

CHAPTER 5

**CROWN EXPROPRIATION OF WAI TIPUNA
FOR POWER GENERATION**

5.1 INTRODUCTION

A new phase in the erosion of Te Ika Whenua's customary and Treaty rights to use and control the middle reaches of the rivers flowing through their rohe began with the grant of water rights to the Bay of Plenty Electric Power Board for the Aniwhenua power scheme in 1975 and to the Rotorua Area Electricity Authority for the Wheao scheme in 1977.

In our *Te Ika Whenua – Energy Assets Report 1993*, we briefly summarised the legislation and process by which the Crown expropriated the wai tipuna of Te Ika Whenua for power generation, and we assessed the extent to which the claimants' rights and interests were prejudicially affected. In this chapter of our rivers report, we examine further evidence given by the Crown, the claimants, and third parties on these matters and on the proposed Kioreweku power scheme.

This evidence includes a substantial report by Crown researcher David Alexander entitled 'The Crown's Hydro-electric Generation Rights and the Aniwhenua and Wheao Power Schemes' and its supporting documents, from which we draw heavily.¹

**5.2 THE CROWN ASSUMES THE RIGHT TO CONTROL THE USE OF RIVERS
FOR POWER GENERATION**

5.2.1 Water-power Act 1903

The Crown's assumption of the right to control the use of rivers specifically for hydroelectric power generation was first set out explicitly in the Water-power Act 1903. According to Mr Alexander:

This act represented the coming together of two threads of Government interest, first in the use of waters for mining, and second in hydro-electric power generation, both of which had occupied the minds of the politicians during the previous 35 years. The Crown's approach to the use of waters for mining purposes was transferred to the new technology of hydro-electric generation.²

1. Documents c5, c5(a)

2. Document c5, p 3

In 1896, the Electrical Motive-power Act conferred on the Crown the control of local authority activities connected with hydroelectric development. The combined effects of this Act and the Mining Act 1886 gave the Crown control over water power generation. Section 2(1) of the 1903 Act vested in the Crown, 'Subject to any rights lawfully held, the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power'.

In introducing the second reading of the Bill, the Minister of Public Works said:

The State – the people – should have within their control the power which is contained in those rivers, falls and lakes . . .

If, in the interest of the State, it is considered advisable to take that power, as lands are taken under the Public Works Act, the State would have the right to do so, compensating the owner for any rights or power so taken.³

The Tribunal, in its *Ngawha Geothermal Resource Report 1993*, considered the Water-power Act:

seemingly inspired by the common law rule that water, whether on the surface of land or underground, is incapable of being owned until it is abstracted or 'captured', at which point it becomes the property of whoever abstracted it. Consistent with that common law rule, the Water-Power Act vested in the Crown, not ownership, but the sole right to use surface water as a source of power.⁴

5.2.2 Concern about Maori rights

In the debate on the Electrical Motive-power Act 1896, both settler and Maori parliamentarians expressed concern about its impact on private property rights. Richard Seddon assured the House that 'it was only designed to affect "public rivers", a term which he never explained'.⁵

Before the Water-power Bill 1903 was introduced into Parliament, the Minister of Public Works sought information from his department 'Re control and use of water power at Mataura Falls, and question as to whether owners of adjoining sections can claim rights to the centre of the river'.⁶

An opinion obtained from the Solicitor General is no longer extant, but in Mr Alexander's view it clearly did not deflect the Government from the course upon which it had embarked.

In the second reading debate, Hone Heke, the member for Northern Maori, thought the provisions in the Bill enabling the Crown to acquire all the water power in the colony were 'going too far'. More particularly, in regard to waterfalls on Maori lands, he thought that:

3. See doc C5, p 9

4. See doc C5, pp 13–14; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 7.3.1

5. See doc C5, p 6

6. See doc C5, p 10

It would not be proper for a Bill like this to take away from Maori owners the use of water-power on their lands. There is no telling to what use even the Maoris may desire to put such water-power for themselves. It would be entirely different if the Crown desires to acquire water-power on Maori land; it remains for them to acquire it from the Natives . . . It is an attempt to take away Native rights.⁷

In response, the Minister for Public Works, William Hall-Jones, pointed out that the clause of the Bill already met Heke's objection – apparently a reference to the phrase: 'Subject to any rights lawfully held'. He assured the member that, 'If there are vested interests held by the Natives or others they would be preserved, and if required under subsection (2) would have to be paid for . . . that is, if they are wanted'.⁸

It was not clear to Mr Alexander whether or not the Minister's assurances satisfied Maori concerns. He found no evidence that the Crown considered the effects of the Treaty at the time that the Water-power Act 1903 was enacted. Clearly, it had regarded section 2(1) of the Act 'as necessary in the national interest'.

