The Legal Voice of Māori in Freshwater Governance

A Literature Review

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Landcare Research
Manaaki Whenua

The Legal Voice of Māori in Freshwater Governance:

A Literature Review.

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This literature review on the contemporary Māori legal voice in freshwater governance was prepared for Landcare Research by Jacinta Ruru, with the assistance of Rosemary Clucas, Naomi Johnstone and Joshua Williams, between August 2008 and March 2009, as part of the Old Problems, New Solutions project funded by the Foundation for Research, Science and Technology (C09X0702).

Objectives

- To conduct work, with assistance from Landcare Research and Te Rūnanga o Ngāi Tahu, required to complete Milestone 1.3.1 as described in the project proposal entitled Old Problems, New Solutions: 'review legal and institutional frameworks in respect to Māori leadership in resource governance in New Zealand'.
- To provide a summary of how the Māori voice in regard to rights to govern fresh water has been interpreted by central government, the courts, and the Waitangi Tribunal.
- To collate a useful research bibliography of published works, government reports, judicial cases, Waitangi Tribunal reports, and Treaty of Waitangi settlements concerning Māori and fresh water.

Methods

- Information was primarily gathered through the University of Otago libraries, including online publicly restricted databases and interloan services, and from material provided at the Te Rūnanga o Ngāi Tahu head office.

Main Findings

- Through collating the research bibliography it became apparent that (1) few sources were readily available to those in the public wishing to better understand how Parliament and the courts have been responding to the Māori voice in regard to freshwater governance; and (2) there were significant gaps in the literature relating to Māori and freshwater governance.
- Specifically, no summaries of the Waitangi Tribunal reports, settlement statutes or court cases existed in any of the published or unpublished material. It is impossible to grasp the legal framework concerning the Māori articulation to rights and responsibilities to govern fresh water without a sound understanding of the developments in these quarters. It thus became a priority of this literature review to provide a publicly available report that summarised key developments in relevant Environment Court and Appeal Court cases, Treaty of Waitangi settlement statutes and Waitangi Tribunal reports.
- In addition, the collation of the research bibliography highlighted two primary concerns of Māori: who owns fresh water and should Māori be viewed as a partner or merely a stakeholder in the recognition of rights to govern fresh water? This literature review provides a legal analysis of the first issue in the context of exploring whether there exists the possibility of the High Court recognising Māori ownership of a river pursuant to the common law doctrine of native title. The second issue has been tagged as urgent research for a subsequent project.

Conclusions and Recommendations

- Developments in the Environment Court and appeal courts, the Waitangi Tribunal and Parliament in the context of Treaty of Waitangi settlement statutes require close monitoring in the immediate future to ascertain the struggles and successes of Māori to better participate in the governance of fresh water.
- More legal research is urgently required to address whether Māori ought to be viewed as a Treaty partner or merely a stakeholder in the recognition of rights to govern fresh water.
- While the objective of this report was to review legal and institutional frameworks, other related research is required. For instance, local authority policies and plans, and relevant iwi policy and plans (such as iwi management plans) ought to be comparatively reviewed. Relevant media reports (primarily newspaper articles) and submissions made to the Government ought to be canvassed over a time period of perhaps the last five years to better appreciate the Māori voice.

1. Introduction

This literature review on the contemporary Māori legal voice in freshwater governance was prepared for Landcare Research by Jacinta Ruru, with the assistance of Rosemary Clucas, Naomi Johnstone and Joshua Williams, between August 2008 and March 2009, as part of the Old Problems, New Solutions project funded by the Foundation for Research, Science and Technology (C09X0702). Information was primarily gathered through the University of Otago libraries, including online publicly restricted databases and interloan services, and from material provided at the Te Rūnanga o Ngāi Tahu head office.

2. Background

In 2008, a general consensus emerged among government officials that Māori have some rights to be involved in any new governance structure for fresh water. For example, the *Proposed National Policy Statement for Freshwater Management* (Ministry for the Environment (MfE) 2008b, released 20 September) accepts that the Treaty of Waitangi is the 'underlying foundation of the Crown–Māori relationship with regard to freshwater resources'[1]. The proposed national policy statement embraces that it is 'one step in the process of addressing tangata whenua values and interests including the involvement of iwi and hapū in the management of fresh water'[1]. Even the New Zealand Business Council for Sustainable Development's 2008 report entitled *A Best Use Solution for New Zealand's Water Problems* recognises iwi as a stakeholder and accepts that the current framework 'has proven to be unable to incorporate customary rights under the Treaty of Waitangi into local water allocation and use' and that 'iwi rights under the Treaty of Waitangi in respect of freshwater resources have yet to be resolved in many catchments'[2]. Moreover, on 15 December 2008, Prime Minister John Key accepted that in the context of water allocation 'Māori, without doubt, will be a clear stakeholder when it comes to that debate'[3].

But are Māori simply 'very important stakeholders'[3]? According to the Ministry for the Environment's *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* (published in July 2005) '[T]here was widespread expectation that the appropriate role for Māori in water management is one of partnership with the Crown rather than a stakeholder relationship' (MfE 2005d, p. vii)[4]. Many have recognised that it is unclear in law

[1] Preamble. Note that this report is available to view on the Ministry for the Environment's website at: http://www.mfe.govt.nz/rma/central/nps/freshwater-management.html (accessed 29 March 2009).
[2] The New Zealand Business Council for Sustainable Development, *A Best Use Solution for New Zealand's Water Problems 2008*, p 17. Note that this report can be viewed at: http://www.nzbcsd.org.nz/water/content.asp?id=444 (accessed 29 March 2009).
[3] Juliet Rowan of The New Zealand Herald 'Key offers Māori say on water' *Otago Daily Times* Monday 15 December 2008, p 1. This article can be viewed at: http://www.odt.co.nz/news/national/36055/key-offers-Māori-say-water (accessed 29 March 2009). See also Juliet Rowan 'Key to look at who owns water' *The New Zealand Herald* Monday 15 December 2008 at: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10548068 (accessed 29 March 2009).
[4] Note that this report is available on the Ministry for the Environment's website at:

who owns water – the Crown or Māori – and many Māori in particular stress that this issue 'must be addressed before any major changes to water management can be considered'[4]. The uncertainty arises in part because the common law relating to flowing water does not recognise ownership possibilities, but the common law doctrine of native title potentially does along with the guarantees made to Māori in the Treaty of Waitangi in 1840, as is discussed at length later in this report. Moreover, New Zealand's legislation (other than the iwi-specific settlement statutes) is silent on the ownership of fresh water. Nonetheless, such legislation is vocal on its management.

Principally, the Resource Management Act 1991(RMA) – an Act that restates and reforms the law relating to the use of land, air, and water – gives regional and local councils the power to assert rules and guidelines for the take, use, damming, and diversion of fresh water (s 14). In formulating these rules and guidelines, and issuing of consents, the RMA directs councils to recognise the Māori relationship with water. Section 6(e) mandates that all persons exercising functions and powers under the RMA must recognise and provide for matters of national importance, including the relationship of Māori and their culture and traditions with water. However, this is one of several factors that councils must weigh up in reaching decisions. Other interests often trump Māori interests, such as the need to have particular regard to 'the benefits to be derived from the use and development of renewable energy' (s 7(j)).

There are several instances where Māori have appealed council decisions that approved resource consents to increase the take of water for agriculture and development purposes. Often Māori have been unsuccessful in their arguments. However, a recent Environment Court case did favour the Māori applicants: *Te Maru o Ngati Rangiwewehi v Rotorua District Council*, which was decided on 25 August 2008. Here the Court gave strength to section 6(e) of the RMA stating (in para 132) that such a direction 'should not be given lip service to'. In that case the Court held that the cultural effects on Ngāti Rangiwewehi of the proposed increased take of water from a spring and stream central to their identity are sufficiently significant to warrant serious consideration to be given to alternatives.

Other than advancing arguments in the courts, Māori have the option to pursue claims via the Treaty of Waitangi settlement process. For more than 100 years, Māori have been seriously contending for the ownership and governance of fresh water. Māori have had some success with the Crown accepting tribal ownership of lakebeds in both the North Island and South Island[5]. Significantly, in 2008, the Government introduced the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Bill. This Bill is revolutionary because it advances a new co-management regime for the governance and effective management of the country's longest river, the Waikato River (425 km).

This report focuses on such issues and advancements within the context of providing a crucial summary for those interested in navigating the legal and institutional framework of the potential for Māori leadership in freshwater governance. It is concerned mostly with the contemporary, post-1975 voice. The report first seeks to explain how the current governing statute, the RMA, regulates freshwater and the role it provides for Māori to be involved in that regulation (Section 4). Second, it provides a brief picture of the initiatives being advanced by the Ministry for the Environment to reform water law (Section 5). Third, it

http://www.mfe.govt.nz/rma/central/nps/freshwater-management.html (accessed 29 March 2009).

[5] For more recent examples see the Ngai Tahu Claims Settlement Act 1998 and Te Arawa Lakes Settlement Act 2006.

summarises the difficulties Māori have faced in pursuing their rights to be involved in the allocation of freshwater governance via the Environment Court and the upper appeal courts (Section 6). The fourth and fifth parts focus on the Treaty of Waitangi settlement process by initially canvassing how the Waitangi Tribunal has interpreted existing Māori rights to govern, and in some instances own, fresh water (Section 7), and then looks to Treaty of Waitangi settlement statutes to see how specific iwi and the Government have resolved such governance issues (Section 8). A consideration of the potential for Māori to argue the common law doctrine of native title takes place in Section 9. The report concludes with a comprehensive research bibliography and appendices listing statutes, bills and agreements etc. (Appendix 1), case law (Appendix 2), and Waitangi Tribunal Reports (Appendix 3).

The aim of this report is to provide a collection of background information relevant to considering the Māori voice in the governance of fresh water. It focuses on the legal articulation of that voice. The report does not provide an insight into how iwi are expressing their rights through planning documents, such as iwi management plans, or how local authorities are responding to and providing avenues for Māori involvement in water governance. It is hoped that a subsequent report will canvass these issues. Notwithstanding this policy gap, the strength of this report is its provision of an insight into the legal issues surrounding Māori and water. It ought to be of value to those seeking an introductory understanding to how Māori have articulated their rights to be involved in water governance over the past couple of decades. No similar document exists that attempts to pull together this legal material. This report is thus timely in the current political environment where the issue of Māori rights to govern water is gaining momentum.

3. Objectives

- To conduct work, with assistance from Landcare Research and Te Rūnanga o Ngāi Tahu, required to complete Milestone 1.3.1 as described in the project proposal entitled Old Problems, New Solutions: ‘review legal and institutional frameworks in respect to Māori leadership in resource governance in New Zealand’.
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4. Resource Management Act 1991

4.1 Introduction

The Resource Management Act 1991 (RMA) is New Zealand's pre-eminent natural resources statute. It puts forward an all-encompassing regime for the sustainable management of land, air, and water. Section 5 defines sustainable management as:

> …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.

The common starting point is that no person may do anything with land, air or water that contravenes a rule in a district plan unless the activity is expressly allowed by a resource consent, or coastal permit, granted by the territorial authority responsible for the plan, or a rule in a regional, or regional coastal, plan[6].

4.2 Responsibilities for water regulation

As defined in the RMA (s 2) water:

> (a) Means water in all its physical forms whether flowing or not and whether over or under the ground;
> (b) Includes freshwater, coastal water, and geothermal water;
> (c) Does not include water in any form while in any pipe, tank, or cistern:

Water body is defined in the RMA (s 2) to mean 'fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area'.

The RMA gives regional and local councils the power to assert rules and guidelines for the take, use, damming, and diversion of fresh water. Section 14 specifically sets out the restrictions relating to water:

> (1) No person may take, use, dam, or divert any—
> (a) Water (other than open coastal water); or
> (b) Heat or energy from water (other than open coastal water); or
> (c) Heat or energy from the material surrounding any geothermal water—
> unless the taking, use, damming, or diversion is allowed by subsection (3).
> (2) No person may—
> (a) Take, use, dam, or divert any open coastal water; or
> (b) 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

[6] See Part 3 of the RMA: ss 9–23. Note, New Zealand legislation is freely available to view online at: www.legislation.govt.nz.

> expressly allowed by a resource consent or allowed by section 20A (certain existing lawful activities allowed).
> (3) A person is not prohibited by subsection (1) from taking, using, damming, or diverting any water, heat, or energy if—
> (a) The taking, use, damming, or diversion is expressly allowed by a rule in a regional plan and in any relevant proposed regional plan or a resource consent; or
> (b) In the case of fresh water, the water, heat, or energy is required to be taken or used for—
> (i) An individual's reasonable domestic needs; or
> (ii) The reasonable needs of an individual's animals for drinking water,—
> and the taking or use does not, or is not likely to, have an adverse effect on the environment; or
> (c) In the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Māori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or
> (d) In the case of coastal water (other than open coastal water) the water, heat, or energy is required for an individual's reasonable domestic or recreational needs and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or
> (e) The water is required to be taken or used for fire-fighting purposes.

Section 30 states the specific functions that all regional councils have in regard to water. These include controlling the use of land for the purpose of the maintenance and enhancement of the quality and quantity of water in water bodies (s 30(1)(c)(ii) and (iii)). The functions also include controlling the taking, use, damming and diversion of water, and the control of the quantity, level, an flow of water in any water body, including setting of any maximum or minimum levels of flows of water the control of the range, or rate of change, of levels of flows of water, and the control of the taking or use of geothermal energy (s 30(e)). Regional councils need to control discharges of contaminants into water, and discharges of water into water (s 30(f)). Regional councils can also, if appropriate, establish rules in a regional plan to allocate the taking or use of water, as long as the allocation does not affect the activities authorised by section 14(3)(b)–(e)[7].

4.3 Recognition of Māori

In formulating district and regional plan rules and guidelines, and issuing of resource consents, the RMA directs local authorities to recognise the Māori relationship with water. Section 6(e) of the RMA mandates that all persons exercising functions and powers in relation to managing the use, development, and protection of natural and physical resources must recognise and provide for matters of national importance, including the relationship of Māori and their culture and traditions with *water*[8]. However, this is one of several factors that local authorities must weigh up in reaching decisions. Section 6 in full reads:

[7] Section 30(fa)(i) and s 30(4)(f). Note that all territorial authorities have the power to control any actual or potential effects of activities in relation to the surface of water in rivers and lakes: see s 1(1)(e).
[8] Emphasis added.

> 6 Matters of national importance
> 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 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 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.

Additionally, section 7(a) of the RMA directs that all persons exercising functions and powers in relation to managing the use, development, and protection of natural and physical resources shall have particular regard to kaitiakitanga. Again, it is one of several factors that must be considered. Section 7 in full reads:

> 7 Other matters
> 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;
> (aa) The ethic of stewardship;
> (b) The efficient use and development of natural and physical resources;
> (ba) The efficiency of the end use of energy;
> (c) The maintenance and enhancement of amenity values;
> (d) Intrinsic values of ecosystems;
> (e) [Repealed]
> (f) Maintenance and enhancement of the quality of the environment;
> (g) Any finite characteristics of natural and physical resources;
> (h) The protection of the habitat of trout and salmon;
> (i) The effects of climate change;
> (j) The benefits to be derived from the use and development of renewable energy.

The fourth section in Part 2 of the RMA is section 8, which reads:

> 8 Treaty of Waitangi
> 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).

These four sections provide the foundation for the RMA and provide a strong base for Māori to voice their concerns relating to fresh water. In addition, several other sections in the RMA create mandatory requirements on local authorities to listen to the Māori voice. For example, in 2003, the RMA was amended to direct that a regional council, when preparing or changing a regional policy statement, must[9]:

[9] Section 61(2A)(a) inserted by s 24(2) of the Resource Management Amendment Act 2003. Note that a similar direction exists for territorial authorities see: s 74(2A)(a) inserted by s 31(2) of the Resource Management Amendment Act 2003. Note that s 2 of the RMA defines an iwi authority as 'the authority which represents an

> …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.

Section 62(1)(b) directs that a regional policy statement must state the resource management issues of significance to iwi authorities in the region. Moreover, since 2005, all local authorities must keep and maintain, for each iwi and hapū within its region or district, a record of (s 35A(1)):

> (a) The contact details of each iwi authority within the region or district and any groups within the region or district that represent hapu for the purposes of this Act; and
> (b) The planning documents that are recognised by each iwi authority and lodged with the local authority; and
> (c) Any area of the region or district over which 1 or more iwi or hapu exercise kaitiakitanga.

The RMA also provides for some substantial possibilities for Māori to be more actively involved in the governance of natural resources, including water. For example, the RMA empowers a local authority to transfer any one or more of its functions, powers, or duties to any iwi authority (s 33(2)). The RMA also enables a local authority to make a joint management agreement with an iwi authority and group that represents hapū for the purposes of this Act (s 36B)[10].

4.4 Conclusion

While the RMA provides some safeguards for Māori to express their voice in regard to water as has been explained above, the RMA is currently undergoing amendment via the proposed Resource Management (Simplifying and Streamlining) Amendment Bill 2009. The Bill was introduced on 19 February 2009 and is currently being reviewed by the Local Government and Environment Committee. Public submissions were due on 3 April 2009. The select committee will report back to the House on 19 June 2009. Important future research will involve reviewing the submissions and considering the implications of any amendments to the RMA in the context of Māori and fresh water.

5. Central Government Initiatives

5.1 Introduction

In 2003, the Labour-led Government established the Sustainable Water Programme of Action as part of the wider Sustainable Development Programme of Action, to ensure that the country's freshwater resources are managed wisely to provide for the present and future environmental, cultural, social and economic well-being of New Zealand. A discussion document was released in December 2004, outlining the key issues with water management and a proposed package of actions. In early 2005, 17 hui with Māori were held around the country to discuss the issues raised in the discussion document. In July 2005, the Ministry for

iwi and which is recognised by that iwi as having authority to do so'.

[10] See also ss 36C–36E.

the Environment published *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* plus several other key documents. In April 2006, the Minister for the Environment and the Minister of Agriculture and Forestry jointly released the implementation package of the Sustainable Water Programme of Action. As part of this the government is seeking to achieve three key national outcomes in relation to fresh water (MfE 2008a, p. 1):

- Improve the quality and efficient use of fresh water by building and enhancing partnerships with local government, industry, Māori, science agencies and providers, and rural and urban communities.
- Improve the management of the undesirable effects of land use on water quality through increased national direction and partnerships with communities and resource users.
- Provide for increasing demands on water resources and encourage efficient water management through increased national direction, working with local government on options to support and enhance local decision-making, and developing best practice.

The government committed to developing a national environmental standard (NES) under the Resource Management Act 1991 (RMA). The NES is intended to complement and enhance the existing Resource Management Act process for establishing environmental flows and water levels through regional plans. The proposal has been developed in response to a key challenge in water management identified by regional councils and others. It consists of three key objectives (MfE 2008a, p. viii):

- To ensure that all resource consent decisions on applications to take, use, dam and divert water from rivers, lakes, wetlands and aquifers are made in the context of a clear limit on the extent to which flows and water levels can be altered.
- To ensure that all resource consent decisions on applications to take, use, dam and divert water from rivers, lakes, wetlands and aquifers are made in the context of a clear specification of available water.
- To reduce conflict and provide consistency on the appropriate technical methods used to assess the ecological component of environmental flows and water levels.

As stated in the *Proposed National Environmental Standard on Ecological Flows and Water Levels Discussion Document* (MfE 2008, p. ix), the preferred option to address these problems is to develop a national environmental standard that:

- Sets interim limits on the alterations to flows and/or water levels in those rivers, wetlands and groundwater systems for which there are no limits set in a proposed or operative regional plan (or other statutory instrument);
- Provides a process for selecting the appropriate technical methods for evaluating the ecological component of environmental flows and water levels.

The Ministry for the Environment published this discussion document in March 2008 and called for public submissions. In February 2009, the Ministry published the *Summary of Submissions* report. This chapter seeks to briefly reproduce the public submissions that specifically relate to Māori as described in the 2005 *Wai Ora* report and the 2009 *Summary of Submissions* report.

5.2 Wai Ora: Report of the Sustainable Water Programme of Action consultation hui (MfE 2005)

The *Wai Ora* report is a substantial (200+ pages) report that summarises the initial comments made on the *Freshwater for a Sustainable Future: Issues and Options* report (MfE 2004). Reproduced below are pages 5–13[11].

KEY ISSUES EMERGING FROM CONSULTATION

TE RIRI ME TE MAMAE [ANGER AND PAIN]

General frustrations

One of the most striking and consistent themes to emerge from the hui is the anger, pain and sorrow many Māori individuals and communities feel due to the current state of New Zealand's freshwater resources, particularly the effects of pollution and over-allocation of water. Many things underlie these feelings – pain at the damage which has been caused to Papatūānuku (the waterways are seen as her veins) and the mauri of waterways, the cultural offence caused by practices such as sewage and effluent discharge, the damage to and loss of mahinga kai, damage to the health of those who rely on that mahinga kai, the loss of cultural wellbeing caused by degradation of the mauri of the waters, the cumulative effects on all aspects of wellbeing and much more.

For Māori, issues around water allocation and quality are not new, and many communities have been dealing with the impacts of declining water quality for years. Consequently, there is widespread frustration at a lack of action over the years on water management issues, which was reflected in the annoyance and even anger expressed by many hui participants in their verbal submissions (although almost all submitters remained courteous in the expression of their anger).

Poor water quality and declining quantities of water were raised as an issue at almost all of the hui, especially in regions with extensive dairy farming or sewage discharges to freshwater bodies.

Many people stated quite specific concerns about the impacts of poor water quality on both the waterways they relate to and their local community. These were often based on their own experience or knowledge of local impacts, or feared local impacts. The criticisms which were most commonly expressed were that water management did not give proper priority to the environment, that poor water quality and quantity had significant effects on indigenous species in waterways (including mahinga kai and taonga species) that some types of pollution were highly offensive in cultural terms, and that human health was being affected by water-borne pollutants or contaminated food sources.

While hui participants sometimes spoke about water quality issues in general terms, many also complained about water quality degradation caused by particular activities in their area (for example, sedimentation from subdivision, roads, or forestry; discharges from industry, sewage works or farming; fall in water levels due to forestry or abstraction for irrigation). These comments were frequently linked with the speaker's personal familiarity with the quality of waterways in the area, and the activities causing the impact.

Consultation and process issues

There is support for the Sustainable Water Programme of Action kaupapa – some hui

[11] Note that this report can be viewed on the Ministry for the Environment's website at: http://www.mfe.govt.nz/publications/water/wpoa-hui-report-jul05/ (accessed 29 March 2009).

participants felt that the Sustainable Water Programme of Action was a good initiative with the potential for positive change. Engaging with Māori and local communities early in the policy development process and the opportunity to discuss issues at the hui was also supported by some, although the general view was that the hui should be the first step in a longer ongoing process of engagement with tangata whenua on freshwater management.

The climate of consultation on the Sustainable Water Programme of Action was influenced by Māori experience in other local and central government consultation processes. Some hui participants expressed cynicism about the central government approach to consultation, mostly due to late engagement with Māori resulting in non-meaningful consultation on issues in the past. Some also stated that past consultation has left them feeling as though their views were not incorporated into the feedback or the final policy, or that decisions had already been made prior to the consultation.

'Hui fatigue' was also cited as an issue by some participants, who find that attendance of hui can be a time-consuming commitment, with the same iwi and hapū members often required to attend hui and provide input for consultation on a number of concurrent issues without financial compensation for their time. Hui fatigue was expressed as an issue at the Sustainable Water Programme of Action hui, as they closely followed hui for foreshore and seabed, land access and aquaculture reforms, and the Review of the Resource Management Act 1991, with Treaty negotiations also proceeding in some areas.

There were some other specific criticisms and dissatisfactions expressed regarding the Sustainable Water Programme of Action consultation process. These included inadequate advertising, notification and provision of information (mostly in the first week of the hui where there were problems with advertising), inadequate resourcing for Māori to participate in government processes, complaints about the venues and locations chosen (including the desire of many for engagement to take place at hapū or marae level) and the relatively short time available to consider the information and make written submissions.

The general nature of the government presentation meant that many participants did not have sufficient information to discuss some of the technical or unfamiliar aspects of the Sustainable Water Programme of Action. Discussion of some issues and actions (for example, those around market mechanisms as a tool) was limited and only took place in very general terms, due to a lack of detail in the presentation and the discussion document itself.

There were also some concerns that the information from the hui would not influence the policy process, and that the discussion document showed a lack of understanding or consideration of issues for Māori (see following section). Fears were expressed at some hui that the Sustainable Water Programme of Action could lead to privatisation of water, and if so, the consultation was insufficient.

The hui presenters gave undertakings at the hui in order to assure the participants that the Sustainable Water Programme of Action consultation process is genuine. Participants were told that minutes of the hui would be supplied to Ministers and treated as formal submissions, that the hui would be reported back separately so that the views expressed would remain clearly differentiated, and that this consultation round was part of the initial stage of developing policy for the Sustainable Water Programme of Action, with no decisions on the shape of the final policy package having yet been made.

Scope of the Sustainable Water Programme of Action and the discussion document

The absence of any discussion of high-level Treaty issues (including issues around ownership of water) from the Sustainable Water Programme of Action discussion document *Freshwater for a Sustainable Future* was criticised at many hui. There was also particularly strong criticism from many of the hui that the discussion document makes little or no reference to Māori viewpoints, issues, and values. The absence of such references was alienating to many. Concerns were also raised that proposed actions to enhance Māori participation was only listed 11[th] out of 13 actions, when it should be at or near the top of the list, to reflect the Treaty relationship. The lack of prominence given to the issues for Māori has led to some

participants in the hui being unwilling to fully engage.

Themes emerged regarding the scope of the Sustainable Water Programme of Action, and its sustainable development context. Many felt that a reprioritisation was needed to create an approach more in line with the principles of kaitiakitanga, with factors other than economic ones being given greater priority, and that the emphasis should be on enhancing rather than exploiting the water resource.

There was also a feeling in some areas that the Sustainable Water Programme of Action was not taking enough of a holistic view, as it did not consider issues and actions around urban water management, including stormwater and sewage treatment, or effects of freshwater management on the coastal environment and estuaries.

In relation to Māori participation in the Sustainable Water Programme of Action process, many at the hui supported the work done to date by the Māori Reference Group but sought changes to its composition. There was some support for a broader reference group with members from around the country representing waka or iwi.

The need to deal with Treaty issues around ownership and partnership

As noted above, many people felt alienated by the lack of discussion of high-level Treaty issues, Treaty claims or Māori values in the discussion document. A few saw the question of freshwater management as essentially a Treaty issue. Many participants called for the Treaty to be a factor in determining the appropriate level of Māori involvement in freshwater management, and wanted consideration of the Treaty relationship to be a priority within the Sustainable Water Programme of Action.

Many speakers were of the view that Treaty-based relationship and ownership issues must be addressed before any major changes to water management can be considered, with some stating that this was especially so where changes which might result in auctioning or tendering of water rights, or privatisation of the resource, were being considered. Some participants asked for government to work to address and clarify some of the uncertainties around property rights in fresh water. A few submitters wanted it to be much clearer whether the Crown was assuming ownership or management rights. Article 2 issues, particularly the need to protect water as a taonga and give Māori the power to protect their taonga themselves, were also raised.

The Treaty settlement process was raised as an issue in some areas. Many iwi have claims with freshwater and natural resources aspects in the hearings or negotiations phases. Some have settlements which recognise interests in freshwater resources through mechanisms such as statutory acknowledgements. There was a concern that those currently managing freshwater resources did not have a good understanding of the significance of historical Treaty claims and the issues they raised.

Hui participants expressed a wide range of views on the underlying ownership issues. Some have stated that Māori consider that the water resource belongs to them. A similar comment was that Pākehā have never bought the water resource, but assume they have the right to manage it. Others described the relationship of Māori to water as that of a rights-holder, compared to the interests of others who were stakeholders. Another point of view expressed was that no-one owns the water but someone has to manage it, and the question is who should do that.

Regardless of the views on ownership, there was a general consensus that iwi and hapū have some form of customary rights or interest in water, with a greater interest in its use and management than those who are seen as stakeholders.

Almost all of those who discussed the use of market mechanisms such as tradable property rights in water, or auctioning or tendering of rights to use water were opposed to such proposals. There was a common view that fresh water is essential to all, and that market-based

approaches would advantage a wealthy minority at the expense of others. Some also felt that an increase in commercialisation would be a threat to the environment. The option also raised ownership issues for some, and a fear that Māori interests would be traded off or extinguished.

