recommendations from the Ngawha Geothermal Claims and the Te Arawa Representative Geothermal Claims that section 8 of the RMA should be amended should have been followed by the Crown while it was still possible to have some impact on the planning processes of the RMA. The fact that it has not done so and has stated baldly that it will not do so is a fundamental act and policy in disregard of the principles of the Treaty of Waitangi.

In Treaty terms more is expected of the Crown, and given the long association of CNI iwi and hapu with the underlying common heat and energy system within the TVZit is not in line with the honour of the Crown to maintain such a position.

Even if the Crown is not prepared to amend the RMA it should intervene. There is an opportunity to do so from the central government level by the promulgation of a national policy statement so as to influence regional planning processes under the RMA. We consider this is necessary and should be undertaken as a matter of priority.[773] While the two regional councils in the CNI have completed the procedures relevant to the finalisation of their policy statements and regional plans, we do note the power of the Minister to intervene in matters of national significance. In making a decision on whether a matter is of national significance, the Minister may have regard to whether the matter is significant in terms of section 8 of the RMA.[774] In deciding what is a matter of national significance, the Minister's powers may relate to resource

[772] Crown closings, 3.3.111, part 2, p 508
[773] Resource Management Act 1991, ss 24-29
[774] Resource Management Act 1991, ss 140-141B

consents, preparation or change to regional plans, public works and heritage protection orders.[775]

The Tribunal's Findings

We find after our review of the evidence that:

- In order to provide for the exercise of tino rangatiratanga in resource management, the Crown should now acknowledge the nature and extent of CNI Maori customary rights and or their Treaty interests in the geothermal resource.

- The Crown has failed to adequately provide for CNI Maori to exercise their tino rangatiratanga, control and management over their taonga in breach of the principles of the Treaty, including the principle of Maori rangatiratanga in resource management. It has failed to discharge its duty active to protect Maori in possession of their taonga. This finding is made because prior to 2001, there was no adequate provision made for the exercise of Maori autonomy in local or regional self-government. To this extent the Crown acted in a manner inconsistent with the principles of the Treaty of Waitangi.

- We accept that there is a clear need for a sustainable management regime in circumstances where there are significant environmental issues that relate to the use of geothermal surface features, the geothermal fields and the TVZ (as we discuss below). It is a resource that is susceptible to overuse with potential environmental impacts such as subsidence. Therefore, the Crown has a legitimate Article 1 interest in ensuring such a management regime is provided. But in accordance with the principle of partnership, that management regime should include CNI Maori in decision - making roles and it should accord them an appropriate priority based on Treaty principles. That can be done in a number of ways - either through iwi or hapu models of autonomy, through a regional Maori body or through joint management with regional councils. The legislation could be amended to reflect that priority.

- It seems to us that CNI Maori concern regarding the failure of the geothermal surface features and the geothermal fields at Rotorua and Wairakei and the actions they took to bring this to the Crown's attention in Rotorua, indicates that they were and are capable of working multilaterally with the Crown and other agencies such as the local authorities to ensure the protection of the resource. This adds to, rather than reduces, the force of the arguments for the claimants that they should have a real and meaningful role in the management of their taonga. If they had been delegated authority, either separately or

[775] A heritage protection order can protect any place of special interest, character, intrinsic or amenity value or visual appeal, or of special significance to the tangata whenua for spiritual, cultural, or historical reasons. This definition could be extended to include significant geothermal sites.

jointly with councils an entirely different management regime to that adopted may have evolved – one that incorporated concepts of Maori customary law and kaitiakitanga. In this respect we note the additional restrictions that the Tuaropaki Power Station imposes on itself at Mokai. This evidence indicates that the responsibility to manage a resource such as the TVZ should not vest solely in one or two agencies such as Regional Councils. Although our discussion in no way suggests that they have not so far done a reasonable job, but in our view it reflects the need for a multilateral approach involving CNI Maori. The adoption of such a Treaty-based approach would, in our view, result in added protection for the geothermal resource, which would ultimately benefit all New Zealanders.

- While the Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001 and the Local Government Act of 2002 have signalled a substantial advance on the previous local government regime, this legislation does not ensure that CNI hapu and iwi can exercise their own form of tribal local self-government should that be their wish. It will not prevent CNI Maori customary rights and Treaty interests to geothermal surface features, the geothermal fields and the TVZ being adversely affected by the enforcement of regional plans and resource consent applications in favour of other sectors of the community seeking access to geothermal surface features, the fields and the TVZ. That is because no matter how many Maori representatives there may be on the Regional Councils, or other consent authorities, the scheme of the RMA will remain unaffected.

- The Crown will also need to amend the RMA as it does not accord CNI hapu and iwi any sufficient recognition of their customary rights and their Treaty interests to geothermal surface features, the geothermal fields and the TVZ. In this way the RMA continues to fail to accord Maori sufficient priority because local and regional authorities are not required to act in a manner consistent with the principles of the Treaty, requiring that they recognise Maori customary rights.[776] They 'may do so, but they are not required to do so.'[777] The evidence before us was that delegation to regional and local authorities has been inadequate in terms of how iwi and hapu resource management issues are dealt with. Their concerns are merely being listed or selectively integrated into RMA planning documents with fleeting references to tikanga, kaitiakitanga and the identification of taonga for protection.

- CNI Maori under the RMA are marginalised in that their position is not much stronger than that of any other interest group. In all aspects of management, CNI Maori rights and interests are continually weighed against the competing demands of sustainable management and access for other sectors of the community.

[776] *Te Arawa Representative Geothermal Claims*, p 23
[777] *Te Arawa Representative Geothermal Claims*, p 23

- No regional or district council has yet transferred powers to iwi or hapu so that they may exercise their own self-governance over their resources by way of section 33 of the RMA. We do note, however, that serious attempts were considered by Environment Waikato in terms of Ngati Kurauia of Tuwharetoa, but that the hapu did not have the resources needed to proceed. In this respect it may be time for the Crown to require compulsory transfer under section 33 for certain categories of resources such as geothermal sites on Maori land or within their villages such as Tokaanu, Waipahihi, Whakarewarewa and Ohinemutu, with substantial Government assistance to fund the development of Hapu Management Plans to enable this to happen.

- The current regime under section 14 of the RMA treats geothermal water as a water resource requiring resource consent to access these resources, rather than recognising CNI Maori as the proprietors of the resource. There are exceptions, and section 14 (c) authorises use of geothermal water, heat or energy if it is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and it does not have an adverse effect on the environment. This exemption is rendered meaningless if planning documents then classify uses for this purpose as having an adverse effect on the environment. It appears that even in terms of tikanga, culture and customary use of the surface and subsurface resources on their land, the RMA procedures cannot guarantee a priority of customary use for Maori of their geothermal surface features and the geothermal fields where over exploitation of the resource in an area is leading to adverse environmental effects. Instead of recognising that the burden of adverse effects on the environment should be borne by other sections of the community, the Crown told the Tribunal that Maori must shoulder that burden equally with other sectors who cannot claim the same long association with the geothermal surface features, the geothermal fields and the TVZ or Treaty rights protecting their interests. This result makes nonsense of the Crown's argument that section 14(3)(c) goes in some measure towards meeting their Treaty obligations.[778]

- Any iwi or hapu or individual Maori wanting to develop their geothermal resources and fields must apply to a regional council for resource consents to take and discharge geothermal fluid, energy, steam etc, unless authorised by an exception in section 14, a regional plan, or regulations. They are then subjected to the public submission and hearing process whereby their Treaty rights to use and manage their own resources are balanced within a hierarchy of standards. We were given one such example from the Taupo district of the experience of a Maori land trust, Tuaropaki Trust, with the RMA. This Trust owns and farms areas of land overlying and within the vicinity of the Mokai

[778] Crown closings, 3.3.111, part 2, p 510

field. They applied under the RMA for a resource consent to develop their geothermal field. This consent was granted in 1994 but their evidence was that this was at great cost and significant prejudice, and irrespective of their ownership and rangatiratanga rights over the Mokai field. We are not saying that Maori should not go through the consent process, we are saying that the process should be modified so that Maori rangatiratanga is provided for.

- The RMA renders Maori rights and interests as much less than the Treaty guaranteed. It reduces those rights and interests to an identification of Maori resource management issues, with some aspects of their concerns being incorporated into the resource management process. Since the RMA was amended in 2005, there is now no requirement imposed on applicants to consult on resource consent applications. As a result of the amendment, s. 36A of the RMA makes this very clear. However Maori may still be consulted to the extent required so as to enable a consent authority to fulfil the requirements of Part II of the RMA. (See *Ngati Kahu Ki Whangaroa Cooperative Society v Northland* RC A095/00, 5 NZED 720)

- As we discussed in Part II of this report, the Treaty of Waitangi guaranteed to iwi and hapu of the CNI the right to autonomy and local and regional self-government. In this context, that means control and use of their own geothermal surface features, the geothermal fields and the TVZ was guaranteed. We find that the Crown should consult with CNI Maori and Regional Councils to determine in some innovative way, constructed during negotiations, how they together could manage geothermal surface features, the geothermal fields and the TVZ. This is not conceptually or inherently inconsistent with the Crown's Article I responsibility to provide a sustainable management regime, which the Crown has acknowledged it must provide.[779] That would be consistent with the Crown providing for Maori rangatiratanga in resource management whilst ensuring that they are supported with the relevant resources and expertise held by Regional Councils.

- It seems to us that the use of rentals or profits derived by the Crown and regional councils from royalties for geothermal power generation and other uses of the resource, could be shared with CNI Maori without violating the rights of private land owners and authorised users. Such an outcome will only impact on the current and future revenue stream currently channelled to the Crown and Regional Councils.

- The Crown should promulgate a national policy statement and guidelines; in this process CNI Maori and other Maori with geothermal surface features, the geothermal fields and the TVZ should play a central role.

[779] Crown closings, 3.3.111, part 2, p 510

- Finally, the Crown should reconsider its position in respect of section 8 of the RMA and amend it so that decision makers under the RMA must give effect to the principles of the Treaty of Waitangi.
- Excluding them is at odds with the centrality of geothermal surface features and the geothermal fields in their everyday life. Quite simply the resource is theirs in Treaty terms, and the honour of the Crown demands that their interests be provided for.

- In our view also, Maori should also be delegated decision-making regarding future access to and resulting profit from the resource as we explained in Part IV.

Issue 3: Have CNI Maori been prejudiced by the Crown's failure to acknowledge, and provide for their customary rights and Treaty interests in the geothermal surface features, the geothermal fields and the subterranean resource (TVZ)?

Introduction

In the previous sections of this Chapter we have found that Maori controlled, owned, and used the geothermal resources, the geothermal fields and the TVZ as at 1840. After 1865, their rangatiratanga, rights and interests in the resources were modified with the change to their title source from Maori customary rights, to a title derived from the Crown or through the Native Land Court. That modification did not affect their customary rights and Treaty interests in the geothermal taonga. However, the customary rights of the hapu in the land, being the right to control access to the resource, were extinguished once land was sold outside the hapu. But that did not affect the hapu rights and interests in the geothermal fields and the TVZ unless all or most of the land over a field was sold. In such cases, the hapu still maintained customary rights and a Treaty interest, amounting to a substantial or priority interest in the geothermal taonga that comprise the legacy of Ngatoroirangi. In the context of the CNI, and despite the significantly reduced scale of Maori land ownership, much of that land rests over or is within close proximity to all the geothermal fields in the CNI save for Wairakei, Ngatamariki, Orakei Korako, Reporoa, and Paeroa areas and in the northern area of Rotorua.

In Part IV, we discussed the right to development which extended to the right of CNI Maori to use their properties and to enlarge and develop those uses as time and circumstances dictated. We found that by certain acts and omissions the Crown has failed to provide for the CNI Maori right to development in relation to geothermal surface features and their fields.

We have further found that in asserting control over the geothermal resources, the geothermal fields and the TVZ, either through the individualisation of customary rights to land by the Native Land laws, Crown purchases targeting Maori resources, or through other actions inconsistent with the principles of the Treaty of Waitangi, the Crown failed to provide for and protect CNI Maori customary rights and Treaty interests in their geothermal taonga. We have also found that the Crown appropriated to itself the right to access and develop geothemal resources, the geothermal fields and the TVZ through the Geothermal Energy Act 1953 and the RMA in breach of the principles of the Treaty of Waitangi. We turn now to consider the impacts of the Crown's overall actions, failures and omissions in terms of the claimants' exercise of tino rangatiratanga, ownership, control, and use of their geothermal surface features, the geothermal fields and the TVZ.

Claimant case

In presenting the generic submissions for the claimants, Mr Taylor considered the impacts on claimants of the Crown's failure to acknowledge their rangatiratanga and proprietary ownership of the resource. He contended that as a result of the Crown's targeting of geothermal resources for acquisition, and of low prices and high costs of land transactions, and the Crown purchase tactics generally, the purchase of all significant geothermal features is suspect and these resources should be returned to tangata whenua.[780]

In relation to the Crown's actions after the 1940s, Mr Taylor submitted that it is clear from Crown actions and the legislation reviewed in section 2 of this chapter that the use, control, and rights to derive revenue from geothermal resources are completely controlled by the Crown.[781] Mr Taylor submitted that the Geothermal Energy Act 1953 took away from CNI Maori the significant incidents of ownership.[782] This appropriation of the rights of use, control, and profit to the Crown has continued under the RMA with the Crown sharing the benefits of management with Regional Councils.

Mr Taylor argued that the RMA is deficient to the extent that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.[783] He contended that it is inconsistent with the principles of the Treaty for the Crown to impose a system of royalties or resource rentals for its own benefit without first determining and giving appropriate effect to the interests of the claimants.[784] The Crown has done so since the 1950s without making any provision for Maori

[780] Taylor, generic closings, 3.3.67, p 196
[781] Taylor, generic closings, 3.3.67, p 193
[782] Taylor, generic closings, 3.3.67, p 193
[783] Taylor, generic closings, 3.3.67, p 194
[784] Taylor, generic closings, 3.3.67, p 194

ownership and Treaty interests in the resource. It should now pay compensation to CNI Maori for this use.

In concluding, Mr Taylor argued that Maori retained rangatiratanga over, and ownership in, the whole of the TVZ, due to both their continued rangatiratanga over the fields and TVZ per se, and to the flawed manner in which most Maori lands containing geothermal features were purchased.

Other counsel for the claimants detailed impacts of development on geothermal resources or specific fields. At the northern end of the CNI a number of counsel for claimants submitted to us that harm has been caused by excessive draw-off and/or by the flow-on effects from other activities such as land use for tourisim development, public works, and private enterprise developments. The use of Rotoiti Paku and the geothermal features in the Kawerau area were particularly emphasised by Ms Sykes and Mr Pou, counsel for Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi.[785] Counsel noted that the evidence was that most geothermal phenomena were no longer visible at this spot.[786]

Other counsel have argued that harm has been occasioned by either direct Crown action or by failure to protect the geothermal resource.[787] Ms Feint, after adopting the generic submissions made by Mr Taylor, argued for Ngati Tuwharetoa that Crown regulation, or lack of it, has failed to protect the geothermal resources and the geothermal fields of the region and enormous harm has resulted. Instead of actively protecting the resource, the Crown has allowed unchecked development leading to an unnecessary degradation of the resource.[788] With respect to power generation at Wairakei as an example, the Crown 'mined' the resource with widespread destruction and significant impacts.[789] This has caused the mauri of the earth to suffer and the loss of pressure has caused subsidence of the land and collapse of puia, ngawha and wairiki.[790]

In the areas surrounding Lake Taupo and geothermal areas adjacent to dams on the Waikato River, the claimants allege that geothermal features have been destroyed and disrupted by the fluctuations in lake level brought about by hydroelectric developments.[791] At Tokaanu, they allege, bores have been sunk but not properly capped and the geothermal system is being run down.[792] Ōhaaki, they allege, has been

[785] A Sykes and J Pou, Closing Submissions for Ngati Tuwharetoa te Atua Reretahi, Ngai Tamarangi, 3.3.93
[786] Sykes and Pou, 3.3.93, p 21
[787] Paper 3.3.106, p 177 re Taupo. The Claimants cite the evidence given by Dr Charlotte C Severne, evidence, E7 at this point.
[788] K Feint, Closing Submissions for Ngati Tuwharetoa, 3.3.106, pp 182-184
[789] Feint, Ngati Tuwharetoa closings, 3.3.106, p 184
[790] Feint, Ngati Tuwharetoa closings, 3.3.106, p 184
[791] Feint, Ngati Tuwharetoa closings, 3.3.106, paras 29.42.5-29.42.8, p 178
[792] Feint, Ngati Tuwharetoa closings, 3.3.106, para 29.42.9, p 179

seriously affected by subsidence and much of Orakei Korako by flooding resulting from the raising of Lake Ōhākuri.[793]

The Crown's case

In the Crown's view, Maori have continued to enjoy traditional use of the geothermal resources where they have access because they retained ownership over land where the resource is manifest.[794] The implication is that there has been no significant impact from the Crown's failure to provide for their customary rights and their rangatiratanga over their taonga.

The Crown further contends that it does not assert ownership over geothermal resources and Crown counsel contended that the RMA is not inconsistent with existing property rights as a matter of custom.[795] It contends that it does not effect any extinguishment of such property.[796]As noted above, the Crown claims it has a legitimate Article I interest in the geothermal resources. Crown interests in this regard are two-fold. First, its interest in the allocation and management of natural resources generally and, second, an interest arising from the fact that geothermal resources are significant energy sources.[797]

In terms of commercial use, the Crown does not accept that the Treaty, including the exercise of rangatiratanga, confers a right upon Maori to generate electricity.[798] The Crown notes that there are sectors of the community expressing significant interest in geothermal resources and that they may make an important contribution towards the nation's electricity needs.[799] The Crown does not believe it feasible or desirable, in policy terms, to change the current RMA regime.[800] The Crown contends that Environment Waikato's regional policy statement and regional plan provide considerable protection and conservation measures in relation to geothermal resources[801]

The Crown contends that in terms of impacts from the Crown's actions, there is little evidence updating the Tribunal on the issue of the extent to which the geothermal taonga in Rotorua, or by implication any other field or system, have continued to suffer damage because of excessive quantities of steam being drawn off bores.[802] It asserts that some redress can be provided to Maori as part of settlements that may be used to commercially develop geothermal resources and the geothermal fields should

[793] Feint, Ngati Tuwharetoa closings, 3.3.106, para 29.42.10, p 179; and H TeNahu and M Crapp, Closing Submissions for Ngati Tahu, 3.3.88, paras 6.12-6.18, pp 32-33
[794] Crown closings, 3.3.111, part 2, p 509
[795] Crown closings, 3.3.111, part 2, pp 500-501
[796] Crown closings, 3.3.111, part 2, p 501
[797] Crown closings, 3.3.111, part 2, p 500
[798] Crown closings, 3.3.111, part 2, p 509
[799] Crown closings, 3.3.111, part 2, p 508
[800] Crown closings, 3.3.111, part 2, p 508
[801] Crown closings, 3.3.111, part 2, p 508
[802] Crown closings, 3.3.111, part 2, p 509

they consider that appropriate.[803] But the Crown will retain responsibility to protect geothermal resources in the sense of ensuring there is a sustainable management regime.[804] It points to its closure of the Rotorua bores during the 1980s to protect the features of Whakarewarewa as an example of the need for it to maintain this responsibility.[805] The Crown and Ngati Whakaue discussed the closing of the bores and reached an agreement on the issue.[806]

In relation to Ohaaki, the Crown contended that the risk of subsidence and inundation were known to be likely consequences of the development of the field from the outset.[807] The Crown submitted that with that in mind the trustees entered into the lease arrangement on the understanding that the Crown would accept responsibility for mitigation and remedial action, as and when subsidence and inundation occur. The only real uncertainty was when the trustees chose the development option.[808] As is not uncommon, there appear to have been different views within Ngati Tahu as to the desirability of development. Those differences of view remain. The Crown notes that the Ngati Tahu trustees have received the sum of $1,100,000 pursuant to an agreement with Contact Energy dated 15 March 1999.[809] This sum represented an addition to the capitalised rental paid in advance to the trustees in 1982 of $570,000.[810] The Crown submitted that this was a situation of a community electing to pursue a development opportunity through a negotiation process with the Crown and its agencies. This inevitably involved trade-offs between economic development and related opportunities.[811] Ngati Tahu representatives have negotiated a successful assumption of responsibility by the Crown for adverse environmental consequences. These responsibilities are currently being borne by Contact Energy.[812] Considerable effort and investment has gone into trying to find solutions acceptable to Ngati Tahu.[813]

In relation to Lake Rotoiti-Paku the Crown acknowledges that the primary solid waste disposal site in the lake is now significantly contaminated.[814] The lake is situated on blocks that were leased to NZ Insurance Limited and Tasman Pulp and Paper Limited in 1971.[815] The Crown contends that the full extent of contamination had not become apparent until reasonably recently, pointing to a report in 1995 that indicated the spring Te Wai U o Tuwharetoa was not endangered. Since that date further research has indicated differently. The Crown acknowledges that Tasman Pulp and Paper caused the problems, but also states that the directors would not have appreciated the

[803] Crown closings, 3.3.111, part 2, pp 509-510
[804] Crown closings, 3.3.111, part 2, p 510
[805] Crown closings, 3.3.111, part 2, p 510
[806] Crown closings, 3.3.111, part 2, p 512
[807] Crown closings, 3.3.111, part 2, p 452
[808] Crown closings, 3.3.111, part 2, p 452
[809] Crown closings, 3.3.111, part 2, p 451
[810] Crown closings, 3.3.111, part 2, p 451
[811] Crown closings, 3.3.111, part 2, p 453
[812] Crown closings, 3.3.111, part 2, p 453
[813] Crown closings, 3.3.111, part 2, p 453
[814] Crown closings, 3.3.111, part 2, p 461
[815] Crown closings, 3.3.111, part 2, p 462

scale and problem that there is now in relation to the site.[816] Impacts have been the subject of the Deed of Settlement of 1983. There was also a lease review in 2003 resulting in a rental of 45% of the land value.[817] The lessee (Norske Skög) has agreed to undertake substantial restoration work.[818] Te Wai U o Tuwharetoa is not included in the lease because it is on a neighbouring block (A8) but the lease requires the lessee to protect the spring.[819]

The Tribunal's analysis on prejudice to CNI Maori

We begin our analysis of the issue whether CNI Maori have been prejudiced by the Crown's failure to acknowledge, and provide for CNI Maori customary rights and Treaty interests in their geothermal taonga by noting that the claimants' arguments may be grouped as follows:

- Impacts of diminishment of rangatiratanga and control through land alienation and targeting of geothermal resources;
- Impacts of failure to protect rangatiratanga in the statutory schemes which regulate geothermal resources and the geothermal fields;
- Impairment of development rights;
- Loss of the financial benefits from the use of the geothermal taonga; and
- Environmental Degradation and loss of geothermal Taonga.

We have set out the full range of claimant arguments here, for the sake of completeness. We have however already addressed two of them – loss of development rights, and loss of financial benefits from use of the resource- in Part IV of this report, as well as the Crown's failure to protect rangatiratanga in statutory schemes for regulation of the resource in our previous section. We will do no more than summarise our conclusions on these issues here. Our main analysis in this section therefore will focus on diminishment of rangatiratanga, loss of taonga, and environmental degradation.

Impacts of diminishment of rangatiratanga and control through land alienation and targeting of geothermal resources

In Part III of this report we considered the Native Land legislation from 1865, the creation of new forms of title, the operation of the Native Land Court, and Crown purchasing policy and Maori land administration during the 19th Century and in the early years of the 20th Century. We found that in terms of the CNI there were a number of breaches of the Treaty of Waitangi leading to land and resource alienation.

[816] Crown closings, 3.3.111, part 2, pp 461-462
[817] Crown closings, 3.3.111, part 2, p 462
[818] Crown closings, 3.3.111, part 2, p 462
[819] Crown closings, 3.3.111, part 2, pp 462-463

We draw upon some of the examples from the evidence before us to provide a snap shot of such impacts due to the Crown's actions and omissions in targeting failing to recognise and provide for Maori rights to their geothermal taonga, the geothermal fields and the TVZ.

Early land alienations - Tauhara-Wairakei-Ohaaki

We have already referred to the Crown's targeting of geothermal resources in its purchases of Maori land, its failure to protect Maori owners from pre-title negotiations, and its failure to provide for community titles which would better have protected hapu lands and resources from alienation to either the Crown or private purchasers. In combination, the outcomes prejudiced a number of hapu.

We note for instance the number of early purchases around the current township of Taupo to demonstrate the impacts of the Crown's failure to actively protect Maori interests in geothermal resources. By 1887, the Tauhara claimants allege that thousands of acres of Tauhara land had been purchased by the Crown, despite the Maori desire to hold onto the land as demonstrated by the leasing economy developed in the Taupo area by the 1870s.[820] With these sales, geothermal resources and a few the geothermal fields or taonga were lost including surface manifestations around Mount Tauhara and on the lakefront of Lake Taupo, at Wairakei and at Rotokawa. Mr Clarke told us that he believed that rather than protect Maori interests, the Crown made every effort to 'promote its own interests by purchasing lands it desired, regardless of the welfare of Maori.'[821] This perception is not easily overcome in light of the historical record of land alienation in the Tauhara blocks which Mr Stirling has reviewed.[822]

We mention the issues here merely to explain why Tauhara Maunga and Waipahihi, always traditionally important, became even more so for the people of Ngati Raukawa, the Hikuwai Confederation, Ngati Tuwharetoa and Ngati Tutemohuta. It became, along with the remnants of the lands they retained within the Tauhara North and Middle blocks, the means for continuing rangatiratanga over the Tauhara-Wairakei field. It became, therefore, even more important for the Crown to protect their remaining geothermal taonga. But the evidence is that the geothermal features in and around Mount Tauhara and Waipahihi have been affected by the impacts of the Wairakei power generation station, as we discuss below.

The Alienation of lands at Wairakei

We have already noted in Part III the notorious passage of the Wairakei lands through the Native Land Court at the behest of Robert Graham, a prominent Auckland settler and political figure. Graham had focused on purchasing property in the vicinity of

[820] P Clarke, evidence, D13, p 13
[821] P Clarke, evidence, D13, p 13
[822] Stirling, 'Taupo-Kaingaroa', A71, vol 1, pp 1-3

geothermal resources in Rotorua at Waiwera, Ohinemutu and Te Kautu. In 1881 he moved to acquire 4203 acres in the Wairakei block, including the geysers there, and the Huka Falls. He did so by negotiating with a small group of five customary owners prior to the Native Land Court investigation into customary rights. We have pointed in our earlier discussion to Graham's determination, the Court's haste with the case, the intervention of the interpreter (who was in Graham's pay) to pressure the counter-claimants to hurry through their cases, and the angry reaction of those in court when judgment was given for the five owners whose names had been handed in. Mair, we noted, wrote to the Native Affairs Minister to express his concern, and record his view that 'numbers of natives were kept out of the certificate by unfair means,' and that 'a great wrong [had been done them]'.[823] The transaction with Graham was concluded before the day was over. A rehearing was held in January 1882, when the main counter-claimants withdrew their claims – an odd outcome, which leads Stirling to suspect Graham's involvement.[824] We have referred also to the court's backdating its order to the date of the original hearing in 1881, thus avoiding the restrictions on private purchasing under the Thermal Springs District Act 1881. In any case, by then the land had been all but sold.

Graham, having finally secured his title, set about developing Wairakei as a tourist and health resort. Consequently, from being an important customary area for fishing, for koura and kokopu, bathing in the hot springs, and gathering fern root and red ochre, Wairakei became a tourist mecca. The remaining portion of Wairakei, the 137 acres called Oruamuturangi, was later bought by the Government in 1892.[825]

This story concerning the acquisition of Wairakei and the operation of the Native Land Court is an example of how the conversion of Maori customary collective title was effected by the operation of the Native Land legislation,and the consequential ease with which the land could be then alienated.

As a result of the vesting of title in a small number of owners, with whom a purchaser had already made an arrangement, and the immediate purchase of the land, most of those with rights were excluded from ownership of the block and the rights that ran with ownership, including the right to access and control access to the geothermal resources and the field of Wairakei. Maori lost the ability to control what happened to this land; yet this was not an outcome that had been agreed. The hapu did not sell their land; it was sold by a handful of individuals. This was a direct result of the title system introduced by the Crown and its failure to protect communities of owners from such alienations. . There was no protection and subsequently there was alienation. Maori lost their immediate cultural and spiritual associations with the block over time, as we discuss below. They were prevented from exercising their rangatiratanga over the Wairakei block. They have also suffered the impacts of excessive unsustainable use of the resource due to the extent of environmental effects at Rotokawa and

[823] Cited in Stokes, 'Wairakei Geothermal Area', A20, pp 38-9
[824] Stirling, 'Taupo-Kaingaroa', A71, pp 393-394
[825] Stokes, 'Wairakei Geothermal Area', A20, p 74

Tauhara, again discussed in more detail below. These impacts have occurred due to these intial actions and omissions of the Crown in failing to institute a system of land titles and land alienation that would protect hapu rights to land and natural resources.Field

The land blocks associated with the Ohaaki/Broadlands, Ngatamariki, and Reporoa fields are part of the original Tahorakuri blocks. These blocks have been targeted for geothermal and hydro-generation since the 1950s.[826] The claimants before the Native Land Court seeking the title to these blocks during early title investigations were Ngati Tahu and a number of other hapu. Ngati Whaoa claim they have customary rights here as well.[827]

The Tahorakuri block once comprised all the land north from Aratiatia to a point about 5 kilometres upstream from Orakei Korako. The title to Tahorakuri was first investigated by the Native Land Court in 1887 and the entire block was awarded to Ngati Tahu.[828] During the 1880s, lands on the east bank of the Waikato River from Reporua were purchased from Ngati Tahu.[829] This land passed into European hands and became known as Broadlands.

In 1899, the remaining part of Tahorakuri block was partitioned into four sections: Waimahana, Te Ohaaki, and Kaimanawa in the east and Waikari in the south west.[830] In 1930, a new round of partitions occurred beginning with the subdivision of Tahorakuri A Block into A1 and A2.

Ohaaki o Ngatoroirangi

Here we consider the pressures on Ngati Tahu in respect of their geothermal resource at Ohaaki. A number of partitions affected Tahorakuri A1 during the 1930s and 1940s. A papakainga reserve at Te Ohaaki was set aside on Tahorakuri A1 in 1932.[831] The order was made in favour of 210 owners for an area of 255 acres to be called Tahorakuri A No 1A (Ohaaki Papakainga Reserve). The area was never gazetted but comprises the present Tahorakuri A1 Section 1 block.[832] During the 1930s the papakainga was the home for over thirty households.

