PREPARING CLAIMANT EVIDENCE FOR THE WAITANGI TRIBUNAL

Dr Grant Phillipson

WAITANGI TRIBUNAL 1999

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PREFACE

This booklet has been written in response to claimant requests. It is designed to assist claimants with information about what they need to do to prepare their claims for a Waitangi Tribunal inquiry. Part I provides a step-by-step guide for preparing claimant evidence, describing the types of information that the Tribunal needs and outlining a process for claimants to follow in identifying the issues that have to be covered, and in providing evidence about those issues. Part II provides a more detailed outline of what the Tribunal needs to know from traditional history reports, and a guide for claimants on how to provide that information.

This booklet does not cover in any detail what needs to be done for the land alienation and other historical reports (these reports should be prepared by professional historians). Instead, it suggests ways for ensuring successful input from claimants into the process of researching and writing historical reports. The claimants' contribution is a vital one, and needs to be organised effectively. A second booklet will be written on the process for preparing professional historical reports, describing what claimants need to ensure is covered in those reports.

The Tribunal's research unit can provide further information on any of the matters raised in this booklet. The Tribunal can be contacted at PO Box 5022, Wellington.

PART I

PREPARING EVIDENCE FOR CLAIMS TO THE WAITANGI TRIBUNAL

Claims to the Waitangi Tribunal are complaints that (a) the Crown has breached the Treaty of Waitangi by particular actions, laws, policies, or inactions; and (b) Maori have suffered prejudice (harmful effects) as a result. Claims need to be comprehensive – that is, cover all matters at issue between claimants and the Crown – and they need to be proven – that is, supported by evidence of a standard which the Tribunal will find convincing. The Crown has an opportunity to challenge evidence by cross-examining witnesses, and to submit evidence of its own. When receiving historical evidence, the Tribunal requires reports from professional historians. A professional historian will be a member of each Tribunal, to advise other members in their interpretation of historical evidence. When receiving traditional evidence, the Tribunal requires reports based at least partly on oral interviews with claimants, and it requires oral evidence from claimants at hearings. There is a kaumatua on each Tribunal, to advise other members in their interpretation of traditional evidence. These and other types of evidence are all important in a Tribunal inquiry.

WHAT DO CLAIMANTS NEED TO DO?

In order for claims to be both comprehensive and proven by sufficient evidence, the Tribunal normally expects the following evidence from claimants:

- A traditional history report, covering matters set out in part II of this booklet.
- Any surviving oral traditions about Crown actions. This would include:

  —oral traditions passed down to claimants about nineteenth-century actions of the Crown; and

  —oral evidence about actions of the Crown committed within living memory (eg, public works takings in the 1960s, etc).

  This oral evidence should be collected and collated through taped and transcribed interviews. It should be made available to the historians writing the land alienation and other reports, and should also be made available directly to the Tribunal through oral presentations at hearings.
- Any surviving oral traditions about the impact of Crown actions, and the prejudicial effects on claimants. As with the item above, this would cover both oral traditions and matters in the more recent past, and would be supplied to the historian writing the social impact report and to the Tribunal during oral evidence at hearings.
- A list of the particular grievances of whanau or hapu. These often relate to particular blocks of land, recent public works takings, and so forth. Claimants need to identify all their specific claims as early as possible. A list of these claims should be compiled, and oral evidence recorded about the nature of each grievance, including any details

that the claimants have. After defining which blocks or matters are at issue, a professional historian should search archival sources and write a report. These 'specific claim' reports can be commissioned by the Tribunal or the Crown Forestry Rental Trust (CFRT). Claimants should make each specific claim an item in the iwi or hapu statement of claim. Alternatively, the whanau or hapu can lodge their own separate claim if they wish.

- A list of contemporary grievances of iwi, hapu, or whanau. The Tribunal would expect to:

  —hear oral evidence about these grievances;

  —receive any relevant papers about these grievances; and

  —receive a written submission from the claimants' lawyer, outlining the claimants' issues and how these relate to the Treaty.

  Contemporary grievances usually relate to current relationships between iwi and the Crown, its agencies, and local government. They sometimes refer to matters at issue with the Department of Conservation (DOC), the Resource Management Act 1991, and the education and health systems. Evidence and submissions on these matters do not have to be included in the casebook, but they should be ready in time for the hearings. Again, each specific issue needs to be covered by an item in the statement of claim.

- Written historical reports about actions of the Crown, and the impact of those actions. These reports need to be researched and written by professional historians and included in the casebook. This type of research can be commissioned by the Tribunal or CFRT.

WHAT IS THE TIME-FRAME FOR THESE MATTERS?

Step 1

Discuss the scope of research with the Tribunal and CFRT, and produce a research plan to cover claimant reports. Engage professionals where appropriate, obtain training in conducting and recording oral history, and plan a questionnaire for the interviews. (Scoping and research by the professional historians should begin at the same time.)

Step 2

Conduct oral interviews covering:

- oral traditions about Crown actions;
- Crown actions that took place within living memory;
- oral traditions about the impact of Crown actions;
- memories of the impact of Crown actions that took place within living memory;
- any specific block or issue grievances;
- any sites of major significance; and
- any contemporary grievances.

Afterwards, transcribe the interviews.

Step 3

Discuss the outcome of interviews with whanau and hapu, and compile a list of all the specific block or issue grievances.

Discuss the outcome of interviews with the professional historians. Supply material for inclusion in their reports. Arrange follow-up meetings and interviews between informants and the historians where necessary.

Compile a list of all the contemporary grievances.

Compile a list of the key sites that claimants want to include in the claim.

Step 4

Oversee the writing of the traditional history report. Discuss what the researcher is finding in Maori Land Court minute books and other written sources. Provide feedback wherever possible. Make strategic decisions about how to approach this part of the research; in particular, discuss issues with hapu and neighbours, and minimise the opportunities for mutual misunderstanding and conflict.

Decide which specific block or grievance claims to pursue – there may be too many, and strategic decisions may have to be made. The whanau or hapu that 'owns' the grievance has to be happy with the decision. Having finalised the list of these claims, you need to ensure that they are covered by professional research. This can be done in one of two ways: a specific report can be written on a block or group of blocks; or the block or blocks can be used as case studies in large reports. This should be discussed with the Tribunal and CFRT, and arrangements made to cover the research. The results of the interviews should then be supplied to the historian, and follow-up interviews or meetings arranged where necessary.

Decide which contemporary grievances will be included in the claim. Here, you need to consider whether there is a better avenue of redress (eg, through the courts), and weigh the importance of the matter to the overall claim or claims. Having decided which matters to include, you need to find out what written material is available about them (eg, correspondence

with DOC and other agencies in the hands of individuals or groups), and collect it. Conduct follow-up interviews where necessary. Then discuss what else needs to be done with your lawyer.

Decide which key sites you wish to include in the claim. Having done so, discuss with the historians whether there needs to be research of written sources in addition to the oral material that you have collected. This may be necessary in some cases. Having decided which sites need to be researched, you should ensure that these get included in the Tribunal's or CFRT's research programme, or researched as part of the traditional history report.

Collect information about your contemporary status for the traditional history report (see part II of this booklet). Decide how you wish to present yourselves to the Tribunal.

Step 5

Read and comment on the draft traditional history report, and ensure that this report is completed in time for the casebook.

Read and comment on the historians' reports, and ensure that these reports are completed in time for the casebook.

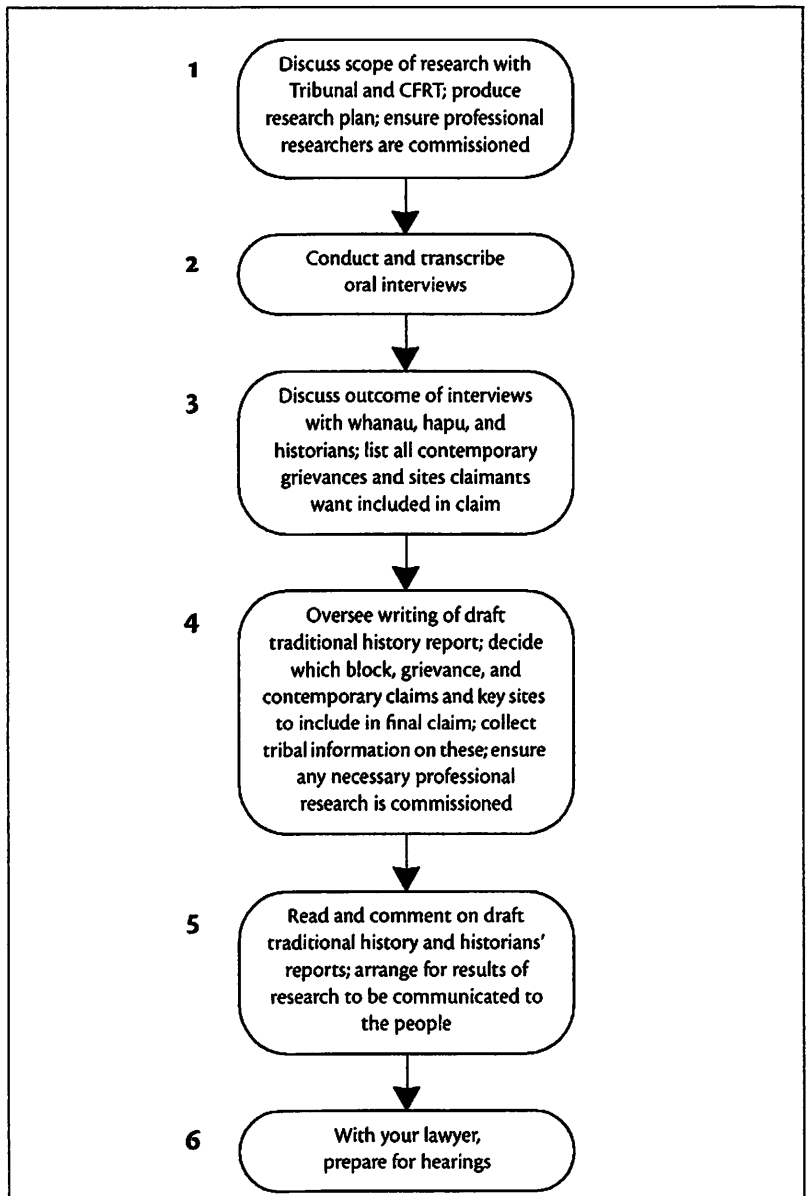
Arrange for the results of the completed research to be communicated to the people by circulating the reports and setting up oral briefings.