There was a view at some hui that the current system did not encourage water users to recognise the true cost and value of water, and that some forms of charging for the use of the water resource would be desirable because they encouraged efficiency and a greater valuing of the resource.

KAITIAKITANGA O PAPATŪĀNUKU [WATER MANAGEMENT]

Traditional water management philosophies

The cultural perspective described by hui participants was one which is still influenced by the traditional Māori world view. Water was described as the essence of life and the lifeblood of Papatūānuku, often reflected in the use of the word 'mauri' (which can be translated as 'life force'). The significance of the tapu and wairua of water was also discussed. Participants recounted how fresh water is integral to their cultural and personal identity and wellbeing – rivers and lakes carry ancestral connections, identity and wairua for whānau, hapū and iwi, as reflected in all tribal pepeha and personal mihi. This importance was not only described in spiritual terms. Participants also described the value of fresh water as a resource that promotes social wellbeing for Māori communities and individuals through the capacity of healthy waterbodies to provide food, resources, and opportunities to maintain traditional connections and practices such as manaakitanga. The value of access to fresh water for the development of land or other economic and employment opportunities was also discussed.

The perspective that water always comes first as a resource can be explained by the spiritual and cultural concepts underlying this, and are reflected by one of the whakataukī shared at the hui: 'Tuatahi ko te wai, tuarua whānau mai te tamaiti, ka puta ko te whenua' – when a child is born the water comes first, then the child, followed by the afterbirth ('whenua', which also carries the interpretation of earth, land and Papatūānuku).

Hui participants shared many aspects of traditional water management practices which are rooted in the principles of kaitiakitanga and care for Papatūānuku. As described at the hui, these practices are based on an approach which:

* emphasises responsible management through care, healing and replenishment of Papatūānuku rather than exploitation without replenishment
* does not distinguish between physical and spiritual approaches
* recognises the various states of water (including wai tapu, wai ora, wai kino, wai piro and wai mate [Waiora – waters of life, purest form of fresh water, gives and sustains life, can rejuvenate damaged mauri, counteracts evil. Waimate – dead water, has no regenerative capacity, mauri is lost, can contaminate other mauri of living things or other waters. Waitapu – waters of death, waters are tapu due to loss, restrictive (Jane West, presentation, WaiMāori Water Values, 2005).])
* focuses on the protection and restoration of the mauri or life force of the water
* focuses on the health of waterways and their ability to replenish and heal themselves
* takes a holistic and whole-of-catchment approach to managing water.

The use of traditional Māori indicators for assessing the health and mauri of the water, such as the presence or absence of particular species, were also discussed in many places. There was a desire for a much wider recognition of the value of mātauranga Māori (traditional knowledge) and the information about fresh water held within local communities to be complementary with current monitoring principles.

A few participants also cautioned that there was not a single Māori approach to water management, or a single set of traditional values for fresh water, but that each iwi and hapū have their own practices and values. While there was a lot of consistency in the values expressed at hui, various examples of different tribal approaches were explained. For example, some iwi agreed with the 'mountains to the sea' approach taken by the Sustainable Water

Programme of Action; while other iwi spoke of fresh water from puna (springs) to the sea, and their water management practices that reflect the groundwater origins of rivers and streams.

Strong desire to be involved in decision-making and management at all levels

One of the fundamental complaints expressed at many of the hui was that the current water management system does not recognise the role of Māori as kaitiaki, or recognise the responsibilities and duties that come with kaitiakitanga within the water management system. Māori would like to see their concepts and values, such as giving effect to or restoring the mauri of waterways, as part of the water management framework.

As outlined above, there is a wide range of views on the underlying ownership interests in water, but a general consensus that Māori should have a special place in water management. Some expressed the view that more Māori participation in decision-making was necessary to protect Māori values and interests, which were otherwise invariably outweighed by national or majority interests. For most at the hui, the proposed action of 'enhance Māori participation' in the Sustainable Water Programme of Action discussion document did not go far enough to achieve a suitable role for Māori in water management.

While some spoke about improving the existing Māori role in water management, most participants sought a more active role in decision-making around water at a governance and management level, and more use of ongoing joint management arrangements for water bodies. Many also sought an appropriate role for at the Māori hapū/marae level. A few sought fundamental changes to the current system, such as recognition of Māori customary ownership of or rangatiratanga over water resources, and the Government approaching iwi and seeking permission for any matters to do with fresh water. This was, however, a minority view, with most participants seeking a partnership role for Māori in water management.

In many areas there was also an interest in forming more practical partnerships and relationships with local authorities over water management issues, such as local Māori communities working more closely with councils on water quality monitoring. In some areas people had already gained relevant monitoring skills and qualifications, and were keen to work with councils to improve monitoring practices and create employment opportunities in communities.

Participants of hui felt that improved Māori participation was a means of improving outcomes for all, not just for Māori. There was a strong sense that almost all of the community, including Māori, were seeking the same outcomes in terms of healthy waterways, and that Māori would therefore be acting in the interests of all. Many participants spoke of the advantages that greater Māori participation would bring, because they felt that Māori brought a particular passion for healthy waterways and special knowledge to water management.

Participants also felt there would be benefits for all from greater adoption of Māori water management approaches and principles because of the Māori focus on kaitiakitanga, health and wellbeing as well as economic factors (ie, a balancing of the components of the sustainable development approach) compared to what they saw as the focus of councils largely on economic benefits. As a result, many participants would like to see Māori as kaitiaki playing a much more active role in determining, monitoring and enforcing minimum standards for water, among other things.

The capacity and capability of iwi and hapū to engage with councils in both consultation processes and decision-making or joint management was raised as an issue in some areas, as many organisations lack the structures and resources to engage as they would like. This was seen as a major impediment to greater Māori participation. While some iwi have resource management units staffed by full-time staff, most iwi and hapū rely on voluntary contributions and people undertaking unpaid work to deal with councils and Resource Management Act processes. A common suggestion at the hui was that central and local government should make greater provision of resources to allow Māori organisations to participate effectively (perhaps through direct resourcing or shared funding with councils) which would lead to higher quality engagement and better Māori involvement. Many participants also sought

assistance to develop technical/scientific skills to complement the mātauranga Māori (traditional knowledge) and kaitiaki skills already existing in Māori communities.

It was often noted that iwi and hapū are not resourced by local or central government to take part in the consultation processes under the Resource Management Act or with central government. This could result in limited resources being stretched far too thinly. It was also seen as a distinct disadvantage when dealing with other parties, such as council staff or lawyers, who are paid for their time, while iwi participants are not.

Strong support for community-based solutions

Many hui participants suggested that communities and individuals were responsible for protecting and restoring the quality and mauri of waterways. Numerous examples were given of successful community-led projects which have effectively addressed water quality issues and changed behaviour, such as the 'Wanting Ahipara's Infected River Open Again' project run by Ahipara School in Northland. While some existing projects had received financial help from councils, many people were frustrated that other programmes did not receive any help for doing what was seen as the council's responsibility. There was a call for councils to resource groups with a passion for the work. It was also noted that these projects were often important for building better relationships with councils.

There was strong and widespread support for public education to be provided by central or local government to raise public awareness of water issues and promote water efficiency measures and better land management practices. Providing education about freshwater issues for children, councillors and farmers was seen as a high priority. This included introducing more education on water management to schools, educating councillors on environmental issues and tikanga, and providing land users with information on the impacts of water use. It was noted that water efficiency measures (eg, use of rainwater tanks for non-drinking water) which were once common are no longer widely used, and that these should be encouraged or required. It was felt that far less regulation would be necessary, and councils would be better able to achieve compliance, if the underlying problems with water management were understood.

TE KAWANATANGA ME TE IWI MĀORI [RELATIONSHIPS WITH LOCAL AND CENTRAL GOVERNMENT]

Variable relationships with central and local government

Given that most resource management is undertaken at local government level, existing relationships between Māori and regional and territorial authorities formed part of the background to consultation. Different hui reported variable relationships with local government. Some hapū and iwi reported good relationships and information-sharing processes with both councils and the wider community, while others spoke of poor relationships with councils and a feeling of exclusion from the decision-making process. Even in areas where relationships were generally good, nearly all hui participants who addressed this point sought a far greater and more active role for iwi and hapū in decision-making for freshwater management. There was a general view that the views and needs of other sectors of the community, such as farmers or industry, would always outweigh Māori concerns in local government decision-making.

Some hui participants considered that the inability or unwillingness of local authorities to work with tangata whenua, or to involve iwi in planning as the Resource Management Act provides for, as a significant barrier to high-quality Māori participation in water management. For this reason, some participants requested that central government take a greater role in water management (although others were nervous about greater central government involvement). It was felt that central government had a responsibility to provide guidance to local authorities on how to meet their obligations, and to ensure that Treaty matters were considered and honoured.

Issues around the way the Resource Management Act is implemented

A number of hui participants expressed faith in the Resource Management Act as a world-leading overarching framework for managing water resources, and saw it as a definite improvement on earlier practices. While confidence in the Resource Management Act as a piece of legislation was expressed at a number of the hui, concerns were expressed about the effectiveness of the resource consent system in promoting efficient use of water. Some hui participants felt that the Resource Management Act was very poorly implemented by councils. Some participants suggested that the water management system should provide requirements for much stricter limits for minimum flows and water allocation and more enforcement. A review of all water permits in a catchment or region at the same time, and tools to allow councils and the community to address allocation issues using an 'integrated catchment' approach were also suggested.

The variable performance of councils in meeting their obligations under Part II of the Resource Management Act, as well as monitoring water standards and monitoring and enforcing resource consent conditions, was noted at a number of hui. Considerable dissatisfaction was expressed with the performance of councils in addressing water quality and allocation. It was also noted by many hui attendees that many councils could not provide good information on the total amount of water being taken. It was also suggested that councils have not sufficiently investigated the cumulative effects of water allocation and discharges. Some hui attendees considered that central government should monitor council performance to ensure that councils enforced compliance with consent conditions under the Resource Management Act. Some felt that, in smaller areas, there was not a sufficient gap between council governance and management structures, and that compliance staff were put under political pressure. Others complained that those with close relationships with councils received preferential treatment when often scarce resources were allocated.

Many at the hui felt that central government should play a greater role in setting standards for water quality, and that standards set should ensure water is safe to swim in and drink. There was also support for central government setting standards for council monitoring of water quality, and introducing central government monitoring of council compliance and performance with regard to the Resource Management Act. There was dissatisfaction that, in the 14 years since the Resource Management Act was passed, no national environmental standards on water have been developed. Some participants did, however, caution that setting national standards carried a risk, as they could encourage council performance only to the minimum level set in the standards. Others were concerned that setting a national standard might not reflect standards appropriate for their region or circumstances.

There was support for clearer direction and guidance from central to local government, in the interests of consistency across the country. This was a particular issue for iwi or hapū whose rohe includes more than one council.

NGĀ TAKE A MOMO ROHE O AOTEAROA [REGIONAL ISSUES]

Regional concerns/focus

At each hui we heard about specific regional water issues including water quality problems, water allocation issues, and issues surrounding access to and ownership of fresh water. Issues were different in each region. Participants stated:

* water quality problems resulting from sewage, farm and industrial discharge, and council relationships
* allocation issues and property rights
* poor relationships with local councils and lack of opportunities to participate in water management
* balancing iwi and hapū interests in freshwater resources with the 'national interest' or majority interests where there has been significant hydro-electric development
* protecting access to freshwater for land use purposes, and ensuring that councils recognise freshwater interests and accordingly engage in ongoing consultation.

5.3 Proposed National Environmental Standard on Ecological Flows and Water Levels. Summary of submissions (MfE 2009a)

The summary of submissions report is also a substantial (200+ pages) report (MfE 2009a). It summarises the 166 written submissions received by 29 August 2008, and the discussions that took place at the 12 workshops (more than 300 people attended) held around the country during May and June 2008. Eight iwi made submissions:

- Ngāti Kahungunu iwi
- Ngāti Tuwharetoa Māori Trust Board
- Waikato Raupatu Trustee Company
- Te Kaahui o Rauru
- Te Maru o Ngati Rangiwewehi
- Te Rūnanga o Ngāi Tahu
- Te Taiwhenua o Heretaunga
- Whanganui River Māori Trust Board

In the summary of the submissions, few references identify concerns raised specifically by Māori. One related to the process of adoption/consultation and involvement (MfE 2009a, p. 11)[12]:

> Notably, iwi submitters were disappointed at their lack of involvement in the process before notification, and this lack of pre-notification consultation was observed by other stakeholders. Iwi submitters were concerned about the lack of ability to negotiate environmental flows and proposed levels/limits, and argued that the proposed NES process needs to enable effective tangata whenua consultation.

Another related to question 1 of the discussion document that asked: Do you agree with the statement and the three key problems that were identified as benefiting from national direction? The proposed NES identified three key problems that could benefit from national direction:

- Resource consent decisions are being made on water bodies for which there are no environmental flows or water levels in place.
- Existing environmental flows and water levels do not always clearly define the available amount of water.
- The existing process for setting ecological flows and water levels is costly and contentious.

As summarised in the report (MfE 2009a, p. 12) in response to this question:

[12] This report can be viewed on the Ministry's website (accessed 29 March 2009) at http://www.mfe.govt.nz/publications/water/proposed-nes-ecological-flows-water-levels-2008-02/index.html. Note that free copies are available from the Ministry.

> Approximately 10 per cent of submissions on this question considered that the problems and issues identified were too narrow; and that they should be expanded to encompass environmental, cultural and social aspects, including tangata whenua. The iwi submitters considered that these tangata whenua issues had not been recognised and needed to be explicitly described in the discussion document.

Finally, in relation to questions 12 and 13 concerning the range of benefits and costs of the proposed national environmental standard, a common argument was that the analysis needs to include a number of additional points, including tangata whenua values (MfE 2009a, pp. 24–25). As recognised in the Summary, its intention was to summarise the views expressed, not provide an analysis of those views or make recommendations in response to the submissions. But this will be done in the next report.

5.4 Conclusion

Where to from here? The Ministry expects to prepare a final report and recommendation to be presented to Government mid-year (2009). If it is approved, the proposed standard will go to formal legal drafting. If approved by Government, the proposed standard is likely to be introduced later in 2009. This could be of concern to many iwi who have had concerns about their lack of involvement in the process. The Government ought to be aware that if it fails to take proper regard of Māori, iwi may seek to allege that the Crown has breached its Treaty of Waitangi obligations in an urgent Waitangi Tribunal claim.

While this literature review report focuses on the legal developments in regard to Māori and water, this part highlights the simultaneous urgent need to focus on policy developments. Research is required to collate and summarise all central and local government planning documents, and Māori-developed policy documents (such as iwi management plans) relating to fresh water and Māori. Such a report could contribute towards bolstering a better understanding of the role Māori want to play in governing water, and how local and central governments are responding and providing for those wishes. Other important issues to canvas would include whether local authorities are subject to Treaty of Waitangi obligations, and to case study best local authority practices throughout the country (as identified by Māori). Such research would be very useful. However, due to the pressing need to provide a solid legal foundation to such issues, this report focuses on the law, and the next chapter provides a useful summary of Environment Court and appeal court decisions relating to Māori and water.

6. Case Law

6.1 Introduction

This section provides a summary of the Environment Court and appeal court cases heard pursuant to the Resource Management Act 1991 that concern Māori and water. It is important to recognise that many court decisions are not readily publicly available[13]. Even if general

[13] The best public source to access cases is on the NZLII website (http://www.nzlii.org/), but note that few Environment Court cases are posted on this site.

members of the public do gain copies of specific cases, to confidently read and understand cases can be an overwhelming experience for those not legally trained. Thus issues relating to how Māori have articulated their voice in court proceedings, and how the courts have responded to that voice, have been a closed window for many in the public, open only to lawyers and those clients with the resources. This part of the report thus takes the opportunity to provide a useful summary of the key cases concerning the articulation of the contemporary Māori voice in relation to water pursuant to the Resource Management Act 1991. It has involved searching all New Zealand water-related cases on publicly restricted legal databases available in the University of Otago Law Library and prioritising those concerned with specific Māori concerns.

6.2 Case law

Seventeen cases (Appendix 2), including any appeals arising from those cases, have been identified as the most important for better understanding the articulation of the contemporary Māori voice in relation to water pursuant to the Resource Management Act 1991. These cases are summarised below in chronological order.

A. Tautari v Northland Regional Council [1996] 1 NZED 513

Tautari challenged a resource consent granted to Vickers for the construction of a farm irrigation dam on the Waiopitotoi Stream. The consent also allowed the applicant to take up to 2700 cubic metres of water per day. Tautari appealed on behalf of the interests of the Māori people living in the Waiomio area, only 6 km downstream from the proposed dam.

The appeal was based on the concerns that the iwi had not been consulted adequately and that the proposed dam and irrigation would aversely affect the environment in several respects. Specifically, Tautari alleged that the regional council had not identified the tangata whenua early in the consultation process, did not understand the meaning of the term kaitiaki and that because the Waiomio iwi had not been involved in the measurement of the water flow and movement of the fish, they were uncertain about sustainable management of those concerns.

The Court stated that the RMA does not specifically require consultation with the tangata whenua by the applicants for resource consent. Consultation was recognised as good practice where proposals may affect matters in section 6(e) and 7(a) of the Act. The Planning Tribunal found that the applicants took considerable steps to identify the tangata whenua about the proposal and genuinely consulted with the various groups they had identified. They did all that was reasonably expected of them and in doing so satisfied the requirements of taking the principles of the Treaty of Waitangi into account under section 8. Tangata whenua concerns were noted on the regional council's decision and a condition of the consent invited tangata whenua to participate in monitoring the consent. In such circumstances, the Tribunal concluded that there had been adequate consultation.

The Tribunal noted that damming the water could have an adverse effect on the environment if the dam failed and the water was released. It was satisfied that if the dam was designed, constructed and monitored properly, it would be safe from failure.

Tautari was concerned about the disruption to the migration of eels and kokopū, as well as the general effect on fish life as traditional sources of food. The proposed fish bypass would ensure that the passage of eels would not be unduly inhibited by the dam. The two litres per second requirement for the bypass' was also more than 75% higher than the one in five-year

low flow. The Tribunal found that with the fish passage, there would not be adverse effects on the fauna or flora that would affect the availability of traditional food sources.

The Tribunal also found that if the condition that a minimum flow of at least two litres per second was complied with, the ability of the iwi who lived downstream of the dam to extract water for their own needs would not be adversely affected.

The Tribunal concluded that the evidence did not establish that the proposal would affect the value of the Waiopitotio Stream to the Māori people of Waiomio. Their relationship with the stream and their role as kaitiaki would not be affected by the granting of the consent. There would be no signification potential effects on the environment from allowing the proposal. The construction of the fish passage will involve the Waiomio people in monitoring compliance with the conditions of the consent. The Tribunal concluded that these matters all showed recognition for the principles of the Treaty, as required by section 8 of the RMA, and would serve the purpose of the Act and not contravene Part II. The appeal was dismissed.

Conclusion: Tautari were unsuccessful at challenging resource consent for a farm irrigation dam on the Waiopitotoi Stream.

B. Mangakahia Māori Komiti v Northland Regional Council [1996] NZRMA 193

The case arose from 17 applicants wanting consent to take water from the Mangakahia River, with one applicant wanting to take water from the Opouteke River. All of the applicants are dairy farmers who believed that irrigation from the river to improve pasture growth would result in greater efficiency and better productive returns for their farms. The Northland Regional Council granted all 17 applicants resource consent, although only 14 defended their position on appeal. The Mangakahia Māori Komiti sought to have all the consents revoked on the grounds of:

(1) Inadequate consultation with tangata whenua by the regional council; and
(2) Lack of recognition and respect for Māori values in relation to the river.

The resource consents authorised a total abstraction of 59 210 cubic metres per day subject to rationing conditions to maintain a minimum flow of 3000 litres per second. Fifteen consents were for 5 years and two consents were for 9 ½ years.

The Komiti contended that the Treaty of Waitangi guaranteed to Māori the undisturbed right to catch fish in the river, which the water permits would adversely affect. It contended that the regional council failed to observe the principles of the Treaty and consult with them prior to its decision, and that it failed to promote the RMA's purpose of sustainable management by granting the consents 'in the absence of sufficient authoritative data on the river'.

(1) The Planning Tribunal found that there had been consultation between the applicants and Māori interests. But as these were left unreconciled, the regional council was faced with having to hear the case. Where the applicants and tangata whenua are in clear opposition, the consent authority cannot prejudice its own position as a quasi-judicial body by seeking to reach an understanding with one party of interest to the disadvantage of the other. The Tribunal found that the regional council had acted appropriately by leaving its officer to consult with the Komiti. The officer could have done little more than to listen to the concerns of the Komiti and record those concerns in his report to the regional council. The Tribunal found that he had satisfied these requirements.

(2) The applicants sought to have the total abstraction volume increased, the terms of the consents increased, and that the rationing conditions should apply at a lower residual flow level. This was justified on the basis that a higher level for a lesser number of applicants is actually a lower total level than what the regional council awarded. The council claimed it had taken into account Māori values whilst recognising the benefits of the resource consents – all within the aim of promoting the Act's purpose. The Minister of Conservation largely supported the regional council's decision on the basis that a cautious approach was taken and that level of water abstracted per day would promote sustainable management of natural and physical resources.

The tangata whenua placed a strong emphasis on the value of the river as a food supply. The Tribunal found that the likelihood of fish in the river being exposed to higher temperatures, which would have an adverse effect on some native fish species, was unlikely. It also found that the proposed abstraction would not be likely to significantly promote algal growth.

The Tribunal noted the provisions of section 6(e) and 8 had to be read in context against the background of Part II as a whole. Sections 6, 7 and 8 are intended to be invoked and applied against the promotion of the Act's purpose in section 5. It concluded that refusing the permits altogether would be unjustified, but no more than 6-year terms were warranted. A 6-year term would ensure that the quality and nature of the river would be maintained and safeguarded, recognition would be made for all aspects of section 6, regard would be had to section 7, and the principles of the Treaty would be taken into account (section 8). To grant the applicants the 10-year term sought would be an insufficient recognition of the river's central importance to the tangata whenua. Against the background of the tangata whenua concerns, the Tribunal concluded that the 6-year consent term ensures that practical experience in irrigation could be gained and data gathered, so that the regional council, tangata whenua and applicants can reconsider the irrigation and the quantity of the water take. As a fishing source, the Tribunal also concluded that the river would not be adversely affected.

The Tribunal held that the term of consent for all permits should be 6 years. The increased allocation volumes sought by the applicants were upheld. In total, lower amounts were awarded because the higher allocations were spread over fewer applicants.

Conclusion: A middle ground was obtained between the concerns of Mangakahia Māori Komiti and the desires of the farmers. The terms of consents were in most cases increased by 1 year, but decreased by 4 ½ years for two of the consents. The total level of water taking was also reduced.

C. Kemp Litigation

1) G R Kemp and E A Billoud v Queenstown Lakes District Council [2000] 7 NZRMA 289

The case combines two appeals concerning commercial jetboating on the Dart River (Te Awa Whakatipu). The Court immediately found that the river is clearly an outstanding natural landscape of national importance under section 6(b) of the RMA. Whilst recreation jetboat activity is not regulated, commercial jetboat operators require resource consents. Dart River Safaris ('DRSL') had consent to run up to 20 jetboat trips per day on the river. Mr and Mrs Kemp had consent for two jetboat trips per day for transporting trampers and anglers. They applied for an additional consent to run a further 10 trips per day. Mr Billoud had consent to

take customers down the Dart River in plastic canoes (funyaks) although that operation depends on jetboats to transport the funyaks. Usually, DRSL provided him the jetboat service. However, Mr Billoud applied for consent to run four jetboat trips per day. He has no interest in actually running the trips but wanted the consent to ensure that his funyaks and customers can get up the river if DRSL does not have the capacity to transport them.

Kai Tahu, in the form of Te Rūnanga o Ngāi Tahu ('TRoNT'), opposed the Kemp's application and supported Mr Billoud. The Dart River is a taonga of spiritual importance to Kai Tahu. Under the Ngāi Tahu claims settlement with the Crown, Kai Tahu negotiated to have 'topuni' (mana and protection over a person or area) of certain features of the area. Kai Tahu's topuni for Pikirakatahi (Mt Earnslaw) extends halfway across the Dart River. Kai Tahu opposed the Kemp's resource consent application on the following grounds:

(1) Detrimental effects on the river's intrinsic values and their spiritual and cultural relationship with the catchment;
(2) Incremental alienation of Kai Tahu from their taoka;
(3) Detrimental effect on the wildlife that would diminish Kai Tahu's role as kaitiaki, which would in turn decrease their mana;
(4) Safety and the effect a human tragedy would have on their spiritual values;
(5) Diminishing a place of tranquillity; and
(6) Diminishing the quality of a place wither cultural relationships are recharged.

Despite the Court hearing both appeals together, the Kemps' and Mr Billoud's applications had to be considered separately and on their own merits. In determining the priority between them, the date for priority is when the completed application is lodged with the council[14]. An application is compete when it is notifiable. This occurs upon submission of a full application, an adequate assessment of environment effects, and adequate answers to any council requests for further information. The Kemps were held to have first priority.

The Court considered the relationship between the current applications and the existing resource consents. The Court noted that it could approve the Kemps' application, despite a conflict with the existing resource consents and the Harbourmaster's memorandum in 1993 concerning the operation of jetboats. The Court also noted that DRSL's rights under its existing resource consents were not an automatic bar preventing further resource consents from being granted.

The Court, whilst recognising the psychological and cultural importance of the statutory acknowledgements of the Ngai Tahu Claims Settlement Act 1998, noted that such acknowledgements mainly have a procedural purpose and no substantive effect against resource consent applications under the RMA. Kai Tahu's substantive interests are protected in sections 6(e), 7 and 8 of the RMA, despite being granted special status in section 274.

The Court then considered the effects of the applications if they were approved. It looked at noise and intrusion on amenities, ecological values, safety issues, the Transitional District Plan, the Proposed Regional Plan and the Water Conservation (Kawarau) Order 1997. It also looked at the question of consultation under section 8 of the RMA. TRoNT argued that there was inadequate consultation by the Kemps with the relevant hapū or iwi. Section 8 of the

[14] Fleetwing Farms Ltd v Marlborough District Council [1997] NZRMA 385 at 393.

RMA obliges the Court and local authorities to take into account the principles of the Treaty of Waitangi, which necessitates that an applicant and the consent authority must consult with the relevant hapū or iwi[15]. The Court also noted that this duty is strengthened by the Ngai Tahu Claims Settlement Act 1998. Whilst some attempt was made by the Kemps, it was inadequate and was used as an example of how the Kemps misunderstood what values Kai Tahu were trying to protect.

Section 105(2A) RMA thresholds:

Looking at the first threshold, the Court noted that the environmental effects of the Kemps' application for 10 jetboat trips were more than 'minor' under section 105(2A)(a) especially considering the Dart River flows through an outstanding landscape of special significance to the tangata whenua. The environmental effects of Mr Billoud's application for only four jetboat trips, which would only be used where DRSL could not accommodate his customers, were held to be only 'minor' and thus satisfied the first threshold. If the Kemp application was reduced from 10 trips to four, their application would also be considered 'minor' and meet the threshold. The Court also found that both the proposals were contrary to Policy 11 in the Proposed Regional Plan, referring to a need to reduce adverse environmental effects, but were not contrary to a the Transitional District Plan. As they were not contrary to at least one of the plans, the applications meet the second threshold.

Overall discretion of the Court under section 105(1)(c) of the RMA:

The case involved almost every matter of national importance under section 6 of the RMA, including the relationship of Kai Tahu and their culture and traditions with their ancestral waters and their waahi tapu. From subsections 6(a)–(e) with the exception of (d) all factors opposed the applications. The Court noted that where these factors compete against one another, the Court must balance the significance of the conflicting interests in light of the facts. Stating that the issues raised by TRoNT cannot be easily mitigated by section 5(2)(c) the Court held that the duty to take into account the principles of the Treaty of Waitangi does influence the substance of the Court's decision. However, the duty to recognise and provide for the relationship of Kai Tahu with their ancestral water and waahi tapu is not a trump card the Court can use to make a decision. The entire Māori dimension must be balanced with other considerations so that the Court can come to a decision from the perspective of New Zealand society as a whole.

