

CHAPTER 10

ISSUES: RIGHT TO DEVELOPMENT

10.1 INTRODUCTION

Incorporated in Te Ika Whenua's claim is a right to the development of their interest in the rivers. This right to development is asserted in the prayer for relief set out in paragraph 9 of the amended particulars of claim (see app 1) as follows:

9. The claimants seek the following relief:
- (a) Recognition of te tino rangatiratanga in relation to the Rangitaiki, Wheao and Whirinaki Rivers including their tributaries.
 - (b) A recommendation that a system of recognition of the claimants' tino 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.
 - (c) A recommendation that the claimants be compensated for past breaches of the Treaty.
 - (d) Any other relief the Waitangi Tribunal deems fit.¹

In final submissions, the claimants claimed rights over the rivers in the nature of a proprietary interest and sought findings including that:

- (a) The river as a whole, including the water is a taonga.
- (b) The claimants have a proprietary interest, which can practically be encapsulated within the legal notion of ownership in the waters of the rivers.
- (c) This proprietary interest and relationship between the claimants and the water existed at 1840 and has continually been in existence from 1840 until today.²

In this chapter, we examine Te Ika Whenua's claim to a right to development, including the nature and extent of their interest in the rivers, which we see as an integral part of the present claim and the nub of the relief sought.

1. Claim 1.1(e), para 9
2. Document D2, pp 71-72

10.2 TE IKA WHENUA RIVERS REPORT

10.2 DEVELOPMENT – A TREATY RIGHT

10.2.1 The claimants' view

Inherent in the claimants' argument is the principle that the Treaty does not simply preserve for Maori their customary rights as at 1840 but includes a right to development. Ms Ertel submitted:

The pre-amble to the Treaty specifically envisaged immigration and a place in one country for both people. At the time of the signing of the Treaty all lay ahead, immigration, the development of a new country, good order and a settled form of civil government. The flexibility and adaptability, 'the living Document', nature of the Treaty has as an imperative the development of both Maori and Pakeha. This includes economic and technological development.³

Counsel then quoted from the Tribunal's findings in its report on the Muriwhenua fishing claim to support such an argument:

Maori no longer fish from canoes but nor do non-Maori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other.

The Treaty offered a better life for both parties. A rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty.

A treaty that denied a development right to Maori would not have been signed.

It is the inherent right of all people to develop and progress in all areas. No one has seriously suggested that Maori could not develop their lands on Western lines and sell the produce of their industry.

The Treaty envisaged that Maori would gain greater development opportunities from settlement and access to new markets.⁴

Ms Ertel also pointed to actions by the Crown in ratifying international declarations and instruments as setting for itself minima that it should not fall below when exercising kawanatanga. In particular, she cited the following articles of the United Nations Declaration on the Right to Development adopted by the General Assembly on 4 December 1986 (resolution 41/128), which was supported by New Zealand:

Article 1(1)

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

3. Document B10, pp 8–9

4. Ibid, quoting from *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed, Wellington, GP Publications, 1996, secs 11.6.5, 11.6.6

Article 3(1)

States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

Article 10

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.⁵

To advance her argument that Maori Treaty rights were not frozen in time as at 1840 and contained a right to development, Ms Ertel then quoted from the Tribunal's *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*:

The question of development of rights was a subject of considerable discussion in chapter 10 of the Tribunal's *Ngai Tahu Sea Fisheries Report 1992*. There, the Tribunal noted that it is by now a truism that Maori Treaty rights are not frozen as at 1840. All lay in the future and there would be developments that could not have been foreseen or predicted at that time. The generation of electricity from geothermal energy is surely a good example.⁶

10.2.2 The Crown's response

The Crown limited its response to comment based on the decision of the Court of Appeal in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 as follows:

66. Rangatiratanga appears to be a flexible concept, which can vary both as between peoples and as between situations. In the Mohaka River case the Tribunal described rangatiratanga as 'something more than ownership or guardianship of the river but something less than the right of exclusive use'. Such a general description provides little assistance and seems in the present case to be inconsistent with the Court of Appeal's judgement in the *Ika Whenua* case.

67. The Court of Appeal indicated that Maori interests had to be articulated or capable of contemplation as at 1840. For that reason, the Court found that Ika Whenua had no right under the Treaty to an interest in the power schemes. Viewed in this way, Crown Treaty duties towards Ika Whenua in respect of the rivers will be limited – to recognition of traditional values for food gathering and so on. A consequence of this is that Ika Whenua's mana or rangatiratanga in the rivers, if it continues, will be defined solely by reference to those traditional values.⁷

5. Document B10, p 10

6. Ibid, quoting from *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, Wellington, Brooker and Friend Ltd, 1991, p 22

7. Document D5, p 22

10.2.3 The courts' approach

The courts have made several observations with respect to the principles of the Treaty of Waitangi and, by implication, the right to development. Their approach has been limited by the traditional view expressed in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC): namely, that the court can only recognise or rely on rights under the Treaty to the extent that those rights have been incorporated into statute.

