

# Taipa sewerage claim

## 5 Jurisdiction And Crown Responsibilities

### 5.1 Jurisdiction

#### PART III-CONCLUSIONS

#### 5. JURISDICTION AND CROWN RESPONSIBILITIES

##### 5.1 JURISDICTION

The claim is not against the County Council, though the Council promoted the sewerage scheme. It is important that the tribe and the Council should understand that to be so, for some individual comments suggested that this case is a contest between them. In fact the claim concerns the arrangements the Crown has made, or has omitted to provide, for the protection of Maori treaty interests in the provision of public schemes. For the continuance of amicable relations it ought not to be forgotten that the sewerage scheme arose not from whim but need, and that the County has been responsive to Maori concerns in the past. It introduced papakainga housing to its district scheme when the concept was still new, adopted Maori as an official language and has engaged a Maori adviser for many years. We would not minimise the fund of goodwill that exists, for that is essential if better understandings are to be achieved.

Instead the claim is against the Crown. Our Act requires that that should be so, section 6 enabling claims only in respect of the acts or omissions of the Crown. Our task is to measure the performance of the Crown, in providing for orderly settlement, against the broad principles arising from the Treaty of Waitangi. The Treaty requires that in all its doings, the Crown's commitment to the original occupants must be considered.

It does not follow that local schemes cannot be reviewed. All that Councils do, they must do according to law, and it is the Crown, through Parliament, that provides that law. Indeed, Maori bargained for "the necessary laws and institutions" in the Treaty of Waitangi, but the question for us is whether the laws and institutions provided for, and the national criteria laid down for local administration, are necessary and proper having regard to the Treaty's terms.

If they are not then it ought to be borne in mind, that Parliament retains the ultimate right to govern and can change the law. If Maori have suffered a loss in the interim, or could be prejudicially affected by some current scheme approved under laws that conflict with the principles of the Treaty, Parliament has the authority to remedy the loss or amend the scheme.

We must therefore consider the national rules made for local government control, but in doing so we are reminded that we too are constrained. It is essential to our brand of democracy, that the authority in any body, be it a Parliament, court, tribunal, state department, county council or a tribe, should be subject to a check so that a balance is

maintained. Such checks and balances put paid to the situation that once plagued Ngati Kahu, when only might was right and the more populous tribes prevailed.

The constraint on this Tribunal is that claimants cannot range freely over all aspects of state laws and policies. They must show that they have been or may be prejudiced by the laws and policies made, and that the laws and policies are inconsistent with the principles of the Treaty. Without evidence of that prejudice, we can not recommend a change.

In this context it is important to review once more the claims that have been made, as described at 2.2.

1. The Council argued that the claimants should have made known certain of their concerns much earlier, and should have lodged proper objections.
2. The claimants contend the objection procedure is inimical to their ways, and
3. that there should have been prior consultation with the tribe at an early planning stage.
4. It was contended that the land needed for the works and the surrounding buffer zone will unduly restrict farming and future developments, and
5. 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.
6. Some contended that the residual flow from the marsh will affect the food resources of the Parapara stream and Aurere beach and is in any event culturally offensive, for the Maori spiritual ethic demands exceedingly high standards in the maintenance of clean water regimes.
7. The pond site itself was said to be on important ancestral land, but
8. a more serious contention was that the location of the treatment works at Taipa, is inconsistent with the ancestral significance of Taipa as a whole.
9. Finally it was contended that the proposed works conflict with the tribal need to maintain a proper land reserve.

For a combination of those reasons it is argued that the works should be sited elsewhere. In this chapter we consider the arrangements the Crown has made in delegating its governance to a local level, and the extent to which it has enabled certain of the claims to be addressed. Whether adequate protection has been given for the claimants treaty interests is considered in the following chapter, where each of the issues is assessed.

