

Mohaka River Report 1992

01 Introduction

1.1 Te Tono a te Iwi (The Claim)

INTRODUCTION

1.1. Te Tono a te Iwi (The Claim)

This claim concerns the tino rangatiratanga of Ngati Pahauwera over the Mohaka river. It was brought by the late Ariel Aranui, tribal leader, for himself and on behalf of Ngati Pahauwera. The Mohaka river claim forms part of a wider claim relating to tribal lands in Hawke's Bay and Wairarapa. It has been severed from the wider claim and been accorded urgency by the Waitangi Tribunal at the request of the claimants. The Planning Tribunal has recommended to the Minister for the Environment that a national water conservation order be placed over the Mohaka river. The claimants say that their tino rangatiratanga over the river confirmed and guaranteed in article 2 of the Treaty of Waitangi has never been relinquished. They allege that the making of a water conservation order without their consent would usurp their rangatiratanga and would be a breach of the principles of the Treaty.

The Mohaka river has its headwaters in the central ranges of the North Island, the Kaweka and Kaimanawa ranges (see map 1.1). It flows into Hawke Bay, approximately 48 kilometres north of Napier. It is fed by several major tributaries.

Ngati Pahauwera's claim relates to the lower reaches of the river as it flows through their traditional tribal territory from the Te Hoe river junction to its mouth. They claim that the river, including its waters, bed and fisheries, is a taonga of Ngati Pahauwera. In particular they place great emphasis on the role the river plays in their tribal identity.

The claimants say that the Crown through legislation, in particular the Water and Soil Conservation Act 1967, has failed to recognise and give effect to their rangatiratanga over the Mohaka river. They claim that this legislation is inconsistent with the principles of the Treaty because it fails to recognise tribal authority and provide appropriate mechanisms for its exercise. Detailed proposals for how this could be achieved were not submitted to the tribunal in the context of this hearing, but the claimants sought a finding that the relevant statutes failed to provide for rangatiratanga, in breach of the Crown's Treaty obligations, and that new forms of authority for regulating use of waters and other natural resources need to be devised.

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1.2 The History of the Claim

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In October 1987 the Minister of Works and Development received an application from the Hawke's Bay Acclimatisation Society and the Council of North Island Acclimatisation Societies for a water conservation order in respect of the Mohaka river. The application was made under section 20A(1) of the Water and Soil Conservation Act 1967. It did not relate to the whole of the Mohaka river system but to a significant portion of it, from its headwaters down to just below the Te Hoe river junction, and including all contributing rivers and streams above that point. In its original form the acclimatisation societies' application did not directly affect Ngati Pahauwera, as their traditional river rohe extends downstream from the confluence of the Mohaka and Te Hoe rivers and then out to the sea.

In May 1989 the Minister for the Environment appointed a special tribunal to consider the application under s33A of the Soil Conservation and Rivers Control Act 1941 and submissions from interested parties were received. In July 1989 the special tribunal held public hearings in Napier where representatives of Ngati Pahauwera sought an adjournment. Ngati Pahauwera expressed their view that there had been inadequate consultation with them and that a prior issue, "possession and control of the river and its waters", had yet to be determined by the Waitangi Tribunal. The special tribunal agreed to an adjournment and the hearing resumed in November 1989. Ngati Pahauwera did not give evidence but made written submissions following the hearing.

In January 1990, Ariel Aranui filed a claim with the Waitangi Tribunal on behalf of himself and the Ngati Pahauwera people. In their statement of claim, the claimants recorded their objection to the making of a conservation order prior to the issue of rangatiratanga over the river being decided by this tribunal.

In March 1990, the special tribunal issued a draft conservation order. It held that the Mohaka river had certain outstanding features, that those features should be protected and that hydro-electric power development, other than small dam construction on tributaries, was not compatible with conservation of the river system's waters. The special tribunal declared that in addition to outstanding scenic characteristics and amenities the river contained "outstanding spiritual and cultural values to the tangata whenua over the whole river system" (A36:101). It was at this point that Ngati Pahauwera's interests in the river were directly affected.

In response to the draft national conservation order two objections were lodged with the Planning Tribunal, one from Electricorp in April 1990 and the other from Ngati Pahauwera at the end of May 1990. Electricorp objected on the basis that the draft order would restrict any hydro-electric development which Electricorp might consider

necessary or desirable. Ngati Pahauwera objected on the ground that the proposed order would undermine their status as tangata whenua having control and management of the river.