In considering the affects of the extra jetboat trips on Kai Tahu's values and mana, the Court also took into account TRoNT's recent purchase of a controlling interest in DRSL. The Court noted an inconsistency. On one front, TRoNT is opposing the Kemps' application on cultural and spiritual grounds. On the other, it has an interest in DRSL that presumably offends the same cultural and spiritual values. The Court considered it acceptable to Kai Tahu for the Kemps to operate four extra jetboat trips, provided that all other effects could be mitigated. This four-trip consent would be granted on the condition that it lasted as long as the DRSL resource consent operated. As long as Kai Tahu allowed DRSL to conduct jetboat trips, so too could the Kemps.

The Court concluded that four new jetboat trips per day were acceptable (down from the 10 applied for). A six-trip consent was granted in favour of the Kemps if they surrendered their existing two-trip consent. Mr Billoud's application was declined because he had second

[15] NZ Māori Council v Attorney-General [1989] 2 NZLR 142, 152.

priority behind the Kemps and the Court felt it could not grant any more trips on the river. The Court concluded that whilst DRSL are operating jetboat trips, the addition of four more trips has only a small harmful effect that outweighs TRoNT's opposition.

Conclusion: Kai Tahu succeeded in limiting the resource consent for the operation of 10 additional jetboat trips to four. This is conditional to DRSL, which TRoNT has a controlling interest in, continuing to operate jetboat trips under its resource consent.

2) Dart River Safaris Ltd v Kemp and Anor [2000] NZRMA 440

Dart River Safaris ('DRSL') appealed the Environment Court's decision *G R Kemp and E A Billoud v Queenstown Lakes District Council* [2000] 7 NZRMA 289 to the High Court. DRSL argued that the Environment Court had exceeded its jurisdiction by placing a condition on all parties (including the appellant) to sign a memorandum that recorded agreed procedures for operating the jetboats. It also argued that the Court had misinterpreted section 6(d) of the RMA as to the meaning of 'public access to and along…rivers.' Its final ground of appeal was that too much weight was given to the evidence concerning safety considerations if the resource consent was granted to the Kemps. No appeal was brought in respect of sections 6(e), 7 or 8 of the Act.

Conclusion: The High Court dismissed the appeal.

D. Contact Energy Limited v Waikato Regional Council [2000] 6 ELRNZ 1

Contact Energy ('Contact') appealed Waikato Regional Council's refusal to grant resource consents for a proposed geothermal power station near Taupo. The application sought to take 57 000 tonnes of geothermal fluid per day from the Tauhara Geothermal Field, which would have enabled a 50-megawatts power station and an associated binary plant of 20 megawatts. After lodging its appeal Contact reduced the size of its proposal to only take up to 20 000 tonnes of geothermal fluid per day.

The case for the Tauhara Middle Trust was that the hapū have a special relationship with the Tauhara geothermal resource, which they regard as a highly valued taonga. They sought exclusive and undisturbed possession of the resource and did not want Contact to have access to any more of 'the limited and non-renewable geothermal resource from the Wairakei/Tauhara geothermal system'. They did recognise, however, that their claim to possession of the geothermal resource was not a matter for the Environment Court to decide.

Tauhara Middle Trust argued in reliance on section 14(3)(c) of the RMA that any geothermal development must be consistent with tikanga Māori. The Court found that if the resource consent was granted, the taking would be expressly allowed by a resource consent. Contact would be entitled to rely on section 14(3)(c) as an exception to the general prohibition in section 14(1). The Court held that section 14(3)(c) had no application to the case and accordingly Contact's proposals were not required to be carried out in accordance with tikanga Māori.

Tauhara Middle Trust argued that consultation with the Māori people had been insufficient. The Court found that Contact had made appropriate attempts to consult with the Tauhara hapū but had been unable to identify anyone with a mandate to speak for the hapū. Failure to achieve more than this was not Contact's failure. The Court concluded that there had not been

a failure to take into account the principles of the Treaty of Waitangi regarding consultation with tangata whenua.

Conclusion: The Tauhara Middle Trust was unsuccessful at stopping Contact from being awarded its sought-after resource consents.

E. Land Air Water Association v Waikato Regional Council [2001] 7 NZED 26

The case concerned appeals from the granting of 16 resource consents to Envirowaste Services and Northern Disposal Systems for a proposed 86-ha engineered landfill. The case primarily concerned issues regarding land, but a small portion of the decision was dedicated to the potential adverse effects on the Waikato River. The Waikato River, its tributaries and adjacent land are of cultural and spiritual significance to Tainui. Questions arose whether the landfill would desecrate those cultural values and whether appropriate conditions could sufficiently avoid or mitigate this.

The Court conducted a broad overview of sections 6(e), 7(a) and 8 of the RMA. It stated that in a general way, section 8 requires that it takes into account tikanga Māori, whereas sections 6(e) and 7(a) refer to specific philosophical concepts that form an important part of tikanga Māori. The need to have regard to tikanga Māori means that the Court may be required to have regard to a wide range of concepts.

The Court found that although the construction of the landfill would diminish the mauri of the Clune Stream, this had to be seen in the context of the positive effects from the pastoral development, including the artificial channelling and straightening of the stream for agricultural purposes.

The Court was satisfied that no harm to the river or its tributaries would occur as a result of the project. The Court had regard to other issues involving land. The appeals were ultimately dismissed and the relevant resource consents were granted subject to conditions.

Conclusion: The appeal was dismissed and the Court concluded that no harm would occur to Tainui regarding the Waikato River.

F. Calter Holt Harvey Litigation

1) Te Runanga o Tuwharetoa Ki Kawerau v Bay of Plenty Regional Council [2002] 7 NZED 363

The case concerned discharge-to-water permits granted to Carter Holt Harvey (‘Carter Holt’) for its pulp and paper plant at Kawerau. Carter Holt sought to discharge wastewater to forest areas as a way to ultimately eliminate direct discharges to the Tarawera River. The Bay of Plenty Regional Council originally granted Carter Holt a 15-year term. Carter Holt appealed, and following negotiations, a 21-year term was agreed to by the regional council.

Tuwharetoa could not agree to that term, but did acknowledge that discharge to land is more acceptable than discharge directly to the Tarawera River. The relationship of the tangata whenua with the river was said to be central to the iwi’s position of influence and identity, and fulfils a sustaining function both physically and spiritually. Accordingly, the iwi has developed an environmental policy that regards a resource consent involving the Tarawera

River (either directly or indirectly) to be generally unacceptable if it is longer than 10 years' duration. The iwi will allow exemptions where satisfactory mitigation measures are found.

The Court looked at evidence relating to soil and groundwater aspects, effects on the Tarawera River, aspects of the proposed extensions to the infiltration basins, the colour and clarity of the water discharged, resin and fatty acids, bacteria and viruses, and issues bearing on the water's ecology. It was satisfied that exercise of the consent, with the conditions proposed by Carter Holt, would meet the purpose of the RMA. The effect upon the river's water quality would also be maintained at the minor level intended.

However, the Court did have one reservation. The conditions proposed made no provision for tangata whenua interests over matters that may arise during the term of the consent. The Court noted the Act's provisions that bear on Māori values, especially section 6(e) and 7(a). It held that if the longer 21-year term is to be upheld, the conditions should be amended so that copies of reports to the regional council (in compliance with three conditions) are to be given to tangata whenua. Further, if the council should serve notice on Carter Holt in terms of another specified condition, it should also notify tangata whenua. If Carter Holt formally seeks to change or delete a condition, it should also first consult with Tuwharetoa and other appropriate tangata whenua over its intention and reasons for such an act.

Carter Holt was invited to file amended conditions to apply to its 21-year application in light of the Court's decision. If conditions were filed that did not comply with the Court's decision, then the term of consent would be reduced to a term in accordance to Tuwharetoa's submission.
Conclusion: Whilst Tuwharetoa did not succeed in reducing the 21-year term of the consent, they were given a more participatory role that better enabled their interests to be protected.

2) Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau [2002] 8 NZED 335

The case was an appeal from the interim judgement of the Environment Court ('EC') in *Te Runanga o Tuwharetoa Ki Kawerau v Bay of Plenty Regional Council* [2002] 7 NZED 363. Two issues were raised by Carter Holt in respect of that decision:

(1) Whether, as a matter of law, the EC erred in imposing the conditions which it did – either through lack of jurisdiction or an inappropriate exercise of discretion; and
(2) Whether the EC erred in law in failing to give the parties an opportunity to make submissions on additional conditions before it imposed those conditions.

The Court gave an overview of the relationship between the RMA and the Māori dimension, most notably section 8 – to take into account the principles of the Treaty; section 6(e) – within matters of national importance, the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga must be taken into account; and section 7(a) – to have regard to kaitiakitanga in relation to managing the use, development and protection of natural and physical resources. Against this general background, Heath J considered the issues.

(1) The Court concluded that the EC was entitled to impose conditions aimed at addressing issues of te ao Māori, provided that those conditions were not implicitly forbidden as being contrary to the intent of conditions contained in section 108(2) and section 108(3) of the RMA.

The Court also concluded that the EC did have jurisdiction to require Carter Holt to supply tangata whenua with information relating to the exercise of the resource consent in addition to supplying this information to the regional council. The Court labelled this the 'parallel reporting' point. The Court held that it would be consistent with sections 6(e), 7(aa) and 8 of the RMA to impose, as a condition of a long-term consent, an obligation to report to tangata whenua so that they could monitor development without the need to inspect council records. This was limited to providing no further information that is required to be sent to the regional council.

However, where the EC did err was requiring Carter Holt to make its own assessment of the appropriate tangata whenua interests to whom reports should be sent. There is no clear answer in the imposed conditions as to who exactly should receive the reports. The Court stated it is both undesirable and wrong in principle for a party to be required to make its own assessment of what is necessary to comply with a condition imposed.

(2) The Court concluded that the EC ought to have indicated to the parties the additional conditions it was intending to impose on the consent and ought to have sought further submissions from the parties before its determination on them. Heath J stated that it is important for every party to have an opportunity to make submissions on orders contemplated by any court, tribunal or other public authority, which has the power to make determinations that affect that party's rights, obligations or interests.

The Court held that the EC did have jurisdiction to impose the 'parallel reporting' obligation to tangata whenua interests, particularly having regard to the role of the Tuwharetoa as the kaitiaki of the Tarawera River. However, it held that as a matter of discretion, it was inappropriate for the EC to impose the conditions as they did because it did not sufficiently define the 'interests' to whom Carter Holt must report. The appeal was allowed and both the imposition of the condition requiring parallel reporting and the imposition of the requirement of consultation with tangata whenua interests prior to any section 127(1)(a) application were quashed. The case was remitted back to the EC.

Conclusion: The conditions placed on Carter Holt's consent by the EC were removed by the High Court. Tuwharetoa no longer have consultation interests in the resource consent.

G. Fulton Hogan Ltd v Bay of Plenty Regional Council [2002] 7 NZED 485

The case involved appeals against consents to extend a quarry operation on a 133-ha site off State Highway 2, 5 km north-west of Te Puke and 15 km south-east of Mt Maunganui. Fulton Hogan claimed that it was lawfully entitled to continue quarrying under existing use rights. However, it was willing to cede its existing use claim and operate in accordance with the resource consents that it sought be upheld on appeal. It had come to an agreed position with Nga Potiki.

The appellants indicated that they each were authorised to appear in a representative capacity for one or more groups, namely Nga Uri o Tamapahore (Anthony Praire) Te Arawa coastal iwi including Ngāti Whakaue, Ngāti Pikiao, Tapuika and Ngāti Rangiwewehi (Maru Haerepo Poihipi Tapsell) and Waitaha (Riko Ahomiro). The appellants were concerned about the identified archaeological sites within the proposed quarrying area and sought that consent be

refused, ultimately resulting in the quarry's closure.

Whilst the case is primarily concerned with quarrying archaeological land sites, small technical and engineering aspects of the case required consents that involved fresh water – the discharge of treated wastewater and treated stormwater to a tributary of the Kopuaroa Canal. However, this issue was not specifically discussed by the Court in its determination of the overall resource consents.

The Court found that significance of the valley area and its associated natural features to the appellants outweighs Fulton Hogan's application to continue quarrying. Fulton Hogan was restricted from quarrying any further than 20 m beyond the area it had already reached. The Court held that the combination of vesting the Karangaumu Pa site as a reserve, the exclusion of a defined part of the valley from the resource consents, and the protection of specific archaeological sites would appropriately recognise and provide for nationally important values under section 6(e) of the RMA. In coming to its determination, the Court also paid particular regard to section 7(a) as to kaitiakitanga and the principles of the Treaty of Waitangi under section 8. The Court took a balanced approach that took into account the appellants' concerns and weighed them against the well-being and positive effect the extraction of the valuable rock deposits would have for the communities of the Bay of Plenty.

Conclusion: The Māori appellants were not successful in revoking the resource consents in their entirety and thus stopping the quarrying altogether. They were successful in having specific areas protected from quarrying.

H. Federated Farmers of New Zealand (North Canterbury Province Inc) v Canterbury Regional Council [2002] 8 ELRNZ 223

The case primarily concerned when a man-made channel (Cust main drain) becomes a 'river' as defined under the RMA. Federated Farmers sought a declaration that the Cust main drain is not a river and therefore not subject to minimum flow requirements in the proposed Waimakariri River Regional Plan ('the plan'). The regional council, TRoNT and Fish and Game strongly opposed the declaration, believing the Cust main drain is subject to the minimum flow requirements. The case thus turned on the meaning and definition of 'water body' and 'river' in section 2 of the RMA and the powers of the regional council under section 20(1)(e) of the Act to control water flows according to the plan.

The Court noted that TRoNT has mana whenua for the area and considers the Cust main drain to be part of the Cust River. The main drain still had the capacity to support traditional use and values, and therefore the wairua had not diminished in the spiritual sense despite the water quality degradation.

The Court found that whilst the Cust main drain had been dug out by man, it was not unnatural because the bed and its banks are made up of materials from that area. The Court also had regard to the single purpose of the Act, particularly Part II. It found that that if the Federated Farmers' interpretation were adopted, Ngāi Tahu would be deprived of consideration in the allocation of resources. The Act provides for the participation of tangata whenua in decisions relating to resources, which apply to the water that flows through the Cust main drain. The Court noted that whilst Ngāi Tahu would still have power to control the water itself, such controls may be illusory if the regional council's power to set minimum flows and control abstraction was constrained.

The Court concluded that the Act should control the minimum water flows in the Cust main drain. An interpretation that allowed the regional council to control the water flowing in and out of the drain, but not the water inside the drain, would be contrary to the purpose of the Act. Thus, an interpretation of the Cust main drain as a 'river' under section 2 of the Act is the only practical interpretation available.

The declarations sought by Federated Farmers failed and the Court itself declared: 'The Cust main drain is a river in terms of the Resource Management Act 1991'.

Conclusion: Ngāi Tahu was successful in retaining the protection of tangata whenua interests in the Cust main drain's body of water.

I. Walker v Hawke's Bay Regional Council [2003] NZRMA 97

The case was an appeal against the granting of a discharge permit to allow aerial spraying of Roundup® weedkiller along the margins of Lake Whatuma for a 4-year period. Spraying was intended to control willow and raupō vegetation, which was spreading into the lake and reducing the area of open water to the detriment of aquatic and bird life. Resource consent was required under both the Regional Water Resources Plan and the Proposed Regional Resource Management Plan. Mr Walker sought to cancel the permit, as he was concerned that the spraying would poison aquatic species (especially eels) and remove habitat for the birds and eels.

The Court found that the likely effects on the eel population would be relatively minor as:

(1) Only 20 ha of willow and raupō in the 150-ha lake would be sprayed;
(2) Eels were not highly sensitive to the toxicity levels;
(3) Eels might move out of the sprayed area;
(4) The active ingredient, glyphosate, binds with organic matter in the water; and
(5) A large amount of the chemical would be absorbed by foliage so would not get through to the lake.

The Court held that any adverse effects on fauna that are more than minor would be avoided if additional conditions were imposed to prevent spraying when the lake is low and to prevent spraying when the water is clear (it is preferable to spray when the lake is 'dirty').

The Court found that the Proposed Water Resources Plan anticipates the use of agrichemicals in water environments. It also found that the Proposed Regional Resource Management Plan's policies would be achieved if the purpose of the spraying was for the preservation and long-term enhancement of the ecologically significant wetland. This was found on the condition that adverse effects of the spraying could be avoided.

The Court found that this case invokes aspects of national importance under section 6(a) and (e) of the RMA. Five hapū of Ngāti Kahungungu have claims to be kaitiaki of Lake Whatuma: Ngāti Tamatera, Ngāi Oatua, Ngāti Hikatoa, Ngāti Toroiwaho and Ngāti Kere. The Court needed to balance the consideration that Lake Whatuma is ancestral land and water against the need to preserve the natural character of the lake, which required the spraying.

The Court rejected the regional council's claim that it has a kaitiaki role itself, preferring the view that this role should be left to the relevant tangata whenua. The regional council's role is as 'stewards' under section 7(aa) of the Act.

The Court did not accept that there had been a breach of the duty to consult under section 8 of the Act. Mr Walker could not reject the scientific views of the spraying without giving sufficient reasons. He had not done anything more than to express concern regarding the possible risk to eels and the humans that eat them. With regard to other Treaty principles, the Court found that best way to protect the rights of the hapū to their fisheries in the lake was to ensure that the potential adverse effects of the spraying were avoided. The Court also found that the regional council had most likely breached its duty to act in the utmost good faith to the hapū by not furnishing them with the *Lake Whatuma Ecological Monitoring Report 2001* that the regional council had commissioned and wished to call as evidence.

The Court concluded that the purpose of the Act would be achieved if the areas of willow and raupō were sprayed and killed. This was environmentally desirable because the open area of the lake would increase. The effect on eels and other fauna would be minimal, and the eels would be safe for human consumption shortly after the spraying. The Court did exclude a large isolated area of willow-free raupō from the resource consent. It stated that raupō by itself was part of the natural succession that will eventually change the lake into a wetland. The isolated area was retained for small eels and for the uncommon or threatened species of waterbirds that lived there.

The appeal was dismissed and the regional council's decision was confirmed subject to amendments to the conditions.
Conclusion: Walker was unsuccessful at revoking the consent entirely, but he did succeed in having a large isolated area of raupō excluded from the consent.

J. Ngati Rarua Iwi Trust, Ngati Rarua Atiawa Trust, Ngati Tama Manawhenua Ki Te Tau Ihu Trust, Resource Management Advisory Komiti (Motueka) v Tasman District Council [2004] 9 NZED 399

This case was the final decision and report to the Minister of Conservation following the interim decision of this case (W025/03). The Māori appellants appealed against a recommendation to the Minister of Conservation to grant a coastal permit to Tasman District Council to enable them to install a 200-mm underground pipeline for the Kaiteriteri–Riwaka wastewater scheme. The sections of the wastewater scheme dealt with in the case, and the interim decision, relate to:

(1) The esplanade reserve at Tapu Bay, where the pipeline would run at a depth of 1 m below ground from the Tapu Bay pumping station to the coastal marine area;
(2) The coastal marine area, where the pipeline would run at a depth of 1 m across Tapu Bay and around Pah Point (Puketawai) until it reaches land; and
(3) The bed of the Riwaka River, with the pipeline to be installed at a minimum depth of 2 m beneath the riverbed.

In the interim decision, the Court concluded that:

(1) Consent should be granted for the pipeline across the esplanade reserve at Tapu Bay;
(2) Granting a coastal permit for the pipeline across Tapu Bay would be in accordance

with the purpose of the Act and would promote the sustainable management of natural and physical resources; and
(3) The parties should be given further opportunity to address some issues in relation to the crossing of the Riwaka River.

A memorandum of understanding between the Māori appellants and the district council was lodged in the EC prior the final decision. It dealt with the third issue left open for discussion by the Court. Paragraph 4(a) states that the iwi would prefer an above-ground pipeline that sees the least disturbance to the riverbed. However, after considering alternatives, the parties agreed to bury the pipeline beneath the bed of the river by way of open trenching, with full reinstatement of the riverbed. Paragraph 4(b) states that whilst the district council initially sought a 35-year term of consent, the parties agreed to all three consents' expiry on 1 October 2018, giving the district council a 14-year term of consent for all three applications.

The Court was satisfied that parties had considered the alternatives for the pipeline crossing and concluded that it was appropriate to grant the consent. It also endorsed the agreed expiry date for all three of the consents being 1 October 2018. It recommended to the Minister that a costal permit be granted to Tasman District Council and granted consents to the council for the Riwaka River crossing and the Tapu Bay esplanade reserve excavations.

Conclusion: The Māori appellants came to an agreement with the Tasman District Council, which the Court then enforced.

K. Ngataki, Ted and Ngati Tamaoho Trust v Auckland Regional Council [2004] 9 NZED 725

The case was an appeal by Ted Ngataki on behalf of the Ngāti Tamaoho Trust against the Auckland Regional Council's decision to grant resource consent to the Papakura District Council to construct and operate tidal gates on the Pahurehure Inlet No. 2 culvert under the Southern Motorway for 10 years. The inlet is a tidal estuary and was formed when the headwaters of the Papakura Channel were cut off by the construction of the Southern Motorway in 1964. At that time, structural work was undertaken to leave a place for tidal gates to be installed at a later date. The purpose of the proposed gates was to enhance the recreational use of the inlet.

The Court discussed four issues. The third issue addressed tangata whenua interests and values. The Court concluded that Ngāti Tamaoho's spiritual values would be affected by an interference with the natural flow of the tide. If the water was interfered with, the wairua of the water would decay.

The fourth issue addressed consultation. Ngāti Tamaoho Trust's concern had been about the mediation process, but the Court doubted that it should go behind the veil of confidentiality that surrounded the process of mediation. Regardless, the Court concluded that consultation was not an issue because the Trust had had the opportunity to express its concerns.

The Court weighed the benefits of a 10-year consent against the loss of habitat for avifauna and the effect on the Māori people. The Court concluded that the district council should address the future of the inlet in a holistic way in order to enable long-term benefits to be balanced against negative effects on the environment. The Court allowed the appeal and

Auckland Regional Council's decision was quashed.

Conclusion: Ngāti Tamaoho Trust was successful in revoking the Papakura District Council's resource consent to construct and operate tidal gates in the Pahurehure Inlet.

L. Manawatu-Wanganui Regional Council litigation

1) *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* (Environment Court, Auckland, A67/2004, 18 May 2004, Judge Whiting)

The case heard three appeals by Ngāti Rangi Trust and others against a decision by the Manawatu-Wanganui Regional Council that granted resource consents to Genesis Power ('Genesis') to enable the Tongariro hydroelectric power development scheme ('Tongariro') to continue operating.

The appeals arose from the diversion of water from the Whangaehu, Whanganui and Moawhango rivers into Lake Taupo and then into the Waikato River. Water is channelled through Eastern and Western diversions. Ngāti Rangi Trust was primarily concerned that the taking of water from the Whanganui River was culturally unacceptable to the Māori people living in the area. The river holds a spiritual and cultural significance to Māori that underlies the ancestral ties of the people to their river and tributaries. Cultural traditions have been inhibited by a reduced flow of water, reduced water levels, degraded water quality and a change to the ecological system that affects the food chain.

Genesis argued that if there were physical effects on the river that impacted on cultural traditions, these were not caused by Tongariro.

To give genuine consideration to the Māori concerns, the Court sat on the Tirorangi Marae to hear evidence relating to how Māori saw the rivers in the context of their customary and cultural values. The Court found that the most damaging effect of both the diversions on Māori has been on the wairua (spirituality) of the people. Both the Ngāti Rangi and Whanganui iwi see their river as their tupuna (heritage). For centuries the river was the home of Whanganui iwi – a home built around the river. To take away part of the river is to take away part of the people. The Court came to the conclusion that the Tongariro water diversions continue to have a considerable effect on the cultural and spiritual values of the Māori people.

From the scientific evidence heard, the Court found there was no connection between Tongariro and the physical effects on the rivers, including the decline in the native fish life. Other factors noted were floods, overfishing, loss of forest, and pastoral development. The reduction in the flow and water levels could not be excluded from the Tongariro, however. The Court found that the overall physical effects of Tongariro were minor.

The Court also looked at the effect Tongariro had on the national interest. It found that it makes a significant contribution to hydro energy production – 3.5% of New Zealand's annual demand. When required to operate at full capacity, this figure rises to 9%. The Court also took into account evidence of Tongariro's particular significance to New Zealand's climate change obligations under the Kyoto Protocol. Any loss of water to Tongariro would impact New Zealand's comparative advantage in renewable energy production. From the evidence heard, the Court also accepted that both Genesis and Mighty River Power would be severely affected by a further water restriction, which would then flow on to the national economy.

The Court also felt it necessary to examine the evidence regarding the effect Tongariro has on the sensitive landscape it is situated in. It accepted that the effects on the landscape environment, which need to be protected in section 6(b) of the RMA, are minor. This was taken from a present-day perspective, as evidence that the natural character of the landscape has adapted to the Tongariro over its 40-year development was also accepted.

The Court needed to balance the significant contribution Tongariro has for New Zealand's hydro energy production against the cultural and spiritual effects Tongariro has on the Māori people. The Court noted its responsibilities under sections 5, 6(e), 7(a) and 8 of the RMA, which must be balanced with the other provisions of Part II to give effect to the single broad purpose of the Act. Section 6(e) was particularly relevant to the Court's determination because much of the evidence it heard related to the cultural and traditional relationship of the Māori appellants with their ancestral waters.

Due to a lack of a quantitative assessment of how much water should be restricted to satisfy the Māori appellant's grievance, the Court declined to impose a minimum flow regime in favour of the Māori appellants. However, the Court was of the view that some mitigation was required. Māori argued for either a release of more water down the waterways or a reduced term of consent. Genesis proposed that any Māori grievances could be met by consent conditions that properly address tangata whenua concerns.

The Court found that reducing the term of consents from 35 years to 10 years could accommodate the interests of the Māori appellants. This shortened term would provide for both parties to work through these complex issues together.

Conclusion: Whilst the Māori appellants were not able to have the water diversions for Tongariro closed, they were successful in reducing the term of consent from 35 years to 10 years.

2) Genesis Power Ltd v Manawatu-Wanganui Regional Council [2006] NZRMA 536

This case was an appeal by Genesis Power ('Genesis') from the decision of the Environment Court ('EC') in *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* (Environment Court, Auckland, A67/2004, 18 May 2004, Judge Whiting). Genesis appealed to the High Court on the basis that the EC erred in law by reducing Genesis' resource consent for the operation of the Tongariro Power Development Scheme ('Tongariro') from 35 to 10 years. Genesis submissions concerned the following issues:

(1) Was the Court's 'meeting of the minds' requirement based on irrelevant and erroneous considerations, or was it otherwise an improper test?; and
(2) Did the Court misconstrue the extent of the consent review process under the RMA?

(1) Genesis' primary argument was that the EC departed from its powers under the RMA in substituting the 10-year term of consent to effect a 'meeting of the minds' between Genesis and the Māori appellants.

First, Genesis argued that the concept was unprecedented, contrary to Part II and section 104 of the RMA, and not previously recognised in case law. Wild J agreed with Genesis as the Māori respondents did not suggest that the 'meeting of minds' requirement had precedent or recognition in the RMA. The Māori respondents had pointed to cases

where the term of the resource consent had been reduced because information about adverse effects was incomplete. Wild J distinguished those cases from the present case, where the insufficient information existed regarding appropriate ways to mitigate the adverse effects. In each of the cases Wild J distinguished, there was potential for the adverse effects to increase or vary during the term of the consent or there was anticipation that other forms of mitigation would become available during the term of the consent. Given that both the impact of the Tongariro and the cultural and spiritual values of the Māori respondents can be expected to remain constant over the next 35 years, and that the parties had 12 years to consider practical methods of mitigation, Wild J dismissed the notion that the parties would come to an agreement regarding mitigation in the next 10 years.

Second, Genesis argued that the reduction in the term of the consent does not achieve a 'meeting of the minds' to mitigate the adverse effects on the Māori respondents. This is evidenced by the previous 12 years of unsuccessful engagement. Wild J evidenced excerpts of the EC's decision to show that no rational basis for repeating the consultation over the 10 years will secure a 'meeting of the minds' as to the mitigation of the adverse effect on the Māori respondents. Evidence pointed to was that the Māori respondents did not allege a failure to consult and the finding of the EC itself that Genesis had gone to 'considerable lengths' to incorporate the Māori dimension[16].

