

Mohaka River Report 1992

03 The Mohaka Purchase and the Crown's Assumption of Riparian Rights

3.1 Ngati Pahauwera's Customary and Treaty Rights Over the River

THE MOHAKA PURCHASE AND THE CROWN'S ASSUMPTION OF RIPARIAN RIGHTS

3.1. Ngati Pahauwera's Customary and Treaty Rights Over the River

At the time of the Crown purchase of the Mohaka block in December 1851 the mana and rangatiratanga over the lower Mohaka river at least as far as the Te Hoe confluence was held by Ngati Pahauwera and confirmed and guaranteed by article 2 of the Treaty of Waitangi. While their rangatira controlled the river, individual family groups and hapu occupying adjoining land had customary rights to use its resources such as water, fish and hangi stones. The duty of preserving and protecting the purity of the water and wahi tapu devolved on Ngati Pahauwera. Historically land sales and confiscation disrupted the relationship between the river and the people. Alienation from the land led to an alienation from the river (cf B28:10). Ngati Pahauwera's customary and Treaty rights were eroded.

This chapter examines whether or not Ngati Pahauwera disposed of any of their customary and Treaty rights in the river when they sold land on the south bank to the Crown in December 1851. The following chapter examines the same question in respect of land on the north bank of the river which was subdivided and sold through the Native Land Court. For the purposes of this claim we do not need to consider whether or not the sales themselves were fair and proper and whether sufficient land was reserved for Ngati Pahauwera's present and future needs. These issues are the subject of a further claim.

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3.2 Crown Land Purchase Policy

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As early as 1848 blocks of land in Hawke's Bay were being leased from local Maori chiefs for sheep grazing in spite of the express prohibition on squatting in the 1846 Native Land Purchase Ordinance (C2:8). Governor Grey's land purchase policy was to exercise the Crown's exclusive right of pre-emption to purchase extensive blocks of land ahead of the needs of settlers as quickly and as cheaply as possible, that is before settlement had enhanced its value. In the Wairarapa and Hawke's Bay he was anxious to purchase land being illegally leased by squatters before the chiefs fully realised the advantages of leasing rather than of selling.

In December 1850, Donald McLean, who had been successfully negotiating purchases for Grey in Taranaki, Wanganui and Rangitikei, met very large assemblages of Maori at Waipukurau and Ahuriri to negotiate the purchase of the Waipukurau and Ahuriri blocks (C2:22ff; C4:7). McLean was an able, experienced negotiator, "expert at arousing the cupidity of Maori owners" (A56:7) but, in his early dealings, careful to gain the consent of the hapu in open meetings. Although he regarded himself as a "sort of protector of the Maori" (A56:4), he saw no conflict between his public duties as land purchase commissioner and his private ambition to acquire a great pastoral estate (A56:3). In Hawke's Bay he worked under considerable pressure to execute Grey's land purchase policy and to satisfy both settler demand for cheap land and chiefly ambitions to participate in the market economy and acquire European wealth and settlers. Prominent among the land-selling chiefs in Hawke's Bay was Te Hapuku who virtually assumed "the role of Crown land agent in chief" in the Mohaka purchase.

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3.3 Waikare and Mohaka Chiefs Offer Land to McLean

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In April 1849, three Waikare chiefs had asked Governor Grey to visit them to discuss whether he was disposed to permit Pakeha to settle in the district. For 15 years, the writer said he had been considering having white people, and some cows, sheep, horses and goats that he might see "in what consists the wealth of the White people". Soon after he arrived at Ahuriri, McLean was offered land by three northern Hawke's Bay Maori. They were: Te Aotea, a chief of Te Wairoa who invited McLean to visit his settlement; an unidentified man from Wairoa; and a Mohaka chief, Paora Rerepu, "a quiet sensible young man well disposed to the English" who seemed anxious that McLean visit his place (C4:8).