In closing, Ms Ertel submitted that from at least 1903 the claimants' management rights over these waters were expropriated or usurped for the purposes of generating electricity. This was inconsistent with the Crown's Treaty obligations actively to protect taonga.⁹

5.3 STATE DEVELOPMENT OF HYDROELECTRICITY

5.3.1 Crown monopoly of power generation, 1908–87

Despite the Government's desire to develop hydroelectricity itself, this was beyond its resources at the time. Consequently, under section 5 of the Public Works Amendment Act 1908, it allowed private enterprise to construct hydro schemes, subject to it issuing a generation consent. Although a few privately owned hydro stations were licensed, these initiatives were too slow to satisfy latent public demand. By 1910, the Government considered that the time had arrived 'to take up with vigour the question of developing our abundant water-powers'.

Thereafter, it became the generator and wholesale supplier, developing a national grid to assist in selling to large consumers and, from 1918, to electric power boards. This effectively put an end to private investment and, until the 1970s, small local schemes. According to the historian J E Martin, 'only the state had the capacity and resources to undertake large projects'. 'The state,' he concluded, 'was to develop these resources for the benefit of the nation . . . the government was determined to ensure its control over crucial natural resources, in this case water.'¹⁰ With the swing to a free

7. See doc C5, p 11

8. See doc C5, p 12

9. Document D2, p 55

10. Document C5, p 16, quoting J E Martin (ed), *People, Politics and Power Stations: Electric Power Generation in New Zealand, 1880–1990*, Wellington, Bridget Williams Books and Electricity Corporation of New Zealand, 1991, pp 286–287

market economy, corporatisation, and privatisation nearly 80 years later, the requirement for direct Crown consent to be secured for any use of water for power generation was repealed by section 3 of the Electricity Amendment Act 1987.

5.3.2 Statutory provisions and regulations

To maintain the Crown's sole right to control the use of natural waters for electricity generation, section 2 of the Water-power Act 1903 was incorporated in successive Public Works Acts in 1905 (s 267), 1908 (s 267), and 1928 (s 306). Under section 25 of the Electricity Act 1928, permission to use water power had to be obtained from the Minister of Electricity. The Water Power Regulations 1934 defined how the Crown's sole right of control was to be used. Under regulation 6(27):

Neither the granting of the licence nor anything in the licence expressly or by implication contained shall be deemed to create a lease from His Majesty the King of the bed of any river or any land.

This meant that rights to land, as distinct from rights to the use of water, had to be obtained separately, either by direct negotiation or under the provisions of the Public Works Act.

Subsequent Acts repeating the 1903 provision, or enacting fresh sections that had the same effect, were the Electricity Act 1945, the Water and Soil Conservation Act 1967, and the Electricity Act 1968.

5.3.3 Post-war policy on hydro schemes

Under section 3(1) of the Electricity Act 1945, the administration of the relevant provisions of the Public Works Act 1928 and the Water Power Regulations 1934 was transferred from the Public Works Department to the State Hydro-Electric Department. As Mr Alexander saw it, 'the ethic of State development had become virtually absolute'.

In the post-war period, demand for electricity increased dramatically, supply was often insufficient, and power restrictions were imposed.

Despite the long lead-in time for large power schemes, they were seen as being the most efficient option, but as the Minister of Public Works stated in 1948:

These schemes must be properly investigated, designed, and built in accordance with the national needs and then operated so that power developed is made available for the general pool . . . The criterion must be whether the development will benefit the whole community.¹¹

In this context, the Waikato schemes were programmed and developed and the Matahina scheme on the Rangitaiki River to the north of Te Ika Whenua's rohe was approved in 1959 and completed in 1967.

