

CHAPTER 1

THE CLAIM AND THE CLAIMANTS

1.1 THE CLAIM

This claim concerns the mana and tino rangatiratanga of the hapu of Te Ika Whenua over the Rangitaiki, Wheao, and Whirinaki Rivers and their tributaries. These rivers have their headwaters in the Urewera and Kaingaroa plateau. The claim relates to the middle reaches of the rivers, which flow through Te Ika Whenua's traditional rohe down to the Galatea Plains.

The claim builds on the Te Ika Whenua energy assets claim (claim 1.1(d)) and has a narrow focus.¹ Like the energy assets claim, it was severed from Te Ika Whenua's original claim to lands and waterways, dated 6 June 1991 (claim 1.1), and was accorded urgency by the Waitangi Tribunal at the claimants' request and after other tribes with river claims had agreed.² This was in line with the view expressed in our *Energy Assets Report* that the substantive claim should be heard as soon as possible.³

Amended particulars to this claim (claim 1.1(e)), dated 26 October 1993, state:

- that the Rangitaiki, Wheao, and Whirinaki Rivers, including their tributaries, 'are a water body which jointly and severally are the taonga of claimants';
- that the Crown in the Treaty of Waitangi guarantees to the hapu of Te Ika Whenua te tino rangatiratanga over these rivers for as long as they wish to retain them;
- that the claimants have never relinquished their tino rangatiratanga over these rivers either through legislation or through the application of the English common law presumption that the owner of land on the bank of the river also owns the bed of the river to the middle line (the *ad medium filum aquae* rule);
- that the construction and operation of the Aniwhenua Dam and Wheao scheme were and are detrimental to these rivers and their fisheries.

Claimant counsel, Kathy Ertel, expanded on the above particulars as follows:

In 1840 the Rangitaiki, Wheao and Whirinaki Rivers were a taonga and possession of the claimants. The Crown guaranteed to the hapu concerned, pursuant to the Treaty of Waitangi, te tino rangatiratanga and full exclusive and undisturbed possession of the Rangitaiki, Wheao and Whirinaki Rivers for so long as it was the wish of those hapu to retain them.

