

CHAPTER 8

ISSUES: TE TINO RANGATIRATANGA

8.1 TINO RANGATIRATANGA OVER THE RIVERS AS AT 1840

The evidence outlined in our opening chapters illustrates that the claimant hapu exercised tino rangatiratanga over the rivers within their rohe as at 1840 and for many decades thereafter. It further illustrates that these rivers ‘jointly and severally’ were and still are their tipuna awa and taonga.

Although the Crown in article 2 of the Treaty of Waitangi guaranteed to the claimant hapu te tino rangatiratanga over these rivers for as long as they wished to retain them, and the claimants say that they have never wished to relinquish their tino rangatiratanga, the evidence shows that it has been seriously undermined by Government actions, policies, and omissions. More particularly, this has been through the introduction and application of the *ad medium filum aquae* rule, which has seen the owners unknowingly divested of title to beds of rivers when riparian lands were sold (in many cases to the Crown); also through legislation empowering the Crown to manage and control the water in the rivers for hydroelectric power generation and other purposes. In consequence, the claimants’ hapu contend that they have been denied their customary and Treaty rights to use, occupy, control, and enjoy these rivers and have sought relief under this claim.

Crown counsel Terence Arnold, in his opening submissions, accepted that as at 1840 the iwi or hapu making up Te Ika Whenua held mana over portions of rivers and tributaries associated with the lands over which they held mana at that time. He pointed out that Ms Ertel, in opening, and Maanu Paul, in cross-examination, had accepted that persons could sell or relinquish control over taonga inextricably linked with that land, and that, if this were done voluntarily, the article 2 guarantee would no longer apply. A Treaty breach in respect of such alienation could arise if the Crown failed in its fiduciary obligation actively to protect taonga.<sup>1</sup> For reasons we examine later (see sec 8.4.3), the Crown did not see mana over rivers as separate from and unrelated to mana over adjoining lands but as being coextensive with mana over land.<sup>2</sup>

Mr Arnold emphasised that there were overlapping claims, and he expressed concern that the extent of the rohe claimed by Te Ika Whenua had not been established or settled. If the Tribunal found for the claimants, then the Crown was concerned that the territory was properly defined so that it knew with whom to

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1. Document C14, p 11

2. Ibid, p 12

negotiate.<sup>3</sup> Apart from its concern over the extent of the proper boundaries of the rohe and the extent of Te Ika Whenua's interest in the rivers and streams, the Crown did not dispute that as at 1840 the claimant hapu were tangata whenua of the rohe and that the rivers and streams formed part thereof.<sup>4</sup> The Tribunal accepts this position.

### 8.2 THE RIVERS AS TAONGA OF TE IKA WHENUA

Evidence has been given as to the importance of the river system to the hapu of Te Ika Whenua. We do not need to revisit this evidence but observe the general importance of river systems to tangata whenua. In the case of Te Ika Whenua, we have been presented with evidence of a harsh, not very fertile land, a severe climate, and an almost total reliance on their river system for sustenance. To them, the rivers were a life force, a taonga of inestimable value.<sup>5</sup> We accept that they were part of the psyche of Te Ika Whenua, that they formed and still form a large part of the lives of the people, and that they were and still are regarded as taonga.

We note that our finding is consistent with that of the Mohaka River Tribunal, which found that the Mohaka River was a taonga of Ngati Pahauwera when the Treaty of Waitangi was signed in 1840 and remains so today.<sup>6</sup>

Similarly it is consistent with the comments of the Pouakani Tribunal that in 'local Maori terms', the Waikato river 'was, and still is, regarded as a taonga, a highly-prized resource, by the hapu who occupied the area'.<sup>7</sup>

### 8.3 DID THE CROWN FAIL TO PROTECT TE IKA WHENUA'S CUSTOMARY AND TREATY RIGHTS TO THE RIVERS?

In the Maori text of article 2 of the Treaty of Waitangi (signed by most chiefs, except those at Waikato Heads), the Queen agreed to preserve to the chiefs, the hapu, and the people 'te tino rangatiratanga' over their wenua (land), kainga (villages), and taonga.

The English text, on the other hand, guaranteed to:

the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

While the term 'te tino rangatiratanga' has been the subject of much interpretation and comment, in the context of this claim we see no need for further detailed

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3. Document D5, pp 8–9

4. Ibid, pp 2, 10

5. See Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 2.4

6. Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications, 1996, sec 6.3

7. Waitangi Tribunal, *The Pouakani Report 1993*, Wellington, Brooker's Ltd, 1993, sec 16.2

examination or analysis. The Tribunal in earlier reports has variously described ‘te tino rangatiratanga’ as ‘full chieftainship’, ‘tribal self-management’, and ‘full authority’.<sup>8</sup> Generally, it appears accepted that the term, applied to taonga, means authority and control.

