

# Taipa sewerage claim

## 6 Particular Claims

### 6.1 Estoppel

#### 6. PARTICULAR CLAIMS

This chapter makes findings in terms of our jurisdiction on the issues that were raised, as summarised at 2.2.

#### 6.1 ESTOPPEL

The County Council contended the inquiry should not proceed for at no stage had the ancestral significance of the pond site been raised. Each step taken in the statutory planning process was reviewed along with the opportunities for the claimants to object, and copies of some previous objections were filed. The Council was prejudiced as a result, it was claimed, for having obtained certain statutory approvals, it had proceeded with the works (documents A20 and B32).

Counsel for the claimants replied that, because of the then state of the law, the ancestral significance of the lands could not have been raised at any stage in the objection procedures. It was not the Council but the claimants who were prejudiced as a result, she argued, and not only by the inadequacy of those procedures but also by the failure of the Council to consult at an early stage.

The Council reviewed each step in the planning process and we will do the same. The Ryders Creek site, with a discharge to the creek itself, was first publicly disclosed in 1973 when particulars of the sewerage scheme were sent to ratepayers and the scheme was notified in the District Plan. There were 253 objections and in 1974 there was an appeal to the Town and Country Planning Appeal Board. Mr G P Adamson was represented in that appeal.

There were no Maori appellants but Mr Adamson explained why (document B46). He pointed out that his family has had a long relationship with the Ngati Kahu tribe and with Kawiti Tomars in particular. When the sewerage scheme was first notified he and the Maori people discussed the matter. It was decided that Ngati Kahu would contest the discharge of the effluent and Mr Adamson would oppose the designation of the works on his farm. It was their opinion, which was true at the time, that the tribe had no standing to debate the use of lands that they did not own. Accordingly, on the Town Planning question, Mr Adamson appealed and Kawiti gave evidence in support.

Kawiti Tomars was a generally accepted spokesperson for Ngati Kahu. His recent death is widely mourned. He was a member of the Ngati Kahu Trust Board, the Ngati Kahu Executive and the Tai Tokerau District Maori Council. The latter body represents tribal executives throughout Northland. Kawiti was the local representative.

Kawiti complained in evidence that the extensive shellfish beds of the Taipa estuary might become polluted (see document A24). He stated "if an oxidation pond were sited where the Mangonui County Council proposes, people would stop taking shellfish from the beds and in due course a notice would appear saying 'unsafe for human consumption'".

Despite the Council's complaint that Kawiti said no more, it is difficult to conceive of any other grounds on which he might have objected at that time. The requirement to consider the Maori relationship to land was not introduced into planning laws until 1977. The Act, as it was, provided for no more than the recording of historic sites on town plans and the pond site was not an historic site for the purposes of that provision.

In the event a planning consent was denied as the Council had not properly examined alternatives, but the battle was continued in the application to the Regional Water Board for a right to discharge the effluent, also heard in 1974. By then it had been decided to shift the discharge from Ryders Creek to a sea outfall off Taipa beach near to the Otengi headland.

Otengi however was special. As the resting place of the Mamaru canoe and the site where Ngati Kahu began, it might be considered an historic site, even by non-Maori. Kawiti objected to the water right on the grounds of both fishing and the importance of the Otengi headland (document A26). Once more a right was refused but again for other reasons. The Council had not adequately researched water movements, but leave was given to apply again.

When the Council did apply a second time, in 1979, the outfall pipe had been shifted to Otengi Point itself, with the pipes traversing the headland. It was the very spot to which Kawiti had been most opposed and demonstrated the weight the Council attached to the tribe's ancestral land claim. If Otengi was to be so regarded, even after notice had been given, what hope might there have been in raising the cultural significance of other areas?

The Council's explanation is indicative of the mindset of the time. It advised the plans had been approved by the Historic Places Trust Board. The Board had no objection so long as archaeological sites were not disturbed. The Trust Board has an important role in protecting sites of scientific value and can require the completion of archaeological surveys before they are destroyed, but Ngati Kahu was not conceived for the benefit of scientists.

In accordance with the Adamson pact, Kawiti objected once more. He was then supported by two others of Ngati Kahu and each referred to the importance of the Otengi headland (documents A31, A32, A33). They need not have bothered. Neither cultural relationships nor historic sites were relevant to water rights laws at the time. The Regional Water Board had merely to adjudicate on whether the discharge at the point proposed was compatible with the desired quality of the receiving water.

At the same time, in 1979, the Council again sought to include the works and the Otengi outfall in the district scheme. The Council stressed to us once more that no

Ngati Kahu objections were received though specific notice had been sent to the Tai Tokerau District Maori Council.

That Council, as has been seen, spans Northland. No notice was sent to the Ngati Kahu Trust Board. The Board however, was aware of the position and representatives for Ngati Kahu were in fact involved in accordance with the pre-arranged plan. This being a land use matter Mr Adamson objected. On his eventual appeal to the Planning Tribunal Ngati Kahu appeared in support, Kawiti and R S Gregory raising again the importance of the headland (see document A35 pp 12-16 and document A41).

It is hardly surprising in our view that there was no reference to the significance of other areas of land at that time (1979). In 1977 the legislature had enacted that the relationship of Maori people with their ancestral land had properly to be brought into account, but the Planning Tribunal had already determined, in other cases, that the provision could relate to no more than Maori owned land (see 5.5).

Ngati Kahu were well aware of that interpretation of the law. Only months before, the relationship of Ngati Kahu to other lands had been argued in another case and the Tribunal had held that, as the land was not Maori owned, the objection could not be sustained (see *Quilter v Mangonui County Council Planning Tribunal No. 1 Division*, decision of 12 October 1978).

Otengi headland had by then passed to Ngati Kahu ownership, but technically even that was without the benefit of the new "ancestral land" provision as the Planning Tribunal in this particular case was to observe. The earlier Planning Tribunal decisions had held that the land had always to have been Maori owned, and those decisions were binding.

