

CHAPTER 6

**THE LOCAL POWER SCHEMES:  
CLAIMANT CONCERNS AND  
CROWN RESPONSES**

**6.1 CLAIMANT CONCERNS**

Three major concerns were expressed by the claimants to this Tribunal concerning the local power schemes constructed or proposed on the rivers:

- (a) the diversion of the Rangitaiki River into the Wheao River;
- (b) the lack of consultation over the Aniwhenua and Wheao schemes and the proposed Kioreweku scheme; and
- (c) eel depletion and the lack of consultation over the eel replenishment scheme.

In this chapter, we examine the evidence and submissions on the claimants' concerns and the Crown's responses.

**6.2 THE DIVERSION OF THE RANGITAIKI INTO THE WHEAO**

**6.2.1 The claimants' perspective**

The claimants strongly objected to the Wheao scheme on spiritual and cultural grounds because it mixed the waters of the Rangitaiki with the Wheao; indeed, this was a 'great hurt'.<sup>1</sup>

Billy Messent explained that this mixing of the waters reversed and forever destroyed the tuakana (older brother) and teina (younger brother) concept of wai tipuna. Ten miles of the Rangitaiki River had gone:

The river has been diverted into the tributary, the Rangitaiki into the Wheao. The tuakana into the teina. The mana of the Rangitaiki has been eroded.<sup>2</sup>

According to Maanu Paul:

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1. Hohepa Waiti, oral submission on behalf of the claimants, first hearing, 10 November 1993, tape 3, side A, 2980–2988
2. Document B13, p 2

The Wai Tipuna at the Wheao scheme have and are subjected to a huge dislocation of their mauri leading to an irreversible state of the extinction of their mana.<sup>3</sup>

Traditionally, the Rangitaiki was the tuakana of their ancestors and the Wheao and Whirinaki were the teina ‘that joined their tuakana at Ngahuinga and Kowaikura respectively’. Since the Wheao scheme had mixed the waters, it was ‘difficult/impossible’ to tell who was the tuakana and who was the teina of their wai tipuna. The mixing had shattered their ‘tapu/sanctity’.<sup>4</sup>

Further up the Rangitaiki, Mr Paul continued, Faxy Creek, which used to flow into the Wheao above the dam, was channelled into the Flaxy Dam, then through a tunnel and canal to mix with the Rangitaiki and Wheao, and finally through the penstocks, through the Wheao powerhouse, and down into the Wheao:

If the river is diverted and the waters are mixed then the life force is extinguished – no longer can we continue to quote our pepeha, without attracting derision and ridicule from other iwi who know the reality of the loss of mauri through the construction of the schemes.<sup>5</sup>

Hohepa Waiti, in cross-examination, expressed similar concerns. He had an objection to the building of the dam if it affected their spiritual way of life.<sup>6</sup> He was opposed to the rechannelling of the sacred river Rangitaiki and the mixing of its waters with the Wheao, which upset their natural relationship. Moreover, the claimants were unable to identify whether the rechannelled river was the Rangitaiki or the Wheao, an important matter when the tangata whenua identified themselves with the pepeha ‘Tawhiuau is the mountain, Rangitaiki is the river and Tangiharuru is the man’.<sup>7</sup> In order to restore the spiritual relationship they had with the river, Mr Waiti sought a natural flow of water that would allow the eels access to the length of the river.

### 6.2.2 Rotorua Electricity’s perspective

Commenting on tangata whenua concerns about the ‘unnatural mixing’ of the Wheao and Rangitaiki Rivers, Dr Wayne Donovan, the director of Bioresarches Consulting Biologists of Auckland, who was speaking on behalf of Rotorua Electricity, said he was in no position to respond to the cultural reasons for this. From a scientific perspective, their data indicated that the waters in these two rivers were very similar in quality and that both supported a diverse range of plants and animals, including trout – an indication that the waters were of a high quality, both before and after they were mixed.<sup>8</sup>

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3. Document B16, para 11

4. Ibid, paras 13–15

5. Ibid, para 80

6. Document B18(c), p 29

7. Ibid, p 32

8. Document C13, p 11

### 6.3 LACK OF CONSULTATION OVER ANIWHENUA AND WHEAO SCHEMES

#### 6.3.1 The claimants' charge

The claimants alleged that, in allowing the construction of the Aniwhenua and Wheao power schemes on their rivers and in granting water rights for those schemes without consultation with their Treaty partners, the Crown had trampled on their tino rangatiratanga over those stretches of the Rangitaiki and Wheao Rivers that flowed through their rohe.

Thomas Higgins said the dams were constructed without any consultation with Te Ika Whenua, only with people from outside the area.

Maanu Paul thought that the tangata whenua really had no idea of what was happening to their wai tipuna during the construction of the Wheao scheme. Even though Rotorua Electricity had taken urgent action to log the area, the scale of the scheme had not been explained to them and could not have been imagined.<sup>9</sup> Moreover, it prejudiced their full enjoyment of their customary and Treaty rights.

#### 6.3.2 The Crown's response

The Crown rejected the claimants' charge that they were not consulted over the power schemes.<sup>10</sup> It pointed out that other Maori groups had utilised existing objection procedures; for example, the Tuhoe–Waikaremoana Maori Trust Board. Representatives of local iwi, and Maurice Bird in particular, were specifically consulted by the power boards. Te Ika Whenua as a group did not raise concerns about power development.

Admittedly, it might be said that the consultation procedures were inadequate and did not explicitly provide for Maori spiritual and cultural values. But the power boards (later companies) were not the Crown or agents thereof and were under no obligation to act in accordance with Treaty principles. To the extent that there was any obligation to consult, the Crown did so on the facts of the case. The existing objection procedures, although arguably not adequate to meet the Crown's Treaty obligations, did provide an opportunity for Te Ika Whenua people to raise at least some of their concerns, yet they did not do so.

#### 6.3.3 Third party submissions

In opening and closing, counsel for third parties (Rotorua Electricity and Bay of Plenty Electricity) submitted that consultation by the companies was appropriate and sufficient in the context of the time.<sup>11</sup> Prior to 1986, there was no broadly recognised obligation, whether under the Treaty or otherwise, to consult tangata whenua. The statutory regime that they operated under then was marked by an absence of consideration for Maori interests. The Town and Country Planning Act 1953 contained no

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9. Document B16, para 10

10. Document C14, p 15–16; doc D5, pp 24–26 and interpolations

11. Document C15, pp 2–6; doc D4, pp 3–9

express reference to Maori interests and no requirement to consult Maori. The Town and Country Planning Act 1977 did have a provision to recognise matters of national importance but did not take effect until 1 June 1978 – that is, after the consents were granted. The Water and Soil Conservation Act 1967 did not require specific notification to be given to Maori, though after the *Huakina* decision in 1987, consideration of Maori matters became a requirement under the Act.<sup>12</sup>

At the time of the development of the power schemes, statutory concerns focused on environmental impact, not principles of the Treaty. Despite this, the companies did consult with tangata whenua in good faith and made genuine efforts to accommodate Maori concerns where possible.