In the *Mohaka River Report 1992*, the Tribunal in its consideration of tino rangatiratanga made reference to two earlier reports as follows:

In both the *Muriwhenua Fishing Report* and the *Ngai Tahu Sea Fisheries Report*, the tribunal referred to three main elements embodied in the Treaty guarantee of rangatiratanga:

First, authority or control, since without it the tribal base is threatened. Secondly, the exercise of that authority must recognise the spiritual source of the taonga; thirdly, the exercise of authority was not only over property but over persons within the kinship group and their access to tribal resources.

In addition the *Ngai Tahu Sea Fisheries Report* emphasised that an important element in rangatiratanga is trusteeship.

To use the words of the Ngai Tahu tribunal:

While rangatiratanga is best defined in its own context, there are some principles of general application. . . . Rangatiratanga includes management and control of the resource and reciprocal obligations between those who actually harvest the resource.<sup>9</sup>

As far as the word ‘taonga’ is concerned, it has a more exclusive meaning of special significance than is denoted by the word ‘properties’. It is a highly prized and precious treasure, something of inestimable value. Applied to nga awa (the rivers), not only does it describe a food source and a means of sustenance for the hapu of Te Ika Whenua; it represents their ‘spiritual and physical mana’.<sup>10</sup>

The case for the claimants is that, in the words of the Treaty, the rivers were ‘other properties’, ‘taonga’ guaranteed to the hapu of Te Ika Whenua. This was the position in 1840 and still is, there being no argument by the Crown that the rivers were not included in the article 2 guarantees.

The essence of Te Ika Whenua’s claim is that they never voluntarily relinquished their possession or control of the rivers and that their loss of ownership of the beds of the rivers and the Crown’s appropriation of the management and control of the waters is a breach of the Treaty principle of active protection contained in article 2. We accept that, while Te Ika Whenua still exercise vestiges of te tino rangatiratanga, there is no legal recognition of this in accordance with Treaty principles.

Ms Ertel called evidence to show that legislation affected Te Ika Whenua’s authority and enjoyment of the rivers. Predominant in this legislation were the statutes that gave water rights to the Crown and made provision for the local Aniwhenua and Wheao power schemes (see secs 5.1–5.4.3). The impact of these schemes changed the character of the Wheao and Rangitaiki Rivers (see sec 6.2.1).

8. See, for example, Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, secs 4.6.6–4.6.7, and *The Mohaka River Report 1992*, sec 5.5.2

9. *The Mohaka River Report 1992*, sec 5.5.2

10. Compare with *The Mohaka River Report 1992*, sec 2.6

To people who see themselves as kaitiaki or traditional guardians of the mauri of the river, this was undoubtedly an affront to their values. In the words of the Manukau Tribunal, ‘it was as though not just their beliefs had no status, but they as a tribe and as a people had no status’.<sup>11</sup>

The Aniwhenua and Matahina Dams depleted eels and other native fish, causing the loss of an important food source. This severely limited the capacity of the claimants to fulfil their traditional obligations to host (manaaki). It also impacted on the way they related to each other and to their rivers, all of which the Crown failed to appreciate (secs 6.5.1–6.5.2). The Tribunal sees these matters as a consequence of the serious undermining of te tino rangatiratanga.

While there are now provisions under the Resource Management Act 1991 for consultation with tangata whenua,<sup>12</sup> these could be likened to recognition of tangata whenua as a party with a special interest, not one with authority and control commensurate with tino rangatiratanga over taonga or property. It is not surprising that the claimants allege that consultation was inadequate over the Kioreweku proposal (see sec 6.4) and the eel replenishment scheme (see secs 6.5–6.8), for while some individuals were consulted, there was no attempt made to identify and consult with hapu interests. Although the Act makes specific provision for the protection of Maori values and interests (see sec 5.3.5) – in contrast to the Water and Soil Conservation Act 1967 (sec 5.3.4) – it does not accord to tangata whenua the authority or control over taonga or property guaranteed to them under article 2 of the Treaty.

The Crown did not dispute that it had failed to protect Te Ika Whenua’s tino rangatiratanga over the rivers. Rather, it claimed that Te Ika Whenua had voluntarily relinquished it in selling their riparian lands. The erosion of tino rangatiratanga is not a matter of contention. It is the manner of erosion, either by voluntary relinquishment, as put by the Crown, or by other means in breach of the Treaty, as put by the claimants, that is at issue.

