Rangahaua Whanui National Theme q

INLAND WATERWAYS: LAKES

BEN WHITE

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LIST OF ABBREVIATIONS

AJHR	*Appendices to the Journals of the House of Representatives*
AJLC	*Appendices to the Journals of the Legislative Council*
app	appendix
ch	chapter
CFRT	Crown Forestry Rental Trust
DNZB	*Dictionary of New Zealand Biography*
doc	document
ed	edition, editor
encl	enclosure
fn	footnote
GBPP	*Great Britain Parliamentary Papers*
GLR	*Gazette Law Reports* (New Zealand)
JPS	*Journal of the Polynesian Society*
LINZ	Land Information New Zealand
MA	Maori Affairs series
MA-MT	Maori Affairs Maori Trustee series
NA	National Archives
no	number
NZPD	*New Zealand Parliamentary Debates*
NZLJ	*New Zealand Law Journal*
NZULR	*New Zealand University Law Review*
p, pp	page, pages
para	paragraph
pt	part
RDB	Raupatu Document Bank
rod	record of documents
rop	record of proceedings
s, ss	section, sections (of an Act)
SASR	*South Australian State Reports*
sec	section (of this report, or of an article, book, etc)
sess	session
vol	volume
Wai	Waitangi Tribunal claim

THE AUTHOR

My name is Ben White. I was born and raised in Christchurch. After graduating from Canterbury University in 1992 with a degree in New Zealand history, I completed a Masters degree in resource management at Lincoln University and Canterbury University. As part of this program I took honours papers in New Zealand history and Maori studies. I also completed a dissertation that examined conflicts surrounding the possibility of using conservation estate lands in the settlement of Treaty claims.

Since being employed by the Waitangi Tribunal in April 1995, I have researched and written reports on the McKee oilfield, the West Coast settlement reserves, and with Suzanne Woodley, the acquisition of the Puketapu blocks for the New Plymouth Airport. Since 1996, I have been the claims facilitator for the Wellington region.

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INTRODUCTION

This report is part of a series of national theme reports written for the Waitangi Tribunal's Rangahaua Whanui project. As is stated in the Tribunal's practice note of 23 September 1993, the Rangahaua Whanui project was undertaken to provide a historical review of relevant Crown policy in order that claims can be properly contextualised.

This Rangahaua Whanui report (National Theme Q) was originally to provide an overview of Crown policy in relation to harbours, the foreshore, and inland waterways. At the outset the project was divided into two parts: Richard Boast was commissioned to prepare a report on the foreshore; and the present author commissioned to undertake a project on inland waterways. As work progressed on the inland waterways project, however, it became apparent that the lakes aspect of it was in itself a major undertaking that required extensive research. It was therefore decided by the Rangahaua Whanui advisory group to limit the parameters of the report so as that it only dealt with lakes. Another factor bearing on this decision was that the Waitangi Tribunal will be issuing substantive reports on both the Te Ikawhenua Rivers claim and the Whanganui River claim in the near future.

Central to this report is the argument that the Crown considered that it should be the owner of all lakes in New Zealand. It would appear, though, that this objective never found expression in a clear policy. Rather it remained a nebulous (even subconscious) imperative that drove Crown officials. Certainly there was never any systematic attempt to secure title to lakes either by purchase or decree. Instead the Crown tacitly assumed it held rights in lakes, only overtly asserting these rights in the face of a claim by Maori to the ownership of a particular lake. Given this context, it was decided that the best way to arrive at a sense of the policies and practices of the Crown in respect of lakes was to structure this report around a series of case studies concerned with some of the major contests as to the ownership and control of lakes in New Zealand.

A feature of the way in which the Crown dealt with lakes in New Zealand has been the arbitrary distinction made between waterways and land. Despite the situation at English common law whereby the ownership of the beds of rivers and lakes accrues to the owner of riparian land, the Crown's approach has generally been to try and separate out the ownership of each. It is likely though that iwi considered land and water to be parts of a whole, with the rights in each being too a large extent coterminous. In many ways the approach adopted in this report perpetuates the western tradition of making these somewhat arbitrary distinctions between land and water. In the case study chapters, the history of particular lakes is approached with minimal reference to the history of the landscape in which they existed. It may be of some concern that the histories of lakes contained in this report are generally viewed in isolation from the catchments in which they exist. Although the interconnections

between lakes, their tributaries, and surrounding lands are axiomatic, various exigencies have meant that a more holistic approach could not be adopted.

A major concern, given that lakes are not considered in relation to their catchments in this report, is that swamps receive little attention. In New Zealand's historiography there is a paucity of studies relating to waterways. But whereas there has been some work done on rivers and lakes, swamps have received virtually no scholarly attention. This has much to do with the way in which Pakeha have regarded swamps. With few exceptions, swamps have historically been seen as an impediment to the realisation of a bucolic paradise in New Zealand. And while the scenic qualities of lakes and rivers captured the imagination of some Pakeha settlers, grounded in traditions of the romantic sublime, swamps have never been held in such esteem. This contrasts markedly with the attitudes of Maori for whom swamps were often an important source of fish, birds, and plants. In the colonisation of New Zealand, rights to swamps generally passed with the title to the land in which they were situated. However, the historiography concerned with the alienation of Maori land in New Zealand has had little regard for the importance of swamps to Maori, and the impact of the loss of access to these resources. Swamps are only touched on in this report (mostly in the context of legislation that enabled their drainage) and they remain a phenomenon that requires a great deal of further research.

Another aspect of waterways in New Zealand that receives only a perfunctory treatment in this report is Maori customary law as it pertains to inland waterways. Although the focus of this report is on Crown action and policy, a crucial consideration in this is the manner in which customary law and principles of tenure were accommodated (or otherwise dealt with) by successive governments. The nature of Maori customary rights in relation to lakes is particularly important given the claim repeatedly made by the Crown that lakes were not subject to Maori customary title. However, a comprehensive consideration of Maori customary law and tenure in relation to lakes was well beyond the skill and expertise of the present author. In the case study chapters of this report, where evidence was received by the Native Land Court in connection with customary rights, this is recounted, along with what secondary source material exists, and some tentative conclusions drawn.

To provide a context in which to locate the case study chapters – especially the legal issues involved – this project begins with a survey of English common law and legislative interventions in New Zealand relative to waterways. In this chapter the key principles of common law that pertain to lakes are traversed, and an examination undertaken of how this law has found expression in New Zealand. The chapter then turns to a consideration of legislative interventions by successive governments in respect of waterways. The ambit of this survey is relatively wide, and includes legislation pertaining to swamp drainage, flood protection, fisheries management, and water rights. The case studies of the major lakes are contained in chapters two to seven. After starting with the Wairarapa lakes (chapter 2), the report proceeds to examine Lake Horowhenua (chapter 3), the Rotorua lakes (chapter 4), Lake Waikaremoana (chapter 5), Lake Taupo (chapter 6), and Lake Omapere (chapter 7). Generally these chapters are structured along similar lines. From the evidence

available, the nature of the uses made by Maori of the lake in question is discussed along with a consideration of the way in which rights were held in the lake. A detailed consideration of the history of the ownership and management of the lake is then undertaken. In particular, emphasis is placed upon what can be adduced from this evidence as to the actions and policies of the Crown in relation to lakes. Where agreements or settlements were reached as to the ownership of the lake, these are analysed. In chapter 8 the themes that emerge in the case study chapters as to Crown policy and action are brought together, along with those pertaining to Maori customary rights.

Where extensive primary research has already been undertaken on particular lakes, secondary sources have been relied upon as a basis for the case study chapters. In particular, chapter 3 on Lake Horowhenua draws heavily on Keith Pickens' work (undertaken as part of the Wellington district Rangahaua Whanui report), and chapter 5 on Lake Waikaremoana is based upon Emma Stevens' report on the ownership of the lake (written for the Crown Forestry Rental Trust). Minimal use was made of primary source material in these two chapters. Chapters 4 and 5, which deal with the Rotorua lakes and Lake Taupo respectively, draw on various secondary sources but also rely on archival resources. Only chapters 2 and 7 (on the Wairarapa lakes and Lake Omapere respectively) are based almost entirely upon primary source material. Virtually all the primary documents consulted in the course of researching this project are contained in correspondence files of various Government departments. An important source for information on fisheries has been Suzanne Doig's doctoral thesis on Maori customary freshwater fishing rights – particularly her work on Lakes Taupo and Wairarapa. As a cogent and rigorous study of freshwater fishing rights, this work should be referred to if further information on this subject is sought. In order to engender an understanding of the wider context for the contest over the ownership of the lakes, each of the case study chapters should be read in conjunction with the relevant Rangahaua Whanui district report.

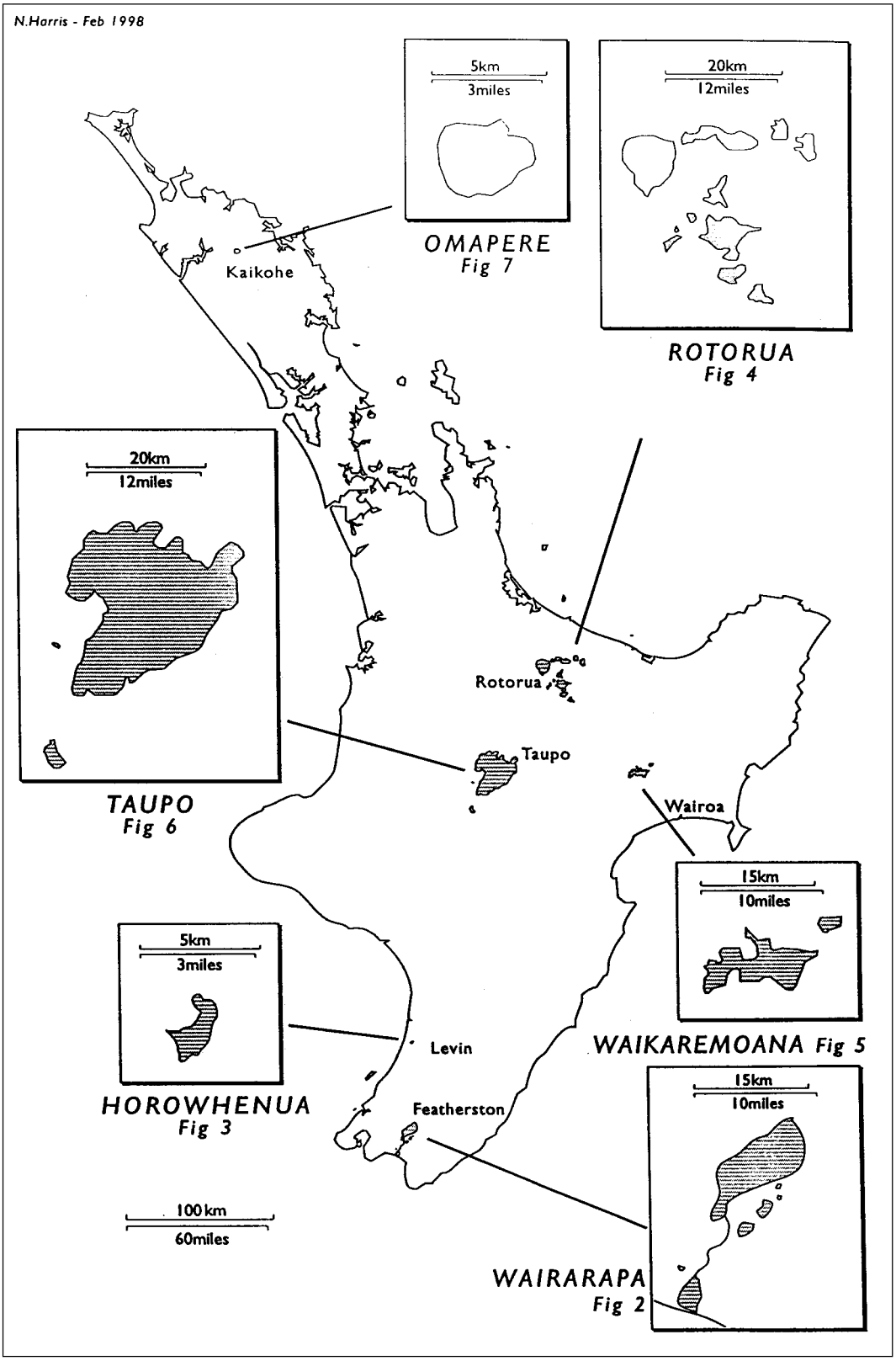

Figure 1: Locations of lakes

CHAPTER 1

WATERWAYS AND THE LAW

1.1 Introduction

Generally the law was the instrument used by the Crown to secure control, and in many cases the ownership, of New Zealand's waterways. From the mid-nineteenth century it is apparent that the Crown was attempting to establish itself as the owner of New Zealand's waterways. In pursuing this policy, a pattern is apparent. English common law presumptions were asserted insofar as they could be relied upon to secure rights for the Crown. But if these presumptions could not achieve this objective, common law was modified by legislative intervention. Such interventions initially saw the Crown assuming the right to manage and control waterways. But later confiscatory measures were initiated to vest exclusive rights in the Crown in such riverbeds and all natural waters.

In the Crown's quest for the ownership and control of lakes in New Zealand, a crucial consideration is the nature of the interface between Maori customary tenure and common law – especially the extent to which the latter accommodated the former. An important issue in this interface was the relationship between ownership and use rights under Maori and English law. Maori rights in waterways can be seen as being primarily about use rights, from which claims to ownership derive. However, under English law the reverse was the case: the right to use and manage a resource flows from the ownership of it. The way Maori were forced to reconceptualise their rights and customary law in order that they be cognisable under English common law, is one of the key issues of the colonial encounter in New Zealand. A full consideration of this, however, is beyond the scope of this project.

The endeavour of the Crown to establish itself as the holder of paramount rights in waterways was very much related to the imperatives that drove its colonisation of New Zealand. To ensure the long term viability of the colony, it was considered important to develop industries other than ones based solely on the extraction of natural resources such as gum digging and whaling and sealing. In this regard the establishment of an agricultural sector was seen as critical. And with the advent of refrigerated shipping in the late 1880s and the huge European markets that this opened up, the demand for land suitable for dairy farming was even greater. Hence the draining of swamps and mitigation of flooding (operations that often involved interference with rivers and lakes) to bring more land into agricultural production, was equated with the 'national interest'. The country's future lay in sheep and cattle, not eel and koura. In realising this future, it was claimed that the rights of Maori and

Pakeha were on the same footing, and that both must yield to the national interest. But invariably the 'national interest' was identical to that of the Pakeha farming sector, and in conflict with traditional Maori economic practices.

Although this report is about lakes, in considering legislation it is necessary to employ a wider focus given the interconnections that exist between lakes, swamps, and rivers. Often decisions made in relation to swamps, for example, had a profound effect upon lakes. This chapter begins with an examination of principles of English common law as they pertain to lakes. It then proceeds to examine how this law has found application in New Zealand, and poses the question of who, as a question of English law, owns the beds of lakes in this country. A survey of legislation that pertains to waterways follows. In particular, this section looks at the statutory regime put in place to manage freshwater fisheries, at legislation that enabled the drainage of lakes and swamps, and Acts that vested use and proprietary rights in the Crown.

1.2 Lakes at Common Law

As will be shown in the case studies, successive governments have at various times attempted to secure rights to New Zealand's lakes predicated upon precepts of English common law. An obvious issue in relation to these attempts is how applicable such precepts were in New Zealand with its long history of pre-colonial settlement, and where Maori customary tenure was recognised as being a burden upon the Crown's title. Although a comprehensive consideration of this is beyond the scope of this paper, a major issue is how Maori rights and relationships with the environment were often adjudged solely in relation to western principles of ownership. Although this report does not attempt a general analysis of Maori customary law in relation to lakes, this is a consideration in the case study chapters that follow this one. And the principle that clearly emerges from those examples, and upon which this entire report is premised, is that iwi possess bodies of law that pertain to lakes and other inland waterways.

The inappropriateness of applying precepts of common law to waterways in New Zealand is particularly apparent in relation to the separation that is made at common law between the ownership of the bed of a lake and its waters. The Crown on many occasions argued as a point of law that the ownership of the bed of a lake was a concept that was foreign to Maori customary law, and that consequently lakes were incapable of being owned by Maori. In regard to this contention the views of Judge Acheson in his 1929 decision as to the ownership of Lake Omapere are instructive. He observed that:

> The bed of any lake is merely a part of that lake and no juggling with words or ideas will ever make it other than part of the lake. The Maori was and still is a direct thinker and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soils that comprise a mountain. In fact in olden days he would have regarded it as a rather grim joke had any strangers asserted that he did not possess the beds of his own lakes. A lake is land

> covered with water, and it is part of the surface of the country in which it is situated, and . . . it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a stream.[1]

It would seem nonsensical to contend that in traditional Maori society were the bed of a river or lake to become dry land, that land would not be rightfully claimed by those that had previously held rights in the waterway. This example stands as testament to the huge differences between the way in which nineteenth-century Maori and colonial officials grounded in English common law, viewed the world – especially environmental phenomena. In the context of the ownership of lakes, this disparity gave rise to a mutual non-comprehension which in some respects has endured until the present.

But regardless of the relative propriety of the imposition of common law in New Zealand, the orthodox view is that Britain's acquisition of sovereignty in New Zealand brought with it the automatic application of British law.[2] This was confirmed by statute in 1858, and re-enacted in 1908.[3] And although there would appear to have existed the possibility of integrating aspects of Maori customary law into English law in New Zealand 'so that it reflected the real circumstances of time and place', this was never seriously considered.[4]

1.2.1 Ownership of lake beds at common law

In respect to lakes in England, it is clear that at common law, the Crown does not have prerogative rights to the beds of lakes. *Halsbury's Laws of England* states that the 'soil of lakes and pools, even when they are so large that they might be termed inland seas, does not of common right belong to the Crown'.[5]

It is agreed that when a lake is situated wholly within a single block of land, title to the bed of the lake resides with the owner of the land in question.[6] This view appears to have been accepted by the Crown in New Zealand. However, the situation in respect to lakes that are abutted by more than one property, is somewhat less settled. Essentially there would seem to be two possibilities: the title to the lake bed is shared *ad medium filum aquae* by the owners of riparian lands; or title resides with the Crown. The doctrine of *ad medium filum aquae* holds that title to the bed of a river or lake is divided between the adjacent riparian landowners – the rights of each extending to the midpoint of the river or lake.[7] This presumption of ownership by

1. Bay of Islands Native Land Court minute book 11, 1 August 1929, p 7
2. See Law Commission, *The Treaty of Waitangi and Maori Fisheries – Mataitai: Nga Tikanga Maori me Te Tiriti o Waitangi*, preliminary paper no 9, Wellington, Law Commission, 1989, p 139.
3. English Laws Act 1858, s 1; English Laws Act 1908, s 2
4. Law Commission, p 142
5. *Halsbury's Laws of England*, 4th ed, London, Butterworths, 1984, vol 49, p 219
6. Ibid; H J Coulson and U A Forbes, *The Law Relating to Waters: Sea, Tidal and Inland*, London, Henry Sweet, 1880, p 98
7. Property Law and Equity Reform Committee, 'Background Report on Ownership of River Beds', in *Interim Report on the Law relating to Water Courses*, Wellington, 1983, p 3; see also *Halsbury's Laws of England*, vol 49, p 215

riparian proprietors refers only to the origin of the title. The title to the bed of the lake and the adjacent land are not inseparably connected: an owner may, for example, retain one and alienate the other.[8]

Coulson and Forbes, in their 1880 text, *The Law Relating to Waters: Sea, Tidal and Inland,* observe that the doctrine of *ad medium filum aquae* applies to all inland waterways regardless of whether they are lakes or rivers, with the possible exception of large lakes where the rule might cause inconvenience. However, they state that 'modern' decisions of the courts had removed that doubt. In *Bristow v Cormican*, an 1877 case concerning a large lake in Ireland, the court ruled that 'the Crown has no *de jure* rights to the soil and fisheries of large non-tidal navigable lakes.'[9] This view was reiterated by Lord Macnaghten in his decision in the 1911 case *Johnston v O'Neill* – a case again pertaining to an Irish lake. Macnaghten stressed that there was no difference in this respect between a small lake and a lake so large that it may be termed an inland sea. To his mind, the same law applied to all inland, non-tidal waters, regardless of their size.[10]

But in other common law jurisdictions, the issue of the Crown's right to lake beds is less clear. In the case of the Great Lakes of North America, for example, it has been held that English common law was not applicable, and the rights of riparian owners *ad medium filum aquae* were rebutted.[11] More recently in Australia, the notion that it is the Crown and not the riparian owners that own lakes, has gained some currency. In this regard the key piece of case law is the 1979 decision of the South Australian Supreme Court in *Southern Centre of Theosophy Incorporated v South Australia.* The case was primarily concerned with the propriety of the plaintiff having successfully claimed title to land that was formerly part of a lake bed abutting its property. However, the decision necessarily pertained to the ownership of the lake bed in question. On this point Zelling J ruled that it was the property of the Crown, noting that this was contrary to the decision in *Johnston v O'Neill.* In justifying this departure from common law, Zelling observed that however appropriate the decision in *Johnston v O'Neill* may have been to Ireland – with its long history of settlement – the same position ought not necessarily pertain in Australia where the Crown had always been 'the ultimate proprietor of all the waste lands of the colony'. Further, Zelling held that the requirement in South Australian legislation that provision be made for esplanade reserves whenever littoral lands are subdivided or otherwise developed, showed a public policy that did not generally favour the security of landowners.[12] Although the decision was later overturned by the Privy Council, the finding that the title to the bed of the lake resided in the Crown was not altered.[13]

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8. Ibid, p 216
9. *Bristow v Cormican* (1877) 3 App. cas. 641, cited in Coulson and Forbes, p 98
10. *Johnston v O'Neill*, (1911) AC 552 at 578, cited in E J Haughey, 'Maori Claims to Lakes, River Beds and the Foreshore', NZULR, vol 2, April 1966, p 32
11. See F M Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', NZLJ, no 11, August 1981, p 368; Haughey, p 32, fn 12
12. *Southern Centre of Theosophy Incorporated v South Australia*, (1979) 21 SASR 399, cited in F M Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed'
13. F M Brookfield, 'Accretion and the Privy Council', NZLJ, May 1982, p 174

1.2.2 Riparian rights

At common law, various rights accrue to the owners of lands abutting rivers and lakes. Importantly, the ownership of water is vested in no one; it being a common property resource like air. Riparian owners do, however, have various use rights in respect of waters abutting their land. Essentially they have the right to take and discharge water in accordance with their own needs, including the watering of stock. Conceivably the whole flow of a river could be taken if it was to be used for domestic purposes on riparian land.[14]

In terms of fisheries, the presumption at common law appears to be that the owners of lands abutting a lake have exclusive rights to the lake's fisheries. Hence if the lake is contained within a single block, the land owner has exclusive rights to the lake's fish. However, if several people own lands abutting the lake, the fisheries are shared between them. The public enjoys no rights to fish in such lakes either by custom or prescription. Similarly the Crown has no rights at law to the fisheries of lakes.[15] At common law, the owners of lake beds are entitled to the mineral resources within the bed.[16] Like navigable rivers, however, lakes are public highways at common law, and are navigable by all persons in a reasonable way for a reasonable purpose.[17]

1.2.3 The doctrine of accretion

Where land is bounded by water, the water boundary is not fixed but is movable. Such land is sometimes referred to as 'moveable freehold'. This raises the issue of who owns part of a lake bed that through a gradual and imperceptible change in the lake's water level, becomes dry land. The doctrine of accretion holds that this land accrues to the owner of the parcel of land to which it is added. Where the change is sudden (such as when a lake bed is uplifted by an earthquake) title to the accretion goes to whoever owns the lake bed. Riparian landowners are not entitled to land that is deliberately reclaimed.[18]

Brookfield draws attention to the possibility that many boundaries in New Zealand that appear to be water boundaries, are in fact fixed line boundaries that at the time of survey happened to coincide with a lake shore or river. In *Southern Centre of Theosophy Inc v South Australia*, the South Australian Supreme Court found that the boundary of the land in question was in fact not coterminous with the lake. Hence it ruled that the plaintiff had wrongly received title to an accretion of 20 acres.[19]

14. G W Hinde, D W McMorland, and Sim, *Introduction to Land Law*, 2nd ed, Wellington, Butterworths, 1986, pp 556–557
15. *Halsbury's Laws of England*, vol 18, p 268
16. Property Law and Equity Reform Committee, *Interim Report on the Law Relating to Water Courses*, pp 11–12
17. Coulson and Forbes, pp 72, 101
18. Hinde, McMorland and Sim, pp 202–203
19. Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', p 365

1.3 Lakes and English Law in New Zealand

It is agreed by various commentators that the legal situation vis-a-vis inland waterways in New Zealand – especially as to their ownership – is at best indeterminate.[20] There can be little doubt that lakes come within the ambit of article 2 of the Treaty of Waitangi – as either 'taonga' in the Maori version, or as 'fisheries' or 'other properties' in the English version. But as has been the case with land in New Zealand, the Treaty did not guide the policy of successive governments in respect to lakes.

In New Zealand a key piece of case law pertaining to the ownership of lakes is the Court of Appeal decision in *Tamihana Korokai v Solicitor General*. The plaintiff sought a determination from the court that he had a right to go the Native Land Court to have his claimed title to the Rotorua lakes investigated. This right, however, was disputed by the Crown.The Solicitor General claimed that his assertion that the bed of lake in question was Crown land meant that the Native Land Court could not investigate whether the bed was Maori customary land, and that this settled the matter.[21] In this regard, the Crown saw the case as an opportunity to get the Land Court to decide as a matter of law the legal position with regard to the ownership of inland navigable lakes.[22] The Crown's contention, however, was rejected unhesitatingly by the Court. It was ruled that the Native Land Court could determine title to land that was claimed by the Crown, and that the fact of whether the land was a navigable lake or not, was immaterial.[23]

Although the New Zealand courts made it clear in the late nineteenth century that the doctrine of *ad medium filum aquae* applied to rivers in New Zealand,[24] its application to lakes is doubtful. The only piece of domestic case law which holds that the presumption applies to lakes known to the present author is the 1905 case of *Strang v Russell*. Under the special circumstances of that case, it was held that the presumption of ownership *ad medium filum aquae* applied to sections abutting a small lagoon. However, Hinde, McMorland, and Sim state that this presumption 'is almost certainly not of general application'.[25]

In an article on accretion and the ownership of lakes, Professor F M Brookfield considers the decision in *Southern Centre of Theosophy Incorporated v South Australia* in relation to the question of lake ownership in New Zealand. In particular he discusses it in relation to *Tamihana Korokai v Solicitor General*. Brookfield opines that the Court of Appeal's decision in respect of the Rotorua lakes only makes sense if the bed of the lake is Crown land, subject to Maori customary title if found to exist. This, he claims, is consistent with the view that the Crown holds an allodial title in New Zealand, subject only to Maori customary title. Brookfield attaches significance to

20. J A B O'Keefe *The Law and Practice Relating to Crown Land in New Zealand*, 1967, cited in Property Law and Equity Reform Committee, 'Background Report on Ownership of River Beds', p 9; Hinde, McMorland, and Sim, p 202
21. *Tamihana Korokai v Solicitor General* (1912) 15 GLR, 95
22. Haughey, p 30
23. Ibid; Haughey, pp 30–31
24. See *Mueller v the Taupiri Coal Mines Ltd* (1900) 20 NZLR 89 (discussed below)
25. Hinde, McMorland and Sim, p 202

the court's finding in *Tamihana Korokai* that the ownership of the bed of Lake Rotorua could be investigated independently of the lake's riparian lands. This, he considers, is consistent with the view that Crown Grants for lands abutting the lake did not carry with them title to the midpoint of the lake: in effect a rebuttal of the doctrine of *ad medium filum aquae*. Hence Brookfield contends that:

> saving where the Maori customary title in a lake bed is found by the Maori Land Court to exist . . . or has been lawfully extinguished under statute, the bed in such cases generally remains the allodial property of the Crown.[26]

Brookfield's argument is consistent with what has been termed an orthodox view of tenure in New Zealand. This view holds that upon annexation, the Crown acquired the allodial title to all lands in New Zealand, and that the only fetter upon this is Maori customary title.[27] This was the opinion held by Crown officials such as John Salmond and Francis Dillon Bell in connection with the major lakes cases heard by the Native Land Court in the first decades of the twentieth century (these are discussed in the following chapters). Salmond, the Solicitor General from 1910 until 1920, had presented the Crown's case in *Tamihana Korokai* and subsequently worked hard but unfruitfully to establish the Crown as being the owner of lakes in New Zealand. He maintained that under the Treaty of Waitangi the Crown acquired both imperium (territorial authority) and dominium (ownership) subject to Maori customary rights.[28] Subsequent to the Native Land Court decision awarding Maori title to Lake Waikaremoana, Bell, the Attorney General stated a similar view, stressing the limited nature of the Maori customary title:

> By the Treaty of Waitangi the whole fee simple of the land of New Zealand became vested in the Crown, subject to the Native right. The Native right in respect to these waters was the exclusive use by certain tribes and hapus, but as in the case of the shores of the sea and navigable rivers of New Zealand, the bed of the waters was in no sense vested in the tribes and hapus, which have the rights over the waters. The contrary view confuses the question of Maori right which is a matter of custom determinable by the Native Land Court, with the legal result in England of ownership of fishing rights and marginal occupation.[29]

But although the Crown tried repeatedly to prove that lakes were not subject to a Maori customary title, this was not the view taken by the Native Land Court. Hence the Crown was forced to admit the existence of strong Maori rights in lakes, and negotiate settlements to secure public rights in them.

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26. Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', pp 365–366
27. Law Commission, p 106
28. See for example Alex Frame, *Salmond Southern Jurist*, Wellington, Victoria University Press, 1995, p 129; Alex Frame, 'John William Salmond', *Dictionary of New Zealand Biography*, vol 3, Wellington, Department of Internal Affairs, 1996, p 457
29. Attorney General to Cabinet, 21 March 1922, CL 196/10, NA Wellington

1.3.1 Marginal strips

The existence of marginal strips along the shores of many lakes in New Zealand functions to further obfuscate the issue of who has title to the beds of lakes. Marginal strips, more commonly known as the 'Queen's chain', have their origin in the Land Act 1892. Under section 110 of that Act, when the Crown sold lands abutting either the foreshore, lakes over 50 acres, or streams and rivers wider than 33 feet, a one chain strip was to be reserved and vested in the Crown. The purpose of the reserves was to provide for public access to waterways and the foreshore. The provision was later re-enacted by the Lands Act 1948. Similar provisions exist in the Conservation Act 1987 and the Local Government Act 1974. Today all marginal strips are administered by the Department of Conservation.[30]

The issue insofar as the ownership of lakes is concerned is whether title to such marginal strips carries with it title to lake beds *ad medium filum.* If they do, the Crown would be the owner of all lakes which are subject to a marginal strip. To the present author's knowledge the principle that marginal strips include title to abutting lakes has not been recognised by statute, nor is it supported by any domestic case law. However, in the case of *Southern Centre of Theosophy Incorporated v South Australia*, the existence of state legislation requiring that waterfront reserves be designated when lands with water boundaries are subdivided or developed, was considered by the court to be relevant to the question of who owned the lake in question. But rather than lakes to which such reserves abutted being owned by the Crown *ad medium filum*, the court took the view that the reserve provision suggested a public policy that did not favour the general interests of landowners. Hence the application of the doctrine of *ad medium filum aquae* was rebutted.[31] Another complication with respect to marginal strips in New Zealand is that there can be no general assumption as to which lakes have marginal strips. Presumably lands alienated by the Crown prior to 1892, would not have marginal strips attached to them. Neither would land subject to sales transacted directly between Maori and individual Pakeha.[32]

1.4 General Legislation Pertaining to Waterways in New Zealand

The history of legislation pertaining to inland waterways in New Zealand clearly evidences the Crown's assumption that it had the right to control rivers, streams and lakes. This assumption was in effect a tacit assertion of ownership. But as was discussed in the preceding sections, at common law such rights were not vested in the Crown. In light of this, it seems that from the mid-1800s successive governments pursued a policy whereby the rights of Maori in waterways were gradually displaced, and the Crown was established as being the owners of such. In the context of land

30. Conservation Act 1987, s 24; Local Government Act 1974, s 289
31. F M Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', p 36
32. James P Ferguson, 'Maori Claims Relating to Rivers and Lakes', Research paper for Indigenous Peoples and the Law (LAWS 546), Victoria University, 1989 (Wai 167 ROD, doc A49(D)), 266–313), p 15

drainage the Crown was guided by the presumption that it had the right to take private property for public purposes in exchange for compensation. But as the history of public works legislation in New Zealand shows, generally only the value of 'productive' land was considered to be compensable. Less tangible usufructuary rights associated with waterways were typically not compensated.[33]

The Land Claims Ordinance of 1841 declared all 'unappropriated' land to be Crown Land, subject to the 'rightful and necessary occupation and use thereof by the aboriginal inhabitants'.[34] The problem for Maori though was that rivers and lakes were rarely considered by colonial officials to be subject to such 'rightful' or 'necessary' occupation. Consequently governments passed a raft of legislation that enabled swamp drainage and flood protection works to be undertaken; provided for domestic and agricultural water supply; and instituted a management regime for freshwater fisheries. Only in relation to fisheries legislation were any specific protections of Maori rights afforded. This is telling of the Crown's attitude that the interests of Maori in inland waterways were confined solely to rights of fishery. But even then protections afforded were minimal, and the courts proved reluctant to give effect to them.

Essential to the success of colonial New Zealand was the conversion of the landscape to enable large scale agricultural production. In many areas swamps and their associated waterways rendered lands useless that were otherwise suitable for agricultural production. Although some swamps were preserved by Pakeha landowners because of the value of the flax that they supported, generally Pakeha invested huge amounts of energy in draining swamps upon their land and bringing it into agricultural production. And with the advent of refrigerated shipping in the 1880s and the expansion of the export market for New Zealand's agricultural produce, the demand for arable land was even greater.

Swamps also failed to attract any support from the nascent preservation movement. From around the turn of the century there is evidence that at least some Pakeha settlers were beginning to appreciate lakes and rivers for their scenic values. But with the possible exception of the flax entrepreneurs, swamps were viewed altogether differently. They lacked the scenic and recreational values of larger waterways, and along with the bush, were an embodiment of the 'otherness' of the New Zealand landscape. Swamps stood as an impediment to realising the colonial vision of creating a pastoral Arcadia in New Zealand. Hence legislation was passed that enabled the drainage of huge areas of wetland.[35]

And whereas to many colonialists the notion that Maori had rights in rivers and streams was far fetched, to contend that they had rights in swamps was idiotic. The thinking at the time was clearly that title to any land acquired by settlers carried with it exclusive rights to swamps. But it is possible that Maori who sold lands containing

33. See for example Cathy Marr, *Public Works Takings of Maori Land*, Report for the Treaty of Waitangi Policy Unit, Wellington, 1994
34. Land Claims Ordinance 1841, s 2
35. See Geoff Park, *Nga Uruora–The Groves of Life: Ecology and History in a New Zealand Landscape*, Wellington, Victoria University Press, 1995, pp 176–177

swamps assumed they would continue to enjoy usufructuary rights in the swamps. Little did they realise that not only would they be excluded from the land, but their mahinga kai would be totally transformed and their much cherished fisheries destroyed. In some areas such as the Wairarapa where the Crown had acquired large amounts of land, Maori were anxious to ensure their livelihoods by retaining rights in their lake fisheries. But pastoralists that had taken up occupation of lands abutting such lakes were often anxious to lower them in order that their farms were not subjected to flooding every winter. Such contests between agriculture and Maori customary fishing rights were the impetus for the Crown seeking to acquire ownership of several North Island lakes.

It also important to bear in mind that the distinctions made between swamps, streams, rivers, and lakes are in many respect entirely arbitrary. When does a swamp ceases to be a swamp and become a lake? Also each of these entities do not exist in isolation. Swamps, rivers, and lakes of an area are interconnected, forming a catchment. In many respects they can, and perhaps should be regarded as single entities. The draining of swamps can lower the entire water table in a particular catchment having an adverse effect upon say the fisheries of a lake.

1.4.1 Drainage, flood protection, and general public works legislation

The earliest legislation pertaining to inland waterways vested powers in provincial councils and other local authorities to undertake public works with a view to providing domestic water supply and draining land. Later this tradition was continued with the vesting of powers to undertake a wide variety of public works (many of which affected waterways) in various regional and local authorities. It has been observed that these acts were generally intended to develop land to facilitate further settlement, and were very much in the interest of Pakeha settlers.[36]

In 1858, the Highways and Watercourses Diversion Act was passed. It empowered provincial councils to pass laws for the purposes of diverting or damming rivers and streams, and to sell and exchange the beds of any such waterway so diverted or dammed.[37] Five years later the Provincial Councils Powers Extension Act became law. This enabled provincial councils to pass legislation affecting Crown lands for the purposes of undertaking work in relation to roads and highways. The Act stated that any law passed that affected 'a navigable river stream or creek' required the consent of the Governor – clear evidence that the beds of rivers and streams were considered to be the property of the Crown. In 1865, another Provincial Councils Powers Extension Act was passed. This Act extended the powers of provincial councils to pass legislation that affected any waste lands of the Crown. Such lands were deemed to included the 'bed of any creek stream river pond or lake'.[38] Included in the Act was the proviso that councils could not pass an Act affecting land to which the 'title of the Native Aboriginal owners' had not been extinguished. The extent to which such title

36. Marr, p 105
37. Highways and Watercourses Diversion Act 1858, s 1
38. Provincial Councils Powers Extension Act 1863, s 2

was held to extend to rivers and lakes is unclear. But other legislation, and the attitude of the Crown in relation to rivers and especially lakes, suggests that the Crown considered customary title to have only limited application to inland waterways.

The Crown's assumption of rights in waterways was further expressed in legislation that made provision for residential water supply. In 1867 the Municipal Corporations Act was passed. Part 20 of the Act provided that corporations established under the Act were to supply water within their municipality. Five years later the Municipal Corporations Waterworks Act became law. Under section three, corporations were empowered to construct and maintain waterworks in order to abstract water for domestic supply from any stream or reservoir. All such waters, 'together with all rights incidental to the ownership of such waters', were deemed 'to be the property of and to be vested in the Crown.' This was a modification of the common law presumption that water was a common property resource. No mention was made in the statute of any pre-existing rights of Maori in water.

The 1876 Public Works Act saw the Crown formally vesting in itself strong powers over waterways. Under the Act any natural watercourse in which fluvial action occurred could be declared a 'public drain'. Such drains could be proclaimed to be under the control of a local authority. The Government was also empowered to build drains through any lands in the colony.[39] Under section 165 of the Act, a 'drain' was defined as being 'every passage or channel above or on the ground through which water flows, except a navigable river.' A 'public drain' was deemed to be any drain made by the Government or a local authority prior to or after the passage of the Act. Every river that was not navigable was a public drain within the meaning of the Act. Although it is doubtful whether lakes themselves would have satisfied the criteria of being drains, as is recounted in the chapter in this report dealing with Lake Wairarapa, the outlet of that lake was.

When the Act was before Parliament, George Waterhouse, the Legislative Councilor for Wellington, drew attention to what he saw as being a general abrogation of individual rights in waterways:

> According to the existing law, where a creek or river passes through a property the water in that creek or river belongs to the proprietor. But here it is declared that all such watercourses, etc, are public drains and all public drains are under the control of the Council of the county in which they are.[40]

No provision appears to have been made in the Act for compensation to be paid to either Maori or Pakeha who had rights in waterways (arising from either customary or common law) that were thus apparently expropriated.

County councils were also established in 1876. And as Waterhouse observed, they were given wide ranging powers in relation to waterways.[41] Under the 1876 Public Works Act, county councils could undertake large scale drainage operations. Councils could take any land under the Act required for drainage purposes, build

39. Public Works Act 1876, ss 168, 176
40. NZPD, 1876, vol 22, p 109
41. Counties Act 1876, s 6

new drains, declare any existing drain to be a 'public drain', and deepen or widen any existing drain. In 1883 the powers of county councils were extended so that they could undertake irrigation works. Any stream could be taken for the purposes of supplying an irrigation race, and councils were free to make dams.[42] These provisions were re-enacted by the Counties Act 1886 with no protection being afforded to Maori rights.[43]

Powers to interfere with waterways were also vested in private companies that were considered to be engaged in enterprises that were in the national interest. In 1881, for example, the Railways and Construction Act vested powers in companies engaged in building railways to alter the course or level of any river, stream, or other waterway.[44] Such actions by the Crown further evince the displacement of the rights of Maori in New Zealand's waterways.

It would seem though that Maori had some recourse through the courts to safeguard their interests in waterways. In 1871 a Thames Maori concerned at the potential for damage to his eel weirs, successfully debarred a settler from floating timber down a river that passed through his land unless a toll was paid. Although winning an action brought in the Supreme Court, the jury protested against the law being made 'the instrument of spoliation and oppression'. Parliament responded by passing the Timber Floating Act 1873.[45] Essentially the Act required a licence to be obtained before timber was floated down a waterway, and provided for compensation to be paid to riparian landowners whose properties were damaged as a result of activities carried out under the Act.[46] While still in bill form, several petitions were sent to Parliament by Maori in connection to the Bill. These petitions expressed concern 'that their rights over those [affected] streams would be taken by the Queen or by the Government' as a consequence of the legislation. Despite Maori members speaking of the possible catastrophic effects the practice could have upon Maori eel weirs, the Bill was passed into law. During the Bill's passage, Karaitiana Takamoana, the Member for Eastern Maori, recounted how the water necessary to run a Maori-owned sawmill had been diverted by Pakeha for the purposes of timber floating, and as a consequence the mill had become inoperative.[47] The 1873 Act was repealed by the Timber Floating Act 1884. Although this legislation again included provisions for compensation for downstream river users affected by the floating of timber, it is doubted that these provisions were available to Maori, especially as the Act was never translated into Maori.[48]

Under the Public Works Act 1894, rivers could be brought under the 'control' of local authorities. The extent and nature of this control was tested in the 1901 case of *Taranaki Borough Council v Brough*. In this case Justice Conolly ruled that such control of rivers could not deny 'ownership which at common law extends to the centre of the river bed in non-navigable rivers'.[49] By this time Public Works legislation

42. Counties Act Amendment Act 1883, ss 30–32, 37
43. Counties Act Amendment Act 1883, ss 266–289
44. Railways and Construction Act 1881, s 34(4)
45. Alan Ward, *A Show of Justice*, Auckland, Auckland University Press/Oxford University Press, 1973, p 305
46. Timber Floating Act 1873, ss 3–4
47. NZPD 1873, vol 15, pp 1006–1011
48. CFRT Maori Land Legislation Database, Timber Floating Act 1884

made special provision for the notification of the owners of Maori land affected by operations carried out under the legislation. However, there was no recognition that Maori may have special interests above and beyond the ownership of land. As with legislation pertaining to river boards and drainage boards discussed below, it was only land owners who were recognised as having any specific rights. Thus Maori could not object to a public work on the grounds that it would disrupt a fishing right unless that right attached to an interest in land which they owned.

As well as vesting powers in existing authorities, legislation was passed that created bodies with powers strictly in respect of waterways. In 1884, the Rivers Board Act was enacted. Section 6 of the Act made provision for catchments to be declared river districts if the Governor was petitioned by not less than two-thirds of ratepayers in an area affected by flooding. Subsequent to such a proclamation, all rivers, streams, and other water courses subject to flooding within the district came within the jurisdiction of the board for the purpose of undertaking flood protection works. Boards were empowered to compulsorily acquire land under the Public Works Act 1882, levy rates, raise loans, and enter into contracts for the execution of works permitted under the Act. Board members were elected by ratepayers.[50]

The provision that a river board could be constituted if this was favoured by a majority of ratepayers would generally have been prejudicial to Maori interests. In places where Maori had sold much of their land and were consequently even more reliant upon freshwater resources, the ratepayer criteria was particularly unjust. Similarly where Maori land was held in trust for several owners, it is likely that only the trustees would be actual 'ratepayers'. Given the deleterious effect that drainage operations had upon an economy based upon freshwater resources, the Act's bias towards ratepayers was particularly cruel, as was the fact that members of the boards were also elected by ratepayers. In this way it is likely that farmers with a vested interest in the prevention of flooding (and interference with waterways) could dominate boards and override other community interests. The ways in which river boards acted to the detriment of Maori is evidenced in the chapter of this report concerning the Wairarapa lakes.

In 1893, a Land Drainage Act was passed – 'An Act to provide for the Drainage of Agricultural and Pastoral Land'. This Act contained similar provisions for the constitution of drainage boards as were employed for river boards. A drainage board was established if the Governor was petitioned by a two-third majority of ratepayers, and ratepayers elected the board's members. As well as being able to maintain, deepen, and widen existing watercourses, boards were empowered to dig new drains.[51] As was the case with river boards, drainage boards could raise loans, levy rates, and enter into contracts to effect drainage operations. Limited powers were afforded landowners to object to drainage operations, and provision was made for landowners to have drainage work undertaken on other person's properties to alleviate flooding on their own property.[52] The Act also provided for boards to be

49. *Taranaki Borough Council v Brough,* (1901) 2 GLR 160
50. River Boards Act 1884, ss 18, 44, 74, 88, 110
51. Land Drainage Act 1893, title, ss 5, 9, 19

constituted to carry out irrigation works where the provisions of the Water Supply Act 1891 had been insufficient to meet landowners' needs.[53]

Near identical provisions as featured in the 1893 Act were contained in the 1908 Drainage Act – a consolidation of earlier drainage legislation. Under the 1908 Act, landowners on whose properties it was proposed to construct drains or other works could object to such operations. However, there appears to have been no provision for objections to be made by other people who would have suffered injury as a consequence of drainage works being undertaken. Consequently Maori had no recourse under the Land Drainage Act if drainage works adversely affected their fisheries. The chapter of this report that recounts the history of Lake Horowhenua shows how Muaupoko's fisheries were deleteriously affected by drainage operations carried out under the 1908 Act.

Central government's powers to undertake large drainage operations were extended under the Swamp Drainage Act 1915. This measure was enacted with a view to making more agricultural land available for settlement. To facilitate drainage, land could either be purchased or compulsorily acquired under the Public Works Act 1908. Land being used exclusively for the purposes of Maori settlement could not be taken unless the Governor General considered it essential for the successful completion of the proposed drainage operations.[54]

1.4.2 Local drainage schemes

As well as legislation that vested powers in particular authorities to undertake drainage in the areas over which they had jurisdiction, Acts were also passed to enable the drainage of particular areas of swamp. Officially these were described as 'land improvement' schemes.

The Hauraki Plains Act 1908 is an example of such legislation. It was passed to enable the drainage of swamp lands abutting the Piako River near Thames. Being a large expanse of flat land dominated by stands of tall straight kahikatea, the Hauraki plains had long been regarded as a location eminently suitable for European settlement. Geoff Park recounts how Cook explored the Waihou River on his visit to New Zealand in 1769. To Cook's mind the plains, along with the Bay of Islands, would be 'the best place for fixing a colony'. In this respect, the bestowing of the name Thames upon the area is revealing.[55] But because of the softness of kahikatea (making it unsuitable for ship building), and the scale of the drainage operations required, the area remained relatively unchanged until the 1890s. Around that time a number of factors converged which meant that draining the Piako flood plain became feasible. While the demand for cheap land for settlement continued, the advent of refrigeration meant that there was now an almost unlimited market for New Zealand

52. Land Drainage Act 1893, ss 30, 36, 43, 63–74
53. Land Drainage Act 1893, s 62
54. Marr, p 106
55. J C Beaglehole (ed), *Cook Journal I: The Voyage of the Endeavour*, Cambridge, Cambridge University Press, 1955, p 278, cited in Park, p 28

dairy products. And although soft, kahikatea was ideal for building boxes in which to export butter. Further, advances in engineering technology meant that a drainage scheme of the magnitude required, became feasible.[56]

At the turn of the century the Crown began to consider the district as the object of a land improvement scheme to be effected by the construction of canals, stop banks and various other public works. Following an investigation of the area in 1906, an engineer (W C Breakell) prepared a scheme to drain the flood plain. An integral part of the proposal was the acquisition of much Maori-owned land on the Piako delta.[57]

Subsequently the Hauraki Plains Act 1908 was passed. The Act provided the legal machinery for both the drainage operations and the acquisition of lands in the area. In the three years following the passage of the Act, almost 2000 acres of Maori land were acquired supposedly to facilitate 'the more effective carrying out of drainage works' as stipulated by the Act. However, Robyn Anderson presents evidence that it is doubtful whether all of this land was strictly necessary to carry out the operations.[58] As well as being divested of much of their remaining land, many valuable water-based resources exploited by Hauraki were destroyed. In the course of approximately 50,000 hectares of land being drained, important habitat for eel, water fowl, and flax disappeared. Further, as a consequence of retaining so little land, Hauraki received virtually no benefit from the expansion of the dairy industry on the plains.[59] But to the Government's mind the whole scheme was a success: 'a dreary waste . . . where previously there had been only a few Natives and flax workers' had been transformed into a 'productive district'.[60]

Other examples of legislation passed to enable local drainage operations include the Poukawa Native Reserve Acts of 1903 and 1910, the Ellesmere Lands Drainage Acts of 1905 and 1912, the Auckland and Suburban Drainage Act 1908, and the Manawatu-Oroua Rivers District Act 1923.

1.4.3 Legislation vesting rights in the Crown

As well as the loss of rights in specific waterways (such as were effected by the Hauraki Plains Acts), governments also passed legislation that expropriated general rights of Maori in inland waterways and vested them in the Crown.

In 1903, the beds of navigable rivers were vested in the Crown by section 14 of the Coal Mines Amendment Act 1903. This provision arose as a consequence of the Court of Appeal's decision in *Mueller v The Taupiri Coalmines Ltd* – a case in which the rights to mine the bed of the Waikato River were contested. This action involved consideration of the proposition that the vesting of riverbeds in riparian owners *ad medium filum aquae* is rebuttable if the river is navigable. The plaintiff, the Auckland

56. Robyn Anderson, *The Crown, the Treaty, and the Hauraki Tribes, 1880–1980,* Paeroa, Hauraki Maori Trust Board, 1997, pp 118–119
57. Ibid, pp 120–121
58. Ibid, pp 122–123
59. Ibid, pp 120, 124
60. 'The Drainage and Settlement of the Hauraki Plains' p 8, LS1 15/13/180 NA Wellington, cited in Anderson, p 123

Commissioner of Crown Lands, sought a declaration that certain lands beneath the Waikato River that the defendants had been mining were in fact Crown lands. The defendants had justified their actions by virtue of being the riparian landowner *ad medium filum*.

Although the rights of the Crown were upheld by the majority of the judges, Chief Justice Stout issued a vigorous dissenting judgement to the effect that the navigability of a river did not detract from the riparian owner's proprietary rights in the river bed. In arriving at their decision rebutting the common law position, the remaining judges stressed: that in New Zealand the Crown has a role as a trustee over lands of such public importance as those in question; the historical circumstances of the original Crown grant; and the fact that the section of river in question had been navigated for commercial purposes.[61]

In the 1900 case *Re Beare's Application*, the rights of the riparian owners were upheld against the Crown's contention that the bed of the Arahura River was Crown land. The case resulted from the question as to whether or not mining licences could be granted for a section of the river that ran through a Native Reserve. In upholding the rights attaching to the riparian owners, Chief Justice Stout made much of the fact that for all intents and purposes the river was neither 'a public highway or such [a] navigable river as makes the bed of the river Crown lands.'[62] This decision, as with the dissenting judgement of Chief Justice Stout in *Mueller v Taupiri*, suggests that prior to the enactment of the Coal Mines Amendment Act 1903, the Crown lacked prima facie rights to the beds of navigable rivers.[63]

Section 14 of the Coal Mines Act 1903 (by which the beds of navigable rivers were vested in the Crown) was an addition to a controversial piece of legislation pertaining to the rights and working conditions of miners, and appears to have received scant attention in the parliamentary debates concerning the Bill. The provision was re-enacted in the Coal Mines Acts of 1905, 1908, 1925, and 1979. Although those Acts are now repealed, anterior vestings pursuant to the Coal Mines legislation are preserved by section 354 of the Resource Management Act 1991. An important issue is whether section 14 of the Coal Mines Act 1903 and its subsequent re-enactments were declaratory of the situation under common law or confiscatory. In a report to the Waitangi Tribunal, Graeme Austin has contended that when compared to common law, the provisions appear to be confiscatory.[64] This raises the spectre of compensation for riparian owners' rights – recourse that it appears Maori did not seek at the time the provision was enacted. In a 1993 decision concerning claims to dams on the Wheao and Rangitaiki Rivers by Te Runanganui o Te Ika Whenua, the Court of Appeal stated that the:

61. *Mueller v the Taupiri Coal Mines Ltd*, (1900) 20 NZLR 89, cited in Graeme Austin, 'Legal submissions on the beds of navigable rivers, section 246 of the Coal Mines Act 1979', in Waitangi Tribunal, *The Pouakani Report 1993*, Wellington, Brookers, 1993, pp 462–464
62. *Re Beare's Application* (1900) 2 GLR 242, cited in Austin, p 463
63. Austin, p 464
64. Ibid, p 466

> vesting of the beds of navigable rivers in the Crown provided for by the Coal-mines Act Amendment 1903 and succeeding legislation might not be sufficiently explicit to override or dispose of the concept of a river as taonga, meaning a whole and indivisible entity, not separated into bed, banks and waters.[65]

In 1903, the Water-Power Act was enacted. Section 2 vested in the Crown the sole right to use waters in lakes and rivers for electricity generation. While the Act was before Parliament, many members expressed concern at what they considered to be an essentially privative clause. Hone Heke, the member for Northern Maori remarked that:

> It would not be proper for a Bill like this to take away from Maori owners the use of water-power on their lands. There is no telling what use even the Maoris may desire to put such water-power for themselves . . . the sweeping provision of subsection (1) is going too far. . . . It is an attempt to take away active rights.[66]

The Crown's exclusive right to generate electricity from water was continued under section 306 of the Public Works Act 1928.

In 1967, the rights of the Crown in relation to freshwater were extended by the Water and Soil Conservation Act. Section 21(1) vested in the Crown:

> the sole right to dam any river or stream, or to divert or take any natural water, or discharge natural water or waste into any natural water, or to use natural water.

The right of people to take water for their reasonable domestic needs was preserved. Although stopping short of actually nationalising water, this is what the Act achieved in practice. Provision was also made in the Act for the management of municipal water supplies and the granting of permits to use water. The Act has been criticised for making no provision for the protection of Maori interests, especially in view of the fact that many Maori fisheries have been seriously affected by pollution allowed by authorities exercising powers under the Act. This led the Waitangi Tribunal to state that the Water and Soil Conservation Act had been 'aptly described as monocultural legislation'.[67]

Other legislation in the twentieth century extended the powers of local authorities in respect of waterways by delegating them town planning responsibilities. The Town Planning Act 1926 required that local authorities prepare planning schemes for both rural and urban areas. Matters they were to provide for included sewerage, drainage, and water supply.[68] Such powers were continued in the Town and Country Planning Acts of 1953 and 1977. Unlike the 1926 and 1953 Acts, the 1977 Act made a limited recognition of Maori rights. Section three required agencies exercising powers under the Act to have particular regard for the 'relationship of Maori people and their

65. *Te Runanganui o Te Ikawhenua Incorporation Society v Attorney-General*, (1994) 2 NZLR 20, p 21
66. 24 September 1903, NZPD, 1903, vol 125, p 798
67. Waitangi Tribunal, *The Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Department of Justice, Waitangi Tribunal, 1985, p 86
68. Marr, p 106

culture and traditions with their ancestral land.'[69] The Soil Conservation and Rivers Control Act, passed in 1941, consolidated existing legislation pertaining to flood control. It set up the system of catchment boards that continued until the enactment of the Resource Management Act in 1991. Boards were also empowered to carry out public works in the interests of conserving soil and mitigating erosion.[70]

Virtually all legislation affecting waterways was either repealed by the Resource Management Act 1991 or at least made subject to its principles – most significantly that of sustainable management. Local authorities wanting to undertake drainage operations must apply for a resource consent and abide by the process the Act sets out for public notification and the hearing of objections. Also people exercising powers under the Resource Management Act must 'take into account the principles of the Treaty of Waitangi', 'have particular regard to Kaitiakitanga', and 'recognise and provide for . . . the relationship of Maori . . . with their ancestral lands, waters, sites, waahi tapu, and other taonga.'[71] However, the right to allocate water remained vested in the Crown – a major criticism of the Act being that it did not address the issue of the Maori ownership of resources.[72]

1.5 Fisheries Legislation

As is evident in the case studies of this report, freshwater fisheries were historically of the utmost importance to Maori. In many areas fish found in rivers and lakes formed the basis of the local economy. In terms of legislation, fisheries were affected in two ways. Firstly, as has been detailed in the preceding sections, legislation was passed that resulted in the habitat of fish being altered through drainage operations and water abstraction. And secondly, from the 1860s, various acts were passed concerning the management and control of freshwater fisheries.

An important aspect of the colonial project in New Zealand was the acclimatisation of English biota. This has been seen as an attempt to mitigate the 'otherness' of the New Zealand environment by making it more like that of England.[73] From the 1860s large numbers of trout were introduced to the rivers and lakes of New Zealand with a view to establishing sport fisheries. Although some fish were introduced by private individuals, mostly this work was undertaken by acclimatisation societies. In the 1860s, informal societies or committees were formed by Pakeha settlers as a means to alleviate the costs and logistical problems of

69. Town and Country Planning Act, s 3(1)G
70. Judy van Rossem, 'Fresh and Geothermal Water' in Christopher Milne (ed), *Handbook of Environmental Law*, Wellington, Royal Forest and Bird Protection Society, 1992, p 124
71. Resource Management Act 1991, ss 6(e), 7(a), 8
72. See for example Jane Kelsey, 'The Treaty of Waitangi, Local Government Reform and Resource Management Law Reform' in *People, Politics, and Processes,* Proceedings of the New Zealand Planning Institute Conference, Waikato University, 1989, p 33; Robert Mahuta, 'Maori Perspectives In Resource Planning Perspectives', in *Regional Resource Futures,* Conference Proceedings, Waikato University, August 1991, p 165
73. See for example Paul Hamer, 'Nature and Natives: Transforming and Saving the Indigenous in New Zealand', MA thesis, University of Victoria, 1992, p 3, passim

acclimatising wildlife. In 1867, acclimatisation societies were recognised by statute and afforded rights in respect of fauna they introduced.[74]

Also in 1867, Parliament passed the Salmon and Trout Act 1867. It appears that this legislation came about at the instigation of the Canterbury and Otago Acclimatisation Societies. The societies were about to release trout and salmon into the waterways of the east coast of the South Island, and were anxious that provision was made to prevent poaching.[75] The resultant Act enabled the Governor of the colony to make regulations to preserve and propagate stocks of salmon and trout, and to take punitive action against any person in breach of such regulations. The Governor's powers under the Act were far reaching. Regulations could be made as were thought necessary with a view to promoting and preserving stocks of trout and salmon in particular rivers and streams. As well as prohibiting the use of particular kinds of fishing tackle, these powers presumably extended to declaring closed fishing seasons for particular rivers.[76]

But it appears that the Act did not apply to lakes. This became apparent when a person was charged pursuant to the Salmon and Trout Act with taking trout from Lake Wakatipu by the use of dynamite and nets. The charges, however, were dismissed because it was held that the Act only applied to rivers and streams, and not to lakes. This gave rise to the Salmon and Trout Amendment Act 1884 – section 2 of which extended the operation of the 1867 Act to lakes.[77] Unlike later fisheries legislation, the Salmon and Trout legislation applied equally to Maori and Pakeha. Thus if a closed season was declared to promote stocks of salmon and trout in a particular waterway, Maori would presumably have been prevented from taking native fish from the waterway in question. This was considered by the Ngai Tahu Sea Fisheries Tribunal to be a clear encroachment of Treaty rights.[78]

The Larceny Act of 1869, closely modelled on an English Act of Parliament, codified some common law presumptions in relation to fisheries. It recognised that the ownership of the bed of a waterway gave rise to exclusive rights in the water's fisheries. The Waitangi Tribunal has observed that Maori fisheries were not considered to come within the ambit of 'private waters' unless they had been specifically reserved or granted. This reflects the policy that customary fisheries were held to have no status unless they had been expressly reserved to Maori.[79] Evidence does exist though that Maori could and did reserve fishing rights in waters abutting lands that they had sold.[80]

The first comprehensive fisheries management regime was introduced by the Fish Protection Act 1877. It extended the Government's control to both sea and freshwater

74. R M McDowall, *Gamekeepers of the Nation: The Story of New Zealand's Acclimatisation Sicieties,1861–1990*, Christchurch, Canterbury University Press, 1994, p 17; Protection of Animals Act 1867, s 3
75. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, Wellington, Brooker and Friend, 1992, p 135
76. Salmon and Trout Act 1867, s 2
77. 2 October 1884, NZPD, 1884, vol 49, p 173
78. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, p 135
79. Waitangi Tribunal, *Report of he Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988, p 83
80. Ibid, p 83

fisheries. Under the Act the Governor was empowered to issue licences granting exclusive rights to fisheries prescribed under the Act. In respect of such fisheries, the Governor could make regulations specifying seasons and declaring that certain species could not be taken. Section 8 declared that nothing in the Act 'shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder.'[81]

Prima facie this provision afforded broad protection of Maori fishing rights as had been contemplated by the Treaty. But the Waitangi Tribunal has noted it is typical of the approach adopted by successive governments in respect of recognising Treaty rights in legislation. An attitude is apparent that such rights could be recognised simply by mentioning the Treaty in a general way, despite everything else in the Act being contrary to Treaty principles. In the case of the Fisheries Protection Act, the Muriwhenua Sea Fishing Tribunal postulate that section 8 was in all likelihood 'window dressing' inserted to placate Maori members of Parliament, and that no one really knew or cared what it entailed.[82] It would appear that any Treaty-derived interest in fisheries was limited by the Government's right to make regulations governing the exploitation of fisheries.

The Fish Protection Act 1877 became operative by the issue of regulations. The first general regulations were issued by the Governor in April 1878. Importantly, clause four of these stated that the regulations were not to apply to Maori, nor to any method of fishing other than by net. The regulations were entirely concerned with commercial sea fisheries and did not affect freshwater fisheries. Although the Act enabled exclusive rights in particular fisheries to be granted to licence holders, this was not done.[83] In 1878, legislation was passed that made it illegal to use dynamite in public fisheries.[84]

In 1884, the Fisheries Conservation Act was passed. Section 2 held that the Act was to be read in conjunction with various fisheries legislation in force at the time – including the Fish Protection Act 1877. This meant that the provision preserving Maori Treaty rights in respect of fisheries was to be given effect under the 1884 legislation. Under the Act, regulations could be issued that, inter alia: provided for the protection and improvement of any fishery or waterway; afforded protection to any species of fish; prohibited the sale of any fish; prescribed the minimum size of any fish caught; restricted the use of certain types of tackle; prohibited fishing in certain waterways in which fry or spawn were present; and prohibited the dumping of any sawmill refuse into streams or rivers. Section 3 of the Act states that its provisions do not apply in privately owned waters. This exemption attracted the attention of Sir George Grey during the parliamentary debates concerning the Act. He contended:

81. Tony Walzl has described how this clause what not in the original Act that was passed, but was inserted at the request of the Governor the following Month. Tony Walzl, 'Evidence on the Crown/Maori Relationship Over Fisheries, 1849–1890', Report commissioned by the Crown, nd (Wai 27 ROD, doc Z49), p 265
82. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 85
83. 11 April 1878, *New Zealand Gazette*, 1878, no 33, vol 1, pp 441–442
84. Fisheries (Dynamite) Act 1878, s 3

> that the rivers and the fish in them were the common property of the whole nation. Why, therefore, should any person pay a license [sic] for fishing in waters running through government lands?[85]

But the section of the Act that enabled the Government to build fish hatcheries in any river or other fresh waters evinces the Crown's assumption that it had sufficient rights in inland waterways to build such facilities.

Regulations were subsequently issued under the Fisheries Conservation Act pertaining to commercial fishing. The regulations stated that they were not to apply to Maori. However, shortly afterwards this regulation was amended so as that Maori were only exempted if they were engaged in fishing for their own needs and not commercially.[86] In light of the guarantees afforded by section 8 of the Fish Protection Act 1884, the Ngai Tahu Sea Fisheries Tribunal considered this limitation to non-commercial fishing to be both ultra vires and inconsistent with the Treaty.[87] Although the Sea Fisheries Act 1894 repealed section 8 of the Fish Conservation Act insofar as it affected sea fisheries, the section remained in force in relation to freshwater fisheries.[88]

The next Act passed that affected freshwater fisheries was the Fisheries Conservation Amendment Act 1903. The provisions of this Act pertained primarily to trout. The Governor was empowered to require people fishing for trout and perch to hold a licence. Regulations could also be issued to control the export of trout and to prevent the pollution of streams in which trout and salmon were present. When before the house, Tame Parata drew attention to what he perceived as the expropriation of Maori fishing rights in inland waterways:

> Under the deed of sale by Ngai Tahu the Maoris were allowed to retain their rights to their fisheries – their sea-fishing grounds, their eel and other freshwater fisheries, in the rivers and lakes – and there is also a clause in the Treaty of Waitangi which assures to them the fishing rights in their rivers, lakes and seas . . . Why should this house pass legislation to ask the Maoris to pay for a license [sic] when the rivers belong to them and the fish belong to them?[89]

Parata was incorrect in thinking that the Act would require Maori to hold a licence in order to fish for indigenous species. But he still drew support from William Field, the member for Otaki:

> I am one of those who hold that the provisions of the Treaty of Waitangi are too apt to be forgotten. It is unmistakable that in that treaty there is preserved to the Natives the right to fish freely in all rivers, streams, and lakes of the colony; and in dealing with legislation on fishing matters we should bear that closely in mind. . . . The Natives should undoubtedly have the free right to fish for native fish, at any rate, in the streams

85. 7 November 1884, NZPD, 1884, vol 50, pp 477–478
86. 2 April 1885, *New Zealand Gazette*, 1885, no 20, pp 380–381; 4 June 1880, *New Zealand Gazette*, 1885, no 20, p 720
87. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, pp 141–142
88. Ibid, pp 144–145
89. NZPD, 1903, vol 126, p 115

> of the colony; and if it is true that the imported fish variously devour the native fish, then I am not sure the Natives ought not to be allowed to fish for imported fish in the same way as they do the native fish, without having to purchase licences.[90]

Field and Parata were wrong in thinking that Maori would require a licence under the 1903 legislation. Further, Maori rights in respect of freshwater fisheries were supposedly protected by section 8 of the Fish Protection Act (which was still in force at this time). But the licence requirement did create problems for Maori. In the course of fishing for native fish, if a trout was incidentally caught, Maori were liable for prosecution unless they had a licence. Although incidences of Maori catching fish without licences have been documented, it is not always clear whether trout in these cases were a by-catch or whether they were the species targeted by the fishers involved (see below). However, it is known that some Ngai Tahu were prosecuted for taking trout when they were attempting to catch eels.[91]

As is evinced in the case study chapters of this report, the effect trout were having on indigenous fisheries, as averted to by Field, was a major grievance of Maori. A speech in Parliament by Wi Pere (the member for Eastern Maori) illustrates the grievance of many Maori in respect of trout. He complained on behalf of Te Arawa that the fishing rights that they had held 'from time immemorial', had been disturbed by the introduction of exotic fish. Pere said Te Arawa were aggrieved that exotic fish were depleting stocks, and that Maori were required to obtain fishing licenses for fish 'that are absolutely no good, because they are unpalatable.'[92]

In 1908, a new Fisheries Act was passed that repealed and consolidated all prior legislation. In the previous year section 8 of the Fish Protection Act had been repealed by the Statutes Repeal Act 1907. Part 1 of the Fisheries Act 1908 pertained to sea fisheries, whereas part 2 related to freshwater fisheries. Although part 1 contained a guarantee that nothing in the Act 'shall affect any existing Maori fishing rights', no such provision was contained in part 2.[93] The parliamentary debates say nothing as to why a guarantee of Maori fishing rights was not extended to freshwater fisheries. Under part 2 of the Act, section 89 held that it was illegal to sell or let the right to fish in any waters. Under section 90 the lawful occupier of any land could fish without a licence during the prescribed season. Otherwise the provisions governing freshwater fisheries remained the same as they had under the previous Acts.

The Fisheries Act 1908 remained in force until it was repealed by the Fisheries Act 1983. Although several minor amendments were made to the 1908 Act in the 75 years from when it was passed, it remained substantively unchanged. The only amendments that were of any real significance to freshwater fisheries were in relation to commercial eel fishing. In 1963, the licensing of commercial fishers was replaced by a permit system. Unlike licences, permits were freely available to anybody upon application. It was thought that conservation could be ensured by the permits

90. Ibid, pp 119–120
91. Anake Goodall and David Palmer, *Water Resources and the Kai Tahu Claim*, Wellington, Ministry for the Environment/Resource Management law Reform, 1989, p 7
92. NZPD 1908, vol 145, p 1159
93. Fisheries Act 1908, s 77(2)

specifying the kind of fishing gear that would be used by each permit holder. But it would appear that in the case of eels and certain shellfish, this was not so. Consequently in 1977 the Fisheries Amendment Act was passed. The Act gave the Minister of Fisheries the power to declare commercial eel, paua, crayfish, mussel, and scallop fisheries to be 'controlled fisheries'. This modified the free entry provisions that had been introduced by the permit system in 1963. Were the Minister to declare a controlled fishery, the methods of fishing could be regulated, and anyone fishing in the fishery required a licence.[94]

The Waitangi Tribunal has observed that throughout the history of fisheries legislation, the Crown acted 'on the assumption that it was entitled to disregard Maori fishing rights under the treaty.'[95] Importantly in respect of freshwater fisheries, there was no procedure by which Maori could secure legal recognition for their customary fishing rights other than by inviting prosecution and having a court rule on the extent of their rights. But as will be seen in the following section which briefly surveys some of the key cases, until the mid-1980s, the Crown's reluctance to recognise Maori rights in respect of fisheries was mirrored by the attitude of the courts.

1.5.1 Fisheries legislation as seen by the courts

For most years since the 1870s, fisheries legislation in New Zealand has contained provisions that ostensibly protect the fishing rights of Maori. However, as will be shown in the following survey of key cases, the courts have refused to give meaningful effect to these provisions. Although this report is concerned primarily with lakes, because many of the legal principles pertaining to fishing apply to both sea and freshwater fisheries, sea fishing must be considered in the development of freshwater fisheries case law.

The first case of relevance to Maori fishing rights that was brought before the New Zealand courts did not actually involve Maori. In *Baldick v Jackson* the Supreme Court considered whether an English statute that conferred certain rights in respect of whales was applicable in New Zealand. One of the grounds upon which the court held that the act was not applicable, was that the rights sought by the plaintiff:

> would have been impossible to claim, without claiming it against the Maoris for they were accustomed to engage in whaling and the Treaty of Waitangi assumes that their fishing was not to be interfered with. They were to be left in undisturbed possession of their lands, estates, forests and fisheries.[96]

This case suggests that in matters of English law in relation to fisheries, the courts were to bring into account existing Maori fishing rights under the Treaty of

94. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, pp 197–198
95. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, p 214
96. *Baldick v Jackson* (1910) 30 NZLR 434, cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim,* p 97

Waitangi.[97] But decisions of the courts in the years immediately following *Baldick v Jackson* were to adopt the opposite position – a position that was to endure until 1986.

Subsequent to the introduction of trout to the Rotorua lakes, Maori were convicted for taking the introduced fish without licences. In 1908 Reverend F A Bennet was convicted for taking trout from the Ohau channel and fined £5. Although his conviction incensed Te Arawa leaders, he appears not to have appealed the conviction.[98] Five years later, Pita Heretini was convicted of breaching fisheries regulations by taking trout out of season from Lake Rotorua. Before Mr Dyer SM, Heretini pleaded that he had a customary right guaranteed by the Treaty of Waitangi to take fish from the lake. Dyer, however, was not impressed. He was reported as having said that:

> it was not the duty of any court, in dealing with statutes relating to Natives, to decide if there had been any infringement of that [Treaty of Waitangi] . . . If Parliament had dealt unfairly with the natives . . . that was the business of parliament.

Heretini was fined £5 plus 12s in costs.[99]

In 1914, a young Te Atiawa woman, Waipapakura, had her whitebait nets confiscated by a fisheries officer for non-compliance with regulations issued under the Fisheries Act 1908. Waipapakura was fishing in the tidal reaches of the Waitara River. She filed an action for the wrongful conversion of her nets. The matter came before the Magistrates Court in New Plymouth in October 1914. Mr Crooke SM dismissed the action on the basis that it was the Native Land Court alone that could determine what fishing rights were conserved by the Treaty of Waitangi.[100]

The plaintiff then removed the matter to the Supreme Court. In her defence Waipapakura claimed that she was exercising a customary fishing right protected under section 77(2) of the Fisheries Act 1908. In the case, the court adopted a narrow construction of 'existing fishing rights'. Rather than considering that the plaintiff was exercising a non-territorial aboriginal right, the court took the clause of the Fisheries Act to mean rights guaranteed by the Treaty of Waitangi. And in accordance with the view enunciated by the Privy Council that in the absence of legislative enactment the Treaty conferred no rights, the court held that section 77(2) created no rights that were enforceable against the Crown. Rather it was held that the section merely guaranteed those fishing rights provided for by statute. Further the Court made it clear that there 'cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast'.[101] The Waitangi Tribunal has expressed the view that the Crown were more than happy with this interpretation of section 77(2) and therefore took no action to amend it.[102]

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97. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 97
98. Manatu Maori, *History of the Rotorua Lakes Settlement and Resource Materials*, Wellington, Research Unit Manatu Maori, 1990, p 16; W A Leonard, 'The Formation of the Te Arawa Maori Trust Board and its First Ten Years', MA Research Essay, University of Auckland, 1981, p 12
99. 'Old Fishing Rights: Treaty Trout and the Maori', *Dominion*, 25 September 1913, p 8
100. Mr Crooke SM's decision, CLO 267, cited in Frame, p 104
101. *Waipapakura v Hempton* (1914) 33 NZLR 1065, cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, pp 97–98

A similar set of circumstances came before the Crown again in 1953. But whereas the *Waipapakura* case had involved tidal waters, the plaintiff in *Inspector of Fisheries v Ihaia Weepu and others* had been fishing for whitebait in a river. Although the court considered that section 77(2) protected Maori fishing rights that had been 'preserved by the Treaty', it was held that in the case of land-based fishing, those rights lapsed upon the sale of the adjoining land. As a matter of law the court considered that 'when Maori sold land, they sold their fishing rights too'.[103]

In view of the decision in *Waipapakura* and the unlikelihood of a more general recognition of fishing rights by the Crown, Maori in many parts of the country instituted proceedings in the Native Land Court to have their ownership of their waterways determined. In this way sections of Te Arawa, Tuhoe-Ruapani, Ngati Kahungunu, and Ngapuhi applied to the Native Land Court to have title to their respective lakes investigated. These claims are the subject of the following chapters. Similarly proceedings were initiated in respect of the Whanganui River and Ninety Mile Beach. These claims were considered by the Muriwhenua Fishing Tribunal as being primarily driven by the desire to secure a recognition of the respective hapu's fishing rights.[104]

In 1965, Keepa and Wiki were prosecuted for taking undersized toheroa from Ninety Mile Beach. As in the case of *Ihaia Weepu*, their defence that they were exercising a customary right was rejected on the grounds that those rights had been extinguished at the same time as the customary title to the abutting land.[105] The issue of customary rights was not tested again until 1986, when Tom Te Weehi appealed against his conviction for taking undersize paua. In *Te Weehi v Regional Fisheries Officer*, the plaintiff argued that he was exercising a customary right as was preserved to him under the Fisheries Act 1983. In his decision, Justice Williamson made it clear that this customary right claimed by Te Weehi did not derive from the ownership of land adjacent to where he took the shellfish. Rather it was a common law non-territorial customary right. Williamson held that such a right was within the ambit of what was guaranteed to Maori by section 88(2) of the Fisheries Act 1983, but that such rights were narrow in their extent. He held that they could only be exercised in accordance with Maori custom, they were non-exclusive, and they could only be exercised to take fish for one's own use.[106] The case of *Te Weehi* was the first general recognition at law of a Maori right of fishery that did not attach to adjacent land. Also it was the first time that the doctrine of aboriginal title had been recognised in the New Zealand courts since *R v Symonds* in 1847.[107]

As well as asserting their fishing rights in the courts, there is also a substantial legacy of Maori protesting against the abrogation of their freshwater fishing rights by

102. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim,* p 98
103. *Inspector of Fisheries v Ihaia Weepu and others*, (1956) NZLR 920, cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 98; Ibid, p 98
104. Ibid, pp 98–99
105. *Keepa and Wiki v Inspector of Fisheries* (1965) NZLR 322, cited in Ibid, p 98
106. *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 680, cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 99
107. Ibid, p 99. For a discussion of non-territorial aboriginal rights see Doig, pp 23–30

the Crown. The report of the Ngai Tahu Sea Fisheries Tribunal, for example, chronicles protest by Ngai Tahu against the way in which they were disadvantaged by the Crown's management regime in respect of freshwater fisheries.[108]

1.6 Conclusion

Upon the Crown's acquisition of sovereignty in New Zealand, it is held that it acquired the allodial title to all of the country subject to Maori customary title. However, the Crown has generally adopted the view that such title had only a limited application to inland waterways – Maori rights in such being confined to those of fishing. Although this position was not clearly articulated by the Crown until around the turn of the century, from the 1860s, successive governments have simply assumed the right to pass legislation governing the use and control of inland waterways. Such legislation left open the ultimate question of who had ownership rights in rivers and streams. However, it was tantamount to an assertion of ownership and reflected the conviction of Government officials that the Crown should be the owner of rivers and lakes in New Zealand.

Establishing the Crown as being the owners of waterways required a departure from English common law. In England the beds of lakes, no matter how large, do not of common right belong to the Crown. Instead they are owned by whoever has title to lands abutting the lake. Similarly, rivers above the point that they ebb and flow belong to riparian landowners *ad medium filum* – not to the Crown.

The Crown's desire to be the owner of inland waterways in New Zealand was very much tied up with ideology that underpinned the colonial project in New Zealand. One of the objectives of the Colonial Government in New Zealand was to avoid the situation that existed in Britain where people held private rights in waterways and fisheries, from becoming established in New Zealand. In the interests of 'the public', the Crown sought to extend its prerogative rights in relation to the foreshore and seabed to inland waterways. A view was apparent that the Crown should be the trustee of lands and waters that were of public importance. This was a reason given by the Court of Appeal in 1900 for why it ruled that the doctrine of *ad medium filum aquae* should not be applied to a navigable river.[109] Similarly in other 'New World' common law jurisdictions (such as Canada, the United States, and Australia), the Crown was held to be the owners of navigable lakes. The thinking in rebutting the presumption of *ad medium filum aquae* in these countries was that it was inappropriate to apply it in countries that did not have the long history of settlement that had given rise to common law in Britain.[110] But while there had not been a long history of English settlement and law in New Zealand, there was an irrefutably long history of Maori use and occupation of waterways. Further, there was a complex body

108. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, pp 203–205
109. *Mueller v the Taupiri Coal Mines Ltd* (1900) 20 NZLR 89
110. See for example *Southern Centre of Theosophy Incorporated v South Australia* (1979) 21 SASR 399, cited in Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', p 366

of customary law governing their use and ownership. But as a question of English law, the precise legal situation as to the ownership of lake beds in New Zealand remains unclear to this day. Although 'it is arguable that there is a presumption that lakes remain the allodial property of the Crown', the law 'is not finally settled on this point'.[111]

Undeniably the history of legislative intervention in respect of waterways constituted an abrogation of Maori rights. Importantly, no such legislation acknowledged any pre-existing Maori rights in waterways, or made any specific provision for the payment of compensation for such. The objective of much of the legislation that affected waterways was to promote settlement, and bring more land into agricultural production. In this way legislation was passed that provided for flood protection, swamp drainage, irrigation, domestic water supply, and electricity generation. As well as many of the public works undertaken under this legislation having a deleterious effect upon Maori fisheries, large amounts of Maori-owned land were compulsorily acquired.[112] Another issue is the way in which the Crown vested powers in various local authorities to undertake public works that interfered with rivers and lakes.

In relation to such land development schemes it was held that Maori rights were on the same footing as those of Pakeha in respect of these enterprises, and that they must both give way to the 'national interest'. But this unquestioned 'national interest' aligned squarely with the aims and aspirations of Pakeha farmers, and if anything, provision for Maori to continue their traditional economic practices was seen as being antithetical to these goals. This was illustrated in a report of a commission appointed to investigate ways to alleviate the flooding of lands abutting the Tairei River in Otago. An earlier flood protection scheme had been abandoned because of objections from Ngai Tahu. The commission observed that it could not:

> conceive that such a consideration as fishing-rights in a lake which is almost dry, and which could therefore have no commercial value to anyone should be allowed to weigh against the enormous benefits, financial and otherwise, which would accrue to the settlers and the State if the Maori Lake were used for the purposes herein indicated, and in which capacity it would be doing a service infinitely greater than ever it will do as a fishing-ground for Natives.[113]

Clearly provisions that allowed Maori to continue to exercise traditional food gathering rights did not feature in the Government's vision of the country's future.

The right of the Crown to take private property for public works was a principle of government that was brought to New Zealand from Britain. This right, however, was subject to the proviso that compensation was paid to persons who had their rights expropriated. The issue of the extent to which Maori received compensation for rights they forfeited in waterways as consequence of drainage schemes and flood protection works has not been researched by the present author. But it would appear that if the

111. Hinde, McMorland and Sim, p 202
112. See for example Anderson, pp 118–127
113. 'Report of Rivers Commission on Tairei River' AJHR, 1920, D-6D, p 12

Crown did pay any compensation to Maori, it would have only been in respect of their fishing rights. This reflects the Crown's view that Maori rights in waterways were limited solely to rights of fishery, and did not extend to the actual ownership of them. Maori have received no compensation for legislation that divested them of rights in waterways such as the coal mines legislation, the Water-Power Act, and the Water and Soil Conservation Act.

The Crown's recognition of Maori freshwater fishing rights found expression in fisheries legislation. From 1877, Maori fishing rights have been afforded a degree of statutory recognition. Initially this was in terms of what was guaranteed by the Treaty of Waitangi, and later in terms of 'existing rights'. The courts, however, have constructed the extent of these rights very narrowly. The position that was adopted repeatedly from the turn of the century until 1986 was that the only rights conferred by the guarantees of Maori rights in the fisheries legislation were those that had been expressly confirmed by Parliament. Also it was held that because the Treaty was not recognised in any domestic legislation, it conferred no rights in respect of fisheries. As technically correct as this may be, it is hard to reconcile this position with either the guarantee contained in the English version of the Treaty (that preserved to Maori the full and exclusive possession of their fisheries), or with the original intentions of the Acts. The refusal of the Crown and the courts to afford any substantive recognition to Maori freshwater fishing rights can be seen as being a manifestation of the Crown's ideology that private rights in waterways and fisheries should be limited as much as possible. This refusal has been seen as a reason why hapu applied to the Native Land Court to have title to their lakes determined.[114] The history of such applications in respect of Lakes Wairarapa, Rotorua, Waikaremoana, and Omapere are contained in the case study chapters that follow.

114. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, pp 98, 105

CHAPTER 2

WAIRARAPA LAKES

2.1 Introduction

The Wairarapa lakes lie on the plains bounded by the Tararua Ranges and the Aorangi mountains. The southern lake, Onoke, is located on the shores of Palliser Bay, whereas Lake Wairarapa lies to the north, approximately 12 kilometres west of present day Martinborough.[1] Along with associated swamps and streams, the lakes in total comprise an area in excess of 50,000 acres – the largest wetlands complex in the lower North Island.[2] The lakes are fed by the Ruamahanga River but it is only in times of flood that the waters are powerful enough to break through the narrow spit separating Onoke from the seas of Palliser Bay. This, however, was not always the case. A large earthquake occurred in 1855 which changed the topography of the region dramatically. One such change was that Onoke, which had previously been open to the sea most of the time, was subsequently closed for several months of the year.[3] When the bar was closed, heavy autumn rain could cause the water level in the lakes to rise up to four metres – the two lakes becoming one body of water extending as far north as Martinborough – before the mass of water forced the bar open.[4]

Archaeological evidence shows that many small settlements existed in Palliser Bay as early as AD 1050.[5] The identity of these earliest inhabitants remains uncertain, but it appears that they were displaced by the closely related groups of Rangitane and Ngati Ira upon their arrival from further north.[6] Following a similar pattern, Ngati Kahungunu are held to have arrived from the Hawke's Bay region around AD 1500.[7] According to Goldsmith a clear distinction between Ngati Kahungunu and Rangitane is difficult to make by virtue of various alliances and intermarriages between the iwi.[8]

1. Onoke and Lake Wairarapa are also sometimes referred to as the lower and upper lakes respectively.
2. A G Bagnall, Wairarapa: An Historical Excursion, Masterton, Hedley's Bookshop for the Masterton Trust Lands Trust, 1976, p 377; B J Hicks, Investigation of the Fish and Fisheries of the Lake Wairarapa Wetlands, New Zealand Freshwater Fisheries miscellaneous report, no 126, Christchurch, NIWA, 1993, p 6
3. Angela Ballara, 'The Origins of Ngati Kahungunu', PhD thesis, Victoria University of Wellington, 1991, p 40
4. Alexander Mackay, 'Report on Claims of Natives to Wairarapa Lakes and Adjacent Lands', AJHR, 1891, G-4, pp 5, 12, 19
5. Janet Davidson, 'The Polynesian Foundation' in Geoffrey Rice (ed), *The Oxford History of New Zealand*, 2nd ed, Auckland, Oxford University Press, 1992, pp 9–10
6. Ballara, pp 14–15
7. T W Downes, 'History of Ngati Kahungunu', JPS, vol 24, 1915, p 60, cited in Suzanne Doig, 'Customary Maori Freshwater Fishing Rights: an Exploration of Maori Evidence and Pakeha Interpretations', PhD thesis, Canterbury University, 1996, p 190
8. Paul Goldsmith, Wairarapa, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), July 1996, p 1

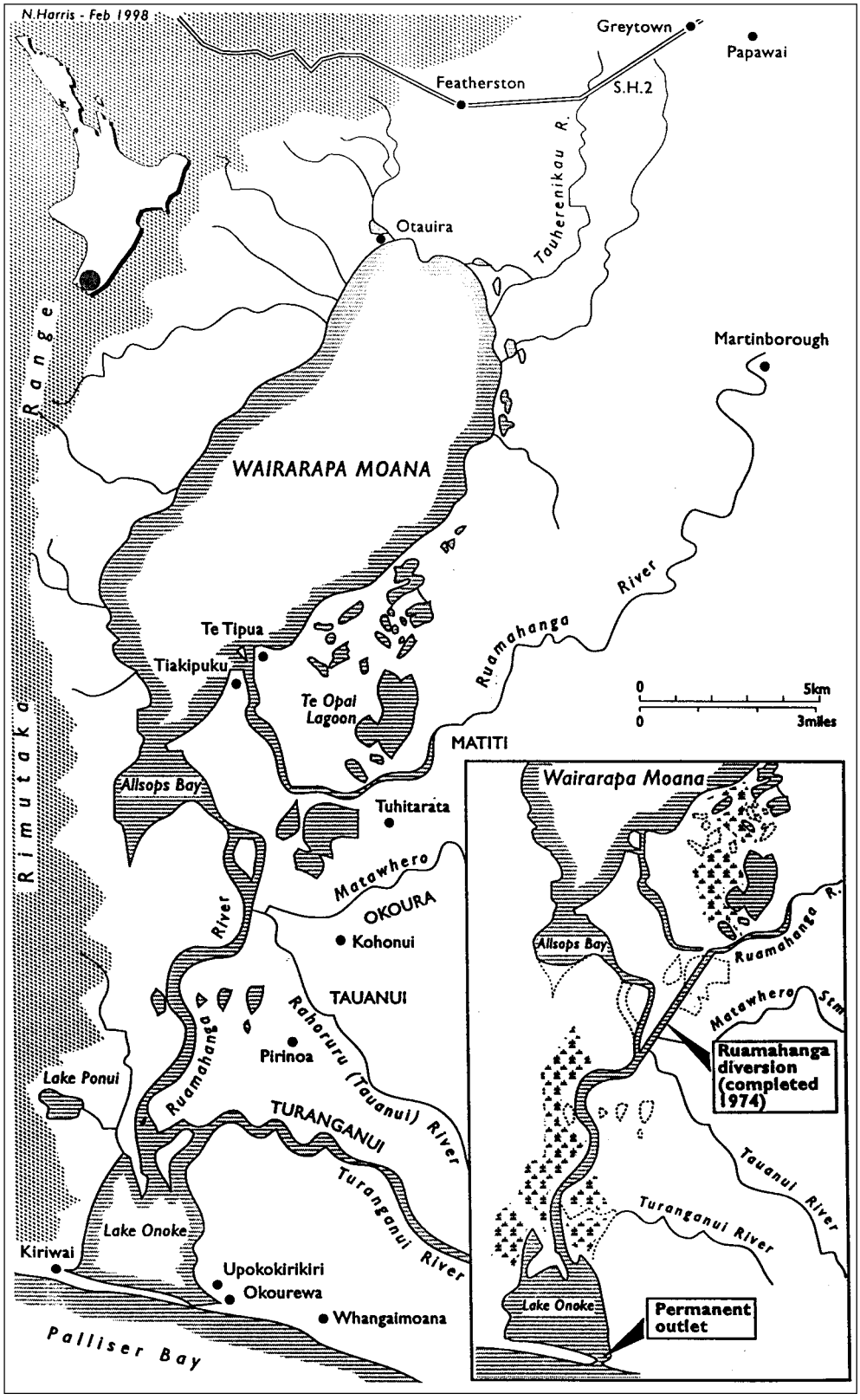

Figure 2: Wairarapa lakes

Although the occupation of these groups was disrupted by taua comprising of Nga Puhi, Te Atiawa, Ngati Tama and Ngati Toa in the 1820s, the various Rangitane–Ngati Kahungunu groups had returned to the Wairarapa lakes region by 1841.[9]

For centuries the Wairarapa lakes have been a vital food source for Maori of the area. While various species of whitebait, flounder, fin fish, and water fowl were taken, it was eels that were historically most important to local Maori.[10] This significance extended beyond just the subsistence of those living near the lake as eels were an important commodity traded with groups both further north and in the South Island. When the Crown purchased large areas of lands contiguous with the lakes in the 1850s, Maori were at pains to ensure that the lakes were excluded from these sales, thus protecting their all-important fisheries.