It should be noted that the courts have not been called upon to consider a right to development on the same basis as has the Tribunal. The Tribunal is specifically required under the Treaty of Waitangi Act 1975 to take into account the principles of the Treaty, whereas the courts' consideration is limited to proceedings where those principles are incorporated into statute or otherwise relevant to the proceedings. Nevertheless, there are some statements by the courts that imply a right to development or the need to adapt and apply the Treaty in the light of present-day circumstances.

In *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA), Cooke P did not tie Tainui's interest in coal to its use by them in 1840 but considered that they were entitled to compensation based on a considerable proportion of the resource. At page 529, he said:

The demand for coal and the establishment of the New Zealand coal industry have come largely from European or Western civilisation. Even so coal can be classified as a form of taonga, there was apparently some limited Maori use of it before the Treaty, and there has been the Maori contribution to the industry. A negotiated settlement which recognised as regards coal that Tainui are entitled to the equivalent of a substantial proportion but still considerably less than half of this particular resource could be suggested as falling within the spirit of the Treaty of Waitangi.

The following year, in delivering the judgment of the Court of Appeal in *Te Runanga o Muriwhenua Incorporated v Attorney-General* [1990] 2 NZLR 641, Cooke P referred to the Treaty as a living instrument and the obligations thereunder as ongoing and evolving as conditions change. At pages 655 and 656, he said:

As was said in the *Maori Council* case, the Treaty is a living instrument and has to be applied in the light of developing national circumstances. For most of the 150 years of the lifetime of the Treaty Maori were in general evidently content to raise no objection to Pakeha sea fishing. The resource was abundant. The problem has arisen in recent decades when inshore fish stocks have become depleted and the more valuable fishing areas are at distances from the coast which Maori fishing canoes can have reached at best only sporadically. Certainly the overfishing of traditional Maori fishing grounds has created a situation not foreseen at the time of the Treaty.

and at page 656:

The position resulting from 150 years of history cannot be done away with overnight. The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change. The North American experience is instructive in this respect also.

The Courts there have so exercised their jurisdiction as to bring about or encourage changes with what the Supreme Court of the United States call 'all deliberate speed'. The phrase was used, for instance, in *Brown v Board of Education of Topeka* 349 US 294, 301 (1954), known as *Brown II*, the desegregation case.

The Privy Council in the Maori language case, *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, referred to the obligations of the Crown as being dependent upon the situation that exists at the time, a clear indication of the application of the Treaty to ongoing and changing circumstances. Lord Woolf, delivering the judgement of the Judicial Committee, said at page 517:

Foremost among those 'principles' are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori . . . It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection.

Conversely, the decision of the Court of Appeal in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 was cited by the Crown in this claim as authority for limiting the Crown's duties towards Te Ika Whenua in respect of the rivers to the recognition of traditional values for food gathering and so on.⁸ Cooke P, in delivering the judgment of the court, reasoned at page 24 that (with respect to the right to generate electricity):

The Treaty of Waitangi 1840 guaranteed to Maori, subject to British kawanatanga or government, their tino rangatiratanga and their taonga, or in the official English version 'the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties . . .'. In doing so the treaty must have been intended to preserve for them effectively the Maori customary title, as mentioned in the fisheries case [*Te Runanga o Muriwhenua Incorporated v Attorney-General* [1990] 2 NZLR 641 (CA)] at p 655. But, however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have

8. Document c14(b); for the original judgment, see doc c1

been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840. No authority from any jurisdiction has been cited to us to suggest that aboriginal rights extend to the right to generate electricity. Nor was the argument for the appellants put to the Court in that way. It was not contended that the dams are themselves taonga.

and at page 26 that:

It seems that the obstruction of free passage of migrating eels up and down the rivers has been one Maori grievance. But the assumption of control over the rivers implicit in the construction of the dams is more fundamental. If control has been assumed without consent there may well have been breaches of the Treaty of Waitangi, as the Crown acknowledges. But, as to these two dams non-Maori control has been an accomplished fact for a decade and more. The clock cannot be put back.

We consider the above decision further at section 10.3.5.

10.2.4 The Tribunal's view

The traditional and somewhat muted approach on the right to development adopted by the courts must be contrasted with that taken by the Tribunal. In a number of reports where that right has been an issue, the Tribunal has clearly expressed the view that a right to development of property or taonga guaranteed under the Treaty is indeed a Treaty right.

Earlier in this chapter we referred to Ms Ertel's submissions, which included extracts from the *Report on the Muriwhenua Fishing Claim* supporting the right to development (see sec 10.2.1). The Tribunal followed this with a similar finding as to a right to development in the *Ngai Tahu Sea Fisheries Report*.⁹ Notwithstanding that in both these hearings the Crown contested the right to development, settlement of the fisheries claims was effected by the passing of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The basis upon which settlement was negotiated and reached is not known, but having regard to the amount of the settlement and the extension of the fishery to the 200-mile zone, it is obvious that the settlement did not bind Maori to the exercise of their customary rights tied in time to 1840. Rather, it was a recognition by the Government of their right to the development of property and resources that were subject to the guarantees under the Treaty.