Step 6

While the casebook is in process, and in consultation with your lawyer, begin preparations for the hearings. These should include:

- deciding where you want to be heard;
- deciding when you want to be heard (in particular, discuss the order of hearings with other claimants);
- deciding who should give evidence (which kaumatua and kuia, which representatives of whanau or hapu, which rangatahi);
- preparing briefs of evidence (together with your lawyer, discussing what will be said in the oral evidence, and writing summaries of it for submission to the Tribunal);
- finalising your evidence and submissions on contemporary grievances;
- discussing with your lawyer how the claim will be presented overall; and
- finalising your statement of claim (this involves itemising all the Crown actions and points of grievance in a written document, which the lawyer will prepare with your input).

PREPARING CLAIMANT EVIDENCE



Summary of steps in preparing evidence for Waitangi Tribunal claims

PART II

TRADITIONAL HISTORY REPORTS: WHAT DOES THE TRIBUNAL NEED TO KNOW?

Who Are You, and How Do You Relate to Your Land?

The Tribunal researches and hears claims on a district-by-district basis. Each Tribunal inquiry will include all the claims from those individuals, whanau, hapu, and iwi whose main claims are located within a defined region. There are normally overlapping claims from neighbouring groups that will also be considered, in so far as they relate to Crown actions in the region under inquiry. The focus of claims is on the actions of the Crown, and two questions arising from those actions: (a) Did the actions breach the Treaty?; and (b) To what extent were Maori prejudiced (harmfully affected) by those actions? A related question is: Who was affected by those actions of the Crown? A mana whenua or traditional history report should assist the Tribunal to answer all three of those questions.

The last question above is the main focus of a traditional history report: Who was affected by the actions of the Crown? The answer to this question will require evidence that identifies

claimant groups and their relationship to the land. If a group of people was affected by the actions of the Crown, then the Tribunal needs to know the answers to the following questions:

- What is the name of that group, and what was its name in the nineteenth century (or earlier)?
- Is the group an original people of the region?
- Did the group migrate to the district? If so, when? What is the relationship with the original inhabitants?
- Having arrived in the region, what sort of customary rights were acquired? Where were pa and kainga located? What sort of fishing and other hunting and gathering rights were exercised, and where were they exercised? Did the group migrate regularly around the region, exercising rights in different areas from time to time? If so, where and what kinds of rights? Did groups share land and resources? If so, on what basis?
- If the group is an iwi, what are the names of its hapu, and where did they live in the nineteenth century? Where do they live now?
- What are the relationships between the hapu? How are they linked in terms of whakapapa, geography, history, and so forth?
- Who are their neighbours and how are they related to them?
- What were the wider regional relationships? Who was allied with whom? Who fought with whom and why?

Claimants should note that, in answering these types of questions, they should not restrict themselves to matters before 1840. The Tribunal needs to know how the customary world of Maori continued to function after 1840, because it is critical in evaluating the actions of the Crown on all sorts of issues, especially questions of whether the Crown used iwi against each other to

obtain land sales, military conquest, and so on. Claimants must always keep in mind the questions: Did the Crown deal with the correct right-holders when negotiating land transactions? Did it deal with *all* the correct right-holders? Did it recognise some sorts of rights but not others? A traditional history report should not try to address these matters directly. Instead, the land alienation reports should cover them for each transaction, drawing on the information in the traditional history reports; that is, in arguing the claim, discussions of the direct actions of the Crown should be left to the historical reports.

Rohe Boundaries, Exclusive Rights, and Claims against Other Maori

Claims are against actions of the Crown, not actions of other Maori groups. Unfortunately, it is not possible to make a neat division between these two things. Sometimes, the actions of the Crown were at fault because the Government bought land from the wrong people, or returned land to the wrong people after raupatu. Similarly, the Native Land Court sometimes awarded land to the wrong people, the right people then petitioned Parliament, and the Crown then either did not act on the petition or acted inadequately. In all these cases, claimants could have a legitimate grievance against the actions of the Crown. The Tribunal would require proof of these matters. Some of the proof should be contained in the traditional history report. The specific arguments about wrongdoing should be left to be discussed in the land alienation reports, but the traditional history report should clearly set out the nature of overlapping rights in any particular area. If a claimant group feels that it was

the 'right' group for the Government to deal with, then the reasons for that should be evident in the traditional history report. It might be wise to include a section on particular blocks or court cases, setting out the argument about customary interests (but leaving aside Crown actions), if these are to be a major part of the claim.

Claimants need to weigh up a number of factors in deciding how to present this evidence. It is often difficult to prove that groups were the 'right' or 'wrong' group to be dealt with. It is often the case that the Crown should have dealt with more than one group. It is much easier to show this than to set up a claim for exclusive rights. Claimants also need to consider what impact running this type of case may have on their relationships with their neighbours. Strategic decisions need to be made about how best to argue matters; in particular, claimants need to avoid showing disrespect to each other's tupuna and each other's claims against the Crown. There are ways to manage these things, so that the focus remains on the Crown instead of the past actions of other claimants.

The Tribunal does not require people to state the extent of their rohe, or to draw hard and fast boundaries on a map. In setting out the information required to answer the questions posed above on pages 9 to 11, it is sufficient to state where people were living and where they exercised their rights, and the types of rights.

What Are Your Sites of Special Significance?

A traditional history report should include information about sites of special significance. This does not mean that claimants

need to list all wahi tapu or all sites of significance to them. Instead, claimants should identify those sites of special significance that are of relevance to the claim against the Crown. These would include:

- wahi tapu that claimants feel unhappy about, whatever the issue (whether because of who owns them now, how they are being treated, past damage caused to them, and so forth);
- key mahinga kai, where for some reason (involving the Crown) these are no longer able to be used in the same way;
- rivers or other waterways, if they are going to be at issue in the historical reports;
- the tribal mountain, if there are issues with the Crown about it;
- any flora and fauna with which claimants have a special relationship that the Crown has damaged in some way, or for which the claimants are seeking greater legal protection;
- any key pieces of Crown land that the claimants want to have returned for whatever reasons (in the traditional history report, their history and significance should be noted, not that the claimants wish for their return).

Claimants need to provide evidence on these sites explaining:

- their history;
- why they are significant – every cultural, economic, and other reason; and
- what the complaint against the Crown is (this explanation should be brief – the detailed analysis of actions of the Crown should be contained in the land alienation

reports by the historians, drawing on information from the traditional history report and elsewhere).

The sections on specific sites will also need to provide a context of general information about how the claimants relate to the natural world of, and how they used resources in, their rohe. There will be some crossover with the questions on pages 9 to 11.

Who Are You Today? (Providing the Tribunal with a Contemporary Profile)

At the end of the traditional history report, there should be a section that provides the Tribunal with a contemporary profile of the claimant group. This should include:

- a description of your marae;
- a description of any trusts or incorporated societies that are used to give the group a legal character and basis of operations;
- a description of any cultural, social, or other programmes that are run through your marae or any other vehicle;
- a population estimate, based on beneficiary lists and any other information that you have, and also an account of how many of those people still live in the rohe; and
- anything else that claimants feel is relevant to describing themselves as a group today.

Confidential Information

Claimants can provide sensitive information to the Tribunal on a confidential basis. While normally a report to the Tribunal is a

public document, claimants can ask the Tribunal to restrict access to certain information (such as whakapapa) or place limitations on how it can be used by others. Before imposing such restrictions, however, the Tribunal must be satisfied that there are good grounds for doing so. Fairness may still require that the information be available to:

- the Tribunal members;
- all the lawyers representing parties to the inquiry, including the Crown's lawyer; and
- those Tribunal staff who are involved in the inquiry.

RESEARCH

Research for traditional history reports should cover two types of source:

- Oral evidence: interviews should be conducted with kaumatua and kuia. These interviews should cover not just matters for the traditional history report but also issues of concern to other reports (see part I of this booklet).
- Written evidence: key written sources need to be consulted: Maori Land Court minute books; archival sources (eg, missionary correspondence, the papers of nineteenth-century officials); any whakapapa books and other written material in the keeping of the tribe; and any published tribal histories.