Nonetheless, Kawiti and R S Gregory objected to the outfall from off the headland, perhaps hoping that the tribe's acquisition of the headland in the interim, might have made some difference; and the Planning Tribunal was sympathetic. It observed that the headland had "deep significance" for Ngati Kahu, and should, if practicable, be avoided (document A35 p11). However the Tribunal concluded that the location of the outfall was not its concern. By section 64 of the Town and Country Planning Act 1977 pipelines could be laid throughout the area without a planning consent, landowners having objection rights under the sixteenth schedule of the Local Government Act 1974. Planning consent was granted. That decision was affirmed by the High Court in 1981 following proceedings initiated by the Environmental Defence Society.

The five yearly review of the District Scheme provided a further opportunity to object but, as the Council again pointed out, there were no objections based on the ancestral significance of the treatment site. The law however, was still the same. It was still the opinion that the land had always to have been Maori owned. G P Adamson and Kawiti Tomars in fact objected, a matter the Council appears to have overlooked, but with Kawiti still relying on the threatened despoliation of fishing grounds and the significance of Otengi Point (document A42, as produced by the claimants). The matter had been before the Planning Tribunal before however, and following that, the High Court. When the objections were disallowed by the Council, as must have been expected, it was natural that there should have been no further appeal.

Then in 1986 there was a change to the Parapara marsh site and a new water right was required. Mr Adamson objected once more to the treatment site, referring to the cultural and historic values of Taipa as a whole, but the Regional Water Board had earlier determined that such matters were outside its purview.

In all it is clear that at all material times, the nub of the Ngati Kahu complaint, that Taipa was one of their more significant ancestral homes, was not a matter that the law could entertain, let alone comprehend, until the ancestral land provision in the Town and Country Planning Act was directly before the High Court in 1987, as explained at 5.5. Until then, the most that Ngati Kahu might have hoped for was that the headland would be spared, because of its historical importance and because, during the course of proceedings, the tribe had come to own it once more. Even that could not be protected, as it turned out, although the Planning Tribunal was clearly concerned.

Nor can we accept that the Council endeavoured to accommodate the Ngati Kahu concerns, at least not until the very last stage. The Council was limited by its ratepayers means, but it is difficult to escape the impression that the original scheme involved the most minimal proposal and that each improvement was solely the result of external pressure from other than Maori forces.

The original proposal was for a single stage treatment pond. It was the Department of Health that required a two stage system.

The initial intention was to discharge to Ryders Creek, despite the proximity of important fishing grounds. Change came only in the face of 253 objections from local residents, backed by some 406 notices given in support of those complaints.

The first sea outfall site was likewise opposed and planning approvals were denied. Neither the Planning Tribunal nor the Regional Water Board was satisfied with the inquiries made.

The second outfall site at Otengi was chosen in spite of Ngati Kahu's recorded objections to a discharge near the headland concerned. Change came when the Planning Tribunal expressed its disquiet.

Then the marsh system was proposed. The Council placed great weight on the fact that its officers then met with Ngati Kahu, at their marae, to explain it. That meeting we note, was not held until the claim to this Tribunal had been filed and notified.

The marae meeting raised another question. The County Chairman believed that the meeting was very successful and he referred to a letter from the Executive Officer of the Tai Tokerau District Maori Council expressing the appreciation of the Ngati Kahu people (document A37). The letter stated

[Ngati Kahu] were particularly pleased to hear of the proposals for the on-land disposal of sewage effluent. ... The whole purpose of taking a case to the Waitangi Tribunal was to protect their kaimoana and it will no longer be necessary to pursue that course if the marsh system of disposal is adopted.

Before us the Executive Officer was to say that he left the meeting early, and he was not aware of the objections that were subsequently made.

We think it entirely to be expected that a discussion followed the retirement of the Council's officers after the marsh idea had been explained. Such proposals need to lie with any group for quite some time before positions can be taken. We were advised that there was initial enthusiasm for the marsh system for Otengi would be spared, the disposal would be to land, and the Council was understood to have said that the marsh would produce no final sewerage leachate. Later however there were misgivings about the continued location of the treatment works, and divided opinions on whether the Parapara stream would be affected. In any event the claim to the Waitangi Tribunal was not withdrawn.

We are satisfied that the opposition to the siting of the treatment works because of the significance of the land, was not a matter that could have been settled and resolved elsewhere, or that any other good cause has been given why this inquiry should not proceed.

The position is rather the reverse. Ngati Kahu were prejudiced by the state of the law at the time, and by the general opinion that Maori relationships to the land need not be seriously regarded.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Taipa sewerage claim

## 6 Particular Claims

### 6.2 Objections

#### 6.2 OBJECTIONS

Significantly the claimants also took issue with the objection procedures and argued that better arrangements should be made to give the tribes a greater say. This item was introduced to this report at 5.6.

It has been a matter of comment in this and other claims to this Tribunal, that Maori did not fully avail themselves of opportunities to object or to be heard, that complaints were made rather late in the day, or that some complained of one thing and others of another so that there were divided views. Maori society is no different from any other, of course, in having members with opposing opinions, but that need not prevent the settlement of a general tribal position. Of greater concern is the recurring criticism that objections were not made, were made too late, or that positions taken were changed.

We consider there are cultural constraints that need to be addressed. Maori have their own consultation and discussion processes which do not usually fit with the requirement to file an objection, within a given number of days.

There are at least three elements in traditional procedures, the first that proposals should lie for some time before any final debate. It is contrary to the traditional ethic that a position is taken on matters that have not been both casually and formally discussed within the various whanau.

It is also important that the 'take' or topic should be introduced at a marae or some other open forum. Maori leaders are regularly asked for their views, and quite often an opinion has been given, but in the final analysis a tribal leader must represent any common opinion of the group. It follows that a leader's initial position may need to change, though it be to the frustration of others.

The need for a meeting of the group, as a group, is thus endemic. It explains why many Maori are not content with a notice, or a right of individual objection, and consider that the proposer of the development should first consult with the group as a whole.

