

## CHAPTER 11

# FINDINGS AND RECOMMENDATIONS

### 11.1 INTRODUCTION

In the last three chapters, we have dealt specifically with the various issues arising out of this claim and have made comment and findings as we saw fit as well as some recommendations. These issues are not separate or stand-alone entities. Contained within the rohe of Te Ika Whenua, they are all integrally related. The common bond between them is the claimants' right to exercise tino rangatiratanga over properties or taonga – a right recognised by the Treaty. In this chapter, we address the claim as a whole and summarise our findings and make our recommendations. While we do not intend to revisit or restate our comment in detail, some recapitulation will be necessary.

### 11.2 TREATY PRINCIPLES

#### 11.2.1 Section 6 of the Treaty of Waitangi Act 1975

Authority for the Tribunal to act is conferred under section 6 of the Treaty of Waitangi Act 1975. Under section 6(1), Maori may submit a claim if prejudicially affected by any act or omission, policy or practice of the Crown and its agents that was or is inconsistent with Treaty principles. If the Tribunal, after inquiry, finds the claim is well founded, it may, under section 6(3), 'recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future'.

There is no doubt that the claimants' case falls within the ambit of the above section. They complain of the policies and practices of the Crown relative to their rivers and how these have impacted upon the various guarantees contained in the Treaty; that of tino rangatiratanga over the rivers, that of protection of their rights over and interests in the rivers, and that of protection of their fisheries.

Section 6 requires that we assess the claim on the basis of the principles of the Treaty, and as we have dealt with each of the issues raised by Te Ika Whenua, we have referred to the Treaty principles that have applied and that have been breached. These principles are not new but have been enunciated and discussed in a succession of Tribunal reports and court decisions. We therefore see no need to devote a separate section of this report to a detailed analysis and explanation of them but will simply make some brief comments on the major Treaty principles that apply. We consider the

discussion on Treaty principles in the *Mohaka River Report 1992* and the *Turangi Township Report 1995* particularly apposite to this claim.<sup>1</sup>

### 11.2.2 The principle of active protection

As in the *Mohaka River Report 1992*, we find that, of these principles, the most important is that the Crown must actively protect Maori property interests to the fullest extent reasonably practicable (see secs 8.2, 8.3, 8.6).<sup>2</sup> It is derived from the Crown's article 2 guarantee of tino rangatiratanga over properties (taonga) and in our view extends to the right of development (see secs 10.2.4, 10.3.3). That principle was the basis of the Court of Appeal decision in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, where it is notable that in separate decisions each of the five judges of that court supported it. We quote, as indicative of the court's view, from the judgment of Cooke P at page 664:

Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's *Te Atiawa [Report of the Waitangi Tribunal on the Motunui–Waitara Claim]*, *Manukau* and *Te Reo Maori* reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. It should be added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers and reasonable co-operation.

### 11.2.3 The principle of exchange – reciprocity

In the *Turangi Township Report 1995*, the basic overarching Treaty principle of exchange–reciprocity is seen as embodying the principle of protection.<sup>3</sup> This principle is formulated in the *Ngai Tahu Report 1991* and briefly discussed in the *Ngai Tahu Sea Fisheries Report 1992*.<sup>4</sup> It is derived directly from articles 1 and 2 of the Treaty and establishes that the cession of sovereignty (kawanatanga) was conditional upon the continuing guarantee of tino rangatiratanga (full authority and control) (see sec 9.4.1). Applied to the present claim, it follows that the Crown's authority to control and manage Te Ika Whenua's rivers is qualified or limited by Te Ika Whenua's tino rangatiratanga over their taonga.

Closely associated with this principle of exchange are the Crown's fiduciary obligations not only to protect Maori Treaty rights (referred to above) but also to

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1. Waitangi Tribunal, *Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications Ltd, 1996, sec 6.1; *The Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, ch 15
  2. *Mohaka River Report 1992*, sec 6.1
  3. *Turangi Township Report 1995*, sec 15.2.1
  4. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, sec 4.7.5; *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 11.5.1

consult fully with Maori on the exercise of kawanatanga (see sec 9.4.2) and to redress Treaty breaches by taking positive steps to make amends, including compensation for loss.<sup>5</sup>