Ms Ertel referred to the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, where the Tribunal found that 'the Rotoma claimants have a Treaty right to develop the geothermal resource lying under their land'.¹⁰ This serves to illustrate that the right to development has been accepted by the Tribunal, not only in the case of fisheries but also where natural resources involving the generation of electricity are concerned.

In contrast to the reports cited above, which are of relatively recent origin, we refer to the *Report on the Motunui–Waitara Claim* of 1983, where the Tribunal said:

9. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, ch 10

10. *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, p 23

The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. . . .

We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.¹¹

Thus, the Tribunal has, over a number of years, consistently upheld the principle that the Treaty did not simply preserve the status quo as at 1840 but that it must be adapted to meet changing needs and circumstances – in other words, it must allow a right of development.

This Tribunal firmly supports the principle that the rights to property and taonga preserved and guaranteed under the Treaty included a right to development and that this right extended to Te Ika Whenua in the case of its rivers.

10.3 THE NATURE OF TE IKA WHENUA'S INTEREST IN THE RIVERS

10.3.1 Introduction

Having found that Te Ika Whenua has a right to development in the case of its rivers, a number of questions arise. What is the extent of that right? Is it qualified in any way by the application of the principles of the Treaty or by the nature of the interest in the rivers? Did Te Ika Whenua 'own' the rivers? Is the right to generate electricity from water power excluded by the Court of Appeal's 1993 *Te Ika Whenua* decision?

We now proceed to examine these questions.

10.3.2 The position as at 1840

In pre-Treaty times, Te Ika Whenua held tino rangatiratanga (territorial jurisdiction) over its rohe. While individual members of the hapu or whanau may have held customary use rights to areas of land and rivers, it was the hapu that held territorial rights and through which such use rights were derived. We would, however, caution that we must not confuse tino rangatiratanga with modern 'ownership'. Customary rights and traditional ownership were displaced by the systems of title introduced by the Crown. From 1865 on, when Crown grants and Native Land Court title were awarded, seldom to hapu but normally to individuals on the basis of ancestry, occupation, and use, 'ownership' was thereby acquired, notwithstanding that tino rangatiratanga remained with the hapu.

Maori or native rights are often described as aboriginal rights or title or native customary rights. The use of these terms often leaves the impression that these are simply use rights or possessory rights – in law, something less than full title. In *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR

11. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara Claim*, 2nd ed, Wellington, Government Printing Office, 1989, sec 10.3

20, the Court of Appeal referred to the terms ‘Maori customary title’ and ‘aboriginal title’ as being interchangeable. At page 24, the court commented that at one extreme ‘they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law’ and at the other extreme as ‘at best a mere permissive and apparently arbitrarily revocable occupancy’. In rejecting the submission of Te Ika Whenua that aboriginal or customary title to its rivers included the right to generate hydroelectric power, the Court of Appeal left the impression that it regarded such title as fixed in time and something less than full title.

This raises the question as to what is guaranteed under article 2 of the Treaty. Is it full rights of proprietorship or merely customary use rights? Article 2 guarantees ‘full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties’. In our view, the guarantee of exclusive and undisturbed possession could not be maintained if the Treaty were construed as merely guaranteeing existing use rights and the territorial authority or tino rangatiratanga of the hapu were not taken into account.

Furthermore, the Treaty constitutes an acknowledgement by the Crown that Maori were the sovereign people of New Zealand. In article 1, the chiefs ceded to Her Majesty the Queen ‘all rights and powers of Sovereignty’ that they exercised or possessed ‘over their respective Territories as the sole Sovereigns thereof’. The recital preceding the execution of the Treaty refers to the chiefs ‘claiming authority over the Tribes and Territories which are specified after our respective names’. The nature and intent of the Treaty is clearly to recognise the territories of the chiefs and tribes, and article 2 is a full and unequivocal guarantee as to the exclusive and undisturbed possession of those territories. Although the word ‘territories’ is not mentioned in article 2, which spells out the nature of the property guaranteed and could extend to customary use rights enjoyed outside a particular tribal territory, the guarantee of territorial rights is implicit. The whole tenor of the Treaty is to guarantee full proprietary rights and there is nothing in it to suggest that the guarantee is limited merely to use rights as at 1840. Individuals and families who held such customary rights over lands and rivers were dependent upon their hapu holding and maintaining its territorial authority over its rohe.

To construe the Treaty as simply guaranteeing Maori customary use rights tied to particular uses as at 1840 overlooks the territorial authority of the hapu. In 1846, Sir William Martin, the first chief justice in New Zealand, wrote:

So far as yet appears, the whole surface of these Islands, or as much of it as is of any value to man, has been appropriated by the Natives, and, with the exception of the part which has been sold is held by them as property. Nowhere was any piece of land discovered or heard of [by the commissioners] which was not owned by them or some person or set of persons . . .¹²

In this statement, Sir William acknowledged that the territorial rights of Maori extended to the whole of New Zealand. The same view was held by Governor Hobson

12. AJHR, 1890, G-1, p 3

and accepted by the British Colonial Office.¹³ The Treaty also recognised this: article 2 guaranteed to Maori full proprietary rights, that is, full rights of ownership in their respective territories; namely, ‘their Lands and Estates Forests Fisheries and other properties’, for as long as it was their wish and desire to retain them.