With a view to extending the coastal frontage of the Ahuriri block further north, McLean stopped a night at Mohaka on 27 January 1851 where Paora Rerepu's offer was repeated. McLean told them that "as the interior of the river was sold the freshets would soon reach the Sea which they construed into a partial assent". Proceeding on to Wairoa, McLean informed the people there of his intention to purchase only one side of the Wairoa river and ascertained that the southern bank could "be easily purchased". After visiting Turanga, he stopped at Mohaka on his way back to Ahuriri to resume negotiations. On 5 March local Maori assembled and "fully agreed to sell their claims to the south side of the Mohaka on to Waitaha, retaining the north side on to Waihua" at his suggestion "for themselves which will be a good river boundary", McLean agreed to the purchase. On the morning of 6 March, "the Natives of Waikare arrived and offered to sell from Waitaha to Moiengiengi", that is the block immediately to the south of the Mohaka block and on both sides of the Waikare river. At Waikare on 7 March, he received a further offer of land which extended the boundary on to the Waipapa stream. From Ahuriri on 14 March he reported to Grey that he had:

obtained an extension of the Ahuriri block towards the Mohaka river, including several thousand acres of land, which from being bounded by the Mohaka river, will save a great expense in surveying.

Clearly during the course of these negotiations both McLean and the local Maori regarded rivers as suitable block boundaries. Furthermore river boundaries to McLean were a means of reducing the cost of surveys and ensuring that both the local Maori and incoming settlers would have access to water.

As yet the inland boundaries of the blocks being offered were undefined. On 1 April 1851, Paora Rerepu informed McLean that:

all the people have gathered and agreed that Mohaka at Waikari to be given to you at Waikari is the boundary that finishes with you going on to Maungahururu and falling off at Mohaka.

The offer of the Waikare-Moeangiagi land had been withdrawn and the Moeangiagi Maori had withdrawn from the sale (C4:19). The Mohaka Maori retained land north of the Mohaka river which McLean reckoned extended as far as the Waihua river. The Waikare Maori retained their land to the south of the Waikare river extending presumably to the Moeangiagi river (ibid). McLean could now procure a survey of the block lying between the Mohaka river and the Waikare river.

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3.4 McLean Procures a Survey

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In May the external boundaries of the Mohaka block were surveyed by Robert Park, chief government surveyor in Hawke's Bay. As the boundaries were almost entirely defined by rivers and the coast, he completed his work in just over three weeks (C4:21). In a brief report to McLean he described the Mohaka block as follows:

The Mohaka block is distant about 21 miles from the Ahuriri block and ... from 80,000 to 90,000 acres. On the Southeast it is bounded by sea, the distance from Mohaka southwards to Waikari being about 7 miles-all cliff ... The southern boundary is formed by the Waikari River along which it runs to its source, about 16 miles, to a place called Patuawahine on the Maungahururu range from thence down to the Mohaka 2 miles farther. On the West and North by the Mohaka River following it until it joins the sea, the whole distance may be 30 miles.

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

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3.5 Deed of Sale

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

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

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

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

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

The 'McLean translation' states:

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

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

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

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

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

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

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

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

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

The 'McLean translation' states:

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

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

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

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

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

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3.6 Was Any Part of the Mohaka River Sold?

3.6. Was Any Part of the Mohaka River Sold?

The point at issue between the Crown and the claimants was whether Ngati Pahauwera disposed of any of their customary and Treaty rights in the Mohaka river in the 1851 sale. Both the Crown and the claimants agreed that the river was a boundary. But did this mean, as the claimants maintained, selling land south of the river, but no part of the river itself? Or was it, as the Crown submitted, an absolute transfer of ownership of half of the river?

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

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

Cordry Huata maintained that:

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

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

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

Mr Brown submitted that:

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

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

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

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

In support of this view he referred to Toro Wakaa's interpolation to his written evidence regarding trouble arising from the one fishing on the other's side of the river (B8:7). He also referred to claimant evidence distinguishing a Maori side of the river from a Pakeha side (C17:46-47 & interpolation). He concluded that all the evidence on the deed (the Maori version and English translations) "pointed to the boundaries of the block being in the river itself" (C17:50).

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

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

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

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

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

Ms McHugh observed that McLean's explanation of the boundary was accepted without question or comment by the assembly. In her opinion, it was significant that

the grievance which prompted it was on the side of the settlers and it was possible that Maori understanding might have been incomplete. It was equally possible that the Waikare Maori understood themselves to have sold half of the river but had continued to use the whole width without perceiving that this might have created difficulties (C4:59-60). Ms McHugh concluded that:

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

Ms Elias submitted that it was absurd to suggest that Ngati Pahauwera had any understanding of legal presumptions attached to ownership of riparian lands which were not in accordance with the Maori perception of taonga. The river was a natural boundary and understood in that sense (C14:54).