#### **8.4 DID TE IKA WHENUA VOLUNTARILY RELINQUISH TINO RANGATIRATANGA OVER THE RIVERS?**

##### **8.4.1 The Crown’s submissions**

In his final submissions, Mr Arnold contended that Te Ika Whenua, through sales of riparian lands (see sec 3.3.2), voluntarily relinquished tino rangatiratanga over the rivers.<sup>13</sup> He also contended that the claimants had accepted that taonga can be sold and that this concession was supported by the evidence in relation to the sale of the Tawhiuau block, which contained what was to some of the Ika Whenua peoples a sacred mountain, Tawhiuau.

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11. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989, sec 9.3.5

12. See Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker’s Ltd, 1995, sec 9.10

13. Document D5

The Crown did not rely on or endeavour to justify the *ad medium filum aquae* rule as a means of land acquisition consistent with the Treaty and thereby constituting voluntary relinquishment of tino rangatiratanga but put forward alternative arguments, which we now examine.

#### 8.4.2 Riparian land sales

Figure 10 on page 26 shows that most riparian lands were sold in the final quarter of the last century and the early part of this century. The Crown relied very much on these land sales and, in support of its contention that Te Ika Whenua had voluntarily relinquished jurisdiction over the rivers, submitted:

there is strong prima facie evidence that the owners of the riparian lands were willing sellers of that land;  
there is a very strong case in respect of those streams or rivers that were entirely within the boundaries of land sold that mana over those rivers or streams was relinquished when mana over the lands was relinquished;  
in relation to those rivers or streams which form the boundary of lands sold, the position is less clear and, while there is evidence that mana over the rivers was relinquished, the matter is better not resolved until further research has been completed.<sup>14</sup>

Dealing with the first of these submissions – namely, that ‘there is strong prima facie evidence that the owners of the riparian lands were willing sellers of that land’ – we do not accept that there is such evidence. We do, however, have evidence that suggests that costs and expenses incurred by owners in obtaining title through the court were telling factors in inducing them to sell (see secs 3.3.2–3.3.3). Even if we did have evidence that the owners were willing sellers of their lands, we fail to see its relevance to establishing their willingness to relinquish tino rangatiratanga over the rivers. We simply cannot accept the proposition that, even if members of Te Ika Whenua were willing sellers of their lands, then, by implication or inference, they were willing sellers of their rivers or voluntarily relinquished tino rangatiratanga over them. Mr Arnold’s submission fails to take into account the value and significance of the rivers to the tangata whenua, and there is simply no evidence to support the claim that the rivers were included as part of the sale of riparian land.

Secondly, Mr Arnold said that:

there is a very strong case in respect of those streams or rivers that were entirely within the boundaries of land sold that mana over those rivers or streams was relinquished when mana over the lands was relinquished.<sup>15</sup>

In our view, the Rangitaiki, Wheao, and Whirinaki Rivers were taonga and entitled to protection under article 2 of the Treaty. However, the position in respect of tributaries and streams is less clear. There is little evidence to suggest that they too were regarded

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14. Ibid, p 10

15. Ibid

as taonga. Consequently, we find it hard to believe that tino rangatiratanga was retained over streams and tributaries that were contained within the boundaries of land sold and where access to and authority and control over them was eventually lost.

The case for Te Ika Whenua in these circumstances rests almost entirely on the validity or otherwise of the land sales, and the issue of tino rangatiratanga over these streams and tributaries is a question that must be reserved until the land claims are heard.

Mr Arnold observed that, ‘in relation to those rivers or streams which form the boundary of lands sold, the position is less clear and, while there is evidence that mana over the rivers was relinquished, the matter is better not resolved until further research has been completed’.<sup>16</sup> Having agreed to look at the present claim without regard to the validity or otherwise of the land sales, the Tribunal is somewhat surprised by this statement. David Alexander’s evidence showed quite conclusively that from 1878 the Crown presumed that the *ad medium filum aquae* rule applied to all freehold titles to riparian lands unless there was a clearly expressed intention and understanding to the contrary.<sup>17</sup> Furthermore, there was no instance where plans annexed to sale documents showed external boundaries extending into a river, let alone to the middle line.

Notwithstanding the Crown’s contentions, we have no firm evidence that mana over rivers was ever voluntarily relinquished when riparian lands were alienated. We do, however, have firm evidence that, after the land transactions described in Mr Alexander’s evidence, the people of Te Ika Whenua continued to use, occupy, and control their rivers in much the same way as before; but sharing the resources and benefits with incoming settlers (see secs 3.3.3–3.3.5) until the ‘permit culture’ restricted their exercise of customary and Treaty rights (see sec 4.5). Moreover, our general understanding is that very few Maori would knowingly and willingly relinquish mana over land and rivers. The Crown’s case relies essentially on inferences drawn from the fact of sale and the subsequent loss of tino rangatiratanga.