Where, in accordance with Crown procedures, land title was established and awarded to Maori subsequent to the Treaty, full possessory title was inevitably granted. It mattered not that the lands may have been used only seasonally for hunting purposes or for foraging or for both; a grant of full freehold title was still made. An award of lesser title was not contemplated.

While one of the purposes of the Native Land Court in awarding full possessory title may have been to provide specified owners who could deal with and convey acceptable title to purchasers, the Crown has long regarded the issue of such titles to Maori as being in compliance with its guarantee in respect of lands under article 2 of the Treaty. If, from the Crown’s perspective, full possessory title could be awarded for lands under the principles of the Treaty, why should rivers be dealt with any differently? The answer, of course, lay in the application of the common law principles to rivers, as we have already demonstrated in chapter 7. Suffice to say that, at common law, there was no ownership of running water. From the Maori perspective, however, lands and rivers were both their properties and their rights of ownership were absolute.

In Te Ika Whenua’s case, we reject any suggestion that their customary rights to the rivers were tied in time to their use as at 1840. If such were the case, it would have been open to others to enter their rohe and use the rivers for any purpose that did not interfere with those rights. Such a proposition overlooks Te Ika Whenua’s territorial rights and tino rangatiratanga; indeed, we cannot envisage such a situation arising without their full acquiescence. In our view, Te Ika Whenua’s customary rights entitled them to the full use and control of their rivers and enabled them to enlarge and develop those uses as time and circumstances dictated, subject to conformity with their own protocols and customs.

10.3.3 ‘Ownership’ of the rivers

The claimants seek a finding that they have a proprietary interest ‘which can practically be encapsulated within the legal notion of ownership in the waters of the rivers’.¹⁴ This immediately raises a difficulty in that the Tribunal is being asked to recognise a form of ownership of waters that is not recognised in English common law and that is not easily described in conventional legal terms.

We feel that it is important to distinguish, at this stage, between the elements of ‘property’ that Te Ika Whenua possessed in respect of their rivers and that were guaranteed to them under article 2 of the Treaty. There was, first, tino rangatiratanga, or authority and control, which was vested in the hapu and, secondly, rights of use,

13. Peter Adams in *Fatal Necessity: British Intervention In New Zealand, 1830–1847*, Auckland University Press and Oxford University Press, Auckland 1977, ch 6, pp 175–209

14. Document D2, p 72

which were available to members of the hapu. Use rights did not need to be all the same, and it was not unusual for occupiers of riparian lands to hold special rights to sections of a river, nor for members of another hapu, particularly those with a connection through whakapapa, to be accorded use rights.

The exercise of tino rangatiratanga generally required no active demonstration by the hapu, being recognised through custom and protocol. Rahui, for example, as to times of fishing and as to who could fish were known and accepted customs. In the case of a drowning, members of the bereaved family would pronounce a tapu, which would also be accepted by way of custom. It was only where the interest of the hapu as a whole might be affected, such as by a grant of right of passage to another hapu, that a decision was made at hapu level, generally by the rangatira.

As at 1840, Te Ika Whenua were entitled to the full use and control of their rivers. The rivers were theirs and nobody could obtain use rights other than by submitting to their jurisdiction and control and through their authority or acquiescence.

The Treaty promised to Maori in respect of their taonga – the rivers – full, exclusive, and undisturbed possession, something more than mere common law rights. This encompassed the two separate elements of tino rangatiratanga and full rights of use referred to above. Accordingly, Te Ika Whenua were entitled, as at 1840, to have conferred on them a proprietary interest in the rivers that could be practically encapsulated within the legal notion of ownership of the waters thereof. The term ‘ownership’ conflicts with the common law view because the waters were not captured but flowed on and were consequently available to other users downstream. Protection of those users’ interests by way of preservation of the resource would be provided for by custom and protocol. Notwithstanding this limitation, the right of use and control of their rivers rested with Te Ika Whenua. We therefore describe the ‘ownership’ or property or proprietary right of Te Ika Whenua of or in their rivers as being the right of full and unrestricted use and control of the waters thereof – while they were within their rohe.

10.3.4 The position as of now

Essentially, the Treaty of Waitangi was a blueprint for the settlement of this country that sought to provide benefits and guarantees for both parties. What the Treaty partners contemplated when the Treaty was signed was seen by Ms Ertel as immigration and a place in one country for both people, the development of a new country, good order, and a settled form of government (see sec 10.2.1). It must therefore have been contemplated by Maori that there would, of necessity, be a sharing of those resources that were essential for immigrants to settle and survive in a new land. In effect, this would be a reciprocal arrangement in consideration for the apparent advantages of being part of the expanding empire of trade and Christianity and *pax Britannica*. The article 2 guarantee of exclusive possession of resources had to be modified by a practicable accommodation by Maori to make the Treaty a living and workable document. In other words, the Treaty had to be viewed in the light of existing circumstances and it had to be interpreted reasonably.