11. See doc c5, p 19

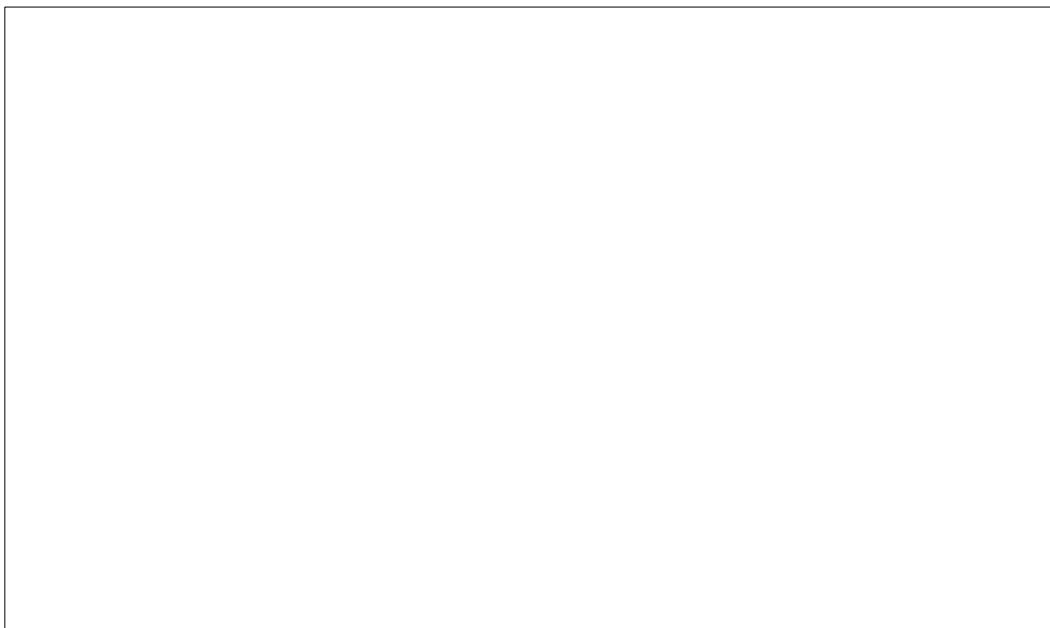


Figure 17: The Wheao scheme – the Flaxy Dam. Photograph courtesy of Hohepa Waiti.

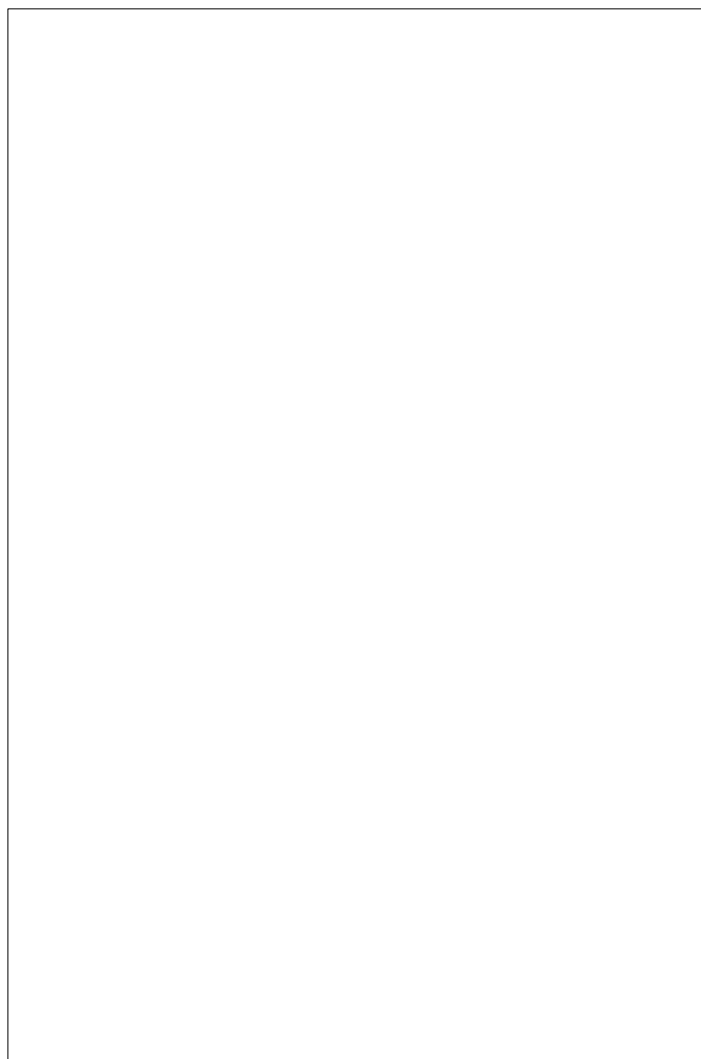


Figure 18: The Wheao scheme – the Rangitaiki canal. Photograph courtesy of Hohepa Waiti.

5.3.4 The separation of rights to use water and generate power

Until the passing of the Water and Soil Conservation Act 1967, ‘the Minister of Electricity had an unfettered right to use New Zealand’s water resources for the generation of electricity and to licence other people to use water if he saw fit’. Under the 1967 Act, the Minister of Electricity or the Electricity Department would ‘have to obtain authority from the Water and Soil Conservation Authority just as anyone else has to do’.¹²

The 1967 Act had its effective genesis in the 1965 report of an interdepartmental committee on water which proposed the establishment of a national water authority that was not a user of that resource. The Electricity Department had declined to sign the report on the grounds that electricity was a ‘special case’ and that control of its ‘essential fuel’ could not be handed to another body. Nevertheless, the committee’s proposal for a national water authority prevailed.