Subsequent to the Crown purchases of the 1850s, Pakeha pastoralists gradually took up occupation of the Ruamahanga flood plain. However, whereas Wairarapa Maori attached huge value to the lake, to the settlers it was an impediment to their economic advancement. The lakes and their associated waterways were of little use for transport – the outlet to Palliser Bay being naturally closed for most of the year and the actual lakes and river being so shallow as to allow the passage of only boats with the smallest draught.[11] As more and more Pakeha settlers took up occupation of the ceded land and demand for arable land grew, it was not long before farms were being established on lands abutting the lake. Although this land was highly fertile as a consequence of floods depositing large amounts of silt, the floods meant that the lands were frequently inundated with water and hence unusable for up to several months each year. Thus by the 1870s, Pakeha pastoralists were bringing significant pressure to bear upon Government officials to abrogate the rights retained by local Maori that allowed them to maintain the closure of the lakes in order to control the eel fishery. Further pressure was exerted by settlers for the Government to gain control of the lake mouth as it was evident that by maintaining a permanently open channel between Onoke and the ocean, a considerable amount of extremely fertile land could be brought into production.

It was this pressure that precipitated an exhaustive campaign by the Crown to acquire rights to the lake. Although the customary title to the lakes was extinguished when they passed through the Native Land Court, the majority of owners steadfastly refused to sell their interests to the Crown. A catalyst for much initial opposition appears to have been outrage at the fact that the Government had assumed ownership of land thrust out of the lake by the 1855 earthquake. However, eventually the Crown's persistence paid off. The attitude of successive Government officials 'that sooner or later the Maori 'mana' [over the lakes] must pass to the Crown' along with sometimes extreme pressure from local Pakeha, wore down Maori resistance.[12] Subsequent to a

9. Doig, pp 194–195. For a more comprehensive account of the history of the occupation of the Wairarapa plains and of those exercising rights over the Wairarapa lakes, see Doig, pp 189–196
10. Evidence of John Alfred Jury, 'Report on Claims of Natives to Wairarapa Lakes', AJHR, 1891, G-4, p 19
11. Bagnall chronicles early interest and investigations as to the possibility of maintaining a permanently open channel linking Palliser Bay with Onoke. It appears, though that nothing much came of these encounters bar an occasional short lived launch service. Bagnall, pp 377–378
12. Maunsell to Under-Secretary, Native Affairs, 26 May 1885, MA 13/97, NA Wellington

royal commission of inquiry undertaken in 1891, the Crown finally managed to purchase the rights of the lakes' owners. Initially it was intended that the lakes' owners would receive a grant of land in the Wairarapa. But by the time the deal was concluded, land in the Wairarapa was considered to be too expensive. Instead, part of the Pouakani block, near the present day town of Mangakino, was vested in the lakes' owners – approximately 300 kilometres from the lakes' owners' turangawaewae.

This chapter begins with a brief consideration of Maori fishing practices and the nature of fishing rights in the Wairarapa lakes. It then recounts the Crown's campaign to acquire the beds of the lakes that culminated in the 1891 royal commission and the eventual cession of the lakes.

2.2 Maori Fishing Practices in the Wairarapa Lakes

There can be no doubt as to the significance of the Wairarapa Moana eel fisheries to the nineteenth century local Maori economy. This fact was repeatedly stressed in the report of Alexander Mackay, a judge of the Native Land Court, who in 1890 was commissioned to inquire into the claims of Maori vis-a-vis the Wairarapa lakes. Alfred John Jury, appearing before the commission, stated that eels, flounder, kokopu, whitebait, and ducks were procured from the lake.[13] But eels, it would seem, have constituted the major food resource taken from the lakes over the entire period of human occupation.[14]

During the course of the commission's inquiry, a memorial was prepared by the solicitors acting for the group of Maori owners opposed to both the sale of the lake and any interference with their fishing rights. The memorial stated that:

> Prior to the settlement of these islands by Europeans, sheep and cattle were unknown to the aboriginal race, who derived sustenance from several kind of roots, birds, rats and fish. Fish constituted the most important article of diet; consequently whilst lands in European opinion most valuable were frequently neglected, those spots which were renowned as fishing-stations were of sepreme [sic] importance. The Wairarapa Lake was one of these.[15]

The importance of the Wairarapa lake fisheries to the owners appears to have been grasped by Commissioner Alexander Mackay and reflected in his report. He made the observation that while many 'persons may probably not appreciate the importance of the eel-fishing to the Natives', the practice had a reputable English precedent in that 'a great part of the revenue of one of the richest abbeys and cathedral churches in England was derived from eel-ponds'.[16] Continuing, he spelt out the significance of the fishery to Wairarapa Maori yet further:

13. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 19
14. B Foss Leach, 'The Prehistory of the Southern Wairarapa', *Journal of the Royal Society of New Zealand*, vol 11, 1981, pp 28–29, cited in Doig, p 187
15. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 12
16. Ibid, p 5

> In the primitive state of life formerly led by the Natives the eel preserves were the most important property they possessed. Eels were a favourite food with the Maoris, and a good eel fishery like the Wairarapa Lakes is of as much value to them as the banks of the Newfoundland are to those who deal in cod-fish. To European minds cultivation may seem a more important exercise of ownership than catching eels; but you may raise crops or depasture stock anywhere, but eels can only be obtained where Nature causes them to be. Eels in olden times not only formed a large article of diet for the Natives, but they used to dry them in quantities and send them as presents to neighbouring hapus, receiving in return other kinds of food not generally procurable by the donors. It is only of late years that the possession of sheep and cattle has afforded them animal food of another description, and distracted their attention to a certain extent from their old pursuits of hunting and fishing, but not withstanding this, their eel-preserves will always remain a valuable property, more especially when the progress of settlement limits the exercise of their former pursuits to the remnant of the land retained by them.[17]

The importance of the fishery also extended beyond the immediate needs of consumption. Dried eels were exchanged for pounamu and dried sea fish from other areas with groups as far afield as Wellington, Napier, and Gisborne.[18]

In addition to stressing the actual importance of the Wairarapa eel fishery to local Maori, the report of the 1891 commission also contained much detail as to the methods by which the eels were captured at the lake mouth. Mackay noted that the outlet of the lower lake usually remained closed from the end of December until April. During these four months, eels, and other fish congregated near the outlet waiting for the water to burst out so that they could escape to the sea and breed. A much larger variety of eels were obtainable during this period than at other times. John Jury told the commission that the species of eel known as hao, te heko, and kokoputuna (migrating eel) could only be obtained at the mouth of the lake when it was in flood.[19]

During the eeling season at the lake mouth, large numbers of Maori congregated to fish, especially during the months of April and May.[20] Eels were caught there by one of three methods: simply by picking them up at night as they attempted to slither across the bar to the sea; by the use of large hinaki (woven eel pots) that were secured to weirs or stakes; or by the 'koumu' method whereby eels swam into specially dug ditches in search of salt water.[21] Accounts of the lake mouth fishery suggest that annually it yielded as much as 20 or 30 tonnes of eels.[22] As well as the seasonal fishery at the lake mouth, smaller scale operations were carried out throughout the year in

17. Ibid, pp 5–6
18. Hohepa Aporo, Wairarapa Native Land Court minute book 9, 26 October 1888, fol 478; Mackay 'Report on Claims of Natives to Wairarapa Lakes', pp 19, 27–28, and 33
19. Ibid, pp 5, 19
20. Piripi Te Maari and seven others to Native Department, 29 October 1886, (translation), MA 13/97, NA Wellington
21. Doig, p 19
22. Before the Wairarapa Lakes commission, Hoani Paraone Tuinirangi stated that 20 tonnes were caught annually. Doig, drawing on various sources, stated that the figure was 30 tonnes. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 28; Doig, p 188

both the upper lake and the rivers, streams and swamps that formed the lakes' catchment. This appears to have been mostly through the use of hinaki.[23]

2.3 The Nature of Maori Fishing Rights in Wairarapa Moana

As has been established above, it would appear that Wairarapa Maori attached value to Onoke and Lake Wairarapa primarily as a consequence of the lakes' fish resources. Certainly the Crown held the view that if it acquired Maori fishing rights to the lake, objection to the opening of the lake would be removed. Suzanne Doig, in her analysis of fishing rights in the Wairarapa lakes, has contended that a definite distinction can be made in this regard between the upper and lower lakes. Whereas the lake mouth fishery was an extremely high yield seasonal fishery concentrated in a very small area, the main lake fishery existed over a much wider area and was fished throughout the year. However, as Doig has noted, the upper lake fishery was much less plentiful than that of the lake mouth.[24]

The basis of all claims to fishing rights at the mouth of Onoke appear to be predicated upon the gifting of the Wairarapa lakes and surrounding lands by Te Rerewa to Te Rangitawhanga. Doig has shown that virtually all people who gave evidence before the Native Land Court in connection with the lakes and contiguous lands, 'agreed that the lower lake formed part of the area apportioned to Te Rangitawahanga when the lands were divided amongst the Ngati Kahungunu migrants'. Although other ancestors have been claimed as being a source of take tupuna in connection with Onoke, these putake appear to have coexisted with claims deriving from Te Rangitawahanga.[25] Importantly, while control of the fishery always seems to have resided with a nucleus of groups inhabiting the area in the immediate vicinity of the lake mouth, many hapu in the wider Wairarapa region had rights to use the fishery.

Largely as a result of the claim by Hiko Piata that he was the paramount chief of Onoke – a claim evidenced by the sale of the lakes to the Crown in 1876 by him and 16 others – a major issue for the 1891 royal commission was the nature of the rights to the lake. Hoani Paraone Tuninarangi explained to the commission that although some hapu had a 'direct right', others 'only had a right through others'.[26] Direct rights appear to have been those derrived through ancestry and occupation of lands abutting the lake, whereas any other type constituted an indirect right.[27] With regard to occupation, Tuninarangi told the commission that the 'chiefs and hapus who owned the land on the banks of the lake had also a right to a portion of the lake opposite their respective localities'.[28]

23. Doig, p 188
24. Ibid, p 225
25. Ibid, p 203–204
26. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 29
27. Doig, p 205
28. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 29

An example of an indirect right was that exercised by Tuninarangi's hapu, Ngai Tahu. This was based not on a direct ancestral right or occupancy but on the marriage of Iraia of Ngai Tahu with Maraea Toatoa of Rakaiwhakairi – a hapu that held eeling rights at the lake mouth. Tuninarangi recounted before the commission how upon the occasion of the marriage, Te Kai a te Kokopu, a chief of Rakaiwhakairi, gifted lands to Iraia and his hapu that included Okourewa near the lake mouth. Thus each year members of Ngai Tahu established a temporary camp on the gifted land at Onoke and exercised their fishing rights.[29]

Evidence also exists of groups with ancestral rights who had left the immediate vicinity of the lake continuing to exercise their fishing rights despite their non-residency. In this regard Doig has noted that the:

> Onoke resource was rich enough to allow all a share in the fishery, and those with an ancestral and occupational right did not prevent the exercise of non-territorial rights.[30]

It would seem that so long as some sort of connection could be demonstrated and that local practices were complied with, virtually any one could fish at the lake mouth. As Raniera Te Iho stated in an 1876 letter to the Native Department, 'the entrance to the Wairarapa river is for all who wish to make an Eel fishing settlement'.[31]

Clearly the lake mouth fishery was exploited by a large number of groups by virtue of numerous different rights. But what of the claims by chiefs such as Hiko to having a paramount controlling right? Mackay asserted that Hiko did have a 'superior control' over the lake mouth fishery, evidenced by the fact that 'he was the only person who could open the fishing season in the lower lake'. However, Mackay was of the opinion that upon the opening 'ceremony being over his position was exactly similar to that of other persons of his own rank, and neither he or any of the others could or would think of performing any act that would operate detrimentally to the interest of those who possessed fishing-rights in the lake'.[32] Doig concluded that although it appears that some chiefs had a wider influence than others as a consequence of their authority over various hapu in different areas:

> it seems unlikely that the rights of any individual or small group could override those of the whole group with an interest in the control of the lake mouth fishery.[33]

Although Lake Wairarapa was included in the area gifted by Te Rewa to Te Rangitawhanga, the situation with regards to Lake Wairarapa (in other words, the upper lake) and the streams and swamps in the vicinity of the lakes, was somewhat different to that of the lake mouth fishery. Again Tuninarangi stated before the 1891 commission that whereas, 'all the people fished together at the mouth of the lake . . . it was a different matter in the creeks and rivers; each hapu had their own rights to these places'.[34] Similarly Doig has observed that unlike the lake mouth area, the

29. Ibid, p 28; Ballara, p 231
30. Doig, p 207
31. Raniera Te Iho to Halse, 24 June 1876, MA 13/97, NA Wellington
32. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 10
33. Doig, p 213

waters and shores of the lakes appear to have been divided into areas owned and worked largely by single hapu or by groups of small, related hapu.[35]

2.4 The Crown and the Wairarapa Lakes

In the period 1853 to 1854, the deadlock the Crown had previously found itself in with regard to its attempts to acquire lands in the Wairarapa was broken in a spectacular fashion. The deluge of purchases in this period included four blocks in the immediate vicinity of the upper and lower lakes. Of the four deeds, two – the Turakirae and Turanganui, being the lands to the east and the west of the lakes respectively – stated the lakes as a boundary. However, the actual detail of the boundaries was very vaguely stated. The sellers were adamant, subsequent to the deal being concluded, that:

> the flood-line of the lake was the boundary agreed to, as they were unwilling to cede the adjacent low-lying land for fear of destroying the value of their eel fisheries.

The vendors' claim appears to have been affirmed by the fact that land below the flood line in the Turanganui block was subsequently bought by the Crown 'with the full knowledge that the land comprised therein was situated within the alleged boundaries of the Turanganui block'.[36]

The exact location of the boundaries and ownership of the lake bed appears to have first been disputed following the earthquake of 1855 which caused much land to be forced up from beneath the lake. Despite assurances that the lake had been excluded from the sales, the Government assumed ownership of the land and subsequently sold it as the Te Puata Block in 1862.[37] The common law doctrine of accretion holds that dry land created by slow or imperceptible means – such as was caused by a drop in the level of the Wairarapa lakes – accrued to the owner of the land abutting that part of the lake. Where a lake bed is uplifted suddenly, title to the land accrues to the owner of the lake bed (though of course the owner of the riparian lands was, at common law, usually the owner of the lake bed as well).[38] So the Crown's sale of the Te Puata block suggests that the Crown assumed that it was the owner of the beds of the Wairarapa lakes. Other Crown officials, however, took a contrary view that supported the notion that the lakes remained in Maori ownership. In 1874, for example, the Under-Secretary of Native Affairs, H T Clarke, in a communication to the Native Minster, submitted 'that the Government cannot equitably claim a right to the lake nor to any land which has since the cession become dry land through natural causes'.[39]

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34. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 29
35. Doig, p 217
36. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', pp 7,3
37. Ibid, pp 4, 9
38. See F M Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', NZLJ, no 11, August 1981
39. Clarke, Under-Secretary of Native Affairs to Native Minister, August 1874, cited in Memorandum to the Honorable Native Minister on position of the Wairarapa Lake purchase, nd, p 2, MA 13/97, NA Wellington

Further, the vendors unwaveringly asserted that Donald McLean, in negotiating the sales, assured them that their fishing rights would not be interfered with in any way. Mr Russell, who acted as McLean's secretary at the time of the purchases, stated before the royal commission of 1891 that, 'Mr McLean told me that he had promised the Natives that the lake should not be opened'.[40] In fact it appears that an agreement was made that anyone opening the lake mouth could be fined. In December 1868, Raniera Te Iho wrote to a Mr Cooper asking:

> that the arrangement made by the Government respecting our eel fisheries should be confirmed. That law was set up by the Government in 1853. It was the word that no one either Maori or Pakeha was to dig the stream. If anyone interferes. . . let him be tried before the Magistrate. Government said that a fine of £50 should be inflicted for that place is a bridge. . . upon which everyone can travel.[41]

Mackay stated of this arrangement that the 'lake was to be able to burst a channel for itself, but the hand of man was not to touch it' and that 'this rule was to be permanently observed for all time'.[42]

Initially relations seem to have been amicable between European settlers occupying the lakes' floodplain and local Maori. In his report of 1891, Mackay stated:

> That there does not appear to have been any trouble between the settlers and the Natives about opening the lake during the early occupation of the Wairarapa, as there was plenty of land available for pasturage purposes at that time, and it was not until sometime after the former had purchased the land adjacent to the lake from the Government that a disposition was manifested to prevent these lands being flooded; but even then amicable relations existed between the parties concerned, and a right to release the flood-waters was always conceded on application and payment.[43]

However, as Mackay noted, once pastoralists acquired title from the Crown to the lands in the immediate vicinity of the lake that were most deleteriously affected by flooding, settlers began to exert serious pressure upon the Government to allow them to open the lake mouth when flood waters threatened to inundate their lands.

The Government's position at this time, however, appears to have been that Maori with an interest in the lake had an incontrovertible right to control the opening of the lake mouth. In an August 1874 letter to the Native Minister, the Under-Secretary of Native Affairs opined that 'the dry strip of land and shingle between the outlet of the lake and Kiriwai has never been ceded' and 'that the Government cannot equitably claim a right to the lake'.[44]

As a result of pressure from Pakeha settlers, Herbert Samuel Wardell, a Resident Magistrate in the Wairarapa, had earlier in 1874 been instructed by the Government

40. Ibid, p 7
41. Raniera Te Iho to Mr Cooper, 30 December 1868, MA 13/97, NA Wellington
42. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 7
43. Ibid, p 7
44. Under-Secretary of Native Affairs to Native Minister, August 1874, excerpt contained in 'Memorandum to the Honorable Native Minister on Position of the Wairarapa Lake Purchase', nd, p 2, MA 13/97, NA Wellington

to attempt 'to purchase the alleged right to the closing of the lakes and to pay for this £200'.[45] With this objective in mind, Wardell interviewed a group of Maori with rights in the lake at a meeting in Featherston sometime in 1874. Those present, however, 'declined to accede to the request'.[46] This refusal caused the settlers to take the matter into their own hands. On 1 February 1875, a meeting was convened at Featherston at which a resolution was passed whereby 'they pledge[d] themselves to test the question of the right of opening the mouth of the Wairarapa lake by digging a channel for the water' to escape. Further, as was reported in the *New Zealand Times*, 'in the event of legal proceedings being taken against the persons doing so,' a pledge was made 'to subscribe the necessary funds to decide the matter in a permanent way'.[47] In response to this, McLean informed Major Atkinson that, the 'resolution of the settlers was simply preposterous and cannot be entertained for a minute'.[48] Clearly, then, the Government maintained the position that Maori retained rights in the lake sufficient to give them control of the lakes' outlet to the sea. However, the extent and nature of the rights acknowledged by the Crown are not clear; especially as to whether it was thought Maori had an undisputed customary title to the lakes.

2.4.1 The 1876 purchase

In 1875 Edward Maunsell, who had replaced Wardell as the Government's agent in negotiating the purchase of the lakes, stated that the settlers' resolution 'has created a considerable degree of excitement in the Native mind, and will be the means of rendering the negotiations difficult'.[49] However, Maunsell set about his task with great alacrity. In March 1875 at Tuhitarata, he met with those whom he considered to be 'the principal chiefs who claim the Wairarapa lakes'. Of the interview, Maunsell reported that the chiefs 'evinced a sullen reticence . . . in the expression of any opinion upon the subject of the sale' and expressed the fear that 'in the event of their opposing the opening of the spit . . . the militia and volunteers would attack them'. At this meeting an offer was made to purchase the rights to both the lake and its fisheries for the sum of £800. Despite Maunsell being of the mind that those present at the meeting were 'suspicious as to the reason why the offer of the purchase was made by the Government',[50] a deed of sale was eventually executed by Hiko, Hemi Te Mihi and 15 others in Wellington on 14 February 1876.[51] Maunsell recounted how at the March 1875 meeting, Hiko had complained that he had been 'unjustly deprived of his salary' of £50 per annum that he received for his work as an assessor. In his report of the meeting, Maunsell had stated that if Hiko's salary was reinstated, the chief would in

45. Ibid, p 1
46. Ibid, p 7
47. Maunsell to Clarke, 8 February 1875, MA 13/97, NA Wellington; untitled, *New Zealand Times*, 5 February 1875
48. McLean to Major Atkinson, 16 February 1875, MA 13/97, NA Wellington
49. Maunsell to McLean, 9 March 1875, MA 13/97, NA Wellington
50. Report by Maunsell re interview with the principal chiefs who claim the Wairarapa lakes, 24 March 1875, MA 13/97, NA Wellington
51. Turton, deed 198, pp 410–411

all likelihood agree to the sale. Accordingly the deed of cession contained a clause that an 'annuity or pension of Fifty pounds to be paid to Hiko Piata'.[52]

The deed stated that the signatories:

> held rights over the Wairarapa Lakes . . . for the purposes of eel fishing which . . . have been protected by the Government of New Zealand, in so much that Europeans have not been permitted to use artificial means to drain off into the sea the waters confined in such lakes . . .

and that such:

> eel fishery rights and other rights and interests of any kind whatsoever which we claim to have in such Lakes or in the borders of whether in land or in the waters thereof . . .

were surrendered and conveyed to the Crown.[53] Although the deed explicitly recognised that the vendors had a set of prior rights to the lake, these were not defined. The sale was contested from the outset on the grounds that Hiko did not have a paramount authority that enabled him to sell the entire lakes and all profit a prendre[54] deriving from them. Interestingly, before the 1891 commission, Maunsell recounted how his original intention, and presumably instruction:

> was only to purchase the fishing-rights, so as to obtain control over the mouth of the lake, but owing to my zeal in the matter, I inserted a clause making it a cession of the land both under the water and on the margin of the lake as well.[55]

Manihera Rangitakaiwaho and John Jury were both members of the party that travelled to Wellington with Maunsell. In a report of the signing of the deed, Maunsell recounted how, en route to Wellington, Manihera had expressed the opinion that the proceeds from the sale should be divided equally between his followers and Hiko's party. Maunsell informed Manihera that he had been instructed that Hiko 'had come to arrangement viz that the 'mana' of the fisheries was held by him and that £500 [of the £800 total] was to be deposited in his name'. Being dissatisfied with how it was proposed to distribute the money, Manihera and Jury 'set up a claim for all the land reclaimed along the margin of the lake since the cession of the various blocks mentioned'. To this Maunsell recounted his response as being that the:

> Government would not recognise any claims to land reclaimed since the cession and bordering on the blocks ceded. That the Government offered them a sum of eight hundred pounds for the surrender of their fishery rights and any other claims they may have, more particularly the surrender of rights in the lower lake, so that no questions

52. Report by Maunsell re interview with the principal chiefs who claim the Wairarapa lakes, 24 March 1875, MA 13/97, NA Wellington; Turton, deed 198, p 411
53. Ibid, p 411
54. A profit a prendre is the right to take some part of an estate such as minerals or produce of the land. The rights exists independently of the title to the land in question. They can be exclusive or held in common with others. GW Hinde, D W McMorland, and Sim, *Introduction to Land Law*, 2nd ed, Wellington, Butterworths, 1986, p 366
55. Evidence of Maunsell in Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 32

> would hereafter arise as to the right of the Government to open a passage for the confined waters. That if they set up claims for reclaimed lands they may as well set up claims for land cast up by volcanic action in the middle of the sea and that the Queen of England was the undoubtful and legal disposer of lakes and colonial seas. Manihera referred me then to the Treaty of Waitangi where in he says all reclaimed land became Native property. Not being conversant with the contents of that Treaty, the only reply I could give was, the Treaty had been violated by the Maori consequently it was unfair to hold the Crown to its part of the bargain.[56]

Maunsell considered that Manihera and Jury's opposition resulted from them being jealous of Hiko's influential position. Further, Maunsell felt compelled to:

> bring under the notice of the Government. . .the unprincipled and fraudulent practices of certain of the Wairarapa Natives not only towards the Government but also towards private Europeans and [that] this state of their morals is daily becoming more corrupt. Manihera and Ngatueres' parties more especially in this respect.[57]

Before the 1891 commission, Piripi Te Maari recounted how he and others opposed to the sale of the lakes had formed a committee, and that because of this he had not been consulted vis-a-vis the 1876 sale. This committee, in response to a notice being published by the Government stating that the Crown had acquired all rights to the lake, published a reply disputing the validity of the Crown's purchase.[58] Initially it appears that Raniera Te Iho, a chief who had been granted a reserve on the shores of Lake Onoke, had been party to negotiations along with Hiko and Hemi Te Mihi. However, it appears that he subsequently regarded the proposed sale unfavourably. Maunsell stated that because Raniera 'has acted in an under [hand?] way and opposed the Government in the matter' he 'declined to bring him to Wellington or [allow him to] join in the conference held by myself and the chiefs'.[59] It appears that in negotiating the purchase, Maunsell simply did not consult those chiefs he knew to be opposed to the sale. In June 1876, Raniera Te Iho wrote to Halse stating his opposition to the sale:

> I do not agree to the sale of those eel weirs at the Wairarapa – part of which belong to me . . . and of which the tribe at large knew nothing. Those weirs . . . do not only belong to two persons – but to us all, and you know yourself there are a good many persons owning those weirs and I am one of them, and upon that ground do I dispute the sale of them – the entrance to the Wairarapa River is for all who wish to make an eel fishing settlement:— . . . This sale can only be likened to a murder, the first that is known about it is that the land is gone – and I am greatly troubled by this sale:—[60]

It is evident that Maunsell's assertion that Hiko had a paramount interest in the lakes may have been to a large extent informed by the fact that he was prepared to sell.

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56. Maunsell to Native Department, 15 February 1876, MA 13/97, NA Wellington
57. Ibid
58. Evidence of Piripi Te Maari in Mackay, 'Report on claims of Natives to Wairarapa Lakes', pp 31, 18
59. Maunsell to Halse, 11 February 1876, MA 13/97, NA Wellington
60. Raniera Te Iho to Halse, 24 June 1876, (translation), MA 13/97, NA Wellington

Similarly, the converse would also appear to be the case; that Maunsell considered those opposed to the sale to have less significant interests in the lake than those that favoured the sale. For example, in April 1876, Maunsell wrote to the Native Department concerning a letter of complaint in connection with the sale by Manihera. Of the complaint Maunsell stated that Manihera claimed:

> that I told him the Maoris had no 'mana' over the lakes. My remark to him was somewhat similar to what he states, but this took place after his refusal to sign the deed. . . My remark was it was doubtful in law whether they could claim the land under and on the margin of the lakes but I did not say that they had no fishery 'mana'.[61]

As will be detailed below, largely as a result of such vociferous opposition, the extent of what the sale conveyed to the Crown was later deemed by the Native Land Court to be significantly less than what the deed purported.

Subsequent to the sale, Peter Hume, a settler with an interest in the lake question, informed the Native Department that it was intended to open the lake mouth in spite of the fact that a Crown proclamation had not yet been issued. Maunsell replied that, the illegality of this action aside, 'there existed a feeling of regret in the Native mind at the sale to the Crown' and that to open the lake 'would be also an impolitic act at present for reasons which I am not prepared to divulge'.[62] This suggests that only a month after the Crown's purported purchase of the lakes, the Government was doubting the extent of the rights that it had acquired.

In September 1876, Manihera and others petitioned Parliament concerning the sale of the lakes. They claimed that the Wairarapa lake had 'been improperly purchased by the Government commissioners, inasmuch as the majority of the chiefs and their hapus objected to the sale of the same'. Upon consideration of the petition, the Native Affairs Committee were:

> satisfied, from the evidence they have taken, that the majority of the owners of the lake have not joined in the sale, and they are of the opinion that it would have been better that the title should have been investigated by the Native Land Court, previous to the completion of the purchase; and the Committee are further of the opinion that the petitioners; and any other Natives who may allege a claim, ought to have an opportunity of proving their title, if they are able to do so before the Native Land Court.[63]

The committee's recommendation was acted upon and the case came before the Native Land Court in Masterton in August 1877. However, it was dismissed by the court because there was no survey plan.[64]

Dissatisfaction with the sale and ensuing state of affairs was also felt by farmers affected by the lakes' flooding. In October 1877, John Hume along with other settlers, petitioned Parliament emphasising the necessity of keeping the lake mouth open in

61. Maunsell to Under-Secretary, Native Department, 12 April 1876, MA 13/97, NA Wellington
62. Maunsell to Hulme, 13 March 1876, MA 13/97, NA Wellington
63. 'Report on the Petition of Manihera Rangitakaiwaho and others of Wairarapa', AJHR 1876, I-4, p 17
64. Bagnall, p 379

order to mitigate the loss suffered by farmers as a result of flooding. Before the Native Affairs Committee, it was claimed that between 12,000 and 15,000 acres were affected by the flooding of the lakes each year and that this resulted in approximately £6000 of lost income. Further, the settlers appearing before the committee claimed that the economic importance of fishing to the Wairarapa Maori was much overstated and was in fact 'only a pretence'.[65] In its report, the Native Affairs Committee reiterated its recommendation vis-a-vis Manihera's earlier petition – that the matter be referred to the Native Land Court as soon as possible – and that 'the grievance complained of by both parties [be] settled with the least possible delay'.[66]

2.4.2 The Wairarapa lakes and Native Land Court

In April 1880, Maunsell reported to the Under-Secretary of Native Affairs that he had attended a meeting concerning the Wairarapa lakes at which 60 Maori were present. He recounted how before the Native Land Court Piripi Te Maari had expressed his disappointment at the dismissal of the 1877 case, and:

> that if the case had come before the Court, he and his tribe should enter into arrangements with the Government to finally settle the question for the good of the pakeha.

However, according to Maunsell, Te Maari went on to express his regret that he and his people:

> had been treated lightly in the matter of the lakes by the Government and spoke bitterly at no replies [having been made] to their letter of the 15 November 1878 . . .

Consequently Te Maari was 'uncertain whether they would again apply to the Court'.[67]

Meanwhile Pakeha farmers continued to exert pressure upon the Government to settle the matter. A bad flood in 1880 had caused extensive stock losses and, to the farmers' minds, illustrated the urgency of the matter.[68] In July of that year, George Beetham wrote to Bryce informing him that he had received a large number of complaints from settlers deleteriously affected by the flooding of the lakes. And later in 1880 he wrote to the Minister of Justice suggesting that Heaphy be commissioned to act in the matter.[69]

In spite of Te Maari's (perhaps deliberate) vacillatory position reported by Maunsell, Te Maari made an application to the Native Land Court to have his and others' interests defined in Wairarapa Moana South. Concurrently the same

65. LE 1/1877/5, cited in Bagnall, p 379
66. 'Report on the petition of John Hume and others, European inhabitants of the Wairarapa', New Zealand Native Affairs Committee Reports, 1872–90, p 38
67. Maunsell to Under-Secretary, Native Department, 10 April 1880, MA 13/97, NA Wellington
68. Bagnall, p 379
69. George Beetham to Bryce, 6 July 1880, MA 13/97, NA Wellington; Beetham to Minister of Justice, 17 September 1880, MA 13/97, NA Wellington

application was made by Manihera Rangitakaiwaho vis-a-vis the northern lake, and by the Crown in relation to both lakes. However, when the case came before Judge Brookfield at Masterton in June 1881, Te Maari and Manihera withdrew their claims, preferring to appear as counter claimants in relation to the Crown's claim.[70]

The Crown opened its case stating that it intended to base its case on, inter alia, section 6 of the Native Land Amendment Act 1877, and the deed of 1876. (Section 6 of the Native Land Act 1877 held that the Native Minister could apply to the Native Land Court to determine the extent of interests purchased by the Crown in any block of land. Upon investigating such a claim, the court could declare such lands to be absolutely vested in the Crown.) However, the court immediately responded that under section 87 of the Native Land Act 1873, transactions of Maori land made before freehold tenure was ordered by the court are void. Therefore the deed relied upon by the Crown was invalid. The court also observed that by virtue of the 1876 deed, nothing but fishing rights passed to the Crown. And given that the right to fish was not an interest in land, such rights were not within the court's jurisdiction.[71] The Crown subsequently asked that these matters be referred to the Supreme Court.

When the matter came before the Supreme Court, the Crown sought a rule nisi to prevent the Native Land Court investigating title to the lakes. The basis of the Crown's case, according to Mackay, was that 'no right existed, according to Native custom, to the soil beneath a lake, nor is the same recognised by Native custom as being capable of ownership'. Justice Richmond ruled that the Supreme Court:

> could not interfere with the Native Land Court upon any such grounds; but supposing that the applicants [the Crown] were right in their view of Native custom, there appeared to be no reason why the Native Land Court should not issue certificates of title to rights of fishing as tenements, distinct from the rights to the soil, which would then be in the Crown.[72]

During the course of the Land Court's 1881 inquiry, an opinion appears to have been sought from the Solicitor General as to what exactly the Crown had acquired as a result of its 1876 purchase. Peculiarly though, this opinion appears not to be mentioned in the minutes of the case. The opinion, dated 13 June 1881, states 'that in the purchase by Mr Maunsell only the fishing rights over the lakes were acquired and not the lakes and the ground under the lakes'.[73] That the 1876 deed only conveyed to the Crown the fishing rights of 17 individuals was confirmed by the findings of the 1891 commission of inquiry into the lakes question.[74]

The Crown again attempted unsuccessfully to purchase the remainder of the interests in the lakes in 1883.[75] In October of that year, the Crown brought the matter

70. Wairarapa Native Land Court minute book 3, 16 June 1881, fol 351
71. Report of Fitzgerald to Assistant Law Officer, 22 June 1881, MA 13/97, NA Wellington; Wairarapa Native Land Court minute book 3, 15–16 June 1881, fols 348–352
72. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 8
73. 'Opinion of Solicitor General', 13 June 1881, cited in 'Memorandum to the Honorable Native Minister on Position of the Wairarapa Lake Purchase', nd, p 7, MA 13/97, NA Wellington
74. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 11
75. Ibid, p 8

before the Native Land Court at Greytown in an attempt to get defined the rights it had acquired in the 1876 purchase. The court received evidence from Maunsell and several interested Maori, including Te Maari. In its decision the court held that the Crown had acquired the interests of the 17 signatories in both the upper and lower lakes.[76] At this hearing, all counter claimants were admitted. John Gill, the Under-Secretary of the Native Land Purchase Department, advised the Native Minister that this was 'another way of frustrating a settlement as an order including all owners will at the very least carry in the capacity of 200 names'. However, while being uncertain as to whether or not it was possible, he considered the only way to proceed was to try to buy out the interests of all the owners admitted by the Land Court.[77]

There can be little doubt that the Government saw the Native Land Court as the best instrument through which to get their interests defined, ideally as a controlling or paramount interest. However, others also saw the Court as potentially useful in terms of the lakes question. In May 1883, the Clerk of the Wairarapa West County Council wrote to the Under-Secretary of the Crown Lands Office, requesting that a sitting of the Native Land Court be arranged to enable the taking of Maori land under the Public Works Act for the purposes of draining the Wairarapa lakes.[78] The council's chairman had earlier advised the Minister of Public Works of a resolution passed unanimously by the council, that the Government should take the land necessary to enable the drainage of the Wairarapa basin to proceed, pursuant to sections 24 to 26 of the Public Works Act 1882. It was stated that the Native Land Court, 'in awarding any compensation which might be found fairly due to the Natives would effectively prevent any injustice being done to them'. The letter noted that 18,000 acres of settler's land was flooded each year and that other land, although not inundated, was not being developed because of inadequate drainage.[79]

In November 1883, the matter was again before the Native Land Court, although not with a view to County Council's request. After hearing extensive evidence concerning ancestral rights from various Maori witnesses, the Court issued orders registering a further 122 persons as owners of the lakes on the basis of ancestral right, occupation, and use. In his decision, Judge Puckey confirmed that the 17 interests the Crown had acquired in 1876 meant that it was merely a co-owner or tenant-in-common. Clearly the Crown lacked sufficient rights to control the lake mouth.[80] Subsequent to the 1883 hearing, a certificate of title for the beds of the lakes was issued in accordance with the Native Land Court orders.[81] But now that the ownership of the lake had finally been determined and the Crown had a definitive list of owners, it resumed its quest to acquire title to both Lakes Onoke and Wairarapa.

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76. Wairarapa Native Land Court minute book 4, 26 October 1882, fols 42–47
77. Gill to Native Minister (telegram), 23 October 1882, MA 13/97, NA Wellington
78. County Clerk, West Wairarapa County Council to Under-Secretary, Crown Lands Office, 10 May 1883, MA 13/97, NA Wellington
79. Chairman, West Wairarapa County Council to Minister of Public Works, 3 May 1883, MA 13/97, NA Wellington
80. Wairarapa Native Land Court minute book 4, 8–11 November 1883, fols 117–132; Doig, pp 199–200
81. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 8

2.4.3 Crown initiative, Maori resistance, and settler pressure, 1884–85

In 1884, John Bryce, in his capacity as Native Minister, met with a group of Maori with interests in the lake. But like his predecessors, he failed to progress the matter of the Crown's acquisition of the lakes. Similarly unfruitful was the audience John Ballance granted to a group of settlers in the following year. Matthews, the chairman of the South Wairarapa River Board, claimed of the meeting that the Minister gave nothing more than promises that the matter would be quickly settled.[82]

In May 1885, Maunsell reported to the Under-Secretary of the Land Purchase Department, that he had:

> endeavoured to purchase other shares [in the lakes] but have met with a strong feeling against selling; it appears that an agreement has been signed throughout the District that no shares shall be sold and any who depart from the agreement is to forfeit £50 payable to the non-sellers.[83]

Maunsell had in fact been told as much the previous month during a meeting with Te Maari, who informed him of a meeting of owners at which the anti-selling resolution had been passed. Maunsell reported to the Native Department that, upon Te Maari telling him this, he had replied:

> Maories, as a rule, at meetings like this were like a flock of geese, when one cackled others followed but when they were separated it was different, hence those he [Piripi Te Maari] most relied on would not resist the temptation of receiving money for what was of little or no value to them – merely a Maori 'mana'. He admitted this was so.[84]

At the same meeting, Maunsell assured Te Maari that Maori would still be allowed to fish in the lake were it to become part of the Crown's demesne. However, to this Te Maari apparently replied, 'that there would be no fishing grounds if the Government drained the lower lake'. According to Maunsell, the chief then proceeded to set out 'the principal cause of our opposition to the lakes becoming Crown property'. Interestingly, the protection of their fisheries was not stated as the primary concern:

> When we sold to McLean the boundary was the margin of the lakes since then large tracts of land have been raised by earthquakes. The Government without consulting us has sold to Europeans lands which ought to have been ours – we have protested against the sales. We have not received compensation. Whenever we have raised this question Government officers have produced the deeds of sale of lands bordering on the lakes where it is stated that the lake is the boundary – true – the then lake. The margin of the lake is changed since the Deeds were signed. This is our grievance against the Government.[85]

At the same meeting, Maunsell questioned those present regarding an allegation that certain Maori had removed a Pakeha's fishing nets from the lake. From the response

82. Bagnall, p 379
83. Maunsell to Under-Secretary, Land Purchase Department, 26 May 1885, MA 13/97, NA Wellington
84. Maunsell to Native Department, 20 April 1885, MA 13/97, NA Wellington
85. Ibid

this inquiry solicited, rights to the lakes' avifauna also appears to have been an issue at stake. In reply to the allegation, Maunsell recounted that those present had:

> denied having done so and said they would not do so to anyone. What they had done was to notify that persons trespassing for the purpose of shooting wild fowl on the lakes would be prosecuted and that they had [received] repeated applications since for permission to shoot and sell [wild fowl] in Wellington. They had however refused permission as the lakes were held in partnership between them and the Government. They did not object to a person desirous of having a day's sport only for private use. They also objected to the wholesale and reckless destruction of birds by the use of large punt guns where many are wasted, being wounded they get away and die; total extinction being the probable result.[86]

An unsourced newspaper article stated that Maori who held interests in the Wairarapa lakes had published a notice stating that any 'persons who shall be guilty of trespassing, fishing, or shooting birds upon the lake or lakes' will be fined between £5 and £50.[87] Subsequent to the April 1885 meeting between Maunsell and Te Maari, two inquiries were made to the Native Minister, one by Te Maari and another by H T Watahoro, asking whether Europeans had been authorised to shoot birds and catch fish on the lake. A file note on the latter of these letters states that the 'Answer given to Piripi to same question was "no"'.[88]

The position adopted by Wairarapa Maori in relation to the rights of non-Maori to take birds and fish from the lake reveals much about their conception of their rights. Claiming an exclusive right to the fish and birds of the lakes was very much in accordance with the rights that accrue to the owner of a lake bed under English common law. However, at common law lakes are public highways, and the owner of a lake has no right to prevent others from navigating its waters.[89]

Maunsell concluded his report of the April 1885 meeting noting that he:

> had left Piripi in a friendly way and judged from his proposition to get the consent of all concerned to the sale of the lake as indicative of a withdrawal of his past opposition and that he understands that sooner or later the Maori 'mana' must pass to the Crown.[90]

Te Maari, it should be noted, had made similar statements before but little had come of these. Clearly Te Maari desired that the entire group agree to sell rather than the Crown gradually acquiring the interests of individuals. However, it must also be asked, especially in the light of the fact that it was to be nearly two decades until a

86. Ibid
87. Untitled, unsourced, undated newspaper article attached to Maunsell to Under-Secretary, Native Land Purchase Department, 28 May 1885, MA 13/97, NA Wellington
88. Piripi Te Maari to Ballance (telegram), 6 May 1885, (translation), MA 13/97, NA Wellington; H T Watahoro to Ballance, 19 June 1885, (translation), MA 13/97, NA Wellington; file note dated 29 June 1885 on H T Watahoro to Ballance, 19 June 1885, MA 13/97, NA Wellington
89. See *Halsbury's Laws of England*, 4th ed, London, Butterworths, 1984, vol 18, p 268; H J W Coulson and U A Forbes, *The Law Relating to Waters: Sea, Tidal and Inland*, London, Henry Sweet, 1880, pp 72, 101
90. Maunsell to Native Department, 20 April 1885, MA 13/97, NA Wellington

settlement was agreed to, whether he was simply telling Maunsell what he wanted to hear in order to get him off his back.

Throughout the 1880s, Maunsell continued to assert that the Crown had possibly acquired sufficient rights by virtue of the 1876 purchase to simply override the rights of those who had not sold. This somewhat optimistic view was held in spite of the rulings of the Native Land Court vis-a-vis the extent of the Crown's interests in the lakes, and the opinion having been expressed by officials of the Native Department as early as 1879, that the 1876 purchase was perhaps defective in that 'it did not contain the names of all the persons' interests'.[91] In May 1885, Maunsell wrote to the Under-Secretary of Native Affairs that:

> The interests acquired were those of the principal chiefs who were acknowledged by Ms [sic] as the proper persons to deal with the fishery rights and I think if such interests were ascertained the Government would come out very well. Much care would have to be exercised in getting the necessary evidence to prove the 'mana' of Hiko, Arihia and Wiremu Kingi to deal under Maori custom with these lakes and also that there should be a sum of money provided to cover expenses of witnesses.

He continued that those signatories had had strong rights to the spit between Kiriwai and Okourewa, which if defined by the Native Land Court, could be sufficient 'to enable the Government to do whatever it pleased with it'. Upon the Government opening the lake mouth, aggrieved parties:

> could take legal proceedings in a Court and then the question can be tested, as to whether or not the rights or 'mana' which they assert to hold under the Treaty of Waitangi have or have not passed away[, given that] the lakes [are] now being held under Crown title and [are] subject to be dealt with under the law.

Further he contended 'that Piripi Te Maari has acted with duplicity and that he does not intend to assist in settling the long vexed question'.[92]

Meanwhile, aggrieved farmers continued to exert pressure upon the Government to settle the lake question. In March 1886, a Pakeha settler named Buchanan wrote to the Native Minister and informed him that unless immediate action was taken, 'the settlers must unfortunately lose all their winterfeed for stock and suffer grievous damage'. Buchanan's letter mentions a pledge made by Te Maari that upon being asked by farmers to open lake in the face of impending flooding, he would do so.[93] A Native Department file note by Halse stated that:

> Piripi Te Maari most certainly assured that whenever the lake filled to threaten a loss to any of the settlers that he would if requested see that the lake was opened.[94]

However, Buchanan's letter contained an excerpt of a letter written to him by a farmer, which stated that upon such a request being made to Te Maari, the chief was

91. File note by T W Lewis, 8 November 1879, MA 13/97, NA Wellington
92. Maunsell to Under-Secretary, Native Department, 28 May 1885, MA 13/97, NA Wellington
93. Buchanan to Native Minister, 14 March 1886, MA 13/97, NA Wellington
94. File note by Halse, 22 March 1888, MA 13/97, NA Wellington

unable to give 'a satisfactory answer until he saw all the natives that were fishing' and that after 'seeing them the conclusion was that they wanted to fish on the dark nights of April that would have been about five weeks'.[95]

Two meetings of the Maori committee chaired by Te Maari to consider the lakes question appear to have been convened in 1886. The first, held at Papawai in April, was according to Matthews 'only a waste of breath'.[96] The second, held around October of the same year, saw the committee proposing a compromise solution to the flood problem. As Te Maari reported to the Native Department, the lake mouth fishing season extended over four months:

> However, in compliance with the wish expressed by the Native Minister, that an understanding should be come to between the two races, we have decided to divide those four hinapouri [months?]. We shall retain the hinapouri of February and March, but will relinquish the months of April and May.

Continuing, Te Maari pointed out 'that the months we relinquish are the principal months in which the fish are caught'.[97]

In an account of a meeting held between the Native Minister, Te Maari and Wi Hutana in November 1886, the Minister conveyed to the committee 'his thanks for the generous proposition'. However, he was still adamant that they should allow the Crown to purchase their interests in the lake, being of the opinion that it would be in the owners' 'best interest to sell'. The minister also stated the possibility of the owners being granted a reserve elsewhere in the Wairarapa. Te Maari, although undertaking to communicate the offer to the other owners, asked 'that there should be no dealing with individual owners until the whole of the owners had had a meeting on this subject and decided to sell'.[98]

2.4.4 Negotiations with the Crown continue

Having reiterated in several interviews that, were the matter placed in his hands, a settlement of the lakes question would be forthcoming, Henry Bunny was appointed to negotiate the purchase of the lakes in 1887.[99] Bunny had formerly been a Member of the House of Representatives for the Wairarapa, and owned land in the vicinity of Featherston. However, the task of negotiating the purchase of the lakes proved to be somewhat more onerous than Bunny had supposed. Although reporting to the Native Minister in February 1887 that the committee of owners had agreed to settle the lakes question upon the condition that a commission be established to settle disputes,[100] just three months later Te Maari informed the Government that 'all the people

95. Buchanan to Native Minister, 14 March 1886, MA 13/97, NA Wellington
96. Matthews' Memoirs, cited in Bagnall, p 379
97. Piripi Te Maari and 7 others to Native Department, 29 October 1886, MA 13/97, NA Wellington
98. Account of meeting between Native Minister, Piripi Te Maari and Wi Hutana, 12 November 1886, MA 13/97, NA Wellington
99. Bagnall, p 380
100. Bunny to Native Minister, 24 February 1887, MA 13/97, NA Wellington

interested in the aforesaid lake have come to the conclusion that the same be neither sold nor leased to the Government, or to any other person'.[101]

However, the Maori owners were not oblivious to the plight of the Pakeha settlers. In 1887 the committee made a proposal to the Native Minister through their solicitor, Mr Pownall. The agreement proposed was that the Crown would release its interests in the lake acquired by virtue of the 1876 purchase, and that the proper boundary of the lake be ascertained and that this be marked by posts. Upon the lake rising beyond the posts, that is when it encroached upon land not in Maori ownership, the Government would be able to open the lake mouth so as to release the floodwaters. Although this apparently would have solved the settlers' problems, no action was taken. Royal commissioner Mackay considered this to be because the matter 'involved questions that were necessary to be submitted to the Law Officers and to Parliament'. Pownall, appearing before the commission, stated that Mitchelson, the then Native Minister, 'declined to have anything to do with it, and ignored the rights of the Natives to consideration'.[102] It would seem that the Crown was not prepared to settle for anything less than the complete cession of the owners' title to the lakes.

By the end of 1887 negotiations appear to have completely broken down as a result of the Maori owners' intransigence on the question of sale.[103] Despite the owners appointing a 12-person committee to negotiate with the Crown and again interviewing the Government on the matter, it appears that the Government was considering courses of action that would force a resolution of the flooding problem.[104] A Native Department file note of January 1888, for example, urged that another application be made to the Native Land Court to define the extent of the Crown's interests acquired by the 1876 purchase, and that what remaining interests were necessary to control the lake mouth be taken pursuant to the Public Works Act.[105] However, it was to be the South Wairarapa River Board, taking the matter into its own hands, which would ride roughshod over the lake owners' rights.

In June 1888, the chairman of the South Wairarapa River Board wrote to the Native Minister advising that the board, acting under powers delegated to it by the South Wairarapa County Council, had declared the outlet to the Wairarapa lakes a 'public drain'. But 'it was thought best, before taking further steps, to communicate with you, with a view to obtaining your sanction'.[106] In a file note in connection to this letter, Lewis, despite being of the opinion that the question should be considered by Cabinet, appears to have considered the idea to have been fundamentally sound:

> The River Board or County should also accept all the responsibilities of dealing with the opening of the lake and any proceedings or claims that might arise thereafter. On

101. Piripi Te Maari to Native Minister, 13 May 1887, MA 13/97, NA Wellington
102. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 9
103. Ibid, p 6
104. Buchanan to Native Minister, 11 March 1888, MA 13/97, NA Wellington; Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 9
105. File note, 23 January 1888, MA 13/97, NA Wellington
106. Bock to Native Minister, 22 June 1888, MA 13/97, NA Wellington

this understanding I am of the opinion that to give the required permission is the best and perhaps the only reasonable way of settling this officially.[107]

Of the declaration Bagnall has expressed disbelief that '1000 years of Polynesian history and 100,000 tuna could be dismissed in this fashion'.[108] However, aside from the injustice of the way in which Wairarapa Maori's customary rights were abrogated, in terms of strict law it would appear that the river board was in fact acting illegally. As was made apparent in a subsequent Court of Appeal case concerning the lakes, it was not until the next year that County Councils were empowered to exercise such powers.[109]

2.4.5 The South Wairarapa River Board

In 1884, the River Boards Act was passed. The purpose of the Act was to authorise the undertaking of flood control works. The Act provided for catchments to be constituted as river districts, upon the Governor being petitioned by not less than two-thirds of ratepayers in an area affected by flooding. All rivers, streams, and other watercourses within a proclaimed district that were subject to flooding, came within the board's jurisdiction. Boards could compulsorily acquire lands necessary for flood protection works, levy rates, and raise loans. Boards were free to enter into contracts for the carrying out of any work permitted under the Act.[110]

Two years after the passing of the Act, the South Wairarapa River Board was constituted to control the flooding of the Wairarapa lakes. Presumably it was thought that lakes came within the meaning of watercourse under the Act (this was not defined in the Act). The 1891 commission of inquiry described the establishment of South Wairarapa River Board as 'an attempt by a side-wind to violate the Native rights under the Treaty of Waitangi, but for the time it was not successful as section 74 of the Act was, upon competent authority pronounced ineffectual to meet the case'.[111] According to Mackay, the river board simply did not have the power to act as it proposed. Neither the River Boards Act 1884 or the Public Works Act 1882 empowered a board to release flood waters. Mackay was of the view that 'the property on which the trespass is made belongs to the petitioners, and the interference with their fishing rights is an infraction of the second article of the Treaty of Waitangi'.[112] This was supported by the Solicitor General, who in March 1888 opined that:

> The only body that has power to carry out drainage-works is a County Council . . . The power is to execute 'drainage-works of any sort', but these must be taken to mean drainage in the ordinary sense of removing superfluous water from land for the purposes of improving it. It does not appear to me that altering a large natural reservoir like the Wairarapa Lake . . . can be said to be within the meaning of the drainage-works

107. File note by Lewis, 23 January 1888, MA 13/97, NA Wellington
108. Bagnall, p 380
109. *Piripi Te Maari v Matthews and another* (1893) 12 NZLR 13, 23
110. River Boards Act 1882, ss 6, 44, 68, 74, 88, 110
111. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 14
112. Ibid, p 5

> contemplated by the Counties Act . . . All I can say upon the question . . . is that there is a legal power to execute 'drainage-works', but that, in my opinion, a work of such presumed magnitude and effect as draining a large lake was not contemplated by the Act.[113]

In a letter to the Minister of Native Affairs, the clerk of the South Wairarapa River Board described the committee of owners' 1888 proposal to allow the lake to be opened during the months of April and May as being entirely unsatisfactory. Further, were it implemented, the '. . . Natives would then possibly have a right to keep the lakes closed during those two months'.[114] It is clear that the river board was simply not prepared to compromise its assumed right to control the lake mouth.

In June 1888, the river board attempted to open the lake for the first time. Although the river board had requested the presence of the police on the occasion, Lewis was of the opinion that the lakes' Maori owners were unlikely to use force.[115] On the agreed day, 33 men accompanied by two police constables set to work opening the lake mouth. Upon the arrival of a group of owners led by Piripi Te Maari, much tense discussion ensued. Eventually Te Maari struck upon the idea of getting Matthews to sign a statement acknowledging the Maori owners' protest and advising that Supreme Court action was to follow. At this juncture hands were shaken and the lake mouth was opened.[116] The day's events caused Matthews to remark to his workers that the 'Natives have behaved like gentlemen. Had a body of Europeans come . . . there would have been a very different state of affairs'.[117]

It appears, however, that the Supreme Court action that Te Maari foreshadowed was abandoned in favour of the 1891 royal commission of inquiry. One of the owners' grievances investigated by the commission was the actions of the river board. According to Hemi Te Miha:

> Since the River Board took the matter in hand the settlers have not consulted us. We are substantially injured by the Action of the Board in opening the lake without consulting us, especially when we are engaged in fishing. The Board pays no heed to us, although we have asked them to delay the opening of the lake; although we may be fishing there at the time, they will not even grant us a week's delay.[118]

Various other witnesses appearing before the 1891 commission attested to the fact that the opening of the lake mouth by the Board had resulted in dramatically reduced catches of eels.[119]

In 1889, an amendment to the Public Works Act was passed that supposedly gave the river board the necessary power to artificially open the lake. Section 18 of the Amendment Act extended to those exercising powers under the principal Act, 'the

113. Cited in Ibid, p 5
114. Bock, (Clerk, South Wairarapa River Board) to Native Minister, 22 January 1887, MA 13/97, NA Wellington
115. Bock to Native Minister, 28 June 1888, MA 13/97, NA Wellington; File note by Lewis, contained in Bock to Native Minister, 28 June 1888, MA 13/97, NA Wellington
116. Bagnall, p 381
117. Matthews, cited in Bagnall, p 381
118. Evidence of Hemi Te Miha in Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 22
119. See for example the evidence of Aparo Henare and Hoanai Paraone Tuninarangi, ibid, p 28

power of making, constructing and maintaining an outlet to any lake or other water body not having navigable communication with the sea or any navigable river'. Mackay claimed that the section was intended to give the Wairarapa River Board the 'power to violate treaty obligations'. Further, his report stated that the Act was never translated into Maori as was required under standing order 366, and that the aforementioned provision, having an apparent exclusive application to the Wairarapa, should have been included in a private or local bill rather than a public bill.[120] Had such a course of action been taken, the Bill would have:

> been attended in its passage into law by the formalities requisite in cases where the rights of individuals are promoted, or local interests threatened, and where those private or local interests are those of the aboriginal race, solemnly guaranteed by treaty and protected by Standing Order.[121]

It would appear that section 18 of the amendment Act was included specifically to give the South Wairarapa River Board statutory authority to open the outlet of the lake. It was noted by the Court of Appeal that the wording of section 18 of the Act (passed in September 1889), was almost identical to the wording of 'the instrument of delegation' (dated January 1889), that delegated the necessary powers to open the lake mouth to the river board from the South Wairarapa County Council.[122]

Despite the legal situation and protest from the lakes' Maori owners, the lake mouth continued to be opened under the instructions of the river board. In the face of threatened resistance by Maori, the Native Minister, Edwin Mitchelson promised that upon a submission being made to Parliament, a commission would be convened to investigate their grievances. Subsequently a special commission was established in 1890. But because it was unable to complete its investigations through lack of time, a Royal Commission was established at the end of 1890.[123]

2.4.6 1891 royal commission on the Wairarapa lakes

As is evident from the preceding text, the report of Commissioner Alexander Mackay was a most thorough investigation into the Wairarapa lakes question and the Crown's endeavours to acquire a controlling interest in them. In the memorial submitted to the commission by counsel for the lakes' Maori owners, their grievances were set out as being:

> 1. That, in consequence of the selfish and wholly unjustifiable pressure of certain European settlers, the Government, by which may be termed a fraud upon the

120. The present author has been unable to locate a copy of the parliamentary standing orders that were in effect in 1889. However, standing order 366 that is in effect today, appears to be an amendment of the standing order 366 referred to by Mackay. Today standing order 366 states that the 'Speaker may order that bill introduced into the House . . . be translated and printed in another language', Standing Orders of the House of Representatives, September 1996
121. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 14
122. *Piripi Te Maari v Matthews and another* [1893] 12 NZLR 13, 23
123. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', pp 14–15

> legislature, has deprived them [the lakes' owners] of the fishery-rights solemnly guaranteed by the Treaty of Waitangi.
>
> 2. That the Government of New Zealand has wrongfully seized and sold a large area of land in and around the margin of the Wairarapa Lakes which the Native owners never ceded to the Crown.[124]

The conclusions that Mackay arrived at, however, were somewhat contradictory. On the one hand it was held, 'That the Natives are the undoubted owners of both the upper and lower lakes and the spit between Okourewa and Kiriwai', and:

> That neither the Government or any of the local bodies are legally authorised to interfere with the opening of the lake to the detriment and injury of the fishery and other proprietary rights guaranteed to the Natives by a solemn pact with the Imperial Government, and that such infringement of their rights without their consent, or the payment of compensation for the injury done, is a grievous wrong, and contrary to the law of property.

However, it was also stated that the Maori owners were not justified in allowing the lands they sold to the Government to flood, causing injury to the Pakeha settlers who had by then acquired the lands.[125]

In terms of a possible solution to the problems faced by the settlers, Mackay made a number of suggestions, none of which involved the expropriation of the Maori owners' rights in the lakes. Instead he recommended that an agreement be sought with those Maori with interests in the lakes, whereby the lake mouth, upon being closed for a period longer than two months, or in the event of an impending flood, could be opened, provided Maori were not engaged in fishing at the time. Further, either an annuity or a lump sum was to be paid to them for this concession. Another suggestion was that a cement weir be built to enable the opening of the lake without allowing large numbers of eels to escape to the sea. With regard to land between the lake margin and the flood-line in the Turanganui block, Mackay recommended that the Crown compensate the lakes' owners for all land that had passed in to European ownership but for which no consideration had ever been paid to Maori.[126]

On 30 July 1891, James Carroll asked the Government when the report of the Wairarapa lakes commission was to be laid before the house, noting that 'the Natives had expected this report for sometime' and that 'they were very anxious indeed to see it'. In response, the Native Minister, Alfred Cadman, informed the house that the commission's report was currently being printed, and that he expected it to be released 'about the end of the week'.[127] The parliamentary debates, however, do not record the report being tabled in Parliament. The next reference to the report was not until 16 August 1893. On that occasion Parata, the member for southern Maori, asked the Government whether it intended to take any action to give effect to the commission's recommendation. Carroll responded that any decision in the matter

124. Ibid, p 15
125. Ibid, p 11
126. Ibid
127. NZPD, 1891, vol 72, p 620

was contingent upon the outcome of litigation presently before the courts (detailed below). He observed that:

> the Government were anxious at one time to see the Natives with a view of settling this matter, but the Natives, although they knew the intentions of the Government, did not approach them, preferring rather to go into Court.[128]

The river board, however, was not prepared to wait for the machinations of either central Government or the courts to arrive at a solution guided by Mackay's maxim that 'justice is itself the great standing policy of civil society'.[129] Instead in 1892, the Board prepared for another show of strength, apparently with the support of the Government.[130] On 11 May 1892, a group of Pakeha settlers and a party of over 100 Maori assembled at the lake mouth – both parties accompanied by their lawyers. Police Inspector Thomson informed the gathering that any physical contact would be regarded as assault. But in reply to a question from one of the Maori present, he said that the laying of hands upon shovels did not constitute such a violation of the law. It was made clear to all that any breach of the peace would result in the immediate arrest of the offending party.[131] According to Bagnall:

> No sooner did the first party of about a dozen shovellers start to open the trench than several lithe young men stepped forward. Each man seized hold of one of the shovels, firmly and effectively preventing the Europeans from 'further working it'.

The settlers demanded that the offenders be arrested, but Thomson replied that he could not as the Maori were simply resisting passively. Matthews recounted that 'the Europeans stood looking like fools for a time' before deciding upon a change of tactics.[132] The Pakeha then linked arms and formed a circle around those digging. Thomson assured the crowd that anyone who broke the circle would be arrested. However, a group of Maori women proceeded to dive between the settlers' linked arms into the ditch 'kicking and scratching furiously and bringing down large quantities of sand'.[133] In the end, it was suggested by either Thomson or Menteath, the solicitor representing the lakes' Maori owners, that if the river board 'summonsed one of Maori party for obstruction it would be just as effective and certainly less abrasive than a technical assault'. After more 'grasping of shovels' the settlers were convinced of the wisdom of the proposal. Upon Izard, counsel for the river board, undertaking to initiate a prosecution for obstruction, the Maori party withdrew any further opposition and performed a haka. Bagnall states the haka was one 'of triumph'. But why this would be so remains unclear to the present author given that as they celebrated, the settlers completed the trench and the waters were released into

128. NZPD, 1893, vol 81, p 85
129. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 11
130. Bagnall, pp 381–382
131. Ibid, p 382
132. Ibid, p 382; Matthews, cited in Bagnall, p 382
133. *New Zealand Times*, 17 May 1892, cited in Bagnall, p 382; Matthews, cited in Bagnall, p 382

Palliser Bay. An alternative reading of the event was that the haka was performed as a challenge.

Various legal complications meant that it was to be a year before the case was brought before a court. In the interim, Te Maari along with ten others, petitioned Parliament, praying 'that their rights in connection with the Wairarapa Lakes may be protected, and that they may receive compensation for land wrongfully occupied by the Crown'. However, by the time the petition was considered by the Native Affairs Committee the matter was before the courts and consequently the committee declined to make any recommendations.[134]

Upon application to the Supreme Court, the case brought by Te Maari was removed to the Court of Appeal. The action was a claim for damages for alleged trespass against the defendants – Matthews and Barton (the river board's contractor) – in opening the channel in May 1892. Further, the action challenged the legal basis upon which the river board asserted rights to open the channel.[135] Four of the court's five judges ruled in favour of the defendants. Much of the appellant's case turned around the contention that the outlet of the lake was not a 'natural watercourse' within the meaning of the Public Works Act 1882. Further, Menteath contended, possibly erroneously in terms of legislation, that:

> The Treaty of Waitangi expressly confirmed and guaranteed to the Natives the full, exclusive and undisturbed possession of their fisheries. The Treaty of Waitangi was a pact in the nature of a treaty binding on the Crown as representing the colony, and has been recognised throughout the legislation in regard to Native lands.

Also, he argued that the 'normal condition of the lake is the full condition. It is not flooded but full.'[136] However, with the exception of Justice Conolly, his arguments held little sway. And although noting some irregularities in terms of the authority of the river board, the court dismissed the case.

As well as advising that he intended to take the case to the Privy Council, Te Maari again petitioned Parliament in 1893 asking for compensation for losses Maori had sustained in connection with the Wairarapa lakes. It was also pointed out that he, along with the other 138 owners of the lakes had had no voice in the formation of the river board, and subsequently, no representation upon it. Hence their interests and property rights were in the hands of the 22 ratepayers that constituted the board.[137] The Native Affairs Committee, noting that the whole question had been investigated by the 1891 royal commission, reported that:

> It is clear that the Natives have been wronged, and the only question is whether the local bodies interested or the Government should compensate them. The Committee is of [the] opinion that it should be done by the Government, as the land was sold to the settlers, and provision made in the Public Works Act which enabled the local body to

134. Petition 244/1892, AJHR, 1893, I-3, p 3
135. *Piripi Te Maari v Matthews and another* (1893) 12 NZLR 13, 14
136. Ibid, 17–19, 21
137. Bagnall, p 383

> open a channel from the lake to the sea, and thus the proprietary rights of the Natives were interfered with.

The committee recommended that the Government should either try and purchase the rights of the Maori owners, or compensate them for any injury suffered.[138] It appears that the Court of Appeal did not grant the necessary approval for Te Maari to take his case to the Privy Council.[139]

Te Maari and five others petitioned Parliament again in 1895 in connection with the same matter. The Native Affairs Committee stated that it had considered the same question in relation to the 1893 petition, and quoted its report issued in that year. The committee stated its regret that the Government had paid no attention to its previous recommendation, and said it would 'most urgently recommend that the undoubted grievances under which the Natives labour should be redressed'.[140]

Piripi Te Maari died in August 1895, not living to see the settlement of the Wairarapa lakes conflict. Commentators such as Bagnall, Ballara, and Carter have seen this as a tragedy given that Te Maari did not survive to witness his victory.[141] However, it must be asked if in fact he would have seen the eventual outcome as a victory, given that in what transpired, the Crown purchased all the Maori owners' interests. This clearly was not what he was seeking in the case he brought before the Court of Appeal or in his petitions of 1893 and 1895. Upon his death, Tamahau Maupuku appears to have assumed the mantle that Te Maari had carried vis-a-vis the lakes question.

On 13 January 1896, an agreement was signed at Papawai whereby the lakes were 'surrendered and assured to Her Majesty the Queen' in consideration for which the Crown was to pay £2000 'and shall out of any lands which shall come into the possession of the Government . . . make ample reserves for the benefits of the Native owners'.[142] Following the Native Land Court giving the decision legal effect, a huge picnic was held by the Maori owners at Pigeon Bush. Over 1000 people were in attendance including the then Premiere Richard Seddon and his family, other members of the Cabinet, and Pakeha settlers. By comparison, the reciprocal picnic held a fortnight later was apparently somewhat of an anticlimax.[143] Unfortunately, it did not prove possible to locate any further information about the sale of the lakes. Thus several important questions – such as who was party to the sale, why they agreed to sell, and whether the settlement was freely negotiated – remain unanswered and require further research.

Many years ensued until effect was given to the agreement. In 1907, legislation was passed authorising the Government to purchase land to exchange for the Wairarapa lakes. The Act noted that it had originally been intended to grant the owners of the

138. Petition 444/1893, AJHR, 1893, I-3, pp 21–22
139. Bagnall, p 383
140. Petition 180/1895, AJHR, 1895, I-3, p 19
141. Bagnall, p 383; Angela Ballara and Mita Carter, 'Te Maari o-Te-Rangi, Piripi', in *Dictionary of New Zealand Biography* W H Oliver (ed), vol 1, Wellington, Department of Internal Affairs, 1990, p 468
142. *New Zealand Time*s, 8 and 20 January 1896, cited in Bagnall, p 383
143. Bagnall, pp 383–384

lakes reserves abutting the lake, but that it become 'inexpedient' to do so. The Government was authorised to spend £3000, and the Act specified that the land purchased was to be inalienable.[144] Bagnall notes that initially it was hoped that part of the Whangaimoana subdivision in the Wairarapa could be secured for the owners of the Wairarapa lakes, but that these lands proved to be too expensive. The Pouakani Block, just north of Lake Taupo, was then mooted as an alternative. Although the various hapu had reservations on account of the block's distance from the Wairarapa, Bagnall claims that a change of Government in 1912 made it expedient for them to acquiesce to the proposal. The Native Land Court proceeded to place the names of 130 Ngati Kahungunu on the Pouakani title as 'an "aroha" from the Government'. On 22 January 1915, Judge Gilfeder made an order vesting 30,486 acres of the Pouakani block in Arete Tamahau and 229 others with no restrictions upon alienation. A number of the owners later settled on this land.[145] It appears that the grant of the Pouakani lands was the only consideration made to the owners of the lake, and that no money was paid.

According to the Waitangi Tribunal, at the time the Pouakani block was vested in the hapu of Ngati Kahungunu who had formerly been owners of the Wairarapa lakes, the block was undeveloped Crown land, covered in scrub, with a little bush on the southern margins and in the river valleys. Pinus radiata was later planted on parts of the block. In the 1960s, a substantial area of scrub was included in a development scheme and converted into farmland. It is ironic that years after the exchange, some 439 hectares of the riverbank margins of the land granted to the 'Wairarapa Natives' was taken under the Public Works Act and much of it flooded for hydro-electric power purposes.[146]

2.5 The Catchment in the Twentieth Century

Although the eels that were so cherished by Wairarapa Maori remained in the lakes, their future now lay in the hands of the Government. In 1900, a survey of the catchment was undertaken. Based on its findings, a proposal was developed whereby the Ruamahanga would be diverted into Lake Onoke, and a permanent outlet be maintained at the lake mouth. However, the magnitude of the proposed works appear to have been beyond the financial resources available to both local and central government at the time. Throughout the next several decades, the South Wairarapa River Board and the newly constituted Kahutara River Board undertook several small-scale projects such as the construction of stop banks and the diversion of the Turanganui River into Lake Onoke. Subsequent to the enactment of the Soil Conservation and Rivers Control Act 1941, the Wairarapa Catchment Board was established. Gradually this board took over the functions of the various river boards in the area. In the mid-1950s a comprehensive scheme for the entire lower catchment

144. Reserves and Other Lands Disposal and Public Bodies Empowering Act 1956, s 53
145. Bagnall, p 384; *New Zealand Gazette*, 1916, no 47, p 1105
146. Waitangi Tribunal, *Pouakani Report*, Wellington, Brooker and Friend, 1993, p 301

was proposed. As with the 1900 scheme it involved the diversion of the Ruamahanga into Lake Onoke, and the construction of a barrage to control the lake mouth. The scheme would reclaim 13,000 acres and relieve another 30,000 acres from the perennial threat of flooding. The scheme went ahead with the barrage eventually being opened in March 1974.[147]

Over 120 years after pastoralists began farming the Wairarapa flood plain, their goal of maintaining a constantly open outlet from the lake to the sea was realised. However, as was noted in a 1993 governmental fisheries report, the:

> important historical fishery for eels, based on fishing downstream migrants in April and May when the barrier bar to Lake Onoke was closed, no longer exists because the bar is maintained in an open state.

On the other hand, a permanently open outlet to the lake has meant that there are now larger numbers of various other fish in the lakes than there were previously. The lakes also now support a commercial eel fishery.[148]

2.6 Conclusion: Eel versus Sheep

The contest between Wairarapa Maori and Pakeha settlers over the right to control the Wairarapa lakes was, in many respects, typical of conflicts that emerged in nineteenth century New Zealand between Maori and Pakeha over the control of waterways. As Pakeha began farming recently acquired land that abutted waterways controlled and used by Maori, the right to control waterways became a hotly contested issue. In the case of the Wairarapa lakes, the desire of Pakeha settlers to end the periodic inundation of their lands caused by the lake flooding was in direct opposition to the interests of Maori whose major fishery was centred on the annual flooding of the lakes; in short, a conflict that can be typified as one between eel and sheep.

It would seem difficult to overstate the importance of the Wairarapa lakes to the local Maori economy. Eels caught in the lake were not only important for immediate consumption, but were traded throughout the lower North Island. Whereas land was seen as being the key economic resource by Pakeha, Wairarapa Maori appear to have regarded their lakes and associated fisheries as being 'the most important property they possessed'.[149] When Wairarapa Maori eventually agreed to part with many of their lands in the mid-1850s, they sought and were granted guarantees that their rights to the lakes remained unaffected. But the significance of waterways to Wairarapa Maori was not purely in economic terms. The continued exercise of fishing rights constituted an important link with the past in that rights were predicated on the actions of their ancestors.

147. Bagnall, pp 384–386
148. B J Hicks, 'Investigation of the Fish and Fisheries of the Lake Wairarapa Wetlands,' New Zealand Freshwater Fisheries Miscellaneous Report no 126, Christchurch, NIWA, 1993, pp 1–2
149. Mackay, 'Report on claims of Natives to Wairarapa Lakes', p 5

The Wairarapa lakes saga was the first significant contest between Maori and Pakeha as to the ownership and control of a major lake. For this reason, an important aspect of the contest was what it revealed about the Crown's position vis-a-vis Maori rights to waterways. When in the mid-1850s Maori received guarantees that their rights to the Wairarapa lakes remained unaffected by the sale of their riparian lands, the Crown was explicitly acknowledging that Maori had rights in the lakes. But in the subsequent history of the Wairarapa lakes the nature and extent of these rights were never clearly defined. From the time of the sales till the mid-1880s, the Crown's position seems to have been that Maori had an irrefutable right to control the outlet of the lakes. But what this right was predicated upon in the Crown's view, is unclear. However, it was more likely to have been as consequence of the guarantees afforded at the time of the sales of riparian lands, than because the Crown considered Maori to be the absolute owners of the lakes.

When the Crown attempted to purchase the lakes from 17 individuals in 1876, what rights the vendors were surrendering other than those of fishing was not clear. The deed acknowledged that the signatories 'held rights over the Wairarapa Lakes . . . for the purposes of eel fishing' and that such 'eel fishery rights and other rights and interests of any kind whatsoever' were surrendered and conveyed to the Crown.[150] However, it soon became apparent that whatever the nature of the rights were that the Crown had acquired from Maori, it had not succeeded in acquiring the rights of all Maori with interests in the lake. Hence the Crown turned to the Native Land Court to determine the extent of what rights it had acquired, along with what rights it had not. The court, however, refused to hear the Crown's case. It held: that it could only determine the extent of interests acquired from Maori by the Crown if the land had already passed through the Native Land Court; that under the 1876 deed, nothing but fishing rights passed to the Crown; and that it was not in the Native Land Court's jurisdiction to determine the extent of rights other than those in land.

The Crown then sought to prevent the lakes' Maori owners from having their title determined by applying to the Supreme Court for a rule nisi preventing the Native Land Court from investigating the ownership of the lakes. Mackay recounted that the basis of the Crown's case was that 'no right existed, according to Native custom, to the soil beneath a lake, nor is the same recognised by Native custom as being capable of ownership'. Although this position was frequently articulated in the early twentieth century in respect of other lakes, this is the only instance uncovered by the present author that this was the view of the Crown in the nineteenth century. Importantly, the Supreme Court considered that it could not interfere in the matter and that the Native Land Court must ascertain Maori custom, but foreshadowed the possibility that the Land Court could find that Maori held fishing rights in the lake while title to the lake bed resided in the Crown.[151]

The Native Land Court finally determined the ownership of the Wairarapa lakes in 1883, ruling that there were 139 Maori with interests in the lake – 17 shares of which the

150. Turton, deed 198, pp 410–411
151. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 8

Crown had acquired by virtue of its 1876 purchase. Subsequently a certificate of title as issued for the bed of the lake and the customary title was extinguished.

In the history of the Wairarapa lakes, an issue over which rights to the actual lake bed were discussed at very early on, and in which a conflict between customary and common law was plainly evident, was that of accretion. Maori were incensed that parts of the lakebed uplifted by the 1855 earthquake were assumed by the Crown and subsequently sold. Under English common law the Crown would have been entitled to the accretion only if it had title to the lake bed. That the Crown sold land uplifted by the 1855 earthquake evinces its attitude that it owned the beds of the Wairarapa lakes. Although Maori protested about this on numerous occasions, they received no compensation. It is clear from this protest that they considered the land beneath the lake to be their property as an incident of owning the lake.[152] As Judge Acheson observed in his 1929 decision as to the ownership of Lake Omapere, the bed of a lake is merely a part of the whole lake, and Maori 'would have regarded it as a rather grim joke had any strangers asserted that he did not possess the beds of his own lakes'.[153]

Throughout the conflict over the control of the Wairarapa lakes, the Crown was determined to acquire title to the lakes. It is not apparent though that this was necessary to alleviate the problems farmers faced when the lakes flooded each year. Both Piripi Te Maari and Mackay proposed that Maori retain ownership of the lakes but allow floodwaters to be released when they were threatening adjacent farmlands. However, this proposal was rejected outright by the Crown which was of the view that it was in the owners' 'best interests to sell'.[154] This policy – that lakes should be vested absolutely in the Crown – can be seen as an attempt by New Zealand's Colonial Governments to avoid the situation that existed at common law whereby lakes were the private property of riparian land owners.

It could be argued that the Crown, in also not wanting the control of the Wairarapa lakes to fall into the hands of the pastoralists who owned the lakes' riparian lands, were not favouring the interests of the agricultural sector. However, this was in fact manifestly untrue. Presumably a corollary of the guarantees afforded Maori when they sold their riparian lands was that pastoralists who subsequently acquired the lands from the Crown, did so on the basis that they were periodically subject to flooding. But once the full extent of the farmers' difficulties became apparent, the Government places extreme pressure on Maori to give up their rights in the lake and control of its mouth to the Crown. Suddenly the idea of a 'national interest' gained currency – an interest that just so happened to align with the agenda of pastoralists. A later summary of the saga of the Wairarapa lakes by Francis Dillon Bell illustrates the prevalent Pakeha view:

152. See for example Maunsell to Native Department, 15 February 1876, MA 13/97, NA Wellington; Maunsell to Under-Secretary, Land Purchase Department, 26 May 1885, MA 13/97, NA Wellington
153. Bay of Islands Native Land Court minute book 11, 19 June 1929, fol 5
154. Piripi Te Maari and seven others to Native Department, 29 October 1886, MA 13/97; Account of a meeting between Native Minister, Piripi Te Maari and Wi Hutana, 12 November 1886, MA 13/97, NA Wellington; Mackay, 'Report on claims of Natives to Wairarapa Lakes', p 11

> Maori, like the European, must submit, for the public good, to accept full monetary compensation for rights which barred a public work. . . . Drainage was only another example of the same principle. It was impossible to permit a Maori to hold up the whole drainage of a plain, to prevent the straightening of a river, to prevent the reclaiming of swamp land and turning it into productive land. It was not alone the land immediately affected that must suffer for the public good; the whole of the land above and below it suffered if the drainage was to be held up by a lagoon or stream. . . . in the case of the Wairarapa Lake the Maoris did for many years so hold the lake until they recognised the necessity of settlers, and they then accepted full compensation.[155]

Bell's account of the Wairarapa lakes episode suggests that Maori suddenly became aware of the errors of their way – that they must submit to the interests of the settlers – and willingly agreed to the sale. Another way of looking at it, however, was that the resistance of the owners of the lake was worn down over time. In many respects, the tactics the Crown adopted in acquiring title to the lakes were typical of the way it went about acquiring title to various blocks of land around the country. The 1876 'deed of purchase' exemplified such tactics. The Crown agent secured the signatures of Hiko Piata and Hemi Te Mihi – chiefs who were keen to sell the lake and who claimed to have paramount interests in the lake – along with 15 of their followers. No attempt appears to have been made by the Crown to substantiate the chiefs' claims of having paramount rights. Piripi Te Maari claimed before the 1891 commission that he and others had not been consulted in connection with the sale because they were opposed to the sale.[156] Little detail as to the circumstances surrounding the eventual agreement reached in 1896, pursuant to which the lakes passed to the Crown, was uncovered by the present author. However, the agreement by Wairarapa Maori has to be seen as the culmination of an exhaustive campaign by the Crown to extinguish Maori rights to the lakes.

155. NZPD, 1912, vol 161, p 1117
156. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 18

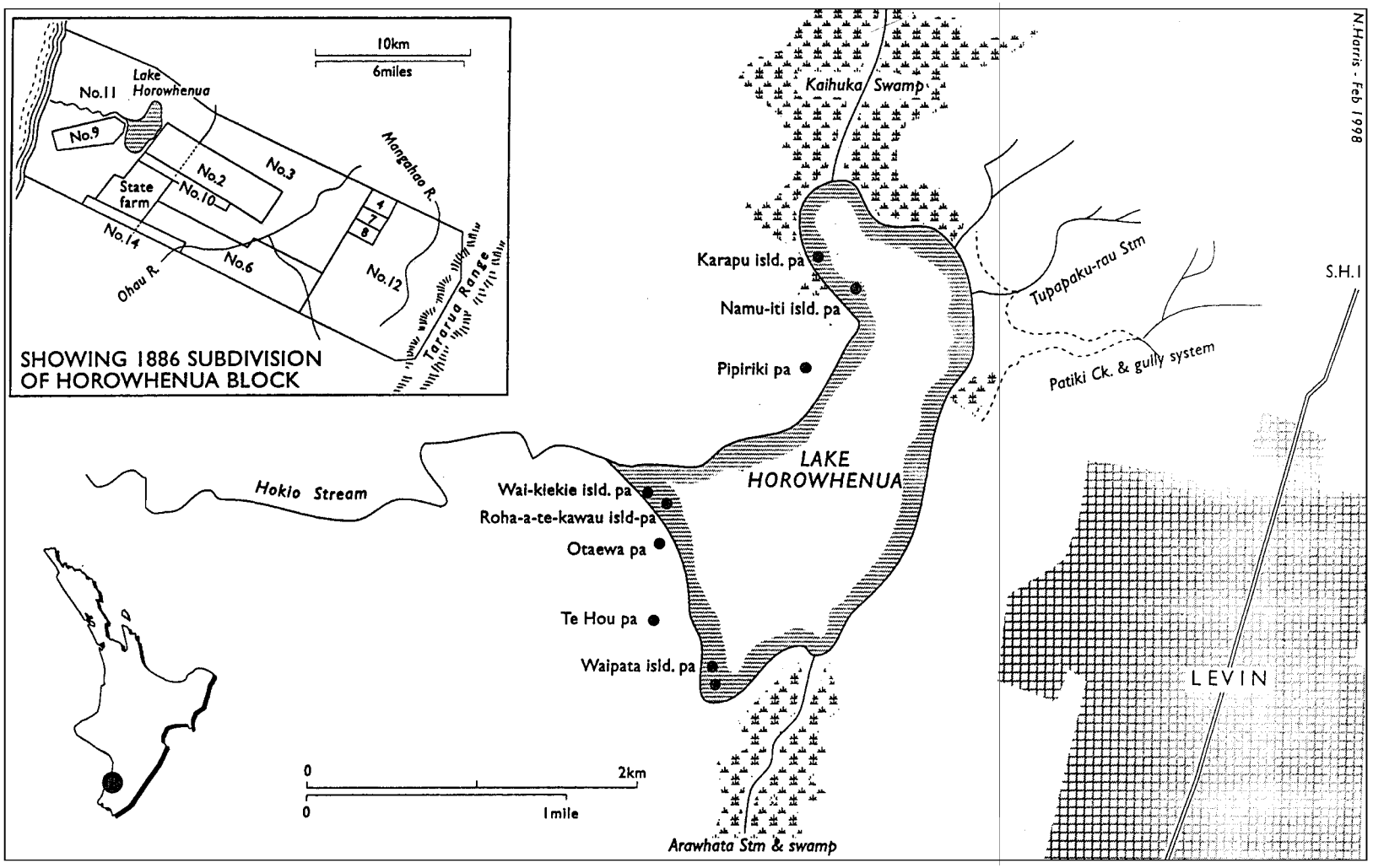

Figure 3: Lake Horowhenua

CHAPTER 3

LAKE HOROWHENUA

3.1 Introduction

Lake Horowhenua lies on a sand plain near present-day Levin in the centre of Muaupoko's rohe. The lake covers an area of approximately 390 hectares, and is at no point much deeper than a couple of metres. It is fed by various small streams, springs, and associated swamps. Hokio Stream drains the lake. Once surrounded by podocarp forest, the lake was by all accounts a thing of wondrous beauty.[1] Today, however, with the forest gone and the lake significantly lowered, Lake Horowhenua is situated in a somewhat forlorn rural landscape – its permanently muddied waters testament to the radically altered ecology of the area.

Unlike many other lakes in the North Island of New Zealand, Horowhenua has always been in Maori ownership. However, at various times confusion has existed as to the legal status of the lake. This confusion appears to have resulted from some rather haphazard, incremental legislation, and the predilection of various Government officials to try and limit the rights of Maori. In that no serious attempt has been made by the Crown to extinguish the rights of Maori to the bed of Horowhenua, and that its ownership by Muaupoko has been confirmed by legislation, the case of Lake Horowhenua represents something of an aberration in the history of the ownership and control of New Zealand's lakes.

This chapter begins with a summary of Muaupoko's use and occupation of Lake Horowhenua. From the limited secondary sources available to the present author pertaining to the use of the lake, some tentative conclusions about the nature and extent of Muaupoko's rights are made. After a cursory look at the history of the lands surrounding Lake Horowhenua up until 1895, a detailed history of the ownership and management of the lake is presented. This section examines how the lake came to be first a recreational reserve and later a public domain; conflicts between the lake's Muaupoko owners and the Crown and various local authorities; and how these conflicts were resolved.[2]

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1. G Leslie Adkin, Horowhenua: *Its Maori Place Names and their Topographic and Historical Background*, Wellington, Department of Internal Affairs, 1948, p 18; James Cowan, 'Report on Horowhenua Lake to Department of Tourist and Health Resorts', AJHR, 1908, H-2A, p 1
2. This chapter draws primarily on the history of Lake Horowhenua written by Keith Pickens contained in Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei and Manawatu*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), August 1996. Virtually no primary research was undertaken by the present author.