The third aspect, of course, is that the group may not come to a common opinion. It is time that brings consensus, and skilful diplomacy in drawn out debate, but accord is not always found, or the time required is not available. It is nonetheless important in tradition that the debate within the tribe should be informed.

We appreciate that modern circumstances do not usually permit of the time that Maori processes require and that it is not always practicable to follow the traditional route. Tribal structures have not been provided for in law, nowadays groups may be difficult to call together, and traditional processes are not always maintained by modern Maori either.

We nonetheless consider that Maori and non-Maori have widely different perceptions on how public issues should be resolved. To file an objection or take a stance before the subject has been discussed is anathema to the traditional way, for once a position is taken, honour demands that there be no retreat.

We do not pretend to know how the different cultural approaches might be reconciled but solutions may come with time. More Maori today use objection procedures despite cultural inhibitions, and there is increasing awareness amongst developers of the need to consult with Maori in the traditional manner. In this case it can be said, in our view, that the claimants may have suffered in a general way from the uncustomary objection procedure, but the gravamen of the complaint, as outlined by Counsel for the claimants, is not so much in the procedures themselves as the need for consultation, and much sooner than that which occurred at the meeting in 1985.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Taipa sewerage claim

## 6 Particular Claims

### 6.3 Consultations

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In accordance with the Treaty, there should be consultations with the district tribes in our view, when certain local projects are proposed. An individual right of objection is not an adequate response to the Treaty's terms. The problem however is in consulting with tribes when no one tribal body has lawful authority to speak for the tribe on local issues. It is essential in our view that steps be taken to provide the tribes with such legally cognisable authorities as they may prefer.

It ought not to be forgotten that the Treaty was with tribes, being signed at different places and times by persons on their behalf. The Treaty itself recognised the sovereignty which individual chiefs "respectively exercise or possess or may be supposed to exercise or to possess over their respective territories." The contemporary perception of 'chiefs' and 'tribes' may not have been quite right but the intention to respect customary institutions was sound. It was also clear in the Maori text and in the statements made at the time, that traditional mechanisms for tribal controls would continue to be respected and maintained.

The main difficulty is that they were not. On the contrary, as the Orakei Report makes clear, policies were introduced over a century ago to put an end to tribal powers. The New Zealand Wars were very largely fought on that one issue and much of our subsequent racial history revolves around official policies to stymie tribal authorities and Maori endeavours to maintain them. At least on the larger world scene there is now a gathering momentum of opinion that indigenous peoples have inherent rights of tribal self-management through institutions of their own choosing, a view made clear by Madame Erica Irene Daes, Chairwoman of the United Nations Working Group on Indigenous Peoples, following her visit to New Zealand in January of this year.

Criticism that a tribe has failed to object is largely to blame the victim of the historic process for its current condition. The nub of the problem is in the omission of the Crown to recognise the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs and to take all necessary steps for the protection of tribal interests.

Ngati Kahu were prejudiced in our view through the failure of the Crown to provide the necessary structure for the proper management of their affairs. With such a structure, and statutory recognition of a right to represent tribal opinion on local issues, discussions may well have happened early in the planning stage, and objections may have been more clearly defined.

The failure to recognise tribal status in district affairs is not the sole cause of the problem however or even the main cause in this case. In the early 1970s when the scheme was first proposed, Maori were in any event reluctant to talk openly of the significance of the landscape for them. Too often their opinions were greeted with mild amusement at best, or at worst, with barely concealed scorn. That we consider was a major reason why such matters were not always raised. In any case, as we have pointed out, such opinions were also irrelevant in the then planning laws.

Accordingly, on this issue we need state no more than our general opinion.

- (a) The Treaty requires the recognition of tribal self management rights.
- (b) Modern circumstances compel the need for legally cognisable forms of tribal institutions with authority to represent the tribe on local issues and adequate resources to assist the formulation of tribal opinion.
- (c) Such tribal institutions should provide a means whereby local authorities and private interests can confer with the tribe where desired.
- (d) The Planning Tribunal, in our view, should have power to defer proceedings where, in its opinion, consultation ought reasonably to have occurred but was not sought.
- (e) The objection procedure is important however, and necessary where tribal institutions and local authorities or developers do not agree.
- (f) Nothing should prevent an individual Maori from lodging an objection at variance with any stated tribal stance.
- (g) The prejudice to Ngati Kahu in this case however is not a reason for setting aside the sewerage scheme; but it does provide good grounds for a review of the issues that for various reasons were not fully canvassed before.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Taipa sewerage claim

## 6 Particular Claims

### 6.4 Land Use

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It was argued that the treatment plant is not the best use of the land involved and that the land needed for the works and the surrounding buffer zone will restrict farming and future development.

The treatment site covers 7.4095 hectares of inferior land, swampy, low lying and in rough pasture infested with reed. It is at the rear of the Adamson farm. A perimeter of 150 metres from the boundaries of the treatment site describes a buffer zone, where farming and forestry are allowed but residential buildings are prohibited (document B52). This area is in good farm pasture and has two small plantations.

It was put to us that the treatment site would preclude the effective operation of the farm, and the buffer zone would prejudice a recreational tourist complex on the land in the long term.

It is not the function of this Tribunal to review the findings of other judicial bodies, especially, as here, where they have a specialist experience in the matters entrusted to them by Parliament. The contention that the works will unduly restrict farming and future development was specifically rejected by the Planning Tribunal in this case, in 1980, and accordingly it is not for us to revive it.

It was argued however that because of new technologies a much smaller area is now required, C B M Duncan, a public health engineer consultant, pointed out that when the designation was first proposed, in the 1970s, 10 hectares was thought to be required. The current wisdom, as exemplified is the 1986 water right approval, gives a design requirement enabling smaller ponds he claimed, and no more than 4 hectares would be needed (document A13). This opinion appears to be affirmed in a report prepared for the Council in 1987 (document B31 p6) which considers that an even smaller pond area is required.