The committee agreed that the Electricity Department should control generation, ‘but only within the framework of the national and regional water authorities and their consents’.¹³ Accordingly, the Electricity Act 1968 was passed to consolidate the legislation concerning power generation and to amend it to conform to the Water and Soil Conservation Act 1967. A proviso added to clause 25 of the Bill at the committee stage stated that:

Except as expressly authorised by or under any other Act, no person or body shall generate electricity by the use of water without the consent in writing of the Minister [of Electricity].¹⁴

While consent to the use of rivers for power generation remained in the hands of the Minister of Electricity, the power to use water was a matter for the Water and Soil Conservation Authority. Persons wanting to use water for generating electricity now required two consents, one from the authority, the other from the Minister. Procedurally, it was arranged that an application to the authority for the right to use water would be referred automatically to the department and the two consents would be given together.

By the time those consents were sought for the Aniwheua and Wheao schemes, Mr Alexander concluded:

The water right was the key consent needed by the electricity authorities. Issuing of the water right also provided opportunities for public submission and appeal, which had been lacking under the Water-power and Public Works Acts.¹⁵

The Water and Soil Conservation Act, Ms Ertel submitted, was ‘almost wholly deficient in criteria . . . to achieve recognition of Maori interests at all in the statutory consent process’.¹⁶ Indeed, it was not until 1987 and the High Court *Huakina* decision

12. Document c5, p 22

13. Ibid, p 21

14. Ibid, p 24

15. Ibid, p 53

16. Document b5, p 30

that ‘the Treaty of Waitangi and evidence of Maori values were legitimate extrinsic aids to the Act’s interpretation’.¹⁷

5.3.5 Power to grant water rights retained in Resource Management Act 1991

Section 21 of the Water and Soil Conservation Act 1967 (rights in respect of natural water) was retained in section 354(1)(b) of the Resource Management Act 1991. The power to grant rights for the use of natural water, however, was to be exercised by regional water boards instead of by ministerial discretion.

Under the Resource Management Act, specific provision is made for the protection of Maori values and interests. All persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are required to recognise and provide for various matters of national importance, including the ‘relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga’ (s 6(e)). They are also required to have particular regard to kaitiakitanga (s 7(a)), interpreted as ‘the exercise of guardianship’, including ‘the ethic of stewardship’ (s 2). Furthermore, all persons exercising functions and powers under the Act are required to ‘take into account the principles of the Treaty of Waitangi’ (s 8).

When preparing or changing a regional policy statement, a regional council is required under section 61(2)(a)(ii) and (iii) of the Act to have regard to any regional planning document recognised by an iwi authority affected by the policy statement and to regulations relating to the conservation or management of fisheries, including taiapure, mahinga mataitai, and non-commercial Maori customary fishing. Similar provisions are imposed under section 66(2)(c)(ii) and (iii) in the case of preparation or change of a regional plan. A regional policy statement is to state matters of resource management significance to iwi authorities (s 62(1)(b)). A regional council is required to consider the desirability of preparing additional regional plans whenever any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources are likely to arise (s 65(3)(e)).

The Act, Ms Ertel submitted, was deficient because it failed to make any positive provision for the recognition and exercise of Maori ownership and tino rangatiratanga over a river and, particularly, of or over the water.¹⁸

5.4 THE DEVELOPMENT OF THE ANIWHENUA AND WHEAO SCHEMES

5.4.1 Local hydro schemes policy

According to Mr Alexander:

Up to 1973 and the first oil crisis, the New Zealand Electricity Department, successor since 1958 to the State Hydro-Electric Department, was of the view that it had the prime

17. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (doc B5(a)(2)); doc B5, p 30

18. Document D2, pp 61–62

5.4.2 TE IKA WHENUA RIVERS REPORT

responsibility for developing new power stations to meet a rapidly increasing demand for electricity. Only a State organisation had the resources to build the large schemes necessary to make any serious inroads into the national power shortages. Local power schemes were seen as bit-players which would not be hindered, but neither would they be especially helped . . . the Power Division of Ministry of Works . . . held a similar view.¹⁹

A file summary of a policy announcement made in 1965 indicated that a policy of encouraging local body hydro generation in the national interest was already in the making, provided the following conditions were fulfilled:

1. Their construction will not adversely affect the possible future development of a larger scheme.
2. They can be developed economically . . .
3. They are designed to make the best use of the water available . . .²⁰

This policy appeared to Mr Alexander 'to demonstrate that the Crown was at least as much interested in ensuring complementarity with its own commercial generation operations as it was in the sound use of the water resource'.²¹

5.4.2 Consents required

By the mid-1970s, when the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority wished to proceed with the Aniwhenua and Wheao power schemes respectively, they each required a consent to generate electricity from the Minister, a water right from the Water and Soil Conservation Authority, and approval to raise loan moneys from the Local Authorities' Loans Board. To obtain a ministerial consent, they had to have prepared an environmental impact assessment or report and have had it audited by the Commission for the Environment.

5.4.3 Crown grants water rights for Aniwhenua and Wheao schemes

Water rights for the Aniwhenua and Wheao power schemes were granted by the Crown to the Bay of Plenty Electric Power Board in 1975 and the Rotorua Area Electricity Authority in 1977 respectively. The Aniwhenua scheme began power generation on 3 October 1980. The Wheao canal collapsed in December 1982, rebuilding commenced in 1983, and power generation began in May 1984.

5.4.4 Dams and water rights transferred to energy companies

Following the enactment of the Energy Companies Act 1992, which established a process of corporatisation, the determination of the future structure of ownership of the assets and undertakings of power boards passed to representatives of the local

19. Document c5, p 28

20. See doc c5, p 25

21. Ibid, p 26

community. This applied to the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, which were to become Bay of Plenty Electricity Limited and Rotorua Electricity Limited respectively, and included the Aniwhenua and Wheao Dams and the water rights attaching thereto.

In accordance with the provisions of the Act, establishment plans for Bay of Plenty Electricity and Rotorua Electricity were prepared and submitted to the Minister of Energy for his approval. Each plan provided for the transfer of the assets and undertaking of the board to its energy company. Ministerial approval of the establishment plans was delayed to enable Te Ika Whenua's claim to these energy assets to be heard urgently by the Waitangi Tribunal.

In the *Te Ika Whenua – Energy Assets Report 1993*, we recommended:

That the assets in question, namely the Wheao and Aniwhenua power schemes and water rights attaching thereto, should be protected and retained in their present ownership or alternatively in the hands of the Crown until such time as the substantive claim has been heard and determined.²²

In the event, the Crown rejected this recommendation, and the Minister of Energy approved the establishment plans. Undoubtedly, the Minister's hand was strengthened by the Court of Appeal judgment in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, delivered by Cooke P on 17 December 1993.²³

5.4.5 *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General*

Following the issue of the *Energy Assets Report 1993* on 20 May 1993, the claimants brought judicial review proceedings seeking a declaration that the Minister not approve any establishment plan providing for the transfer of the dams and not recommend to the Governor-General that she make an Order in Council providing for any such transfer. In these proceedings, the claimants applied for interim relief, which Justice Doogue declined on 15 June 1993.

An appeal from this judgment was heard on 22 and 23 July 1993. The appellants were taken to be 'representing iwi and hapu and all Maori having interests in the Rangitaiki and Wheao rivers in the Bay of Plenty'. Their case was argued on an amended statement of claim based on aboriginal title. They alleged that the Minister of Energy, in consenting to the construction of the dams, and the local power authorities, by constructing the dams, had interfered unlawfully with the rights of iwi. The court's judgment, *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, read as follows (p 26):

as to these two dams non-Maori control has been an accomplished fact for a decade and more. The clock cannot be put back. The Maori remedy lies in the Waitangi Tribunal

22. Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 7.4

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

5.5 TE IKA WHENUA RIVERS REPORT

claim, or conceivably in Court action based for instance on Maori customary title or fiduciary duty.

In the judgment, ‘aboriginal title’ and ‘Maori customary title’ were used interchangeably. The court stated at page 24 that, however liberally Maori customary and Treaty rights might be construed, ‘one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power’.

In the event, the Minister approved the establishment plans, which transferred the dams and water rights to the energy companies.

5.5 CONSENT PROCESS FOR THE ANIWHENUA AND WHEAO SCHEMES

5.5.1 Introduction

A background research report on ‘The Aniwhenua and Wheao Schemes and the Energy Companies Act 1992’ was commissioned by the Tribunal from Dr Geoffrey Bertram and presented at the hearing of the energy assets claim.²⁴ This contained evidence on the water right consent and appeal process, the environmental impact assessment or reporting and auditing process, and the financial aspects of approvals by the Local Authorities’ Loans Board.