Water rights applications were publicly notified; the Tuhoe–Waikaremoana Maori Trust Board objected to a water right for the Aniwhenua project. In fact, Bay of Plenty Electricity relied on the board as representative of tangata whenua because there was no other Maori objection to the scheme. At that time, Te Runanganui o Te Ika Whenua did not exist. A water right was issued on 4 December 1975 by the Bay of Plenty Regional Catchment Commission and the regional water board.

With regard to the Wheao proposal, contact was made with Ngati Manawa, in particular with Mr Bird, at meetings and on site visits, but this contact did not reveal tangata whenua concerns about eels or rangatiratanga. A water right was granted by the Bay of Plenty Water Board on 1 July 1977, and it was approved by the Town and Country Appeal Board on 2 March 1978.

#### 6.3.4 Consultation in the Wheao development

Evidence supporting Mr Williams’s submissions was given by Peter Fitchett, a civil engineer employed by Murray–North Partners, who, along with Alan Withy, a principal of the firm, had been engaged by Rotorua Electricity to handle the scheme development and specifically to make an environmental impact assessment (see sec 5.4.2). ‘In essence,’ he said, ‘we relied on the status of Mr Bird, a kaumatua of Ngati Manawa, and sought his guidance.’<sup>13</sup>

Early in 1977, he made a site visit to the affected area with Mr Bird, who told him something about its history. Significantly, Mr Bird said there was nothing of sacred interest to Ngati Manawa in the Wheao Gorge, only on higher ground. The fishing and eeling had deteriorated, especially since the Matahina Dam was built, and in particular the lower part of the Rangitaiki (above the confluence) was not considered good for eels.

Mr Bird made a second visit to the site on 19 May 1982, accompanied by Dennis Whimp. Neither Mr Fitchett nor Mr Whimp could recall any adverse comments from Mr Bird regarding the Wheao development. On 20 May 1982, Mr Whimp wrote to Mr Bird as follows:

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12. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (doc B5(a)(2))

13. Document c17, p 2; cf doc c19, pp 5–6

A large portion of the flow in the Rangitaiki River will be diverted into the Wheao River upstream of the Ngahuinga Block, increasing the flow of the Wheao substantially. . . . this increased Wheao flow will accelerate erosion of the riverbank.<sup>14</sup>

Although Mr Whimp had asked Mr Bird if he or the Ngahuinga Trust he was representing had any concerns, none were voiced. On that basis, Murray–North Partners had concluded that the effects of the scheme on Maori tribal interests would be minor and proceeded with the completion of the development.

Similar evidence was given by Mr Withy.<sup>15</sup> Conventional wisdom on the processes of consultation in the 1970s, he acknowledged, was very undeveloped and recognition of Treaty principles very limited. In this context, he had approached Mr Bird, who was regarded by the Murupara Borough Council as spokesman for Ngati Manawa, a major landowner within the borough through the Ngati Manawa Tribal Lands Incorporation. On 9 November 1976, he sent Mr Bird a copy of the Wheao scheme statement and invited his views on the proposal. He met Mr Bird on more than one occasion at his Rotorua office and drove him to Murupara to inspect the general area and location of the scheme.

About the same time, Mr Withy had considerable contact with Tamaroa Nikora, a Rotorua-based surveyor and planner in the Department of Lands and Survey. He had sought Mr Nikora’s advice on numerous occasions in respect to Maoritanga and tangata whenua matters, but could not recall anything specific in relation to the Wheao power scheme.

Mr Bird had confirmed that Ngati Manawa were the tangata whenua in the Murupara–Wheao area but had not referred to any sacred sites or burial grounds in the area of the Wheao development, nor to eel fishing as being of significance or great interest above the confluence of the Rangitaiki and the Wheao.

The conclusions of Murray–North Partners concerning local Maori interests as recorded in their 1977 environmental impact assessment were as follows:

To avoid any risk of . . . affecting land associated with Maori history or culture, Mr Bird was invited to inspect the area affected by the scheme. The various elements of the scheme and the general nature of the proposal were indicated to him. It was found that the scheme in no way conflicts with tribal interests in the area.<sup>16</sup>

Mr Withy believed Mr Bird had been ‘the appropriate person to talk to about Maori interests in the Wheao scheme development area’ and he ‘was not aware of any other person or body capable of representing what is now known as Te Ika Whenua’.<sup>17</sup>

### 6.3.5 The claimants’ response

In her closing submissions, Ms Ertel said that the Crown had admitted that its obligations to consult were discharged by third parties. But there was no evidence that

14. See doc c17, p 5

15. Document c18, pp 2–6 and interpolation

16. See doc c18, pp 5–6; for the 1977 environmental impact assessment, see doc c18(a)

17. See doc c18, p 6

anyone other than Rotorua Electricity and Bay of Plenty Electricity had contacted tangata whenua prior to and about the construction of the Wheao and Aniwhenua schemes. The information provided and the consultation undertaken were seen by claimants as inadequate. In cross-examination, Neil Brennan had admitted that even today he did not know the name of the tangata whenua that he was supposed to consult.<sup>18</sup>

In reply to Mr Williams and Mr Andrews, Ms Ertel refuted the power companies' view that tangata whenua could not have been unaware of the Aniwhenua and Wheao proposals. It was easy to see local Maori being unaware of the 'actual effect on the rivers of the scheme' (emphasis in original).<sup>19</sup> She also criticised the legislative framework within which this happened, not the power companies themselves (see sec 6.3.3).

With regard to Mr Brennan noting that the Tuhoe–Waikaremoana Maori Trust Board did not raise the issues of river ownership or the impact of the dams on the eel fishery when objecting to the schemes, she pointed out that the trust board made no claim to the rivers.

It seemed there was uncertainty as to whether Mr Bird received anything other than the preliminary report in respect of the hydro scheme. The information provided was scant and not explicit about the effects of the scheme, and yet the boards were able to obtain rights that had a prejudicial effect on the cultural and property rights of the claimants.

## 6.4 CONSULTATION OVER THE KIOREWEKU PROJECT

### 6.4.1 A proposed new claim

In her opening submissions, Ms Ertel referred to a proposed new claim concerning Bay of Plenty Electricity's project to build another dam near Lake Aniwhenua (the Kioreweku Dam) and to consultative meetings called under the Resource Management Act 1991. The claimants had been formally advised of the proposal, which seemed to have gone through some modification and been the subject of a feasibility study.<sup>20</sup>

The claimants showed us a videotape of a meeting hosted by Bay of Plenty Electricity in October 1993, and provided us with a transcript of the proceedings to support their contentions, first, that they had not been properly informed and consulted as a Treaty partner who had tino rangatiratanga over the area and, secondly, that the Resource Management Act was 'fatally flawed'.<sup>21</sup>

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18. Document D2, pp 17–20

19. Document D6, p 3

20. Document B10, p 23 and interpolation

21. Documents B15, B15(a)

### 6.4.2 Third party evidence and submissions

At the first hearing on 9 November 1993, Miss Stanbridge, on behalf of third party interests, briefed the Tribunal on the proposal and consultation process initiated under the Resource Management Act.<sup>22</sup> On our site visit, Laurie Scott, the manager of Bay of Plenty Electricity, explained the proposal.