The Council has recently advised, after the grant of the water right, that the area proposed to be taken has been reduced to 7.4095 hectares, which will include ponds, pumping stations and ancillary buildings (document B52). The area is still much more than Mr Duncan envisaged, but Mr Duncan was proposing a more mechanised anaerobic system. The Council has consistently been opposed to a highly mechanised system. The smaller area that it now seeks arises for another reason, that more recent patterns indicate a lower population growth than that projected when the first water right was sought. In particular it is now anticipated that the daily quantity of waste to be treated by the design year will be reduced from the 1200 cubic metres originally projected, to 893 cubic metres.

In addition it appeared to us that in future the treatment works may need to expand, the design being based on projections to 1996. Future expansion does not seem to have been emphasised much at the time, but is referred to quite often in the most recent report for the Council given in 1987 (document B31).

The area of land reasonably required and the reasonableness of the particular works proposed are matters that may be raised upon a compulsory acquisition, as has been seen (5.6). A further issue arising, that as a result of the small land requirement of the new technologies, other sites may now be practicable, is dealt with later. Under the land use heading however, a diminution of the area reduces the adverse impact that is claimed, and the changed circumstances do not justify a re-opening of the issue.

It was further advised that the land concerned had been sold to Ngati Kahu. That also raises another issue dealt with elsewhere, but it cannot alter the finding that the Planning Tribunal has made, that the treatment ponds would not preclude the effective operation of the farm, or unduly prejudice a recreational-tourist complex in the longer term.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Taipa sewerage claim

## 6 Particular Claims

### 6.5 Taipa Waters

#### 6.5 TAIPA WATERS

Much evidence was given that seepage or spillage from the treatment ponds may occur, and will threaten the aquifer that provides the town of Taipa with its main freshwater source, and the adjoining estuary that supports a variety of life forms and provides food.

Taipa sits upon a large aquifer or underground water supply that lies unusually close to the surface. There being no water reticulation to the schools, homesteads and businesses of the area, the aquifer provides an important bore-water supply. The treatment ponds, it was argued, threaten the security of the Taipa aquifer, and for that reason the ponds should be sited elsewhere.

This matter, we find, was also raised before the Planning Tribunal in 1980. It was not its function, the Planning Tribunal declared, "to determine whether a site selected for a project is the only suitable site, or the most suitable site, but merely whether or not it is a suitable site" (emphasis supplied). It was presented with claims of a possible seepage from the treatment ponds to the aquifer, but the Tribunal preferred the evidence of the engineer for the County that substantial seepage was unlikely, and in any event, the ponds could be sealed. It concluded "although the site itself may not be particularly well suited for the purpose in respect of the permeable nature of its soils and its location on the edge of the service area, we conclude that in the circumstances it is not an unsuitable site" (document A35). But since then, it was argued in this case, more information has come to hand.

The treatment site lies in a depression below the immediately adjoining land. It is a swampy area less than one metre above high tide level and, although it is one kilometre from the foreshore, it closely adjoins the tidal arm of Ryders Creek. It is to be built upon the aquifer. Beneath a 200mm peaty topsoil is a sandy clay, relatively waterproof according to the County Engineer, and about 400mm thick. Below that again is the permeable grey sand. At this point, the fresh ground water is within 700mm of the surface. The 1986 water right envisages a maximum depth of 1.5 metres for the maturation pond (document B31 page 6).

C M Adamson explained the nature of the aquifer on the Taipa sandspit and assessed its potential, although he pointed out that his figures were partly estimates and a full hydro-geological survey is required (document B14). He holds a post-graduate certificate in engineering hydrology from the University of New South Wales and has had 18 years overseas experience in land use planning, agricultural hydrology and soil conservation work. He is a member of the Adamson family of Taipa.

An aquifer is comprised of porous sand, gravel or rock that both stores water and permits of water flow within it. The Taipa aquifer is unconfined, that is to say it is located freely within the coastal surface sands which extend over 85 hectares of the flats, bounded by the Taipa river to east and south, and by high hills to the south and west. The water table is to be found 1.5 to 3.0 metres underground, and extends to 7 metres below the surface giving an effective depth of 4 to 5 metres of ground water. In brief, it is shallow and large. The storage capacity has been assessed at 157,000 m<sup>3</sup>.

The aquifer provides a substantial, accessible and good quality water supply. The porous medium acts as an excellent filter. If not disturbed it gives a safe domestic water supply. It has also good recharge characteristics with a likely inflow of 1.8 million m<sup>3</sup>. In all, the aquifer was described as unique in the district and a very valuable natural resource.

A limitation on the aquifer is that the water table height is maintained by the sea level, and the interface between the salt and sea water depends on the freshwater outflow to the sea. The aquifer is fed from run-off from the 60 hectares of high hills in the south that are coated with non-porous clay. Over-exploitation of the aquifer could result in the intrusion of the salt water inland (which has already occurred, as shall later be seen, as a result of works excavations). Nonetheless, in Mr Adamson's estimation, if only half of the 1.6 million m<sup>3</sup> of annual yield was taken up, the aquifer could provide sufficient water for 350 permanent households, or a resident population of 2,000, without recourse to roofed catchment or other sources.

The value of the aquifer is increased by the lack of alternative sites for a reticulated water supply. Mr Adamson thought the nearest reasonable site for a water dam was 30 kilometres inland. He was therefore opposed to the sewage treatment site on the aquifer land. Pollution of an aquifer is irreversible in the short term, in his view. There is only one opportunity to make the correct decision, he said, and he urged the evaluation of alternatives. There are at least five concerns. The unconfined aquifer covers a wide field, and although the sand provides its own filtering, continual seepage from the treatment ponds may eventually carry pathogens into domestic water supplies. The second is that seepage of over-enriching nutrients to the adjoining Ryders creek would also disturb the ecological balance of the estuary, and pathogens may be carried into the food chains (document A10, A11). The ponds are dangerously close to the estuarine ecosystem, Professor Morton considered, and he explained in that context the value of the adjoining mangroves.