From October 1990 the Planning Tribunal set about its task of considering the objections by way of public inquiry. Ngati Pahauwera requested that the Planning Tribunal inquiry be postponed until the Waitangi Tribunal had had the opportunity to report on the Treaty claim. At judicial conferences in October 1990 and September 1991 the Planning Tribunal declined claimant requests for deferment and it announced, in March 1991, that its inquiry would commence on 30 September 1991. Three days before the commencement of the inquiry Ngati Pahauwera appealed to the High Court against the Planning Tribunal's decision not to postpone its proceedings. The Planning Tribunal inquiry began as scheduled on 30 September 1991, despite renewed claimant application for a stay. On 17 October 1991 the High Court dismissed the claimants' appeal against the decision to proceed.

On 18 September 1991 counsel for Ngati Pahauwera applied to the Waitangi Tribunal for severance of the river claim from the rest of the wider land claim, which had been filed in April 1990, so that the river issues could be given an urgent hearing. Although the Crown opposed urgency, the tribunal was satisfied that there was:

a very real possibility of injustice to Ngati Pahauwera if the draft conservation order is confirmed before this Tribunal has considered and reported on the present claim.

The application for urgency was granted and the claim was set down for hearing in April and May 1992.

Waitangi Tribunal, Department of Justice, Wellington.

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1.3 Planning Tribunal Inquiry

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The Planning Tribunal inquiry was held between 30 September 1991 and 29 January 1992. Its report and findings were released in March 1992. After a comprehensive review of the statutory context and the evidence presented the Planning Tribunal concluded that the draft conservation order should be confirmed, but with amendments. The area of the river to which the order would apply was reduced to the upper reaches above the Napier-Taupo road, the Mokonui gorge and all tributaries except for a small part of the lower Te Hoe river. Allowance was made for low dams at Raupunga and the Te Hoe junction.

The Planning Tribunal summarised Ngati Pahauwera's objection to the draft order as the iwi's assertion that the Mohaka river is a tribal taonga, that Ngati Pahauwera claim te tino rangatiratanga of the river, and that their rangatitanga was guaranteed by article 2 of the Treaty of Waitangi. In Ngati Pahauwera's view the making of the order would be inconsistent with their rangatiratanga and a breach of the Crown's Treaty promise to protect it.

The Planning Tribunal rejected the view that it has the authority to give effect to the Treaty of Waitangi under the Water and Soil Conservation Act or could recognise that Ngati Pahauwera have rangatiratanga in respect of the river. In amending the draft order the Planning Tribunal deleted the original reference to the river's spiritual and cultural values for tangata whenua.

Waitangi Tribunal, Department of Justice, Wellington.

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1.4 Waitangi Tribunal Hearings

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The first hearing of the Mohaka river claim was in Wellington on 15 April 1992, when opening submissions were presented by counsel for the claimants and the Crown. The claimants were represented by Sian Elias QC, assisted by Eugenie Laracy. Brendan Brown, briefed by the Crown Law office, appeared as senior counsel for the Crown with Harriet Kennedy from Crown Law as junior counsel.

The second hearing began at Mohaka on 4 May 1992. It continued for three days at Mohaka, until Wednesday 6 May. During that time the tribunal received written and oral evidence from 33 members of Ngati Pahauwera. Submissions were also received in support of Ngati Pahauwera from other river iwi with a similar affiliation for their awa: Tainui for Waikato; Atihaunui-a-Paparangi for Whanganui; Ngati Pikia of Te Arawa for Kaituna; and Ngati Tuwharetoa for the Upper Mohaka.

The hearing recommenced the following day at Napier, finishing on Tuesday 12 May. Evidence was heard from other Ngati Pahauwera members and from expert witnesses on behalf of Ngati Pahauwera. Following the conclusion of Ngati Pahauwera's evidence the Crown presented its evidence.

Final submissions from counsel were presented at a further hearing at Napier on 5 June.

Waitangi Tribunal, Department of Justice, Wellington.

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1.5 Notice to Crown

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On 19 June the tribunal issued a memorandum advising counsel that although the tribunal had given the preparation of this report the highest priority, it was unlikely to be completed before the end of July. However the tribunal's consideration of the claim had progressed to the point where it could say that it would be making recommendations which if accepted would affect the proposed water conservation order. Crown counsel were requested to advise the Minister for the Environment accordingly.

References

1 See statement of claim dated 29 January 1990, appendix one

2 Planning Tribunal "Report on the Mohaka River Draft Water Conservation Order 1992", appendix A, p 101

3 Waitangi Tribunal Direction, 12 November 1991, record of proceedings, 2.53

Waitangi Tribunal, Department of Justice, Wellington.