We do not regard it as part of our brief to consider whether the Crown's assumption of the overall control and management of Te Ika Whenua's water resource for power generation was justified in Treaty terms (see sec 9.3). Rather, we have to consider whether the Crown breached the Treaty principle of exchange and its associated obligations in exercising the powers and responsibilities of government in this way. There is no doubt that the Crown failed actively to protect Te Ika Whenua's Treaty rights (see secs 8.1, 8.3, 8.6) or to consult them as Treaty partners (see secs 9.5.1, 9.5.2) or to compensate them for loss of water power and the right of development (see sec 10.4). In other words, it failed to qualify or limit its exercise of kawanatanga over Te Ika Whenua's rivers in a manner that was consistent with article 2 Treaty guarantees.

#### 11.2.4 The principle of partnership

A further important principle of the Treaty applicable to the present claim is that of partnership. This, too, is well established in earlier Tribunal reports and is authoritatively laid down in the *New Zealand Maori Council* case cited above. It derived from 'a basic object of the Treaty that two people would live in one country . . . a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based on their pledges to one another'.<sup>6</sup>

Associated with this principle is the responsibility of one partner to act towards the other 'in good faith, fairly and reasonably' (see secs 9.4.2, 10.3.3, 10.4); there is also the duty fully to consult one's Treaty partner (see sec 9.4.2). When the Crown assumed the overall control and management of Te Ika Whenua's rivers, it is evident that it did not properly consult with, or give thought or consideration to sharing power with, its Treaty partner (see secs 9.5.1, 9.5.2).

### 11.3 FINDINGS

In the course of this report, we have made various findings and given reasons for them. We now precis those findings in much the same way as the issues to which they relate were presented to us.

#### 11.3.1 Tino rangatiratanga

As to tino rangatiratanga, we find:

- (a) That the Rangitaiki, Wheao, and Whirinaki Rivers are tipuna awa and living taonga of the hapu of Te Ika Whenua.

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5. *Turangi Township Report 1995*, secs 15.2.1(1), 15.2.2–15.2.4

6. *Ibid*, sec 15.3, quoting the Muriwhenua Tribunal

- (b) That the hapu of Te Ika Whenua as at 1840 exercised tino rangatiratanga over the reaches of these rivers within their rohe so as to protect the resources of the rivers for their sustenance and benefit.
- (c) That these rivers were and still are to Te Ika Whenua whole and indivisible entities in contrast to the separate constituent parts as recognised at common law: namely, bank, bed, and water.
- (d) That the title system introduced by the Crown failed to recognise and protect Te Ika Whenua's rights and interests in the rivers and tino rangatiratanga over them.
- (e) That the assumption of ownership of the rivers to the middle line through the application of the common law doctrine of *ad medium filum aquae* differed from and conflicted with the Maori view of 'ownership'.
- (f) That the hapu of Te Ika Whenua had no knowledge or understanding of the presumption of *ad medium filum aquae* when freehold titles were conferred under the Native Land Court system.
- (g) That the sellers of the riparian blocks of land between 1870 and 1920 would not have intended or understood those sales to carry with them the ownership of adjacent beds of rivers to the middle line.
- (h) That those sellers of riparian lands adjoining the rivers did not intend to sell their interests in the rivers or to relinquish tino rangatiratanga over them.
- (i) That Te Ika Whenua did not knowingly and voluntarily relinquish tino rangatiratanga over the rivers.
- (j) That all Government policies, actions, and legislation that effected the transfer of ownership of the riverbeds to the Crown or to private purchasers of riparian lands, or that vested or confirmed exclusive control of the waters in the Crown or third parties, were breaches of the Treaty principles of active protection of taonga, exchange, and partnership.
- (k) That, as a consequence of the various actions referred to, there is now no recognition and protection by the Crown of Te Ika Whenua's right to tino rangatiratanga over the rivers as is guaranteed by article 2 of the Treaty, and Te Ika Whenua are unable to exercise such right.
- (l) That the loss of the ability to exercise tino rangatiratanga has been occasioned in such a manner as to constitute a breach of the Crown's duties and guarantees under the Treaty of Waitangi and, therefore, the principles of the Treaty.
- (m) That the alteration of the waters of the rivers so that the Rangitaiki and Wheao merged into one indistinguishable watercourse resulted in the transgression of the ancient tapu with which the rivers were regarded – the rivers were not only part of the environment of successive generations of ancestors but also part of the ancestral link with both the past and the future, with each river being specific to that linkage. The cultural and spiritual stress and trauma of all this is still evident in the people.