At the second hearing, Mr Brennan outlined Bay of Plenty Electricity's current investigations of the Kioreweku project, which it considered was in the best interests of the people of the region and which it hoped would protect the local community against future price rises and further national power shortages.<sup>23</sup>

Consultation had begun with the local community and tangata whenua representatives with the intention of getting early feedback on the various options for the design and location of the new dam. Consultation with local Maori had highlighted the existence of a wahi tapu (the riwai site), which was threatened by flooding under one of the development options, since abandoned. Discussions were under way for the appropriate design of two elver passes for the new dam. Applications had been lodged for the necessary resource consents and would be publicly notified. There would be an opportunity for all interested parties to make submissions to the Bay of Plenty Regional Council. In the meantime, consultation with the local Maori community would continue.

Bay of Plenty Electricity was fully aware of the requirement for consultation with tangata whenua under the Resource Management Act. It had entered that consultation process with good intentions and the belief that the process would be of benefit to all participants.

Dr Donovan, who had been involved in surveys of a number of rivers in the Bay of Plenty, gave evidence evaluating the impact of the proposed Kioreweku scheme on the ecology of a section of the Rangitaiki River downstream of the Aniwhenua Falls.<sup>24</sup> Primary impacts were the formation of an 18-hectare lake, the diversion of approximately one kilometre of the existing river through a canal and power station, and the deepening of some 2.5 kilometres of river downstream of the power station. Design features to minimise the impact on the ecology of the river included pools to sustain fish in the diverted section, eel passes to permit upstream movement of eels and other native fish, and screens on the penthouse intakes to prevent the passage of larger fish through the turbines.

Bay of Plenty Electricity had carried out consultation with the Waiohau Community Trust, Te Runanganui o Te Ika Whenua, Ngati Manawa, and Tuhoe o Waikaremoana. As a result, Bioresearches Consulting Biologists was requested to complete a preliminary assessment of sites of historical and cultural importance (wahi tapu) in the area of the scheme. Tangata whenua assisted in this preliminary assessment. This had identified the riwai site, which was a factor in Bay of Plenty

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22. Miss Stanbridge, oral submission on behalf of third party interests, first hearing, 9 November 1993, tape 2, side A, 3140–3430. For the overall provisional layout of the project, see doc B7.

23. Document C11, pp 7–8

24. Document C13, pp 8–10

Electricity abandoning one of the proposed options for the scheme, which would have involved flooding the site.

### 6.4.3 The claimants' response

In closing, Ms Ertel reminded us that the Resource Management Act 1991 had 'heralded a new era in consultation', but the claimants were critical of the Act, as was the Tribunal, particularly in the *Ngawha Geothermal Resource Report 1993* and the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993*.<sup>25</sup> One of the faults of the Act was that it did not require input from the tangata whenua until much preliminary work had been done and the tangata whenua were faced with a fait accompli. 'Relegating the tangata whenua to the role of a submitter or objector to the Regional Council' was an affront to their mana and not in accordance with the rangatiratanga promised in the Treaty.<sup>26</sup>

Bay of Plenty Electricity had begun consultation with the local community and tangata whenua. Mr Donovan was then commissioned to produce a report on the Kioreweku site, and his evidence described the consultation process undertaken in this project by Bay of Plenty Electricity. The consultation, however, was not about whether the project would proceed but design options and the location of the new dam, subject to the granting of resource management consents.

An example of this consultation was the October 1993 meeting held between some claimants and Bay of Plenty Electricity representatives at the Aniwhenua powerhouse. In the 14 years of its existence, this was the first time that these claimants had been there, which underlined the attitude of the electricity authorities. Some of the land needed for development was Maori owned. It was inappropriate, Ms Ertel suggested, that hired property consultants were directed by Mr Scott to discuss purchase options with attendant Maori landowners at a function serving alcohol.

Bay of Plenty Electricity had asked the Tribunal not to judge the consultation, which it had not completed. It was, however, within the jurisdiction of the Tribunal to make findings on the evidence presented that this was not consultation in accordance with the principles of the Treaty. For consultation to meet Treaty requirements, Bay of Plenty Electricity would have to talk with tangata whenua about the need for the Kioreweku Dam and dismantle the Resource Management Act process.

A finding from the Tribunal that the claimants owned the waters of the river would provide them with protection in the future and give them a more appropriate level of influence over future development such as Kioreweku. There was no suggestion that they would seek to stop development. The Treaty required that rangatiratanga be recognised and given effect. The Resource Management Act was inconsistent with the Treaty because it failed to make positive provision for Maori ownership of the river, and particularly the water, and Maori rangatiratanga and the exercise of it. If the

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25. Document D2, p 58

26. Ibid, p 61

Tribunal dealt with these issues at an early stage, it would assist those in whom statutory discretions were vested under it.<sup>27</sup>

#### 6.4.4 Closing submissions of counsel for power companies

Counsel for Bay of Plenty Electricity and Rotorua Electricity submitted that claimant counsel, in requesting a recommendation on Kioreweku consultation, was asking the Waitangi Tribunal to ‘second guess’ what the Planning Tribunal might say about its adequacy. Indeed, she was seeking a finding from the Waitangi Tribunal to ‘derail’ Bay of Plenty Electricity’s consent application.<sup>28</sup> The issue of this Tribunal’s ability to review the Planning Tribunal had been canvassed in its *Mohaka River Report 1992*. The Waitangi Tribunal had agreed with Crown counsel that the Planning Tribunal was ‘neither the Crown nor the agent of the Crown’. Although it had the power to review the legislation under which the Planning Tribunal operated, it did not have the power to review Planning Tribunal actions under that legislation.<sup>29</sup> The Planning Tribunal was, ‘as a result of the provisions of Part II of the Resource Management Act, becoming increasingly familiar and comfortable with Treaty jurisprudence’. Parliament had clearly intended that it ‘should be the forum in which Treaty compliance under that Act was tested’.<sup>30</sup>

### 6.5 EEL DEPLETION AND THE EEL REPLENISHMENT SCHEME

#### 6.5.1 Claimants’ concerns

In their original claim for lands and waterways (claim 1.1), the claimants allege that the Aniwhenua and Wheao Dams had ‘deprived them of their kaiawa (eels), an important food for which they were “nationally renown” by blocking the migratory routes for the eels to and from the sea’.<sup>31</sup>

Building on the oral evidence presented at the urgent hearing of the energy assets claim, a number of witnesses for the claimants in the present claim gave evidence on the depletion of the eels since the construction of the Matahina, Aniwhenua, and Wheao Dams.