When Maori, including Te Ika Whenua, sold lands that were to be used for settlement and development and that depended upon the resources of rivers, whether for water, fishing, travel, or other uses, in no way did they alienate their dependence on those resources. Rather, they relied on the guarantee of tino rangatiratanga under the Treaty to protect their rights to those resources. Inevitably, the resource had to be and was shared, and Te Ika Whenua, like Maori generally, accepted this situation, although not, at times, without protest. What they do say, however, is that the rights of use so permitted are subject to their Treaty rights of tino rangatiratanga.

The perception of Maori is that the extension of rights of use to others is part of and consistent with the exercise of tino rangatiratanga. It was, and still is, not uncommon for one hapu to allow members of another hapu to exercise certain rights by way of custom within its rohe, including those of passage, hunting, foraging, and fishing. The extension of such rights to others enhances rather than detracts from or diminishes tino rangatiratanga.

The Tribunal has already referred to the sharing of resources in several of its earlier reports. In the *Mohaka River Report 1992*, it examined the shared use of the river with neighbouring settlers and concluded that:

Far from relinquishing any of their mana or control over the river, [Ngati Pahauwera] were using their mana or control to invest in the future development of a resource and for the benefit of a people.¹⁵

In considering the position of the seas, harbours, and foreshores, the Manukau Tribunal said:

By the same token we do not think the Maori interest in the seas is the ‘full exclusive and undisturbed possession’ of the English text. European New Zealanders need this Treaty too because by it the Maori people agreed to and accepted the existing and projected settlements and emigration referred to in the preamble and thereby agreed that the Europeans too would ‘belong’. Both parties stood to gain by this Treaty as partners in a new enterprise. The new partner necessarily needed access. The Europeans’ interest in the harbour and foreshore areas cannot be denied either.

We suspect that the original Maori signatories would have appreciated this and that the subsequent claims to exclusive ownership reflect the total denial of the Maori mana in the laws of the seas and fisheries. Those who appeared before us claiming that the Manukau belonged to them spoke of the Maori willingness to share the Manukau. They spoke also of the belittlement they felt when their ‘first nation’ status was relegated to that of ‘an ethnic minority’.

We conclude that the Treaty did promise the tribes an interest in the harbour. That interest is certainly something more than that of a minority section of the general public, more than just a particular interest in particular fishing grounds, but less than that of exclusive ownership. It is in the nature of an interest in partnership the precise terms of which have yet to be worked out.¹⁶

15. Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications, 1996, sec 5.1

16. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989, sec 8.3

Te Ika Whenua face a similar situation in that they have shared the use of their rivers. They claim recognition of their mana over the rivers, their authority and control, and restoration of the means to protect and preserve this resource, as is guaranteed by the Treaty. They also claim a proprietary interest in the rivers. We do not see that their acquiescence in sharing the use of the rivers should detract from their claim to tino rangatiratanga.

What we do see, however, is that the sharing anticipated under the Treaty derogates or detracts, not from tino rangatiratanga but from the proprietary interest in the rivers. Just as Te Ika Whenua claim the right to the development of their interest in the rivers, so too can other users – indeed, the public at large – although effectively such right is controlled by the Crown. In fact, we are seeing increased public use of the rivers, particularly for recreation and as a water supply. The claimants appear to have accepted this except where such usage is of a commercial nature, in which case they consider they should get a return for the use of their proprietary interest.

We find that Te Ika Whenua held a proprietary interest akin to ownership of the rivers as at 1840 in that they had full and unrestricted use and control of the waters thereof while they were in their rohe. That right or interest was property guaranteed protection under article 2 of the Treaty. Since then, circumstances, such as the sale of lands for settlement and the general contemplation under the Treaty that there would need to be a sharing of the resources upon which settlement depended, have led to a reduction of Te Ika Whenua's proprietary interest. The residue proprietary interest has never been acknowledged or protected by the Crown, and this constitutes a breach of the Treaty principle of active protection guaranteed in article 2.

We see little difference in our approach from that adopted by the Manukau and Mohaka River Tribunals, which found, in the case of the harbour and the river respectively, that Maori could not claim an exclusive interest under the Treaty because they had agreed that Europeans would 'belong'. Notwithstanding, Maori were entitled to the recognition of their special interest as Treaty partner. In the case of Te Ika Whenua and their rivers, the same could be said. There has been a sharing of the proprietary interest, as contemplated by the Treaty, but effectively the Crown has appropriated total management and control. Yet, under the Treaty, Te Ika Whenua are entitled to the recognition and active protection of their residual proprietary interest by the Crown. It matters not whether we call this a residual interest to which Te Ika Whenua are entitled or a share under a partnership – the result is the same. We also see a similarity in our finding and the dicta of Lord Cooke in *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) when he stated that Tainui were entitled to a share of the Waikato coal resource.

In coming to this determination, we have considered other alternatives. It could be argued that Te Ika Whenua, in sharing, merely allowed the settlers use rights to the rivers appropriate to those times and retained for themselves full rights to development or to any future uses that might eventuate or to both. Conversely, it might be argued that in the process of sharing Te Ika Whenua simply retained for themselves customary use rights, and the residual rights, including those to

development and future uses, went to the settlers and were thereby able to be acquired or appropriated by the Crown.