### 8.4.3 The Crown purchase of the Tawhiuau block

Mr Alexander gave evidence that by 31 March 1920 the Crown had purchased the majority of the shares in the Tawhiuau block.<sup>18</sup> Further purchases occurred until June 1921. During the Urewera consolidation scheme in 1921, the Crown sought and was awarded the whole of the block, and the interests of the non-sellers were relocated. We fail to see how this can be accepted as evidence that ‘the people were prepared to sell a taonga’.<sup>19</sup> Wharehuia Heta and three others of Murupara wrote to the Native Minister on 16 October 1916 and gave as the reason for the sale of the land the need to pay survey charges on Crown-granted lands; that is, the family subdivisions:

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16. Document D5, p 10

17. Document C3, p 22

18. Ibid, pp 117–121

19. Document D5, p 12

This (Tawhiuau) mountain is the rangatira mountain of our clans, and its caves contain our dead.<sup>20</sup>

We incline to the view that Maori were prepared to sell this taonga under the pressures placed on them and on the understanding that the mountain would become part of the national Urewera reserve and remain a taonga under the protective mantle of the Crown.

#### 8.4.4 The link between the land and the rivers

Mr Arnold, in his closing submissions, stressed the link between riparian lands and rivers and put the Crown's case thus:

the possession of mana over land surrounding or adjacent to rivers or streams carried with it the possession of mana over those streams or rivers (or parts of them where different iwi occupied opposite banks); and  
relinquishment of mana over the surrounding or adjacent land carried with it the relinquishment of mana over the rivers or streams (unless rights in relation to the rivers or streams were specifically reserved).

This is similar to the philosophy underlying the common law principles as to riparian rights encapsulated (where opposite banks are in different ownership) in the 'ad medium filum' concept.

Had Ika Whenua relinquished mana over the surrounding or adjacent lands as a result, for example, of conquest or of abandonment of the lands they would surely have relinquished mana with the associated rivers or streams. The question is why, where there [sic] relinquishment of mana over land is by sale, the same would not apply.<sup>21</sup>

We note that, in presenting the above submissions, Mr Arnold substituted for 'mana' the words 'jurisdiction' or 'overriding authority and control'. But to Maori, the word 'mana' means many more things.

Mana is acquired by whakapapa and can never be extinguished by Pakeha law, even though the physical exercise of the rights pertaining to it may at the time be 'legally' impossible.

The Crown's notion that mana can be relinquished as a result of conquest or abandonment or through land sales is completely alien to Maori culture and philosophy and is a misunderstanding of Maori land tenure. In traditional Maori society, conquest rarely if ever resulted in abandonment of land. Those who fled and lived in exile eventually returned and resumed their use rights. After conquest, it was mana over people not land that would have been affected. If victors migrated and resettled in the territory of the vanquished, they incorporated the original occupants for greater security or were themselves incorporated. Through intermarriage, they validated land rights (cf secs 2.2, 3.2.1, 3.2.4).

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20. Document C3, pp 118–119

21. Document D5, pp 12–13

At the time of the land sales, alienation of land interests by individuals unrestrained by whanau and hapu considerations was novel and absolute alienation of land and rivers was generally inconceivable. The Maori concept of land sales in post-contact years was essentially reciprocal, a new form of traditional gift exchange and hospitality.<sup>22</sup> The use of rivers was shared with settlers as part of their rangatiratanga. As was said at section 5.1 of the *Mohaka River Report 1992*, ‘Far from relinquishing any of their mana or control,’ the sellers ‘were using their mana or control to invest in the future development of a resource and for the benefit of a people.’