Third, it was argued that the EC had abdicated its decision-making role and in effect directed the parties to mediation. Wild J criticised the EC for allowing the Māori respondents to have a 'different opportunity to express their concerns,' through the 'meeting of the minds' 10-year term, when they failed to make out their case on insufficient evidence. He stated that the Māori respondents had an onus to bring to the EC evidence of measures that would adequately mitigate the adverse effects on them caused by Tongariro. By failing to discharge this onus, Wild J noted that it should have been the end of the matter then and there. The EC was wrong to grant a reduced term that had the sole aim of bringing about the 'meeting of minds' regarding appropriate mitigation measures. According to Wild J, this 'is not a proper legal response'.

Wild J concluded on this first point by stipulating that no Court should permit a party to take advantage of its own default. He agreed with Genesis that the EC's approach was erroneous in law and that this error materially affected the EC's decision.

(2)Genesis' second argument was that the EC had erred in law by understating the powers of regional councils to review resource consents. As a result, the EC had not given necessary consideration to the consent review conditions proposed by Genesis. The EC had held that 'any such review would not have the same ameliorating power as a fresh application'. Wild J agreed with Genesis that this was not the correct position, citing previous decisions that have held that powers on review do include substantially reducing the level of the resource consent activities and cancelling a resource consent[17].

(3)Wild J concluded by holding that the 'meeting of the minds' construct that led the EC to choose one of the two options involved an error of law. He further concluded that the EC had taken an unjustified narrow and restrictive view of the ambit of the powers given

[16] *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* (Environment Court, Auckland, A67/2004, 18 May 2004, Judge Whiting, at para 462.

[17] *Minister of Conservation v Tasman District Council* (High Court, Nelson, CIV 2003-485-1072 9 December 2003, Ronald Young J) and *Director-General of Conservation v Marlborough District Council* (High Court, Wellington, CIV 2003-485-228 3 May 2004, MacKenzie J).

by the consent conditions review process. The EC's decision was quashed and referred back to the EC for a new determination.

Conclusion: The Māori respondents lost on appeal to the High Court because the Environment Court erred in law, and the case was referred back to the EC for a new determination.
NB: The second EC decision was unable to be located. See below for the appeals lodged by Ngāti Rangi Trust in the High Court to the Court of Appeal.

3) *Genesis Power Limited v Manawatu-Wanganui Regional Council* (High Court, Wellington, CIV-2004-485-1139, 22 May 2007, Judge Wild)

The case concerned an application by Ngāti Rangi Trust and the Whanganui River Māori Trust Board for leave to appeal to the Court of Appeal ('COA'). This follows Wild J's previous decision to quash the Environment Court's ('EC') decision that reduced Genesis' water-related resource consents for the Tongariro Power Development Scheme ('Tongariro') from 35 years down to 10 years.

The Ngāti Rangi Trust and the Whanganui River Māori Trust Board applied to put seven questions to the COA. Wild J summarised them into two:

(1) Did the High Court err in holding that the Māori respondents had failed to discharge an evidentiary onus on them?; and
(2) Did the High Court err in holding that there was no material difference between the ambit of the EC's powers upon a fresh resource consent application and those under the consent conditions review process?

(1) The High Court ('HC') concluded that the question of the evidentiary onus did not raise any question of law of sufficient public importance to warrant the COA's consideration.

(2) Ngati Rangi Trust and the Whanganui River Māori Trust Board argued that the difference between a fresh application and the consents review process is that under review, there is no ability to cancel the resource consent. The HC stated that this couldn't be argued because it was never suggested that Genesis' resource consents be cancelled. The HC also stated that this point also did not have sufficient public importance to warrant the COA's consideration.

Conclusion: The HC declined the Ngāti Rangi Trust and Whanganui River Māori Trust Board leave to the COA.

4) Ngati Rangi Trust v Genesis Power Limited [2007] NZCA 378

This was an application for special leave to appeal to the Court of Appeal ('COA') from Wild J's first High Court ('HC') decision *Genesis Power Ltd v Manawatu-Wanganui Regional Council* [2006] NZRMA 536. Ngati Rangi Trust had sought leave to appeal in May 2007 but were refused in Wild J's second HC decision.

The COA noted that the HC had been faced with a 'plethora' of questions that had failed to address the crux of the application. In the COA's view, there were two questions of law that were of distinct public importance, which raised questions as to how environmental cases of this kind are to be approached under the RMA:

(1) Was the HC correct in finding that there was an evidential onus on the Māori applicants to demonstrate the appropriate measures to mitigate the adverse effects of Tongariro?; and
(2) Was the HC correct in finding that the EC 'meeting of minds' construct was not directed to the statutory purpose of 'sustainable management' under the RMA, but instead was directed to providing the applicants with another opportunity to express their concerns?

Leave was granted to the COA to address these two questions only.

Conclusion: Ngāti Rangi Trust was successful in obtaining leave to appeal to the COA.
NB: The COA decision has not yet been delivered.

M. *Mokau Ki Runga Regional Management Committee v Waikato Regional Council* (Environment Court, Auckland, A046/06, 10 April 2006, Judge Whiting)

The case was an appeal against the regional council's decision to renew resource consents for the continued operation of the Mokauiti Hydroelectric Power Scheme ('Mokauiti Hydro') on the Mokauiti River. King Country Energy owns, operates and manages Mokauiti Hydro. Water is diverted from the river to the power station. King Country Energy was granted resource consents for the flashboards (timber extensions to the dam that increase the size of the head pond storage) to be replaced by hydraulically controlled gates that manage the dam water levels. The Mokau Ki Runga Regional Management Committee ('Mokau Ki Runga') had two concerns about the consents:

(1) That the increased height of the proposed control gates would have an adverse effect on traditional Māori fishing sites (pa tuna); and
(2) That the consents did not adequately take into account methods of assisting fish passage over the dam.

(1)The Court accepted that by replacing the flashboards with a control gate, the head pond will be able to maintain its head during normal water flow. During flood events, the gate will automatically reduce the water level in the head pond and reduce undesired backwater effects. The Court put Mokau Ki Runga's arguments into context. Not all of the pa tuna would be submerged all of the time. Some of them would be fishable during normal and low flows in a river where the mean flow is very low. There are also a large number of pa tuna that are outside the backwater effect and not affected at all by the consent. Further, denying the resource consents for the control gates would reduce the generating capacity of the power station by 30% and would maintain an unacceptable risk to the dam's security. The Court concluded that benefits of the control gates far outweigh the adverse affects on Mokau Ki Runga's pa tuna.

(2) The parties disagreed over the method for ensuring the native fish, particularly eels, get past the physical barrier of the dam. The two methods were trap and transfer, and constructed fish passages. Mokau Ki Runga was opposed to trap and transfer and would only reconsider after there had been two years of trials and monitoring of the constructed fish passages. The Court considered that it was not unreasonable to listen to the iwi and allow a trial of the constructed fish passages, especially considering eels are very good climbers upstream.

The Court did not alter the resource consent for the control gates but did amend the consent conditions for the fish passage. For the first complete migration season, King Country Energy could only trial constructed fish passages. At the end of this complete season, King Country Energy must furnish the regional council with a report. With consultation with Mokau Ki Runga, the report will provide recommendations for the future of assisting fish passage.

Conclusion: Mokau Ki Runga did not succeed in having the control gates removed but it did succeed in having its preference for assisted fish passage over the dam approved.

N. Central Plains Litigation

1) *Ngai Tahu Property Limited* (Re an application) (Environment Court, Christchurch, C104/06, 21 August 2006, Judge Bollard)

The case concerned an application by Ngai Tahu Property for a declaration under section 311 of the RMA. The declaration sought was for priority in relation to applications for the granting of permits for the taking of water from the Waimakariri River under the Waimakariri River Regional Plan.

The key issue was whether the Central Plains Water Trust ('Central Plains') had priority in applying for and obtaining a permit to abstract water ahead of Ngāi Tahu given that they had made their application in 2001. The dispute arose because Environment Canterbury had decided under section 91 of the RMA not to publicly notify Central Plains' application until a date that fell later than the notification of Ngāi Tahu's application.

The Court found that in using section 91, Environment Canterbury had reasonable grounds for concluding that Central Plains' irrigation proposal would require further consents. The Court noted that Environment Canterbury's deferral of Central Plains' application meant that they were vulnerable to other applications establishing priority. The Court held that where a consent authority required further applications in order to better understand an intended proposal, then an initial application like Central Plains' was not notifiable.

The Court concluded that Ngāi Tahu was entitled to priority and allowed its declaration.

Conclusion: Ngāi Tahu succeeded in gaining a declaration of first priority over Central Plains for the take water consent.

2) Central Plains Water Trust v Ngai Tahu Property Limited [2007] 13 ELRNZ 63

The case was an appeal against the Environment Court's ('EC') ruling in decision C104/06. The EC held that priority between the competing applicants was to be determined by which application was first ready for public notification.

The High Court ('HC') held that the determination of priority of competing applications was generally decided by which one was first ready for notification. The HC further held that when a consent authority decides under section 91 of the RMA not to proceed with notification, the application is not ready for notification until the additional consent applications are made. Where both sections 91 and 92 are used, the HC held that applications are not ready for notification until the further applications are made and the consent authority is satisfied with the adequacy of the information requested.

The HC held that the declaration made by the EC was correct and dismissed the appeal.
Conclusion: The HC affirmed Ngāi Tahu's position.

3) Central Plains Water Trust v Ngai Tahu Property Limited [2008] NZRMA 200

This was a decision by the Court of Appeal regarding two questions of law following the High Court's decision CIV-2006-409-2116. The questions of law were:

(1) Whether the priority between competing applications for resource consent was determined by discovering which was ready first for notification; and
(2) If so, whether a decision under section 91 of the RMA to defer notification meant that the application was not ready for notification until the additional consents were made.

By a majority, the Court of Appeal held that the decision *Fleetwing Farms Ltd v Marlborough DC* [1997] 3 NZLR 257 had decided that priority is to be decided on a first come, first served basis, and that each application is to be considered on its merits without regard to other applications. However, Fleetwing had not determined at what stage priority is achieved.

The Court stated that both the Enviroment Court (EC) and High Court (HC) had taken a too narrow view when granting Ngāi Tahu priority. The Court noted that ensuring sustainable management weighed heavily in assessing what priority regime accorded with Parliament's policy, and that there was a public interest that the law should not frustrate a proposed development in the course of undergoing the statutory processes. The Court did not agree with Ngāi Tahu's argument that priority was lost because Central Plains' final application had not been filed until after Ngāi Tahu's own application was complete.

The Court noted that Central Plains' application was not an insubstantial application that could be brushed aside in favour of a later and more comprehensive application. Although the Central Plains' application in 2001 had been for the taking of water only, it had given a clear and substantial account of what was to be done with the water through an integrated water management approach with the relevant local authorities. As a matter of policy, the Court preferred to give priority to an application which, although needing subsequent applications, could not be rejected as a nullity rather than give priority to a complete application that had been filed later. The Court stated that any other decision would infringe fundamental policies of the RMA.

(1) The Court held that consent to take water, which was not disqualified by unreasonable delay and needed subsequent applications, could not be rejected as a nullity. It takes priority over a complete application that relates to the same resource but was filed later with knowledge of the earlier application.

(2) The Court did not consider that the second question of law required an answer.

Ngāi Tahu was ordered to pay Central Plains $10,000 in costs.

Robertson J's minority opinion was that, notwithstanding the regional council's 2001 letter stating that Cental Plains' application was ready for notification, the application had not in fact been in a notifiable form at that date. It could not have become notifiable until the matters referred to in the deferral had been dealt with. Robertson J considered that it was regrettable that Parliament had not legislated in clear and unequivocal terms as to when an

application is actually made. Robertson J did note that serious practical problems arose from the interpretation of the EC and the HC, but priority was determined by the application that was first ready for notification. Accordingly, Robertson J believed that both the questions should be in the affirmative.

Conclusion: The majority of the Court of Appeal concluded that Ngāi Tahu did not have first priority for the take water consent. Their application was thus subject to Central Plains' consent.

4) Ngai Tahu Property Limited v Central Plains Water Trust [2008] NZSC 49

The Supreme Court granted leave to Ngāi Tahu to appeal against the decision of the Court of Appeal.

The grounds approved were:

(1) Is priority as between competing resource consent applications determined by which application is lodged first with the consent authority, or by which is first ready for notification, or by some other test?
(2) Is priority lost by:
(a) a decision of the consent authority under section 91 of the RMA to defer notification pending application for additional consents; or
(b) delay while the applicant makes additional applications required by the consent authority under section 91; or
(c) the grant of an application by another applicant relating to the same resource?

Conclusion: Ngāi Tahu succeeded in obtaining leave to appeal to the Supreme Court.
NB: No substantive decision of the Supreme Court has been released.

O. Te Kura Pukeroa Māori Incorporation v Waikato Regional Council [2007] NZRMA 521

The case was an application by the Thames–Coromandel District Council to strike out an appeal made by Te Kura Pukeroa against a decision made by the Waikato Regional Council and the Thames–Coromandel District Council. The regional council had granted consent to the district council to discharge treated wastewater into the Tairua Forest. The district council also granted a number of consents to itself relating to the construction and operation of the Whangamata Wastewater Treatment Plant.

The district council's application to strike out the appeal was based on the fact that it only addressed a procedural defect – a failure to comply with a duty to consult. They argued that a procedural defect by itself was not sufficient grounds on which to base an appeal.

In opposition to the strike out application, Te Kura Pukeroa argued two reasons in favour of the appeal. First, that the district council had failed to consult with Māori representatives in relation to the proposed treatment plant. Second, that no statutory adherence had been given to the principles of the Treaty of Waitangi, under section 8 of the RMA, or the Local Government Act 2002.

The Court held that Te Kura Pukeroa's appeal did not address ways in which exercising the resource consents would fail to promote the sustainable management of the natural and

physical resources. Because of this, it was unacceptably vague and is not a valid ground for appeal. The Court also found that it lacked the jurisdiction to decide the appeal by ordering consultation with particular people. The Court held that the appeal was vexatious and that to allow it to proceed would constitute an abuse of process. The Court struck out the appeal.

Conclusion: Te Kura Pukeroa's appeal was struck out.

P. Wakatu Inc v Tasman District Council [2008] NZRMA 187

The case was an application for judicial review of actions of the Tasman District Council in processing a resource consent application for itself to take water from the Motueka River catchment. Wakatu Inc. ('Wakatu'), a Māori Incorporation under section 15A of the Māori Reserves Act 1995, is made up of approximately 3500 descendants from four iwi – Ngāti Rarua, Te Ati Awa, Ngāti Koata and Ngāti Tama. The Motueka River is regarded by the tangata whenua as the life blood of Motueka, and Wakatu has been actively involved in the management in the river's catchment for the last 20 years.

Prior to the council's application, Wakatu had lodged two resource consent applications to take water from a location in Parker Street in Motueka. Both applications were rejected by the council as incomplete under section 88(3) of the RMA, to which Wakatu lodged objections to both rejections under section 357 of the RMA. The council then lodged its own application to take water from the exact same location as Wakatu intended to. The council's resource consents officer decided that the council's application could be received under section 88. Independent consultants Sinclair Knight Mertz ('SKM'), after conducting a review of the application, suggested that the council should proceed with the public notification process. This occurred on 24 March 2007 and Wakatu's two section 357 objections were heard on 28 March. On 10 April, the hearing commissioner confirmed that both of Wakatu's applications were incomplete and the rejections were justified.

Wakatu challenged both the council's decision to accept its own application as complete under section 88 of the RMA and the council's decision that their own application could be publicly notified. The Court reviewed the various steps in the RMA for making and processing resource consent applications. Whilst there is no provision in the RMA that establishes priorities between competing applications, the Court reviewed relevant case law and came to the conclusion that the date of the decision to publicly notify an application is the determinative date in deciding priority. Thus, Wakatu can only challenge the council's decision to publicly notify the application and not its decision to accept its application as complete under section 88 of the RMA.

Wakatu challenged the council's public notification decision on two grounds. Firstly, that it had been influenced by bias because the council had a conflict of interest in being both the applicant and decision maker. The Court accepted that while bias will disqualify a judicial or quasi judicial maker, it will not disqualify an administrative decision maker. It noted that the relevant decision in this case was wholly administrative and had no elements of a quasi judicial nature. Thus, the sole question that must be asked is whether the application had the requisite information for public notification. In deciding this, the Court then addressed two questions:

(1) Whether the scheme of the RMA shows that Parliament has appointed a decision maker despite an actual or potential conflict of interest; and
(2) Whether the decision maker came to the decision with an open mind.

(1) Whilst there are powers of delegation in section 34A of the RMA, there is no indication in the Act that these powers should be used in respect of all administrative decisions where the council may be perceived to have a potential conflict of interest. The Court concluded that the decision to publicly notify the council's application did not have to be delegated because there was no potential to be influenced by bias. This was because, at the time of the decision, no other application was before the council. Wakatu's previously rejected section 357 applications were 'sufficiently remote' from the council's decision to publicly notify its own application that no conflict of interest was possible.

(2) As to whether the council had kept an open mind, the Court found that while there had been a degree of urgency in making the decision, there was no evidence that the decision maker was attempting to pre-empt an issue of priority between its own and Wakatu's application. The Court suggested that the urgency could have related to adhering to the statutory timetable for processing applications. Urgency itself is not evidence of lacking an open mind.

Wakatu's second ground of review was that the council had erred in law by applying the wrong test when making the notification decision. The council's test, which it had asked SKM, was 'whether the application had sufficient information for potential submitters to assess the effects on them'. Wakatu argued that the correct test was 'whether the application contained enough information to enable the assessment of the effects on the environment' [emphasis added]. The Court held that the council's test was correct. Environmental impact concerns do not arise at this stage of the process – they come later on.

Conclusion: Wataku's application for review was dismissed. It could not have the Tasman District Council's decision to publicly notify its own resource consent application revoked. Consequently, a future public notification of a Wakatu resource consent application will be affected by Tasman District Council's notified consent.

Q. Te Maru o Ngati Rangiwewehi v Bay of Plenty Regional Council [2008] ELRNZ 331

The case concerned the source of the water supply for the Rotorua District Council. The district council applied under section 14(1)(a) of Resource Management Act 1991 ('RMA') for a resource consent to take water from the Taniwha Springs. The new permit was intended to replace the existing permit that was due to expire. In 2004 the Bay of Plenty Regional Council granted the consent for a term of 25 years, but restricted the volume and rate of the taking to figures less than what was applied for. The Rotorua District Council appealed to the Environment Court, seeking a higher volume and rate. Te Maru O Ngati Rangiwewehi ('the voice' of Ngāti Rangiwewehi) also appealed the term of the consent. They argued that the overall effect of the consent on the iwi was so significant that the council should seek an alternative supply source. Consequently, they argued that the term of consent should be reduced to an appropriate term that would allow the council to source and implement an alternative water supply.

The Rotorua District Council's application to take up to 18 144 cubic metres per day, at a rate of 210 litres per second, was restricted to a maximum take of 3500 cubic metres per day from 1 December to 31 March (peak demand) and 2500 cubic metres per day from 1 April to 31 November (off-peak demand). The rate of the consent was also restricted to a maximum of 68

litres per second. The Commissioner that granted the resource consent believed that lower rates provided a balance between the needs of the district council and the concerns expressed by Ngāti Rangiwewehi and Eastern Region Fish and Game.

The Court explored three issues in formulating its decision:

(1) The significance of the cultural effects on Ngāti Rangiwewehi;
(2) The potential availability of a reasonable alternative; and
(3) Whether the effects on Ngāti Rangiwewehi can be sufficiently remedied or mitigated through conditions being imposed on the consent.

(1) The Court sat for four days on the Tarimano Marae so that it could properly consider the cultural effects on Ngāti Rangiwewehi. The Court concluded that the springs and the stream were taonga and central to their identity as an iwi. The Court found that the desecration of the springs by the district council's compulsory purchase in 1966, the covering of Te Wairo-Uri spring with a concrete structure, and the continued abstraction of water by the district council were acts of 'considerable cultural insensitivity'. For the above reasons, the Court concluded that the effects were matters of national importance that are required to be recognised and provided for under sections 6(e), 7(a) and 8 of the RMA.

(2) The Court looked at relevant case law and found that when an objection is raised against a matter of 'national importance' (section 6 RMA), an alternative source of supply is a necessary consideration in determining whether a proposal will result in sustainable management. The Court first decided that district council's consideration of the alternatives to the Taniwha Springs was 'cursory at best.' The Court was satisfied that good quality groundwater was a potentially viable source of water that could affectively replace the abstraction from the Taniwha Springs. To replace a supply of 9936 cubic metres per day, available from the Taniwha Springs as per the district council's revised consent application, between five and six bores would be required. However, the Court noted that whilst an alternative supply from the ground (bore water) was a technically feasible and sustainable alternative, the estimated cost to the district council would be $7.6 million, as opposed to $2.1 million from extraction from the springs. The district council considered this cost to be an unacceptable burden on the ratepayers, as they were ultimately going to have to pay for the increase in water abstraction costs if the groundwater was sourced. Ultimately, the Court considered that increased cost was less than equal to the cultural degradation caused to the springs and that the public benefits of continuing the springs extraction did not outweigh the affliction towards the spiritual and cultural values of Ngāti Rangiwewehi.

(3) The Court then found that the mitigation offered by the district council that is focused on the volume and rate of the taking does little to alleviate the hurt caused to the iwi. The significant cultural effects are not proportionate to the amount of water abstraction; rather, they are fixed by the mere fact that abstraction occurs at all. The Court found that the proffered conditions would not adequately remedy the effects on Ngāti Rangiwewehi.

The Court acknowledged that it had no jurisdiction to direct the council to source water from an alternative supply. It did, however, have jurisdiction to find that the district council had not given adequate consideration to the alternative options. The Court concluded that a term of 10 years would adequately reflect the cultural sensitivity of the environment, comply with

the statutory prerogatives in the RMA relating to Māori, the evidence of a viable alternative water supply, and the failure of the district council to adequately consider that alternative.

The Court granted the Rotorua District Council's consent to extract water from the Taniwha Springs, but limited it to a 10-year term commencing 28 August 2008. The volume of the taking was limited to 7340 cubic metres per day at a maximum rate of 115 litres per second, but in emergency situations (left to be defined by the parties themselves) the volume of water was capped at a maximum of 9936 cubic metres per day. The Court also set a minimum residual downstream flow level of 29 litres per second.

The parties were given 30 days to settle and agree on the conditions of the consent that were attached to the judgement.

Conclusion: Ngāti Rangiwewehi succeeded in reducing the term of the resource consent from 25 to 10 years. However, they did not succeed in reducing the maximum daily volume and rate the Rotorua District Council can take from the Taniwha Springs.

6.3 Noting other cases

Beadle, Shayron Lee v Minister of Corrections [2002] 7 NZED 394
Proposed construction of a prison that would interfere with taniwha.

Parata v Northland Regional Council [1999] 4 NZED 633
Wastewater discharges into coastal marine area.

Aoraki Water Trust and Others v Meridian Energy Limited [2005] NZRMA 251
Considered whether resource consent to take water excludes all others from taking. No mention of Māori rights to water.

Paokahu Trust & Others v Gisborne District Council **(Environment Court, Wellington, W078/05, 26 September 2005, Judge Thompson)**
Discharge into coastal waters.

Tainui Hapu and Others v Waikato Regional Council [2004] 9 NZED 545
Discharge into coastal waters across Māori land.

Te Awatapu O Taumarere v Northland Regional Council [1998] 3 NZED472
Discharge into coastal waters.

Te Kura Pukeroa Māori Incorporation v Waikato Regional Council **(Environment Court, Wellington, W069/07, 5 September 2007, Judge Dwyer)**
Discharge into forest.

Te Pairi, Benjamin v Gisborne District Council **(Environment Court, Wellington, W093/04, 22 December 2004, Judge Thompson)**
Discharge into coastal waters.

Trustees of Poukawa 13B v Hawke's Bay Regional Council [1995] 4 NZPTD 506
Hapū directly opposed diversion of water into Lake Poukawa. Appeal was revoked as parties

reached agreement.

Paki & Ors v Attorney-General Paki & Ors v Attorney-General (30/7/08, Harrison J, HC Hamilton CIV-2004-419-17)

This case also deserves mention. It is different from the other cases identified in this chapter because it was brought to the courts via an argument based in fiduciary duties, and not pursuant to the Resource Management Act 1991. However, it is a recent case concerning Māori articulating rights to fresh water and thus it is important to note it. In this case, the representatives of the Pouakani people pled that the Crown owed the original owners of land adjoining the Waikato River a fiduciary duty based on four arguments, which were collapsed into two streams of authority by Harrison J: the Treaty of Waitangi jurisprudence, and related authority on the Crown's duty on extinguishment of customary rights. Harrison J held against the Pouakani people on an earlier point of law but still progressed to consider the claim of alleged breach of fiduciary duty. He prefaced his discussion as 'strictly obiter' (paras 25 and 108). The Pouakani people are currently seeking to appeal this decision to the Court of Appeal.

6.4 Conclusion

This part has provided a summary of the cases heard pursuant to the Resource Management Act 1991 that concern Māori and water. It has been prepared as a valuable resource for those who wish to gain an understanding of how the courts have responded to the Māori voice in regard to freshwater concerns. In terms of the seventeen cases, iwi were only successful in three cases and partially successful in four cases. Iwi were unsuccessful in eight of the cases, and in regard to the other two, iwi are awaiting final appeal court decisions. More legal analytical work needs to be done in regard to closely examining the effect and usefulness of section 6(e) of the RMA to Māori.

7. Waitangi Tribunal Reports

7.1 Introduction

Another avenue for Māori to advance their interests and connection to water has been through the Treaty of Waitangi settlement process. By way of brief background, in 1840 the British Crown and over 500 Māori chiefs signed te Tiriti o Waitangi / the Treaty of Waitangi (the 'Treaty'). It is a short document, consisting of three articles expressed in English and Māori. The controversy lies in the translation of the first two articles. According to the English version, Māori ceded to the Crown absolutely and without reservation all the rights and powers of sovereignty (article 1) but retained full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties (article 2). In contrast, in the Māori version, Māori ceded to the Crown governance only (article 1) and retained tino rangatiratanga (sovereignty) over their taonga (treasures). Article 2 granted the Crown a pre-emptive right to purchase property from Māori, and article 3 granted Māori the same rights and privileges as British citizens living in Aotearoa New Zealand.

While the Crown mostly ignored the guarantees made to Māori in the Treaty, a new era dawned in the 1970s. The Waitangi Tribunal (the 'Tribunal') was established in 1975 as a

permanent commission of inquiry empowered to receive, report, and recommend on alleged Crown contemporary breaches (post-1975) of the principles of the Treaty[18]. During Labour's next term in Government (commencing 1984) it passed legislation granting the Tribunal retrospective powers to investigate claims dating back to 1840[19]. The Tribunal's jurisdiction is to consider claims by Māori that they have been prejudicially affected by legislation, Crown policy or practice, or Crown action or omission on or after 6 February 1840. The Tribunal mostly can only make non-binding rather than binding recommendations to the Crown on redress for what it considers to be valid claims.

The Tribunal's quarter-century work has been immense. It has released numerous reports on iwi-region-specific claims alleging historical breaches in the South Island, North Island and Chatham Islands, including many claims specifically concerning rivers[20]. However, because the Tribunal only has recommendatory powers, the Crown can and does ignore some reports, including the prominent Whanganui River Report, published 1999, and discussed at length later in this chapter.

This part of the report consists mainly of summaries of those parts of the Waitangi Tribunal Reports which deal with fresh water, that is, rivers, lakes, springs, lagoons and geothermal resources. Rivers, and to a lesser extent, lakes have been the focus for this research. However, three examples of the Tribunal's approach to geothermal resources, lagoons and springs have also been included. The historical common law treatment of rivers and lakes has been briefly traversed, but the main focus remains on how Māori have articulated their past and present relationship with rivers and lakes, how the Crown has responded to this, and the conclusion and recommendations of the Tribunal. Discussion and findings by the Tribunal on kawanatanga, tino rangatiratanga, environmental management and the RMA have also been included where relevant. The following discusses the reports (Appendix 3) in a chronological manner.

7.2 The Waitangi Tribunal Reports concerning rivers

WAI 6 Motunui Waitara Report, 1983

This report dealt with a claim brought by the Te Atiawa people of Taranaki that they had been prejudicially affected by the discharge of sewage and industraial waste onto or near certain traditional fishing grounds and reefs and that the pollution of the fishing grounds is inconsistent with the principles of the Treaty. The Tribunal found that the reefs and the Waitara River constitute significant and traditional fishing grounds of the hapū and they had been prejudicially affected in that the reefs and river had been polluted. The Tribunal recommended that the proposal for an ocean outfall at Motunui be discontinued, that the Crown seek an intermin arrangement with the Waitara Borough Council for the discharge of effluent, that a regional planning and co-ordinating task force be established along with an interdepartmental committee to promote legislation for the reservation and control of significant Māori fishing grounds.