### 11.3.2 The fishery

As to the fishery, we find:

- (a) That the fishery within the rivers of Te Ika Whenua constituted a taonga of Te Ika Whenua as at 1840.
- (b) That such fishery provided an essential food source.
- (c) That the fishery has remained a taonga and Te Ika Whenua have never relinquished their tino rangatiratanga over, and property in, the fishery.
- (d) That the abundance and quality of eels from this fishery contributed greatly to the mana and standing of Te Ika Whenua.
- (e) That the fishery does not constitute a commercial fishery and the claim is not in respect of commercial fishing within the meaning of section 9(a) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
- (f) That the fishery has been gravely depleted through a lack of proper control and through policies and actions of the Crown favouring trout fishing over the customary fishery and permitting the construction of the hydroelectric power schemes, particularly the Matahina and Aniwhenua Dams.
- (g) That the Crown's exercise of kawanatanga in respect of the fishery has been devoid of proper consultation and in breach of the Treaty principles of exchange and partnership and the associated obligations arising therefrom.
- (h) That the Crown has failed to recognise and protect Te Ika Whenua's property in the fishery in accordance with article 2 of the Treaty and that such failure is a breach of the Treaty principles of active protection of taonga and exchange.
- (i) That, in consequence, the Crown has a fiduciary obligation to take all reasonable steps to protect and restore the fishery in full consultation with its Treaty partner.
- (j) That the Crown's restrictions on customary times and methods of fishing constitute breaches of the Treaty principles of protection and exchange and associated obligations.

### 11.3.3 Right to development

As to the right to development, we find:

- (a) That as at 1840 Te Ika Whenua held tino rangatiratanga over, and aboriginal or native customary title to, the lands and rivers within their rohe.
- (b) That, subject to the dictates of custom, Te Ika Whenua were not restricted in their rights of use of their rivers, which were in the nature of a proprietary right or interest, and were free to extend or develop such rights of use as they might from time to time determine as appropriate.
- (c) That, in the event of any other person wishing to acquire rights in the rivers or rights of use thereof, such could be acquired only with the acquiescence and consent of Te Ika Whenua.
- (d) That Te Ika Whenua were entitled to the full protection of such rights by the Crown under article 2 of the Treaty for as long as they wished to retain them.

- (e) That, subject to the Treaty and as envisaged thereunder, Te Ika Whenua shared the use of the rivers with the early settlers.
- (f) That the residual interest of Te Ika Whenua in the rivers included full and unrestricted rights of use, including the right to development, except where those uses were detrimental to or incompatible with the rights of other users.
- (g) That the Crown's actions in conferring the right to generate hydroelectricity on power boards and later privatising them was in breach of the principles of the Treaty in that it failed to qualify the exercise of its power to govern with its Treaty guarantees of tino rangatiratanga over taonga and:
  - (i) to consult properly with Te Ika Whenua as a Treaty partner over the proposals;
  - (ii) to take into account Te Ika Whenua's interest in the rivers, including their right to development;
  - (iii) to attempt to ameliorate the effect and impact of the exercise of kawanatanga upon the needs and aspirations of Te Ika Whenua;
  - (iv) to compensate Te Ika Whenua for the loss of their rights and interests in the rivers; and
  - (v) to acknowledge and respect the position of Te Ika Whenua as a Treaty partner and to encourage Te Ika Whenua in the development of their resource.

#### 11.4 COMMENTARY

##### 11.4.1 Overview

The foregoing findings provide an overview as to the totality of the claim and clearly illustrate a consistent lack of attention by the Crown to the guarantees under article 2 of the Treaty and its effects upon the properties of Te Ika Whenua. No attention was paid to the special nature of the relationship of Te Ika Whenua with their rivers. No attempt was made to provide title to properties or rights or interests in other than lands nor to introduce a system that gave recognition to tino rangatiratanga over their wai tipuna and to customary water rights. Instead, various policies and practices were introduced that aimed at facilitating the acquisition of Maori land and the amalgamation of the two peoples predominantly under English systems and structures.