In the 1950s when the Government had committed itself to a joint venture with the British Government aimed at extracting heavy water from geothermal steam Ohaaki

[826] Stokes, *Ohaaki: A Power Station on Maori Land*,(Hamilton: Te Matahauariki Institute, University of Waikato, 2004), pp 120-121
[827] P Staite, evidence, C28, for example pp 15-16, 19-20
[828] Taupo Native Land Court Minute Book 6, fol 289-355; Taupo Native Land Court Minute Book 7, fol 30-31 as cited in Stokes, *Ohaaki: A Power Station on Maori Land,* p 53
[829] Stokes, *Ohaaki: A Power Station on Maori Land,* p 53
[830] Taupo Native Land Court Minute Book 12, fol 264-382; Taupo Native Land Court Minute Book 13, fol 1-223 as cited in Stokes, *Ohaaki: A Power Station on Maori Land,* p 53
[831] Taupo Native Land Court Minute Book 31, fol 268-269, 292-300 as cited in Stokes, *Ohaaki: A Power Station on Maori Land,* p 55
[832] Stokes, *Ohaaki: A Power Station on Maori Land,* p 55

was considered as a possible site.[833] The heavy water was needed as a moderator in atomic piles equipment.[834] A number of sites were proposed for for the heavy water plant and Ohaaki was the first site considered, but was never used. In 1952, the DSIR advised the General Manager of the State Hydro-Electric Department that:

> Some enquiries have since been made as to the ownership of the land at Ohaaki. Apparently there are more than 200 owners of the small area in which the springs are situated. With such a complex ownership it is likely that much trouble would be experienced in obtaining a lease or purchase. Also, it became apparent that some pressure would be brought by the owners to prevent drilling.[835]

The plant was never proceeded with. The relevance of the evidence concerning the joint venture is that where CNI Maori at the local level felt their geothermal resources were being threatened or where there was a prospect that the resource might be affected, they were prepared to take direct action to protect their taonga. This example is particularly important as to timing because this was when the Geothermal Steam Act 1952 and then the Geothermal Energy Act were enacted. So while there may not have been any national comment from Maori, there certainly was concern expressed on the ground whenever it appeared that Maori might lose control of access to their geothermal taonga.

One can see the same determination reflected in the manner in which the Maori owners sought to retain their lands at Ohaaki when they were threatened with public works takings in the 1970s. According to Stokes, there were approximately 30 households of people still living at Ohaaki until the 1970s.[836] Issues arose during the 1960s about the payment of rates on the reservation land. On application to the Maori Land Court the main reservation status was varied, and smaller Maori reservations from Tahorakuri A1 Section 1 were set aside under section 439 of the Maori Affairs Act 1953. These reserves cover the marae, the ngawha on the block, the urupa and the fertility rock.[837] The rest of the block, comprising sections 32, 34, 35, was vested in the Maori Trustee due to outstanding rating issues with the Taupo City Council and the land was then leased to the Ministry of Works for geothermal exploration.[838] This background is to be found in the decision of the then Judge Durie (later Chief Judge and then Justice Durie). [839]

The land, along with several other Tahorakuri blocks, was eventually leased by the Ngati Tahu Tribal Trust constituted by Judge Durie to negotiate a lease with the

[833] Boast, 'The Legal Framework for Geothermal Resources', A21, p 59
[834] Boast, 'The Legal Framework for Geothermal Resources', A21, p 60
[835] Original NZED 1, 2/0/83 as cited in Boast, 'The Legal Framework for Geothermal Resources', A21, p 62
[836] Stokes, *Ohaaki: A Power Station on Maori Land,* p 121
[837] Stokes, *Ohaaki: A Power Station on Maori Land,* pp 61-63
[838] Stokes, *Ohaaki: A Power Station on Maori Land,* p 58
[839] Taupo Native Land Court Minute Book 60,159-187 cited in Stokes, *Ohaaki: A Power Station on Maori Land*

Ministry of Works and Development for the Ohaaki Power Project, among other things.[840] The lands leased were:

- Tahorakuri A1 Section 1
- Tahorakuri A1 Section 19
- Tahorakuri A1 Section 32
- Tahorakuri A1 Section 34
- Tahorakuri A1 Section 35

The owners opposed sale to the Crown and the only option to avoid a taking by the Crown under the Public Works Act was to lease the 400 acres of land demanded.[841] The evidence of Stokes, contrary to the submissions of the Crown, indicates an element of coercion and lack of choice. It is not correct to characterise what happened at Ohaaki as a deliberate choice to pursue a development option. It is clear that in negotiating their lease the trustees came under constant pressure to release the Ngati Tahu Tribal Trust Lands. That pressure came from the media and the officials of the Crown who claimed the land was needed to meet the public interest in power generation.[842] Eventually after long negotiations the lease was signed on 28 July 1982, for a period of 50 years with two rights of renewal, to a maximum of 150 years.[843] This is effectively a long term alienation. The Crown's interpretation of events at Ohaaki is incorrect when one considers the direct evidence given to this Tribunal. Mr William Tredgar Hall advised us that he was the Chairman of the Ngati Tahu Lands Trust.[844] He did not agree to the terms of the lease that was negotiated and he was 'told in no uncertain terms by the Crown officials that if the lease was not agreed to, the Crown would take the lands by way of the Public Works legislation'.[845] Hall stated he was appalled that the Crown threatened the Trust in this way.[846]

What this evidence shows is the Crown's determination to secure the resource, by compulsory taking if necessary; and the resistance of Maori to the targeting of their resource. The evidence is that Ngati Tahu were happy to share the resource and could have taken a very active role in its development at this point.[847] But the state was still committed, as we discussed in section 2 of this chapter, to the political ideology of nationalisation of natural resources to meet the public interest.

[840] Stokes, *Ohaaki: A Power Station on Maori Land,* pp 61-63
[841] Stokes, *Ohaaki: A Power Station on Maori Land,* p 63
[842] Stokes, *Ohaaki: A Power Station on Maori Land,* pp 72-77
[843] Stokes, *Ohaaki: A Power Station on Maori Land,* p 76
[844] W Hall, evidence, G10, p 2
[845] W Hall, evidence, G10, p 4
[846] W Hall, evidence, G10, p 4
[847] Stokes, *Ohaaki: A Power Station on Maori Land,* p 127

Te Kopia

The Te Kopia field is situated towards the centre of the Paeroa Range, approximately 29 kilometres south of Rotorua. It is on the original Rotomahana Parekarangi 6A1 block, partitioned by the Native Land Court in 1895 in favour of the Crown as a result of its purchase of interests in 6A during that year.[848] Te Kopia reserve was gazetted in 1911 as a scenic reserve under the Scenery Preservation Act 1908.[849] McBurney states that the purpose of the reserve was to preserve some of the giant totara of the Paeroa Range.The southern portion of the reserve however contained 'the powerful Te Kopia fumerole, a well a associated mud pools, hot-springs and hot pools'. [850] . We have discussed in Part III the impact of Crown purchasing policies on the Ngati Whaoa claimants who, due to actions and omissions of the Crown, were rendered all but landless by the year 1900. Ngati Whaoa claim they have customary rights over this taonga.

Waiotapu/Mount Kakaramea/ Reporoa

The Waiotapu, Mount Kakaramea, and Reporoa fields fall between the Tahorakuri and Paeroa East blocks. Customary rights to the Paeroa East block was investigated for the first time in 1881. Ngati Whaoa were the applicants and there were several cross-claimants. After a rehearing the claim of Ngati Whaoa to the bulk of the block was recognised.[851]

The main area of geothermal activity on this block is Maunga Kakaramea, Rainbow Mountain, and the Waiotapu Geothermal Valley. It was the case for Ngati Whaoa that the Crown actively targeted owners with land interests in this Paeroa East area because it wanted the forest, the geothermal resources and water resources for itself. We were told by Mr Rika that:

> By the end of 1901 however the Crown had acquired shares from 7 owners totalling 822 acres and had it partitioned out. This land took in some geothermal features and therefore competed with and undermined Whaoa's livelihood, even though they retained the main geothermal features. This was acquired at 6s/acre (LHAD). You can see that the admission of two visitors by Aporo Apiata was worth more than what the Crown paid for one acre of land. We don't think its fair that the Crown undermined and pressurised businesses that we were running. I attach marked "A" a copy of a page from the official Environment Waikato website which describes Waiotapu as the "most colourful thermal area in New Zealand".
>
> 6.7 Hearn also talks (p150-152) about the way that the Crown targeted 4B1B, the remaining Maori block at Waiotapu, containing the best geothermal features. We wonder how the Crown can justify taking that resource for a low price, and then even taking their cultivations in spite of promises that they would not.

[848] McBurney, 'Scenery Preservation & Public Works Takings', A82, p 199
[849] McBurney, 'Scenery Preservation & Public Works Takings', A82, p 199
[850] McBurney, 'Scenery Preservation & Public Works Takings', A82(b), p.200p 199-204
[851] M Kawharu, R Johnson, V Smith, R Wiri, D Armstrong, and V O'Malley, 'Nga Mana o Te Whenua o Te Arawa Customary Tenure Report', Part 1, March 2005, Document G2, pp 370-371

6.16 Attached marked "D" is a copy of a second petition sent by the former owners in 1947 regarding this Block. All of the points made in that petition remain valid today. That is, we were rendered landless, and the price too low considering both the geothermal features of the land and its agricultural ability.[852]

Whakarewarewa Thermal Springs Reserve

A full study of the alienation of Whakarewarewa No 3 block and the resulting impacts for both Ngati Wahiao and Ngati Whakaue is provided in Part III. This alienation demonstrates the use of the Native Land Court by the Crown to consolidate its own interests in a block after having purchased individual undivided shares. In summary, and in breach of the Treaty of Waitangi, the Crown aggressively purchased shares held predominantly by Ngati Whakaue in the Whakarewarewa Thermal Valley and then applied to the Native Land Court to have its interests partitioned. Moore and Boyd have outlined the operation (there is no other word for it) undertaken by the Crown's agent Gill, and the care with which at the outset he converted the proportionate shares of the various hapu of each block into acres, roods and perches, then into money values per hapu, into shares (per hapu per block), and finally into share values (per share). He thus calculated how much he could offer each individual.[853] The Crown assumption –as the account of S.Percy Smith,the Surveyor-General, makes clear- was that the people might retain their village and cultivations in the meantime, but would soon move away, and 'the whole of the attractive part of Whakarewarewa will fall into the hands of the Crown'.[854] This turned rapidly into a self-fulfilling prophecy. In January 1896 the court granted the Crown a partition area containing all the major geysers and geothermal features of the valley. The day after the court's orders Gill received instructions to start buying the balance of Whakarewarewa 'at once'.[855] Despite this, both iwi have retained land in and around the Rotorua Geothermal field and so continue to exercise rangatiratanga over the resource today.

Taheke Field

The Manupirua baths are waiariki that Kuiwai and Haungaroa left in their path on the way to save their brother Ngatoroirangi. The baths are on the Taheke No 2 and Paehinahina-Manupirua block and are owned and occupied by Ngati Rongomai and Ngati Hinekura, but not without threat.[856] In November 1915, the Chief Surveyor recommended that a proclamation be issued prohibiting any alienations for some of the Taheke and Rotoiti blocks as the land was required for scenic purposes.[857] These springs were captured by the proclamation and the block within which they were

[852] W Rika, evidence, C26, pp 13-14, 16
[853] Moore and Boyd, 'The Alienation of Whakarewarewa', A30, p 54
[854] Statement of SP Smith, 13 December 1895, encl in Sheridan to Gill, cited in Moore and Boyd, 'The Alienation of Whakarewarewa', A30, p 69
[855] Sheridan to Gill, NLP 1/96/39 in C 2(a), MA-MLP 1 Box 49, cited in Moore and Boyd, 'The Alienation of Whakarewarewa', A30, p 75
[856] Maxwell, A 17, pp 38, 41
[857] McBurney, 'Scenery Preservation & Public Works Takings', A82, pp 66-67

situated was eventually declared a scenic reserve on 12 April 1921. However, Maxwell explains how the owners managed to find a way to keep the land. The land is now vested as a Maori reservation but leased outside the tribe. Colleen McMurchy-Pilkington discussed the negative economic impact on Ngati Rongomai after losing control of their lands and resources.

> Not having self determination over our lands and resources has had a negative economical impact on Ngati Rongomai as an iwi. Instead of being the owners and developers of our lands and resources on our rohe, many of our people are the toilers and labourers for those who lease our lands or acquired our lands through historical Acts of Parliament that encouraged individualisation of our land titles. Rotorua and surrounding environs contain strong examples from the tourist industry: many of my cousins work in the hotels and sing in the concert parties for a pittance. Once the land was ours and we should have been partners in developing those hotels. The Manupirua hot springs are another example. These are leased out to Pakeha, they employ our people to collect the entrance fees.[858]

The evidence on the alienations of Te Kopia, Paeroa East, Whakarewarewa, and Taheke all demonstrate the impacts of Crown purchasing and policies as effective mechanisms for acquiring Maori land and geothermal resources for tourism or scenic purposes.

The Tribunal's findings on the impact of Crown policies targeting geothermal resources

As we discussed in detail in Part III there was a pattern of the Crown actively targeting Maori land for their geothermal resources, particularly where it was sought for tourism, from 1869 into the 20th century. The above examples are but a few of those before us in the evidence and the results were often the same: loss of taonga, loss of cultural and spiritual association.

Claimants have had differing experiences yet the impacts of their exclusion from the control of their geothermal resources, and in some cases the geothermal fields have been similar. They have been unable to protect the resources. Many geothermal features and resources have been irreparably destroyed or degraded. The impacts for the hapu of Wairakei-Tauhara in respect of their system, as Dr Severne has noted, include those on the mauri of the geothermal resource. Many sites of significance to Tauhara hapū have been affected. For example, it is believed that subsidence is affecting Te Pa o Te Waira and Kurapoto (Onekeneke).

Extraction has destroyed or caused irreversible negative impacts on taonga such as puia, ngawha and waiariki and wāhi tapu. An example is the collapse of Pirorirori, this was the source of the headwaters of Kiriohinekai Stream and is considered wāhi tapu. The hapū consider that the mauri of their taonga has been harmed and will continue significant negative impact on all of the key cultural values that the hapū o

[858] C McMurchy-Pilkington, Evidence, Document B40, para 22, p 7

Wairakei-Tauhara hold, such as kaitiakitanga, rangatiratanga, manawhenua, manaakitanga and tikanga.[859]

According to Stokes, the impacts for claimants of the loss of the Wairakei and Ohaaki lands have included the loss of matauranga Maori, knowledge of puia, ngawha and waiariki, as well as the physical loss of many of their valued taonga. Many new names have been bestowed, and Maori names lost – and with them, the history and associations that they embody. In the case of Wairakei, few of the old names were still being used by the 1930s. In some areas, customary use has been ended and the spiritual values of the claimants pertaining to geothermal resources, the geothermal fields and the TVZ have effectively been lost; in other places they have been seriously eroded; and in others they continue in a much reduced form.

Maori knowledge, management practices, and respect for their taonga have been either ignored or marginalised under the Geothermal Energy Act 1953 and through the RMA process, despite the customary rights and Treaty interests of hapu and iwi in the geothermal resources, the geothermal fields and the TVZ.

Failure to protect rangatiratanga in the statutory schemes which regulate the geothermal surface features, the geothermal fields and the TVZ of CNI

We have already considered arguments made regarding the Geothermal Energy Act 1953 and the RMA 1991.

The Impacts of the Geothermal Energy Act 1953

We found that the Geothermal Energy Act 1953 appropriated to the Crown Maori customary rights to control access to and use of the geothermal taonga. This was done without any adequate consultation with Maori, and without adequately addressing their customary rights and Treaty interests, and was thus in breach of the principles of the Treaty of Waitangi. For a long time the state held the monopoly in power generation and development, and Maori were debarred from the process of managing and protecting these taonga. Nor could they obtain a water right or licence in order to protect them. The Crown also appropriated the benefits from charging users for access to the resource. As we noted in section 2, the history of the development of the Mokai field is indicative of the failure of the legislative regime in Treaty terms.

The Impacts of the statutory framework of the RMA

In terms of the RMA, we have found that the Act is deficient and the environmental protection measures in regional policy statements and regional plans have not been

[859] C Severne, evidence, E7, para 19, pp 4-5

able to protect Maori customary rights and their Treaty interests. That is because the assumptions that underpin the RMA are:

- That only the Crown has the right to set the boundaries to regulate access to the geothermal resource and to receive the benefits from, or decide who should get the benefits from, its use. That effectively bypasses CNI Maori common law and Treaty ownership of the resources. We have discussed all these issues in section 2 of this Chapter. In addition, the RMA provides no formula for Maori to be accorded a priority when applying for resource consents. For example, section 8 does not require decision- makers to give effect to the principles of the Treaty of Waitangi.
- That the only recognised Maori interest in geothermal surface features, the geothermal fields and the TVZ is the right to access the geothermal resources on their own land for cooking and bathing and other limited uses. The provisions in sections 6, 7, and 8 of the RMA underscore that perspective, requiring that decision-makers under the Act merely have regard to these forms of uses, Maori values and kaitiakitanga.
- Maori are thus prejudiced because they do not have a right to develop their own fields to access from the benefits from the Crown's royalty system and the TVZ.

Impairment of development rights

We have discussed in detail the right of Maori to develop their geothermal assets in Part IV. We have found that by failing to inform itself of Maori rights in the geothermal resource, and recognise their customary rights, and by passing the Geothermal Energy Act 1953, the Crown foreclosed on Maori opportunities to participate in joint development ventures for geothermal power. The prejudice to Maori of that decision, in lost opportunities, is clear. The recent success of two joint ventures demonstrates both what became possible as a result of restructuring in the 1980s – and the difficulties CNI Maori still faced, after years of marginalisation, in trying to develop their own resource.

The development of the Mokai and Rotokawa fields came very late in the history of geothermal power generation. As noted by Stokes, by the time development options were explored for these two fields, 'the rules for the geothermal power game had changed.'[860] The state restructuring of the 1980s shifted the focus from the state to the private sector. She states:

> Ohaaki was a public work in the national interest, built to supply power for the national grid. The proposed Mokai power station was caught in the transition. At Rotokawa the aspirations of the developers were entirely commercial. In this shift to a market-oriented policy environment it appeared to Maori owners that not only had government changed the rules, but

[860] Stokes, *Ohaaki: A Power Station on Maori Land,* p 126

> had changed the game as well. The Tuaropaki Trustees complained "We are the last to know what is going on. "
>
> …
>
> Among Te Arawa, Ngati Tahu and Ngati Tuwharetoa people, there has been an attitude that the geothermal resource can be shared with others. There was a feeling in the mid 1980s that Pakeha exploitation had taken over. A good deal of destruction of geothermal areas has already occurred …[861]

The new policy environment opened the geothermal resource up to exploitation by private, commercial, and state owned enterprises, which initially tried to circumvent the Maori owners of these lands. We turn now to consider the manner in which Maori fought back to become partners in the industry.

Mokai

Exploration at the Mokai field began very late in the piece as its full potential for power generation was not realised until the 1970s. According to Stokes, in 1976 electrical resistivity surveys carried out by the DSIR geophysicists at Wairakei revealed the potential geothermal field at Mokai on Maori land farmed by the Tuaropaki Trust.[862] In about 1982 the Crown entered Tuaropaki land and drilled exploratory wells.[863] This occurred without access having been agreed to with the Trust.[864] There were moves made to attempt to lease the land but the people resisted.[865] In 1985, officials from the Electricity Division, the Ministry of Energy, and the Ministry of Works Geothermal Projects met with the owners of the Trust lands at Mokai.[866] By 1984 six test wells had been drilled and one, MK 5, indicted a potential of 25 MW of electrical energy.[867] Without consulting the Maori owners, the Crown in 1986 determined Mokai as a field suitable for development.[868] Evidently, there was a delay of some years as state restructuring took hold.[869] The Trust moved in the later 1980s to develop geothermal energy but were blocked at the water rights and then resource consent stages by Electricorp.[870] It was the view of the Trust that the Crown actively worked against the Trust developing its field.[871] However, the 'Trustees held firmly to the view that the Mokai geothermal resource was a taonga that belonged to Maori.'[872]

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[861] Stokes, *Ohaaki: A Power Station on Maori Land,* pp 126-127
[862] Stokes, *Ohaaki: A Power Station on Maori Land*, p 121
[863] G Rangi, evidence, E37, p 4
[864] G Rangi, evidence, E37, p 4
[865] G Rangi, evidence, E37, p 4
[866] Stokes, *Ohaaki: A Power Station on Maori Land*, p 122
[867] Stokes, *Ohaaki: A Power Station on Maori Land*, p 121
[868] Stokes, *Ohaaki: A Power Station on Maori Land*, pp 120, 122
[869] Stokes, *Ohaaki: A Power Station on Maori Land*, pp 121-123
[870] G Rangi, evidence, E37, p 4
[871] G Rangi, evidence, E37, p 4
[872] G Rangi, evidence, E37, p 4

We heard evidence that the land here was amalgamated bringing 60 different land titles into one 2,700 hectare block.[873] The first trustees that took over the land after it was returned from the hands of the Maori Affairs Department were Sir Hepi Te Heuheu, (Chairman), Taxi Kapua, Sam Andrews, Brian Jones, Clarrie Hammond, and Awhi Winiata.[874] Tuaropaki Trust owns most of the land overlaying the Mokai field. The Crown owned one small block and it seems that when the Crown split ECNZ up, the land went to Contact Energy.[875]

Protracted negotiations took place until 1996 when the Crown agreed to sell to Tuaropaki the information it had in relation to the wells.[876] The trustees entered into a joint venture to construct a power station on their land in 1999. The Trust entered into a joint venture with Mighty River Power (25% stake) and built Mokai 1 (the first stage geothermal electricity station) producing 55 megawatt – 'enough electricity for around 50,000 homes.[877] In 2005 they completed another 40 megawatt station beside it – Mokai 2. The Trust also has a five hectare, geothermally heated glasshouse producing tomatoes and capsicums for export. This venture employs 50 people from Mokai and Mangakino, most of them previously unemployed. This has had a significant positive effect on the socio-economic well-being of the two areas. The Trust believes that developing the Mokai geothermal system is a unique opportunity for Maori to take the initiative and create a project that allows for self-determination.[878]

The Trust is staging the development to minimise adverse environmental effects and accommodate the needs of existing users and potential needs of future generations. They recognise their geothermal surface manifestations such as therapeutic and cooking pools need protection. A key part of the development is reinjecting used geothermal fluid back into the deep geothermal aquifer to minimise the impact on existing geothermal features and natural ecosystems. The Trust plans to expand the glasshouse to 20, and then 50, hectares. Further expansion of the power station is also likely once the response to the existing takes has been quantified.[879] They told us during the hearings that the additional conservation measures they impose on their operation are designed to ensure the long term sustainability of their taonga.

Rotokawa

We heard no evidence from the Ngati Tahu Tribal Trust regarding their involvement in power generation. We merely discuss it here to complete the story of geothermal power generation in the CNI. According to Stokes, who was once a trustee of the

[873] G Rangi, evidence, E37, p 3
[874] G Rangi, evidence, E37, p 3
[875] G Rangi, evidence, E37, p 4
[876] G Rangi, evidence, E37, p 4
[877] G Rangi, evidence, E37, p 5
[878] Environment Waikato, 'Mokai Geothermal System', undated, www.ew.govt.nz/enviroinfo/geothermal/maorigeothermal/mokaisystem.htm, accessed 10 July 2007.
[879] Environment Waikato, 'Mokai Geothermal System'

Trust, two wells were drilled in the 1970s at Rotokawa.[880] Since 1984 several more wells were drilled. Part of Rotokawa field on land not owned by Maori was subject to a mining licence held by various mining companies. Previous attempts to mine sulphur deposits under the lake failed, except for a small operation extracting sulphur for farm fertiliser. A pipeline and pump house was constructed on this land without authority.[881] In the mid-1980s the Trust was approached to grant leaseholds to private interests and the Ministry of Works.[882] According to Stokes, 'the highest downhole temperature measured in New Zealand (335ºC at 2450 metres) was at RK5 … This well is located on the Maori Land.'[883] Competition between the licensees over water rights applications went on to the Planning Tribunal and failed. In the 1990s, the Ngati Tahu Tribal Trust entered into a joint venture to construct a geothermal power station at Rotokawa that contributes to the national grid.

We are aware that Maori want to be developers of the resource- but in a manner that protects it for future generations. They want to manage its allocation and use within the vicinity of their specific fields. For example, we were told by Kipa Rex Morehu in giving evidence for Ngati Te Takinga that their land Mourea Paehinahina includes a geothermal field which is capable of generating enough power to source the whole of Rotorua.[884] Maori should not be further prejudiced by the limitations of the RMA and its assumptions.

Findings on the Impacts of the Statutory Framework of the RMA, and the Impairment of Development Rights

The Crown has not accorded Maori an appropriate priority in the RMA process, either through an amendment to section 8 of the RMA or through the promulgation of a national policy statement. The examples of Mokai and Rotokawa demonstrate that Maori have developed the capacity to generate geothermal electricity and can assist in meeting public demands for alternative sources of energy. But their experience suggests that Maori are marginalised during the RMA process and they have to financially struggle against competing interest groups before their customary rights and interests may be realised. In such situations, where there is competition, and at the least, Maori should be accorded resource consent priority over fields that they own where they seek to develop them. They have been prejudiced by the Crown's failure to provide such an opportunity, in accordance with its duties to provide for their tino rangatiratanga, their proprietary interest and their Treaty interests.

[880] Stokes, *Ohaaki: A Power Station on Maori Land*, p 124
[881] Stokes, *Ohaaki: A Power Station on Maori Land*, pp 124-125
[882] Stokes, *Ohaaki: A Power Station on Maori Land*, p 125
[883] Stokes, *Ohaaki: A Power Station on Maori Land*, p 125
[884] K Morehu, Evidence for Ngati Te Takinga, 22 April 2005, Document F28, p 2

Loss of the financial benefits from the use of the resource

We have found that by the Geothermal Energy Act 1953 Maori customary rights in surface resources – which were developable – were appropriated by the Crown, and Maori rights in the entire subsurface resource – also developable – were appropriated.

Maori were prejudiced by the failure of the Crown to pay a resource rental to owners of the resource. The Crown ought to have paid a royalty or rental for each of the geothermal stations: to those Maori who either owned the land within which the geothermal resource was contained, and the hapu/iwi who exercised tino rangatiratanga over it. It should also have paid a resource rental to any iwi or hapu who lost that ownership in breach of the Treaty.

Environmental degradation and loss of geothermal taonga

We turn to consider the extent to which CNI Maori have been prejudiced by the degradation of geothermal resources and certain of the geothermal fields. We are reminded that the TVZ is not only nationally significant, it is of considerable international significance, being one of only six major hot springs regions in the world. The others are in Iceland, Yellowstone Park (USA), Japan, Kamchatka (Former USSR) and Chile.[885] New Zealand's geothermal activity also appears to be scientifically unique and valuable.[886] But the non-renewable nature of the geothermal resources and the fields only really became a matter of national attention after 1980. This was due in large measure to the poor management by the Crown and its statutory delegates whom the Crown preferred over any joint arrangement with Maori. As a result, many geothermal features throughout the CNI had already been subject to considerable damage and modification. Three of the five major geyser areas of the CNI had been eliminated by human activity The poor state of the geothermal manifestations of the CNI was identified in the *Report of the Nature Conservation Council* (1980) in the following terms:

> Of five major New Zealand geyser fields in existence a century ago (Rotomahana, Whakarewarewa, Orakeikorako, Wairakei, Spa) only Whakarewarewa remains with any significant number of geysers active. Rotomahana was destroyed by the 1886 eruption, but Orakeikorako, Wairakei, and Spa, have been eliminated as geyser fields by human activity.[887]

We consider the impacts of the Crown's actions and omissions under three headings in this section:

- Impacts of the creation of hydro lakes and changes in lake levels;
- Impacts of the use of geothermal systems for power generation; and

[885] Boast, 'Geothermal Energy', A19, p 4
[886] Boast, 'Geothermal Energy', A19, p 5
[887] Houghton et al, 1980, as cited in Boast, 'Geothermal Energy', A19, p 6

- Impacts of Crown omissions in failing to adequately manage land use to protect the resources, and the utilisation of geothermal resources and the geothermal fields for residential and commercial use.

This division of tasks is to some extent arbitrary and there are some contexts, as at Tokaanu on the northern shores of Lake Taupo, where more than one environmental factor comes into play and different actions converge. We are not concerned here with making definitive findings on the current scientific status of different geothermal resources and the geothermal fields; rather we are providing a snap shot of that status taken from the evidence before us.

Impacts of creation of hydro lakes and changes in lake levels

There are twelve geothermal fields or manifestations adjacent to or beneath Lake Taupo and the Waikato River. These are: Tokaanu-Waihi-Hipaua, Motuopa, Horomatangi, Tauhara, Wairakei, Rotokawa, Ohaaki, Ngatamariki, Orakei Korako, Atiamuri, Ongaroto/Hikurangi (Mokai), and Mangakino.[888] Mr Bromley, a research scientist and geothermal consultant with 23 years of experience in geothermal research, had this to say about the impact of water levels of a river or lake on adjacent geothermal features:

> Hot springs, pools, steam-vents and thermal groundwater aquifers associated with these geothermal fields are affected to varying degrees by changes in water level of the adjacent lake or river. Often, there is a direct relationship between lake or river levels and adjacent hot spring discharge rates and temperatures. Rising levels cause rising groundwater pressures and increased spring flows. Conversely, dropping levels cause a reduction in flow rates or pool water levels. Temperatures of springs usually increase or decrease in proportion to spring flow rate because of the shallow changes in conductive cooling. Declining water levels in pools can lead to rising temperatures because of conductive heating. If the boiling point is reached, then hydrothermal steam eruptions or geysering may be triggered by either of these processes, that is, by increasing or decreasing water levels.
>
> Submerged hot springs respond to changes in water level because of the change in outlet pressure at the vent, in relation to the underlying aquifer pressure. This will readjust slowly with time as the pressure change propagates back into the aquifer. The rate of propagation is related to the transmissivity (or permeability-thickness) of the aquifer. Submerged springs that are exposed by reducing levels will initially discharge vigorously, but flows will later reduce, as pressure equilibrium is gradually re-established.
>
> The chemistry of discharging hot springs gives an indication of the origins of the source fluids and therefore the likelihood of shallow pressure changes, affecting flow rates. High chloride springs are more susceptible to deep pressure changes, while low chloride springs are essentially steam-heated groundwater and respond to shallow hydrological changes.
>
> Extraction of geothermal fluids from some geothermal fields (Wairakei and Ohaaki) has caused localised subsidence. Pressure reduction in the stream zone causes local drainage of a

[888] Bromley, evidence, H34, p 2

highly compressible mudstone layer, which then gradually compacts. This has the potential of affecting river and lake levels in the vicinity.[889]

Taking this as the basis for our analysis, we review two of the larger components in the Crown schema for hydro electric power development that have had direct impacts on surface geothermal features adjacent to or underneath Lake Taupo and the Waikato River. The first of these was the raising of Lake Taupo in 1941 and the impacts which this had on portions of the geothermal fields adjacent to the lake and Waikato River, and on smaller geothermal areas around the lake and river margins. The second was the creation of the hydro lake known as Lake Ōhākuri in 1961 and the impact which this had on the surface geothermal features in the Ōrākei Kōrako valley.

Lake Taupo and the Waikato River

We have already addressed some of the injurious effects of the raising of Lake Taupo on geothermal resources bordering the lake and whether Ngati Tuwharetoa and their whanaunga received compensation for this in the decades beginning in 1940 and 1950. In this section we rehearse some of these impacts again and review additional impacts.

Dr Severne, in the course of a larger study of the Waihi-Tokaanu geothermal system in the 1990s, observed surface geothermal features and noted the impacts of changes in the lake level.[890] She found a clear correlation and conceptualised the relationship between rises in lake level and the activity of surface geothermal features. Higher lake levels increased the activity levels, and the temperatures, of steam vents, hot springs and mud pools located close to the lake shore. Lower lake levels, conversely, decreased activity levels and temperatures.[891] Our understanding of this evidence is that geothermal activity is relocated as lake levels change but, in sum, it is neither increased nor decreased as a result of changes to the level of Lake Taupo. The major impacts, and the major areas of potential damage from the perspective of the claimants, are those which occur when surface geothermal features adjacent to the previous lake shore are inundated or otherwise rendered inaccessible by the changes in the lake level.