[18] Treaty of Waitangi Act 1975, s 6.

[19] Treaty of Waitangi Act 1975, s 6 as amended by the Treaty of Waitangi Amendment Act 1985. For commentary see: Hayward & Wheen (2004) and Ward (1999).

[20] To view the reports: see the Tribunal's website at http://www.waitangi-tribunal.govt.nz/reports/.

WAI 4 Report of the Waitangi Tribunal on the Kaituna River, 1984

This report dealt with a scheme to build a pipeline from the Rotorua Wastewater Treatment Plant to the Kaituna River. Ngāi Pikiao strongly opposed this scheme, stating that to pump sewage into the Kaituna River was objectionable on medical, social, spiritual and cultural grounds (p. 8). In the course of addressing whether the proposed pipeline was inconsistent with the principles of the Treaty, the Tribunal held that in 1840 the Kaituna River was owned, and had been owned for many generations by Ngāi Pikiao and Te Arawa (p. 31). It also found that these 'traditional rights of ownership' carried with them the right to fish the river, a right they consider part of taonga Māori and one that continues uninterrupted to this day (p. 31).

WAI 8 Report of the Waitangi Tribunal on the Manukau Claim, 1985

In this report the Tribunal accepted Waikato-Tainui's claim that the Manukau Harbour and the lower Waikato River fall within their rohe, within which they held the traditional right to use and occupy the land and waters (pp. 10–11). Tainui claimed that their use and enjoyment of the waters has been 'severely limited' by pollution, major development works such as the mining of ironsands on the Waikato River (p. 11), and that there has been a lack of recognition of their tribal rights with respect to the harbour and river (p. 11).

The Tribunal acknowledged the extremely high importance and value given to the Waikato river by the Tainui tribes, recognising that 'it is a symbol of the tribe's existence…deeply embedded in tribal and individual consciousness' (p. 72).

While the Tribunal made no findings in relation to the river, in its recommendations to the Minister of Local Government and of Energy and Works Development it acknowledged the need to reconcile 'Māori sensibilities' regarding the ownership of the river, with public ownership (p. 129). A further recommendation suggested existing legislation be amended to enable regional water boards to take into account Māori spiritual and cultural values when considering water rights applications (p. 131).

WAI 17 Report of the Waitangi Tribunal on the Mangonui Sewerage Claim, 1988

This report dealt with Ngāti Kahu's objection to the proposed sewerage treatment plant involving oxidation ponds that would be constructed beside a creek flowing to the Taipa River. Ngāti Kahu was particularly worried about the discharge into the river.

The Māori view that natural water should be kept pure and that waste should be discharged through land was noted by the Tribunal (p. 6). In its findings, the Tribunal acknowledged that the alternative plan, involving effluent disposal at a marsh near the Parapara Stream, still did not strictly comply with Māori standards (p. 6). However it decided it was a 'reasonable compromise' (p. 6). Treaty rights to self-management and guaranteed possession of lands and fisheries were recognised by the Tribunal to the extent that they were held to require 'a high priority' for Māori interests when public works impact on Māori possessions. However, it held that ancestral significance and cultural concerns must be weighed alongside other relevant factors such as costs and competing needs and circumstances of the whole community (p. 59). The Tribunal concluded that the ponds should only be resited if there were 'reasonably practical alternatives' (p. 61).

In response to claimant concerns that the treatment ponds may threaten the large underground aquifer that provides Taipa town with its main freshwater source, the Tribunal held that the Ngāti Kahu interest in the aquifer was no greater than the non-Māori interest in the aquifer, and therefore it did not matter if the interests of Ngāti Kahu were not addressed in the water

right proceedings (p. 53).

WAI 38 The Te Roroa Report, 1992

Among the natural resources addressed briefly in the Te Roroa Report was the Waipoua River. Te Roroa claimed that the Crown failed to recognise and give effect to their 'special spiritual, cultural and historical relationship' with the river, their tino rangatiratanga, and their tradition resource rights associated with it (pp. 180, 209).

The Tribunal's findings on the Waipoua River recognised that the Crown's action in removing excessive gravel from the river had led to the depletion of sources of food and fresh water (p. 182). Furthermore, the pollution it caused was culturally objectionable because it ignored Te Roroa's spiritual and cultural values relating to the mauri of the river 'by which they identify themselves' (p. 182).

WAI 119 The Mohaka River Report, 1992

This report dealt with Ngāti Pahauwera's claim of rangatiratanga over the Mohaka River, and whether the proposed national water conservation order recommended by the Planning Tribunal would usurp their rangatiratanga and breach the principles of the Treaty.

Ngati Pahauwera claimed that the Mohaka River, including its waters, bed and fisheries, is a taonga of theirs over which their rangatiratanga was guaranteed in 1840 and never since been relinquished (p. 1). Evidence presented to support the claim that the river, and the many benefits the river provides, are taonga of Ngāti Pahauwera pointed to: the important source of mahinga kai the river provided (p. 11), the significance of hangi stones collected from the river (p 12), the considerable spiritual and healing properties of the river's waters (p. 13), archaeological sites along the riverside including wahi tapu, pa, urupa and papakainga, as well as the fact that the river provided an important traditional means of communication and transportation (p 14).

The Tribunal found that the Mohaka River was indeed a taonga of Ngāti Pahauwera and remains so to this day (p. 78). The Tribunal also found that while the Mohaka was governed by a complex set of rights by many hapū, ultimate authority rested in the tribe, Ngāti Pahauwera (p. 17). They noted that despite the Crown's increasing role in management of the resource, and the alienation of much of the surrounding land, Ngāti Pahauwera continue to see themselves as having 'control' over the river (p. 17).

Ownership of the bed of the Mohaka River

The Tribunal examined the impact of the alienation of land on both the south and north sides of the river on the claimant's claim to ownership. The claimants asserted that the land sales on the south and north boundaries of the river did not include part of the river itself, whereas the Crown maintained that the sales resulted in an absolute transfer of the ownership of the river by virtue of the common law ad medium filum aquae rule (p. 31). This rule means that owners of riparian lands own to the middle line of the riverbed.

The conclusion reached by the Tribunal was that because the deed was ambiguous in its reference to the river boundary, and because this ambiguity should be resolved in favour of Ngāti Pahauwera according to the contra proferentem rule, the Crown must accept that no part of the river was included in the purchase (p. 34).

The Tribunal noted that the *Re the Bed of the Wanganui River* case was relied on by the

Crown to support its assertion that Ngāti Pahauwera did not have property rights to the Mohaka River. In this, the Court of Appeal adopted the opinion of the Māori Appellate Court which stated that there was no tribal ownership of the bed of the river as distinct from adjoining lands. On this basis, the Court of Appeal decided that customary ownership of a riverbed was congruent with the application of the common law ad medium filum aquae rule, and consequently held that title issued by the Native Land Court to riparian owners included the adjacent riverbed to the centre point (p. 35).

The claimants challenged the opinion of the Māori Appellate Court, contending that the ad medium filum aquae presumption could be rebutted even in English common law if the surrounding circumstances showed that this grantor did not intend the rule to apply. Applying this rule, the Tribunal found that there was no evidence Ngāti Pahauwera intended to dispose of any part of the riverbed and also that customary rights were not sufficiently similar to the ad medium filum aquae rule for Ngāti Pahauwera to have understood and intended this rule (p. 37). If the Crown desired to acquire any ownership in the river, the Tribunal held that it had a duty to clearly spell out the exact nature of the transaction. As this did not occur (p. 38) with regards to the river, the presumption of the ad medium film aquae rule was rebutted.

Furthermore, the Tribunal held that even if the presumption had not been rebutted, to take away ownership from Ngāti Puhauwera of the bed of the Mohaka River through the application of a presumption of English common law, that they knew nothing about, would be inconsistent with the principles of the Treaty (p. 50).

Rangatiratanga, kawantanga and the Mohaka River

The claimants asserted that the Crown is obliged to protect taonga to the fullest extent reasonably practical and that kawanatanga should not be exercised in a way that impinged on Māori interests (p. 60). The Crown contended that the imposition of a water conservation order did not diminish or ignore Ngāti Pahauwera's rangatiratanga or mana. As an order for the conservation and thus preservation of the river, it was for the benefit of all New Zealanders, regardless of race, and thus in keeping with the concept of kawanatanga (pp. 61–62). The Crown view was that for such a significant natural resource as the Mohaka River, there was no other 'practical alternative' to it being subject to governmental control, thus the conservation order was a necessary incident of kawanatanga (p. 62). They further submitted that the powers of the Crown to make a water conservation order were consistent with its duty and right to control and manage natural resources in the national interest, for the whole of New Zealand, and that the authority to do so is implicit in kawanatanga (p. 61).

The Tribunal concluded that, as applied to the Mohaka River and Ngāti Pahauwera, rangatiratanga 'denotes something more than ownership or guardianship of the river but something less than the right of exclusive use. It means that the iwi and hapu of the rohe through which the river flows should retain an effective degree of control over the river and its resources as long as they wish to do so' (p. 64). It further held that the while the Crown should ensure an effective conservation regime for the river is in place, this must recognise the Treaty interest of Ngāti Pahauwera by making adequate provision for the exercise of their tino rangatiratanga over the river (p. 65). Finally, the Tribunal found that the Crown failed to adhere to the Treaty principle of active protection, by promoting legislation and adopting practices which gave little or no recognition to Ngāti Pahauwera. It also breached the Treaty by not providing for the continued exercise of tino rangatiratanga over the river or for the retention of property for as long as they so desired (p. 77).

Recommendations

The Tribunal recommended (p. 79) that the Crown enter into discussion with Ngāti Pahauwera in order to reach agreement on the vesting of the bed of the Mohaka River in Ngāti Pahauwera as well as a regime that would provide for the future control and management of the river. Also, that a water conservation order not be made until the above agreement was reached. It further recommended that Ngāti Pahauwera received compensation for gravel extraction from the river and that future removal of gravel or hangi stones be only undertaken with the consent of Ngāti Pahauwera.

WAI 33 The Pouakani Report, 1993

One of the issues dealt briefly with in this report was the Waikato River. The Pouakani people claim the river is a precious taonga, the spiritual and physical qualities of which had been degraded by the pollution and obstruction of the river (p. 290). They also claimed that the use of the river by the Crown for the purposes of producing hydroelectricity, without consultation with them, was a breach of the principles of the Treaty (p. 289).

After traversing the historical law on navigable large rivers, the Tribunal admitted (p. 289) that they found the law on rivers with respect to 'ownership' of riverbeds and corresponding water use rights to be 'confused and confusing', leaving the issue of ownership open. It found that section 261 of the Coal Mines Act 1979, which purported to vest the bed of navigable rivers in the Crown, did not resolve the issue. Given this so-called conflict between Māori rights, the Crown and the public interest over the ownership and use of rivers, the Tribunal recommended that the Crown 'give urgent attention to addressing these matters in the national interest' (p. 289).

While the Tribunal made no specific recommendations regarding the use and management of the Waikato River, they did make a general recommendation that 'the issue of Māori participation in the control and management of the resources of the Waikato River, including fisheries, by actively pursued by the relevant Crown agencies and the Waikato Regional Council' (p. 295). It noted that effective Māori involvement in resource management meant more than just consultation when officials saw fit, but rather requires participation in policy and management decisions (p. 295).

WAI 212 The Te Ika Whenua Rivers Report, 1998

In this report, the hapū of Te Ika Whenua claimed that the Rangitaiki, Wheao and Whirinaki rivers, including their tributaries, form 'a water body which jointly and severally are the taonga of the claimants' (p. 1). They sought recognition of their tino rangatiratanga over the three rivers. Consequent on such a finding, the claimants sought a recommendation that a regime should be established that would recognise the claimant's beneficial interest in the rivers, and would recognise their authority in relation to the management of all aspects of the rivers (p. 115). The claimants asserted that they have a proprietary interest – which can practically be encapsulated within the English legal concept of ownership – in the waters of the rivers and that this interest existed at 1840 and has not been relinquished (p. 115). From their perspective (p. 16), they belong to the rivers and the rivers belong to them.

Ad medium filum aquae rule and tino rangatiratanga

First, the Tribunal traversed the common law position on the ownership of rivers. It noted the application of the common law rule ad medium filum aquae, which assumes that the owner of land bordering a non-navigable river owns the adjacent riverbed to the middle line. It also acknowledged that at common law, ownership of the bed of a river does not confer ownership

of the water above (p. 83). Riparian owners of the riverbed have use rights to the water but under common law natural water is incapable of ownership (p. 83).

Next, the Tribunal examined the Māori view of 'ownership' of a river on the evidence presented to it. In summary, the evidence supported the assertions that the river is a highly valued taonga, it is a tupuna, a valuable good resource, it carries its own separate mauri or life force, and is guarded by the taniwha that inhabit it. It is regarded as an indivisible entity, which contrasts with the common law view of a river as made up of separate components – the bank, bed and water (p. 84).

The Tribunal concluded that the Crown undermined the tino rangatiratanga that Te Ika Whenua held over the three rivers at 1840 and thus breached the guarantee in Article two of the Treaty as well as the Treaty principles of active protection (p. 101). This loss of tino rangatiratanga occurred through the introduction and application of the ad medium filum aquae common rule, and subsequent legislation which empowered the Crown to manage and control and develop the river for hydroelectric power and other purposes (p. 87).

The Tribunal did not agree with the Crown's view that Te Ika Whenua had voluntarily relinquished their tino rangatiratanga over the rivers through the sale of riparian lands, adding that such an argument evidenced a lack of understanding of Māori land rights and tenure (p. 99). Because the Māori vendors would have had no idea of the ad medium filum aquae rule, the Tribunal stated that it cannot be said that they voluntarily sold or relinquished their rights in the river, which were and still are taonga (pp. 100–101).

Right to development of interest in rivers and 'ownership'

The claimants contended that the Treaty did not simply preserve customary rights at 1840, but included a right of development of such interests. They sought a finding that this was the case for their interest in the rivers (p. 115). The Tribunal affirmed previous Tribunal findings which concluded that the right to development is indeed a Treaty right (p. 121). The question

they dealt with in this inquiry was whether this right extended to Te Ika Whenua in the case of its rivers.

With regards to ownership, while the Tribunal noted that tino rangatiratanga should not be confused with modern 'ownership', they find that Te Ika Whenua's customary rights 'entitled them to full use and control of their rivers and enabled them to enlarge and develop uses as time and circumstances dictated' (p. 123). The Tribunal subsequently found that this full exclusive use and control of their taonga, their rivers, meant that at 1840 they were entitled to have conferred on them a proprietary interest in the rivers 'that could be practically encapsulated within the legal notion of ownership of the waters thereof' (p. 124). The Tribunal went on to say that while the interest was akin to ownership at 1840, the Treaty anticipated a sharing of resources upon which settlement depended, such as rivers. Thus, in signing the Treaty, Te Ika Whenua agreed to a sharing of their proprietary interest, leaving them with a 'residual interest' (p. 126). Te Ika Whenua's residual interest in the rivers was held to include 'full and unrestricted rights of use' (p. 138), except where those uses were detrimental to the rights of other users. This residual interest has never been acknowledged or protected by the Crown, constituting a breach of the Treaty principles of active protection (p. 126). As to the extent of this residual interest, the Tribunal stated they would not be finite in specifying it – that should be a matter for the Crown and claimants – but stated that it must be of 'reasonable significance' (p. 127).

The Tribunal then applied this notion to the situation of hydroelectric development. They hold that the right to generate hydroelectricity cannot be regarded as exclusively the claimant's, but that 'there is a strong case' for tangata whenua to be given priority to partake in such development (p. 129). In other words, when property rights are shared, and this shared property is the subject of development, 'the Crown should ensure that its Treaty partner is able to partake fully in that process' (p. 129). If the Crown does not do this, full compensation would need to be paid for the use of Te Ika Whenua's proprietary interest (p. 130).

Tino rangatiratanga, kawanatanga and hydroelectricity

The Crown contended that by using the rivers for electricity schemes, they were exercising their right under Article one of the Treaty to provide for the protection, management and exploitation of natural resources where this is in the national interest, that is, for the benefit of all New Zealanders (p. 56). They grant that tino rangatiratanga, as guaranteed in Article two, should be 'accommodated whenever practicable', but it could not give Te Ika Whenua the right to veto or prevent development of the river (p. 56).

The Tribunal decided that in this case, the Crown legislative restriction of the right to generate hydroelectricity was a reasonable exercise of kawanatanga. However, it noted that such kawanatanga should be exercised with proper consultation, and that when property rights are affected, full compensation must be paid to avoid the 'unacceptable' result of a commercial profit being made from Te Ika Whenua's interest in the river without any form of recognition or compensation (pp. 130–131). The Tribunal recommended that the Crown consult and negotiate with Te Ika Whenua over compensation for past use, compensation for loss of the right to share as a partner in the power scheme, and payment for future use of their proprietary interest (p. 132).

Recommendations

The Tribunal recommended that the Crown negotiate with Te Ika Whenua over establishing a management regime for the rivers that would recognise the Treaty guarantee of tino rangatiratanga, while also taking into account the interests of other river users (p. 143). It also recommended that the Crown recognise and protect Te Ika Whenua's residual interest in the rivers, which was described as being a proprietary interest akin to ownership (p. 145). In order to compensate the loss of Te Ika Whenua's title to the bed of three rivers the Tribunal recommended that where the title to the riverbeds is held by the Crown or as Crown forest land within Te Ika Whenua's rohe, it be vested in Te Ika Whenua. The Crown should also ensure Te Ika Whenua have adequate access to their river and that Te Ika Whenua is compensated for the past appropriation and use of rights to the river for hydroelectric power as well as for future use of such rights (p. 145).

WAI 167 The Whanganui River Report, 1999

The people of Atihaunui-a-Paparangi claim that they had possession and control of the Whanganui River and its tributaries (hereafter 'the Whanganui River') at 1840 (p. 1). They argue that the river was never freely and willingly surrendered by them but rather, in breach of the Treaty, numerous Crown acts, policies and practices combined to take it from them (p. 1). They submit that the Whanganui River is a living taonga, seen as a living entity with its own personality and life force, and is an indivisible whole not to be analysed in terms of constituent parts of water, bed and banks, or tidal and non-tidal, navigable or non-navigable

sections (p. 23). The question the Tribunal examined was whether the claimant's interest in the river had been extinguished, and if so, whether this was done in accordance with the Treaty.

The Crown argued that in Māori practice there was a correlation of property interests in the river and adjacent lands, meaning that the principles of ad medium filum aquae had application in terms of Māori custom. It submitted that there was no evidence of any Māori customs supporting the concept of ownership of running water, noting that use rights are less than the English legal notion of ownership (p. 24).

Faced with two different approaches – an inherent compartmentalisation underlying the Crown's submission, and the holistic view of the claimants – the Tribunal took on the warning in *Amodu Tijani v Secretary Southern Rhodesia* [1921] 2 AC 199, 403 that '[t]here is a tendency operating at times unconsciously, to render that title [to native title] in terms which are appropriate only to systems which have grown up in English law' (pp. 25–26). Accordingly, the Tribunal agreed with the claimant's assertion that 'in terms of law, that which Māori possessed must be determined by reference to that which they possessed in fact, not by reference to that which may be legally possessed in England' (p. 50). Thus, they held that because the river was regarded as a whole by Māori, given that water is an integral part of the river that was possessed, then Atihaunui possessed the water as well (p. 50). The Tribunal rejected the Crown's submission, based on the Canadian Supreme Court case *Calder v Attorney-General of British Columbia*, that a doctrine of native title to water only refers to a use right (p. 292).

The Tribunal accepted that, as with land, rivers were not 'owned' by Māori in the exact English sense of the term but rather they had genealogical connections with rivers and the right to benefit from was not absolute but rather construed in terms of relationships (p. 48). When faced with prospective threats from other groups, they thought in terms of possession and control (p. 48). The Tribunal concluded that it was 'obvious and sensible that Māori "possession" be equated with English "ownership". Māori "rights" in either land or waterways can be seen to be based on usage and possession, from which, according to the law as settled in the Native Land Court, ownership derives' (p. 49).

After examining the law based on the ad medium filum aquae rule alongside Māori customary law, the Tribunal stated that the conclusion reached by the Court of Appeal in *Re the Bed of the Whanganui River*, that the ownership of various sections of the Whanganui River bed passed with the alienation of riparian lands, was 'unsustainable' in terms of Māori customary law (p. 336). It noted the subsequent suggestion by the Court of Appeal in *Te Ika Whenua Inc v Attorney-General* that had the case been presented as a claim to the river as a whole, rather than just the bed, a different conclusion may have been reached (p. 336).

Right to development and profit

The Tribunal noted that the claimants sought to constrain the use of the water to protect the river's health, without pursuing compensation. However, it was of the opinion that 'this exclusive right of access to the river and the water in it is a valuable, tradable commodity...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' (p. 338); such a right to profit from ownership was held to be only natural.

The Resource Management Act 1991

The Tribunal found (p. 339) that, to the extent that the Resource Management Act 1991 vests authority or control over the river in other than Atihaunui and without Atihaunui's consent, it is inconsistent with Treaty principles. The Tribunal asserted that no matter how often the RMA is said to be only concerned with management and not ownership, the reality is such that the rangatiratanga that was guaranteed to Atihaunui has been taken away. It concluded that the only allocated use rights that are consistent with the Treaty are those that Atihaunui have 'freely and willingly allowed'. In order to reflect the Crown's Treaty obligations, the RMA should be amended to ensure that all persons exercising functions under its authority in relation to the management of natural resources must act in a manner that is consistent with, and gives effect to, the principles of the Treaty (p. 344).

Proposals and recommendations

To begin with, the Tribunal made it clear that its proposals are suggested with the Whanganui River in mind, not rivers generally (p. 342).

The RMA was examined by the Tribunal in order to attempt to find a solution within the Act but it was of the view that none contained in it would do the case justice, as every process in the Act left the ultimate power and control with a regional or territorial authority (pp. 342–343). First, the Tribunal proposed that Atihaunui's authority and right of ownership, in the Whanganui River as a whole entity and resource, ought to be recognised in legislation (p. 343). It also stated that any settlement should effectively protect existing use rights and provide for continuing public access within agreed parameters, but on the basis that this is by permission and not as a right (p. 343).

Two options for the management of the river were proposed for consideration. The first would vest the river, in its entirety, in an ancestor of Atihaunui, with the Whanganui River Māori Trust Board as a trustee. Any application for resource consent in relation to the river would have to obtain the approval of the trust board before applying for their resource consent (p. 343). The second option would add the Whanganui River Māori Trust Board as a 'consent authority', as provided for in the RMA, to act jointly and severally with the consenting authority in cases involving the river. Through this scheme, an application for consent would require the consent of both authorities (p. 343).

The Tribunal also made recommendations to the effect that compensation for the taking of water for the Tongariro power scheme and for gravel extraction should be given to Atihaunui (pp. 344–345).

WAI 1200 He Maunga Rongo, Central North Island Claims Report, 2008

Chapters 17 and 19 of Stage One inquiry into the Central North Island claims dealt with Treaty principles as they apply to environmental management, and rangatiratanga in the environmental management of waterways, respectively.

Reconciling kawanatanga and rangatiratanga

The Crown submitted that Article one of the Treaty provides for the Crown to undertake the complete governance of New Zealand (p. 1232). The Crown asked the Tribunal to develop and articulate a Treaty standard that would incorporate the multiple interests the Crown must take into consideration when engaging in the balancing process (p. 1234).

This approach, that Māori only have the right to be consulted and considered as an interest among many other competing interests, as in the RMA, was rejected by the Tribunal (p. 1240). This conclusion was reached because in the Tribunal's opinion this approach excludes a concept of authority, control or responsibility for Māori regarding natural resources that are taonga. This is 'tantamount to seeking a finding that the Treaty deprived Māori of their authority over their natural resources' (p. 1240). The Tribunal held that Māori ownership and rangatiratanga over their taonga should not be diminished by the balancing exercise, unless there are exceptional circumstances in the national interest. In such an instance, any derogation of Māori ownership or control by the Crown should be after a good faith attempt to gain consent and payment of compensation (p. 1240).

The Tribunal held that Article one provided for the right to make national laws, including those for conservation and resource management (p. 1238). In certain circumstances, for example, in order to maintain peace and good order, or where the environment or a certain natural resource is especially endangered, it is appropriate for the Crown to undertake balancing competing interests (p. 1239). However, when none of the five situations outlined by the Tribunal apply, there are restraints on the Crown's exercise of its governance (p. 1239). The Tribunal took pains to make it clear that the Crown's right to provide a regulatory regime for the management of natural resources cannot override Māori property interests; a 'national interest' in conservation is not a suitable justification (p. 1239). Alongside the Crown's regulatory regime, the Crown is obliged to provide for some system which enables Māori to exercise tino rangatiratanga over their resources according to their own preferences (p. 1240).

In conclusion, to use the Tribunal's words: 'in terms of the environment and natural resources, the Māori 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 their duty under the Treaty to act reasonably and with the utmost good faith' (p. 1241).

Principle of consultation

Stemming from the principle of partnership comes a duty on behalf of the Crown to consult on matters of importance to Māori, and to obtain their free, prior and informed consent for anything which affects their possession of lands and taonga guaranteed in Article two (p. 1236). The test of what consultation is reasonable will depend on the nature of the resource and likely consequences of the policy, action or legislation (p. 1237).

Principles of active protection of lands, estates and taonga

The Tribunal held (p. 1243) that the Crown can make laws that regulate natural resources, but they must, at the same time, ensure Māori Treaty interests are protected. When a resource is particularly vulnerable as a result of previous omissions of the duty to protect, there exists a duty to restore the resource, but this is limited to an extent by not being required to go beyond what is 'reasonable in the prevailing circumstances'. What is reasonable is evaluated on a case-by-case basis – it may be that exclusive access for Māori is required, or some priority given to Māori when allocating use. The Tribunal held that where taonga are taken without consent, or where exclusive right to regulate or allocate natural resources are vested in the Crown through common law or statute, the failure to protect property rights from derogation will be, prima facie, a breach of the Treaty. This is case where the Crown relied on English common law rules such as the ad medium filum aquae rule, or the arm of the sea rule for lagoons/estuaries.

Principle of active protection of rangatiratanga in environmental management

According to the Tribunal, the well-founded claims to rangatiratanga over ecosystems, communities and natural resources that are taonga suggests that there is an underlying principle contained in the Treaty that the Crown has a duty to actively protect the exercise of tino rangatiratanga in environmental and resource management (p. 1245). '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 Māori title to their natural resources' (p. 1245). Such a system should allow Māori to manage and use their resources according to their own preferences. The Tribunal notes that just as kawanatanga is not absolute and comes with obligations, so does the exercise of rangatiratanga (p. 1246). Obligations exist in the partner relationship with the Crown – to work and consult and assist one another (p. 1246). However, the Crown is ultimately responsible for Treaty obligations – for developing the appropriate legislative regime capable of meeting its obligations under the Treaty and for ensuring that the exercise of rangatiratanga in environmental and resource management is effective, and not reduced to a mere taking into consideration of relationships and values (pp. 1245, 1256).

Rangatiratanga over waterways

The claimants contended that the waterways remain their taonga, they have never freely consented to their alienation, and they therefore continue to have a right to exercise rangatiratanga over them (p. 1249).

While acknowledging waterways have been taonga to Māori, the Crown did not accept that the guarantee of rangatiratanga was absolute. The Crown argued that Article one reserved the right to the Crown to appropriate Māori taonga for matters of national importance, and to allocate and regulate resources after weighing competing interests (p. 1250). The Crown also did not accept the claim that Māori have ownership of natural waters, such that it requires the Crown to consult with them over the management and allocation of such waters. Following from this was a rejection of the claim that Māori have a right to develop waterways for power development (p. 1250).

Because water is seen by Māori as an essential and indivisible part of a water body, such as a lake, spring, lagoon or river, the Tribunal accepted that water, as part of such a body, was possessed by Māori and formed a component part of the waterways taonga (pp. 1251–1252). The Tribunal thus accepted that water resources were something Māori possessed at the time of the Treaty, and therefore they were guaranteed autonomy and self-government over these waterways according to their own cultural preferences (pp. 1257, 1258). The Tribunal accepted that the closest expression in English law of this type of possession was 'ownership'.