3.2 MUAUPOKO AND LAKE HOROWHENUA

For several centuries the lakes of Horowhenua and Papaitonga have been the centre of Muaupoko settlement in the Horowhenua. Muaupoko whakapapa to three main groups: the people of the Kurahaupo waka, who migrated to the west coast from Mahia; descendants of the Aotea waka resident in south Taranaki; and the people resident in the Horowhenua prior to Muaupoko (described by Adkin – a scholar of the topography and archaeology of the Horowhenua – as being Ngati Mamoe).[3] In the early nineteenth century, Muaupoko suffered serious defeats at the hands of groups migrating from the north, principally Ngati Toa under the leadership of Te Rauparaha and Te Rangihaeata. However, after being vanquished by war parties from the north, Muaupoko were reinstated by their victors on a strip of land centred around Lake Horowhenua.[4] These lands were shared with members of both Ngati Apa and Ngati Raukawa.

Fishing appears to have always been a crucial aspect of the Muaupoko economy. The lake supported eel, flounder, whitebait and kakahi fisheries. Adkin observes that as well as supplying a large local population, the fisheries were capable of 'exciting the dangerous envy not only of neighbouring tribes but also of those occupying territory far distant'.[5]

Eel fishing was a major activity throughout the Horowhenua district. Evidence presented to the Native Land Court in the course of its 1873 inquiry into the ownership of the Horowhenua block, shows that Muaupoko caught eels in lakes and streams throughout the district. Eels were also introduced to waterways where they did not naturally occur.[6] In this inquiry, the exercise of eel fishing rights was clearly a major determinant of the customary tenure of the land.

But of all the eel fisheries in the district, those of Lake Horowhenua and its associated waterways, appear to have been the most significant. Adkin records that eels were caught in such large numbers that there were often more than could be consumed immediately. The surplus was either dried or kept alive in artificial ponds.[7]

Eels were caught in the lake by the use of rau matangi. Adkin describes these as being a series of fences that channelled eels into a hinaki. He contends that 'the rau-matangi type of weir could be operated at pleasure by anyone so desiring', and that they appear not to have had names bestowed upon them.[8]

Most eels, however, were not caught in the lake itself, but in Hokio Stream. Adkin states that from 'time immemorial the pa-tuna (eel weirs) of the Hokio Stream have been famed for their productivity . . . forming an important part of the food-supply of the Mua-upoko people'.[9] Unlike the rau matangi of the lake, the pa tuna of Hokio Stream 'were jealously guarded family or individual property'.[10] At the outlet of the

3. Anderson and Pickens, p 5; Adkin, pp 124–125
4. Ibid, p 127
5. Ibid, p 18
6. Otaki Native Land Court minute book 2, 29–31 March 1873, fol 5–24 (mention of eel husbandry was made by Humia Riwana Te Hakeke at folio 6)
7. Adkin, pp 18, 19
8. Ibid, p 20
9. Ibid, p 20

lake, the stream was divided into three channels. At this point there was a post called Pou-Te-Mou, named after the ancestor who placed it there. This pou was held to possess the power to cause the seaward running eels to divide in equal numbers between the channels. From this point to the coast (a distance of five kilometres), Adkin details the location and names of 24 eel weirs. Only a handful of these weirs were still in use at the time that he was writing in the 1940s. He claims that the:

> extensive series of *pa-tuna* on a stream of short length such as the Hokio, is an impressive indication of the magnitude of the old-time eel-supply of Lake Horowhenua. The inanga also, in season, furnished food for this then populous locality and at the appropriate periods when *tuna* and *inanga* were running seaward to breed, these now almost-disused weirs were the scene of industrious and joyful activity.[11]

James Cowan, in a report to the Government on Lake Horowhenua in 1903, refers to Maori catching kakahi with a type of dredge known as a 'rou-kakahi'. At the time he made his investigations, fishing was still an important aspect of the local Maori economy. In addition to fishing, he records that Maori shot and snared waterfowl on the lake.[12]

As well as being an important source of food, Horowhenua also had a strategic significance to Muaupoko. By the early nineteenth century, significant changes had occurred in tribal dynamics in the lower North Island. Perhaps most important were the successive waves of northern taua and heke that passed through the Horowhenua – especially those led by Te Rauparaha. In the face of uncertain relations with these northern iwi, Muaupoko built several artificial islands in Horowhenua upon which fortified pa were situated. Adkin describes seven such artificial island pa: Mangaroa, Karapu, Namu-iti, Wai-kiekie, Roha-a-te-kawau, Waipata and Puke-iti. The biggest of the pa appear to have been up to a quarter of an acre in area. Of the pa, Adkin considers Managaroa to be the oldest, possibly predating the invasions of the northern iwi. The islands were constructed by logs being laid in the water. The interstices between the logs were then filled with an amalgam of earth, rock, shells and vegetation. Many of the pa relied on marginal swamps as moat-like defences. Wooden stakes were often placed in the waters surrounding the island pa to repel attackers. By the 1940s when Adkin was writing, the pa had all but disappeared: the organic matter with which they were constructed having decomposed causing the islands to subside into the lake.[13]

In his treatise on the Kapiti district, Carkeek describes the passage of the 1819 to 1820 Nga Puhi–Ngati Toa taua through the Horowhenua. On this occasion a battle was fought at the island pa of Wai-kiekie.[14] Cowan states that despite Muaupoko taking refuge in their island pa, Ngati Toa inflicted great carnage upon them. He recounts in his typically populist style, 'that as the old Maoris describe it, the waters

10. Ibid, pp 19–20
11. Ibid, pp 21–23
12. Cowan, p 2
13. Adkin, pp 32–35
14. W Carkeek, *The Kapiti Coast: Maori History and Place Names*, Wellington, A H & A W Reed, 1966, pp 7–9

were red with blood, and the seagulls came in from the coast to feast on what Ngati Toa left'.[15]

Historically the lake was frequently navigated by canoe. Adkin describes 21 named canoe landing sites. Mostly these were located either at the heads of small inlets (where relatively firmer ground ran down to the lake), and at points where cultivations abutted the lake.[16] Cowan reported that at the time of his investigations, there were still several canoes in use on the lake. Amongst these was an old war canoe capable of carrying between 50 and 60 people.[17]

Another interesting phenomenon recorded by Adkin in connection with Horowhenua was the discovery of large numbers of artefacts in the lake bed. He postulates that there were 'a number of undoubted instances in which single objects or hoards were deliberately buried in the mud of the island margins'. These, he contended, were of the Muaupoko phase of occupation; whereas many of the other objects found were thought to belong to the pre-Muaupoko occupants of the Horowhenua. Most of the relics were wooden, but some made of bone and stone have been found. The artefacts recovered include ko, spears, paddles, adze handles, clubs, pounders, burial chests, god sticks, fish hooks, spinning tops, net floats, pumice bowls, and stone patu.[18]

From Adkin's descriptions of Horowhenua, a clear picture emerges of extensive use having been made of the lake by Muaupoko – even to the extent of having literally 'occupied' it. The evidence available to the present author (namely that of Adkin and Cowan) is of a very general nature, and by and large, is insufficient to support many conclusions as to the precise nature of Muaupoko's rights in the lake. However, Adkin's assertion that any person was free to establish eel weirs in the lake is an important point. Whether this meant Pakeha were free to establish eel weirs in the lake is doubtful: presumably he meant any member of Muaupoko. Whether it was only hapu of Muaupoko who occupied riparian lands that had rights to fish in the lake, or hapu from the wider Horowhenua hinterland, remains unclear. The existence of such non-exclusive fishing rights suggests a very different situation to lakes such as Rotorua and Rotoiti. These lakes were divided into sections in which particular hapu exercised exclusive fishing rights. Further, the fishing grounds of the Rotorua lakes were named. It is possible that the existence of non-exclusive fishing rights in Horowhenua reflected the fact that by comparison to Hokio Stream, the lake was much less important as an eel fishery. The relatively lesser importance of the actual lake fishery may also be the reason why the weirs in the lake were not named.

15. Cowan, p 1
16. Adkin, p 36
17. Cowan, p 2
18. Adkin, pp 35, 83–104

3.3 Background to the Lands Surrounding Lake Horowhenua

Subsequent to Ngati Raukawa's invasion and settlement of the Horowhenua and Manawatu, the Raukawa chief, Te Whatanui, allocated Muaupoko about 20,000 acres of land centred around Lake Horowhenua. In spite of this land being handed back to Muaupoko, tensions between Ngati Raukawa and Muaupoko as to their relative rights to Horowhenua lands persisted throughout the nineteenth century. But in relation to these disputes, the Government took no action. Eventually the dispute was taken to the Native Land Court in 1872. The case was heard the following year.[19]

At the hearing, Ngati Raukawa conceded that Muaupoko had a right to the 20,000 acres granted to them by Te Whatanui but claimed the land to both the north and south by virtue of conquest. Curiously though, the court awarded not just the 20,000 acres to Muaupoko, but also 30,000 acres of land to the north and south – land which Ngati Raukawa had occupied since their arrival from the north. Ngati Raukawa were awarded just 100 acres. The decision was inconsistent with the Native Land Court's 1872 decision as to the ownership of the nearby Kukutauaki lands. In this decision Raukawa had received title as a consequence of their conquest and subsequent occupation.[20]

In 1886, the Horowhenua block was subdivided into 14 blocks. The lake was situated within the Horowhenua no 11 block – a block containing 15,000 acres that extended from the lake to the sea, and where the majority of Muaupoko were resident. The western boundary of Horowhenua no 2 also abutted the lake. In the same year, Major Kemp (Kepa te Rangihiwinui) offered to sell Horowhenua no 2 to the Crown to enable a town to be established. Among the conditions upon which he offered the land for sale was that a reserve of 100 acres abutting the lake be established for the purpose of a public reserve. The Government declined the offer. When block 2 was eventually sold to the Crown by Kemp in 1867, he appears not to have insisted on any of the conditions previously agreed upon.[21]

In September 1896, pursuant to the Horowhenua Block Act 1896, the Native Appellate Court determined the ownership of block 11. In doing so it reserved as a fishing easement, the lake, the Hokio Stream, and a one chain strip running along the north bank of the Hokio Stream and around the lake. The reserve was to be vested in trustees for all members of Muaupoko found by the court to be owners of block 11. The lake was formally vested in trustees as a fishing easement for the owners of Horowhenua no 11 in October 1898. However, despite it being stated in the 1896 partition order that it was similarly intended to vest the Hokio stream and the one chain strip, it appears that this was not done.[22]

The decision to vest the lake in the owners of the Horowhenua no 11 block stands out as something of an aberration in the context of the Crown's attitudes to Maori claims to lakes around this time. Elsewhere in New Zealand the Crown was tacitly

19. Alan Ward, *National Overview*, vol III, Waitangi Tribunal Rangahaua Whanui Series, GP Publications, 1997, p 241
20. Anderson and Pickens, pp 213–214
21. 'Report and evidence of the Horowhenua Commission', AJHR, 1896, G-2, pp 5–6
22. Reserves and Other Lands Disposal Act 1956, s 18

asserting its assumed rights as the owner of lakes, and appears to have been increasingly eager to establish a legal basis for being the owner of all lakes. In the case of the Wairarapa lakes, the Crown only admitted the lakes were Maori property in the face of strenuous protest by Maori. It appears that no such claim was asserted by the owners of Lake Horowhenua in the nineteenth century. Why this was remains a mystery to the present author. When lakes are contained within a single block – as was the case with the original Horowhenua appellation and the later no 11 block – title to the lake resided with the owners of the block. So perhaps the Crown thought that as it owned no land adjacent to the lake, it would have great difficulty in establishing a claim to it. When the Crown tried to establish a claim to a lake in the late nineteenth century, it was usually by virtue of owning riparian lands and the rule of *ad medium filum aquae*, rather than by an assertion of a prerogative right. Another possible reason why the Crown acknowledged the Maori ownership of Horowhenua, rather than try and vest it in itself, was that the lake, in being relatively small, was not considered to be of any particular use to the Crown. Also at this time, pressure was not being exerted by Pakeha land owners in the Horowhenua to drain wetlands. In fact evidence exists that farmers were in fact preserving swamps in view of the economic value of flax.[23] Had this not been the case, the Government could have been under pressure to acquire rights in the lake sufficient to enable it to drain the lake and its associated swamps. Another theory is that in view of the lake's importance to the pre-contact economy, Muaupoko would be more inclined to cede their lands if they were guaranteed continued access to the lake. But all this aside, it remains a peculiarity that the Crown, with apparent alacrity, simply admitted the existence of a Maori title to the lake and established what could have become an important precedent.

3.4 Moves to make Horowhenua a Public Reserve

With the establishment of Levin in the immediate vicinity of Lake Horowhenua, local Pakeha began to consider it desirable to make the lake and its adjacent lands a reserve for public use. In November 1897, John Stevens, member of the House of Representatives for Manawatu, asked the Minister of Lands:

> If he will, so soon as the title there to has been ascertained, acquire by purchase from the Native owners the whole of the Horowhenua Lake, together with a suitable area of land around its shores, for the purpose of a public park, reserving to the Native owners and their descendants the right to their eel and other fisheries, and dedicate the lake and land so to be acquired to the local body within whose boundaries they are situate?

He continued, informing the House that not only was the lake eminently suitable for local recreation, but also as a site for regattas: there not being such a place so well suited within two or three hundred miles of Wellington. He cautioned that if action

23. Geoff Park, *Nga Uruora–The Groves of Life: Ecology and History in a New Zealand Landscape*, Wellington, Victoria University Press, 1995, p 178

was not taken soon, similar difficulties may arise as were experienced in the case of the Wairarapa lakes – difficulties that 'had cost the Natives a great deal of trouble, and had also cost the colony a great deal of money to get the matter settled'. The Minister of Lands, John McKenzie, responded that the question had been considered by the Government and that reports had been received advising it to acquire the lake along with another not far from Horowhenua (presumably Papaitonga). If Parliament was prepared to appropriate the necessary funds, he saw no difficulty in the Crown acquiring the lake as proposed by Stevens.[24]

Pressure from the like of Stevens was presumably a factor in the decision of the Department of Tourist and Health Resorts to commission James Cowan to prepare a report on Lake Horowhenua. In his report to Parliament, Cowan described how at the time of his investigations, public access to the lake was at the sufferance of Maori who owned the land surrounding the lake. Although the local rowing club leased land from Maori for the purpose of a boatshed, the club was unable to obtain a formal lease.[25]

Cowan observed that although most of the native forest on the lake's margin had already been destroyed, there remained significant stands of forest on the eastern and southeastern shores. All this forest was on Maori land; the owners of which were selling the trees to a local saw miller. Cowan was of the opinion that what forest remained should be carefully preserved. He also described how there were still several Muaupoko and Ngati Apa settlements on the shores of the lake and opined that the:

> Native life, the canoeing, &c, should enhance the interest of the lake in the eyes of visitors, and if care is taken to guarantee the Maori their rights of fishing &c., they could, no doubt, be induced to co-operate with the Europeans in the preserving of the attractive features of the place for all time.

In this regard, Cowan recalled Major Kemp's proposal of 1886 that a 100 acre public reserve be established between the lake and the township of Levin, which he noted was unfortunately never given effect to. He cautioned that 'the public are at anytime liable to be denied the privilege even to access the Levin peoples' boat-shed on the lake-side'.[26]

Cowan recommended that all remaining bush on the eastern and southeastern shore of the lake be made a reserve, along with Pipiriki pa and the islands which still existed in 1905. In relation to the islands he warned that because Maori were cutting flax from them, they were in danger of eroding away. He advised that in creating such a reserve, Maori 'should be guaranteed their present rights of fishing for eels, dredging with their rou-kakahi for the shellfish which abound on the bottom of the lake, and of snaring and shooting wild ducks'. Cowan reported that he had spoken to the Muaupoko chief Te Rangimairehau, who had lamented the disappearance of birds from the area due to deforestation. Thus the chief favoured the forest being protected.

24. NZPD, 1897, vol 100, pp 143–144
25. Cowan, p 1
26. Ibid, pp 1–2

However, it was Cowan's view that the Ngati Apa who resided on the lake shore would object to whatever Muaupoko did. Therefore, rather than 'arguing with two factions', Cowan proposed that the best plan was to create the reserve under the 'new Act dealing with scenic reserves', and 'to explain to the Maoris afterwards that their ancestral rights will not be intefered with beyond forbidding them to destroy the bush or vegetation'.[27]

Keith Pickens records that subsequent to Cowan's report, plans were set in motion by the Tourist and Publicity Department for a reserve to be created. It was proposed that the reserve would include about 150 acres of bush on the lake's southern and eastern shores and the islands in the lake, but not the lake itself. These lands were to be acquired under the Scenery Preservation Act 1903.[28] Although unable to find any Native Department records pertaining to this proposal, Pickens adduced evidence that the proposal was approved by cabinet.[29] But before the reserve could be proclaimed, plans had to be produced by the Department of Lands and Survey. Delays in the preparation of these documents transpired; apparently because the department was not prepared to give priority to the creation of scenic reserves over work pertaining to land settlement.[30]

Around this time there was much lobbying both from Maori and politicians in relation to Horowhenua. In 1903, Hoani Puihi and 31 others petitioned Parliament praying that the present title of Lake Horowhenua remain undisturbed. In response, the Native Affairs Committee made no recommendation.[31] In the same year, William Field, the Member of Parliament for Otaki. asked the Government when they proposed 'to proceed with the promised nationalisation of the Horowhenua Lake and the dedication of the same as a public park?' Field recounted how on a recent visit to the district by the Premier, Seddon had been taken for a row on the lake and had 'expressed himself as [being] much struck with the beauty of this splendid sheet of water and its surroundings'. And at a function that evening Seddon had apparently said that steps would be taken to acquire the lake and to make it a national park. Thomas Duncan, the Minister of Lands, responded that legislation was to be introduced to the house to enable reserves to be created like that which had been proposed for Horowhenua.[32] Presumably Duncan was referring to the Scenery Preservation Act that was passed later that year.

The following year Field again asked about Seddon's promise that Horowhenua would be made a national park. On this occasion he noted that when such a park was created, the fishing and other rights of Maori would be preserved. In response

27. Ibid, pp 1–2
28. Acting Superintendent of Department of Tourism to Under-Secretary of Lands and Survey, 29 July 1904, TO 1 20/148; Acting Superintendent to Minister of Tourist and Health Resorts, 10 January 1905, TO 1 20/148, NA Wellington; 'Scenery Preservation, Department of Lands', AJHR, C-6, 1906, p 6, cited in Anderson and Pickens, p 272
29. Acting Superintendent of Department of Tourism to Under-Secretary of Lands and Survey, 1 February 1905, TO 1 20/148, NA Wellington, cited in Anderson and Pickens, p 272
30. Under-Secretary of Lands and Survey to Acting Superintendent of Department of Tourism, 22 August 1905, TO 1 20/148, NA Wellington, cited in Anderson and Pickens, p 273
31. Petition no. 891/1903, AJHR, 1904, I-3, p 19
32. NZPD, 1903, vol 124, p 477

Seddon stated that until such time as the Government was empowered to compulsorily acquire Native land for such purposes, the Government could not act. He anticipated that Parliament would be asked to authorise such takings in the present session.[33] By 1905, when Field again asked the same question, the manner in which the Government anticipated acquiring the land appears to have changed. Rather than compulsorily acquiring it, Native Minister Carroll stated that the concurrence of the lake's Native owners had to be obtained before the lake could be secured for public use. He said that this matter would be raised with the owners at the next favourable opportunity, and that the bush on the land abutting the lake would be brought to the attention of the Scenery Preservation Commissioners.[34]

In August 1905, the tenacious Field asked the Native Minister about when a meeting would be arranged with the:

> . . . Natives of Levin . . . with a view to securing to the public, subject to Native Rights, the free use of Horowhenua Lake and the preservation of the fast-vanishing bush scenery of the lake?[35]

Later in 1905, Seddon and Carroll met with various Muaupoko and a delegation of local Pakeha. As well as Field's agitation, Pickens contends that a possible catalyst for the meeting could have been problems experienced by Pakeha attempting to boat on the lake.[36] The meeting was held in the Levin boating club's boatshed averted to in Cowan's 1903 report to Parliament. The meeting resulted in an agreement, the terms of which were as follows:

> 1. All native bush within the reserve to be preserved.
> 2. Nine acres adjoining the lake – where the boatsheds are and a nice titoki bush standing – to be purchased as public ground.
> 3. The mouth of the lake to be opened when necessary, and a flood-gate constructed, in order to regulate the supply of water in the lake.
> 4. All fishing rights to be conserved to the Native owners (lake not suitable for trout).
> 5. No bottles, refuse, or pollutions to be thrown or caused to be discharged into the lake.
> 6. No shooting to be allowed on the lake. The lake to be made a sanctuary for birds.
> 7. Beyond the above reservations, the full use and enjoyment of the waters of the lake for aquatic sports and other pleasure disportments to be ceded absolutely to the public, free of charge.
> 8. In regard to the preceding paragraph, the control and management of the lake to be vested in a Board to be appointed by the Governor; some Maori representation thereon to be recognised.
> 9. Subject to the foregoing, in all other respects the mana, rights and ownership of the Natives to the Horowhenua lake reserve to be assured to them.[37]

33. NZPD, 1904, vol 128, p 141
34. NZPD, 1905, vol 133, pp 551–552
35. NZPD, 1905, vol 134, p 62
36. Anderson and Pickens, p 263
37. NZPD, 1905, vol 135, p 1206

No records of this meeting have been uncovered by the present author. Therefore it remains unclear whether the terms were freely negotiated, or if they were imposed upon Muaupoko by the Government. The comment in the agreement that the lake was an unsuitable habitat for trout suggested that, had this not been the case, Muaupoko's fishing rights may not have been guaranteed to them. But as is detailed below, by the next decade trout were present in the lake and conflict between Pakeha and Maori anglers was apparent. The banning of bird shooting would, in light of the importance of the lake as a source of game birds for Muaupoko, seem to be either an expropriation or a cession of an important right.

3.5 The Horowhenua Lake Act 1905

The agreement reached between the Ministers and Muaupoko formed the basis of the Horowhenua Lake Bill that was introduced to Parliament in 1905. When the Bill was before the Legislative Council, John Rigg, the Member for Wellington, remarked that the legislation 'practically meant that the Natives of Muaupoko Tribe were making a splendid and generous gift to this colony'. It was recorded that Rigg stated he would have:

> preferred that the Government had purchased the lake outright from the Natives and make it a public reserve. The mana of the Natives – whatever that might mean – they were told, was preserved. What is that mana worth when this Bill is passed and the control of the lake handed over to a Board? Nothing. They have, of course, their fishing rights in the lake, and under the Treaty of Waitangi those could not be taken from them. He did not, of course, oppose the Bill, but he did marvel at the generosity of the Natives in making such an arrangement for the benefit of the people of this colony.[38]

Similarly, Thomas Kelly, the Member for Taranaki, expressed the view that the generosity of the Maori owners should be acknowledged – 'either by giving them a grant of land or by monetary consideration'. The Attorney General, Albert Pitt, responded that he was certain the Native Minister had already acknowledged the generosity of the lake's owners, but took it upon himself to represent the views of Rigg and Kelly to cabinet. He himself was of the view that there 'was no doubt the Natives had acted handsomely and generously'.[39]

The Act was passed on 30 October 1905. The preamble stated that it was 'expedient that the Horowhenua Lake should be made available as a place of resort for His Majesty's subjects of both races, in as far as it is possible to do so without unduly interfering with the fishing and other rights of the Native owners'.[40] Thus Lake Horowhenua, 'containing nine hundred and fifty one acres, more or less', was declared to be a recreation reserve. Although the Act guaranteed that the 'owners shall at all times have the free and unrestricted use of the lake and of their fishing

38. Ibid
39. Ibid
40. Horowhenua Lake Act 1905, preamble

rights over the lake', the exercise of such rights was not 'to interfere with the full and free use of the lake for aquatic sports and pleasures'. [41] A clear tension is evident between this clause and the preamble's emphasis upon the public's use rights being constrained by the rights of the lake's owners. As per the 1905 agreement, the Act also prohibited shooting or destroying any game on the lake or reserve; established a board to manage the reserve (a third of whose members were to be Maori appointed by the Governor); and empowered the Governor to acquire ten acres of land adjacent to the lake for the purpose of building a boatshed or other buildings.[42] This last provision was a variation to the original agreement which had stipulated nine acres. That it be ten rather than nine acres had been proposed by Field during the Bill's second reading in the House of Representatives.[43] Although a relatively small change, it appears to have been made without the consent of Muaupoko.

Several matters covered by the agreement were not included in the Act: for example, the provisions to preserve native bush on the one chain strip, the construction of flood gates, banning the disposal of rubbish in the lake, and acknowledging that rights and mana over the lake remained with the Muaupoko owners. Pickens suggests that the first three of these provisions could have been considered to 'come under the control of the board, and so did not require specific enumeration'.[44] As for the acknowledgement of Maori rights and mana over the lake, the situation is somewhat less clear. As noted above, when the Bill was before the Legislative Council, Rigg had pointed out that this aspect of the agreement would mean very little once the control of the lake was vested in the reserve board.[45] However, it is possible that the Government was keen to avoid the inclusion of any terms in the Act that could be construed as being an overt acknowledgement that either the bed or the waters of the lake were Maori property. Rather they may have preferred to leave the question of ownership somewhat ambiguous. In its final form, aside from reference to the lake's 'Native owners' in the preamble, the Horowhenua Lake Act was silent on the point of who owned the lake subsequent to the creation of the reserve.

Tame Parata, the Member for Southern Maori, was clearly of the mind that under the Horowhenua Lake Act, the ownership of the lake had passed from Maori to the Crown. In 1906 he asked Carroll if the Government would repeal the legislation 'which appropriates a valuable estate without the consent of the Native owners'. Carroll responded that the matter would be looked into, but that it was not proposed to interfere with the Act in anyway.[46]

Pickens details how during 1905, the Scenery Preservation Commissioners and the Department of Tourist and Health Resorts had been working towards the acquisition of 150 acres of lake-side land along with the lake's islands. This was to enable the preservation of the forest growing beside the lake, which in turn, would enhance the

41. Ibid, s 2(a)
42. Ibid, ss 2–4
43. NZPD, 1905, vol 135, p 1134
44. Anderson and Pickens, p 274
45. NZPD, 1905, vol 135, p 1206
46. NZPD, 1906, vol 137, p 508

area's attractiveness to tourists. Under this scheme, compensation for Maori would have been computed by the Native Land Court. Pickens speculates that the Horowhenua Lake Act was an effort by the Native Department to prevent the more ambitious Tourist and Health Resorts Department's proposal going ahead; a proposal that would have caused more disruption to the lake's owners. After the passage of the Act, the Tourist Department's scheme appears to have been abandoned.[47]

During the 1906 parliamentary session, Field asked whether the Lake Horowhenua Act could be amended to enable the Crown to acquire a further 20 acres of land abutting the lake. Field claimed that this land was of no value, and that its owners were anxious to sell it. Carroll responded that the Act would not be amended because the Native Department opposed the proposal to acquire the additional land. He stated that if the owners wanted to sell the land, they were free to make an application to do so.[48]

3.6 Conflict over Fishing in the Lake

By 1911, conflict had emerged between Maori and Pakeha in connection with fishing rights in Horowhenua. Pakeha apparently resented the fact that the right to fish in the lake was confined to the lake's Maori owners. Maori reportedly were preventing Pakeha from fishing for trout, and were refusing to obtain licenses to do the same.[49] In January 1911, the *Chronicle* reported that:

> If the present embargo against fishing the lake waters (which operates in the case of all but men with Maori blood) were removed, a great deal would be done to attract week-end visitors to our midst. Already Horowhenua Lake contains trout in large numbers and of abnormal size; and there is no good reason why perch should not be acclimatised and made numerous in its waters, pending the time when Natives of the district shall consent to a widening of the present privileges which they possess. The old type of Maori – jealous of all his privileges, of life habits remote, and of disposition exceedingly exclusive – has passed away; and his educated successor is clear-sighted enough to know that a prosperous community means more to him than any jealously-guarded but seldomly-used privilege could do. We have very little doubt that the present embargo will be lifted amicably as soon as the endeavourers develop sufficient strenuosity.[50]

Later that month, Field wrote to the Native Minister enclosing the above article and advocating that the law be changed.[51]

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47. Anderson and Pickens, p 274
48. NZPD, 1906, vol 137, p 506, cited in Anderson and Pickens, p 275
49. Field to Native Minister, 24 January 1911, MA 5/13/173, W2459, NA Wellington, cited in Anderson and Pickens, p 275
50. 'Horowhenua Lake', *Chronicle*, 17 January 1911
51. Field to Native Minister, 24 January 1911, MA 5/13/173, ACC W2459, NA Wellington, cited in Anderson and Pickens, p 275

Around 1914, presumably as a result of this agitation, the Native Department sought an opinion from the Crown Law Office on the question of fishing rights in Lake Horowhenua. The opinion observed that the 'question of fishing rights had for some time been a bone of contention between Native and European anglers'. It was recounted how in connection with this same matter the Department of Lands and Survey had previously obtained an opinion from the Crown Law Office. This opinion had held that:

> The Horowhenua Lake Act, 1905, is not an Act conferring any rights on the Natives; its purpose is to take away all rights previously held by the Native owners, excepting those expressly reserved. Prior to the passing of the Act the lake, being a comparatively small one, probably belonged to the owners of the adjoining land *ad medium filum*, but in 1905 some of those owners were Europeans, and no Native owner of adjoining land could point to any defined portion of lake as owned or lawfully occupied by him.

The opinion prepared for the Department of Lands and Survey concluded that the 1905 Act only confirmed Maori's access and fishing rights, not the ownership of the actual lake. On the question of whether Maori could fish for trout without a license, the author considered that Maori, like Pakeha, could only fish for trout without a license on land which they owned that abutted a waterway. This was provided for by section 90 of the Fisheries Act 1908. It was stated that:

> as the Horowhenua Lake Act only preserves such rights as they had, and no Native is now in lawful occupation of any of the lake now, no Native can now fish for trout without a licence without committing an offence against Part II of the Fisheries Act, 1908.

The author of the opinion requested by the Native Department concluded that the fishing rights confirmed to Maori by the 1905 Act applied to all freshwater fish except salmon and trout. Further, it was held that fishing for trout by Pakeha would not interfere with those rights.[52]

Both the opinion obtained by the Native Department and the earlier one upon which it was based, are quite incredible. It is hard to see how the claim that the Horowhenua Lake Act extinguished all the rights of Maori other than those it expressly confirmed can be sustained. Admittedly the issue of ownership was obfuscated somewhat by the Act, but nowhere does it say that the ownership of the lake ceased to reside with Maori. Clearly, all that passed to the reserve board was the right to control the reserve; not the ownership of the lake. Further, the claim that Maori had no right to fish for trout without a licence – an activity permitted from one's own land under the Fisheries Act 1908 – would appear to be similarly erroneous. Firstly, the lake remained a Maori property, and at common law, a lake is regarded as simply being land covered with water.[53] Section 90 of the Fisheries Act

52. 'Horowhenua Lake: the Question of Fishing Right', nd, MA 5/13/173, ACC W2459, NA Wellington
53. Section 2 of the Land Transfer Act 1952 holds that 'land' includes 'messuages, tenements, and hereditaments, corporeal and incorporeal, of every kind and description, and very estate or interest therein, together with all . . . waters, [and] waterways . . . unless specifically excepted.'

1908 states that any 'person in lawful occupation of any land may fish without a licence . . . upon that land'. And in this context, 'occupation' would appear to mean a person residing, or importantly, with the right to reside upon a particular piece of land.[54] Therefore an owner of the lake fishing for trout on, or from the margin of the lake, could be exempted from the requirement of holding a licence. And secondly, it appears that some land adjoining the lake was at this point in time still in Maori ownership. Significantly in this regard, the one chain strip had not been made part of the reserve. Had it been so, Maori would not have been able to fish from their own land. However, the Government, perhaps keen to preclude such possibilities or to stymie any claims by riparian landowners to the lake bed, shortly afterwards introduced legislation to make the one chain strip a part of the reserve.

3.7 Reserves and Other Lands Disposal and Public Bodies Empowering Acts 1916 and 1917

In 1916, the Horowhenua Lake Act 1905 was amended by the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1916. While the 1916 legislation was still a bill, Hema Henare and 33 others petitioned Parliament concerning the proposed legislation. They asked that the proposed clause that would have extended the reserve board's sphere of control to the Hokio Stream and the one chain strip surrounding the lake be removed from the Bill. The Native Affairs Committee made no recommendation on the petition, and the clause was passed into law.[55] Consequently the board's authority was extended to the one chain strip and the Hokio Stream, and the reserve was redefined as being the lake plus the one chain strip. The Act also changed the constitution of the reserve board. The 1905 Act had provided that a minimum of one-third of the board's members were to be Maori. Section 2 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1916 set the membership of the board at nine, no more than three of whom were to be Maori. In this fashion, what had been a minimum quotient of Maori board members became the maximum.

The clause of the Act affecting Horowhenua was a late addition to what was described as a 'washing up bill'. When Massey discussed the clause he stated that it 'settled an old dispute between the local bodies of the district concerned with respect to Horowhenua lake'. He observed that it had been referred to the Native Affairs Committee, and that the 'Native members had had an opportunity of looking into the proposal, and he understood, no objection was raised'.[56] Significantly though, the inclusion of the one chain strip in the reserve was not part of the 1905 agreement. As Pickens observes, the 'effect whether intended or not, was that a substantial and strategically placed area of land was removed from Maori control.'[57] An opinion on

54. Peter Spiller, *Butterworths New Zealand Law Dictionary*, Wellington, Butterworths, 1995, p 205
55. Petition no. 251, AJHR, 1916, I-3, p 16
56. NZPD, 1916, vol 177, pp 697, 795
57. Anderson and Pickens, p 275

Lake Horowhenua furnished by the Crown Law Office in 1932 stated that the one chain strip was appropriated to preclude any claims to the lake being made by riparian owners. Of particular concern was that such owners should not benefit if the lake was lowered.[58] But as is discussed below, at different times over successive years, a committee of inquiry, the Chief Judge of the Maori Land Court, and the Commissioner of Crown Lands, all expressed the view that under the 1905 and 1916 legislation, both the lake and the one chain strip remained the property of Muaupoko.

A further 13 acres were transferred to the control of the board by an Act of Parliament in the following year. Although this land was purchased,[59] when legislation affecting the lake came before Parliament in 1956, Eruera Tirakatene, the Member for Southern Maori, claimed that no payment was ever made for it.[60]

3.8 The Lowering of Lake Horowhenua

In 1925, pursuant to the Land Drainage Act 1908, the lands surrounding Lake Horowhenua were constituted a land drainage district under the control of the Hokio Drainage Board. The Hokio Drainage District appears to have included all of the original Horowhenua block 11. The *Gazette* notice proclaiming the district stated that a majority of ratepayers in the area had petitioned the Governor praying that the district be constituted a drainage district.[61] Local farmers had suffered losses as a consequence of their lands being inundated with water when the lake flooded. Interestingly, some Ngati Raukawa who farmed land in the vicinity of the lake favoured the Hokio Stream being widened to reduce the incidence of flooding.[62]

The 1908 Land Drainage Act provided for the establishment of drainage boards that were empowered to construct, maintain, and repair drains and watercourses. Under section 3(1) of the Act, the Governor could constitute a drainage district upon being petitioned by a majority of ratepayers in an area. Under the Act, landowners on whose properties it was proposed to construct drains or other works could object to such operations. However, there appears to have been no provision for objections to be made by other people who would have suffered injury as a consequence of drainage works being undertaken. Consequently the Muaupoko owners of Horowhenua had no recourse under the Land Drainage Act if drainage works adversely affected their fisheries.

Maori could also have suffered prejudicially under the Land Drainage Act's provision for drainage boards to be constituted if this was favoured by a majority of

58. Crown Solicitor to Under-Secretary, Department of Lands and Survey, 31 May 1932, TO 1 20/148, NA Wellington
59. Memoranda attached to Crown Purchase Deed 972, cited in Anderson and Pickens, p 276; Anderson and Pickens, pp 275–276
60. Reserves and Other Lands Disposal and Public Bodies Empowering Act 1917, s 64; Anderson and Pickens, pp 275–276; NZPD, 1956, vol 310, p 2713
61. 25 June 1925, *New Zealand Gazette*, 1925, no 49, p 1955
62. Anderson and Pickens, p 276

ratepayers. In the case of the part of Horowhenua no 11 that included the lake, there were several owners. However, because the land was held in trust, the trustees alone would have been the ratepayers and hence only they would have been counted in a decision to constitute a drainage board. Given the deleterious effect that drainage operations had upon an economy based upon freshwater resources, the Act's bias towards ratepayers, as opposed to other interested parties, is particularly unjust.

At the time the Hokio Drainage Board was constituted, Muaupoko raised concerns about any interference with the Hokio Stream and the effect this could have on the lake and their fisheries. A meeting was held between them and an official of the Department of Lands at which some sort of agreement appears to have been reached in connection with protecting their fisheries. However, when the Drainage Board began work, Muaupoko felt that the agreement was not being observed, and intervened to stop operations. This resulted in a second meeting and another agreement being signed.[63] This second agreement presumably resulted in the provisions in the 1926 Local Legislation Act protecting Maori fishing rights.

In 1926, the Local Legislation Act was passed. Inter alia, this Act contained provisions for the Hokio Drainage Board to carry out drainage operations on lands adjacent to Lake Horowhenua and Hokio Stream. It also provided for the safeguarding of Maori fishing rights and certain other rights enjoyed by public users of the lake. Section 53(1) stated that any proclamations made under the Land Drainage Act 1908 in respect of Hokio Stream were to contain such provisions as were necessary to protect Maori fishing rights and public use rights. According to the Act, such proclamations could provide for: the widening or deepening of Hokio Stream; regulating the removal and replacement of eel weirs; regulating works that would lower the lake level; or protecting the existing rights of users of the lake.[64]

The Drainage Board then recommenced its work on the Hokio Stream, creating a narrow, deep, and fast flowing channel. During the course of a 1934 inquiry into matters concerning Lake Horowhenua, representatives of Muaupoko stated that where there had once been 13 eel weirs on the Hokio. Only two survived after this first phase of work undertaken by the Drainage Board. According to counsel for the Muaupoko owners at the inquiry, the Drainage Board commenced this work before proclamations were issued. The claim was made that 'the board trampled on native rights and then got legislation to justify their actions'.[65] As well as affecting the eel fisheries of the Hokio Stream, the actions of the Drainage Board caused the lake level to be permanently lowered. The lake margin, once muddy and heavily vegetated, became arid and stony. In this way, an important kakahi, eel, and flax habitat was destroyed.

As well as suffering as a result of the altered ecology of the lake caused by the lower water level, Maori found themselves embattled with Pakeha farmers as to who had

63. Memorandum re Hokio Stream by R M Watson, 28 November 1925, MA 5/13/173, W2459, p 2, NA Wellington, cited in Anderson and Pickens, pp 278–279
64. Local Legislation Act 1926, s 53
65. 'Minutes of Committee of Inquiry, Levin', 11 July 1934, MA 5/13/173, W2459, p 2, NA Wellington, cited in Anderson and Pickens, p 279

rights to the dewatered area. As the margins of the lake were not fenced, farmers of the lake's riparian lands proceeded to graze their stock on this dewatered zone. This resulted in further damage being caused to the vegetation of the lake margin, especially flax. The problem was exacerbated by some farmers burning flax bushes and ploughing them under.[66] At this time it is likely that Muaupoko still derived an income from the sale of flax – an economic opportunity that would have been reduced by the destruction of plants on the lake margin.[67]

Muaupoko grievances about the lowering of the lake precipitated a series of petitions, complaints, and deputations to the reserve board, Government departments, and politicians. In November 1929, Te Puku Matakatea and others wrote to Apirana Ngata complaining that lessees of certain lake-side lands were burning flax, draining the lake margins, and claiming rights to the one chain riparian strip. It was stated that Muaupoko had decided to fence off part of the one chain strip. They had commissioned a surveyor to prepare the fence line; acquired the necessary materials to build half the fence; and through their solicitors, served notice on the lessees of the land that they would be liable for half the cost of the fence. In response one of the lessees ploughed over the survey line that had been laid down, and declared that he would cut down any fence that was erected. It was recounted how the lessee's solicitors had advised that because the one chain strip was considered to be vested in the reserve board, his clients would not comply with the request to cooperate in building the fence.[68] The following month, Matakatea again wrote to Ngata asking that the Hokio Drainage Board assist him in compelling the lessees to erect a fence. In the letter it was noted that the owner of the land was himself a member of the Drainage Board.[69] Nothing appears to have resulted from Matakatea's request.

A deputation of Muaupoko travelled to Wellington in 1930 to complain about the actions of the Drainage Board which had caused the lowering of the lake. Subsequently there was a meeting at Horowhenua to examine the situation and hear the views of various parties on the problems. Pickens records that at this time there also appears to have been an investigation into the numbers of eels in the lake.[70]

In 1931, the Domain Board sought an opinion from the Department of Lands and Survey as to whether the domain was the property of the Crown or of Muaupoko.[71] The inquiry was referred to the Crown Law Office, who replied the following year. The Crown Solicitor opined that although 'not stated in express words', all rights other than those reserved to Maori in section 2(a) of the Horowhenua Lake Act 1905 had been resumed by the Crown. The lake, the Crown solicitor continued, had been declared a reserve, not a domain, and therefore had not been vested in the board. The lowering of the lake, it was contended, had not affected the legal boundaries defined in the 1916 Act: if adjoining landowners were grazing the dewatered area, they were

66. 'Minutes of Committee of Inquiry, Levin', 11 July 1934, MA 5/13/173, W2459, p 2, NA Wellington, cited in Anderson and Pickens, p 279
67. Adkin, pp 142–143; Park, pp 177–178
68. Puku Matakatea and others to Ngata, 30 October 1929, MA 5/13/173, W2459, NA Wellington
69. Puku Matakatea and others to Ngata, 14 November 1929, MA 5/13/173, ACC W2459, NA Wellington
70. Anderson and Pickens, p 279
71. Ibid, p 277

trespassing – presumably upon Crown land in light of the view that the Crown had assumed ownership of the lake. The Crown Law Office considered that although the Board was not technically a domain board, it enjoyed all the powers of one. It therefore could require landowners to fence their lands and impound any stock found on the reserve.[72]

3.9 1934 COMMITTEE OF INQUIRY

The advice from the Crown Law Office vis-a-vis the lake reserve appears to have been ignored by the Board. Instead in 1933, after meeting with the Levin Borough Council, the Board resolved to ask the Department of Lands and Survey to set up an inquiry into the Board's rights in relation to the lake and the one chain strip.[73] A year later a committee of inquiry was appointed to undertake an investigation. The committee consisted of J Harvey, a judge of the Native Land Court, and H W C McIntosh, the Commissioner of Crown Lands. Their terms of reference required them to hear the views of Maori, the Domain Board, the Levin Borough Council, and any other local bodies and individuals in relation to the lake reserve. The committee of inquiry was to consider how the rights of Maori could be affected by the further development of the reserve as a public resort, along with any other matters which might emerge in relation to the legal or equitable rights of Maori. The committee was to report to the Minister of Lands.[74]

The committee of inquiry met with various local bodies in Levin on 11 July 1934. As well as the Domain Board and the Levin Borough Council, the Chamber of Commerce and the Wellington Acclimatisation Society were represented at the meeting. Morison represented the Muaupoko owners. Two members of the tribe and two Pakeha individuals also made oral submissions.

With the exception of the Acclimatisation Society, all of the Pakeha present at the meeting favoured the further development of the lake reserve. In light of this, they all believed that it was imperative that the legal situation vis-a-vis the ownership of the lake and the chain strip be clarified. Although favouring the further development of the lake reserve, the Domain Board believed it could not act so long as its powers and the rights of Maori remained undefined. The Acclimatisation Society, on the other hand, was most concerned about the effect stock were having on the lake margin and the wildlife that inhabited this zone. The society favoured the restoration of the lake margin and intimated that they could be able to help meet the cost of the necessary fencing. Although the general tenor of their submission was towards making the lake

72. The board was, however, frequently referred to as a domain board in official correspondence pertaining to the lake. Crown Solicitor to Under-Secretary, Department of Lands and Survey, 31 May 1932, TO 1 20/148, NA Wellington
73. Under-Secretary, Department of Lands and Survey, to Minister of Lands, 15 November 1933, MA 5/13/173, W2459, NA Wellington, cited in Anderson and Pickens, p 277
74. 'Horowhenua Lake Domain: Committee of Enquiry – Terms of Reference', nd, MA 5/13/173, W2459, NA Wellington

a wildlife reserve, they did not oppose Maori fishing in the lake. However, they did object to ducks being taken.

Morison then presented the position of Muaupoko to the committee. He stated that they considered the lake to be their property, held in trust since 1898. It was held that the 1905 Act had given Pakeha the right of navigation over the lake; nothing more. Morison recounted that the Board had been advised in 1911 that it did not own the lake or have any control over the one chain strip. According to Morison, the inclusion of the one chain strip in the reserve under the 1916 legislation was done without Muaupoko being consulted. This, it was held, was in breach of the agreement reached between Seddon, Carroll, and Muaupoko in 1905. That the Crown had rights over the surface of the lake and to the 13 acres of the reserve was not disputed by Muaupoko. The committee was told that Muaupoko wanted to have control of the one chain strip returned to them, that it be fenced, and that it be available exclusively for their use.[75]

Judge Harvey's report to the Minister held that the evidence the committee had received clearly demonstrated, that up until the passage of the 1916 and 1926 legislation, the lake and the one chain strip were Maori property. It was observed that if 'these amendments have taken away the Natives' title ... they have done it [in] a subtle manner mystifying alike the Domain Board and the Natives.'[76] The report set out the positions of the Domain Board and Muaupoko as they had been represented to the committee.

Harvey opined that a compromise rather than a strict legal definition of rights may represent the best solution to the impasse that had developed in relation to the lake and the riparian strip. He recommended that subject to the fishing rights of Muaupoko, the Board have control of the surface of the lake, and that it be afforded title to 83½ chains of the dewatered area and the one chain strip along the Levin side of the lake. Under Harvey's proposal, the lake bed, and the rest of the one chain strip and dewatered area would be owned by the trustees of Horowhenua no 11.[77]

3.10 Attempts at a Resolution

The Native Minister, G W Forbes, favoured Harvey's recommendations as a basis for a settlement of the difficulties that had arisen in relation to Horowhenua. In March 1935, the proposals were put to Muaupoko. However, whereas Harvey's proposal required Muaupoko to cede 83½ chains, they were only prepared to give up about half of that area. After this impasse emerged, both the Department of Lands and Survey and the Native Department considered that the matter should be left to lie.[78]

75. 'Minutes of Committee of Inquiry, Levin', 11 July 1934, MA 5/13/173, W2459, NA Wellington, cited in Anderson and Pickens, pp 278–279
76. 'Judge Harvey's Report to the Honourable The Minister of Lands', 10 October 1943, MA 5/13/173, W2459, p 3, NA Wellington, cited in Anderson and Pickens, p 279
77. 'Judge Harvey's Report to the Honourable The Minister of Lands', 10 October 1943, MA 5/13/173, W2459, p 3, NA Wellington, cited in Anderson and Pickens, pp 279 –280
78. Anderson and Pickens, p 280

In May 1936, a deputation of Muaupoko met with Prime Minister Savage in Wellington. The delegation requested that all legislation affecting the lake be repealed, and that the ownership of the lake and riparian strip be returned to Muaupoko. This delegation resulted in another meeting between Government officials and Muaupoko in Levin seven months later to discuss Harvey's proposals. Muaupoko, however, wanted to discuss the legislation pertaining to the lake and had expected the relevant ministers to be in attendance. The meeting was abandoned when it became apparent that the impasse that had caused the cessation of the March 1935 meeting remained unresolved.[79] Subsequently, Harvey advised the Native Department that progress towards a settlement as proposed in his report was unlikely to be achieved through further meetings with Muaupoko. Alternatively he proposed that the one chain strip be revested in the trustees of Horowhenua no 11, and then the part wanted for the proposed domain be taken under the Public Works Act.[80]

By the 1940s the Domain Board had effectively ceased to function. A letter from the Native Department to the Department of Lands and Survey stated that the reason for this was that no Maori were willing to accept nomination.[81] In 1943, another meeting was convened between representatives of the lake's owners and the then Native Minister, H G R Mason. At this meeting the perennial grievances concerning the one chain strip and the dewatered area were traversed.[82] Nothing appears to have resulted from the meeting. The opinion of the Chief Judge of the Native Land Court was then sought. He considered that to a large degree, the Domain Board's failure to fence off the one chain strip and take action in preventing stock from grazing the domain were to blame for the impasse that had developed. He stated that although the issue of the lake's ownership had become confused, the lake remained the property of Muaupoko pursuant to the Native Land Court orders for Horowhenua no 11.[83] Pickens, in the course of his research into this matter, found no response to Shepherd's opinion. He speculates that this could have been because of the Second World War, or that the impasse that had developed over Harvey's proposal precluded any progress being made towards a resolution of the conflict.[84]

Another series of meetings and deputations began in the 1950s. In 1950, the Minister of Maori Affairs, Ernest Corbett, met a delegation of Muaupoko in connection with the lake. The group, led by the member of Parliament for Otaki, had sought an audience with him:

> in an endeavour to obtain some solution to this vexed problem of control, and to clear up, if possible, the position as to the ownership of the lake and the Hokio Stream.[85]

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79. 'Minutes of Meeting of Deputation of Muaupoko Tribe and Prime Minister, 29 May 1936', p 6, MA 5/13/173, W2459, NA Wellington, cited in Anderson and Pickens, p 280
80. Harvey to Under-Secretary, Native Department, 15 December 1936, MA 5/13/173, W2459, NA Wellington, cited in Anderson and Pickens, pp 280–281
81. Under-Secretary, Lands and Survey to Under-Secretary, Native Department, 13 June 1940, MA 5/13/173, W2459, NA Wellington, cited in Anderson and Pickens, p 281
82. Anderson and Pickens, p 281
83. Shepherd to Under-Secretary, Native Department, 21 October 1943, MA 5/13/173, W2459, NA Wellington, cited in Anderson and Pickens, p 281
84. Anderson and Pickens, p 281

In 1952, a report on the Lake Horowhenua dispute was produced by E McKenzie, the Commissioner of Crown Lands, and Messrs Mills and McEwan of the Department of Maori Affairs. In spite of Crown Law Office opinions to the contrary, the report considered that the 1905 Act had not vested the lake in the Crown. The authors identified the Domain Board as the main source of difficulty: particularly the way in which it had repeatedly ignored the views of Maori and even requested that they be removed from the Board. They were of the opinion that the only solution was to try and purchase the additional land wanted for the reserve.[86]

3.11 Reserves and Other Lands Disposal Act 1956

In 1956, the Reserves and Other Lands Disposal Act was passed, section 18 of which pertained to Lake Horowhenua. Although it is not clear the extent to which this legislation resulted from the 1952 report of McKenzie et al, both were predicated upon the notion that the lake and the one chain strip were Maori property.[87]

In introducing the part of the Bill affecting Lake Horowhenua, the Minister of Maori Affairs, Ernest Corbett, repeatedly stressed that the legislation met 'fully the wishes of the Maori owners.' In speaking to the same clause, Eruera Tirakatene, the Member for Southern Maori, briefly traversed the legislative history of the lake and contiguous lands. He noted that as a consequence of various Acts of Parliament, it appeared the Maori owners had lost some of the rights guaranteed to them in the original 1898 deed. He observed that 13 acres for the domain had also been ceded by Muaupoko, and that there existed no record of any payment being made for these lands. In addition the Maori owners felt 'that motor boat racing on the lake is detrimental to the waterfowl and other bird life there, and that the lake should be retained as a bird sanctuary.' The bill contained provision for the constitution of a Domain Board. It was proposed that the board would include four members of Muaupoko and that it would be chaired in an ex-official capacity by the Commissioner of Crown Lands for the Wellington District. In respect to the proposed board, Tirakatene was critical of the fact that it was to be chaired by a Commissioner of Crown Lands. 'Why', it was asked, 'could not a Maori be the chairman of the board? There are many Maoris capable of holding that office.'[88] In response to a question from Tirakatene as to the status of Muaupoko's rights to the lake, Corbett stated 'that the Bill safeguards the rights of the Maoris to the ownership of the lake bed, to the bed of the Hokio Stream, the chain strip, and the dewatered area around the Lake, as well as those lands for which title had been granted by the Court in days gone by.'[89]

85. NZPD, 1956, vol 310, p 2712
86. E McKenzie, J A Mills, and J M McEwan, 'Horowhenua Lake Domain Brief History and Recommendation', 1952, MA 5/13/173, W2459, NA Wellington, cited in Anderson and Pickens, p 281
87. Anderson and Pickens, p 281
88. NZPD, 1956, vol 310, p 2714
89. Ibid

The Act declared 'the bed of the lake, the islands therein, the dewatered area, and the strip of land one chain in width around the original margin of the lake . . . to be and to have always been owned by the Maori owners'. The Act confirmed that the lake, the dewatered area, and the one chain strip were vested in the trustees appointed by the Maori Land Court in 1951 on behalf of the owners. Similarly the bed of the Hokio Stream, excepting any part that had been legally alienated by its Maori owners, was deemed to be Maori property.[90] Subsection (4) of the Act secured public access to the 13 acre reserve, the chain strip, the dewatered area, and the surface waters of the lake. Subsection (5) declared the surface of the Lake to be a domain and guaranteed public access to it. It also secured to Maori unrestricted use of the lake, and guaranteed their fishing rights in both the lake and the Hokio Steam. However, as with previous guarantees, the exercise of these rights was not to interfere with the reasonable rights of the public – the extent and nature of which were to be defined by the Domain Board. The Act abolished the Hokio Drainage Board and transferred its powers and jurisdiction to the Manawatu Catchment Board. However, no work was to be undertaken by the Catchment Board without the prior consent of the Domain Board.[91] Subsection (8) specified how the Domain Board was to be constituted: four members of Muaupoko; one member recommended by the Horowhenua County Council; two members recommended by the Levin Borough Council; and in an ex officio capacity, the Commissioner of Crown Lands, who was to chair the board. Subsection 12 repealed all earlier legislative provisions affecting the lake.

Pursuant to the Reserves and Other Lands Disposal Act 1956, a certificate of title for the bed of the lake was issued by the District Land Registrar on 12 October 1959.[92]

3.12 A CONTEMPORARY VIEW OF THE LEGAL OWNERSHIP OF HOROWHENUA

In 1989, the Director-General of Conservation requested an opinion from the Crown Law Office on several legal issues pertaining to Lake Horowhenua. The reason why this opinion was sought is not known.

In considering section 18 of the Reserves and Other Lands Disposal Act 1956, S E Kenderdine of the Crown Law Office opined that, under the Act, the lake 'is an entity and ownership of its waters were to be confirmed by vesting the bed of the lake in the Maori owners'. The effect of this, it was thought, 'should provide adequate legal protection for the Maori owners in respect of the lake.'[93] However, Kenderdine considered that the declaration contained in section 18(5) that the waters are to be a public domain suggested that the ownership of the lake's waters does not necessarily accrue to the owners of the lake bed. The effect of section 18(5) therefore is to 'place boundaries on what would then have been common law rights to water and Maori

90. Reserves and Other Lands Disposal Act 1956, s 18(2)–(3)
91. Ibid, s 18(9)–(10)
92. S E Kenderdine to Director General of Conservation, 13 July 1989, Wai 52/0, Waitangi Tribunal, p 5
93. Ibid, p 3

customary title'. But as noted by Kenderdine, there has never been an authoritative decision from 'the superior courts' in New Zealand as to exactly what such rights in relation to lakes and rivers are.[94] The opinion continued, that by declaring 'the surface waters of the lake to be a public domain and assuming them to be vested in the Crown cuts across the full incidents of ownership envisaged by Muaupoko's title to the lake bed'. Therefore 'it is hard to escape the conclusion that the legislation was designed to take away ownership to the lake once it had granted it back again.'[95]

Kenderdine goes on to consider in some detail some other questions posed by the Department of Conservation. In doing this, a rather confused and ambiguous situation vis-a-vis the legal situation is revealed. To make sense of these ambiguities, Kenderdine proposes that the issues raised be reconceptualised in terms of rights rather than absolute ownership. She contends that employing such an analysis of the Reserves and Other Lands Disposal Act 1956 as it affects Horowhenua, 'makes extraordinarily good sense'. First, she opines that the title to the lake bed and contiguous lands affirms Muaupoko's status as tangata whenua and that they hold manawhenua over the lake: 'Their rangatiratanga to the lake is more important than who "owns" the surface waters.' Secondly, the retention of Muaupoko's unrestricted use of the lake is consistent with their manawhenua. Thirdly, it is observed that the 1956 legislation records an agreement between Muaupoko and the Crown that transfers to the public some of the tribe's use rights. Also recorded in the Act is the agreement that Muaupoko will not exercise its rights in such a way as to 'interfere with the reasonable rights of the public.' Fourthly, Kenderdine notes that the 'reasonable exercise by the public of its rights demonstrates the reciprocal duties involved in the grant by the Tribe of use rights to the lake.' Finally she argues that the constitution and existence of the Domain Board is an acknowledgement by both Muaupoko and the Crown that to accommodate the use rights of the public, the lake needs to be appropriately managed.

3.13 Conclusion

The traditional importance of inland waterways to Horowhenua Maori was immense. Geoff Park, in his treatise on New Zealand's lowland forest ecosystems, has opined that 'the Horowhenua's vast swamps of harakeke and eels were the mainstay of mana, and the central attractions to the Waikato people who overran them.'[96] Maori fished for flounder, kakahi, whitebait, and eels in Lake Horowhenua and its associated swamps and streams – especially the Hokio. Not only was fish an important part of the local Maori diet, it was also dried and traded. Evidence shows that Muaupoko engaged in eel husbandry. The lake and its margins also furnished Maori with supplies of game birds and weaving material.[97]

94. Ibid, pp 5–6
95. Ibid, pp 7–8
96. Park, p 178
97. Adkin, pp 18–23; Cowan, pp 1–2

But apart from the resources its ecology supported, Horowhenua had many other significances to Muaupoko. Artificial islands were constructed in the lake upon which fortified pa were built. These were an integral part of Muaupoko's response to the invasions of northern iwi during the early nineteenth century. The lake was also a repository for taonga. Large numbers of artefacts have been uncovered – many in surprisingly good condition. Exactly why they were placed there is not entirely clear, but it could have been to prevent them from falling into the hands of the invaders from the north. In light of the uses made of Horowhenua by Muaupoko, and that many of their number died in the defence of their pa situated in it, it would be hard to overstate the importance of the lake to them. The evidence certainly supports the contention made in relation to other North island lakes that to Maori, waterways were in many ways more treasured than land.[98]

Although the importance of Horowhenua to Maori was perhaps no more remarkable than with many other lakes in New Zealand, that the Crown afforded legal recognition of the Maori ownership of the lake in the late nineteenth century is something of an aberration. In 1898 the lake was formally vested in Muaupoko. Although cases of the Crown claiming lakes to be within the ambit of its prerogative rights were rare in the nineteenth century, it was actively engaged in trying to limit the extent to which Maori rights to lakes were recognised. In the case of the Wairarapa lakes, for example, the Crown persistently argued that Maori simply held fishing rights and nothing else. Exactly why the Maori ownership of Horowhenua was recognised by the Crown remains unclear to the present author as well as to others that have written on the history of the lake. Importantly, Maori do not appear to have mounted a campaign to retain title to the lake.

The legislation pertaining to Lake Horowhenua that followed the vesting of the lake in Muaupoko served to obfuscate the issue of who held title to the lake. The 1905 Horowhenua Lake Act was based on an agreement reached between Seddon, Carroll and Muaupoko. While prima facie, the Muaupoko ownership of the lake was not altered by the agreement or the Act, they did afford guarantees to Pakeha that they would be able to use the lake for fishing and boating. Importantly this shows a willingness on the part of Maori to grant rights to Pakeha in respect of their lakes so long as their overall ownership was acknowledged and protected. However, disputes did arise as to the extent and nature of fishing rights in the lake. The issue appears to have been whether the guarantee of Maori fishing rights meant that they could fish for trout without a licence and prevent pakeha from fishing on the lake.[99] This precipitated an opinion being sought from the Crown Law Office – the first of several that disputed whether the title to the lake resided with Muaupoko. Essentially it was argued that because the Act of 1905 did not expressly confirm the Muaupoko ownership of the lake, it had therefore passed to the Crown.[100] Surely though the very opposite was true – that title remained unless expressly extinguished? This was

98. See for example Alexander Mackay, 'Report on Claims of Natives to Wairarapa Lakes and Adjacent Lands', AJHR 1891, G-4, pp 5–6
99. 'Horowhenua Lake', *Chronicle*, 17 January 1911
100. 'Horowhenua Lake: the Question of Fishing Right', nd, MA 5/13/173, W2459, NA Wellington

certainly the view taken at different times by a committee of inquiry, the Chief Judge of the Maori Land Court, and the Commissioner of Crown Lands.

Although Lake Horowhenua has remained in Maori ownership until the present day, the history of the lake in the twentieth century serves to illustrate how such ownership rights can in fact mean very little in connection with the control and management of a lake. It appears that once the flax industry went into decline, farmers began to assert pressure for the lake level to be lowered. This was to achieve the object of bringing further land into production, and to mitigate the effects upon adjacent lands when the lake flooded. Under the Land Drainage Act 1908, the lands surrounding the lake were constituted as the Hokio Drainage District. The Act provided for districts to be proclaimed when the majority of ratepayers in an area petitioned the Government. This provision clearly prejudicially affected Maori given how much of their land was held in trust, and how few individual Muaupoko would therefore have been ratepayers. Although Muaupoko sought and were granted guarantees that their fishing rights – especially in the Hokio Stream – would not be affected by the operations of the drainage board, it is clear that many of their eel weirs were destroyed and the lake's water level permanently lowered.[101] When it is considered that much of the drainage board's membership was made up of local farmers, it is hardly surprising that the rights of Muaupoko were disregarded.[102]

The constitution of the board set up to manage the recreation reserve similarly shows how in practical terms, being the legal owners of the lake did not correspond to a high degree of control over the lake. Under the 1905 Act a minimum of one-third of the members of the board charged with managing the lake had to be Maori. When the Act was amended in 1916, this quotient was changed to a maximum of one-third, and the total membership of the board set at nine. But even though the board's constitution meant that Maori would always be a minority on the board, evidence exists that the Pakeha members requested that the Maori positions on the board be done away with altogether.[103] The board was also identified in two reports as being primarily responsible for the failure to resolve the ongoing conflict over the extent of Muaupoko's rights in relation to the lake that had existed since shortly after the enactment of the 1905 legislation. In particular, attention was drawn to the way in which the views of the Maori board members had been repeatedly ignored.[104]

Although the Reserves and Other Lands Disposal Act 1956 explicitly acknowledged that the lake belonged to Muaupoko, an analysis of the Act serves to further illustrate how the incidents of ownership are in fact very limited. Clearly under the Act, the ownership of the lake's waters did not accrue to Muaupoko as the

101. 'Minutes of Committee of Inquiry, Levin', 11 July 1934, MA 5/13/173, W2459, p 2, cited in Anderson and Pickens, p 279

102. See for example Puku Matakatea and others to Ngata, 14 November 1929, MA 5/13/173, W2459, NA Wellington

103. E McKenzie, J A Mills, and J M McEwan, 'Horowhenua Lake Domain Brief History and Recommendation', 1952, MA 5/13/173, W2459, NA Wellington, cited in Anderson and Pickens, p 281

104. Shepherd to Under-Secretary, Native Department, 21 October 1943, MA 5/13/173, W2459, NA Wellington, cited in Anderson and Pickens, p 281; E McKenzie, J A Mills, and J M McEwan, 'Horowhenua Lake Domain Brief History and Recommendation', 1952, MA 5/13/173, W2459, NA Wellington, cited in Anderson and Pickens, p 281

owners of the bed. Also they have no right to prevent others accessing the lake or fishing in it. As the Crown Law Office stated in 1989 in respect of Horowhenua, 'it is hard to escape the conclusion that the legislation was designed to take away ownership to the lake once it had granted it back again.'[105]

Although this view could be considered to be somewhat brutal, the fact that Horowhenua has always been in Maori ownership – even if the full incidents of ownership have not accrued to the owners – is somewhat remarkable in the context of the history of lakes in New Zealand. And despite the recent history of the lake having been fraught with conflict concerning its management, the situation vis-a-vis the ownership of Horowhenua is a possible model for what could have happened to other lakes, or importantly, still could.[106] Although it could be argued that Muaupoko's ownership of the lake is reduced to a purely symbolic phenomenon, their status as tangata whenua, and the fact that they exercise mana whenua over the lake is formally recognised. And further, their fishing rights, traditionally an important incident of ownership, are preserved.

105. S E Kenderdine to Director General of Conservation, 13 July 1989, Wai 52/0, Waitangi Tribunal, pp 7–8
106. See for example James Norgate, 'Failure to consult over lake causes friction', *Dominion*, 8 August 1996, p 10

CHAPTER 4

ROTORUA LAKES

4.1 Introduction

The numerous lakes of the Rotorua district lie in an area of hill country approximately 80 kilometres south of Tauranga, and 50 kilometres west of Whakatane.[1] For centuries the lakes of the Rotorua district have been the centre of Te Arawa settlement. Shortly after the Arawa canoe's arrival at Maketu, Ihenga travelled into the interior in search of birds, and by chance his dog discovered Lake Rotoiti. He returned and told his kin of his discovery. Subsequently an expedition was mounted to further explore the area. On this journey Rotorua was discovered, and Ohinemutu named. Quite apart from their metaphysical significance to Te Arawa, for centuries the lakes appear to have been the mainstay of their economy. In a volcanic landscape that was ill-suited to horticultural production, the lakes and their margins were an important source of various species of freshwater fish, waterfowl, and plants.[2]

Throughout the mid-nineteenth century, there appears to have been both a tacit and statutory acknowledgement by the Crown of the rights of Maori in the Rotorua lakes. By the late nineteenth century, however, the lakes' importance to the country's nascent tourist industry saw the Government assuming ever greater rights in the lakes. When Te Arawa sought a legal determination of their perceived ownership rights, the Crown argued that Maori only enjoyed rights of fishing and navigation. This pattern of the Crown initially acknowledging the existence of strong Maori rights in lakes, but over time trying to limit the extent of these, is a scenario common to the contest for the ownership and control of many lakes in New Zealand.

In 1922, legislation was passed vesting in the Crown the beds and waters of 14 lakes in the vicinity of present day Rotorua. The legislation put into effect an agreement negotiated between representatives of Te Arawa and the Crown, whereby native customary title in the beds and waters of the lakes, if such a thing existed, was extinguished in exchange for the preservation of certain fishing rights, and an

1. Historically attention has focused primarily upon the three largest lakes of the area; Rotorua, Rotoiti, and Tarawera. During the 1918 Native Land Court investigation of title to the Rotorua lakes, counsel for the applicants informed the court that he had only prepared the applications for Rotoiti and Rotorua, but that he would attend to the others in due time. However, the Court's inquiry was abandoned, and a settlement was negotiated that applied to Rotorua, Rotoiti, Tarawera, Rotoehu, Rotoma, Okataina, Okareka, Rerewhakaitu, Rotomahana, Tikitapu, Ngahewa, Tutaeinanga, Opouri, and Ngakaro. 'Minutes of the Rotorua Lakes Case: Application for Investigation of Title to the Bed of Rotorua Lake', 16 October 1918, p 137, CL 174, NA Wellington
2. For a detailed account of the traditional history of Te Arawa, see D M Stafford, *A History of the Te Arawa People*, Auckland, Reed Books, 1967

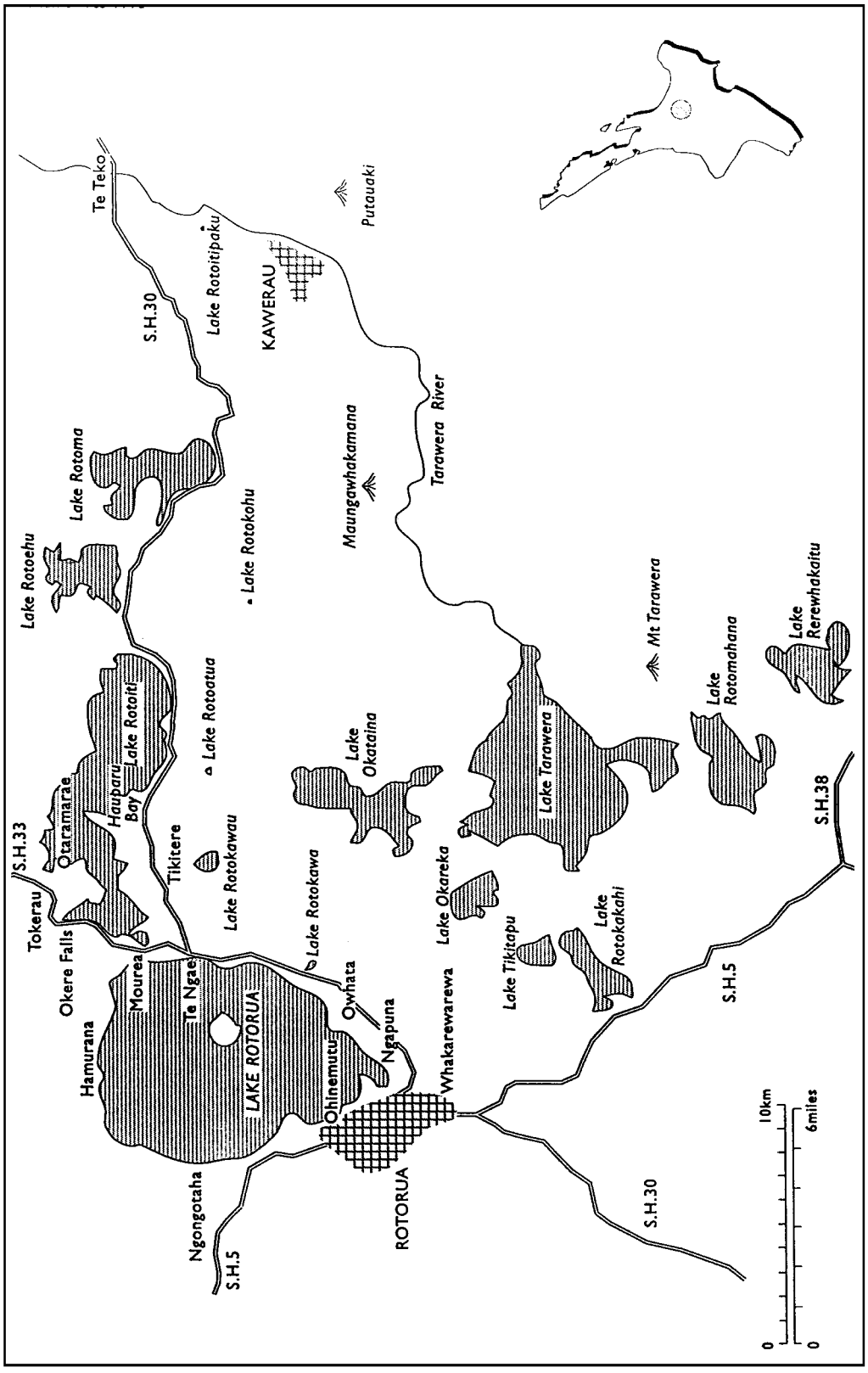

Figure 4: Rotorua lakes

annuity of £6000. The agreement was arrived at after a protracted saga of litigation to determine the ownership of the lakes. From around the turn of the century, Te Arawa had made repeated applications to the Native Land Court for title to the lakes to be investigated. The Government prevented the inquiry from proceeding by refusing to supply a plan and by maintaining it was outside of the Land Court's jurisdiction to determine the ownership of lake beds. Eventually in 1912, the question of jurisdiction was removed to the Court of Appeal which ruled that such matters were in fact within the jurisdiction of the Native Land Court. The Land Court began an investigation in 1918. This was never completed, however, and the applicants succumbed to pressure from the Crown to negotiate a settlement without title having first been determined. It is apparent that the Crown favoured this option because it seemed that the Land Court would have found in Te Arawa's favour. The legislation that put into effect the settlement was carefully worded so as not to be an admission that lakes were subject to Maori customary title. Instead the Act referred only to the lakes as being 'freed and discharged from the native Customary title, if any'.[3]

4.2 The Rotorua Fisheries and Other Resources

Most of the evidence uncovered concerning the nature and extent of Maori rights in the Rotorua lakes is in connection with what appear to have been the two major lakes in economic terms – Lakes Rotorua and Rotoiti. Little evidence has been uncovered as to the nature of rights in the numerous smaller lakes of the Rotorua district. It is likely, though, that to a large extent, the nature of these rights would have been similar to those over bigger lakes. One likely difference though, is that the smaller lakes were probably situated entirely within the rohe of just one hapu, unlike Rotorua and Rotoiti in which several groups clearly had distinct rights.

Throughout the 1918 Native Land Court inquiry into the ownership of the Rotorua lakes, witnesses appearing in support of the Te Arawa application repeatedly stressed the economic significance of the lakes to those people. Captain Gilbert Mair, for example, a man who had lived amongst Te Arawa for most of his adult life, informed the court that birds and rats aside, the Rotorua district 'is sterile country that is unsuitable for cropping' and therefore fishing was of the utmost importance to Te Arawa. This importance extended beyond mere subsistence given that fish were bartered with iwi from other districts. Later Mair made comparisons between the Rotorua lakes and the Wairarapa lakes, which in the late nineteenth century the Government had accepted were the property of Maori. He contended that Rotoiti and Rotorua were:

> of more value to these [Te Arawa] Natives than Wairarapa Lake was to those Natives – of infinitely more value from the variety of food for one thing. Wairarapa was surrounded by fertile lands upon which unlimited quantities of food could be grown.

3. The Native Land Amendment and Native Land Claims Adjustment Act 1922, s 27(1)

> We all know . . . that Lakes Rotorua and Rotoiti are surrounded by sterile land that does not lend itself to such cultivations as the Maori possessed in those days.[4]

Mr F Earl, counsel for the Te Arawa claimants in their applications before the Native Land Court in 1918, stated that:

> Your honour will find that for their food-supply the people of the blocks surrounding these two lakes depended very much more upon the lake than upon the dry land. The lake was supplying them from the earliest times, and still supplies, an almost inexhaustible quantity of various kinds.[5]

Mair listed the various species of fish caught in the Rotorua lakes before the Native Land Court during its 1918 inquiry. These included kakahi (a kind of freshwater mussel), kokopu and koaro (fish similar to small trout), koura (freshwater crayfish), and inanga (whitebait).[6] All the species of fish found in Rotorua appear to have also occurred in Rotoiti. However, as a consequence of Rotoiti being considerably deeper, with the exception of koura, there were fewer numbers of all species in Rotoiti.

In connection with evidence of the fishing practices of Te Arawa, much mention was made of fishing posts or tumu. These were posts that were placed in the lake to mark the boundaries of particular fishing grounds, and that were used to attach nets to whilst fishing. Tumu were sometimes carved and there were often waiata and proverbs that referred to them.[7] Throughout the court's 1918 inquiry, the posts were frequently alluded to by various witnesses in describing the boundaries of the divisions between the parts of the lakes controlled by different hapu.

As well as extensive detail being presented to the Court as to the methods employed to catch the various species of fish in Rotoiti and Rotorua, witnesses also referred frequently to the practice of rahui. Mair, on being asked to explain the custom of rahui, responded that:

> In these days it [rahui] would be called an injunction from the Supreme Court to restrain anyone from acting in a certain manner on land claimed by another person. It is a right vested in a Chief and in him was vested the power of declaring these places open. In the same way fish in the Lake on the various properties in the lake were protected by Rahui. It was to prohibit members of the tribes from fishing out of season. In like manner the sharks in Katikati harbour at Tauranga, these would be rahuied . . . No one would go venture to catch sharks without the chief of the tribe having given his permission, and those rights were applied to these lakes, and to the surrounding country in like manner. In former times, and long after the introduction of Christianity men were killed for any infringement of rahui. No law amongst the Maori was higher than that of setting up rahui, and if the rahui was thrown down it was because someone either challenged the ownership, or it had been put up by the wrong man of the tribe.[8]

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4. Evidence of Capt Gilbert Mair, 'Minutes to Rotorua Lakes Case', pp 190–191, 246
5. Ibid, p 128
6. Evidence of Gilbert Mair, ibid, pp 191–196
7. Ibid, pp 189–190, passim
8. Evidence of Gilbert Mair, ibid, pp 212–213

The existence of a rahui was usually marked by the placement of a special post on the lake's margin. An example of a rahui on Rotoiti was given to the court during its 1918 inquiry by Wiremu Maihi Ereatara, quoting an extract from an earlier inquiry of the Native Land Court:

> A rahui was set up alongside the lake, at the bight on the East side of Te Whiowhio – at [a] place called Te Whaiawa – that is in the lake itself – a post was put there. . . . That rahui was in respect of the koura. Ngatihinekura put it up when they wished to specially conserve the koura. That post was standing there when I was there and I believe that it is there still. It was a pou kaha. When the rahui was in force, arms would be fixed upon the post. . . . A new post would be put in when required.[9]

As well as being important as fisheries, the lakes and their margins were also significant as a source of birds and plants (such as raupo). Earl, counsel for the applicants in the 1918 investigation of the title of the Rotorua lakes, recounted to the Land Court how shortly after he arrived at Rotorua in 1880, he visited Rotomahana. Arriving at the lake, he was astounded at the number of fowl upon it, and was 'anxious to get a gun and get to work upon them.' However, he was prevented from doing so by the local Maori as the lake was:

> held sacred so far as sport was concerned, or the pursuit of game, and was sacred to the Natives, and the only manner to secure the birds was by snares.[10]

The water fowl were held to be the preserve of a particular hapu, and were carefully managed to ensure the resource's sustainability.

Similar stories were recounted to the court in respect of kawa (shags) and seagulls, both of which nested on the lakes' margins. Mair described how particular hapu had exclusive rights over the birds' nesting areas, and that these rights were jealously guarded: 'no man would dare to go and interfere with them without the consent or permission of the owner of the land.'[11] Similarly, patches of raupo growing along the lake shore were the preserve of particular hapu. Evidence exists of rahui being declared in respect of raupo.[12]

4.3 The Nature and Extent of Maori Rights in the Rotorua Lakes

4.3.1 Rotorua

While some witnesses appearing before the Native Land Court in its 1918 investigation of the title of Lake Rotorua stated that five hapu owned Lake Rotorua, others claimed their were in fact six. A possible explanation for this disparity is that

9. Taheke Native Land Court minute book 22, fol 192, cited in ibid, p 315
10. Ibid, p 160
11. Evidence of Mair, ibid, p 206
12. Evidence of Wiremu Maihi Ereatara, ibid, p 306

some individuals afforded groups autonomous status that others considered to be subsumed by larger groups. Wiremu Maihi Ereatara listed Ngatiuenukukopako, Ngatirangiwewehi, Ngatingararanui, Ngati Whakaue, Ngatirangiteaorere, and Ngatiparua as being the hapu that owned Lake Rotorua. In support of this, Ereatara recited at length the physical boundaries of the divisions between the different hapu with rights in the lake.[13] Ereatara's evidence was broadly in accordance with that of Mair, who listed five groups and concomitant divisions. Mair held that the divisions were well known, and that in only one instance had they ever been disputed. [14]

Ereatara stated before the court that all the hapu with rights in the lake descended from Uenukukopako, the father of Whakaue. These groups are known as Te Ure-O-Uenukukopako. Although Te Ure-O-Uenukukopako did have ancestral rights to Rotorua, it seems the major basis of their claims stemmed from their conquest of Kauarero. In conjunction with their rights by virtue of conquest, Te Ure-O-Uenukukopako's claim to the lake was supported by what Ereatara simply described as 'mana' – being the right to work on the lake and exclude others.[15]

The exclusive nature of the different hapu's rights in Rotorua was stressed by all witnesses before the court in its 1918 inquiry. In response to a question from Judge Wilson, Ereatara expounded upon the nature of rights held in Lake Rotorua:

> It was exclusive possession. Each hapu had an exclusive right to its own division. When I say exclusive I mean this. Take for instance the Ngatirangiwewehi subdivision. Ngatiwhakaue would not dare go on the Ngatirangiwewehi subdivision as a Ngatiwhakaue ... If a hapu were seen rowing over another hapu's subdivision, questions would be asked as to why they were rowing over it. If it were found that they were going over it for the purposes of working or laying claim to it the result would be a fight. The only time they are able to go over these subdivisions is when, say Ngatirangiwewehi were going over the Ngatiwhakaue portion as Ngatiwhakaue, or vice versa. Although there are Ngatiwhakaues amongst the Ngatirangiwewehi they have no right to go and work the taus[16] of the Ngatirangiwewehi.

He went on to say in connection with non-Te Arawa tribes, that they:

> would not be permitted on any account to go over the lake. Their only way of getting across the lake was to go to their relatives, and for those relatives to take them over the lake. They would be questioned of course as to why they were going over the lake. If it were found that they were going over the lake for some wrong reason of course they would be killed.[17]

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13. Evidence of Wiremu Maihi Ereatara, pp 283–287
14. Evidence of Gilbert Mair, Ibid, pp 210–211, 205–206
15. Evidence of Wiremu Maihi Ereatara, p 283
16. A tau consists of bundles of fern that are tied to a large flax rope, one end of which is attached to a large post. The posts appear to have been either in the lake, or on the shore. After a while the tau would be pulled to the surface and fish that had become lodged in the bundles of fern removed. They were mainly used for catching kokopu. John Te H Grace, *Tuwharetoa: The History of the Maori People of the Taupo District*, Wellington, A H & A W Reed, 1959, p 511
17. Evidence of Wiremu Maihi Ereatara, 'Minutes of Rotorua Lakes Case', p 309

Rights to the lake's fisheries were clearly exclusive. For example, Arama Raraka, a witness before the Native Land Court in 1882, discussed various fishing grounds in Lake Rotorua as part of his evidence in support of his claim to the Whakapoungakau block. He stated that:

> Ringaringakatia is a pipi bank of ours in the lake, and Harangia, Hinekuia and Te Matarae are fishing grounds and no other people would attempt to take pipis or catch fish on those grounds. Death would be the penalty.[18]

Similarly, in 1890, a witness appearing before the Native Land Court in an inquiry into the Parawai block observed that Te Arawa 'considered the work on the Lake in the same light as the work on the land and the portion it was considered proper for a person to work was opposite to his cultivation.'[19]

4.3.2 Rotoiti

Before the Native Land Court in 1918, Mair stated that Rotoiti was divided into three parts and owned by three sections of people: Ngati Pikiao, Ngati Tamateatutahi and Ngati Whakaue.[20] Ngati Pikiao, in the time of eponymous ancestors Pikiao I and Pikiao II, had conquered the descendants of Taketakehikuroa, usurping their rights to the lake and occupying lands along the western shore of Rotoiti.[21] Ngati Pikiao were made up of four hapu – Ngati Hinekura, Ngatirangiteaorere, Ngati Kawiti, and Ngati Rongomai. The lands on the eastern and southern shores of the lake were occupied by Ngati Tamateatutahi and Ngati Whakaue respectively.[22]

Ereatara described how the lake had been divided between the three groups, listing various landmarks and pou that delineated the divisions. He informed the court that these divisions were 'ancient' and that 'from olden times down to our times they have been respected.' While in the past there had been fighting in respect of defending rights to the lake, 'there has been no dispute since Ngati Pikiao got possession of the lake.'[23] Mair impressed upon the court that these rights were enforceable against other groups trespassing on the lake.[24]

Tieri Te Tikao also described the divisions between the different groups with rights in Rotoiti. All the points he mentioned were on the lake shore; the boundaries of the divisions being between these and the midpoint of the lake:

> Our elders have always told us that the taus of both sides [of the lake] only went as far as the middle of the lake and no further. If it is found by one party that the other party's nets or taus go over the centre of the lake there are objections made.

18. Rotorua Native Land Court minute book 4, fol 273, cited in ibid, p 303
19. Rotorua Native Land Court minute book 18, fol 204, cited in ibid, p 155
20. Evidence of Captain Gilbert Mair, ibid, pp 221–223
21. Evidence of Tieri Te Tiakao, Ibid, pp 322–323. See also Taheke Native Land Court minute book, fol 51, cited in ibid, pp 322–323
22. Evidence of Captain Gilbert Mair, ibid, pp 221–223
23. Evidence of Wiremu Maihi Ereatara, ibid, pp 288–292
24. Evidence of Gilbert Mair, ibid, p 224

Te Tikao stressed that each of the 'divisions is owned exclusively by each hapu' and that, 'unless by special permission', one hapu could not fish on the grounds of another – the divisions being 'on the same basis as those on the mainland.' Te Tikao went on to recount how a battle had been fought in defence of a fishing ground on a sand bar, and that two men had been killed as a consequence. Hapu were allowed to travel over parts of the lake belonging to other hapu, so long as they were not fishing or exploiting other resources. However, it would appear that such concessions were contingent upon the hapu concerned being at peace with each other. Further, groups from other iwi would be prevented from travelling on the lake unless they had a valid reason to be there – such as travelling to a tangi or hui – 'if they came for no reason at all of course it would be assumed that they came to claim the lake.'[25]

Under cross-examination by Earl, Ereatara described the basis of Ngati Pikiao's "take" to Rotoiti. These were conquest over the descendants of Tuhourangi, 'the strong arm' in repelling subsequent groups who attempted to usurp Ngati Pikiao's position, and the fact that Ngati Pikiao had worked on the lake and occupied its shores. He stated that originally Tuhourangi came to be possessed of the lake by virtue of a 'take tuku' from Ihenga to Kahumatamamoe, but that take had been 'wiped out by the conquest'.[26]

The picture that clearly emerged from the Native Land Court's inquiry, which to the present author's knowledge is the only major source of written evidence as to the nature and extent of Te Arawa rights in the Rotorua lakes, is that Te Arawa considered themselves to have absolute ownership of the lakes. That each group excluded others from working its particular division of the lakes, and at times even prevented others from navigating the waters, clearly satisfies the English common law test of ownership that property rights are both enforceable and exclusive. The matrix of rights that existed in the Rotorua lakes is not dissimilar to contemporaneous descriptions of the way rights were held and exercised over land. As Gilbert Mair expounded to the Land Court in its 1918 inquiry:

> I know from my 50 years experience in Native Land Courts in different positions, that no land in New Zealand has been held more absolutely, more completely, and more thoroughly under Maori owners' customs and rights than these two lakes, nor do I know of any piece of land in New Zealand in all my experience that has been used or that can show more marks of ownership, individual or tribal than those lakes, and the surrounding lands.[27]

The conception that Te Arawa had of themselves as being the owners of the lakes – informed largely by the existence of clearly demarcated areas of the lake and that particular hapu had the exclusive rights to fish in these divisions – is somewhat unusual in the context of other lakes in New Zealand. In the course of the present author's research pertaining to other North Island lakes, no evidence of such clearly defined open water boundaries has been uncovered. Similarly in the case of other

25. Evidence of Tieri Te Tikao, ibid, pp 322–331
26. Evidence of Wiremu Maihi Ereatara, ibid, pp 292–293
27. Evidence of Gilbert Mair, ibid, pp 184–185

lakes, no evidence appears to exist of punitive action being taken against people taking fish who did not have the right to do so.

4.4 Early Pakeha Visitors to the District

From the beginning of the European colonisation of New Zealand, Rotorua seems to have held particular fascination for successive Pakeha visitors. While this was to a large degree a consequence of the spectacular geothermal activity of the region, the beauty of the lakes was also a major attraction. The first Pakeha to settle in the Bay of Plenty is believed to be Philip Tapsell, a trader who, at the invitation of Te Arawa, based himself at Maketu in 1830. By 1835 a mission settlement had been established at Rotorua by Thomas Chapman.[28]

In 1842, Bishop Selwyn made a journey from Tauranga to the Rotorua district. He recorded how upon entering a clearing, he was confronted with:

> a noble view of Rotorua Lake – the Island of Mokoia in the centre, the steam of the hot-springs rising in a thick cloud, at the north end, and the beautiful wooded hills of Tarawera, forming the background.[29]

Similarly, William Colenso described how his party, upon:

> gaining the summit of a high hill ... had a fine prospect of the principal Lake of Rotorua – a fine sheet of water, about six miles in diameter, with a very picturesque island nearly in the midst.[30]

John Johnson, New Zealand's first colonial surgeon, was also struck by the sight of Lake Rotorua. During his tour of the central North Island in 1846 and 1847, he described seeing 'a fine valley opening on the lake, which was an oblong form, reflecting on its glassy surface the surrounding hills, and the island of Mokoia'. To the surgeon's mind it 'was a truly magnificent scene'.[31]

The Reverend Richard Taylor, in his 1855 account of his impressions of New Zealand, *Te Ika a Maui,* describes a visit he made to Lake Rotomahana:

> The first view of Rotomahana is very remarkable, and cannot fail to excite the traveller's astonishment. The lake lies in a great hollow, evidently a crater, flanked on the side by which we approached ... with lofty precipices; but containing a considerable extent of low swampy land along one of the shores; the opposite bank is formed of hills, literally covered with boiling springs, emitting columns of steam, and the soil being of red or white ochre, gives the whole a most extraordinary appearance.