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### 5.2 Public Health

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The Department and Board of Health, which have important roles in the formulation, management and enforcement of public health policies, have an expansive view of the necessary ingredients for good health. They consider it important to maintain those cultural preferences that contribute to a people's sense of well being (see document B49). In that context, the Maori view that sewage effluent should not pass to waters used for drinking or to support food, no matter how highly the effluent is treated, is seen to be relevant to sanitation plans (per D R Cameron oral and document B48).

It does not follow that the Department or Board will intervene to protect the Maori position when local body sewerage schemes are proposed.

They have several opportunities to do so. It is fundamental to public health administration that health services should be provided at a district or area level with only some central control. Local authorities are bound to provide all necessary sanitation works (section 23 Health Act 1956) and they may be required to do so in some cases (section 25). Where they are so required, the Board (or now, the Director-General) must approve of the works. Similarly, most of such schemes are financed from loans and government subsidies. The Department must approve of the works where a subsidy is given, and again, when a loan sanction is sought of the Local Authorities Loans Board. Additionally the Ministry of Works and Development advises on the capability of the works to meet required water right standards, whether it provides the most economic option and whether certain engineering criteria will be met (document B50).

The Health Department's Senior Environmental Health Engineer submitted that matters of treatment, disposal and plant location are for the local authority to determine (document A4 para 2). If that is so, of what must the Department or Board approve? It seems clear that an approval is required. In section 25, for example, where a sewerage scheme has been required plans and specifications must be submitted; for no other reason we presume then that they must be approved. It is then provided (in subsection 7) that the Board (or now, the Director-General) may approve of the proposals with or without modifications and conditions, which seems rather like saying that an approval is required, but the submitted plans may be approved with such conditions or amendments as may be needed.

In this case an approval was given and was subject to substituting the proposed single pond with a two pond system. That condition relates to treatment and possibly to disposal too, for the standard of treatment was relevant to the then intention to

discharge near a public beach. It is not beyond anyone's wit to consider either, that the siting of a treatment plant could be relevant to public health concerns.

Nonetheless, although that the Board has in fact intervened to require an amendment to the sewerage scheme, we can understand that neither the Department nor the Board should wish to be overly prescriptive, or to look beyond preventing an unwise expenditure of public money on a clearly defective scheme. It seems reasonable that the Council paying the cost and bearing responsibility should select the means of achieving the ends, and that the main control on local authorities should not come from specific directions on every case, but from the enactment of general criteria stated in advance.

Accordingly, while the Department and Board of Health have important educative roles, and can influence local authorities to provide for Maori needs, under current policies they are not the ultimate guardians of Maori interests in the formulation of sewerage schemes.

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*Waitangi Tribunal, Department of Justice, Wellington.*

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### 5.3 Water Control

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The same may be said of the Catchment Commissions that operate at a district level. They are concerned with the overall management of a district's water resources and, the maintenance of water standards and to that end, they conduct research, promote policies and monitor certain works.

Like the Department and Board of Health, the Northland Catchment Commission has recently experienced some attitudinal change. Conscious of the Maori preference for land based treatment systems, it has carefully monitored and cautiously promoted the wetland marsh system, and appears to have advised the Mangonui County Council which has now accepted such a scheme. The Northland Catchment Commission was also the Regional Water Board. Both bodies have since merged into the Northland Regional Council.

The Commission has an invaluable role in bringing about improvements but it cannot stipulate that the Council adopt a particular type of works.

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*Waitangi Tribunal, Department of Justice, Wellington.*

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### 5.4 Water Rights

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Instead, the Crown has provided general criteria for the control of a local authority's powers, and the first of those to be considered relates to water rights. The discharge of waste to natural water requires a water right from a Regional Water Board. Members of the public may object to any proposed discharge, and will be heard by the Board. There are rights of appeal to the Planning Tribunal.

The criteria are prescribed by the Water and Soil Conservation Act 1967. The basic approach however may be seen as inimical to Maori concerns. The right to discharge waste to natural water is assumed provided prescribed water standards appropriate to an area can be maintained, including, where required, standards necessary for the protection of fisheries. That is anathema to many Maori for whom waste can never be discharged to waters that support food.