English common law and native title

Noting the tension between English common law's non-recognition of ownership in natural water and the customary Māori view which conceptualises water as an essential and indivisible component of a water regime, the Tribunal proceeded to address the question of whether English common law was sufficient to recognise Māori customary, or native title. It traversed the different common law rules applying to various water resources, including small inland lakes, large inland lakes, springs, lagoons and estuaries, streams and rivers (pp. 1262–1265).

The Tribunal's findings regarding rivers concluded that, especially as applied to large navigable rivers, the issue of whether native title has been extinguished is an issue still to be settled in law. In reaching this conclusion it noted the difference of opinion on the matter between Lord Cooke in *Te Runanganui o Te Ika Whenua Inc v Attorney-General* and Justices Keith and Anderson in *Attorney-General v Ngati Apa* (p. 1265).

The Tribunal found (p. 1268) that the common law 'should have been' sufficient to recognise Māori customary title but that to safeguard Māori interests, formal recognition in legislation of Māori native title interests was needed to ensure their property rights were protected. Such a failure to protect and provide a form of title constituted a breach of the Treaty and led to the alienation of many resources, such as small lakes, rivers, streams and springs. Whether large inland lakes and rivers have been alienated remains a live issue. The Tribunal asserted that 'one of the continuing Treaty rights held by Māori 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 a local or regional level'.

Rangatiratanga in the environmental management of waterways

The claimants submitted (p. 1403) that the Crown failed to actively protect their rangatiratanga in resource management, a failure which has impacted on their ability to effectively manage and protect their taonga. They claim that the Crown has not enabled them to make decisions about the allocation of rights to access and use natural resources that they consider to be taonga. Before the RMA there was only very limited provision for Māori rangatiratanga in relation to environmental issues. The claimants conceded that after the RMA there had been a significant increase in consultation with Māori, but submitted that the legislation still fails to comply with Treaty principles in numerous ways.

While the Crown recognised the failure of the regulatory scheme pre-RMA to properly take into consideration Māori values and interests, they rejected the claim that the RMA does not adhere to the principles of the Treaty (p. 1403), maintaining that the guarantee of rangatiratanga is not absolute. They argued that the multiplicity of interests involved in natural resources must be carefully weighed by any management regime, and that the current provision which give weight to Māori values and interests are adequate. In the Crown's view, the RMA 'strikes an appropriate balance' between its responsibilities under the Treaty and its obligations to manage resources for all New Zealanders.

The Tribunal agreed with the claimants' view that the Crown has not adequately provided for the exercise of Māori rangatiratanga in environmental management (p. 1404). Because the position of Māori, as a Treaty partner, is not the same as other New Zealanders, the Crown has a duty to ensure that the legislative regime reflects this (p. 1406). 'The Crown cannot assume that under its Article one power it has the sole right to manage the natural environment. To the extent that a legislative framework is enacted that does not reflect this, such a regime cannot be consistent with the principles of the Treaty of Waitangi' (p. 1406).

The Tribunal noted that authorities following the RMA are required to undertake a balancing act, firstly taking into consideration the matters of national importance in section 6, then the other matters outlines in sections 7 and 8 in order to fulfil the Act's purpose as set out in section 5 (p. 1408). It was noted that authorities are not required to act in a manner consistent with the principles of the Treaty. While acknowledging that the RMA is an improvement on pervious legislative regimes, the Tribunal rejected the Crown's submission that the RMA is

consistent with principles of the Treaty (p. 1409).

Rivers and springs: Hamurana Springs – Kaikaihuna River and Taniwha Springs – Awahou River

The claimants made several assertions generally in relation to springs, rivers and streams, particularly, that as at 1840 they possessed the water and water resources within the Central North Island, which were guaranteed protection by the Crown through the Treaty. Additionally, they claimed that their exercise of rangatiratanga over such water resources has been prevented by the Crown's regulation of waterways through environmental legislation and delegation to local authorities (p. 1429).

As a case study, Ngāti Rangiwehi claimed that they continue to own and exercise rangatiratanga over the Hamurana Springs – Kaikaihuna River and the Taniwha Springs – Awahou River. Based on the assertion that they owned, managed and controlled these resources in a holistic way, and that the land on which these springs are located were alienated in breach of the Treaty of Waitangi, they sought a finding that they own the water of these resources (p. 1429). They also sought the cancellation of resource consents to extract water along with compensation for the negative environmental effects on the Awahou River (p. 1429).

The Tribunal found that Ngāti Rangiwehi did indeed possess the springs, including the water and links with other waterways, and that there was no doubt they were taonga. Because of the alienation of land and rights to allocate water by actions of the Crown and the Rotorua County Council, the ability of Ngāti Rangiwehi to exercise control over the springs was lost (p. 1432). However, the Tribunal found that because Crown actions leading to this alienation were a breach of the Treaty, Ngāti Rangiwehi still have a historical interest in the springs, which should be recognised in any relevant water management regime (p. 1434). The Tribunal noted that, because of the deficiency of the RMA's section 8 in Treaty terms, it was unlikely that the impact of past Crown and council actions and their effect on Ngāti Rangiwehi's relationship with these taonga would ever be addressed in a way that was consistent with the guarantees of the Treaty. Therefore it recommended that these issues be examined during negotiations and the possibility of a joint-management agreement considered (p. 1434).

Rivers and streams: Kaituna River and the Tarawera River system

The claimants alleged that the Crown used the Land Act 1932 (where the Crown sold lands abutting foreshore, rivers, lakes and streams wider than 33 feet) to gain ownership of sections of rivers such as Tarawera and Rangitaiki based on the ad medium filum aquae rule. Such alienation was carried out without considering the existence of competing native title rights (pp. 1434–1435).

The Crown chose not to reply on general issues concerning the ownership of rivers and streams, deciding to contain their dealings with river issues to environmental concerns (p. 1435).

The Tribunal recognised that the relevant hapū and iwi possessed both river systems 'in a manner akin to ownership' as at 1840 (p. 1435) and they remained taonga of great significance to this day (pp. 1440, 1453). In the case of the Kaituna River, the Tribunal found that a localised form of self-government with appropriate links to the regional body was currently being achieved by the establishment of the Joint Rotorua Lakes Strategy Group and

the Joint Maketu Estuary Steering Group (pp. 1445–1451). However, it stated that despite the work done to increase Māori participation in relation to the RMA consent process, the Treaty rights of tangata whenua are only one among many competing interests to be taken into account during a resource consent hearing. In lieu of an amendment to the RMA to address this deficiency, the Tribunal recommended – in the case of both river systems – that as a minimum measure, joint management agreements should be entered into with all iwi who have an interest in the rivers (p. 1455).

7.3 The Waitangi Tribunal Reports concerning lakes

WAI 27 Ngai Tahu Report, 1991

One of the Ngai Tahu Claim's nine 'tall trees' around which their claims were based was mahinga kai. The Waitangi Tribunal found that the Crown failed to make specific reserves to protect and preserve Ngāi Tahu's mahinga kai, including at Waihora and Waiwera lakes (p. 911). Consequently they recommended that one option would be for the Crown to vest Waihora for an estate in fee simple in Ngāi Tahu, at the same time as entering into a joint management scheme. This joint management scheme would deal with issues such as the control of the opening of the lake to improve fisheries, improvement of water quality by controlling the bird population, use of margin land, lake usage, and sewerage control. The Crown should provide financial, technical, scientific and management resources for such a scheme (pp. 911–912). The second option they provided was for the Crown to vest beneficial interest of Waihora in Ngāi Tahu but remain on the title as trustee. Thus, in a similar situation to the Titi Islands, the Crown would consult with the beneficial owners to make regulations for the future control and management of the lake (p. 912).

In relation to Lake Wairewa, the Waitangi Tribunal recommended that a management plan be prepared, with the participation of Ngāi Tahu, the Department of Conservation, the regional authority, and the Ministry of Agriculture and Fisheries, for the improvement of water quality and fisheries, and providing the same resources as for Lake Waihora (p. 912).

WAI 27 Ngai Tahu Ancillary Claims Report 1995

The claims relating to water resources in this report were all discussed in terms of Ngāi Tahu's access to mahinga kai; the Ngai Tahu Report 1991 found that the Crown failed to set aside specific mahinga kai reserves. The Tribunal accepted evidence that Ngāi Tahu never relinquished their mahinga kai but were denied access by the process of settlement. This failure to protect and preserve Ngāi Tahu's mahinga kai constituted a breach of Article two of the Treaty (p. 50).

The following are water resources that were specifically mentioned and recommendations made:

Tutaepatu Lagoon

Tutaepatu was not involved in a breach of the Treaty, but as it is a Crown reserve, Ngāi Tahu asked for its return as a compensatory measure for the loss it sustained regarding mahinga kai. The Tribunal recommended the vesting of the lagoon in Ngāi Tahu and that it enter into a joint management scheme (pp. 50–51).

Wainono Lagoon

The Tribunal recommended this lagoon be developed in partnership with Ngāi Tahu and local bodies as a reserve for fishing and other wildlife, to compensate for the loss of other mahinga kai (p. 54).

WAI 1200 He Maunga Rongo, Central North Island Claims Report 2008

In chapter 18 of this report, the Tribunal examined the case study of Taupo-nui-a-tia or Taupo waters. In Ngāti Tuwharetoa's view, the Taupo waters are a system of their lakes and rivers, which jointly and severally are taonga, tupuna, and whole water resource entities. More than mere use rights, they claim absolute rights of control and authority, or rangatiratanga, over the water resources, alongside corresponding obligations to conserve, nurture and protect the resources (p. 1279). It was Tuwharetoa's contention that these rights include a right to the use of the water, to control access to the water, as well as a right to development in the use of the water, specifically for hydroelectricity (p. 1279). They interpreted Article two as guaranteeing rangatiratanga over what in fact was possessed, which in terms of Tuwharetoa tikanga was a water resource, not just the beds of lakes and rivers (p. 1279). Thus, they claimed ownership of the water, as a resource which flows through their stream and rivers (p. 1282). They also argued that the guarantee of tino rangatiratanga was not limited to how they possessed and used their rights at 1840. Rather, reflected in the way they have continually adapted their customary authority and practice according to new and changing circumstances, they have a continued right of development (pp. 1285–1286).

The importance of Lake Taupo as a taonga and Ngāti Tuwharetoa's rangatiratanga over it, was acknowledged by the Crown. However the Crown stopped short of explicitly recognising the waters of Lake Taupo as taonga and did not accept that Ngāti Tuwharetoa has a proprietary interest in those waters (p. 1281).

For its part, the Tribunal found that Lake Taupo waters and fisheries were taonga, exclusively possessed by Ngāti Tuwharetoa. This exclusive possession, together with authority over, a cultural and spiritual relationship with, and a responsibility to care for the taonga, were elements of the tino rangatiratanga Tuwharetoa exercised. The Tribunal found that the Crown had a duty to protect this rangatiratanga over the taonga (p. 1286).

The Tribunal found when the Crown acquired the lakebed and waters through the Native Claims Adjustment Act 1926, there were changes in the Act which had not been discussed or agreed to by Tuwharetoa; among these changes was the inclusion of 'waters' (p. 1332). Furthermore, the failure by the Crown to compensate for such acquired rights was exacerbated by their later refusal to compensate for new uses, for example when the lake was used as a reservoir for hydroelectricity. These constituted breaches of the Treaty and its principles (p. 1332).

In a discussion around rangatiratanga in the environmental management of waterways and the RMA, two case studies of lakes were examined by the Tribunal. A summary of their findings are found below.

Rotorua Lakes

First the Tribunal noted that large-scale developments in agriculture, forestry, tourism and hydroelectric power, while bringing prosperity to the region, have also 'impacted massively' on the quality of water in the lakes. The Tribunal agreed with the claimants when they insisted that the burden of rectification of these issues should not be transferred to them (p. 1412). While recognising the important positive developments in relation to management and increased authority of Māori, as provided for in the Te Arawa Lakes Settlement Act 2000, the Tribunal asserted that these developments do not prevent the application of the RMA 'with all its attendant systemic issues' (p. 1416).

Lake Taupo

The Tribunal rejected the Crown's contention that Ngāti Tuwharetoa's right to participate in the special committee and groups established to implement nitrate policy was sufficient provision for the exercise of their tino rangatiratanga. Rather, it labelled this as 'unsatisfactory participation' because there was no guarantee that Ngāti Tuwharetoa's concerns would be given adequate weight in Treaty terms (p. 1428). It concluded that this finding provides yet another example of how the current RMA regime is not able to ensure Māori rangatiratanga over their taonga (p. 1428).

7.4 The Waitangi Tribunal Reports concerning geothermal resources and lagoons

WAI 304 The Ngawha Geothermal Resource Report, 1993

This claim arose from a joint venture's application for resource consent to develop the Ngawha geothermal resource. The claimants, a number of Ngapuhi hapū, who became known as nga hapu o Ngawha, sought a finding that 'ownership of and rangatiratanga over the Ngawha geothermal resource is and remains vested in nga hapu o Ngawha, and the grant of resource consents to the join venture applicants would be in breach of those rights unless and until the consent of nga hapu o Ngawha is procured' (p. 133).

The Tribunal agreed that at 1840, the hot springs were a taonga over which the hapū of Ngawha had rangatiratanga, and that in this sense they 'owned' the Ngawha geothermal resource (p. 133). However when the Crown acquired ownership of the land on which the hot springs were located, Māori owners lost the right of access to that land and the hot springs on that land. Consequently they also necessarily lost their previous right of management and control over both surface and subsurface components of the system under the alienated land (pp. 133–134). While the claimants no longer own or have rangatiratanga over the entire Ngawha geothermal resource, they do own and have rangatiratanga over the land springs that are part of the land remaining in their ownership.

The Tribunal found that while the hapū of Ngawha no longer have an exclusive interest in the subsurface geothermal resource, they do however retain a substantial interest in the resource. The preservation of their taonga depends on the preservation of the underlying geothermal resource; the interest in the hot springs and geothermal resource cannot be divorced (p. 134).

Application of Treaty principles

Rangatiratanga over a taonga was found by the Tribunal to mean more than possession; it is the right to control and manage the taonga according to their own cultural preferences. This was held to be the context in which the Crown exercises kawanatanga, including making laws for conservation control and resource management; the exercise of kawanatanga 'should not diminish the principles of article 2 or the authority of the tribes to exercise control'.

WAI 64 Rekohu Chatham Island Report, 2001

Māori and Moriori on Rekohu (Wharekauri/Chatham Islands) claimed that Te Whaanga, a large expanse of water over 46 000 acres in the middle of the island, is a lake and belongs to them until it is freely and willingly relinquished (p. 276). The Crown argued that the body of water is an arm of the sea, and as such, under the common law rules governing an arm of the sea, it has assumed to own it (p. 276). The Tribunal stated that ownership at law is not the question before them, but rather what the Treaty might provide.

The Tribunal began by asserting that taonga which are protected by the Treaty include lakes, rivers and lagoons (p. 277). The fact that Māori and Moriori saw themselves as having exclusive use rights, alongside authority and control as against others, was interpreted as 'possession' (p. 277). It noted that what was possessed by Māori and Moriori was a 'water regime', that is, the whole entity including the bed, water and contents, not just dry land (p. 278). The English common law approach of distinguishing between ownership of land and ownership of water was held to be not a good enough ground for making the same distinction in this case; the Treaty guaranteed whatever Māori possessed, and what was possessed was a water resource: 'There is no point in the guarantee if it is seen to apply only to the bed' (p. 278). The Tribunal affirmed the finding in the Whanganui Report that the Crown's guarantee of 'ownership' at English law is an appropriate cultural equivalent to 'possession', and concluded by recommending that a body representing Moriori and Māori should hold the title to Te Whaanga (p. 278).

7.5 Conclusion

The Waitangi Tribunal Reports relating to Māori and water starkly illustrate the deep concern consistently expressed by Māori for fresh water and their belief that they ought to be more active in governing fresh water. The Tribunal has accepted without qualification that many rivers are a taonga and made strong recommendations to better include Māori in the management of fresh water. The next part of this report highlights that while Parliament has begun to make significant amends with Māori in recognising the importance of fresh water to Māori, many of the specific Tribunal recommendations remain stagnant. That is, several claimant groups continue to languish in their negotiations with the Crown despite Tribunal recommendations to better accommodate iwi and hapū. With the current government aspiring to settle all historical claims in the near future, the agreements reached in regard to rivers of taonga standing require close attention.

8. Treaty of Waitangi Settlement Statutes

8.1 Introduction

In regard to reaching settlement with the Crown, the Crown aspires to engage in a 'fair and final' settlement process. The Crown does not require claimants to have first gone to the Waitangi Tribunal, but many claimants find value in doing so. The settlement process itself is conducted through the Office of Treaty Settlements as a separate unit within the Ministry of Justice. The Office has the mandate to resolve historical Treaty claims (defined as claims arising from actions or omissions by or on behalf of the Crown or by or under legislation on or before 21 September 1992). There are five steps in the claims process encompassing several preliminary agreements, often including 'terms of negotiation', 'agreement in principle', 'deed of settlement' and finally settlement legislation[21]. The settlements aim to provide the foundation for a new and continuing relationship between the Crown and the

[21] See Office of Treaty Settlements (2002). Note: available to download at the Office of Treaty Settlements' website: www.ots.govt.nz.

claimant group based on Treaty principles. Settlements thus contain Crown apologies of wrongs done, financial and commercial redress, and redress recognising the claimant group's spiritual, cultural, historical or traditional associations with the natural environment.

A. Statutory acknowledgments of waterways

Throughout the Treaty of Waitangi claims settlement legislation, (hereafter 'settlement legislation') rivers and lakes are dealt with by making a statutory acknowledgement of 'statements of association' regarding a particular waterway, or part of a waterway. These 'statements of association', set out in the schedules to the Acts, outline the cultural, spiritual, historical and traditional association of the relevant Māori trustees with a particular area or resource (e.g. Ngati Mutunga Claims Settlement Act 2006, s 48).

The only purposes of statutory acknowledgments are spelt out in the legislation and generally follow the same pattern. First, they require relevant consent authorities, the Environment Court and the Historical Places Trust to have regard to the acknowledgements when deciding whether the trustees are persons who may be adversely affected by the grant of a resource consent for activities relating to the statutory area (ss 49, 50), who may have an interest in proceedings greater than the public generally (ss 49, 51), or who may be directly affected in relation to an archaeological site, respectively (ss 49, 52). Second, the acknowledgements require the relevant consent authorities to forward summaries, to the trustees, of resource consent applications impacting on the area in relation to which a statutory acknowledgement has been made (ss 49, 54). Third, the trustees and members of the relevant Māori group are able to cite the statutory acknowledgements as evidence of their association with a statutory area in relevant proceedings or submissions. This is not, however, binding as deemed fact (ss 49, 55).

The legislation states that the statutory acknowledgement will not affect the lawful rights and interests of persons not party to the deed of settlement (s 60), and will not prevent the Crown from providing statutory acknowledgement to other Māori groups in the area (s 58). The express limitation placed on the effect of a statutory acknowledgement is that it is held to not have the effect of granting, creating, or providing evidence of an estate or interest in, or rights relating to, a statutory area (s 61). The effect of a statutory acknowledgement is further limited in that the acknowledgement may not be taken into consideration by a person exercising a power or function under a statue, regulation or bylaw. Neither can such a person give greater or lesser weight to the association of the relevant Māori group than they would normally give were the statutory acknowledgment not in existence (s 59).

In the definition provided in the legislation, a statutory acknowledgement in relation to waterways does not include a part of the bed of the waterway that is not owned by the Crown, or land that the waters of the waterway do not cover at its fullest flow without overlapping its banks, or an artificial watercourse, or a tributary flowing into the waterway (s 57). However, waterways do include rivers, which are defined as a continuously or intermittently present body of fresh water, including a stream or modified watercourse, and the bed of the river (s 57).

B. Vesting a lakebed

Another way lakes are dealt with in the settlement legislation is to vest an estate in fee simple of the lakebed in the trustees. Unless otherwise specified in this report, this is defined in the

legislation as excluding the 'Crown stratum', that is, the space above the bed occupied by water, and the space occupied by air above the water[22].

C. Structure

This part of the report proceeds to provide a brief summary of agreements in principle, bills, and statutes (Appendix 1) that seek to recognise Māori interests in fresh water including rivers and lakes, and lakebeds. They are discussed in a chronological order, beginning with the most recent.

8.2 Agreements

A. Ngati Pahauwera Agreement in Principle, 30 September 2008

As part of the cultural redress aspect of this Agreement, a co-management regime over parts of the Mohaka, Waikari and Waihua Rivers will be set up (e.g. Agreement in Principle for the settlement of Ngati Pahauwera Historical Claims and Foreshore and Seabed Claims, para 20). Many of the details of this co-management regime have yet to be decided, but it will involve a statutory body established through the settlement legislation to enable enhanced participation of Ngāti Pahauwera by providing a system where by they can work alongside decision makers exercising their powers under the Resource Management Act 1991 (hereafter 'the RMA'). The statutory body will have representatives from Ngāti Pahauwera and the other river management agencies, including the Hawke's Bay Regional Council and other local authorities, and will engage in decision making by consensus (para 26). It will have functions relating to gravel extraction, hangi stones, discharge into the river, and other river management issues (para 26). It was agreed that after the Agreement in Principle, the parties would investigate whether the policy and planning instruments of the Hawke's Bay Regional Council can appropriately address Ngāti Pahauwera use of river resources; they would also investigate options for delegating or transferring management functions relating to the rivers to Ngāti Pahauwera, in consultation with the river management agencies (para 27). The settlement legislation would provide that Ngāti Pahauwera would be notified of all resource consent applications affecting the rivers so that they could participate in resource consent processes concerning the rivers under the RMA (para 28).

B. Ngati Manawa Agreement in Principle, 18 September 2008

This Agreement provided that statutory acknowledgements would be made in relation to the Rangaitaki River, the Whirinaki River, the Horomanga River and the Wheao River (Agreement in Principle for the Settlement of the Historical Claims of Ngati Manawa, para 58). These would be non-exclusive and limited to the Crown-owned portions of the riverbeds (para 59). It was agreed that the Crown will meet with Environment Bay of Plenty Regional Council with a view to facilitating and enhancing Ngāti Manawa's relationship with that council and their input into the management of the rivers (para 62). Similarly, the Crown and Ngāti Manawa will meet with the regional council and the relevant power companies in relation to the resource consent for dams over the Rangitaiki River with a view to facilitating better protection of tuna (para 63). Following this Agreement, the Crown and Ngāti Manawa will establish a suitable regime to allow Ngāti Manawa to have input into the management of its rivers and waterways, similar to the solution agree to in relation to the Waikato River

[22] See, for example, section 38(2) Port Nicholson Block Taranaki Whanui ki te Upoko o Te Ika claims Settlement Bill 2008

(Paras 64–65).

C. Ngati Kahu Agreement in Principle, 22 December 2007

The Agreement includes the parties exploring the issue of vesting the beds of Lake Rotokawau and Lake Rotopotaka in Ngāti Kahu, on the condition that any existing uses are protected and the vesting of the lakebeds will not confer any rights in relation to the waters of the lakes (para 26).

D. Ngatikahu ki Whangaroa Agreement in Principle, 22 December 2007

A statutory acknowledgement of part of the Oruaiti River will be made (para 43).

E. Te Rarawa Agreement in Principle, 7 September 2007

Statutory acknowledgement will be made in relation to the Awaroa River (para 37). After the signing of the Agreement, the Crown will explore the possibility of offering Te Rarawa a statutory acknowledgement over the Awanui River (para 42).

F. Te Aupouri Agreement in Principle, 13 September 2004

The Te Aupouri Agreement in Principle proposes to discuss and negotiate redress with regards to rivers and lakes, including possible input into management and improving the access and use (para 28).

G. Te Ati Awa Heads of Agreement

Statutory acknowledgement of the Waitara River will be included in the settlement legislation for Te Ati Awa[23].

H. Rangitaane o Manawatu Heads of Agreement

Statutory acknowledgements of those parts of the Manwatu, Rangitikei, Orua and Whangina rivers that are within the Rangitaane o Manawatu area of interest will be included in the settlement legislation[24].

I. Ngati Apa Deed of Settlement, 8 October 2008

Five waterways will be given statutory acknowledgements as agreed in this Deed. These are the Rangitikei River, Turakina River, Whagaehu River, Mangawhero River, Orous River, as well as the Pukepuke Lagoon.

8.3 Bills

A. Waikato-Tainui Raupatu Claims (Waikato River) Settlement Bill 2008

Waikato-Tainui's special relationship with the Waikato River

The Waikato River is recognised in the Act as Waikato-Tainui's tupuna, with its own mana and mauri. It is a single indivisible being, and includes its waters banks and beds, as well as streams waterways, tributaries, lakes, vegetation, wetlands, flood plains, islands, springs, substratum, fisheries, air space, water column as well as its metaphysical being. Waikato-Tainui's relationship with the river gives rise to responsibilities to protect it in accordance with long-established tikanga[25].

[23] Heads of Agreement between the Crown and Te Atiawa, Cultural Redress, 2(a)
[24] Heads of Agreement Between the Crown and Rangitaane o Manawatu, Cultural Redress, 2(a)
[25] Section 8, Waikato-Tainui Raupatu Claims (Waikato river) Settlement Bill 2008

It is recognised by the Crown and Waikato-Tainui that they have different concepts and views regarding relationship with the Waikato River, including the concept of ownership, thus it is explicitly stated that this Act is not intended to resolve those differences, but is primarily concerned with the management of the river. However, if the Crown or a Crown entity proposes to take action relating to a property interest or right in the Waikato River, they must engage with Waikato-Tainui according to the principles described in the Kiingitanga Accord (s 34)[26].

Vision and strategy

The settlement package includes a vision and strategy for the Waikato River, to which persons performing functions or exercising duties under other legislation relevant to the Waikato River will have to have 'particular regard' (Settlement Bill s 11). The vision and strategy is a national policy statement under the RMA, requiring local authorities to give effect to the vision and strategy when preparing or changing regional plans and policy statement and district plans (ss 12, 13). The vision and strategy will further consist of a statement of general policy for the purpose of conservation legislation (s 10). The vision and strategy will not affect any existing use rights, but when new rights are created, or existing rights lapse, the decisions regarding these rights will need to take into consideration the vision and strategy (p. 8). The vision is 'for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River, and all it embraces, for generations to come' (Schedule 2). It includes objectives such as the restoration and protection of Waikato-Tainui's economic, social, cultural and spiritual relationship with the river according to their tikanga and kawa, and an integrated, holistic and coordinated approach to management of the natural, physical, cultural and historical resources of the river (Schedule 2). The strategy for achieving the objectives includes establishing the current health status, and developing targets for improving of this using matauranga Māori and latest scientific methods, recognising wahi tapu and sites of significance to Waikato-Tainui and other Waikato River iwi, and ensuring public access to the Waikato River while protecting and enhancing the health and well-being of the river (Schedule 2).

Guardians of the Waikato River

The Bill establishes a statutory body called the Guardians of the Waikato River (s 15), whose membership consists of 10 members, half of whom will be representatives from the relevant Māori trust boards that have an association with the Waikato River, and half of whom will be representatives appointed by the Minister for the Environment (Schedule 3). The principal functions of the Guardians will be to promote and work for the restoration and protection of the health and well-being of the river, as well as facilitating the implementation of the vision and strategy for the river (s. 16). Other functions of the Guardians will include reviewing the vision and strategy at least every 10 years, as well as carrying out research into, promoting education programmes relating to, and sharing information on the state of the Waikato River (ss 17, 18).

Waikato River Statutory Board

The Waikato River Statutory Board will be created by the Act, with its principal functions to support Waikato-Tainui in their exercise of mana whakahaere over the river, and to support

[26] The Principles of the Kiingaitangi Accord are found in Schedule 1.

and promote their relationship with the river in order to achieve implementation of the vision and strategy (ss 20–21). The Board membership will consist of five representatives appointed by the Waikato Raupatu River Trust, and five representatives appointed by the relevant local authorities (Schedule 4). The general functions of this body include commissioning independent audits of resource consents, concessions and other instruments that may affect the Waikato River to assess the extent to which they are consistent with the vision and strategy; co-ordinating interaction between Crown, local authorities and other interested stakeholder on issues relevant to the vision and strategy; participating in statutory, and non-statutory policy and planning affecting the Waikato River; and reporting annually to the appointers and the Minister for the Environment (s 22).