A number of the claimants have provided evidence that this was the case. Paranapa Otimi, in evidence set out in table 10.3 above, described some 13 springs 'used for centuries to feed, heal and sustain the tribe'.[892] All were close to the lake shore. His claim that only three of these features escaped the rising lake level is consistent with the evidence provided by Dr Severne. Rotopotakataka, Te Kiri o Pahau, Te Korua, Ngapuauaki, Waihi Te Korua, Waihiparehopu, Te Rorohi, Te Paraki, Te Pakihi o Te Oinga, and Waihi Kahakaharoa have been lost to the tangata whenua at Waihi as a

[889] Bromley, evidence, H34, p 3
[890] Severne, 'The Tokaanu-Waihi Geothermal System', H16
[891] Severne, 'The Tokaanu-Waihi Geothermal System', H16, chapter 6 on 'Present geothermal manifestations and temporal changes in thermal activity', pp 85-128, 238, 239
[892] P Otimi, evidence, E16(a), paras 16, 17-19, pp 4-5

result of the increases in lake level. Only Te Tuki, Paraki Tuarua, and Whakatara survive.

Changes in lake level, triggered by Crown actions from the 1940s onwards, also impacted on low lying areas at Tokaanu to the south of Lake Taupo. For example, Merle Ormsby described Te Mimi o Tara where she and her companions used to bathe and wash their hair. When the level of the lake rose, the land surrounding the pool became wet and soggy. Access became more difficult and the pool was abandoned sometime around 1979.[893] The timing of the abandonment, as cited by Mrs Ormsby, suggests to us that a number of events converged to cause this result. In the wake of the raising of Lake Taupo from 1941 onwards once the control gates were installed, came the diverting of the Tongariro River between 1966 and 1973.

Dulcie Gardiner, in a similar manner, shared memories of her grandfather's māra and thermal pool at Mahinahina. She described the spectacular geothermal eruption which took place during the construction of the Tokaanu Diversion:

> The whole area by my papakāinga was demolished by the building of the tailrace and the aqueduct that the Tokaanu River was diverted through. When the construction of the tailrace reached the area of the thermal māra Mahinahina a huge geyser erupted. It was spectacular to watch. We heard that the engineers were beside themselves over how to stop it. In the end they poured in tons and tons of cement and sealed it. The old people were very upset. We realised that it was the end of an era, the end of a way of life. We had lost a very valuable resource in that piece of land. But it was more than that, we had lost control of our ancestral land and our ancestral river.[894]

We are unable to apportion damage done, and loss of amenity, between lake level rises and river diversion, both of which are actions of the Crown. What we can suggest is that it is likely that geothermal conditions below the surface of the earth at Tokaanu were changed as a result of the interplay, and that natural forces responded in a violent fashion causing the eruption.

Jocelyn Rameka and Mataara Wall have provided evidence about the loss of geothermal resources at Waipahihi marae on the north shore of Lake Taupo, not far from Tauhara maunga.[895] There has been a loss of amenity from the Onekeneke Stream with a decrease in water temperature and water flow important for the marae, but we are not able to determine the causation. If it is the result of lake level rise, or geothermal power development at Wairākei, the Crown is the direct agent. If it has been triggered by residential and commercial development in Taupo township, the Crown is also at fault for failing to adequately address the situation in a similar manner to the action it took in Rotorua as discussed above. We will return to geothermal development at Wairākei in section (b) and residential and commercial development in section (c) below.

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[893] M Ormsby, evidence, I10, para 12.6, p 14
[894] D Gardiner, evidence, E25, para 18, p 5
[895] J Rameka, evidence, D25, paras 8-20, pp 3-5; and M Wall, evidence, D1, paras 91-95, pp 23-24

Tereowhakotahi Charles Wall told us about Taharepa on the Taupo lakefront where a man-made pool had been carved by the owners into the bank. It was his view that the pool had been destroyed by the raising of the lake level:

> Hot water would come into the pool from out of the bank into which it was cut. This was our main bathing and swimming pool. The water also had healing properties, especially when it was drunk... .
>
> Sadly this resource has been destroyed by the rising of the lake levels, which has resulted from the control gates and use of the lake for hydro storage. The hole remains, but it is now filled with sand, the whole thing is underwater. This is another instance of a resource which formed part of our everyday lives, but has now been taken away.[896]

Emily Rameka confirmed this impact on the Taharepa Bath. She also spoke of its loss for it had been used continuously by her hapu and whanau and indeed the Taupo community for many generations, primarily for healing and general bathing.[897]

Lake Ōhākuri and the Ōrākei Kōrako valley

The Ōrākei Kōrako geothermal field, with its very visible surface features, was also likely to have been a prime candidate for geothermal development before the 1950s. However, this was pre-empted by hydro electric development with a series of hydro electric dams and power stations on the Waikato River, especially once the control gates at Lake Taupo were fully in position.[898] Ōhākuri, constructed between 1956 and 1961, was part of that sequence. The large gravity dam, located downriver from Ōrākei Kōrako, would create Lake Ōhākuri, the largest artificial lake in the North Island.[899] This new lake would flood much of the Ōrākei Kōrako geothermal field and geothermal electric development could not proceed without putting the hydro electric power station at risk.

Edward Lloyd, a geologist on the staff of the New Zealand Geological Survey, was assigned the task of mapping the geothermal features in the Ōrākei Kōrako valley before the new Lake Ōhākuri was filled, and monitoring the immediate and long term effects of the changes which resulted. His observations, and his analysis, were published as part of a more comprehensive Geological Survey Bulletin in 1972.[900] The results of his work are important for this field area and provide insights into the processes at work in other areas, including Lake Taupo. In the course of this work at Ōrākei between 1958 and 1961, Lloyd identified more that 1000 geothermal features. By the time he completed his task and published Geological Survey Bulletin 84, three

[896] T Wall, Evidence for Ngati Hineure, Ngati Te Urunga, Ngati Hineuru, Ngati Tutemohuta, Ngati Rauhoto of the Hikuwai Confederation of Ngati Tuwharetoa, 28 February 2005, Document D18, p 4
[897] E Rameka, Evidence for Waipahihi Marae, Ngati Hineure, Ngati Te Urunga, Ngati Hineuru, Ngati Tutemohuta, Ngati Rauhoto of the Hikuwai Confederation of Ngati Tuwharetoa, February 2005, Document D26, p 5
[898] See section 10.3 above
[899] John E Martin, *People, Politics and Power Stations: Electric Power Generation in New Zealand, 1880-1998* (Wellington: Electricity Corporation of New Zealand and Historical Branch Dept. of Internal Affairs, 1998), p 167
[900] See section 10.3.4 above. E F Lloyd, *Geology and Hot Springs of Orakeikorako* (Wellington: New Zealand Geological Survey Bulletin number 85, 1972)

quarters of these features and a substantial proportion of the Ōrākei Kōrako valley had been submerged by the waters.[901]

Lloyd, already familiar with the field area, began his surveys in October 1958 and monitored the physical and chemical changes which occurred as the lake filled between 19 January 1961, when the diversion was closed, and 8 February 1962 when the lake reached its final level. The new lake was some 8 km^2 and flooded the valley to a depth of 20 to 30 metres.[902] Lloyd records two sets of effects: those changes which took place as the lake filled; and those which continued after the lake had filled and the water table stabilised at new levels. A number of spectacular changes occurred in 1961 before the new equilibrium was established. The long term effects of increased pressure of lake water are described, mapped, and graphed in considerable detail. As noted above, Lloyd recorded and mapped more than 1000 surface geothermal features (springs, vents, hot pools, warm pools, and geysers). A large proportion of these, in the order of 60 to 75 per cent, were submerged.[903]

Lloyd's report shows that increased geothermal activity took place above the new lake level, but for the most part this was not sustained.[904] Some vents became, for a time, spectacular geysers: one set, known as Aorangi Geysers, erupted for a period of eight months and then collapsed; Hochstetter's Pool became a geyser that was active for a time then declined; springs in the vicinity of the Artist's Palette, which had previously been tranquil, became boiling and erupted at irregular intervals. The impression we gain from the scientific evidence before us is that the enhanced activity in the areas just above the new lake level is modest compared with the thermal features which are submerged. Our understanding is that most of the additional energy which would have resulted from the creation of Lake Ōhākuri would have been released below the surface, into the new lake.

There is little in the claimant evidence for Ōrākei Kōrako which describes the environmental impacts of creating the lake. Their attention focused on how Kahurangi Te Hiko's parents and grandparents were forced to move from their home and ancestral lands, hot pools, and cooking areas; this loss has overwhelmed memories of specific impacts.[905] We have before us, however, the carefully compiled evidence of Edward Lloyd. In particular we re-present his summary tabulation, which contains two lists of named hot springs, sorted according to their fate: those which were submerged and lost from sight are shown in the first column; those which survived are listed in the second column.

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[901] Lloyd, *Geology and Hot Springs of Orakeikorako*. See also E F Lloyd, 'Orakei Korako Geothermal Field', *New Zealand Geological Survey Bulletin*, 1974
[902] Bromley noted that the depth is 31 metres immediately behind the dam. Bromley, evidence, H34, para 3.9, p 11
[903] Bromley uses the figure of 60 per cent (Bromley, evidence, H34, para 5.6, p 18). Houghton, Lloyd, and Keam, in a 1980 report to the Geological Society of New Zealand suggest 75 per cent. (Houghton, Lloyd, Keam, 'The Preservation of Hydrothermal System Features of Scientific and Other Interest' in Keam (ed), *Geothermal Systems,* Appendix B, p 24)
[904] Lloyd, *Geology and Hot Springs of Orakeikorako*, chapter 8, especially pp 129-136
[905] K Te Hiko, Evidence for Ngati Raukawa, 28 February 2005, Document D11 para 38, p 8

Table 10.4 Named hot springs at Ōrākei Kōrako. Source Lloyd (1972) Table 4, pp 48-49

Submerged springs and geysers	Surviving springs and geysers
Sarah's Grotto	Bath Pool/Map of Australia
Pudding Basin	Jelly Fish Pool
Mimi Homai-o-te Rangi	Moss Pool
Te-mimi-a-Homaiterangi/Foot Bath	Potiki/Diamond Geyser
Ngawha Tuatahi	Cascade Geyser
Ohaki/Nga Puia Paruparu	Hockstetter Pool/Puia Tuhitarata
Terata/Raharahu/Tutukau	Dante's Pool
Orakeikorako	My Lady's Lace
Waikawa/Minginui	Dragon's Mouth/Queen Mary's Turbine
Rahurahu/Terrific Geyser	Fred and Maggie
Rameka Geyser	Champagne/Manganese/Fruit Salts Pool
Waipapa Geyser	Petrifying Pool
Soda Pool	Prince of Wales Feathers Geyser
Iodine Pool	Witch's Cauldron/Lady Cobham's Geyser
Te Korokoro-o-te Turewa/ Taipo	Terrace/Dreadnought/Lord Cobham Geyser
Oyster Pool	The Three Bears
Cardinal's Robe/Haematite Pool	Psyche's Bath/Rock and Roll/Gordon's Geyser
Man Friday's Foot	Kohuna
Wine Chalice	The Broken Heart
Map of England	The Perfect Heart
The Beauty Parlour	Bendix Washer Geyser/Kurapai
Mushroom Pool	Kurapai
Albert Geyser	Waiwhakaata/The Wishing Pool
Petrifying Pool	Jewel Geyser
O.K. Pool	Palette Pool/White Pool
Champagne Pool	Square Pool/Blue Pool

Turtle/Opal/Earthquake/Copper Sulphate Pool	Twin Pools
Ace of Spades/The Swinging Rock	Map of South America
The Shamrock/The Ace of Clubs	Te Wahine
The Map of Australia	Te Tane
Kahurangi	Sarah's Washing Pool
Spring above bog en route to Wainui	
Spring below Wainui	
Pool below Wainui	
Wainui Barrier Springs	
Wainui Geyser	
Erupting Cauldron/Ngahapu Geyser	
Coral Geyser	
Sea Egg Geyser	
Large spring, East Bank	
The Bird's Nest	
Ruakiwi	
Porangi Geyser	
The Split	
White Mud Pool	
Red Mud Pool	

Lloyd does not provide a separate listing for geysers. A number are listed in association with hot springs. His published bulletin provides a visual record of geyser activity in the form of an 1859 sketch by Hochstetter and photographs by: Burton Brothers c 1880; Griffiths in 1894; Lascelles in 1898; Batchelor in 1943; New Zealand Herald in 1946; and Lloyd himself in 1952, 1954, 1958, 1959, and 1960.[906] Overall for this system, only 35 active geysers, the Ruatapu cave, silica terraces, plus approximately 100 hot springs, plus mud pools and sinter deposits remain.[907] Bromley comments briefly on the present day tourist operation which provides access to the

[906] Lloyd, *Geology and Hot Springs of Orakeikorako*. The Lloyd photographs give an indication of his familiarity with the area well in advance of his 1958 assignment. He first visited the area in 1949 and worked there with his colleague Keam in 1951.
[907] Environment Waikato, 'What is happening in our region?', www.ew.govt.nz/emviroinfo/indicators/geothermal/resources/geo3/report.htm, accessed 12 July 2007

thermal area: it provides ferry access across the lake to walking trails passing 'Rainbow Terrace', 'Golden Fleece Terrace' and 'Diamond Geyser'.[908]

The evidence before us suggests that the geothermal features which were submerged by the hydro lake were much more numerous and much more striking than the new features which emerged above the shoreline of the new lake. Ōrākei Kōrako maintains its importance among geothermal tourist destinations in New Zealand but it also suffered from degradation and loss of surface energy.

Impacts of Use of Geothermal fields for Power Generation

Wairākei

In the 1940s and 1950s, the Minister of Works, the Hon Robert Semple, and the Electrical Engineers in the Department of Public Works were confident that natural steam, like water power, was 'supplied by nature, and there for the taking'.[909] They were conscious that they were world leaders in a new field of human endeavour and stood alongside Italy, Israel, Iceland, Japan and the USA in the application of the new technologies. There was a considerable investment in geothermal research by government engineers and government geologists. The intention was to identify which fields had the greatest potential for development and to generate the maximum amount of power with the greatest possible efficiency.[910]

Wairākei was the first selected. Surface features showed clear evidence of powerful geothermal forces below and the land above the field was owned by the Crown. Robin Fry elaborates:

> Wairakei was chosen because its hot pools, fumeroles, geysers and boiling mudpools clearly indicated geothermal activity. A large fumerole known as the Karapiti blow-hole emitted super-heated steam nearby. The Waikato River could provide cooling water for the project, and there were streams in the area to provide water for drilling. Apart from the tourist hotel and the grounds and golf course, Wairakei was an unproductive wasteland. As it belonged to the Government no private interests were involved, and the location being fairly isolated meant that the development would not impinge on important scenic and tourist resources.[911]

Test bores were drilled from 1950 onwards and electric power generation began at Wairākei in 1963. Scientific and engineering research reports appeared in the journals and the DSIR bulletins from 1955 onwards.

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[908] Bromley, evidence, H34, para 2.21, p 7

[909] Stokes, 'Wairakei Geothermal Area', A20, p 130, quoting from R Fry, *Power From the Earth: Over 25 Years of Geothermal Development in New Zealand* (Wellington: Ministry of Works and Development, 1985)

[910] See the annual reports in AJHR, the Geological Survey Bulletins, and the research papers published in the engineering and geological journals, cited in the references which follow. For overviews, see Martin, *People, Politics and Power Stations*; Fry, *Power From the Earth*; and L I Grange, *Geothermal Steam for Power in New Zealand* (Wellington: Government Printer, 1965)

[911] Fry, *Power from the Earth*, cited by Stokes in, 'Wairakei Geothermal Area', A20, p 131. Fry is one of those who prefers the spelling fumerole.

This field was selected for test drilling in advance of any comprehensive survey of the sustainable long term use of the resource. Rather, the decisions on testing were made on the basis of surface thermal activity. There is no evidence in the engineering or scientific literature, the annual reports to Parliament, or the published histories of the New Zealand Electricity Department, that Maori were consulted or that their environmental values were considered at the time Wairākei was selected and investigated.[912] We now turn to consider what happened to the geothermal resources, and the field at Wairikei. We do so by reference to a series of articles and reports published from 1955.

Leslie Grange, 1955

Leslie Grange, Director of the New Zealand Geological Survey in the 1950s, had carried out research in the Rotorua and Taupo districts in the 1930s and was a long-time advocate for the use of steam for industrial purposes. His overview *Geothermal Steam for Power in New Zealand* was published as a DSIR Bulletin in 1955. It contains chapters by a number of government scientists and engineers and gives us an important window of insight into official attitudes and expectations.[913]

Wairākei, along with Ōrākei Kōrako and Waiotapu, was seen as a field offering the greatest potential for electricity generation. An expanded programme of research had been under way at Wairākei since 1950. Grange was aware that the 37MW generating plant would impact on the levels of geothermal activity but was, on the basis of data already collected, unable to predict the nature or the pace of the changes which might follow. His primary concerns were with the sustainability of the field and the best locations for the productive bores.

The temperatures and the temporal dynamics of springs and geysers were carefully monitored to provide production-related data. Water chemistry was studied, partly to provide information about subsurface dynamics and partly to minimise corrosion of drilling equipment and the power station itself. There was an awareness that surface features would change but no recognition of Maori interests in these and no explicit consideration of the environmental impacts on these features.[914]

Smith and Studt, 1958

J H Smith, an engineer with the Ministry of Works, and F E Studt, a scientist with the DSIR, each published papers in 1958, shortly before the power station was

[912] See, for example, the engineering and scientific papers listed by Grindley, *The Geology, Structure, and Exploitation of the Wairakei Geothermal Field*, pp 126-127
[913] Grange, *Geothermal Steam for Power in New Zealand*, includes chapters by Beck (Geological Survey), Robertson (Geophysics Division), Wilson (Dominion Laboratory) and Fisher (Ministry of Works)
[914] Environmental impacts are clearly evident in the photographs which illustrate the bulletin and in an evaluation of techniques to measure noise output and protect construction workers from injury by noise

commissioned.[915] There is recognition in the Studt paper that geothermal fields could not be exploited on a sustained basis without careful attention to the scale of production, the position of the aquifers and the dynamics of groundwater discharge. Smith shows a similar awareness when he tabulates natural heat flows for each of the geothermal fields in the region and comments that 'the amount which can be taken off by bores cannot be determined'. Later he makes the comment, specific to Wairākei, that 'lack of inflow water could ultimately be the limitation to increase (sic) of production', and he recognises that a case could be made for returning hot water into the ground.[916] The focus for both writers is on the organisation and scale of production: there is no acknowledgement of Maori interests or potential environmental impacts on the land above the field or the river receiving the geothermal fluids once discharged. So at this stage the scientific community was aware that inflow water was relevant to the organisation and scale of production.

R G Fisher, 1964

Issues relating to heat flows and the sustainability of the Wairākei field were clearly in the minds of scientists and engineers monitoring impacts in 1958. R G Fisher, in a paper published in 1964, compared natural heat flows in 1952 and 1958.[917] His conclusion was that the heat flow at 100,000k cal/sec had not changed significantly. The heat used for power generation matched the decrease in surface discharge. Fisher commented further that 'there was a steady decline in mass discharge from natural thermal activity as seen by the decrease in the spring and geyser activity of Geyser Valley'. This time Maori are not completely invisible in the scientific report: there is a photograph of 'Opal Pool, Geyser Valley 1949' and a young Maori woman standing beside the pool. There is no photograph for 1958 and no mention of Maori or Maori values in any caption or the text. At this stage the Crown should have been aware, therefore, that power generation was starting to impact on the geothermal manifestations of the field.

Grindley, 1965

George Grindley published in 1965 what was to become the definitive volume on the geology and exploitation of the Wairākei geothermal field.[918] This was a comprehensive study, based on information from 150 drill holes and 15 years of field investigation. Grindley was able to answer some of the questions which were taking shape when Studt wrote in 1958. Underground heat resources had been sustained but

[915] J H Smith, 'Production and Utilisation of Geothermal Steam', *New Zealand Engineering*, vol 13, no 10, 1958, pp 354-375; F E Studt, 'The Wairakei Hydrothermal Field Under Exploitation', *New Zealand Journal of Geology and Geophysics,* vol 1, 1958, pp 703-23. The papers were written by the named individuals but would, according to Public Service procedures, have come under careful scrutiny by senior officials before they were approved for publication (for example, Smith acknowledges the permission of CWO Turner, Engineer in Chief, Ministry of Works, p 375).
[916] Smith, 'Production and Utilisation of Geothermal Steam', p 365
[917] R G Fisher, 'Geothermal Heat Flow at Wairakei During 1958', *New Zealand Journal of Geology and Geophysics,* vol 7, 1964, pp 172-184
[918] Grindley, *The Geology, Structure, and Exploitation of the Wairakei Geothermal Field*

the geothermal fluids, which carry the heat to the surface, were found to be much less sustainable. Accelerated pressure drops in 1958 and 1959, when the station was operating to capacity, were evidence that the Waiora aquifer was being depleted of water.[919] The reduction in pressure, Grindley notes, was apparent throughout the field, 'even in remote parts of the aquifer little exploited by drillholes'.[920]

The primary focus of attention in this authoritative report is on the productive capacity of the field, the ability to operate the power station at full capacity and the prospects for an additional station or stations. Environmental impacts are alluded to indirectly: if the decline in pressure continues the final result might be 'the elimination of water flow at the surface and its replacement by steaming ground and fumeroles'. Areas such as Geyser Valley, remote from the discharge region and supplied by stream water from outside, might survive but 'the few discharging springs that still remain in the Waiora Valley should disappear and be replaced by fumaroles'.[921]

Grindley had three comments to make about field management: firstly, monitoring was important and should continue; secondly, it was the availability of water, rather than heat, which was the controlling factor; thirdly there should be experimentation with aquifer recharge. He then raised the possibility that the life of the field might be prolonged by operating the Wairākei power station, not as a base load station, but as a peak load station. Reduction in the load factor 'would allow areas of the field to be shut down periodically for recovery of aquifer pressures by natural or artificial recharge'.[922] Grindley and his colleagues were aware that there were problems at Wairākei. Energy was being used more rapidly than the aquifers could recharge. Grindley, clearly but tentatively, pointed out ways in which these problems could be addressed.

There is no recognition of Maori interests in the geothermal field and no explicit concerns about environmental damage already evident or likely to happen in this study. However, the contents of the document, and the author's insights into field dynamics and management options, indicate that operations could be more sustainable and less environmentally destructive. His study suggests new operating options which should have been more fully explored given that it was known by this time that the resource was not renewable.[923]

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[919] Grindley, *The Geology, Structure, and Exploitation of the Wairakei Geothermal Field*, p 60 and, especially, figure 51, p 75 which plots cumulative discharge against maximum aquifer pressure
[920] Grindley, *The Geology, Structure, and Exploitation of the Wairakei Geothermal Field*, p 60
[921] Grindley, *The Geology, Structure, and Exploitation of the Wairakei Geothermal Field*, p 77
[922] Grindley, *The Geology, Structure, and Exploitation of the Wairakei Geothermal Field*, p 80
[923] The technical questions posed by Grindley in 1965 were taken up by Bolton, Dawson, and Dickenson and reported at a UN Symposium on the development and utilization of geothermal power, held in Pisa Italy in 1970. Compare G W Grindley, 'Wairakei Geothermal Field', *Staff of the New Zealand Geological Survey*, (1974) *Minerals of New Zealand*, DSIR Wellington, part D Geothermal, section 3.20

Allis, 1981

R G Allis, from the Geophysics Division of the DSIR, published an overview of heat flows associated with the exploitation of the Wairākei geothermal field.[924] As a scientist publishing his work in the *New Zealand Journal of Geology and Geophysics*, Allis is careful not to show bias towards those who wish to maximise electricity production in the medium or long term. Nor does he take sides with those who wish to ensure that the environment is protected from damaging exploitation. His paper is substantial, technical, and important for both audiences.[925] Allis builds on the results obtained from previous heat flow studies and when he surveys heat flows in 1978 and 1979, he provides a measure of the magnitude of heat extraction between 1952 and 1978. He estimates that 62,000 MW years of heat flowed from the field. Had the field been left untouched, he estimates the heat flow over the same period would have been 12,000 MW years.[926] Allis was also able to map areas where there had been a decline in heat flows and those where heat flows had increased and new surface features had emerged.[927] His primary task is to develop a heat flow model and provide insights for those charged with positioning wells, considering re-injection options, and planning power generation in the future. In the course of this work, Allis provides some detailed information about areas where geothermal activity has declined and areas such as the Karapiti Thermal Area where new geothermal activity has been triggered. He makes brief and passing reference to subsidence, as much as five metres, which has taken place as hydrothermal fluids have been removed.

Allis postulates two distinctive phases in the dynamics of the volcanic field from 1952 to 1980. Between 1952 and the mid 1960s, large quantities of hot water were taken from the hydrothermal reservoirs and there was insufficient replacement of water to maintain pressure. From the mid 1960s onwards, the reservoirs have been replenished with hot water inflows from outside of the production area and cold water inflows from the surface. We know from other sources, in particular Martin (1998), that major operational adjustments were made by the electricity managers in the 1960s. In the late 1950s and early 1960s, the power station at Wairākei was a major source of supply for the national grid and was used as a load power station, running close to full capacity throughout the year. Peak output was achieved in 1965 but by then it was clear that the hydrothermal reservoir was running down. Since then, Martin comments (without giving precise dates or details), 'the emphasis had shifted to managing the field to sustain existing capacity'.[928] On the basis of the evidence presented above it would appear that adjustments, along the lines suggested by Grindley, were made in the interests of maximising production, rather than the protection of the Wairākei environment.

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[924] R G Allis, 'Changes in the Heat Flow Associated with the Exploitation of Wairakei Geothermal Field, New Zealand', *New Zealand Journal of Geology and Geophysics,* vol 24, 1981, pp 1-19
[925] R W Henley, 'Wairakei Geothermal Field', in Henley, Hedenquist, and Roberts, *Guide to the Active Epithermal (Geothermal) and Precious Metal Deposits of New Zealand*. This chapter by Henley has helped us to interpret the Allis paper and see it in a wider perspective.
[926] Allis, 'Changes in the Heat Flow Associated with the Exploitation of Wairakei Geothermal Field', p 17
[927] Allis, 'Changes in the Heat Flow Associated with the Exploitation of Wairakei Geothermal Field', figure 4, p 7
[928] Martin, *People, Politics and Power Stations*, p 263

The impacts of over fifteen years of extraction at this level have had significant effects. The Wairākei geothermal field is now a geothermal field without geysers. The loss of geysers is most apparent in Geyser Valley. 'Steam-heated pools, fumaroles and steaming ground', writes Mr Allis, 'have now completely replaced the springs and geysers in the valley'.[929] The Allis paper, complete with maps, graphs, and mathematical models, confirms claimant evidence. The extraction of large amounts of water over a sustained period of time has changed the character of surface geothermal activity. Allis himself writes:

> The geysers and hot springs in Geyser Valley have been replaced by steam-heated features. In the Karapiti thermal area, at the southern end of the field, there has been a spectacular increase in thermal activity, with the appearance of large fumaroles, steaming craters, and an extensive area of steaming ground … The Karapiti area has now replaced Geyser Valley as the major tourist attraction at Wairakei field.[930]

There are also impacts further afield from the production areas. Allis shows that the Tauhara geothermal field surrounding Taupo and the Wairākei geothermal field are linked and operate as a single field. The changes which result from geothermal extraction at Wairākei in the north of the field impact on Tauhara and Taupo in the south.[931] This is particularly important for the Tauhara Hapu and the Hikuwai Confederation whose reserves and Maori land are being affected. Geyser activity at Spa Sights, on the banks of the Waikato River below Lake Taupo, became intermittent and then ceased. Hot and cold spring activity at Spa Sights continued in the 1950s and ceased around 1960.

Dame Evelyn Stokes, 1991

Dame Evelyn Stokes describes impacts from development ushered in by the construction of the power station, in these words:

> Waiora Valley, the place of health-giving waters, was bulldozed into Bore Valley. Another unique and distinctive landscape evolved, of pipe lines, well heads, flash plants and silencers, and plumes of steam rising from the engineering works. The geysers and hot pools died. The areas of hot and steaming ground shifted. Some ground subsided, up to 10 metres and more. A new thermal attraction appeared at Karapiti and someone gave it the name Craters of the Moon. The fumarole Karapiti has died, but there are other fumaroles and the occasional hydrothermal eruption to titillate the tourist and entice the scientist.[932]

Dr Christopher Bromley, 1999

Dr Christopher Bromley provided Environment Waikato with a summary overview of the environmental effects of geothermal development at Wairākei:

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[929] Allis, 'Changes in the Heat Flow Associated with the Exploitation of Wairakei Geothermal Field', p 3
[930] Allis, 'Changes in the Heat Flow Associated with the Exploitation of Wairakei Geothermal Field', p 1
[931] Allis, 'Changes in the Heat Flow Associated with the Exploitation of Wairakei Geothermal Field', figure 2 and p 3
[932] Stokes, 'Wairakei Geothermal Area', A20, p 134

> Deep pressure drawdown … during the first 20 years created extensive steam zones at about 300 m depth in both Wairakei and Tauhara fields. These changed the nature of surface thermal features. Steaming ground and fumaroles (e.g. "Craters of the Moon") replaced hot springs and geysers that previously discharged about 20,000 tonnes/day of high chloride water into the Waikato River (at "Geyser Valley" and "Spa Park").[933]

Bromley is more specific than Allis about subsidence:

> Over the past 40 years, subsidence has gradually occurred over large parts of the Wairakei-Tauhara field. The total amount has been generally less than 2m, although a localised subsidence "bowl" of almost 15 m is centred beneath the Wairakei Stream, forming a pond.[934]

Dr Charlotte Severne, 1999

Dr Charlotte Severne reaches similar conclusions with respect to degradation at Wairākei: In particular, she reminds us that:

> Contrary to popular opinion, geothermal energy is not a renewable resource. Through extraction of geothermal fluid, the geothermal field is progressively degraded. This leads to a loss of pressure, which causes subsidence of land and collapse of puia, ngawha and waiariki. In theory it would take many hundreds of years for the system to recover.[935]

She notes that extraction has caused subsidence throughout the Wairaki-Tauhara area for 40 years, and is predicted to continue into the future.

They have in some cases been forced to witness the destruction or decline of their geothermal surface manifestations on land they own through no fault of their own.

Impacts of use of geothermal fields for power generation

Ohaaki

Increasingly, from the 1970s it became evident to officials and to the public at large that environmental values were matters of national importance and needed to be taken into account. This change can be seen in relation to Ōhaaki and proposals to use this field. The Ōhaaki field posed very different technological and public policy challenges for the Ministry of Works and Development and the New Zealand Electricity Department. In the public policy context, the *Water and Soil Conservation Act 1967* and the *Town and Country Planning Act 1977* were both in position.[936] The first required applications for water rights which would, in the case of large projects,

[933] Bromley, evidence, H34, para 2.11, pp 4-5. Bromley's evidence was provided to Environment Waikato when it was considering a consent application brought by Mighty River Power.
[934] Bromley, evidence, H34, para 2.12, p 5
[935] C Severne, evidence, E7, para 17, p 4
[936] Lawless et al, 'Legal Aspects of Using Geothermal Energy', in *Geothermal Energy for New Zealand's Future*, chapter 8, pp 36-37

involve the preparation of an Environmental Impact Assessment Report.[937] The second would require attention to land use zoning and recognition that the relationships between Maori culture and traditions and ancestral lands were matters of national importance.[938]

Negotiations between the Crown, the iwi, the Maori owners of the land, and the Taupo County Council took place over an extended period of time. The site selected for the power station was immediately adjacent to Te Ōhaaki marae, to their sacred rock and to the reserves which contained urupā and a large hot pool (figure 10.13). The negotiations culminated in July 1982 with an agreement signed between the Crown and the Ngati Tahu Tribal Trust. The Crown would lease the land for 50 years, with the right of two renewals, and would proceed with geothermal development for electricity generation. In return it would protect the marae, the urupā, and the sacred places, restore the hot pool and the supply of steam to the marae.[939]

Ōhaaki was commissioned in 1988 and began electricity generation in 1989, some 25 years after Wairākei. In the lead up to construction there had been an environmental audit by the Commission for the Environment and a determination on water rights, made by the National Water and Soil Conservation Authority.[940] It would seem at first sight that the power station at Ōhaaki, built with a much higher level of resource management and planning protection, and with the benefits of three decades of experience at Wairākei, would have minimal environmental impacts. Such, however, was not the case. The evidence of Bromley, Browne, Kirkpatrick, Martin, and Stokes leads us to five conclusions, four relating to geothermal electricity development and one relating to the construction of Lake Ōhākuri for hydro electric development. Lake Ōhākuri comes first in chronological sequence.