In their report *Nga Awa me nga Iwi o te Ika Whenua*, the claimants’ research team stated that:

During the heyday of forestry development, people would go down to the Wheao from Waiapukao and Kaingaroa villages and catch eels with a bait and line at night. A

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27. Ibid, p 62

28. Document D4, p 10

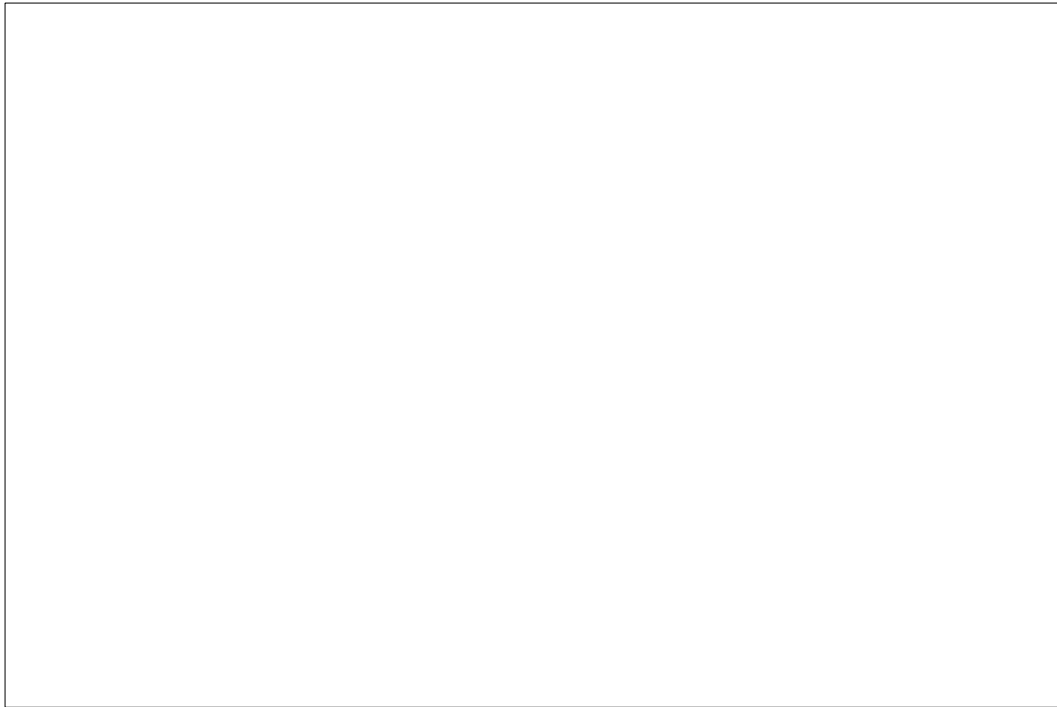
29. Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications, 1996, sec 5.6

30. Document D4, p 11

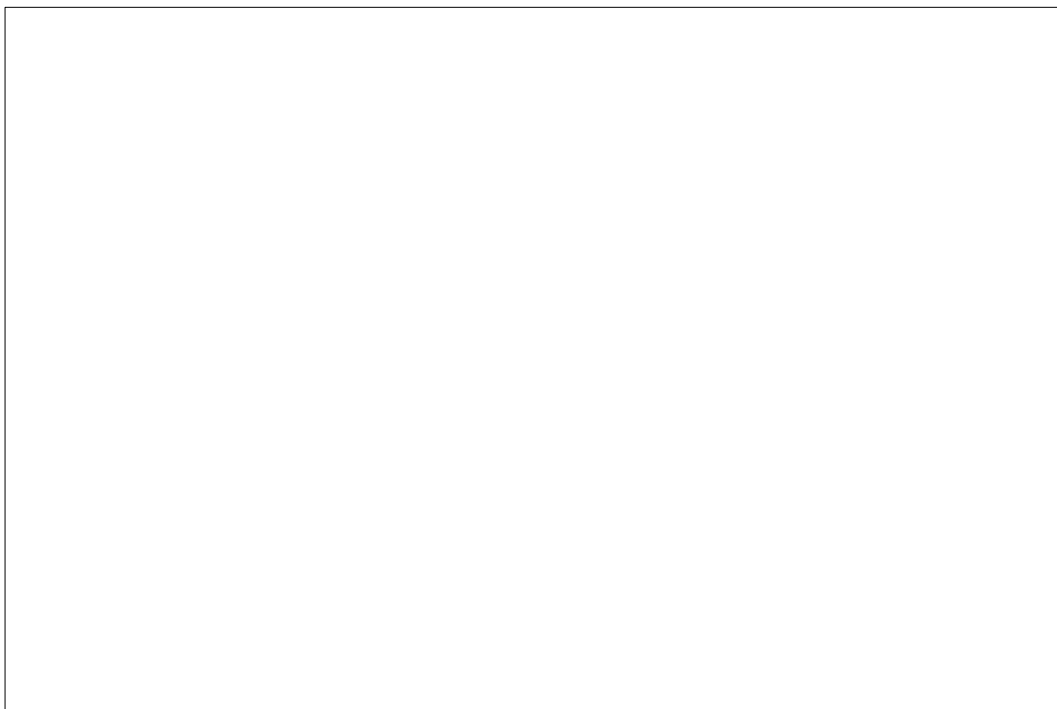
31. Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 1.2

6.5.1

TE IKA WHENUA RIVERS REPORT



Figures 21 (above) and 22 (below): Eels retrieved from the grilles of the Aniwhenua Dam, where they were caught as they migrated to the sea; the marks on their bodies were caused by the grilles. Photographs courtesy of Hohepa Waiti.



normal catch would be about 25 eels in two hours. These would be taken back to the villages and shared or the people would pawhara (dry) them for future use.<sup>32</sup>

According to Maurice Toetoe, who had lived in Murupara all his life and fished around the area since childhood, the mixing of the waters of the Rangitaiki and the Wheao affected the fishing grounds in both. Consequently, the Wheao became faster running and its bottom more turbulent. This meant there was less food for fish on the bottom of the river, and less fish. The Rangitaiki is now almost a dry river where no eels can live.<sup>33</sup>

For Billy Messent, one of the greatest tragedies of the diversion of the Rangitaiki and the Wheao ‘blowout’ was that all the beautiful little pools of clear water that made the Wheao one of the greatest trout fishing rivers in the world, as well as a great place for tuna, were wiped out. The Wheao they had known, the lands on which they had lived for weeks and what used to be a great place for mahinga kai were all gone.<sup>34</sup>

Evidence given at the hearings and on the site visit indicated that the dams were impregnable walls that prevented not only the annual migration of eels down the river to the sea to spawn but also the migration of baby elvers up the rivers. But because eels have a 30-year breeding cycle, the full effects of this were only recently being realised.<sup>35</sup>