Tribunal reports should be consulted for examples of the types of evidence that the Tribunal needs, and to see how it has used the oral stories related in traditional history reports and at hearings.

Preparing Claimant Evidence

Research needs to be carried out by trained professionals where possible. The report needs to be written by a person with excellent writing skills. Not all the information needs to be written up though; claimants can present it orally at hearings. This is often a more effective way of presenting this type of evidence. Your lawyer should advise you on which would be the better way to do it, depending on the type of information and a host of other factors.

In general, the best method of researching material for a traditional history report is to have the claimants search their own papers, get training on how to record information at interviews, and then carry out the interviews themselves. At the same time, a professional researcher should search Native Land Court and other written records. Information should then be pooled, the claimants should discuss the shape and content of the report with a professional writer, and the writer should then produce a first draft for consideration by the claimants. The writer and the claimants should agree on any changes to be made to the content or emphasis.

There also needs to be close liaison and sharing of information with the historians writing the land alienation and other historical reports, so that the oral histories can contribute to these. For more on this point, see part 1 of this booklet.

Maps and Illustrations

Traditional history reports should be illustrated by maps and photographs. These illustrations should enable readers of the report to locate sites covered in the claim, and should show any visual points that the claimants wish to make. They are an

important part of the overall effect of the report in communicating its ideas to the Tribunal. Colour maps and photographs are more expensive and may be reproduced in black and white by the Tribunal when it copies reports for release to the Crown and other claimants. Professional mapping assistance can be accessed through CFRT funding or from private providers. Existing maps can be reproduced (with permission if there is copyright) for less cost, and claimants can of course take their own photographs. Copies of historical maps and photographs can be obtained from various libraries and museums.

FUNDING

There are two main sources of funding for traditional history reports. The principal funding organisation is CFRT. It organises the funding of this type of research through a team called Te Roopu Raranga Tangata. Claimants can write to this team at PO Box 2219, Wellington. The Tribunal is the second main source of funding, although it operates with a much smaller research budget than CFRT. The Tribunal commissions traditional history reports via the research unit, which is headed by the chief historian. Claimants can write to the Tribunal at PO Box 5022, Wellington. Claimants may also be able to access other sources of funding.

HOW MANY TRADITIONAL HISTORY REPORTS?

Normally, the Tribunal would expect to receive a traditional history report from each claimant group (or from combinations

of claimant groups) in the inquiry. Sometimes, the report is combined with the land alienation and other historical reports, especially when the claim is a small one. Sometimes, there are no traditional history reports, and the evidence is provided orally at the hearings. The Tribunal's preference is to have a traditional history report from each group, which would be included in the casebook, or to have a report on behalf of as many groups as possible that can combine to produce a common report with one author. Afterwards, the Tribunal may decide to commission an independent report, which would cover the whole region and provide the Tribunal with a comparative analysis of key issues and overlapping histories.

TREATY OF WAITANGI

CLAIMS PROCESS

WITHIN THE

DEPARTMENT OF CONSERVATION

INFORMATION PACKAGE
FOR
KAUPAPA ATAWHAI MANAGERS

Department of Conservation
Te Papa Atawhai
Head Office
October 1993

CONSERVATION
TE PAPA ATAWHAI

DETAILED CONTENTS

RESOLUTION OF MAORI CLAIMS/GRIEVANCES

General

Maori have three legal processes available for pursuing redress for claims and grievances:

i direct negotiation with the Crown;

ii the Courts;

iii the Waitangi Tribunal.

April '91 **Government Policy Approach to Direct Negotiations**

Pursuant to this mandate, the previous Government approved:

a) A policy relating to the process for the direct negotiation of claims;

b) A Negotiation Register;

c) An information booklet detailing the Claims Negotiation process;

d) A policy on the provision of financial assistance to Maori claimants geared to progression through the stages of negotiating.

Claims Negotiation Policy

The Claims Negotiation Policy provides for:

a) The receipt and registration of claims;

b) Conducting preliminary assessment of claims;

c) Criteria for determining whether a claim is suitable for direct negotiation;

d) The process for the conduct of negotiations.

The process agreed to provides for most negotiations to proceed in three phases:

a) The negotiation of a Framework Agreement (Terms of Reference);

b) Agreement in Principle;

c) Final (Implementation) Agreement.

The Negotiating Process

Upon acceptance of Waitangi Tribunal findings, it is usual for Ministers to agree to enter into the Three Phase negotiating process with claimants as set out below. It should be noted that substantive negotiations would not occur until Ministers have endorsed the Crown's negotiating position.

Once Ministers have decided whether or not to accept the findings of the Tribunal and to enter negotiations, the claimants should be advised accordingly and, if appropriate, be invited to enter the Three Phase negotiating process with the Crown to resolve their claim.

The three phase negotiating process provides for Ministers to be fully informed at all stages of negotiations. The Minister in Charge of Negotiations will seek endorsement for each phase as the process proceeds. It operates as follows:

Phase One

- Exploratory discussions with the claimants to ensure that the nature of the claim is fully understood by both parties and to elicit the claimants' views and preferences regarding possible remedies.

- The matters discussed would be recorded in a Framework Agreement. A draft would be submitted for Ministers' approval before it was ratified by the Crown.

Phase Two

- Development of a Crown position on issues of principle and the preparation of a negotiating brief within which the negotiations may operate.

- This should ensure that the Crown's position is clear to the claimants and has been approved by Ministers before negotiations commence. It also recognises the fact that although one Minister is in charge of negotiations, there are wider Cabinet interests in the settlement of a claim.

Phase Three

- Negotiations with the claimants in terms of the agreed Crown position in order to reach agreement.

- This phase involves the negotiations themselves. Negotiations with claimants would be undertaken by the Crown team within the confines of the established brief.

- At this stage an Agreement in Principle can be reached with the claimants. It will record substantive agreement achieved on all items and will be referred back to Ministers for approval.

(CLAIMDOC.WD)

TREATY OF WAITANGI CLAIMS AND THE DEPARTMENT OF CONSERVATION

Introduction

Some of the claims made under the Treaty of Waitangi Act 1975 affect land managed or administered by the Department of Conservation or other of its functions.

This section describes the process generally followed within the Department in handling such claims through its various stages.

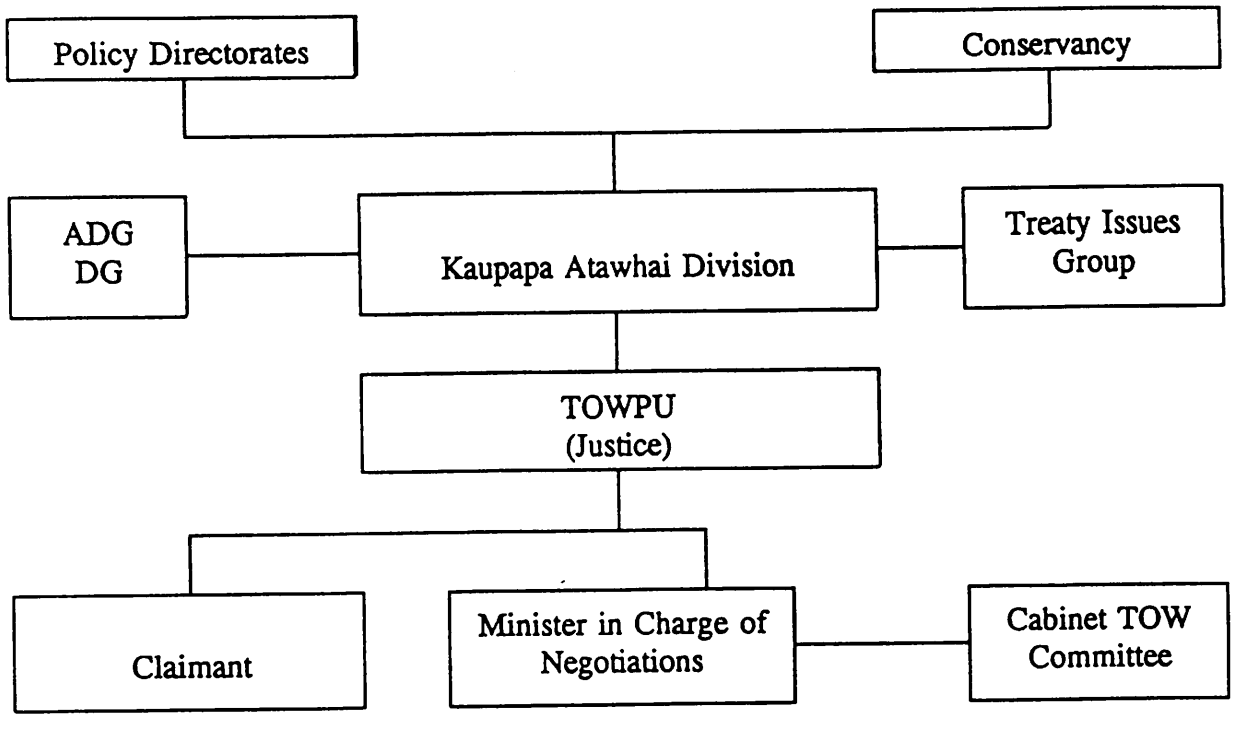
STAGE	DESCRIPTION
1	**Claim lodged:** Head Office and conservancy notified. NB: Stages 2 and 3 will not occur if mediation or direct negotiation is decided on by the relevant parties.
2	**Tribunal hearings:** DOC officials may attend. May give evidence at the invitation of Crown Law Office - KAD co-ordinates.
3	**Tribunal report:** KAD co-ordinates DOC analysis of implications for conservation and develops a DOC approach for report to Minister.
4	**Exploratory discussions:** DOC official(s) may be invited to join Justice (TOWPU) in meeting the claimants.
5	**Framework agreement:** KAD co-ordinates DOC response at ministerial level and/or to TOWPU on draft Cabinet TOW Committee paper.*
6	**Crown position developed: *** KAD co-ordinates DOC response at ministerial level and/or to TOWPU on draft Cabinet TOW Committee paper.