1. Document B4, p 5

2. Paper 2.35

3. Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993, ch 6

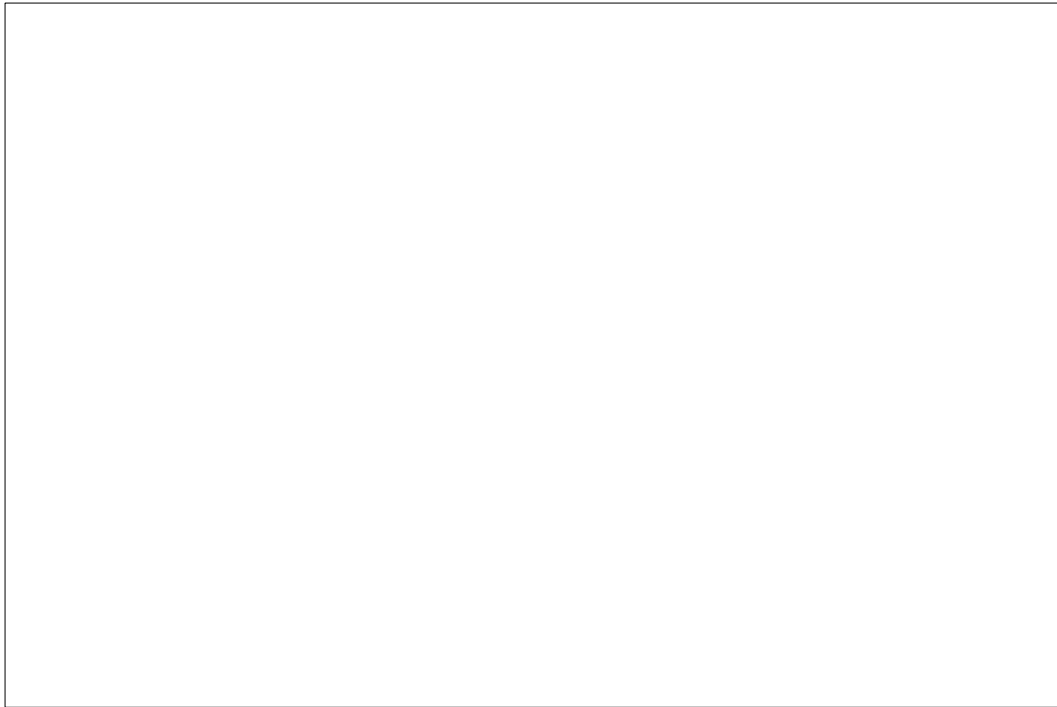


Figure 2: Powhiri, first hearing, Tipapa Marae (manuhiri)

The rivers continue to be taonga to the claimants.

They have never wished to relinquish te tino rangatiratanga over or possession of their rivers.

The claimants have been and are prejudiced in the full enjoyment of their Treaty rights guaranteed to them by, inter alia:

- (a) The expropriation by the Crown of the beds of the rivers via various Coal Mines Legislation.
- (b) The expropriation of management rights and the right to take, use, and dam the water in their rivers (see the Water and Soil Conservation Act 1967, the Public Works Acts, and the Electricity Act 1968).
- (c) The Resource Management Act 1991.