There is a biological base for that view but for Maori it is manifest as a spiritual belief. Maori values are quite often brought into account by Water Boards and the Planning Tribunal, but for a time spiritual values transcending the physical environment were seen as not strictly recognised under the Act. More recently, that opinion has been revised by the High Court, which considered that spiritual matters could be brought into account, but since we understand that that case is subject to an appeal we explore the matter no further at this stage. We need only note that at all material times in the case under review, Maori spiritual concerns had no relevance to planning laws, but in future the situation may be different.

The prescribed methodology for the Board is to set the standard of water quality that a discharge must achieve. Technically the Board is not primarily concerned with the treatment to be used for so long as the desired target is capable of being reached. In practice the standard set may determine the form of treatment required, or whether the proposed discharge can be effected at all at the intended location. In setting standards the Board must have regard to safeguarding fisheries and wildlife habitats (section 20 (c)). Those are only some of the things that need to be considered however, and in the competition for various uses of water, other and conflicting interests must be brought into account.

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### 5.5 Planning Requirements

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A similar situation applies in assessing the impact of the works upon the land. Nowadays, public works must be integrated with comprehensive land use plans. They must be provided for in district planning schemes with due regard for certain broad criteria laid out in the Town and Country Planning Act 1977. Once more the public has certain rights of objection and appeal involving again, the Planning Tribunal.

Two important criteria set out in section 3 are that regard must be had to (a) the conservation, protection and enhancement of the physical, cultural and social environment and (b) the relationship of the Maori people and their culture and traditions with their ancestral land. Once more, they are merely some of the factors that must be considered and weighed with competing demands, but it was at least necessary to know in this case, that when balanced with other objectives, the works were in reasonable harmony with those broad principles.

The two items referred to go a long way to satisfying Maori concerns, although in some cases the treaty guarantees in respect of lands and fisheries would appear to require not a balancing of interests but a priority for the Maori claim. In this case however, there is another problem again. When the matter was before the Planning Tribunal in 1980, Ngati Kahu did not own the land, and the view prevailed that if the land was not Maori owned an objection based upon ancestral associations could not be sustained (see *Knuckey v Taranaki County Council* (1978) 6 NZTPA 609, *Emery v Waipa County Council* (1979) Planning Tribunal No. 1 Division appeal 549/78 and *Mirrieles v Cook County Council* (1979) Planning Tribunal No. 2 Division, appeal 834/78. Later cases holding to the same opinion include *Auckland District Maori Council v Manukau City Council* (1982) Planning Tribunal No. 1 Division appeal 99/82 and *NZ Synthetic Fuels Application* (1982) 8 NZTPA 138).

That may have inhibited an objection based on the location of the treatment works, but if the claimants were prejudiced at the time, they need not be prejudiced again, for since then, legal opinions have again changed.

In recent years, Maori interests have been incorporated into planning laws through a number of decisions of the Planning Tribunal and High Court. We need not review the cases here. It is sufficient to say that the previous decisions on the meaning of ancestral land were specifically overturned by the High Court in a judgment given in March 1987, *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd*, High Court, Wellington, M655/86, 31 March 1987. It is now clear that it is the relationship that Maori have with any particular land, and the manner in which any development

may affect it, that is important, not the historical accidents that have given rise to the current legal tenure.

That resolves a problem for future cases, but not here, where due to the then state of the law, the question was by-passed. For that reason, and because there are doubts that the matter can be caught up with under the Public Works procedures that follow, we will examine the ancestral significance in this case, though in the context of the Treaty not, the planning laws. But for that lacuna we would not have intervened however, for as we have said, it is not for this Tribunal to settle matters entrusted to the consideration of another.

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*Waitangi Tribunal, Department of Justice, Wellington.*

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### 5.6 Compulsory Acquisition

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Although since the inclusion of public works in district schemes, one might expect the designation of a work to be conclusive of the right to acquire the necessary land, in fact the acquisition of the land requires an additional procedure. Following the notice of an intention to take, an objection may be made, and under the Public Works Act 1981, the Planning Tribunal that hears it is to consider yet further criteria.