28. W A Leonard, 'The Formation of the Te Arawa Maori Trust Board and its First Ten Years', MA research essay, University of Auckland, 1981, p 1
29. 'Letters from Bishop Selwyn', 21 December 1842, in Nancy M Taylor (ed), *Early Travellers in New Zealand*, London, Oxford University Press, 1959, p 83
30. William Colenso, 'Excursion in the Northern Island of New Zealand, in the Summer of 1841–2'; together with part of 'Early Crossing of Lake Waikaremoana', in ibid, p 34
31. John Johnson 'Notes from a Journal', ibid, pp 151–152

> On the lower side it has an outlet into the Tarawera Lake. There are several islands in it, some merely a few connected tufts of grass, but abounding in water fowl, ducks, pukeko, and sea birds, which appear to delight in the warmth of their abode. Two of these islands present a singular appearance, being composed of misshapen rocks and ochreous hills, filled with boiling cauldrons and jets of vapour, intermingled with manuka trees and native huts.[32]

By the later nineteenth century, the area's lakes and geothermal activity (remarked upon by so many early Pakeha visitors to the area) was the basis of a rapidly expanding tourist industry. And it appears that to a large degree it was the Government's desire to control this tourist industry that led them to assert ownership rights in the Rotorua lakes.

4.5 THE THERMAL SPRINGS DISTRICT ACT 1881

4.5.1 Tourism in Rotorua at 1880

By the late 1870s, tourism in the Rotorua region was reasonably well established. This had come about to a large extent by a road having been completed from Tauranga to Taupo via Ohinemutu. The nascent tourism industry was centred upon the region's lakes and hot springs. The pink and white terraces of the Rotomahana region were also a major attraction until they were destroyed by the Tarawera eruption of 1886.[33]

Evidence exists that Maori were profiting from charging tolls for tourist access to various attractions, ferrying tourists upon the lakes, and by providing other services such as accommodation. In 1860, Alex St Clair Inglis travelled through the Rotorua district by horseback, en route from Napier to Taupo. His diary of the journey records arriving at Te Wairoa on the shores of Rotokakahi. He described Te Wairoa as being:

> A large missionary settlement laid out in the form of a town, with streets[,] the houses having chimneys and little gardens and a very good road through the settlement along which we managed to spur our jaded steeds into a canter. At the side of the road near a Flour Mill a large board [was] erected with the different rates of fares for tourists on the lake.[34]

Gilbert Mair, before the Native Land Court in the course of its 1918 inquiry into the ownership of the Rotorua lakes, recounted how Maori derived a revenue from charging tourists who wanted to visit the Okere Falls – 'a favourite resort for tourists' on the shores of Rotoiti. According to Mair:

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32. Rev Richard Taylor, *Te Ika a Maui or New Zealand and its Inhabitants*, Wertheim and Macintosh, London, 1855, pp 245–246
33. Richard Boast, 'The Legal Framework for Geothermal Resources: a Historical Study', nd, report commissioned by the Waitangi Tribunal (Wai 304 ROD, doc A34), p 5
34. Alex St Clair Inglis, Diary entitled 'Bubbles form the Boiling Springs of Taupo', MS-784, WTU, cited in Richard Boast, 'Maori Customary Use and Management of Geothermal Resources', November 1992, A report to Te Puni Kokiri on behalf of FOMA Te Arawa, (Wai 153 ROD, doc A82), p 43

> Hundreds of Tourists used to go there, and the Native girls who were selected as guides used to take them over this beauty spot and a charge of eighteen pence was made for each tourist, and I never heard of a tourist begrudging it. The people living there got a nice little income which amounted to several hundred a year.[35]

Similarly tolls were charged at Hamurana, Rotomahana and Tarawera. But after the Government's purchase of part of Tarawera in 1901, tolls ceased to be charged there. Mair, under cross examination from Earl, agreed that the tourism centred on the Pink and White terraces 'was a lucrative matter for the Natives', and that Tuhourangi:

> were getting quite opulent, although I never heard of the tourists objecting to the charges as being excessive. What they did object to was an innovation introduced by the hotel-keeper that the tourists had each to buy 5/- worth of rum to make supplication to a taniwha or else they would never have got to the end of their journey.

Mair continued, that before 'the days of the hotel-keeper the "mana" of Rukuhia [the taniwha] was satisfied by simply throwing a boiled potato or a few leaves on it.'[36] At Whakarewarewa, local Maori had built tourist accommodation from which they appear to have derived a reasonable income.

Although the tourist trade attracted several Pakeha storekeepers and hoteliers to Rotorua, Te Arawa on the whole remained 'jealous' of their lands and refused to give up the freehold of them. Despite the fact that most Te Arawa allied with the Crown, it was the Komiti Nui o Rotorua – a council of Te Arawa chiefs – who held political power in the region. In many respects the region remained a zone of Maori autonomy with the settler government having little influence or authority.[37] Because of the refusal of Te Arawa to sell their lands, Europeans who settled in the district were forced to lease land. By 1880, the Pakeha community remained negligible and survived under Maori sufferance.[38] Te Arawa's refusal to sell land was somewhat frustrating for the Government as it was retarding the development of a state-owned tourist industry based on the region's lakes and thermal attractions. Thus in 1880, Chief Judge F D Fenton of the Native Land Court was instructed by the Native Minister, James Bryce, to travel to Rotorua:

> and endeavour to ascertain on what conditions the Maoris would be willing to dispose of enough land to remove the present difficulties and obviate future ones in respect to Hotel accommodation for visitors upon the lake.[39]

35. Evidence of Gilbert Mair, 'Minutes of Rotorua Lakes Case', pp 242–243
36. Evidence of Gilbert Mair, Ibid, pp 243–244
37. George Rusden, *History of New Zealand*, vol 3, Melbourne, Mullen and Slade, 1895, p 264; Boast, 'The Legal Framework for Geothermal Resources', p 4
38. Ibid, p 5
39. Bryce to Fenton, date illegible, MA 13/79, NA Wellington, cited in Boast, 'The Legal Framework for Geothermal Resources', pp 6–7

4.5.2 Fenton's agreement and the Thermal Springs District Act 1881

After a fortnight of meetings, on 25 November 1880, Fenton signed an agreement with Ngati Whakaue to enable the establishment of the town of Rotorua. The agreement required the Native Land Court to determine the ownership of all of the lands in the district subject to the agreement except Ohinemutu, and for these to be surveyed. It was agreed that the sections would then be leased. The leases were for a term of 99 years and were to be sold by auction.[40]

The agreement was then given legislative effect by the Thermal Springs District Act 1881. The Act's long title described it as being an act 'to provide for the settlement of the Thermal-Springs Districts of the Colony.' Importantly, in districts subject to the Act, only the Crown could acquire any estate or interest in Maori land.

Under section 5(3), the Governor was empowered to 'treat and agree with the Native proprietors for the use and enjoyment by the Public of all mineral or other springs, lakes, rivers and waters.' Section 6(7) vested in the Governor the power to:

> manage and control the use of all mineral springs, hot springs, ngawha, waiariki, lakes, rivers and waters, and fix and authorise the collection of fees for the use thereof . . . with the consent of the Native proprietors, to be ascertained in such manner as he may think fit.

Prima facie, these sections were an overt acknowledgement by the Crown that the lakes of the Rotorua district were the property of Maori. Mair informed the Land Court during its 1918 inquiry that Fenton would never have secured the agreement of Ngati Whakaue had there been any suggestion that the lakes were not Maori property. Had the Government asserted this, Mair claimed a situation would have arisen that would have been more serious than the Waitara affair.[41] By 1883, a district of over 600,000 acres centred upon Rotorua had been proclaimed under the Act.[42]

Although under the Thermal Springs District Act it was only Ngati Whakaue who were required to put their lands through the Native Land Court, the previous reluctance of the other hapu of Te Arawa to do the same appears to have subsided. By 1900, title to the vast majority of the land in the vicinity of the Rotorua lakes had been determined by the Land Court and been Crown granted. During this period of Land Court activity, some of Te Arawa made attempts to get title to lakes abutting their land included in the land's title. The following section briefly examines the status of the lands surrounding the Rotorua lakes, and looks at how the Native Land Court dealt with the issue of the lakes' ownership in relation to contiguous lands.

40. Ibid, pp 9-11
41. Evidence of Gilbert Mair, 'Minutes of Rotorua Lakes Case', pp 233–237
42. *New Zealand Gazette*, 1881, vol 2, no 1267, pp 1375–1376; *New Zealand Gazette*, 1883, vol 1, no 411, p 480

4.6 The Status of the Lands Abutting the Rotorua Lakes Around 1918

Between 1881 and 1913, virtually all of the lands surrounding Lake Rotorua passed through the Native Land Court. These blocks, along with Mokoia, were awarded variously to Ngatiwhakaue, Ngatirangiwewehi, Ngatiparua, Ngatirangiteaorere, and Ngati Uenukukopako. These were the same hapu who claimed ownership of the lake. Earl argued before the Native Land Court in 1918, that the Court's earlier inquiries into the ownership of lands abutting the lake showed 'that the exercise of rights of ownership over the lake was the dominating factor in the determination of title to the adjoining land.'[43]

The Rotorua township lands within the district proclaimed under the Thermal Springs District Act were initially leased under the Act. However, the lessees eventually stopped paying rent and began agitating to be afforded the opportunity to acquire the freehold. After a decision by the Supreme Court that Ngati Whakaue could not sue for rent arrears, it appears that they acquiesced to selling their lands. It is possible that they agreed to sell in order to acquire desperately needed capital which they had been denied by the lessees' refusal to pay their rent.[44] Thus in the 1880s and 1890s, most of Ngati Whakaue's lands were alienated to the Crown – the Thermal Springs District Act having introduced a right of Crown preemption for lands affected by the Act. The deeds for blocks abutting the lake did not include any interests in the lake.

The titles to all of the blocks in the immediate vicinity of Rotoiti were awarded to hapu of Ngati Pikiao by the Native Land Court.[45] Although it appears that the Crown grants did not include title to any parts of the lake, it has not proved possible to broadly establish the extent to which these lands were retained in Maori ownership or were alienated.

With respect to Lake Rotoehu, applicants to the Land Court between 1899 and 1900 for title to lands surrounding the lake, asked that the lake be included in the awards for the riparian blocks. The court refused, however, stating that 'it did not intend to include large lakes in orders – [as] they belonged to "te katoa"'. The court's refusal precipitated an intimation from the applicants that they intended to bring separate actions in respect of the lakes of the area. The lands were duly awarded to the Ngati Pikiao applicants.[46] Similarly, Lakes Rotoma, Ngahewa, Okataina, Tikitapu, Rotokawau, and Rotokakahi were expressly excluded from the Land Court orders, survey plans, and partitions pertaining to the blocks abutting the lakes. Rotokakahi was surrounded by both Crown and Maori-owned land, whereas the land in the immediate vicinity of Ngahewa and Rotokawau was all Maori land.[47]

43. 'Minutes of Rotorua Lakes Case', pp 128–132
44. CFRT Database, Thermal Springs District Act 1881
45. 'Minutes of Rotorua Lakes Case', pp 133–140
46. Typescript of Maketu Native Land Court minute book 16, fols 164–167, CL 200/27, NA Wellington; 'Lakes Case: Details of Lands Included in or Abutting on Lakes Referred to in Mr Earle's Address', CL 200/25, NA Wellington, p 4; Tania Thompson, 'Interim Report: Rotorua Lakes Research', report commissioned for the legal firm of O'Sullivan Clemens Briscoe and Hughes, March 1993, p 7
47. 'Lakes case: Details of Lands Included in or Abutting on Lakes', CL 200/25, NA Wellington, pp 3–6

Prior to the Tarawera eruption of 1886, Lake Rotomahana was in fact dry land. The eruption dammed various rivers, and over the course of several years, the lake was formed. As a consequence, the boundary of a block of land ran through the middle of the lake. The lake, however, was later excluded from the block. In 1918, the blocks abutting the lake were in both Crown and Maori ownership.[48]

Unlike other lakes in the area, parts of Tarawera and all of Rotokawa were acquired by the Crown. In December 1901, the Native Land Court ruled that part of Tarawera was included in the Crown's purchase of the Ruawahia no 1 block.[49] The purchase deed describes the block as being bounded 'towards the southwest by portion of Tarawera Lake', and the attached plan clearly shows the boundary running through the lake. Although it is not expressly stated in the deed that the bed of the lake was included in the purchase, the acreage given on the attached plan clearly included the portion of the lake within the boundary.[50] Earl later claimed that the inclusion of part of Tarawera in the purchase was 'an absolutely convincing precedent' as to the lakes in the area being Maori property.[51] Rotokawa was included as part of a larger area of land ceded to the Crown by its Maori owners in lieu of survey liens.[52] At common law, where lakes are situated within a single block of land, ownership of the lake bed resides with the owners of the land. Thus title to the lakes Rerewhakaitu, Tutaeinanga, and Okareka passed to the Crown when it purchased the blocks in which the lakes are situated.[53]

Inconsistencies are evident in the way that the Crown dealt with lakes when land was purchased that was bounded by a lake shore. While generally the lake was excluded, part of Tarawera was included in the purchase of an adjoining block. An argument used by the Crown in claiming ownership of lakes in other parts New Zealand, was that by virtue of the common law doctrine of riparian rights, ownership of the lake bed passed with the title to abutting lands. Thus if the Crown acquired such lands, it also held rights in the lake bed. This argument appears not to have been made in the case of the Rotorua lakes. The instances in New Zealand where such a case was argued generally involved lands adjoining a lake that were ceded to the Crown in the 1850s and 1860s. Lakes Wairarapa and Omapere are examples of this. That such arguments were never made in respect of the Rotorua lakes is probably related to the fact that the lands in the Rotorua district were ceded much later. By this time, deeds and other documentation of land sales were generally much less ambiguous and would clearly show whether lakes were included or not. Further, by the 1880s and 1890s, when most of the purchases in the Rotorua area appear to have been transacted, Te Arawa were fully seized of the economic potential of the lakes in terms of tourism, and appear to have been anxious to preserve their rights to them.

48. Ibid, p 4
49. Order in favour of HM (under section 78 of the Native Land Court Act 1894), 12 December 1901, Ruawahia no 1, LINZ
50. Crown purchase deed for Ruawahia no 1 block, LINZ
51. 'Minutes of Rotorua Lakes Case', p 66
52. Ashley Gould, 'Lake Rotokawa' report commissioned by the Crown, (Wai 153 and Wai 154 ROD, doc B1) p 36, passim
53. 'Lakes Case: Details of Lands included in or Abutting on Lakes', CL 200/25, NA Wellington

Whether Crown land purchase agents attempted to acquire parts of any other of the lakes as part of land purchases, as happened in the case of Tarawera, is not known.

4.7 Challenges to Te Arawa's Rights and Authority in Respect of the Lakes

During the late nineteenth century, it appears that the Crown began to assume greater and greater rights in the lakes. By the first decades of the twentieth century, this gradual assumption can be seen as having taken the form of a tacit assertion of ownership. Concomitant with this was the increasing contempt with which the Crown regarded Te Arawa's rights in the lakes.

By around 1908, the Government was running its own tourist launch service upon Lake Rotorua. Further, when a Te Arawa chief, William Rogers, acquired a launch with the intention of setting up a passenger service, he was asked to pay royalties to the Town Board or similar such authority. The fee was paid, but under protest that he was being asked to pay for the right to operate a launch on his own lake. The Government's actions in setting up a launch service and requiring other operators upon the lake to pay a toll, were done without the consent of the lake's Maori owners. Section 6(7) of the Thermal Springs District Act held that the Governor could manage and control lakes in the district, including the collecting of fees for the use thereof, so long as the Maori proprietors consented. The Government's launch operation suggests that it was no longer prepared to accept that the lakes were exclusive Maori property. By the early twentieth century, Te Arawa had begun to wonder if their rights were not subject 'to a slow process of destruction'.[54]

That the Crown had come to see itself as the rightful owners of the lakes was evident in a statement made by the Prime Minister, Richard Seddon, when he visited Rotorua around 1906. On that occasion, Gilbert Mair was Seddon's interpreter. Before the Native Land Court in 1918, Mair recounted the Prime Minister's message to Te Arawa:

> He came to unveil monuments of two chiefs, shortly before his death. It must have been 1909. He then told the Natives for the first time that they had no claim to the lakes. . . . He stood inside the railing of the monument of Te Petera te Pukuata. He told them that the Europeans had complained about the Natives fishing, or wanting to fish which was equally criminal, and that they had no claim to the lakes. It passed away under the Treaty of Waitangi to the Government. To make the blow fall easily upon them he would build freezing works round the lakes and up at Taupo and the tourists would be enjoined to place all their surplus fish in these freezing works for the benefit of the Arawa people. The Arawa could not believe it. They could not believe their ears. They thought it must be a huge joke. Directly the meeting was over they rushed over to me to know what the meaning was. I could not believe it either. It seemed so impossible; it was beyond my mind to grasp.[55]

54. 'Minutes of Rotorua Lakes Case', p 15
55. Evidence of Mair, ibid, p 238. Mair was clearly mistaken as to the date, however, as Seddon died in 1906.

4.7.1 The impact of trout upon customary fisheries

Another major abrogation of Maori rights in the Rotorua lakes was the introduction of trout and the consequent management of the fishery. It appears that Maori were not consulted in connection with either. Trout were introduced during the 1880s as part of the Government's effort to promote tourism in the region. As was detailed above, though, pursuant to section 6(7) of the Thermal Springs District Act, any action ordered in respect of the management and control of lakes within a proclaimed district required the consent of the Native proprietors. In 1918, the secretary of the Rotorua Acclimatisation Society confirmed that 'he believes no permission was sought from the Natives to place the [trout] fry in the Lake.'[56]

The presence of trout in the lakes and rivers of the Rotorua district appears to have had a radical effect on the freshwater ecology, causing dramatic reductions in the numbers of the indigenous species upon which Te Arawa had relied so heavily as a food source. Mair, who confessed to having been involved in the introduction of trout to Lake Rotorua, recounted to the Native Land Court how their introduction had the result of practically destroying the Maori food supply in the lakes.[57] In his personal papers he described the impact of the trout upon indigenous fish as having been so serious that:

> The position of natives in this area is worse than it has ever been, and they are absolutely without hope. Through the introduction of trout their bounteous food supply of Native fish has been destroyed. These European fish swarm in these lakes so numerously that they are unfit for food and merely serve to give sport (so called) to tourists in knickerbockers while the Native owners are sometimes on the verge of starvation.[58]

As well as introducing trout to the region, the Government set up a regime to manage the species. This required fishers to be licensed, and restricted the methods that could be employed in catching the fish. Thus Maori were liable for prosecution if they caught trout without a licence, even if the trout were caught as by-catch while traditional methods were being employed in an effort to catch indigenous species.

The matter came to head in 1908, when the Reverend Manihera Tumatahi was fined £5 for fishing without a licence in the Ohau channel. Reverend F A Bennet, later to be the Bishop of Aotearoa, publicly voiced his disapproval of this fining. He considered it to be a grave injustice that Tumatahi had been punished for fishing from his own land in his own lake for fish introduced to the lake without his or any other Te Arawa's consent. W A Leonard, in his paper on the formation of the Arawa District Trust Board, states that Bennet's condemnation was echoed by many other local Maori chiefs and leaders, and that Tumatahi's conviction precipitated numerous

56. Hawthorne to Prenderville, 7 October 1918, CL 174/2, NA Wellington
57. Evidence of Gilbert Mair, 'Minutes of Rotorua Lakes Case', p 209
58. 'Memo on Subjects re Te Arawa Tribe', Gilbert Mair Papers, MS-Papers 0092–15, ATL, cited in Manatu Maori, *History of the Rotorua Lakes Settlement and resource materials*, Wellington, Research Unit Manatu Maori, 1990, p 16

meetings amongst Te Arawa to consider the matter of fishing rights and the ownership of the lakes.[59]

When the Stout–Ngata commission on Maori land sat in Rotorua around 1908, Te Arawa seized the opportunity to air their concerns regarding the Crown's tacit assertion that Te Arawa did not own the lakes of the Rotorua area. Of particular concern was the abrogation of their fishing rights. Twenty-two members of Ngati Whakaue prepared a memorandum which was presented to the commissioners. In their submission it was stated that Te Arawa had come to regard the Thermal Springs District Act as the 'Magna Charta' of their liberties; the Act 'assumed in us a right to the properties enumerated, for which the Government had to treat with us', and that clearly included the Rotorua lakes. The memorandum continued, stating the importance of the lakes' fisheries to Maori, and how these had been seriously affected by the introduction of trout. It was held that the injustice they suffered was even worse given that Maori were now compelled to obtain a licence to take fish from the lakes affected by the Thermal Springs District Act. Further, it was contended that lakes were within the ambit of properties guaranteed to Maori under the Treaty of Waitangi. The memorandum appealed for Te Arawa to be able to take any fish from the lakes for food, as of right. In conclusion it was stated that Te Arawa had become 'very suspicious of the pakeha law and justice'.[60]

In its interim report on the Native lands of the Rotorua county, the commission observed that it could not be denied that Te Arawa had 'suffered a grievous loss by the destruction of the indigenous fish' by trout. As a remedy for this injustice, it was recommended that free licences be issued to the heads of Te Arawa families. It was proposed, however, that it would be illegal to sell any trout caught.[61]

The commission's recommendation vis-a-vis Te Arawa fishing rights was included in the 1908 Native Land law Amendment Bill. The bill included provision for 20 fishing licences to be granted to Te Arawa at a nominal fee. During the bill's passage through Parliament, Wi Pere, Member for Eastern Maori, after remarking generally on the inattentiveness of the other members whenever he spoke, and offering to resume his seat if no one was interested in what he had to say, proceeded to discuss the parts of the Bill that affected Te Arawa. According to Pere, one of Te Arawa's:

> principal grievances related to their fishing rights. From time immemorial this tribe have had fishing-rights, but since the introduction of fish that are not natural to the waters of this country those rights have been disturbed, and they have been asked to take out licenses entitling them to fish in the streams. Recently these pakeha fish have been introduced into these streams; but they are absolutely no good, because they are unpalatable. So far as the Maori taste and desire is concerned, they are not fit to eat.

Pere was of the mind that:

59. Manatu Maori, p 16; Leonard, p 12
60. 'Memorandum on general matters affecting the Arawa Tribe for the information and consideration of the Native Land Commission, now sitting at Rotorua.', AJHR, 1908, G-1E, pp 6–7
61. 'Native Land and Native Land Tenure: Interim Report of the Native Land Commission, on Native Land in the County of Rotorua', ibid, p 5

> no license should be required by a Maori to fish. A Maori should have a free rod and he should be allowed to go and fish in these streams when it suits him. I repeat that these pakeha fish are lean things and not fit to eat, and I should tell you that the only fish fit for food in this country are the inanga, the kokopu, and the tuna: these are relishable fish and good to eat; but the pakeha fish should be destroyed, and they should not be allowed to propagate, because they destroy the inanga, the kokopu and the tuna.[62]

However, the provision to grant licences specifically to Te Arawa did not appear in the 1908 Native Land Laws Amendment Act. Instead it seems that the Fisheries Amendment Act 1908 was passed solely to make provision for the granting of licences to Te Arawa. Under the Act the Governor could issue trout fishing licences to members of Te Arawa for use within the district proclaimed under the Thermal Springs District Act 1908. The number of licences that could be issued under the Act was limited to 20, and recipients of a licence were not to be charged more than 5 shillings.[63] The present author has not had the opportunity to determine what the ordinary licence fee was, or whether any licences were in fact granted to any Te Arawa individuals under the 1908 Amendment Act.

In 1913, Pita Heretini was convicted for taking trout out of season from Lake Rotorua. Before Mr Dyer SM, Heretini pleaded that he had a customary right guaranteed by the Treaty of Waitangi to take fish from the lake. Dyer, however, was not impressed. He was reported as having said that:

> it was not the duty of any court, in dealing with statutes relating to Natives, to decide if there had ben any infringement of that [Treaty of Waitangi] . . . If Parliament had dealt unfairly with the natives . . . that was the business of parliament.

Heretini was fined £5 plus 12s in costs.[64]

4.7.2 The Native Land Act 1909

Further doubt was cast upon the security of Te Arawa's rights in the Rotorua lakes by the passing of the 1909 Native Land Act. The Act, drafted by the Solicitor General, John Salmond, included 'a battery of privative and other clauses aimed at making Maori assertions of customary title non-justiciable against the Crown.' The Act reflected Salmond's resistance to Maori claims being dealt with in the judicial system, his preference being that they be settled politically.[65] The Act has, in part, been seen by some commentators as an attempt by the Crown to secure rights to the Rotorua lakes in order to ensure the viability of a state-owned and run tourist industry.[66] When the matter of title to the Rotorua lakes finally came before the Native Land Court in 1918, Earl argued 'that certain clauses in that Bill were drawn for the specific purpose of defeating the claim of the Arawa's to' the Rotorua lakes.[67]

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62. NZPD, 1908, vol 145, p 1159
63. The Fisheries Amendment Act 1908, s 2
64. 'Old fishing rights: Treaty trout and the Maori', *Dominion*, 25 September 1913, p 8
65. Alex Frame, *Salmond: Southern Jurist*, Wellington, Victoria University Press, 1995, pp 112 –113, 115
66. See for example Thompson, p 9; Manatu Maori, p 13

Of particular concern were sections 85, 87 and 100. Pursuant to section 87, native customary title was deemed to have been lawfully extinguished for all land which had been in the continual possession of the Crown for ten years or more. Under section 85, any proclamation declaring Crown land to be free from customary title had to be accepted as being conclusive proof of that fact. Section 100 of the Act vested in the Governor the power to prohibit the Native Land Court from ascertaining the title to any area of customary land. Through these provisions, the potential existed for the Rotorua lakes to be declared free of customary title and thus become the property of the Crown.

When the 1909 Native Land Act was in bill form, evidence exists that some Te Arawa petitioned Parliament opposing it on the grounds that it could be used to deny their ownership of the lakes.[68] Te Arawa were also concerned that Ngata appeared to be in support of the bill. In 1909, Tai Mitchell wrote to Ngata:

> You have actively supported the movement of bringing the matter [of the Rotorua lakes] before the proper authorities for investigation and now the whole thing is to be squashed in a back-door fashion and our rights over customary lands guaranteed by a solemn treaty are to be confiscated without compensation. What argument can justify such an extreme course?

The letter concluded: 'Nui atu te pouri me te tangi – there is great sadness and lamenting'.[69]

4.8 Te Arawa Apply to the Native Land Court

Around 1910, on the advice of both Apirana Ngata and Earl, an application was made to the Native Land Court for an investigation of the title to the Rotorua lakes.[70] Initially the application met with a form of 'tacit resistance' on the part of the Crown with the Survey Office refusing to supply the necessary plan to enable the inquiry to proceed. When the Chief Surveyor absolutely refused to issue the necessary plan, the applicants, again apparently on the advice of Ngata and Earl, removed the matter to the Supreme Court.[71]

Earlier Te Arawa had beseeched the English Attorney General to intervene, asking for his support in connection with the dispute as to the ownership of the bed of Lake Rotorua. The appeal to the English government, published in the *Appendices to the Journals of the House of Representatives,* was written by C B Morison, and was on behalf of a committee appointed by tribes of the central North Island that claimed to represent some 29,000 Maori. Morison had been instructed to present a memorial asking for the support of rights assured to Maori by the Treaty of Waitangi, and to

67. 'Minutes of Rotorua Lakes Case', p 17
68. Manatu Maori, pp 14–15
69. Tai Mitchell to Ngata, 22 November 1909, AAKM 869/84B, NA Wellington, cited in Manatu Maori, p 14
70. Manatu Maori, p 13; 'Minutes of Rotorua Lakes Case', p 16; Thompson, p 12
71. Leonard, p 13; 'Minutes of Rotorua Lakes Case', p 16

inform the Attorney General of an impending Privy Council appeal by Maori against claims by the Government to the bed of Lake Rotorua. Harcourt, of the English Attorney General's office, wrote to the Governor of New Zealand on 21 July 1911. His letter stated that it was not possible for the English Attorney General to intervene in any matter that was to come before the Privy Council.[72] Exactly what this impending appeal to the Privy Council was remains a mystery to the present author.

When Te Arawa filed proceedings with the Supreme Court in connection with the Rotorua lakes, the case was immediately removed to the Court of Appeal. Presumably this was because the matter was considered to be of such import. The case, *Tamihana Korokai v Solicitor General*, came before the Court in July 1912. The plaintif's contention was 'that he had a right to go to the Native Land Court claiming under the Native Land Act, a freehold title to Lake Rotorua'. In response, Salmond for the Crown, held 'that his assertion that the land was Crown land concluded the matter, and that the Native Land Court could not proceed to make inquires as to whether the land was Native customary land.'[73] Earl was later to suggest that the position that the Crown took in *Tamihana Korokai v Solicitor General* was:

> Because the Tourist Department wanted sole and complete domination over the Lakes. There could have been no other reason. The lakes were not a valuable asset in 1881, but in 1909 they had become a valuable asset. . . . It was not the thing to have Maoris coming and saying we own this land and Lakes. It was not convenient that the Natives should have any rights at all.[74]

The court, after a detailed consideration of the Treaty of Waitangi, common law and relevant domestic legislation, found unanimously in favour of the plaintiff. Chief Justice Stout stated:

> I am of the opinion that the Native Land Act recognises that Natives have a right to their customary titles . . . I know of no statutory authority that the Attorney-General as Attorney-General, or the Solicitor-General as Solicitor General, has to declare that land is Crown land . . . What the customary title to the bed of Lake Rotorua may be must be considered and determined by the only Court in New Zealand that has jurisdiction to deal with Native titles – the Native Land Court .[75]

Similarly, Sir Joshua Williams 'caustically observed' that:

> However worthy a person the Solicitor-General may be, he can hardly contend that he has been invested by his Sovereign with the power of disregarding treaties and overriding Acts of Parliament.[76]

Justice Edwards opined that:

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72. L Harcourt to Governor the Right Honourable Lord Islington, 21 July 1911, AJHR, 1912, A-2, p 56
73. *Tamihana Korokai v Solicitor General,* NZGLR, vol 15, 1912, p 96
74. 'Minutes of Rotorua Lakes Case', p 19
75. *Tamihana Korokai v Solicitor General,* NZGLR, vol 15, 1912, p 106
76. Frame, p 116; *Tamihana Korokai v Solicitor General,* NZGLR, vol 15, 1912, p 106

> if the Crown desires to set up its title as a bar to the investigations by the Native Land Court in its ordinary jurisdiction of claims by Natives, it must either be prepared to prove its title or it must be able to rely upon a proclamation in accordance with the 85th section of the Native Land Act 1909.[77]

Exactly why the Crown had not issued a proclamation under the Native Land Act 1909 declaring that the lake was Crown land freed from any customary title is unclear to the present author. It would seem that the only basis upon which the Crown could have issued such a proclamation was by virtue of having continuously occupied the lake for 10 years prior to 1909, as was provided for by section 87. Presumably then the Crown considered that it could not sustain such a claim were it to be challenged in court by the lake's owners. Shortly after the decision was issued, Salmond set sail for England on Crown Law Office business. Before leaving he wrote to the Attorney General:

> It is possible that this matter [the Rotorua Lakes affair] may require my attention during my absence in England . . . It is I think essential that under no circumstances should Natives obtain freehold orders and freehold titles in respect of such waters. An Order in Council should therefore be issued under s.100 of the Native Land Act prohibiting the Native Land Court from investigating the title and making freehold orders. Any Natives who feel themselves aggrieved by any such prohibition will have their remedy by petition to Parliament for compensation . . .

Salmond advised, however, that this course of action was only to be taken once the Native Land Court had determined the preliminary question of 'whether such waters are by Maori custom the subject of exclusive proprietary rights', and found in the affirmative.[78]

Another application was made to the Native Land Court immediately after the decision was issued in *Tamihana Korokai v Solicitor General.* However, the case did not come before the Native Land Court until 1918. Initially proceedings were delayed because the Native Land Court still did not have a plan of the lakes at its disposal. This, it appears, was the result of the Lands Department having been instructed not to furnish the Court with the necessary documentation.[79] In 1913, the Under-Secretary of Lands asked the Crown Law Office how it thought the Crown should proceed in the matter of the application before the Land Court. Replying in May 1913, H H Ostler suggested that he:

> be instructed to appear before the Court to argue the point that by Native Custom there can be no ownership of the bed of large inland lakes such as Rotorua. Meantime I think it advisable that the Order in Council under section 100 of the Native Land Act 1909 should be prepared, so that, if necessary, it can be passed and gazetted at short notice.[80]

77. Ibid, p 109
78. Salmond to Attorney General, 4 November 1912, CLO Wellington, case file 84, cited in Frame, p 118
79. Judge Brown to Chief Surveyor, 17 May 1913, LS 22/2019, LINZ, cited in Thompson, p 12; Thompson, footnote 18, p 12
80. H H Ostler to Under-Secretary of Lands, 17 May 1913, Wai 32/4, Waitangi Tribunal

Whether such an order in council prohibiting the Native Land Court from investigating the title to the Rotorua lakes was ever drafted is not clear. But if it was, it was never implemented.

In 1914, World War I broke out and proceedings were further delayed until 1917. In August 1914, Salmond wrote again to the Attorney General informing him that the Prime Minister had instructed that the necessary plans were to be provided to the Native Land Court to enable the inquiry to proceed. Further, Salmond noted that he had been directed to appear before the Court to contest Te Arawa's claim; and to argue that their rights in the Rotorua lakes, like those of all Maori in New Zealand's lakes, were only those of fishing and navigation. Salmond cautioned that he thought it:

> possible that the full seriousness of the situation created by these claims is not quite realised by the . . . Prime Minister. It is to be observed . . . that the question related not merely to Lake Rotorua but to all rivers and lakes, foreshores and tidal waters in the Dominion. In the second place it is quite out of the question to allow freehold titles to be obtained by the Natives to such waters. Such titles would enable the Natives to exclude the whole of the European population from all rights of fishing, navigation and other uses now enjoyed by them. In the third place I think it exceedingly doubtful whether any such contention as that which I am now instructed to raise before the Native Land Court could be maintained. If these cases are allowed to go before the Court in their present form it may be anticipated that the Court will hold that by native custom the Natives own not merely the land but the waters of this country and freehold titles will be issued accordingly.

Salmond continued, bemoaning the fact that section 100 of his much cherished 1909 Native Land Act had been repealed, and that as a consequence, the option of prohibiting the Land Court's inquiry was not open to the Government.[81] Salmond clearly considered that the Crown's case would fail, and was of the mind that securing the Crown ownership of New Zealand's rivers and lakes was of such importance that a political settlement should be sought.

Salmond's pessimism as to the likelihood of the Crown's case being rejected by the Native Land Court, was at least in part, a result of advice he had sought and received from ethnologists Percy Smith, Elsdon Best and Te Rangi Hiroa. Smith, professing no great knowledge of the Rotorua area, simply stated that where there were fishing posts, individual fishing rights were likely to exist.[82] Elsdon Best's response considered remarks made by Wi Maehe te Rangikaheke about fishing posts in the Rotorua lakes. Best contended that the presence of fishing posts was denotative of rights existing in the actual lake bed. This was qualified though by his remark that 'the idea in a Maori's mind would undoubtedly be associated with, not the submerged land, but the food supply in the water'.[83] Te Rangi Hiroa opined that:

81. Salmond to Attorney General, 1 August 1914, 'CLO Opinions Relating to Lands Department 1913–1915', CLO Wellington, cited in Frame, p 119
82. Percy-Smith to Salmond, 14 April 1910, CLO Wellington, Case File 84 and 84A, cited in Frame, p 122
83. CLO 174/2, NA Wellington, cited in Frame, pp 122–123

> the tumu in the lake were used like surveyors' pegs in modern times: they marked off the parts of the lake that belonged to the various families and subtribes . . . it was far more valuable to the old time Maori than any equal area of land.[84]

Salmond's search for evidence of 'limited rights' had been in vain.

By 1917, the matter of the ownership of Waikaremoana was before the Native Land Court. In view of this and the applications in respect of the Rotorua lakes, Salmond began agitating for a special court to be constituted to determine what he saw as the preliminary question of whether Maori custom recognised the exclusive ownership of navigable waterways, or if in fact they only possessed rights of fishery and navigation. Again Salmond's pragmatic concerns with public policy and welfare seem to be foremost. He argued that it was unreasonable to suppose that the intent of the Treaty of Waitangi was to vest lakes such as Rotorua and Waikaremoana in specific hapu, and that the public were to be excluded from the enjoyment of such waterways.[85]

Salmond's advice that a special court be constituted to consider the general question of lake ownership, and that section 100 of the Native Land Act be reinstated, was not heeded. This led him to conclude that 'there would seem to be nothing to be done except to allow the claims of the Natives to be adjudicated upon by the Native Land Court'.[86] The Crown was clearly concerned that the Native Land Court would decide against its rights in the Rotorua lakes. Early in October 1918, E Hawthorne of the Lands Department wrote to the Crown Law Office:

> I feel somewhat unhappy about this Lake Rotorua business. So far I have not been able to obtain any fresh evidence of uses by the Crown, although I have put in a considerable amount of time in the search. . . . The Crown had certainly . . . used the Lake as if it were public property, but the question we shall have to answer will be: By what authority did the Crown do these things? The use of the lake by the Crown and public is insignificant in comparison to the use of the Lake by the Natives since time immemorial, and personally I cannot see that evidence of public uses is going to help us very much. All talk of Native 'mana' over the Lake is nonsense: 'mana' is a purely personal thing, and does not apply to either land or water. . . . It would have been far better to have winked at a little poaching, but the Tourist Department are not remarkable for insight into the Native mind (or anything else) . . . the only rights of Native tribes or hapus over the Lake itself are rights of fishing.[87]

Finally then, in October 1918, the matter of title to the Rotorua lakes came before the Native Land Court.

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84. 'Maori Food-Supplies of Lake Rotorua', *Transactions of the New Zealand Institute,* vol LIII, 1921, pp 433–451, cited in Frame, p 123. (It is noted that the article was based on evidence collected prior to World War I)
85. Solicitor General to Under-Secretary of Lands, 'Lakes Rotorua and Waikaremoana', 11 June 1917, CLO opinions, vol 6, LINZ
86. Salmond, Opinion for Lands Department, 28 March 1918, 'Opinions Relating to Lands Department 1916–1918', CLO Wellington, cited in Frame, p 122
87. E Hawthorne, Department of Lands to Prenderville, 5 October 1918, CL 174/2, NA Wellington

4.9 1918 Native Land Court Inquiry

On 16 October, the Native Land Court sat in Rotorua to investigate the titles of lakes Rotorua and Rotoiti. Judge T W Wilson presided, and counsel were F Earl for the applicants, and J Prenderville for the Crown. Salmond was content to remain in Wellington and let the inquiry run its own course but instructed Prenderville that he would travel to Rotorua in order to make the Crown's closing submission.[88] There appears to have been some confusion as to what exactly the application before the court pertained to. Midway through the inquiry, the matter was addressed by Earl. He stated that he had only prepared applications in respect of Rotorua and Rotoiti, and that although applications in relation to other lakes in the area existed, he knew nothing of the state of these. He informed the Court that once the applications for Rotoiti and Rotorua had been dealt with, he would turn his attention to the other lakes in the district.[89]

The inquiry began with Earl's opening address. Central to Earl's case was that there had been no assertion by the Crown, either at the time of the Thermal Springs District Act 1881, or in the subsequent 20 years, that it owned the Rotorua lakes. Earl maintained that whenever Pakeha went to 'a beauty spot' throughout the 1880s and 1890s they were charged a small fee by the local Maori. That this was never challenged by the Government, was testament to Te Arawa's undisputed possession.[90] In essence, Earl contended, the case came down to three questions that he would seek to answer in the presentation of his case. First, there existed a need to establish:

> the nature and extent of the title to the Lakes, as navigable and food producing lakes.

Secondly, it had to asked:

> whether the customary title to the Lakes passed to the Natives by the confirmation and guarantees of the Treaty of Waitangi, or whether that title or any such title was excepted or excluded from the operation of the Treaty of Waitangi and the confirmation and guarantee therein contained.

And thirdly:

> if that customary title was not excluded from the confirmation and guarantees of the Treaty of Waitangi, has it since the date of the Treaty been lost, forfeited or otherwise destroyed?[91]

In introducing the case, Earl stressed Te Arawa's loyalty to the Crown over time, particularly in having fought with Government troops during the wars of the 1860s. In briefly traversing the history of the Rotorua lakes since European colonisation, Earl argued that the first challenge to Maori rights in the lakes was the prosecution of Manihera Tumatahi for catching trout without a licence. Previous to that, he stated,

88. Salmond to Prenderville, 16 October 1918, CL 174/2, NA Wellington, cited in Frame, p 124
89. 'Minutes of Rotorua Lakes Case', p 137
90. Ibid, pp 11–12
91. Ibid, p 21

the Thermal Springs District Act and the Government's tolerance of Maori charging Pakeha visitors to travel upon the lake, were proof of its acknowledgement of Maori ownership and control of the lakes.[92]

Earl's attention then turned to the Treaty of Waitangi. He argued that under the Treaty, only sovereignty passed to the Crown, not any resources or territory.[93] In support of the notion that article 2 guarantees included lakes, Earl detailed Hobson's instructions and various authorities on the Treaty. The Treaty, he reasoned, would clearly not have been signed were it stated at the time that article 2 did not cover lakes.[94] Interestingly though, Te Arawa in fact did not sign the Treaty. With regard to the Wairarapa Lakes, the fact that title to them was investigated by the Native Land Court and later purchased by the Crown, was to Earl's mind, conclusive proof that Maori had legally cognisable rights in lakes:

> If they admit Wairarapa to have been the property of the Natives, and buy the Natives out, why should they deny our rights to Rotorua and Rotoiti? I am afraid that the only answer is that it is very convenient for the Tourist Department to have domination over the lakes, and very inconvenient to have the natives claiming interests which it was thought they would forget all about.[95]

Earl continued, citing various other precedents of the Crown recognising Maori ownership of lakes, including some in the Rotorua area. The Thermal Springs District Act was discussed in this context as being an explicit recognition of Maori ownership of the lakes.[96]

Having described ways in which Maori used the lakes, Earl proceeded to discuss the legal situation vis-a-vis rights of fishing and navigation. Earl contended that the public had no fishing rights unless such rights had been expressly granted. This was based on the premise that the fisheries possessed by Te Arawa were 'several fisheries' – that is they were exclusive rights. He stated that Maori had tolerated Pakeha trespassing upon the lake because their presence was not injurious to Te Arawa's interests. This tolerance, however, did not convey a right to Pakeha or the Crown, nor did it constitute a surrender of rights on the part of Te Arawa. Although Earl conceded that the public may have rights of navigation at common law, these did not confer rights to the bed of the lake. 'If the Crown is going to rely on English Law,' Earl surmised, 'it appears to me that it is in a very parlous position.' Attention was drawn to the possibility of the Crown invoking section 87 of the Native Land Act 1909. Under this 'wretched' and 'cruel' section, customary title was deemed to have been lawfully extinguished for land that had been continuously in the possession of Crown. Earl suggested that the only bases upon which the Crown could possibly claim that it had possessed the Rotorua lakes were in relation to the establishment and

92. Ibid, pp 2–15
93. On the transcript of the minutes of the Land Court's 1918 inquiry, there appears a marginal note that states: 'Acquired the whole dominion subject to Natives proving titles.' Salmond's biographer, Alex Frame, considers that there is no doubt that this note was written by Salmond. Frame, p 124
94. Ibid, pp 22–34
95. Ibid, pp 37–41
96. Ibid, pp 63–83

management of the lake's trout fishery, and because Pakeha had been able to freely navigate the lake's waters. He stressed, however, that these 'paltry acts' by the Crown did not qualify as acts of possession. He considered that the fact that the lake's owners had allowed the Crown to act in such ways was testament to the 'native character' – characterised by their 'slowness to take action, their general dilatoriness, and their patience and tolerance.'[97]

Continuing in the second week of the hearing, Earl briefly recounted some of Te Arawa's traditional history, before going on to give details of the ownership of lands contiguous with both Rotorua and Rotoiti. He argued that if his 'clients are found to have had the lands surrounding the lake awarded to them, and if their "takes" upon the ascertainment of the titles to the land were to a large extent dependant upon the uses of the lake itself, then surely I have established a strong presumption that the lake belonged to those people in certain shares between themselves.'[98] In concluding his opening submission, Earl presented evidence of hapu fighting to protect their rights in the lake – proof that they were in fact exclusive (exclusivity being an important test of European-style ownership). Further detail followed of Te Arawa history and evidence relating to the capture of water fowl upon the lakes.[99] Like fish, the taking of birds was considered to be an important act of ownership.

On 24 October 1918, Earl called Captain Gilbert Mair to take the stand. Earl told the Court that he placed very great reliance upon Mair's evidence, and that he was not aware of a man dead or alive who knew more than Mair did about the Te Arawa people and the ownership of the Rotorua lakes. It is apparent that the Crown expected Mair's evidence to be difficult to counter. Shortly after the beginning of the hearing, Prenderville wrote to Salmond, informing him that Mair would be one of the applicants' principal witnesses. Prenderville stated: 'I don't know how we can combat his statements unless I can get him to contradict himself.' A few days later, Prenderville reported to Salmond that:

> Captain Mair has begun his evidence. A lot of it is irrelevant but Earl says it is relevant to his case to prove long occupation. Besides the old man is garrulous and will not answer a question without a long explanation.[100]

Mair was clearly of the mind that the Rotorua lakes were held as absolutely and completely under Maori custom as any land in New Zealand – exactly what the Crown hoped to disprove.

Mair presented extensive detail to the court of the divisions that existed between the various parts of the lakes belonging to the various hapu, and of the location of a huge number of sites on the lakes including fishing grounds, tumu and urupa. He stated that whereas once he could have remembered between 700 and 800 places in and around the lakes, now he could only remember about 200.[101] His evidence also

97. Ibid, pp 83–108, 110–123
98. 'Minutes of Rotorua Lakes Case', p 128
99. Ibid, pp 124–140
100. Prenderville to Salmond, 25 October 1918, CL 174/2, NA Wellington, cited in Frame, p 124
101. Evidence of Gilbert Mair, 'Minutes of Rotorua Lakes Case', p 207

included detail of waiata about the lakes; the impact of trout upon the lakes' ecology; the practice of rahui; the capture of shags; Te Arawa charging tourists tolls; and the thermal springs district legislation. The tenor of Mair's evidence was very much in accordance with the applicants' contention that they held and exercised exclusive proprietary rights in the lakes of the Rotorua region.[102]

The next witness called was Wiremu Maihi Ereatara, a claimant to both Rotorua and Rotoiti. Taking the stand on 30 October, Ereatara proceeded to describe the nature of the rights that the various hapu held in Lake Rotorua, and the divisions that existed between the various groups' parts of the lake.[103] Continuing his submission the following day, he gave similar detail in respect of Rotoiti, including waiata relating to the history of the lake's occupation. Maps were then produced of Rotoiti and Rotorua that had been prepared by the applicants, and Ereatara proceeded to give detail as to the various sites and landmarks that appeared on them. In total, around 250 sites and landmarks were shown on the maps. In the course of his evidence, mention was also made, inter alia, of war canoes on the lakes, rahui in respect of raupo and kakahi, battles that had been fought in connection with the lakes, and urupa. Frequent references were made to extracts from Land Court minute books which contained details of the lakes.[104]

Tieri Te Tikao of Ngati Pikiao next took the stand. Te Tikao had originally been one of the plaintiffs in the court action against the Solicitor General in 1912. He gave evidence as to the origins of Ngati Pikiao's claim to Rotoiti, and described the boundaries between the parts of the lake owned by the three hapu that claimed the lake by descent from the ancestor Pikiao. In doing this, he referred to various fishing grounds, tumu, and other sites on the lake's shore. He stressed that the different fishing grounds were owned exclusively, and that battles had been fought in defence of these rights. Te Tikao's evidence concluded what was to be the only hearing of the application.[105]

In the evidence of Gilbert Mair and the two Te Arawa witnesses, an intimate knowledge of the actual lake bed was demonstrated. In describing the divisions between the parts of the lakes belonging to different hapu and the location of fishing grounds, reference was frequently made to their location in relation to features on the lake bed such as shelves, submerged rocks, and sand banks. Specific sites on the lake were also referred to in terms of the relative depth of the lake in different parts. Mair, under cross examination by the Crown, was asked whether some lakes were thought to be bottomless by Te Arawa, to which Mair replied 'no'.[106] Clearly the Crown was keen to argue that the lake beds were incapable of ownership given that they were considered to be bottomless. However, this was not the case. Quite to the contrary, witnesses appearing before the court in 1918 demonstrated that they had a considerable knowledge of the beds of both Rotorua and Rotoiti.

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102. Ibid, pp 168–281
103. Evidence of Wiremu Maihi Ereatara, ibid, pp 282–287
104. Ibid, pp 288–322
105. Evidence of Tieri Te Tikao, ibid, pp 322–341
106. Evidence of Gilbert Mair, ibid, p 268

In November 1918, just days after the first hearing had concluded, Judge Wilson died in the infamous influenza epidemic of that year. Despite Wilson being replaced on the case by Judge Rawson (and later Judge Ayson), and Earl proposing at least three fixtures between late 1919 and early 1920, the court never reconvened to complete its inquiry.[107] The Crown's vacillation was the subject of complaint by the Department of Lands in October 1919:

> It's all very fine for your Chief [presumably Salmond] to say don't do this or that. Any one could say as much. Why doesn't he tell us exactly what to do. Apparently he is relying upon tiring the Natives out and so disheartening them with delay and expenses that they will at length chuck up the sponge. He seems to be trying to bluff them that he has a royal flush. Suppose they see him? What then! That *de novo* stunt of his is staggering – what about us poor blighters having to go through this again. . . . the Natives were forced to bring their case partly owing to the fat headed inquisitional attitude of the rangers employed by the Tourist Department and partly in the hope of getting a bit . . . all that remains is to rid them of the unappreciated attentions of the fishing rangers and the case will fade into limbo.[108]

The Crown's vacillation in resuming the inquiry was a result of its preference to enter into direct negotiations for a settlement. The Crown favoured this option because it considered itself likely to lose the case, and for the Native Land Court to find in favour of Te Arawa. In April 1920, the Solicitor General wrote to the Under-Secretary of Lands:

> It is advisable that the continuance of this litigation be put to an end if possible by some settlement with the Natives. I think it is probable that the final result of the litigation will be the making of freehold orders by the Native Land Court giving them title to these lakes as being Native freehold land. . . . As a matter of public policy it is out of the question that the Natives should be permanently recognised as the owners of the navigable waters of the Dominion. It would not seem to be a matter of serious difficulty to avoid this result by making some form of voluntary settlement with the Natives and vesting these Lakes by Statute in the Crown.

Although concluding his letter with the admission that he had no information as to the attitude of Te Arawa on this matter, Salmond was clearly of the opinion that this should not be a consideration – a political rather than a judicial outcome should be sought. The possibility that, were the Land Court to continue its inquiry, a further precedent could be set as to lake beds being capable of ownership under Maori customary law, was a prospect Salmond seemed desperate to avoid.[109]

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107. Leonard, p 21
108. Knight, Lands Department Auckland to Prenderville, 21 October 1919, CL 174/2, NA Wellington
109. Solicitor General to Under-Secretary of Lands, 29 April 1920, CLO Opinions, vol 7, LINZ, cited in Thompson, p 16

4.10 Negotiations For Settlement

Subsequently, the Crown managed to convince Te Arawa to enter into negotiations by a number of means. The Government asserted that even if Maori were found to be the owners of the lake bed, the Crown would not purchase their interests but take them by proclamation. And were such a course of action adopted, Te Arawa might have received little or no compensation. The Government also suggested that the litigation before the Land Court might go on interminably at exorbitant cost.

Thompson records that in July 1919, the Department of Tourist and Health Resorts had suggested a settlement be negotiated. It was claimed that Te Arawa were tired of the litigation and its costs, and that they were anxious to reach a settlement.[110] Even though Earl was still trying to secure another fixture for the continuation of the Land Court's inquiry, Salmond advised the Government to adopt MacDonald's proposal that Te Arawa's fishing rights be preserved in exchange for an acknowledgement that the Crown owned the lakes.[111] Consequently, on 12 May 1920, Prenderville was authorised by the Minister of Lands to negotiate a settlement along those lines.[112] R Knight, of the Lands Department in Auckland, counselled that every effort should be made to close the matter while the conditions were favourable. He considered that Te Arawa should not be given 'too much time for negotiating . . .[as] Natives always want to get more than they should especially when they are backed up by interested Europeans.'[113] The following week, Knight wrote to Prenderville stating that he thought between £5000 and £6000 'would be required to indemnify the Natives and satisfy little baksheesh demands'. Knight was of the view that as soon as a basis for settlement had been agreed to by the Government, a meeting at Rotorua should be convened with Earl 'and his dingbats and finally and formally dispose of the affair'.[114]

Earl 'and his dingbats' declared their terms of settlement on 20 May 1920. In return for Te Arawa surrendering their claims to the lakes, they asked that the Government recognise the existence of Maori freehold rights over lakes in the Rotorua district; that legal costs incurred in pressing their claim be refunded; and that money be granted for the purposes of education and housing. Also Te Arawa sought guarantees that their fishing rights would be preserved, that protection would be afforded to sites of particular importance, and that Lake Rotokakahi would be excluded from the settlement. It was stated that Te Arawa would forgo all hapu divisions and treat with the Government as one tribe. Similarly, compensation received from the Crown would be used for the benefit of the whole tribe.[115] On the same day as the proposed terms of settlement were issued, Ngata wrote to the Minister of Lands, David Henry Guthrie, informing him of the proposed terms.[116] Although initially the Crown

110. MacDonald to Attorney General, 12 July 1919, CL 174/2, NA Wellington, cited in Thompson, p 16
111. Solicitor General to Under-Secretary of Lands, 29 April 1920, CLO Opinions, vol 7, LINZ, cited in Thompson, p 16
112. Minister of Lands to Prenderville, 12 May 1920, 226 Box 5B, LINZ Wellington
113. Knight to Prenderville (telegram), 15 May 1920, CL 174/2, NA Wellington
114. Knight to Prenderville, 21 May 1920, CL 174/2, NA Wellington
115. 'Memorandum Containing the Proposals of the Arawa Claimants for a Settlement in the Case re Lake Rotorua and other Lakes in the Thermal Springs District', 20 May 1920, MA1 5/13/242, NA Wellington, cited in Thompson, pp 16–17

maintained negotiations were to be conducted between the Attorney General and Earl, the latter was later able to arrange for Ngata to be admitted to the process as a negotiator for Te Arawa.[117]

Of Te Arawa's proposal, Guthrie responded that an admission of Te Arawa's title could not be agreed to. His reasoning was that such an admission 'would bind the Government in similar claims to other lakes', and that the 'only basis of negotiation for settlement could be that the right to the bed of the lake is sufficiently doubtful both to claimants and [the] Crown as to be the subject of reasonable compromise.'[118] In respect of the proposed terms the Auckland Commissioner of Crown Lands was less circumspect: 'Ngata's proposals . . . are too absurd to merit serious consideration.' He made the point that even if the Land Court found in favour of Te Arawa, it would be a:

> pyrrhic victory as the Crown has no intention whatever of purchasing the Lakes or paying compensation for them. . . . If this fantastic attempt at blackmail is their last word we had better proceed with the case.[119]

Towards the end of May, the Attorney General reiterated the position of the Auckland Commissioner of Crown Lands: the Crown had no intention to buy the lake bed if the Land Court found that it was Maori property. He stated, though, that so long as public rights were safeguarded, the Crown would not defeat or diminish those Te Arawa rights that did exist.[120]

The first meeting between Te Arawa and the Crown for the purpose of negotiating a settlement was held at Ohinemutu on 13 December 1920. The previous day a conference was held between Bell, Prenderville, Knight, Earl and Ngata. At that conference Ngata informed the Crown of the growing divisions within Te Arawa, and that Ngati Pikiao and other hapu with rights in Tarawera and Rotomahana now wanted separate settlements in respect of their interests. Bell expressed the view that unless a single Te Arawa-wide settlement could be reached, it would be better to continue with the Land Court inquiry. However, he cautioned that this would be 'disastrous' for Te Arawa. It appears that resuming the Land Court inquiry was an increasingly unattractive option for Te Arawa. At the meeting, Ngata stated that in view of the inter-tribal differences that were emerging, that were it resumed, the court inquiry would take even longer to complete. This would subject Te Arawa to even greater costs. He considered though, that 'the most intelligent of the Natives [concerned] recognised that the public must have the Lakes.' Bell concluded, therefore, that the only issue of contention between the Crown and Ngata was one of cost – all that remained to be done was to agree upon a price.[121] The actual meeting

116. Ngata to Guthrie, 20 May 1920, 226 box 5B, LINZ Wellington
117. Manatu Maori, pp 22–23
118. Guthrie to Ngata, 22 May 1920, 226 box 5B, LINZ Wellington
119. Auckland Commissioner of Crown Lands to Prenderville, 21 April 1920, CL 174/2, NA Wellington
120. Memorandum of Attorney General, Sir F D Bell, 27 May 1920, CL 174/2, NA Wellington
121. Notes on a conference between the Attorney General and representatives of the Arawa natives, relative to the control of the lakes, 12 December 1920, MA1 5/13/242, NA Wellington, cited in Thompson, p 18; Notes of meeting between Crown and Te Arawa Representatives, 13–14 December 1920, 226 box 5B, LINZ Wellington

took place the following day. Bell reiterated the Crown's position and stated Te Arawa had a choice between a settlement now or resuming the Land court inquiry. Of the latter option, he cautioned:

> The Government is not afraid of the law. The Government pocket is full, and it has able lawyers to represent it in the Courts. You will never frighten the Government by threatening it with the law, and even if you could . . . you certainly could not frighten the Attorney General.

In his somewhat bullying speech, Bell informed the meeting that the Crown had decided to settle because it had been convinced of the merits put forward in Ngata's proposal.[122] However, as has been shown above, the Crown appears to have initiated negotiations for a settlement, and that this option was favoured because it was sure the Court would find in Te Arawa's favour.

By around this time, cracks were appearing in the Te Arawa coalition. Thompson records that Ngati Tura and Ngati Te Ngakau, hapu with claims to Lake Rotorua, were reluctant to give up their individual claims, and that Ngati Pikiao continued to demand a separate settlement.[123] As a consequence of their demands, Bell met with Ngati Pikiao in January 1921 at Otaramarae. At this meeting Bell reiterated that the Crown would not deal with individual hapu but only with Te Arawa as a whole. Again he challenged them to think about what they would gain by continuing with the Land Court inquiry, even if the court found in their favour. Earl, present at the meeting in his capacity as counsel for Ngati Pikiao, urged that his clients come under a general Te Arawa settlement. In response, Ngati Pikiao reminded Earl that they paid his fees, and that therefore he was to follow their instructions and not dictate terms.[124]

Bell and Guthrie met again with Ngati Pikiao two days later. At this meeting, the chief Morehu asked how it was that the Crown had accepted a gift of land at Mourea for a scenic reserve from Ngati Pikiao without the consent of the whole of Te Arawa, but that the Crown could not treat separately with Ngati Pikiao in connection with their lakes? Bell simply reiterated the Crown's position that it would negotiate only with Te Arawa as a single entity, and that it was willing to resume the Native Land Court inquiry if necessary. He reminded them that 'the Government had a long purse but it wished to save the Maoris any further expense by coming to some mutually agreeable settlement.'[125] The following month, the garrulous Knight of the Lands Department in Auckland, in supporting the hard line taken by Bell, described Ngati Pikiao as 'the bad eggs of the Arawas'; further pointing out that they were 'the mob who joined the Hauhaus in 1866.' Presumably in reference to the meetings between Ngati Pikiao and the Crown the previous month, he recounted how Earl had said 'that

122. Bell's speeches from meeting, Rotorua, 13 December 1920, AAMK 869/84c, NA Wellington, cited in Thompson, p 19
123. Ibid, p 19
124. Notes of meeting, Otaramarae, 29 January 1921, 226 box 5B, LINZ Wellington; Knight to Prenderville, 9 February 1921, CL 196/72, NA Wellington, cited in Thompson, pp 19 –20
125. Notes of meeting, 31 January 1921, 226 box 5B, LINZ Wellington

they were fools not to come in with the others and that he would have nothing more to do with them if they did not amend their ways.'[126]

In October 1921, Earl, on behalf of Te Arawa, put forward a proposal that he thought would accommodate the dissenting hapu. It was mooted that as payment for Te Arawa's ownership rights in the lakes, a lump sum of £120,000 be paid into a specially constituted trust which would administer the money for the benefit of the whole of Te Arawa. In the event of any hapu being dissatisfied with the administration of the monies, they could apply to the Government to have their share paid directly to them.[127] In the absence of the ownership of the lakes being determined by the Native Land Court, how these relative shares would have been computed remains unclear.

A final meeting between the Crown and Te Arawa was held at Tarewa on 2 March 1922. In opening the meeting, Earl informed those present that the terms of the settlement had been extended to include reparation promised by previous governments in respect of Te Arawa's loyalty during the wars of the 1860s, and for injustices they had suffered in relation to their lands generally. Bell informed those present that, as a consequence of the recent economic recession, Te Arawa could not expect to receive what they were demanding. Presumably in view of the vexed question of lake ownership nationally, and the desire that the outcome of these negotiations did not prejudice other cases, Bell informed the meeting that the deal would admit nothing in terms of Te Arawa ownership of the lake:

> I thought I had made it plain that the very basis of the agreement was that we did not admit you had anything to sell and therefore we had nothing to buy.[128]

Bell stated that the options were for Te Arawa to accept a settlement as originally proposed, or, if they wished to extend the scope of any settlement to include other grievances, a commission of inquiry could be constituted to investigate such matters. He made it clear, however, that the question as to the ownership of the lakes would be placed squarely outside of the jurisdiction of any such commission. Perhaps in light of this fetter upon a commission of inquiry, Earl strongly urged Te Arawa to accept the settlement. In light of the financial constraints upon the Government, he urged that an annual payment be made rather than a lump sum. He stressed that the annuity should not be fixed so that when the economy improved, the amount could increase.[129] By March 1922, a settlement agreement had been signed by Earl, Ngata, Levin and Bell. The agreement contained five clauses:

> 1. Crown would admit rights of Te Arawa fishing grounds and burial reserves while Te Arawa would admit that the fee simple of all the lakes vested in the crown;

126. Knight to Prenderville, 9 February 1921, CL 196/72, NA Wellington
127. Earl to Bell, 28 October 1921, 226 box 5B, LINZ Wellington
128. Notes of meeting, 2 March 1922, Tarewa, Rotorua, 226 box 5B, LINZ Wellington; Notes of a conference between Bell and Te Arawa at Tarewa, Rotorua on 2 March 1922, 13 March 1922, MA 1 5/13/242, NA Wellington
129. Notes of meeting, 2 March 1922, Tarewa, Rotorua, 226 box 5B, LINZ Wellington; Notes of a conference between Bell and Te Arawa at Tarewa, Rotorua on 2 March 1922, 13 March 1922, MA 1 5/13/242, NA Wellington

2. Rotokakahi would be controlled by a special board set up for this purpose;
3. Te Arawa would receive 40 trout fishing licenses at a nominal fee;
4. No trading of indigenous fish would be permitted; and
5. £6000 would be paid annually to a Board, for the benefit of the entire tribe.[130]

After the heads of agreement had been signed, Ngata described his reward to be:

> the feeling of pride in my associates with the finest broadest and most humane settlement of any Native question of recent years and in the fitting end to many years of careful negotiation and diplomacy.[131]

Thompson states that between June and October 1922, the Government corresponded with Earl and Ngata (in his capacity as negotiator for Te Arawa) vis-a-vis the drafting of legislation to put into effect the heads of agreement. Immediately before the legislation was passed into law, Native Minister Coates visited Rotorua and met with representatives of Te Arawa to ensure that they were amenable to the proposed legislation.[132]

So rather than insisting that the Native Land Court complete its investigation into the ownership of the Rotorua lakes, Te Arawa agreed to negotiate with the Crown and eventually reached a settlement in connection with the lakes. Although there were several reasons why Te Arawa agreed not to pursue its court case, there can be little doubt that in making the decision to negotiate, the further costs of litigation were highly significant. Had the land court completed its inquiry and found in favour of the applicants, the Crown, in all likelihood, would have appealed the decision. And as became evident in the case of both the Lake Waikaremoana and Lake Omapere Native Land Court decisions, the disposal of the Crown's appeal could have dragged on interminably, at exorbitant expense to Te Arawa. The Attorney General's repeated assertions that the resources available to the Crown to fight the case were infinite, can be seen as carefully calculated to play upon Te Arawa's concerns as to the legal costs of their claim.[133]

Questions also surround the issue of who made the decisions to negotiate and on what terms. Particularly relevant is the nature of any mandate the Te Arawa negotiators, Earl and Ngata, enjoyed from the constituent Te Arawa hapu with rights in the various lakes. Earl appears to have had considerable influence over Te Arawa and to have exerted pressure on them to negotiate a settlement directly. Unfortunately no material has been uncovered pertaining to any process by which Earl and Ngata consulted with the various groups who surrendered their rights in the eventual settlement. Who paid Earl's fees, for instance, is an important consideration in terms of whose interests he represented. Evidence certainly exists that there were groups

130. Memorandum for Cabinet, 'Proposed arrangements with respect to Arawa claims', 24 March 1922, CL 174/2, NA Wellington
131. Ngata to Mitchell, 25 March 1922, cited in Leonard, p 24
132. Coates letter, 17 October 1922, AAMK 869/84c, NA Wellington, cited in Thompson, p 27
133. By 1924, the legal costs incurred by Te Arawa in prosecuting its case were held to be £1385. Letter from Secretary, Arawa District Maori Trust Board, 26 June 1924, cited in Leonard, p 25

unhappy with a general Te Arawa settlement, but there are few details as to why they ceased to press their rights to have individual settlements.

4.11 THE NATIVE LAND AMENDMENT AND NATIVE LAND CLAIMS ADJUSTMENT ACT 1924

On 31 October 1922, the Native Land Amendment and Native Land Claims Adjustment Act, section 27 of which embodied the agreement between Te Arawa and the Crown, was passed into law. The second schedule of the Act listed the lakes that were affected by the settlement. These were Rotorua, Rotoiti, Rotoehu, Rotoma, Okataina, Okareka, Rerewhakaitu, Tarawera, Rotomahana, Tikitapu, Ngahewa, Tutaeinanga, Opouri, and Ngakaro.

As well as vesting in the Crown the beds and waters of the 14 lakes, pursuant to section 27(1) of the Act, they were 'freed and discharged from the Native customary title, if any'. This was contingent upon all islands in the lakes not previously alienated being reserved to Te Arawa, and that the Governor could reserve to Te Arawa any portion of the lake bed or any part of the foreshore that was Crown land. Section 27(2) reserved to Te Arawa their fishing rights in respect of indigenous fish, but specified that no such fish could be sold. Section 27(3) provided for the annuity of £6000, payable from 1 April 1924. It was stated that the annuity had to be confirmed by further legislation. Why this provision was included is not known by the present author. Provision for the establishment of a trust board to administer the annuity was made in section 27(4). Significantly, the annuity was not indexed to inflation.

In 1923 and again in 1924, legislation was passed amending the 1922 Act in respect of the Arawa Trust Board. The 1923 amendment confirmed the payment of the annuity as was required by section 27(3) of the 1922 Act.[134] Section 15 of the Native Land Claims Adjustment Act 1924 granted the Arawa Trust Board the power to purchase or sell land, subdivide, let lands for Maori settlement, farm lands, lend money, and act as guarantors.

Evidence exists that throughout 1923, several Te Arawa protested to the Government, expressing concern that their hapu ownership rights had been sold out by the agreement between Te Arawa and the crown – an agreement that they had had little or no involvement in negotiating, and had certainly not signed.[135]

Most comments made about the settlement, however, were positive. Much was made of the fact that a single bilateral settlement had been reached, and that the rights and interests of individual hapu had been subordinated for the 'common good' of Te Arawa. In 1920, Ngata had written to Tai Mitchell vis-a-vis the negotiations. Ngata described the lakes contest as a 'test of partisanship', and stressed how important it

134. The Native Land Amendment and Native Land Claims Adjustment Act 1923, s 13

135. See for example Taima Te Ngahue to Native Minister, 28 March 1923, MA1 5/13/242, NA Wellington; Heke Hakopa and 39 others to Native Minister, 13 January 1923, MA1 5/13/242, NA Wellington; Te Miri o Raukawa Tauwahika to Governor General, 28 May 1923, MA1 5/13/242, NA Wellington; Under-Secretary Native Affairs to Native Minister, 11 April 1923, MA1 5/13/242, NA Wellington; T Savage to Prime Minister, 20 October 1924, AAMK 869/84c, NA Wellington, all cited in Thompson, p 23

was 'to stick to every item of the kaupapa and in the kaupapa to stick to the principle of sacrificing individual and hapu rights for the larger good of the Arawa Tribe.'[136] In a paper Ngata subsequently wrote on Te Arawa, he stressed the 'dominant provision' of the lakes settlement as being that the money was not to be distributed amongst individuals, but instead was made a tribal fund.[137]

4.12 The Arawa District Trust Board

The Arawa District Trust Board was a body corporate with perpetual succession and a common seal. Its members were appointed by the Governor General, who could also make stipulations in relation to various matters, including the administration of funds. However, the board had the power of decision as to what were appropriate objects for the investment of its funds. In respect of borrowing money, the consent of the Native Minister was required. The formation of the Arawa District Trust Board has been noted as being the first time in New Zealand's history that responsibility to administer a substantial sum of money was vested in a Maori authority. And Leonard argues that the Government allowed the board a surprising degree of freedom in its activities.[138]

Initially the board was to have 12 members, but this was increased to 15 to enable adequate representation of the various sub-tribal interests. The district was divided into wards on the basis of previously determined hapu boundaries. The numbers of representatives from each hapu in the different wards were determined proportionally according to their relative land interests. Within each ward, representatives were elected.[139]

Given that the Trust Board's genesis lay in the lakes settlement, it is perhaps unsurprising that the board viewed the agreement very positively. The board's first chairman, Tai Mitchell, wrote to Coates recording that the 'board expresses its warmest thanks to the Honourable J G Coates, Native Minister, for placing on the statute book the legislation giving effect to the settlement of the lakes question.'[140] Similarly, at the board's inaugural meeting, the motion was passed that:

> The board places on record its appreciation of the services rendered by the late Captain Gilbert Mair, the Honorable A T Ngata, Messrs F Earl KC and R Levin in the promotion of the Arawa lakes case and the final settlement of the same.[141]

Further, the board asked Prime Minister Massey to take the following message of gratitude to King George on behalf of Te Arawa:

136. Ngata to Mitchell, 12 June 1920, cited in Leonard, p 27
137. A T Ngata, 'The Te Arawa Tribe – A History', MA 31/8, NA Wellington, cited in Manatu Maori, p 26
138. Leonard, p 28
139. Ibid, p 28
140. Mitchell to Coates, AAMK 869/84C, NA Wellington, cited in Manatu Maori, p 27
141. AAMK 869/781B, NA Wellington, cited in Manatu Maori, pp 27–28

> We thank you and Parliament for this year's legislation, fulfilling all promises and engagements made to the Arawas since the signing of the Treaty of Waitangi, thus again proving that England's stated word is a sacred bond capable of fulfilment.

Massey duly took this message to England and presented it to King George V.[142]

In his paper on the Arawa District Trust Board, Leonard details its activities in its first ten years of operation. During this time there is evidence of money being used for, inter alia, the maintenance of marae, improving water supplies, health, education, providing assistance to farmers, housing, pensions, and the promotion of Maori arts. Later the board acquired two farms near Maketu and made large investments in these properties.[143]

In 1934, a commission investigated all Government departments and other agencies involved in administering Maori affairs, including the Arawa Maori Trust Board.[144] The commissioners found evidence of impropriety surrounding the involvement of the board's chairman, Tai Mitchell, in various land boards and development schemes in the Rotorua area, and implicated him in the mismanagement of various land purchases. Further, it was observed by the commission that Ngata, in his capacity as Native Minister, had approved the vesting of disproportionately large amounts of money in the Waiariki Land Board, which employed Mitchell. The possibility of Mitchell having influenced Ngata was not discounted by the commission. The commission also identified evidence of irregular accounting practices in the payment of workers in various trust board projects and unemployment schemes run by the board. Mitchell appears to have been involved in all of these matters. Complaints were made to the commission by some of the board's members that they did not know in any detail how the board's funds were expended. The accusation was also made that Ngata had interfered with the process by which nominations were made for seats on the board.[145] The commission's report focused unsurprisingly on financial impropriety, and recommended that the board be subjected to greater financial control by central government.[146]

4.13 Discussion of the Settlement

As with any settlement, the way in which it is administered is an important consideration. Pan-iwi authorities are always vulnerable to capture by individuals who operate to better their personal or hapu interests. This certainly appears to have been the case with the Arawa District Trust Board – at least in its first 10 years of operation. Prima facie it would appear that not all hapu of Te Arawa benefited equally,

142. Letter of Governor Jellicoe, 17 December 1923, MA W2459 5/13/242, pt 4, NA Wellington, cited in Frame, p 128
143. Leonard, pp 29–32, 34–35
144. See Native Affairs Commission, 'Report of the Commission on Native Affairs', AJHR, 1935, G-11
145. Leonard, pp 36–41
146. Ibid, pp 41–42

despite them having been pressured by the likes of Ngata and Earl to enter into a Te Arawa wide settlement rather than one on a hapu by hapu basis.[147]

In 1924, an annuity of £6000 was a significant sum of money. Had the annuity been indexed to inflation, it is considered that it would have been worth $168,120 in 1982, and around $400,000 in 1993.[148] Importantly, though, the figure was fixed. There have, however, been two increments since 1922: upon the introduction of decimal currency in 1967, the annuity was increased to $12,000; and around 1976, there was a further increment of $6000 per annum. That the annuity was not indexed to inflation, despite Earl requesting this during negotiations, would appear to be an injustice. In light of the current value of the tourism industry centred on the Rotorua lakes today, an annuity of $18,000 is a rather insignificant sum. The inequity is even greater when it is considered that in accepting the annuity and the settlement in respect of the lakes, Te Arawa forfeited their rights to own and control much of the tourist trade based upon the lakes. It is not surprising then, that today, Te Arawa are attempting to renegotiate the lakes settlement with the Crown.

Apparently some members of Te Arawa have interpreted the settlement as a rent in perpetuity, rather than an extinguishment of Te Arawa's rights.[149] Of similar settlements made around this time where an annuity was paid in perpetuity, Richard Hill has observed that it seems possible that they 'were regarded by their recipients as a kind of "symbolic rent" in lieu of – even pending – the return of the land.'[150] The Crown, however, appears to have denied that the annuity bore any relation to the beds of the Rotorua lakes whatsoever. During negotiations with the owners of Lake Taupo, Coates sought to downplay the precedent set by the annuity that the Crown paid to Te Arawa. This, he was reported as having claimed, 'was not a payment for the beds of Rotorua lakes, but was made in consideration of the services rendered to the Crown by the Arawa people in the Maori War days.'[151]

The provision within the Native Land Claims Adjustment Act 1922 that guaranteed to 'the Natives' the right to take indigenous fish from the lakes was an important aspect of the settlement. However, it was not clear from the Act whether this was an exclusive right, or whether Pakeha and other Maori were able to take indigenous fish from the lakes. It appears though that the Rotorua Trout Fishing Regulations in force from around the time of the settlement until 1990, specified that this right was vested exclusively in Te Arawa. However, since the passage of the Conservation Law Reform Act in 1990, trout fishing regulations no longer exist, and no provision for preventing non-Te Arawa from taking indigenous fish has been instituted.[152]

147. Ibid, p 42
148. J T Ward, H J Baas, 'The Real Value of Compensation by Annuity', Department of Economics, University of Waikato, app to Manatu Maori; Frame, p 128
149. See Manatu Maori, p 33
150. Richard Hill, 'Settlements of Major Claims in the 1940s: A Preliminary Historical Investigation', unpublished paper, 1989, p 13, cited in Manatu Maori, p 33
151. *Evening Post*, 23 April 1926, cited in Bargh, p 113
152. Personal communication, Christopher Richmond, Department of Conservation Head Office, Wellington, 30 January 1998

4.14 Conclusion

The history of the ownership and control of the Rotorua lakes stands out as a crucial episode in the history of Maori claims to lakes in New Zealand. Although the Native Land Court had earlier determined the ownership of the Wairarapa lakes, it was not until the matter of the Rotorua lakes was considered by the Court of Appeal that it was enunciated with any certainty that it was within the jurisdiction of the Native Land Court to determine the ownership of lakes.[153] And the subsequent Native Land Court inquiry, although never completed, produced a corpus of evidence that clearly established that lakes were capable of being the exclusive property of particular hapu.

Although Gilbert Mair's contention that he was aware of no land in New Zealand that has 'been held more absolutely,' or that 'can show more marks of ownership' than the Rotorua lakes, seems somewhat extreme, it was supported by evidence received by the land court in 1918.[154] Partly because their lands were so infertile, Te Arawa's economy relied heavily upon the biota of their lakes. Various species of fish and birds were caught in large numbers, and the plants growing in the lakes' margins were used in a variety of ways. An important aspect of the way in which rights were held in Rotorua and Rotoiti was that particular hapu held exclusive rights to defined parts of the lakes. In this respect, the land court received a huge amount of evidence concerning the specific location of open water boundaries. Also witnesses recounted how punitive action was taken against groups caught poaching in another hapu's part of the lake. A clear picture emerged during the Native Land Court's inquiry of rights being held in a similar fashion to how rights were conceived of in relation to land. Importantly this satisfied the criteria of European-style ownership that rights were exclusive.

It was not until around the turn of the century that the Crown made any intimation that it disputed Te Arawa's claim to the lakes and in fact appeared to have recognised Te Arawa authority in the Thermal Springs District Act 1881. Because of the area's unsuitability for agriculture, conflicts over the right to control the lakes did not arise as they had elsewhere in New Zealand as farmers sought to drain their lands and limit the effects of flooding. Instead, a catalyst for the Crown wanting to gain control of the lakes was its desire to acquire rights in what had become the basis of an increasingly valuable tourist industry. From the mid-nineteenth century, Maori had been major players in the development of a tourist industry in the Rotorua region. Te Arawa derived revenue from providing accommodation and transport upon the lake, guiding tourists, and charging tourists tolls to travel over their lands and lakes. In respect to their lakes, these actions were seen as important assertions of ownership that for decades went unchallenged by the Crown.[155] The desire of Te Arawa to retain their autonomy was such, that to enable the town of Rotorua to be established, the Government had to pass special legislation acknowledging Te Arawa's ownership of their lands and lakes.[156] The rights of Te Arawa to their lakes also appear to have been

153. *Tamihana Korokai v Solicitor-General,* NZGLR, vol 15, 1912
154. Evidence of Gilbert Mair, 'Minutes of Rotorua Lakes Case', pp 184–185
155. See for example ibid, pp 11–12
156. The Thermal Springs District Act 1881

acknowledged when Lake Tarawera was included in the purchase of abutting lands, although the land court had specifically excluded the lakes from titles to riparian blocks.[157]

However, in spite of these tacit and explicit acknowledgements, the Crown gradually began to assume greater and greater rights in the lakes that eventually took the form of a tacit assertion of ownership. Trout were introduced to the lakes, for example, and a regime to manage them instituted, and the Government began to charge the owners of tourist boats a levy to operate on the lakes. By the first decades of the twentieth century, actions of the Crown that appear to have been concerned with the development of a state-owned and operated tourist industry, converged with the evolving position of the Crown that it should be the owner of all lakes in New Zealand. In response to this, Te Arawa applied to the Native Land Court to have its title to the Rotorua lakes determined. However, as a consequence of the Department of Lands refusing to issue the necessary survey plan, the matter was brought to the attention of the English Attorney General, and then taken to the Court of Appeal.

The case that ensued, *Tamihana Korokai v Solicitor General*, is, along with Judge Acheson's decision in respect of Lake Omapere, one of the key pieces of case law supporting the notion that Maori claims to lakes are justiciable in the New Zealand courts. By the time the case was heard in 1912, the Crown was actively asserting the view that upon declaration of British sovereignty in New Zealand, the Crown acquired the radical title to the whole dominion, subject to the existence of customary title. And significantly in the case of lakes, it was considered that no such customary title existed. The Court of Appeal, however, unhesitatingly rejected this position. It was held that the Crown simply asserting title to a particular piece of land was insufficient to prevent the investigation of the title to such land, and that the ascertainment of whether a piece of land was held under Maori customary title was a question for the Native Land Court in the first instance. And importantly in relation to the latter, the court took the view that it was within the jurisdiction of the court to determine this in respect of Lake Rotorua.[158]

Although the Native Land Court began an investigation of the title to the Rotorua lakes, it was never completed. Instead the Crown, through employing considerable pressure, managed to convince Te Arawa to enter into an agreement concerning the ownership of the lakes. Under the agreement Native title to the lakes – if such a thing existed under English law – was extinguished in exchange for an annuity and various other rights being confirmed.[159] It is apparent that this course of action was favoured by the Crown because it was convinced that, had the Native Land Court completed its investigation, the court would have ruled that the lakes were Maori customary land.[160] In the interests of establishing the Crown as being the owner of all lakes in the country, the last thing the Crown wanted was a precedent being set by the land court

157. See Ruawahia no 1
158. *Tamihana Korokai v Solicitor General*, NZGLR, vol 15, 1912, p 95
159. The Native Land Amendment and Native Land Claims Adjustment Act, s 27
160. See for example Solicitor General to Under-Secretary of Lands, 29 April 1920, CLO, Opinions, vol 7, LINZ Wellington, cited in Thompson, p 16

determining that the Rotorua lakes were the absolute property of Maori. But as the history of the contest for the control of lakes in New Zealand shows, the Crown's attempts to deny (as opposed to acquiring) the claims of Maori to their lakes were to be almost entirely unsuccessful. That Te Arawa are presently trying to renegotiate the Rotorua lakes settlement reflects their dissatisfaction with the original agreement. Despite Te Arawa's counsel having requested during the negotiations of the 1922 agreement that the annuity be indexed to inflation, this was not done. Neither was there any provision for Te Arawa to receive a share of revenue generated from the lake from such things as the sale of fishing licences (as there was in the settlement reached between Ngati Tuwharetoa and the Crown). Hence Te Arawa have not managed to secure any ongoing benefits. Since the mid-1970s they have received a paltry $18,000 per annum. Further, it appears that not all Te Arawa hapu have shared equally in what money has been received.

CHAPTER 5

LAKE WAIKAREMOANA

5.1 Introduction

Lake Waikaremoana lies in the Urewera Mountains, 65 kilometres to the north of Wairoa. To Ngai Tuhoe, Ngati Ruapani, and Ngati Kahungunu, Waikaremoana is a sacred lake. To Tuhoe and Ruapani it is known as 'Te-Wai-Kauakau o nga Matua Tipuna – the bathing waters of the ancestors'.[1] The lake appears to have been a focus for settlement for as long as Maori have been present on the East Coast. Traditionally it was a source of fish, water fowl and plant material, as well as being important in terms of transport. The histories of the hapu of the region are rich with stories of battles fought on the lake's shores. While today Lake Waikaremoana is leased to the Crown (forming part of the Urewera National Park), it remains an essential aspect of the identity of the Tuhoe–Ruapani people.[2]

Geologists account for the lake having been formed about 2200 years ago by a huge landslide damming the Waikaretaheke River. Most of the drainage from the lake occurred through cracks and fissures in the natural rock dam.[3] In the traditions of Tuhoe–Ruapani, however, the formation of the lake is attributed to the actions of the ancestor Haumapuhia.