(i) Lake Ōhākuri and its impact at Ohaaki

Historically, there were alkaline hot springs and bathing pools at Ohaaki. Before development Ohaaki had several mud pools heated by steam; hot pools isolated from ground water by a layer of mineralised earth, also heated by steam; and hot springs producing chloride water and depositing sinter. The creation of Lake Ōhākuri for electricity generating purposes, in 1961 and 1962, impacted not only on Ōrākei Kōrako further downstream, but also on portions of the Ōhaaki geothermal field within the valley of the Waikato River. The waters of the lake extended upstream as far as Ōhaaki and flooded the cave of Makawe, the protective taniwha of the

[937] This requirement was very much on the minds of government planners and local residents in the wake of the environmental conflicts surrounding the construction of the Huntly thermo-electric power station. Plans to use large quantities of Waikato river water for cooling were challenged, the EIA confirmed that problems would arise and approvals to discharge heated water into the river were not granted. Martin, *People, Politics and Power Stations*, p 264
[938] Town and Country Planning Act 1977, s 3(1) (g)
[939] Martin, *People, Politics and Power Stations*, p 265
[940] R Kirkpatrick, K Belshaw, and J Campbell, 'Land Based Cultural Resources and Waterways and Environmental Impacts (Rotorua, Taupo & Kaingaroa) 1840 – 2000', Document E3, p 345

papakainga.[941] Other springs, bathing places, wāhi taonga, and urupā were also inundated. Among them was Te Apiti, an alum hot spring, and a paruparu place nearby which provided dark mud used for dying flax fibre.[942]

(ii) Exploratory drilling and site testing 1965-1986 at Ohaaki

The Ohaaki Ngawha (boiling pool) is the dominant remaining natural feature of the system. Before the area was developed, the large Ohaaki Ngawha with its clear, pale, turquoise-blue water and extensive white sinter terrace was once described as 'the most handsome pool in the whole thermal area'.

Exploratory drilling from 1965 onwards, including a phase of large scale testing between 1967 and 1972, had significant environmental impacts. In the case of the Ōhaaki Ngawha, close to Te Ōhaaki marae, these appear to be irreversible. Bulldozers, engaged as part of the drilling exercise, damaged a number of smaller surface features.[943] Browne, writing for an international audience in 1986, noted that 44 deep wells had been drilled, and added that 25 of these would be used for power production and 8 for the reinjection of geothermal fluids back into the geothermal system.[944]

When large scale testing began in 1967 the water level in the Ōhaaki Ngawha fell dramatically. This caused the partial collapse of the delicate sinter edge and the white silica formations weathered to a dull dirty grey. Maria Johnston remembers that forty truckloads of concrete were poured into the pool in an effort to block the vents but the ngawha did not recover.[945] The damage had been done and more recent attempts to solve the problem by reinjecting wastewater into the ngawha have not improved it. Kirkpatrick provided the Tribunal with colour photographs of the pool, the injection device, and the waste water flows, taken in July 2004. He then summed up, saying:

> The ngawha is now wholly artificial and concentrations of chemicals, designed to keep the injection pipes clean, make it impossible to utilize.[946]

According to Environment Waikato, the sinter terrace is now cracking and has plants growing through it.[947] The Ngawha is now fed by geothermal bore water, which contains chemicals added to prevent silica depositing in the bore pipes. According to

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[941] Stokes, *Legacy of Ngatoroirangi*, A56, p 116, and figure 16 p 114
[942] Kaumātua evidence given to Stokes when she carried out field research in the 1960s or 1970s. Stokes, *Legacy of Ngatoroirangi*, A56, p 116
[943] See Stokes, *Legacy of Ngatoroirangi*, A56, p 115. When she carried out field work in the 1970s, with kaumātua interviews and field mapping, 'it was very difficult to reconstruct the original sites'.
[944] P R L Browne, 'Broadlands Geothermal Field', in Henley, Hedenquist, and Roberts, *Guide to the Active Epithermal (Geothermal) Systems and Precious Metal Deposits of New Zealand*, chapter 5
[945] Reported by Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources and Waterways and Environmental Impacts', E3, p 356
[946] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources and Waterways and Environmental Impacts', E3, section 8.5.3, and figures 8.11-8.14 inclusive, pp 355-356, 357-359
[947] Environment Waikato, 'Ohaaki', www.ew.govt.nz/enviroinfo/geothermal/fieldsmap/ohaaki.htm, accessed 12 July 2007

Environment Waikato, most of the other flowing surface features at Ohaaki have dried up because of the extraction of geothermal fluid.[948]

(iii) Project design and site selection for Ohaaki

The Maori owners have suffered from inappropriate site selection. Planning for the design and location of the Ōhaaki power station was carried out in the 1960s and 1970s.[949] On the basis of evidence before us, it was done with limited consultation with Maori, with limited consideration of environmental values, and little, if any, recognition of Maori cultural and spiritual values. Given the configuration of marae reserve, ngawha reserve, wāhi tapu reserve, and urupā reserve at Te Ōhaaki, it was inevitable that any adverse environmental effects would be felt primarily by Maori and most particularly by those who affiliated to Te Ōhaaki marae.[950] In the event, there have been impacts and it is Te Ōhaaki marae which is most affected.

(iv) Environmental impacts at Ohaaki since 1988

Dr Christopher Bromley, in two separate reports, has noted that geothermal production since 1989 has caused a drop in surface geothermal activity[951] and has presented map evidence which shows increases in ground temperatures in the vicinity of Te Ōhaaki marae.[952] Kirkpatrick has mapped and tabulated the Bromley evidence for the field as a whole and combined this with his own field visits to the Ōhaaki marae locality. A number of photographs, taken on these field visits, are reproduced in Kirkpatrick et al Document E3. From these sources we identify the following environmental impacts:

- the destruction of the Ōhaaki Ngawha, close to Te Ōhaaki marae (we have noted above that major damage had been done during the drilling programme, in advance of the lease agreement between Ngāti Tahu Tribal Trust and Crown)
- a number (more than 12 in all) of warm pools have dried up
- fumaroles near the main ngawha and sinter terraces are no longer active
- urupā show signs of ground disturbance and, in some cases, graves have been exposed
- vegetation changes, including the spread of wilding pines and shifts in the location of thermo-tolerant vegetation

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[948] Environment Waikato, 'Ohaaki'

[949] Martin, *People, Politics and Power Stations*, pp 263-265, identifies two periods when the most significant planning was done: the first between 1965 and 1968 the second between 1974 and 1977

[950] For detailed maps of the features listed see Stokes, *Legacy of Ngatoroirangi*, A56, figures 16, 17; and Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources and Waterways and Environmental Impacts', E3, figures 8.6, 8.10, pp 341, 354

[951] Bromley, evidence, H34, para 2.15, p 6

[952] T Hunt and C Bromley, 'Some Environmental Changes Resulting from Development of Ohaki Geothermal Field, New Zealand', *Proceedings World Geothermal Congress*, Kyushu, 2000. Material from this paper is reported by Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources and Waterways and Environmental Impacts', E3, especially figure 8.10 and tables 8.1, 8.2, pp 354, 355, 356

- noise and visual pollution, especially in the vicinity of Te Ōhaaki marae where there are 20 bores
- land, leased by Ngāti Tahu to NZED and its successors Electricorp and Contact Energy, in the area between power station and marae, shows signs of being derelict, degenerated, and in some cases overgrown with wilding pines or littered with construction debris

(v) Ground subsidence at Ohaaki

The most serious and problematic environmental impacts are those relating to subsidence. The engineers who planned the Ōhaaki scheme, and the authorities who granted water rights and geothermal licence, were aware of two potential environmental problems. On the one hand there was the problem of ground subsidence, already evident at the Wairākei geothermal field. Alongside that were the problems of river pollution, created by the thermal and chemical discharges from the Wairākei scheme, which would be added to if the geothermal effluent from Ōhaaki was also discharged into the Waikato River. The final design schemes, as incorporated into the water rights application, addressed both problems. The scheme would include a cooling tower, and a large proportion of the geothermal effluent would be injected back into the geothermal field.

The theory was attractive but the practical outcome was far from satisfactory. Significant subsidence, up to and exceeding 3 metres, is occurring on the western side of the field in the vicinity of the power station, Te Ōhaaki marae, the urupā, the sacred stone, and the Waikato River valley. Dr Bromley, from the Institute of Geological and Nuclear Sciences, has prepared a detailed contour map showing total subsidence in the Ōhaaki power station area between 1979 and 2000. Bromley explained to the relevant consent authority of Environment Waikato that:

> Production has also caused localised subsidence near the Ohaaki Marae at a rate of around 0.4m/year. This is having a significant effect on the nearby Waikato River bank, threatening to inundate areas of adjacent farmland during periods of high river flow.[953]

Contact Energy, successor to NZED and Electricorp and the current holder of the lease with its contractual obligations to Ngāti Tahu, has recognised the problems created by the subsidence. It commissioned a series of projections of maximum water levels for 2003, 2010, and 2020 and presented these in the form of colour maps. The visual impact is dramatic.[954] According to this evidence, the marae at Te Ōhaaki will be surrounded by water in 2010 and inundated in 2020. The power producer has offered to fund the relocation of the marae or build a massive embankment to protect the marae and the Wāhi Tapu Reserve. The large sacred rock, 130 to 230 tons in weight, would be inundated if the former option is taken up or buried under the embankment if the latter is followed.

[953] Bromley, evidence, H34, para 2.16, p 6
[954] The maps are reproduced by Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources and Waterways and Environmental Impacts', E3, figures 8.19-8.21, pp 365-367

Kirkpatrick et al point to evidence suggesting that the certainty of subsidence was known to Crown parties at the point when the Commission for the Environment presented an audit in 1977 and the Crown negotiated its lease agreement with Ngāti Tahu in 1981 and 1982. We have not been able to refute or verify this serious claim. We are, however, in substantial agreement with the conclusion reached by the University of Waikato research team:

> What the Crown hoped to be a substantial, sustainable geothermal field has proved to be anything but. There are questions about the medium-term sustainability of any geothermal field. Whatever happens, it appears that Ngati Tahu have lost a very valuable resource.[955]

We note the Crown's advice regarding the payment to the Ngati Tahu Tribal Trust in respect of the impacts from power generation. We trust that the Crown is fully appraised of the actual and true cost of the remedial works that must be taken in relation to the damage on this traditional papakainga land.

Impacts of use of geothermal fields for power generation

Kawerau

During the late 1940s, the Kāingaroa forests, planted by the State during the previous three decades, had reached maturity and were ready to be cut. Government was about to join forces with private enterprise to create the wood processing facilities needed. The Tasman Pulp and Paper Company was formed to build and operate a large scale integrated mill which would process logs and produce pulp, paper, timber, cardboard, and fibreboard.[956]

In 1951 and 1952 DSIR scientists carried out geological and geophysical surveys to establish the geothermal energy capacity of the Kawerau geothermal field.[957] The results confirmed the potential of the field for commercial development and were reported to the Geothermal Energy Committee. This was not the time to build a second geothermal electric power station, but another commercial option was close at hand. Geothermal energy would be used to operate the mill, dry the products which were produced, and generate power for the new town which would be built. The Tasman mill was thus located at Kawerau, on the geothermal field and between the forests at Kāingaroa and the port at Mount Maunganui. Government provided its share of the venture capital and enabled the process by designing and building the new town, constructing roads and railway and passing legislation to ensure that production could commence with a minimum of delay. The joint venture partners intended to run

[955] Kirkpatrick, Belshaw, and Campbell, 'Land Based Cultural Resources and Waterways and Environmental Impacts', E3, p 380
[956] Lawless et al, *Geothermal Energy for New Zealand's Future,* p 17
[957] Healy, J (1974) "Kawerau Geothermal Field" in New Zealand Geological Survey (1974) *Minerals of New Zealand*, part D Geothermal, section 3.3

the mill on natural steam.[958] This proposal did not fit under the rubric of the Geothermal Steam Act 1952 because that Act was confined to the use of the resource for electrical generation. We note the consternation of the Commissioner of Works in his advice to the Minister of Works regarding the determination of the Maori owners to secure an adequate price for granting access rights to the Crown to the underlying geothermal resource, should the bores have proven successful. On 23 July 1953, the Commissioner of Works advised the Minister of Works as follows regarding the situation at Te Teko (Kawerau):

> You are aware of the impasse which has arisen in regard to the acquisition of suitable areas at Te Teko for the production of geothermal steam for the proposed pulp and paper mill. The right has been secured to enter on Maori-owned property for the purpose of sinking the necessary bores but the owners have so far declined to reach any agreement as to the price of the land should the bores prove successful.
>
> Various prices have been suggested even up to £1.2000 an acre. As it stands the land is worth very little, being scrub and fern covered and possibly used occasionally for grazing.
>
> It is felt that if we enter the property and put bores down, if these prove to be successful a very heavy price will be demanded for the land.
>
> The matter has been referred to the Solicitor-General's Office and the information we have to date indicates that the Crown has no right to acquire this land for any other purpose than the generation of electricity [this was due to the limited wording of the Geothermal Steam Act 1952] and even in this latter case the question of compensation would have to be decided by the appropriate Court. The indication from the Solicitor-General's Office is that the Court would be likely to take a liberal view of the valuate of the land…
>
> Consideration should, I think, now be given to legislation extending the provisions of the Geothermal Act to give the State protection in regard to the utilisation of this steam in the national interest and on a basis wider than the utilisation of this asset for the production of electricity.[959]

It was not long after this that the Geothermal Energy Act 1953 was enacted. The Tasman Pulp and Paper Company Enabling Act 1954 was also passed into law. Among its provisions, important in the present context, were clauses which freed the company from the restraints of the river pollution laws and allowed it to dispose of waste from the mill and the geothermal field into local rivers and lakes.[960] The Crown was a partner in the joint venture from 1952 to 1985, when it sold its interest. The company is currently operated by Norske Skög.

Ngati Rangitihi claimants told us about the impact of the Mill on the geothermal taonga within the vicinity of Kawerau. David Potter for Ngati Rangitihi says that the

[958] Boast, 'The Legal Framework for Geothermal Resources', A21, p 64
[959] Electricity Dept file 1, 2/0/22/3, Pt II, as quoted in Boast, 'The Legal Framework for Geothermal Resources', A21, pp 64-65
[960] Kirkpatrick in H37, p 292

Onepu Springs have declined and that this has had a major impact on Ngati Rangitihi's relationship with the resource.

> Bathing in the geothermal waters of the Onepu springs have long been recognised as being very therapeutic by Ngati Rangitihi. For this reason many of our tribe not only travelled there regularly, but also occupied this area on a semi-permanent basis for centuries. Our Chief Tionga had a particular love for bathing here. Many members of the Tangihia family made regular trips here up to 1953 when suddenly the geothermal activity declined, which largely reduced the attractiveness of this area. This decline in geothermal activity affected large areas where the Town of Kawerau is built today. ...
>
> Today the Onepu Springs are spoiled and nothing like what I remembered them to be, mostly due to the reduced geothermal activity....[961]

We do not have for Kawerau, the pool of scientific evidence which is available for Wairakei and Rotorua. The observations made and reported by Mr Potter are, however, consistent with the evidence of impacts at other geothermal sites. They are also consistent with the views of Stokes. Stokes recorded that the significant geothermal resources at Kawerau have been modified by the development of the pulp and paper mill and geothermal steam extraction.[962]

Impacts of Crown omissions in failing to adequately manage land use, residential and commercial use

The final category of impacts relates to Crown omissions in failing to adequately manage land use to protect the resources, and the utilisation of geothermal resources, and certain fields for residential and commercial purposes. In considering this issue we canvass some of the impacts identified by Environment Waikato.

Tokaanu-Waihi-Hipaua

At Tokaanu and Waihi-Hipaua, many of the hot pools and fumaroles continue to be used frequently by the local Maori people for bathing, cooking, medical, and ceremonial uses. There are small takes for bathing and heating for a hotel, motels, and domestic use.

According to Dr Severne the main impacts on the geothermal resources and the field are from raised lake levels and test drilling. She advised that in 1942 four shallow bores to a maximum depth of 107m were drilled in Tokaanu to assess the value of the unusually high boron concentration in this field.[963] These were the first geothermal

[961] Potter, evidence, B3, pp 22-23
[962] Stokes, *Legacy of Ngatoroirangi,* A56, p 203
[963] C Severne, evidence, E7, p 7

wells drilled outside the Rotorua area. The wells were grouted in the 1960s. However they are not stable and pose a danger.[964] Dr Severne notes in relation to one bore:

> Healy's bore remains a concern as it has broken through and has been discharging reservoir fluids into a nearby stream for several years. This mismanagement should be remedied as it is wasteful and the system is being run down as a result.[965]

In other words, nothing has been done about these bores and one has been left discharging geothermal fluid. According to the Environment Waikato's website this bore loses geothermal fluid at a rate equal to the sum of all other takes. As a result, Environment Waikato believes that large-scale energy extraction has the potential to exacerbate, damage, or destroy the remaining geothermal features. It may also cause heating of the ground and hydrothermal eruptions in populated areas, possibly resulting in ground subsidence causing the settlements of Tokaanu and Waihi to become flooded by Lake Taupo.

In addition to the above problems, Dr Severne gave evidence that the presence of the Tokaanu power station poses difficulties for the development of the Tokaanu field for power generation. The effect of the extraction could cause the Tokaanu power station to sink and crack, making it unlikely that any proposed development would get past the resource consent process.[966] These impacts, along with the raised lake levels and the bore spillage rate, have contributed to a situation where the tangata whenua at Tokaanu-Waihi-Hipaua are unable to fully utilise and develop their geothermal resources and their field. The Crown has failed to take direct action to cap or cause its successors to cap this bore.

Rotorua, Taupo and Kawerau

The urban areas of Rotorua and Taupo are both built over geothermal fields. Energy from these has been used for heating homes and businesses, and hot water has been used by residents, hotels, motels, and hospitals for baths, pools, and spas. We turn now to discuss the impact of the Crown's failure to provide an adequate legislative regime to prevent excessive exploitation and use of the Rotorua Geothermal System with the resulting environmental consequences for geysers and other surface manifestations at Whakarewarewa.

Rotorua

The urban areas of Rotorua are built over the Rotorua and Rotorua East Geothermal fields. There is no evidence to suggest that energy from these fields had not been sustainably used by Maori pre-colonisation and for most of the 19th Century. Since colonisation, geothermal energy from these fields has been used for heating homes

[964] C Severne, evidence, E7, p 7
[965] C Severne, evidence, E7, p 7
[966] C Severne, evidence, E7, p 7

and businesses and hot water has been used by residents, hotels, motels, and hospitals for baths, pools, and spas. The Rotorua Geothermal Regional Plan discusses these uses:

> Allis and Lumb (1992) and Gordon, Scott and Mroczek (2005) enable us to identify four periods of domestic and commercial use at Rotorua.[967] In the first period, from the 1880s to the 1940s, the uses were customary and sustainable and did not impact on the natural energy level of the geothermal field. In addition to customary use by Māori, private residents, tourist hotels and government agencies including hospital and gardens took advantage of the resource for heating or for pool and spa amenities. Initially they drew on surface resources but increasingly, from the 1920s onwards, they began to drill wells.[968]

The extent of use increased sharply in the second period, from the 1940s to the early 1980s. Rotorua, as the urban centre for a region where agriculture, forestry and tourism were all growing, expanded rapidly. From the 1950s onwards, the Government attempted an active role in regulating the resource. In addition to the general authority the Crown had vested in itself with the Geothermal Energy Act 1953, it also delegated powers under the Rotorua City Geothermal Empowering Act 1967 as discussed above. Many wells in Rotorua were, however, outside of any controls since the regime did not apply to domestic wells which were less than 61 metres deep or which released water at temperatures less than 70ºC. The Crown promoted the use of geothermal energy as a convenient and cost effective form of power for a wide range of uses.[969] The number of wells and the quantity of heat and fluid extracted for urban uses increased rapidly in Rotorua. Gordon, Scott, and Mroczek look back on this period of Rotorua history and comment that:

> many bores were drilled and development of the field progressed in an unplanned way with no regard for the sustainability of the resource or protection of surface features.[970]

In other words, this period, from 1950 to 1986, is characterised by unsustainable extraction. The Crown also took no adequate steps to protect the Rotorua geothermal resources and field from excessive residential and commercial use, or to monitor the extent and impact of such use.

By the end of the 1970s and the early 1980s there was widespread public concern, by Maori and European alike, that geothermal activity at Whakarewarewa and Ohinemutu – Tarewa was in decline. The Pohutu, Te Hora, Waikite and Papakura

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[967] Allis and Lumb (eds), 'The Rotorua Geothermal Field, New Zealand: its Setting, Hydrology and Response to Exploitation', in *Geothermics : Proceedings of the United Nations Symposium on the Development and Utilization of Geothermal Resources*, Pisa, 22 September-1 October 1970, vol 21, nos 1 and 2, pp 7-21; and D A Gordon, B J Scott, and E K Mroczek, *Rotorua Geothermal Field Management Monitoring Update: 2005* (Whakatane: Environment Bay of Plenty, 2005), no 12

[968] R B Glover, Rotorua Geothermal Field', in Henley, Hedenquist, and Roberts, *Guide to the Active Epithermal (Geothermal) Systems and Precious Metal Deposits of New Zealand*, chapter 10, p 111

[969] See for example Grange, *Geothermal Steam for Power in New Zealand*; and Lawless et al, *Geothermal Energy for New Zealand's Future,* p 38

[970] Gordon, Scott, and Mroczek, *Rotorua Geothermal Field Management Monitoring Update*, p 3

geysers failed and a number of hot springs, including Rachel Spring, Ororea, and Kuirau Lake, ceased to flow.[971] Government set up a monitoring programme in 1982 which confirmed that the field was being over utilised and that much of the fluid being drawn off was being wasted.[972]

An inter-agency Ministerial task force involving the Department of Scientific and Industrial Research, Ministry of Works and Development, and the Ministry of Energy was set up in 1983 and the Commission for the Environment was asked to report on the management options for the geothermal field.[973] Neither Te Arawa Maori Trust Board nor Whakarewarewa Maori were included in the Task Force and there is no reference to consultation with Maori in either the Task Force or the Commission for the Environment reports.

The Task Force was unanimous in its recommendations that bores should be closed. As a result, the powers of the local Council to issue licenses were revoked.[974] In October 1986 the minister implemented the decisions to ensure (a) that all wells within 1.5km of Pohutu geyser in Whakarewarewa should be closed by December 1986 with some exceptions; (b) that all Government agencies in Rotorua which were users of geothermal energy from bores beyond the 1.5 kilometre radius of Pohutu geyser be required to convert to alternative fuels as soon as possible; and (c) that all bores within the Rotorua metropolitan area be licensed in terms of the Geothermal Energy Act 1953 by April 1987 and a royalty imposed on their use.[975] Regulations were promulgated – the Geothermal Energy Regulations 1961 Amendment No 2 1987. Shallow wells 61 metres or less were not initially included but a Ministerial directive gazetted in February 1987 brought them into the schema and they too required licences.[976] Thus, the third period from 1986 to 1992 of geothermal resource use in Rotorua township is marked by bore closure and recovery.

It is clear in the evidence before the Tribunal that the Crown moved late to protect the geothermal taonga at Rotorua. This failure seriously affected the ability of Rotorua Maori at Whakarewarewa, Ōhinemutu, Kuirau, and Tarewa to use their resources. Our view of the situation is strengthened by reference to the decision of the High Court in 1987, which, when hearing challenges from the Rotorua Geothermal Users Association to the Minister's decision and the regulations closing bores in 1987, commented on the City Council's management in the following terms:

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[971] Allis and Lumb, in *Geothermics*, vol 21, nos 1 and 2, p 20. See also R B Glover, 'Rotorua Geothermal Field', in Henley, Hedenquist, and Roberts, *Guide to the Active Epithermal (Geothermal) Systems and Precious Metal Deposits of New Zealand*, chapter 10, p 112

[972] S Drew, *The Rotorua Geothermal Field: a Report of the Rotorua Geothermal Monitoring Programme and Task Force 1982-1985* (Wellington: Ministry of Energy, 1985), pp 4, 23, 44. Gordon, Scott, and Mroczek, *Rotorua Geothermal Field Management Monitoring Update*, p 3

[973] P Gresham, O Cox, and C Chung, *Management of Geothermal Rresources: Issues and Options* (Wellington: Commission for the Environment, 1983)

[974] 'The Rotorua District Council Lakeshore, Lakebed, Riverbed and Waters Control Order 1986', *NZ Gazette*, 2 October 1986, no 155, p 4134

[975] Cooney, EBOP Rotorua Geothermal Plan, I22, p 34

[976] NZ Gazette, 16 Feb 1989. Domestic wells less than 61 metres deep and those which supplied water cooler than 70^0 had been outside of the previous legislation

> The administration of the resource by the Rotorua District Council has been a curious exercise of its statutory power. On the evidence before me it seems that they have exercised control over the sinking of bores and the issuing of permits in respect thereof, focusing largely on the engineering aspects, but have made no attempt to regulate or control the use of the resource itself by any of the normal methods of so doing. They have, it seems, issued no licences in respect of the use of energy and notwithstanding evidence of a declining resource and its consequences on the physical features of Rotorua have made no charges on an annual or any other basis for the use of the energy that was being consumed. Whilst the Court is in no final position to express any view of the course of action taken by the District Council, it is not at all surprised that its performance has been the subject of criticism. It is important to remember in this case, there was emerging over at least the last six years an overwhelming body of opinion that the draw off of energy in the Rotorua City was having a significant effect on the performance of geysers and springs in the Whakarewarewa field.[977]

What this decision tells us is that the Crown must act quickly to protect the resource for conservation purposes. In the case of Rotorua it did not, but rather delayed despite Maori concerns and despite the grave consequences for Maori. Miki Raana, for example, told us that all three communal bathing places within Ohinemutu had to be closed 'due to principally the lack of hot water which not [sic] doubt arose from the over use of the Geothermal resource within the Rotorua township.'[978] And Mrs Douglas (kuia of Ngati Whakaue) from Ohinemutu stated:

> I can also remember also [sic] the large natural hot water pools near what we call the Waikite pool was always full of hot water and that on one occasion my father fell into it and was scolded [sic] from the waist down. … the level and temperature of the water was hot enough to scold [sic] a man. I can remember that in the late 1960's the level of water in this pool had started to recede…. By the 1990's the pool had completely dried up and there is now only manuka growing there in its place. I feel really sad that this has happened to this pool as it was one of the pools that we used to get our hot water for washing and cleaning right throughout my childhood. … Again it is sad to see these pools dry up. I firmly believe that as a result of the number of bores drilled to access the geothermal resource due to the tourism industry that this has had a devastating effect on the ngawha, puia and waiariki of Ngati Whakaue and in particular the Ohinemutu area. I cannot see how the controlled use by Ngati Whakaue of these taonga could have caused such a decline in the level and temperature of the pools. When I walk pass [sic] those areas that I can remember as a child where the pools were still full I am saddened that the mauri of those pools has died, and how they used to sustain our people.[979]

Mrs Douglas identified a tapu cave or ana (within which there was a hot pool used for acts of utu), a lime pool used as a communal pool and other pools that had also dried up.[980]

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[977] *Rotorua Geothermal Users Association v Minister of Energy (*1987) (Unpublished CP 543/86, High Court, Heron J) pp 4-5
[978] M Raana, evidence, F 62, p 3
[979] M Douglas, evidence, F 63, pp 3, 4
[980] M Douglas, evidence, F 63, pp 3-4

We note that we can not be certain that these events occurred due to the strain on the resource, but the observations of these witnesses is consistent with what we know was happening with the resouerce generally at this time.

We should also note that the Crown did finally act. The decision it took in the 1980s to close bores within 1.5 kilometers of the Pohutu geyser, in the Whakarewarewa Valley, led to the recovery of the resource. The closure of production wells within the 1.5 km exclusion zone was mandatory and a management zone was set up for the remaining portions of the urban area, designated in Maps 20.14 and 20.15 as the geothermal field indicative area. Two mechanisms were used to reduce the number of wells and reduce the adverse impacts: rentals were charged for the use of geothermal energy and rebates were given to those who conformed to a code of practice and re-injected the fluids back into the geothermal field.[981] Closure of wells was progressive from 1986 onwards. Primary responsibility for planning, monitoring, and implementing resource management procedures in relation to the Rotorua Geothermal Field was given in the late 1980s to the Bay of Plenty Catchment Commission as the Regional Water Board under the Water and Soil Conservation Act 1967. It passed to Environment Bay of Plenty when the Resource Management Act 1991 became operational.[982] As a result of measures taken during this period, improvements were apparent by the time Cave, Lumb, and Clelland wrote their report in 1993.[983] Pohutu geyser was active and Rachel Springs had resumed its overflows.[984] Monitoring continues on a regular basis and the results are published annually by Environment Bay of Plenty.[985] In their Rotorua Geothermal Regional Plan they note that the field is stable at the current level of extraction.[986]

The Crown initiatives to restore the stability of the geothermal field through bore closures and re-injection, while late, were successful. The net withdrawal of geothermal fluid from the field was reduced from 29,000 tonnes/day in 1985 to 4,400 tonnes/day in 1992 and as a result the aquifer levels stabilised.[987] All this confirms that where there is a failure of delegated management, as occurred in Rotorua, then it is irrefutable, given the vulnerability of the resources and the multiple parties affected, that the Crown must make appropriate decisions such as the above leading to the closure of bores. That is consistent with its Article I powers. It has the right to do so in terms of the Treaty. However, we do not see how this result assists the Crown's next

[981] M P Cave, J T Lumb, and L Clelland, *Geothermal Resources of New Zealand*, Resource Information Report number 8, (Wellington: Energy and Resources Division, Ministry of Commerce, 1993), pp 24-25
[982] A management plan for the field was prepared by the Bay of Plenty Catchment Commission, with the encouragement of the Crown, but challenged in the courts because it had not been authorized by statute. The plan did not become operational but the experience gained was made available to Environment Bay of Plenty after the RMA took effect.
[983] Cave, Lumb, and Clelland, *Geothermal Resources of New Zealand*, p 25
[984] Allis and Lumb, in *Geothermics*, vol 21, nos 1 and 2, pp 21-22
[985] See, for example, Gordon, Scott, and Mroczek, *Rotorua Geothermal Field Management Monitoring Update*, p 3
[986] Cooney, EBOP Rotorua Geothermal Plan, I22, p 56
[987] Allis and Lumb, in *Geothermics*, vol 21, nos 1 and 2, p 22; E Bradford, 'Pressure Changes in Rotorua Geothermal Aquifer, 1982-1990', in *Geothermics*, vol 21, nos 1 and 2, 1992, pp 231-248; and Cooney, EBOP Rotorua Geothermal Plan, I22, section 9.3, p 56

contention, namely that this is a type of decision that only central government, or a regional council operating under delegated powers, would be capable of efficiently taking. If it is good enough for the Crown to delegate some management responsibility as it has done to Regional Councils, then Maori can and should be involved.