At all times, strong emphasis was placed by the Crown on its unlimited power of kawanatanga. The development of the forest industry through the 1920s and 1930s and the construction of the hydropower schemes in the 1960s and 1970s took little or no cognisance of Te Ika Whenua's Treaty rights. The Treaty was not, then, part of domestic law and there was no special process whereby Maori could claim rights under it or contest Crown actions that might infringe those rights. There has been some change in that some statutes, notably the Conservation Act 1987, require the principles of the Treaty be given effect to, while others, such as the Resource Management Act 1991, require those principles to be taken into account. Further, the Treaty of Waitangi Act 1975 now allows Maori to bring Treaty grievances before the

Waitangi Tribunal. Nevertheless, the Treaty has yet to be formally adopted as part of New Zealand law.<sup>7</sup>

Throughout those years of development, the Crown was politically dominant. They were times of transition for Te Ika Whenua, who eventually became a labour force for the forestry industry. To ameliorate their social and economic conditions, they had little alternative but to accept and adapt to this process of change. It is thus not surprising that there was little protest over the failure of the Crown to recognise their rights and interests under the Treaty.

Te Ika Whenua have illustrated how various policies and practices of the Crown have undermined their property rights, mana, and tino rangatiratanga and have in recent years produced high rates of unemployment and welfare dependency. Far from active protection, the Crown has deprived Te Ika Whenua of most of their rights and interests in the rivers. In particular, and unbeknown to the claimants at the time, the *ad medium filum aquae* rule brought about much of their loss of the one and only title they were awarded in respect of their rights to their rivers: namely, title to the beds thereof.

We find it noteworthy that the Crown argued that Te Ika Whenua had voluntarily relinquished their interest in the rivers through the sale of adjoining lands, claiming title links between lands and rivers. Such argument, based on inference and implication, hardly accords with the Treaty guarantee of retention of property for so long as desired and the Treaty principle of active protection of such property. Rather, it suggests a dearth of hard evidence to support this argument and an unwillingness by the Crown to apply those Treaty principles to the rivers as taonga of Te Ika Whenua.

#### 11.4.2 Overlapping claims

In section 8.5, we referred to the fact that there are overlapping or competing claims in respect of small areas of the rohe and that questions of representation, particularly for Ngati Patuheuheu, may need to be resolved. Our views on those issues are adequately covered in that section of this report, and for the reasons stated therein, we do not see it as imperative that these questions be settled before making findings on this claim.

#### 11.4.3 Access

The claimants invite the Tribunal to award such other relief as the Tribunal deems fit.

One of the concerns expressed by the claimants was the difficulty of access both to the rivers and to the forests that now form part of Crown land. Permits are generally needed, and time constraints and working hours often make it hard to obtain them. In the context of the claim, access is an important part of Te Ika Whenua's tino rangatiratanga over and ability to utilise their interest in the rivers.

The Crown has long been committed to providing access to lakes, rivers, and seas by means of what is commonly known as the Queen's chain. However, when land is

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7. Compare with *The Turangi Township Report 1995*, secs 15.1.2–15.1.3

acquired by the Crown, it generally takes no steps to provide such access, possibly on the precept that Crown ownership will protect the public right of access, but more probably as lessees and Crown agencies that use such lands seek to restrict access for their own purposes: for example, the protection of forests, stock, and fishing rights. In Te Ika Whenua's case, there is no general right of access because permits are required – a situation that Maanu Paul referred to as the 'permit culture'. The use of land for forestry right down to the banks of the rivers without provision for esplanade reserves militates against public access, and there is no requirement to allow or provide access.

We consider that the provision of access to the rivers is an important ingredient in the restoration of tino rangatiratanga to Te Ika Whenua and that this should be a matter of negotiation between the Crown and the claimants.

## 11.5 CONSIDERATION OF RELIEF SOUGHT

### 11.5.1 As to tino rangatiratanga

The claimants sought the following specific relief in respect of tino rangatiratanga:

- (a) the recognition of te tino rangatiratanga in relation to the Rangitaiki, Wheao, and Whirinaki Rivers, including their tributaries; and
- (b) a recommendation that a system of recognition of the claimants' rangatiratanga be given effect. Such a system should recognise the claimants' beneficial interest in the rivers (including their right to development) and their authority in relation to the management of all aspects of the Rangitaiki, Wheao, and Whirinaki Rivers.<sup>8</sup>

In general terms, the claimants sought recommendations that they be compensated for past breaches of the Treaty and be accorded any other relief the Tribunal deemed fit.