- (d) The application of the *ad medium filum aquae* rule.
- (e) The failure of the Crown to develop a system consistent with the Treaty for the recognition of the rights of the claimants to their rivers.
- (f) The failure of the Crown to recognise to give effect to Maori custom as it relates to rivers.
- (g) The fragmentation of elements of the Rangitaiki, Wheao, and Whirinaki Rivers for the purposes of ownership, control, and management.
- (h) The detriment to their rivers by the construction and operation of the Aniwhenua Dam and the Wheao scheme.
- (i) The detriment to their fisheries of the Aniwhenua and Wheao scheme.
- (j) The proposed creation of third party rights with the consent of the Crown in the Aniwhenua and Wheao scheme.⁴

4. Document B5, pp 6-8

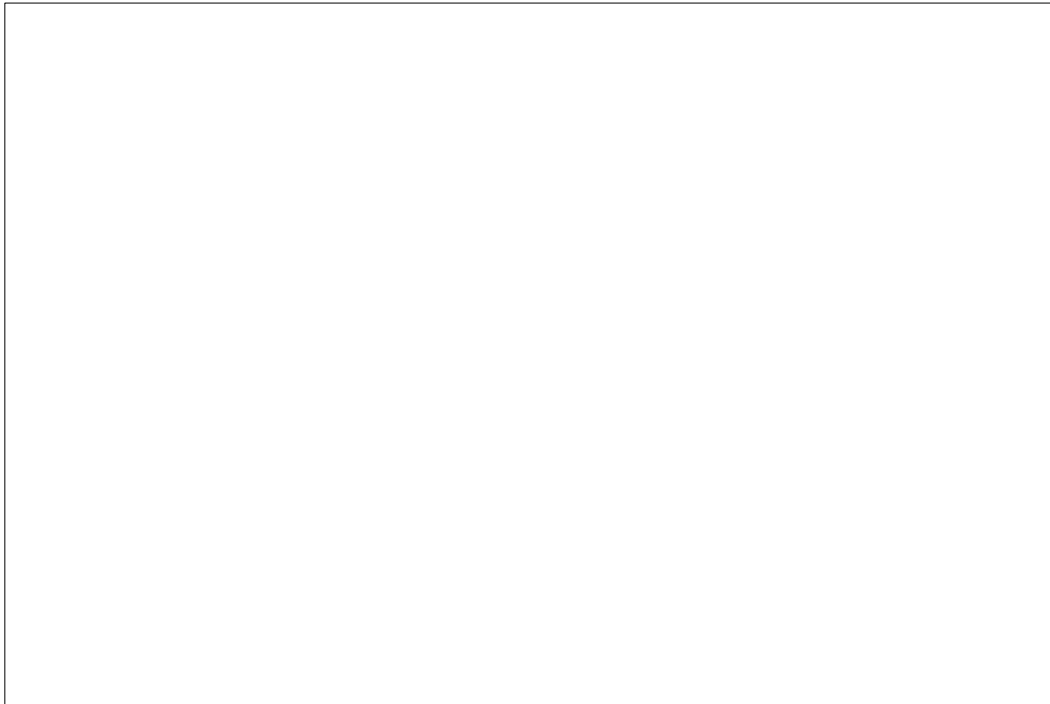


Figure 3: The claimants (tangata whenua)