As the claimants point out, they raised concerns regarding the resource early. They were not successful in receiving assistance and their own attempts to care for the resource were being undermined in a manner that threatened the continued use of the resource that they possessed or owned. In this respect we note the evidence of the claimants that they clearly blame the state of their geothermal resources at Ohinemutu on previous Crown inaction. To end this section on the effects on the claimants, we refer to Miki Raana and Hamilton Pihopa Kingi who told us:

> M Raana: In 1953 the Crown used the Geothermal Energy Act to negate the private property rights of Maori. This was done without consultation with Maori or their consent. In 1967 the Rotorua Geothermal Energy Empowering Act was passed and enabled the then County Council to make provisions for the control of the tapping and use of geothermal energy in the city of Rotorua. This allowed the Council to have the sole power to allocate the use and utilisation of the geothermal resource. This in effect took the mana of Ngati Whakaue away as the custodian and kaitiaki of the natural geothermal resource in the Rotorua area.[988] … All of these Acts that have been passed by the Crown have had a detrimental effect on the Rotorua people, particularly those of Ngati Whakaue descent. As I have stated earlier I was born and bred in Ohinemutu and the effect that the Crown has had on this area has been marked. There have been a number of pools that I can remember as a young man that were once filled with hot water that have since dried up. I can only put this down to the number of bores that have been issued by the Council over the years particularly for hotels and motels and the tourism industry. The use by Ngati Whakaue of the Geothermal resource has not changed but the effects of overuse elsewhere has seen a decline in the resource available.[989]
>
> H P Kingi: The resource has apparently rekindled itself. The crown will no doubt say its decision from the 1980s was justified. Ngati Whakaue's use we have always believed was based on sensible and good controlled use as our communal ways ensured this happened. Therefore in a way Ngati Whakaue's position has been justified.
>
> Be that as it may there is no resolution to the central argument of ownership. The geothermal in all its manifestations has always been part of our history from the time of its discovery shortly after the arrival of the Te Arawa waka until now. In the future it will always be part of our core and therefore the Crown should readdress this issue to ensure that the resource is as much ours as it is that of the wider community.[990]

Taupo

We touched on the impacts of the Wairakei power generation extraction in terms of the Wairakei-Tauhara field closer to Taupo, which include possible subsidence near the Onekeneke Valley. We have also touched on the impacts associated with the

[988] M Raana, evidence F62, p 3
[989] M Raana, evidence F62, p 4
[990] H P Kingi, evidence, F66, p4

raising of Lake Taupo. The Tauhara hapu claimants have noted impacts on the flow and temperature of the Onekeneke Stream. The stream was once used at Waipahihi as a hot water supply and for bathing, washing, and cooking. A number of witnesses spoke of the impacts as follows:

> The reserve was based around the Onekenke Stream [sic], which was always a very good supply of hot water, and used for bathing, washing, and even cooking. The drilling of the source by the Taupo Thermal Park (formally De Bretts) has lowered the water flow significantly, and has made the stram [sic] just luke warm, instead of hot like it used to be. This is a real loss of one of our taonga. The people at the baths are good to us and sometimes provide sponsorship and give free entry to the trustees of our marae. However it is no kind of compensation for this loss.[991]

> At the source of the Onekeneke stream, there are a series of black terraces, which used to be a striking visual feature. Nowadays they are blotted out from sight because of the Taupo Hot Springs development. This is a tourist facility leased by pakeha from DOC and offering spa & recreational water activities. … The heat from the spring has been dissipated by the thermal development. As a result, I have learnt to be active in the protection of Taonga prior to the development of any of the Tauhara geothermal resource.[992]

These views demonstrate the concern of the claimants regarding their taonga. The result at Waipahihi, as described by Emily Rameka, is that the Onekeneke Stream is now 'a tepid polluted trickle'.[993]

The reasons for the degradation relate to a number of sources. We have already mentioned above the possible impacts from Wairakei power station and the possible impacts from the raising of Lake Taupo which may have impacted on the water-table, thus affecting the Tauhara field. Dr Severne also told us that when she last saw the spring source for the Onekeneke Stream in 2000 it was located within a grazed paddock, a source of pollution.[994] Added to this, in her expert opinion, ongoing stormwater drainage into the Onekeneke valley has had a significant impact on Onekeneke Stream. She states:

> I consider that ongoing storm water drainage into the valley has had a significant impact on Onekeneke, turning it from a silicified channel fed by seeps along its length into a valley filled with pumice from the untreated storm water where seeps no longer enter the main channel. This has resulted in the impacts spoken of in evidence by the kuia from Waipahihi: the Onekeneke Stream has significantly decreased temperatures, the flow rate has decreased, the valley is overgrown, and for the large part the water in the Onekeneke Stream is bathing water overflow from the De Bretts Thermal Resort and therefore potentially unhygienic.
>
> I have seen part of the remnant black terraces at Onekeneke spoken of by Jocelyn Rameka. They are located downstream of De Bretts Thermal Resort (50m below a large storm water pipe). In 1998 I dug beneath the sediment that has buried the black terraces. The sedimentation

[991] P Clarke, evidence, D13, para 6.17.1, pp 16-17
[992] J Rameka, evidence, D25, paras 7-8
[993] E Rameka, evidence, D26, para 17, p 5
[994] C Severne, evidence, E7, p 6

> is caused by untreated stormwater discharge through Taupo District Council stormwater structures.[995]

As this illustrates, there could be a number of land use issues contributing to the decline of the Onekeneke Stream. We have much sympathy with Mr Wall when he stated:

> I agree with the other witnesses as to the importance of water and geothermal resources to our people, and as to the fact that we were the kaitiaki and owners of those resources. … these interests have been eroded without any real consultation with, or agreement from ourselves.[996]

This is really the point of this evidence. Maori, through various actions and omissions of the Crown, have been unable to protect their geothermal resources and fields and the RMA legislation prevents them being able to exercise rangatiratanga over them.

Kawerau

At Kawerau the focus is on land use for waste disposal and its impact on the thermal resources associated with Lake Rotoitipaku, and the geothermal spring Te Wai U o Tuwharetoa. There were impacts on Rotoitipaku, cultural and natural, beginning in the 1850s when sulphur mining took place, continuing into 1886 when Mt Tarawera erupted and deposited large quantities of pumice which found its way into rivers and lakes. There were more human interventions in the 1910s when the Crown initiated drainage and river control schemes.[997] As a result the lake had been reasonably modified by the 1950s, but it was far from destroyed. The real Rotoitipaku story begins in the 1950s when the Crown decided to locate the major Tasman Pulp and Paper mill at Kawerau.[998] Kirkpatrick, Belshaw, and Campbell summarise:

> At its outset the mill was given special dispensation to bypass the existing (and relatively weak) river pollution laws through the Tasman Pulp and Paper Company Enabling Act, 1954. In the mid 1960s restrictions were placed on the mill disposing of solid waste into the Tarawera River …[999]

The impacts of pollution were becoming important policy concern issues long before this critical period. The Crown's actions can, thereby, be measured against what was being done at the time. In 1937 the Crown set up an inter-departmental committee which examined the problems of water pollution and set these in the context of industrialisation and social organisation. A fact finding survey was carried out after World War II and the committee reported in 1952.[1000] The Crown passed the Waters

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[995] C Severne, evidence, E7, p 6
[996] T Wall, evidence, D18, paras 8-9, p 4
[997] Kirkpatrick et al, H37, pp 301-316, especially figures 7.5 to 7.16 inclusive
[998] See above for Murupara and Section 10.3.4 for the decision to use the geothermal resources at Kawerau as a source of industrial energy
[999] Kirkpatrick et al, H37, p 292. The restriction on the disposal of waste into the Tarawera River was made by the Pollution Advisory Council in 1966, some months in advance of the passing of the Water and Soil Conservation Act 1967
[1000] W S Goosman, Minister of Marine, *Report of the Inter-departmental Committee on the Pollution of Waters in New Zealand* (Wellington: Technical Publications, 1992)

Pollution Act 1953 which set up the Pollution Advisory Council. In 1963 the Council published regulations and classified coastal and inland waters according to their uses. Water quality standards were determined by the Ministry of Works, the DSIR, and the Ministry of Health. The Tarawera River which provided water supplies for settlements downstream had to meet higher standards than those laid down under the previous regime. In 1966 the Pollution Advisory Council, acting on the advice of the Ministry of Works, directed Tasman Pulp and Paper that it must improve the quality of waste water discharge into the Tarawera River.[1001] The new requirements were so stringent that Tasman Pulp and Paper turned to the Lake Rotoitipaku option. There is no evidence before us that the Crown, intent on improving the quality of water in the Tarawera River, considered the impacts that these regulations and policies would have on Lake Rotoitipaku. [1002]

Tasman Pulp and Paper Ltd, faced with the need to find other means of waste disposal, selected Lake Rotoitipaku and its surrounds as the best option. There is evidence that the company considered other options, including incineration at the mill site and the use of dried sludge as fuel for the mill,[1003] but appears to have decided against these on the basis of capital and operating costs. Documentation held by the owners of the Kawerau A9 Trust suggests that the Company began negotiations in 1967 and, in the months that followed, presented them with three options: sell the site; lease the site; or have it taken under the Public Works Act.[1004] It is not our intention to make a substantive finding on this topic; we simply note this as background.

In the event a lease agreement was entered into with the Maori owners, annual rental payments were to be made over a 42 year period, and the company agreed to restore the site at the end of the lease. The environmental components of the lease were carefully negotiated and explicitly set out. Kirkpatrick, Belshaw, and Campbell summarise them as follows:

> The lessee was required to fence the area and to safeguard all graves, historical and sacred places within the leased area. The lessee was able to dispose sludge, barkwood and woodknots, and construct necessary buildings, roads and dams necessary to carry out the sludge disposal. It was also required to clarify the sludge prior to its disposal and to prevent toxic materials from entering the clarifier system, to construct and maintain an embankment to prevent seepage, to take measures to prevent and control pest outbreaks (midges, mosquitoes, algae and weeds) and remove any floating crusts that may form, employ modern measures for pollution and odour control, and take advice from geophysical experts to ensure the geothermal safety of the lands. The company also undertook to plant trees around the boundary of the proposed sludge area to screen it from adjoining lands. At the end of the lease

[1001] Norske Skog Tasman Ltd, 'Summary Report - Upper Embarkment & Primary Solids Waste Disposal - Final Report V2', Document H37(a), Text Table 1, p 2; Fox Whanau Archives Doc B10(a) Section V Timeline pp 10-23
[1002] Kirkpatrick et al, H37, pp 292-327
[1003] Kirkpatrick, H37 table 7.1, p 296, which is referenced to a February 1967 project report summarises these. We have not been able to sight the original source.
[1004] Kirkpatrick et al, H37 pp 317-318. The threat to use the *Public Works Act* was by implication and is not explicit in the exchanges of correspondence.

> the company was to ensure that the land would be made suitable for either forestry or agricultural purposes at the option of the lessor.[1005]

The Crown seems to have had a double role in these decisions as it was a commercial partner in the pulp and paper mill, and it exercised a larger responsibility for environmental protection. In relation to this latter role, the evidence is that the Crown moved to protect water quality in the Tarawera river. There is no evidence that it investigated or weighed up the impacts which the Tasman Pulp and Paper waste would have on Lake Rotoitipaku, and its surrounds. Major damage to the lake was done during the period 1968 to 1983, long before any monitoring was put in place by the Crown or by territorial authorities mandated by the Crown.

With the advent of the Resource Management Act 1991, Environment Bay of Plenty has environmental responsibilities and carries out a programme of research and monitoring of environmental quality including surface water and ground water. In this instance, the primary focus of attention is on the water quality in the Tarawera River and the nature of the discharges into that river.[1006] Reports by their Compliance Officers[1007] make minimal reference to Lake Rotoitipaku and the site receives scant attention in the planning documents or the monitoring programme. Maps and photographs in the same (and other) documentation highlight the lack of interest or awareness: Land Information New Zealand, for example, has transferred the name Lake Rotoitipaku to a body of water ponded behind the protective embankment.[1008] The map of industrial discharge to the lower river catchment in the 1995 planning document identifies locations where other forms of rubbish, including asbestos, had been dumped.[1009] The 1999 compliance report has a cryptic comment that contaminants which were not authorised by consent had been discharged at the site, then added that the mill should be discouraged from doing this without specific approval.[1010] Therefore, despite the Resource Management Act 1991, the lake has not received the attention it deserves as an important taonga of the tangata whenua. The Tribunal has in front of it very detailed evidence as to the outcomes at Rotoitipaku. The present owners of the mill, Norske Skög Tasman Limited, and the Waikato University research team have each commissioned or carried out investigations. Both confirm the same sad story.

[1005] Kirkpatrick et al, H37, p 319 citing the Deed of Lease between The New Zealand Insurance Company Limited and Tasman Pulp and Paper Company Limited. For the Deed of Lease see Norske Skog Tasman Ltd, Document H37(b)

[1006] Environment Bay of Plenty, www.envbop.govt.nz/media/pdf/ProposedTaraweraPlan_v1.pdf (accessed 12 July 2007) and Environment Bay of Plenty, *Draft Bay of Plenty Regional Waste Strategy: Zero Waste and a Sustainable Bay of Plenty* (Whakatane: Environment Bay of Plenty, 2004), www.envbop.govt.nz/media/pdf/waste%20management%20strategy.pdf, (accessed 12 July 2007)

[1007] A C Bruere, *Pulp and Paper Mills in the Bay of Plenty* (Whakatane: Environment Bay of Plenty, 2003)

[1008] Land Information New Zealand, *Topographic Map 260-V15 Edgecumbe Sheet, scale 1:50,000* (2004); Kirkpatrick et al, H37 figure 7.2; and Environment Bay of Plenty, www.envbop.govt.nz/media/pdf/ProposedTaraweraPlan_v1.pdf (accessed 24 July 2007), figure 26

[1009] This is figure 26, Environment Bay of Plenty, www.envbop.govt.nz/media/pdf/ProposedTaraweraPlan_v1.pdf (accessed 24 July 2007), p 180. This has now been replaced by an operational plan. Regional Plan for the Tarawera River Catchment, 1 February 2004.

[1010] A C Bruere and T K Wilding, *Compliance Report: Pulp and Paper Mills in the Bay of Plenty* (Whakatane: Environment Bay of Plenty, 1999), 4.5, p 31

In 2004, Rob Christie of Gulf Resource Management Ltd was asked to carry out a comprehensive study of environmental conditions at the Rotoitipaku waste disposal site. The project was commissioned by Norske Skög Tasman Ltd at the request of Taumaunu Associates and involved measurements of levels of contamination, and assessment of the levels of environmental risk including the potential for further contamination. It involved a review of aerial photographs for the period from 1944 onwards; testing of soil, water, and sediment samples for contamination; and measurement of the migration of contaminated materials. Following national and international guidelines, Christie reported significant contamination within the site itself and in groundwater down gradient from the site.[1011] In the time available for his study, Christie was unable to measure the exact extent of the contamination plume, or complete a full assessment of the risks involved if embankments built by the mill owners were breached by flood or earthquake. His conclusion reads:

> Elevated levels of contaminants have been found throughout the landfill in both General Mill Wastes (Upper Embankment) and primary solids. The site is in effect a landfill that contains pockets and layers of contaminated wastes generated from saw milling, pulp and paper mill, the use of Geothermal Steam and other potential industrial activities. The levels exceed certain national and international contaminated land guideline criteria for agricultural use and ecological protection. The waste is located in possibly the worst situation one could contrive for a landfill. The underlying geology consists of high permeability pumice. The landfill blocks a natural spring/waterway. The landfill is partly saturated with groundwater. The landfill site is within 100 meters of a significant waterway (Tarawera River). The site is located next to and on land with significant cultural value. The waste is situated over a major fault line and geothermally active area.[1012]

Kirkpatrick, Belshaw, and Campbell complete their review of environmental impacts by noting that the most devastating changes have occurred since 1970 when the disposal of the solid waste sludge began:

> This has in effect destroyed an important taonga, together with associated geothermal and ecological resources. As well wāhi tapu have been exposed to the risk of desecration by the migration of contaminants, instability of embankments and inundation by the artificially created A8 pond.
>
> These environmental impacts may be seen as the 'costs of progress'. However, it seems that the costs have fallen quite disproportionately on the tangata whenua.[1013]

The most serious damage was done in the decades between the 1950s and the 1980s. Pollution, to an extent not fully determined, continues to the present day and there are unanswered questions about the ability of the company to halt the pollution and restore the site. All of which verifies what we were told by Ngati Tuwharetoa ki Kawerau claimants who appeared before us. Wayne Huia Peters remembers emotively:

[1011] Gulf Resource Management Ltd (2004) *Summary Report Upper Embankment and Primary Solids Waste Disposal*; Norske Skog Tasman Ltd, H37(a)
[1012] Gulf Resource Management Ltd (2004) *Summary Report Upper Embankment and Primary Solids Waste Disposal*; Norske Skog Tasman Ltd, H37(a), p 48
[1013] Kirkpatrick et al, H37 pp 326-327

> Then one day Tasman Pulp & Paper cut a road down the big flat separating Rotoitipaku and the Tarawera. At the top of this road a wooden spillway was constructed. Liquid waste was pumped to this spillway, then flowed down into Rotoitipaku. Solid waste was brought in trucks. My cousins and I went to have a look at the spillway. The sludge was slowly moving into the lake from the ngawha end. Little did we know this was the beginning of the end to our playground and foodbasket. Sadness filled our minds. Then anger took over, we knew what was happening was wrong. We lifted a big boulder from the side of the road and smashed the spillway. The workers fixed it up, and we smashed it again. In time we came to realize that Rotoitipaku was gone FOREVER.
>
> ….
>
> These memories are all that are left. Through my writing I have had to stop, take time out, for the hurts are still there. The tears flow for our whenua, our lakes, our tipuna, our kaitiaki, our hapu and finally our iwi – Ngati Tuwharetoa. We do not carry the shame or accountability for this disaster, this lies with the Crown, government and borough councils.[1014]

To add to the pain it would become increasingly more difficult to access the lake:

> Tasman began putting roads into the area. They put pipes to the top of the hill, overlooking the bubble. They began to pump a black liquid into Rotoitipaku. Truck loads of sludge and other wastes were poured into Rotoitipaku from atop the hill. The lake began to stink and was so discoloured you couldn't see beneath the surface. At first there were plumes of pulp floating on the surface. Then a crust began to form over the surface of the lake. Truck loads of sludge, wood and pulp waste were added to the mix till we get to where we are today. Many times I asked Uncle Bunny why they allowed these things to happen. All he would say was they could do nothing.
>
> These things were occurring in the Rotoitipaku environs. Other things were also happening to our rights as "tangata whenua".
>
> Slowly but surely our access to Rotoitipaku was being denied. Tasman used our road to access the area until they built a bridge over the Tarawera river. Then we were stopped from using the road to the lake. We had to get permission to access the area. When in the area for what ever reason, security from the mill would tell you to leave.[1015]

But the company could not have done what it did to Rotoitipaku without the legislative protection afforded to it by the Crown through its enactment of the Tasman Pulp and Paper Company Enabling Act 1954. The Ngati Awa Tribunal records this history in the report noting that:

> This area is rich in Maori history and has special significance as the ancestral home of the Tuwharetoa people. Rotoiti-paku is fed by a warm spring that was used to calm the infant Tuwharetoa when he was crying for his mother's milk. It thus became known as Te Wai U o Tuwharetoa (the mother's milk of Tuwharetoa).
>
> Rotoiti-paku enjoyed abundant fowl and fish life and provided the main source of food for the local people. Last century, the Tarawera River altered its course to run closer to this area. It too was a major source of food.

[1014] W Peters, Evidence, B38, paras 10,12, p 5
[1015] C Park, Evidence, B36, paras 6-8, pp 2-3

> Today, Rotoiti-paku sits near to the Tasman Pulp and Paper mill. By the authority of the Tasman Pulp and Paper Enabling Act 1952, the mill discharged waste into the Tarawera River, killing all fish life downstream. In 1966, the Government required the mill to filter and monitor its waste-water. To this end, it built sludge ponds, which affected the lake and adjacent Maori land. The Maori evidence is that the lake and part of the land were reluctantly sold in the belief that this would enable the Tarawera River to recover. In 1971, the company built an embankment to prevent Te Wai U o Tuwharetoa from draining into the lake, which had been converted to sludge ponds. The resulting pool built up, and water leached through the embankment to adjacent Maori land, threatening the urupa.
>
> We were taken to the area. It is no longer habitable and the Maori land there is no longer an asset. We were advised that the Tarawera River remains polluted. It is, however, clear that the company has gone to considerable lengths to contain the problem.[1016]

Limitations of the RMA in respect of remedying past environmental impacts

To compound the matter of environmental degradation, there is no requirement in the RMA to remedy past environmental impacts, a matter that has serious consequences for CNI Maori whose geothermal taonga have been adversely affected by the historical actions of the Crown. Dr Severne completed her evidence by pointing the Tribunal to this limitation of the Resource Management Act 1991:

> A further issue in relation to the resource management process is the extent to which the impact of past effects can be addressed under the Resource Management Act. The effects of early drilling and fluid withdrawal in the 1950s and 1960s on the Wairakei-Tauhara geothermal field were significant and taonga such as ngawha and puia were lost. Under the Resource Management Act 1991, an applicant for a resource consent does not need to address the impact of past effects. They need only concern themselves with ongoing effects of the activity for which they are applying.[1017]

The Tribunal's findings on environmental degradation and loss of geothermal taonga

- The actions and omissions of the Crown in relation to the failure to institute environmental controls to protect the Maori customary rights and Treaty interests in geothermal resources, the geothermal fields and the TVZ under the Treaty of Waitangi have impacted on geothermal systems and surface geothermal features in a variety of ways.
- In respect of Crown actions in the creation of hydro lakes and the raising of lake levels, we found in Chapter 18 that the raising of the level of Lake Taupo in 1941 resulted in the inundation of surface geothermal features such as springs adjacent to the Lake shore, (such as at Waihi and Tokaanu) rendering them inaccessible.
- The impact of the creation of the large hydro lake Lake Ohakuri in the course of hydro development on the Waikato River resulted in the submerging of 60-75 per cent of the very large number of surface geothermal features of the remarkable

[1016] Ngati Awa Report, pp 112-113
[1017] C Severne, evidence, E7, para 20

Orakei-Korako geothermal field; though some new features emerged. Thus Orakei-Korako suffered from degradation and loss of surface energy.

- At Wairakei, 40 years of extraction for geothermal power has resulted in degradation of the geothermal field: subsidence throughout the Wairakei-Tauhara area, the loss of its geysers, collapse of its puia, ngawha and waiariki, which have been replaced by fumaroles and steaming ground.
- The creation of Lake Ohakuri also impacted on portions of the Ohaaki geothermal field within the valley of Wairakei, flooding springs, pools, wahi taonga and urupa. The beautiful Ohaaki Ngawha (close to the marae) was irreversibly damaged; and there are serious subsidence problems.
- At Kawerau. geothermal development for power generation and for timber, pulp and paper mill operations at the Kawerau mill has led to the modification and destruction of surface geothermal activity; and the taonga Rotoitipaku has been used as a waste disposal site, and destroyed;
- Impacts of Crown omissions in failing to adequately manage land use, residential and commercial use:
  - At Taupo, such impacts include discharge from an uncapped bore at Tokaanu-Waihi-Hipania; and degradation of the Onekeneke stream at Waipahihi, a taonga of the people of that marae
  - At Rotorua, there was unsustainable extraction between 1950 and 1986,where many wells were outside any controls. The Crown move to protect the geothermal resource came late, though it was successful, and Rotorua Maori were seriously prejudiced in their ability to use their resource.
- It is clear that some of the geothermal fields of the CNI have been exploited with minimal consideration for environmental impacts. As a result, the geothermal resources and the affected fields are in a vulnerable state with physical and spiritual prejudice for Maori that flow from their decline.

OVERALL FINDINGS ON PREJUDICE TO CNI MAORI AS A RESULT OF CROWN ACTIONS OR OMISSIONS

We find that CNI Maori have been prejudiced by the Crown's failure to acknowledge their customary rights and Treaty interests in the geothermal resources, the geothermal fields and the TVZ in a range of ways:

- By the Crown's active targeting of their land for its geothermal resources, particularly where they were sought for tourism or (later) the power generation. In some cases Maori lost their taonga, cultural and spiritual association with them, and access to development potential of the resource.
- By the Crown's failure, in the period 1940s -80s, to explore, plan for, and work with Maori in relation to the development of their geothermal taonga; and by its foreclosing on their opportunities to participate in joint ventures for geothermal power.

- By the Crown's appropriation of their customary rights by the Geothermal Energy Act 1953 in taking control of the allocation of the right to access and use the geothermal resources, the geothermal fields and the TVZ of the CNI; and by being debarred from the process of managing and protecting the resource.
- By the Crown's taking all the benefits of development of the resource for itself or its delegates; and its failure to pay a royalty or rental for each of the geothermal stations to those Maori who either owned the land within which the geothermal field was contained, and the hapu/iwi who exercised tino rangatiratanga over it, or who lost that ownership in breach of the Treaty.
- By the Crown's failure to take into account Maori customary values in relation to geothermal systems and surface geothermal features.
- By the operation of the RMA, which has failed to provide for the rights of CNI Maori to exercise rangatiratanga in resource management over geothermal resources, the geothermal fields and the TVZ, and failed to accord them a priority in RMA processes despite their customary rights and interests in the resource.

- By environmental degradation and loss of geothermal taonga as a result of the creation of hydro lakes, the raising of the level of Lake Taupo, by geothermal development for power generation, and for timber, pulp and paper mill operations at Kawerau.

- By the accompanying loss of matauranga Maori, knowledge of puia, ngawha and waiariki , of customary use, and the loss or erosion of spiritual values through the destruction or decline of geothermal taonga,or loss of association with them through alienation in breach of the Treaty.

- By the Crown's failure to include provisions in the RMA for the remedy of past environmental impacts, despite the adverse impacts of past Crown actions on geothermal taonga.

SUMMARY OF FINDINGS FOR CHAPTER 20

The Origins of CNI Maori Customary Rights to Geothermal Taonga

- The Central North island Maori relationship with their geothermal taonga is an ancient one, as is evident in the significance right across the region of stories of the ancestor Ngatoroirangi, specialist navigator and priest of the Te Arawa waka who, in the course of his early explorations called for fire from Hawaiiki, which was brought for him, his relatives, and his descendants.
- The stories show that Maori conceived the arrival of the geothermal waters and heat and energy source as separate in time from the creation of the land.
- They show also the linkages between the three districts of our region (Rotorua, Taupo, Kaingaroa) converging via the 'geothermal passage' to Hawaiiki, binding the geothermal resource and the people through whakapapa (geneaology).
- Though these are stories which go back many generations, which should not be thought of only as artefacts of a long-gone past. Nothing was clearer to us than the central importance of these stories down to the present, in the history and worldview of the peoples of the Central North Island, and their claim to the resource. Like many key Maori traditions, they also express a deep understanding and knowledge of the natural world –in this case of the nature and extent of the Taupo Volcanic Zone.

The Nature of Customary Rights to the Geothermal Taonga at 1840, and Since

Extensive evidence from many who gave evidence in this inquiry, and from early European accounts, makes it clear that:

- The geothermal resource of the CNI is a taonga of great cultural, spiritual and economic importance, protected by the Treaty of Waitangi;
- The hapu/iwi of the CNI exercised rangatiratanga over the resource through customary tenure and law, based on their deep knowledge and understanding of the resource over many generations;
- As at 1840 CNI Maori held customary title to all land in their region, and to all its geothermal resources;
- Their rights were at three levels: 1) to the geothermal surface features and resources 2) to the fields 3) to the subterranean resource (TVZ) system itself shared by all hapu/iwi by virtue of their common history, whakapapa and reliance on the discovery of the resource by the ancestor Ngatoroirangi.
- In legal and Treaty terms Maori customary rights to the fields and the TVZ were retained
- Where customary ownership of land has been modified by the issue of freehold title, the exclusive right of hapu/iwi to control access to resources was modified, in that it became the responsibility of individual Maori owners; but all other aspects of their customary rights and Treaty interests remained because the Maori land owners continued to act in accordance with tikanga and custom

- Moreover CNI hapu/iwi have retained sufficient Maori land in and around geothermal features and resources to establish that they have never relinquished their rangatiratanga over the TVZ; even though in some cases alienation of the land has meant that the right to control access has gone

Crown Treaty Breaches

- The Crown failed to recognise and provide for the customary rights and Treaty interests of CNI Maori held in the resource and its underlying heat, energy and water system which was clearly part of their taonga because that was and is its essential characteristic and the source of its value to Mäori.
- Nor did the Crown in 1840 look to Maori law in respect of the geothermal resource as the basis for developing a management regime, despite the complexity of that law and the visibility of the Mäori association with the resource. Instead, it assumed that the key to access, management and use of the geothermal resource lay in land ownership and water law.
- The Crown clearly targeted geothermal lands for acquisition, and in the period 1840-1950 some were acquired by the Crown in a manner inconsistent with the Treaty
- From 1950, there were sound policy reasons for the Crown to explore and develop alternative sources of energy such as geothermal energy; and it was reasonable for the Crown to take the lead in the development of the industry
- But when the Crown asserted control and regulation over the geothermal resource through legislation from 1950, it breached the principles of the Treaty in a range of ways:
- It failed to inform itself of the nature and extent of Maori customary rights in the resource
- It failed to provide for Maori customary and Treaty rights when developing geothermal energy; thus appropriating CNI Maori property in order to develop the industry
- It failed to respond to the concerns of local hapu/iwi at Kawerau and Orakei-Korako when it attempted to use Maori land for geothermal development.