In her closing submissions, Ms Ertel requested the following relief:

- (a) that the management and control functions exercised pursuant to the Resource Management Act 1991 be vested in the claimants; and
- (b) that the regional authority transfer the required financial and other resources to the claimants to enable them to undertake all required functions.<sup>9</sup>

Earlier in those submissions, Ms Ertel traversed various legislative enactments by which the management rights of Te Ika Whenua were appropriated or usurped by the Crown, commencing with the Water-power Act 1903 through to the Resource Management Act 1991.<sup>10</sup> These are dealt with in chapter 5.

Particular reference was made to section 21 of the Water and Soil Conservation Act 1967, under which all rights of management, use, and authority of natural water were vested in the Crown. This legislation was considered by the Tribunal in the *Mohaka River Report 1992*, where it found that the Act was in breach of the letter and principles

8. Claim 1.1(e)

9. Document D2, p 74

10. Ibid, pp 54–55, 58–62

of the Treaty to the extent that it conferred on the central government exclusive control over the waters of the Mohaka. We have made a similar finding in the case of Te Ika Whenua's rivers on the basis that, because tino rangatiratanga was never voluntarily relinquished, the Crown's assumption of exclusive rights of control, without Te Ika Whenua's consent, constituted a Treaty breach.

Current legislation relating to the use of water is the Resource Management Act 1991. Ms Ertel claims that this legislation is inconsistent with the Treaty because it fails to recognise positively:

- (a) Maori ownership of the river and particularly the water; and
- (b) Maori rangatiratanga and the exercise of it.<sup>11</sup>

The *Mohaka River Report 1992* contrasts the Resource Management Act with the Water and Soil Conservation Act 1967 in that:

it requires 'all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources,' to 'take into account the principles of the Treaty of Waitangi' (s 8). It also recognises that the 'relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga' is a matter of 'national importance' (s 6(c)) and that all persons exercising powers and functions under the Act shall have particular regard to 'Kaitiakitanga' (s 7(a)), meaning the exercise of guardianship (s 2).<sup>12</sup>

It is noteworthy that two pages later in that report the Tribunal comments that, while the Crown is entitled to devolve its duties under the Treaty to another authority through carefully worded legislation, it cannot divest itself of its Treaty obligation actively to protect rangatiratanga over taonga. The Mohaka River Tribunal made no finding on whether the Act is consistent with the principles of the Treaty.

We have found that the claimants have been denied the ability to exercise tino rangatiratanga over their rivers. The Crown has been in breach of article 2 and has failed actively to protect the taonga of Te Ika Whenua. While the Resource Management Act requires those administering it or in management to take into account the principles of the Treaty and Maori views and values, it does not confer tino rangatiratanga on tangata whenua or recognise any such status. It simply gives Maori the opportunity to be heard by the controlling body on matters of concern to them; albeit without any funding or assistance by way of proper legal and technical advice – a situation that seems to us to be far removed from the guarantee given under article 2 of the Treaty.

In the *Ngawha Geothermal Resource Report 1993*, the Tribunal found that:

the Resource Management Act is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.<sup>13</sup>

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11. Ibid, p 62

12. *The Mohaka River Report 1992*, sec 5.7.1

13. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 8.4.7

In the *Te Whanganui-a-Orotu Report 1995*, the Tribunal endorsed those findings and drew attention to the absence in that Act of any provision giving priority to the protection of taonga and confirming Treaty rights in the exercise of rangatiratanga and kaitiakitanga.<sup>14</sup>

We agree with those observations and with the view that the Resource Management Act cannot be said to provide compliance by the Crown with the principles of the Treaty relative to those issues.

Ms Ertel, on behalf of the claimants, seeks a recommendation that the management and control function exercised pursuant to the Resource Management Act be vested in the claimants and that the regional authority transfer to the claimants all the required funds and other resources necessary to undertake those functions.