Mr Butterworth considered that:

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

Yet with respect to the river boundary he concluded:

There is an ambiguity because the boundary is placed in the water but there is no suggestion that it went into the middle of the river or that people were selling the river in the sense of the river bed and water.

Given the holistic cast of Maori thought, the notion that their river could be divided into fractions was beyond their experience.

There is little doubt that McLean wanted to create this ambiguity so that he could later claim to the Waikare people 'that half the river was theirs, and half the White people's' ... The local people apparently accepted the compromise of allowing a passage for timber and boats. It does seem that given Polynesian traditions of hospitality and courtesy that they may simply not have disputed the issue with McLean. At the time of signing what Ngati Pahauwera would have believed they were giving was a user-right of access to water stock and to use the river for fording and for transport; this would fit well into Maori customary practice. (B21:13)

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

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

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

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

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

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

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

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3.7 Ad Medium Filum Aquae Presumption

3.7. Ad Medium Filum Aquae Presumption

Having stated our conclusion on what was sold, we must now consider the applicability of the ad medium filum aquae rule to the 1851 sale. As Mr Brown submitted, this principle is that as a matter of common law ownership of land adjoining a non-tidal river also includes with it ownership of the bed of the river to its mid-point. If the bank of the river is sold then this portion of the river bed is also sold. Mr Brown argued that when the southern bank of the Mohaka was sold, so also was the river bed to mid-stream. The 1962 decision of the Court of Appeal in *Re the Bed of the Whanganui River* was relied on to support this proposition. This decision marked a decisive point in a long running dispute between Whanganui tribes and the Crown over the ownership of the Whanganui river. The Court of Appeal was asked to determine who owned the river prior to 1903 when s14 of the Coal Mines Amendment Act 1903 declared all navigable rivers-which clearly included the Whanganui-to have been the property of the Crown from 1840. Was the river owned by the tribe and thus still customary Maori land, since it had neither been sold to the Crown, nor investigated by the Native Land Court to determine title? Or had the river passed into Crown ownership through the application of the ad medium filum rule, and then into European hands as land was eventually sold?

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

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

Accordingly, sale of land on the banks of the river must have been understood by Ngati Pahauwera as including the sale of at least a portion of the river.

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

- the Maori Appellate Court, whose opinion was relied upon by the Court of Appeal, had received less extensive evidence than had the 1950 Royal Commission on the Whanganui River which concluded that the Whanganui river had been owned by Whanganui Maori as a tribal estate (C14:44);
- the Maori Appellate Court had based its reasoning on the absence of any tribal claim to the river when Native Land Court titles were applied for and on the fact that no claim to the river had emerged until the 1938 proceedings (C14:33);
- the Court of Appeal decision dealt only with the river bed and did not address other aspects of the river, notably its waters. This meant that the Maori perception of the river as a whole and indivisible entity, not separated into bed, banks and waters, was not taken account of. In view of the evidence on the separate identity of rivers and their mauri, specific investigation of native custom was called for (A38:44); and
- the Court of Appeal had stated in 1955 that evidence that eel weirs were situated in parts of the river not adjacent to settlement areas would be sufficient to rebut the *ad medium filum* presumption. The Maori Appellate Court had subsequently determined that the ownership of eel weirs was not restricted to those whose land was immediately adjacent. Nevertheless in 1962 the Court of Appeal discounted the effect of such evidence on the application of the riparian presumption (C14:34).

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

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

Examples of surrounding circumstances in the Whanganui river were:

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

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

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

In English law if, on the sale of riparian lands, the vendor reserves fishing-rights that accompanied his right *ad medium filum* of a stream, the reservation could rebut the presumption that his purchaser acquired the bed of the river *ad medium filum*. If such an owner had erected weirs while he was the owner and reserved the right to use those weirs, the ownership of the soil would still remain with him. (A44:12)

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

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

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

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

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

Ngati Pahauwera would have thought that all they were relinquishing to the Crown was the right to use and occupy land on the south bank and access to the river for

water and transport. Notwithstanding the Crown's submission that it could "not comprehend the assertion that ownership of the River is separable from riparian ownership" (A54:7), we agree with the dictum of Mr Justice Hay in *Morison* that "the right to the bed of the river is not inseparably bound up for ever with the right to the land, and an owner may retain one and part with the other". As we have already stated, it is our view that Ngati Pahauwera had no intention of relinquishing rangatiratanga over the Mohaka at the time of the land sale to McLean. The language of the deed of sale and the surrounding circumstances demonstrate that Ngati Pahauwera neither understood nor intended that the sale would alienate any portion of the river.