Dated at Wellington this 31st day of July 2007

C L Fox, presiding officer

A R Parsonson, member

Dated at Pawarenga this 31st day of July 2007

G H Herbert, member

HE MAUNGA RONGO:
REPORT ON CENTRAL NORTH ISLAND CLAIMS
STAGE ONE

PART FIVE MAPS

JULY 2007

INTRODUCTION

This map booklet contains pre-publication versions of maps and figures referred to in the text of Part V (Chapters 17 to 20) of the report.
The maps and figures contained in this booklet are numbered as follows:

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Chapter 18	
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Figure 18.1	The Waikato River and the cascade of hydro lakes
Figure 18.2	Lake Taupo showing the uncontrolled level since 1905 (simulated after 1914); the controlled level since 1941; and the 'no consents' level since 1941
Figure 18.3	Lake Taupo lake levels 1941 to 1947
Figure 18.4	The water table and zones of saturation and aeration in relation to rivers and lakes
Figure 18.5	Changes in the amount of productive land, Waihaha 3B: 1919/1945/2002
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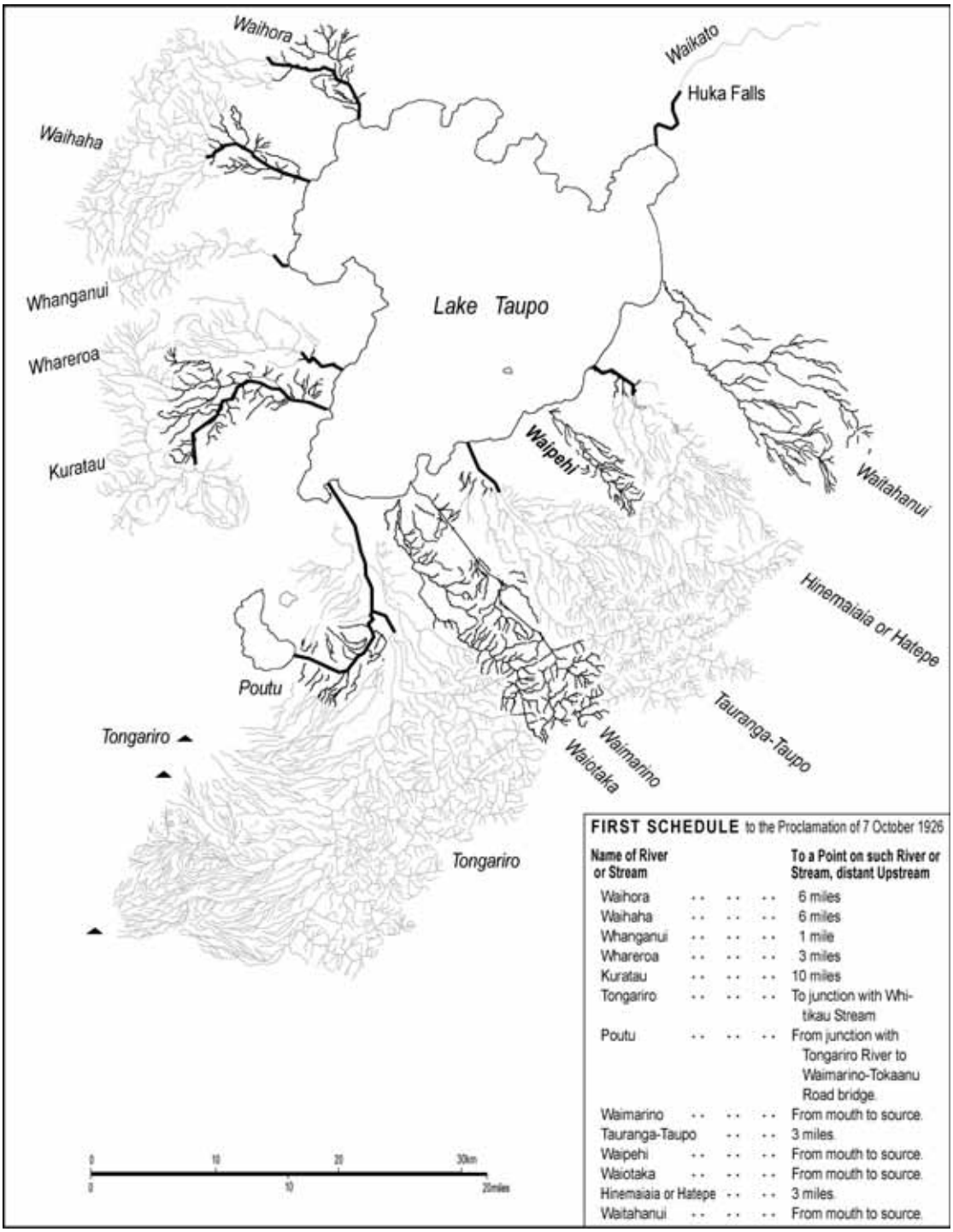
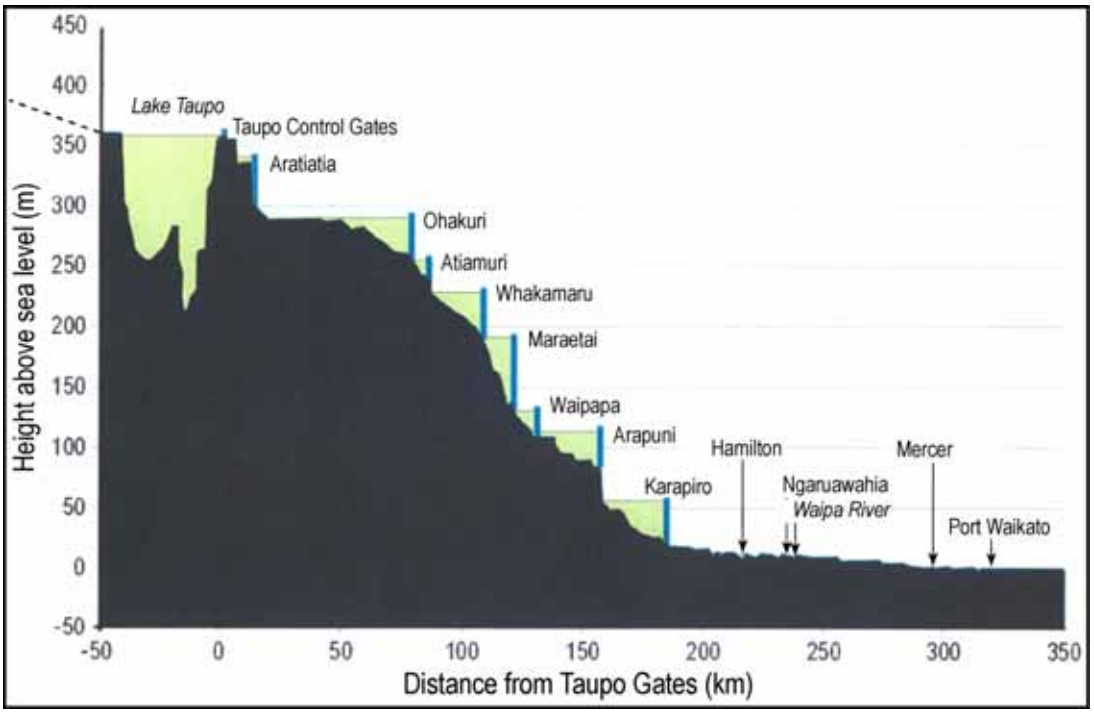
Map 20.14	Bores in Rotorua 1987
Map 20.15	Bores in Rotorua 1998

Map 18.1 The 'Taupo waters' as defined in the proclamation of 7 October 1926 and the Deed of Agreement of 28 August 1992



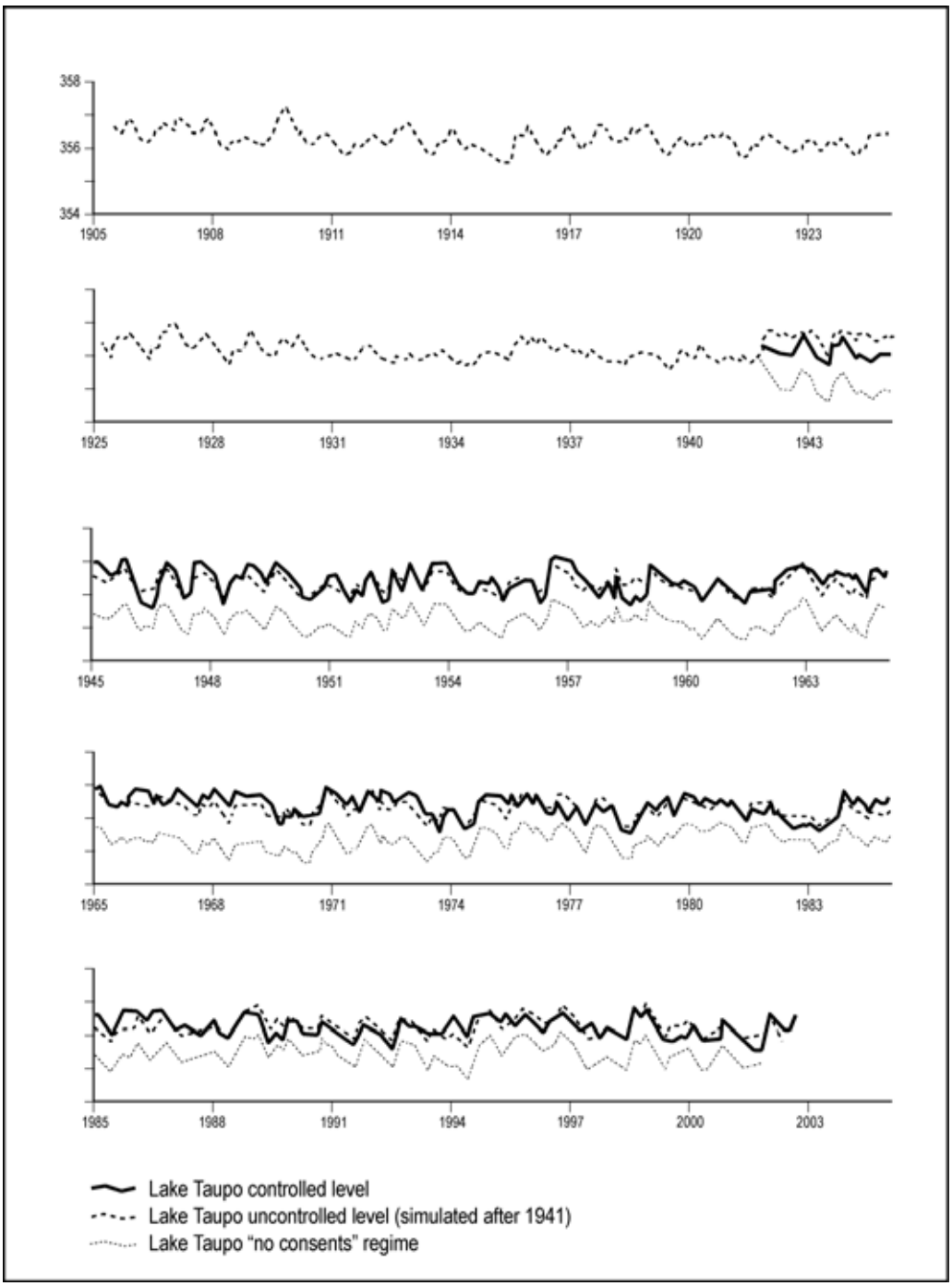
Information sourced from: Deed of Agreement between the Crown and Ngāti Tuwharetoa, 28 August 1992 (document A55(b), pp 204-212) and *New Zealand Gazette*, 1926, vol 3, pp 2895-2896

Figure 18.1 The Waikato River and the cascade of hydro lakes



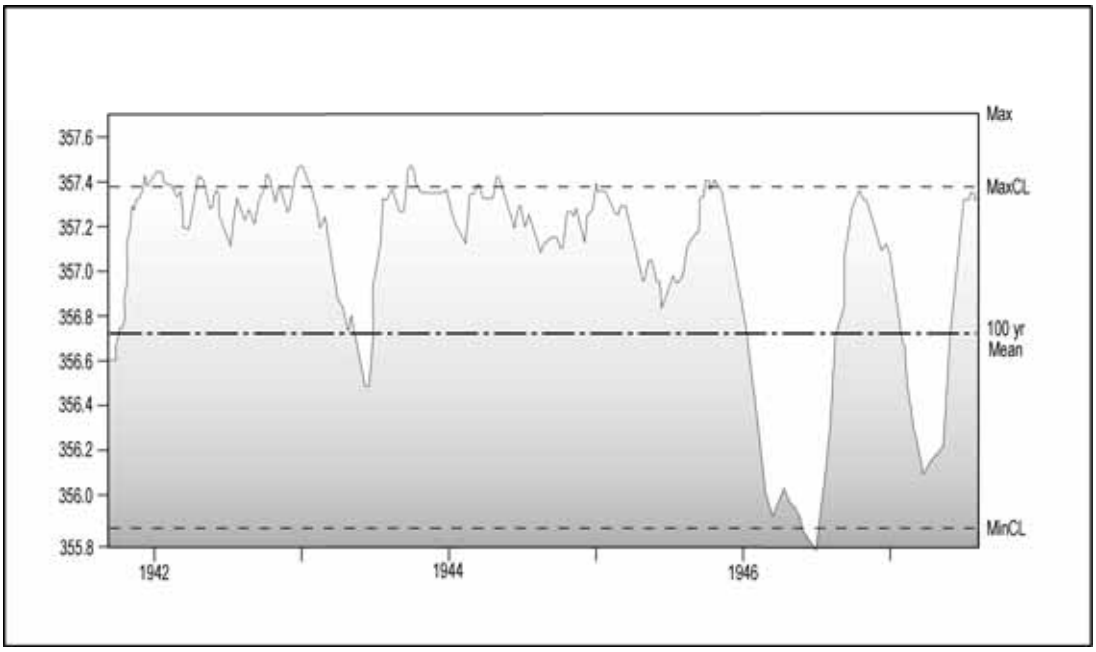
After JA McConchie, Document H33, figure 1; DM Hicks, Document H32, figure 16; Malcolm McKinnon (ed), *New Zealand Historical Atlas: Ko Papatuanuku e Takoto Nei* (Auckland: Bateman, 1997), plate 92

Figure 18.2 Lake Taupo showing the uncontrolled level since 1905 (simulated after 1914); the controlled level since 1941; and the 'no consents' level since 1941



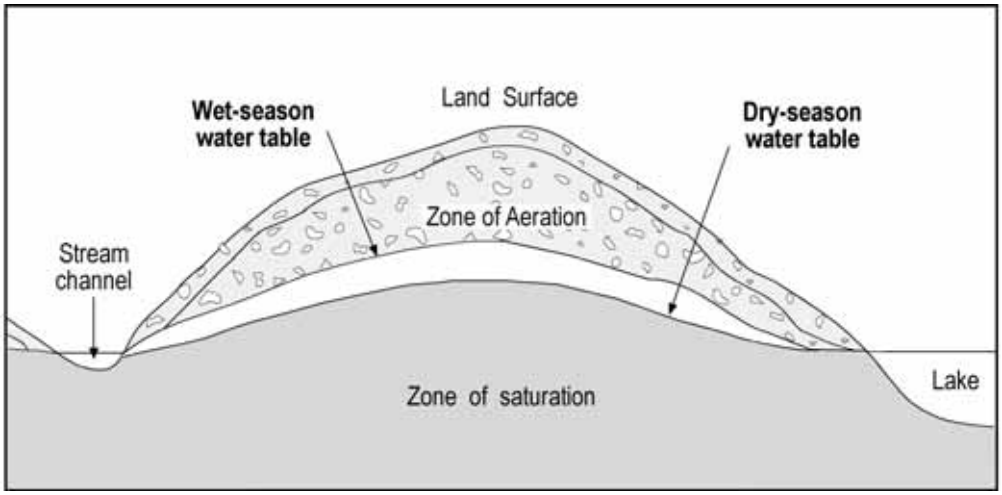
After H Freestone, Document H29, figure 10.3

Figure 18.3 Lake Taupo water levels 1941 to 1947



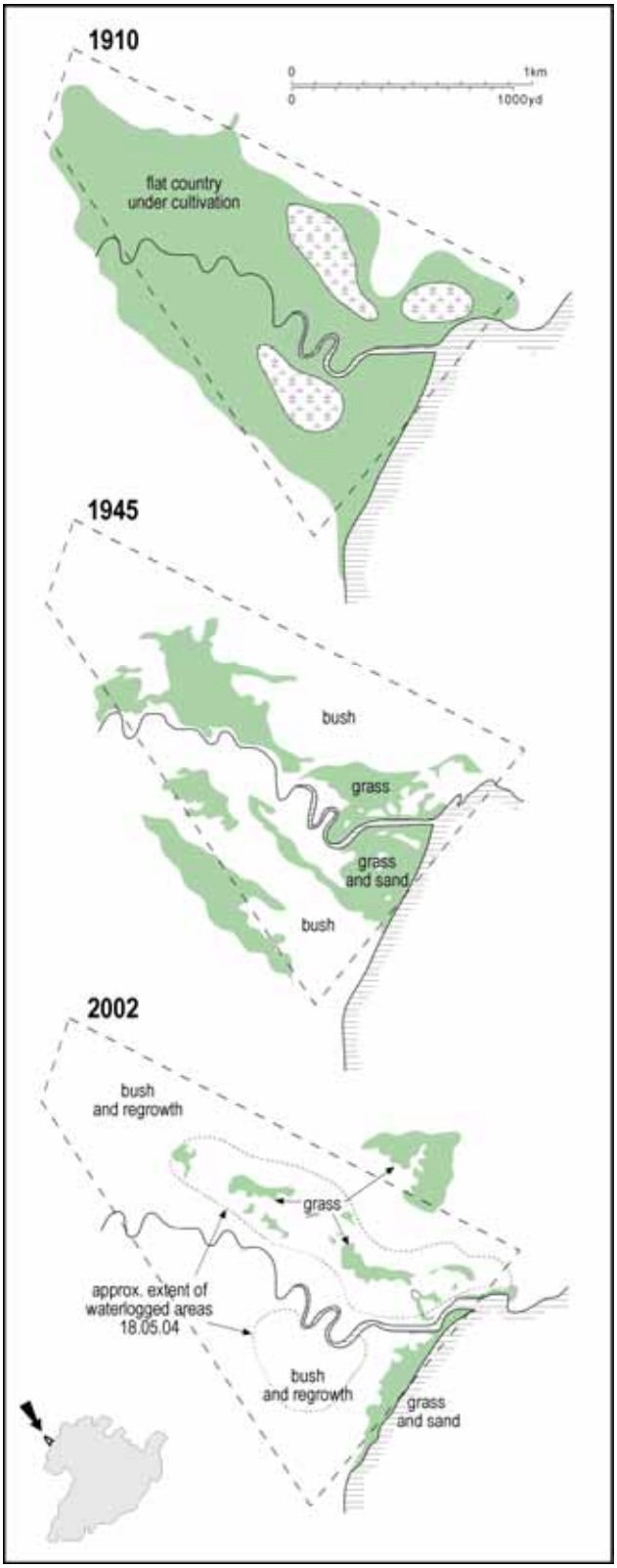
After D Hamilton, 'Lake Taupo Hydrology Review', Document I35, figure 5.3

Figure 18.4 The Water table and zones of saturation and aeration in relation to rivers and lakes



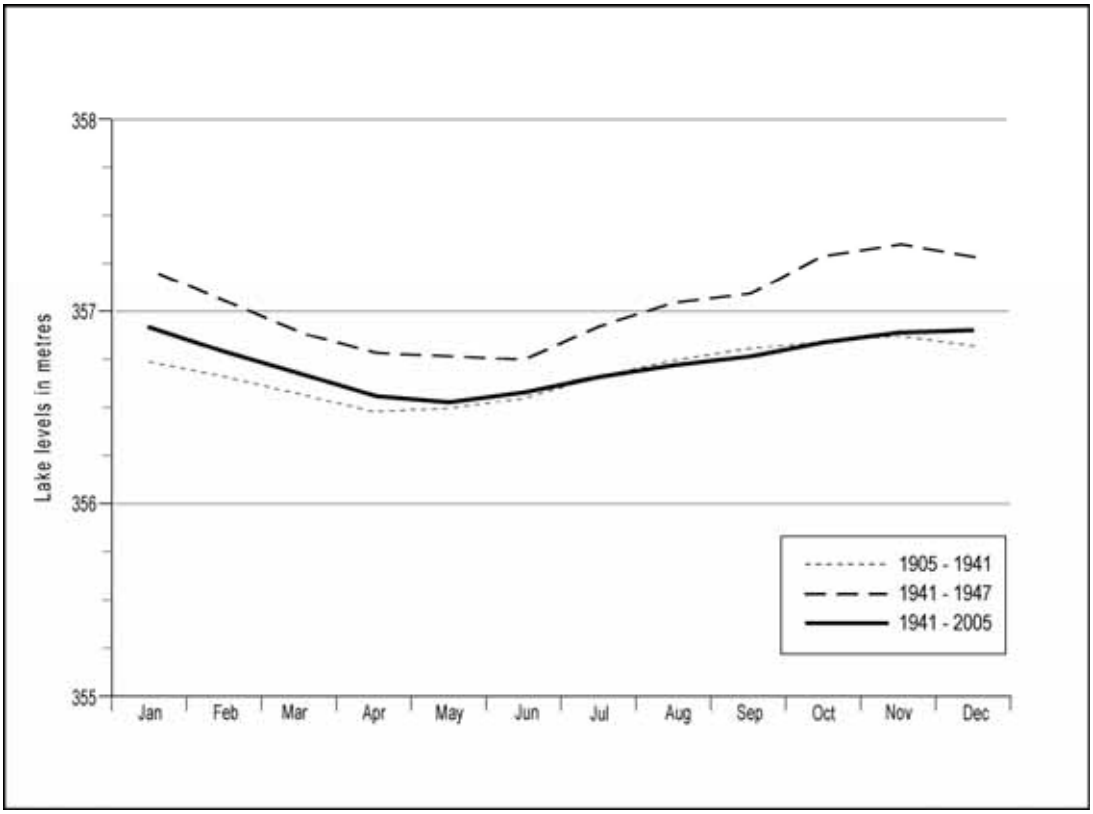
Based on a figure by Paul Bealing, after: HJ Blij and P Muller, *Physical Geography of the Global Environment* (New York: Wiley, 1993), figure 39.7; AN and AH Strahler, *Modern Physical Geography*, (New York: J Wiley, 1992), figure 16.19

Figure 18.5 Changes in the amount of productive land, Waihaha 3B: 1910/1945/2002



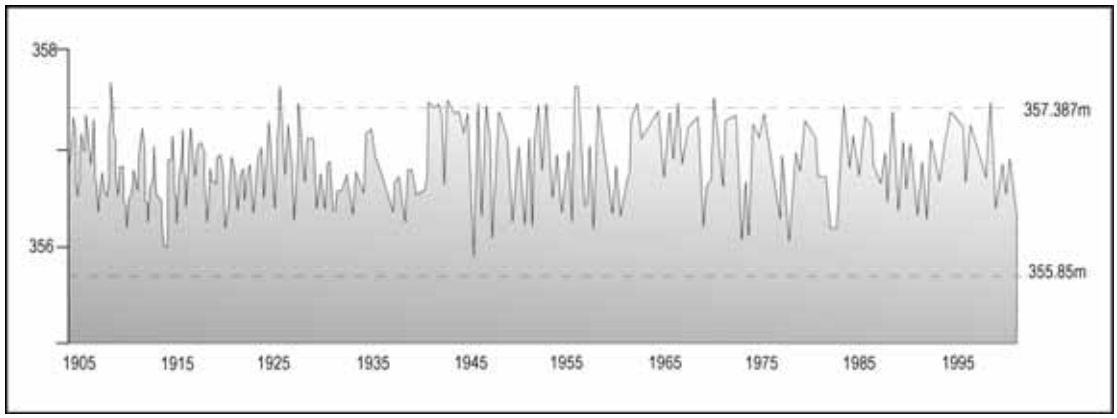
Source: R Kirkpatrick et al, 'Land based Cultural Resources and Waterways and Environmental Impacts (Rotorua, Taupo & Kaingaroa) 1840-2000', 17 December 2004, Document E3, figure 12.15

Figure 18.6 Lake Taupo monthly mean lake levels: pre-control, post control, and 1941-1947



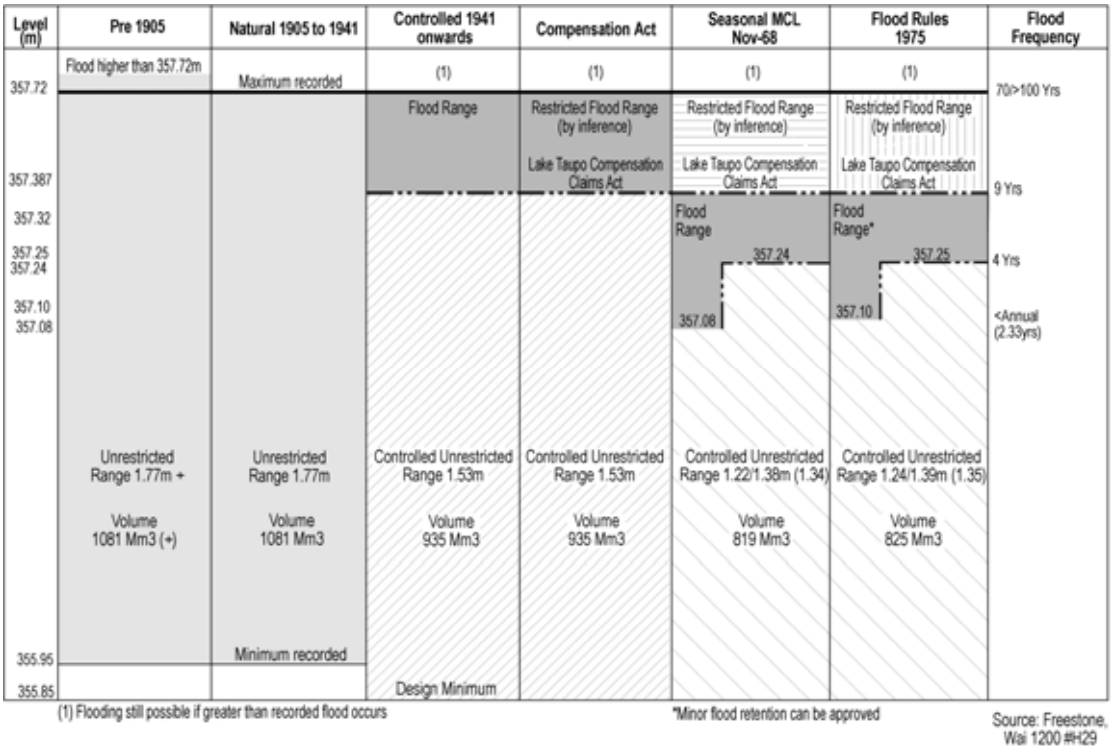
After D Hamilton, I35, figure 5.6

Figure 18.7 Lake Taupo actual water level record (1905-2000) and the original design maximum and minimum control levels (in metres, Moturiki datum)



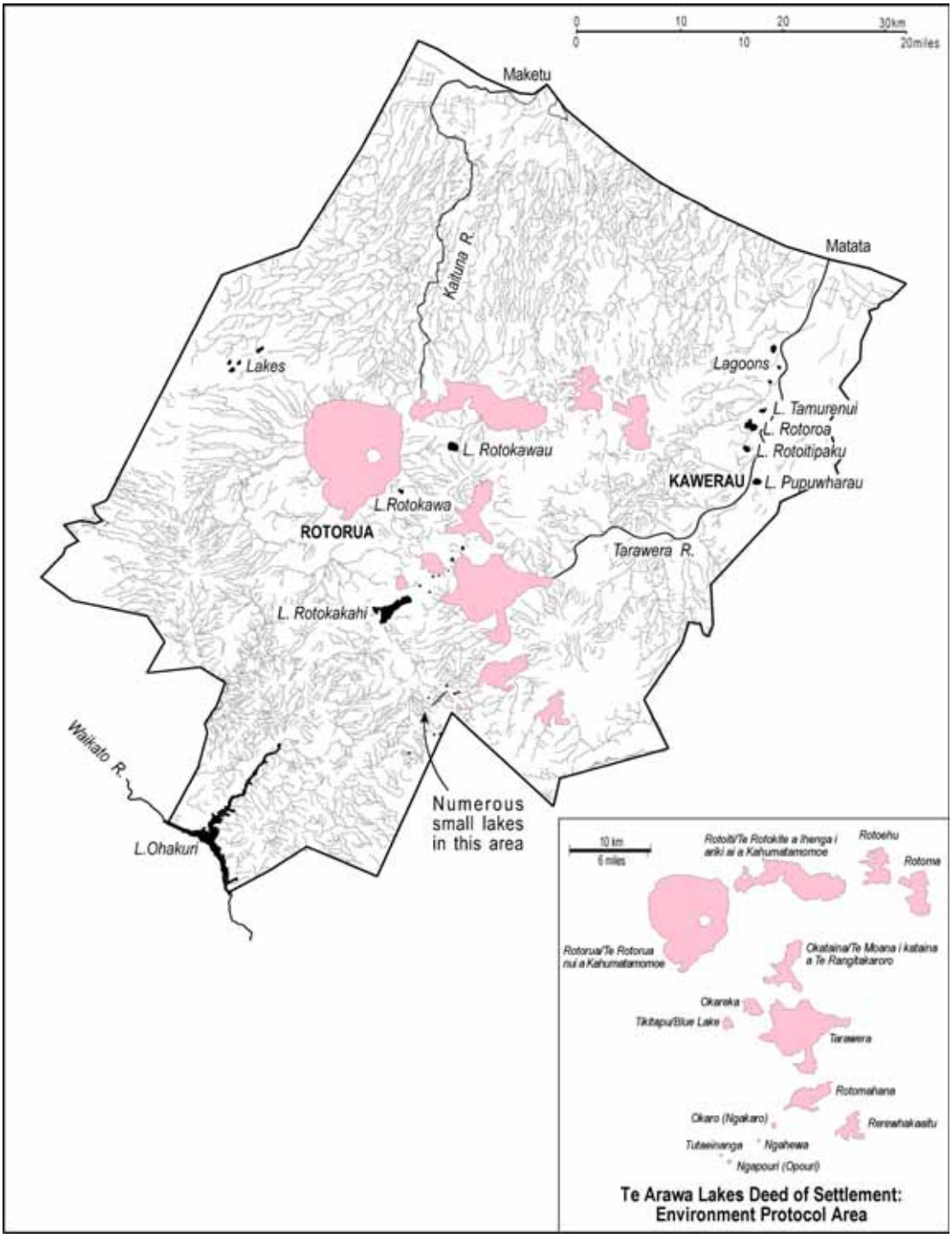
After Freestone, H29, figure 10.1

Figure 18.8 History of Lake Taupo water level control as presented in the evidence of H Freestone