Integrated River Management Plan

The purpose of the plan is to achieve an integrated approach between Waikato-Tainui, the relevant Crown agencies and relevant local authorities, to the management of the Waikato River (s 24). It will include conservation, fisheries and regional council components. It will be prepared together by Waikato-Tainui, relevant departments and local authorities, and upon joint approval by Waikato-Tainui and the Minister of Conservation and Minister of Fisheries it will have the status of a conservation management plan and a freshwater fisheries management plan (ss 25, 26).

Waikato-Tainui Environmental Plan

The Bill provides for the possibility of Waikato-Tainui preparing an environment plan, which would be developed in consultation with the Waikato-Tainui Marae (s 28). The local authorities with whom it is lodged will have to take the plan into account when reviewing or changing a planning document under the RMA, as will the consent authorities when they consider a plan relevant and reasonably necessary to determine an application (s 29).

Resource Management planning processes

Whenever a local authority intends to start preparing, reviewing or changing an RMA planning document that affects the Waikato River, they must notify the Waikato River Statutory Board beforehand, and convene a joint working party consisting of equal numbers of people appointed by Waikato–Tainui and the local authority. This working party is to try and reach consensus on what is required for the planning document to give effect to the vision and strategy and prepare a report on their findings, and then the local authorities must consider this report in their work (s 30).

Other provisions

The Bill also gives Waikato-Tainui the first right of refusal over the leasehold estate of the Huntly Power Station (ss 35–38).

B. Port Nicholson Block (Taranaki Whanui ki Te Upoko o Te Ika) Claims Settlement Bill 2008

The fee simple estate in the bed of Lakes Kohangatera and Kohangapiripiri is vested in the trustees; this is subject to a covenant, similar to a conservation covenant as in the Reserves Act 1977 (ss 48, 49). There is also statutory acknowledgement of the Kaiwharawhara Stream, Hutt River and Waiwhetu Stream (in Schedule 1).

8.4 Statutes

A. Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008

The fee simple estate in the Lake Rotokawa site is vested in the trustees but explicitly excludes any right to the waters or aquatic life of Lake Rotokawa (s 100). Similarly, fee simple estate in the beds of Lakes Rotongata and Rotoatua are vested in the trustees, subject to the same exclusion of waters and aquatic life (s 101). Statutory acknowledgements are made for part of the Kaituna River, part of the Tarawera River, part of the Waikato River, the Waiteiti Stream, and Ngongotaha Stream (Schedule 3, part 1).

B. Ngati Mutunga Claims Settlement Act 2006

Statutory acknowledgements are made for the Onaero and Urenui rivers, as well as the Waitara River and Mimi River within the area of interest (Schedule 3).

C. Te Arawa Lakes Settlement Act 2006

Te Arawa Lakes means Lakes Ngahewa, Ngapouri, Okareka, Okara, Okataina, Rerewhakaaitu, Rotoehu, Rotoiti, Rotoma, Rotomahana, Rotorua, Tarawera, Tikitapu, Tutaeinanga, and includes the water, fisheries and aquatic life in those lakes, but does not include the islands in those lakes (s 11). The fee simple in each Te Arawa lakebed is vested in the Trustees of the Te Arawa Lakes Trust but they must not alienate the lakebeds (ss 23–24). It is explicitly stated that this vesting of the lakebeds does not include any rights in relation to the water in the lakes, or the aquatic life (s 25).

The Act also provides for the establishment of the Rotorua Lakes Strategy Group, made up of members from the Rotorua District Council, the Bay of Plenty Council and the trustees of the Te Arawa Lakes Trust (s 43). The purpose of this group is to contribute to the sustainable management of the Rotorua Lakes, while recognising and providing for the traditional relationship of Te Arawa with their ancestral lakes (s 49).

D. Ngaau Rauru Kiitaki Claims Settlement Act 2005

The bed of Lake Moumahaki is vested in the governance entity (s 29). The Patea, Whenuakura and Waitotara rivers are areas for which a statutory acknowledgement is made (Schedules 3, 9–11).

E. Ngati Tuwharetoa Bay of Plenty Claims Settlement Act 2005

Statutory acknowledgements are made for Tarawera and Rangitaiki rivers (Schedules 3, 7, 8).

F. Ngati Awa Claims Settlement Act 2005

Statutory acknowledgements are made for Whakatane, Rangitaiki and Tarawera rivers (Schedules 10–12).

G. Ngati Tama Settlement Act 2003

Statutory acknowledgements are made for Mohakatino and Tongaporutu rivers (Schedules 9–10).

H. Ngati Ruanui Claims Settlement Act 2003

Statutory acknowledgements are made for the Tanghoe, Whenuakura and Patea rivers (Schedules 4, 7–9).

I. Ngai Tahu Claims Settlement Act 1998

Statutory acknowledgements [schedule numbers are in brackets] are made for the Aparima River (15), Hakataramea River (16), Hakatere (Ashburton River) (17), Kekao (Hinds River) (19), Hurunui River (21), Kakanui River (23), Kowai River (26), Oreti River (50), Pomahaka River (52), Rangitata River (55), Taramakau River (56), Waiau River (69), Waitaki River (71), and Waipara River (74).

Statutory acknowledgements are also made for Hoka Kura (LakeSumner) (20), Ka Moana Haehae (Lake Roxburgh) (22), Karangarua Lagoon (24), Kotuku-Whataoho (Lake Brunner Moana) (25) Kuramea (Catlins Lake) (28), Lake Hauroko (29), Lake Hawea (30), Lake Kaniere (31), Lake Ohau (32), O Tu Wharekai (Ashburton Lakes) (46) Okari Lagoon (48), Takapo (Lake Tekapo) (57) TeAna-au (Lake Te Anau) (58), Te Ao Marama (Lake Benmore) (59) Te Wairere (Lake Dunstan) (61), Uruwera (Lake George) (68), Waiwera (Lake Forsyth) (71), Whakatipu Wai Māori (Lake Wakatipu) (75), Whakamatau (Lake Coleridge) (76), and Whakarukumoana (77).

The bed of Te Waihora (Lake Ellesmere) is vested in Ngāi Tahu (s 168) but the Act expressly stipulates that this does not confer any rights of ownership, management or control of the waters or aquatic life of Te Waihora (s 171). The possibility of a joint management plan is provided for, conditional on the agreement of the Minister of Conversation, for areas including the bed of Te Waihora (s 177). The same agreement, only less the option for a joint management plan, is set out for Muriwai (Coopers Lagoon) (s 184) and Lake Mahinapua (s 192).

J. Ngai Tahu (Tataepatu Lagoon Vesting) Act 1998

This Act provided for the vesting of Tataepatu Lagoon in Ngāi Tahu for an estate in fee simple (s 6). It is not clear whether this includes the water in the lagoon or not.

8.5 Conclusion

This part of the report has provided a summary of the settlement agreements concerning Māori and water. The statutory developments in recent years illustrate the legislative imagination that can take place if the Crown is willing to acknowledge Māori. But, are those iwi that have settled with the Crown happy? All settlements are prefaced as full and final. In order to ensure that this is a reality the Crown must ensure that the negotiations are as fair as possible, recognising and accommodating for a large power imbalance, including monetary disparity, between itself and iwi and hapū. As part of this the Court ought to come to the negotiating table with an open mind towards brainstorming new options for providing for the primary concerns of Māori. Little work has been done to trace the trends in the new settlement statutes and thus this chapter is of value for identifying those provisions relating to Māori and fresh water.

9. Common Law Doctrine of Native Title

9.1 Introduction

This section of the report moves from placing the emphasis on summarising legal material to

exploring a legal point that many Māori regard as the essential issue concerning freshwater governance: ownership. In 2003, the Court of Appeal, in *Attorney-General v Ngati Apa (Ngati Apa)*[27] reintroduced the unqualified applicability of the common law doctrine of native title into New Zealand, clearly articulating the principle that: '[w]hen the common law of England came to New Zealand its arrival did not extinguish Māori customary title…title to it must be lawfully extinguished before it can be regarded as ceasing to exist' (p. 693, per Tipping J). A question thus arises as to whether Māori customary title to fresh water, namely rivers, remains the property of Māori in accordance with the doctrine of native title? While the Crown claims that at common law no-one 'owns' water for it is common property, like air, the Court of Appeal warns against such presumptions (albeit in obiter and in the context of the foreshore and seabed) (p. 668):

> The common law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interests in the foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.

Using the *Ngati Apa* precedent, for a successful claim to rivers the legal test will require (1) Māori to prove that, according to tikanga, iwi have a recognised customary property interest in a river; and (2) the Crown to fail to prove that statute law has clearly and plainly extinguished that property right. This part of the report thus takes the opportunity to canvass the possibilities whereby Māori could claim property rights to rivers via the common law doctrine of native title. While some important work has been done on addressing this issue, many gaps remain[28]. This part of the report seeks to contribute to the existing literature by considering the contemporary success of such a claim and the political climate suggests that it is timely do so.

This section begins by exploring the history of the common law doctrine of native title in Aotearoa New Zealand. It then specifically canvasses four issues which a court will need to address in order to accept native title in rivers. Assuming that native title is found in a river, subsection 9.4 canvasses the possibility of whether a court will award actual ownership of the river. A brief conclusion is then drawn.

9.2 A history of the doctrine of native title in Aotearoa New Zealand's courts

In New Zealand, law derives either from statute law (law made by Parliament) or common law (judge-made law). The common law can be described as 'the law built up in the courts from generations of decided cases and administrative practices'[29]. Statute law can trump common law. Customary law is the law, values and practices developed by Māori. The standard principle is that the legal system does not recognise Māori customary law, or rights derived from the Treaty of Waitangi, unless it has been incorporated into statute or is recognised by the common law doctrine of native title. This part of the report is focused on establishing whether Māori can use the common law to assert ownership of rivers; thus, it

[27] [2003] 2 NZLR 643 ('*Ngati Apa*').

[28] The most relevant work is Schroder (2004). See also Gibbs & Bennett (2007), Morel (2002) and research part of Ferguson (1989) (but note these three works do not explore the significance of *Ngati Apa*). The Waitangi Tribunal's reports are another significant source of work that has considered these types of arguments. The most relevant recent report is: *He Maunga Rongo. Report on Central North Island Claims* vol 4 (2008). See also Strack (2007) and proceedings from the Ngai Tahu Water Forum, Christchurch, 5 February 2007.

[29] Finn (2001, ch. 1, p. 2).

briefly traces the evolution of the common law doctrine of native title in New Zealand[30].

A. The Treaty of Waitangi

All land and waters in New Zealand were once Māori property and held by Māori in accordance with tikanga Māori (Māori customary values and practices)[31]. As accepted by Chief Justice Elias in the *Ngati Apa* 2003 foreshore and seabed case, Māori customary land was property in existence when a colonial government was established by the Crown in 1840[32]. The Treaty of Waitangi, signed in 1840 between Māori and British representatives, did not create, alter or extinguish this property. The Treaty simply gave the British Crown the right to govern. Māori retained their chieftainship over their own affairs, Māori were guaranteed the same rights and privileges as British citizens living in New Zealand, and the Crown was given the right of pre-emption to purchase Māori land[33]. Specifically, the second article guarantees to Māori 'their lands, villages and all their treasures'[34], or, as the English version reads: 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession'[35]. The second article then states the Crown has the exclusive right of pre-emption 'over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon'[35].

The Treaty of Waitangi thus endorsed the position at common law: a change in sovereignty does not extinguish indigenous peoples' property rights, and specifically: Māori remain the proprietors until they wish to sell to the Crown. Even the English version of the Treaty endorses the position that Māori owned not only the dry land, but also the 'fisheries' and 'other properties' as stated in the text. This was consistent with the Māori world view, which saw no distinction between land below and above high tide, or fresh or salt water. It was all considered one country, one garden, with, for example, patches for root vegetables, berries, eels, fish and shellfish.

B. R v Symonds 1847

It was the English common law, which was imported into New Zealand after the signing of the Treaty, that ensured the continuation of Māori property rights in their customary land despite the change in sovereignty. The Treaty simply endorsed this common law. New Zealand's now-named High Court clarified this fact back in 1847. The Judges in that case, *R v Symonds*[36], held that Māori customary interests were to be solemnly respected and not to be extinguished at least in times of peace without their free consent. Justice Chapman stated (p. 390):

> …it cannot be too solemnly asserted that [native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It

[30] For a comprehensive comparative understanding of the doctrine of native title: see McHugh (2004).
[31] Defined in Te Ture Whenua Māori Act/Māori Land Act 1993, s 129(2)(a).
[32] *Ngati Apa*, p. 651.
[33] For a copy of the Treaty, see Treaty of Waitangi Act 1975, first schedule, or see State Services Commission's Treaty of Waitangi website at http://www.treatyofwaitangi.govt.nz/ (accessed 29 March 2009).
[34] This is Professor Sir Hugh Kawharu's English translation of the Māori version of the second article: see Kawharu (1989, pp. 319–320).
[35] See the second article of the English version.
[36] See Appendix 2 for details of where to find the cases summarised.

> follows…that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi…does not assert either in doctrine or in practice any thing new and unsettled.

C. The Native Land Court

Twenty years after the signing of the Treaty of Waitangi, i.e. in the early 1860s, the government sought the means to actively encourage the conversion of the property in land owned by Māori so as to enable sales to new settlers. It established the Native Land Court[37]. The court's mandate was to enable the speedy British settlement of New Zealand. The Crown's right of pre-emption was thus waived in favour of a process whereby Māori were to apply to the court for issuance of a fee simple title which would, in effect, change the status of Māori customary land to Māori freehold land. Once a freehold title was issued, Māori were encouraged to alienate (sell, gift, lease, mortgage etc.) their land to the new settlers. The founding legislation clearly envisioned the 'assimilation as nearly as possible to the ownership of land according to British law' to result in 'the peaceful settlement of the Colony and the advancement and civilization of the Natives'[38].

D. Wi Parata 1877

A decade after the establishment of the Native Land Court, the judiciary did an about-turn on native title. In 1877, Chief Justice Pendergast, in *Wi Parata v The Bishop of Wellington* (*Wi Parata*)[36] declared that the doctrine of native title had no application in New Zealand because there were no laws or rights in property existing before 1840 (p. 78):

> On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered, to such extent as may be necessary, by the Courts of the new sovereign. …But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based.

This case labelled the Treaty a 'simple nullity', based on the reasoning that 'no body politic existed capable of making cession of sovereignty' because Māori were 'primitive barbarians' (p. 78).

E. *Baker* 1901

At the turn of the century, the Privy Council, hearing an appeal from New Zealand, *Nireaha Tamaki v Baker*[36], retaliated and said the reasoning in *Wi Parata* 'goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court' (p. 577, Lord Davey). Their Lordships recognised that New Zealand's legislation refers to Māori customary law and therefore (pp. 577–578, Lord Davey):

> It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence…one is rather at a loss to know what is meant by such expressions 'native title', 'native lands', 'owners', and 'proprietors', or the careful provision against sale of Crown lands until the native title has been extinguished, if there be no such title cognisable by the law, and no title therefore to be extinguished.

[37] See the Native Lands Acts of 1862 and 1865. This court later became known as the Māori Land Court.
[38] Native Lands Act 1862, preamble.

F. In Re Ninety Mile Beach 1963

Even though the Privy Council condemned *Wi Parata*, believing that the existence of customary title was affirmed in statutes, New Zealand's judiciary continued to adhere to the *Wi Parata* reasoning. For example, *In Re Ninety Mile Beach*[36], decided in 1963, New Zealand's Court of Appeal held that all foreshore in New Zealand which lies between the high and low water marks and in respect of which contiguous landward title has been investigated by the Māori Land Court was land in which Māori customary property had been extinguished. The reasoning of the judgment was as follows (p. 468):

> In my opinion it necessarily follows that on the assumption of British sovereignty. . the rights of the Māoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand, whether above high-water mark or below high-water mark.

It was because of this case that the issue of whether the renamed Native Land Court, now the Māori Land Court, had jurisdiction to determine the status of foreshore and seabed land came before the Court of Appeal in *Ngati Apa*.

G. *Te Weehi* 1986

By the mid-1980s, Canada had began to reassert the doctrine of native title into their common law, introducing a spectrum that ranged from recognising Aboriginal peoples' rights to use a resource to potentially own a resource. In 1986, New Zealand's High Court reintroduced part of the doctrine into our common law in the landmark case *Te Weehi v Regional Fisheries Officer* (*Te Weehi*)[47]. In this case, the High Court held that a Māori person has a right to take undersized shellfish, paua, in contravention of statute law, on the basis that he was exercising a customary right which the law had not extinguished. Williamson J found in favour of Te Weehi recognising that the establishment of British sovereignty had not set aside the local laws and property rights of Māori (p. 687), thus concluding that because there had been no plain and clear legislative extinguishment of the fishing right, the right continues to exist: 'It is a right limited to the Ngai Tahu tribe and its authorised relatives for personal food supply' (p. 692). In reaching this decision, Williamson J recognised the significance of the Treaty of Waitangi for New Zealand: 'obviously the rights which were to be protected by it arose by the traditional possession and use enjoyed by Māori tribes prior to 1840'(p. 692).

Justice Williamson, in *Te Weehi*, alleged: 'Canadian Courts have consistently taken the view that customary rights of Aboriginal peoples must be preserved and that charters and treaties similar to the Treaty of Waitangi recognise obligations which arise as a result of those customary rights' (p. 691). He stated that the 'Canadian cases follow the general approach that customary rights of native or Aboriginal peoples may not be extinguished except by way of specific legislation that clearly and plainly takes away that right' (p. 691)[39] He endorsed that view, stating that in New Zealand if customary rights have not been extinguished, they are preserved (p. 692).

While *Te Weehi* reintroduced the doctrine, it did so in regard to native fishing rights, not title. Williamson J did not feel bound by the earlier *Wi Parata* case law, distinguishing those cases from the one he was hearing on the right to take undersized paua because it was a 'non-territorial' claim; this case was 'not based upon ownership of land or upon an exclusive right

[39] For example, some of the Canadian cases cited included: *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 and *Guerin v R* (1984) 13 DLR (4th) 321.

to a foreshore or bank of a river' (p. 692). It was important for Williamson J to emphasise this aspect otherwise he would have been bound by higher court precedent (namely the Court of Appeal's *In Re The Ninety-Mile Beach* decision). It was *Ngati Apa*, a case concerning land (rather than rights to resources such as fish) that conclusively put to an end the *Wi Parata* 'barbarian theory', overruled *In Re The Ninety-Mile Beach*, and asserted that the doctrine could possibily extend to exclusive ownership.

H. Te Runanga o Muriwhenua 1990

In 1990, the Court of Appeal heard a case concerning the quota management system for commercial fishing: *Te Runanga o Muriwhenua Inc v Attorney-General*[36]. As part of this case, Cooke P made extensive reference to the Canadian case law, stating '[a]lthough more advanced than our own…is still evolving'(p. 645) but is likely to provide 'major guidance' (p. 655) for New Zealand. He added that New Zealand's courts should give just as much respect to the rights of New Zealand's indigenous peoples as the Canadian courts give to their indigenous peoples (p. 655). Cooke P saw no reason to distinguish the Canadian jurisprudence on the basis of constitutional differences and emphasised the analogous approaches to the partnership and fiduciary obligations being developed in Canada under the doctrine of native title and in New Zealand under the Treaty of Waitangi. This comparison enabled Cooke P to confidently conclude: '[i]n principle the extinction of customary title to land does not automatically mean the extinction of fishing rights' (p. 655).

I. Te Ika Whenua 1994

In 1994, the Court of Appeal concluded, in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* (*Te Ika Whenua*) 36, that neither under the common law doctrine of native title, nor under the Treaty of Waitangi, do Māori have a right to generate electricity by the use of water power. But in discussing the doctrine, and accepting its existence in New Zealand (although not to the extent of electricity generation), Cooke P agreed that the Treaty guaranteed to Māori, subject to British *kawanatanga*, their *tino rangatiratanga*, and their *taonga* and 'in doing so the Treaty must have been intended to preserve for them effectively the Māori customary title' (p. 24).

In this case, Cooke P referred to the Canadian case law, and the 1992 High Court of Australia case *Mabo v Queensland (No. 2)* (*Mabo*)[36], in devising the nature of native title. He explained the doctrine as (pp. 23–24):

> 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.

Cooke P elaborated on the nature of native title rights, stating that they are usually communal, cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and can only be transferred to the Crown – the transfer must be in strict compliance with the provisions of any relevant statutes; it is likely to be in breach of fiduciary duty if an extinguishment occurs by less than fair conduct or on less than fair terms; and if extinguishment is deemed necessary then free consent may have to yield to compulsory acquisition for recognised specific public purposes but upon extinguishment proper compensation must be paid (p. 24). Cooke P then explained the scope of native title in terms of a spectrum (p. 24):

> The nature and incidents of Aboriginal title are matters of fact dependent on the evidence in any particular case…At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee simple recognised at common law. At the other extreme they may be treated as at best a mere permissive and apparently arbitrarily revocable occupancy.

As *Te Ika Whenua* was decided two years after the Australian High Court decision, *Mabo*, Cooke P stated that on the extent of the jurisdiction of the courts the very full discussion in *Mabo* 'would require close study' (p. 25). But he added: 'Of course nothing said in that case is binding on a New Zealand Court. In New Zealand we would have to be guided by our conception of the strength of the competing arguments and any others relevant to this country's circumstances' (p. 25).

J. McRitchie 1999

In *McRitchie v Taranaki Fish and Game Council* (*McRitchie*)[36] Richardson P, for the majority, discussed the doctrine using the then leading Canadian and Australian cases – *R v Sparrow*[36] and *Mabo* – for support that native rights 'are highly fact specific' (*McRitchie* p. 147). He explained the test as (p. 147):

> The existence of a right is determined by considering whether the particular tradition or custom claimed to be an Aboriginal right was rooted in the Aboriginal culture of the particular people in question and the nature and incidents of the right must be ascertained as a matter of fact.

Interestingly, Justice Thomas, in dissent, who found in favour of a Māori customary right to fish for introduced species, based his decision entirely on New Zealand law; no reference was made to overseas decisions.

K. Ngati Apa 2003

Finally, in 2003, the New Zealand Court of Appeal had the opportunity, in its *Ngati Apa* decision, to explicitly foresee the possibility of the doctrine of native title recognising exclusive ownership in land[40]. For example, Chief Justice Elias stated, 'Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature' (pp. 655–656), and, 'The content of such customary interest is a question of fact discoverable, if necessary, by evidence' (p. 656). Elias CJ explained, 'As a matter of custom the burden on the Crown's radical title might be limited to use or occupation rights held as a matter of custom' (p. 656), or, and she quotes from a Privy Council decision, *Amodu Tijani v Secretary, Southern Nigeria*[36], they might 'be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference' (p. 656). Elias CJ substantiated this possibility with reference to Canada[41]:

> The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructuary rights to *exclusive ownership* with incidents equivalent to those recognised by fee simple title.

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[40] Much has been written in response to *Ngati Apa*. For example, see: Boast (2005), Tomas & Johnston (2004), and Charters & Erueti (2007).

[41] *Ngati Apa*, p. 656 (emphasis added). The Canadian case cited was *Delgamuukw v British Columbia* SCC [1997] 3 SCR 1010.

The other four justices discussed the common law doctrine of native title in similar terms. For example, Tipping J began his judgment with the words: 'When the common law of England came to New Zealand its arrival did not extinguish Māori customary title…title to it must be lawfully extinguished before it can be regarded as ceasing to exist' (p. 693). Keith and Anderson JJ, in a joint judgment, emphasised 'the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain' (p. 684). Moreover, Gault P expressly recognised the uniqueness of New Zealand in the existence of the common law jurisdiction of native title and the statutory jurisdiction of Māori customary land status and stated that he prefers to 'reserve the question of whether it is a real distinction insofar as each is directed to interests of land in the nature of ownership' (p. 673).

No other New Zealand court has come as close as *Ngati Apa* in providing a hint as to how the courts may have developed a common law precedent in relation to land. For example, as reproduced in the opening paragraph of this section of the report, Elias CJ stated (p. 668):

> The common law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.

The reasoning in the *Ngati Apa* decision suggests acceptance of the fact that the common law of New Zealand is unique. Chief Justice Elias stressed this reality (p. 562):

> In British territories with native populations, the introduced common law adapted to reflect local custom, including property rights. That approach was applied in New Zealand in 1840. The laws of England were applied in New Zealand only 'so far as applicable to the circumstances thereof'…from the beginning the common law of New Zealand as applied in the Courts differed from the common law of England because it reflected local circumstances.

However, the precedential weight of the *Ngati Apa* case may be limited to the foreshore and seabed context. No court has yet been asked to determine whether the doctrine of native title applies to rivers. The remaining part of this section thus considers whether it will be possible for iwi and hapū to substantiate ownership of rivers by relying on the doctrine of native title.

9.3 Applying the doctrine of native title test to rivers

Using the *Ngati Apa* precedent, it appears that the legal test for successfully pursing a claim to rivers in accordance with the doctrine of native title will require (1) Māori to prove that, according to tikanga, iwi have a recognised customary property interest in a river; and (2) the Crown to fail to prove that statute law has clearly and plainly extinguished that property right. However, two further hurdles present themselves as preliminary barriers to exploring this two-limbed *Ngati Apa* test. One is whether native title is applicable to water? New Zealand cases certainly accept that it is applicable to dry land and land either temporarily or permanently under salt water. But is it applicable to water, and specifically the moving fresh water of a river? If native title does encompass water (and I argue below that it does) can the doctrine of native title trump the doctrine of publici juris of fresh water and recognise indigenous ownership of a river? It is these four issues that would occupy the court's attention if Māori were to pursue a claim in native title to water. This subsection introduces these two preliminary questions and makes an assumption in the positive to allow an opportunity to focus on the two-limbed *Ngati Apa* test. The next subsection returns to these four questions to provide a critical answer to the raised issue.

A. Does native title recognise water?

The doctrine of native title definitely includes dry land. For example, in the 1847 *Symonds* case, Justice Chapman states that Māori 'dominion over land' is 'entitled to be respected' (*Symonds*, p. 390). The *Ngati Apa* decision accepted that the doctrine could extend to land temporarily or permanently under salt water. But does the doctrine encompass fresh water? No court has decided this issue. However, Cooke P, in *Te Ika Whenua*, discussed Māori rights 'to land *and water*'[42]. The Australian Native Title Act 1993 (Cth) recognises rights 'to land or waters'[43]. The most recent native title case to be decided by the High Court of Australia has found native title in water[44]. This observation by Elias CJ in *Ngati Apa* is surely relevant: 'it is difficult to understand why an entirely different property regime would necessarily apply on the one hand to the pipi bank…and on the other to the hapuka grounds…or reefs' (pp. 660–661).

Hence, it is argued here that it is difficult to accept that the common law doctrine of native title is exclusive of water. The purpose of the doctrine is to protect indigenous peoples' property and it would thus seem odd if today the doctrine could be limited to land – a distinction that Māori would not have been aware of at the time when the Crown assumed sovereignty of the country. According to the Māori worldview, land and water are seen as one holistic entity: Papatuanuku (earth mother). However, assuming that it is inclusive of water, can native title trump other common law doctrines that have been developed specifically for water?

B. Does native title trump water-specific doctrines?

The common law relating to water 'compartmentalises rivers into separate legal components: the bed, the banks, and the flowing water' (Morel 2002, p 2). It also makes a distinction between parts of a river that are navigable, tidal, and neither navigable nor tidal (See Hinde et al. 2004, ch. 21). While the common law may not recognise the ability to own flowing water, it recognises riparian rights pursuant to the presumption of ad medium filum aquae, and rights accruing to the Crown as an extension of its prerogative rights in relation to the sea (White 1997, p. 349).