The mangroves carry a hard economic justification for their presence in addition to every aesthetic argument that can argued. The areas of estuaries and harbours lined by them are the shallow breathing sectors of the inter-tidal shore, with a high surface area in relation to depth and water volume. Water is withdrawn from them at each ebb of the tide, carrying out and mixing into general circulation the productivity achieved. In production of biomass, mangrove swamps are the equivalent of tropical agricultural land, with a higher yield than a temperate farm pasture. The beneficiaries of the food - benthic invertebrates and the rest of the burrowing fauna and the oxidised productive skin at the surface, goes in large part to sustain our shallow water fisheries. ... Mangroves are the nurseries for 20 or more of New Zealand's economic fish species.

He considered the proposal to discharge the effluent to an artificial marsh elsewhere, called into question the decision to site the ponds by an estuary at all. That leads to the third concern, that a pump failure or pipe damage could result in a pond overflow to Ryders creek. The ponds however have a seven day storage capacity above the level of discharge to the top of the pond embankment, according to the County Council (document B48). The Regional Water Board considered ponds are normally constructed with at least one metre freeboard which in this case would allow at least 10 days for remedial action to be taken in the event of pump failures.

Fourthly, Professor Morton speculated that seepage could apply the other way, affecting operations with estuary water passing to the ponds, but that is probably of lesser concern. The fifth disturbing feature, as C M Adamson made clear, is that the water flows to the aquifer from the hills behind Taipa. The treatment ponds lie between the two, in the narrow channel between Ryders Creek and the adjoining range.

Though much of the necessary knowledge came to light after the Planning Tribunal hearing, in 1980, it had still to be tested before the Regional Water Board. A new water right was required following the change from a sea outfall in favour of the artificial marsh and was heard in December 1985. Two objections were lodged including one from the Adamsons who specifically referred to the importance of the aquifer and the possibility of seepage from the ponds. The Design Engineer for the County advised that it was intended to seal the ponds with a layer of clay (document B48). On that occasion, as distinct from the last, the Board added a new condition, that the ponds be sealed during construction, to the satisfaction of the Board.

Although there was no appeal to the Planning Tribunal from that decision, it has done little to allay the fears of certain of those who appeared before us. C B M Duncan, a consultant public health engineer called by the claimants, considered that although the compacted clay liner would reduce waste water seepage from the ponds, "it can be expected that some seepage will still occur" (document A13). Professor Morton was of a similar mind (document A11). He was sceptical of the ability to line the ponds against seepage except by concreting, which he considered to be overly expensive. He warned of the suck down effect to the creek at low tide, from the high level of water in the pond.

Counsel for the claimants referred to a publication of the Public Health Engineering Section of the Ministry of Works and Development, entitled "Guideline for the Design, Construction and Operation of Oxidation Ponds". Although produced in 1974, it is still current, we were advised. At page 7 there is a warning on sealing-

When choosing a site for an oxidation pond full consideration must be given to subsoil conditions, ground water levels and the availability of local sealing materials. It is important that the pond be adequately sealed. . .

Some types of ground, such as pumice and river gravels, may be unsuitable for the construction of ponds without the use of imported sealing material or impervious membranes. Where there are doubts about subsoil permeability consideration should be given to relocating the pond: if this is impracticable the use of special compaction and sealing methods must be considered at the outset. A layer of properly compacted

clay may be used. In pumice country a penetration bitumen seal may be satisfactory. Full liners have been used recently, using either butyl sheeting throughout or using butyl sheeting over the full bank height with a lighter membrane on the floor; these techniques have been used for water storage ponds but have not yet been fully evaluated for oxidation pond construction in New Zealand.

In cases where the ground watertable can rise above pond floor level the pond must be filled as quickly as is practicable and must be kept full, to prevent the sealing layer from being lifted.

Finally, the claimants obtained the opinion of A G Brantley, principal hydro-geologist of a private consultancy firm with a wide experience in projects requiring hydro-geological evaluation. He considered

An effective impermeable barrier can be obtained by placement of a suitable clay fill under controlled conditions, particularly in view of the limited hydraulic head pressure produced in a relatively shallow oxidation pond. However, placement and adequate structural compaction of clay fill onto saturated ground is next to impossible, and such construction would again require localised dewatering to achieve the desired end result (document B13).

He was careful to say however, that the proposed oxidation pond on ground overlying the near-surface aquifer, should not be categorically rejected.

Local residents were reminded of the vulnerability of the aquifer in the following August of 1986. During construction of the pipeline and pumping station on the main Taipa road, it was necessary to pump water from an excavated 27 foot hole, some 20 thousand gallons per hour being taken over several days. The result was to shift the seawater-freshwater interface near to the sandspit edge admitting salt-water to household and business bores. The complaints were well borne out by tests, though taste alone was enough to prove it, and the Northland Catchment Commission, which was also the Regional Water Board, concluded that no further dewatering should occur in the immediate area (see documents A17, A47). In the opinion of the Commission, and of A G Brantley, the salt water intrusion would have long term effects.

How safe then, is the aquifer, when a much larger work is proposed, though considerably further inland? The Council was confident that adequate sealing would be achieved but gave no evidence to impart that confidence to us. It was unable to specify the material and method that would be used, variously referring to local clays, imported clays, bonding resins and membranous materials. Nor were we enlightened on any special measures proposed to avoid salination of the aquifer during the extensive dewatering of the excavations that would be needed during construction and sealing. No response was given either to suggestions that during construction, or on emptying the pool for cleaning, the seal would be ruptured or lifted as a result of the pressure from the surrounding water table.

In all we have very grave doubts that serious seepage can be avoided or that the seal can be maintained; but in the final analysis we must accept the decision of the Regional Water Board acting under the provisions of the Water and Soil Conservation

Act 1967. The Board is an independent body which must be taken to have found that the ponds can be satisfactorily sealed. We are bound by that finding. We must also have regard to the fact that there was no appeal to the Planning Tribunal from the Board's decision that the ponds be simply sealed to the Board's satisfaction. Since that decision, the Northland Regional Council, constituted this year, has replaced both the Northland United Council and Northland Catchment Commission and has been given the functions and duties of the Regional Water Board. It is now that body that must be satisfied.