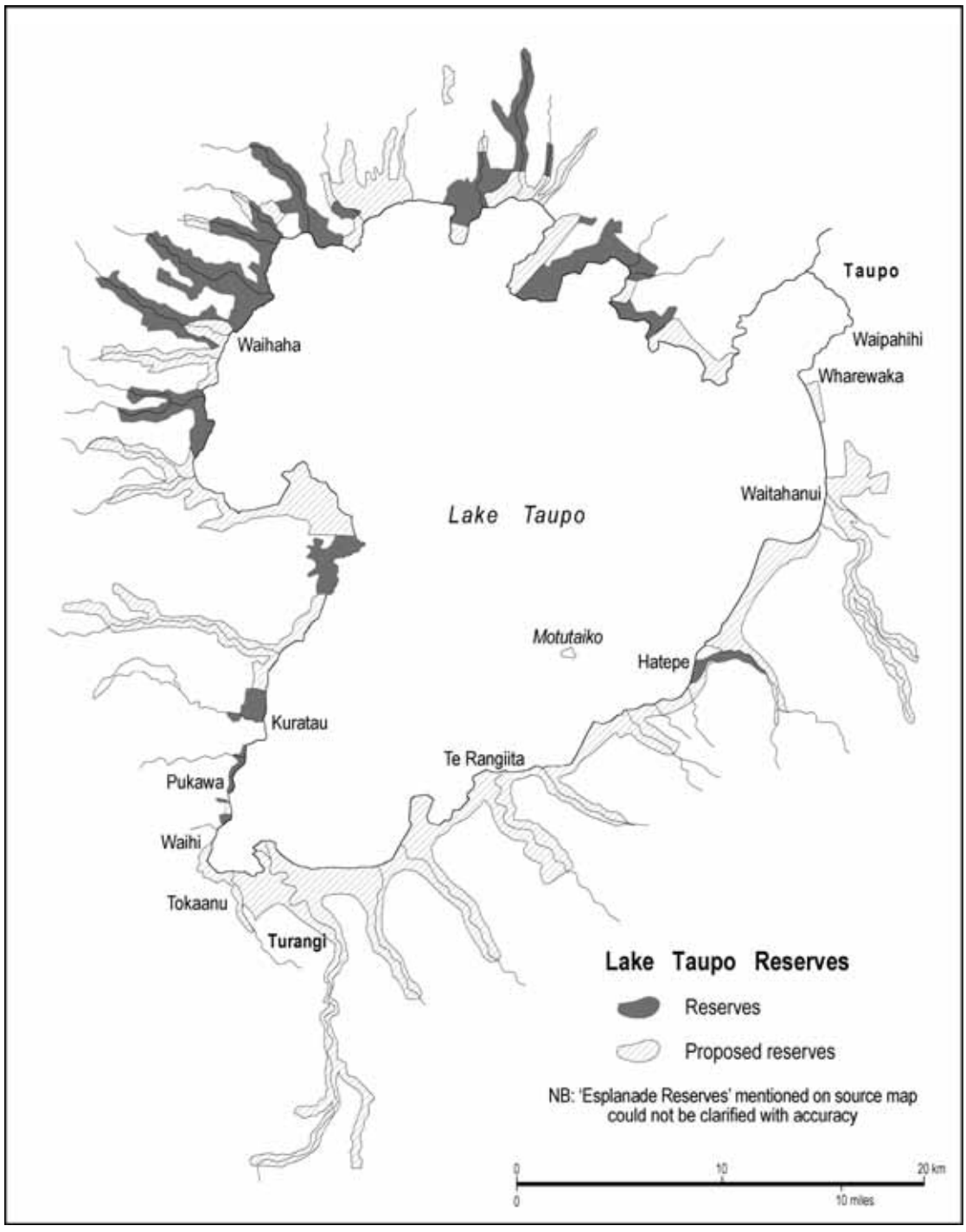


Source: Freestone, H29, figure 10.9

Map 19.1 Waterways of the Rotorua inquiry district



Map 19.2 Lake Taupo Reserves



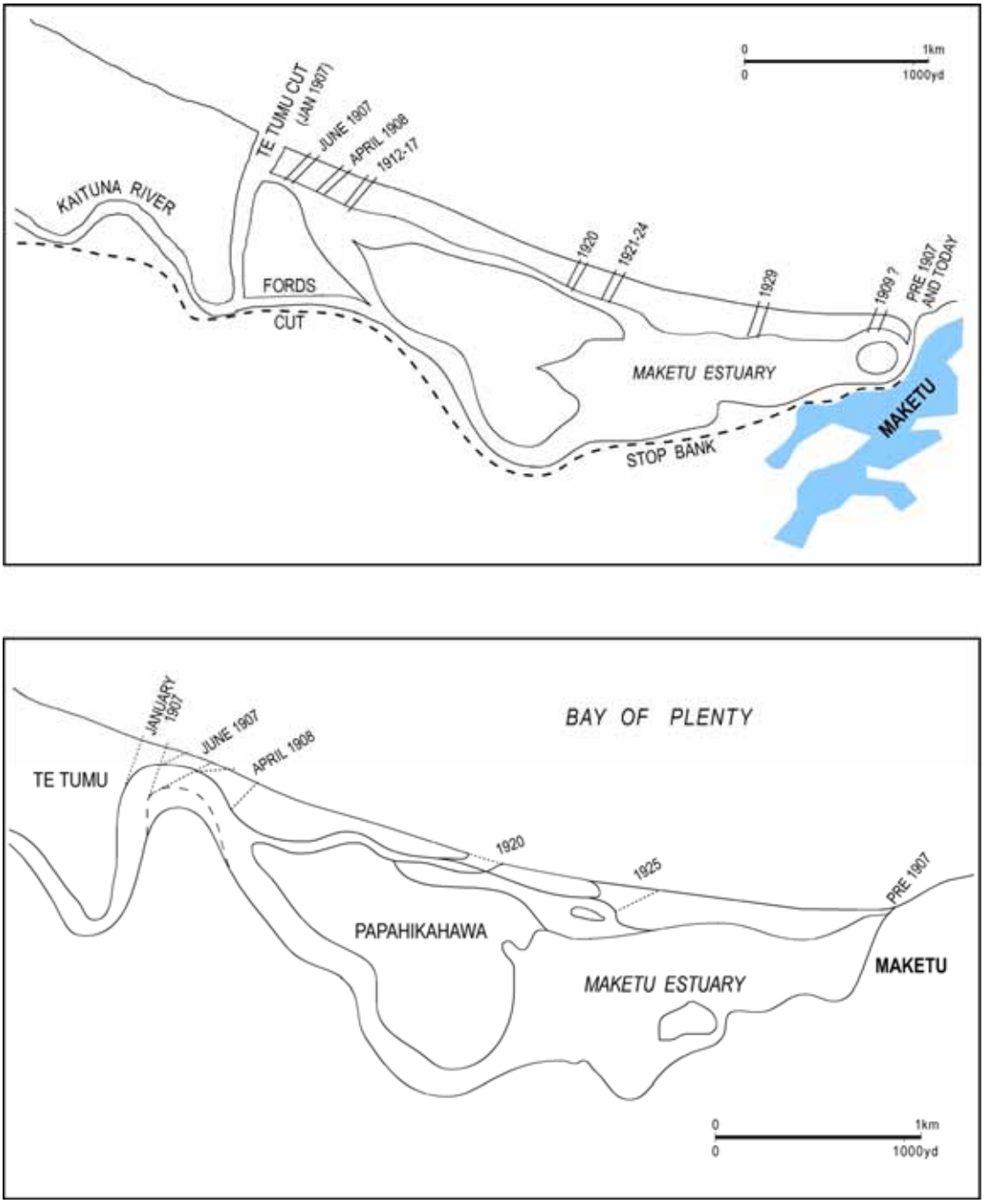
Source: Taupo County Council and Taumarunui County Council, 'Proposed Lakeshore Reserve Scheme – Lake Taupo: Special Report', November 1981, Document I1, [first map (unnumbered)]

Figure 19.1: [drainage, 1910 & 1950]

[To follow in published version]

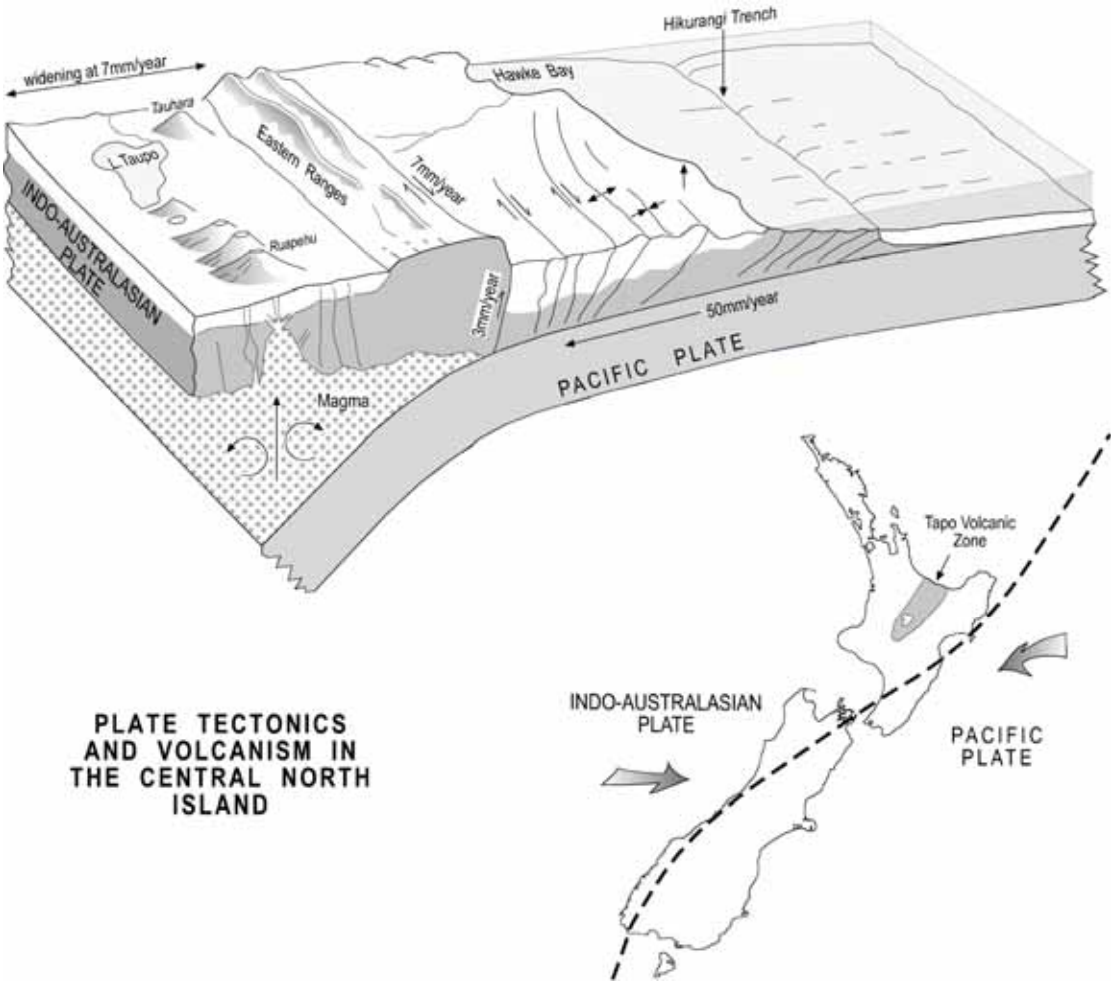
Source: Stokes E, *A History of Tauranga County,* 1980, p 399 reproduced in Kirkpatrick et al., E3, p 448

Figure 19.2 Changes in the path of the lower Kaituna River and river mouth



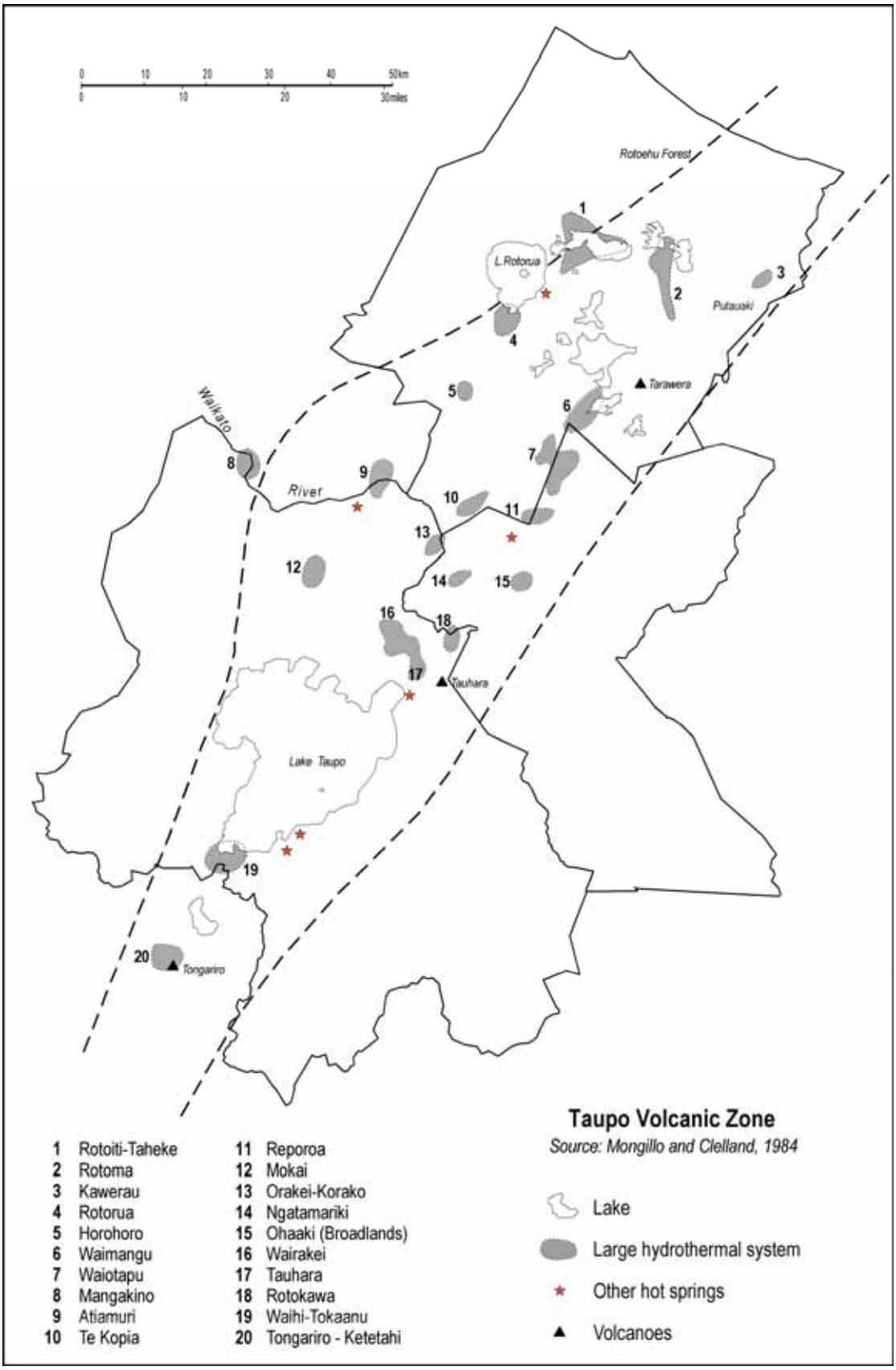
Source: Kirkpatrick et al., E3, p 452

Figure 20.1



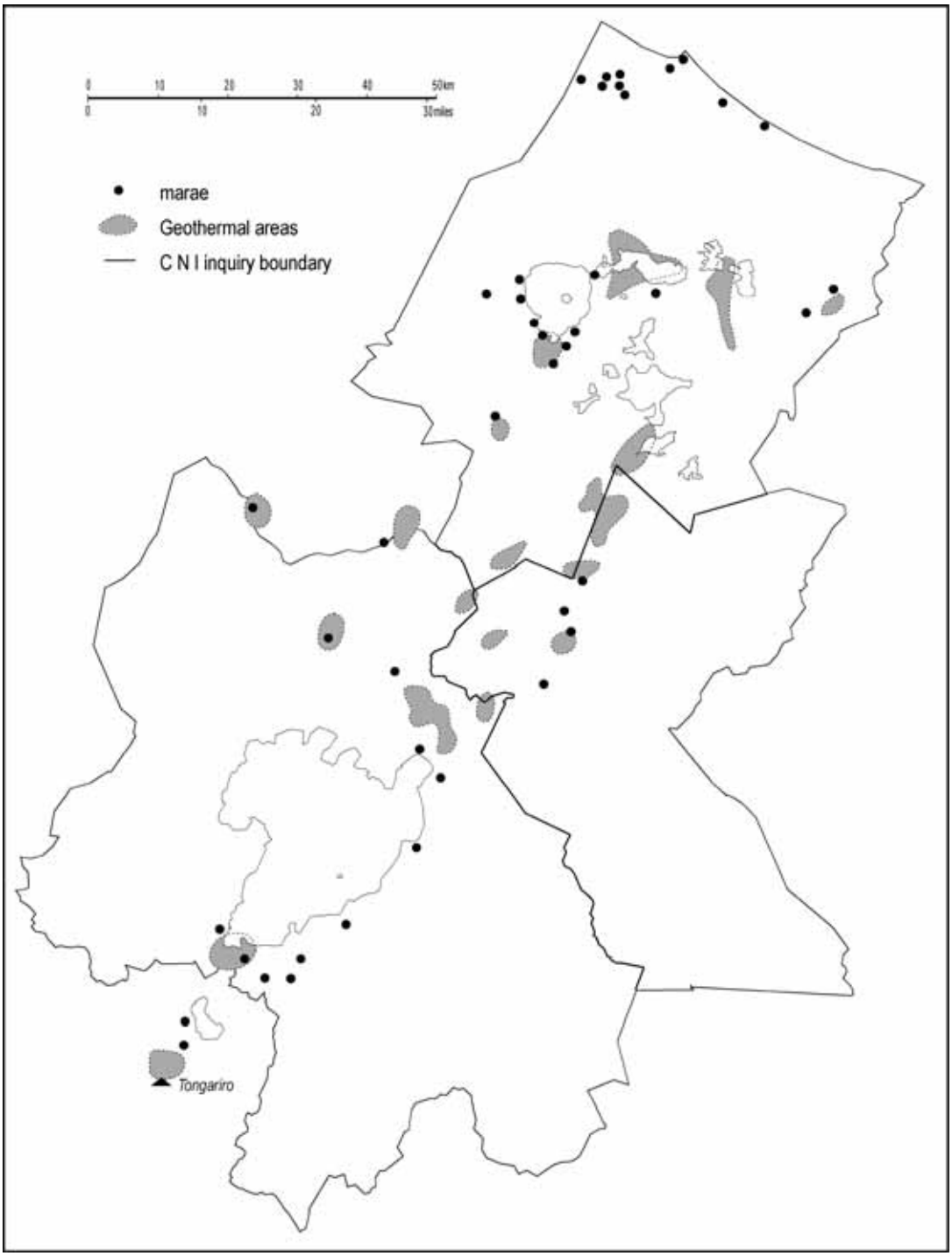
After Evelyn Stokes, *The Legacy of Ngatoroirangi: Maori Customary Use of Geothermal Resources* (Hamilton: University of Waikato, 2000), Document A56, figure 2*; New Zealand Historical Atlas*, plate 5

Map 20.1 Taupo Volcanic Zone



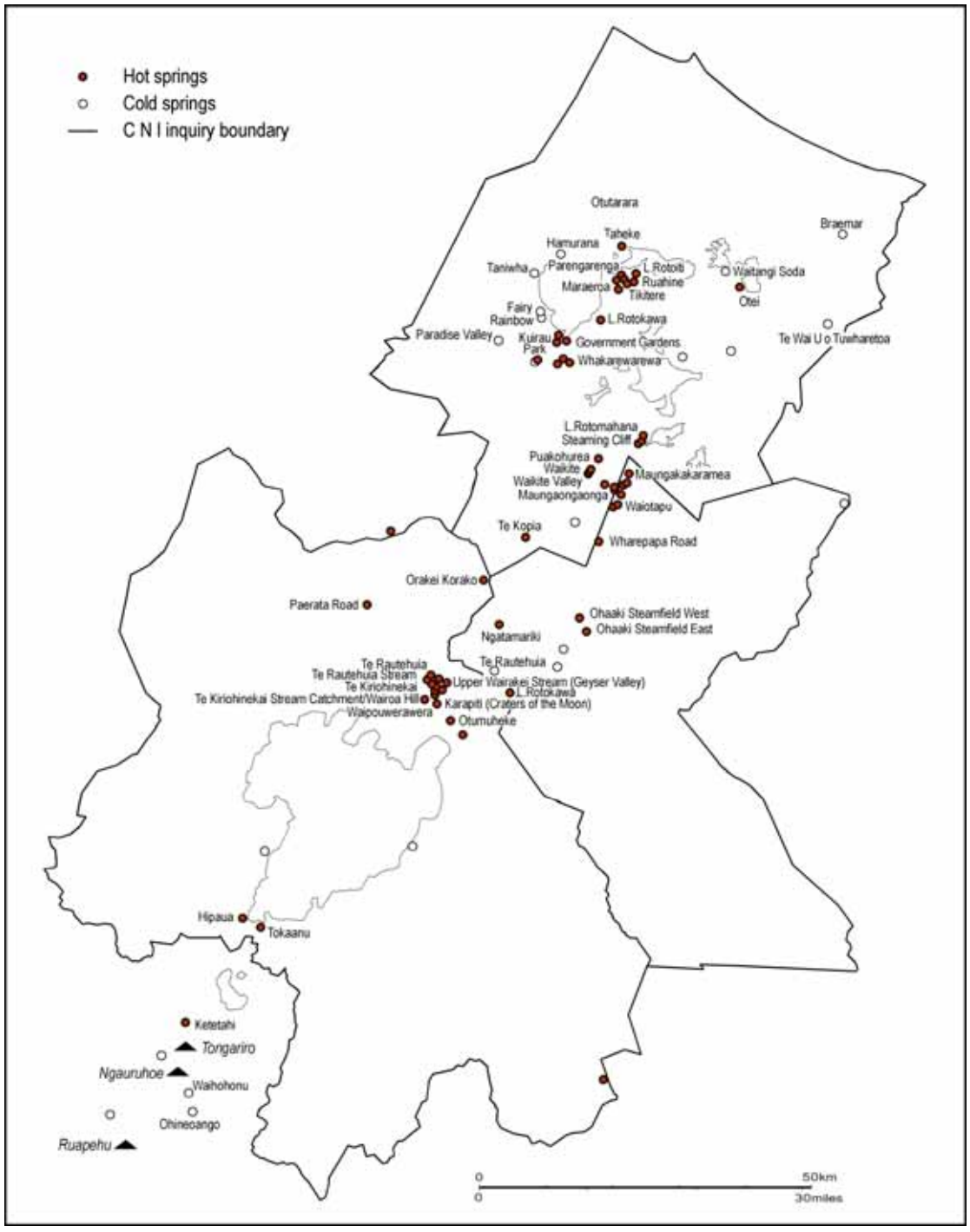
After version reproduced in Stokes, *The Legacy*, A56, figure 3

Map 20.2 Marae in relation to principal geothermal fields



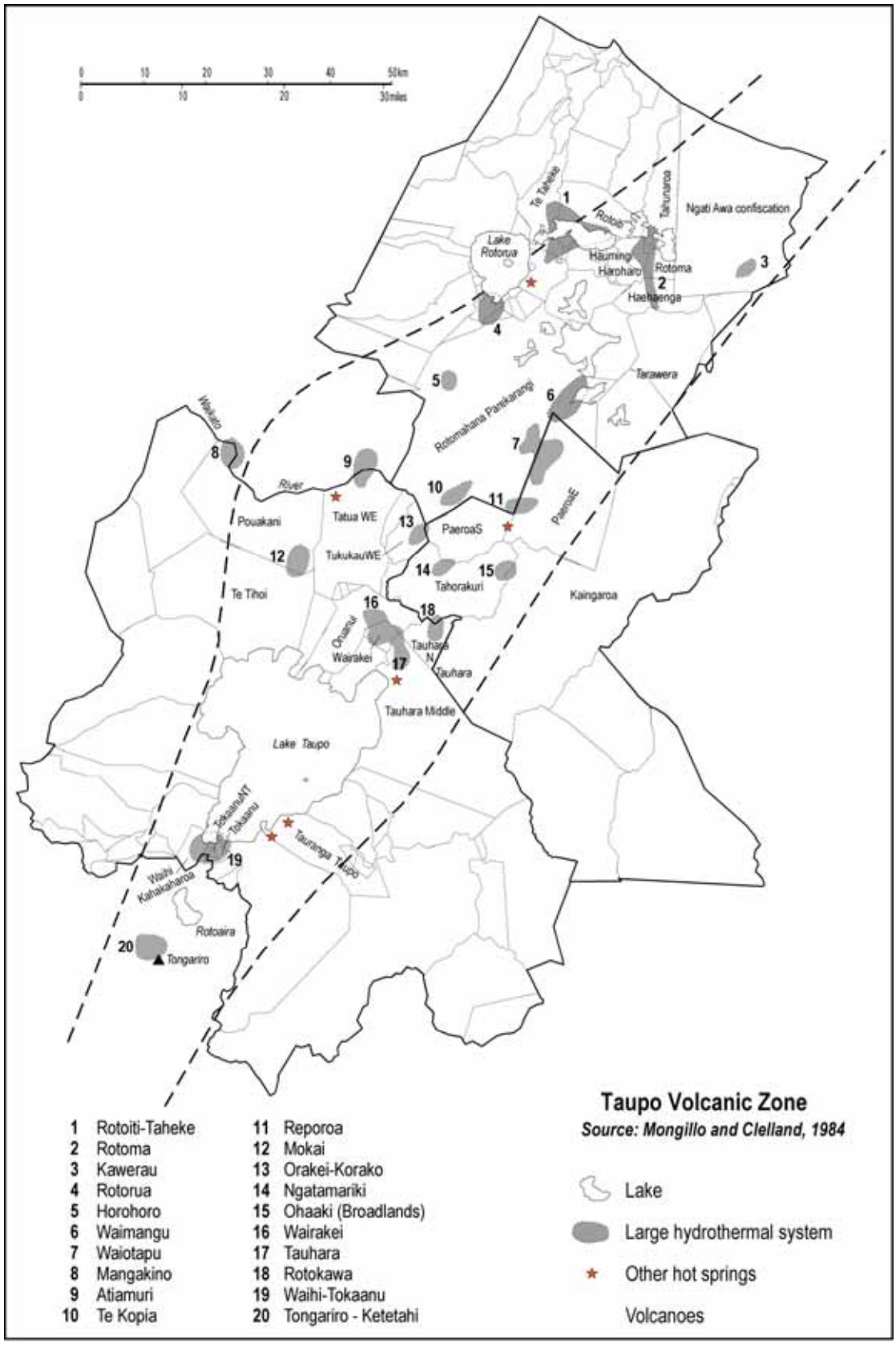
Based on information from: Stokes, *The Legacy,* A56, figures 3 and 4

Map 20.3 Hot and cold springs in the central North Island



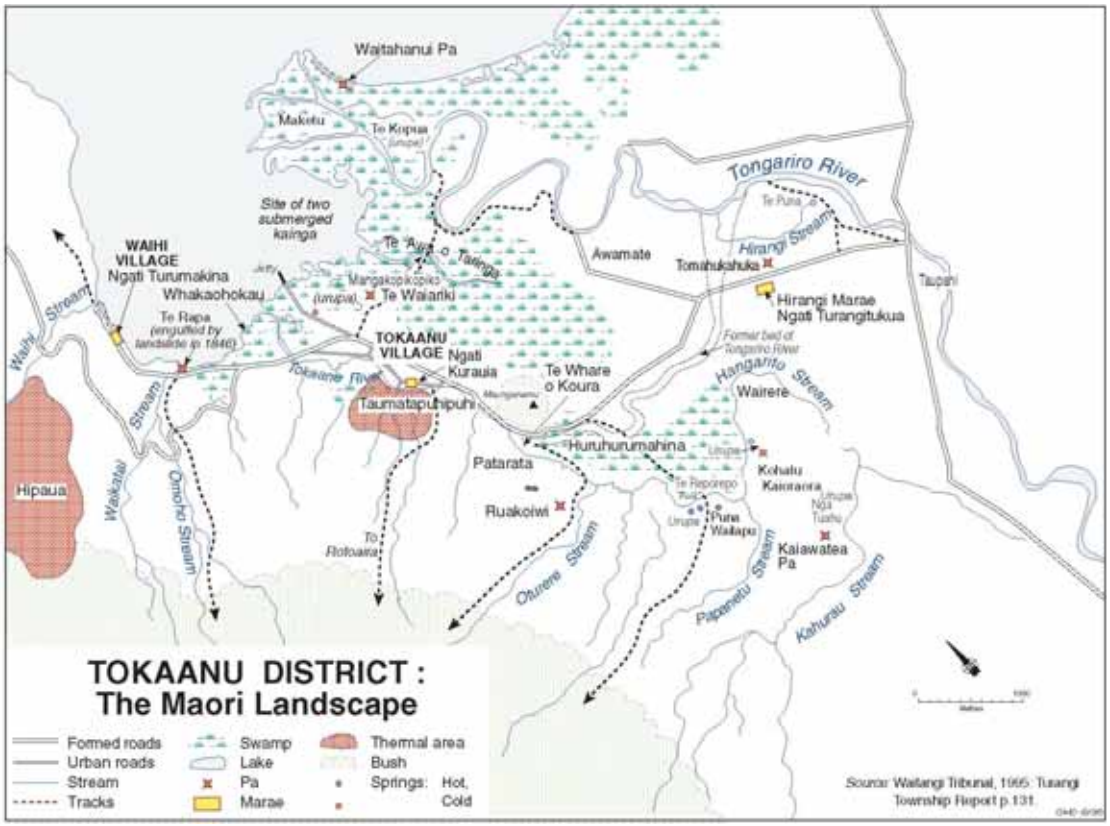
Source: 'Maps of the Central North Island Inquiry Districts, part 2', CFRT, March 2005, Document D35, plate 10

Map 20.4 Geothermal fields in relation to Maori land block boundaries

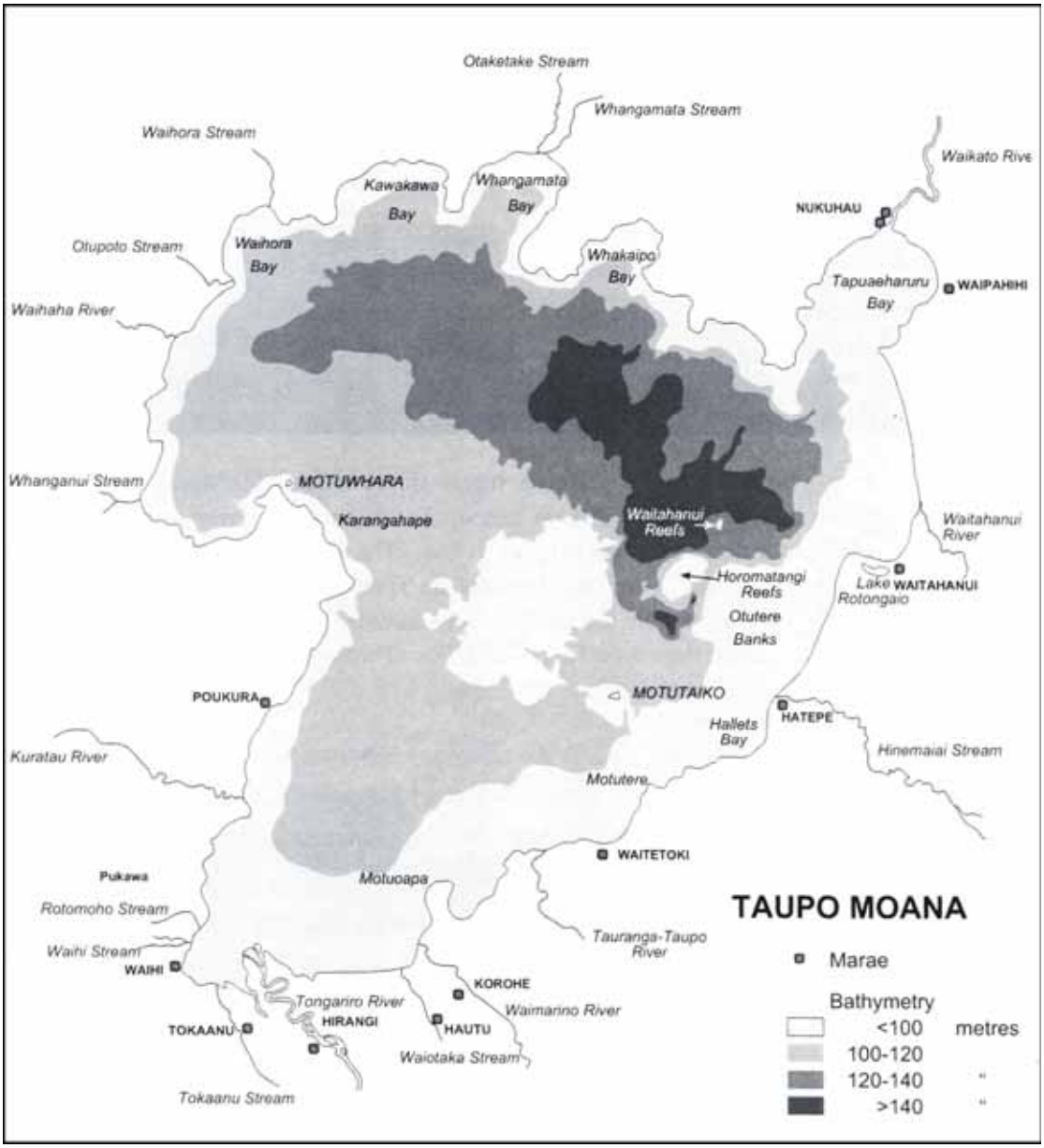


Location and extent of geothermal fields sourced from: Stokes, *The Legacy*, A56, figure 3, p 8