The Crown endeavoured to establish a link between lands and rivers by reference to Native Land Court title hearings containing evidence of use of rivers and streams for eeling in support of ownership of adjoining land. In this, it relied very much on the evidence and conclusions of Mr Alexander, who observed that:

In a number of cases river-related activities such as eel fisheries, and (in the case of Kuhawaea) a dam, were referred to before the Court to substantiate occupation of the riparian lands. The river was an important feature of adjoining lands. As the Maori Appellate Court said in relation to the Wanganui River [*In Re the Bed of the Wanganui River* [1962] NZLR 600, 619 (CA)]:

... claims of ownership and use of eel weirs were frequently given in proof of occupation and ownership of such lands ... the ownership of the riparian lands would likewise have a very large bearing, if not indeed a decisive one, upon the ownership of the bed of the river that lay within such lands.<sup>23</sup>

Mr Alexander found no evidence in the Native Land Court records he had examined ‘to suggest that the rivers were separately distinguished from the lands adjoining them’. In his belief, ‘historically the river and the adjoining lands were so interlinked as to be indistinguishable’.<sup>24</sup> Nor did he find anything he would interpret as an expression of tino rangatiratanga concerning the rivers or that would give the Crown reason to believe that there was a grievance about rivers.<sup>25</sup>

We find that the references to rivers and streams in support of claims to land ownership are understandable, since in establishing the right to title in the Native Land Court, the question of occupation and use of land played an important part. For this reason, it was common to refer to physical landmarks such as mountains, streams, and rivers and to the use of resources, kainga, cultivations, and hunting and fishing grounds as evidence of occupation.

As we have seen, rivers were and are regarded differently from land. They have separate physical characteristics, provide distinctive resources and benefits, and possess their own mauri (life force) and spiritual being. They constitute whole and indivisible entities, not being separated into bed, banks, and waters. Though the rivers and the land are all in one rohe and under the tino rangatiratanga of the hapu,

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22. Compare with Waitangi Tribunal, *The Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 1.3

23. Document C3, p 122

24. Ibid, p 123

25. Ibid, p 125

we cannot accept, in the absence of any firm evidence, the Crown's argument that where riparian lands were sold such sales automatically included rivers to the middle line. Nor do we accept that, by implication, Maori, because of customary links between the lands and the rivers, generally understood the *ad medium filum aquae* rule. Both arguments are based on presumptions that the Tribunal has already rejected in the *Mohaka River Report 1992*.<sup>26</sup>

#### 8.4.5 'I roto i te awa' and 'i roto o te awa'

Mr Arnold referred to the use of the words 'i roto o' and 'i roto i' in correspondence and documents relating to Crown purchases as evidence that Ngati Manawa understood that control of the rivers went with control of the land.<sup>27</sup> Mr Alexander instanced examples in relation to the boundaries of the Crown purchases of Kaingaroa 1 and Kuhawaea 1. In English, the words 'i roto i Rangitaiki awa' were 'thence down the Rangitaiki River' and the words 'i roto o te awa o Rangitaiki' were 'thence in the Rangitaiki River'.<sup>28</sup> Other English renderings of 'i roto o Rangitaiki' and 'i roto o te awa o Whirinaki' were 'bounded . . . by the Rangitaiki River' and 'thence . . . by the Whirinaki'.<sup>29</sup>

Mr Arnold emphasised that the Crown's argument as to the relationship between the land and the rivers and streams did not depend on the interpretation given to the words 'i roto i te awa'. He suggested, however, that the Crown's argument might be assisted if the words were interpreted as meaning 'in the river'; but even if they meant 'along the river', the Crown's submission remained good.<sup>30</sup> At that point, the Crown was 'simply . . . not able to identify precisely what the parties had in mind when they used the term'.<sup>31</sup> Accordingly, it was agreed by both parties that Mr Arnold would prepare written questions for Professor Karetu of the Maori Language Commission.<sup>32</sup>

In response, Professor Karetu supported wholeheartedly a comment by Lyndsay Head in her report to the Tribunal on Maori land boundaries to the effect that further research was required to ascertain the difference between 'i roto i te awa' (translated as 'within the river') and 'i te awa' (translated as 'along the river').<sup>33</sup> He felt quite strongly that it was 'crucial' in coming to a decision about the most appropriate translation to take cognisance of the background of the documents in which the words were used.<sup>34</sup>

In light of the Crown's conclusion that, on the evidence available, the position was unclear,<sup>35</sup> the Tribunal sees no need to pursue the matter further. It notes, however,

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26. *The Mohaka River Report 1992*, sec 3.7

27. Document C14, pp 12–13

28. Document C3, pp 48, 53–54

29. *Ibid*, p 54

30. Document D5, p 16

31. *Ibid*, p 17

32. Paper 2.56(a); for these questions, see paper 2.56(b)

33. Document C2, p 45

34. Paper 2.57

35. Document D5, p 17

that the various interpretations of the words ‘i roto o te awa’ and ‘i roto i te wai’ presented in evidence at the hearing of the Mohaka River claim did not help that Tribunal resolve the problem of ambiguity in a deed of sale over a river boundary.<sup>36</sup>