We were informed by Michael Lear, the general manager of the Energy and Resources Division of the Ministry of Commerce, that the Ministry had examined Dr Bertram’s evidence and considered that it accurately reflected the legislative and regulatory developments affecting the Aniwhenua and Wheao schemes.²⁵

Evidence for third parties given by Richard Stevens, the general manager of the Rotorua Area Electricity Authority, and Neil Brennan, a company secretary of the Bay of Plenty Electric Power Board, was directed to establishing that in each case statutory requirements that the public should be consulted were fulfilled.²⁶

In the presentation of evidence and submissions, the Rotorua Area Electricity Authority was commonly referred to as Rotorua Electricity and the Bay of Plenty Electric Power Board as Bay of Plenty Electricity, and for the sake of consistency, we adopt these abbreviations in this and the next chapter.

5.5.2 Investigations and consents for Aniwhenua

Mr Alexander’s report included detailed evidence on the investigations and consents process for Aniwhenua.²⁷ The application for water rights was publicly notified in July 1975. The Wildlife Service investigated the consequences of the proposal but only in terms of trout and water fowl.

24. Document A6

25. Document C7, p 27

26. Documents C10, C11

27. Document C5, pp 28–38

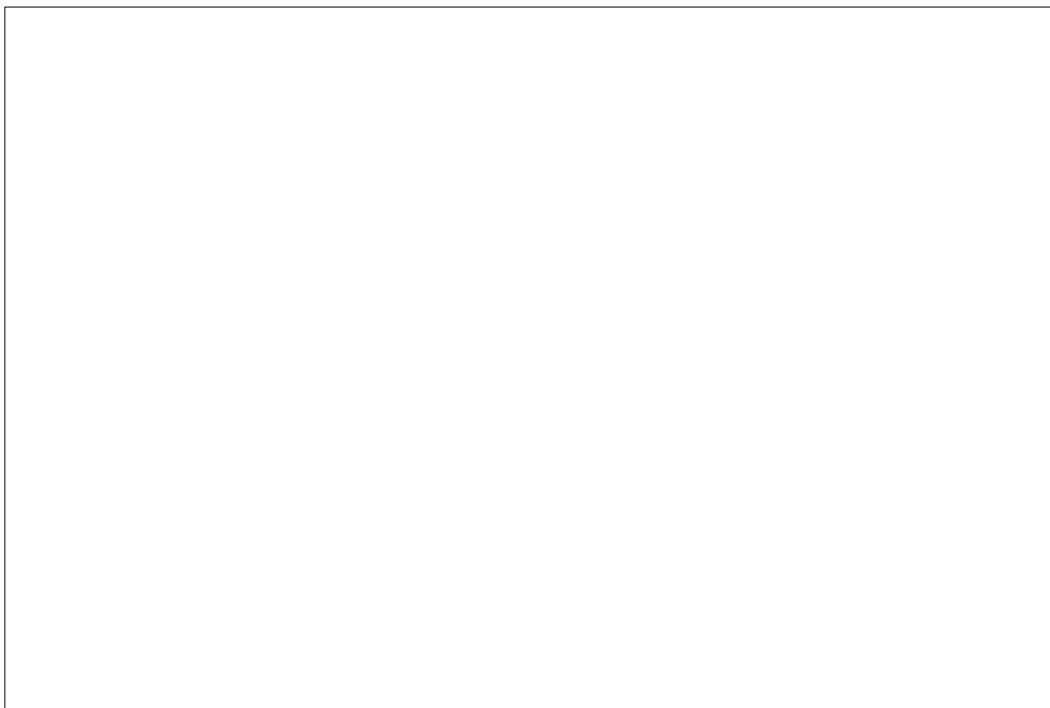


Figure 19: The Aniwhenua Falls

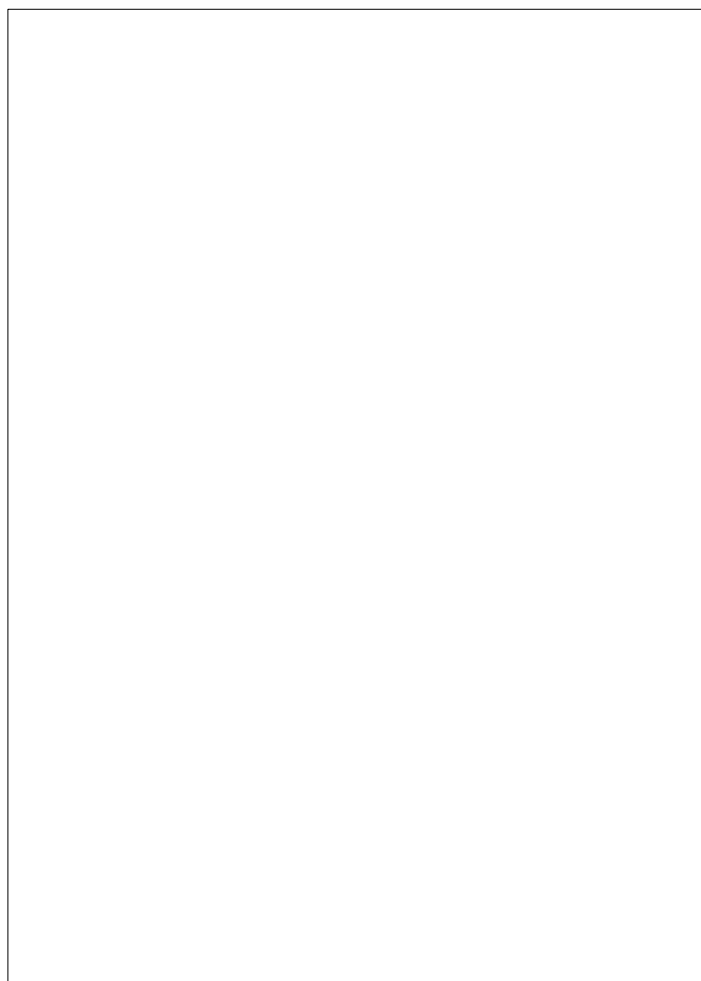


Figure 20: The Aniwhenua powerhouse and falls. Photograph courtesy of Hohepa Waiti.

Seven objections were received and heard. None came from tangata whenua or concerned their rights and interests in the Rangitaiki River, the Aniwhenua Falls, and traditional fisheries. Bay of Plenty Electricity's environmental impact report was publicly notified in December 1975, by which time a water right subject to certain conditions had been granted by the Bay of Plenty Regional Water Board. Ten submissions were received, but once again, none referred to the rights and interests of tangata whenua. The Commission for the Environment did not independently identify the future of the eel fishery as a concern, and consequently no comment on it was made in the environmental impact audit, completed in March 1976. Rather, the commission expressed the view that the total environmental benefits (such as recreation, public amenity, and electricity) exceeded total environmental costs (such as loss of farm land and the falls). None of the four appeals to the Town and Country Planning Appeal Board on the water right concerned tangata whenua rights and interests.