Map 20.5

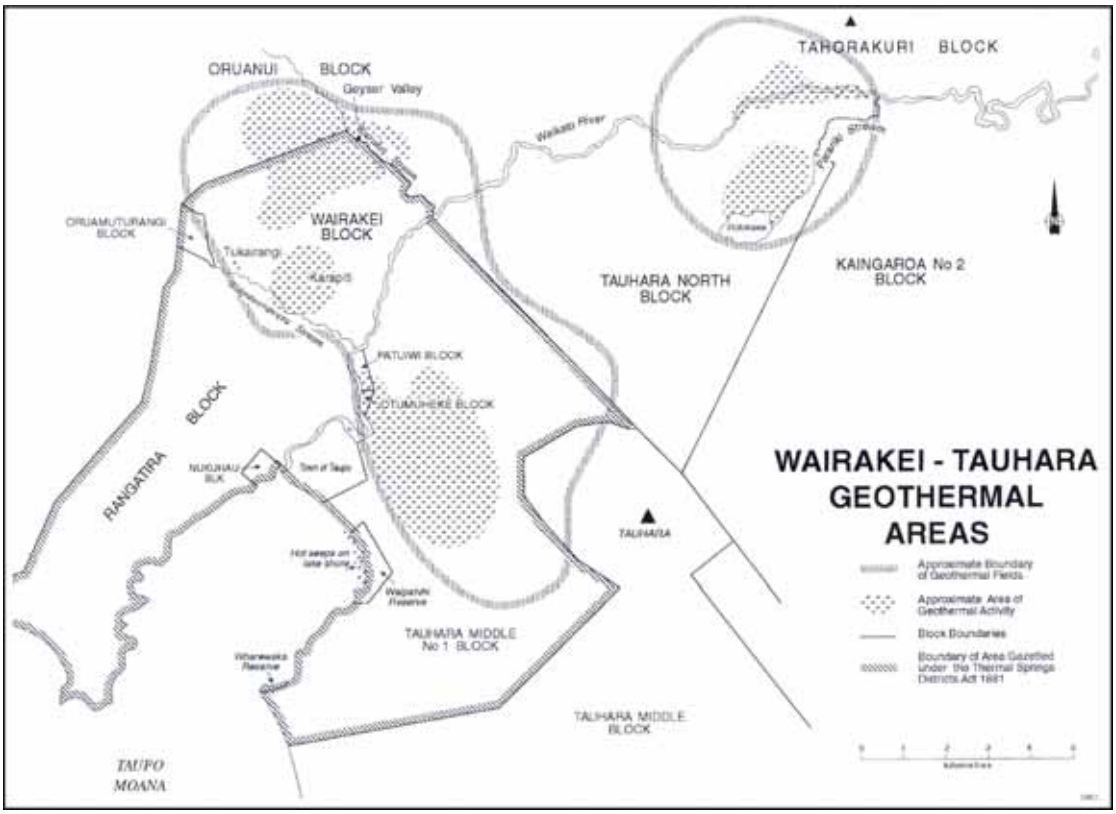


Map 20.6 Taupo Moana and Horomatangai reef



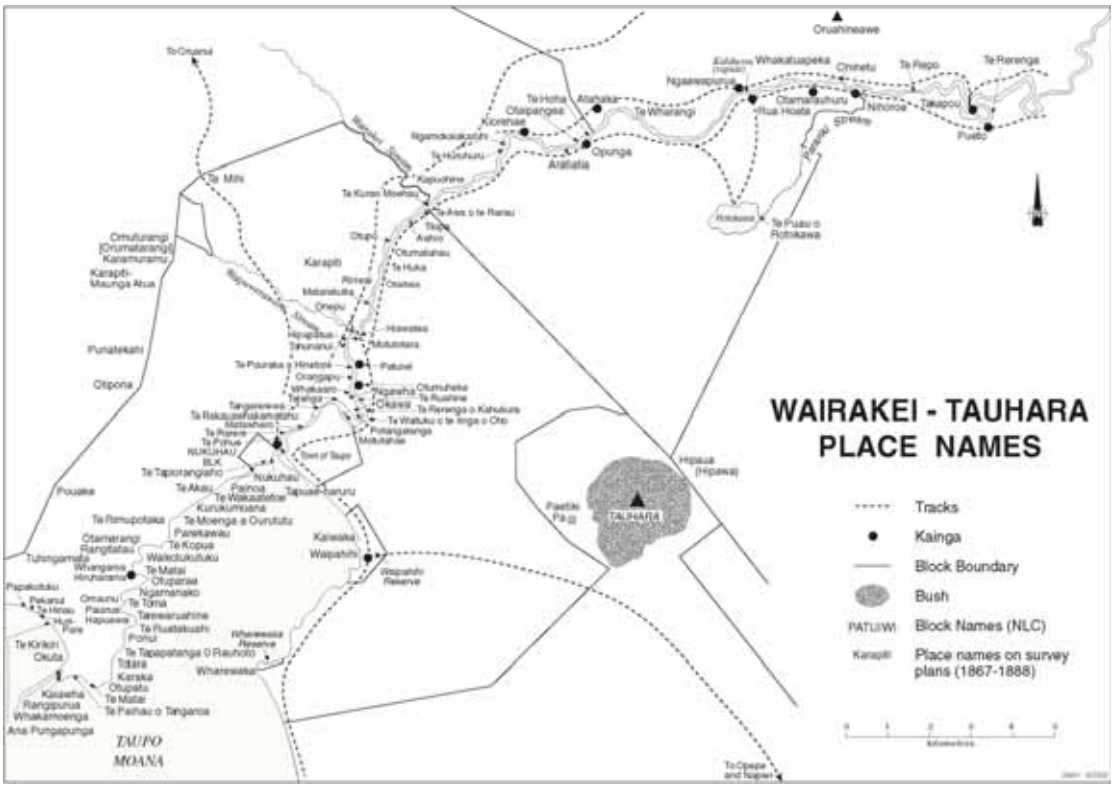
Source: Stokes, *The Legacy*, A56, figure 6, p 40

Map 20.7 Wairakei – Tauhara geothermal areas



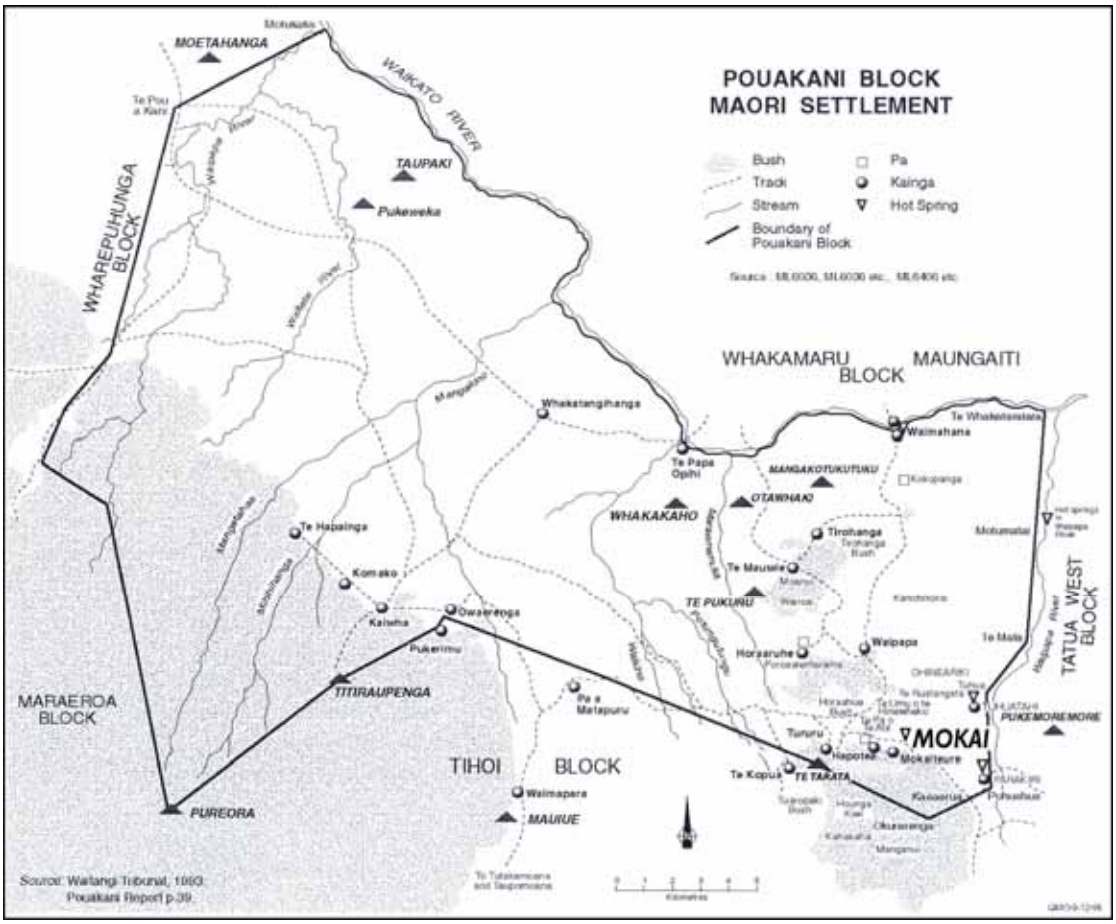
Source: Stokes, *The Legacy*, A56, figure 19, p 130

Map 20.8

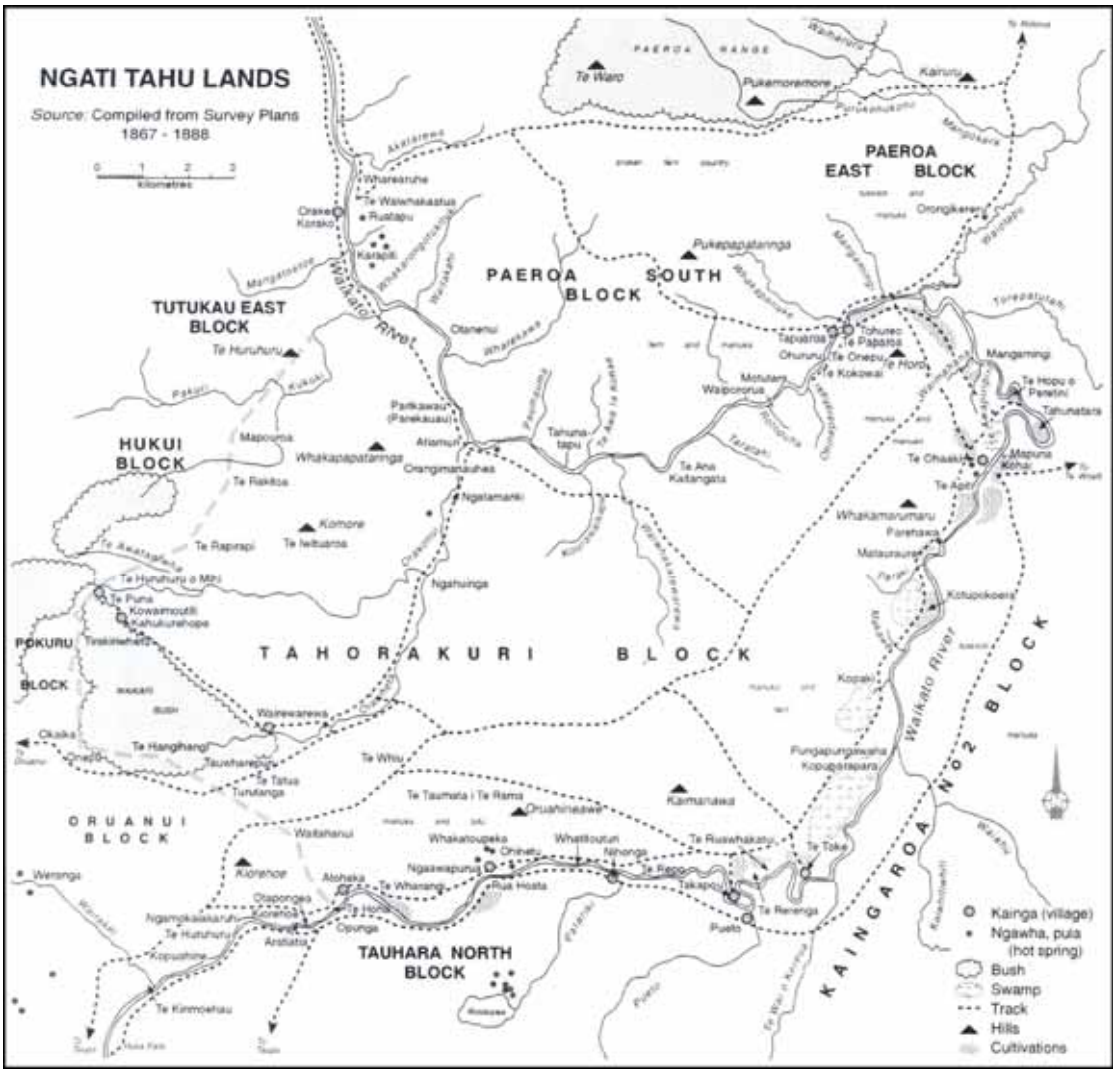


Source: Stokes, *The Legacy*, A56, figure 20, p 131

Map 20.9

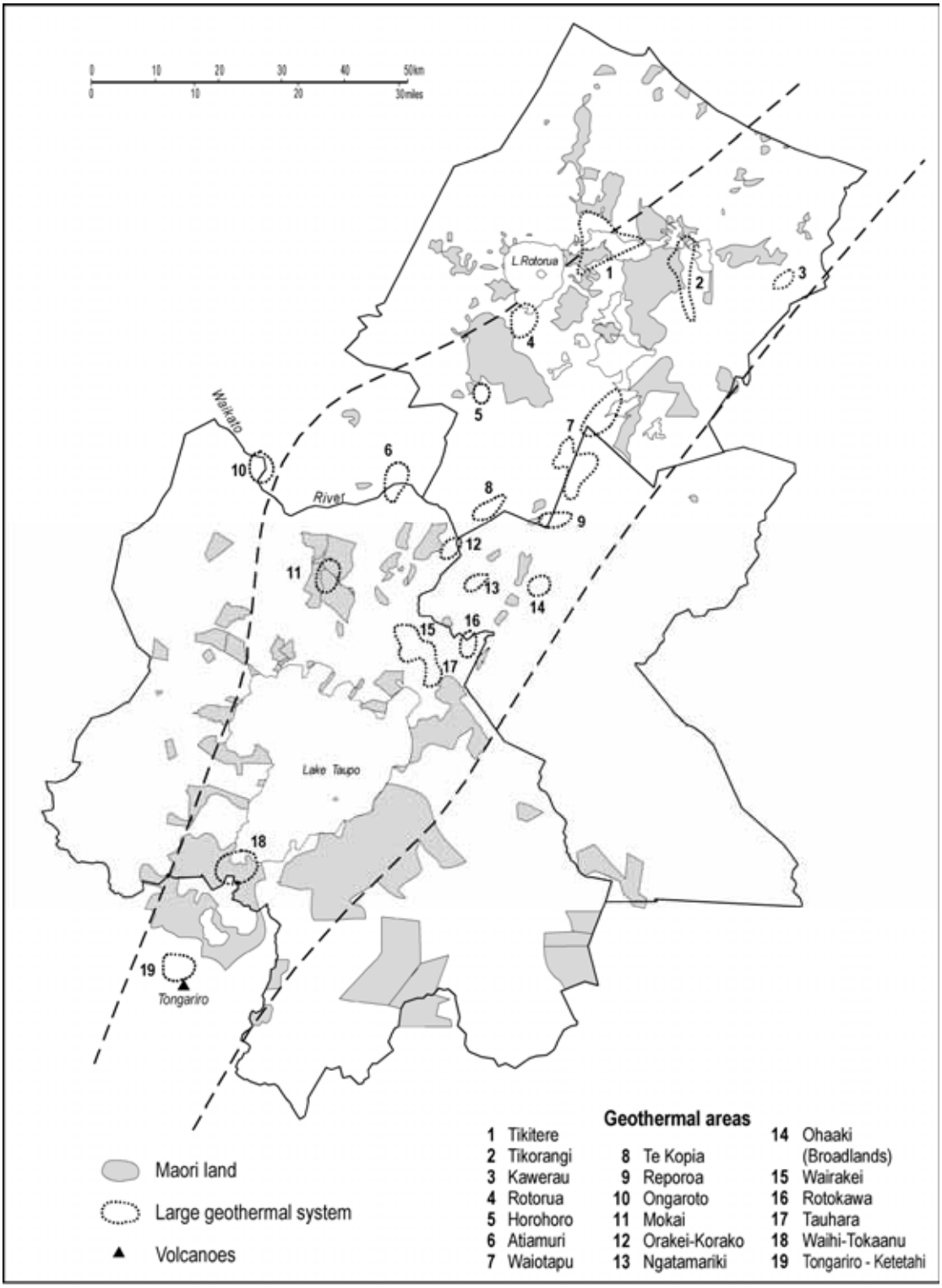


Map 20.10



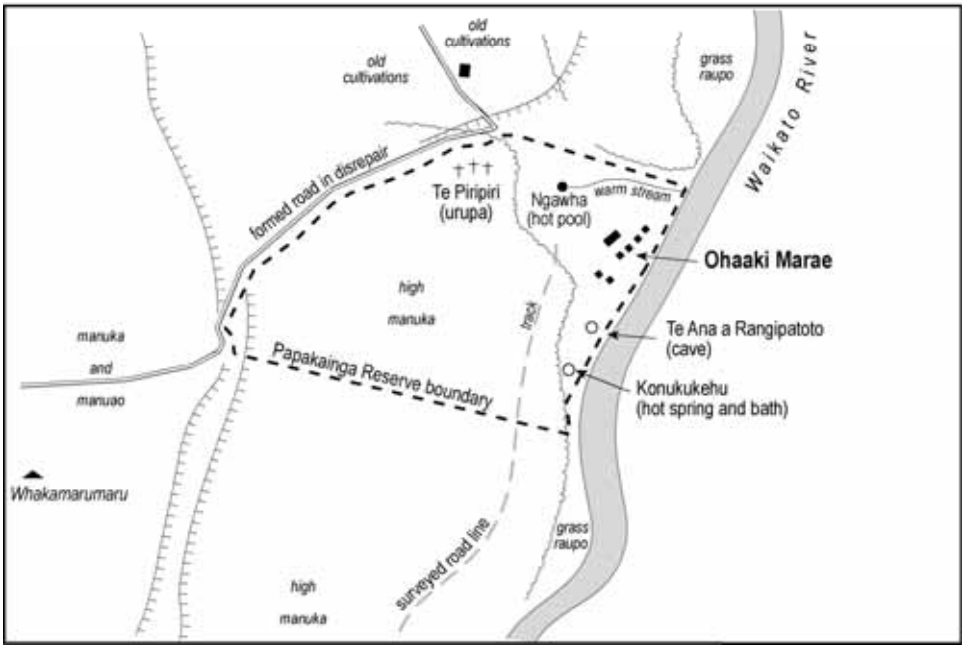
Source: Stokes, *The Legacy*, A56, figure 13, p 96

Map 20.11 Remaining Maori freehold land in relation to geothermal fields in the Taupo Volcanic Zone



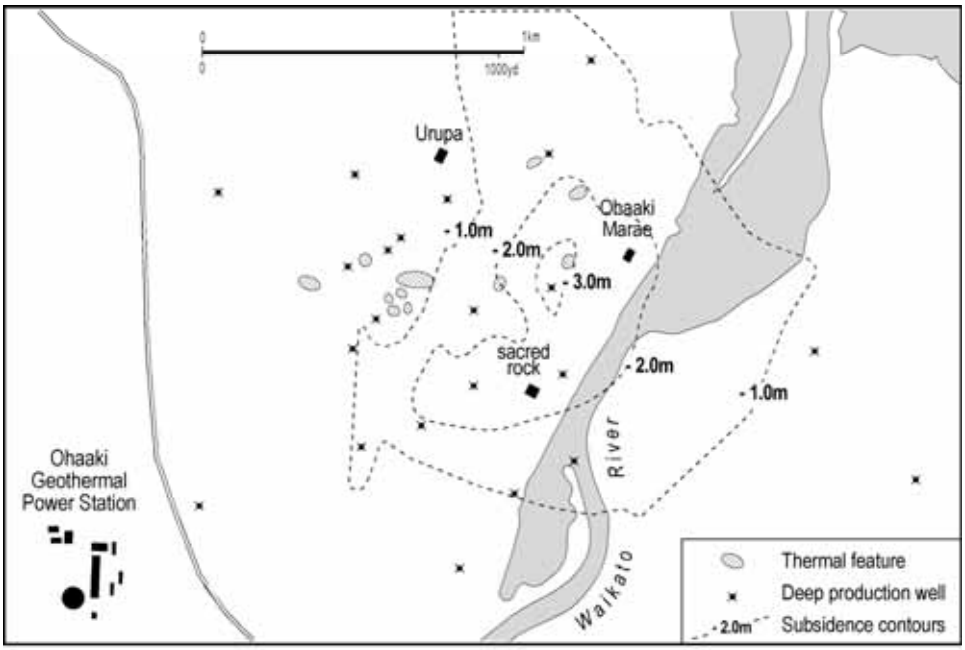
Based on information from *A Guide to Geothermal Development*, (Wellington, Te Puni Kokiri, nd), figure 3; Stokes, *The Legacy*, A56, figure 3, p 8

Map 20.12 Ohaaki papakainga reserve c1930



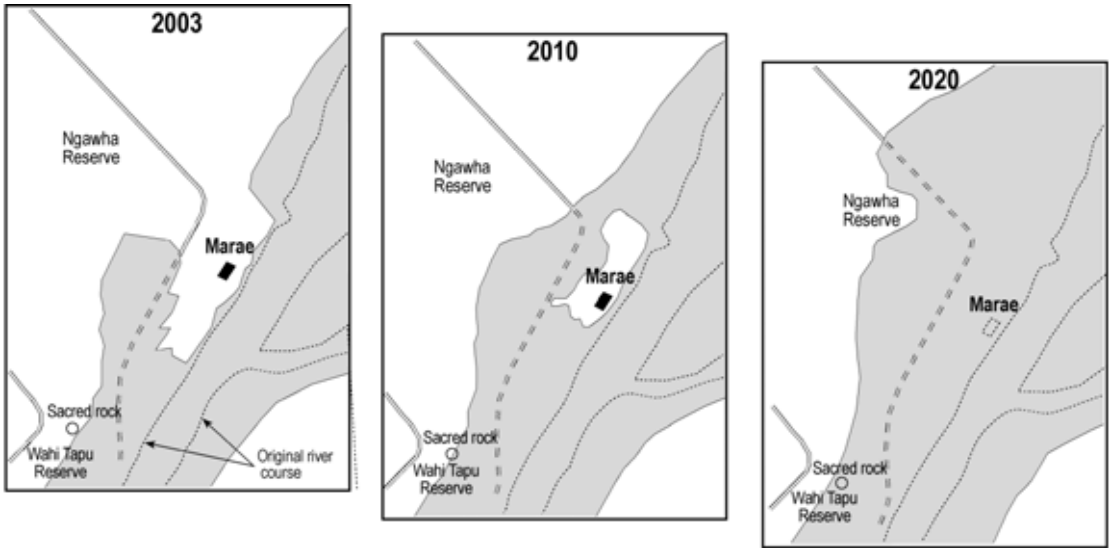
After Stokes, *The Legacy*, A56, figure 15, p 110

Map 20.13 Subsidence at Te Ohaaki



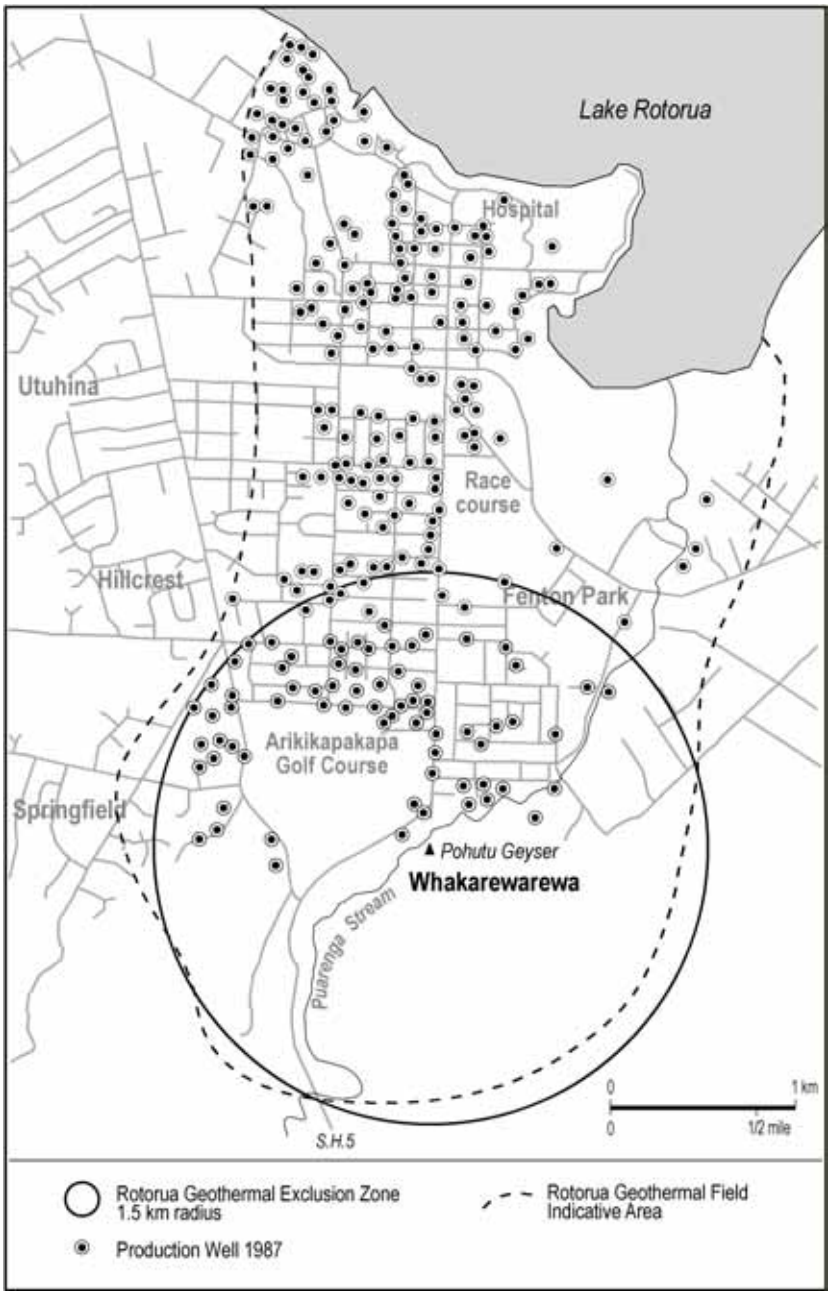
Based on: Kirkpatrick et al, E3, figure 8.16; C Bromley, Document H34, figure 2

Figure 20.2 Projected flooding at Te Ohaaki: 2003, 2010, 2020



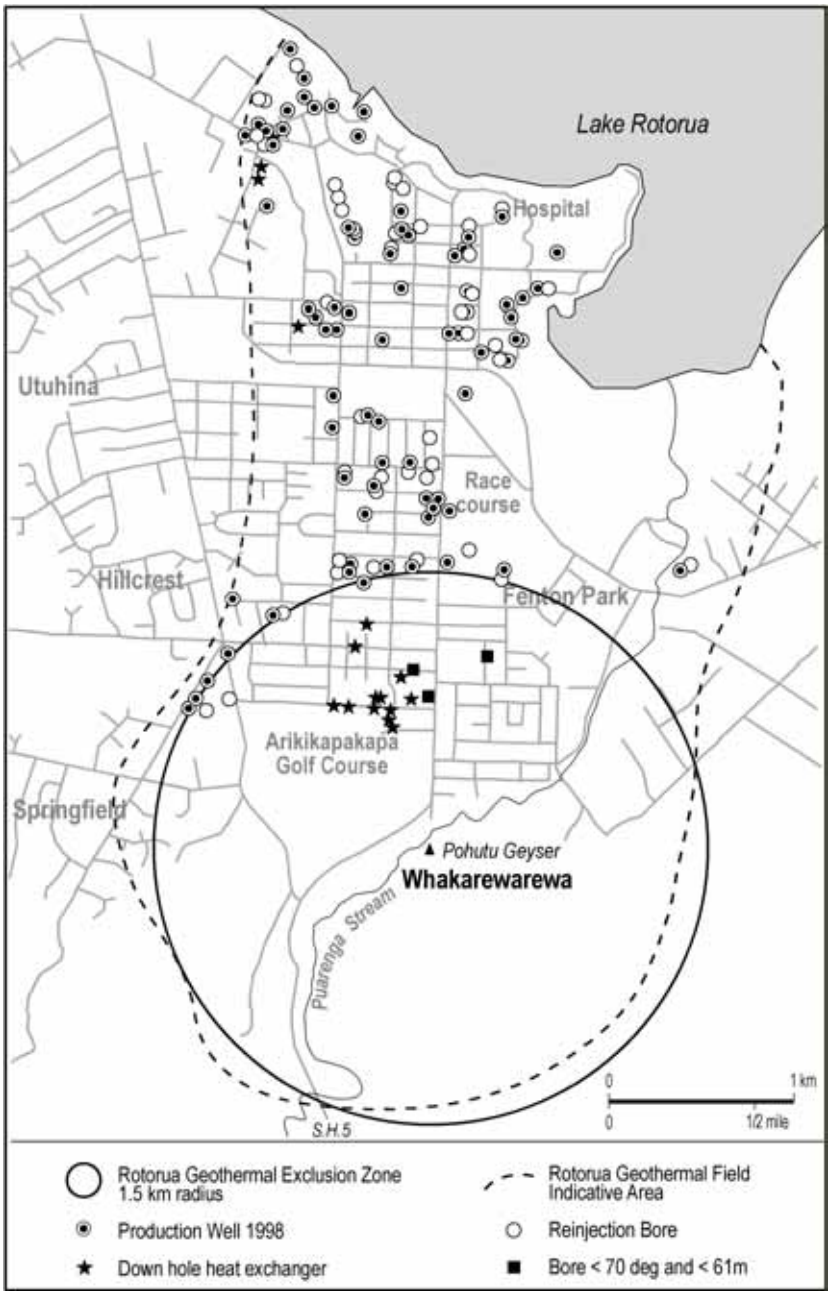
Based on: Kirkpatrick et al, E3, figures 8.19, 8.20 and 8.21

Map 20.14 Geothermal bores in Rotorua, 1987



Source: *Rotorua Geothermal Regional Plan* (Whakatane: Environment Bay of Plenty, July 1999), figure 5

Map 20.15 Geothermal bores in Rotorua, 1998



Source: *Rotorua Geothermal Regional Plan* (Whakatane: Environment Bay of Plenty, July 1999), figure 6