The Crown has a power of kawanatanga that is qualified or limited by the Treaty guarantee of tino rangatiratanga. In exercising that power, it must have regard to Te Ika Whenua's right of tino rangatiratanga over their rivers and their position as a Treaty partner and weigh these against the interests of other users and the national interest. How the Crown addresses its obligation to restore tino rangatiratanga is a matter for it to assess in consultation and negotiation with Te Ika Whenua. We do not therefore consider the suggested recommendation to be appropriate in that it could inhibit the Crown as to the manner in which it seeks to redress its Treaty breach.

Our recommendation will therefore correspond with the claimants' prayer for relief: namely, that a system of recognition of the claimants' rangatiratanga over the rivers be given effect. This is also similar to the recommendation given in the *Mohaka River Report 1992*.

#### 11.5.2 As to the fishery

The relief sought in the amended statement of claim is set out earlier in this chapter (sec 11.5.1) and in respect of the fishery was merely encompassed in the general prayer for relief. In final submissions, the claimants expanded upon their claim for relief, seeking recommendations that the Crown:

- (a) reconstitute the native eel fishery;
- (b) compensate the claimants for the loss of and interference with the traditional fishery;
- (c) declare the lawfulness of the retireti; and
- (d) transfer to the claimants all management functions and adequate resources to undertake those functions.

In section 9.5.2, we considered some of the measures needed to remedy the breach of the Treaty principles of active protection and exchange in respect of the fishery and the Crown's obligation to address its depletion and to safeguard Te Ika Whenua's right to exercise tino rangatiratanga over it. The Crown has a duty to take steps to replenish and protect the eel fishery and to involve Te Ika Whenua in the process and

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14. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995, sec 9.13.5

in its future management so that their tino rangatiratanga is recognised. Our recommendations will incorporate these measures.

We note that problems with the Matahina Dam mean that considerable strengthening and reconstruction work is to be undertaken. We draw the Crown's attention to this because there may be an opportunity to include with such works passes that would accommodate elvers and migrating eels, and if such opportunity exists, it would be a pity for it to be lost.

### 11.5.3 As to the right to development

The relief sought in the amended statement of claim is again as set out earlier in this chapter (sec 11.5.1). In closing submissions, a finding is sought that the development right inherent in the Treaty be not affected by the Court of Appeal decision in the *Te Ika Whenua* case and alternatively, if it be so affected, the claimants seek a recommendation that the Crown legislate to clarify that the Treaty contains a development right.

In chapter 10, we discussed the nature of Te Ika Whenua's interest in the rivers and in particular their interest in the waters. We found that as 1840 Te Ika Whenua had customary rights to their rivers, somewhat akin to ownership, comprising full rights to use of the waters within their rohe, have since shared those rights with other New Zealanders and now hold a residual interest of which they are entitled to protection under the Treaty. They have an inherent right to develop that interest. Where the Crown wishes to use or provide for the development of a resource incorporating such interest, it has duties and obligations to Te Ika Whenua arising under the Treaty.

Our recommendations take these findings and duties and obligations into account.

## 11.6 COSTS OF BRINGING THIS CLAIM

Te Ika Whenua have succeeded in establishing most aspects of their claim. We think that they should be reimbursed by the Crown for any reasonable costs and disbursements incurred in bringing this claim where they exceed any contribution that may have been made by the Tribunal or the Crown Forestry Rental Trust.

## 11.7 RECOMMENDATIONS

We recommend:

- (a) That the Crown enter into discussions and negotiations with Te Ika Whenua to establish a suitable regime of management and control of the rivers that recognises and takes into account the Treaty guarantee of tino rangatiratanga over them, at the same time taking into account the interest of other river users brought about by their sharing.