It is a quite separate action, it seems (see *Davis v Wanganui City Council* (1985-1986) 11 NZTPA 240, at 241-2). Amongst other things the Planning Tribunal must ascertain the local authority's objectives, enquire into the adequacy of the consideration given to alternative sites, routes or other methods of achieving the objectives, and determine whether it would be fair, sound and reasonably necessary for the land to be taken to achieve the Council's ends (section 24 (7)).

Whether the national criteria set out in the Town and Country Planning Act 1977 can also be incorporated into the Public Works laws is by no means clear. Certain passages in *Huakina Development Trust v Waikato Valley Authority*, High Court, Wellington, M430/86, 2 June 1987 suggest that may be so.

There are also considered views that the Planning Tribunal is not directed to locate the best site or the optimum method, for those are policy matters for the local authority to determine. The main concern, it seems, on one interpretation of the Act, is to ensure that the site has not been fixed or the works proposed in some arbitrary way that does not give justice to the landowner affected.

Much also depends on how the objectives are framed, for the exercise it seems, is not to question the objectives but the inquiries made into the alternatives for achieving them.

In this case we must exercise some care, for any objections to the compulsory acquisition will later be heard by the Planning Tribunal. Indeed the Waitangi Tribunal does not usually inquire until all other hearings have been concluded lest we prejudice the proceedings of those bodies, that unlike us, make final determinations. We have taken steps in this case because of the urgency that has arisen and the costs attendant on delays, and because we are primarily concerned with the framing of the ground-rules, not their application.

Therefore at this stage we should say no more than that there are doubts that under the Public Works Act the ancestral significance of land and the need to maintain adequate tribal reserves, can be brought into the arena to compel a better search for options than

might normally be required. The former issue, it could be said, belongs more to the Town Planning hearings following the Works designation. The second is not provided for at all unless it is an aspect of the ancestral land provision. The question for us is not what the law might be but whether, for those reasons, the land should be taken having regard to the principles of the Treaty.

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*Waitangi Tribunal, Department of Justice, Wellington.*

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### 5.7 Local And Tribal Government

#### 5.7 LOCAL AND TRIBAL GOVERNMENT

It has been seen that the Crown has provided a number of opportunities for members of the public to object. That of course includes Maori but some contention was made that, in terms of the Treaty, the tribes should have a greater say, and not merely as objectors.

Counsel for the claimants referred to the evidence of John Bayley, a Canadian Attorney who appeared before the Tribunal and who is involved in Indian claims (document B10); and to a paper that he presented to the XIIth Congress of the International Academy of Comparative Law (Sydney 1986) describing how Canadian tribes held half of the seats on various resource advisory Councils. Reference was made also to the paper by Professor Douglas Sanders of the law faculty of the University of British Columbia, given to the same conference (document B22), which outlined political developments in Canada for the recognition of certain tribal rights of self government within a proposed Canadian constitution.

Counsel contended that in this country all projects affecting natural resources or Maori interests should be taken to the tribes, as a matter of right, and that their Councils and Boards should be involved in discussions with local authorities at an early planning stage.

We are not sure that all such matters should be taken to the tribes as a matter of course, but we can see many advantages in improving upon the opportunities for the tribes and local authorities to consult. It also reflects the nature of the relationship inherent in the Treaty. The main problem, as we see it, is that the legal status of tribes is ill-defined. The lack of a recognised structure makes it as difficult for project promoters to know where to go as it does for the tribes to formulate an authoritative tribal position.

As matters stand, the Crown has made some arrangements for District Maori Councils to be involved with planning schemes. The Councils however, cannot always speak for the local tribe in all places. It appears to us that a great deal needs to be done to give formal recognition to properly structured tribal bodies, to define their roles, to provide for consultation between local and tribal authorities in proper cases, and to furnish the resources for tribal councils to be adequately informed and effectively involved.