The Minister of Electricity consented to power generation in December 1976; that is, after the required environmental impact audit had been received by the New Zealand Electricity Department. Subsequent to the consent to generate being granted, the power board in 1977 obtained the consent of the Local Authorities' Loans Board to raise a \$12.5 million loan and a water right to cover the construction period. The water right had been publicly advertised for objection in December 1976.

Following the filling of the lake behind the dam, the power board initiated a public meeting, which led to the setting up of the Aniwhenua Reserves Management Committee by the Whakatane District Council. This joint advisory committee of council representatives and locally elected citizens proceeded to prepare a lake management plan. The plan was publicly notified, and submissions were received and amendments made before it was approved. As far as Mr Alexander could ascertain, no submissions from Maori were made.

5.5.3 Investigations and consents for the Wheao scheme

Again, Mr Alexander's report included detailed evidence on the investigations and consents for the Wheao scheme.²⁸

The possibilities of diverting the Rangitaiki into the Wheao for power generation were first investigated in the early 1960s by the Ministry of Works, then by the Tasman Pulp and Paper Company. In the late 1960s, the views of the Wildlife Service were sought. The conservator in Rotorua 'was adamant that the addition of such a large volume of new water into the Wheao would eliminate the trout fishery'. The Nature Conservation Council and the Marine Department supported this assessment and the council recommended that the Electricity Department not grant a generation licence. Nothing came of the investigations until the proposal was picked up by Rotorua Electricity in 1974. In October 1975, Rotorua Electricity decided to go ahead and obtain the necessary consents.

28. Document c5, pp 39–51

An environmental impact assessment was completed and published in February 1977 and appraised by the Commission for the Environment in May and July 1977. Generally, it was supportive except in respect of the impact the scheme would have on trout fishing. The Fisheries Research Division, however, expressed concern at the lack of comment on native fish. Accordingly, the commission recommended that the Minister of Electricity be advised to withhold his consent until possible modifications involving less of an impact on fisheries had been considered.

Three alternatives to that proposal by Rotorua Electricity were made, but its consulting engineers were of the opinion that the only one that was 'really viable' produced 'only little reduction on the impact of the scheme on the Wheao River'. The Electricity Department was satisfied that both Rotorua Electricity and its consultants were 'aware of the impact of the scheme on the fish, the fishing and the environment generally', and would 'treat the development with the required sensitivity'.