### 6.5.2 Crown involvement in the eel fishery

Mr Alexander presented detailed historical evidence headed ‘The Crown and the Eel Fishery’, mostly for the period 1929 to 1987, and supporting documents to that report.<sup>36</sup> In this section, we summarise his evidence, which in effect indicates that he was mistaken when he concluded in his earlier report that ‘there was total silence from tangata whenua while the power schemes were being debated and constructed’, which ‘certainly proved fatal to the ability of the schemes as constructed to protect the eel fishery’.<sup>37</sup>

Occasional Maori complaints to the Government about the effects of Pakeha fishers on the eel population and traditional fisheries dated back to the 1930s and 1940s, but ‘these were not considered to have sufficient substance to them to justify a statutory response’.<sup>38</sup> In any case, the traditional view of the acclimatisation societies that eels were a threat to trout and salmon fisheries was shared in official circles and worked against remedial action. This view was still held by the Rotorua office of the Conservator of Wildlife in the early 1960s, and was echoed in the early 1980s ‘in the form of notes of caution about doing too much to help eels get around the Matahina and Aniwhenua dams’.<sup>39</sup> ‘The Rangitaiki,’ Mr Alexander noted, ‘was effectively

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32. Document B4, p 18

33. Document B11, p 4

34. Document B13, p 2

35. Document A8(13), pp 4–5

36. Documents C6, C6(a)

37. Document C5, p 54

38. Document C6, p 4

39. *Ibid*, p 5

dammed, and eel migrations cut, from 1963.<sup>40</sup> Some years elapsed, however, before Maori realised that eel populations above the dam were seriously depleted.

On 26 June 1970, the *Rotorua Daily Post* reported that:

Maori anger is mounting over development on the Rangitaiki River that has seriously depleted eel populations in the Murupara District . . . Below the Te Mahoe dam [at Matahina], eel populations are building up. But in the quiet Ikawhenua Range country, the river's birth place, Maoris are concerned that one of their traditional foods is disappearing.

Moves to press the Internal Affairs Department into building a run-off or race for eels so they might 'climb' over the dam have been turned-down because of high costs.<sup>41</sup>

In 1976, a report from a local Wildlife Service officer indicated 'a good population of eels' still existed in the Wheao River, yet 'the eel fishery did not get a mention in the Conservator's written submissions' after he lodged an objection to the water right in 1977.<sup>42</sup>

In 1981, the Murupara Maori Committee asked the Hamilton district manager of the Electricity Department for an investigation to see if the Matahina Dam was the cause of the scarcity of eels. The letter was referred to the Conservator of Wildlife in Rotorua, who replied that the dam had stopped what was previously 'a very small run migrating up to the central reaches' of the Rangitaiki River owing to 'a general obstruction at the Aniwhenua Falls'. Compounding the position was 'the establishment of the barrage in the Aniwhenua Lake'.<sup>43</sup> The Wildlife Service, Mr Alexander pointed out, was apparently unaware of Elsdon Best's references to elvers traversing the falls and of the size and scope of the eel fishery above the falls.

At a meeting held by the Bay of Plenty Electric Power Board in Murupara in March 1982, a representative of the Maori Women's Welfare League spoke about the scarcity of eels and blamed the Aniwhenua scheme for preventing migration. Following discussion with the Wildlife Service, the board replied to the league members that service studies had revealed that elvers were able to cross both the Matahina and the Aniwhenua Dams and had been found by its own station attendants at the top of the Aniwhenua Dam referred to as the barrage.

Later that year, the Murupara Maori Committee made representations to its local member of Parliament, the member for Eastern Maori, Peter Tapsell, who wrote to the Minister of Energy. The Minister in reply repeated, word for word, the previous response of the Conservator of Wildlife. He added that the Electricity Division of the Ministry had not made any attempt and had never been requested by the Wildlife Service to provide for eels to migrate up and down the river. He suggested that the committee discuss the matters with the service in Rotorua, which he understood was to conduct investigations that November relating to eels in the Rangitaiki River.

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40. Document c6, p 8, fn13

41. See doc c6, pp 8-9; doc c6(a), p 55

42. See doc c6, p 10; doc c6(a), p 58

43. See doc c6, p 11; doc c6(a), p 61

By this time, the conservator had admitted that, regardless of what had caused the decline in the availability of eels above Aniwhenua, there was ‘obviously more of a need to enhance the traditional fishery than to attribute blame’.<sup>44</sup> The options were to restrict commercial harvesting, provide an eel pass through, over, or around the Aniwhenua Barrage, or transport elvers around the Matahina Dam.

On 7 January 1983, eight days after the collapse of the Wheao canal, 13 long-finned eels were collected off the Aniwhenua intake screens. Mr Tapsell wrote again to the Minister of Energy, on behalf of the Murupara Maori Committee, which felt ‘very strongly about this matter’.<sup>45</sup> He pointed out that the Maori people would confirm that the population of eels had dwindled drastically within the last few years and that they did not accept that this was due to over-fishing during this period of time.

The Acting Minister replied that it was now apparent that substantial numbers of eels were able to pass the Matahina Dam but the Aniwhenua Barrage remained a barrier to their upstream migration and appeared to be the principal cause of the decline in numbers in the upper reaches. A small felt matting structure attached to the flap gate above the spillway would be a practical proposition to convey elvers over the barrage.

In response to letters from the Acting Minister and Mr Tapsell, the Wildlife Service and the power board offered to install an experimental eel pass over the Aniwhenua Dam during the summer of 1983–84. After the collapse of the Wheao canal and following representations from Mr Tapsell to the Ministers of Fisheries, the Environment, and Energy, it was decided to commission a report from a Fisheries Research Division scientist, Charles Mitchell, in the Ministry of Agriculture and Fisheries in Rotorua.

Mitchell reported that the Aniwhenua Barrage was ‘virtually impassable’ for the greatly diminished number of elvers that managed to reach it, and he identified two options: the construction of elver passes or, for the immediate elver season, the transportation of elvers around the dam and their release into Aniwhenua Lake. In regard to the latter option, he noted that ‘The Maori have long had a tradition of stocking eels in bodies of water they would be unable to reach by normal means’.<sup>46</sup>

The Hamilton district manager of the Electricity Department and the general manager of the Bay of Plenty Electric Power Board favoured the second option (manual transfer). So did Ngati Manawa elders at Murupara, who, through Henry Bird, informed Mr Tapsell and the conservator that they had a very suitable man to do the job. The Wildlife Service officer at Murupara also supported the trans-shipment option, primarily because of a lack of time to install eel passes before the next seasonal migration.

As a result of agreement by all concerned, a trans-shipment programme was put into effect during the 1983–84 elver migration season. The costs were shared by the Wildlife Service, the Electricity Division of the Ministry of Energy, and the Bay of Plenty Electric Power Board. Transfers were made of an estimated total of 15,000

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44. See doc c6, p 16; doc c6(a), p 75

45. See doc c6, p 18; doc c6(a), p 84

46. See doc c6, p 23; doc c6(a), p 115; for Mitchell’s report, see doc c6(a), pp 101–119

elvers. The programme was repeated during the 1984–85 season, involving an estimated 23,000 elvers.