STAGE	DESCRIPTION
7	**Negotiation and agreement in principle:** DOC official(s) may be invited by Minister in Charge of Negotiations to be on Crown negotiating team. Otherwise KAD will co-ordinate DOC input of advice to the team.
8	**Public input:** KAD co-ordinates as a DOC/Quango activity with the agreement of Ministers and the claimant.
9	**Settlement approval:** KAD co-ordinates DOC report to Ministers on Quango/public input and DOC response to TOWPU on draft Cabinet TOW Committee paper.
10	**Implementation:** KAD briefs relevant Head Office divisions and conservancy about action required and monitors progress.
* = *The role of Quangos at this stage is still a matter of discussion.*	

(COORDINA.WD)

CO-ORDINATION WITHIN THE DEPARTMENT OF CONSERVATION

The diagram below explains how activities to do with Treaty of Waitangi claims are co-ordinated within the Department of Conservation.



Claims Negotiation Register

The previous Government endorsed the establishment of a Claims Negotiation Register in accordance with approved criteria. Once reviewed against defined criteria, claims are allotted a place on a Negotiation Register. It is anticipated that up to eight claims could be in some phase of the negotiation process at any one time.

Criteria for acceptance of a claim for direct negotiation - in each case the decision to proceed with direct negotiations is made by the Crown Task Force on Treaty of Waitangi Issues.

The Task Force looks at the research already carried out to decide whether or not it thinks a solution can be reached by negotiation. It also checks:

* if the Crown has previously agreed to negotiate;
* if the claimants wish to negotiate all or part of the claim;
* that the person or persons acting on behalf of the claimants properly represents the areas, iwi, hapu and whanau concerned in the claim;
* that both the claimants and the Crown have a measure of agreement about the underlying facts of the claim (this does not have to include agreement on how these facts might be interpreted);
* that both the claimants and the Crown are prepared to abide by any final agreement. A final agreement is not complete until both parties have decided exactly how it is to be carried out;
* that the claim does not present new policy issues for the Crown which it has not had the chance to consider fully.

If the Crown Task Force accepts a claim for negotiation, it is placed on the Negotiation Register . Unlike the Tribunal registration system where claims are in date order according to when they were registered, this register is in priority order. A claim is likely to be given high priority on the Negotiation Register if one or more of the following criteria applies:

* the Crown had already agreed to negotiate the claim in the past;
* the Waitangi Tribunal or the Courts have encouraged the direct negotiation of the claim;
* the claim has been awaiting negotiation for a long time and no negotiation has been attempted;
* the claim would be a good example which could be used to help resolve similar claims;
* there is a reason which makes negotiation of the claim urgent.

Communications Booklet on the Direct Negotiation of Maori Claims

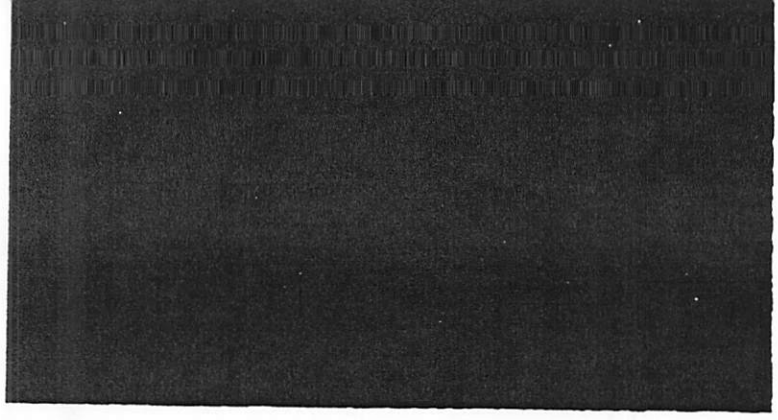
In recognition of the priority need to communicate and discuss the content of the policy pertaining to the direct negotiation of claims with Maori, a booklet detailing Government structures and policy and procedures for the submission and negotiation of claims was prepared, approved by the previous Government, and broadly circulated in September 1990.

The booklet emphasizes the interrelationship between the direct negotiation process and the mandate and work of the Tribunal. It is being used to both provide required information to Maori claimants as well as a basis for on-going consultations on possible improvements to the overall process and policy in the future.

The booklet sets out current policy for resolution of Treaty of Waitangi claims. Central to this policy are the 'Principles for Crown Action on the Treaty of Waitangi'.

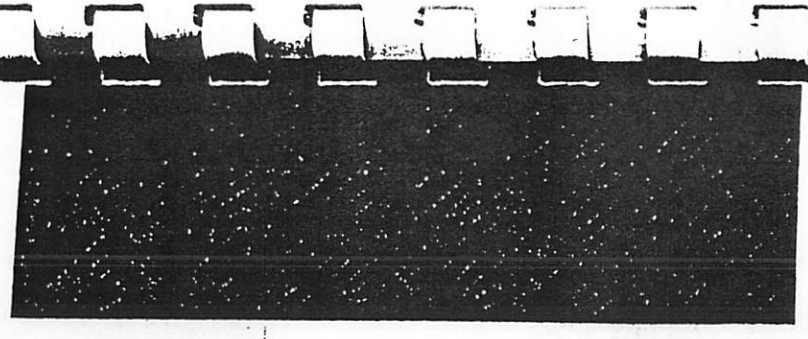
4 Claim: Principles p. 3

Te Haere Hāngai o ngā Tono o ngā Whakawhitiwhitinga Whakaaro i Waenganui i Te Iwi Māori me Te Karauna



"Kua turuturua e ngā roimata o Tāwhiri Matea, kua ākina e ngā tai o te marangai o te uira e timu ana e pari ana, ahakoa mau tonu ngā kupu. E kore ngā kupu o te Tiriti o Waitangi e taea te whakataha".

Nā Tīmoti Kiriwi ēnei kōrero i a ia ka kōrero ki a Kāwana Lord Ranfurly i Te Tii Marae i Waitangi 1899



HE KARERE NĀ TE MINITA MŌ NGĀ TURE

Nō te Tīhema 1989, ka whakapuakina e te Pirimia o Aotearoa ngā tūmanako a tōna Kāwanatanga kia noho tahi tātau ki te whiriwhiri ki te wānanga i ngā tono a ngā iwi Māori i raro i te mana o Te Tiriti o Waitangi.

He ara tēnei hei āwhina i ngā tono a ngā iwi Māori, hei tautoko hoki i ā rātau kaupapa i mua i te aroaro o Te Rōpū Whakamana i te Tiriti o Waitangi.

Ko te pukapuka e whai ake nei he pukapuka whakatakoto kaupapa, hei ārahi i ngā iwi me te Kāwanatanga hoki, kia mama ai te whakawhitiwhiti kōrero, whakawhitiwhiti whakaaro a tētahi ki tētahi.

He maha rawa atu ngā ara, kua whakamarangatia, kua hinga, kua whakatūria hei wānanga i ngā amuamu o te ao Māori, me te whakapae, he maha anō hoki ka pērā anō i roto i ngā tau e heke mai nei.

Mēnā kua tatū te whakatakoto a ngā iwi i ā rātau amuamu, ā, mēnā e whakaae ana te Kāwanatanga ki te ara kōkiri i te kaupapa rā, kātahi ia ka whakaae kia noho tahi tātau ki te whakawhitiwhiti whakaaro.

Tērā pea he kōrero a koutou hei tāpiri ki ngā kōrero nei, hei tini rānei i ngā kōrero o roto o te pukapuka nei. Tuhi mai:

Te Tumuaki
Te Tari Kaupapa – Tiriti o Waitangi
Private Box 180
Te Whanganui-a-Tara

Ko te Kāwanatanga e kī ana:

Ka rangona ngā tono ā iwi e te rōpū kua whakatūria e te Karauna hei titiro i ngā kaupapa ā iwi i raro i te maru o Te Tiriti o Waitangi, arā, te Rōpū Whāiti a te Karauna hei Kōkiri i ngā Kaupapa e pā ana ki te Tiriti o Waitangi (Crown Task Force on Treaty of Waitangi Issues). Ka manako te Karauna kia tika, kia pono hoki te haere o ēnei kaupapa, kia eke hoki ngā whakahaere o ngā kaupapa ki tā te iwi i pai ai, ki tā te Karauna hoki.