Our view is that neither argument is tenable. Sharing of the rivers occurred on an ad hoc basis as the country was developed and settled. No thought was given to the reservation of customary and Treaty rights for Maori, let alone to the reservation of rights to development or for possible future uses in favour of either party. The generation of hydroelectric power was not even contemplated.

The Treaty, as we have said, envisaged settlement and, in consequence, a sharing of the river resource for the benefit of Maori and Pakeha alike. For a finding to be made in the case of Te Ika Whenua's rivers that excludes either the tangata whenua or other New Zealanders would be contrary to the Treaty principle of partnership.

Consequently, having regard to the very nature of the sharing, the intent of the Treaty, and the principle of partnership, our rejection of the above alternatives reinforces our finding that, while Te Ika Whenua were, and still are, entitled under the Treaty to a proprietary interest akin to ownership in the rivers and to the active protection thereof, they agreed to a sharing of that interest.

We cannot be finite as to the extent of the residual entitlement Te Ika Whenua now have in the rivers. This should be a matter for negotiation and settlement between the Crown and the claimants. Regardless of present-day circumstances, such as access and legal title to the banks and beds of the rivers, the interest must be of reasonable substance. However, the ability of Te Ika Whenua to control and deal with their interest because of their riparian land holdings may support a claim to a greater proprietary interest. In this regard, the result of the land claim, still to be heard, may have an influence on the overall negotiation. Although it may not be appropriate to reach a final settlement prior to that claim being finalised, some interim relief is urgently needed to provide Te Ika Whenua with an economic resource that they can utilise to develop and protect their interest in the rivers and to assist them to break away from welfare dependency. To delay such relief would constitute a breach of the Treaty principle of redress.

10.3.5 The *Te Ika Whenua* decision

Under the principles of the Treaty, Te Ika Whenua are entitled to a right to development in respect of their rivers and to a proprietary interest therein. The decision of the Court of Appeal in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 raises the question as to whether Te Ika Whenua's right to development extends to the right to generate electricity by the use of water power.

Mr Arnold, for the Crown, contended that Te Ika Whenua do not have a right to generate electricity by harnessing water power and that the Crown's Treaty duties to Te Ika Whenua in respect of the rivers are limited to the recognition of traditional values. He quoted as authority the above decision, where the Court of Appeal found that Maori customary title and Treaty rights did not include the right to generate

electricity from water power. Extracts from that decision, including this finding, are set out earlier in this chapter at section 10.2.3.

The decision and pronouncements in the *Te Ika Whenua* case must be looked at in their proper context. *Te Ika Whenua* brought judicial review proceedings in the High Court seeking an interim declaration that the Minister of Energy not approve any establishment plan providing for the transfer of the Wheao and Aniwhenua Dams to certain electricity companies being established under the Energy Companies Act 1992 and not recommend to the Governor-General that she make an Order in Council providing for any such transfer until such time as this Tribunal had heard and determined *Te Ika Whenua's* claim to the rivers. Interim relief was declined by the High Court and *Te Ika Whenua* appealed.

The decision of the Court of Appeal turned simply on what the court described as the strength of the case of the appellants. At page 23, Cooke P said:

In the present case a major factor must be the strength or otherwise of the case of the appellants. As the legislation stands now, the Crown has only limited powers over electric power boards and authorities. In general they are not agents of the Crown. But there is power under ss 95 and 96 of the Electric Power Boards Act 1925 to purchase electric works compulsorily at a price to be determined by arbitration. That power will cease when s 96 of the Energy Companies Act 1992 comes into force: see s 1(4) and (8) of the 1992 Act. But if there were any realistic prospect that by compulsory purchase or otherwise the Crown would take steps to bring about a complete or partial vesting of the dams in the tangata whenua, or that a Court might order such a vesting, we think that this Court should give at least serious consideration to making an order which would keep those prospects open. It is because, in the light of the nature of Maori customary title, the scope of treaty rights and the history of electricity generation in New Zealand, no such realistic prospect appears, that we dismiss this appeal.

The court, on the following page (p 24), made the statement referred to earlier in this chapter regarding the right to generate electricity by harnessing water power (see sec 10.2.3) and then at page 25 said:

The essence of what has been said above is that neither under the common law doctrine of aboriginal title, nor under the Treaty of Waitangi, nor under any New Zealand statute have Maori, as distinct from other members of the general New Zealand community, had preserved or assured to them any right to generate electricity by the use of water power. Consequently there can be no legal objection to the transfer of the Aniwhenua and Wheao dams to energy companies. If any claims to compensation for interference with Maori customary or fiduciary or treaty rights to land or water can be mounted, they will not be diminished or prejudiced in any real sense by such transfers.

We do not disagree with the comment of the Court of Appeal that Maori, as distinct from other members of the community, have not had preserved or assured, through customary title, any right to generate electricity by the use of water power. What we do say is that under the Treaty Maori were entitled to the full, exclusive, and undisturbed possession of their properties, which would include their rivers. As part

of that exclusive possession, they were entitled to the full use of those assets and to develop them to their full extent. This right of development would surely include a right to generate electricity. The ability to exercise that right, however, depends on present-day circumstances, not on the position as at 1840. Te Ika Whenua have shared the use of their rivers, thus reducing their interest therein. This and other circumstances must have an impact on their development rights, including their right to generate electricity. We look at this further in the next section.