In both instances, Mr Bird's offer of Maori participation was declined; in 1983–84 on the ground that, being the first season, the emphasis was on developing various transfer techniques; in 1984–85 because the elvers had already moved through to the dam and been transferred. When Mr Tapsell inquired about using Maori people to carry out the transfer the following season, he was told that the small amount of time involved would not warrant employment of local people specifically for the task. Further transfers took place in the 1985–86 and 1986–87 seasons; in the latter about 40,000 elvers were involved.

Mr Alexander concluded that 'the Crown failed to appreciate that the Matahina dam would sever the essential reproductive links between the eel fishery of Te Ika Whenua and the sea'.<sup>47</sup> Since then, the elver transfer programme had shown 'a willingness by the Crown to respond' to Maori concerns. Construction of the dams meant that the maintenance of the eel population in the upper reaches of the river must inevitably involve human intervention. This was not inconsistent with Maori practice. Although to his knowledge Te Ika Whenua did not have a tradition of eel relocation, and did not respond to the new situation by undertaking transfers themselves, there were records of tribes elsewhere moving eels between lakes and rivers.

Christopher Richmond, the manager of science and technical services at the Department of Conservation in Rotorua, gave further evidence on the Crown's involvement with the eel fishery on the Rangitaiki River mostly since 1987. This clarified a few of Mr Alexander's comments on the lack of action taken by the Wildlife Service to protect eel populations.

Legislative responsibilities for freshwater fish species from 1972 to 1987, he explained, were divided between the Ministry of Agriculture and Fisheries and the Wildlife Service. The former was responsible for research and management as well as for controlling the harvest of whitebait and eels; the latter was responsible for trout and non-harvested populations of native fish: 'In relation to eel passage and populations MAF had research and regulatory responsibilities whereas the Wildlife Service roles were advisory, advocacy and management of transfers.'<sup>48</sup>

Consultation with tangata whenua on the protection and management of the eel fisheries was undertaken by the Wildlife Service. From the Rotorua regional office files, this appeared 'to have ranged from initially minor to more substantial in more recent years'. He understood that the old field office files contained notes of verbal consultation with local tangata whenua:

Preliminary liaison . . . about the capture of elvers at Matahina for transfer upstream was based on misunderstanding of iwi boundaries and responsibilities, and so approvals were sought from Ngati Awa as the collection point was within that rohe. Subsequent consultation placed more emphasis on the Ngati Manawa people of

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47. Document c6, p 29

48. Document c16, p 3

Murupara . . . The Wildlife Service concluded eventually that the elvers were collected from Ngati Awa waters, transferred across Tuhoe waters and released into Ngati Manawa waters.<sup>49</sup>

Since the formation of the Department of Conservation in 1987, the quality of iwi consultation about fishery management and protection had improved. Previously dispersed administrative responsibilities had been merged, allowing the development of more integrated management of non-commercial fisheries. Moreover, under section 4 of the Conservation Act 1987, the department was required to give effect to the principles of the Treaty of Waitangi. The Bay of Plenty Conservation Board included a high level of representation of iwi interests. One of the initial members was the claimant representative Hohepa Waiti, who was subsequently reappointed and was recently chairman of the board's Maori Policy Committee.

In August 1990, Mr Richmond invited and received a deputation from Te Runanganui o Te Ika Whenua to discuss the eel situation and options for quickly rehabilitating the fishery. Of primary concern was the need to increase the recruitment of elvers upstream from Aniwhenua; of secondary, but increasing concern were the hazards to the return of mature adult eels to their spawning grounds in the Pacific. He was able to confirm departmental commitments to continue and to increase the annual transfer of elvers upstream from Matahina; to monitor the effectiveness of the fish pass established over the Matahina Dam; and to work with iwi and the Bay of Plenty Electric Power Board to find an effective form of fish pass upstream from Aniwhenua and with fisheries scientists and the power authorities to develop effective methods of ensuring that at least some mature adults completed their return migration to the spawning grounds. In 1994, iwi representatives and Department of Conservation staff assisted fisheries consultant Charles Mitchell with the first trial for capture of downstream migrant adults.

Two priorities of special significance identified in the draft *Conservation Management Strategy* prepared by the Bay of Plenty conservancy in 1994 were:

- to establish a charter of partnership with the tangata whenua of the area; and
- to promote the restoration of fish passage across the dams and other barriers within the Rangitaiki catchment area.<sup>50</sup>

In Mr Richmond's opinion, the department and board had 'made good progress in implementing these priorities', and he was confident that 'this partnership and the goodwill of the power authorities' would 'result in the rehabilitation and enhancement of the eel fishery' as their knowledge and technical skills increased.<sup>51</sup>

### 6.5.3 Impact of local hydro schemes on eel populations

Evidence of the impact of the hydro schemes on eel populations was presented on behalf of Bay of Plenty Electricity by its fisheries consultant Mr Mitchell.<sup>52</sup> The dams

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49. Ibid, pp 3-4

50. Ibid, p 6

51. Ibid

52. Document c12

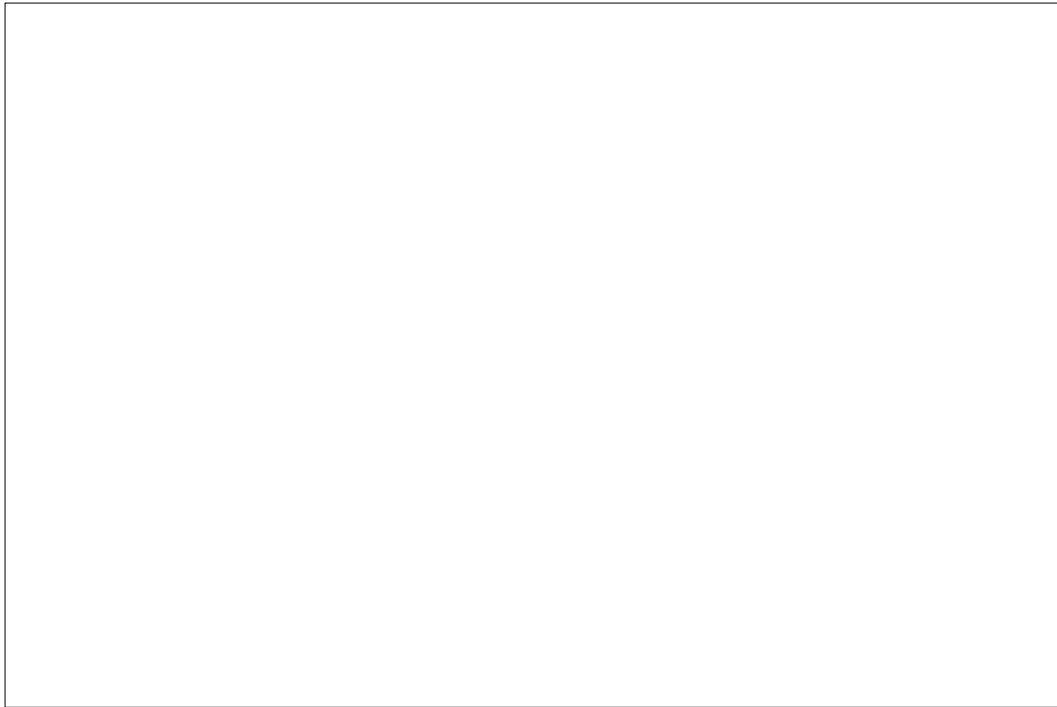


Figure 23: The Aniwhenua Dam. Photograph courtesy of Hohepa Waiti.