Unsurprisingly, the Urewera – and Lake Waikaremoana in particular – made a striking impression upon early Pakeha visitors to the area. Elsdon Best, in his 1897 monograph *Waikaremoana – the Sea of Rippling Waters*, observed that 'the Urewera country, the snow-wrapped peaks and mighty ranges, the vast forest and rushing torrents, the lone lakes and great gulches which form the leading features of Tuhoe land' engender 'that strange sensation of vivid interest and pleasing anticipation which is felt by the ethnologist, botanist and lover of primitive folk-lore'.[4] Of Lake Waikaremoana, S Percy Smith stated that:

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1. Robert Wiri, 'Te Wai-Kaukau o Nga Matua Tipuna: Myths, Realities and the Determination of Mana Whenua in the Waikaremoana District', MA Thesis, University of Auckland, 1994 (Wai 36 ROD, doc A4), p 11
2. This chapter report is based primarily upon Emma Stevens' 'Report on the history of the title to the lake-bed of Lake Waikaremoana and Lake Waikareiti' prepared for the CFRT in 1996. Virtually no primary research has been undertaken by the present author.
3. Department of Lands and Survey, *Land of the Mist: The Story of Urewera National Park*, Wellington, Government Printer, p 51
4. Elsdon Best, *Waikaremoana – The Sea of Rippling Waters: The Land, the Lake, the Legends with a Tramp Through Tuhoe*, Wellington, Government Printer, 1975, cited in Wiri, pp 11–12

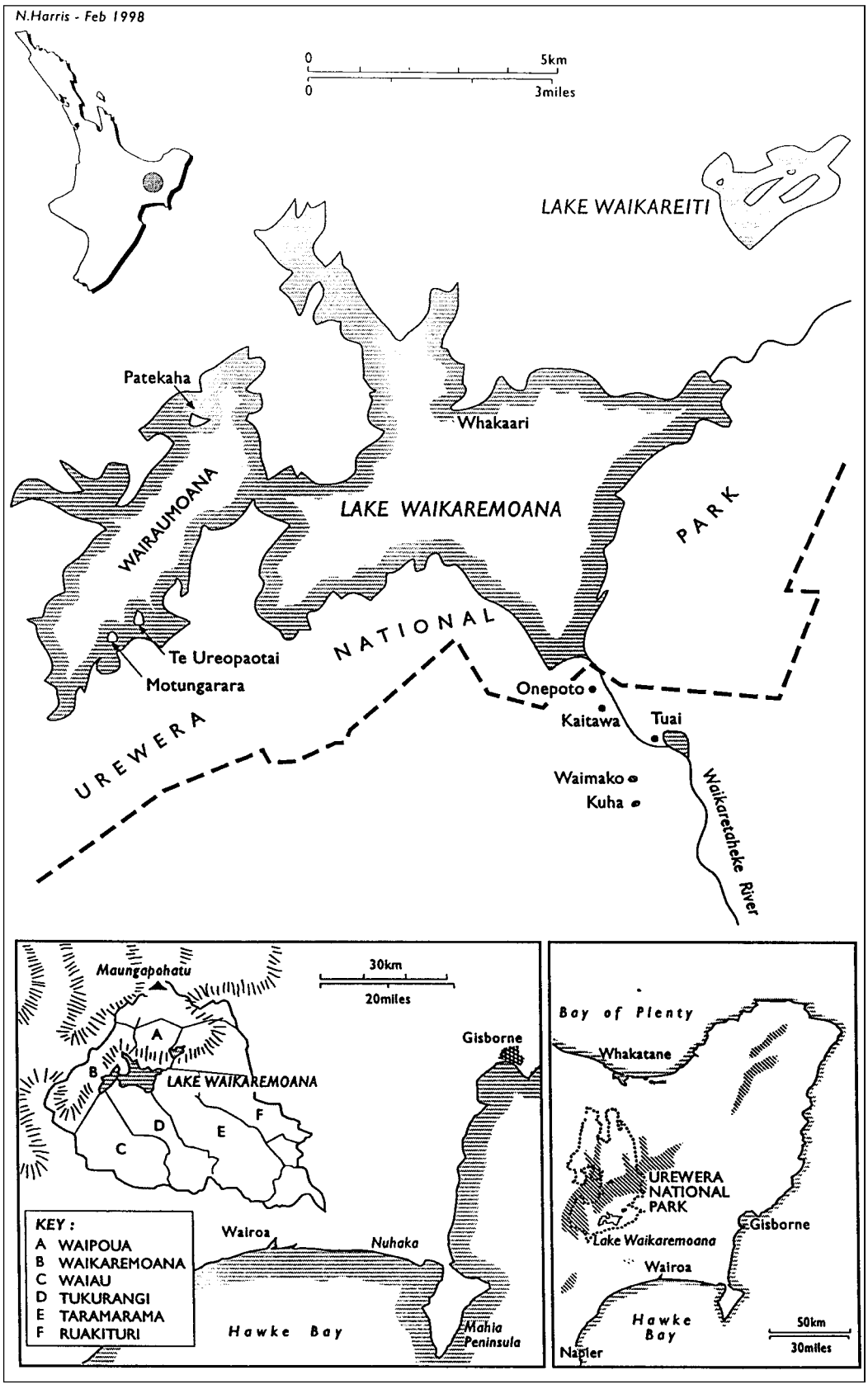

Figure 5: Lake Waikaremoana

> It is acknowledged by all who have seen it to be by far the most beautiful of all the lakes of the North Island. The grandeur of the Bluffs of the eastern side, rising . . . to 1100 feet perpendicularly out of the water is unsurpassed by any cliff scenery I am acquainted with.[5]

Another Pakeha upon whom the area made a distinct impression was the author, Katherine Mansfield. Her travels through the district were the basis of her travelogue, *The Urewera Notebook*.[6]

Subsequent to a tour of the Urewera in 1894, Richard Seddon proposed that the forests of the district be protected. However, much pressure existed at the time to mill the timber resources of the Urewera. A recommendation was made to the Minister of Lands in 1916 that an area of land to the north of the lake be acquired for the purposes of scenery preservation. Although this was approved by the Minister, it was never pursued.[7] This, at least in part, was because it was not until 1921 that the Crown reached an agreement with Maori as to what was actually Crown land and what land remained in Maori ownership. This agreement was formalised by the Urewera Lands Act. Also around this time there appears to have been a shift in public opinion towards favouring the preservation of Urewera forests – by then the largest remaining tract of virgin forest in the North Island. In spite of this though, it was not until 1954 that the catchments of Lakes Waikaremoana and Waikareti were gazetted as the Urewera National Park. Subsequently more land has been incorporated into the park.[8]

From the late-nineteenth century, Lake Waikaremoana appears to have been a popular destination for tourists. Around 1874, accommodation was available at a lodging house that was a part of the Armed Constabulary Redoubt at the lake. In 1900, the first purpose-built tourist accommodation was constructed. By 1909, it had become an official Government tourist hostel. The hostel was run by the Tourist Hotel Corporation from 1956 until 1972 when it was closed because of financial losses. In 1930, the Government launched the boat *Ruapani* which provided a passenger service upon the lake.[9]

Lake Waikaremoana is also important in terms of hydro-electric generation. After lengthy investigations, a temporary generating facility was commissioned at Tuai in 1922. Seven years later, the main Tuai station opened. By 1943, the Piripaua generation facility, situated four kilometres southeast of Tuai, was in production. Water from the Tuai station travelled to Piripaua by way of a sequence of specially made tunnels. The third station constructed was the Kaitawa station, completed in 1947. Located between Tuai and the lake, Kaitawa necessitated the construction of twin tunnels through the natural rock dam that formed the lake.[10] In order to maximise the

5. S Percy Smith, 'Sketch of the Geology of the Northern Portion of the Hawke's Bay', *Transactions of the Proceedings of the New Zealand Institute*, vol 9, 1876, pp 565–573, cited in Wiri, p 17
6. Katherine Mansfield, *The Urewera Notebook*, Wellington, Oxford University Press, 1978
7. 'Lake Waikaremoana: History of Surrounding Lands', p 12, CL 200/2, cited in Emma Stevens, 'Report on the History of the Title to the Lake-bed of Lake Waikaremoana and Lake Waikareiti', CFRT research report, 1996, p 16
8. Department of Lands and Survey, pp 39–41
9. Ibid, p 41

amount of water available for generation, extensive work was undertaken to seal the leaks in the natural rock dam. Once this was achieved – around 1946 – the lake's waters have been maintained at a permanently lowered level. As a consequence of this, the shoreline drops away much more steeply, and exposed terraces and stream mouths have become subject to erosion.[11] There is no evidence suggesting that the Maori owners of Lake Waikaremoana were ever consulted during the planning or construction of the Waikaremoana power schemes.[12]

Set against this history of the lake is that of the claim by Maori to the lake's ownership. As a result of applications by Tuhoe, Ngati Ruapani and Ngati Kahungunu, the Native Land Court investigated the title to the bed of Lake Waikaremoana between 1915 and 1918. In its decision of 1918, the court ruled that all three groups held rights in the lake bed. The Crown subsequently lodged an appeal against the decision; as did Ngati Ruapani in relation to the inclusion of Ngati Kahungunu. As was the case with the Crown's appeal in the matter of the title to Lake Omapere, there were long delays in the Government prosecuting its appeal. Eventually, though, it came before the Native Appellate Court in 1944. Despite strenuous arguments on the part of the Crown, the court upheld the Native Land Court's 1918 decision. Similarly, Ngati Ruapani's appeal was dismissed when it came before the court in 1947. The Crown then filed proceedings in the Supreme Court challenging the jurisdiction of both the Native Land Court in having awarded Maori title to Waikaremoana, and the Native Appellate Court in upholding the original decision. The case, however, was never prosecuted. The lake's Maori owners first raised the issue of receiving compensation for their interests in the lake bed in 1921. However, the possibility was not considered by the Crown until 1947, and a settlement not reached until 1971. As a consequence of the lake's owners' refusal to sell their interests, the subsequent agreement involved leasing the lake bed to the Crown. The lease was for 50 years with a perpetual right of renewal, and ten yearly rent reviews. The rent was fixed at 5½ percent of the Government valuation of the lake. Rather than being paid to a specially constituted trust board, the rent, backdated to 1967, was paid to the already existing Wairoa and Tuhoe Trust Boards. The arrangement was given effect by the Lake Waikaremoana Act in 1971.[13]

This chapter begins with a brief survey of tribal traditions pertaining to Waikaremoana. It then proceeds to set out the main events in the Crown's dealings with the lands in the vicinity of Lake Waikaremoana in order to establish a context in which to understand the Native Land Court's investigations into the ownership of the lake between 1915 and 1918. This inquiry is the subject of the following section which details what transpired at the four hearings held in relation to the ownership of the lake. The chapter then proceeds to rehearse the history of the appeals by the Crown and Tuhoe–Ruapani in relation to the Native Land Court's decision. Attention then

10. G G Natusch, *Power From Waikaremoana*, Wellington, Electricorp Production, 1992, pp 11, 37, 47
11. Lands and Survey, p 44
12. See for example Stevens, p 26
13. Ibid, pp 2–4

turns to the issue of compensation for the Maori owners' interests and the eventual leasing of the lake bed.

5.2 Traditional Histories

According to Robert Wiri, there are three distinct phases to the tribal history of Waikaremoana. The first phase is centred around an ancestor called Mahu-tapoa-nui and his whanau. Subsequent to the eclipse of Mahu at Waikaremoana, the descendants of the eponymous ancestors Ruapani and Kahungunu emerged and dominated the second epoch. The third and final phase saw the annexation of Waikaremoana by Tuhoe.[14]

5.2.1 Mahu-tapoa-nui

In Tuhoe and Ngati Ruapani traditions, Mahu-tapoa-nui and his whanau were the first inhabitants of the Waikaremoana district. While most sources agree that Mahu was a descendant of Toi, Best considered him to be an ancestor of Ngati Kahungunu who arrived in New Zealand upon the Horouta canoe.[15] Mahu resided with his family at Wairaumoana – now the southern arm of Waikaremoana. Mahu had eight children to his first wife, Kauariki. Of these, however, only the youngest was human, the rest being 'tipua' or demi-gods.[16]

Tuhoe–Ruapani tradition holds that Waikaremoana as we know it today was formed by the actions of Haumapuhia, a daughter of Mahu. In a version of the story recounted by Timoti Karetu, there was a sacred spring near where Mahu and his whanau resided. One day Mahu instructed his children to fetch him some water to drink. However, two of the children – Haumapuhia and Te Rangi – did not go as instructed, and those that did, took water from the sacred spring instead of the one designated for everyday usage. Upon discovering that the water was from the tapu spring, Mahu turned the offending children into stone. These are still visible today and are known as the 'Te Whanau a Mahu'. Haumapuhia was then again asked to fetch some water – and again she ignored her father's request. Mahu was so incensed at his daughter's disobedience that he drowned her in the spring, turning her into a taniwha. Haumapuhia then endeavoured to escape at the northern end of the lake. In attempting this, the inlet known as Te Whanganui-a-Para was formed. Unsuccessful in that attempt, she then turned to the south and tried to leave the lake near present day Onepoto and reach the sea. Although successfully finding her way underground to the Waikaretaheke River, when she surfaced the sun had risen and the rays falling

14. Wiri's MA thesis is the major source drawn upon in this section. Although the work is based upon extensive research and is well reasoned, it should be borne in mind that Wiri is himself of Tuhoe–Ruapani descent, and a major aspect of his work appears to be the discrediting of the claims by Ngati Kahungunu to Lake Waikaremoana and the Waikaremoana district. Wiri, p 61
15. Elsdon Best, *Tuhoe: The Children of the Mist*, 2 vols, Wellington, Polynesian Society/Reed, 1925, p 189, cited in Wiri, p 63
16. Wiri, pp 67–68

upon her caused her to be transformed into a rock.[17] The rock that is Haumapuhia lies in the Waikaretaheke River but was buried by a landslide shortly before the completion of the Lake Waikaremoana power development.[18] As well as forming many of the lake's geographical features, Haumapuhia's actions disturbed the lake's waters. This gave rise to the name Waikaremoana – 'the sea of rippling waters'.[19] According to Best, Mahu was saddened by the fate of Haumapuhia, and thus resolved to leave the Waikaremoana district, settling at Putauaki in the Bay of Plenty.[20]

5.2.2 Ngai Tauira

Mahu's whanau were succeeded by Ngai Tauira as the dominant group at Lake Waikaremoana. Wiri states that Ngai Tauira were a people of the northern Hawke's Bay who occupied the Upper Wairoa district as far inland as Waikaremoana. In the Wairoa region they were later subsumed by Ngati Kahungunu, and around Lake Waikaremoana, absorbed by Ruapani's descendants.[21]

There is no definitive account as to the origins of Ngai Tauira. Explanations range from them having arrived on a canoe of the same name, to them being descendants of the Maui–Potiki. Wiri considers that the scarcity of Ngai Tauira traditions in the Waikaremoana district suggests that the group did not have strong rights to land in the area. However, their association with the area is evident in several placenames that record the actions of certain Ngai Tauira ancestors. Ngati Kahungunu claim that they conquered Ngai Tauira and took possession of all their land from Wairoa to Waikaremoana.[22]

5.2.3 Ngati Ruapani

Ngati Ruapani succeeded Ngai Tauira as the preeminent tribal group at Waikaremoana. Ngati Ruapani were part of the Tuhoe confederation of hapu, and the descendants of the eponymous ancestors Ruapani and Kahungunu of the East Coast region. Ruapani was a direct descendant of Pawa and Kiwa of the Horouta canoe. Tradition has it he travelled to Waikaremoana where he resided for some time, gradually acquiring the mana of his brother Tuhoropunga. There were five arranged marriages between the children of Ruapani and those of Kahungunu.[23] These marriages are the basis of Ngati Kahungunu's claim that they have mana whenua in the Waikaremoana district. However, the extent to which these marriages and

17. Timoti Karetu, *Te Reo Rangatira: A Course in Maori for Sixth and Seventh Formers*, Government Printer, Wellington, 1974, pp 38–40, cited and translated in Wiri, pp 71–75
18. Lands and Survey, p 17
19. Wiri, p 80
20. Best, 1925, p 191, cited in Wiri, p 76
21. Wiri, pp 82–85
22. Ibid, pp 85–86, 94–95
23. Hippolite records that the first daughter of Ruapani, Ruareretai, in fact married Kahungunu himself. Joy Hippolite, *Wairoa,* Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), November 1996, p 10

alliances saw Ngati Ruapani ki Waikaremoana subsumed by Ngati Kahungunu remains a contested issue to this day.[24]

Pukehore was one of the key ancestral figures of Ngati Ruapani ki Waikaremoana. Pukehore was descended from both Ruapani and Tuhoe–Potiki, and was instrumental in defining tribal boundaries with Tuhoe to the west and Ngati Kahungunu to the east. Through a series of strategic marriages, alliances were maintained with the Tuhoe hapu of Ruatahuna and Maungapohatu.

Another important figure in the history of Ngati Ruapani was the famous warrior chief Tuwai. Tuwai lived two generations after Pukehore, and along with his sister, was instrumental in maintaining boundaries with both Tuhoe and Ngati Kahungunu. It is said that it was because of his military prowess that Ngati Ruapani maintained their authority over Lake Waikaremoana and adjacent lands. The descendants of Tuwai and Pukehore have maintained a constant presence at Waikaremoana until the present day.[25]

5.2.4 Tuhoe, Ngati Ruapani, and Ngati Kahungunu at Waikaremoana

In order to arrive at an understanding of who holds rights in Lake Waikaremoana today, consideration must be afforded to the historical relationship between the three main iwi of the region – Tuhoe, Ngati Ruapani and Ngati Kahungunu.

According to Wiri, Tuhoe were defeated by Ngati Ruapani in a battle staged at Raehore Pa in Ruatahuna around 1660. This led to Tuhoe retaliating, attacking Ngati Ruapani at Te Ana-putaputa on the northern shore of Waikaremoana. Subsequent to this battle, it appears that Tuhoe and Ngati Ruapani joined forces against Ngati Hinganga – a section of Ngati Hinemanuhiri of Ngati Kahungunu – to avenge the killing of two Tuhoe chiefs. After fleeing from Whakaari pa in Lake Waikaremoana's Whanganui inlet, Ngati Hinganga took refuge at Pukehuia. Tuhoe and Ngati Ruapani duly attacked them again at Pukehuia and Ngati Hinganga were defeated.[26]

The next major battle saw the Ngati Kahungunu hapu of Ngati Hinemanuhiri attacking Tuhoe and Ngati Ruapani at a cave on the shore of Waikaremoana known as Te Ana-o-Tikitiki. In this battle it was mainly women and children who were killed, as the fighting men were at the time engaged in a battle with Ngati Kahungunu at Wairoa. In retribution for this massacre – known as 'Te Wai-kotero a Te Ariki' – Tuhoe and Ruapani, with the assistance of Te Arawa, waged war on Ngati Hinemanuhiri. Large numbers of Hinemanuhiri were killed, and those that escaped fled to the Wairoa district.[27]

This battle is considered by Tuhoe–Ruapani as having strengthened their stronghold over Waikaremoana. Subsequently more and more Tuhoe began to occupy the district, reinforcing their rights attained through conquest with those of occupation. During this period, raids continued to be made upon nearby Ngati

24. Wiri, p 117
25. Ibid, pp 117–118
26. Ibid, p 167; Lands and Survey, p 21
27. Wiri, p 169

Kahungunu strongholds. In a final attempt at revenge, Ngati Kahungunu attacked Tuhoe at Te Ana-o-Tawa but suffered a heavy defeat. This appears to have been the last pre-European battle of any significance staged at Waikaremoana. Subsequently a peace arrangement was made between Tuhoe–Ruapani and Ngati Kahungunu known as Te Tatau Pounamu.[28] This involved a symbolic marriage between two mountains situated in the range between Waikaremoana and Wairoa known as Te Kuha Tarewa and Turi-o-Kahu.[29]

Subsequently, Wiri argues that over several generations, Tuhoe and Ngati Ruapani became one and the same people at Waikaremoana through various intermarriages.[30] It should be noted though that Wiri's interpretations may be disputed by various claimant groups.

5.3 Waikaremoana Lands and the Crown

The ownership of the lands surrounding Lake Waikaremoana was an important consideration of the Native Land Court in its investigation of title to the lake between 1915 and 1918. It is therefore useful to briefly consider the history of the Waikaremoana lands – especially the Waikaremoana block – before proceeding to detail the Land Court's dealings vis-a-vis the lake.

5.3.1 Alienation of Ngati Ruapani lands in the Waikaremoana district

Vincent O'Malley has examined the alienation of Ngati Ruapani lands around the southern margin of Lake Waikaremoana in a report for the Ngati Ruapani claim before the Waitangi Tribunal.[31] He argues that Tuhoe–Ruapani were branded 'rebels' subsequent to the New Zealand wars and the establishment of the Pai Marire religion on the East Coast. Despite the Hauhau of Tuhoe–Ruapani and Ngati Kahungunu having 'largely refrained from hostile acts', they were subjected to a military campaign by both Crown and 'loyalist' Maori forces.

Although keen to forcibly acquire title to the land owned by 'rebel' Maori in the Waikaremoana district, the Crown was reluctant to implement the 1863 New Zealand Settlement Act on the East Coast. This seems to have been because by the mid-1860s, the Act had become both a military and economic liability. Instead, in 1866, the East Coast Land Titles Investigation Act was passed. The Act provided for all 'rebel-owned' land to be forfeited to the Crown through the agency of the Native Land Court. By 1867 though, the Government considered that implementing the East Coast Titles Act was prohibitively expensive. Instead a policy was decided upon whereby

28. A tatau pounamu is a type of peace established between two warring parties, the intended permanence of which being symbolised by a greenstone door. See H M Mead and O E Phillis, 'Tatau pounamu' in *Customary Concepts of the Maori,* Wellington, Department of Maori Studies, Victoria University, 1993
29. Wiri, pp 159–160, 169
30. Ibid, pp 161–164
31. Vincent O'Malley, 'The Crown and Ngati Ruapani: Confiscation and Land Purchase in the Wairoa–Waikaremoana Area, 1865–1875', October 1994 (Wai 144 ROD, doc A3)

cessions of land were obtained from particular groups in exchange for guarantees that land remaining in their ownership would not to be subject to the East Coast Titles Act. Thus, the Wairoa deed of cession was conducted at Hatepe between 'loyalist' chiefs and the Crown. Under this cession, between 40,000 and 50,000 acres were exchanged for the remainder of 'rebel-owned' lands to the south of Poverty Bay. O'Malley considers that this was effectively a forced cession: had the owners not agreed to it, the lands would have been taken under the East Coast Titles Act. The cession was confirmed by the Native Land Court in September 1868.

After Te Kooti escaped from the Chatham Islands, Tuhoe–Ruapani provided refuge for him in the Urewera. For this, Tuhoe–Ruapani found themselves subjected to a military campaign of even greater severity and duration than what they had experienced in 1865 and 1866. The Government, dependent upon the military support of Kahungunu 'loyalists' in this campaign, found itself under renewed pressure to honour the Wairoa cession and transfer to the 'Kupapa' some of the Wairoa block that had been confiscated from the 'rebels'. Consequently in 1872, Samuel Locke negotiated an agreement with 18 individuals – only one of whom was Tuhoe–Ruapani. The Wairoa block was subdivided into four blocks. The boundaries of the subdivisions were based upon natural features rather than traditional boundaries. The customary ownership of the land was not investigated. Quite apart from the injustice of the subdivision, O'Malley considers that Locke acted illegally in doing this because most of the lands actually lay outside of the East Coast confiscation district. Lake Waikaremoana formed part of the northern boundary of three of the four subdivisions: the Waiau, Tukurangi, and Taramarama blocks. The fourth subdivision – the Ruakituri block – lay to the northwest of the lake.[32]

Although the owners of the four subdivisions were never issued with Crown grants, they were able to lease the lands to Pakeha farmers. This raised the ire of many Tuhoe–Ruapani who protested on several occasions. In 1874, upon being advised to do so, they sought an investigation of the lands by the Native Land Court. However, in the same year the Crown decided to acquire the four blocks. By the time the Court was scheduled to open its inquiry in 1875, it appears that Josiah Hamlin had already finalised the lands' purchase with the Ngati Kahungunu owners. The Tuhoe–Ruapani chiefs subsequently decided to withdraw their claims to the land before the Native Land Court. O'Malley suggests that this was partly because of the purchase agreement, but also that the court had no jurisdiction under the East Coast Act. This would have meant that Tuhoe–Ruapani would almost certainly have been deprived of their lands even if they had been found to have been the customary owners. As a consequence of the purchases, the 'loyalists', who had no customary interests in the land, received £1500; and the Pakeha who had leased the land, £8000. Tuhoe–Ruapani received £1250 and were granted 2500 acres of reserves. These were situated in the Ruakituri, Taramarama and Tukurangi blocks. None of them were anywhere near the lake and were gradually whittled away over the years.[33]

32. Hippolite, p 45
33. Wiri, pp 136–137, 168–173

5.3.2 The Waikaremoana block

Throughout the 1880s and 1890s, Te Urewera Maori remained hostile to the opening of their rohe to Pakeha settlement. They actively opposed surveying, road making, and general development. In 1894, Seddon and Carroll toured the district, advocating that the area be opened up for Pakeha settlement.[34] Shortly afterwards the Urewera District Native Reserve Act 1896 was passed. This Act provided for a commission to sit and determine the ownership of hapu lands within the Urewera Native Reserve. This appellation included the Waikaremoana block. Despite the fact that much of the reserve abutted Lake Waikaremoana, the lake itself had been expressly excluded from the reserve.

The first Urewera Commission sat between 1899 and 1902. It determined that Tuhoe–Ruapani were the owners of the Waikaremoana block, and that no Ngati Kahungunu had rights in the lands. Ngati Kahungunu subsequently appealed this decision. This led to the Crown appointing a second Urewera commission. In 1907, the second commission, which included nobody of Tuhoe descent, reported to the Government that it approved of the inclusion of 118 Ngati Kahungunu appellants.[35] One of the main reasons afforded for the inclusion of Ngati Kahungunu in the Waikaremoana block was that the commission considered, upon the evidence of Wi Pere, that the tribal boundary between Tuhoe and Ngati Kahungunu was the Huiarau range to the west of the lake. A corollary of this was that Tuhoe–Ruapani of Lake Waikaremoana were considered to be a powerful hapu of Ngati Kahungunu, and that the Waikaremoana district was regarded to be within Ngati Kahungunu's rohe.[36]

Final orders were made by the Native Minister, James Carroll, in 1907. These formed the basis of the titles to the Waikaremoana block.[37] In 1909, the Urewera District Native Reserve Amendment Act was passed. This provided for the conversion of the Urewera title orders into freehold orders pursuant to the Native Land Act 1909.

In 1913, Hurae Puketapu and 84 others petitioned Parliament requesting that an inquiry be made into the boundary of Lake Waikaremoana. Subsequently, Rawaho Winitana stated before the Native Land Court during its investigation of Lake Waikaremoana's title, that the petitioners had requested that the lake be made a part of the Urewera District Reserve. The Native Affairs Committee made no recommendation vis-a-vis Puketapu's petition on the grounds that the claimants had not exhausted all the legal remedies available to them.[38] Presumably the committee meant that the petitioners could pursue a claim to the lake through the Native Land Court.

In order to facilitate an exchange of interests between the Crown and 'non-sellers', a consolidation scheme was set up for the Urewera District Reserve under the Urewera Lands Act 1921. The Act also validated all purchases and acquisitions of land

34. Lands and Survey, p 39; Wiri, p 266
35. Wiri, pp 251, 267
36. Ibid, p 268
37. Stevens, p 9
38. AJHR, 1913, I-3, p 10; Wairoa Native Land Court minute book 25, fol 47, cited in Stevens, p 10

that the Crown purported to have made within the Urewera. Under the consolidation scheme, two reserves that had been set aside in 1875 (Whareama and Ngaputahi) were acquired by the Crown, despite opposition from members of Ngati Ruapani. In 1925, fourteen reserves were finalised for Ngati Ruapani along the shore of Lake Waikaremoana. These were later rendered inalienable by an Order in Council.[39] The Urewera Lands Act also made provision for the Waikaremoana block to be vested in the Crown – it having been earlier 'decided that the Crown should acquire the Waikaremoana catchment for scenic and tourist purposes'. Subsequently the Waikaremoana block was acquired by the Crown.[40]

5.4 The Native Land Court's Investigations into the Ownership of Lake Waikaremoana, 1915–18

From the late-nineteenth century, the Crown acted as if it were it the legal owner of Lake Waikaremoana. Variously the Government stocked Lake Waikaremoana with trout, managed the fishery through licensing anglers and the appointment of rangers, ran a tourist launch service, and provided tourist accommodation on the lake's shore. However, it appears that it was not until 1913 that the Crown expressed any interest in formally acquiring title to Lake Waikaremoana. In that year, Crown commissioners that had been appointed to investigate the state of forestry in New Zealand proposed that Lake Waikaremoana be made a scenic reserve.[41]

But also in 1913 an application was made to the Native Land Court by Rawaho Winitana, Mei Erueti and Matamua Whakamoe for an investigation to be made into the ownership of Lake Waikaremoana.[42] In a Native Affairs Department memorandum concerning the application, it was noted that 'the applicants are members of the Tuhoe tribe, and ask that the application be heard at Waikaremoana, or failing that at Taneatua.'[43] On 8 June 1914, a counter claim to the lake was lodged by Hukanui Watene and Rutene Tuhi of Ngati Kahungunu ki Wairoa.[44]

5.4.1 First hearing, 1915

Despite the Tuhoe applicants' request that the court sit at Waikaremoana, the first hearing of the Native Land Court's investigation into the title of the lake was held in Frasertown, near Wairoa. Commencing on 18 August 1915 with Judge Robert Jones presiding, the court had before it seven applications for ownership served by Tuhoe and Ngati Ruapani, and a further eleven by Ngati Kahungunu. The Tuhoe–Ruapani claimants were represented by Rawaho Winitana, and the Ngati Kahungunu

39. Stevens, p 12–13
40. Evelyn Stokes, J Wharehuia Milroy and H Melbourne, *Te Urewera, Ngai Iwi, Te Whenua, Te Ngahere: People, Land and Forests of the Urewera*, Hamilton, University of Waikato, 1986, p 71
41. 'Report on Forest Reserves', AJHR, 1913, C-12, p ix
42. Wiri, p 302
43. Memorandum, 25 September 1913, MA 8/4, NA Wellington, cited in Wiri, p 302
44. Wiri, p 302

applicants by J H Mitchell, Tuehu Pomare and Haenga Paretipua.[45] While both claimant groups asserted that they had rights to Lake Waikaremoana on the basis of ancestry and occupation, Tuhoe–Ruapani further claimed on the grounds of conquest.[46]

The hearing was dominated by the presentation of evidence pertaining to ancestral rights to Lake Waikaremoana and of the boundary between Tuhoe–Ruapani and Ngati Kahungunu. However, the first matter considered was the question raised by Mitchell of whether or not the Native Land Court had jurisdiction to investigate the ownership of lakes. In response, Judge Jones stated that:

> The Court holds that it has jurisdiction to hear the matter unless it is prohibited by proclamation, it is Crown land, is taken under [the] Public Works Act or a title has already been issued. None of these things as far as the Court is aware has happened. Under these circumstances the Court will proceed but some questions may arise as to the question of whether the Native custom and usage applies to the bed of the lake. This is of course open for evidence to be given upon.[47]

Although Jones was in no doubt that the matter of Lake Waikaremoana's ownership was within the Native Land Court's jurisdiction, as shall be seen, this was later strenuously disputed by the Crown in its appeal against the Native Land Court's initial decision.

The spokesperson for the Tuhoe–Ruapani claimants was Hurae Puketapu. He recited the whakapapa of several descendants of Ruapani including Tane-potakataka, Pukehore, Tuwai, and Wairau. Puketapu told the court that these people and their descendants had occupied the Waikaremoana district permanently over successive generations, and that the mana of the lake had always resided with them.[48] Puketapu then proceeded to describe the tribal boundary between Ngati Ruapani and Ngati Kahungunu to the south and east of Lake Waikaremoana. In doing this he listed a great number of places located on the boundary between Te Apiti and Pukehuruhuru that had been named by ancestors such as Pukehore and Tuwai, and expounded upon the history of each place.[49]

Upon the completion of the presentation of Tuhoe–Ruapani evidence, the Ngati Kahungunu claimants were called upon to present theirs. The main spokesperson for Kahungunu was Hukanui Watene whose evidence focused upon an ancestral claim to Waikaremoana under two ancestors – Tamaterangi and Makoro. While concurring with certain points along the Huiarau boundary recited by Puketapu, Watene rejected others and proceeded to give his version. According to Wiri, the boundary given by Watene was the same one Wi Pere recounted before the Urewera commission in 1906. Effectively this was a Tuhoe–Ngati Kahungunu boundary which ignored Ngati Ruapani – relegating them to the status of a sub-tribe of Kahungunu. Upon the

45. Wairoa Native Land Court minute book 25, fol 47, cited in Stevens, p 14
46. Wiri, pp 303–304
47. Wairoa Native Land Court minute book 25, fol 48, cited in Stevens, p 15
48. Wairoa Native Land Court minute book 25, fols 54–62, cited in Wiri, p 304
49. Wairoa Native Land Court minute book 25, fol 62, cited in Wiri, p 304

completion of Ngati Kahungunu's evidence, the case was adjourned until the following year – the boundary issue being left open.[50]

Subsequent to the first hearing, Judge Jones wrote to Jackson Palmer, Chief Judge of the Native Land Court, requesting that the evidence presented to the Urewera Commission be made available to the present inquiry. Palmer, in sending Jones his personal copy of the evidence, stated in an explanatory note that:

> there have been many efforts by petition to parliament by both Ngati Kahungunu and Ngai Tuhoe since the decision to re-open the question of the tribal boundary each wanting to get more from the other tribe. I strongly advised the Native Affairs Committee and the Minister not to allow the matter to be re-opened as the boundary was most carefully considered by the second Commission whose decision was acted upon by the Minister in his said order which is final under section 10 of the said Act. The matter can only be reopened by Act of Parliament and this the Native Affairs Committee had always refused to recommend and have always thrown out the petitions sent up to the present time. I also refused to reopen the matter under section 50 when it was in force.[51]

Presumably Chief Judge Palmer could have taken this opportunity to prohibit the Native Land Court from investigating the title to Lake Waikaremoana. In her history of Lake Waikaremoana, Emma Stevens, contends that given that the chief judge resided in Wellington, he would have had ample opportunity to take up any concerns he may have had with the Crown Law Office and other Government officials.[52]

5.4.2 Second hearing, 1916

By the time the case resumed in August 1916, Judge Jones had, with some apparent difficulty, managed to procure from the Chief Surveyor a sketch plan showing the boundaries of the lake.[53] At the previous hearing, Judge Jones had remarked that although 'two telegrams had been sent and ample time allowed, the sketch has not been sent.' This, the judge surmised, appears to have been because the Crown considered itself to have a claim to the lake and the Department of Lands had therefore been advised to withhold the plan.[54]

The second hearing was entirely taken up with the presentation of evidence by the Ngati Kahungunu claimants. Hukanui Watene was the first witness called. At the first hearing Watene had stated that Kahungunu based their ancestral claim to Waikaremoana on the ancestors Tamaterangi and Makoro. However, at the second hearing, Watene claimed that the basis of his ancestral claim derived from the ancestor Mahu-tapoa-nui.[55] Interestingly though, Mahu left the Waikaremoana

50. Wiri, p 305
51. Chief Judge Native Land Court to Judge Jones (note), 3 August 1916, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, pp 16–17
52. Stevens, p 17
53. Ibid
54. Cited in Native Appellate Court minutes, 25 March 1944, MA 5/13/78/1, RDB, vol 59, p 22354, NA Wellington
55. Wairoa Native Land Court minute book 27, fol 287, cited in Wiri, p 306

district to reside in the Bay of Plenty after the saga with Haumapuhia, and thus may have abandoned his rights to the lake. Consequently, local Waikaremoana people, although being descendants of Mahu, do not claim ownership of the lake under his mana.[56] Other Ngati Kahungunu witnesses called included Mitchell and Peta Hema. Hema claimed Ngati Kahungunu had rights to the lake by virtue of having sold the Tukurangi, Taramarama, Waiau and Ruakituri blocks that lie to south and east of Lake Waikaremoana in 1875.[57] The hearing was adjourned on 26 August 1916.

During the second hearing the question of the Native Land Court's jurisdiction vis-a-vis Lake Waikaremoana appears to have again played upon Judge Jones's mind. On 12 August, Jones wrote to Chief Judge Palmer stating that nothing had been demonstrated to the court that denied Maori the right to have their claim heard. However, he stated that he remained open minded regarding any reason why the court should refuse to exercise its jurisdiction on this occasion.[58] Stevens considers that this letter constituted an open invitation to the Crown to appear during the proceedings and present its case before the court.[59]

In closing the second hearing, Judge Jones informed the court that an application had been received from the Tuhoe–Ruapani claimants asking that the Ngati Kahungunu applicants be prevented from going onto the lake until the court's investigation had been completed.[60] Jones was referring to two letters of 15 and 20 July 1916, whereby a court order was requested to prevent Te Haenga Paretipua – the conductor of the Ngati Kahungunu case – from going upon the lake and wandering upon the lands of Tuhoe–Ruapani.[61] It appears that the application was made because Ngati Kahungunu were allegedly interfering with boundary markers around the lake. Jones' response was to suggest that neither party should go on to the Waikaremoana block until such time as the case was concluded. This was objected to by Tuhoe–Ruapani because they had livestock on this land and would consequently be unfairly disadvantaged. Although at the time their protests were disregarded, it is unclear to the present author as to whether or not the proposed prohibition was ever implemented or observed.[62]

5.4.3 Third hearing, 1917

Subsequent to Kaho Hapi and 41 other Tuhoe–Ruapani petitioning Parliament for the Native Land Court's investigations into Lake Waikaremoana to be resumed, the court resumed its inquiry on 24 July 1917, again at Frasertown.[63] On this occasion the

56. Wiri, p 306
57. Wairoa Native Land Court minute book 27–28, fols 331–305, cited in Wiri, pp 307–308
58. Jones to Chief Judge Native Land Court (memo), 12 August 1916, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 17
59. Stevens, p 17
60. Wairoa Native Land Court minute book 28, fol 27, cited in Wiri, p 308
61. Mahaki Tapiki, Hurae Puketapu, Matamua Whakamoe, Tuahine Noa, Wahanui Na and others to Judge Jones, 15 July 1916, MA 8/3/484, NA Wellington, cited in Wiri, pp 308–309; Mahaki Tapiki, Hurae Puketapu, Matamua Whakamoe, Tuahine Noa, Wahanui Na and others to Judge Jones, 20 July 1916, MA 8/3/484, cited in Wiri, pp 308–309
62. Wairoa Native Land Court minute book 28, fol 27, cited in Wiri, p 309

recently appointed district judge, Michael Gilfedder, presided. Evidence presented again focused upon the issue of the boundary between Ngati Kahungunu and Tuhoe–Ruapani. Eria Raukura – at the time the leading tohunga of the Ringatu faith – appeared at this sitting and corroborated the evidence of Hurae Puketapu.[64] Upon the completion of the presentation of both parties' evidence, Judge Gilfedder issued an interim decision. In doing so he observed that:

> If as alleged by the Tuhoe–Ruapani people the Ngati Kahungunu had no ancestral right across the boundary line laid down by the former how come they came to be included in the Waikaremoana Block and to have Te Kiwi and Te Rara set aside for them along side or near the reserves set apart for Tuhoe and the Ureweras in the block sold to the Crown. It seems reasonable to assume that those who had right Ancestral and occupatory to the lands bordering on the lake should be considered to be the best entitled to the lake if such be found to belong to the Natives instead of the Crown. By intermarriages the various hapu are now very much mixed. It appears that if there be a stronger claim to the lake by one party over the other – the Tuhoe–Ruapani's is the stronger and it is apparent that for the last generation the Ngati Kahungunu's have been seeking to get a footing in the lands of others.
>
> Both suggested boundary lines cannot be right but both may be wrong and there is no convincing evidence to warrant this Court in deciding that either of the alleged dividing lines is correct.
>
> The Court therefore considers that each of the three contending parties has some ancestral right to this region and that the extent of area must depend upon occupation. Lists of names and evidence of occupation will be received and heard and an interlocutory judgement will be given – to be made final if it is ascertained that the lake belongs to the Maoris and not the Crown.[65]

The issuing of a final freehold order was postponed pending further argument and a final decision.[66]

The applicants then submitted lists of persons they wished to be included in the title. In total the court was presented with 42 lists – nine from Tuhoe–Ruapani, and 33 from Ngati Kahungunu. The court then received further evidence in support of these lists. This material was heard by Judge Jones and Matamua Whakamoe of Waikaremoana who had acted as an assessor during the 1917 proceedings. Of the 33 East Coast lists received by the court, 19 were dismissed on account of the evidence of occupation being inadequate, or because the basis of their ancestral claim was considered to be incorrect.[67] The investigation was adjourned for a third time on 3 August 1917.

Although the Crown again did not appear during the third hearing, there can be no doubt that the Government was aware that the investigation was in progress. On the

63. Petition of Kaho Hapi and 41 others to Minister of Native Affairs, 9 April 1917, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 18
64. Stevens, p 18
65. Wairoa Native Land Court minute book 29, fol 78, cited in Stevens, p 19
66. Salmond to Under-Secretary of Native Affairs, 13 September 1917, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 20
67. Wiri, p 312

same day as the Court had resumed its inquiry (24 July 1917), Sir J G Findlay informed the Native Minister, W H Herries, that he had received a request from Maori of Waikaremoana that the Crown desist from purchasing land in the Waikaremoana Block until such time as the Native Land Court's investigation into the title of the lake had been completed. Clearly both the Native Minister and the chief judge of the Native Land Court were aware of the Native Land Court's investigation of the title to Waikaremoana.[68]

5.4.4 The general issue of Maori claims to lakes

In the Court's interim ruling set out above, Gilfedder alluded to a decision being made in the future as to whether New Zealand's lakes belonged to Maori or the Crown. Earlier in the day's proceedings he had stated that it was the intention of the Crown to convene a panel of Native Land Court judges in order to consider the issues and make a decision upon the matter.[69] It appears this idea had been mooted by the Solicitor General, John Salmond, earlier in June 1917. Clearly, it was hoped that such a forum would determine that as a matter of law, title to lakes resided in the Crown and not Maori. In setting out his reasoning for convening a special court, Salmond stated that it was 'unreasonable to suppose that this Treaty or legislation was intended to vest [lakes] in the Natives as exclusive owners thereof to the destruction of the interests of the Crown and the public in the navigation of such waters'.[70]

In September 1917, Salmond stated that he considered the matter of the application currently before the Native Land Court vis-a-vis Lake Waikaremoana to be a suitable opportunity for the issue of Maori title to lakes to be decided upon once and for all. In a letter to the Under-Secretary of Native Affairs, Salmond expressed concern that Gilfedder was not cooperating, having gone ahead and issued an interlocutory decision awarding Maori the title to Waikaremoana. Salmond also requested that the under-secretary be authorised to require Gilfedder to give notice to the Crown Law Office of any further order in relation to the application to the title of Waikaremoana. This was so that the Crown Law Office, by way of an appeal, could protect the interests of the Crown.[71]

In November 1917, the proposed meeting of Native Land Court judges to consider the issue of lake ownership was postponed until March the following year.[72] However, the sitting of the special court was never in fact convened.

68. J G Campbell to Minister of Native Affairs, 24 July 1917, MA-MLP 1910/28/1 pt 2, NA Wellington, cited in Stevens, p 18
69. Wairoa Native Land Court minute book 29, fols 18–19, cited in Wiri, p 310
70. Salmond to Under-Secretary, Lands Department, 11 June 1917, cited in Stevens, p 20
71. Salmond to Under-Secretary of Native Affairs, 13 September 1917, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 20
72. Judge Palmer to Judge Jones, 14 November 1917, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 21

5.4.5 Fourth hearing, 1918

The Native Land Court resumed its inquiry into Lake Waikaremoana in May 1918. On this occasion, Judge Gilfedder stated that the 'project to set up a special tribunal to settle the legal question as to whether the lakes belonged to the Natives or the Crown had ended in smoke'. Further, it was observed that 'the Crown have had ample opportunity if they thought it fit to oppose the application of the Natives' and that his order would soon be made final 'as the matter cannot be hung indefinitely'.[73]

On 6 June 1918, Gilfedder delivered his final decision, ruling that the Maori applicants were the owners of Lake Waikaremoana. As had been earlier intimated by the Court, 22 lists were settled as being final – 8 Tuhoe–Ruapani and 14 Ngati Kahungunu. The balance of shares was in Tuhoe–Ruapani's favour: in total their eight lists comprised 389 shares, whereas Ngati Kahungunu's totalled 146.[74]

In relation to these interlocutory orders, Wiri draws attention to a discrepancy that appears to exist between them and the court's interim decision of 3 August 1917. He considers that by stating in his interim decision of 1917 that Tuhoe–Ruapani had the stronger claim, Gilfedder clearly discredited Ngati Kahungunu's claim. However, 14 lists of Kahungunu owners 'still managed to worm their way in to the lake'.[75] In analysing the Court's decision, Wiri compares the Judge's interlocutory decision vis-a-vis each list in 1917 with his final judgement of the following year. In almost every case it was stated in 1917 that the evidence of occupation was weak if existent at all. Under the terms of the Native Land Act 1909 under which the investigation of Waikaremoana was conducted, ownership of lands before the court was to be determined in accordance with Maori custom. In the case of Ngati Kahungunu and Waikaremoana, the relative paucity of conclusive evidence of both occupation and ancestry suggests that Ngati Kahungunu's claim was perhaps somewhat more tenuous than is implied by the extent of the shares they were awarded.[76] Wiri's interpretation, of course, may be challenged by claimants before the Waitangi Tribunal.

Three weeks subsequent to the Court's final judgement, the Crown lodged an appeal against the decision on the basis that 'the said lake is not Native customary land but is Crown land free from Native title'.[77] Tuhoe–Ruapani also appealed against the inclusion of the 14 lists of Ngati Kahungunu owners in the final order.

5.5 The Investigations of the Appellate Court

5.5.1 Delays and adjournments, 1918–44

Although the appeals of the Crown and Tuhoe–Ruapani were lodged a matter of days after the Native Land Court's decision in relation to Lake Waikaremoana, it was not

73. Wairoa Native Land Court minute book 29, fol 234, cited in Stevens, pp 21–22
74. MA 8/3/484, NA Wellington, cited in Wiri, p 320
75. Wiri, pp 312–313
76. Ibid, pp 314–319
77. MA 8/3/484, NA Wellington, cited in Wiri, p 320

until 1944 that the Crown's appeal was heard, and a further two years in the case of Tuhoe–Ruapani's. By this time, as well as the Crown's appeal, there were a total of eight appeals from Tuhoe–Ruapani, and two from Ngati Kahungunu opposing the Tuhoe–Ruapani appeals.[78] Stevens considers that these delays were largely due to the Government's failure to proceed with the case, although initially Tuhoe–Ruapani did request an adjournment because they were engaged in trying to protect their lands to the north of the lake.[79] It appears that the lake's owners were concerned about how the Crown's Waikaremoana consolidation scheme and proposed acquisition of the Waikaremoana Block could affect their rights to the lake. The fear was that by virtue of the Crown acquiring lands contiguous with the lake, it could make a claim to the ownership of the lake bed in accordance with the doctrine of *ad medium filum aquae*.[80]

In June 1921, the Native Appellate Court sat at Wairoa. On this occasion, a solicitor for the Crown, J Prenderville, asked that the Crown's appeal in relation to Waikaremoana be heard before that of the Tuhoe–Ruapani claimants, and that it be heard in Wellington. The representatives of Tuhoe–Ruapani and Ngati Kahungunu, after some discussion, agreed unanimously. The appeals of Tuhoe–Ruapani and Ngati Kahungunu were thus adjourned sine die, and the Crown appeal set down to come before the Appellate Court in August of that year.[81]

It appears, however, that the matter did not come before the Appellate Court again until 1922. On this occasion the hearing of the Crown's appeal was again postponed. This was because of the negotiations that were underway in connection with the Urewera consolidation scheme, and because Francis Dillon Bell, the Attorney General, was travelling overseas at the time and he did not want the case to be heard in his absence. Bell considered himself to be 'one of the few who have any considerable knowledge of the principles which guided the Courts in similar matters in the early days'. [82]

In 1924, it is evident that the Crown was undertaking research in preparation for the hearing of its appeal. In February of that year, Prenderville wrote to the Crown Solicitor in Gisborne, asking that he be provided with the names of any persons residing on or near to Lake Waikaremoana who might be able to furnish information pertaining to the use of the lake by Maori for fishing and boating. This information apparently was to be used in support of the Crown's contention that Maori custom did not support the notion that lakes were land covered with water.[83] Accordingly, arrangements were made by the Crown's Solicitor in Gisborne for his office's interpreter to undertake the investigations – for which he was to be paid a special fee.[84] The outcome of the interpreter's investigations remains unknown.

78. Wiri, p 321
79. Stevens, pp 22–23
80. R J Knoght, Native Lands Department Draughtsman to Under-Secretary Lands, 21 June 1921, MA 29/4/7A, NA Wellington, cited in Stevens, p 23
81. Stevens, p 23
82. Attorney General to Cabinet (memo), 21 March 1922, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 24
83. Prenderville to Crown Solicitor, Gisborne, 15 February 1924, CL 200/13, NA Wellington, cited in Stevens, p 254

Subsequently, Prenderville unsuccessfully endeavoured to arrange a fixture for the Crown's appeal to be heard the next year.[85]

The files of both the Crown Law Office and Native Affairs Department suggest that the Crown's appeal was simply left to lie for the next 10 years. In February of 1935, the Solicitor General, H H Cornish, wrote to both the Attorney-General and the Minister of Native Affairs to clarify the Crown's position in relation to the appeal. He drew their attention to the existence of appeals by the Crown to decisions of the Native Land Court awarding title to both Lakes Omapere and Waikaremoana, and that an inquiry had been received from the Native Land Court asking whether or not the Crown intended to proceed with its appeals. Although he was confident the court would not dismiss the appeals for want of them being prosecuted, he urged that a decision be made to either proceed with them or that they be abandoned. Another option Cornish raised was for the Crown to circumvent the whole issue by passing special legislation vesting the beds of lakes in the Crown. In this regard, it was noted that:

> The opinion of Sir Francis [Bell] is that the appeals should be gone on with. He also thinks that it is premature to legislate at this stage and that the Crown would be in no worse a position for purposes of legislation after a decision (even though adverse) of the Appellate Court than it is now.

Cornish continued, stating that although he understood the Crown wished to proceed with its appeal, it was not purely a legal issue and that matters of Government policy may also be involved.[86] Clearly the Crown was prepared to wrest title to Waikaremoana from its Maori owners by whatever means necessary.

In August 1935, the hearing of the Crown's appeal set down for that month was postponed – this time at the request of Lake Waikaremoana's Maori owners. Apirana Ngata, on behalf of the owners, approached the Crown Law Office requesting a postponement to give the owners an opportunity to discuss the proposals forwarded by the Government at a recent hui at Ruatoki.[87]

At this time the Crown clearly remained intransigent in its position that title to the lake resided with the Crown and not the Maori owners as determined by the Native Land Court. Further, as is evident in the following correspondence, the Crown appears to have been anxious not to act in any way that could be construed as an admission of Maori rights in the lake. In 1938, Whena Matamua, the secretary of the Ruapani Maori Labour Party Committee, requested from the Department of Internal Affairs details of the revenue the Crown derived at Waikaremoana from fishing licences, the Government launch, other boat hire fees, private launch fees, the Government-owned Lake House, and hunting licence fees. This information was

84. Crown Solicitor, Gisborne to Prenderville, 27 February 1924, CL 200/13, NA Wellington; Prenderville to Crown Solicitor, Gisborne, 4 March 1924, CL 200/13, NA Wellington, cited in cited in Stevens, pp 254–255
85. Stevens, p 25
86. Solicitor General to Attorney General and Minister of Native Affairs, 15 February 1935, CL 200/15, NA Wellington, cited in Stevens, p 28
87. Crown Solicitor to Chief Judge, Native Land Court, 4 August 1935, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 28

wanted for the Labour Maori Conference that was to be held in June of 1938, where presumably the Maori claim to Lake Waikaremoana was to be discussed.[88] In relation to Matamua's request, the Acting Minister of Native Affairs was advised by his under-secretary that as:

> the matter stands at present it would be unwise to . . . supply any information asked for as such an action might be interpreted as an admission by the Crown of the title of the lake being in the Natives.[89]

In June 1938, Ngati Ruapani twice petitioned the Prime Minister, M J Savage, requesting that the Government dispose of its appeal in order that their title could be made permanent.[90] The petitions, however, appear to have had little effect – the hearing of the Crown's appeal being again delayed in 1939; this time because the Solicitor General was occupied with other matters.[91] In 1943, H G R Mason, the Minister of Native Affairs and Attorney General, wrote to the Prime Minister in connection with both the Lake Waikaremoana and Whanganui River appeals. He noted that Maori were of the opinion that 'fabulous sums of money' could be involved were their interests confirmed, but that he considered compensation for their interests could not be of great magnitude because of the large legal costs that were being incurred by the Crown.[92]

In a memorandum to the Solicitor General dated 24 February 1944, Prenderville set out three possible courses of action he considered that the Crown could take in the matters of the Whanganui River and Lake Waikaremoana appeals. The first option was to negotiate a compromise similar to what had been reached in the cases of the Rotorua and Taupo lakes, whereby an annual payment was made to the tribes, and the wider issue of the lakes' ownership ignored. Secondly, legislation could be passed that declared all rivers and lakes, unless expressly granted by the Crown, were and always had been vested in the Crown. The final option proposed was to simply proceed with the appeals. Prenderville contended that if the Crown's appeals were prosecuted and subsequently dismissed, the Crown would be forced to purchase the interests of the Maori owners. However, in spite of this, Prenderville expressed reluctance at seeking a further adjournment.[93]

88. Whena Matamua to Under-Secretary, Department of Internal Affairs, 15 April 1938, MA 5/13/78, NA Wellington, cited in Stevens, p 28
89. Under-Secretary Native Department to Acting Minister of Native Affairs, 1 June 1938, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 29
90. Petition of Karu Rangihau and others, 13 June 1938; Petition of Natau Ihimaera and others, 13 June 1938, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 29
91. Stevens, p 29
92. Mason to Prime Minister, 29 October 1943, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 29
93. Prenderville to Solicitor General (memo), 24 February 1944, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 30

5.5.2 The Native Appellate Court's hearing of the Crown's appeal, 1944

Finally, on 25 March 1944, the Crown's appeals in connection with both Lake Waikaremoana and the Whanganui River came before the Native Appellate Court. Chief Judge G F Shepherd presided over a Court that included five other Native Land Court judges. The Solicitor General, H H Cornish, appeared for the Crown, assisted by J Prenderville. S A Wiren and D G B Morison represented the Waikaremoana and Whanganui owners respectively.

The session opened with the consideration of the Crown's application for yet another adjournment. In support of the Crown's application, the Solicitor General stated that an exceptional work load at the Crown Law Office, staff illness and the recent death of a Crown solicitor had meant that little preparation had been undertaken for the purposes of the present case. In response, Wiren stated that if the Crown had appeared at the time of the Native Land Court investigation into the title of Waikaremoana, it would now have been saved from incurring considerable trouble and expense. Since the lodging of its appeal, Wiren submitted that the Crown had:

> not done anything to see that the Maoris received justice. By justice I mean the right of a British subject to have his case dealt with by a court and his rights determined.[94]

Wiren continued, informing the court that the owners would be prejudicially affected were a further adjournment granted. This was because at the time, the Public Works Department was interfering with the lake – modifying it for the purposes of hydro-electric generation. Until such time as the owners were awarded a freehold title, the owners could receive no remedy. So long as the lake remained customary land, only the Crown could bring charges of trespass.[95] The court duly ruled that the Crown's appeal in relation to Waikaremoana would be heard on 4 April.

Convening the following month, the court proceeded to hear the Crown's opening submission presented by Cornish. This focused primarily on the aspect of the Crown's appeal concerning jurisdiction. His proposition was that the Native Land Court's 1918 decision was a nullity because Judge Gilfedder had failed to determine upon 'proper evidence' that the land subject to the investigation was customary land.[96] In support of this he cited the Court of Appeal's decision in *Tamihana Korokai v the Solicitor General* concerning Lake Rotorua. Cornish quoted the decision, where it stated that:

> It is a question for the Native Land Court in the first instance to determine upon proper evidence whether any particular piece of land is native customary land or not, and in ascertaining this it may determine whether or not the area described in the application as Lake Rotorua or any part of it is or is not a navigable lake and if so whether according to native custom the Maoris were and are the owners of the bed of such lake or whether they had and have merely a right to fish in the waters thereon.[97]

94. Native Appellate Court minutes, 25 March 1944, MA 5/13/78/1, RDB, vol 59, p 22,340, NA Wellington,
95. Ibid, p 22,341
96. Ibid, p 22,352
97. Ibid, p 22,353

Cornish then proceeded to refer to the judgement of Justice Edwards in the above case. In support of the notion that the extent of customary title is necessarily limited, Cornish drew attention to Edwards' view that there was 'an inherent probability that there was no intention either by the Treaty of Waitangi or by the statutes to cause detriment to the public' by way of depriving the Crown of important rights such as navigation. This, Cornish argued, could be extended to include hydro-electric development such as was now an issue in the case of Waikaremoana.[98]

Cornish contended that the Department of Lands and Survey's refusal to supply a sketch plan of the lake was clear evidence that the Crown considered it had a claim to the lake. Further, quoting from the minutes of the land court's investigation of the lake's title, it was demonstrated that there was an awareness on the part of the judge of the important legal questions involved in the claim to Lake Waikaremoana. The Crown, according to Cornish, adopted the position that until such time as the generic legal questions had been settled, there was no need to supply the necessary plan. However, in proceeding with the investigation, the court had unfortunately 'put the cart before the horse' in order 'to save the natives inconvenience'. Apparently the owners had arrived at Frasertown in anticipation of the hearing going ahead – 'no doubt at some inconvenience and expense, and the court did not like to disappoint them.'[99]

The Solicitor General then returned to the matter of the need for determinations of title by the Native Land Court to be based upon 'proper evidence' as the Court of Appeal had ruled in *Tamihana Korokai v the Solicitor General*. He contended that in the case of Lake Waikaremoana, the evidence upon which the court made its interlocutory decision in favour of the Maori owners was in fact 'improper'. It was argued by Cornish that the only piece of evidence that was received by the court that supported the idea that Maori had a conception of the customary ownership of the bed of Waikaremoana (as required by *Tamihana Korokai v the Solicitor General)*, was given by Hukanui Watene. However, Watene had given this evidence under cross-examination by H T Mitchell. No mention was made of the customary Maori ownership of the lake bed in Watene's original 'spontaneous and untutored' evidence. Further, Cornish pointed out that Mitchell was representing one of the other Kahungunu claims, and hence had an interest in demonstrating the customary ownership of the lakebed identical to that of Watene.[100]

Another position adopted by the Crown in its appeal that it had forwarded in the case of other North Island lakes, was that Maori had only a piscary right in relation to Waikaremoana, and that this did not equate to the ownership of the lake bed. Cornish submitted:

> that strict proof of a custom is necessary . . . which implies, if it exists, a considerable power of abstract reasoning. We Europeans reached this conception . . . of ownership of the bed of a lake after many centuries of experience, centuries of experience which of

98. Ibid, p 22,352
99. Ibid, p 22,354
100. Ibid, pp 22,355–22,356

> course, the Maori never had. We did not come to this conception all at once. It is an artificial conception and therefore one will expect proof of it to be strict.

Cornish continued that in the investigation of the Native Land Court concerning Lake Waikaremoana:

> The Maoris had an opportunity of proving the usage. They were told [by the Court that] they had to prove it not once but twice or thrice. They did not do it. All the circumstances point to the fact that they could not do it. Therefore the result is the land, if it is land, remains free of native customary title. Therefore the equitable as well as the legal interest is in the Crown . . . [and] the Native case fails by its own infirmity.[101]

Thus according to the Crown, the determination of the Native Land Court in the matter of the title to Lake Waikaremoana was a nullity because it was made upon improper evidence. Further, if this was so, it was argued that the appeal was in fact outside of the Appellate Court's jurisdiction, and that therefore it should go before the Supreme Court.[102]

Cornish informed the court that the aspects he had thus far argued were only a part of the Crown's appeal, and that further time would be required to prepare its 'affirmative appeal'. These aspects presumably dealt with the substantive legal issues. In response, the Chief Judge stated that 'after a lapse of years the matter had assumed very great importance' and that 'it was up to the Crown in the past 26 years to initiate proceedings'. The Crown, he stated, 'had no excuse for not having done so.'[103]

S A Wiren, on behalf of the lake's owners, then responded to the Crown's submission, expressing surprise that after such a long delay the Crown was adopting the position that the 1918 decision was a nullity. In disputing the Crown's submission that there was no admissible evidence of ownership, Wiren stated that the 'whole evidence was redolent with the uses that Maori made of Lake Waikaremoana.' He contended that 'the lake was much more valuable than anything else' the Maori owners had, and that there was evidence before the Native Land Court that:

> they used it for fishing, for trapping birds, that they had their canoes on it, that their forts were around it, and . . . that they used this lake for purposes of attack and defence.[104]

Wiren then proceeded to detail some of the evidence presented during the Native Land Court's investigation in connection with uses made of Lake Waikaremoana.[105]

Next Wiren addressed the Crown's contention that Watene's evidence given under cross-examination was inadmissible because Mitchell and Watene did not have conflicting interests. He asserted that the Native Land Court could regulate itself in terms of what was acceptable evidence, and pointed out that the Supreme Court

101. Ibid, pp 22,357–22,358
102. Ibid, p 22,362
103. Ibid
104. Ibid, p 22,364
105. Ibid, pp 22,365–22,366

could cross-examine upon matters not initially mentioned. Thus, Wiren opined, it was quite proper for Mitchell to have questioned Watene in such a way as to better establish his case.[106] The contention that the claimants only held a piscary in Lake Waikaremoana was also summarily dismissed.[107] Wiren argued that rather than being a right to fish in another person's lake, the claimants' right of fishery derived from their ownership of the lake bed. British case law was cited in support of this – at English common law, the owners of a lake have exclusive rights to all fish within their lake. Wiren also contended that, in the matter before it, the Native Land Court could have regard to decisions made in relation to other North Island lakes (such as Wairarapa and Rotorua) where Maori had been found to be the customary owners.[108]

Finally, Wiren pointed out that there existed no presumption in English law as to the Crown ownership of lakes, and that unless there had been a cession, grant or purchase, the Crown had no rights. Given that no evidence of any such Crown right was presented in the case of Lake Waikaremoana, Wiren submitted that the judge 'was entitled to rely on the evidence which was before him given by the Maoris, and that [this] was quite sufficient and established a prima facie case.'[109] The court then proceeded to deliver its decision. It was stated that:

> The Crown was aware of the application to the Court but for some reason . . . its representatives refrained from attending Court or offering any evidence of title in the Crown. Under these circumstances, the Court had before it the uncontradicted evidence of the Natives' witnesses. Having examined the claims and the uncontradicted evidence adduced at the hearing, and after giving full consideration to the submissions of the Solicitor General in this matter, we are of the opinion that sufficient material was presented to the Court to justify its conclusion that at the time of the signing of the Treaty of Waitangi, Lake Waikaremoana was land held by Natives under their customs and usages and, therefore, that the Court acted within its jurisdiction in making its order.[110]

The hearing was adjourned until 21 April 1944 to allow the Solicitor General to apply either for a writ of certiorari or a writ of prohibition in the Supreme Court.[111]

5.5.3 The position of the Crown Law Office

In her report, Stevens details various miscellaneous papers pertaining to the Crown's appeal on the case of title to Lake Waikaremoana. These papers are significant in that they show the arguments of the Crown Law Office that purported to support the notion that the Crown owned lakes in New Zealand.

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106. Ibid, p 22,365
107. A piscary is the right to fish in another person's waters. Peter Spiller, *Butterworths New Zealand Law Dictionary,* 4th edition, Wellington, 1995, p 219
108. Ibid, pp 22,366–22,367
109. Ibid, pp 22,368–22,369
110. Ibid, p 22,377
111. A writ of certiorari requires proceedings be removed from an inferior court to a superior court for the purposes of review. An order of prohibition prevents an inferior court from exercising any jurisdiction that by law it is not empowered to exercise. Spiller, pp 44, 235

One paper held that the Treaty of Waitangi did not extend to Maori a guarantee of their exclusive possession of navigable and tidal waters. Such a guarantee, the paper held, would have potentially paralysed the water traffic of the country and was thus forbidden in the public interest which 'required the reservation of these "lands" in the interests of all.'[112] The same paper also noted that since 1898 the Crown had exercised rights of ownership over Lake Waikaremoana; having stocked it with fish, granted fishing licences, and employed rangers to look after the fishery.[113] Further, a draft of the Crown's appeal stated that these rights of the Crown had been strengthened by its purchase of the Taramarama, Tukurangi, Waiau, and Waikaremoana blocks.

In this draft, the position was argued that in its 1918 decision, the Native Land Court had been wrong in its belief that Maori custom recognised separate property in the bed of a navigable lake. Further, even if Maori custom did make such a recognition, it had not been legally recognised or validated under the Native Land legislation:

> Native title is not in itself entitled to legal recognition. Nor has the Treaty in itself any legal force or efficacy. Native custom, Native title and the Treaty are in force in law only in so far as they have been given legal validity by the Native land legislation of the colony.

It was stated that only evidence of fishing and marginal occupation had been presented to the court. And, that such usufructuary rights should not be confused with ownership rights as defined in England, where the concept of a Crown grant was a key determinant. As the draft appeal stated, the:

> . . . English idea of ownership of land beneath water is essentially a feudal idea and is an abstraction that was made possible only by the theory of a Royal grant of such land to the owner of the upland adjoining the water.

This contrasted with the Maori view of a lake as being a body of water rather than as land covered with water. Consequently it was argued that 'a people which thought of a river or lake not of land but in terms of water and the space covered by water could not possibly have the conception of ownership of land lying beneath the water.' It was also contended by Crown Law Office officials that the motivation of the Maori seeking title to Lake Waikaremoana was simply to cause inconvenience to the Pakeha population – it being held that there was no Native interest other than 'the interest of preventing the public from navigation, recreation and European fisheries.'[114]

5.5.4 The Native Appellate Court's decision

On 20 September 1944, the Native Appellate Court delivered its final judgement in relation to the Crown's appeal against the Native Land Court's 1918 decision as to the title of Lake Waikaremoana. In this decision, the chief judge stressed how the issues

112. File note, CL 200/7, NA Wellington, cited in Stevens, p 35
113. Ibid
114. Draft of the Lake Waikaremoana appeal, CL 200/11, NA Wellington, cited in Stevens, pp 35–36

before the court had to be considered in the context of New Zealand as opposed to English law. He observed that:

> The questions of the application of the *ad medium filum* rule, highway of necessity and the effect of conveyances and memorials of ownership are of great interest, but are not applicable to the present case. There is an abundance of authority that in New Zealand the rights of Natives are safe-guarded without reference whatsoever to the incidence of English law. The Natives successfully established their title to Lake Waikaremoana once they satisfy the Court that it was held by them in accordance with their ancient customs and usages unless it be shown that this title has been extinguished. This cannot be shown by the mere assertion of title by the Crown but satisfactory proof must be adduced to the Court. In the course of years, many rules and presumptions have been incorporated in English law but we are of the opinion that in New Zealand these are of no force or effect if it is found that they in any way conflict with the customs and usages of the Maori people. We consider that these rights once established are paramount and freed from any qualification or limitation which would attach [to] them if the rules and presumptions of English law were given effect to.[115]

The court continued, stating that it considered the matter before it to be 'very simple':

> We have already decided that Lake Waikaremoana can be considered as native customary land and that sufficient evidence was adduced to the Native Land Court upon which it could proceed to make freehold orders. We can find nothing in the submissions of the Solicitor General to vary this view and the appeal of the Crown must fail.[116]

The judgement of the Appellate Court was still not accepted by the Crown Law Office. Shortly after the decision on the Crown's appeal was issued, the Solicitor General wrote a paper outlining the issues in dispute in general terms. A major pragmatic concern appears to have been the possible need to compensate the Maori owners. It was stated, that if comparisons were made between Waikaremoana and the Rotorua and Taupo settlements, it would be said that Waikaremoana was of greater public value – presumably because of the hydro-electric development in the district. It was noted that the payment of an annuity of £2000 to the owners of Waikaremoana in exchange for them surrendering their rights to the bed had already been proposed.

The Solicitor General also refused to accept the Appellate Court's determination that Lake Waikaremoana was customary land, urging that the 'decision ought to be got rid of.' Essentially it was argued by Cornish that upon 'the proclamation of British sovereignty, all the soil of New Zealand was vested in the Crown' and that the 'guarantees under the Treaty are good in law only so far as they have been recognised by Parliament.' Further, it was stated that Parliament was quite entitled 'to legislate in derogation of the Treaty as it has done in respect of fisheries', and that the Treaty 'cannot be appealed to as a source of rights'.[117]

115. CL 200/16, NA Wellington, cited in Stevens, p 37
116. Ibid, cited in Stevens, p 38
117. Report dealing in general terms with the issue in dispute, CL 200/10, NA Wellington, cited in Stevens, p 39

Incredibly then, in spite of the Native Land Court's 1918 decision and the subsequent upholding of that decision by the Native Appellate Court – made up of six Native Land Court judges – the Government still disputed that Lake Waikaremoana was Maori customary land.

5.5.5 The Native Appellate Court's hearing of the Ngati Ruapani appeals, 1946

Between 8 May and 16 May 1946, the Native Appellate Court sat again to hear the appeals pertaining to the lists of owners settled by the Native Land Court in 1918. On this occasion D G B Morison presided as chief judge, Wiren again appeared for the Tuhoe–Ruapani appellants and H E McGregor represented the Ngati Kahungunu respondents. By this time, with the exception of Pita Tauaho, all of the original Ngati Ruapani appellants had died.[118]

Wiren proceeded to systematically go through all of the lists that Tuhoe–Ruapani appellants objected to, detailing the grounds upon which they were opposed.[119] Wiri considers that the Tuhoe–Ruapani objections to the lists of Ngati Kahungunu owners were: that there was inadequate evidence of occupation to justify their inclusion; that there was a tribal boundary between Tuhoe–Ruapani and Ngati Kahungunu well to the south, west and east of Lake Waikaremoana; that Ngati Ruapani are a separate tribe from Ngati Kahungunu who were conquered by Tuhoe; and that the lists of Ngati Kahungunu had been included by the Government in the early blocks because of their assistance to the Crown during the Hauhau wars.[120]

On 22 April 1947, the court delivered its decision in relation to the Tuhoe–Ruapani appeals. Chief Judge Morison observed that:

> the Court is irresistibly drawn to the conclusion that Ngati Kahungunu and Ngati Ruapani are not separate *tribes* but that Ngati Ruapani is a powerful hapu of the Ngati Kahungunu tribe. This being so, it follows that there can be no *tribal* boundary between N'Ruapani hapu and N' Kahungunu tribe. This Court is satisfied that the tribal boundary between Ngati Kahungunu and Tuhoe is along the Huiarau range set up by Wi Pere and found by the Commission in 1906. [Emphasis in original.]

Therefore the court considered:

> that no Ngati Kahungunu should be excluded from the list of owners solely upon the ground that he is a member of a particular tribe, and unless the appellants can satisfy the Court that the Native Land Court was not justified in finding that they . . . had the necessary ancestral or occupatory rights the appeals of the Ngati Ruapani must fail.[121]

In arriving at this decision it was clear that the court had placed much emphasis upon the occupation of lands abutting the lake. The Native Land Court had investigated the ownership of lands to the south of the lake in 1875, awarding them to

118. Extract from Tairawhiti Native Appellate Court minute book 27, RDB, vol 59, p 22,379
119. Ibid, pp 22,379–22,386
120. Wiri, pp 323–324
121. Extract from Tairawhitit Native Appellate Court minute book 27, RDB, vol 59, p 22,410

Ngati Kahungunu who promptly sold them to the Crown. It would appear that these lands in fact belonged primarily to Ngati Ruapani.[122] This was accepted by the Appellate Court as being adequate proof of the ownership of these lands, and sufficient justification for the inclusion of Ngati Kahungunu in the lists of owners of the lake.[123] Stevens considers that the further recognition of Ngati Kahungunu rights in the Waikaremoana district by the Native Appellate Court in 1947 can be seen as having compounded the earlier injustice Ngati Ruapani suffered when Ngati Kahungunu sold Ruapani tribal lands to the south of the lake.[124] This question has yet to be considered by the Waitangi Tribunal.

On 10 September 1947, the judgements of the Appellate Court rejecting the appeals of both the Crown and Tuhoe–Ruapani were finalised. Thus under section 65 of the Native Land Act 1931, Lake Waikaremoana was ruled to be the property of the 354 Maori owners.[125]

5.6 Compensation

Once the question of the ownership of Lake Waikaremoana had been settled, attention turned to the issue of how to get Maori to surrender their rights to the lake, and the extent of compensation they should receive for such a cession. This question has yet to be considered by the Waitangi Tribunal.

5.6.1 Negotiations for compensation

According to the Minister of Native Affairs, J G Coates, the possibility of the Maori owners of Lake Waikaremoana receiving compensation for their interests was first raised back in 1921. On this occasion the owners offered to surrender their rights if the Government granted a sum of money for educational and other purposes.[126] It appears, however, that the matter was not actually considered by the Government again until 1947 – subsequent to the 1918 land court decision being upheld by the Native Appellate Court.

In January 1947, a conference was held in the office of the Prime Minister, Peter Fraser, to discuss matters relating to Lake Waikaremoana. Fraser expressed the opinion that although the Appellate Court decision was erroneous, he believed the matter of compensation needed to be dealt with. G P Shepherd, the Under-Secretary of Native Affairs and the Chief Judge of the Native Land Court who had presided in the Appellate Court hearing over Lake Waikaremoana, opined that because the lake was now private property, the Government would be required to negotiate a purchase. It appears that the Attorney-General, H G R Mason, had offered the owners

122. See O'Malley for a detailed discussion of this.
123. Extract from Tairawhiti Native Appellate Court minute book 27, RDB, vol 59, p 22,410
124. Stevens, p 41
125. MA 8/3/484, NA Wellington, cited in Wiri, p 326
126. J G Coates to A T Ngata, 13 June 1921, MA 29/4/7A, NA Wellington, cited in Stevens, p 43

£1000 as an annual grant on behalf of the Government, but that Rangi Mawhete of the Maori Land Court had informed the Government that a figure of £6000 was closer to what the owners now wanted.[127]

In 1949, the matter of compensation for the owners of Lake Waikaremoana was again brought to Fraser's attention – this time in his capacity as the Minister of Maori Affairs. In a memorandum from his under-secretary, Fraser was informed that the owners were interested in coming to an arrangement with the Government with regard to the future use of the lake for the purposes of hydro-electric generation, fishing and tourism.[128] Later that year, representations were made to the Minister at the Wairoa Hotel. H E McGregor, representing people who appear to have been mainly Ngati Kahungunu owners, informed Fraser that following discussions with Tuhoe, the owners had decided to propose that the Government effect a settlement similar to that in the case of Lakes Taupo and Rotorua whereby an annuity was to be paid to the owners in perpetuity. Apparently upon being consulted, Wiren, the solicitor acting for the Tuhoe owners, had suggested that an annual payment of £1000 be made.[129]

In the same year, however, it is apparent that moves were being entertained by the Crown to quash the earlier decisions of the Native Land Court and Native Appellate Court. The Solicitor General had proposed filing proceedings with the Supreme Court to obtain a writ of certiorari in order that the Lake Waikaremoana Court decisions could be annulled. However, given that the Government was considering passing legislation governing Maori claims to lakes and rivers, the papers were not filed. But although the proposed legislation did not go ahead, the matter of title to Lake Waikaremoana was not referred to the Supreme Court despite such proceedings being initiated in respect of the Whanganui River. The Under-Secretary of Maori Affairs was duly cautioned that in any talks with the owners of Lake Waikaremoana regarding possible compensation, the owners should be made aware that the legal issues relevant to the case could still be revisited.[130]

In August of 1949, Fraser met with Wiremu Matamua and Sam Rurehe at Nuhaka (near Mahia). Fraser, in response to a request from Matamua and Rurehe that the lakes' owners be paid an annuity of £10,000, informed them that cabinet would never agree to such a sum. However, he informed them that he did not favour an appeal being made to the Supreme Court in the matter of Lake Waikaremoana, and that he would ask the Government to accept the Appellate Court's decision. Upon being informed by Matamua that Maori in the area owned little land, Fraser raised the possibility that land could be exchanged for the lake. He undertook to make inquiries as to what lands were available in the district.[131]

127. Notes of a conference held in the Prime Minister's room, 29 January 1947, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 43
128. Under-Secretary of Maori Affairs to Minister of Maori Affairs, 1 February 1949, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 44
129. Notes of representations made to the Minister of Maori Affairs at the Wairoa Hotel, 16 June 1949, MA 5/13/78 pt 2, NA Wellington, cited in Stevens, p 44
130. Memorandum for the Under-Secretary of Maori Affairs, 11 July 1949, MA 5/13/78 pt 2, NA Wellington, cited in Stevens, p 44

Subsequently a meeting was convened in October 1949 at Kohupatiki, Hastings, attended by a delegation from the Department of Maori Affairs. In opening the meeting, Turi Carroll of Ngati Kahungunu stated that the owners wanted the Government to offer them a price for their rights. McGregor, on behalf of the owners, informed the delegation that the owners had decided to waive their individual rights of ownership, and that any funds procured would be used for the general benefit of the people. It was hoped that such monies could be used to alleviate the poverty of those living near the lake – by providing housing, improving marae, and acquiring land suitable for farming. It appears that the idea forwarded in August by Fraser of the lake being exchanged for land was rejected by those present in favour of an annual payment in perpetuity.

In proceeding to discuss a possible rental, the owners urged that the Government consider the lake's scenic value and the destruction of their fish feeding grounds caused by the lowering of the lake. McGregor proposed £6000 as a tentative figure. The Minister, although assuring the meeting that he was anxious to settle their claim, stated that nothing could be done until a basis for the claim was established.[132] Presumably by this he meant a proper valuation of the lake from which a rental could be computed.

Despite Fraser's undertaking in August 1949 to get the Government to accept the Native Appellate Court findings in connection with Lake Waikaremoana, the 1950s again saw the prospect of the case being relitigated. In 1950 the Maori Land Court requested that the chief surveyor supply a plan of the lake to enable the freehold title of Lake Waikaremoana to be completed.[133] But before the plan was supplied, the Under-Secretary of Maori Affairs instructed the Solicitor General to file the necessary proceedings to prevent this happening.[134] The following year at Ruatoki, another representation was made to the Minister of Maori Affairs asking that the matter of compensation for Lake Waikaremoana be finalised.[135]

In 1954, the Crown filed a statement of claim with the Supreme Court in relation to Lake Waikaremoana. The statement requested that a writ of certiorari be served upon the Chief Judge of the Maori Land Court by which the papers relating to Lake Waikaremoana could be obtained, and ultimately the courts' decisions could be quashed. Further, it was asked that the chief judge be prevented from taking any steps towards giving effect to the decisions.[136] However, later in the same year, the Crown abandoned the proceedings.[137]

131. Notes of an interview with the Minister of Maori Affairs, 27 August 1949, MA 5/13/78 pt 2, NA Wellington, cited in Stevens, p 45
132. Notes of representations made to the Right Honourable Peter Fraser, Minister of Maori Affairs, 8 October 1949, MA 5/13/78 pt 2, NA Wellington, cited in Stevens, p 46
133. E B Corbett, Minister of Maori Affairs to Apirana Ngata, 12 July 1950, MA 5/13/78 pt 2, NA Wellington, cited in Stevens, p 46
134. Under-Secretary Maori Affairs to Solicitor General (memo), 5 July 1950, MA 5/13/78 pt 2, NA Wellington, cited in Stevens, p 46
135. Notes of an interview, 16 April 1951, MA 5/13/78 pt 2, NA Wellington, cited in Stevens, p 46
136. Statement of claim, CL 200/1, NA Wellington, cited in Stevens, p 15
137. Stevens, p 47

Negotiations for compensation resumed in 1957, by which time it appears that the owners had finally received the freehold title to the lake. In that year, Wiren, on behalf of the owners, proposed that an annuity of £4500 be paid to Lake Waikaremoana's owners. Of this figure, £1500 represented payment for past uses of the lake made by the Crown.[138] The Department of Maori Affairs responded that the matter required consideration by the Department of Lands and Survey, and the State Hydro Electric Department. Further they advised that comparisons with the Rotorua and Taupo cases were not particularly relevant.[139]

Throughout the late 1950s, the Government continued to deliberate over whether the lake should be acquired, and if so, what constituted an appropriate value for the Maori owners' interests. In 1959 the Director General of the Department of Lands and Survey stated that he had considerable difficulty in actually finding a substantial reason why the Government should even buy the lake. Although disagreement appears to have existed between Lands and Survey and the Electricity Department as to the value of the lake, in 1959 the sum of £10,000 for the purchase of the lake bed, plus £2000 for the islands in the lake, was recommended in a paper presented to Cabinet.[140] In a subsequent Cabinet meeting of June 1961, the purchase of the lake bed, the islands within Lake Waikaremoana, and 15 Maori-owned reserves abutting the lake for a lump sum of £25,000 was approved.[141]

A meeting was then held in Wellington in August 1961 between Wiren; J R Hanan, the Minister of Maori Affairs; and R G Gerard, the Minister of Lands. Wiren inquired as to how the figure of £25,000 had been arrived at, and informed the Ministers that the owners favoured the payment of an annuity in perpetuity rather than a lump sum payment. In response to his question as to why the Crown wanted to purchase the Maori-owned reserves, Wiren was told that this would enable the development of tourist resorts, and 'clean up' Crown ownership of lands in the area. Gerard stated that he considered the islands should be a part of the national park.[142]

A proposal was then made by the owners whereby an annual payment of £3250 was to be made to a trust board. This figure was to include the islands but their title would remain with the Maori owners. Cabinet duly rejected the proposal and made a counter offer of a one-off payment of £30,000 for the sale of the lake bed and the islands excluding Patekaha. This island appears to have been excluded because of it being a Ngati Ruapani urupa. The proposed purchase also no longer included the reserves. At a meeting of 72 owners held at Wairoa in November 1966, the Government's offer was unanimously rejected.[143]

138. Secretary of Maori Affairs to Minister of Maori Affairs, 27 August 1957, MA 5/13/78 pt 2, NA Wellington, cited in Stevens, p 47
139. Stevens, p 47
140. Director General, Department of Lands and Survey to Secretary of Maori Affairs, 22 January 1959, MA 5/13/78 pt 3, NA Wellington, cited in Stevens, pp 47–48; Secretary of Maori Affairs to Minister of Maori Affairs (memo), 28 July 1959, MA 5/13/78 pt 3, cited in Stevens, p 48
141. Minister of Maori Affairs to Wiren, 21 July 1961, MA 5/13/78 pt 3, NA Wellington, cited in Stevens, p 48
142. Notes of a deputation held in Minister of Maori Affairs' rooms, 9 August 1961, MA 5/13/78 pt 3, NA Wellington, cited in Stevens, p 48

In October 1968, the Valuer-General supplied a special valuation for Lake Waikaremoana. The report covered the lake's history, lake levels, fishing revenue, boating facilities, and tourist attractions. In arriving at the valuation, regard was had for the value of the lake itself, improvements, and land that had been exposed by the lowering of the lake's level.[144] In total the lake was valued at $143,000. This figure did not include the value of the water in the lake because pursuant to section 306 of the Public Works Act 1928, the sole right to use water for the purposes of generating electricity was vested in the Crown.[145]

Cabinet subsequently authorised negotiations for the purchase of the lake bed for $143,000. However, at a meeting of owners held at Wairoa in September 1969, the offer was rejected. Instead the owners proposed a 50-year lease with a perpetual right of renewal and with the rental set at six percent of the lake's valuation. The owners favoured the lease being backdated to 1957.[146]

This offer was duly put to the Secretary of Maori Affairs and Assistant Director General of Lands at a meeting with the committee of owners the following year. The Assistant Director General argued that were the lease backdated to 1957, the owners would have to settle for a lower rental, and that given the rent was to be fixed for 50 years, this would ultimately be to the owners' disadvantage. Thus the owners agreed to a lease being granted from 1 July 1967, with the rental set at 5½ percent of the lake's value. The owners were assured that their rights of access to the lake would not be affected.[147] The lease arrangement was confirmed in a letter to the owners' lawyers from the Minister of Lands in May 1970. The lease was to include the lake bed, islands within the lake excluding Patekaha, and the dry land between the water's edge and the title boundary.[148] The agreement afforded Maori no fishing rights above and beyond those of the general public. Although it appears that fishing rights were not an issue for the owners in the negotiations, the present author is not certain on this point.

5.7 The Lake Waikaremoana Act 1971

Throughout 1970, much correspondence occurred between officials of the Department of Lands and Survey, the Department of Maori Affairs, and counsel for the Lake Waikaremoana owners concerning the lease of Lake Waikaremoana and the form that the necessary legislation validating the lease should take. One of the major issues appears to have been whether a trust board should be specially constituted to

143. Secretary of Cabinet, Prime Minister's Office to Minister of Lands, 9 April 1962, MA 5/13/78 pt 3, NA Wellington, cited in Stevens, p 49; Statement of proceedings of meeting of assembled owners, Lake Waikaremoana block, 16 November 1966, MA 5/13/78 pt 3, cited in Stevens, p 49; Stevens, p 49

144. A lowered lake level had been maintained since around 1946 as part of the Waikaremoana hydro-electric generation scheme.

145. Stevens, pp 50–51

146. Ibid, p 51

147. Assistant Director General of Lands to Minister of Lands, 12 May 1970, MA 5/13/78 pt 4, NA Wellington, cited in Stevens, pp 51–52

148. Minister of Lands to Messrs Lusk, Willis, Sproule and Gallen, 14 May 1970, MA 5/13/78 pt 4, NA Wellington, cited in Stevens, p 52

administer the rental received, or whether existing trust boards should be used. The owners, however, strongly favoured using the existing Wairoa and Tuhoe Maori Trust Boards. Rent paid in respect of the lease would be divided between the two boards according to the number of shares of the owners affiliated with each. Also, adding 'Waikaremoana' to the names of each trust board was mooted as a possibility.[149]

Finally on 21 August 1971, a deed executing the lease was signed by the Minister of Lands, Duncan MacIntyre, and Sir Turi Carroll along with the other nine members of the owners' committee. The agreement reached was that the lake be leased to the Urewera National Park Board for a period of 50 years with a perpetual right of renewal. The annual rental was initially set at 5½ percent of the Government valuation, with provision for it to be reviewed every 10 years. The lease was to be backdated until 1 July 1967.[150]

The legislation to confirm the lease was introduced to Parliament in November 1971. During the debate concerning the bill, the Maori members stated their approval as to the extent of consultation that had been undertaken with the Maori owners in the negotiation of the lease. The Lake Waikaremoana Act was passed on 16 December 1971. Under sections 5 and 6 of the Act, the Tuhoe and Wairoa Trust Boards became respectively the Tuhoe–Waikaremoana Maori Trust Board and the Wairoa–Waikaremoana Maori Trust Board. Section 14 held that rent payable under the lease was to go to the two trust boards according to the respective shares of their beneficiaries. As per the agreement, the Act made no mention of the owners' fishing rights.

Subsequent to the passing of the Act, there appears to have been some confusion amongst the Lake Waikaremoana owners as to how it would be implemented. According to Judge K Gillanders Scott of the Maori Land Court, Rotorua, 'the only thing certain is the uncertainty of thinking and understanding on the part of probably the majority of the Maori persons concerned with Lake Waikaremoana.' While a number of owners expected to receive payment according to their share holding; others understood that the Act precluded the distribution of rent to individuals. Another point of confusion identified by the judge was whether the lake bed remained the property of the owners; or whether it now formed part of the assets of the two trust boards.[151]

After discussion between the District Land Registrar, the Maori Trustee, and the Gisborne Maori Land Court, it appears that by 1973 it had been decided, at least by the Department of Maori Affairs and the Maori Land Court, that the lake bed was now to be regarded as European freehold land.[152] This was reasoned by the registrar of the Gisborne Maori Land Court on the basis that no Maori now owned the lake as the freehold was now vested in the Wairoa–Waikaremoana and the Tuhoe–Waikaremoana Maori Trust Boards.[153] In 1973, the Maori Land Court in Gisborne

149. Stevens, pp 54–57
150. Wiri, pp 329–330
151. Judge Gillanders Scott to Registrar, Maori Land Court Gisborne, 2 May 1973, MA 8/3/484 vol 2, NA Wellington, cited in Stevens, p 60
152. Stevens, pp 60–61

advised that it no longer held the title to the lake, and that any inquiries should be directed to the trust boards.[154]

The view that the lake's freehold was now vested in the trust boards. however, was disputed by the lawyers for the Tuhoe–Waikaremoana Maori Trust Board. They considered that a correct interpretation of the Lake Waikaremoana Act was that the owners only intended the revenues from the lake to go to the trust boards, and not the ownership of the lake itself. It was maintained that the retention of ownership was important for the owners because of the 'special feeling Maori people have for their ancestral land'.[155] The Maori Trustee's office saw things somewhat differently – specifically that the intention of the Act was to vest the lake bed in the trust boards absolutely and not in trust. The owners, upon the assent of the Act, became beneficiaries of the trust boards whose primary object was to deal with the rental from the boards' assets.[156]

Because the lake forms a part of the Urewera National Park, the management of Lake Waikaremoana is the responsibility of the Department of Conservation.

5.8 Conclusion

Like so many North Island lakes, Waikaremoana has been the object of a complex and drawn-out legal wrangle as to whether it is the property of Maori or the Crown. But unlike many other lakes in New Zealand, the impetus for the Crown seeking the ownership of Waikaremoana was not in order to gain control of its catchment so as to be able to bring swamp land into production and reduce the incidence of flooding. Instead the Crown's campaign was driven by other aspects of a supposed 'national interest' – the preservation of scenery and the generation of electricity. But underpinning these rationales was the imperative, evident in the case of all major North Island lakes, that the Crown considered that it should be the owner of lakes – irrespective of the fact that this view was at variance with common law.

Prima facie, the evidence of Maori ownership and control of Lake Waikaremoana would seem irrefragable. A centre of settlement for Urewera and East Coast Maori for centuries, Waikaremoana has been used for fishing, birding, navigation, and as a means of defence. Further, islands situated in the lake are designated urupa. But utility aside, the area is redolent with the history of various Tuhoe, Ruapani, and Kahungunu ancestors – the actions of whom have given shape to the landscape and given rise to the names of various topographical features. But despite this evidence of use and ancestral association, the Crown endeavoured to construct a case that held that title to the lake in fact belonged to it. Interestingly, in doing this, the Crown in

153. Attewell for Registrar, Gisborne Maori Land Court to the Secretary, Tuhoe–Waikaremoana Maori Trust Board, 27 March 1974, MA 8/3/484 vol 3, NA Wellington, cited in Stevens, p 61
154. Stevens, p 61
155. Urquhart, Roe and Partners to the Registrar, Gisborne Maori Land Court, 16 May 1974, MA 8/3/484 vol 3, NA Wellington, cited in Stevens, p 62
156. J H Dark for the Maori Trustee, to Department of Maori Affairs Gisborne, 23 May 1974, MA 8/3/484 vol 3, NA Wellington, cited in Stevens, p 63

part relied upon evidence of use similar to the evidence adduced by Maori before the Native Land Court in its inquiry in the years from 1915 to 1918. The fact of having stocked the lake with fish, issued licences to anglers, employed rangers to police the fishery, and run a launch service upon the lake were held to be evidence of the exercise of ownership rights on the part of the Crown.[157] Interestingly though, the Crown vigorously denied use of the lake by Maori as being evidence of the fact that they owned it.[158]

But as in the case of other North Island lakes, the claim of the Crown to be the owner of Lake Waikaremoana can be seen as somewhat confused, relying upon various divergent principles. Before the Native Appellate Court and other fora, the Crown argued its case for being the owner of all lakes, and if not, why it should be. A key tenet of its case before the Appellate Court was that, because Maori had no conception of lakes as being land covered with water, how could Maori customary ownership extend to lake beds? Concomitantly it was held that upon the proclamation of British sovereignty in New Zealand, the Crown acquired radical title subject to Maori customary title where it existed. Instead of ownership rights, the Crown maintained that Maori simply held a bundle of usufructuary rights in Lake Waikaremoana.[159] But despite the Crown being so adamant on this point, other fall-back positions were articulated. The idea was stated that even if lakes were a property as was guaranteed by article two of the Treaty of Waitangi, the ambit of these guarantees was limited by public goods such as navigation and the generation of hydro-electric power.[160] The Crown also trotted out its riparian rights argument: that as a consequence of owning lands abutting the lake, the Crown owned part of the lake bed *ad medium filum aquae*.