Nā
W Jeffries
Te Minita mō ngā Ture
TE WHARE PAREMATA, TE WHANGANUI-A-TARA, AOTEAROA

The Courts

The Courts generally, and the Court of Appeal in particular, have become increasingly involved in dealing with Maori claims and Treaty-based issues. Pressures from Court decisions have encouraged both Maori and the Crown to work on negotiated settlements to many of the major issues at hand.

Court of Appeal decisions of major importance include:

a) 1987 New Zealand Maori Council v Attorney-General [1987] 1 NZLR G41 (State Owned Enterprises);

b) the M R R Love v Attorney-General unreported judgement, 1988, (Petrocorp);

c) New Zealand Maori Council v Attorney-General [1989] 2 NZLR 142 (Forestry);

d) Tainui Maori Trust Board v Attorney-General [1989] 2 NZLR 513 (Coal Corporation);

e) Te Runanga O Muriwhenua Inc v Attorney-General (CA 110/90) (fisheries);

f) Attorney-General v New Zealand Maori Council (CA 247/99) (Radio spectrum).

Generally the Court uses its power to send the Treaty partners away to negotiate while ensuring that established or potential Maori interests are not unduly prejudiced in the meantime. The Court of Appeal has treated the Treaty as a living instrument that has to *"be applied in the light of developing national circumstances"*.

The Waitangi Tribunal

The Waitangi Tribunal was first established in 1975 with limited numbers, mandate and powers. The Tribunal now has the power to look at claims going back to 1840 and has eighteen members. The Tribunal makes findings of fact and interpretation and related recommendations, as opposed to binding orders (except in the special case specified in 1.4.2 below).

The Tribunal is unique:

a) It comprises people of both parties to the Treaty.

b) Its membership involves a mixture of legal and lay personnel.

c) It has adopted procedures whereby Maori claims are heard on Maori marae in accordance with Maori procedural law or protocol, while the Government's responses are generally held in Court room settings.

Currently the Waitangi Tribunal plays a limited role in negotiations. For a claim to be considered for negotiation, it must be registered with the Waitangi Tribunal. This step is essential to first, determine that the claim meets the criteria set out in Section 6 of the Treaty of Waitangi Act 1975 and, secondly, to ensure claimants have access to the Tribunal if negotiations are unsuccessful.

The Waitangi Tribunal plays the central role in mediations. The Treaty of Waitangi Act 1975, as amended, enables the Tribunal to refer a claim to mediation. The mediator, who is appointed by the Tribunal, must use his or her best endeavours to bring about a settlement of the claim.

Negotiations have been recommended in the Waitangi Tribunal's Ngai Tahu Report and will be required to address the recommendations in the Ngati Rangiteaorere Report.

Tribunal Powers

The Tribunal's general powers are defined in the Treaty of Waitangi Act 1975 (as amended). These include the power to make findings of fact and interpretation and related recommendations, but not the power to make binding orders except for the "clawback" provisions set out in the Treaty of Waitangi (State Enterprises) Act 1988.

This latter Act, reflecting an agreement arrived at between the New Zealand Maori Council and the Crown, provides the Tribunal with the power to make a binding recommendation for the return to Maori ownership of any land or interest in land transferred to State Enterprises or their successors in title.

Consideration of claims by non-Maori and the right to be heard

The Waitangi Tribunal is a specialist body whose express function is to inquire into claims by Maori alleging breaches of Treaty principles by the Crown. There is no provision in the Treaty of Waitangi Act 1975 for the Tribunal to inquire into, and make recommendations about, claims from non-Maori who happen to have interests in the same property as Maori claimants.

However, it is important not to conclude that the Tribunal operates on a "closed shop" basis or that it disregards the wider social context surrounding Maori claims. The Tribunal is required by law to provide an opportunity for other peoples' points of view to be heard. The Commissions of Inquiry Act 1908, which applies to the Tribunal, states

> (1) Any person shall, if he is a party to the inquiry or satisfies the [Tribunal] that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry.
>
> (2) Any person who satisfies the [Tribunal] that any evidence before it may adversely affect his interests shall be given an opportunity during the inquiry to be heard in respect of the matter to which the evidence relates.
>
> (3) Every person entitled, or given an opportunity, to be heard under this section may appear in person or by his counsel or agent.

The Crown Task Force on Treaty of Waitangi Issues · April 1991

In December 1989 the previous Government approved and announced a system for the handling of Maori claims and Treaty related issues which added to, altered and complemented previous structures. The system comprised:

a A Cabinet Committee on Treaty of Waitangi Issues;

b A Core Group of Officials;

c Strengthened units in the Department of Justice (the Treaty of Waitangi Policy Unit) and the Ministry of Maori Affairs.

The mandate for the Task Force included:

* Achieving clear consistent policy and legislative frameworks (especially relating to Maori interests in natural resources);

* The development of additional procedures for the handling of Maori claims, complementary to the procedures of the Waitangi Tribunal;

* The development of the negotiation register and process;

* The development of Crown positions for specific negotiations;

* Overseeing of implementation of negotiated agreements or Waitangi Tribunal recommendations accepted by Government or Court judgements;

* Communications.

The Terms of Reference of the Cabinet Committee on Treaty of Waitangi Issues as stated in the Prime Minister's memorandum of December 1990 are:

i To develop a clear and consistent policy and legislative framework in respect of Maori interests in resources provided for under the Treaty of Waitangi;

ii To develop and communicate clear procedures for the handling of Maori claims when they are received by the Crown;

iii To monitor the Negotiation Register so that Maori claims can be prioritised and handled in an orderly sequence;

iv To develop the Crown's position in respect of specific negotiations, Waitangi Tribunal hearings or Court proceedings;

v To ensure prompt implementation of negotiated agreements, Waitangi Tribunal recommendations accepted by the Government and Court judgements;

vi To monitor public awareness of, and attitudes to, Maori claims and to identify appropriate material to remedy misinformation;

vii To work within the priorities for action established for this Committee by the Cabinet Strategy Committee to reflect the Government's overall priorities;

The Officials Standing Committee on Treaty of Waitangi Issues (formerly called the Core Group of Officials)

The Officials Standing Committee on Treaty of Waitangi Issues is supporting the Cabinet Committee by fulfilling the responsibilities detailed below. Individual agencies are identified as having a lead role for specific areas of responsibility.

i assessing the interrelationships between Treaty-related questions, reconciling different pieces of legislation touching on Maori issues and ensuring consistent references to the Treaty in legislation: *Treaty Policy Unit (Justice) (lead), with Parliamentary Counsel Office and Ministry of Maori Affairs.* ~~TPK

ii coordinating the Crown's position before Waitangi Tribunal hearings begin: *Treaty Policy Unit (Justice).*

iii instructing the Crown Law Office in respect of the Crown's position at Waitangi Tribunal hearings: *Treaty Policy Unit (Justice).*

iv conducting the Crown's case in Treaty of Waitangi hearings and in the Courts: *Crown Law Office.*

v conducting direct negotiations with Maori on behalf of the Crown: *Treaty Policy Unit (Justice).*

vi implementing Tribunal recommendations accepted by the Government : *Department of Justice, in consultation with the Core Group of Officials.*

Treaty of Waitangi Policy Unit (Justice)

The Treaty of Waitangi Policy Unit was established by Cabinet Policy Committee at its meeting of 28 June 1988 (Pol (88) M 23/11). The Director of the Unit took up the position in January 1989. The broad function of the Unit was to advise the Crown on issues arising from the Treaty of Waitangi. This function relates to Officials Standing Committee on Treaty of Waitangi Issues responsibility (i) (assessing the interrelationships between Treaty-related questions, reconciling different pieces of legislation touching on Maori issues and ensuring consistent references to the Treaty in legislation).

Crown Law Office Treaty Issues Unit

Crown Law Office conducts the Crown's case in Waitangi Tribunal hearings and before the Courts. In recognition of the significant workload that flows from Treaty Issues and the need for specialist expertise in the field, the Crown Law Office established a discrete Treaty Issues Unit in August 1987.

The Unit is staffed by two Crown Counsel and two Assistant Crown Counsel. Counsel from this Unit, as well as other Crown Counsel, prepare and present legal submissions on behalf of the Crown. Crown Counsel have ultimate responsibiliity for the conduct of the Crown's case before the Waitangi Tribunal and the Courts.

The Unit has also developed its own research capability with five consultant historians working on contract. The Unit's historians, on instructions from Crown Counsel, conduct research, prepare submissions and give evidence. The Unit receives instructions as to the Crown's Treaty Issues policy framework and then relies on its own internal resources and expertise to conduct the Crown's case.

Treasury

Treasury's role, in the light of Government policy on the settlement of Treaty claims, is the provision of advice directed to the removal of uncertainties over property rights occasioned by outstanding proven claims (including those affecting proposed sales of Crown assets) through expeditious, fair, just and durable settlements that have regard to the Government's overall fiscal position.

Department of Prime Minister and Cabinet

The Department of Prime Minister and Cabinet chairs the Officials Standing Committee on Treaty of Waitangi Issues and manages the inter-departmental consultative process. The Chairman gathers together departmental advice, exposes options, reconciles conflicts, and ensures Ministers have access to contestable advice. The department relies on its knowledge of the overall framework of Government policy to ensure that the work of the Officials Standing Committee on Treaty of Waitangi Issues is consistent with Government's broader strategic focus.