and power stations, he said, posed obstacles for the fishery upstream because of the diadromous life cycle of eels. Each spring, the elvers swarmed into the river from the sea and migrated up it. These migrations were remarkable not only for the numbers involved but for the tenacity with which they climbed up the wetted side of the Aniwhenua Falls. The migration might take several years before the elvers settled into suitable habitats. Adult eels, after they had attained a suitable size and perhaps fat level, migrated back to the sea to breed and never returned. Mortality in turbines was related directly to the size of both the turbines and the fish. The survival of particularly large migrant eels was likely to be poor:

Recruitment of elvers to the eel population of the Upper Rangitaiki would have been greatly reduced by construction of Matahina Dam . . .

Nonetheless some eels seem to have got over the dam in the years since construction . . . Nighttime inspections of Aniwhenua Barrage, the base of the Power House and Aniwhenua Falls in 1992 and 1993 found elvers present in very small numbers (1–10), not the teeming multitudes as described by Best.<sup>53</sup>

Dr Donovan, on behalf of Rotorua Electricity, supported Mr Mitchell’s evidence in respect of the major impact of the Matahina Dam on the eel fishery. As to references to the loss of eels from the Wheao River, in his opinion, ‘there was a significant reduction in the number of eels in the Wheao River prior to the construction of the Wheao scheme as a result of [the] construction of the Matahina Dam.’<sup>54</sup>

53. Document c12, p 6

54. Document c13, p 10

There was ‘little doubt that [the collapse of the Wheao canal] changed the character of the river . . . in particular over a four-kilometre section downstream of the powerhouse’, but surveys indicated that trout had readily colonised the river following the collapse and had reached average numbers within three years following that event.<sup>55</sup> While the Wheao scheme had resulted in significant changes to some aquatic habitats, as would the proposed Kioreweku scheme, design features had been included to reduce the impact of these developments; in particular, on the fisheries in those areas. But in both schemes, principal concerns had been expressed about the impact on the trout fishery.<sup>56</sup>

#### 6.5.4 The eel replenishment scheme

At the urgent hearing of the energy assets claim and on our site visit, we were told that Bay of Plenty Electricity had transported 70,000 elvers from below the Matahina Dam to above the Aniwhenua Dam and was committed to spend \$25,000 the following year on this eel replenishment scheme.<sup>57</sup>

More detailed evidence on the scheme was given by Mr Mitchell, who in the previous 11 years had been involved with measures introduced by the Electricity Corporation of New Zealand and Bay of Plenty Electricity to restore and enhance the eel population of the Rangitaiki River above their respective power stations.<sup>58</sup>

Elver passes, he explained, were necessary because of the diadromous life cycle of eels. Early releases of elvers into the Matahina and Aniwhenua Reservoirs were certainly successful. When he examined the Aniwhenua power station and barrage again in 1992, with a view to installing an elver pass, he concluded that very low numbers of elvers present below the dam meant that the construction of a full-scale pass was unnecessary. The same outcome could be achieved by the more cost-effective method of capturing them below the Matahina Dam and releasing them into the Aniwhenua Reservoir. The claimants’ observation that ‘new’ eels had been introduced was correct. Short-finned eels were now being stocked above Aniwhenua when few would have migrated past this point naturally. The long-finned eels had been the dominant eel in the upper Rangitaiki in former times, and they ate the smaller short-finned eels when they encountered them. Unfortunately, he had failed to consider the status of long-finned eels as a traditional food in his original recommendations for restocking. This, he admitted, reflected ‘a lack of cultural awareness’.

Although the impetus for the restocking work came from local Maori, he was not initially involved in any consultation with them. In the first instance, he had recommended that local Maori be encouraged and supported to trap elvers below the Matahina Dam for release into the Aniwhenua Reservoir. However, the Wildlife Service and its successor, the Department of Conservation:

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55. Ibid, p 7

56. Ibid, p 11

57. Document A8(13)(h); see also doc D5, pp 3–4

58. Document C12, pp 8–21

did not wish to delegate authority for management of fisheries values. In particular, concerns were expressed over the impact on trout of releasing large numbers of eels into the catchment. The now disbanded Wildlife Service was dominated by trout fishing interests . . . only recently . . . local people have become involved with the stocking of eels.<sup>59</sup>

To sustain an eel population in the upper Rangitaiki River, all aspects of the life cycle had to be completed by at least part of the stock. A proportion had to pass downstream unharmed to spawning grounds somewhere in the tropical Pacific Ocean. This conclusion led to the project in February and March 1994, financed by Bay of Plenty Electricity, to trap migrating eels within the Aniwhenua power canal, transport them downstream below the Matahina Dam, and release them. At the conclusion of these trials, a report on the experiment would be prepared. Mr Mitchell considered the results ‘highly encouraging and relevant to the sustainable management of eel stocks in catchments above power stations’.<sup>60</sup> Although he understood the claimants had requested that a two-way channel for eels be provided, he considered trapping and manually transporting the migrant eels was better. Any two-way channel at the Aniwhenua Dam would simply divert eels to their death at the Matahina Dam. The eels were now very few in number and it was physically impractical to do anything else but net these few eels. Moreover, a take of migrating eels was fully compatible with the traditional Maori fishing practice of building large and permanent pa tuna on rivers and trapping the heke (migration).

The work to date on downstream migrating eels had been strongly supported by Maori. Young men from Murupara and Waiohou had appeared to work beside Mr Mitchell. Discussions with them and local residents led Mr Mitchell to believe that a migrant eel catch and release programme would be supported. Bay of Plenty Electricity had clearly demonstrated its support for programmes designed to sustain the native fisheries in the Rangitaiki River. Its migration programme provided an opportunity to develop a traditional fishery and traditional fishing customs that coexisted with an operating hydro dam. Their efforts had been motivated by a desire to minimise as far as possible the impact the dams had had in the past on the native fish population.