For this Tribunal to intervene it is necessary to establish that the Board, as a statutory body and in the performance of a statutory function, acted contrary to the principles of the Treaty, or was unable to give effect to the principles of the Treaty, having regard to the statutory rules that bind it. That has not been established.

Counsel for the claimants contended that under the Water and Soil Conservation Act 1967, the Regional Water Board is not bound to give any special weighting to Maori concerns for the maintenance of pure waters. She referred to the evidence of R Gabel that Maori once dug in the Taipa sands to create water ponds (document A2) and to that of G P Adamson, that in his youth, before bores were thought of, open wells existed (document B26). We accept that the river waters surrounding the Taipa flats are brackish at best, and that a large Maori population at Taipa in former years probably relied upon the aquifer for fresh water.

It may very well be that the Water and Soil Conservation Act should be amended to provide better for Maori interests. The Waitangi Tribunal so recommended in the Manukau Report. But it does not follow that a prejudice resulted in this case. We do not think the Ngati Kahu interest in the aquifer was any greater than that it was a freshwater source, and since the non-Maori interest in the aquifer is the same, it matters not if the interests of Ngati Kahu were not specifically addressed in the water right proceedings.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Taipa sewerage claim

## 6 Particular Claims

### 6.6 Parapara Stream

#### 6.6 PARAPARA STREAM

There was at least one opinion that the residual flow from the marsh would affect the food resources of the Parapara stream and Aurere beach and was in any event culturally offensive; for the Maori spiritual ethic demands exceedingly high standards in the maintenance of clean water regimes.

The possibility of biological pollution was considered by the Regional Water Board. It found "the proposed system of sewerage treatment is, with good management, capable of producing an effluent quality superior to the existing water quality of the Parapara stream". As is usual in rural areas, the stream is substantially affected by farm runoff.

Once more it could be said however, that Maori cultural concerns, being not provided for in the Act, could not have been brought into account.

That we think, would grossly overstate the position. The whole point of the marsh option is to provide as much disposal to land as is practicable. Certainly there will still be a residual flow to the catchment but much will be lost by evaporation, transpiration and soakage, and the land and marsh reeds will provide a natural cleaning and purifying regime.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Taipa sewerage claim

## 6 Particular Claims

### 6.7 Pond Site

#### 6.7 POND SITE

The oxidation ponds are proposed on part of the former Waimutu Reserve set aside for Tipene of Ngati Kahu but long since sold, and Counsel inferred that the land must have held special significance to have been so reserved. We would not so presume.

Dr Bulmer, regional archaeologist for the New Zealand Historic Places Trust, advised there had been no archaeological excavation of the site but surface examinations suggested it had been used for wet gardens and for crops such as taro and tii. There are a series of pit sites nearby, probably used for crop storage, while an area of rising ground beside the pond site was probably used as a dwelling place. Others described how the Waimutu reserve was once strategically located on the pathway from Taipa to Kaitaia. The well-worn foot track, still known to local Maori, crossed the reserve and the Parahēki hill leading to Parapara pa. The creek itself was said to be a landing place for canoes and we suspect there may have been moorings in the swampy area to help preserve the wood.

Yet even accepting those accounts there is no evidence that Waimutu was selected for the reserve because it was culturally significant. The main villages had been either on the hills or nearer the coast. Waimutu has not the importance of Otengi for example and the reserve appears to have represented no more than the award of an area of land at the back of the flats as distant as practicable from the settlers homes by the coast. Evidence of past occupations, or even extensive use, is not in itself sufficient to warrant restrictions. That must be so for all of Doubtless Bay was occupied at some stage, and the whole of Taipa-Oruru was extensively used. It is the relative importance of a place in the living culture and tradition that needs to be established.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Taipa sewerage claim

## 6 Particular Claims

### 6.8 Ancestral Associations

#### 6.8 ANCESTRAL ASSOCIATIONS

Ma te kai te toto o te tangata, te oranga o te tangata, he whenua - food supplies the blood but the essence of life is land. Maori feelings for the lands of their ancestors transcend the vagaries of modern occupation. The lament of the chief taken prisoner in battle "tukua mai he kapunga oneone ki au, hei tangi" (send me a handful of soil that I may weep over it) is reminiscent of the settlers who yearned for the hills of home. To each it was known that the love of one's homeland was not dependent on owning it. For Maori the treasures inherent in land were far greater than mere possessions - he kura kainga e hokia, he kura tangata e kore e hokia.

It does not augur well for the maintenance of two cultures therefore, if we assume that life began in New Zealand in 1840, if place names are changed as though there were no prior history or if we settle the land without regard for the integrity of existing cultural associations. 'Your past is our past' is an alternative philosophy, for we are now inextricably mixed, and whether that past begins in England or Hawaiiiki, we are one people when we honour both traditions.

Taipa, as has been seen, was the cradle of Ngati Kahu existence, the centre of their later development and now the hoped-for base for their rebirth. In the spiritual order of Maoridom, the collection of human wastes in such an area defiles that which should be esteemed. Even for those untutored in Maori law, sewage treatment ponds may be seen as incompatible with places of high regard.

Counsel for the claimants referred to this extract from Buick (1936:379) as summarising the position for a tribe.

The case of a tribe's own territory was developed to an absorbing degree, for tribal history was written over its hills and vales, its rivers, streams and lakes and upon its cliffs and shores. The earth and caves held the bones of their illustrious dead and dirges and laments teemed with references to it.

Ngati Kahu's tribal history was related to us with references to particular sites. Our attention was directed to the Otengi headland where the Mamaru canoe finally rested, and where Mamangi, an ancestress of the tribe had her home. The tawapou trees at Te Paraua, overlooking the point, are said to have come as skids in the canoe, planted after the canoe landed.

Further down the headland, overlooking the Taipa beach, is the site of Otanguru Pa. There the last battle was fought, using muskets, as part of the Oruru war, and 46 died

on the sands. On the eastern sentinel at the other end of the beach stood the Te Huiki and Pekehorohoro pa.