#### 8.4.6 Reserves

Mr Arnold tried to show ‘an understanding that rights to use the river went with ownership of the bank’ by pointing to the Ngati Manawa petition to Parliament in 1924 in relation to the sale of the Kaingaroa 1 block. Among other things, this petition alleged that the Crown failed to set aside a reserve (Kiorenui) that was intended for use as a fishing ground.<sup>37</sup>

Elaborating on the necessity to provide bush and river reservations for trapping birds and rats and for food gathering and planting, Mr Arnold submitted that river reservations were also needed for access to the resources of the river:

The fact that the need . . . was discussed between local Maori and Government officials suggests that it was understood that, without such reservations, Maori would not have access to important natural resources.<sup>38</sup>

With regard to the 1924 petition, Mr Arnold noted that the commissioner who investigated it rejected the claim in relation to the Kiorenui reserve and submitted that what the petition did tend to show was ‘that Ngati Manawa understood that rights to use the river, for example for fishing, went with ownership of the bank. Accordingly they needed to reserve some of the bank for the purpose of fishing.’<sup>39</sup>

Our assessment of this evidence is that, while it illustrates that Ngati Manawa were aware of the need to reserve riparian land and fishing grounds from Crown purchase, it did not constitute an acknowledgement that the river itself or jurisdiction over it passed as a consequence of the Kaingaroa 1 purchase. Furthermore, because land, not river, was reserved, rights to use the river were not an issue. Indeed, the allegation that the Crown failed to set aside the Kiorenui reserve supports the argument that the petitioners believed that the Crown purchase cut off their access to the river, which they needed for the continuing exercise of their customary river rights.

#### 8.4.7 The wider context

Mr Arnold submitted that, when considering the issue of whether mana over rivers and streams was relinquished when mana over riparian lands was relinquished, there were at least two other factors that needed to be taken into account. First, the changing economy, which meant that at least some of the people of the area considered that they could operate within the money economy and so, at least to

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36. *The Mohaka River Report 1992*, sec 3.5

37. Document C14, p 13

38. Document D5, p 18

39. *Ibid*, p 19

some extent, neglected their traditional culture and food gathering activities; and, secondly, the various reservations made for Ngati Manawa to use as food sources, which, together with unsold areas, may well have been adequate for the needs of a relatively small population.<sup>40</sup>

We have already outlined the economic and social changes that occurred in the claim area in the nineteenth and early twentieth centuries and the extent to which Ngati Manawa and other hapu participated in the money economy (see secs 3.2.2, 3.2.4, 3.3.3–3.3.5, 4.1–4.3). The conclusions we drew were that the river remained a continuing source of food and spiritual sustenance for the people and that they never wished to relinquish rangatiratanga over it. Rather, this was usurped by the Government through the application of a common law principle and legislation designed mainly for the purposes of forestry, the Murupara project, hydropower schemes, towns, and recreation. Consequently, we reject any inference that these factors influenced the hapu of Te Ika Whenua voluntarily to relinquish mana and tino rangatiratanga over the rivers.

## 8.5 OVERLAPPING CLAIMS

In his closing submissions for the Crown, Mr Arnold referred to various overlapping claims as follows:

- *Ngati Tahu*: Ngati Tahu have notified a claim, the boundaries of which go from Onepu across the Rangitaiki River to Ngapuketuruua, back across the Rangitaiki to Wairapukao and from there towards Waiotapu – see document B3, p 3 and enclosure 2.1. Importantly for present purposes the Ngati Tahu claim covers the upper portion of the Rangitaiki River, including the area where the waters of the Rangitaiki are diverted into the Wheao. Wai 288 is a claim by Ngati Tahu for the Kaingaroa Forest;
- *Tuhoe*: Tuhoe have lodged a claim for the Whirinaki River (see Wai 36) and have indicated that they are researching a claim for the Rangitaiki River or some part of it – see Doc A10. Tuhoe have made it plain that they do not accept Ika Whenua's claimed rohe or right to represent the tangata whenua of the area – see Doc A10 pp 4–6;
- *Ngati Tuwharetoa*: Ngati Tuwharetoa have filed a claim (Wai 269) to the Kaingaroa Forest Crown lands;
- *Ngati Awa*: Ngati Awa have advised that they wish to prepare and present a claim in respect of the Kaingaroa Forest – see letter from Martelli McKegg Wells & Cormack to Waitangi Tribunal dated 26 August 1994.<sup>41</sup>

Mr Arnold went on to state that the claims had not been fully particularised or researched and that, when they were, the areas of conflict may be reduced or eliminated. The Crown was concerned to ensure that, whatever process was adopted for resolving Te Ika Whenua's claims, no other group either had cause for complaint

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40. Document D5, pp 19–20

41. Ibid, p 8

that their rights had been adversely affected without their having had a proper opportunity for input or could raise the question as to whether the Tribunal had adhered to its obligations to comply with the rules of natural justice.