In regard to owning flowing water, the common law characterises water as publici juris (common to all who have access to it) and thus not capable of being owned by anyone[45]. A New Zealand court has endorsed this doctrine: a riparian owner possesses 'no property in the water of a stream flowing through or past his land but is entitled only to the use of it as it passes along for the enjoyment of his property'[46]. In regard to using flowing water, the common law doctrine of riparian rights permits the riparian owner to take water from a river for ordinary purposes connected with the riparian land such as drinking, washing and supplying a reasonable quantity of livestock[47]. However, for many decades, New Zealand

[42] *Te Ika Whenua*, p. 25 (emphasis added).
[43] See s 223(1). Note that this section is reproduced in the next part of this part of the report.
[44] *Northern Territory of Australia & Anor v Arnhem Land Aboriginal Land Trust & Ors* [2008] HCA 29 (*Arnhem*). Note that this case is discussed in the next part of this part of the report.
[45] *Embrey v Owen* (1851) 6 Exch 353. See also Blackstone's Commentaries on the Law of England (1765) 2 Wm BI 14, 18, and Tom Bennion's discussion in 'Water Issues' (March 2007) *Māori Law Review* 1.
[46] Glenmark Homestead Limited v North Canterbury Catchment Board [1975] 2 NZLR 71.
[47] Morel (2002, p 4). Note Morel is quoting the *Glenmark* case above.

legislation has regulated the rights to use flowing water as per repealed statutes such as the Water and Soil Conservation Act 1967 and the current Resource Management Act 1991. According to the common law doctrine of ad medium filum aquae, the presumption is that non-tidal riverbeds are vested in the owners of adjoining lands (the riparian owners) to the halfway point between the banks of the river[48]. The fact that this rule has been in part qualified by legislation will be discussed later.

But, first, the issue here is which doctrine trumps? That is, if, on the one hand, the doctrine of native title encompasses water and thus the possibility that indigenous peoples' own water, and on the other hand, another doctrine says that it is not possible to own water, which doctrine is correct? A similar quandary caught the attention of the Waitangi Tribunal in its consideration of the foreshore and seabed issue. The Tribunal premised its support for the position that it would have taken a bold court to recognise indigenous ownership in salt-water-covered land because of the maxim 'the law cannot recognise for Indigenous peoples what it does not recognise for the sovereign power' (Waitangi Tribunal 2004, p. 60). But the reasoning in *Ngati Apa* suggests a different approach: 'The proper starting point is not with assumptions about the nature of property…but with the facts as to native property' (p. 661 Elias CJ). *Ngati Apa* stressed, first, 'the entire country was owned by Māori according to their customs and that until sold land continued to belong to them' (p. 657 Elias CJ) and, second, the 'common law of New Zealand is different' (p. 668 Elias CJ) to the English common law.

It is argued here that applying *Ngati Apa*, the Waitangi Tribunal's maxim should not significantly influence a court considering whether a native title claim in rivers can succeed. No court is bound by Tribunal opinions. While the courts have maintained that the Tribunal's opinions 'are of great value to the Court'[49], and 'are entitled to considerable weight'[50], the courts are free to dismiss such statements. As the Court of Appeal has asserted: 'The crucial point is that the Waitangi Tribunal is not a Court and has no jurisdiction to determine issues of law or fact conclusively'[51]. Moreover, the Tribunal's foreshore and seabed report was the outcome of an urgent inquiry – it had limited time to hear the claim and write the report: 'we have had four weeks in which to produce the report' (Waitangi Tribunal 2004, p. xi). Significantly, the Tribunal stressed: 'Unfortunately, at the Tribunal's hearing, claimant counsel did not take the opportunity to cross-examine Dr McHugh, preferring to treat his evidence as if it was a legal submission to be responded to by their own submissions' (Waitangi Tribunal 2004, p. 53).

Moreover, the rules that the courts have developed for the qualification of native title do not include inconsistency with other doctrines but clear and plain statutory extinguishment. Hence, Parliament has at hand a solution to resolve the perceived conflict between native title and other common law doctrines: legislative extinguishment. Without clear and plain extinguishment, the courts should not attempt to remedy a conflict that undermines its own development of the native title doctrine. Thus native title ought to be capable of trumping other common law doctrines.

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[48] Morel (2002, p 5). Note that the presumption can and has been rebutted as discussed by Morel. For example see: *Mueller v Taupiri Coalmines Ltd* (1900) 20 NZLR 89 (CA). In contrast see: *Re the Bed of the Whanganui River* [1962] NZLR 600 (CA).

[49] New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641, 662.

[50] Moana Te Aira Te Uri Karaka Te Waero v The Minister of Conservation and Auckland City Council (HC, Auckland, M360-SW01, 19 February 2002, Harrison J) (HC) para 59.

[51] *Te Runanga o Muriwhenua Inc v A-G* [1990] 2 NZLR 641 at 651 (Cooke P).

Assuming that these two preliminary tests are met, the court would now turn to the specific native title test as advanced in *Ngati Apa*: can Māori prove that according to tikanga that they have a recognised customary property interest in a river; and can the Crown prove that is has enacted clear and plain legislation that extinguishes that property right?

C. Are property rights in rivers recognised by tikanga Māori?

According to tikanga Māori, land, air and water are one entity. This holistic notion of the environment caused no like separation between fresh water, riverbeds, and riverbanks as in English common law. The opening page of the *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* (MfE 2005d) begins with several whakataukī concerning water. One reads (p. vi):

> Tuatahi ko te wai, tuarua whānau mai te tamaiti, ka puta ko te whenua
> When a child is born the water comes first, then the child, followed by the afterbirth (whenua)

Parliament, the courts, including the appeal courts, and the Waitangi Tribunal have all recognised that specific rivers are a taonga to Māori. For example, in 1998, the Crown recognised 14 rivers in the Ngāi Tahu takiwa with statutory acknowledgments[52]. Many other settlement statutes have continued this trend. For instance, in 2008, the Crown signed agreements in principle to implement: statutory acknowledgments for four rivers in the Bay of Plenty area[53], and co-management arrangements for three rivers in the Hawke's Bay area[55]. In reviewing past cases brought by Māori to the courts concerning water, Ben White has concluded 'the outcome of so much litigation shows that there can be no doubt that Māori society had its own body of rules and customs relating to the ownership and management of rivers' (White 1997, p. 347). While it is possible that the High Court will accept that a river is a taonga, iwi will still have to establish in fact that they held property rights in that specific river. Assuming that Māori can do so, is the next barrier surmountable?

D. Are Māori property rights in rivers extinguished by statute law?

There exists no statute that clearly and plainly extinguishes Māori customary property rights in rivers. The Resource Management Act 1991 (RMA) is the statute that comes closest to doing this. Section 354 of the RMA specifically singles out special attention of section 21 of the Water and Soil Conservation Act 1967. While the RMA repeals this 1967 Act, section 354 of the RMA makes it clear that the repeal:

> 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.

So what right did section 21 of the Water and Soil Conservation Act 1967 give the Crown? Section 21(1) made it clear that [54]:

> in respect of any specified natural water, 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, or to

[52] See Ngai Tahu Claims Settlement Act 1998.
[53] See Ngati Manawa Agreement-in-Principle, signed 18 September 2008.
[54] Emphasis added.

> discharge natural water containing waste on to land or into the ground in circumstances which result in that waste, or any other waste emanating as a result of natural processes from that waste, entering natural water, or to use natural water, is hereby *vested* in the Crown subject to the provisions of this Act.

Is simply vesting water in the Crown enough to override any Māori customary property rights in rivers? According to case law precedents, the doctrine of native title requires a clear and plain extinguishment of Māori property rights. For example the justices in *Ngati Apa* stressed the importance of extinguishment stemming from clear and plain legislation. Justices Keith and Anderson, in a joint judgment, emphasised 'the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain' (*Ngati Apa*, p. 684.)

While the warning in *Ngati Apa* that there may be no remaining customary land in the foreshore and seabed because of subsequent developments such as the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992[55] needs to be taken note of, the test of clear and plain extinguishment should be kept at the forefront of any legislative inquiry. Here, in the context of water, the legislative inquiry would focus on the RMA and the now repealed section 21 of the Water and Soil Conservation Act 1967. But both of these statutes are silent as to Māori property rights. The initial observation thus must be that the legislation does not clearly and plainly extinguish Māori property rights.

Assuming that a claim proceeded to this point, would a court still nonetheless shy away from finding native title in a specific river? Even it was prepared to accept the existence of native title in a river, at what end of the spectrum would the court place that title: at the rights end or the ownership end?

9.4 Predicting how a court might decide a native title claim to a specific river

It seems that the New Zealand courts have accepted the Canadian stance that a doctrine of native title encompasses a spectrum. For example, *Te Weehi* is evidence that native title can be held at the rights end of the spectrum: a right to collect undersized shellfish. *Ngati Apa*, albeit in obiter, indicated that it might be possible to recognise exclusive ownership equivalent to fee simple title. Interestingly, Parliament has recognised that the common law doctrine of native title has the potential to encompass 'exclusive use and occupation'[56]. The issue that deserves attention here is, despite there being the possibility of a court recognising exclusive ownership, is it in reality a likely outcome of a successful native title claim to rivers? In other words, even if an iwi was successful in pursuing a native title claim to a river, would the court award what the iwi want: ownership of the river?

In the context of the foreshore and seabed scenario, eminent law academic Dr Paul McHugh argued that if given the opportunity New Zealand's courts at most would have recognised a somewhat middle ground on the rights–ownership spectrum. This middle ground has been labelled 'a bundle of rights' approach by the High Court of Australia in a majority decision. In agreement with McHugh, the Waitangi Tribunal, also deliberating in the context of the foreshore and seabed, claimed that it would have taken a 'bold' (Waitangi Tribunal 2004, p. 60) New Zealand court to deliver anything more than a bundle of rights. Both McHugh and the Tribunal thought it unlikely a New Zealand court would recognise even qualified

[55] See discussion at *Ngati Apa*, p. 650 (Elias CJ).
[56] Foreshore and Seabed Act 2004, s 32(1)(a).

exclusive ownership of the foreshore and seabed as had been advocated by Justice Kirby in a minority High Court of Australia decision.

This subsection therefore takes the opportunity to comparatively explore in brief detail how the High Court of Australia has dealt with indigenous peoples' claims to exclusive ownership of natural resources and what influence those decisions might have on New Zealand's High Court.

A. Australia

1. *Yarmirr* 2001

The first Australian High Court case to accept the applicability of the common law doctrine of native title was *Mabo* decided in 1992. In response to this decision, Parliament enacted the Native Title Act 1993 (Cth). Section 223(1) of this Act states:

> The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.

In 2001, the High Court released its *Commonwealth v Yarmirr*[36] decision whereby the majority promoted the 'bundle of rights' approach. In this case, the Court had to determine whether the common law doctrine of native title is incapable of recognising a customary interest in the sea (including the salt water and the resources in that water) and seabed in the Croker Island region of the Northern Territory that equates to ownership. It is a split decision. Gleeson CJ, Gaudron, Gummow and Hayne JJ (majority) held that there is a 'fundamental difficulty standing in the way of the claimants' assertion of entitlement to exclusive rights of the kind claimed' (p. 31). According to the majority, the common law public rights of navigation, fishing and the right of innocent passage cannot stand alongside exclusive native title rights and interests: 'the inconsistency lies not just in the competing claims to control who may enter the area but in the expression of that control by the sovereign authority in a way that is antithetical to the continued existence of the asserted *exclusive rights*' (p. 33, emphasis added). The majority, in interpreting the three-pronged test of section 223(1) accepted that the Native Title Act requires the two systems of law – traditional law and common law – to operate together. However, they claimed that the continued recognition of traditional law is dependent on whether the two laws can co-exist. They concluded that the starting point for a native title analysis must therefore 'begin by examining what are the sovereign rights and interests which were and are asserted over territorial sea' (p. 18). In this case, those rights – public rights to navigate and fish, and the international right to innocent passage – trump traditional law because 'these are rights which cannot co-exist with rights to exclude from any part of the claimed area all others' (p. 31).

Nonetheless the majority endorsed the lower Court's finding that the claimants are able to exercise non-exclusive native title rights and interests, in accordance with and subject to their traditional laws and customs, to, for example: fish, hunt and gather for personal, domestic or non-commercial communal needs; access the area to visit and protect places which are of cultural or spiritual importance; and access the area to safeguard their cultural and spiritual knowledge (pp. 1–2). Hence, the majority accepted what has been coined as a 'bundle of

rights' – limited rights to take and have access.

The two remaining High Court Justices dissented but for different reasons. Callinan J believed that the majority went too far in recognising the possibility of non-exclusive rights, stating there could be no native title at all in the sea and seabed as it would be inconsistent with the Crown's sovereignty. Not only could there be no exclusive native ownership or rights over the sea, there could be no native title rights at all for there was 'certainly no evidence in this case as to any system of law with respect to, or regulation of (p. 153), enforceable, effective rules to regulate the use, access, and exploitation of the sea and seabed.

At the other end of the spectrum, Kirby J believed that the majority had not gone far enough in recognising the possibility of exclusive ownership. He held that the common law doctrine of native title could, and should, recognise Aboriginal exclusive ownership of the sea and seabed but that public rights of navigation, fishing and passage should qualify it. In contrast to Callinan J, Kirby J accepted that the Aboriginal people had their own laws (p. 101):

> In the remote and sparsely inhabited north of Australia is a group of Aboriginal Australians living according to their own traditions. Within that group…they observe their traditional laws and customs as their forebears have done for untold centuries before Australia's modern legal system arrived. They have a 'sea country' and claim to possess it exclusively for the group. They rely on, and extract, resources from the sea and accord particular areas spiritual respect. The sea is essential to their survival as a group.

Kirby J emphasised: 'In earlier times, they could not fight off the "white man" with his superior arms; but now the "white man's" laws have changed to give them, under certain conditions, the superior arms of legal protection' (p. 101). He devised a different solution to that of the majority and its 'bundle of rights' approach – qualified exclusivity (p. 101):

> They yield their rights in their 'sea country' to rights to navigation, in and through the area, allowed under international and Australian law, and to licensed fishing, allowed under statute. But, otherwise, they assert a present right under their own laws and customs, now protected by the 'white man's' law, to insist on effective consultation and a power of veto over other fishing, tourism, resource exploration and like activities within their sea country because it is theirs and is now protected by Australian law. If that right is upheld, it will have obvious economic consequences for them to determine – just as the rights of other Australians, in their title holdings, afford them entitlements that they may exercise and exploit or withhold as they decide.

Kirby J, believed that this type of outcome was 'precisely that for which *Mabo [No. 2]* was decided and the [Native Title] Act enacted. The opinion to the contrary is unduly narrow. It should be reversed' (p. 101). Kirby J observed that the only limitations on recognition of native title rights and interests are those stated in *Mabo*: 'namely that native title could not be recognised when to do so would "fracture a skeletal principle of our legal system"; or where to do so would be repugnant to the rules of natural justice, equity and good conscience' (p. 77).

In comparison to Kirby J, the majority in *Yarmirr* read *Mabo* quite differently. Gleeson CJ, Gaudron, Gummow and Hayne JJ stated that the skeletal metaphor could not be used (p. 32):

> …to obscure the underlying principles that are in issue. There are obvious dangers in attempting to argue from the several elements of the metaphor to an understanding of the principles that lead to the result that is expressed by the metaphor. It is, therefore, not profitable to stay to consider what principles of the legal system are, or are not, part of its

> 'skeleton'. Rather, attention must be directed to the nature and extent of the inconsistency between the asserted native title rights and interests and the relevant common law principles.

Kirby J strongly disagreed with this reasoning, likening the majority judgment to the pre-*Mabo* legal fictions. For example, Kirby J exclaimed (pp. 100–101):

> To press on with a blind adherence only to the adapted rules of the common law of England is not only inconsistent with the essential legal foundation for the step which this Court took in *Mabo [No. 2]* as the basis for the new legal reasoning concerning native title. It is also incompatible with the independence and self-respect that should today be reflected in the exposition by this Court of the common law of Australia, at least where that law is concerned with vital and peculiar problems of a special Australian character. The rights of the Indigenous peoples of Australia are of that kind.

Kirby J therefore approached his judgment in a very different manner to the majority, not accepting that the common law necessarily trumps traditional law. He forcefully argued (p. 93):

> In short, to take a view of the common law of Australia, including as it is given recognition and protection under the Act, that would confine the native title rights of Indigenous peoples solely to those enjoyed by their forebears before European settlement of Australia could itself amount to imposing on them an unjust and discriminatory burden not imposed by the common law on other Australians.

2. *Arnhem* 2008

Seven years on, a partially differently constituted High Court of Australia bench has however moved not just from the 'bundle of rights' approach but also the qualified ownership point to accepting exclusive ownership. In stark contrast to the majority decision in *Yarmirr*, in July 2008, the High Court, by majority, held that traditional Aboriginal owners have the right to exclude fishermen and others from tidal waters within Blue Mud Bay in north-east Arnhem Land. *The Northern Territory of Australia & Anor v Arnhem Land Aboriginal Land Trust & Ors*[57] has been heralded as 'a victory for Aboriginal people'[58]. The case required the Court to determine (*Arnhem*, para 1):

> …whether a grant in fee simple, made under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth)…confers rights to exclude from tidal waters within the boundaries of the grant persons who wish to take fish or aquatic life in those waters, including persons holding a licence under *the Fisheries Act* (NT)…

The majority (Gleeson CJ, Gummow, Hayne and Crennan JJ) held yes, that without permission from a land council a person holding a fishing licence could not fish in tidal waters within the fee simple grant areas. Fishing in those waters was to enter or remain on Aboriginal land contrary to the Aboriginal Land Rights (Northern Territory) Act. Kirby J concurred with the majority in his separately laid out judgment. He stressed 'the need for specific and clear legislation to extinguish any traditional legal rights of the Indigenous peoples of Australia' (para 72). Kirby reinforced this message by citing a Canadian case that insists that: 'Indian title…being a legal right, it could not…be extinguished except by

[57] [2008] HCA 29 ('*Arnhem*'). This case can be viewed at: http://www.austlii.edu.au/au/cases/cth/HCA/2008/29.html.

[58] 'Indigenous win in fishing rights case' posted 30 July 2008 on the ABC News website: see http://www.abc.net.au/news/stories/2008/07/30/2318613.htm (accessed 29 March 2009).

surrender to the Crown or by competent legislative authority, *and then only by specific legislation*' (para 67). Kirby agreed with the statutory interpretation approach of the majority judgment because (para 69):

> - It preserves the Aboriginal interests concerned as species of valuable property rights not to be taken away without the authority of a law clearly intended to have that effect;
> - It does this against the background of the particular place that such Aboriginal rights now enjoy, having regard to their unique character as legally sui generis, their history, their belated recognition, their present purposes and the 'moral foundation' (now recognised in legislation) for respecting them;
> - It ensures that, if the legislature of Northern Territory wishes to qualify, diminish or abolish such legal interests it must do so clearly and expressly, and thereby assume full electoral and historical accountability for any such provision; and
> - It avoids needless argument about the suggested invalidity of the Fisheries Act that might otherwise arise if a broader operation were to be attributed to that Act.

As stated in a newspaper article following the release of the judgment: '…[f]or traditional owners, the decision ends a 30-year fight for exclusive rights, while commercial and recreational fishers will be forced to negotiate terms for access'[59]. As Professor Jon Altman of the Centre for Aboriginal Economic Policy Research, Australian National University, stated in reaction to this case: 'So what people have to understand is that this gives a right of exclusion over a column of water between the low and high water mark. In that sense it's an extraordinarily significant outcome for Indigenous people because it gives them effectively a commercially valuable property right which is really unprecedented in the Australian context'[60].

C. Aotearoa New Zealand

If a New Zealand court has the opportunity to consider the extent of indigenous property rights in rivers, the Australian case law would be considered, at most, persuasive authority. The *Arnhem* case would be of limited value to where Māori already have fee simple title in a riverbed. In New Zealand, the most movement in this regard has been made in the context of returning ownership of lakebeds to iwi pursuant to Treaty settlements. However, the statutes that have enacted these settlements have muddied the ownership issue of the water by, for example, in the context of the Te Arawa lakes: 'Crown stratum means the space occupied by water and the space occupied by air above each Te Arawa lakebed'[61]. Nonetheless, the Arnhem case is of interest because (1) it illustrates that a court can award exclusive title pursuant to water; and (2) it provides an excellent list of statutory interpretation principles that ought to be of interest to a New Zealand court.

In regard to the *Yarmirr* case, while there is support for New Zealand to take a *Yarmirr* majority judgment type approach to situate the far end of the native title spectrum at the point of recognising 'a bundle of rights' via the work of Dr Paul McHugh and the Waitangi Tribunal, it is argued here that such an approach is unwarranted. The majority judgment does not align with the observations in *Ngati Apa* that it is possible in New Zealand to recognise ownership. An examination of President Gault's judgment in *Ngati Apa*, for example,

[59] 'Indigenous win in fishing rights case' posted 30 July 2008 on the ABC News website: see http://www.abc.net.au/news/stories/2008/07/30/2318613.htm (accessed 29 March 2009).
[60] 'Unprecedented commercial rights' posted 30 July 2008 on the ABC News website: see http://www.abc.net.au/news/stories/2008/07/30/2318613.htm (accessed 29 March 2009).
[61] See Te Arawa Lakes Settlement Act 2006, s 11.

suggests that he did not accept the argument that indigenous ownership would per se be inconsistent with the coastal marine management extolled in the Resource Management Act 1991 for 'those provisions are not wholly inconsistent with some private ownership' (*Ngati Apa*, p. 677). If given the chance, Gault P might have reached a 'qualified exclusive ownership' decision in a like manner to Kirby J.

The joint judgment of Keith and Anderson JJ definitely hints at this possibility: 'Subject to such qualifications arising from the circumstances of New Zealand, property in sea areas could be held by individuals and would in general be subject to public rights such as rights of navigation' (*Ngati Apa*, p. 679). Keith and Anderson JJ, in contrast to the majority in *Yarmirr*, accept that New Zealand's common law has allowed for individual ownership: 'under the law of England which became part of the law of New Zealand in 1840 "so far as applicable to the circumstances of New Zealand", private individuals could have property in sea areas including the seabed' (p. 679). Moreover, Elias CJ expressly rejects the argument that the different qualities in land under water compared to dry land should make private property interests in the foreshore and seabed unthinkable because of the public interest in navigation and recreation. She agrees with Keith and Anderson's JJ review that 'interests in the soil below low water mark were known under the laws of England' and 'it is difficult to understand why an entirely different property regime would necessarily apply on the one hand to the pipi bank…and on the other to the hapuka grounds…or reefs' (pp. 660–661).

It is argued here that even if a New Zealand court shied away from recognising exclusive ownership in a river, it might very well be prepared to adopt a qualified exclusive ownership solution as advanced by Kirby J.

9.5 Conclusion

The current political environment is one where Māori seek to know whether the common law doctrine of native title is capable of recognising a customary interest in a river that equates to ownership. It is argued here that given the right factual mix, there is a distinct possibility that this could occur. If Parliament does not like this possibility, it has the right to pass clear and plain legislation that extinguishes native title in fresh water.

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Appendix 1 Statutes, bills, deeds of settlement and agreements in principle

- Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008
- Ngaau Rauru Kiitaki Claims Settlement Act 2005
- Ngai Tahu Claims Settlement Act 1998
- Ngai Tahu (Tataepatu Lagoon Vesting) Act 1998
- Ngati Apa Deed of Settlement, 8 October 2008
- Ngati Kahu Agreement in Principle, 22 December 2007
- Ngatikahu ki Whangaroa Agreement in Principle, 22 December 2007
- Ngati Manawa Agreement in Principle, 18 September 2008
- Ngati Mutunga Claims Settlement Act 2006
- Ngati Pahauwera Agreement in Principle, 30 September 2008
- Ngati Ruanui Claims Settlement Act 2003
- Ngati Tama Settlement Act 2003
- Ngati Tuwharetoa Bay of Plenty Claims Settlement Act 2005
- Port Nicholson Block (Taranaki Whanui ki Te Upoko o Te Ika) Settlement Bill 2008
- Resource Management Act 1991
- Te Ati Awa Heads of Agreement 1999
- Te Arawa Lakes Settlement Act 2006
- Te Aupori Agreement in Principle, 13 September 2004
- Te Rarawa Agreement in Principle, 7 September 2007
- Rangitane o Manawatu Heads of Agreement 1999
- Waikato-Tainui Raupatu Claims (Waikato River) Settlement Bill 2008

Appendix 2 Case law

New Zealand cases

[Abbreviations: DLE, Department of Labour and Employment; ELRNZ, Environmental Law reports of NZ; N.Z. Jur., NZ Jurist Reports; NZED, NZ Environmental Digest; NZLR, NZ Law Reports; NZPCC, NZ Privy Council Cases; NZPTD, NZ Planning Tribunal Digest; NZRMA, NZ Resource Management Appeals; NZSC, NZ Supreme Court.]

Aoraki Water Trust and Others v Meridian Energy Limited [2005] NZRMA 251

Attorney-General v Ngati Apa [2003] 2 NZLR 643

Beadle, Shayron Lee v Minister of Corrections [2002] 7 NZED 394

Calder v Attorney-General of British Columbia (1973) 34 DLE (3d) 145

Carter Holt Harvey Ltd v Te Runanga O Tuwharetoa Ki Kawerau [2002] 8 NZED 335

Central Plains Water Trust v Ngai Tahu Property Limited [2007] 13 ELRNZ 63

Central Plains Water Trust v Ngai Tahu Property Limited [2008] NZRMA 200

Contact Energy Limited v Waikato Regional Council [2000] 6 ELRNZ 1

Dart River Safaris Ltd and Kemp and Anor [2000] NZRMA 440

Federated Farmers of New Zealand North Canterbury Province Inc v Canterbury Regional Council [2002] 8 ELRNZ 223

Fleeting Farms Ltd v Marlborough DC [1997] 3 NZLR 257

Fulton Hogan Ltd v Bay of Plenty Regional Council [2002] 7 NZED 485

Genesis Power Ltd v Manawatu-Wanganui Regional Council [2006] NZRMA 536

Genesis Power Ltd Manawatu-Wanganui Regional Council (High Court, Wellington, CIV-2004-485-1139, 22 May 2007, Judge Wild)

G R Kemp and E A Billoud v Queenstown Lakes District Council [2000] 7 NZRMA 289

In Re Ninety Mile Beach [1963] NZLR 461

Land Air Water Association v Waikato Regional Council [2001] 7 NZED 26

Mangakahia Maori Komiti v Norhtland Regional Council [1996] NZRMA 193

McRitchie v Taranaki Fish and Game Council [1999] 2 NZLR 139

Moana Te Aira Te Uri Karaka Te Waero v The Minister of Conservation and Auckland City Council (HC, Auckland, M360-SW01, 19 February 2002, Harrison J)

Mokau Ki Runga Regional Management Committee v Waikato Regional Council (Environment Court, Auckland, A046/06, 10 April 2006, Judge Whiting)

New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641

Ngai Tahu Property Limited v Central Plains Water Trust [2008] NZSC 49

Ngai Tahu Property Limited (Re an application) (Environment Court, Christchurch, C104/06, 21 August 2006, Judge Bollard)

Ngataki, Ted and Ngati Tamaoho Trust v Auckland Regional Council [2004] 9 NZED 725

Ngati Rarua Iwi Trust, Ngati Rarua Atiawa Trust, Ngati Tama Manawhenua Ki Te Tau Ihu Trust, Resource Management Advisory Komiti (Motueka) v Tasman District Council [2004] 9 NZED 399

Ngati Rangi Trust v Manawatu-Wanganui Regional Council (Environment Court, Auckland, A67/2004, 18 May 2004, Judge Whiting)

Nireaha Tamaki v Baker PC 1900 [1901] AC 561, Privy Council

NZ Maori Council v Attorney-General [1989] 2 NZLR 142

Paokahu Trust and Others v Gisborne District Council (Environment Court, Wellington, W078/05, 26 September 2005, Judge Thompson)

Parata v Northland Regional Council [1999] 4 NZED 633

R v Symonds [1847] NZPCC 387

Tainui Hapu and Others v Waikato Regional Council [2004] 9 NZED 545

Tautari v Northland Regional Council [1996] 1 NZED 513

Te Awatapu O Taumarere v Northland Regional Council [1998] 3 NZED 472

Te Kura Pukeroa Maori Incorporation v Waikato Regional Council [2007] NZRMA 521

Te Kura Pukeroa Maori Incorporation v Waikato Regional Council (Environment Court, Wellington W069/07, 5 September 2007, Judge Dwyer)

Te Maru O Ngati Rangiwehi v Bay of Plenty Regional Council [2008] ELRNZ 331

Te Pairi Benjamin v Gisborne District Council (Environment Court, Wellington, W093/04, 22 December 2004, Judge Thompson)

Te Runanga o Te Ika Whenua Inc. Society v Attorney-General [1994] 2 NZLR 20

Te Runanga o Muriwhenua Inc. v Attorney-General [1990] 2 NZLR 641

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- Ngai Tahu Report 1991, Wai27 (1991)
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