E II R
NEW ZEALAND

CROWN LAW OFFICE

Our Ref : DOC 041/77

13 September 1993

The Director-General
Department of Conservation
PO Box 10420
WELLINGTON

Dear Sir

Draft Protocol for Department of Conservation and Crown Law Office: Participation in Waitangi Tribunal Claims

1. Further to our recent conversation I am writing to you to explore the various ways that we can move forward to facilitate the involvement of Department of Conservation ("DOC") officials in claims before the Waitangi Tribunal. I appreciate that your suggestion was prompted in part by recent discussions with the Chief Judge of the Waitangi Tribunal and the latter's view that having the relevant officials from a particular area or who are responsible for a particular policy under investigation before the Tribunal can often be of assistance to the Tribunal in its deliberations. While we agree with some aspects of that approach, the nature of the claims process and the Tribunal have changed with the result that it is necessary for the Crown to have a co-ordinated and consistent approach.

2. I understand that you have made this approach to us as it is this Office which co-ordinates the Crown's response to the Waitangi Tribunal and is ultimately responsible for the conduct of the Crown's case before the Tribunal.

3. Your suggestion is a welcome one and it is one which fits in with the approach that we have been trying to develop which is that this Office should be more pro-active in the claims' process so that where possible matters can be drawn to the attention of the relevant Department and dealt with, where possible rather more quickly than being dealt with at the end of or as a result of the Waitangi Tribunal hearing. Obviously, this has to be in keeping with overall Government policy in relation to Treaty claims.

4. I would envisage that the end result of our discussions would be as you suggested a very brief written protocol which sets out the manner in which we will keep each other informed as to relevant matters. It would also acknowledge the role of the Treaty of Waitangi Policy Unit in the claims process whether it be in instructing this Office on government policy with respect to the settlement of claims, or by the direct

JAL:18689

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DX 8161 Wellington Central

negotiation for the settlement of claims or negotiations arising from Waitangi Tribunal reports.

5. I can easily identify two situations in which contact would be of mutual benefit. First, in the longstanding complex historical claims such as **Muriwhenua** (post-1865) or **Taranaki** where a large part of the existing Crown land within the tribal rohe is conservation land. In this situation that in itself should be sufficient to trigger the protocol and the necessity for an initial approach to DOC. Your Department may well have valuable input as to the current attitude of iwi in the area and of urgent issues of concern to local iwi that may be raised within the context of a claim, for example, a new policy initiative which may impact on the approach the Crown is taking to the claim. There will also be situations where matters may be able to be resolved outside of the claim process under current statutory regimes, eg, the Historic Places Act with its protection regime for wahi tapu sites. Similarly our experience in the Te Paki Farm Park situation showed the benefits of a close liaison with this team and DOC officials, in that case the regional conservator. I could also see that it could be important where a claim has a more contemporary focus, where, for example, it is a claim relating to management.

6. **Second,** I see that in some urgent hearings such as the **Mohaka River** claim that have a direct bearing on the conservation estate or conservation issues it will be just helpful generally that your Department is aware of the claim. From our point of view I understand the regional solicitor from DOC in Napier was very helpful in the **Mohaka** claim as DOC had already been through the Planning Tribunal hearings relating to the river.

7. I note that because of our close working relationship with the Treaty of Waitangi Policy Unit we have a monthly meeting with them on all relevant matters of concern. I would not at this stage see a necessity for such a regular meeting with DOC. Although an initial meeting would be helpful so that we could meet the designated officials at DOC who will liaise with the Crown Law Office on these matters.

8. My tentative suggestions at this stage are that, first, for new claims which are filed or which no immediate action is required (ie they are given a file number and shelved), I will note that DOC should be sent a copy of the claim where clearly conservation issues arise. I note however that this will not always be apparent as the original statement of claim filed may be very brief and is often subject to a number of amendments. Further, not all matters with which the claim will ultimately be concerned are raised in the statement of claim as it undergoes a certain development during the claims process. Second, on current matters ie matters that are currently in hearing or matters that are given priority or urgency then it will be the responsibility of Crown Counsel assigned to inform DOC where necessary. I would suggest this being a very broad requirement and it would only be in situations such as, for example, claims relating to the Government's immigration policy where you would not need to be advised. In this context, I would see the protocol as reflecting a current practice. Crown Counsel would then contact the liaison person within DOC head office who

would then make their own assessment of whether your regional people needed to be involved.

9. I would certainly see the opportunity for communication to be mutually beneficial. It would be helpful if we knew of major policy initiatives by the Department that have an impact on the claims. For example, we are currently completing an opinion on national parks which is of course extremely helpful to be aware of in relationship to the claims that are affected. Another example of where it may have been helpful to have had that initial contact was during the **Mohaka** claim. Here a claim to a river bed was proceeding at the same time as the revesting of the bed of Lake Taupo.

10. I hope the foregoing represents the direction in which you wished me to take your suggestion. I will be happy to receive your advice as to how you wish us to proceed or to make contact with the relevant person in your department with whom we can develop the ideas in this letter.

11. I look forward to hearing from you or one of your officials.

Yours faithfully

Jennifer Lake
Crown Counsel

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ADDRESS BY BILL MANSFIELD,

DIRECTOR-GENERAL OF CONSERVATION,

TO WAITANGI TRIBUNAL MEMBERS' CONFERENCE

28 JULY 1993

The greatest gains for conservation in New Zealand will be achieved when all New Zealanders or the maximum number of New Zealanders are supportive of conservation and working for conservation. That means that we need the support of iwi Maori for conservation and we need the support of conservation and recreation groups.

The fact that there is some tension between these groups and iwi over a resolution of treaty claims is unsurprising but threatens to hamper progress in the achievement of conservation goals. The tension arises from different views of the protection of the natural world and is amplified by the histories of change in both the area of Maori land rights and also in the area of conservation.

Both changes in our society have come in part from a tradition of activism by groups who were minorities in their society. Those groups and people have been prepared to stand out from the crowd and to endure significant criticism to make their point. Over time they have gained greater support and changes have occurred.

What we see as an organisation talking both with iwi Maori on a regular basis and also working alongside conservation groups is that we have reached a point where both groups now see the other as being in power. Both see themselves as having an ownership interest and philosophy that needs to be recognised. Both look at things from a minority point of view, from a point of view of groups which are used to being outside of power but assume that the other group, which also has a history of being a minority, are now somehow in power and in control. There is a need for both sides of this debate to recognise the history and contributions that each other have made.

In his recent address to the annual meeting of Federated Mountain Clubs, the Minister of Conservation acknowledged the two sides of this debate. He said "at bedrock there are two fundamentally different views on Maori claims to the conservation estate. One view held very genuinely by many in the conservation movement is that the conservation estate belongs to everybody, that no one group in society has any particular claim to it and that all should share in the management of it.

Many people in this group have fought tremendous battles to achieve the current conservation estate, deserve substantial recognition of this, and feel that their vision of it must prevail. They are naturally extremely uneasy at any indications of a more even power sharing process, unless it can be confined to the advisory board mentality.

The second view is that while we may be one nation, we are in fact two cultures. Maori have specific treaty rights, and where they are expressed in statute, the courts will give recognition and definition to them.

These treaty rights give them a distinct and unique relationship in regard to not just the conservation estate but the whole fabric of New Zealand society.

They feel that, at the very least as equal treaty partners, they should have a significant say into how Crown assets are used.

There are many Pakeha, including conservationists, who uneasily straddle the two, rightly cherishing the conservation estate but also appreciating that bi-cultural diversity might require a little more than simply imposing their cultural vision on the other treaty partner. And there is a massive range of views in between".

The Minister noted that debate and honest questioning was beginning and said this was not only welcome but long overdue. "Because if both sides continue to snipe at each other from the safety of their fortified bunkers, then we will not make much progress."

The fervour with which conservation groups have advanced their claims within New Zealand relates to the remarkable natural history of this country and the rapid changes that have been made to the New Zealand environment.

The isolation of New Zealand was the key determinant in the evolution of the world's most unusual ecology. So unusual, that it has been described as "as close as we will get to the opportunity to study life on another planet". These islands were a long way from any other large landmass. Bird species were doing things here that they did nowhere else and they were doing it undisturbed by humans. This was the last large landmass settled by humans.

Imagine being here at the time Jesus Christ lived on the other side of the world. Yes there would be abundant kiwi and moa and kakapo and huia in the dense forests, seals and penguins on the foreshore. But there would be other things we have more difficulty imagining. There were Giant Weta performing the roles of small rodents. And the moa, weighing in at 170 kilo, would be at risk, and so would we, from the world's largest eagle. This bird, with a three metre wingspan and talons the size of tigers', is reckoned to have been able to drop from the sky onto its prey and take out the moa in a single strike.

Nowadays the only birds of prey menacing the Terrace sweep down in dark suits from multi-storeyed buildings. If people are doing the damage now, they were doing it from the time of their arrival on these shores.

Human impact on the natural world was expressed in three ways:

1. habitat destruction (burning forests)
2. mammal introductions (dogs, rats, cats etc.)
3. hunting (by both Maori and European)

These three factors act in concert and as a continuum.