Once the Appellate Court had upheld the Native Land Court's original decision that Lake Waikaremoana was Maori property, some more pragmatic reasons as to why Maori should not be granted title to the lake became apparent. The view was expressed that the motivation of Maori to receive title to the lake was simply to inconvenience Pakeha by preventing them from fishing in and travelling upon the lake.[161] And the prospect of Maori being able to exclude others from the lake gave rise to the need for the Crown to purchase these rights and concern that this would be at exorbitant expense to the Crown.

But alternatives to purchasing the lake were considered. The possibility of passing special legislation vesting all navigable lakes in the Crown – in much the same fashion as the Coal Mines Legislation had in respect to rivers – was mooted by Crown Law Office officials.[162] Mother alternative was to lodge an appeal against the Appellate Court's decision in the Supreme Court. Although a statement of claim was lodged in

157. See for example file note, CL 200/7, NA Wellington, cited in Stevens, p 35
158. Native Appellate Court minutes, 25 March 1944, MA 5/13/78/1, RDB, vol 59, pp 22,357–22,358, NA Wellington,
159. Ibid, pp 22,357–22,358; MA 8/3/484, NA Wellington, cited in Wiri, p 320
160. 'Report Dealing in General Terms with the Issue in Dispute', CL 200/10, NA Wellington, cited in Stevens, p 39; Stevens, p 20
161. 'Draft of the Lake Waikaremoana Appeal', CL 200/11, NA Wellington, cited in Stevens, pp 35–36
162. Solicitor General to Attorney General and Minister of Native Affairs, 15 February 1935, CL 200/15, NA Wellington, cited in Stevens, p 28

the Supreme Court seeking a writ of certiorari, the Crown did not proceed with it. However, it could be argued that the threat of such legal action and confiscatory legislation in respect of lakes possibly pressured the Waikaremoana owners to agree to a settlement.

The eventual settlement in respect of Lake Waikaremoana confirmed that Tuhoe–Ruapani and Ngati Kahungunu were the owners of the lake, and made provision for the lake to be leased to the Urewera National Park Board. But unlike the settlements vis-a-vis Lake Taupo and the Rotorua lakes, the owners of Lake Waikaremoana enjoy no fishing rights above and beyond those of the general public. Although fishing rights appear not to have been an issue for the owners during negotiations with the Crown, the present author is not certain on this point.

CHAPTER 6

LAKE TAUPO

6.1 Introduction

Taupo-nui-a-Tia, commonly known as Lake Taupo, is New Zealand's largest lake. It comprises a total area of some 62,320 hectares, and in most places it is between 100 and 140 metres deep. Situated on the volcanic plateau of the central North Island, Lake Taupo is the crater of an ancient volcano. Today, several thermal springs on the lake's shores bear testament to the lake's volcanic origin. Taupo's western shores are dominated by sheer cliffs punctuated by narrow inlets, whereas sandy beaches are more prevalent on its eastern shores. Although 17 sizeable rivers feed Lake Taupo, the Waikato is the lake's only outlet.[1] The lake's beauty is often remarked upon. As one writer has stated:

> Although not claiming the majestic mountain scenery which surrounds the southern lakes, Lake Taupo has a strange beauty of its own – frowning bluffs and carved promontories, huge beetling cliffs and sandy beaches, sheltered bays and, in places, shores clad in dense virgin bush.[2]

For centuries Lake Taupo has been the focus of Maori settlement on the central North Island's volcanic plateau. Archaeologists consider that Maori occupation of the district dates from the AD 1200. It is thought that around this time, population pressure in coastal areas forced groups to settle in the interior of the North Island. Ngati Hotu, Ngati Ruakopiri, Ngati Kahupungapunga, and Marangaranga were peoples resident in the vicinity of the lake prior to the arrival of Ngati Tuwharetoa. Tuwharetoa tradition holds that Tia and Ngatoroirangi, both of the Arawa canoe, were the first of their ancestors to visit the area. Tia gave the lake the name by which it is known today. Being of the mind that the cliffs along the lakeshore resembled his rain cloak or 'taupo', he called it Taupo-nui-a-Tia – the Great Cloak of Tia.[3]

In the generations subsequent to Ngati Tuwharetoa's arrival in the Taupo district around AD 1500, they gradually displaced the area's prior occupants. The eponymous ancestor Tuwharetoa was a sixteenth-century chief of Te Arawa who lived near Kawerau. Although he did not live at Taupo, his descendants shifted there upon

1. Suzanne Doig 'Customary Maori Freshwater Fishing Rights: an exploration of Maori evidence and Pakeha interpretations' PhD thesis, Canterbury University, 1996, pp 274–275
2. John Te H Grace, *Tuwharetoa: The History of the Maori People of the Taupo District*, Auckland/Wellington, A H & A W Reed, 1959, p 516
3. Doig, pp 279–282

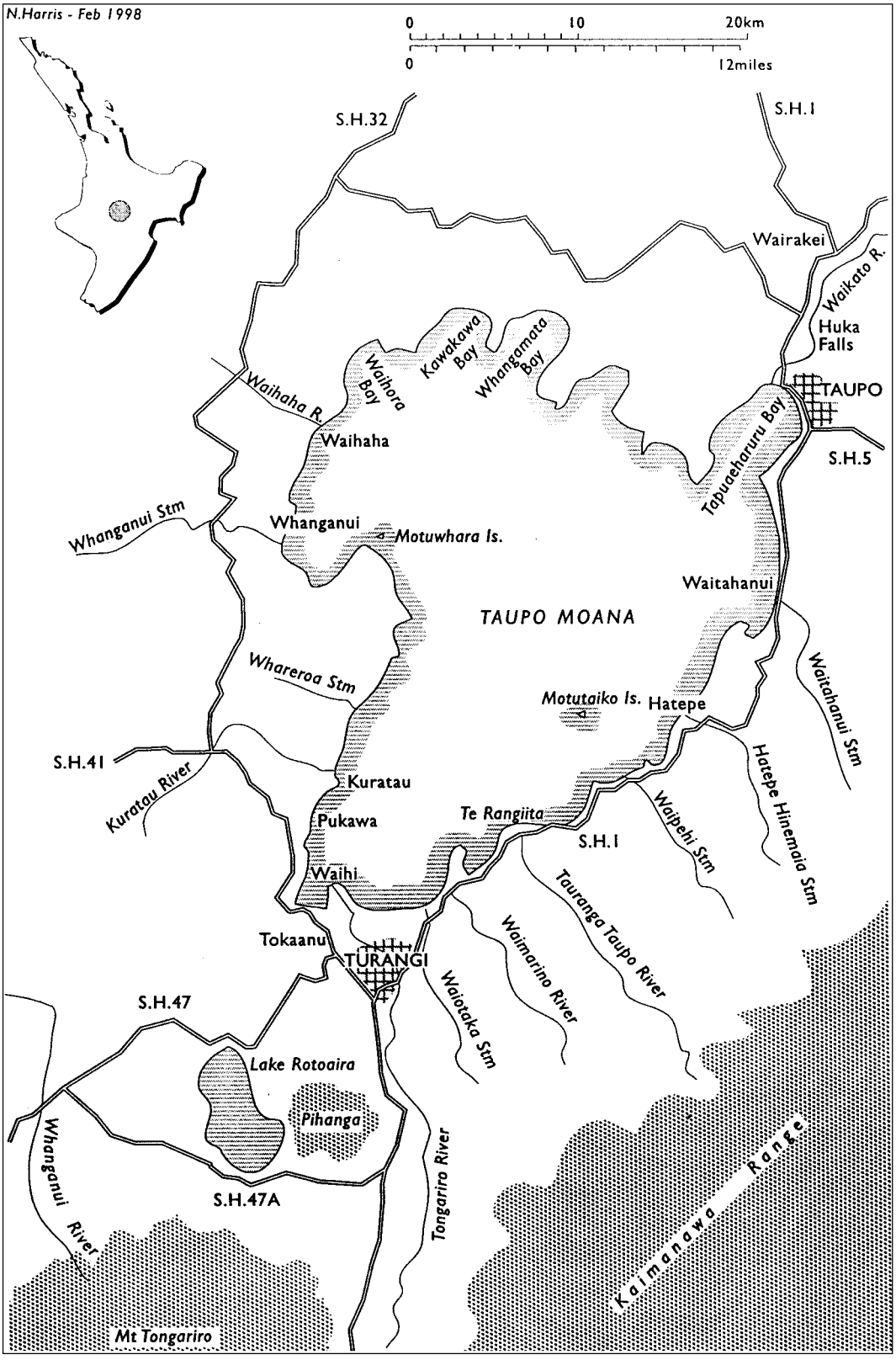

Figure 6: Lake Taupo

suffering military defeats. Tuwharetoa is the ancestor upon whom all claims brought before the Native Land Court in the area were based.[4]

Historically the fisheries of Taupo have been of great importance to local Maori. However, upon arriving in the district, Maori found the lake entirely bereft of fish – the result of a huge volcanic eruption that occurred around AD 186. Tradition holds that Maori introduced the indigenous fish that are found in the lake today. Ngati Tuwharetoa credit Ngatoroirangi with this act. Like lakes Waikaremoana and those of the Rotorua district, no catadromous (sea-migratory) species are found in Lake Taupo. This is because the Huka Falls on the Waikato River are impassable for fish returning from the sea (although another theory is that eels may be unable to survive in the lake because of its water's thermal properties). It appears that Maori made several unsuccessful attempts to introduce eels to the lake. Species that are found in the lake include kokopu, inanga, koura, and kakahi. Despite the fact that the variety of species found in Taupo are relatively few, they have at various times existed in great numbers and constituted an important element in the Ngati Tuwharetoa economy.[5]

Prior to the 1870s, the Crown acquired virtually no land in the Taupo district – the majority of which had not passed through the Native Land Court. Even when the Crown did manage to secure title to some lands, Ngati Tuwharetoa retained the majority of those abutting the lake and hence remained in control of the lake. Although the title to the lake was never determined by the Land Court, the Government tacitly acknowledged that it was Maori property.

After trout were introduced to Taupo in the 1880s, the practical control Tuwharetoa continued to exercise over the lake – particularly in terms of regulating access – became a cause of concern to the Government. Maori were deriving substantial revenue from anglers by charging them to cross their lands to gain access to the lake and rivers, and for leasing camping sites. The Government's objection to this practice seems to be very much related to the colonial imperative that if at all possible, the creation of private property rights in wild game and fish was to be avoided. Consequently, the Government set about trying to secure control of the lake and its tributaries from Maori. In 1926, an agreement was reached between Ngati Tuwharetoa and the Crown whereby title to the lake and associated rivers passed to the Crown. This was in exchange for an annuity and a guarantee of the right of Maori to take indigenous fish from the lake. The agreement was enshrined in legislation later that year.

The story of the 1926 settlement largely forms the topic of this chapter. Firstly, though, the history of lands in the Taupo district in the contact period is briefly traversed. The chapter then proceeds to describe Maori customary fishing practices and to discuss the nature of rights in the lake. After briefly recounting the establishment of the Taupo trout fishery, events leading up to the 1926 agreement are described and analysed in detail. Finally aspects of the post-settlement history are rehearsed.

4. Ibid, pp 279–283
5. Ibid, p 276; Grace, pp 510–515

6.2 The Taupo District in the Contact Era: A Summary

As with most lakes in New Zealand, it is necessary to consider the history of the ownership and control of Lake Taupo within the context of the lands surrounding the lake. A distinctive feature of the Taupo district in the nineteenth century was Ngati Tuwharetoa's resistance to Pakeha acquiring land and settling in the area. This resistance continued for twenty years after the advent of the Native Land Court. But even without Pakeha settlers in the area, the influence of colonialism was felt by Ngati Tuwharetoa. Raids on the Taupo area by musket-armed war parties from the north precipitated Tuwharetoa seeking a market for their flax in order to raise funds with which they could acquire arms. Evidence also exists that prior to 1840, pigs and large quantities of potatoes were being cultivated.[6]

Small discrete areas of land to the north of the lake were brought before the Native Land Court in the late 1860s. In 1872 an application was filed with the Land Court to investigate the ownership of a fishing ground situated in the lake along with Motutaiko island. The application was dismissed because the areas claimed had not been surveyed – even though this was not required by law in 1872.[7] As inroads were made into the Rohe Potae in the early 1880s, Ngati Tuwharetoa petitioned the Government seeking protection from land speculators, and a guarantee that Tuwharetoa would continue to exercise control over their lands. This initiative resulted in the Native Land Alienation Restriction Act 1884. This Act reinstated the Crown's right of pre-emption in the Rohe Potae.

Once the protections that Ngati Tuwharetoa sought were in place, an application was made to the Land Court to determine title to the Tauponuiatia block – an appellation of some 2½ million acres of land surrounding Lake Taupo. Te Heuheu Tukino Horonuku, who brought the claim on behalf of Tuwharetoa, submitted a list of 141 hapu who were held to have rights to the lands in question. The block was divided into 151 subdivisions that were each heard separately. Judge Scannell delivered his decision in 1887. Although a great deal of evidence was received in connection with fisheries, little is revealed about fishing rights in the final decision.[8] Although some lands to the west of the lake were awarded to Ngati Raukawa, all those abutting the lake were found by the Native Land Court to belong to hapu of Ngati Tuwharetoa. It would seem that by virtue of owning these lands, the tribe's right to the lake was never seriously disputed by the Crown.

6. Waitangi Tribunal, *The Pouakani Report 1993,* Wellington, Brookers Ltd, 1993, p 47; Barbara Cooper, *The Remotest Interior: A History of Taupo*, Tauranga, Moana Press, 1989, p 71
7. Doig, pp 289–290, 310
8. Ibid, pp 289–292

6.3 The Lake Taupo Fisheries

In the past the waters of Lake Taupo provided Maori with what has been described as an 'inexhaustible supply of food'.[9] In his history of Ngati Tuwharetoa, John Grace describes in some detail the traditional fisheries of Lake Taupo.

The most important fish in the Ngati Tuwharetoa economy was the kokopu. It is the largest fish found in the lake, growing up to 20cm in length. Grace describes it as being 'most palatable' and when cooked in a hangi, 'there was no fish more delicious'. Kokopu were also dried for consumption during winter. Mostly they were caught by means of a pouraka – a kind of large basket net. Koura were placed in the net and then it was lowered to the bottom of the lake by means of a long flax rope. Pouraka were usually set in the evening and brought back up in the morning. This method was employed between November and March. Through the winter months, kokopu were caught by the use of tau. A tau is a large flax rope to which bundles of fern are attached. One end was attached to a stake on the shore and the other anchored in the lake. After a while the tau would be pulled to the surface and fish that had become lodged in the bundles of fern removed. Small numbers of kokopu were also caught with flax lines to which worms were tied. Elsewhere this appears to have been a common method by which eels were caught.[10]

Inanga were also an important species in the Taupo fishery. Those caught in Taupo are the young of the kokopu. These are also called pangare. During the summer months, pangare would bask in the shallows near the lake shore and would wash up in large numbers on the beach during northerly storms. Maori would then proceed to gather the fish for food. This practice gave rise to Ngati Tuwharetoa being known by coastal iwi as 'kai-pangare' – a pejorative term implying that they lived on dead fish scavenged from beaches. From September to January, inanga were also caught by the use of hinaki. These nets were secured in a stream with fences on either side to channel the fish into them. Large drag nets known as kupenga were also used. Kupenga were made out of finely woven flax and were up to 100 metres long. They were either used from two canoes or from the shore. Grace stated that inanga were usually eaten as a relish to accompany fern root and kumara. Like kokopu, inanga were also dried for consumption during winter.[11]

Crustaceans were also present in Lake Taupo. Koura, or freshwater crayfish, were caught either with nets or with bundles of fern such as were used to catch kokopu. The koura of Lake Taupo reach lengths of up to 12 centimetres. Roasted on a bed of hot embers, they are by all accounts delicious. In comparison to the kokopu, inanga, and koura, kakahi – a kind of freshwater mussel – were much less plentiful in Taupo. Consequently they were not as sought after by Tuwharetoa. When kakahi were gathered it was either by hand, or by the use of a dredge known as a rou-kakahi.[12]

9. Grace, p 509
10. Ibid, pp 510–511
11. Ibid, pp 512–513
12. Ibid, pp 513–514

6.4 The Nature of Fishing Rights in Lake Taupo

Included in Suzanne Doig's doctoral thesis on Maori customary freshwater fishing rights, is a detailed analysis of the Taupo fishery. This is based on evidence brought before the Native Land Court in the 1880s in connection with lands contiguous with the lake. In these court cases, the exercise of fishing rights was an important basis upon which titles to riparian lands were established. However, because issues pertaining to fishing rights were relatively uncontested between the various Tuwharetoa claimants, often little evidence was adduced before the court in connection with such matters. It appears that generally, detailed evidence was only recounted when rights to a particular resource or piece of land were contested between different groups.

The land court evidence considered by Doig shows that fishing rights in Taupo, like most Maori customary rights, were predicated upon ancestral take and the continued exercise of such rights. In the case of fisheries, ancestral rights were usually traced to the person who first developed the resource. Being a member of a hapu tracing a direct line of descent from such an ancestor appears to be the primary basis for fishing rights. However, rights to a fishery could also be established through marriage, one's own endeavours, and by the failure of those with paramount rights to take punitive action against poachers. Doig notes that there were no examples of fishing rights in Lake Taupo being established through conquest.[13]

In terms of the relationship between the rights of individuals, whanau, and hapu, Doig contends that it is very difficult to make clear distinctions between these groups and concomitant categories of right. The tendency of the Native Land Court to find in favour of rights at the hapu level means that possibly witnesses appearing before the court placed greater emphasis on that level of right. Certainly the records of the Native Land Court show that the commonest expression of fishing rights in Taupo were hapu rights based on ancestral title. Claims before the court in Taupo were invariably brought by hapu, and resource ownership generally talked about at this level. However, prominent individuals were often associated with particular sites. When claims to fisheries were made by individuals, it is likely that they tacitly included the individual's household or whanau. Generally such individual claims appear to be either an attempt to establish individual right to the resource within the broader rights of the hapu, or an endeavour to strengthen the hapu claim by giving evidence of personal exploitation of the resource. Doig averts to some instances where a personal 'title' was claimed, but notes that there is very little detail of such claims in the Land Court minute books.[14]

Unlike other lake fisheries in New Zealand, the Taupo fisheries were generally concentrated in the lake's inshore waters. Hence the issue of open water boundaries did not arise. Given that most fisheries were close to the shore, they were generally associated with particular sites on the adjacent land such as villages and beaches. In 1987, Asher, a Ngati Tuwharetoa kaumatua, described how:

13. Doig, pp 292–298
14. Ibid, pp 300–305

> . . . Maori settlements around Lake Taupo were connected with portions of the lake. These were accessible to, and exploitable by, the residents of the relevant settlements. Outside individuals . . . would not have transgressed onto these portions without permission.[15]

This, Doig contends, is consistent with evidence received by the Native Land Court 100 years earlier. Evidence exists of people travelling from settlements situated some distance from the lake to go fishing. Such groups appear to have had rights to the lands adjacent to these fishing grounds rather than there having been a divorce of occupation and use rights. Most probably fishing activity by such groups was a part of a seasonal round of resource exploitation. In this sense fishing rights were a part of a parcel of resource rights held in connection with a particular block of land.[16]

However, the historical record pertaining to the settlement reached in respect of Lake Taupo suggests that Tuwharetoa considered rights in the lake to be communally held, as opposed to rights in rivers which were vested exclusively in the owners of riparian lands. This situation became apparent in connection with compensation for individuals' rights in the tributaries to the lake that the Crown vested in itself. This compensation was separate from the annuity paid for the lake bed, and was to be determined after the settlement was made. Hence the claim that the lake was communally held can be seen as a rationale for why Tuwharetoa accepted a pan-hapu settlement in respect of the lake, and as strengthening their claim for compensation in respect of rivers.[17] The trust board's solicitors also stated that the lake was treated as a 'tribal property' because the Native Land Court had not investigated its title. The owners of lands abutting the lake's tributaries had been ascertained, on the other hand, and the beds of such rivers belonged to the riparian owners under British doctrine of *ad medium filum aquae*.[18]

In her thesis, Doig attempts to determine the particular nature of fishing rights in Lake Taupo; particularly in terms of whether they are proprietary or usufructuary. She notes though that trying to make such a distinction from the evidence recorded in land court minute books is made problematic by the imprecise deployment of key terms, and the possibility that translations were inaccurate. References to the ownership of fisheries by witnesses appearing before the Land Court are frequent. But rather than implying western-style notions of ownership (such as the right to alienate and exclusive individual rights), such references appear to be an expression of an ultimate right over a resource in terms of a Maori tenure. In numerous cases, usufructuary rights were implied if not explicitly stated. Doig contends that fishing rights at the hapu level were conceived of in this way. Importantly this usufructuary conception of hapu rights appears not to have been regarded as an inferior title

15. Asher, personal communication, cited in Ann Williams, 'Land and Lake: Taupo Maori Economy to 1860', MA thesis, University of Auckland, 1988, p 77, cited in Doig, p 310
16. Doig, pp 309–316, 318
17. See for example Grace to Coates, 4 May 1926, MA 31/23B, NA Wellington; 'Memorial of the Native Owners of the Several Rivers Flowing into Lake Taupo the Beds of which had been Proclaimed to be Crown Lands', 12 August 1927, AAMK 869/706B, enclosed in T W Lewis to Minister of Native Affairs, 29 August 1927, AAMK 869/706B, NA Wellington
18. Earl, Kent, Massey, and Northcroft to Coates, 19 October 1927, AAMK 869/706B, NA Wellington

subject to a superior ownership right. Claims to usufructuary fishing rights by individuals were, however, subject to a superior hapu right. Doig cautions against attempts to reduce Maori customary rights to accord with technical western conceptions of ownership and property. Alternatively she advances a conceptualisation in terms of community rights associated with particular kin groups whereby 'residence in a particular settlement and affiliation to the appropriate kin groups conferred a right to use the various resources of that community'.[19]

From her analysis of evidence before the Native Land Court, Doig draws some tentative conclusions about traditional Maori management and control of Taupo fisheries. As with land and people, she contends that mana was the basis of chiefly authority over natural resources. As a consequence of such mana, chiefs and kaumatua had an acknowledged role in the management of natural resources such as fisheries. Witnesses appearing before the land court in Taupo recounted who were the principal men in relation to particular resource areas that included fisheries. An expression of this authority over a fishery was the claim made before the court that people exploiting a resource without the right to do so would be expelled by force. Although the claim to be able to do this was frequently made in connection with Taupo fisheries, there were no examples cited of force actually being employed in this respect.

A tangible aspect of Maori resource management is the institution of rahui: a kind of prohibition. Rahui were imposed variously to ensure the sustainability of a resource, after waters had been polluted (usually as a consequence of a death), or to reserve a resource for one's own use. In this latter respect particularly, rahui can be seen as an expression of ownership. In connection with the fisheries of Lake Taupo, Doig describes rahui being imposed after people died in the vicinity of the lake. These occasions were subsequent to Te Heuheu Mananui being killed in a landslide at Te Rapa, and when the missionaries Manihera and Kereopa were murdered at Tokaanu.[20]

Clearly strong rights existed in the Taupo fishery. Although lesser emphasis appears to have been placed on boundaries between fishing grounds than in the Rotorua lakes, fishing grounds were associated with particular settlements and other sites. Further, the existence of the right to exclude others from fishing grounds suggests that the common law criteria of ownership was met.

In the course of the present author's research into Lake Taupo, one reference to Maori claiming the ownership of waters in the immediate vicinity of the lake was discovered. In a report of a meeting held amongst Tuwharetoa in 1926 to discuss the issue of rights in the Taupo catchment, Pateroe Pohe claimed that the Waikato River from the lake to Huka Falls belonged to him and his hapu, and that no arrangement had been made with him to take water from the river for the Wairakei power scheme. He informed the meeting that his hapu wanted 'the authority to enable us to make arrangements with Wairakei Ltd so that we be able to arrive at what is a fair consideration for this water'.[21]

19. Doig, pp 317–321, 328–329
20. Ibid, pp 321–326

6.5 The Introduction of Trout to Lake Taupo

The earliest attempts to acclimatise fish to Lake Taupo for the purposes of sport were made in the 1880s. Around 1880, the golden carp was introduced by the head of the Crown garrison based at Taupo. Although it acclimatised, numbers always remained small. Shortly afterwards, Gilbert Mair released what became known as Taupo carp. But it was not until the introduction of trout that a sport fishery of any significance became established. Whereas Grace states that Brown trout were not introduced until the 1890s, Barbara Cooper in her book on Lake Taupo claims that occasional sightings of brown trout were being reported as early as 1888. However, regardless of when they were introduced, it is clear that they did not become prolific until after the Hawke's Bay Acclimatisation Society, with financial assistance from the Government, released large numbers in 1892. By the turn of the century the Tongariro River was being described as one of the best brown trout fisheries in the world, and local hotels were promoting trout fishing in Lake Taupo and its tributaries.[22]

Around 1900, the Government was petitioned to release rainbow trout into the waters of Lake Taupo. The petition was widely circulated amongst Taupo residents and was signed by both Maori and Pakeha. It appears that one of the reasons people favoured the introduction of rainbow trout was that the brown trout were proving too difficult to catch. Between 1905 and 1907, acclimatisation societies released thousands of rainbow trout. To help the trout become established, shags – birds which found trout a welcome addition to their diet – were shot in large numbers. Cooper records that by 1906, the district had become a popular destination for anglers.[23]

But by around 1912, the Taupo trout fishery was in decline. Apparently trout had become so numerous and large that they were exceeding their available food supply. The Government responded by introducing smelt to the lake (a small fish indigenous to New Zealand but that did not occur naturally in Lake Taupo) as an additional food supply, and by culling trout. Grace recounts how for several years around this time, smoked trout netted in Lake Taupo could be bought in New Zealand's major cities. Although the fishery recovered, by the late 1920s it was in decline again. This decline was arrested by more smelt being released into the lake. In 1927, the Duchess of York (now the Queen Mother) caught a trout in the Tongariro River on a visit to New Zealand. To this day the lake and its associated rivers and streams are considered to be one of, if not the best trout fishery in the world. [24]

It has been claimed that the introduction of trout to the Taupo catchment caused a serious depletion of stocks of indigenous fish. In 1926, Sir Maui Pomare remarked in Parliament that 'the pakehas' trout ate out the Maoris kouras and kokopus' in Lake Taupo.[25] Similarly, John Grace records how the native fish 'that were once seen in great shoals . . . are now seldom seen' having been 'almost exterminated by the trout and shag'.[26]

21. 'Enquiry as to Private Rights', 22 April 1926, MA 31/23B, NA Wellington
22. Cooper, pp 109–111; Grace, p 516
23. Ibid, pp 112–113
24. Ibid, p 114; Grace p 517
25. Pomare, NZPD, 1926, vol 211, p 289

In 1867, legislation was passed that inter alia vested power in various acclimatisation societies to introduce and manage sport fish and game in New Zealand.[27] Initially Lake Taupo fell within the area of control of the Auckland, Wellington, and Hawke's Bay Acclimatisation Societies. In the early 1900s, though, local anglers pressured the Government to form an acclimatisation society centred on the Taupo fishery. Rather than acquiescing to their demands, the Government responded by placing the control of the fishery in the hands of the Hotel and Tourist Department. As a consequence of apparent mismanagement by that department, responsibility for the Taupo trout fishery was in turn handed over to the Department of Internal Affairs in 1926. In the same year, the Government established a trout hatchery on the banks of the Tongariro River.[28]

Although initially acclimatisation societies (and later Government departments) were legally responsible for the management of the Taupo trout fishery, in many respects Tuwharetoa were very much in control of large parts of the fishery. By virtue of still owning much of the land contiguous with both the lake and its tributaries, many hapu and individuals of Ngati Tuwharetoa were able to regulate access to parts of the lake. Many such landowners charged anglers for the right to fish from and camp upon their land. In February 1924, the Registrar of the Aotea Native Land Court described to the Under-Secretary of Native Affairs how the Maori owners of riparian lands on the Tongariro River had struck a deal with a local Pakeha. The Pakeha paid the Maori owners for the right to have huts on their land for the accommodation of anglers – an arrangement that by all accounts the Tuwharetoa concerned were most happy with. In the memorandum, the registrar also stated that he was aware that some Maori in the area had issued notices warning trespassers to stay off their land and that others were deriving an income from charging anglers a fee to camp on their lands.[29] In 1926, A P Grace stated that Maori were deriving an income from charging anglers to fish the Tongariro, Waitahanui, and Waihaha Rivers.[30]

Doubts existed in some officials' minds as to the legality of such practices by Ngati Tuwharetoa. Under section 89 of the Fisheries Act 1908, it was illegal to sell or lease fishing rights. This was a provision enacted to prevent the situation arising in New Zealand that existed on many waterways in Britain where riparian landowners exclusively owned fishing rights. However, it would seem doubtful whether restricting access and charging camping fees actually constituted an alienation of a fishing right. Judge Acheson reported to the Department of Native Affairs in March 1924 that Ngati Tuwharetoa were aware it was illegal to sell their fishing rights, but that they claimed that what they were doing did not in fact constitute a sale. Acheson reported that Ngati Tuwharetoa asserted that they had no objection to people using the beds of the lake and rivers. He stressed that in the case of the Tongariro River, the owners of the riparian lands were anxious to restrict access to the fishery in order that

26. Grace, p 509
27. Protection of Animals Act 1867, ss 3, 6
28. Cooper, pp 115–116
29. Registrar, Aotea Native Land Court to Under-Secretary of Native Affairs, 28 February 1924, MA 31/23B, NA Wellington
30. Grace to Coates, 6 August 1926, MA 31/23B, NA Wellington

it did not become over-fished. They were particularly concerned to ensure the fishery remained attractive to anglers that travelled from all over the world to fish there. Acheson also alluded to problems some sections of Ngati Tuwharetoa were having with campers who were illegally camping on their land and who refused to leave when asked.[31]

The way in which Maori were exercising control over parts of the Taupo trout fishery led the Government to fear that foreign investors could buy Maori riparian lands and consequently acquire control of large parts of the fishery. In 1926, Coates stated in Parliament that a number of foreigners had entered into negotiations with Ngati Tuwharetoa with a view to acquiring their lands abutting the lake and its tributaries.[32] This fear was the reason given by the Government for wanting to acquire Maori riparian rights (which included their fishing right) and ensure public access to the lake. Although this did not necessitate the Government acquiring title to the lake bed itself, the opportunity was taken to extinguish Tuwharetoa title to the bed of the lake. Provision was also made to extinguish title to the tributaries of Lake Taupo by proclamation. This reflects the evolving Crown policy that it, and not Maori, should be the owners of lake beds in New Zealand.

6.6 The Native Land Amendment and Native Land Claims Adjustment Act 1924

In 1924, special legislation was introduced to Parliament that empowered the Crown to enter into negotiations with the Maori owners of lands abutting Lake Taupo and its tributaries in order to reach an agreement in respect of, inter alia, the bed of Lake Taupo. In speaking to the Bill, Apirana Ngata, the member for Eastern Maori, drew attention to the section that affected Lake Taupo. He noted that:

> Members interested in trout-fishing will know that a difficulty has arisen in that district [Taupo] where there is a danger of the fishing-rights being acquired by rich gentleman from overseas. The clause ensures that the people of this country will not be denied access to some of the best fishing-grounds bordering on Lake Taupo.[33]

Having been considered by the Native Affairs Committee, the Bill was passed into law.

Section 29(2) of the Native Land Claims Adjustment Act 1924 held that it 'shall be lawful for the Native Minister to enter into negotiations with Natives claiming to be owners of the lands bordering on Taupo waters for an agreement in respect of fishing-rights in Taupo waters and in respect of the beds and margins of Taupo waters.' The Act defined 'Taupo waters' as being 'Lake Taupo and all rivers and streams flowing into the lake, and the Waikato River between Lake Taupo and the Huka Falls.'[34] The Act authorised the Native Minister to arrange a meeting with those Maori claiming to

31. Judge Acheson to Under-Secretary of Native Affairs, 12 March 1924, MA 31/23B, NA Wellington
32. Coates, NZPD, 1926, vol 211, p 285
33. Ngata, NZPD, 1924, vol 205, p 1047
34. Native Land Amendment and Native Land Claims Adjustment Act 1924, s 29(1)

be owners of riparian lands. At such a meeting, if the majority agreed on the proposed terms and conditions, the Minister could enter into an agreement with the owners. The Governor General could then give effect to the agreement by issuing an Order in Council.[35]

Although the Native Land Claims Adjustment Act empowered the Government to enter into an agreement 'in respect of the beds and margins of Taupo waters', it did not foreshadow that the Government would seek to acquire title to such lands.

6.7 Conflict Over Fishing Rights

Subsequent to the passing of the 1924 legislation, but before a meeting with the Maori owners of the lands in question was held, conflict emerged between Maori and Pakeha in relation to fishing rights in Lake Taupo. In July 1925, Morehu Downs wrote to the Native Minister complaining about reports in local newspapers that Maori were trapping trout in drains which were then fed to pigs. Downs, himself a Maori, stated his strong objection to these reports, opining 'that neither a Maori nor a Pakeha would indulge in such a practice as we are only too thankful to obtain trout for food and in consequence [would be] loathe to give it to pigs.' He informed the Minister that although the police and fisheries rangers had inspected various Maori-owned houses and lands in the district, no evidence to support the allegations had been found. A letter from the Minister of Internal Affairs to the Prime Minister the following month also stated that the allegations appeared to have been unsubstantiated.[36]

Later in 1925, Hill of the Government Tourist Bureau in Rotorua informed the General Manager of the Department that a fisheries ranger had reported 'a wholesale defiance by the natives of the regulations requiring that licenses must be held by people who are fishing [for trout].' When approached, the Maori concerned said that they were 'doing this on the strength of an alleged permit given to them by the Native Minister issued from his office at Wellington'. The alleged letter, Hill contended, was in fact nothing of the sort, being simply notice that the Minister intended to convene a meeting pursuant to the Native Land Claims Adjustment Act 1924 to discuss the issue of fishing rights in Lake Taupo. Hill's letter continued, describing how one of the alleged offenders, Tepuroa Maniapoto, had accosted a ranger in Taupo and 'was very boastful about the Maoris having the right to fish without a license'. Hill urged that such 'promiscuous fishing [as was] being indulged in' should be clamped down on. He was of the opinion that Maniapoto should be made an example of by being prosecuted. In his letter, Hill also alerted attention to the fact that anglers were being charged a fee to fish from Maori-owned land abutting the Waitahanui River. Apparently numerous tourists had complained of this in the previous year.[37]

35. Native Land Amendment and Native Land Claims Adjustment Act 1924, ss29(4–7)
36. Morehu Henry Down to Minister of Native Affairs, 29 July 1925, MA 31/23B, NA Archives, Wellington; Minister of Internal Affairs to Prime Minister, 7 August 1925, MA 31/23B, NA Wellington

The matter of Maori fishing for trout illegally was subsequently put before William Nosworthy, the Minister in charge of Tourist and Health Resorts, by the General Manager of Tourist and Health Resorts, B M Wilson. Wilson stated that for years the department 'have turned a blind eye on natives fishing for food, and indeed have granted them a number of licenses at a nominal fee.' But now, he continued, 'they are making matters too warm', and urged that they be prosecuted, though he cautioned that adopting such a course of action would 'arouse a storm among the Natives.'[38] Just two days later, Coates, the Prime Minister and Minister of Native Affairs, wrote to Nosworthy enclosing the letter on which authority Maniapoto et al were claiming that they did not require licences. Indeed, as Hill had asserted, the letter made no mention of Maniapoto's claimed arrangement. Coates, however, urged Nosworthy not to press charges against the offenders because he thought Maori of the Taupo district were in the mood to settle with the Government, and he did not wish to jeopardise this state of affairs.[39]

6.8 A Settlement is Negotiated

6.8.1 First meeting: Waihi, 21 April 1926

Coates issued a notice in December 1924 advising that a meeting was being called of owners of lands surrounding Lake Taupo. The purpose of the meeting was to negotiate with the Crown an agreement pertaining to fishing rights and the ownership of the beds and margins of Taupo waters. However, 18 months passed before the meeting was actually held. The cause of the delays were various and included an outbreak of infantile paralysis, the availability of various politicians, and disagreement amongst Ngati Tuwharetoa as to the best place to convene the meeting.[40]

In the period between the first notice and the actual meeting, disquiet became evident amongst parts of Ngati Tuwharetoa as to the proposed settlement. In March 1926, a petition signed by members of northern Taupo hapu was sent to the Minister of Native Affairs. It stated that signatories disagreed with the proposal that would see Lake Taupo and its tributaries ceded to the Crown. It was claimed that this proposal was the wish of chiefs from the south of the lake, and that these chiefs had not conferred with chiefs at the northern end.[41] Earlier that same month, Sir Francis Dillon Bell, then a member of the Legislative Council, wrote to the Prime Minister in connection with the proposed meeting. Bell urged that a meeting, as provided for by

37. W Hill, Government Tourist Bureau, Rotorua to the General Manager, Department of Tourist and Health Resorts, 7 December 1925, AAMK 869/706A, NA Wellington
38. B M Wilson, General Manager, Department of Tourist and Health Resorts to Minister in Charge of Tourist and Health Resorts, 9 December 1925, AAMK 869/706A, NA Wellington
39. Minister of Native Affairs to Minister in charge of Tourist and Health Resorts, 11 December 1926, AAMK 869/706A, NA Wellington
40. Brian Bargh, *The Volcanic Plateau*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), November 1995, p 112
41. John Chase to Minister of Native Affairs, 27 March 1926, MA 31/23B, NA Wellington

the 1924 Act, be held forthwith, stressing 'the extreme urgency and importance of the matter'. He considered that:

> If such a meeting be held and an agreement arrived at, the whole question of the bed of Lake Taupo and of the streams flowing into it would be settled, proper fees could be determined for the special fishing in the Lake and streams, the Natives would be benefited, and a great advantage would accrue to Europeans.

Bell also expressed the view that an agreement in respect of Lake Taupo that avoided litigation 'would practically dispose of the necessity for argument in the long pending appeal in the case of Lake Waikaremoana.'[42] In 1918, the Native Land Court had ruled that Lake Waikaremoana was Maori customary land. Although the Crown immediately lodged an appeal, it was not heard by the Appellate Court until 1944.

The meeting was held in Waihi on 21 April 1926. It was attended by Coates, Sir Maui Pomare, a large number of Ngati Tuwharetoa, and various Government officials. The only record of the meeting uncovered by the present author was an article in the *Evening Post* on 23 April 1926. It stated that at the meeting Hoani Te Heuheu spoke in support of the proposed settlement. Ngahu Huirama was reported as having claimed that a cession of all Maori rights over the lake and rivers of the area would require an annuity of £15,000 being paid to Ngati Tuwharetoa. According to Huirama, this would be similar to the deal reached with Te Arawa in respect of their lakes. The article stated that Coates had replied:

> that the Crown was not concerned with the ownership of the lake. All they wanted was to secure to the Natives some financial benefit from the fishing attractions of the lake. At present the Natives got nothing and government wanted to ensure they got something. However, he rejected an annual payment of £15,000 but offered in return 50% of the fishing fees. In return Natives would cede all their fishing rights in and over the Taupo waters. Mr Coates pointed out that the payment made annually to the Arawa people was not a payment for the beds of the Rotorua lakes, but was made in consideration of the services rendered to the Crown by the Arawa people in the Maori war days. Further the Government did not want to have anything to do with the bed of Lake Taupo which was quite a different matter from the question of the fishing rights in Taupo waters.[43]

According to the *Evening Post*, Coates then met with the leaders of Ngati Tuwharetoa. In this meeting it was agreed that:

> the Natives hand over to the Crown their fishing rights in and over Lake Taupo, in consideration of a perpetual annual payment of £3000, provided that should 50 percent of the license fees collected be more than £3,000 then such larger sum should be paid.

It was agreed that the details of the agreement would be worked out at a later date, especially the question of rights in the streams and rivers flowing into Lake Taupo.[44]

42. Bell to Prime Minister 'Memorandum for Ministers', 9 March 1926, MA 31/23B, NA Wellington
43. *Evening Post*, 23 April 1926
44. Ibid

Although it was reported that the detail of the agreement was to be worked out at a later stage, a memorandum from Coates to the Governor General, dated 26 April 1926, detailed what had been agreed at the Waihi meeting five days earlier. Essentially the contents of the agreement were eventually included in the final agreement and the 1926 legislation. The memorandum concluded by asking the Governor General to sign the attached Order in Council that, in accordance with the Native Land Claims Adjustment Act 1924, would give the agreement statutory effect.[45]

The claim made in the *Evening Post* that it was agreed that 'the Natives hand over to the Crown their fishing rights' is a trifle confusing. Coates's memorandum to the Governor General stated that the 'beds of all Taupo waters' were to be vested in the King. No mention was made of fishing rights other than in connection with trout, but when the agreement was enshrined in legislation, Tuwharetoa's customary fishing rights were reserved to them. Possibly the author of the *Evening Post* article meant that Maori were ceding the right to charge anglers for camping and the right to fish from Maori-owned land. Although the article raises the possibility that Tuwharetoa did not agree to cede the beds of the lake and its tributaries, this seems unlikely when Coates's memorandum is considered.

But Coates's memorandum makes his claim reported by the *Evening Post* that the Crown had no interests in the beds of the Taupo waters seem rather duplicitous. The 1924 legislation pursuant to which the meeting was held makes specific reference to seeking an agreement in respect of the bed and margins of Taupo waters. In the light of this and the eventual agreement, the Prime Minister's claim that the Crown had no interests in the beds of Taupo waters was incredible. And further, the claim that the annuity paid to Te Arawa was for services rendered to the Crown during the wars, is at best a half truth. Although Te Arawa's loyalty may have been a factor, the extinguishment of Te Arawa's customary rights to 14 of their lakes surely was a significant aspect of the deal secured by the Crown. Similarly, there can be little doubt that the Government's eyes were set on acquiring title to the bed of Lake Taupo. That this was denied at the only meeting that appears to have been held with anything close to a comprehensive representation of Ngati Tuwharetoa is alarming.[46]

6.8.2 The question of rivers

Before the preliminary agreement reached at Waihi was formalised, confusion emerged as to whether or not fishing rights in the tributaries of Lake Taupo would be included in the settlement. An undated story in the *New Zealand Herald* referred to a 'telegram from Wellington' that stated 'fishing rights including those in regard to the rivers as specified, [were] to fall into the hands of the Crown'. The article reported that Taupo Maori who had been present at the 21 April meeting were emphatic that it had not been agreed that fishing rights in the streams and rivers were to be ceded to the Crown.[47] On 26 April, the *New Zealand Times* ran a story on the negotiations vis-a-vis Taupo waters. The article pointed out that 'Taupo waters', as defined by the

45. Minister of Native Affairs to Governor General, 26 April 1926, MA 31/23B, NA Wellington
46. *Evening Post*, 23 April 1926

Native Land Claims Adjustment Act 1924, included all tributaries to the lake and the Waikato River as far as Huka Falls.[48]

In connection with the same matter, Hoani Te Heuheu sent a telegram to the Prime Minister on 29 April 1926. Te Heuheu asked Coates to:

> Please correct report of lake meeting appearing in *Hawke's Bay Herald* Monday morning wherein it states freehold lake and one chain reserve to all rivers conceded to Crown for £3000 as such. Reports incorrect and detrimental to our interests.[49]

The following day, Raumoa Balneavis, Coates's private secretary, acknowledged the receipt of Te Heuheu's telegram. However, the question as to whether rivers and streams were to be included in the settlement was not addressed. Balneavis simply stated that a date was to be set for a meeting in Wellington between representatives of Ngati Tuwharetoa and the Crown to discuss details of the preliminary agreement reached at Waihi.[50]

In late April, Judge Browne of the Aotea Native Land Court advised the Department of Native Affairs that the court had received applications from 6 owners of Maori land adjacent to the Tongariro River who wished to 'transfer' their fishing rights. According to Browne's letter, these rights were worth between £10 and £30 per annum.[51] Although it is not clear exactly what these applications were about, it would seem that the owners of these lands wished to sell to private individuals the rights to fish from and camp on their riparian lands. In any case, the Government was opposed to any such alienations being allowed to proceed. On the advice of Balneavis and Shepherd (the Chief Clerk of the Department of Native Affairs), an Order in Council was issued in May 1926 prohibiting the sale of Maori land in the vicinity of the Tongariro River and Tokaanu to anybody other than the Crown.[52]

6.8.3 Second meeting: Wellington, July 1926

The meeting in Wellington alluded to by Balneavis was eventually held in July 1926. At this meeting, Ngati Tuwharetoa were represented by Puataata Grace, Weehi Tuiri, Pau Mariu, Nguha Huirana, Pitoroi Mohi, Waimarama Te Hata, Paora Rokino, Hoani Te Heuheu, Joseph Moon, Hika Rahui, and Kahu Te Kuru. The Government met the costs of travel and accommodation incurred by the Ngati Tuwharetoa representatives.[53] On 21 July 1926, the Ngati Tuwharetoa representatives met amongst themselves and agreed upon a set of resolutions. With one exception, these resolutions were essentially what Coates had reported to the Governor General as

47. 'Taupo fishing rights: Inclusion of the rivers not intended by Natives: Meaning of Agreement', *New Zealand Herald*, nd, AAMK 869/706A, NA Wellington
48. *New Zealand Times*, 26 April 1926, cited in Bargh, pp 113–114
49. Hoani Te Heuheu to Prime Minister, 29 April 1926, MA 31/23B, NA Wellington
50. Balneavis to Haoni Te Heuheu, 30 April 1926, MA 31/23B, NA Wellington
51. Judge Browne to GP Shepherd, 26 April 1926, AAMK 869/706A, NA Wellington
52. Balneavis to Shepherd, 14 May 1926, AAMK 869/706A; Shepherd to Coates, 17 May 1926, AAMK 869/706a NA Wellington; 20 May 1926, *New Zealand Gazette*, 1926, no 31, p 1320
53. Balneavis to the Proprietor, Wellington Hotel, 16 July 1926, MA 31/23B

what had been agreed to at Waihi. However, the one exception was quite significant: 'That the beds of all Taupo Waters shall *not* be vested in the King as a Public Reserve' (emphasis in original).[54]

Ngati Tuwharetoa's resolutions were then tabled at a meeting with Coates the following day. The outcome of that meeting was the final agreement, signed on 22 July 1926 by Hoani Te Heuheu, on behalf of Tuwharetoa, and Coates, on behalf of the Crown. The agreement defined 'Taupo waters' as being the lake, all tributaries, and the Waikato River from the lake mouth to Huka Falls. In exchange for title to the beds of these waters being vested in the Crown as a public reserve, and a right of way to licence holders being granted over all Maori-owned riparian lands, Ngati Tuwharetoa were to receive an annuity of £3000 plus half of any revenue over £3000 derived from trout fishing licences, camping fees, and fines. The tribe would also receive 50 free licences. A trust board was to be established to administer all monies that were to be paid to Ngati Tuwharetoa. As well as the right of access around the lake, holders of special licences were to have access rights to a one chain strip along tributaries to the lake as defined by the Governor General. The agreement provided for some areas not to be subject to the public rights of access, and for compensation to be paid to owners of Maori freehold land bordering the lake and its tributaries. This compensation was for the loss of income previously generated from charging anglers to camp and fish on their land, and was to be assessed by a specially constituted tribunal. It was agreed that legislation would be passed to give effect to the agreement.[55]

What caused Ngati Tuwharetoa to agree to the beds of all Taupo waters being vested in the Crown after having resolved just days earlier not to agree to this remains unclear to the present author. As well as what transpired in this meeting with Coates, little is known about the process by which the Tuwharetoa representatives who negotiated the agreement were decided upon. It would appear that the Government was happy for Ngati Tuwharetoa to work this out internally. However, it seems that the various hapu of Ngati Tuwharetoa appointed representatives to attend the Wellington meetings. A telegram in connection with the lake question from a section of Ngati Tuwharetoa based in Rotorua averts to them having appointed one of the representatives.[56] Given that no records of the meeting have been uncovered, it remains unclear whether the terms of the agreement were clearly understood by all present and negotiated freely. Neither is it apparent whether the representatives who were party to the Wellington negotiations had a mandate from all those at the earlier Waihi meeting to enter into a final agreement without further consultation with the constituent Tuwharetoa hapu.

54. 'Resolutions passed at a Meeting of Ngati Tuwharetoa at Wellington, 21 July 1926', MA 31/23A, NA Wellington
55. 'Taupo Waters and Fishing Rights', 26 July 1926, MA 31/23B, NA Wellington
56. Wikitoria Dansey to Minister of Native Affairs (translation), 26 April 1926, MA 31/23B, NA Wellington

6.8.4 Problems with the agreement

Shortly after the agreement had been signed, Grace wrote to Coates informing him that the terms of the agreement had been 'broadcasted' to the tribe. He stated that 'the majority of the natives interested are fairly satisfied, provided a satisfactory settlement is arrived at between the Crown and the river owners'. Grace went on to discuss the situation in relation to the Tongariro River. He stated that Maori who owned riparian lands along the river were making a good income from anglers, and that these owners were concerned that the compensation to be determined would be inadequate. He also informed Coates that the riparian owners were farming their lands and had undertaken flood protection works. According to Grace, they were concerned that under the settlement, they would lose the right to undertake such works on the riverbank. In light of these concerns, Grace proposed that the Tongariro be excluded from the ambit of the settlement. He suggested that the Tongariro be made a special reserve for overseas visitors so that fishing of a world class standard could be guaranteed. If this was not acceptable, Grace sought an assurance that compensation for these landowners would be equal to the income they were presently deriving.[57] Coates responded that the question of river rights would be dealt with by the tribunal to be appointed pursuant to the July 1926 agreement, and that the agreement reached could not be varied.[58]

Further to the concerns expressed by Grace in connection with the Tongariro River, dissension amongst other members of Tuwharetoa became apparent shortly after the agreement was signed. On 29 July 1926, W R Ngahana, an employee of the Native Trust Office and member of Ngati Tuwharetoa, wrote to Coates's private secretary. Ngahana stated that he was:

> convinced that [the] majority of my people would much prefer that the 'mana' to the beds of the Lake and Rivers be not taken away from them. Is it now possible to have this clause [of the agreement] amended . . . ?

He also asked whether every member of Ngati Tuwharetoa could receive 'free fishing rights' (presumably meaning a licence to fish for trout), or if not free, at least at a nominal rate.[59]

As well as concern about the private rights of individuals in rivers and streams, there appears to have been disquiet amongst some members of Ngati Tuwharetoa as to how the agreement in respect of 'Taupo waters' affected their rights to thermal springs situated on the banks of the lake and its tributaries. A R Graham wrote to Coates in August 1926 drawing the minister's attention to the fact that springs were situated on lands that fell within the chain strip around the lake and on the banks of the Waikato River.[60] Similarly in September, Mrs L M Grace wrote to Coates informing him that, along with two others, she was the owner of valuable springs on

57. Grace to Coates, 6 August 1926, MA 31/23B, NA Wellington
58. Coates to Grace, 12 August 1926, MA 31/23B, NA Wellington; Coates to Grace, 25 August 1926, MA 31/23B, NA Wellington
59. W R Ngahana to Balneavis, 29 July 1926, MA 31/23B, NA Wellington
60. A R Graham to Coates, 20 August 1926, MA 31/23A, NA Wellington

lands bordering Lake Taupo that fell within the one chain designation. In reply to her question as to what to do to protect the springs, Balneavis stated that ample provision was contained in the agreement for the exemption of such springs. He advised Mrs Grace to apply to the Minister of Internal Affairs for the springs to be excluded from the one chain right of way around the lake.[61]

6.9 The Native Land Amendment and Native Land Claims Adjustment Act 1926

As noted above, the 1924 legislation provided for an agreement to be entered into between the Government and Ngati Tuwharetoa in respect of Taupo waters, and for that agreement to be given effect by an Order in Council.[62] But rather than an Order in Council being issued, the agreement was enshrined in legislation in 1926. In a 1928 decision of the Supreme Court concerning the meaning of the terms of the Lake Taupo settlement, it was stated that the provisions for compensation contained in the 1924 agreement exceeded what the 1924 legislation provided for. Therefore statutory authority was necessary to validate the agreement.[63] Presumably the Government, being seized of the fact that the terms of the agreement reached in 1926 had exceeded what was provided for in the 1924 legislation, decided to give effect to the agreement through legislation. Accordingly a clause was included in the Native Land Amendment and Native Land Claims Adjustment Bill 1926 to that effect.

The Native Land Claims Adjustment Bill 1926 declared the beds of Taupo waters to be vested in the Crown, and made provision for the public to be able to use lands abutting the lake and its tributaries. As payment for forfeiting these rights, the bill made provision for Tuwharetoa to receive an annuity of £3000 (to be administered by a trust board), along with 50 free trout fishing licences. A schedule of fees for trout fishing licences was also included in the bill.[64]

In introducing the final reading of the bill, Coates stressed that the reason the Government had sought an agreement with Ngati Tuwharetoa in respect of Lake Taupo was to avoid the danger of the banks of the lake and tributaries being leased to foreigners. He then proceeded to discuss the competing claims of Maori and the Crown to the ownership of lakes in New Zealand. Coates, somewhat curiously, noted that:

> These kinds of disputes have only to be prolonged a comparatively short time before Parliament may be faced with expensive Commissions and findings that will involve the country in very heavy expenditure. As time passes we get farther and farther away from the actual facts. The Treaty of Waitangi.

61. L M Grace to Coates, 3 September 1926, MA 31/23A, NA Wellington; Balneavis to L M Grace, 7 September 1926, MA 31/23A, NA Wellington
62. Native Land Amendment and Native Land Claims Adjustment Act 1924, s29(8)
63. *Hoani Te Heuheu v His Majesty the King*, 14 December 1928, unreported, MA 31/23B, p 5, NA Wellington
64. NZPD, 1926, vol 211, p 286

He continued, observing that although Maori base their claims to lakes on the Treaty, 'the Crown has never admitted it'. The 'matter had become a grievance as between the Maori and the pakeha, and, of course, every honourable member knows that it is dangerous to allow a dispute of that sort to drag on, particularly as the Native mind is apt to magnify the trouble.' Having outlined the contents of the Bill, Coates praised the generosity of Tuwharetoa in the matter, and noted that they 'are anxious to have some satisfactory method of being able to bury the past and deal with the future.'[65]

Albert Samuel, the member for Ohinemuri, drew particular attention to the proposed clause that would entitle Ngati Tuwharetoa to half of all fines collected for breaches of fishing regulations – a clause he considered to embody 'a principle of a most pernicious character'. He remarked that Maori 'were positively the worst offenders as far as poaching is concerned ... taking fish in an illegal and unsportsmanlike manner.' Upon being pressed on this, Samuel described how Maori caught trout with spears, pitchforks, and hooks baited with fish roe. He also complained about the proposed licensing regime, stating that it was unfair to demand that fishermen, by way of their licence fees, be required to pay compensation to Tuwharetoa. In regard to Coates's contention that the beds of lakes belonged to the Crown, Samuel incredulously declared that:

> Surely the Government must know if this is so – there must be a definite legal opinion as to whether the beds of lakes belong to the Crown or to the Natives. If they belong to the Crown, the Crown should assert its rights and take the beds of the lakes, and if they belong to the Natives, they should purchase them from the Natives and get it over once and for all.

Samuel continued his diatribe, warning that the institution of licensing fees in the manner proposed effectively created fishing preserves:

> the Taupo fishing belongs to the people of New Zealand, and if we are going to charge them exorbitant fees we are making the Taupo fishing-ground a preserve for the overseas tourist.[66]

Samuel's paroxysm raised the ire of the member for Western Maori, Sir Maui Pomare. Pomare stated that he could not remain silent 'and allow some of the remarks that have fallen from honourable members to pass unchallenged.' He repudiated the notion that the fishing rights in Taupo belonged to all New Zealanders. He claimed that section 71 of the Constitution Act 1852 gave Maori the sole right to their fishing.[67] Responding to the argument that it was Pakeha money that put trout in Lake Taupo, Pomare pointed out that Maori had incurred a cost by their koura and kokopu having been eaten by the trout. In relation to allegations about illegal fishing

65. Coates, NZPD, 1926, vol 211, pp 285–286
66. Samuel, NZPD, 1926, vol 211, pp 287–288
67. This claim is somewhat confusing. Section 71 of the Constitution Act held that the laws of Maori may be maintained in any districts set apart by proclamation. The CFRT Land Legislation Database states that although requests were made by Maori for such a proclamation in the King Country, no such proclamation was ever made.

methods being employed by Maori, Pomare (perhaps somewhat pettily) asked who had taught Maori such 'illegal' techniques. Further, members were alerted to the fact that fish caught in such a way were never wasted. He then proceeded to rebut Samuel's contention that the proposed licensing regime in effect was creating fishing preserves. Pomare claimed that as the situation stood presently, Maori, by virtue of their riparian rights, could prevent anglers from fishing in many parts of the lake and its tributaries. He observed that in 'the Old Country' they 'sell their fishing rights over a stretch of a mile for £1000 and more.' It was argued that this 'bill will give the honourable gentleman what he wants, and that is to give the people of this country the right to fish in these rivers.'[68]

After Pomare, Ngata spoke about the bill. In relation to the allegations that Maori frequently engaged in illegal fishing practices, he stated that:

> the Maori mind cannot understand the psychology of the pakeha in regard to sport, particularly fishing. He cannot understand why a man should travel thousands of miles, at great risk to his health and a good deal of discomfort, and then for hours and days wade up to his waist in cold streams, and, with a very slender stick and a line the thickness of a thread, and an absurdly small hook, try to catch a big fish – and enjoy it. . . . The Maori has been accustomed from time immemorial to fish for food, but probably he is getting more civilised now, and may yet arrive and gain full honours in civilization by being able to handle a rod and tackle.[69]

When the Bill was before the Legislative Council, Heaton Rhodes, the councillor for Canterbury, pointed out that:

> the Natives were not anxious to part with these rights [to Lake Taupo]. They were perfectly content to let things remain as they are at present. They have the right to alienate the Land adjacent to the lake, and they might sell to wealthy sportsmen from England, or America, or elsewhere tracts of Land which would shut out the residents of this country and other visitors from access to the lake and to the rivers.[70]

In connection with the proposed annuity, Alexander Malcolm stated that he considered:

> the Maoris are being very generously treated; but seeing one of the glories of New Zealand is that we have got on so well with our Maori people, perhaps even this generous payment can be accepted.[71]

The Native Land Claims Adjustment Act was passed on 11 September 1926. Section 14(1) vested the beds of Lake Taupo and the Waikato River from the lake mouth to Huka falls in the Crown. Concomitantly they were declared to be 'freed discharged from the Native customary title (if any)'. The vesting of the lake bed in the Crown was contingent upon Maori being guaranteed access to the lake and their fishing rights in

68. Pomare, NZPD, 1926, vol 211, p 289
69. Ngata, NZPD, 1926, vol 211, p 290
70. Rhodes, NZPD, 1926, vol 211, p 378
71. Malcolm, NZPD, 1926, vol 211, p 379

respect of indigenous species being reserved to them. However, indigenous fish caught by Maori could not be sold, and there was nothing in the statute to suggest that Maori had exclusive rights to indigenous fish in Lake Taupo. Section 14(3) gave the public an access right to a one chain strip around the lake. The section made provision for the Governor General to be able to exempt portions of the strip from public use. Under section 14(4) the Governor General could declare the beds of the lake's tributaries to be Crown land. The Governor General was empowered to vest in the holders of special licences access rights over a one chain strip abutting tributaries declared to be Crown land. As with the lake's one chain strip, the Governor General could 'exempt any defined portion' of the one chain strip 'from use by the holders of special licences'. This section also vested in the Crown the sole right to let parts of such lands for the purpose of camping, and declared that it was illegal for any person owning such lands to alienate them in any way without the consent of the Governor General. However, provision was made for compensation to be paid to land owners who were 'injuriously affected' by the exercise of any powers under the section. Pursuant to section 14(8) and (9), the Governor General could issue regulations for the management of the fisheries and waters of the Taupo catchment. Section 14(10) held that the rights of Pakeha landowners were unaffected by the provisions of the Act.

The Native Land Claims Adjustment Act 1926 made provision for the establishment of the Tuwharetoa Maori Trust Board to administer the funds paid by the Government in respect of Tuwharetoa's rights to the bed of Lake Taupo. Section 15 specified that the board was to receive a £3000 annuity, plus half of all revenue over the value of £3000 generated from camping fees, licence fees, and fines in relation to breaches of fishing regulations. Section 16 held that the board was to be a corporate body with perpetual succession and a common seal. Its membership was to be determined by the Governor General in Council. The only substantive differences between the Act and the 1926 agreement was that the Act reserved to Maori their customary fishing rights, and rather than the beds of all tributaries being vested in the Crown along with the lake bed, this was to be done on a discretionary basis by Proclamation.

On 8 October 1926, pursuant to section 14 of the Act, a proclamation was published in the *Gazette* declaring the beds of all the major rivers and streams flowing into Lake Taupo to be Crown lands. The rivers affected were the Waihora, Waihaha, Whanganui, Whareroa, Kuratau, Tongariro, Poutu, Waimarino, Tauranga-Taupo, Waipehi, Waiotaka, Hinemaia (Hatepe), and the Waitahanui. Whereas all of some rivers were vested in the Crown, only parts of others were affected. The proclamation also reserved a right of way over a one chain strip along the banks of such waterways, and restricted the use of certain parts of the one chain strip.[72]

Regulations pertaining to the constitution of the Tuwharetoa Trust Board were published in the *Gazette* on 28 October 1926.[73] As per the 1926 Act, these regulations confirmed that the members of the Trust Board were to be appointed by the Governor

72. 8 October 1926, *New Zealand Gazette*, 1926, no 69, pp 2895–2896
73. 18 November 1926, *New Zealand Gazette*, 1926, no 77, p 3247

General. The first board was appointed by Order in Council on 15 November 1926. The inaugural members included many of those who had represented Ngati Tuwharetoa in the negotiations with the Crown in 1926. The board's first meeting was held on 24 November 1926. At this meeting Hoani Te Heuheu was elected chairman, and A P Grace was elected as secretary.[74]

6.10 The Settlement is Contested

It appears that the negotiators of the 1926 agreement ceded the ownership of the beds of all the major tributaries, along with all concomitant rights, to the Crown. However, this issue was to be hotly contested by various factions and individuals over the ensuing years.

Certainly Maori occupying lands through which the Waitahanui River ran objected to giving up their 'mana' over their river. In November 1926, the Postmaster at Taupo informed the Government that visitors to Taupo were complaining that Maori were refusing to allow them to fish on the Waitahanui River unless they paid a fee. Also a notice had been issued stating that some of the land in question was a 'Native reserve'.[75] Around the same time, Paneta Otene Meihana wrote to the Under-Secretary of Internal Affairs objecting to the proclamations that declared the beds of certain rivers to be Crown Land, and that had instituted fishing regulations in respect of Taupo waters. Meihana pointed out that the riparian rights of Pakeha owning lands adjacent to Taupo waters were not subject to the Government's provisions, and asked why Maori freehold land (as the Waitahanui lands were) could not be exempted.[76] That same week the *Napier Telegraph* ran a story on the conflict over fishing rights in the Waitahanui. It stated that the owners of the river's riparian lands claimed that they were not aware that the river had been opened up to the holders of special licences, and that all notices concerning the fishery had only been published in English.[77]

These problems with fishing rights in the Waitahanui River precipitated a meeting on 23 November 1926 between Balneavis, Maui Pomare, and the Waitahanui Maori concerned. The *Dominion* reported that at this meeting, many of the Maori present disputed that the settlement reached in respect of Taupo waters included the lake's tributaries. Nothing appears to have been settled at the meeting.[78] Two days later Balneavis met again with the Maori concerned. Balneavis reported to the Under-Secretary of Internal Affairs that at this meeting Maori with interests in the river had told him they wanted the Waitahanui excluded from the operation of the 1926 Act.

74. Grace, p 518
75. Taupo Postmaster to Under-Secretary Native Affairs, 2 November 1926, AAMK 869/706A, NA Wellington; Under-Secretary Internal Affairs to Under-Secretary Native Affairs, 5 November 1926, AAMK 869/706A, NA Wellington; Taupo Postmaster to Under-Secretary Internal Affairs, nd, AAMK 869/706A, NA Wellington
76. Paneta Otene Meihana to Under-Secretary Internal Affairs, 4 November 1926, AAMK 869/706A, NA Wellington
77. 'Pay or get off: Troubles Between Anglers and Taupo Natives: Matter goes to Ministerial Office', *Napier Telegraph*, 6 November 1926, MA 31/23A, NA Wellington
78. 'Taupo Fishing: Waitahanui Rights Discussed', *Dominion*, 25 November 1926, AAMK 869/706A, NA Wellington

Further, they had asked Balneavis that if their title to the riparian lands remained unaffected by the agreement reached between Ngati Tuwharetoa and the Crown, as they were assured it did, why could they not exclude trespassers? The Waitahanui owners explained that anglers had provided them with their only source of revenue over the past nine years, and that this opportunity was now being denied them. Further, they claimed that they were not party to negotiating the agreement, and that the Tuwharetoa representatives at the Wellington meeting had not been appointed by them. Balneavis's report stated that he had informed them that he was satisfied the Tuwharetoa representatives had been properly appointed, and that if they molested anglers they would be liable for prosecution. He was adamant that the agreement could not be altered and that their only option was to petition Parliament asking for the law to be changed. In his report of the meeting, Balneavis stated that he was:

> convinced that the persons causing the trouble are under the influence of some agitator and these Natives being the followers of the Ratana movement are easily influenced into taking the course they have adopted.[79]

It is something of an anomaly that Balneavis appears to have made no mention of the provision in the 1926 legislation for compensation to be paid to the owners of lands abutting such rivers.

With regard to the question of whether the Waitahanui owners were represented at the negotiations, it appears that at least one of their number, Paora Rokino, was present at the meetings in Wellington.[80]

Subsequent to Balneavis's meetings with the Waitahanui owners, a delegation from the newly formed Tuwharetoa Trust Board met with the aggrieved owners. The Trust Board reported to the Department of Native Affairs that at the meeting the Waitahanui owners had agreed not to molest anglers on the river. However, they refused to withdraw their objection to the settlement, claiming that Balneavis had intimated that were they to petition the Government, they would in all likelihood be successful. This claim was later virulently denied by Balneavis.[81] But despite the Waitahanui owners' promises, Grace reported to Balneavis on 13 December 1926 that they were again demanding fees from anglers to fish in the Waitahanui.[82]

6.10.1 The Tuwharetoa Trust Board contests the agreement

The terms and extent of the agreement between Ngati Tuwharetoa and the Crown continued to be tested throughout 1927 – primarily by the newly formed Trust Board. In January of that year, Grace, the board's secretary, alerted the Government's attention to the fact that people were taking gravel and sand from the beds of Taupo

79. Balneavis to Under-Secretary Internal Affairs, 2 December 1926, AAMK 869/706B, NA Wellington
80. Balneavis to Grace, 6 December 1926, AAMK 869/706B NA, Wellington
81. 'Report of a subcommittee of the Tuwharetoa Trust Board of a meeting held with the Waitahanui people, 1 December 1926', 2 December 1926, AAMK 869/706B, NA Wellington; Balneavis to P A Grace, 6 December 1926, AAMK 869/706B, NA Wellington
82. Grace to Balneavis, 13 December 1926, MA 31/23B, NA Wellington

waters. Grace queried whether such persons should be paying a royalty, half of which by right should accrue to the trust board. The Under-Secretary of Internal Affairs replied to Grace that there was no provision in the legislation under which a royalty could be charged.[83] However, a few days later, the Under-Secretary of Native Affairs expressed a different position in a letter to the Department of Internal Affairs. The Under-Secretary observed that the Crown had no authority to control or to claim ownership of aggregate except upon Crown land. It was pointed out, that although a right of way existed along the lake margin, this land remained vested in the landowners. But aggregate in the lakes and streams was most certainly Crown property, and the Crown could regulate in respect of it. He was also of the opinion that if any royalties were derived from such aggregates, it would be divisible with the Tuwharetoa Trust Board.[84]

In August 1927, the trust board again wrote to the Under-Secretary of Native Affairs in connection with the terms of the agreement. The letter asked whether the Government would provide fishing licences at a nominal rate to members of Ngati Tuwharetoa who did not receive one of the 50 free licences under the agreement. A fee of 10/- was suggested. The board's earlier position, that the Crown should be receiving a royalty on any aggregate taken from the lake or its tributaries and that half of this should go to Ngati Tuwharetoa, was also restated. With regard to the proposal that licences be made available to Ngati Tuwharetoa at a nominal rate, the Under-Secretary of Internal Affairs wrote to his counterpart in the Department of Native Affairs. The Under-Secretary of Internal Affairs considered that this would be detrimental to Ngati Tuwharetoa's interest given that they received half of the revenue generated from licences over £3000.[85] Nothing further appears to have come of the Trust Board's proposal.

The prolific Grace wrote to Coates again in August 1927 proposing that the terms of the 1926 legislation be varied. His concern was that the settlement contained no provision for the trust board to receive any share of revenue derived by the Crown from camping fees or from royalties received in respect of aggregate extracted from the beds of Taupo waters. The Under-Secretary of Internal Affairs subsequently wrote to the Department of Native Affairs concerning Grace's proposal. He considered that 'there would appear to be sufficient power in the existing legislation to deal with the matter', and was doubtful 'as to the desirability of making any changes'. He concluded that it was 'unnecessary at the present stage to deal any further with the matter.'[86] Section 15(2) of the 1926 legislation stated that camping fees were to be included in the revenue payable to the Tuwharetoa Trust Board. However, the Act make no provision for them to receive a share of royalties in respect of aggregate. And

83. Grace to Under-Secretary Internal Affairs, 24 January 1927, AAMK 869/706B, NA Wellington; Under-Secretary Internal Affairs to Grace, 31 January 1927, AAMK 869/706B, NA Wellington
84. Under-Secretary Native Affairs to Under-Secretary Internal Affairs, 2 February 1927, AAMK 869/706B, NA Wellington
85. Grace to Under-Secretary Native Affairs, 3 August 1927, AAMK 869/706B, NA Wellington; Under-Secretary Internal Affairs to Under-Secretary Native Affairs, 15 August 1926, AAMK 869/706B, NA Wellington
86. Grace to Coates, 23 August 1926, AAMK 869/706B, NA Wellington; Under-Secretary Internal Affairs to Under-Secretary Native Affairs, 12 September 1927, AAMK 869/706B, NA Wellington

clearly the Department of Internal Affairs did not favour any changes being made to that state of affairs.

Another aspect of the 1926 legislation that was of concern to the Trust Board were the provisions that existed for certain areas to be exempted from the public right of way around the banks of the lake and rivers that had been declared to be Crown lands.[87] The Rotorua Conservator of Fish and Game had recommended to the Government which lands should be made subject to the one chain strip right of way. Upon receipt of this recommendation, the Under-Secretary of Native Affairs had written to the Conservator noting that it was assumed that none of the riparian lands recommended included any Maori dwellings or urupa.[88] No reply from the Conservator was on the file. However, it would seem that some of the recommended lands did in fact include urupa.

In August 1926, Grace wrote to the Under-Secretary of Native Affairs requesting that certain lands adjoining the lake and its tributaries be exempted from the right of way provisions under the 1926 Act. The lands for which exemptions were requested included burial caves and other urupa, pa frontages, and cultivations. Early the following month, another list of places the trust board wished not to be subject to the rights of access was submitted to the Department of Native Affairs.[89] Whether these exemptions were ever granted remains unclear to the present author.

6.10.2 The trust board's memorial

As well as seeking to protect the rights of Maori owning land abutting Taupo waters, the trust board continued to lobby the Government in relation to such persons' rights to rivers and streams that had been declared Crown land. By 1927, nothing seems to have happened in relation to compensation being paid to the owners of lands abutting rivers that had been vested in the Crown. On 29 August 1927, solicitors for the Tuwharetoa Trust Board filed with the Government a 'Memorial of the Native Owners of the several rivers flowing into Lake Taupo the beds of which have been proclaimed to be Crown Lands'.[90]

The memorial drew attention to the fact that the 1926 Act only contained provisions for compensating river owners for the loss of revenue they had previously derived from charging tourists to camp on their lands. Because the annuity paid to the trust board was for the general purposes of Ngati Tuwharetoa, these funds could not be used to compensate river owners for their rights in relation to private lands abutting tributaries of Lake Taupo. It was claimed that the negotiations for 'Taupo

87. Native Land Amendment and Native Land Claims Adjustment Act 1926, ss3, 4(a); 8 October 1926, *New Zealand Gazette*, 1926, no 69, pp 2895–2899
88. Under-Secretary Native Affairs to Conservator of Fish and Game, Rotorua, 9 September 1926, MA 31/23A, NA Wellington
89. Grace to Under-Secretary Native Affairs, 24 August 1927, AAMK 869/706B, NA Wellington; Grace to Under-Secretary Native Affairs, 6 September 1927, AAMK 869/706B, NA Wellington
90. 'Memorial of the Native owners of the several rivers flowing into Lake Taupo the beds of which had been proclaimed to be Crown Lands', 12 August 1927, enclosed in T W Lewis to Minister of Native Affairs, 29 August 1927, AAMK 869/706B, NA Wellington

waters' pursuant to the 1924 legislation deprived individual river owners of the right to sell their rights – rights that were of some great value as a consequence of the world class fishing in the district's rivers. It was submitted that 'this was such an invasion of private rights as to be repugnant to all legal and equitable principles'. Further, it was held that 'the river owners are entitled at law and in equity to separate compensation for their private rights of which they have been deprived.' The memorial claimed that at the time of the negotiations in 1926, Tuwharetoa had no legal advice, and that they were not aware of the full extent of their rights. However, they were now seized of the doctrine of *ad medium filum aquae* and the ramifications of this in terms of the ownership of rivers. The Minister was informed that three separate committees had been formed to represent the river owners around the western, southern, and eastern parts of the lake, and that the Waitahanui owners were pursuing a separate claim. The memorial asked that the committees be recognised, and that the 1926 legislation be amended to allow for full compensation to be paid as if under the Public Works Act.[91]

In briefing the Minister of Native Affairs on the matters raised in the memorial, the Under-Secretary of Native Affairs observed that much of the value of the rivers in question was as a consequence of the owners' fishing rights in them. But it was pointed out that under section 89 of the Fisheries Act 1908, it was illegal to sell or lease such rights. Further, the compensation procedure provided for under the 1926 Act would in fact compensate riparian owners for the loss of both the right to fish from their land without a licence, and the use of the one chain strip. In response to the challenges contained within the memorial concerning the impropriety of the way 'private rights' were being dealt with, it was noted that 'Parliament has authorised the procedure and private rights must give way to the public interest.' The Under-Secretary expressed the view that it would be somewhat improper for the Government to recognise the committees set up to represent the various owners given that the committees appear not to have been democratically elected.[92] This objection is ironic when it is considered how the Government passed legislation so that the Crown appointed the members of the trust board, rather than Ngati Tuwharetoa electing them.

On 19 October 1927, the trust board's solicitors wrote to Coates concerning the Taupo waters settlement. The letter traversed the process by which the 1926 agreement had been reached. Aspersions were cast upon the claim that Tuwharetoa were adequately represented at the various meetings with the Crown at which the agreement in respect of the lake was reached. Also, the solicitors stated that Ngati Tuwharetoa thought that the negotiations were only for the fishing rights in the rivers, not their beds as it had turned out. The letter claimed that the principles enshrined in the 1924 legislation upon which the negotiations proceeded, were wrong. The Act provided for the acquisition by a single procedure of both tribal and private properties. It was held that while it was reasonable to treat the lake as a tribal property

91. 'Memorial of the Native Owners of the Several Rivers flowing into Lake Taupo', 12 August 1927, AAMK 869/706B, NA Wellington
92. Under-Secretary Native Affairs to Minister of Native Affairs, 15 September 1927, AAMK 869/706B, NA Wellington

(as title had never been determined) 'it was quite improper that such a procedure should be adopted with regard to private property.' It was further contended that the tributaries of Lake Taupo were at least as valuable as the lake itself. The letter drew attention to the inequity that existed in that Pakeha-owned lands were not subject to the same provisions. In light of these concerns, it was proposed that the Native Land Claims Adjustment Act 1926 be amended to enable full compensation to be claimed and paid in respect of rivers. With a view to such, a proposed amendment to the 1926 Act was forwarded to Coates.[93]

In relation to this letter, the Under-Secretary of Native Affairs, Judge Jones, advised the Minister of Native Affairs that he considered the drafters of the 1924 legislation had knowingly and advisedly included river beds within the ambit of 'Taupo waters'. Jones was clearly of the view that no 'riparian rights other than those of private fishing has been prejudicially affected' for which 'the Natives would be entitled for compensation.'[94] Coates's reply to the trust board's solicitors reiterated what Jones had advised him. It concluded that the Government 'can not see its way to introduce legislation in the direction indicated.'[95]

Coates's reply precipitated another letter from the trust board's solicitors. They contended that the original intention of the compensation clause in the 1926 legislation was to compensate the owners of certain rivers for the income that they were deriving from people wanting to fish in those waterways. However, the clause did not in fact provide for such compensation. Instead, compensation was payable only for the taking of the right of way along the river banks, and not for the fishing rights in the river. A further proposed amendment to the Native Land Claims Adjustment Act 1926 was enclosed.[96] Coates's response to this was short and to the point. He stated that the proposed amendment was 'quite unacceptable to the Government . . . being too far reaching in its effect.' He restated that the Government had no intention of promoting new legislation in connection with the matter.[97]

6.11 The Assessment of River Owners' Compensation

The Native Land Claims Adjustment Act 1926 provided that if any tributaries to Lake Taupo were declared to be Crown land, or any other riparian lands made subject to a right of way, any owners deleteriously affected could claim compensation. Claims had to be filed within three months of any such declaration. Within this period subsequent to the October 1926 proclamation, 48 such claims were filed.[98]

In October 1928, Hoani Te Heuheu filed proceedings in the Supreme Court seeking an interpretation of certain provisions of section 14 of the Native Land Claims

93. Earl, Kent, Massey, and Northcroft to Coates, 19 October 1927, AAMK 869/706B, NA Wellington
94. Under-Secretary Native Affairs to Minister of Native Affairs, 27 October 1927, AAMK 869/706B, NA Wellington
95. Coates to Earl, Kent, Massey, and Northcroft, 10 November 1927, AAMK 869/706B, NA Wellington
96. Earl, Kent, Massey, and Northcroft to Coates, 16 November 1927, AAMK 869/706B, NA Wellington
97. Coates to Earl, Kent, Massey, and Northcroft, 18 November 1927, AAMK 869/706B, NA Wellington
98. Solicitor General to Secretary of Internal Affairs, 30 August 1948, AAMK 869/706C, NA Wellington

Adjustment Act 1926. In particular, clarification was sought as to the extent of compensation that was payable by the Crown under section 14(4) in respect of tributaries of Lake Taupo that had been vested in the Crown. In considering the July 1926 agreement which the 1926 legislation purported to give effect to, Justices Blair, McGregor, and Ostler stated that there was:

> no difficulty in ascertaining the meaning and effect of the agreement. The Natives agreed to give up not only all their rights of ownership in the beds of Lake Taupo and of all the rivers and streams mentioned, but practically their rights of ownership over a strip of land, one chain in width around the margin of the Lake and along both the sides of each of such rivers and streams.

The decision noted that pursuant to the Native Land Claims Adjustment Act 1924, under the authority of which the agreement was made, the Minister had no power to award any compensation other than a proportion of licence fees. Clause 13 of the agreement had made provision for the owners of lands adjoining rivers who had derived an income from letting their land for camping and fishing to receive compensation. This, the decision noted, went beyond the ambit of what was permitted under the 1924 Act, and was therefore without statutory authority. This had given rise to the need to enshrine the agreement in legislation, leading to section 14 of the Native Land Claims Adjustment Act 1926.

However, in terms of giving effect to the agreement and allowing the owners of such lands to claim compensation, Blair et al considered the 1926 Act to be deficient. It was surmised that under that Act, the annuity and the 50 free fishing licences was full compensation for the deprivation of rights resulting from proclamations taking the beds of rivers and streams, and for the reservation of a right of way over the margins of such waters. Therefore no further 'compensation can be claimed by any Native for the deprivation of that right.' This, it was observed, was unjust to those Maori who had been granted a further right of compensation in the 1926 agreement. The decision stated that it was not clear whether this failure to give full effect to the agreement was deliberate or inadvertent. Remedying this problem was seen as being in the Government's 'own hands', therefore the Court considered that it should decline to exercise the discretionary jurisdiction vested in it. Consequently no declaration as to the meaning of section 14 of the Native Land Claims Adjustment Act 1926 was made.[99]

By the mid-1940s, it appears that no progress had been made towards settling the river owners' claims for compensation. In 1946, despite Coates's earlier insistence that the legislation governing the river owners' right to compensation would not be amended, amending legislation was passed.[100] Section 4(c) of the 1926 Act had declared those eligible for compensation to be any person with rights of camping or fishing in lands made subject to a right of way, who were 'injuriously affected' or who had 'suffered damage' by the declaration. Under the 1946 legislation the criteria for compensation was changed to any person who had 'suffered any loss' in respect of

99. *Hoani Te Heuheu v His Majesty the King*, 14 December 1928, unreported, MA 31/23B, NA Wellington
100. Maori Purposes Act 1946, s8

having been deprived of the right to let their land for fishing or camping purposes. A further six months were granted from the time of the passing of the 1946 Act for claims to be lodged, and the successors to affected lands were afforded the same rights to compensation as their predecessors.[101]

In April 1948, S A Wiren, who at that time was acting as the trust board's solicitor, wrote to the Prime Minister in connection with the issue of compensation. The letter stated that Tuwharetoa were anxious that the whole matter be dealt with in a single hearing and without extensive legal argument. To this end, Wiren proposed that the legislation governing the process be amended again. It was suggested that the compensation hearings should be governed by the Native Land Act 1931. This would have meant that the rules of evidence were not applicable. Wiren's concern appears to have been that in the assessment of compensation, it would be necessary to admit secondary and hearsay evidence given that many of the original owners who had lodged claims in 1926 had subsequently died. The Prime Minister instructed Shepherd to draft a further amendment to the 1926 legislation.[102] However, the Solicitor General considered that this was unnecessary. He pointed out that the 1926 legislation stated that compensation hearings were to be held pursuant to the Public Works Act 1908. This provision gave the commissioners appointed to determine compensation the power to receive evidence as they saw fit.[103]

The compensation claims were finally heard between the 1st and the 12th of November 1948. Sir Harold Johnson was appointed to hear and determine the claims, assisted by Judge Beechy of the Maori Land Court. Johnson received evidence from both claimants and the Crown. Although a total of £71,900 was claimed, only £45,600 was awarded. The annual report of the Department of Internal Affairs for 1949 stated that the 'award represents the solution of a long standing problem in connection with the Taupo Trout-fishing district.'[104] No records of the hearings were uncovered by the present author. The claimants were awarded costs of £2400 – approximately half of what their solicitors had claimed on their behalf.[105]

Why there was such a long delay between the agreement of Ngati Tuwharetoa and the Crown in respect of the Taupo waters, and the finalising of compensation for river owners, is not clear. A report of the eventual outcome of the compensation hearing in the *Evening Post* stated that it 'seemed that both the claimants and the Crown had to share the responsibility for the delay that had taken place in settling the claims.'[106] Obviously the matter would have been a low priority for the Government during the 1930s depression and World War II.