10.4 THE CROWN'S OBLIGATIONS TO TE IKA WHENUA

We have found that the claimants have never voluntarily relinquished their tino rangatiratanga over their rivers and have been deprived of the ability to exercise tino rangatiratanga through laws or policies introduced by the Crown. Coupled with this is our finding that under the principles of the Treaty the claimants should hold a proprietary interest in the rivers. The question then arises as to what scope and encouragement the claimants should be given by the Crown to exercise their authority in relation to the management and development of the resource.

In the present case, we must emphasise that the right to generate hydroelectricity cannot be regarded as sole and exclusive to the claimants. The Crown for a long time appropriated the right to generate hydroelectricity, although the way is now open for others to acquire such rights. The ability of the claimants, or any other person for that matter, to undertake such schemes would depend on a number of factors, not the least being the retention of the land or the ability to acquire the land needed for such works. Notwithstanding that those factors may pose difficulties, there is a strong case that the tangata whenua should be afforded priority to partake in or share in such development where the opportunity arises.

The Treaty encompasses reciprocity and partnership. Both parties have an obligation to the nation as a whole to act fairly and responsibly. Where, as in this case, one party has effectively surrendered property rights by sharing them as envisaged by the Treaty, and such property can be the subject of development, then the Crown should ensure that its Treaty partner is able to partake fully in that process. While the Crown is able to appropriate or regulate the interest parted with by Te Ika Whenua (or do both), the residuary interest retained by the claimant remains subject to the Treaty guarantees. The Crown is therefore obliged actively to protect that interest and to allow Te Ika Whenua the full use and enjoyment thereof, including their right to development. The Treaty principle of partnership coupled with the foregoing factors, together with the need to encourage tangata whenua in the sphere of economic development, provide all the more reason for the Crown to make every endeavour to involve them in the development, at least on a partnership basis, of assets in which they retain a substantial interest. The Crown, of course, must have the right to govern in accordance with the general overarching Treaty principle of exchange (see sec 9.4.1), which includes proper consultation. If it decides that development or

management not including tangata whenua is required in the public interest, full compensation would need to be paid for the use of Te Ika Whenua's interest.

In the present case, we do not see the Crown's restriction of the right to generate electricity from water under the Water-power Act 1903 and succeeding legislation as other than a reasonable exercise of kawanatanga. The legislation sought to protect the resource for the benefit of all New Zealand and we do not think that many would argue against that. Where the Crown failed in its Treaty obligations is that, in considering whether or not the Rangitaiki and Wheao Rivers were suitable for local power schemes and in determining how and by whom the power schemes were to be constructed, it failed to consult with Te Ika Whenua and to take into account their interest in the rivers and their economic wellbeing.

The Crown pointed out that the legislation that allowed the development of hydroelectric power by power boards was meant to provide electricity for the benefit of all New Zealand. Mr Arnold submitted that, because of the importance of the resource to New Zealand and the benefits that flowed to all, this was a reasonable exercise of kawanatanga.¹⁷ In answer to a question from the Tribunal as to whether this was a reasonable exercise of the Government's powers, Maanu Paul responded that, while the benefit came from Te Ika Whenua's resource, the people of Te Ika Whenua received no compensation or extra benefit above that derived by the public at large (see fig 24).

We agree with Mr Paul's comments. If kawanatanga is to be exercised, then such exercise should be fair and with proper consultation. If property rights are to be affected, then full compensation should be paid. We have accepted that Te Ika Whenua are entitled to a proprietary interest in the rivers, and it is therefore hard to deny the logic that they are entitled to be paid for the use of such interest. The Court of Appeal suggests as much in the *Te Ika Whenua* decision.

The recent changes in the power industry through the introduction of commercialisation and user pays as a result of the Electricity Companies Act 1992 provide further fuel for Te Ika Whenua's claims. The power schemes are now owned by companies with shareholders who derive a profit from the power generated from Te Ika Whenua's resources. In remoter areas, user pays often means that those subscribers pay more for their power than those in more populated localities. In many cases, people in those areas have an interest in the resource that supplies the power but derive no benefit from that interest. The Wheao scheme, for example, serves the district of Rotorua but not that of Te Ika Whenua.¹⁸

The Crown sought to justify the use of the rivers for the production of hydroelectricity by local power authorities without compensation or payment for the use of Te Ika Whenua's interest as a reasonable exercise of kawanatanga because of the cooperative aspect of the enterprise and the overall benefit therefrom. We do not accept this argument. Under the principles of the Treaty, Te Ika Whenua were entitled to full consultation and to compensation for the loss of their property rights, although such compensation might have been negotiated on a lesser basis because of that