### 6.5.5 The capture and release method

Maanu Paul pointed out that Te Ika Whenua had no faith in the capture and release method to assist adult eels’ migration back to the Pacific Ocean. It was contrary to their traditional knowledge that eelers migrate by following the scent of their parents – indeed, it disrupted this process. It was based on ‘the hit and miss methodology of the Western scientific approach’, as was the technique of electric fishing used to catch the eels. It had been ‘foisted on tangata whenua without their input’. They were ‘simply there to do the donkey work’.<sup>61</sup> At no time were they invited to make decisions

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59. Document C12, p 13

60. Ibid, p 18

61. Document C19, p 3

that catered for their Maori techniques or knowledge. The rate of survival was two elvers out of four million per spawning adult. The capture and release method should not be used in future. Instead, Te Ika Whenua proposed a two-way floating pipeline over the Aniwhenua Dam.<sup>62</sup>

Mr Mitchell denied Mr Paul's criticisms. The capture and release method, he maintained, was based on a close examination of all the conditions. The proposed pipeline over the Aniwhenua Dam would merely lead the eels to their deaths at the Matahina Dam, and it was simply not viable to have a pipeline over the latter dam. Contrary to what Mr Paul said, people of Te Ika Whenua had assisted Bay of Plenty Electricity to save the eels of their own volition. He had worked side by side with local men and shared their knowledge to achieve sustainable management of the eel stocks.

Mr Mitchell defended electro-fishing as a useful technique for capturing eels during the daytime. He disagreed with Mr Paul's statement that it would not result in the eels being stunned since they were already asleep during daylight hours. This was an established and well-recognised fishing technique, used by fisheries scientists throughout the world, not just Western scientists.<sup>63</sup>

## 6.6 CROWN SUBMISSIONS

The Crown stressed that the hydro scheme that seemed to have had the greatest impact on the eel population was the Matahina project, which was completed in the 1960s. This was downstream of the area claimed by Te Ika Whenua, but 'plainly affected the eel fisheries in the rivers and streams which they claim'.<sup>64</sup> The building of the Matahina Dam was not the subject of complaint by Te Ika Whenua, possibly because it was outside their claimed rohe and there was little evidence about it before the Tribunal.

The Crown had attempted to deal with this problem from the early 1980s by employing Mr Mitchell, who experimented with devices for moving elvers above the dam. The work was carried on by the Electricity Corporation of New Zealand, and there was now a permanent elver pass over the Matahina. Similar steps were being taken at Aniwhenua. 'In short, the Crown and the power boards, in consultation with local Maori, had been working on solving the problems for some time.'<sup>65</sup>

The Crown said that commercial eel fishing in the early 1970s seemed 'to have been at least as significant a factor in the decline of the eel fisheries as the hydro developments'. Indeed, it was 'a major, perhaps the major, contributor to the decline'.<sup>66</sup> In December 1972, before the construction of the Aniwhenua and Wheao schemes, Mr Paul, as chairman of the Ngati Awa Maori Executive, had written to the Minister of Maori Affairs expressing the concern of the people of the area at the

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62. For a drawing of this, see doc C19(a).

63. Document D1, p 3

64. Document D5, p 26

65. Ibid, p 27

66. Ibid, pp 3, 26

serious depletion of eel stocks resulting from commercial fishing and estimating that within six months eel stocks would be exhausted.

Under cross-examination, Mr Mitchell agreed that commercial fishing was a major factor in the decline of eel stocks.<sup>67</sup>

### 6.7 THIRD PARTY SUBMISSIONS

In his opening submissions on eels, counsel for Bay of Plenty Electricity and Rotorua Electricity submitted that, prior to the building of the Aniwhenua and Wheao Dams, eel numbers in the upper Rangitaiki were extremely low, and in the lower Wheao even smaller, and that there was a correlation between low eel numbers and the Matahina Dam.<sup>68</sup> Active measures were undertaken to sustain the population and Bay of Plenty Electricity financed elver restocking. Experts concluded that the most effective method was recapture below the Matahina Dam and release in the Aniwhenua Reservoir. In 1993 and 1994, 200,000 eels were restocked. An elver pass at Aniwhenua was looked at and a programme was begun to transport mature migrating eels from the Aniwhenua to below the Matahina. This trapping system complemented traditional Maori eel harvesting. In closing, counsel submitted that the Bay of Plenty Electric Power Board had ‘gone to great lengths to preserve eel populations in the Rangitaiki River above the Matahina Dam’.<sup>69</sup>

### 6.8 CLAIMANT SUBMISSIONS

The claimants stated that they had not been consulted about the eels. Indeed, several of their spokesmen were frankly sceptical that the transferred eels would survive; trout and shags would eat them. Unless eel channels were built, eels would be unable to reach the sea to breed. There was only one way for eels to survive – to come and go freely – and this was known by the powers that be.<sup>70</sup>

Ms Ertel, in closing, submitted that the Crown’s failure to protect the eel fishery was highlighted by Mr Alexander’s evidence that it had not appreciated the effects of the Matahina Dam on eel reproduction.<sup>71</sup> The Crown had also failed to protect the claimants’ customary rights in the eel fishery by allowing it to come under stress from commercial fishing before the construction of the Aniwhenua and Wheao power schemes and by failing to ensure that the power schemes did not exacerbate the stressed fishery.

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67. Charles Mitchell, oral submission on behalf of third party interests, second hearing, 30 August 1994, tape 5, side B, 0356–0380

68. Document C15, pp 11–12

69. Document D4, p 2

70. Thomas Higgins, oral submission on behalf of the claimants, first hearing, 10 November 1993, tape 3, side A, 4200–4222

71. Document D2, p 23

Although in recent years the Crown and Bay of Plenty Electricity had come to acknowledge some responsibility in assisting the migration of adult eels downstream, the capture and release process failed to take account of the traditional Ika Whenua belief and body of knowledge; namely, that elvers migrate by following the scent of their parents.<sup>72</sup> The scientific uncertainty in this area was confirmed by Mr Mitchell in cross-examination. The elver pass, constructed in 1992, had only one of the two entrances in the original design, and they had been lobbying the Electricity Corporation of New Zealand ever since. The best guess Mr Mitchell could make was that, for every thousand elvers making it over the dam, one might survive to be a migrating adult. The laissez-faire policy of the 1970s had endangered the eel fishery. The Crown, in breach of the Treaty, allowed the fishery to be exploited:

The Crown failed to ensure that Maori retained authority over their fishery. The power to regulate and protect the fishery was not left, in a legally enforceable sense, with Maori.<sup>73</sup>

#### 6.9 ISSUES ARISING FROM CLAIMANT CONCERNS

An important issue arising from the claimants' concerns and the Crown's responses was whether or not Te Ika Whenua were appropriately and sufficiently consulted as Treaty partners over the construction of the dams for power generation and the eel replenishment scheme. Underlying this issue was the more general and fundamental issue arising from the claimants' Treaty rights to tino rangatiratanga and the Crown's Treaty rights to kawanatanga. These issues are examined in chapters 8 and 9.

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72. Ibid, pp 20–21

73. Ibid, pp 22–23; see also doc c19, p 3