Throughout the whole of the Taipa flats and on the surrounding hills that define the bowl, are a host of other sites. Dr Susan Bulmer, further advised that 97 archaeological features have been recorded at Taipa, grouped into 42 separate sites including 30 habitation areas and 4 where burials have been found (document A14). Gerard Adamson, who has farmed at Taipa for over 60 years, described a period in his youth when the sandhills were littered with the bones of Maori dead from past battles, sometimes exposed by the winds. They were periodically gathered and removed, he said, by Maori people (document B26).

Dr Bulmer explained that when the Historic Places Trust was first approached by the Mangonui County Council, there was very little data on Taipa on which the Trust could give advice. "There have since been many more sites located at Taipa" she said, "and it is clear that the information available in 1979, of only 6 sites, was grossly incomplete and misleading."

Taipa, as has been said, was the gateway to the Oruru valley, possibly one of the most densely settled areas in the country and 22 km long, with the Taipa-Oruru river as its main road. Recently, an unusual find of wood carvings concealed in a pit was made in the Oruru Valley. In Taipa itself artefacts found near the surface suggest that sites of great archaeological interest will be discovered. Finds have included adzes of argillite from the South Island, indicating the extent of the early Maori trade. They also suggest that settlements existed there as early as AD 500, or "as early as any place in Northland, or in the entire country for that matter" as Dr Bulmer put it. Taipa is still barely discovered in archaeological terms, Dr Bulmer said, "but it is a very special component of a very special historical landscape - one that deserves to be treated as a national reserve."

It is not for the discoveries that may be made however, in the Taipa hills and flats, that this claim is brought. Taipa is important because of its known history. We accept that it has special significance for Ngati Kahu and that they have good reason to be disturbed by the various proposed sewerage plans for the area.

Against that however is the pressing need for a sewerage scheme, and the long saga of efforts to accommodate several conflicting interests. Following the changes made, a practical assessment of the likely impact of the works is required. The sewage is still to be transported to Taipa, but, after treatment, is now to be discharged elsewhere. The maturation ponds are on the perimeter of sizeable flats in a low lying position at the rear, at the point most distant from the Otengi headland and foreshore. The pipes are to be buried and the works themselves will be largely hidden from view.

The Treaty provides no absolute bar to the location of the works on this site, in our view, and this is properly a case where some compromise is required. We go no further than to consider that the works should be elsewhere but only if another site can reasonably be found having regard to the Council's means.

# Taipa sewerage claim

## 6 Particular Claims

### 6.9 Compulsory Acquisition

#### 6.9 COMPULSORY ACQUISITION

A question then arises of whether, in all the circumstances and in the context of the Treaty, the Crown should permit the acquisition of the site for a public work and whether we should recommend the intervention of the Crown to stop the taking, if need be by special legislation.

Opposition to the compulsory acquisition of the land extends beyond matters of its cultural significance. There is little tribal land remaining on which the tribe can rely. As found in the Orakei Report 1987, it was a principle of the Treaty that the Crown would assure an adequate land base for the projected economic wants of the tribes, acquiring only that which was excessive to their needs. No detailed accounting is required to ascertain that the principle was not maintained in Doubtless Bay. It is not surprising that large numbers of the tribe have had to shift elsewhere.

The Ngati Kahu question revolves around that problem, - the lack of land. Though it has been a tribal problem for over one hundred years it has not gone away. The tribe's purchase of the original tribal base has merely highlighted the situation. Of the little land remaining in Doubtless Bay only the part now acquired is tribally owned, and that is little enough for the work schemes and the endowment that tribal programmes require. Little wonder then that the tribe is reluctant to allow one hectare to pass from their control or their enjoyment of the land to be restricted by the works proposed. Thus the cultural value of Taipa has an added value now, for the birthplace of the tribe is the place where there are new hopes for a tribal renaissance.

The retention of Maori owned land appears to be outside the scope of the Planning Tribunal to consider in any contest on compulsory acquisition. It is pertinent to ask whether the law should be changed clearly to protect Maori owned land where little tribal land has been reserved. The provision in the Town and Country Planning Act to consider the relationship of Maori people, their culture and traditions with their ancestral land is very important for Maori, but there is nothing that better promotes that relationship than the ownership of a fair share.

For the purposes of planning, the retention of Maori land in Maori ownership ought properly to be a national objective in our view, having regard to the Treaty's prior design. We consider also that land restoration is as valid as land retention, in Treaty terms, when unconscionable land losses have been sustained. A nice point arises however, requiring the aid of legal debate, on whether the Treaty forbids the compulsory acquisition of Maori land in any circumstance. We are relieved from that debate in this case however, since it seems to have been accepted that a distinction should be drawn between lands long held and those acquired already subject to a works designation.

We have considered in this case the compelling need of Ngati Kahu for an adequate land base, the paucity of the lands available to them, the significance of this particular farm at this location and their natural anxiety that having just acquired a foothold in this area, they should not be about to have it impaired. Weighted against that, however, is the history of the troubled sewerage scheme, the amendments made that accommodate earlier Maori concerns, and most especially the simple fact that the site has been proposed since 1973, long before the land passed to Ngati Kahu. Unless reasonable alternative sites are available, in our view, the current ownership of the land ought not to bar the Council's right to pursue the acquisition of the land in accordance with the law as it stands.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Taipa sewerage claim

## 6 Particular Claims

### 6.10 Alternative Taipa Sites

#### 6.10 ALTERNATIVE TAIPA SITES

For a variety of reasons - hindrance of future developments, possible effects on the aquifer or estuary waters, inconsistency with cultural values and the need for tribal endowments - it was claimed that the treatment ponds should be sited elsewhere. We agree, provided there are reasonably practical alternatives. A full analysis of alternative sites at Taipa has not been made by the Planning Tribunal, the Tribunal stating in this case "it is not the Tribunal's function to determine whether a site selected for a particular project is the only suitable site, but merely whether or not it is a suitable site" (emphasis supplied). It added

... the availability of alternative sites is relevant only to the necessity or otherwise of developing the treatment works on a site in the coastal environment... we consider that the obligation on the [Council] is to establish that responsible consideration has been given to other possible sites (and particularly those which are not in the coastal environment) but that it is not necessary for the Tribunal itself to reach a conclusion as to which of the possible sites is the better one. That is an executive decision for which the authority having financial responsibility must be responsible.