People started burning forests, accidentally or deliberately, soon after they arrived here. From about 750 years ago to the arrival of Europeans about half the country's forest cover was lost. The rate of habitat destruction accelerated with the arrival of Europeans and half of the forest cover present on their arrival has now gone.

The arrival of the Maori brought kiore, the Polynesian rat, and kuri, the Polynesian dog. Many species of birds on these islands had evolved to be long-lived and thus slow or irregular breeders. The kiore bred at exponential rates and was the first predator with a good sense of smell - these islands were like a larder of protein for rats. Europeans brought a menagerie of animal predators and plant predators including Norway rat, ship rat, weasels, stoats, deer, goats and possums.

34 species of birds were lost in Maori times and a further 10 species have been lost since Europeans arrived. Human impact has seen the loss of about 44 species of land birds out of around 90 originally.

Both maori and pakeha societies responded to the initial loss of species and habitat that followed their arrival by developing a new relationship to the land, and a conservation ethic and practice designed for this new home. In both cases it took a considerable time to evolve the appropriate cultural practices, but in neither case were all the effects of human settlement able to be prevented or reversed. In particular the introduction of new species (e.g. rats, mustelids and possums) is an ongoing problem despite the Department's best efforts over a number of years.

In response to this history of pillage or progress or both (depending on your viewpoint) much has been achieved and a lot still needs to be done. New Zealand has achieved a great deal for conservation. A relatively large area of the country is under protection, the Department of Conservation looks after about a third of the country's land area and has responsibility for all of the coast line. The places under protection though, are really only representative of certain types of land. The largest types of land that are under protection are the big and beautiful places, mountains and higher altitude forest-places which were unlikely to be of use for other economic reasons, were important for soil and water conservation reasons, or were important for tourism and recreation reasons. It is only

relatively recently that we have been engaged in conservation for ecological reasons, for protection of a wide range of habitat. A lot of habitats and ecosystems are poorly represented in our conserved areas. These include coastal and marine environments, wetlands, high country grasslands and lowland forests.

New Zealand has made considerable advances in conservation because it has so much to lose but also so much that might be saved. Because Aotearoa was the last large landmass to be settled by humans dramatic changes have occurred and species have been lost. Many of the species types that have been lost in other areas of the world have not been lost on the islands of New Zealand but are at risk of being lost. New Zealand has about 11% of the threatened bird species in the world and this is one of the few places in the world where we may be able to halt the rapid tide of extinction that is occurring elsewhere in the world.

The extent of the responsibility requires one national organisation with a clear mandate for protection of people's heritage. Having one national organisation is considered essential for a number of reasons. An important advantage is the ability to set clear priorities and guidelines for species protection work, estate protection work, priorities for the acquisition of new areas or protection of previously unprotected habitats. That strength in setting national priorities also enables the organisation to effectively target resources between various conservation activities, such as species protection, visitor facilities, the protection of historic sites, developing public awareness of conservation issues and seeking the involvement of all elements of the community including tangata whenua. Another major advantage is the ability to develop and effectively utilise specialist expertise, e.g. in species management and pest control. In addition, resources can be provided from taxes and allocated to highest priority areas regardless of location. This national taxation reflects the importance of conservation values to all New Zealanders, and a further advantage of the national system is its ability to represent and respond to the interests of all New Zealanders. This level of national coordination is potentially stronger than that existing in any other conservation organisation in the world.

This national perspective is reflected in the provisions of the Conservation Act. In general:

a. The land is to be managed for conservation purposes. Conservation is defined as the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.

b. The land cannot be disposed of, or have its management category changed, without a public process.

c. Public access to the land is free, although use of facilities (such as huts) may be charged for.

d. Businesses cannot be undertaken on the lands without a permission. There will generally be a rental charged for use.

e. In managing the lands, the Department must give effect to the principles of the Treaty of Waitangi.

There is one other feature that marks out New Zealand's conservation institutions. In world terms New Zealand has a remarkable level of direct citizen involvement in conservation decision making. Citizens have been a part of the creation of protected areas and of the management particularly of national parks and reserves. They are now involved in the oversight of decisions through the New Zealand Conservation Authority and through the Conservation Boards. Those citizen boards are responsible for the commenting on and approval of strategies that govern the whole of the conservation lands and waters of New Zealand. An indication of the significance of this devolution of powers in international terms, was that at the last international parks congress, held in Venezuela in early 1992, our Minister of Conservation was the person who was asked to lead the discussion on citizen involvement in management of protected areas.

The one element that has been lacking in the past from the process of citizen participation in the creation and management of the estate has been the involvement of iwi. (The notable exception was the gifting of the original area of the Tongariro National Park by Te Heu Heu which marked the beginning of the national park system within this country.)

Maori and iwi involvement have increased significantly in the last few years through the work of the Department of Conservation. Firstly, we have a network of Kaupapa Atawhai managers throughout the country to build closer links between the department and iwi. Secondly, Maori representation has been strengthened on the New Zealand Conservation Authority and conservation boards. There are three Maori people who are members of the 12 member Authority, and there are Maori members on each of the 17 conservation boards. A third level of involvement has been the close working relationship with iwi Maori in the preparation of the Conservation Management Strategies that will govern the management of conservation lands and waters for the next 10 years. In most cases conservancies, the regions of the department, have worked closely from the beginning with representatives of iwi Maori in preparing their Conservation Management Strategies.

In addition, for certain lands and issues there have been special arrangements made to provide iwi with greater involvement. For example, a Kapiti Marine Reserve committee has been established to provide a greater involvement of iwi in decision-making about the reserve than would be possible through the conservation board which would otherwise be responsible. This recognises the particular association of iwi groups with the island and the fact that part of the island is Maori owned freehold land.

The claims process has changed the culture of the wider New Zealand community to a greater understanding of its responsibilities to its treaty partners. This, and the effect of the process on iwi themselves, has been an important factor in the greatly increased involvement of Maori in conservation decision-making. But the claims process has, to a degree, also stood in the way of the working through of successful models for conservation consultation and decision-making. The focus of both partners on claims resolution has diverted attention away from the development of partnership models. In part this is because the claims process involves significant economic matters, which have been given a higher profile and/or urgency than conservation management issues.

Arising from the claim process have been expectations that compensation for particular grievances will involve the return of crown owned land. Given that the largest remaining land manager for the crown is the Department of Conservation and the conservation estate is the largest remaining body of crown land, there has been an assumption in some quarters that there would be some significant changes in the ownership of areas of the conservation estate.

Dealing with Treaty issues is not this simple, however.

The Treaty provides, in Article I, for the exercise by the Crown of its right to govern in the best interest of all New Zealanders. The act of governing has changed over time, reflecting changes in community concerns and in the physical, economic and social conditions of the country. One outcome of this process of government is the conservation estate, areas held to protect natural and historic resources and to provide for public recreation and enjoyment. As discussed earlier, the role of government in ensuring conservation outcomes is an ongoing and increasingly important Crown duty.

It is because of this ongoing conservation role of government that Ministers have said that they do not generally see the conservation estate being available as compensation for Treaty grievances. In a series of speeches and other statements, the Minister of Conservation and the Minister in Charge of Negotiations have publicly stated that:

* it is not the Crown's intention to dispose of conservation lands but rather to have them remain in the conservation estate which belongs to all New Zealanders;

* nor is it the intention to privatise the conservation estate, compromise the quality of conservation management, or deny public rights;

* power may need to be shared between Maori and pakeha a little more fairly than it has in the past, by greater Maori involvement in the management of the estate.

They have also indicated, however, that there may be some limited exceptions to these general rules, such as where land is no longer required for conservation purposes.

In relation to the sharing of power through greater Maori involvement in management of the estate, a wide range of levels and types of involvement can be selected from, with an appropriate arrangement tailored to each situation.

The level of involvement may vary between areas, or between different issues in relation to one area. For example, it might be appropriate for iwi to have a veto right over the way in which Maori history is presented in interpretation material, but be inappropriate for them to have any involvement in the choice between two equivalent concession applications where one of the applicants was the iwi.

In between all or nothing is a range of other possible types of involvement. For example, members of iwi can be appointed to decision-making bodies (such as conservation boards and reserve boards), iwi could have a statutory right to be consulted and to have their views given particular regard, iwi could have membership on an advisory body, or iwi could undertake an active management role. In addition to active involvement, the Crown could potentially take action to provide increased public recognition of the iwi interest in a particular area.

What the department is looking for is not a single arrangement applied regardless of circumstance, nor a static solution that does not evolve over time. Rather, it will be seeking the development over time of an effective conservation partnership that achieves the Crown's conservation responsibilities, while also recognising the ongoing interest of iwi. The ideal solution for each area, in the long term, will be an effective partnership between Crown and iwi. In practice this is unlikely to evolve as a partnership with equal participation in management, but rather as two partners who have jointly agreed that a particular sharing of participation is appropriate at that time in that place.

We are a long way from this ideal.

Such an effective partnership cannot be created overnight. It must be based on an acceptance of the role of each partner under the Treaty and of their relative skills in conservation management, and the development of understanding by each partner of the perspective of the other partner. This will take time. In addition, the Crown cannot operate in isolation from the public, whose interests it must represent. The partnership must be supported by all New Zealanders.

