

Taipa sewerage claim

7 Conclusions

7.1 Findings

7. FINDINGS

It was a condition of the Treaty that the Maori possession of lands and fisheries would be guaranteed. The guarantee requires a high priority for Maori interests when works impact on Maori lands or particular fisheries for their guarantee was a very small price to pay for the rights of sovereignty and settlement that Maori conferred. In other cases however, it is a careful balancing of interests that is required. It was inherent in the Treaty's terms that Maori customary values would be properly respected, but it was also an objective of the Treaty to secure a British settlement and a place where two people could fully belong. To achieve that end the needs of both cultures must be provided for and, where necessary, reconciled.

This is a case in our view, where the Treaty requires a balancing of Maori concerns with those of the wider community of which Maori form part. The construction of sewerage works imposes unavoidable costs, financial and cultural, on all members of the community, on the general populace as well as the local tribe. To find the proper balance between cultural and financial concerns is no mean task. The Maori spiritual ethic was singularly suppressed or overlooked in the past but recent Planning Tribunal and High Court decisions show that that need no longer be so. A balance must be maintained however, not an over-redress. In this case it is at least clear that an absolute priority for Maori cannot be upheld. The plans have been changed to avoid the significant fisheries, and the Maori owned lands affected were acquired well after the works were proposed.

The Treaty did envisage however a place of respect for the tribes. This is clearer in the Maori text than the English. The rights of tribal self management that flow from the Treaty require, in certain cases, the right of a tribe to be heard and in a manner consistent with tribal norms.

The Crown's role is apparent from the Treaty's words, as protector of the Maori interests; not as an advocate however but as a judge of fair and expansive mind. Waka Nene captured that image during the Treaty discussions, when he called upon the Governor to remain for all as "father, judge and peacemaker". Much of the judging role has since been passed to the Courts, in this case to the Planning Tribunal. Thus it is that every Judge holds the Governor-General's warrant and is sworn to uphold and apply the Crown's laws. It is important to understand however that it is not the function of this Tribunal to judge the Judges. We are not an appellate court. Our task is to measure the Crown's laws by which the judgments are made against the Crown's undertakings in the Treaty.

With those principles in mind we have made these findings, and for the reasons earlier given.

1. The objection rights in planning laws do not fulfil Treaty obligations when there is not the facility for prior consultation with local tribes. The practical difficulty is that, through the neglect of tribal rights in former years, there is now a dearth of legally cognisable institutions representative of the tribes readily able to formulate a tribal position. Subject to the provision of such institutions, which in our opinion the Crown must now provide, the Planning Tribunal should have power to defer proceedings where in its opinion consultation is required.
2. Such an arrangement ought not to prevent any Maori from lodging an objection at variance with the tribal stance.
3. Ngati Kahu as a tribe were prejudiced in the planning proceedings, for consultation came too late, but the prejudice is not in itself such as to warrant the relief that was mainly sought, namely a change in the sewerage plans.
4. The residual flow to the Parapara stream from the effluent disposal marsh does not strictly comply with Maori traditional standards but is a reasonable compromise. Earth, air and vegetation combine to provide natural purification and substantially satisfies the Maori requirement that wastes should pass to the land.
5. Though we have doubts that the treatment ponds can be adequately sealed, it has not been demonstrated that the claimants have been prejudiced in this instance by those water rights laws on which the decision on sealing depended. There was no appeal to the Planning Tribunal and the judgement of the Regional Water Board must therefore stand.
6. The principles of the Treaty require that planning should have regard to the retention of lands in Maori ownership especially, as here, where insufficient land reserves were made. In this case however the Maori owned land affected by the scheme was acquired after the works were proposed and any contest on its compulsory acquisition should be judged on the law as it stands.
7. The relationship of Maori people, their culture and traditions with the lands of their forebears, ought always to be relevant in land use planning. The assessment of that relationship ought not to depend on the ownership of the land, the more so when, as here, it cannot be assumed that the land was freely and willingly sold with appropriate tribal sanction. The current law provides for this assessment but the claimants were prejudiced by the law as it stood at the time.
8. There is no evidence however that the treatment ponds are sited on culturally critical lands.
9. Taipa as a whole, on the other hand, ranks high in the traditional order. Having regard to the customary opinion that wastes defile that which is esteemed, Maori planning would require the works to be elsewhere.
10. The ancestral significance however, is properly to be weighed with any other relevant factors. In this case the impact on the cultural milieu is not obvious, the works being largely hidden and the discharge being elsewhere. With that must be

measured the needs and financial limitations of other affected citizens. The ponds should be resited we find, only if there are reasonably practical alternatives.

11. Of the alternatives proposed, none is sufficiently free of other problems to warrant Parliamentary intervention to require the ponds' relocation.

12. We should say no further on the various statutes referred to in the formal claim. Some provisions may be inconsistent with the principles of the Treaty but, except as above given, the respects in which the claimants have been prejudiced have not been demonstrated.

As a result of the findings, no recommendation is made. Ngati Kahu had good grounds to bring a claim and reasons to feel aggrieved, but on the weighing of their concerns with those of the wider community, whose rights were also represented in the Treaty, we cannot on balance intervene. The sewerage scheme is symptomatic of wider problems however, arising from the more intensive use of the Ngati Kahu ancestral lands, and other action may be required if the tribal foothold in the territory is to be maintained. Any necessary action on that count however, is properly to be addressed in the land claim.

In declining recommendations we do not predicate the result of other proceedings that may be taken under the Public Works Act. Our conclusion is based upon the Treaty not the Planning Laws. Whether or not the Crown has required a more dedicated pursuit of alternatives in such circumstances, in terms of the Public Works Act, is for the Planning Tribunal to determine. Matters of ancestral significance, should they be relevant to those proceedings, are now within the legal competence of the Planning Tribunal to resolve, and the actual competence too. There is no impediment to that tribunal reaching an entirely different conclusion from our own.

Dated at Wellington this 16th day of August 1988.

Chief Judge E T J Durie, Chairman

M A Bennett, Member

M E Delamere, Member

Georgina Te Heuheu, Member

M P K Sorrenson, Member

Waitangi Tribunal, Department of Justice, Wellington.