1.2 THE CLAIMANTS

The original claim was brought in the name of Hohepa Waiti and Kingi Porima, as the chairman and secretary respectively of Te Runanganui o Te Ika Whenua Incorporated Society, on behalf of themselves and the hapu represented by Te Ika Whenua: namely, Ngati Whare, Ngati Manawa, Ngati Patuheuheu, and Ngati Huinga Waka.⁵

Wiremu McCauley, a Patuheuheu pakeke, explained that Te Ika Whenua was ‘the area surrounded by the mountains of the Rangitaiki valley’ and that they had ‘always missed out on development because of Te Arawa, Ngati Awa and Tuhoe who surrounded them’. They wanted a runanga to look after their land, rivers, waterways, and dams. Looking at their needs, they had ‘decided to establish Te Runanganui O Te Ika Whenua’ in a deliberate attempt to create a mechanism and a process to enable them to seek justice. Each tribal unit had discussed the proposal and had agreed to support it:

Let the mana of the falls of the rivers, especially the Rangitaiki, identify Te Ika Whenua.⁶

The claimants’ research team further explained that:

The Ika Whenua people have Te Runanganui o Te Ika Whenua as their whakaruruhau (overarching-authority) which is derived from the practice of tuku rangatiratanga (transfer of authority).

5. Claim 1.1; *Te Ika Whenua – Energy Assets Report 1993*, sec 1.1

6. Document B4, p 1; doc B4(a)(4), p 10

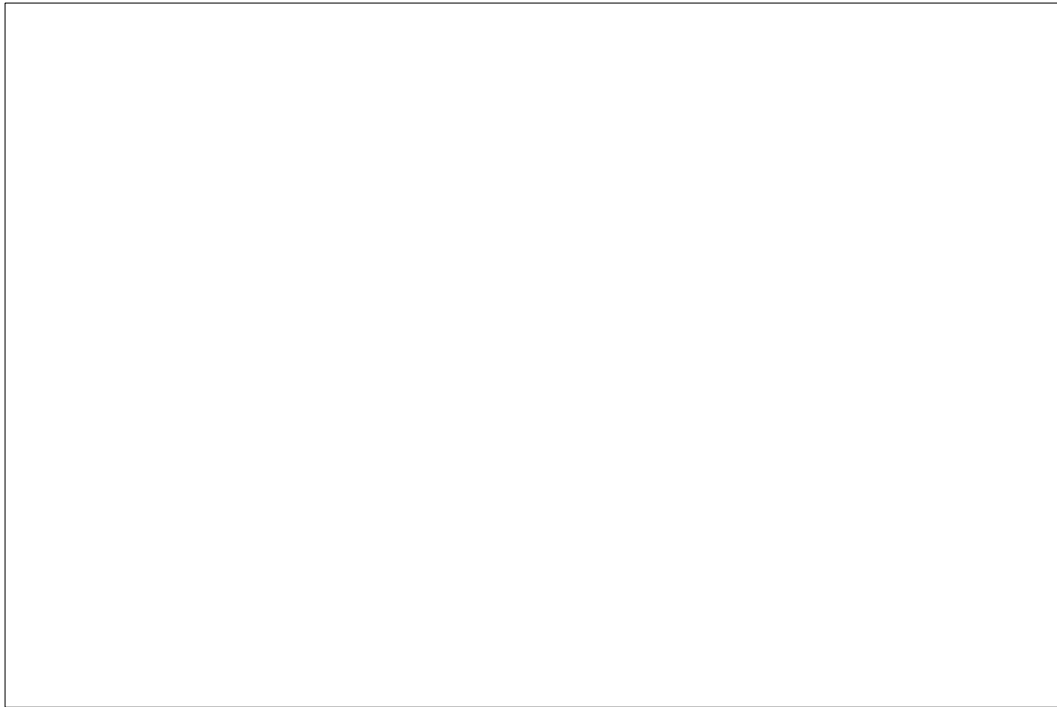


Figure 4: Tangiharuru meeting house, Tipapa Marae

... The limitations are that Te Runanganui O Te Ika Whenua has authority only to the extent of initiating, implementing, processing, negotiating and completing the claims of Ngati Manawa of Murupara, Ngati Whare of Te Whaiti and Minginui, Ngati Patuheuheu and Ngati Haka of Waiohau and Te Huinga Waka of Kaingaroa.

Once the claims are concluded and the transfer of lands and waterways to the respective iwi is reached, Te Runanganui and Te Ika Whenua's authority will cease. At that point the practice of *tuku rangatiratanga* will come to an end ... Three delegates from each of the above iwi form the Runanganui.⁷

At the first hearing, Maanu Paul, a consultant to the claimants, said that the overarching authority of Te Ika Whenua was not static but dynamic – the constituent hapu could take it back again: 'We have to keep returning to the constituent hapu.'⁸

Oral evidence given by Hohepa Waiti demonstrated that this claim was not the first time that the hapu under Te Ika Whenua's umbrella have come together as one people and gone forward as one iwi to remedy their grievances. In 1924, every man, woman, and child in the area had been levied 10 shillings to raise funds to petition Parliament for an investigation into the Crown purchase of the Kaingaroa 1 block. Most managed to pay, and Iki Pouwhare had listed their names under whanau in a journal. There were 36 pages of names and some 20 to 30 names on each page. On most pages, Mr Waiti was able to identify names of whanau still living in the area.⁹

7. Document B4, pp 2–3

8. Maanu Paul, oral submission on behalf of the claimants, first hearing, 11 November 1993, tape 5, side A, 2370–2377

9. Hohepa Waiti, oral submission on behalf of the claimants, first hearing, 10 November 1993, tape 3, side A, 0194–2603; doc B2, p 87