One issue that needs to be grappled with before we can reach that point is the difference in the traditional approaches by Maori and Pakeha to conservation. The Maori ethic was generally based on ensuring sustainable management across the entire resource with tangata whenua recognised as an integral part of the resource. The Pakeha approach tends to identify two different management goals. Sustainable management is reserved for private property resources.

Public conservation lands however are areas set aside for their intrinsic values and to allow enjoyment by all people, provided that doesn't damage the environment.

Another issue is how to integrate the conservation information and knowledge that comes from present day science and that which derives from Maori tradition and practice.

In summary, the Department has developed a significant capacity, particularly through its Kaupapa Atawhai section, to work with iwi and to ensure steady progress towards this ideal of partnership.

While these questions are being worked through our commitment is clear: to strengthen our understanding of and ability to work with iwi Maori, and to ensure effective and active consultation on all key conservation decisions.

Department of Conservation
Te Papa Atawhai

File ref: WIT 0002
(WDMARSH.LTR)

10 February 1994

Ms Barbara Marshall
Federated Mountain Clubs NZ (Inc)
PO Box 1604
WELLINGTON

Dear Ms Marshall

Thank you for your letter of 1 February 1994 in which you requested a copy of the Policy Booklet/Guide for Kaupapa Atawhai Managers, concerning Treaty of Waitangi issues.

I am attaching an information package about the Treaty of Waitangi claims process which was provided to Kaupapa Atawhai managers in October 1993. It is the only booklet meeting your description.

You will see from its index that I have excluded two parts. The first is page three. That information is believed to be more closely connected with the functions of the Department of Justice than the Department of Conservation. Accordingly, I have, under section 14 of the Official Information Act 1982, transferred your request for that paper to the Director of the Treaty of Waitangi Policy Unit in the Department of Justice.

The second part comprises pages 15, 16 and 17, which have been deleted in accordance with section 17 of the Act. They contain extracts from legal opinions and withholding them is necessary to maintain legal professional privilege (section 9(2)(h) of the Act refers). There is no countervailing public interest which makes it desirable to release that information in the circumstances of this case.

You have the right, by way of complaint under section 28(3) of the Official Information Act to an Ombudsman, to seek a review of the decision to delete pages 15, 16 and 17.

Head Office
P.O. Box 10420, 59 Boulcott Street, Wellington, New Zealand
Telephone 04-471 0726, Fax 04-471 1082

Pages 1, 2, 4, 5, 9, 10, 14, 18, 20, 21, 22 and 23 are from a paper already released by the Department of Justice.

Yours faithfully

Murray Hosking
Deputy Director-General
for Director-General

The Mohaka River Report 1992

(Wai 119)

Waitangi Tribunal Report: 6 WTR

BROOKER AND FRIEND LTD
WELLINGTON
1992

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

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

3.5 Deed of Sale

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

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

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

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

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

The 'McLean translation' states:

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

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

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

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

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

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

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

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

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

The 'McLean translation' states:

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

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

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

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

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

3.6 Was Any Part of the Mohaka River Sold?

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

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

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

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

Cordry Huata maintained that:

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

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

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

Mr Brown submitted that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr Butterworth considered that:

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

Yet with respect to the river boundary he concluded:

> There is an ambiguity because the boundary is placed in the water but there is no suggestion that it went into the middle of the river or that people were selling the river in the sense of the river bed and water.
>
> Given the holistic cast of Maori thought, the notion that their river could be divided into fractions was beyond their experience.
>
> There is little doubt that McLean wanted to create this ambiguity so that he could later claim to the Waikare people 'that half the river was theirs, and half the White people's' ... The local people apparently accepted the compromise of allowing a passage for timber and boats. It does seem that given Polynesian traditions of hospitality and courtesy that they may simply not have disputed the issue with McLean. At the time of signing what Ngati Pahauwera would have believed they were giving was a user-right of access to water stock and to use the river for fording and for transport; this would fit well into Maori customary practice. (B21:13)

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

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

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

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

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

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

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

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

3.7 Ad Medium Filum Aquae Presumption

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

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

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

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

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

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

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

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

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

Examples of surrounding circumstances in the Whanganui river were:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

References

1 J G Wilson and others, *History of Hawke's Bay* (Wellington 1939) p 193

2 James Rutherford, *Sir George Grey, K.C.B., 1812-1898 A Study in Colonial Government* (London, 1961) p 182ff

3 *Dictionary of New Zealand Biography* (DNZB), I:M11

4 ibid:T28

5 Te Poihipi & others to governor-in-chief, G7/6/61; A21(d):827

6 McLean journal entry, 7 January 1851; A21(e):1241

7 ibid 28 January 1851; C4(a):80. As Stephanie McHugh, a Crown researcher, pointed out, the meaning of McLean's metaphor is rather obscure. In her opinion it was likely he was referring to the Ahuriri block, implying perhaps that once an inland area of the river had been sold the coastal stretch would follow (C4:12).

8 ibid, 29 January 1851; C4(a):81

9 ibid, 5 March 1851; C4(a):74

10 ibid

11 AJHR 1862 C-1, p 309; A5(a)

12 MS Papers 32 McLean Folder 675c; C4(a):136

13 Park to McLean, 7 June 1851, CS1, 1852/177; A21(d):785

14 *The Te Roroa Report 1992* (Brooker and Friend Ltd, Wellington, 1992) page 50

15 According to the historian J G Wilson, Park prepared a map of Hawke's Bay from the Mohaka river to Porangahau dated December 1851. The original in the Lands and Survey Office, Napier, was destroyed in the 1931 earthquake and a tracing in Wilson's possession was used to make a copy to replace it (Wilson, *History Of Hawke's Bay*, pp 202-203; C4:25). This copy is presumably the 1852 Bousfield map now held by Dosli in Napier which shows the Mohaka Block as consisting of about 85,700 acres and records more place names up both the rivers than were included on the survey plan; also existing pack tracks, and on the south side of the Mohaka mouth, the whaling station (J D H Buchanan, *The Maori History and Place Names of Hawke's Bay*, p 199)

16 McLean journal, 4 December 1851; A21(e):1370

17 H H Turton *Maori Deeds of Land Purchases in the North Island of New Zealand*, vol II (Wellington, 1877) pp 487 & 491

18 For example, the *Te Roroa Report 1992* p 38

19 J G Wilson et al, *History of Hawke's Bay*, p 196

20 J G Wilson *The Founding of Hawkes Bay* (Napier, 1951) p 24

21 Oral evidence of George Hawkins, 4 May 1992

22 McLean to Grey, AJHR 1862 C-1, p 309; A5(a)

23 MS Papers 32 McLean Folder 675c; C4(a):136

24 McLean journal, 6 April 1855, C4(a):98

25 *Ngai Tahu Sea Fisheries Report 1992* (Brooker and Friend Ltd, Wellington, 1992) p 167-168

26 *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9) reprint (Brooker and Friend, Wellington, 1991): 180-181; see also *Report of the Waitangi Tribunal on the Muriwhenua Claim* (Wai 22) (Waitangi Tribunal Division, 1988) p 188; *The Ngai Tahu Report 1991* (Wai 27 (Brooker and Friend, Wellington, 1991) p 223

27 AJHR 1950 G-2

28 *In Re the Bed of the Wanganui River* [1955] NZLR at page 438

29 *The King* v *Morison* [1950] NZLR 247, 254

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

5.5 Treaty Findings

The words of the Treaty

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

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

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

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

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

Rangatiratanga and kawanatanga

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

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

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

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

> Maori understood the cession of sovereignty in terms of some distal relationship .... the Maori chiefs were trying to preserve a form of autonomy that did not amount to complete sovereignty but a kind of local self-government in Maori districts ....
>
> Tino rangatiratanga ... refers not to a separate sovereignty but to tribal self management on lines similar to what we understand by local government.[24]

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

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

In addition the *Ngai Tahu Sea Fisheries Report* emphasised that an important element in rangatiratanga is trusteeship.[26]

To use the words of the Ngai Tahu tribunal:

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

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

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

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

In the *Muriwhenua Fishing Report* the tribunal said:

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

But the tribunal immediately went on to say:

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

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

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

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

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

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

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

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

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

Our conclusions

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

5.6 Recognition of Treaty Principles by the Planning Tribunal

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

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

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

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

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

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

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

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

> The need for greater recognition of the traditions, cultural values and physical requirements of the Maori people.
>
> The need to foster the development of Maori land and resources according to the needs and aspirations of the people (B17:appendix D, p 41).

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

The Resource Management Act

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

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

Chapter 6

Conclusions and Recommendations

6.1 Principles of the Treaty

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

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

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

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

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

Mr Justice Cooke:

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

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

Mr Justice Richardson:

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

Mr Justice Somers:

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

It is this feature which I think dominates most discussions about the Treaty and which is at the heart of s.9 of the State-Owned Enterprises Act. The primary provision of the Treaty relevant to the present case appears to me, as I have said, to be the guarantee of the full exclusive and undisturbed possession of the property of the Maori of whatever kind so long as they wish to retain it. Breaches of this undertaking have occurred.[3]

Mr Justice Casey:

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

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

Mr Justice Bisson:

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

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

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

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

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

6.2 The Costs of Bringing the Claim

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

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

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

6.3 Conclusions

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

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

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

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

6.4 Recommendations

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

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

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

6.5 Concluding Comments

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

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

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

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

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

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

References

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