We note the point made by the Crown. This claim proceeded only after considerable consultation and has attracted reasonable publicity. We would therefore have expected any of the possible overlapping claimants to have made representations had they any concerns over the claim proceeding. We are also aware of a claim filed by Potaka Dewes for various Arawa tribes to which the same comment would apply.

Of those tribes mentioned by Mr Arnold, Tuhoe were present at the hearing and were represented by Mr Nikora, who was happy for the claim to proceed, subject to the caveat that the question of boundaries and representation for Ngati Patuheuheu might have to be resolved at a later date. For Ngati Tahu, Timoti Rangitatau at Tipapa Marae supported Te Ika Whenua's claim and then said:

In terms of boundary overlaps, or even river boundary overlaps, there are processes, culturally appropriate processes that have been put in place by Ngati Tahu and Te Ika Whenua which are still in consultation at the moment. There is no contention there, there is some slight disagreement and differences of opinions perhaps on where the stones were a hundred years ago, but, in terms of resolving that, we believe that the appropriate processes are in place and we have met several times and will continue to meet as a united iwi in this particular case and other cases that we have coming up. So I want to expel the fact that there is dispute between Ngati Tahu and Te Ika Whenua in terms of this river claim, and I just wanted to make that clear this morning.<sup>42</sup>

Ngati Awa, in correspondence from their solicitor, indicated that they did not want to be heard unless the Ika Whenua claim extended to, or northward of, Lake Matahina on the Rangitaiki River.<sup>43</sup>

There is no doubt that the rohe of Te Ika Whenua comprises the major part of the area claimed and that the overlapping claims are in the perimeter areas. Notwithstanding, any finding will be only in respect of the lands within the rohe of Te Ika Whenua and will be subject to the qualification that the rohe is subject to competing claims and has to be finally settled. A finding and recommendation may provide a catalyst to the resolution of the rohe. We are mindful that there are other procedures available to promote the settlement of disputes over rohe and representation, and no doubt these could be implemented if the Crown sought to negotiate. In any event, the rohe may be settled as part of the land claims, the determination of which would appear to be only a matter of time.

For the foregoing reasons, we do not see that it is imperative that the rohe be settled before we make a finding on this claim.

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42. Timoti Rangitatau, oral submission on behalf of third party interests, first hearing, 11 November 1993, tape 5, side A, 4504-4543

43. Paper 2.60

## 8.6 CONCLUSION

In this chapter, we have addressed both the issue of whether or not the claimant hapu voluntarily relinquished their tino rangatiratanga over the rivers and the Crown's substantial argument that they did so through the sale of riparian lands. We note, however, that the Crown's argument was intended to show that such voluntary relinquishment was independent of any application of the *ad medium filum* rule.

In its final submission, the Crown concluded that:

it is impossible for the Tribunal to be satisfied at this stage that the owners of the riparian lands did not relinquish mana over the rivers and their tributaries when they relinquished mana over the riparian lands by selling them. As to the rivers and streams *within* the various blocks, there is a strong case that mana was relinquished. As to the rivers which *border* blocks, there is significant evidence that mana was relinquished. Further evidence is likely to emerge as further research is carried out on the land transactions. [Emphasis in original.]<sup>44</sup>

The focus of the Crown's initial argument was to show that, by the land sales, tino rangatiratanga was voluntarily relinquished. Its final submission, however, did not support voluntary relinquishment but used these facts to further a negative argument: namely, that it was impossible for the Tribunal to be satisfied that the owners of riparian lands did not relinquish jurisdiction over the rivers when selling their lands.

In dealing with the Crown's argument under the various subheadings, we have commented that there is no firm evidence to support the contention that the owners disposed of their interest in, or tino rangatiratanga over, the rivers as part of or allied to the sales of riparian lands. While those sales may have made physical access to the rivers difficult, that does not mean that title or tino rangatiratanga must pass or be surrendered. Where land is difficult of or without access, title or control does not pass with the purchase of adjoining land. Why then should the position with rivers be any different?

We can accept that some of the owners of riparian lands may well have contemplated a lesser use of their riparian rights or a sharing of rights for a variety of reasons as the result of such land sales. However, this is an entirely different proposition from an acknowledgement that their rights and interests in, or tino rangatiratanga over, the rivers passed with such sales. In presenting the argument that, because of the links between the lands and the rivers, the owners in selling riparian lands voluntarily relinquished their rights to the rivers, the Crown evidences a lack of understanding of Maori land rights and tenure.