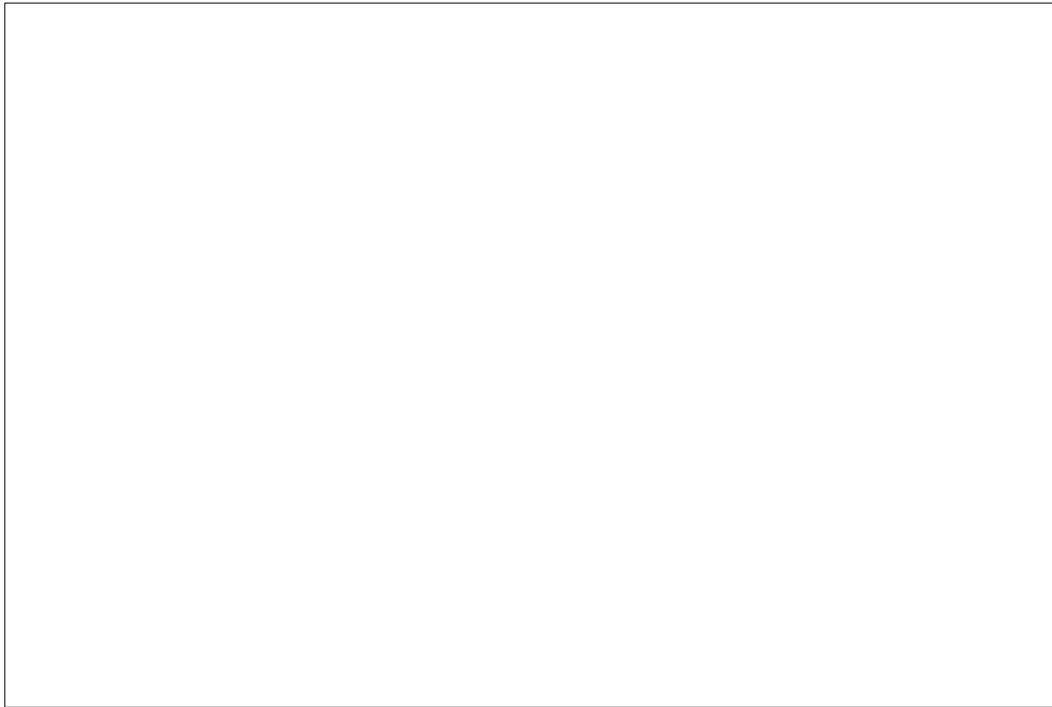


Figure 5: The Tribunal (first hearing). From left: Georgina Te Heuheu, Judge Glendyn Carter (presiding), Bishop Manuhua Bennett, and Mary Boyd.

Another witness, Thomas Higgins, agreed that they were all one people who had lived at Te Houhi, although different sections of the tribes overlapped one another.¹⁰

1.3 THE RELIEF SOUGHT

In her opening submissions, Ms Ertel explained that:

The relief able to be sought in the circumstances of this urgent hearing is limited. The claimants seek recognition of their tino rangatiratanga in relation to the Rangitaiki, Wheao and Whirinaki Rivers. This will necessarily include the development, together with the Crown, of a system of recognition which:

- (a) Gives effect to the claimants' beneficial interest in the resource (recognising their right to develop the resource).
- (b) Assures their authority in relation to the management of all aspects of the Rangitaiki, Wheao and Whirinaki Rivers.
- (c) Compensates the claimants for past breaches of the Treaty which have, among other things, resulted in lost opportunity and incursions upon the mana of the claimants.¹¹

10. Thomas Higgins, oral submission on behalf of the claimants, first hearing, 10 November 1993, tape 3, side A, 4907-4955

11. Document B5, pp 8-9

1.4 TE IKA WHENUA RIVERS REPORT

The redress sought was ‘nothing less than to fully give effect to Maori custom as it relates to rivers’.¹²

With regard to fisheries, counsel explained that:

Te Ika Whenua does not ask for recommendations relating to the taking of fish . . .

Findings are sought on:

- (a) the importance of fisheries, especially eel, to the Ika Whenua culture/tikanga
- (b) the effect of the dams on the traditional fisheries and the integrity of the claimants’ culture/tikanga
- (c) the effect on the traditional fisheries of other Crown actions.¹³

1.4 WAITANGI TRIBUNAL HEARINGS

1.4.1 The first hearing

The first hearing of this claim was held at Tipapa Marae, Murupara, from 8 to 11 November 1993. In formal speeches at the powhiri on the marae and in the meeting house, Tangiharuru, speakers for Te Ika Whenua introduced themselves, as is customary, by whakapapa, whakatauki, and waiata. The claimants were represented by Kathy Ertel. Peter Andrews from the Crown Law Office appeared for the Crown and was assisted by Camilla Owens. Vicky Stanbridge of Kensington Swan appeared for the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, and Paul Sandford had a watching brief for the Forestry Corporation of New Zealand.

Opening submissions were presented by claimant counsel. Miss Stanbridge spoke on behalf of the power boards. In order to prevent unnecessary repetition, it was agreed that the traditional evidence given by witnesses for the claimants at the Rotorua hearing of the energy assets claim,¹⁴ as summarised in chapter 2 of our *Energy Assets Report 1993*, should be adopted and form part of the record of the present hearing.¹⁵ Further oral and written evidence was presented by six witnesses for the claimants: Hohepa White, Maurice Toetoe, Thomas Higgins, Gwenda Paul, Billy Messent, and Maanu Paul.

Claimants arranged a helicopter flight over the claim area for members of the Tribunal and counsel and a ground visit for everybody to the Wheao Dam, the Aniwhenua Dam and powerhouse, and the site of the proposed Kioreweku scheme. On both occasions, spokespersons for the claimants pointed out the natural features of the landscape and special places of historical importance described in oral evidence presented at the energy assets hearing. The helicopter flight gave us a bird’s-eye view of the extent of the rohe of Te Ika Whenua described by Hohepa White in oral evidence. The site visits graphically demonstrated the vast area of remaining native bush extending into the Whirinaki Forest Park and the Urewera National Park. This

12. Document B10, p 37

13. Document B5, p 10

14. Document A8(1)–(18)

15. Paper 2.36; doc B14

provided a striking contrast with the 250,000 hectares of the Kaingaroa State Forest, which is said to be the largest exotic forest in the southern hemisphere (see fig 14).