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101. Maori Purposes Act 1946, s s8(1)–(5)
102. Wiren to Prime Minister, 13 April 1948, Addendum to letter by Prime Minister, AAMK 869/706C, NA Wellington
103. Solicitor General to Under-Secretary Internal Affairs, 30 August 1948, AAMK 869/706C NA, Wellington
104. 'Annual Report of the Department of Internal Affairs for the Year ended 31 March 1949', AJHR, 1949, H-22, p 26; 'Compensation for Maori Lands Used by Fishermen', *Evening Post*, 22 December 1948
105. Spratt to Solicitor General, 2 March 1949, AAMK 869/706C, NA Wellington
106. 'Compensation for Maori lands used by Fishermen', *Evening Post*, 22 December 1948

6.12 Later Events: Deforestation and Fishing Rights

The 1950s and 1960s saw various proposals and developments in relation to Lake Taupo. In regard to these, two things stand out. The Government appears to have adopted the position that in connection with any proposed development that affected the lake, Ngati Tuwharetoa had to be consulted. But although the rights of Tuwharetoa in connection with the lake were acknowledged, increasingly the Government asserted that any such interest could not be put above the national interest. This national interest appears to have been conceived of primarily in terms of the trout fishery and water resources – particularly the hydroelectric potential of the lake and its tributaries.[107]

A particular concern of some Government departments seems to have been the effect that the deforestation of lands abutting tributaries of Lake Taupo was having on water quality and the trout fishery. In 1960, the Department of Internal Affairs alerted the attention of the Secretary of Maori Affairs to the problems being caused by the deforestation of Maori-owned land abutting rivers in the Taupo catchment. The Secretary of Internal Affairs noted that the Tuwharetoa Trust Board derived a significant revenue from the trout fishery by way of the 1926 agreement with the Crown. Therefore it was in Tuwharetoa's interest that water quality be maintained. Consequently the Secretary advocated that land in Maori control not be deforested where it adjoined rivers flowing into Lake Taupo.[108]

As well as deforestation, the nature and extent of the right vested in Maori to take indigenous fish from Lake Taupo emerged as an issue in the post-settlement era. An important aspect of settlement between the Crown and Ngati Tuwharetoa was that the rights of Maori to indigenous fish in the lake were guaranteed. From the early 1960s this provision became the focus of increasing attention. The 1926 legislation included provisions for regulations to be issued governing fishing in Lake Taupo. Although these regulations were primarily concerned with the trout fishery, they did also sometimes modify the rights of Ngati Tuwharetoa to indigenous fish which had been guaranteed by the 1926 legislation. Paragraph (d) of section 14(9) of the 1926 Act stated that the Governor General may 'make special regulations as to any matter or thing relating to or that is in any manner deemed necessary for the due administration of this section'. Presumably this was the basis upon which the right of Maori to take indigenous fish from Lake Taupo was modified by regulation. The first set of fishing regulations had been proclaimed shortly after the passage of the 1926 Act. However, these contained no reference to indigenous fish or the rights of Maori in respect of such.[109] In 1951 a new set of fishing regulations for Lake Taupo were

107. See for example Secretary of Internal Affairs to Under-Secretary of Maori Affairs, 18 July 1955, AAMK 869/706C, NA Wellington; Grace to Under-Secretary of Maori Affairs, 31 October 1951, AAMK 869/706C, NA Wellington; Secretary of Internal Affairs to Minister of Internal Affairs, 3 March 1955, AAMK 869/706C, NA Wellington

108. Secretary of Internal Affairs to Secretary of Maori Affairs, 2 September 1960, AAMK 869/706C, NA Wellington

109. 7 October 1926, *New Zealand Gazette*, no 69, pp 2896–2899

issued. These regulations vested the right to take whitebait, koura or 'other fish indigenous to New Zealand' exclusively in Maori.[110]

In November 1961, the Secretary of Internal Affairs wrote to his counterpart in the Department of Maori Affairs concerning the exclusive right of Maori to take indigenous fish from Lake Taupo. The letter stated that the Conservator of Wildlife in Rotorua had asked if this right could be amended. The Conservator had stated that it was hard to give reasons to Europeans why they could not take indigenous fish when Maori were free to do so. With regard to smelt, the Secretary of Internal Affairs observed that modern fishing methods meant that huge amounts of that species could be caught, and that this could have potentially catastrophic effects upon the trout fishery. Also it was suspected that smelt were being sold. This was illegal under the 1926 legislation. The overfishing of smelt, it was pointed out, should be of serious concern to Maori given that they derive considerable income from the trout fishery by way of licence fees. Thus it was proposed that the 'concession to Maori' be limited, although ideally 'it would be removed all together' to prevent Maori taking excessive numbers of smelt and koura. Interestingly, a marginal note beside the comment that it was hard to justify why Maori were permitted to take indigenous fish, stated 'Treaty of Waitangi'. Presumably this was written by the Secretary of Maori Affairs.[111]

The following year, in relation to the possibility of changing the 1926 Act as it affected fishing rights, the Minister of Internal Affairs wrote to the Minister of Maori Affairs. He observed that:

> For many years now it has been the practice in the Rotorua and Taupo areas for Maoris to take large quantities of smelt and koura. Initially when this concession was granted the Maori was undoubtedly economically in a lower position than the European, but today when the standard of living of both are much the same there is little justification on the basis of food supply for the Maoris to retain this privilege.[112]

On this basis, the Minister of Internal Affairs recommended that the provisions entitling Ngati Tuwharetoa to 50 free licences each year and to take indigenous fish should be revoked. These rights, he considered, should instead be capitalised and Maori paid a lump sum. It was suggested that the value of the rights was £300,000. In arriving at this figure, the value of the annuity paid to the Tuwharetoa Trust Board since its inception was detailed. According to the Minister's figures, 1938 was the first year that revenue from the sale of licences had exceeded £3000. In accordance with the settlement, half of this excess had been paid to the trust board in addition to the annuity of £3000. Since then, the value of the payment to the trust board had increased each year. In 1960 the board had received £9068. The estimate for the 1962 financial year was £12,000. If capitalised, it was suggested that this money, along with a similar lump sum for Te Arawa's rights in the Rotorua lakes, should go to the Maori Education Foundation. The stated rationale for this was that all Maori should benefit

110. 27 September 1951, *New Zealand Gazette*, no 79, p 1447
111. Secretary of Internal Affairs to Secretary of Maori Affairs, 7 November 1961, AAMK 869/706C, NA Wellington
112. Minister of Internal Affairs to Minister of Maori Affairs, 14 May 1962, AAMK 869/706C, NA Wellington

from the compensation rather than just 'two small sections'.[113] Although the opinion of the Tuwharetoa Trust Board on the Minister of Internal Affairs' proposal appears to have been sought, a response is not on the file.[114]

The proposal to revoke the exclusive right of Maori to take indigenous fish from Lake Taupo was not carried out. However, the right continued to be a source of controversy. In the early 1970s, pursuant to regulation 48 of the Taupo Trout Fishing Regulations, fisheries officers placed signs around the shores of Lake Taupo stating that taking smelt was prohibited. Subsequently in 1975, Ngawaka Wall was arrested and charged with illegally taking smelt. The case was heard in the Taupo District Court by Judge Trapski on 3 June 1975. Counsel for Wall pointed out that although the taking of smelt was prohibited by the regulations, these regulations were made subject to section 14(2) of the 1926 legislation. This clause reserved to Maori the right to take fish from Lake Taupo that were indigenous to New Zealand. Wall's counsel therefore argued that Maori had a right to take any fish indigenous to New Zealand from Lake Taupo. And although the intention of the 1926 Act may have been to vest in Maori an exclusive right only in relation to fish indigenous to the lake, the Act was worded so as to confer rights to any fish indigenous to New Zealand that was found in the lake. Judge Trapski accepted this argument and had no hesitation in dismissing the charges against Wall.[115]

The next year, the decision was appealed by the Department of Internal Affairs. The appeal was heard on 6 May 1976 in the Supreme Court by Justice Mahon. The basis of the department's case was that the term 'indigenous' has equal application to a region or a country. Therefore the right conferred on Maori to take 'indigenous fish' from Lake Taupo applied only to fish indigenous to the lake. Justice Mahon, however, rejected this argument and upheld the earlier decision. He observed that the rights of Maori to take indigenous fish 'are secured by an Act of Parliament, and if such rights are to be varied or extinguished, that is a matter for determination by Parliament alone.'[116]

And Parliament did just that. The Maori Purposes Act 1981 amended section 14 of the Native Land Claims Adjustment Act 1926. Whereas previously 'Natives' (later changed to 'Maori') were guaranteed the right to take indigenous fish, under the amendment the right was vested solely in 'Tuwharetoa Maori'. Also the right was limited to fish 'indigenous to the lake'.[117] Fishing regulations for Lake Taupo issued in 1983 held that any person was free to take whitebait, lamprey, or eel from Lake Taupo, but only Tuwharetoa could take koura or other indigenous fish.[118]

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113. Ibid
114. District Officer, Department of Maori Affairs, Whanganui to Secretary of Maori Affairs, 7 June 1962, AAMK 869/706C, NA Wellington
115. *Department of Internal Affairs v Ngawaka Wall,* unreported, 3 June 1975, Wai 18/0, Waitangi Tribunal; *Leslie William Angus v Ngawaka Wall*, unreported, 6 May 1966, Wai 18/0, Waitangi Tribunal
116. *Leslie William Angus v Ngawaka Wall*, unreported, 6 May 1966, Wai 18/0, Waitangi Tribunal
117. Maori Purposes Act 1981, s 10
118. 'Research on claim to Waitangi Tribunal re Taupo Fishing Rights', 29 January 1985, pp5-6, Wai 18/0, Waitangi Tribunal, pp 5–6

The legality of the Lake Taupo regulations was again tested in 1984. In that year a group of Maori were charged with catching trout with spears. In defence their lawyers challenged the validity of the 1983 regulations. It was claimed that whereas the law required such regulations be made pursuant to both the Native Land Claims Adjustment Act 1926 and the Fisheries Act 1908, the 1983 regulations were made pursuant only to the 1926 legislation. This defence was upheld by Judge Monaghan who ruled that the 1983 regulations were 'ultra vires'.[119] In light of this decision, a new set of regulations were issued, this time pursuant to both statutes.[120]

In late 1984, H T Karaitiana lodged a claim with the Waitangi Tribunal concerning fishing rights in Lake Taupo (Wai 18). The claimant sought 'the intervention' of the Waitangi Tribunal on 'proposed law changes in regards to the taking of . . . inanga by the Tuwharetoa Maoris from Lake Taupo.'[121] The Tribunal undertook some preliminary research on the issue.[122] The claimant was furnished with the report of these findings in the hope that it may help him advise the Tribunal more specifically as to his concerns. The Tribunal considered that three important issues arose from this preliminary research. First, whether the Tuwharetoa people should have an exclusive right to lamprey, whitebait, and eel. Secondly, whether Tuwharetoa rights should pertain solely to fish indigenous to Lake Taupo, or whether they should be to all fish indigenous to New Zealand now found in the lake. And thirdly, whether Tuwharetoa 'should have other particular rights where non-indigenous fish have depleted the indigenous resource.' However, because Mr Karaitiana did not respond to the Tribunal's request for further detail as to what exactly was being claimed, the Chairperson of the Tribunal advised the claimant that the claim was considered to have lapsed. The matter, it was noted, would only be referred to a full tribunal should a fresh claim be filed.[123]

6.13 The Revesting of the Lake in Ngati Tuwharetoa

Sixty-six years after title to Lake Taupo was vested in the Crown, it was returned to Ngati Tuwharetoa. A deed transferring the ownership of the lake bed was signed on 28 August 1992 by Sir Hepi Te Heuheu and the other members of the Tuwharetoa Maori Trust Board, and the Minister of Conservation, Denis Marshall. The agreement was ratified by the various constituent hapu of Tuwharetoa on 4 February 1993. The deed stated that Ngati Tuwharetoa had not intended the beds of Taupo waters to be vested in the Crown as a part of the 1926 agreement, and that the trust

119. *Department of Internal Affairs v Mervyn Tahu and others*, 13 November 1984, unreported, Wai 18/0, Waitangi Tribunal
120. 'Research on Claim to Waitangi Tribunal re Taupo Fishing Rights', 29 January 1985, p 6, Wai 18/0, Waitangi Tribunal
121. Waitangi Tribunal, *Report of the Waitangi Tribunal in the Lake Taupo Fishing Rights Claim*, Wellington, Waitangi Tribunal: Department of Justice, 1986
122. 'Research on Claim to Waitangi Tribunal re Taupo Fishing Rights', 29 January 1985, Wai 18/0, Waitangi Tribunal
123. Waitangi Tribunal, *Lake Taupo Fishing Rights Claim*, Waitangi Tribunal, pp 2–3

board had sought the return of such title to the iwi. It was noted that whereas the July 1926 agreement had stated that 'the beds of all Taupo waters shall be vested in the King as a public reserve', the 1926 Act made no such provision. In accordance with the spirit and intention of the Treaty of Waitangi and the 1926 Act, the beds of Taupo waters would be vested in Ngati Tuwharetoa 'to preserve and enhance its tribal mana and rangatiratanga'. The deed also stated that in keeping with the spirit of the Treaty, the public's access rights to the Taupo waters would remain unaffected, and that the beds of such waters would be managed in partnership between Ngati Tuwharetoa and the Crown.[124]

The *Christchurch Press* reported that in revesting the lake in Tuwharetoa, 'the Crown opted to "undo a 66-year-old wrong"'. The article stated that the agreement reached between Ngati Tuwharetoa and the Crown in 1926 made no mention of title to the lake being transferred to the Crown, and that this provision was 'conveniently "slipped in"' when the agreement was given effect to by the Native Land Claims Adjustment Act 1926. The secretary of the Tuwharetoa Maori Trust Board, Stephen Asher was quoted as saying that the 'Government simply helped itself to our title'. Since that time, the article stated, the tribe had tried in vain to persuade 'the Government to give back land it had taken for itself in 1926'. In terms of the compensation paid to Ngati Tuwharetoa in respect of the lake, the article claimed that this was just for access rights to the lake, and that the tribe had never 'received a brass nickel for the Government illegally taking the Tuwharetoa's original title'.[125]

The article also gave details of monies the Tuwharetoa Maori Trust Board had received in respect of the 1926 lake settlement. Since the 1950s, the board has received in excess of $5 million – $3.9 million of that from around 1980. Asher was quoted as saying that Tuwharetoa 'are perceived as being a very strong, united tribe, and [that] one of the reasons is because of the income we get from the Crown'. Although the transfer of title back to the iwi appears to have generated concern amongst certain persons and groups interested in the lake's trout fisheries, the trust board was at pains to stress that public access to the lake would remain unchanged. Asher stated that public access under the terms of the 1926 Act would never be altered since the trust board derived such a significant income from that arrangement: 'That would be killing the goose that laid the golden egg for us.'[126]

The contention set out in the article that the agreement reached between Ngati Tuwharetoa and the Crown in 1926 made no mention of the lake being transferred to the Crown, is patently wrong. As described above, the agreement signed in Wellington on 26 July 1926 by Hoani Te Heuheu on behalf of Ngati Tuwharetoa stated: 'The beds of all Taupo waters shall be vested in the King as a Public reserve.' Although the reserve was never made, this clause clearly shows that the beds of the lake and its tributaries were to pass to the Crown.

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124. Deed between the Crown and Ngati Tuwharetoa regarding Lake Taupo waters, 28 August 1992, TP 4700, Te Puni Kokiri Head Office, Wellington
125. 'Maori ownership of Lake Taupo incenses anglers: Be our guests, tribe replies', *Christchurch Press*, 26 November 1992, p 19
126. Ibid

6.14 Conclusion

Unlike many other lakes in New Zealand, the Crown's desire to acquire ownership of Lake Taupo had nothing to do with bringing swamp land into agricultural production, or mitigating the affects of flooding on adjacent lands. Instead, as in the case of the Rotorua lakes, the impetus came from a desire on the part of the Crown to control tourism and avoid the establishment of private rights in game. These objectives converged with the Crown's evolving position in the early twentieth century that it, not Maori, should be the owner of lakes in New Zealand. But as well as what motivated the Crown, the contest for the control of Lake Taupo differs in many other respects from other lakes in New Zealand: Ngati Tuwharetoa's ownership of Taupo was never overtly denied by the Crown; no major litigation occurred in respect of the lake; in payment for their title to it they received considerable ongoing benefits; and recently, they had their title to it restored.

There can be no doubting the importance of Taupo to Tuwharetoa. As a consequence of the relative infertility of the lands abutting Lake Taupo, the lake's fisheries were a very important part of the Tuwharetoa pre-contact economy. Through the activities of the Native Land Court in the late nineteenth century, a significant amount of evidence has been adduced in connection with Tuwharetoa's customary fishing rights. As with rights to land, these appear to be predicated primarily upon ancestral take and the continued exercise of such rights. Generally rights existed and were exercised at a hapu level, with groups having fishing rights in waters adjacent to their lands. Although generally fishing rights appear to have been conceptualised as usufructuary rights, there is no evidence that this was considered to be an inferior title subject to a superior ownership right. Significantly witnesses before the Native Land Court averted to the right to exclude others from their fisheries, suggesting that they were 'several' fisheries.[127]

Throughout the nineteenth century, the Taupo region remained a zone of Maori autonomy. Ngati Tuwharetoa retained the majority of their lands until the 1890s, and as much of this abutted the lake, they continued to be in practical control of it. This was particularly significant in the context of the sport fishery that by the early twentieth century was well established. Trout were introduced in the 1890s, and shortly afterwards sections of Ngati Tuwharetoa were deriving a considerable income from providing anglers with camp sites, and by charging them to fish from their land. Perhaps these benefits that were accruing to Ngati Tuwharetoa explain why there is virtually no protest on record in connection with the Crown introducing trout to the lake. In the case of other lakes in New Zealand, the introduction of trout, along with the regime instituted to manage them, was seen as an assumption of ownership by the Crown and a source of grievance. Further, there is evidence that the trout caused a decline in the stocks of Taupo's indigenous fisheries that were so cherished by Maori.[128]

127. Doig, pp 292–329
128. Grace, p 509

The commercial activities of Ngati Tuwharetoa in relation to the trout fishery came to be viewed by the Crown as increasingly abhorrent. Maori were seen as exercising and establishing private rights in the fishery – rights that it was feared could easily fall into the hands of foreigners.[129] Apparent in the Crown's fear was the colonial imperative that the situation that existed in Britain in respect of hunting and fishing rights should not be allowed to develop in New Zealand. But more generally, by the 1920s, the Crown was becoming ever more resolute in its view that Maori claims to the ownership of lakes should be defeated, and that lakes should be vested in the Crown. Hence the Crown set about trying to acquire the lake from Ngati Tuwharetoa.

In 1924, legislation was passed that enabled the Crown to enter into negotiations with Tuwharetoa in respect of Lake Taupo.[130] The approach adopted by the Crown would appear to have resulted from its experience with Te Arawa and the Rotorua lakes described in the previous chapter. Significantly, the Crown at this time was of the mind that political settlements as to the ownership of lakes should be sought rather than involving the Native Land Court. The Crown appears to have been of the opinion that denying the existence of Tuwharetoa's rights in the lake would have resulted in them applying to the Native Land Court to have their title determined. And as history has shown, the court would have in all likelihood ruled that Maori were the absolute owners of the lake bed. So alternatively the Crown tacitly acknowledged that the 'Natives claiming to be owners of the lands bordering on Taupo waters' had rights in the lake.[131] However, the Crown was at pains not to admit that Ngati Tuwharetoa were the absolute owners of the bed in accordance with Maori customary law.

Although Ngati Tuwharetoa appear to have been determined that 'the beds of all Taupo Waters shall *not* be vested in the King' (emphasis in original), the eventual agreement saw the bed of Lake Taupo being ceded to the Crown.[132] The legislation that gave effect to the agreement stated that the title to the lake was 'freed and discharged from the Native customary title (if any)'.[133] The approach the Crown adopted in acquiring title to Lake Taupo reflects the confusion that reigned amongst governments at the time as to the extent of the Crown's rights in relation to lakes. Significantly, to the present author's knowledge, there was never a definitive statement by the Crown as to who held the ultimate rights to the lake. By the mid-1920s the Native Land Court had ruled that the Wairarapa lakes and Waikaremoana were Maori property, and was likely to have found the same in respect of Rotorua had its inquiry been completed. But despite this, the Crown Law Office, under the leadership of John Salmond, assiduously denied that Maori customary ownership extended to lakes.

Much uncertainty surrounds the 1926 negotiations between Ngati Tuwharetoa and the Crown in connection with Lake Taupo. Why the Tuwharetoa representatives,

129. See for example Ngata, NZPD, 1924, vol 205, p 1047
130. The Native Land Amendment and Native Land Claims Adjustment Act 1924, s 29
131. Ibid, s 29(2)
132. 'Resolutions passed at a Meeting of Ngati Tuwharetoa at Wellington, 21 July 1926', MA 31/23A, NA Wellington
133. The Native Land Amendment and Native Land Claims Adjustment Act 1926, s 14(1)

having just passed a resolution not to agree to the lake being vested in the Crown, actually agreed to this, remains unclear. But although it has recently been claimed that Ngati Tuwharetoa were wrongfully deprived of their title to the lake,[134] the absence of any protest at the time the agreement was reached, suggests otherwise.

An important aspect of the settlement reached between Tuwharetoa and the Crown is that the tribe has enjoyed ongoing benefits. Although both Te Arawa and Ngati Tuwharetoa were deriving significant income from tourists in the nineteenth century in connection with their lakes, unlike Te Arawa, Tuwharetoa have continued to derive benefits from the industry in the post-settlement era. Tuwharetoa, as well as receiving an annuity, negotiated a provision whereby they received half of all revenue generated by the trout fishery over the amount of £3000. As the fishery has grown, this has become a multi-million dollar source of revenue.[135] Te Arawa on the other hand, settled for an annuity that was not indexed to inflation and with no revenue sharing provision.

Further, Tuwharetoa have had their title to Lake Taupo restored to them. The 1992 decision of the Crown to revest the lake in its original owners stands as both a precedent and a model for the resolution of Maori claims to lakes elsewhere in New Zealand. As with other lakes that remained in Maori ownership (such as Horowhenua and Waikaremoana), the case of Taupo stands as testament to the fact that the restoration of Maori ownership of lakes does not necessarily preclude the public enjoying rights of access, navigation, and fishing. In this regard, title to Lake Taupo is more usefully conceptualised in terms of a recognition of Ngati Tuwharetoa's manawhenua and rangatiratanga, than as exclusive ownership.

134. 'Maori ownership of Lake Taupo incenses anglers: Be our guests, tribe replies', *Christchurch Press*, 26 November 1992, p 19

135. Ibid

CHAPTER 7

LAKE OMAPERE

7.1 Introduction

The case of Lake Omapere is an intriguing episode in the saga of the contest for the control of New Zealand's inland waterways. For centuries an important fishery and site of habitation for local Maori, it appears that throughout the nineteenth century, Maori were tacitly acknowledged as being the exclusive owners of the lake. However, as a result of attempts by Pakeha settlers to lower the lake's level, Maori, from around the turn of the century, began agitating to have their title determined by the Native Land Court. Their efforts towards this end, though, were obstructed by the Government. When the court finally did investigate the title, the Crown assiduously challenged Maori rights of ownership; and after title was awarded to the Maori claimants, immediately lodged an appeal. However, the Crown's appeal was never prosecuted – the Crown eventually deciding in 1953 that the bed of the lake was in fact of no use to it. The case of Lake Omapere suggests that the Crown, after conceding that several major North Island lakes were in fact Maori-owned, was desperate to establish some case law that denied the rights of Maori to lakes – both at common law and under the Treaty of Waitangi – in order to try and secure them as part of the Crown's demesne. The Crown's decision to drop its appeal, although claimed to have been because the lake was of no value to the Crown, was in all likelihood an admission of the sound legality of the original decision.

Lake Omapere lies in a basin midway between the Bay of Islands and the Hokianga harbour, five kilometres north of present day Kaikohe. The surface of the lake covers an area of around 1200 hectares but at its deepest only measures a couple of metres. Although a small lake relative to those occurring elsewhere in New Zealand, Omapere is the largest inland body of water north of Auckland. The lake is fed by run off from adjacent lands and by freshwater springs. Geologists suggest that the lake was formed by a lava flow damming the Waitangi River.[1]

The lake lies in the heart of Nga Puhi's rohe. Evidence presented before the Native Land Court during its investigation of title in 1929, suggests that the hapu of Te Uriohua were the group with the primary interest in the lake, but that several other hapu of Nga Puhi had and exercised rights in relation to the lake.[2]

As can be adjudged from the hearings in 1929, the lake represented a very important fishery for local Maori. As a witness before the court stated, 'The old time

1. Northland Regional Council, Proposed Regional Water and Soil Plan for Northland (sec I): Discharge and Land Management, Whangarei, Northland Regional Council, 1995, p 9

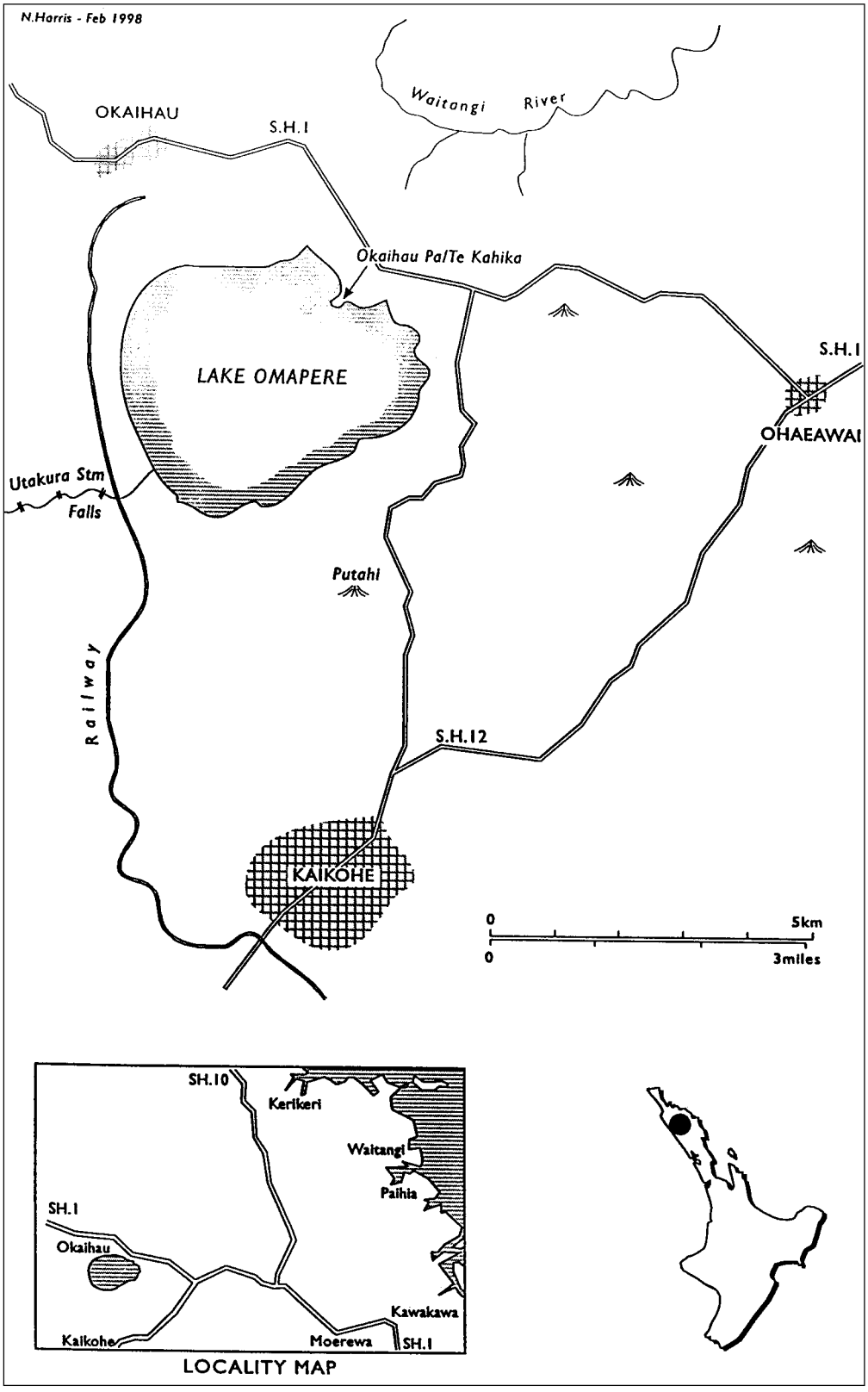

Figure 7: Lake Omapere

Maoris always valued this lake because of the eels . . . From infancy I have heard continually of the catching [of] eels in this lake.'[3] Another stated that 'Omapere lake is the best lake in the district for eel'.[4] As well as eels, kakahi or torewai (freshwater pipi) were obtained from the lake bed. With the advent of Pakeha settlement in the region, the lake became economically significant in other ways: flax and timber were procured from the margins of the lake and then transported upon it; and gum was obtained in relatively large quantities from adjoining swamps.[5] In 1903, a swamp area on the northwestern shore of the lake was designated as a reserve for the purposes of gum digging.[6] It appears that Maori were actively engaged in procuring gum from the reserve. In 1914 the area's reserve status was revoked on account of all the gum that was easily retrieved having been recovered.[7]

Various pa were located either on the shores of the lake or in its immediate vicinity. Of particular note were the pa named Mawhe and Te Kahika. Mawhe, located on the promontory situated in the northeastern corner of the lake, was one of Hongi Hika's strongholds, and according to some sources, was where he died. Te Kahika, more commonly known today as Okaihau, was the site of a major battle in the Northern Wars.

During the winter months the level of Lake Omapere would rise and adjacent farm land would be flooded. And as in the case of many lakes in the North Island, the owners of such land brought pressure to bear on the Crown to permanently lower the lake's water level. However, unlike the situation with other lakes where pressure was being exerted by a large number of settler farmers, in the case of Lake Omapere it appears that only one property was seriously affected by the lake rising in winter. Evidence exists that around the turn of the century, the owners of Omapere estate – being the land abutting the south shore of the lake – simply assumed the right to lower the lake. Although this action precipitated a deluge of protest, interestingly this was largely from Pakeha.

The protest forced the Crown to consider the status of its rights vis-a-vis Lake Omapere – specifically in relation to controlling the outlet and hence the level of the lake. In the first decades of the twentieth century, there exists evidence of widespread confusion as to the nature of the Crown's rights in the lake. Correspondence of various Government departments during this time shows several contradictory views. These ranged from the position that the Crown, by virtue of having purchased adjoining land, had rights to at least half of the lakebed, to the position that the Crown in fact had no rights in the lake whatsoever and hence was powerless to prevent individuals interfering with its level.

2. Ripi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8 (Transcription on the record of documents for the Muriwhenua sea fisheries claim, Wai 22, doc B38 – pagination not that of the original)
3. Ibid, p 6
4. Hone Toia, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8
5. See for example Petition by W M Michie and 60 others to Minister of Internal Affairs, 5 March 1910, LS 1 22/2679, LINZ Wellington
6. 23 July 1903, *New Zealand Gazette*, 1903, no 59, p 1623
7. 12 February 1914, *New Zealand Gazette*, 1914, no 11, p 534; Commissioner of Crown Lands, Auckland to Under-Secretary of Lands, 4 October 1913, LS 1 22/2679, LINZ Wellington

Throughout this period, Maori were anxious to have title to Lake Omapere investigated by the Native Land Court in order to establish where they stood in relation to other parties claiming an interest in the lake. It appears that Maori first applied to have their title investigated by the Land Court in 1913. What followed was a succession of deliberately obstructive actions by various Crown officials to initially block the investigation, and later, once the court had decided in favour of the Maori applicants, to prevent title being issued. Eventually in 1953, the appeal that the Crown had lodged in 1929 and then repeatedly refused to prosecute was dismissed by the court and title was issued – the lake being vested in a trust pursuant to section 438 of the Maori Affairs Act 1953.

After briefly recounting Maori narratives as to the origins of Lake Omapere, this chapter proceeds to examine the importance of the lake as a traditional fishery and briefly considers the nature of Maori rights in the lake. Attention then turns to attempts to lower the lake in the period from 1900 to 1910. The next section, concerned with the subsequent decade, describes how the owners of the Omapere estate brought serious pressure to bear upon the Government to permanently lower the lake level. This forced the Crown to seriously consider its rights in relation to the lake, and eventually, around 1916, to effect a lowering of the lake. It is from around this time that Maori began seeking a determination of the lake's title by the Native Land Court. After detailing these attempts, the chapter then discusses their culmination – the 1929 inquiry and decision of Judge Acheson. The next section deals with the Crown's appeal and the tortuous sequence of events leading up to the eventual issuing of title in 1955. Finally, attention turns to the 1970s and the question as to the status of the lake's waters in relation to the Water and Soil Conservation Act 1967.

7.2 Maori Accounts of Lake Omapere's Origins

Various witnesses before the Native Land Court in 1929 recounted a narrative as to the origins of Lake Omapere. According to Nga Puhi tradition, Lake Omapere was once a swamp in which bush was growing. As Wi Hongi recounted before the Native Land Court:

> On one occasion a man and his son (Ngatikoro the father and Tara the son) went to catch eels in the swamp. When the son found it was getting dark, he called out to his father that it was getting late. His father did not reply and the son thought that the father had left the bush. The son, on getting out of the swamp, set fire to the bush, and his father Ngatikoro was burnt to death.
>
> Takauere was another son of Ngatikoro, and had died before the fire. His body had been buried in the swamp, on a rock called 'Paparoa', on [which] some trees [were] growing . . . It (the rock) was right on the track by which the Natives crossed from one side of the swamp to the other.
>
> When the people went along to look for the body of Takauere they found that the body and the tree had both disappeared, just disappeared – not burnt. Because of this

> strange disappearance, this Takauere became clothed with the mana of a 'Taniwha', and the place became tapu. This was before the bush burnt.
>
> Later the fire burnt as far as Paparoa rock and stopped there. The rock is still there in the lake. After the fire the lake came.[8]

Continuing under cross-examination by the Crown, Hemi Wi Hongi stated that after the fire Maori did not fish over the spot where Ngatikoro was burnt for three generations, but that for 'a long time past there has been no "tapu" over the lake'. The fire, according to both Wi Hongi and John Webster – another witness during the 1929 inquiry – occurred 12 generations ago.[9]

Wi Hongi stated before the court that Ngatikoro had always worn the feather of the toroa or albatross, and that his demise gave rise to the whakatauki in relation to Lake Omapere that when 'the waves look rough they are the feathers of Ngatikoro, the man who was burnt.'[10]

The narrative of the fire and Ngatikoro's subsequent death was presented by witnesses before the Native Land Court as evidence of their ancestral claim to the lake. As John Webster stated: 'The Natives always claimed this lake. They even had a "taniwha" there called "Takauere", an alleged descendant of Ngatikoro. The Natives have always claimed the lake as "Their lake"'.[11]

Interestingly, Judge Acheson, in his preliminary decision after the Kaikohe hearing in 1929 as to the title of Lake Omapere, stated that 'In the absence of any evidence to the contrary . . . the court must accept the Native tradition that the lake bed was originally a swamp area covered with bush, which was burnt' and that 'Probably the outlets blocked up and the lake formed'.[12]

7.3 The Importance of the Lake Omapere Fishery to Maori

There can be no doubt as to the regional significance of the Lake Omapere fishery. In his decision of 1929 as to the ownership of the lake, Judge Acheson placed much emphasis upon the importance of the lake to local Maori as a food resource. He observed that to the Nga Puhi people, Lake Omapere had always been:

> a well-filled and constantly available reservoir of food in the form of the shellfish and the eels that live in the bed of the lake. With their wonderful engineering skill and unlimited supply of man-power, the Maoris could themselves have drained Omapere at any time without great difficulty. But Omapere was of much more value to them as a lake than as dry land.[13]

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8. This story was also recounted before the Native Land Court in 1890 by Pere Wi Hongi – Hemi's brother – during the investigation of the Omapere block. Hemi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 6
9. Ibid, pp 5, 6
10. Ibid, p 6
11. John Webster, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 5
12. Bay of Islands Native Land Court minute book, 5 March 1929, p 9
13. Ibid

As proof of their continued use of the lake, witnesses before the Native Land Court in its 1929 investigation of title, gave evidence as to the nature and extent of their fishing practices. Witnesses stressed that they caught eels over the whole of the lake, 'including the parts in front of the areas sold by the Natives to Crown and Europeans', to emphasise the fact that in selling land abutting the lake they did not cede their rights to the lake itself.

Hemi Wi Hongi and his son Ripi described the various fisheries in Lake Omapere before the Native Land Court in some detail. According to them 'katua' – eels that went out to sea each year in order to breed – were caught in weirs at various outlets of the lake over a three month period each year. Hemi Wi Hongi stated that Waitanumia and Te Kuaha were the principal outlets at which katua were caught. At each of these weirs two to three thousand eels would be caught each season. Ripi Wi Hongi corroborated his father's evidence and added that Ngaruawahia, Te Ahipara and Te Harakeke were other drains at which similar quantities of eels were caught.[14]

In a letter protesting at plans to interfere with the level of the lake, published in the *Northern News* in 1921, W E Bedggood described the way in which Maori caught the migrating eel:

> At certain times of the year the eels leave the lake by the thousands on their way to the deep sea to breed. The Maoris became acquainted with this fact, and by spreading a funnel-shaped net across the outlet, with an eel pot at the end, were enabled to catch them by the hundred. One man stood in the water and when the pot was full handed it to his mate on the bank, who handed him another to be fastened to the net, the full one being emptied into a pit with upright sides dug for the purpose.[15]

In 1916, the Under-Secretary of Public Works reported to the Under-Secretary of Lands that plans to interfere with the Utakura stream outlet in order to lower the lake were 'complicated by the fact that the outlet of the lake has been divided by the native owners into three channels, each channel being the property of a separate native tribe, and each of these channels are used for the purpose of catching eels in very large quantities at certain seasons of the year.'[16] Similarly, in a letter to the Minister of Lands in 1921, Ripi Wi Hongi recounted how 'there are three drains at that place, which were dug by our ancestors for the purposes of eel catching'. According to Wi Hongi, the Native Land Court had awarded this area of land to Maori in 1890 for the purposes of eeling, with each of the three drains belonging to a different 'tribe'.[17] Bedggood claimed that the Omapere fishery was so valuable:

> that constant disputes for possession arose between the tribes whose property bordered the lake, which . . . about 200 years ago culminated in a war in which 600 men were slain. Then some wise man devised a means of settlement by which other outlets were

14. Hemi Wi Hongi and Ripi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, pp 2, 7
15. 'Lowering Lake Omapere: An Old Resident's Protest', *Northern News*, 2 July 1921
16. Under-Secretary of Lands to Under-Secretary of Public Works, 3 November 1916, LS 1 22/2679, LINZ Wellington
17. Ripi Wi Hongi to D H Guthrie, Minister of Lands, 26 January 1921, LS 1 22/2679, LINZ Wellington

> dug so that each party might have one, and leave it to each individual eel to choose the one he preferred to take.[18]

It is unclear whether these drains are any of those named before the Native Land Court as detailed above.

Unlike katua, the variety of eel known as tautoke were caught over the whole lake. Ripi Wi Hongi stated before the Land Court that he estimated 'more than 10,000 tautoke eels per season were caught by spearing or with lines or baskets.'[19] Traditionally Maori had used baskets or hinaki to procure the tautoke eel from Lake Omapere. However, by the 1920s it appears that a method had been developed whereby they were caught from canoes using spears and torches. One witness before the Native Land Court attested that the '. . . Natives by using a spear and a torch now really get more eels than before'.[20]

As well as eels, Hemi Wi Hongi claimed before the Native Land Court in 1929 that kakahi or torewai – a variety of freshwater mussel – 'are plentiful in thousands, in any part of the lake', and that a 'few kewai or crayfish are caught in the creeks away from the lake'.[21]

It is apparent that the katua fishery was affected by various lowerings of the lake between 1903 and 1929. Ripi Wi Hongi stated in his evidence before the Native Land Court in 1929 that the owner of the Omapere estate had lowered the lake to bring more land into production, and that consequently the supply of eels was reduced. Wi Hongi said that there were few katua eels there now.[22] The introduction of trout and carp to the lake also appears to have affected the lake's ecology. In 1914, an inspector of forests reported local Maori having told him that numbers of crayfish in and around Lake Omapere had been greatly reduced through being eaten by introduced species of fish.[23]

In concluding its hearing of the evidence of Maori claiming ownership of Lake Omapere, Judge Acheson observed that the:

> . . . Court decides that it has been proved by evidence not contested by the Crown, that for many generations past the Natives interested in Lake Omapere have used the lake for eel fishing purposes on quite a large scale, many thousands of eels being captured every season. The court is satisfied that these eels constitute quite a substantial article of food diet, and that therefore the fishing rights of the Maoris were and still are of real value to them, and will have to be provided for no matter what decision the court may come to on the other questions involved.

As well as emphatically recognising Maori fishing practices and rights in Lake Omapere, Acheson was clearly of the view that Maori's usufructuary rights in relation

18. 'Lowering Lake Omapere: An old resident's protest', Northern News, 2 July 1921
19. Ripi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 7
20. Hemi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 4
21. Ibid, p 3
22. Ibid, p 7
23. Hugh Boscarven Inspector of Forests to Commissioner of Crown Lands, Auckland, 19 March 1914, LS1 22/2679, LINZ Wellington

to the lake did not extend only to fishing, stating that the court was 'satisfied that for a long time past the Natives have dug for gum in the bed of the lake in the shallows.'[24]

7.4 THE NATURE OF MAORI RIGHTS IN LAKE OMAPERE

Much of the evidence presented before the Native Land Court in 1929 concerned the nature and extent of the rights of the various hapu who had interests in the lake. Those hapu with rights in the lake appear to have been Te Uriohua, Ngatikorohue, Te Popoto, Te Ihutai, Honehone, and Ngatikuri.

According to Ripi Wi Hongi, these groups' rights in Omapere derived from their interests in lands adjoining the lake.[25] Hemi Wi Hongi, before the same court, spoke of the origins of the rights of the various groups claiming an interest in the lake, and the relationship between them:

> If a number of hapus live around a lake the custom would be for all to be entitled to use any part of the lake, but that if they had actually divided the area of the lake the hapus would keep to their own areas. There would be trouble if they fished alongside land belonging to another hapu. It was because of their ownership of the land that they owned the lake. Outsiders could not fish without the consent of the proper owners.[26]

This, however, contradicts evidence concerning the ownership of the weirs where the katua were caught. As detailed above, the Native Land Court apparently awarded the land around the Utakura stream to Maori, and that each of the three channels there belonged to a different group. Similarly, Ripi Wi Hongi speaks of the Ngaruawahia drain as belonging to the hapu of Te Popoto. But Wi Hongi, in the same statement before the Native Land Court, claimed that the drains he had listed 'belonged to all the hapus claiming the Omapere Lake today'.[27] A possible explanation of this disparity is that there appears to have been a sense of common purpose amongst the various hapu with interests in the lake during the Native Land Court investigations; that is, they all opposed the Crown's claim to the ownership of the lake. In this way it is possible that the hapu joined together, stressing their common interests in the face of a common threat from the Crown.

There can be no doubt that Maori perceived themselves as having indefeasible rights to the lake. As Ripi Wi Hongi observed before the Native Land Court:

> The Natives claim the fish, and also the 'mana' of the lake, and also the edges of the lake. The Natives claim the water of the lake, and also the land under the lake.[28]

24. Bay of Islands Native Land Court minute book 11, 1 August 1929, p 9
25. Ripi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8
26. Hemi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 5
27. Ibid, p 9
28. Ripi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8

7.5 Early Moves to Drain Lake Omapere, 1900–10

Relative to other lakes, little land was affected by the rising of Lake Omapere as a result of heavier rains during the winter months. However, once the most easily developed land in the vicinity of Omapere had been brought into production, some settlers became anxious that the lake's level be regulated so that its margins could be exploited. It appears that from around the beginning of the twentieth century, pressure came to be exerted upon the Crown for the lake level to be controlled to enable both the digging of gum and the lake's margins to be farmed. Previously, though, it appears that individuals had simply assumed the right to lower the level of the lake.

The earliest reference the present author has come across to the issue of who had rights to the lake was in 1903. Before the Native Land Court in 1929, John Webster recounted how in 1903, the then Native Minister, James Carroll, had visited Kaikohe and met with local Maori outside the courthouse. According to Webster:

> Various matters were discussed, including the claim of the Natives to Omapere Lake. Hone Byers spoke on behalf of the Natives and referred to the uses to which the lake was put. Then Mr Carroll said that the lake belonged to the Natives, and that they should lodge an application for investigation of title. Hone Bryers did lodge an appln accdly [sic].[29]

It has not proven possible to locate anything further on this meeting.

In 1903, the Bay of Islands County Council passed a resolution that Crown lands abutting Lake Omapere be made a county endowment, and that the council had no objections to Austrians being allowed to dig for gum on the Crown lands on the northwestern shore of the lake. Further, the council considered that 'if draining were carried out upon a satisfactory system the surrounding land now inundated by water would be improved.'[30]

Although this proposal appears to have been supported by the then Minister of Lands, Thomas Duncan, the initiative was widely opposed by other Pakeha settlers in the district.[31] In October 1903, John Guiniven wrote to the Premier protesting against 'the action taken by the Bay of Islands County Council to obtain an endowment at Omapere Lake'. Guiniven claimed that no one in the district wished to drain the lake. Further, he claimed that the move by the council had been precipitated by a councillor who had a gang of Austrians in his employ, for whom he was desperate to find new land upon which they could dig for gum. Guiniven continued, stating that:

> There is also a large number of Natives here as Mr Carroll knows who gain a living from gum & if this was to give way suddenly they would be starving before long.[32]

29. John Webster, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 5
30. Kawakawa County Clerk, Bay of Islands County Council to R M Houston, 7 October 1903, LS 1 22/2679, LINZ Wellington
31. Minister of Lands to Solicitor General, 14 October 1903, LS 1 22/2679, LINZ Wellington
32. John Guiniven to the Prime Minister, 29 October 1903, LS 1 22/2679, LINZ Wellington

Similarly, another Pakeha settler, WA Michie, wrote to R M Houston, the Member of the House of Representatives for Bay of Islands, opposing the swamps of Lake Omapere being drained and 'handed over to the Austrians'. Like Guiniven, Michie registered his concern that were this to happen, Maori and Pakeha that derived an income from digging gum in the district would be denied this opportunity. Michie was also anxious that were the council's plan enacted, the beauty of the lake would be ruined. And, that having Austrians settle in the area was less than desirable.[33]

It would appear that nothing came of the Bay of Island County Council's resolution. But in 1905, an owner of land adjoining the lake assumed the right to lower the level of the lake by interfering with the outlet at the western end of the lake which lay on Maori-owned land. Earle, the owner of the Omapere estate, undertook the drainage work 'with a view to making some swamp land at the eastern end of the lake available for pasturage'.[34] Michie wrote to Houston informing him that this work was in progress and that, upon completion it would 'so ruin the lake that for scenery or for any other purpose it will be for all time totally ruined', reducing it to a 'mere pond'. Michie claimed that all persons he had spoken to in the district were opposed to the lowering of the lake 'as it will completely ruin the best piece of scenery in the locality and the largest lake north of Auckland.' He also asked that as the 'outlet of Lake Omapere runs through Native Land, cannot this land be acquired by the Scenic Department to be set aside as a scenic reserve?'[35]

In 1910, Michie wrote to the Member for the Bay of Islands informing him that persons were again endeavouring to lower the lake – this time using dynamite to deepen the outlet. Michie asked that the Government intervene and halt the work.[36] It would appear that this petition resulted in the Under-Secretary of Justice ordering the Auckland Inspector of Police to investigate the matter.[37] The resultant report, written by Constable Cahill, stated that the work that Michie complained of was 'just a periodical overhaul of the drains'. Cahill stated that the object of the interference was to maintain the lake at its summer level, and that it was physically impossible to lower the lake below that level.[38]

A more detailed police report written by Sergeant Powell, upon which Cahill's seems to be based, stated that the work being undertaken in 1910 was in fact an attempt to finish earlier work that had been undertaken in part by Maori. Cahill stated that Austrians had offered to complete the work for Earle, who, without taking any responsibility for the legality of the work, agreed to pay them upon its successful completion. Powell noted that Earle had contemplated applying to the county council to take action on the basis that the lake was a public drain. While it was reported that

33. WA Michie to R M Houston, 11 November 1903, LS 1 22/2679, LINZ Wellington
34. Report of Constable Cahill to the Inspector of Police, Auckland, relative to the lowering of Lake Omapere, 16 July 1910, LS 1 22/2679, LINZ Wellington
35. WA Michie to R M Houston, 7 November 1905, LS 1 22/2679, LINZ Wellington
36. WA Michie to V Reed, 9 February 1910, LS 1 22/2679, LINZ Wellington
37. Under-Secretary of Justice to Inspector of Police, Auckland (telegram), 12 February 1910, LS 1 22/2679, LINZ Wellington
38. 'Report of Constable Cahill to the Inspector of Police, Auckland, relative to the lowering of Lake Omapere', 16 July 1910, LS 1 22/2679, LINZ Wellington

Earle knew 'nothing of the means taken by the Austrians to effect the object decried . . . if the Natives have any reasonable claim to compensation he will treat with them fairly.' The report contended that:

> The work contemplated could not by any possibility do anybody any harm but on the contrary must do good to all who own low lying land on the shores of the lake. It is believed some of the Natives at one time learned it was intended to entirely drain the lake but this is quite wildly absurd and absolutely impossible.[39]

Around this time, the question as to the rights of the Crown in relation to Lake Omapere appears to have been considered seriously for the first time. In an internal memorandum of the Police Department dated March 1910, the opinion was expressed that Lake Omapere 'is part of the Crown purchase of the Okaihau No 1 block'.[40] The Government was forced to further consider the question as a consequence of a petition to Parliament in March 1910 by Michie and 60 others, protesting at the lowering of Lake Omapere. The grounds upon which the signatories opposed the lowering of the lake were: that it would destroy the lake's scenic values; endanger the lake's fisheries; render it useless as a means of transport; and cause flooding.[41] In response to the petition, the Minister of Lands, J G Ward, expressed the opinion that this was 'not a matter in which the Government can interfere.'[42]

In reply to Ward, Vernon Reed, the Member for the Bay of Islands, expressed his inability to understand why this was the case: 'If the lake is public property, there is surely no one else to look after the interests of the public but the Government.' He continued, noting that the lake had potential in terms of hydroelectric development, and that the lowering of the lake was a 'dangerous precedent to allow to go by unchallenged'. Implicit in such an omission, he stated, was the notion that the Government had no jurisdiction vis-a-vis water power.[43] Ward responded, reiterating the position that it was 'not the duty of the Crown to step in in cases of this kind,' and that he could not 'involve the Crown in, perhaps, a series of actions, when the Government has no standing in the matter.'[44] Interestingly then, the Government of the day appears to have been reluctant to assume any rights to the lake. It would appear though that this was not an acknowledgement of Maori having a superior right, but of the Crown's right being secondary to that of adjacent private landowners. The matter was further complicated by the fact that the owner of the Omapere estate was in fact interfering with a stream that was not on his property, but on Maori-owned land.

In connection with these early attempts to lower the lake, little evidence has been uncovered by the present author of protest by Maori. Such material is more likely to exist in the files of the Department of Native Affairs and perhaps the correspondence

39. Report of Sergeant Powell re lowering of Lake Omapere, 24 February 1910, LS 1 22/2679, LINZ Wellington
40. Memorandum of the Police Department, 8 March 1910, LS 1 22/2679, LINZ Wellington
41. Petition by W M Michie and 60 others to Minister of Internal Affairs, 5 March 1910, LS 1 22/2679, LINZ Wellington
42. Minister of Lands to V Reed, 29 July 1910, LS 1 22/2679, LINZ Wellington
43. Reed to Minister of Lands, 3 August 1910, LS 1 22/2679, LINZ Wellington
44. Minister of Lands to Reed, 22 August 1910, LS 1 22/2679, LINZ Wellington

files of the Native Land Court – neither of which the present author has had the opportunity to peruse.

7.6 1910–22: MAORI AND PAKEHA AGITATION

In contrast to the almost ambivalent position articulated by Ward in the preceding decade, evidence suggests that in the period from 1910 till around 1916 the Crown began to consider its claim to Lake Omapere much more seriously. This was quite possibly a reaction to Maori beginning to press their claim to the lake – an application being made to the Native Land Court in 1913 to have the lake's title determined. However, the Native Land Court did not begin an investigation until 1929.

7.6.1 The Omapere estate

The period from around 1913 till 1916 saw tenacious agitation from the owner of the Omapere estate. By 1913, George Pitcaithly had acquired the property. From around this time he began to incessantly petition Parliament, seeking the Government's assistance in lowering Lake Omapere in order to bring more of his land into production.

Pitcaithly's letters to the Minister of Lands asking that he be assisted by the Crown in draining the lake and maintaining it at its summer level, number at least twelve. The arguments Pitcaithly put forward to support his contention that the Crown should assist him in lowering the lake were various. He argued that the Crown would benefit given it owned the Manawa swamp (Omapere Gum reserve), and that like his swamp land this land could be brought into agricultural production.[45] Repeatedly he emphasised how it was 'a sin to see such excellent land lying idle.'[46] In response to a report by a Government official, Pitcaithly stated that 'very little is known by the officers of the true state of affairs' and that the importance of the lake's fishery was being exaggerated – a keen angler himself, he claimed to have never seen a fish in the lake.[47]

In August 1913, in a letter again asking Massey for assistance from the Government in lowering the lake, Pitcaithly addressed the issue of Maori fishing rights in the lake:

> . . . I am aware that there is some antiquated piece of Maori law which gives that race fishing rights over the waters of many of our New Zealand Lakes; but like much other Maori legislation against which you have raised your voice, it seems to have been designed to retard the development of the country rather than to assist it, and the sooner it is repealed the better . . . [However] Our request in no way infringes upon the rights of the Natives . . .

45. G Pitcaithly to Minister of Lands, 7 February 1913, LS 1 22/2679, LINZ Wellington
46. G Pitcaithly to Minister of Lands, 2 April 1913, LS 1 22/2679, LINZ Wellington
47. G Pitcaithly to Prime Minister, 2 June 1913, LS 1 22/2679, LINZ Wellington

> Lake Omapere certainly is a natural drainage area, and I cannot think that any rights of any one class of individuals can be used to the detriment of neighbouring land owners – as the backing up of these waters are to us.

Pitcaithly continued that:

> Surely settlers of our class deserve more consideration than a few Maori eel-fishers, whose catch will be in no way affected by the granting of our request. As a proof that this question of 'title' quoted in your last letter, is a mere 'dog in the manger' piece of business, put up to obstruct us from developing our property. I may say that very occasionally, if ever, is any eeling done on the lake by the Maories . . .

The letter was concluded, however, with the contention that the opposition to the lowering of the lake had in fact arisen primarily not from Maori but from 'old settlers' who had forgotten about progress.[48] In light of the extensive opposition to the lowering of Lake Omapere from Pakeha settlers detailed above, and the apparent absence of any Maori protest, it would appear that Pitcaithly was possibly correct in this view. However, in 1913 Maori applied to the Native Land Court to get the title to Lake Omapere determined. This can be seen as an attempt to get their rights defined so that they could prevent the lowering of the lake.

Subsequent to this tirade, Pitcaithly wrote at least six further letters urging that the Government assist him in lowering the lake.[49] Pitcaithly's tenacity seems to have paid off when an earlier abandoned investigation by a drainage engineer into the situation vis-a-vis Lake Omapere (see below) was ordered to be completed. In 1916, John Baird Thompson, the country's Chief Drainage Engineer, reported to the Under-Secretary of Lands. Thompson informed the Under-Secretary that in the past, the outlet had been widened and deepened by the owners of the Omapere estate, and that also a certain amount of straightening and blasting had been undertaken. It was held that all these works had been unauthorised. In the report, the opinion was expressed that the outlet could be further widened and deepened in order to cope with the winter rains 'without detracting from the scenic beauties'. However, Thompson concluded that with 'only one property benefitting I could not recommend any expenditure of public monies for the purposes proposed.'[50]

Subsequent to Thompson's report, the Under-Secretary of Lands wrote to the Under-Secretary of Public Works in connection with Pitcaithly's proposal that the Government assist in the lowering of Lake Omapere permanently to its summer level. Although noting that the proposal was feasible, it was stated that:

48. G Pitcaithly to Minister of Lands, 15 August 1913, LS 1 22/2679, LINZ Wellington
49. G Pitcaithly to Minister of Lands, 28 June 1916, LS 1 22/2679, LINZ Wellington; G Pitcaithly to Minister of Lands, nd (received by Department of Lands 22 December 1916), LS 1 22/2679; G Pitcaithly to Stewart, 29 December 1916, LS 1 22/2679, LINZ Wellington; G Pitcaithly to Minister of Lands, 4 June 1917, LS 1 22/2679, LINZ Wellington; G Pitcaithly to Minister of Lands, 3 July 1917, LS 1 22/2679, LINZ Wellington; G Pitcaithly to Minister of Lands, 22 February 1918, LS 1 22/2679
50. Chief Drainage Engineer, Thames to Under-Secretary of Lands, 17 August 1916, LS 1 22/2679, LINZ Wellington

> the matter is complicated by the fact that the outlet of the lake has been divided by the native owners into three channels . . . used for the purposes of catching eels in very large quantities at certain seasons of the year. We have been informed by the Native Land Court that . . . it would be highly injudicious to interfere in the slightest degree with these channels . . . If Mr Pitcaithly's scheme is carried out it will entirely nullify the work of the Natives.[51]

Pitcaithly's problem was eventually resolved by the Government agreeing to purchase the parts of his property that were prone to flooding – using the lands to settle returned servicemen upon. Obviously though, what had been Pitcaithly's problem simply became that of the new occupants. In 1920, the North Auckland Commissioner of Crown Lands wrote to the Under-Secretary of Lands and noted that since the ballot allocating the land, those now affected by the flooding 'have several times spoken to me about it and are now agitating the matter through the Returned Soldiers Association.' The commissioner expressed the view that he thought 'it necessary that something be done in the matter.'[52]

7.6.2 The Crown seriously considers its position

In May 1913, the Chief Surveyor for the Auckland district wrote to the Under-Secretary of Lands, advising him that various Maori had lodged an application with the registrar of the Auckland Native Land Court for the title of Lake Omapere to be investigated.[53] This led the Assistant Under-Secretary of Lands to write to the Solicitor General requesting advice vis-a-vis the Native Land Court application. In his letter the Assistant Under-Secretary stated that:

> The area held on freehold and that reserved for gum-digging, are covered by the purchase by the Crown from the Natives in the year 1858. The boundaries of this purchase are shown in the accompanying deed from which it will be seen that approximately half the margin of the lake is included therein. The deed of purchase describes one of the boundaries as being 'the lake' from which it would appear that the Crown's title ran to the centre.[54]

In reply, the Crown Law Office basically concurred with the position set out by the Assistant Under-Secretary of Lands:

> The presumption of law in such a lake is that the owners of the surrounding land own the bed of the lake to its centre. Unless there are circumstances to rebut that presumption (and on the facts stated I can find no such circumstances), it would appear that the Crown, by virtue of its original purchase from the Natives acquired a title to the Northern half of the lake.

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51. Under-Secretary of Public Works to Under-Secretary of Lands, 3 November 1916, LS 1 22/2679, LINZ Wellington
52. Commissioner of Crown Lands, Auckland, to Under-Secretary of Lands, 25 August 1920, LS 1 22/2679, LINZ Wellington
53. Chief Surveyor, Auckland to Under-Secretary of Lands, 31 May 1913, LS 1 22/2679, LINZ Wellington
54. Assistant Under-Secretary of Lands to Solicitor General, 18 June 1913, LS 1 22/2679, LINZ Wellington

Concomitantly it was held 'that the Southern half of the bed of the lake belongs to the Natives who own the land fronting the southern half.' This, it was stated, was established in the cases of the Rotorua lakes and Lake Taupo. The Assistant Under-Secretary concluded, however, that if:

> there are reasons of public policy why the Natives should not be allowed to establish a title to the Lake, then it is a question of policy for the Government to consider whether it will exercise the power it has under the Native Land Act 1909 of either prohibiting the Native Land Court from entertaining the Native's application, or of proclaiming it Crown land.

An addendum to this opinion pencilled in the margin, refers to Justice Salmond's decision in the case of Lake Takapuna in relation to the rights of people owning land adjacent to lakes.[55]

Presumably the Takapuna 'decision' referred to by the Assistant Law Officer was the opinion given by Salmond on the ownership of Lake Takapuna when he was Solicitor General. It appears that the question of the ownership of Lake Takapuna had arisen in connection with moves to establish regulations governing the abstraction of water from the lake. In his opinion, Salmond set out an earlier opinion given by an Assistant Law Officer. This earlier opinion stated that Lake Takapuna was no longer Crown land. This position was predicated upon the fact that all the lake's riparian lands had passed into private ownership, and that it was believed title to the lake bed was part of these titles, *ad medium filum aquae*. Salmond, although conceding that this position 'may very well be correct', considered that the 'matter is one of considerable doubt.'He stated that in the case of rivers, the rule of *ad medium filum aquae* most certainly applied. However, whether it equally applied in the case of lakes remained 'an unsettled question'; Salmond noting that there were 'no authoritative decisions on this point either in New Zealand or in England.' He contended that if this point was tested, the courts in all likelihood would hold that Crown Grants of small areas of land adjoining a lake, did not include any part of the lake. He therefore advised that the Crown should assume that it was the owner of Takapuna, 'leaving it to the riparian owners . . . to take proceedings in the Law Courts for the establishment of their claims'. Salmond noted that no such claims had ever been made in New Zealand and that there was no reason for the Crown to assume that any would be, or that any such claims are valid. He therefore recommended that if any legislation was contemplated in respect to the abstraction of water from Takapuna, that this should be proceeded with on the basis that the lake is Crown land.[56]

In July 1913, the Under-Secretary of Lands had instructed J B Thompson, a Land Drainage Engineer based in Thames, to investigate the feasibility of lowering Omapere to its summer level.[57] However, in view of the application to the Native Land Court for title to the lake to be investigated, the Under-Secretary informed

55. Assistant Law Officer to Assistant Under-Secretary of Lands, 11 July 1913, LS 1 22/2679, LINZ Wellington
56. Solicitor General to Under-Secretary of Lands (re Lake Takapuna), 19 August 1913, Wai 187/4, Waitangi Tribunal
57. Under-Secretary of Lands to Land Drainage Engineer, Thames, 8 July 1913, LS 1 22/2679, LINZ Wellington

Thompson that the question of title would 'have to be decided before any action can be taken to lower the waters of the lake'.[58] Similarly, in a reply of September 1913 to one of Pitcaithly's various letters, the Under-Secretary stated that the question of title must first be settled, and that it appeared that the Government had no legal rights to the lake.[59] This position was clearly contrary to the opinion of the Crown Law Office detailed above.

The decision of the Under-Secretary of Lands to suspend the investigation suggests that the proceedings being initiated by Maori interested in the lake were being treated seriously. But in fact the Lands Department deliberately obstructed the Land Court's inquiry. In a letter to the Under-Secretary in September 1913, the Chief Surveyor of the Auckland Lands District stated that he did:

> not consider that it is at all expedient that the natives should be allowed to establish any title to the lake and I am therefore refusing to supply the plan for the investigation of the title until the question of the ownership has been definitely settled.

Further, he urged that the lake should be declared Crown land under section 85 of the Native Land Act 1909.[60]

The following year the Under-Secretary of Lands again expressed the view that the Crown's rights in the lake were tenuous:

> it is doubtful if the Crown has any jurisdiction over the Lake except the portion that fronts the Omapere Gum Reserve, and if therefore the owners of the land around the outlet choose to authorise blasting and drainage operations with a view to lowering the level of the lake, and thereby draining and reclaiming the low-lying land in the vicinity, it is not at present clear that they are acting illegally, neither does it appear that the Government has any power to prevent such drainage operations.[61]

To this the Auckland Commissioner of Crown Lands replied that he was of the opinion that the Crown claimed the freehold of the lake.[62] But in a subsequent letter to the Under-Secretary of Lands, the commissioner stated that in furnishing this opinion he had overlooked the Crown Law Office's opinion of July 1913. In light of this he submitted that:

> the Crown, being only owners of a part of the lake . . . does not prevent steps being taken to preserve our riparian rights. I am not aware that any statutory power exists or is necessary to enable the Crown to obtain an injunction to prevent the abstraction of water. The English common law would probably be sufficient, but this is a point upon which the Law Office would be able to advise.

58. Under-Secretary of Lands to Land Drainage Engineer, Thames, 31 July 1913, LS 1 22/2679, LINZ Wellington
59. Under-Secretary of Lands to Pitcaithly, 16 September 1913, LS 1 22/2679, LINZ Wellington
60. Chief Surveyor, Auckland to Under-Secretary of Lands, 5 September 1913, LS 1 22/2679, LINZ Wellington
61. Under-Secretary of Lands to Auckland Commissioner of Crown Lands, 12 May 1914, LS 1 22/2679, LINZ Wellington
62. Auckland Commissioner of Crown Lands to Under-Secretary of Lands, 15 May 1914, LS 1 22/2679, LINZ Wellington

The commissioner stated that in summer, evaporation from Lake Omapere had a beneficial effect upon adjacent Crown lands. He was also of the view that if it were decided to allow the level of the lake to be lowered, that this should be done by a drainage board and not private individuals.[63]

It is evident that much confusion existed amongst Government officials as to the status of the Crown's rights vis-a-vis Lake Omapere. Generally it is agreed that at common law, title to lakes is shared between riparian owners, *ad medium filum*.[64] In New Zealand though, it seems that parts of the Crown did not wish this situation to pertain, preferring that instead lakes be vested in itself. In the case of Omapere, while some Government officials seem to have been seized of this rather nebulous policy, others continued to adhere to the position at common law. The opinion stated in June 1914 by the Auckland Commissioner of Crown lands relates to the situation at common law vis-a-vis water rights. This holds that riparian owners can take water in accordance with their own needs so long as this does not interfere with the integrity of the waterway, or with the rights of the public. Presumably the commissioner considered that if the ownership of the lake was shared between the Crown and private land owners, water could not be abstracted from the lake by private landowners if it jeopardised the integrity of the lake, or injuriously affected the Crown.[65]

The uncertain nature of the Crown's rights was confirmed by a further opinion furnished by the Crown Law Office in July 1914. In a letter to the Under-Secretary of Lands, the Solicitor General stated that for reasons set out in the Lake Takapuna case, he disagreed with the opinion of the Crown Law Office dated 11 July 1913. Although conceding that the 11 July opinion 'may quite possibly be correct', he was of the mind that 'the matter is far too doubtful to express any confident conclusion on it one way or the other'. Significantly, his letter expressed doubt that Maori customary title extended over such waterways as Lake Omapere and suggested that instead they simply held fishing rights. Also the opinion was expressed that there was insufficient authority to extend the *ad medium filum* rule in this instance and, that even if this were not the case, there was no evidence that those who sold lands abutting the lake to the Crown in 1858 were the sole owners of the lake originally. The Solicitor General was of the opinion, though, that if the Crown owned no part of the bed of the lake, as the owner of adjoining land it had sufficient riparian rights to prevent the diminution of those rights by drainage – contending that the situation with regard to riparian rights was vis-a-vis lakes no different to that of rivers.[66]

63. Auckland Commissioner of Crown Lands to Under-Secretary of Lands, 9 June 1914, LS 1 22/2679, LINZ Wellington
64. G W Hinde, D W McMorland and Sim, Introduction to Land Law, (2nd ed) Wellington, Butterworths, 1986, pp 196–197; James P Ferguson, 'Maori Claims Relating to Rivers and Lakes', Research paper for Indigenous Peoples and the Law (LAWS 546), Victoria University, 1989 (Wai 167 ROD, doc A49(d): 266–313), p 20
65. Hinde, McMorland and Sim, pp 556–557
66. Solicitor General to Under-Secretary of Lands, 22 July 1914, LS 1 22/2679, LINZ Wellington

Although the research undertaken by the present author is by no means comprehensive, it appears that the Crown did not further consider its position vis-a-vis Lake Omapere until the Native Land Court investigation of title in 1929.

7.6.3 Moves to acquire land surrounding Lake Omapere

As detailed above, the main outlet of Lake Omapere – the Utakura stream – lay on Maori-owned land. The ownership of this land was seen as an important factor in relation to who had rights in the lake – the thinking being that whoever owned this land could control the level of the lake. However, whether this was in fact legally correct is unclear. At common law it would seem that if the owners of the lake suffered as a consequence of the lake level being altered, they could seek redress.

In February 1914, Reed, the Member for the Bay of Islands, wrote to Massey asking that the land surrounding the Omapere outlet be purchased by the Crown. In his letter, Reed expressed the fear that were this land acquired by Pakeha, the control of the lake would fall into their hands – Reed being of the opinion that the Government should control the lake outlet because of its significant utility and scenic values.[67]

The view that Lake Omapere was of aesthetic significance was not shared by the Inspector of Forests, who was charged to investigate the possibility of the Crown acquiring the Maori land at the outlet of Lake Omapere. Reporting to the Auckland Commissioner of Crown Lands in March 1914, he stated that 'the land is a barren treeless waste, and quite useless for scenic purposes.' However, he considered that for purposes of 'utility it should be acquired, as by doing so, it will prevent interested persons from draining the lake.' Further, he reported that there 'was a Maori camp at Utakura and they asked that the lake not be intefered with'. The inspector also stated the idea that evaporation from the lake made the surrounding atmosphere more humid, and that this had a beneficial effect upon nearby lands.[68]

The next year, Reed again mooted that land surrounding Lake Omapere be acquired by the Crown – this time for the purposes of a recreation reserve. On this occasion some of the 100 acres in question appears to have formerly been part of the Omapere kauri gum reserve on the north western shore of the lake, but did not include the Utakura outlet. After being approached by Reed, Massey replied that the 'area applied for for recreation purposes appears to be excessive and I have decided to defer consideration of the matter', although he did state in relation to the former reserve 'that it is proposed to cut [it] up for settlement purposes as soon as a surveyor is available.'[69]

67. Reed to Massey, 7 February 1914, LS 1 22/2679, LINZ Wellington
68. Inspector of Forests to Auckland Commissioner of Crown Lands, 19 March 1914, LS 1 22/2679, LINZ Wellington
69. Massey to Reed, 17 May 1915, LS 1 22/2679, LINZ Wellington

7.6.4 The Government lowers the lake

The Government was again forced to consider the question of Maori rights to Lake Omapere when, in around 1916, the Okaihau branch railway was constructed. The railway, running between Okaihau and Kaikohe, traversed the western margin of the lake, crossing the Utakura stream immediately below the outlet. Pressure was brought to bear upon the Government that the large labour force based in the Omapere area engaged in the construction of the railway, be used to undertake earth works with the object of lowering the lake.

In a memorandum from the Public Works Department to the Under-Secretary of Lands dated 3 November 1916, it was stated that the Native Land Court had informed the department 'that in connection with our railway works it would be highly injudicious to interfere in the slightest degree' with the eel channels at the Utakura outlet. Consequently it had been 'arranged to deviate the line so that no interference whatever should be caused.'[70] However, Pitcaithly, in one of his many letters urging that the lake be lowered, informed the Member for the Bay of Islands that the Public Works Department, presumably in the course of constructing the railway, had 'fallen foul' of the Maori who owned the eel weirs at the Utakura outlet by filling up one of the channels – 'thus robbing a certain tribe of its right'.[71]

In March 1918, the Chief Drainage Engineer wrote to the Under-Secretary of Lands in connection with the possibility of the lake being lowered through altering the Utakura outlet. In his letter the commissioner drew attention to the eel weirs at the outlet being 'a trouble' and that it was 'more than likely the natives would have a case were they removed.' It was recounted how the Kawakawa Drainage Board had removed some eel weirs and that damages had been awarded against the board to the order of £150. In light of this, the commissioner advised that it 'seems unwise for this Department to place legal machinery in motion for the sake of one individual' – being the owner of the Omapere estate.[72]

Subsequent to the Crown's purchase of the parts of the Omapere estate affected by flooding around the end of the First World War, the North Auckland Commissioner of Crown Lands wrote to the Under-Secretary of Lands. He informed the Under-Secretary that he had recently visited the Utakura outlet and that a party of Public Works Department labourers were still camped there engaged in building the railway. The commissioner urged 'that immediate steps be taken to have the work of lowering the lake put in hand and that the Public Works Department be asked to deal with the matter.'[73]

In 1920, O N Campbell, who had succeeded Thompson as Chief Drainage Engineer, reported to the Under-Secretary of Lands on the feasibility of lowering Lake Omapere. Campbell considered that 'the whole of the lake could if necessary be

70. Under-Secretary of Public Works to Under-Secretary of Lands, 3 November 1916, LS 1 22/2679, LINZ Wellington
71. Pitcaithly to Stewart, 29 December 1916, LS 1 22/2679, LINZ Wellington
72. Chief Drainage Engineer to Under-Secretary of Lands, 11 March 1918, LS 1 22/2679, LINZ Wellington
73. North Auckland Commissioner of Crown Lands to Under-Secretary of Lands, 25 August 1920, LS 1 22/2679 34C

drained' and that 'from a financial point of view this seems a sound proposition' – his calculations suggesting that '3000 acres of Lake bed could be reclaimed at a cost of approximately £7 an acre'. But in light of the considerable opposition to this course of action in the district, and that the question of ownership of the lake bed was still unresolved, he recommended that the lake just be lowered rather than completely drained. This, he considered, would have no detrimental effect upon the eel fishery.[74] Subsequent to the Under-Secretary of Lands receiving this report, he ordered that the work to lower the lake be undertaken, and placed £700 on the supplementary estimates for this purpose.[75]

It is apparent that by February 1921, the work had begun. In that month Sir William Herries, the then Native Minister, received a telegram from Tau Henare informing him that some excavations were underway at the outlet to Lake Omapere and asking whether or not the Government had authorised this action.[76] Around this time, Ripi Wi Hongi wrote to the Minister of Lands, D H Guthrie, regarding the proposal to drain the lake. Although stating that the draining of the lake would be a 'calamity', Wi Hongi was more concerned that each hapu's drain be affected equally so as not to relatively advantage or disadvantage one hapu more than another. He asked, therefore, that all three should be deepened to the same extent. Wi Hongi stated that eel fishing remained very important to the Maori economy of the area because 'the cost of living is very high now, [and] this is one way the Maories can sustain themselves'.[77]

The next year, Hone Toia wrote to Tau Henare, the Member for Northern Maori, registering his opposition to the drains being deepened and demanding compensation: 'We object to the drain being dug on this portion unless the sum of £3000 is paid because the Native Land Court awarded us this stream.'[78] Toia's complaint was investigated by the Chief Drainage Engineer. He reported to the Under-Secretary of Lands that 'the Natives have suffered no injustice and consequently are not entitled to any compensation on account of the works we have carried out at Lake Omapere.' Further, Campbell stated that 'the three existing outlets were deepened to a like depth in order that no one tribe would have any advantage over the other'. It was also claimed that while the water level had been lowered, there was the same volume of water flowing through the outlet, and that therefore the fishery remained unaffected. Campbell considered that the real grievance was not the present works but the fact that Maori had not been paid for lands taken for the purposes of railways and roads in the area, and that the question of the ownership of the lake bed had not been settled.[79]

74. Chief Drainage Engineer to Under-Secretary of Lands, 26 October 1920, LS 1 22/2679, LINZ Wellington
75. Under-Secretary of Lands to North Auckland Commissioner of Crown Lands, 5 November 1920, LS 1 22/2679 35C
76. Minister of Lands to Under-Secretary of Lands (telegram), 3 February 1921, LS 1 22/2679, LINZ Wellington
77. Ripi Wi Hongi to Guthrie, Minister of Lands, (translation) 26 January 1921, LS 1 22/2679, LINZ Wellington
78. Hone Toia to Tau Henare, 7 January 1922, LS 1 22/2679, LINZ Wellington
79. Chief Drainage Engineer to Under-Secretary, 3 February 1922, LS 1 22/2679, LINZ Wellington

Before the Native Land Court in 1929, both John Webster and Hone Toia recounted the lowering of the lake at the time that the Okaihau railway was constructed. According to Webster:

> The Government wanted to lower the level of the lake when the Okaihau railway was put through. The engineers ascertained that the depth of the lake was 14 feet, and they then set about making an outlet. The Natives through Hone Toia and others objected to the Minister in Wellington, and the draining was stopped. Later the engineers deepened the three outlets from the lake, thus interfering with the eel weirs of the Natives, and again the work was objected to by the Natives and was stopped by the Minister.[80]

Similarly, Hone Toia recounted how he remembered:

> . . . Public Works men working at blasting to deepen the outlets from the lake. The PW men were removing the metal to Okaihau. I went to them and asked for compensation first but I was not paid. I stopped them from lowering the level of the lake further. I also stopped the people who wanted to use the water for electric power purposes.[81]

During this time, as was the case around the turn of the century, there is evidence of Pakeha opposition to the waters of Lake Omapere being lowered. In July 1921, an interesting letter appeared in the *Northern News* concerning the lake. Its author, WE Bedggood, bemoaned that:

> the day has passed when any great value is set on Nature's gift so far as scenery is concerned: everything has to give way to provide for another cow or sheep being raised, and for this reason many of our natural beauty spots have been sacrificed.

Bedggood expressed the fear that were the lake lowered six feet, as he believed was the intention, the lake would become 'a raupo swamp, with a channel down the middle.'[82] In response to this claim, the Chief Drainage Engineer informed the Under -Secretary of Lands that the intention was to lower the lake by just under four feet, not the six feet claimed by Bedggood.[83] The Bay of Islands Acclimatisation Society also registered its opposition to the lake being intefered with in a letter to Reed.[84]

7.7 Early Native Land Court Action

The first application by Maori to have the title of Lake Omapere investigated by the Native Land Court was filed in 1913. However, it was not until 1929 – 16 years later – that the matter finally came before the court. To a large extent this delay appears to

80. John Webster, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 5
81. Hone Toia, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8
82. 'Lowering Lake Omapere: An Old Resident's Protest', *Northern News*, 2 July 1921
83. Chief Drainage Engineer, Auckland, 30 July 1921, LS 1 22/2679, LINZ Wellington
84. Secretary, Bay of Islands Acclimatisation Society to Reed, 15 July 1921, LS 1 22/2679, LINZ Wellington

have been effected by various agents of the Crown conspiring to prevent the application being heard.

In 1921, the Auckland Commissioner of Crown Lands informed the Under-Secretary of Lands that a petition asking that the title to Lake Omapere be investigated, had been referred to the Registrar of the Tai Tokerau Native Land Court. In relation to this petition, the commissioner told the Under-Secretary that:

> As the ownership of the lakes beds [sic] is still under consideration, I have up until the present refused to compile a plan for investigation purposes in respect of Lake Omapere, and should be glad of your direction as to what attitude I am to adopt in regard to supplying a plan for this purpose.

It was stated that even were it considered desirable to provide a plan to the Native Land Court, this was impossible given that an accurate survey plan of the lake could not be made until such time as the drainage works underway at the time had been completed.[85] The Under-Secretary of Lands replied that the plan must be prepared once the lowering of the lake was completed – which according to an earlier letter of his, was anticipated to be in January 1922.[86]

By this time Maori who were anxious to have the Native Land Court investigate the title of Lake Omapere had engaged a solicitor, E C Blomfield. A memorandum prepared by the Native Minister's private secretary dated September 1922, stated that Tau Henare had received a letter from Blomfield asking that Henare see either the Minister or Under-Secretary of Lands:

> and arrange so that no objection is made to the issue of a sketch map by the Survey Department at Auckland, without which the investigation of title to the lake could not take place.

According to the memorandum, the Native Minister considered the issue to be 'a lakes matter' and referred it to the Attorney-General, Sir Francis Bell. Bell, replying to the Minister in November 1921, stated that he did 'not think any facilities should be granted to enable an application to be made to the Native Land Court for title to the bed of Lake Omapere.'[87]

Subsequent to this, the matter was brought before the Native Minister at the Treaty of Waitangi hui held in the Bay of Islands on 29 March 1922. Tau Henare, on behalf of Nga Puhi, asked:

> That the Government permit and facilitate the investigation by the Native Land Court of the customary title to the respective lake-beds by providing plans upon which such investigation could be proceeded with.

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85. North Auckland Commissioner of Crown Lands to Under-Secretary of Lands, 21 October 1921, LS 1 22/2679, LINZ Wellington
86. Under-Secretary of Lands to North Auckland Commissioner of Crown Lands, 21 October 1921, LS 1 22/2679; Chief Drainage Engineer to Under-Secretary of Lands, 3 February 1922, LS 1 22/2679, LINZ Wellington
87. Memorandum to the Native Minister from Private Secretary, 6 September 1922, LS 1 22/2679, LINZ Wellington

This precipitated the matter being referred to the Under-Secretary of Native Affairs, Chief Judge Jones. Jones reported to the Minister that the:

> . . . Supreme Court has held that the Natives are entitled to have their claims to lake beds investigated by the Native Land Court. The rules of the court require that before any investigation shall be undertaken, an approved plan or sketch plan of the land shall be produced. The only legal way this can be got is through the Survey Department. I understand that instructions have been issued that no facility is to be given for the preparation of it should a plan be required. With all due deference, this seems to me opposed to the rights the Natives have conferred upon them by statute, to have such rights investigated.

Chief Judge Jones concluded that 'there seems no valid reason why the courts should not be permitted to inquire into the respective claims to them.'[88]

According to the same memorandum, Blomfield again wrote to Tau Henare in 1922 asking that Henare assist the claimants in getting the Survey Department to provide the plans required for a hearing to proceed. Blomfield informed Henare that, if necessary, the claimants were prepared to meet the costs of preparing this plan. Blomfield cautioned that on the authority of previous case law, the claimants had the right to go to the Supreme Court to compel the Native Land Court to investigate their claim. Subsequent to this letter, Henare asked that the Minister of Lands be approached to authorise the Survey Department to compile a plan sufficient to enable an investigation of the title to Lake Omapere. He suggested that the inquiry take place that year and the Native Land Court issue 'an interlocutory order', which the Crown could appeal if they so wished. Henare stated that were such an appeal made, it could be argued before the Native Appellate Court concurrent with the Crown's appeal of the decision in the case of Lake Waikaremoana.[89]

It would appear that Coates, the Native Minister, heeded the advice that legally, Maori could not be prevented from having their title to a lake determined. In September 1922 he ordered that the Survey Department prepare a plan to enable the Native Land Court to investigate title to Lake Omapere.[90]

7.8 The 1929 Inquiry of the Native Land Court

Although Coates instructed that the necessary plan be prepared in 1922, the investigation of title to Lake Omapere did not begin until 1929. The reasons for this further seven year delay remain unclear to the present author.

On 5 March 1929 the court, presided over by Judge Acheson, sat in Kaikohe and heard the evidence of those Maori claiming title to the lake. The court then adjourned

88. Ibid
89. Ibid
90. Addendum (7 September 1922) to Memorandum to the Native Minister from Private Secretary, 6 September 1922, LS 1 22/2679, LINZ Wellington

to Auckland where, on 19 June 1929, the legal issues of the case were argued. Six weeks later, the decision of Judge Acheson was issued.

7.8.1 The Kaikohe hearing, 5 March 1929

The hearing at Kaikohe involved Maori giving evidence as to the basis upon which they asserted their rights to the lake. As this evidence has been drawn on heavily in the earlier section of this chapter detailing the nature and extent of Maori rights in Lake Omapere, it is not described in any great detail here.

After an hour's adjournment to enable the several applicants to consider the relationship between their various claims to the lake, it was announced to the court that Mr Blomfield would represent three claims, and in conjunction with Mr Webster and Mr Guy, a further two. However, the court was told by Blomfield that he was authorised to represent all Maori in their claims against the Crown in relation to Lake Omapere, and that he thus proposed 'to lead the evidence on behalf of all the Natives . . . against the common enemy the Crown.' The minutes of the Kaikohe hearing state that the inquiry was for the hearing of applications 11 to 27 – presumably meaning that in total there were 16 claims in relation to Lake Omapere.[91]

At the outset of the Kaikohe hearing, Crown counsel set out the Crown's contentions in the case before the court. The court minutes record that it was asserted that: Maori custom does not recognise ownership of lake beds; that consequently the beds of lakes belong to the Crown; and further, that by virtue of acquiring lands abutting Lake Omapere, the Crown had acquired the lake bed in those parts of the lake, along with riparian rights to the use of water and the right of navigation.[92] As was later pointed out by claimant counsel, the Crown's argument was somewhat confused; illustrating how uncertain the matter of title to lakes was. Although claiming that the Crown owned all lakes, they still felt it necessary as a fall back position to set up a case that the Crown owned part of Lake Omapere by virtue of its owning lands adjoining the lake.[93]

For the claimants, Blomfield pointed out that the Crown conceded that it had never directly purchased the lake, and that therefore there was 'more onus upon the Crown to prove its right to the lake than there is on the Natives to prove their ownership'.[94] In his decision of August 1929, Judge Acheson summarised the claimants' position as being that:

> Omapere had always been Maori owned, that the Crown had never claimed it prior to the present hearing and that there existed no evidence that the Crown had acquired any rights in the lake, that there existed no presumption in law that the Crown had rights to lakes such as Omapere, that Omapere was customary Maori land and as such

91. Bay of Islands Native Land Court minute book 11, 5 March 1929, pp 1–2
92. Ibid, p 1
93. Bay of Islands Native Land Court minute book 11, 19 June 1929, pp 12–13. The pagination is that of a typed copy of the court minutes contained in LS 1 22/2679, LINZ Wellington.
94. Ibid, p 2

> it had not been legally possible for the Crown to acquire it, and [that] the Treaty preserved such proprietary rights as were being asserted in the case of Omapere.[95]

During the course of the day, four witnesses were heard: Hemi Wi Hongi, Ripi Wi Hongi, Hone Toia, and John Webster. Their submissions were concerned primarily with establishing that Maori had enjoyed continuous and uninterrupted occupation of the lake. Mr Parore stated that the claimants he was representing 'support the evidence given already as to use and occupation' and that they did 'not wish to take up some time by calling further evidence.' Webster, who as well as giving evidence was representing some claimants, stated the same.[96]

At the end of the day's inquiry, Acheson concluded that the evidence of use and occupation of Lake Omapere by Maori was irrefutable. He stated that the:

> . . . Court decides that it has been proved by evidence not contested by the Crown, that for many generations past the Natives interested in Lake Omapere have used the lake for eel fishing purposes on quite a large scale, many thousands of eels being captured every season. The court is satisfied that these eels constitute quite a substantial article of food diet, and that therefore the fishing rights of the Maoris were and still are of real value to them, and will have to be provided for no matter what decision the court may come to on the other questions involved. The Court also holds that it is proved that the Natives fished and still fish for eels over the whole lake and its shores, and not merely in a few well defined outlets on the western side of the lake. The Court is also satisfied that for a long time past the Natives have dug for gum in the bed of the lake in the shallows. The Court has seen them digging, and it has inspected the shores of the lake at various points, and it has seen a number of places where eels are caught. In the absence of any evidence to the contrary both at this hearing, and at previous hearings affecting Omapere lands, the court must accept the Native tradition that the lake bed was originally a swamp area covered with bush, which was burnt. Probably the outlets blocked up and the lake formed.[97]

Acheson then announced that at the request of both the applicants and the Crown, the court would adjourn to Auckland to consider 'some most important legal questions'. These were listed as including: the effect of the Treaty of Waitangi; the claims of the Crown to all lakes and lake beds; the rights of the owners of lands adjoining lakes; and the right of the Crown to lower or raise the level of lakes for hydroelectric purposes.[98]

7.8.2 The Auckland hearing, 19 June 1929

The matter of the title to Lake Omapere next came before the Native Land Court in Auckland on 22 May 1929. Although the hearing was immediately adjourned until 19 June, the court did consider the request of the Crown that Europeans who owned

95. Bay of Islands Native Land Court minute book 11, 1 August 1929, pp 1–2
96. Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8
97. Ibid, p 9
98. Ibid, pp 9–10

land adjoining the lake be afforded the opportunity to be heard. The request, objected to by Blomfield acting for the Maori applicants, was disallowed by the court. In making this ruling, the court stated that even if such parties were admitted to the proceedings, it was 'probable that the court will decide after hearing arguments that the European owners of land adjoining the lake have no status in these proceedings and cannot be heard.'[99]

The Court, reconvening a month later, embarked upon an involved two day inquiry into the legal issues relevant to the ownership of Lake Omapere. Early in the first day's proceedings, Blomfield set out the contentions of those Maori interested in the lake:

> [First] . . . that the lake, until some twelve generations ago, more or less, was land covered with bush and of a swampy nature.
>
> Secondly, that until the land became a Lake, it was occupied and owned by the Claimants. . . .
>
> Thirdly, that the area has since it became a Lake, been extensively used through its entirety as a fishing ground by the claimants and is still so used.
>
> Fourthly, that there is no evidence before the court that the Crown has ever purchased or acquired the area.
>
> Fifthly, that the Claimants have always asserted their claim even to the Native Minister in 1903 and have endeavoured to have the title investigated by the court.
>
> Sixthly, that the Native Land Court has never investigated that title.
>
> Seventhly, that when the Crown commenced to drain the lake, the claimants actively objected.
>
> Eighthly, there is no evidence before the court that the Crown ever claimed the lake until the present proceedings.
>
> [And] Ninthly, . . . that the level of the lake has been lowered and foreshore created along its boundaries by the drainage operations.[100]

Blomfield then proceeded to state what he adduced as being the Crown's position in the case.[101] He considered that it was apparent that the Crown, in not recognising the Maori customary ownership of lake beds, considered that the beds of lakes belonged to it. And that not withstanding, through having purchased lands contiguous with the lake, the Crown had title to those parts of the lake bed that adjoined such lands. Blomfield added that the Crown also claimed that it had acquired riparian rights that conferred upon it the right to take water and possibly the right of navigation.[102]

Blomfield then proceeded to set out the case of the Maori owners in the matter. Of key importance to his submission was the notion that 'by virtue of the Treaty of Waitangi', Lake Omapere was customary land. In support of this contention, he cited the cases of *Tamaki v Baker* (Court of Appeal in 1901) and *Mangakahia v The New Zealand Timber Company* (Supreme Court during 1881 and 1882). It was argued that

99. Bay of Islands Native Land Court minute book 11, 22 May 1929, pp 91–92
100. Bay of Islands Native Land Court minute book 11, 19 June 1929, pp 4–5
101. These, along with the claimants' contentions set out above, were included in the preamble to Acheson's decision, issued on 1 August 1929. Bay of Islands Native Land Court minute book 11, 1 August 1929, pp 1–3
102. Bay of Islands Native Land Court minute book 11, 19 June 1929, p 5

this contention, in conjunction with the precept that a lake was simply land covered with water, meant that the court must work from the assumption that Omapere was customary Maori land unless otherwise shown.[103]

In relation to the spectre of riparian rights, Blomfield submitted that given that Omapere 'is customary land and that the title has never been investigated . . . no principles of English law apply with respect to adjoining owners'. It was also pointed out that the Crown's claim to riparian rights illustrated the rather confused and uncertain nature of its case:

> First of all the Crown says the whole of the lake belongs to us because we own everything. Secondly, if it does not belong to us in that way, we own some of it. Thirdly, that if that is not so, we have riparian rights.[104]

Following the completion of the applicants submission, the Crown then proceeded to state its case. Central to its argument was the notion that in order to:

> establish a claim to the bed of Lake Omapere, the claimants must satisfy the court, first of all that native custom in the district recognised absolute ownership of the lake to specific individuals or a specific collection of individuals, and secondly that such a right has obtained legal recognition or validity in Native land legislation.