The anthropologist Joan Metge described the system as follows:

Under the Maori system of land tenure, rights of occupation and usufruct were divided among sub-groups and individuals, but the right of alienation was reserved to the group. Each hapu of the tribe controlled a defined stretch of tribal territory, which

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44. Document D5, p 20

it guarded jealously. Trespassers and poachers were punished severely, and persistent border violations led to fighting even between hapu of the same tribe. Within hapu, whanau, nuclear families and individuals held rights of occupation and use over specific resources: garden plots, fishing-stands, rat-run sections, trees attractive to birds, clumps of flax, and shell-fish beds . . . the rights of individuals and lesser groups were always subject to the over-right of the greater group.<sup>45</sup>

As from about 1865, the awarding of undivided interests in land to individuals, who were allowed to dispose of those interests, was a concept entirely alien under the Maori system of land tenure just described. That system stressed the over-right of the hapu to control its territories. We therefore find it inconceivable that vendors would even remotely contemplate that the sales of interests in lands would carry with them the transfer of or extinguishment of rights in rivers when the rights of alienation thereto were reserved to the hapu.

Under the terms of the Treaty, the Crown guaranteed to Maori ‘full exclusive and undisturbed possession’ of their properties, ‘so long as it is their wish and desire to retain the same in their possession’. This was a positive guarantee. If title and possession of property has passed from Maori to others so as to free the Crown from such guarantee, then surely the onus rests with the Crown to show that Maori have willingly given up the wish and desire to retain such property. In the present case, however, the Crown seeks to establish that, regardless of the application of the *ad medium filum* rule, Te Ika Whenua voluntarily relinquished tino rangatiratanga as part of the land sales. Having regard to the fact that title to the bed of the rivers passed by virtue of that rule and was instrumental in the loss of tino rangatiratanga, the onus of proof of the alternative proposition must rest with the Crown.

The Crown has argued that the *contra proferentem* rule should not be applied against it. This rule provides that, where there is an ambiguity in a document, it should be construed against the party who drafted or proposed the law or document. We do not see the above determination as an operation of this rule. The Crown has propounded an alternative argument on the loss of tino rangatiratanga, and the onus rests with the Crown to prove such argument.

It is inescapable that the major factor in the loss of title and te tino rangatiratanga over the rivers is the application of the *ad medium filum aquae* rule. By operation of that rule of law, title to the middle of the rivers passed to the purchasers of riparian lands. In the *Mohaka River Report 1992*, the Tribunal found that this was an operation of law inconsistent with the principles and guarantees under the Treaty.<sup>46</sup> We agree. At least with the majority of the Te Ika Whenua land sales, the vendors would have had no idea of this law. Although the riverbeds passed on the sale of riparian lands, this could hardly be said to be a voluntary sale or relinquishment of tino rangatiratanga. It is significant that the Crown did not even endeavour to argue voluntary relinquishment based on transfer of title under this principle.

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45. Joan Metge, *The Maoris of New Zealand: Rautahi*, London, Routledge and K Paul, 1976, p 121

46. *The Mohaka River Report 1992*, sec 4.7 passim

While hypothesis is somewhat dangerous in that it can always lead to other hypothetical questions, we might ponder as to what might have happened to the beds of the rivers had it not been for the *ad medium filum aquae* rule. In such a case, where in deeds of sale rivers were shown to be boundaries, title to the beds thereof would neither have passed nor have been created and would have remained as Maori customary title. Whatever the situation, the ownership and tino rangatiratanga of the greater portion of the Te Ika Whenua rivers would not have passed from their hands by virtue of the land sales.

The Tribunal does not accept the Crown's call for further investigation into the land sales before making its finding on the rivers claim. The parties had ample notice of this claim. Following representations by counsel, the Tribunal determined that the validity of the land sales was not an issue on which it had to rule. The question of whether title to the rivers passed under the land sales was always going to be an issue in this claim, and the parties had ample time to research and argue this issue.

Our finding is that the loss of tino rangatiratanga over the rivers by the claimant hapu was primarily brought about by the loss of customary and Treaty rights to those rivers through the application of the *ad medium filum* rule, a principle of law about which the vendors of the various riparian lands had no knowledge. This constituted a breach of the article 2 guarantees in the Treaty and the Treaty principle of active protection. The hapu of Te Ika Whenua did not knowingly and voluntarily relinquish tino rangatiratanga over their rivers, which were and still are taonga.