There is sense in this approach since the Council bears the cost, and the wrath if plans go awry. The difficulty in this case is that matters of ancestral land and land retention were not and could not have been argued at the relevant time, but had they been, a better search for other sites may have been required. Nor can it be assumed that the omission will be rectified in proceedings yet to be taken under the Public Works Act (see 5.5 and 5.6). In those proceedings the adequacy of the consideration given to alternatives is based on the Council's stated objectives. It may be that other objectives, like the maintenance of the integrity of the Maori association with the land, are irrelevant; but we can say no more for that is for the Planning Tribunal to decide.

We distinguish here the search for alternative sites in the area of the scheme, near Mangonui, at Coopers Beach and at Cable Bay. The question is whether there are other sites near Taipa. In addition it has not been suggested that sites should be sought further west at Otengi or Aurere which have future development potential. It seems to be accepted that that would add too much to the cost.

We are only concerned here with the search for alternative sites near Taipa. Taipa was chosen for the treatment ponds as it had the only adequate area of flat land for the size of ponds then required and which allowed for future expansion. The selection of the Ryders Creek site in particular appears to stem from the original intention to discharge effluent to Ryders Creek but that intention was abandoned in 1974.

Now, it was argued, a much smaller site is needed if there is a change to a more mechanised system that recent technological improvements allow. The area thought to be required in 1973 was 10ha (25 acres), which included ponds with a surface area of 7.6ha (19 acres). The total area required has since been reduced to 7.4095ha but C B M Duncan, Director for Public Health Engineering in a private consulting firm, considered it could still be much smaller. He considered the waste could be treated in a two stage pond system involving a mechanically aerated pond covering a mere 0.5ha, and a maturation pond on 1.5ha requiring a maximum of 4ha in all with the addition of ancillary works (document A13).

A report prepared for the Council in 1987 assessed the net pond area required on this basis at 1.25ha (document B31). These assessments envisage an anaerobic lagoon however. It requires more mechanisation but enables other sites to be considered that earlier would have been seen as too small.

We commissioned Mr D R Cameron to investigate alternative sites in the Taipa area having regard to the recent technological developments that had been referred to. Mr Cameron, a public health engineering consultant, is a member of the Standing Committee for Health Protection of the Board of Health, and has a specialist expertise in sewage treatment and reticulation. His report is document B6.

To recapitulate, the County sewerage scheme involved a single cell aerated lagoon of 3 days retention and a maturation pond to hold the waste for 20 days at the Ryders Creek site, with the pumping of the treated effluent to the Parapara artificial marsh. In Mr Cameron's opinion, the large maturation pond is unnecessary, provided the single cell aerated lagoon is upgraded to a two cell, facultative aerated lagoon with a six day retention in all, and provided a marsh system is still used at the end.

With that alternative form of treatment in mind, Mr Cameron proposed four alternative sites. One on rising ground near Ryders Creek had the advantage of avoiding the Taipa water table, but was impracticable, in the opinion of the Council's advisers, and was not seriously pursued. The others are reviewed below.

(a) The alternative the principal claimant preferred was to pump the sewage to the Parapara site and to establish the treatment plant there. Against that site is the elevation of the pond, a regular concern when ponds may break or overflow, the levelling involved, higher operating costs, the regular inspections required, difficulties of access and the provisions of power supplies and the extra pumping of raw sewage required. The landowner, we were advised, would be opposed. The Council argued that the marsh would be a more integral part of the treatment process and that the Maori of Parapara and Aurere would object.

(b) Mr Cameron preferred a site 1.2 km further up Ryders Creek, in a valley separated from Taipa and beside the Oparera Stream with the effluent to percolate through an existing marsh before passing to the creek. A problem with this site was the lack of room in which to expand, but there is also likely to be much concern from local residents and Maori that the effluent, though very highly treated, will nonetheless flow to the Taipa river.

(c) A further alternative was to pump the treated effluent from the Oparera site to the Parapara marsh. The treated effluent pipeline would be about as long as that from Ryders Creek for the Parapara marsh is roughly equidistant between the two. As we have said however the useable area is small, requiring hill excavations and leaving little room to expand, and we also understand that it is not too distant from another marae.

All options are feasible from an engineering point of view and although no detailed cost estimates could be provided, it seems likely that with the deletion of the maturation pond a lower construction cost is involved. In addition, and most especially in our view, the problems of sealing the Ryders Creek ponds and the heavy costs likely to be incurred in that task, would be obviated. It cannot be denied however, that other problems arise. Some of these have been mentioned. The Council referred as well to the delays inherent in obtaining further planning consents especially if there are objections. The subsidy would be lost too, it was claimed, though we doubt that must follow. It appears to us that approvals may be readily given on a site relocation. We place greater weight on what appears to us to be the Council's main reason for opposing any change. It has consistently sought to avoid a highly mechanised works with attendant risks of failure and which involves more supervision, a specialised staff and higher operating and maintenance expenses.

We have here to balance the cultural concerns of Ngati Kahu with the needs and circumstances of the total community. On the one hand we must assess the actual cultural impact having regard to the fact that the ponds are largely obscured and the discharge is elsewhere, and remind ourselves that we are bound by the opinion of the Regional Water Board that the ponds can be satisfactorily sealed. On the other we must consider the disadvantages to the general community, if the works are to be relocated, and that the alternative sites raise other problems and require a more mechanical system with greater operating expenses involved. In all, we have come to the conclusion that the balance is not so clearly in the claimants' favour as to warrant a recommendation that Parliament intervene to compel the relocation of the works.

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*Waitangi Tribunal, Department of Justice, Wellington.*