1.4.2 The second hearing

The second hearing was held at the Maori Land Court in Rotorua between 29 and 31 August 1994. Terence Arnold, assisted by Andra Mobberley, appeared for the Crown and Ms Ertel, assisted by Rachel Steel, appeared for the claimants. Interested parties were the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, represented by Joseph Williams, assisted by Christian Whata, and the Forestry Corporation of New Zealand, represented by Mr Sandford. Tamaroa Nikora appeared for the Tuhoe–Waikaremoana Maori Trust Board (Wai 36 claimants) and for Wai 40 and Wai 386 claimants, whose claims were to be considered with Wai 36. John Tahuparae and Archie Taiaroa for the Whanganui River claimants attended and spoke in support of the Te Ika Whenua claim.

Opening submissions were presented by Mr Arnold on behalf of the Crown and Mr Williams on behalf of the electricity authorities. The following witnesses were called by Mr Williams for the electricity authorities: Richard Stevens, Neil Brennan, Wayne Donovan, Peter Fitchett, and Alan Withy. Crown counsel then called on David Alexander, a contract researcher and planning consultant, to present his evidence on the Crown's assertion of ownership of the riverbeds, its right to regulate the use of the rivers for hydroelectricity generation, and its activities concerning the eel fishery.

Ms Ertel requested she be given the opportunity to reply to the Crown's assumptions concerning the validity of sales of blocks of riparian lands. Subsequently, she and Mr Arnold requested of the Tribunal that the hearing of the rivers claim be adjourned with a view to having it heard along with the land claim. Following an adjournment to enable the Tribunal to consider this suggestion, Judge Carter explained that this was not possible, because the present Tribunal had been constituted to deal solely with the rivers claim. Mr Arnold then sought a ruling that, for the purposes of the river claim, the Tribunal assume that the land sales were valid and the evidence in reply not relevant. In response, Ms Ertel sought a ruling that the land sales were not valid, the issue being how the Crown got rights over the rivers. Mr Arnold said that, if the validity of the land sales were in question, the whole claim would be opened up to wider issues and the Crown would want to argue them fully. After a 10-minute adjournment, Judge Carter ruled that the validity of land sales was not a point at issue in the Te Ika Whenua rivers claim and that the Tribunal would proceed on the basis that it might be able to reach a determination without considering whether the alienations were valid.

Further evidence was given for the claimants by Gwenda Paul and Maanu Paul. Mr Nikora reserved the right to make a submission.

1.4.3 Third hearing

The third and final hearing was held at Painoaiho Marae, Murupara, between 11 and 13 October 1994. Mr Arnold, with Ms Mobberley, appeared for the Crown; Ms Ertel and Ms Steel for the claimants. Interested parties were the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, represented by Messrs Williams and Whata. The Forestry Corporation of New Zealand was represented by Mr Sandford (as an observer); the Electricity Corporation of New Zealand by Shelley Robinson. Mr Nikora appeared for Wai 36, 40, and 386 claimants.

Further evidence was given by Charles Mitchell for the electricity authorities. Mr Nikora made a submission. Closing submissions were made by Ms Ertel, Mr Williams, and Mr Arnold. Ms Ertel exercised the claimants' right of reply.

1.4.4 Composition of the Tribunal

The Tribunal was constituted to comprise Judge Glendyn Donald Carter (presiding), Bishop Manuhuia Bennett, Mary Boyd, and Georgina Te Heuheu.

Georgina Te Heuheu advised the Tribunal that she had been appointed a list candidate for the National Party in September 1996, and from that point on she took no further part in the Tribunal's deliberations, eventually resigning following her election to Parliament later that year.