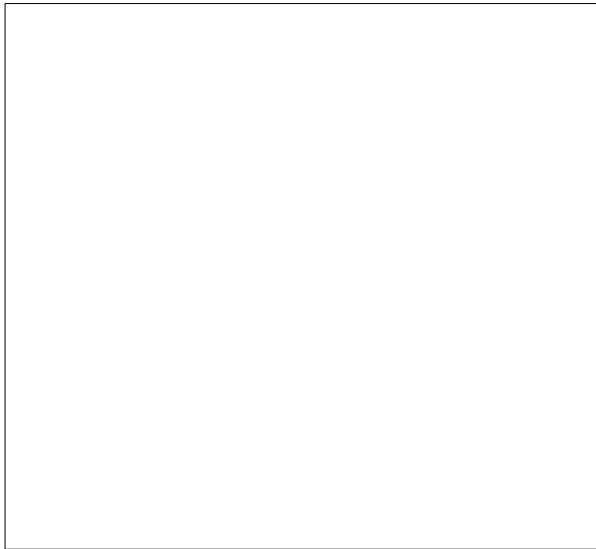
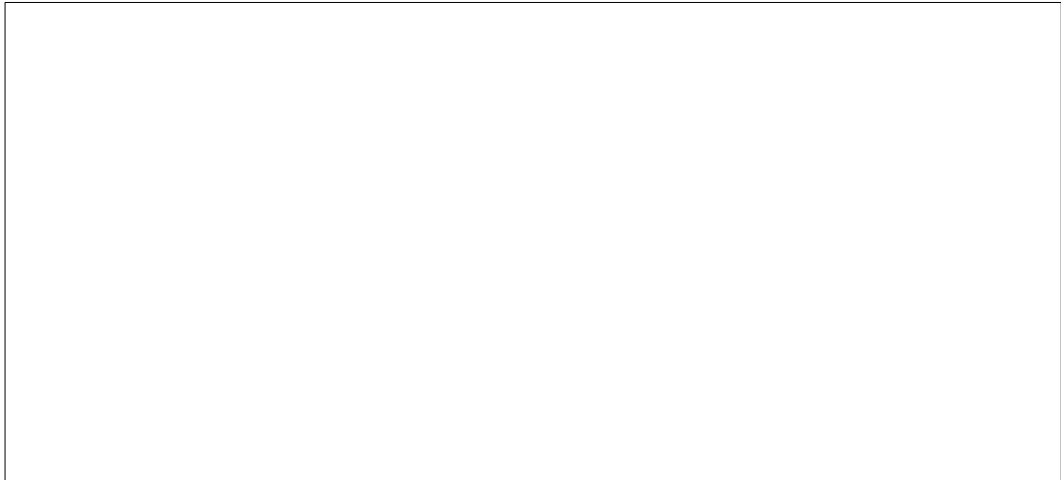


Figure 26: Kathy Ertel and Bert Messent with a retireti board

Figure 25: Hohepa Waiti with himaki

Figure 27: An eel trap



- (b) That the Crown take steps to recognise and protect Te Ika Whenua's residuary rights and interests in the rivers, which we described in chapter 10 as being a proprietary interest akin to ownership.
- (c) That the Crown enter into discussions with Te Ika Whenua as a Treaty partner with a view to reaching agreement over the vesting in them of the bed of those parts of the Rangitaiki, Whirinaki, and Wheao Rivers within the rohe of Te Ika Whenua where title is held by the Crown or as Crown forest land so as to reinforce Te Ika Whenua's right to an interest in the rivers and to compensate them in part for their loss of title through the *ad medium filum* rule.
- (d) That the Crown take steps to provide suitable access for Te Ika Whenua to their rivers and fisheries over Crown and Crown forest lands adjoining those rivers.
- (e) That the Crown compensate Te Ika Whenua for the appropriation and use of their rights to and interests in the rivers for the production of hydroelectric power and for the continued use of such rights and interests for that purpose.
- (f) That the Crown enter negotiations and discussions with Te Ika Whenua to establish a suitable regime of management and control of the native fishery in the rivers that involve Te Ika Whenua and that recognises and takes into account the Treaty guarantees of tino rangatiratanga over and protection of taonga, Te Ika Whenua's customary fishing rights and practices, and the impact of any fishing laws or regulations on those rights and practices.
- (g) That the Crown take all necessary steps to re-establish the native fishery and in particular to replenish the eel fishery by the introduction of suitable measures, including a means to enable elvers and migrating spawning eels to bypass or negotiate the Aniwhenua and Matahina Dams following due consultation and agreement with Te Ika Whenua.
- (h) That the Crown make adequate funds available to Te Ika Whenua to enable them to engage the necessary professional and administrative services to pursue negotiations with the Crown over each of the above recommendations.
- (i) That the Crown reimburse Te Ika Whenua their reasonable costs and the disbursements of bringing the claim, less such costs as have been contributed by the Crown Forestry Rental Trust or the Tribunal.



Dated at Wellington this                      day of                      1998

Judge G D Carter, presiding officer

M A Bennett, member

M B Boyd, member