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

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

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

In summary therefore we conclude that no part of the river was included in the 1851 sale and that, even if the Crown had been entitled to rely on the *ad medium filum aquae* rule, that presumption would on the facts have been rebutted. In any event the Crown was not entitled to rely on the *ad medium filum aquae* rule, an English common law presumption which would have been known to few if any settlers in this country in 1851. To rely on such an esoteric rule to acquire a taonga of Ngati

Pahauwera without their knowledge would we think have been clearly unjust and in breach of article 2 of the Treaty.

References

- 1 J G Wilson and others, History of Hawke's Bay (Wellington 1939) p 193
- 2 James Rutherford, Sir George Grey, K.C.B., 1812-1898 A Study in Colonial Government (London, 1961) p 182ff
- 3 Dictionary of New Zealand Biography (DNZB), I:M11
- 4 *ibid*:T28
- 5 Te Poihipi & others to governor-in-chief, G7/6/61; A21(d):827
- 6 McLean journal entry, 7 January 1851; A21(e):1241
- 7 *ibid* 28 January 1851; C4(a):80. As Stephanie McHugh, a Crown researcher, pointed out, the meaning of McLean's metaphor is rather obscure. In her opinion it was likely he was referring to the Ahuriri block, implying perhaps that once an inland area of the river had been sold the coastal stretch would follow (C4:12).
- 8 *ibid*, 29 January 1851; C4(a):81
- 9 *ibid*, 5 March 1851; C4(a):74
- 10 *ibid*
- 11 AJHR 1862 C-1, p 309; A5(a)
- 12 MS Papers 32 McLean Folder 675c; C4(a):136
- 13 Park to McLean, 7 June 1851, CS1, 1852/177; A21(d):785
- 14 The Te Roroa Report 1992 (Brooker and Friend Ltd, Wellington, 1992) page 50
- 15 According to the historian J G Wilson, Park prepared a map of Hawke's Bay from the Mohaka river to Porangahau dated December 1851. The original in the Lands and Survey Office, Napier, was destroyed in the 1931 earthquake and a tracing in Wilson's possession was used to make a copy to replace it (Wilson, History Of Hawke's Bay, pp 202-203; C4:25). This copy is presumably the 1852 Bousfield map now held by Dosli in Napier which shows the Mohaka Block as consisting of about 85,700 acres and records more place names up both the rivers than were included on the survey plan; also existing pack tracks, and on the south side of the Mohaka mouth, the whaling station (J D H Buchanan, The Maori History and Place Names of Hawke's Bay, p 199)
- 16 McLean journal, 4 December 1851; A21(e):1370
- 17 H H Turton Maori Deeds of Land Purchases in the North Island of New Zealand, vol II (Wellington, 1877) pp 487 & 491
- 18 For example, the Te Roroa Report 1992 p 38
- 19 J G Wilson et al, History of Hawke's Bay, p 196
- 20 J G Wilson The Founding of Hawkes Bay (Napier, 1951) p 24
- 21 Oral evidence of George Hawkins, 4 May 1992
- 22 McLean to Grey, AJHR 1862 C-1, p 309; A5(a)
- 23 MS Papers 32 McLean Folder 675c; C4(a):136
- 24 McLean journal, 6 April 1855, C4(a):98
- 25 Ngai Tahu Sea Fisheries Report 1992 (Brooker and Friend Ltd, Wellington, 1992) p 167-168
- 26 Report of the Waitangi Tribunal on the Orakei Claim (Wai 9) reprint (Brooker and Friend, Wellington, 1991): 180-181; see also Report of the Waitangi Tribunal on the Muriwhenua Claim (Wai 22) (Waitangi Tribunal Division, 1988) p 188; The Ngai Tahu Report 1991 (Wai 27 (Brooker and Friend, Wellington, 1991) p 223
- 27 AJHR 1950 G-2

28 In Re the Bed of the Wanganui River [1955] NZLR at page 438
29 The King v Morison [1950] NZLR 247, 254

Waitangi Tribunal, Department of Justice, Wellington.