17. Document C14, p 15; doc D5, p 23

18. Document A8(2), p 9

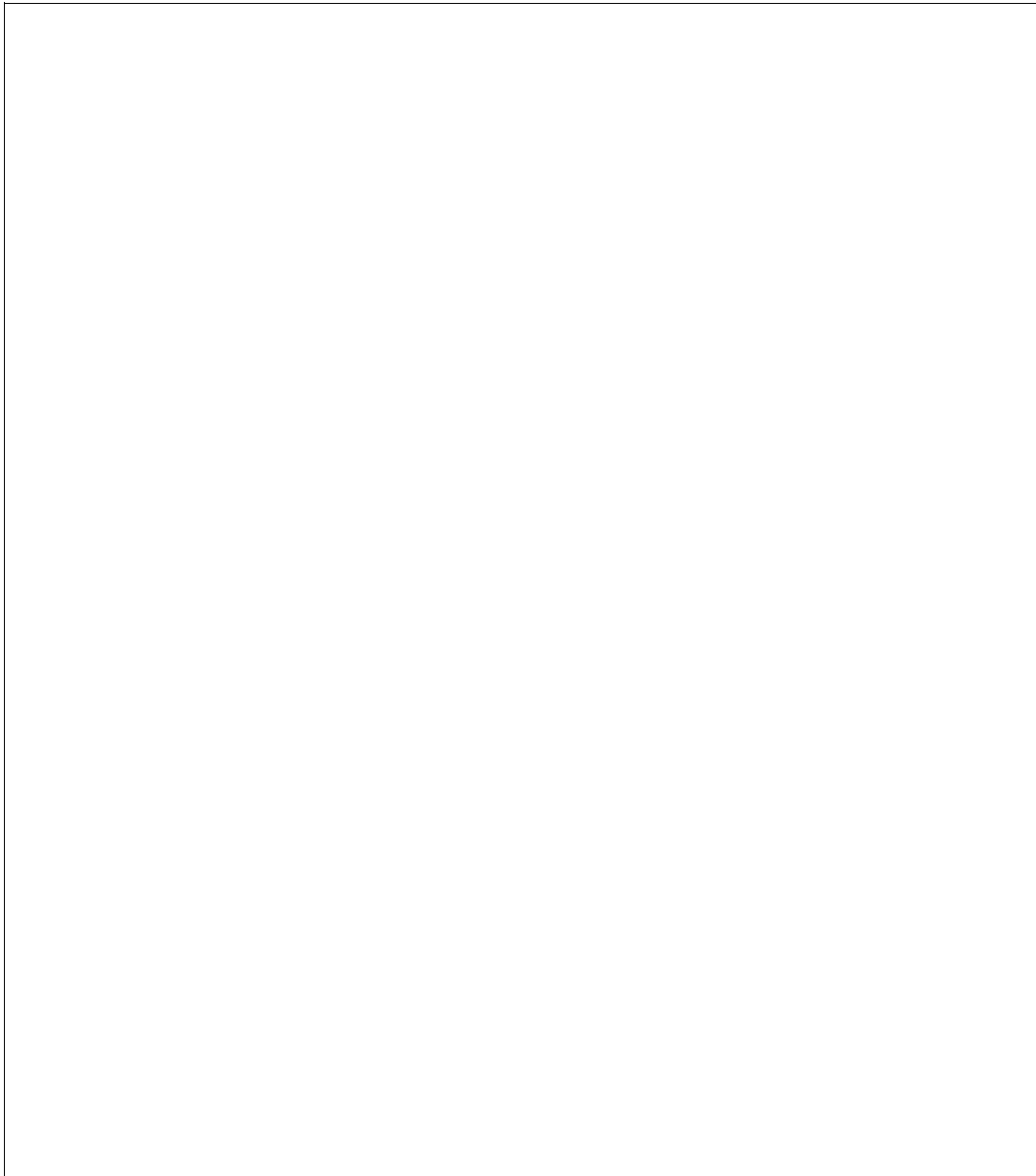


Figure 24: Location map of the Aniwhenua hydro generation scheme and electricity supply areas. Map submitted by counsel for the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority (doc c11(a)).

cooperative aspect and the benefits that would flow to all. The Crown has failed in these obligations to Te Ika Whenua and this failure now needs to be addressed.

Moreover, settlement on the above basis does not satisfy for all time the Crown's obligations under the Treaty, and the transition to commercialisation of power production creates another scenario for consideration. The Treaty has been described as a living document, the interest of Te Ika Whenua in the rivers remains, and if the circumstances of the use changes, as has happened, then the Crown is bound to reconsider the interest of Te Ika Whenua. It seems quite unacceptable that commercial profit can be made from Te Ika Whenua's interest in the rivers without

any form of compensation or payment. The considerations that might be addressed in appropriating property for cooperative use as opposed to commercial use could be markedly different, and the Crown in fairness to its Treaty partner is bound to take these into account.

The Tribunal holds that Te Ika Whenua are entitled to payment for the use of their interest in the rivers for power generation and recommends that the Crown consult and negotiate with Te Ika Whenua over past use and to ascertain a suitable formula for payment for future use. It would seem to us, without attempting to bind or limit the parties in the areas of their negotiations in any way, that the following matters at least need to be addressed:

- (a) compensation for past use;
- (b) compensation for loss of rights or the ability to share as a partner in power production; and
- (c) payment for the future use of the proprietary interest of Te Ika Whenua in the rivers.