Much was also made of the fact that the lake was navigable. Although reference was made to the Coal Mines Act 1925, this was only in terms of a definition of what constituted a navigable body of water, and not in relation to the significance of what navigability meant in terms of the Crown ownership of lakes.[105]

Another argument put forward by the Crown was that the basis of claims such as that by the present applicants to Omapere, lay 'not in Native custom, but in advice of European legal advisers who have been acting for Natives in recent years'. Further, the Crown contended that official documents relating to Maori tenure disclosed nothing to indicate that Maori contemplated the ownership of lake beds. In particular, counsel for the Crown stressed that the 'doctrine that the lake is land covered by water is borrowed from English law, and was not in contemplation by the Natives.'[106]

Upon being questioned by Judge Acheson, Meredith, for the Crown, admitted that there had been no investigation of title to Omapere. But he was quick to add:

> that Native title is not universal and that it is not strictly true that the whole of New Zealand, whether land or water is necessarily the subject of the native title.[107]

In arguing that Maori custom did not recognise the ownership of lakes, Crown counsel made a distinction between exclusive ownership of a lake, and the existence of rights of fishing and navigation in the same body of water. It was contended that in the case of Lake Omapere, no evidence had been produced to demonstrate the

103. Ibid, pp 5–6
104. Ibid, pp 12–13
105. Ibid, pp 19–20
106. Ibid, pp 21–22
107. Ibid, p 22

existence of 'exclusive proprietary rights of ownership in this lake bed.' While Acheson pointed out that fishing rights were clearly part of ownership, Meredith countered that one could fish without necessarily having ownership rights.

At this point, Meredith questioned the preliminary decision of the court that the lake was customary Maori land (made after the hearing at Kaikohe) because it was based purely on evidence of fishing.[108] Acheson contested this point, stating that Maori had dug gum from the lake, and that they had 'done far more than fish.' However, despite being pressed by the Crown to elaborate upon these other uses, Acheson did not specify what they actually were, other than to state that it 'was taken for granted that occupation was admitted and that there has been nothing brought forward by the Crown to disprove the position.' The Crown, in response to the question from the court as to what conditions constituted proof of ownership, replied that ownership would mean:

> that the actual owners would have the right to fish and they would be the only persons to have the right to fish all over it and they could not be restricted if they owned the lake.[109]

The Crown again restated the position that Maori must establish their title before the lake was removed from the demesne of the Crown, and that in the case of Omapere, there was only a right of fishery and that this right only existed in connection to the ownership of land adjacent to the lake. This led to further debate about the difference between normal land and land covered with water. Acheson queried whether in this regard, land covered with water was any different to land covered by forest in which Maori gathered food. In suggesting that in fact they were analogous, Acheson stated that this was supported by common law. Rebutting this, Crown counsel contended that the issue was not the situation under English law, but whether Maori traditionally recognised the ownership of lake beds. In support of the position that usufructuary rights did not necessarily equate with ownership, Meredith argued that the incontrovertible use of sea fishery resources by Maori did not confer upon them ownership of the sea. Judge Fenton's Kawaurenga judgement (Native Land Court, 1870) was cited in support of this.[110]

Crown counsel proceeded to argue that it was preposterous to propose that Maori had exclusive rights to navigable waters. It was asserted that it could never have been contemplated by the Legislature that Maori would have such exclusive ownership of navigable waters, given the position that 'rights of navigation should be vested in the Public'. Hence Crown counsel advocated that a 'restricted' reading of the Treaty of Waitangi in relation to waterways was both necessary and justified. Rights of navigation, it was contended, were an ordinary condition of sovereignty.[111]

Prenderville, who acting for the Crown along with Meredith, then proceeded to outline the situation vis-a-vis other North Island lakes, the title of which had been

108. Ibid, p 27
109. Ibid, pp 28–29
110. Ibid, pp 30–32
111. Ibid, pp 34–35

contested by Maori.[112] Of the lakes discussed, Prenderville considered that it was only in the case of Lake Wairarapa that the Crown actually recognised Maori rights to the whole lake and had accordingly extinguished them by purchase. However, Crown counsel stressed that there were various exigent factors that were a consideration in this acknowledgement of Maori rights to the Wairarapa lakes – especially the possibility of a breach of the peace in connection with the opening of the lake to release floodwaters.[113]

In reply, Blomfield asserted that the Crown was simply claiming all land as the demesne of the Crown, a corollary of which was that the onus was upon Maori to prove otherwise. Blomfield drew attention to the fact that in presenting its case, the Crown had assiduously ignored significant case law. In particular, reference was made to *Tamaki v Baker* – a case that he claimed established the principle 'that the mere assertion [of title] by the Crown amounted to nothing.' Blomfield stated that this principle was affirmed when the case was reheard by the Court of Appeal.[114]

Further, Blomfield contended that the whole of the Crown's case as presented by Meredith was 'shattered', if he considered what happened when a small lake contained within a single block of land came before the Native Land Court. According to Blomfield, in such instances, the land along with the lake is invariably awarded to the land's traditional owners. He also stated that it was irrelevant as to whether or not a lake was navigable.[115]

During the second day of the Auckland hearing, Professor John Arthur Bartrum, a geologist at the University of Auckland, was questioned extensively in connection with the manner in which Lake Omapere was formed. This, it appears, was an attempt to reconcile scientific accounts as to the origins of the lake with those of various witnesses at the Kaikohe hearing. [116]

The hearing concluded with a lengthy exposition by Judge Acheson in which he made a further interim statement of findings. Although a formal written decision was to follow – considered necessary by Acheson given the likelihood that the outcome would be taken on appeal – he considered it desirable that parties be given an intimation as to the likely outcome.[117]

As had been made evident in the previous two days' proceedings, Acheson was emphatic as to the extent of the Crown's demesne in New Zealand:

> I wish to say definitely that the Crown has no inherent right to the beds of the lakes. It has no inherent right in England to beds of lakes, and there would need to be some very definite statutory or other provisions in New Zealand to confer upon the Crown greater rights in respect to the beds of lakes than the Crown has in England.

112. Ibid, pp 37–44
113. Ibid, p 42
114. Ibid, p 45
115. Ibid, pp 45–46
116. Ibid, pp 51–62
117. Ibid, p 63

And specifically in relation to Lake Omapere, it was observed – in concurrence with the submissions of counsel for the applicants – that:

> the claim of the Crown that this bed of the Omapere Lake is Crown land has not been supported by any evidence whatsoever and [that] two well known cases *Tamaki v Baker* and *Tamihana v Solicitor General* quite clearly establish the point that the Crown was not entitled to have its rights assumed. It must prove that it is entitled to the bed of the lake.[118]

From Acheson's closing statement it is apparent that in his final decision, great weight was to be placed upon the Treaty of Waitangi. Acheson discussed at some length the importance of taking into account Lord Normanby's instructions to Hobson in seeking an understanding of the circumstances in which Maori acquiesced to the Treaty. In particular he drew attention to the oft quoted position that Maori sovereignty and title to the soil of New Zealand had been solemnly recognised by the British Government. Acheson was clearly of the mind that article two of the Treaty, when read in connection with these instructions, undoubtedly included lakes.[119]

Acheson was equally dismissive of the Crown's contention that Maori interests in Omapere extended only to fishing rights:

> To the Maori, as we nearly all know, a Lake was a Lake. It was something besides, something that stirred the hidden memories in a tribe or an individual, and it is impossible to believe that those thousands of Maoris who were inhabiting the Pahs, who had been born in sight of the Lake, it is impossible to believe that these Maoris had not loved Lake Omapere for the sake of the Lake itself, and regarded it as a treasured possession. And nothing can make me believe that they would look upon it in such a mean way as to regard it only as an occasional source of food supply for the tribe.

Further, in light of this perceived attachment, Acheson observed that it was hard to entertain the notion that Maori would have contemplated abandoning ownership of the lake to the Crown, and that if the Crown had pressed its claim within 20 years of the signing of the Treaty of Waitangi, 'there would have been more trouble to cope with than it would have cared to undertake at the time'.[120]

Acheson, 'having held that this land is customary land, and having rejected the claim of the Crown to the bed of the lake', proceeded to briefly set out a number of other points that were later expanded upon in his written decision of 1 August 1929.[121]

7.8.3 Acheson's decision

On 1 August 1929, Judge Acheson's written decision as to the title of Lake Omapere was issued. There can be no doubting the significance of this decision. While the ruling that Maori use and occupation of the lake had been continuous and

118. Ibid
119. Ibid, pp 64–65
120. Ibid, p 66
121. Ibid, p 71

uninterrupted since 1840, and that the lake was incontrovertibly Maori customary land, was in itself significant, what was truly remarkable about the decision was the reasoning in connection with the Treaty of Waitangi that underpinned it. Acheson ruled that the Native Land Court was bound to take notice of the Treaty, and that its provisions most certainly guaranteed Maori the ownership of lakes. Such findings led the Waitangi Tribunal, in its 1995 report on the Whanganui-a-Orotu claim, to observe that the '1929 decision of Judge F O V Acheson of the Native Land Court was in our view one of the most perceptive judgements in the legal history of this country.'[122]

The issues pertaining to the title of Lake Omapere were considered to be of such importance, that the court dealt with them at great length. Acheson stated 'that in order to facilitate future reference to its decision on various points, the court will deal with the issues in the form of specific questions and answers.'[123] The following section sets out each question and answer.

(1) Did the ancient custom and usage recognise ownership of the beds?

The question 'Did the ancient custom and usage of the Maoris recognise ownership of the beds of lakes?' elicited an emphatic 'Yes!'. To Acheson's mind, 'this answer necessarily follows from the more important fact that Maori custom and usage recognised full ownership of lakes themselves.'[124] In setting out his rationale for this decision, it was observed that:

> The bed of any lake is merely a part of that lake and no juggling with words or ideas will ever make it other than part of the lake. The Maori was and still is a direct thinker and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soils that comprise a mountain. In fact in olden days he would have regarded it as a rather grim joke had any strangers asserted that he did not possess the beds of his own lakes.
>
> A lake is land covered with water, and it is part of the surface of the country in which it is situated, and . . . it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a stream.
>
> All the old authorities are agreed that the whole surface of the North Island of New Zealand was held in definite ownership, according to Maori custom and usage, by the various tribes and their component parts. The Native Land Court has proved the truth of this time after time in every district.[125]

In support of this position, Acheson cited various case law and other authorities including former Chief Justice Sir William Martin, and the first Attorney-General, William Swainson. In summary, Acheson observed that:

> nowhere throughout those judgements or opinions has he found the slightest suggestion by inference or otherwise that the ancient custom and usage of the Maoris

122. Waitangi Tribunal, Te Whanganui-a-Orotu Report, Wellington, Brookers, 1995, p 207
123. Bay of Islands Native Land Court minute book 11, 1 August 1929, p 7
124. Ibid, p 7
125. Ibid

> did not provide for the full ownership of lakes in exactly the same manner as for the ownership of mountains and forests.[126]

Of the parts of the country with which he was most familiar, Acheson noted 'that it was taken for granted that the lakes were tribal property' and that importantly, lakes were not 'regarded merely as sources of food supply or merely as places where fishing rights might be exercised'.[127] In support of this he stated how lakes 'to the spiritually-minded and mentally-gifted Maori' were 'a striking landscape feature possessed of a 'mauri' or 'indwelling life principle' which bound it closely to the fortunes of his tribe.'[128]

This was not to say, however, that Acheson did not place emphasis upon the importance of Omapere as a food resource. In emphasising the significance of water-based food resources, he cited the 1870 Kauwaeranga judgement in which Chief Judge Fenton observed that the reliance of many iwi upon kaimoana, meant that water resources were often valued more than the land. Lake Omapere, Acheson said:

> has been to the Nga Puhi a well-filled and constantly available reservoir of food in the form of the shellfish and the eels that live in the bed of the lakes. With their wonderful engineering skill and unlimited supply of man-power, the Maoris could themselves have drained Omapere at any time without great difficulty. But Omapere was of much more value to them as a lake than as dry land.

However, he was at pains to distance himself from the position of Justice Edwards' in the case of *Tamihana Korokai v Solicitor General* (in the Court of Appeal during 1912 and 1913). In this decision Edwards contended that it was probable there was no Maori custom that recognised any greater right to navigable waters than that of fishing.[129]

(2) Was Lake Omapere effectively occupied and owned by the Ngapuhi tribe?

This question was 'Was Lake Omapere at the time of the Treaty of Waitangi (1840) effectively occupied and owned by the Ngapuhi Tribe in accordance with the requirements of ancient Maori custom and usage?' Again, Acheson was in no doubt that Omapere was the property of Nga Puhi: 'The occupation of Omapere was as effective, continuous, unrestricted, and exclusive as it was possible for any lake occupation to be.' Further, he contended that by:

> no process of reasoning known to the Native Land Court would it be possible to convince the Ngapuhis that they and their forefathers owned merely the fishing rights and not the whole lake itself.

It was stated that in the case of lakes, the usual tenets of Maori ownership would be the:

126. Ibid, pp 7–8
127. Ibid, p 8
128. Ibid, p 8
129. Ibid, pp 9–10

> unrestricted exercise of fishing rights over it, the setting up of eel weirs at its outlets, the gathering of raupo or flax along its borders, and the occupation of villages or fighting-pas on or close to its shores.

According to Acheson, the evidence received at the Kaikohe hearing:

> was quite sufficient to show that all the signs of ownership set out above had been shown effectively and continuously for many generations past in respect of Omapere. Fishing for eels had been carried out all over the lake and not merely in a few defined spots. Eel weirs had been set up in the outlets. Freshwater shell-fish had been gathered. It is quite certain that raupo was gathered from the lake fringe for the thatching of houses, and flax for the making of cloaks and mats. Without doubt also, although no evidence was given along these lines, the old time Maoris must have snared wild-fowl in the reeds and swamps along the shores and used the lake for the canoeing and other aquatic pleasures and exercises universal among the Maoris of other days.

In conclusion, Acheson observed that:

> the Ngapuhis used and occupied Lake Omapere for all purposes for which a lake could reasonably be used and occupied by them, and [that] the Native Land Court says that much less use and occupation would be ample, according to ancient custom and usage, to prove actual and effective ownership of the lake, bed and all.[130]

(3) Must native title be legally extinguished?

The question was: 'Must Native title be extinguished in accordance with the law before it can be diregarded by New Zealand Courts?' In stating that customary title had to have been legally extinguished before it could be disregarded by the courts, Acheson remarked that he could not see upon what basis the Crown could contend that the Native Land Court could not require the Crown to prove that title had been extinguished.[131]

(4) Has native title been extinguished?

Following on from the third question, this question was: 'Has the Native title to Lake Omapere been extinguished in accordance with the law?' Acheson considered whether or not title to Lake Omapere had in fact been legally extinguished, and he was in no doubt that it had not been extinguished. In support of this, Acheson stated that the Crown admitted that title had:

> not been extinguished by proclamation, or by confiscation arising out of any act of rebellion, or by sale by the Natives, or by cession to the Crown, or by abandonment by the Natives, or by any action of the executive, Government, or by any Statute of Parliament, or by the issue of a Crown Grant.

130. Ibid, pp 10–11
131. Ibid, p 11

Concomitantly, Acheson was emphatic that there was no evidence of the Crown having any rights in the lake. Of the Crown's contention that rights in Omapere had accrued to it because the Crown had purchased adjacent lands, he observed that:

> This contention has no merit whatever. The sales to the Crown were of particular areas of land well defined as to area and boundaries, and could not possibly have been intended to include portions of the lake-bed adjoining.

Acheson concluded that there:

> can thus be no presumption either in law or in fact that the sales of some lands to the Crown adjoining Lake Omapere carried with them rights to portions of the lake or of its bed.[132]

(5) Has the New Zealand legislature recognised native ownership of lakes?

The question was: 'Has the New Zealand Legislature at anytime given recognition to Native ownership of lakes?' Acheson considered that by inference, Parliament had recognised Maori title to lakes. In support of this he cited section 21 of the Native Lands Act 1873. This section provided for the preparation of maps showing the different tracts of country in possession of the various hapu at the time of the signing of the Treaty of Waitangi. The Act specified that the maps were to show, inter alia, the positions of lakes. While it had not proved possible to locate any maps prepared under the 1873 Act for the Nga Puhi territory, Acheson expressed the opinion that if one existed, it would certainly have shown Lake Omapere. Attention was also drawn to the legislative recognition of Maori rights in the cases of Lakes Taupo, Rotorua, and Poukawa.[133]

(6) Is the Native Land Court bound to the Treaty of Waitangi?

The question was: 'Is the Native Land Court bound to take judicial notice of the provisions of the Treaty of Waitangi?' In ruling that the Native Land Court needed to have regard for the Treaty, Acheson stated that the Treaty had received statutory recognition by the New Zealand legislature, and that both the Supreme Court and the Privy Council had taken judicial notice of it. Various case law and statutes were cited in support of this.[134]

(7) Do the provisions contained in article 2 extend to the ownership of lakes?

The question was: 'Are the words, "Lands and Estates, Forests, Fisheries and other properties, which they may collectively or individually possess", contained in Article Two of the Treaty of Waitangi ample in their scope to extend to the ownership of lakes?' Acheson was clearly of the opinion that lakes came under the ambit of article two of the Treaty of Waitangi. In discussing this article and the fact that lakes were not included in the resources listed, Acheson again cited the case of *Tamihana Korokai v*

132. Ibid, pp 13–14
133. Ibid, p 14
134. Ibid, pp 14–18

Solicitor General. In this decision Justice Edwards stated that 'a lake, in contemplation of the English law, is merely land covered by water, and will pass by the description of land.' Further, it was contended that the specific reference to fisheries in article two conferred to Maori rights that were supplementary to what else was guaranteed by article two. Acheson stated that these fishing rights were not a limitation upon any other rights Maori held.[135]

(8) Did the parties of the Treaty contemplate that the natives would be entitled to the bed of Lake Omapere?

The question was: 'Did the parties to the Treaty of Waitangi contemplate at the time of the signing, that the Natives would be entitled to the bed of Lake Omapere?' The notion that subsequent to the signing of the Treaty, Maori would be divested of their title to Lake Omapere, was dismissed as nonsensical:

> common sense dictates that neither they nor the Crown's representatives could have imagined for one moment that, in all the vast tribal territory between the Bay of Islands and the Hokianga, there was one spot right in the centre, called lake Omapere, which was not owned by the Tribe and would be claimed by the Crown.

Acheson observed, that had Maori considered that they were to lose their title to the bed of Lake Omapere, the chiefs of Nga Puhi would not have signed the Treaty and that their numbers would have been sufficient to ensure the rejection of the Treaty at Waitangi on 6 February 1840. Acheson contended that the only right Maori gave up in signing the Treaty, was the right to sell to parties other than the Crown.[136]

(9) Did the parties to the Treaty contemplate that the Crown would claim title to the lake?

The question was: 'Did the parties to the Treaty of Waitangi contemplate at the time of signing that the Crown would claim Lake Omapere or its bed?' In a similar fashion to the previous question, Acheson outrightly dismissed the idea that parties to the Treaty would have considered the possibility that subsequent to its signing, the Crown would claim title to Lake Omapere:

> There was no common law right of the Crown to lakes or to the beds of lakes in England, so it is impossible to suppose that the Crown's representatives who were negotiating with the Maoris took it for granted that New Zealand lakes would belong to the Crown as a matter of right.

In support of this, Acheson quoted at length various case law as well as the instructions under which Hobson was acting when he executed the Treaty. Of the officials who transacted the Treaty, Acheson claimed that it was:

135. Ibid, pp 18–20
136. Ibid, pp 20–21

> impossible to believe that these representatives believed that the Crown had a right to the beds of Omapere and other lakes, yet deliberately refrained from drawing attention of the Natives to that right.

Further, he expressed incredulity that the Crown knew of such a right from the time of the signing of the Treaty, but refrained from pressing a claim for 90 years.[137]

(10) Has ownership of the lake been effective, continuous, and unrestricted?

The question was: 'Have the occupation and the ownership of Lake Omapere by the Ngapuhis ceased to be effective, continuous and unrestricted since . . . 1840?' Judge Acheson was unequivocal that the Maori occupation and ownership of Lake Omapere had remained undisturbed since 1840. In support of this finding, reference was made to the uncontested evidence received at the Kaikohe hearing as to the nature and extent of Maori fishing practices on the lake; that Maori in recent years had been digging for kauri gum in the shallows at the western end of the lake; and that it was admitted by the Crown 'that the Natives have never been disturbed or restricted in their use of the lake up to the present day.'

Acheson claimed that further evidence of the undisturbed occupation of the lake existed in the fact that:

> on the only two occasions on record where officers of the Crown actively intefered with the Lake (by slightly lowering its level), the Native leaders at once made emphatic protests to the Native Ministers in Wellington, with the result in each case that the operations were stopped.
>
> Thus the Natives have not only asserted their own rights continuously, but they have secured the stopping of acts by Crown officers that might possibly have been construed into acts of ownership if permitted.

The court received evidence from both Hone Toia and John Webster that when the Government was in the process of lowering the lake, they intervened and the work was stopped. But despite this it seems that the lake's level was in fact lowered. Also cited as supporting the contention of Maori ownership and possession having been continuous and undisturbed, was the fact that Maori with interests in the lake had been campaigning for many years to have the Native Land Court investigate the title to the lake – 'they have certainly not slept on their rights, or as the Maori would express it, allowed their fires to die out.'[138]

(11) Is Lake Omapere customary land?

The question was: 'Is Lake Omapere in fact 'customary land' within the meaning of Section Two of the 'Native Land Act, 1909''? Acheson ruled that there could be no doubt that Lake Omapere was customary land within the meaning of section 2 of the Native Land Act 1909.[139]

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137. Ibid pp 21–24
138. Ibid, pp 24–25
139. Ibid, pp 25–26

Having worked through the eleven questions, Acheson ruled incontrovertibly that Lake Omapere was Maori customary land. However, the making of a final order was held over pending the disposal of any appeal against the preliminary determination, and the hearing of further evidence from Nga Puhi to determine who should be included on the title to the lake.[140]

7.9 The Crown's Appeal and Other Native Land Court Proceedings

As Acheson had foreseen, on 11 September 1929, the Crown appealed the Native Land Court's decision as to the title of Lake Omapere. However, just as the Crown had obstructed the initial inquiry, it deliberately delayed proceedings subsequent to the lodging of the appeal.It would be a further 24 years before the Crown's appeal was disposed of.

When the appeal first came before the Appellate Court in 1930, the Crown immediately applied for an adjournment which was duly granted. It appears that it was six years before the Crown's appeal again came before the court.[141]

In 1935, however, an application by the Public Works Department for approval to clear out the outlets of Lake Omapere was heard by the Native Land Court.[142] The partial obstruction of the lake's outlets was apparently causing several hundred acres of Pakeha-owned land to be inundated with water. Part of the problem appears to have been that Maori were leaving their eel weirs in the outlets for the whole of the year, not just the few months of the eeling season. The Court reported that Maori present at the hearing:

> agree to the weirs being removed except during the eeling seasons. They agree also to the drains being cleared but object to the drains being widened or deepened. They object to anything being done that might cause a rush of water from the lake and lead to [the] scourin[g of] the channels.

In light of this, the court agreed 'on the spot to the outlets being clear[ed] but not deepened or widened.'[143] When in May 1936 the matter of the Crown's appeal next came before the court, an adjournment was again granted upon the request of the Crown. Two months later, a similar course of events transpired and the hearing of the appeal was adjourned again. The matter next came before the Appellate Court in 1939. At this hearing the court made a statement that one of the major principles of British law is that justice should not be unduly delayed, and that the present case before the court had been delayed by ten years because of the non-prosecution of the Crown's appeal.[144]

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140. Ibid, p 26
141. Auckland Maori Appellate Court minute book 12, 27 October 1953, f ol 347
142. Bay of Islands Native Land Court minute book 14, 31 August 1935, fols 324–325
143. Ibid, fol 325
144. Auckland Maori Appellate Court minute book 12, 27 October 1953, fol 347

7.9.1 Application to have Lake Omapere made a tribal reserve, 1940

In July 1940, the matter of Lake Omapere was again before the Maori Land Court – this time to hear an application that the lake be made a tribal reserve. In setting out the history of the case subsequent to Acheson's 1929 decision, the court expressed the opinion that:

> the appeal should have been dismissed long ago [because of] non-prosecution, or, better still, taken to the Privy Council for a final and binding pronouncement upon the important issues involved. Having waited eleven years, the court cannot wait any longer for the disposal of the appeal, but must in justice to the Natives make its final decision today.[145]

Mr L W Paraone, acting for Maori with interests in the lake, reported to the court that the initial intention was that the lake would be vested in those individuals with proof of ancestral right, and whom had financed the 1929 Native Land Court inquiry. However, as discussions proceeded:

> the leaders and the people gradually realised that the Native interest was paramount and that they should seek first the strength and the welfare of the Ngapuhi tribe. Accordingly the contributors finally decided to join the others and deal with Omapere solely from a tribal point of view, leaving it to recoup the contributions for the funds subscribed for the 1929 case.[146]

Paraone stated how the people of Nga Puhi 'all realised the necessity of making Omapere Lake into a Reserve to be guarded against alienation for all time, especially against purchase or taking by the Crown.' He recounted how at a meeting held to discuss the matter, those present had become:

> fully conscious of the great tribal importance of this matter. It was felt that the spirit of ancestors long dead had returned to the tribe and was guiding the people to unity amongst themselves.

Further, Paraone observed that this 'must be the first time that the Ngapuhi have come to a unanimous decision', and that it was proof of the survival of the 'the tribal spirit'.

It was envisaged that the lake would be used to earn revenue which would then be used for tribal purposes. In order to protect the lake against being alienated or taken by proclamation, it was asked that the court make a recommendation that an order be issued under section 5 of the Native Purposes Act 1937 making the lake a Native reserve. It was stated that 'later we may have to move for an Act of Parliament to close up all holes by which we may lose this lake.' Interestingly, Paraone reported that it was the intention of Nga Puhi to admit a trustee from Ngati Whatua, Te Rarawa, Te Aupouri, and Ngati Kahu – these being iwi 'usually associated with Ngapuhi in all matters affecting the Maori people'.[147]

145. Bay of Islands Native Land Court minute book 18, 31 July 1940, fol 103
146. Ibid, fols 98–99

Upon being satisfied that a full representation of Nga Puhi were present and that the matter had been adequately discussed amongst themselves, the court decided to 'recommend that 'Omapere Lake' be created a Native Reservation' under section 5 of the 1937 Native Purposes Act.[148]

Subsequent to the court's recommendation, Eru Pou and 20 others petitioned Parliament, praying that their title to Lake Omapere be established, and that the lake be made a tribal reserve. The Native Affairs Committee recommended that the petition should be referred to the Government, and 'that the question of the ownership of subaqueous land claimed by Maoris should be brought to finality.'[149] By 1953, the lake had been made a tribal reserve. The court appointed two panels of trustees – one being patrons, the other executives. The trustees were instructed by the court to complete the title to the lake by having a survey undertaken.[150]

7.9.2 The Crown's appeal is dismissed

Although the Land Court went ahead and made Lake Omapere a tribal reserve, the Crown's appeal against the court's 1929 decision remained. On 23 June 1953, the appeal again came before the Maori Land Court, but was adjourned until 24 August that year. The court stated that the present adjournment appeared to have been because the Whanganui River claim was presently to be heard, and that Crown Counsel considered that this case bore directly upon that of Lake Omapere. The Judge, however, was critical of the delay, saying he was doubtful as to the relevance of the Whanganui case to the present matter.[151]

After yet another adjournment,[152] the Appellate Court sat again to hear the Crown's appeal on 27 October 1953. On this occasion the Crown announced that it had abandoned the appeal for practical reasons – specifically that it was by then 'not considered that the ownership of the soil under Lake Omapere has any value to the Crown.' However, they were quick to add that the abandonment of the appeal 'is not to be taken in the future as an admission of the correctness of the decision given in this case.'[153] In response, Mr Henderson, counsel for the owners, stated that:

> It might be thought that we should accept this decision without ado. But I must express most vehement protest at the action of the Crown over the years and especially today.
> . . . I feel that I must say the Crown's actions from the date of the Judgement 24 years ago until this present day can only be termed as being quite unconscionable and such an abuse of the process of this Court as to lead to a denial of Justice.

147. Ibid, fols 98–101
148. Ibid, fols 103–104
149. Petition 102/1945, AJHR 1945, I-3, p 8
150. Bay of Islands Maori Land Court minute book 30, 10 February 1956, f ol 168
151. Auckland Maori Appellate Court minute book 12, 23 June 1953, fols 335–356
152. Auckland Maori Appellate Court minute book 12, 24 August 1953, fol 337
153. Auckland Maori Appellate Court minute book 12, 27 October 1953, fol 347

Further, in the course of recounting the history of the Crown's appeal against the 1929 decision, Henderson remarked that:

> . . . I think it is fair comment to say that it has taken the Crown an inordinately long time to reach this conclusion which is in no way shared by my clients. One wonders why the Crown should not have said this 25 years ago and why the Crown has had to wait until all persons who originally made the application have died before they could legally be declared the owners of what they considered was an extremely valuable right. The Crown's attitude is quite clearly that the Maoris can have the lake solely for the reason that the Crown does not want it itself and after 25 years I would submit that that should not be countenanced by this Court in any way.
>
> . . . . .
>
> After giving every indication of preparing for a major legal battle and calling the court together this year – this is the third occasion the Crown has called the whole matter off by saying the subject matter of the appeal isn't worth fighting about. All that would be bad enough if the contest was between private persons. But when one party is the Crown and is under the most special obligations to afford protection to the Maori rights then I suggest that the position is quite intolerable.[154]

The court reconvened the next day and the Crown's appeal was unconditionally dismissed. Upon this occasion, the court again criticised the Crown, claiming it was unjustified in delaying the issue of title to Lake Omapere by 25 years. It was contended that:

> It would appear from the course of proceedings that the appeal may have been intended to be treated as a lever for negotiation for a settlement of some sort with the Maori owners. If that is so it is reprehensible and an abuse of the process of the court. The Court looks to the Crown's advisers in these matters to be motionless in setting an example to be followed in the use of the court's procedure.

The court ordered the Crown to pay costs of £150 to the respondents.[155]

7.9.3 Lake Omapere becomes a section 438 trust

In 1953, the Maori Affairs Act was passed. Section 438 of that act provided for any Maori freehold or customary land to be vested in a trust, regardless of whether or not it had been formally constituted as a Maori reserve. Subsequent to the passing of the 1953 Act, the Lake Omapere trust was converted to one under section 438 – the Maori Land Court issuing a draft 'intended final order' on 22 February 1955.[156] It has not yet proven possible to find a copy of this draft in order to examine its exact terms, but it is apparent that it included not only the lake bed but also the lake's waters.

In the process of finalising the terms of the section 438 order, it was referred to the State Hydro Electric Department, the Marine Department and the Department of

154. Ibid
155. Auckland Maori Appellate Court minute book 12, 28 October 1953
156. Bay of Islands Maori Land Court minute book 29, 22 February 1955, fol 112

Lands and Survey. While Lands and Survey had no objections to the terms of the order, the other two departments raised concerns as to possible conflicts with existing legislation in relation to hydro developments and fisheries. Consequently the Minister of Maori Affairs declined to approve the order unless it was made subject to the provisions of both the Public Works Act 1928 and the Fisheries Act 1908.[157] This resulted in a further Maori Land Court hearing on 8 March 1956 at which the court directed that the trust order be amended so that it was subject to those Acts.[158]

In a letter dated 3 August 1973, reference was made to the fact that in 1956, an order of the Maori Land Court had vested in the trustees' both the lake's bed and its waters.[159] The letter does not specify what is comprised in the order, and the original section 438 order has not been located.

7.10 The 1970s

Around 1973, the Kaikohe Borough Council applied to the Northland Catchment Commission – the agency charged with allocating water rights in Northland – for a permit to enable it to extract water for domestic supply from Lake Omapere. The application led to a reconsideration of the nature and extent of the rights of the Lake Omapere owners. On 1 June 1973, the Secretary of the Northland Catchment Commission wrote to the commission's solicitors asking, in light of section 21(1) of the Water and Soil Conservation Act 1967, whether:

> any decision by the Maori Land Court to vest the lake in certain "Trustees of Lake Omapere" does not constitute an express authorisation in respect of any body of water under the authority of any particular Act of Parliament.

Essentially the issue was whether the right to take water from Lake Omapere resided solely with the Crown, or whether this right was vested in the lake's trustees.[160]

The solicitors' reply was contained in a letter to the commission dated 20 June 1973. In their opinion:

> ownership of the lakebed is quite irrelevant. Section 21(1) of the Water and Soil Conservation Act 1967 vests all natural water in the Crown irrespective of ownership of the river, lake or stream bed. Any right to sell water vested in the trustees prior to the 1967 Act would be no different from the right that then existed for a European owner to sell water from a lake on European land.
>
> . . . we are of the opinion that the right of any Maori trustees to sell such water, if conferred by the Maori Land Court, would not avoid the intended purpose of the 1967 Act which was to vest such water in the Crown. [161]

157. Maori Affairs (Head Office) to District Officer, Whangarei, 23 February 1956, MA 1, 5/13/184 (Wai 22 ROD, doc B8)
158. Bay of Islands Maori Land Court minute book 30, 8 March 1956, fol 202
159. Connell Trimmer Lamb and Gerard to Secretary, Northland Catchment Commission, 3 August 1973, (Wai 22 ROD, doc B8)
160. Secretary, Northland Catchment Commission to Connell, Trimmer, Lamb and Gerard, 1 June 1973, (Wai 22 ROD, doc B8)

Clearly confusion existed between the status of section 21(1) of the Water and Soil Conservation Act 1967 – whereby the Crown vested in itself the sole right to allocate water – and the terms of the section 438 vesting order for Lake Omapere.

Judge Nicholson of the Tokerau Maori Land Court, however, took a contrary position to that of the commission's solicitors. In a letter to the commission of July 1973, he registered his 'complete disagreement' with the solicitors' opinion. While concurring with the position that the court order for Lake Omapere was now subject to the Water and Soil Conservation Act, he contended that the Act did not vest all natural waters in the Crown but the rights to use such waters. He stated that the opinion was incorrect in claiming 'that the Borough Council need not make any application to the trustees for the taking [of water].' Nicholson's position was that while the Crown had the sole right to take water from the lake, there was no way in which this could be done without physically accessing the lake:

> It must be emphasised that Lake Omapere is not a 'lake' as understood in English law, but is Maori customary land. The Crown has the sole right to take, divert, use etc., the natural water, but it has no right to trespass on the land vested in the trustees and no such right has been delegated to the Commission.[162]

This elicited the response from the catchment commission's solicitors that there could be no doubt that the waters of Omapere were natural waters as defined by section 2 of the Water and Soil Conservation Act, and that they therefore came under the ambit of the Act. It was stated that:

> Prior to the passing of the 1967 Act, the trustees for Lake Omapere, under clauses 3, 4, 5 and 7 of the Maori Land Court Order of 1955 were empowered to sell water; erect water works; promote hydro electric works; drain the whole or any part of the lake. [However,] The sole right to do these things is now vested in the Crown. No compensation is payable under the Act for the loss of these rights by the Maori trustees. The trustees, if they now wish to do any or all of these things, must apply to your Commission for the appropriate right, subject to the usual rights of objection.

In relation to the question of access, attention was drawn to the provision under section 24H of the Water and Soil Conservation Act whereby easements could be compulsorily acquired.[163]

In November 1974, the matter came to a head when Judge Nicholson called a hearing of the Maori Land Court in relation to the Kaikohe Borough Council's intention to abstract water from the lake without the consent of the lake's trustees. Nicholson was reported in the *Northern Advocate* as having said that it was a matter of 'conduct and courtesy' and that the owners were 'just being ignored'. He commented that some people 'seem to think that just because an area is Maori land, they can do

161. Connell, Trimmer, Lamb and Gerard to Secretary, Northland Catchment Commission, 20 June 1973, (Wai 22 ROD, doc B8)
162. Judge Nicholson to Secretary, Northland Catchment Commission, 6 July 1973, (Wai 22 ROD, doc B8)
163. Connell Trimmer Lamb and Gerard to Secretary, Northland Catchment Commission, 3 August 1973, (Wai 22 ROD, doc B8)

anything they like.' The article quoted Nicholson as having told the newspaper that the 'Catchment Commission had been "led astray by some entirely erroneous legal advice" that the Kaikohe Borough Council could take water from the Lake without first asking the trustees.' (This presumably was the opinion of Connell et al detailed above).

Judge Nicholson told the paper that the commission had passed this legal opinion on to the Kaikohe Borough Council who had begun to make arrangements to take water without the consent of the lake's owners. According to Nicholson:

> The proper procedure . . . was for the . . . Council to first make a contract with the trustees of the land and then to obtain the approval of the Northland Catchment Commission for the use of the water. . . . If you are going to touch my land, you ask me not some other fellow. That's what should have been done here. The Commission can say someone can use the water but they can't say they can get to the water. To get to the water, you have to cross the land.

The *Northern Advocate* reported that at the conclusion of the sitting, the Mayor of Kaikohe formally apologised to the trustees for failing to consult them, and stated that he accepted the judge's rebuke.

A factor in the failure of the catchment commission and the borough council to consult with the lake's owners, identified by Nicholson, was that the lake was vested in twenty trustees – some of whom were dead. All trustees, according to Nicholson, needed to be signatories to any contract in relation to the lake. He considered it desirable, therefore, that a smaller executive group of trustees be appointed in order that such matters as were currently before the court could be more easily dealt with in the future. This was agreed to by those trustees present, and a six-member trust was constituted.[164]

The question as to the ownership of both the bed and waters of Lake Omapere was again considered in 1984. In July of that year, H N Austin, the Member of the House of Representatives for the Bay of Islands, wrote to the Minister of Lands inquiring as to the status of the lake.[165] In response, Koro Wetere reported that he had been informed by the Director General of Lands that the bed of the lake was unencumbered Maori freehold land vested in a trust under section 438 of the Maori Affairs Act 1953. With regard to the waters of the lake, Wetere's letter stated that 'they have the same ownership as the bed of the lake', and that:

> this opinion was confirmed by the Maori Land Court in 1955 which after investigating the status of the waters included the waters along with the bed of the lake in the above mentioned vesting order.[166]

164. 'Local bodies rebuked by Maori court judge', *Northern Advocate*, 16 November 1974
165. H N Austin to Minister of Lands, 19 July 1984, LS 1 22/2679, LINZ Wellington
166. K T Wetere to H N Austin, nd, draft, LS 1 22/2679, LINZ Wellington

7.11 Conclusion

The history of Lake Omapere reveals much about the evolving position of the Crown in relation to the ownership and control of lakes in New Zealand. A consideration of the lake's history in the twentieth century illustrates how the Crown attempted to develop a basis by which it could claim title to lakes in New Zealand. However, in the instance of Omapere, this enterprise was somewhat difficult in the face of irrefutable evidence of continuous use and occupation of the lake. When title to Omapere was eventually determined by the Native Land Court in 1929, the evidence of Maori ownership was held by Judge Acheson to be more than sufficient to rebut the Crown's claim of proprietary rights. His decision, considered to be one of the most perceptive judgements in New Zealand's legal history, makes it plain that lakes are clearly within the ambit of article two of the Treaty of Waitangi. Interestingly, Lake Omapere remains in Maori ownership to this day. Although the Crown lodged an appeal against the 1929 Land Court decision, this was never prosecuted. And unlike lakes such as Wairarapa, Taupo and those of the Rotorua region, the Crown did not effect a settlement whereby title passed to the Crown. The reason for this is probably the same as why the Crown abandoned its appeal against the Native Land Court's Omapere decision – the lake was simply considered to be of no value to the Crown.

Events in the early-twentieth century in respect to Lake Omapere illustrate how the Crown attempted to establish that its prerogative rights extended to lakes. But although some Government officials seem to have pursued this policy, it is apparent that others favoured the prevalent common law position – namely that title was shared, *ad medium filum*, between riparian owners. The Crown first considered the extent of its rights as a consequence of pressure from Pakeha settlers to lower the lake's water level. As with the Wairarapa lakes, when the lake level rose, adjacent farmland was flooded. However, in the case of Omapere, only one landowner appears to have been deleteriously affected by the flooding.

Clearly confusion existed amongst officials as to whether the Crown had sufficient rights to lower the lake's water level. In 1910, the Minister of Lands expressed the view that the Crown had no rights in the lake whatsoever.[167] Others, however, thought that as a consequence of having purchased some of the lake's riparian lands, the Crown owned the part of the lake bed subjacent to those lands.[168] Around 1913, the Solicitor General, John Salmond, began pushing the idea that lakes belonged to the Crown. In relation to Lake Takapuna, he considered that the extent to which riparian rights extended to the ownership of the bed of a lake was very uncertain. He therefore advocated that the Crown should simply assume title to the lake and be prepared to defend its rights in court if any riparian owners challenged the Crown's right.[169] Shortly after this opinion, statements were made to the effect that the allodial title of the Crown extended to lakes. However, in stating this, the Solicitor General stressed

167. Minister of Lands to V Reed, 29 July 1910, LS 1 22/2679, LINZ Wellington
168. Memorandum of the Police Department, 8 March 1910, LS 1 22/2679, LINZ Wellington; Assistant Under-Secretary of Lands to Solicitor General, 18 June 1913, LS 1 22/2679, LINZ Wellington; Under-Secretary of Lands to Auckland Commissioner of Crown Lands, 12 May 1914, LS 1 22/2679, LINZ Wellington
169. Solicitor General to Under-Secretary of Lands, 19 August 1913, Wai 187/4, Waitangi Tribunal

that the extent and nature of Crown rights in relation to lakes remained very doubtful.[170]

When the matter of the title to Omapere came before the Native Land Court in 1929, Crown counsel, in accordance with the Solicitor General's opinion, argued that the beds of lakes belonged to the Crown. This seems to be have been largely predicated upon the contention that Maori custom did not recognise the exclusive ownership of lakes.[171] However, Judge Acheson was unequivocal in rejecting the Crown's arguments, and upheld the claim of Nga Puhi to the exclusive ownership of Lake Omapere. In making this determination, the lake was held to be 'customary land' within the meaning of the Native Land Act 1909. Much of the reasoning that underpinned the decision was based upon guarantees extended to Maori by article two of the Treaty of Waitangi. In this regard, Acheson maintained that lakes most definitely came within the ambit of article two, and that the Native Land Court was bound to take judicial notice of the Treaty's provisions. He maintained that had Nga Puhi thought they would have been divested of Lake Omapere subsequent to the enactment of the Treaty, there is no way they would have signed the document. The notion that the Crown's prerogative rights included title to lakes was dismissed on the basis that at common law, the Crown had no right to lakes or their beds.[172]

In the case of Omapere, as with Waikaremoana and the Wairarapa and Rotorua Lakes, the Native Land Court can be seen as having defended Maori rights. Apart from the 1929 decision, evidence exists that on at least two occasions the court advised the Government in connection with public works that to interfere with Nga Puhi's eel weirs would be 'highly injudicious'.[173] The way in which various Crown officials conspired to prevent the investigation of title to Omapere suggests that the Crown was concerned the land court would make another decision that held lakes to be customary Maori land. And it can be said that the land court's eventual decision further jeopardised the Crown's attempts to establish itself as being the owner of lakes in New Zealand.

170. Auckland Commissioner of Crown Lands to Under-Secretary of Lands, 15 May 1914, LS 1 22/2679, LINZ Wellington; Solicitor General to Under-Secretary of Lands, 22 July 1914, LS 1 22/2679, LINZ Wellington
171. Bay of Islands Native Land Court minute book 11, 5 March 1929, p 1; Bay of Islands Native Land Court minute book 11, 19 June 1929, pp 19–20
172. Bay of Islands Native Land Court minute book 11, 1 August 1929, pp 7–23
173. Under-Secretary of Public Works to Under-Secretary of Lands, 3 November 1916, LS 1 22/2679, LINZ Wellington; Under-Secretary of Public Works to Under-Secretary of Lands, 3 November 1916, LS 1 22/2679, LINZ Wellington

CHAPTER 8

CONCLUSION

8.1 Introduction

The main purpose of this report is to provide an account of Crown action and policy in respect of lakes in New Zealand. Generally the Crown only asserted its perceived rights to lakes in the face of a claim by Maori to a particular lake. Otherwise it would seem that it tacitly assumed that it had title to lakes. This assumption was tied to the colonial imperative that the situation that existed in Britain where individuals held private rights in waterways, should not be allowed to pertain in New Zealand. With rivers, the Crown attempted to extend its prerogative rights on the grounds that public rights of navigation were best protected by Crown ownership of all navigable rivers. When the courts rebutted this contention, legislation was passed to vest the beds of all navigable rivers in the Crown. In respect to lakes, however, the approach of the Crown was somewhat different. When Maori pressed a claim of ownership to a particular lake – usually through making a claim to the Native Land Court – the Crown assumed a reactive stance and opposed the claim. In the lake cases that came before the Native Land Court, the Crown was generally faced with irrefutable evidence as to the Maori ownership and use of lakes. In response, Crown counsel advanced a range of arguments to the contrary that were often confused and contradictory. But ultimately the Crown failed to rebut the claims of Maori and was forced to enter into negotiations with the owners of the various lakes to which it wanted to secure title.

In order to establish an account of the Crown's actions and policies in relation to lakes, this report has been structured around a series of case studies of the major contests for the ownership and control of lakes. This methodology was adopted as a way to try and make sense of the Crown's ad hoc and reactive approach to the ownership of lakes. In this chapter the themes that emerge from the case studies are brought together in an attempt to create a clearer sense of the Crown's attitude and approach to both Maori claims to lakes, and to realising its objective of establishing itself as the ultimate owner of lakes in New Zealand.

8.2 Maori, Customary Law, and Lakes in New Zealand

This project did not set out to provide a definitive account of Maori customary law in relation to lakes. For one thing, the assumption that such a definitive account is even

possible is problematic in light of the regional differences that exist between iwi and the flawed assumption that a singular Maori world view exists. Further, the present author lacks the requisite skills to undertake such a project. However, in the case studies of lakes that were the object of Native Land Court inquiries, a body of evidence was found pertaining to Maori conceptions of lakes and the ways in which they were used. To a lesser extent, these Native Land Court inquiries also revealed certain aspects about the metaphysical significance of particular lakes. As with all Native Land Court evidence, it must be remembered that the evidence documented in this report was given under particular circumstances and generally with a certain objective in mind. Caution must also be had given the possibly imprecise deployment of terms and inaccurate translations by those court officials who recorded the minutes.

For all of the lakes examined in this report, it is apparent that there existed a body of customary law pertaining to their ownership, management, and use. The existence of such a body of law is evidenced by the fact that in all of the cases where the Native Land Court completed an investigation of title to a lake, it found them to be subject to a Maori customary title.

To Maori, lakes were imbued with great metaphysical importance. As Judge Acheson observed in his decision as to the ownership of Lake Omapere, to Maori:

> a lake was something that stirred the hidden forces in him. It was . . . something much more grand and noble than a mere sheet of water covering a muddy bed. To him it was a striking landscape feature possessed of a 'mauri' or 'indwelling life principle' which bound it closely to the fortunes and destiny of his tribe.[1]

To varying extents lakes were a tenet of Maori identity. In the case of Ngati Tuwharetoa, for example, Lake Taupo features in the following tauparapara:

> *Ko Tongariro te maunga,*
> *Ko Taupo te moana,*
> *Ko Tuwharetoa te iwi,*
> *Ko Te Heuheu te ariki.*[2]

Reference to lakes are also frequently made in waiata. This was a feature of the evidence received by the Native Land Court in connection with the Rotorua lakes.[3]

This relationship between lakes and identity was very much rooted in tribal traditions as to the origins or discovery of lakes. In the case of Taupo, for example, Ngati Tuwharetoa traditions about the beginnings of their associations with the lake and its naming are centred upon the ancestor Tia. Similarly Te Arawa trace the beginnings of their associations with the Rotorua lakes to the explorations of Ihenga. Nga Puhi hold that the actions of their ancestor Ngatikoro and his sons account for

1. Bay of Islands minute book 11, 1 August 1929, p 8
2. Translation of English version contained in Judge Acheson's 1929 decision in respect of Lake Omapere. Bay of Islands minute book 11, 1 August 1929, p 8
3. Evidence of Gilbert Mair, 'Minutes of the Rotorua lakes Case: Application for Investigation of Title to the Bed of Rotorua Lake', 16 October 1918, CL 174, NA Wellington, pp 168–281

the origins of Lake Omapere. And the history of Waikaremoana is redolent with the traditions of Ngati Kahungunu, Ngati Ruapani, and Ngai Tuhoe that account for the origin of the lake and many of its geological features.

The metaphysical significance of lakes is in all likelihood related to their economic importance. In the case of all the lakes examined in this report, the fisheries they supported were crucial components of the local economy. In many areas, especially the central North Island where the land was unsuitable for horticulture, lakes appear to have been considered as more valuable than land. And in areas where Maori had sold much of their land (such as in the Wairarapa), even greater reliance was placed upon freshwater fisheries. Lakes were also important as a source of water fowl and plant material such as raupo and flax, and were used for transport. Pa were frequently located on the shores of lakes, and in the case of Lake Horowhenua, built on specially constructed islands. Evidence also exists that taonga were sometimes stored in the mud that formed the beds of lakes.

Although lakes were used in a variety of ways, it was in terms of their fisheries that they appear to have been most valued. Consequently, complex systems of rights existed in connection with lake fisheries. Of the lakes studied in this report that had eels in them, there were two types of fisheries: those based at the outlet of lakes, and others situated in the lakes themselves. In the case of Horowhenua and Omapere, the outlet fisheries were jealously guarded and could only be used by particular groups – each of which had their own named weirs. But the Wairarapa outlet fishery appears to have been used by a wide range of groups from the greater Wairarapa area, although those groups resident at the mouth had control of the fishery. As for the fisheries in the lakes themselves, in some cases (such as Omapere and Horowhenua) any group with rights in the lake was free to fish anywhere. With other lakes such as Rotorua, Rotoiti, Wairarapa, and Taupo, they were divided up between various groups who held exclusive rights in their particular part of the lake. Generally rights were held in those areas of the lake which abutted a hapu's lands. In its inquiry as to the ownership of the Rotorua lakes, the Native Land Court received a huge amount of detailed evidence concerning the boundaries between the different hapu's sections of Rotorua and Rotoiti. Witnesses also told the court that in the past, punitive action had been taken against people caught fishing in another group's part of the lake.

Fishing rights in lakes were generally held at the hapu level. As with land, the basis for such right was most commonly descent from a particular ancestor who developed the fishery, and the continued use of the resource. Other bases upon which groups claimed fishing rights included conquest, marriage, and gift. As for the actual nature of the rights, some clear themes are apparent. Witnesses giving evidence before the Native Land Court, generally talked about fishing rights in lakes in terms which we might describe as usufructuary rights. Importantly though, these do not appear to have been subject to a superior 'ownership' right. When an ownership right was claimed, this appears not to have been in accordance with a western conception of ownership, but simply an assertion of an ultimate right. In this way, ownership of the fishery seemed to flow from the right to use the resource. This is in contrast to the European model of ownership where use rights derive from the ownership of the

resource. But as Suzanne Doig cautions in her treatise on Maori fishing rights, one must be wary of trying to reduce Maori customary rights to accord to western conceptions of ownership. Rather she posits a conceptualisation in terms of community rights whereby residence in particular place and membership or affiliation with particular kin groups confers a right to use the various resources of the community.[4]

Maori also actively managed lake resources. It is apparent that high ranking chiefs controlled access to fisheries, and in the case of some lakes, enforced their exclusive rights by taking punitive action against poachers. Rahui appear to have been frequently declared to ensure the sustainability of resources such as fish, raupo, and water fowl, and sometimes following the death of a person in a lake. That Maori exercised their rights in lake in such ways was considered to be evidence of the strength of their rights and that lakes were subject to customary ownership.

In many respects, the matrices of rights held by Maori in relation to lakes were not dissimilar to contemporaneous accounts of the way in which rights were held in land. This was particularly apparent in the case of the Rotorua lakes. Gilbert Mair, a Pakeha witness who appeared in support of the claimants, was of the opinion 'that no land in New Zealand has been held more absolutely, more completely, and more thoroughly under Maori owners' customs and rights than these two lakes'.[5] It is likely that Maori saw their rights to lakes as being coterminous with their rights to adjacent land and that no arbitrary distinction was made between the two. That the Crown argued so strenuously that lakes were not subject to customary ownership is hard to credit.

8.3 Colonial Imperatives and Common Law

A crucial consideration, given that lakes were subject to a customary tenure, is the interface between this title and principles of common law. In this interface a big factor was the ideology that was driving the colonisation of New Zealand. For many, the colonisation of the New World presented an opportunity to depart from some British legal traditions that were thought to be undesirable. Of particular importance was the idea of establishing a relatively egalitarian society in which the public had greater access to, and opportunities to exploit, the natural environment. An important manifestation of this objective was that the Crown considered that it should be the owner of waterways so as that it could act as a trustee to ensure that the public enjoyed rights of navigation, bathing, and fishing. Also it was thought that where possible, private rights should not be allowed to exist in fish and other game so that people other than landowners could have access to these resources.

Realising these objectives in New Zealand, however, required some significant departures from English common law. Importantly, at common law the prerogative rights of the Crown do not extend to lakes, irrespective of whether or not they are

4. Suzanne Doig, 'Customary Maori Freshwater Fishing Rights: an exploration of Maori evidence and Pakeha interpretations', PhD thesis, Canterbury University, 1996, pp 317–321, 328–329
5. Evidence of Gilbert Mair, 'Minutes of the Rotorua lakes case', pp 184–185

navigable. Rather the ownership is shared between riparian landowners *ad medium filum*. In New Zealand the Crown has always recognised that all lands of the colony were subject to a Maori customary title. Regardless of the fact that customary title was not recognised as extending to lakes, English common law holds that by virtue of being the proprietors of lands abutting lakes, Maori were the owners of the beds of the lakes themselves.

In New Zealand, the perceived need for certain lands and waterways to be vested in the Crown to secure public access has been a recurring theme throughout the nineteenth and twentieth centuries. But throughout the nineteenth century, Maori seem to have been content to allow Pakeha to use their lakes so long as certain conditions were adhered to. In Rotorua, for example, Te Arawa allowed Pakeha to travel upon the lake, and initially did not object when trout were introduced by acclimatisation societies.[6] Similarly in the Wairarapa, Pakeha were not prevented from shooting waterfowl upon the lakes so long as they were only taking birds for their own needs and not selling them. Interestingly in this instance Maori claimed not only the ownership of the lakes but of the birds as well.[7]

8.4 Early Crown Action in Relation to Lakes

It is argued in this report that an imperative during the colonisation of New Zealand was that the Crown should be established as the owner of all lakes and other waterways. But in the nineteenth century there were many instances when the Crown acknowledged Maori as the owners of lakes. It would seem that the Crown tacitly assumed the ownership of lakes but acknowledged the existence of Maori rights when it felt that it had no choice. When the Native Land Court investigated the title of lakes Rotorua and Rotoiti, it was told that had the Crown asserted in the 1880s that the lakes were not Maori property, a situation would have arisen that would have been more serious than the Waitara affair.[8] Judge Acheson made a similar point in his decision as to the ownership of Lake Omapere. He considered that had the Crown stated that it intended to claim the ownership of the lakes during the negotiations surrounding the Treaty of Waitangi, Nga Puhi most certainly would not have signed.[9] It would seem that at times the Crown did not challenge the rights of Maori to lakes because it was anxious to maintain the peace and secure Maori support for colonial rule.

An important consideration in this respect is the way that lakes were treated in early Crown purchases of land abutting lakes. The fashion in which the Crown executed such purchases of land was at best erratic – there appears to have been little attempt to acquire land by way of a systematic or consistent approach. When detailed instructions were issued to purchase officers, these were frequently ignored, or at best

6. Rotorua lakes case, pp 83–108, 110–123
7. Maunsell to Native Department, 20 April 1885, MA 13/97, NA Wellington; Untitled, unsourced, undated newspaper article attached to Maunsell to Under-Secretary, Native Land Purchase Department, 28 May 1885, MA 13/97, NA Wellington
8. Evidence of Gilbert Mair, 'Minutes of Rotorua Lakes Case', pp 233–237
9. Bay of Islands minute book 11, 1 August 1929, p 23

only loosely adhered to. Therefore it is not surprising that there was no consistent to approach to dealing with lakes when land surrounding them was purchased. In the South Island, for example, the 1848 Crown purchase of Canterbury and Westland (Kemp Purchase) made no mention of the Crown having acquired title to the many lakes that fell within the purchase boundaries. Although verbal promises were made that Ngai Tahu's access to their mahinga kai would be preserved (many of which were based on lakes), title to the lakes appears to have passed to the Crown.[10] But the verbal guarantees that were made to the vendors not withstanding, under English common law, title to the lakes would presumably have passed to the Crown by virtue of acquiring all the land surrounding the lakes.

Lakes were, however, explicitly included in the 1853 Murihiku Purchase which included all of Southland and Fiordland.[11] Alexander Mackay's translation of the original deed described the boundary of the purchase and stated that all this land passed to the Crown, along 'with the anchorages and landing-places, with the rivers, the lakes, the woods, and the bush'.[12] Another example of when Maori rights to lakes were explicitly extinguished was the 'blanket purchase' of Ngati Toa's interests in the Northern South Island. In August 1853 the North Island chiefs of Ngati Toa signed a deed that 'entirely and forever' transferred their lands in the South Island to the Queen. As Grant Phillipson has observed, although no districts or boundaries were specified in the deed, other resources associated with the land were listed in detail: 'its trees, lakes, waters, stones, and all and everything either above or under the said land and all and everything connected with the said land'.[13]

The 1853 deeds for the Murihiku and Ngati Toa purchases can be seen as having been carefully worded so that they made no explicit acknowledgement that lakes were subject to Maori ownership. The Ngati Toa deed spoke of the land along with 'its lakes', the Murihiku deed referred to 'giving up' and 'alienating' the land along with the lakes contained within the boundaries described. But equally the deeds can be viewed as being an acknowledgement of Maori rights to lakes – that they were theirs to sell. However, regardless of whether or not such purchases constituted a full relinquishment of the vendors' rights to lakes within the purchase boundaries, in many cases, Maori would have expected to have been able to continue to use lakes.

But even if the vendors of land were initially able to continue exploiting their mahinga kai, as more and more Pakeha took up occupation of surrounding lands, Maori were increasingly confined to what lands they had retained. The problem this created for Maori was noted by Alexander Mackay, in an 1881 report on the state of Ngai Tahu. He observed that 'besides curtailing the liberties they formerly enjoyed for fishing and catching birds,' the increased settlement of Pakeha in the midst of Ngai

10. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 1, Wellington, Brooker and Friend, 1991, pp 51–53
11. Ibid, p 99
12. A Mackay, translation of the Murihiku deed, *A Compendium of Official Documents relative to Native Affairs in the South Island*, vol 1, Wellington, 1871, p 287, cited in Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, p 609
13. Mackay, translation of the Ngati Toa deed of sale, 10 August 1853, *Compendium*, vol 1, p 307, cited in Grant Phillipson, *The Northern South Island*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release) June 1995, p 127; Phillipson, p 127

Tahu 'has also compelled the adoption of a different and more expensive mode of life, which they find very difficult to support'. After drawing attention to the deleterious effect imported fish had had on Ngai Tahu's fisheries, Mackay observed that 'on going fishing or bird-catching, ... [Ngai Tahu] are frequently ordered off by the settlers if they happen to have no reserve in the locality.'[14]

In the Wairarapa, unlike in the South Island, the owners of land abutting lakes Wairarapa and Onoke explicitly refused to part with their lakes when they alienated their lands in the 1850s. This resistance was motivated by the fear that parting with the lake would lead to a loss of rights in their all-important eel fisheries. From this time, the hapu that occupied the Wairarapa flood plain were intransigent on the point that they held the ownership of the lakes. The history of the contest for the control of the Wairarapa lakes evinces the theory that where Maori were resolute in claiming the ownership of a particular lake, the Crown capitulated and purchased the owners' interests. In the Native Land Court's investigation of title to Lake Omapere, Crown counsel argued that there were various exigent factors that were a consideration in the Crown's acknowledgement of Maori rights to the Wairarapa lakes – in particular the possibility of a breach of the peace in connection with the opening of one of the lakes to release floodwaters.[15] It is likely that if Pakeha settlers had not brought pressure to bear upon the Government to secure the necessary rights to control the outlet of the lake, its ownership would not have been investigated and it would have remained in Maori ownership.

In the case of the Wairarapa lakes, the Crown repeatedly argued that the only rights Maori held in the lakes were those of fishery – an argument that the Crown was later to make in respect of many other North Island lakes. The way in which the Crown acted in relation to the Wairarapa lakes throughout the nineteenth century is consistent with the view that Maori only held fishing rights in the lakes. For example, when Pakeha farmers proposed lowering the lake to mitigate the flooding of land that abutted the lakes, the Government stepped in to prevent them from doing so because of guarantees that had been afforded Maori that their fishing rights would be protected. Similarly it was thought that by extinguishing the fishing rights of Maori, title to the lake would reside with the Crown. When the question of the jurisdiction of the Native Land Court to investigate title to the lake came before the Supreme Court, the Crown argued that 'no right existed, according to Native custom, to the soil beneath a lake, nor is the same recognised by Native custom as being capable of ownership.'[16]

A corollary of the position that Maori did not own the beds of the Wairarapa lakes, was that they belonged to the Crown by virtue of its radical title. That the Crown considered itself to be the owner of the bed of the Wairarapa lakes is evidenced in the way that it treated lands that were uplifted by the 1855 earthquake. In 1862, it sold

14. A Mackay to Under-Secretary of Native Department, 6 May 1881, AJHR, 1881, G-8, p 16, cited in Grant Phillipson, *The Northern South Island*, part II, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release) October 1996, p 25
15. Bay of Islands minute book 11, 19 June 1929, p 42
16. Alexander Mackay, 'Report on Claims of Natives to Wairarapa Lakes and Adjacent Lands', AJHR 1891, G-4, p 8

lands that prior to the earthquake had been part of the lake bed. Under the common law doctrine of accretion, lake bed that is exposed by sudden uplift accrues to whoever owns the lake's bed as opposed to the owner of the riparian land to which the accretion adjoins (although of course they could be one and the same). When the Crown sold land that was formerly part of the bed of Lake Wairarapa, it clearly considered itself to be the owner of the lake bed, and that the rights of Maori were confined to those of fishing. In connection with the question of who had rights to the accretion caused by the earthquake, Edward Maunsell, the Crown agent charged with negotiating the purchase of the lake, declared 'that the Queen of England was the undoubtful and legal disposer of lakes and colonial seas.'[17] But this view was by no means universal. In 1874, for example, the Under-Secretary of Native Affairs opined in relation to Lake Wairarapa that the Crown 'cannot equitably claim a right to the lake'.[18] This view was in accordance with English common law and reflects the tension that existed between these principles and the view that the Crown should be the owner of lakes in New Zealand.

But whereas the Crown actively tried to limit Maori rights in the Wairarapa lakes to those of fishery, around the end of the nineteenth century, it actually acknowledged the Maori ownership of various lakes. In 1898, for example, Lake Horowhenua was vested in Muaupoko. Why this was done remains unclear to the present author. One possible explanation is that the lake was entirely situated within a block that had been awarded to Muaupoko, and therefore according to common law, would be the property of the land owners. But there was no reason for the Crown to have explicitly vested the lake in Muaupoko – the issue could have just been left to lie. Even though the lake was vested in its Maori owners, the Crown later argued that the ownership of the lake had passed to the Crown. But as numerous officials pointed out, it was patently clear that this was not the case.

As well as Horowhenua, the Crown also acknowledged that other lakes were in Maori ownership around the turn of the century. In 1901 it purchased the Ruawahia No 1 block near Rotorua. This appellation included part of Lake Tarawera. Before the Native Land Court in 1918, counsel for Te Arawa claimed this to be a strong precedent of the Crown having recognised Maori ownership of lakes in the area. As with Horowhenua, it is not clear exactly why the Crown acknowledged that the bed of Tarawera was Maori property. Although these instances do go against the Crown's general ambition to establish itself as being the owner of lakes in New Zealand, it does emphasise the confused and uncoordinated approach of the Crown in relation to lakes. Elsewhere around this time, the Crown was simply assuming the right to manage and control lakes. With regard to lakes in the central North Island the Government was running launch services, assisting acclimatisation societies to stock them with trout, and making provisions for the management of trout fisheries, including the licensing of anglers. This assumption of control and abrogation of Maori rights precipitated Te Arawa applying to the Native Land Court to have their

17. Maunsell to Native Department, 15 February 1876, MA 13/97, NA Wellington
18. Clarke, Under-Secretary of Native Affairs to Native Minister, August 1874, cited in Memorandum to the Honourable Native Minister on position of the Wairarapa Lake purchase, nd, p 2, MA 13/97, NA Wellington

title to the lake investigated. This was one of many applications made by Maori shortly after the turn of the century in respect of lakes in the North Island. In the face of these applications the Crown became focused on defeating the ownership claims of Maori and establishing itself as the owner of lakes. But that is not to say that the means by which the Crown sought to realise this goal were not confused, uncoordinated, and in many instances, contradictory.

8.5 The Native Land Court Cases and the Position of the Crown

Between 1915 and 1929 the Native Land Court investigated the titles of the Lakes Rotorua, Rotoiti, Waikaremoana, and Omapere. It is apparent that from around 1910, in the face of these claims, the Crown began to more seriously consider the nature of its rights to lakes, and invested much energy in trying to defeat the claims of Maori. In this period the Crown more consistently took the line that its prerogative rights extended to the ownership of lake beds. But many Crown officials continued to espouse the common law position that the Crown held no rights to the beds of lakes per se.

One of the first public expressions of the Crown's claim to the beds of lakes in New Zealand was made by Seddon when he visited Rotorua around the turn of the century. According to Gilbert Mair, Seddon told Te Arawa 'that they had no claim to the lakes' as their title had 'passed away under the Treaty of Waitangi to the Government.'[19] Presumably Seddon's logic was that in acquiring sovereignty under the Treaty, the Crown had acquired the allodial title to New Zealand. Although this allodial title was subject to the existence of Maori customary title, this did not extend to the ownership of lakes.

Seddon's remarks, combined with what Te Arawa considered to be a subtle erosion of their rights by the Crown, resulted in them applying to the Native Land Court to have their rights to their lakes determined. The reaction of the Crown was to refuse to supply the necessary plans to enable the investigation to proceed. This resulted in Te Arawa filing proceedings with the Supreme Court seeking a determination that they had a right to have the title to the bed of Lake Rotorua investigated by the Native Land Court. The case, *Tamihana Korokai v the Solicitor General*, was removed to the Court of Appeal where it was heard in 1912. For the Crown, John Salmond, the Solicitor General, argued that lakes were a part of the demesne of the Crown. He stated:

> that his assertion that the land [being the bed of Lake Rotorua] was Crown land concluded the matter, and that the Native Land Court could not proceed to make inquires as to whether the land was Native customary land.[20]

The court, however, did not accept Salmond's argument. It held that Te Arawa had a right to have the title to Lake Rotorua determined, and that the mere assertion that

19. Evidence of Gilbert Mair, 'Minutes of the Rotorua Lakes Case', 16 October 1918, p 238, CL 174, NA Wellington
20. *Tamihana Korokai v Solicitor General,* NZGLR, vol 15, 1912, p 96

the land in question was Crown land was insufficient to prevent such an investigation.[21] An important outcome of the case was the Appeal Court's ruling that lakes were undoubtedly within the jurisdiction of the Native Land Court.

Despite being rebuffed by the Court of Appeal, Salmond continued to posit the theory that the Crown was the owner of lake beds. In 1913, for example, he wrote an opinion concerning the ownership of Lake Takapuna on Auckland's North Shore. In this opinion, he claimed that it was doubtful that the rights of people who owned land abutting the lake extended to the lake bed. The opinion was written in response to an earlier opinion of the Crown Law Office in which it was held that the lake was no longer Crown land because all the lake's riparian lands had passed out of Crown ownership. This was a view that Crown officials frequently articulated in relation to Lake Omapere at this time. In response to demands that the owners of land abutting Lake Omapere be prevented from lowering the lake, it was contended that 'the Government has no standing in the matter', that it was 'not the duty of the Crown to step in in cases of this kind', and that apart from the part of the lake adjoining the small amount of remaining Crown land, the Crown had no jurisdiction over the lake.[22] In the case of Takapuna, Salmond considered that the question of whether the title to lake beds in New Zealand was shared *ad medium filum aquae* between riparian owners was 'one of considerable doubt.' Salmond claimed that there had been no authoritative decision on this matter either in New Zealand or England. In light of this doubt he advocated that the Crown should assume that it was the owner of the bed of lake Takapuna, 'leaving it to the riparian owners . . . to take proceedings in the Law Courts for the establishment of their claims.'[23] Although Salmond was correct in stating that there was no authoritative decision on the matter in New Zealand, his claim that the same was true in England was manifestly wrong.[24]

The following year, Salmond made the same argument in respect of Lake Omapere. In doing so he rejected the view of other Crown officials that the Crown shared title to the bed of the lake with other riparian owners – a view which was in accordance with English common law. In asserting that the Crown owned the bed of Lake Omapere, he expressed doubt that Maori customary title extended over lakes, and suggested that instead they simply held fishing rights. However, as in his Takapuna opinion, Salmond conceded that 'the matter is far too doubtful to express any confident conclusion on it one way or the other'.[25]

21. Ibid, pp 106, 109
22. Minister of Lands to Reed, 22 August 1910, LS 1 22/2679, LINZ Wellington; Under-Secretary of Lands to Auckland Commissioner of Crown Lands, 12 May 1914, LS 1 22/2679, LINZ Wellington
23. Solicitor General to Under-Secretary of Lands (re Lake Takapuna), 19 August 1913, Wai 187/4, Waitangi Tribunal
24. See for example *Bristow v Cormican* (1877) 3 App cas 641, cited in Ibid; H J W Coulson and U A Forbes, *The Law Relating to Waters: Sea, Tidal and Inland*, London, Henry Sweet, 1880, p 98; *Johnston v O'Neill*, (1911) AC, 552 at 578, cited in E J Haughey, 'Maori Claims to Lakes, River Beds and the Foreshore', NZULR, vol 2, April 1966, p 32
25. Solicitor General to Under-Secretary of Lands, 22 July 1914, LS 1 22/2679, LINZ Wellington

8.5.1 Maori ownership of lakes and public policy

Despite the Crown's uncertainty as to the extent of its rights in relation to lakes, from around this time, it was frequently stated that the Crown, as opposed to Maori, should as a matter of public policy be the owners of lakes. Salmond in particular articulated this view in respect of the Rotorua lakes. In 1914, in light of the proposed hearing of Te Arawa's claim by the Native Land Court, he cautioned that:

> it is quite out of the question to allow freehold titles to be obtained by the Natives to such waters. Such titles would enable the Natives to exclude the whole of the European population from all rights of fishing, navigation and other uses now enjoyed by them.[26]

After the Native Land Court inquiry had been abandoned and the Crown was negotiating a settlement in respect of the Rotorua lakes, Salmond continued to warn against the dangers of Maori securing title to lake beds. In 1920 he stated that:

> As a matter of public policy it is out of the question that the Natives should be permanently recognised as the owners of the navigable waters of the Dominion. It would not seem to be a matter of serious difficulty to avoid this result by making some form of voluntary settlement with the Natives and vesting these Lakes by Statute in the Crown.[27]

The settlement that was reached in 1922 was carefully worded so as not to be an admission that Te Arawa had held customary title to the lake.[28] As the Minister of Lands had advised Ngata in 1920, an admission of Te Arawa's title could not be entertained because such an admission 'would bind the Government in similar claims to other lakes'.[29]

In the case of all the lakes studied in this report that were subject to Native Land Court inquiries, this imperative of 'public policy' was considered to be so important that Crown officials attempted to prevent the inquiries going ahead by refusing to supply the necessary plans. In 1913 for example, in connection with Nga Puhi's application to the land court to have the title to Lake Omapere determined, the Chief Surveyor of the Auckland district stated that he did not consider that:

> it is at all expedient that the natives should be allowed to establish any title to the lake and I am therefore refusing to supply the plan for the investigation of the title until the question of the ownership has been definitely settled.

Further, he urged that the lake should be declared Crown land under section 85 of the Native Land Act 1909.[30] Similarly in the case of the Wairarapa lakes, the Rotorua lakes,

26. Salmond to Attorney General, 1 August 1914, CLO Opinions relating to Lands Department 1913–1915, CLO Wellington, cited in Alex Frame, *Salmond Southern Jurist*, Wellington, Victoria University Press, 1995, p 119
27. Solicitor General to Under-Secretary of Lands, 29 April 1920, CLO Opinions, vol 7, LINZ, cited in Tania Thompson, 'Interim Report: Rotorua Lakes Research', report commissioned for the legal firm of O'Sullivan Clemens Briscoe and Hughes, March 1993, p 16
28. See Native Land Amendment and Native Land Claims Adjustment Act 1922, s 27(1)
29. Guthrie to Ngata, 22 May 1920, 226 box 5B, LINZ Wellington
30. Chief Surveyor, Auckland to Under-Secretary of Lands, 5 September 1913, LS 1 22/2679, LINZ Wellington

and Lake Waikaremoana, the Department of Lands refused to supply plans and thereby prevented the land court hearings from getting underway.

8.5.2 Arguments of the Crown before the Native Land Court

Of the three major claims in respect of lakes that were heard by the Native Land Court in the twentieth century, the Crown was only initially heard in relation to Nga Puhi's claim to Lake Omapere. In the case of the Rotorua lakes, the inquiry was abandoned at the instigation of the Crown and a settlement reached. When the matter of title to Lake Waikaremoana was heard by the land court between 1915 and 1918, the Crown elected not to appear. Rather it lodged an appeal with the Native Appellate Court, which largely due to vacillation on the part of the Crown, was not heard until 1944. On this occasion the Crown's argument was finally heard.

At the outset of the land court's investigation of Lake Omapere in 1929, the Crown set out its contentions in respect to the case. The court minutes record an assertion by Crown counsel that Maori custom did not recognise the ownership of lake beds, and that consequently the beds of lakes belong to the Crown. Further, it was claimed that by virtue of acquiring lands abutting the lake, the Crown had acquired part of the lake bed along with the right of navigation and the right to use the lake's waters.[31] When the case was resumed in Auckland later that year, claimant counsel pointed out that the Crown's argument was somewhat confused. Although the Crown claimed it owned all lakes, it still felt it necessary to set up a case that it owned part of Lake Omapere by virtue of owning lands adjoining the lake.[32] That such a fall back position was considered necessary, illustrates the uncertainty with which the Crown regarded its assumed rights.

At the Auckland hearing the Crown presented its case in detail. In arguing that Maori custom did not recognise the ownership of lakes it was stressed that the 'doctrine that the lake is land covered by water is borrowed from English law, and was not in contemplation by the Natives.' Further it was claimed:

> that Native title is not universal and that it is not strictly true that the whole of New Zealand, whether land or water is necessarily the subject of the native title.[33]

Crown counsel contended that the onus was therefore on Maori to establish their title, otherwise the lake was a part of the demesne of the Crown. In the case of Omapere it was held that no such title existed. Maori only had a right of fishery that derived from the ownership of land adjacent to the lake.[34] Mention was also made of the fact the lake was navigable; counsel argued that it was preposterous to propose that Maori had exclusive rights to navigable waters, as navigation was an ordinary condition of sovereignty. Given the conviction that 'rights of navigation should be vested in the

31. Bay of Islands minute book 11, 19 June 1929, p 1
32. Bay of Islands Native Land Court minute book 11, 19 June 1929, pp 12–13
33. Bay of Islands minute book 11, 19 June 1929, pp 21–22
34. Ibid, p 31

Public', it was advocated that a 'restricted' reading of the Treaty of Waitangi in relation to waterways was both necessary and justified.[35]

Ten years earlier, in 1918, the land court issued an interlocutory decision that Lake Waikaremoana was Maori customary land. Three weeks later the Crown lodged an appeal on the basis that 'the said lake is not Native customary land but is Crown land free from Native title'.[36] When the appeal was finally heard 26 years later, Crown counsel argued that strict proof of the customary ownership of the lake was necessary, and that such evidence had not been adduced before the Land Court in its initial inquiry. Therefore it was held that 'equitable as well as the legal interest is in the Crown ... [and] the Native case fails by its own infirmity.'[37] As in the case of Lake Omapere, counsel argued that in the public interest there was a need for the ambit of article two of the Treaty of Waitangi to be constructed narrowly. It was held that there was an inherent improbability that by the Treaty, the Crown had not intended to deprive the public of such important rights as navigation.[38]

In these cases the Crown then was basing its claim on two main principles. First, in acquiring sovereignty to New Zealand, the Crown acquired the radical title to the whole country, subject to the existence of Maori customary title. But because it was held that Maori customary title did not extend to the ownership of lakes, they were the property of the Crown. And secondly, the guarantees of article 2 of the Treaty of Waitangi were limited by the 'public's interest'. Therefore it could not have been intended that the Treaty would secure Maori the ownership of lakes and deprive the Crown and public of rights of navigation. At English common law, though, the owner of the bed of a lake could not prevent the public from navigating the lake's waters – like rivers, lakes are held to be public highways and are navigable for all persons.[39]

That in the case of Lake Omapere the Crown felt it necessary to establish a claim in terms of it owning some riparian lands, shows how uncertain it was of its prerogative rights. This is hardly surprising in light of the outcome of the Waikaremoana investigation in favour of Tuhoe, Ngati Ruapani, and Ngati Kahungunu, and the likely outcome of the Rotorua application had the inquiry been completed.[40] It would seem that generally the Native Land Court was in no doubt that lakes were subject to Maori customary title. The land court and Appellate Courts' decisions in respect of Lakes Omapere and Waikaremoana show the Land Court upholding the rights of Maori and virulently opposing the Crown's claim that it was the owner of all lakes. The Maori Land Court also investigated the ownership of Lake Rotoaira (near Lake Taupo) between 1955 and 1956, finding that Ngati Tuwharetoa were the lake's customary owners.[41] In light of these decisions, it would not be totally outrageous to

35. Ibid, pp 34–35
36. MA 8/3/484, NA Wellington, cited in Robert Wiri, 'Te Wai-Kaukau o Nga Matua Tipuna: Myths, Realities and the Determination of Mana Whenua in the Waikaremoana District', MA Thesis, University of Auckland, 1994, (Wai 36 ROD, doc A4), p 320
37. Native Appellate Court minutes, 25 March 1944, MA 5/13/78/1, NA Wellington, RDB, vol 59, pp 22,357–22,358
38. Ibid, p 22352
39. See Coulson and Forbes, pp 72, 101
40. That the Native Land Court would find in favour of Te Arawa were it to complete its inquiry was the view of Salmond. See Solicitor General to Under-Secretary of Lands, 29 April 1920, CLO Opinions, vol 7, LINZ, cited in Thompson, p 16

argue that in the twentieth century the Maori Land Court was in fact a constant defender of rangatiratanga in respect of lakes.

8.6 THE TWENTIETH-CENTURY LAKE SETTLEMENTS

By the first decades of the twentieth century, the Crown was clearly determined that, if at all possible, Maori should not be recognised as the customary owners of any lakes in New Zealand. Hence in the cases where the land court had found (or was likely to find) that Maori were the customary owners of lakes, the Crown set about securing settlements in which the rights of Maori to the lake bed in question were extinguished. In return Maori variously received grants of land, guarantees of their fishing rights, and compensation. This approach reflected a view on the part of the Crown that the issue of the ownership of lakes should be resolved politically rather than judicially. This certainly was the view of Salmond.[42] That the Crown wanted to keep the question out of the courts can be seen as symptomatic of its parlous position in terms of common law support for its claim to the ownership of lakes.

As is detailed in the chapter of this report on the Rotorua lakes, the Government, considering that the Native Land Court would find in favour of Te Arawa, pressured the applicants to enter into direct negotiations. The deal that was reached extinguished the native title (if such a thing existed) to 14 lakes in the vicinity of Rotorua, guaranteed Te Arawa fishing rights in the lakes, and granted them an annuity of £6000.[43] In the case of Lake Taupo, title to the lake was never determined by the Native Land Court. The history of the lake, though, would suggest that the Crown had in many respects tacitly acknowledged the rights of Tuwharetoa. From the turn of the century, Maori owning land abutting the lake continued to exercise control over the increasingly important trout fishery through charging anglers to fish from, and camp upon, their land. The fear that such lands could fall into the hands of foreigners motivated the Government to expropriate whatever rights Tuwharetoa had in the lake. The resulting settlement was very similar to that between the Crown and Te Arawa – again being carefully worded so as not to be an admission that the lake bed was Maori customary land. But unlike the Te Arawa settlement, Tuwharetoa managed to secure ongoing benefits through a provision in the agreement that they were to receive half of all revenue generated from licence fees.[44]

The Crown, however, never secured the ownership of Lakes Waikaremoana, Rotoaira, Horowhenua, and Omapere. Despite being put under considerable pressure by the Crown, the Maori owners of Lake Waikaremoana refused to sell. After protracted negotiations that lasted from 1947 until the early 1970s, the owners eventually agreed to lease the lake to the Urewera National Park Board. The lease was

41. John Koning, *Lake Rotoaira: Maori Ownership and Crown Policy Towards Electricity Generation 1964–1972*, Wellington, Waitangi Tribunal research series no 2, 1993, p 4
42. See for example Solicitor General to Under-Secretary of Lands, 29 April 1920, CLO Opinions, vol 7, LINZ, cited in Thompson, p 16
43. The Native Land Amendment and Native Land Claims Adjustment Act 1922, s 27
44. The Native Land Amendment and Native Land Claims Adjustment Act 1926, s 14

confirmed by legislation in 1971.[45] In the case of Lake Omapere, the Crown abandoned its appeal of the Native Land Court's decision because it no longer considered the lake to be of any value to it. Presumably for the same reason, it never sought to acquire title to the lake. With Horowhenua, the Crown, after recognising the Maori ownership of the lake, later tried to claim that the ownership had somehow passed to it. However, this was clearly not the case, and legislation confirming that the lake remained the property of Muaupoko was passed in 1956.[46] In the case of Lake Rotoaira, because it was included in the Tongariro power scheme, the Crown attempted to purchase it in the early 1970s. The owners, however, refused to sell. Instead an agreement was reached whereby the owners were divested of the power to jeopardise in any way the power scheme. In return the Crown promised not to compulsorily acquire the lake. No compensation was paid under this agreement.[47]

The various settlements and lease arrangement secured by the Crown in respect of certain lakes are an acknowledgement on the part of the Crown of the existence of Maori rights in those lakes. However, the Crown was at pains to word settlement deeds so as that they did not explicitly acknowledge that the beds of lakes were Maori customary land. But presumably a corollary of the acknowledgement that the vendors had rights which they could sell or lease, was that where they have not been purchased, these rights remain intact.

Although it is argued in this report that in New Zealand the Crown pursued a policy of establishing itself as the owner of lakes – or at least of attempting to defeat the claims of Maori to the same – the cases of Omapere and Horowhenua stand out as evidence to the contrary. By the time the Crown abandoned its appeal against the Omapere decision, it appears that no further applications had been made to the Maori Land Court in respect of lakes other than Tuwharetoa's to Rotoaira (lodged in 1937). It can be argued that the Crown's push to establish itself as the owner of lakes only really manifested itself in the face of claims by Maori. Otherwise the Crown was happy to simply assume it held the ownership of lakes. That the Crown never seriously sought to extinguish the owners' interests in Horowhenua can perhaps be explained in terms of the lake not being considered to be of particular value or importance to the Crown, as was the case with Lake Omapere.

It must be asked though why the Crown did not try harder to establish itself as the owner of all lakes in New Zealand. After the Native Land Court issued its interlocutory decision in respect of Waikaremoana, an option considered by the Government was to pass legislation that vested the beds of all lakes in the Crown.[48] In 1903 legislation had been enacted that vested the beds of all navigable rivers in the Crown.[49] A reason why no such legislation was passed in relation to lakes may have

45. The Lake Waikaremoana Act 1971
46. Reserves and Other Lands Disposal Act 1956, s 18
47. Heads of Agreement, Ministry of Works and Ngati Tuwharetoa, 30 November 1972, Wai 178/0, Waitangi Tribunal, pp 14–18
48. See for example Solicitor General to Attorney General and Minister of Native Affairs, 15 February 1935, CL 200/15, NA Wellington, cited in Stevens, p 28; Prenderville to Solicitor General (memo), 24 February 1944, MA 5/13/78 pt 1, NA Wellington, cited in Stevens, p 30
49. The Coal Mines Act, s 14

been that the Crown did not want to make itself liable to pay compensation to the Maori owners of lakes. Although no compensation has ever been paid to Maori for the beds of rivers that were effectively confiscated under the coal mines legislation, a crucial difference was that the Native Land Court had ruled that the beds of several lakes were Maori customary land. This may have meant that the Crown would have been liable to pay compensation to Maori if lakes were vested in the Crown by statute.

8.7 THE LIMITS OF OWNERSHIP

If the customary rights of Maori in most lakes remain undisturbed, it must be asked what this ownership amounts to today? Although the Crown never formally acquired title to lakes in New Zealand, it assumed the right to legislate in respect of waterways. And as has been argued in the first chapter of this report, the history of this legislation is one of the abrogation of Maori rights. Variously legislation was passed that provided for flood protection, swamp drainage, irrigation, domestic water supply, and electricity generation. The objective of much of this legislation was to promote settlement, and bring more land into agricultural production. As well as many of the public works undertaken under this legislation having a deleterious effect upon the ecology of inland waterways, especially Maori fisheries, large amounts of Maori-owned land were compulsorily acquired. Another issue is the way in which the Crown vested powers in various local authorities to undertake public works that interfered with rivers and lakes. Importantly, no legislation that affected waterways acknowledged any pre-existing Maori rights, or made any specific provision for the payment of compensation for such. In connection with such 'land improvement' initiatives, it was held that Maori rights were on the same footing as those of Pakeha; both of which had to give way to the 'national interest'. But it so happened that this national interest was synonymous with the interests of Pakeha farmers. Also, provisions to protect traditional Maori economic activity were clearly antithetical to these goals.

The Crown's view that Maori rights in lakes were confined solely to those of fishing found expression in legislation governing fisheries in New Zealand. But although guarantees of Maori fishing rights featured in fisheries legislation from 1877, the courts proved reluctant to give meaningful effect to these provisions. Despite the courts' intransigence in not recognising any Treaty rights in respect of freshwater fish, Maori continued to argue that they had rights in freshwater fisheries under the Treaty. Another injury Maori suffered under this legislation was that much of it was angled towards the acclimatisation and management of trout – the presence of which had a serious effect upon stocks of indigenous fish caught by Maori. But where the Crown was anxious to secure the ownership of a particular lake bed (such as in the case of Lakes Taupo and the Rotorua lakes), it did afford guarantees to the lake's Maori owners of their rights to indigenous fish. Also free trout fishing licences were awarded to the lake's Maori owners. This can be seen as a recognition of the effect of the introduction of fish to the lakes on native fisheries. Hence it would appear that where

it was felt that protecting Maori fishing rights was necessary in order to get the owners of a particular lake to agree to sell their interests, the Crown was willing and able to afford such guarantees.

There can be no doubting that Maori held rights in respect of lakes under the Treaty of Waitangi. Be it as 'taonga' in the Maori version, or 'fisheries' in the English version, Maori were guaranteed the exclusive possession of lakes. But the history of Crown action in relation to lakes shows that the Crown acted in a variety of ways to abrogate these rights in an attempt to convert the New Zealand landscape in to 'productive' land, and to secure in itself rights of ownership. In terms of the latter of these objectives, however, the Crown has been largely unsuccessful. The title to only a handful of lakes in New Zealand is beyond doubt, and all of those that are vested in the Crown were each a result of protracted negotiations and special legislation. That the Crown has not established itself as the owner of all lakes is not surprising, though, when regard is had to the extent of its rights at English common law, and that undeniably lakes are subject to Maori customary title. But despite the Crown being relatively unsuccessful in establishing itself as the owner of lakes in New Zealand, it was more successful in securing rights of management and control. In this way, though Maori remain the customary owners of many lakes, this ownership does not amount to much in the way of rights in such things as fisheries and water.

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