The commission, while admitting that the works would affect the fish and, to a greater degree, the fishing in the river, considered 'the problem should not last much longer than it takes for the work to be carried out'. It seemed clear to Mr Alexander that the commission had trout and trout fishing in mind, not eels and eeling. The first reference he had located to eels was to their being found stranded and dead after the collapse of the Wheao canal and dams; that is, several years after the investigatory process had been completed and the appropriate consents granted.

The land use consent given by the Taupo County Council imposing a power generation designation on the site was publicly advertised for comment in December 1976. Water rights were applied for in November 1976 and granted in July 1977. Appeals were dismissed in March 1978. An environmental impact assessment was prepared in December 1976 and appraised by the Commission for the Environment in May 1977.

The newly established Committee on Local Authority Hydro Development recommended making a Government construction loan to the Minister in August 1978. The Local Authorities' Loans Board in September 1978 approved Rotorua Electricity incurring debts by raising loans.

On 28 November 1978, the Minister granted a generation consent, notwithstanding that he had been advised of the environmental objections that had resulted in the appeal to the Town and County Planning Appeal Board and, more cursorily, of the alternatives suggested to meet fishery concerns.

5.5.4 The Flaxy Creek pipeline and subsidiary powerhouse

Some weeks earlier, Rotorua Electricity had advised that it wished to expand generating capacity by including a subsidiary powerhouse at the end of the Flaxy Creek pipeline where it dropped into the Rangitaiki canal. In 1980, the Committee on Local Authority Hydro Development recommended, and the Electricity Department supported, this expansion, despite forecasts of excess generating capacity and a Government review of local hydro policy early in 1979. The Minister of Energy

approved the recommendation in April 1981. The committee also recommended the approval of a supplementary construction loan, which the Minister approved in August 1981.

A revised generation consent to cover the Flaxy Creek pipeline power station was granted on 18 February 1982.

5.5.5 Mr Alexander's conclusions on investigations and consent process

In his examination of the considerable documentation by Government agencies of the investigations and consents for the Aniwhenua and Wheao power schemes, Mr Alexander found no references to objections by Maori or to what he considered to be 'a Maori component, concerning the rivers'. He noted, however, that the 'ability to object and appeal was not foreign to local Maori, as demonstrated by the Tuhoe-Waikaremoana Trust Board's involvement on land-related matters, in the Aniwhenua water right application and environmental impact report'. Any concerns expressed by Maori, he concluded, had always been after the event, despite there being three power schemes on the river and their being well publicised in local newspapers. 'From the Crown's point of view, there was a total silence from tangata whenua about the rivers while the power schemes were being debated and constructed.'

5.6 PUBLIC CONSULTATION

5.6.1 Aniwhenua scheme proposal

According to Mr Brennan, Bay of Plenty Electricity undertook extensive public consultation when it applied for a water right.²⁹ The main opposition had come from local farmers whose land would be affected by the Aniwhenua scheme. The Tuhoe-Waikaremoana Maori Trust Board had also objected, because approximately 39 hectares of its land on the bank of the Rangitaiki River were involved. Bay of Plenty Electricity agreed to certain conditions that met those objections. They included a right to draw water from the reservoir, exclusive access to the foreshore, and adequate compensation by way of an exchange of land.³⁰

As part of its independent audit of the scheme's environmental impact, the Commission for the Environment had canvassed the trust board's views. The trust board asked that suitable provision be made to avoid possible fire hazard problems arising for forestry developments from increased recreational usage of the Aniwhenua Dam. Another matter of concern to the trust board was that transmission lines would cross Maori land and impede forestry developments on it. Terms of entry and compensation for loss of production were negotiated with the power board. In Mr Brennan's view, 'Bay of Plenty Electricity complied with all the requirements imposed by statute at the time it applied for and was granted the water and electricity

29. Document C11, pp 4-6

30. Document C11, pp 4-5; doc C11(d)

generation rights’, and the ‘Trust Board participated fully in the water rights process’. As far as he was aware, the trust board, as the largest and most influential tribal authority in the district then in existence:

represented the interests of tangata whenua at the time of the water rights hearing. Certainly, there was no other Maori objection to the scheme. The Trust Board’s submissions did not raise the issue of ownership of the river or impact of hydrodam development on native fisheries.³¹

5.6.2 Wheao scheme proposal

According to Mr Stevens, ‘Rotorua Electricity undertook extensive public consultation’ during the development of the Wheao scheme.³² This began in December 1975 with a seminar for public authorities and members of Parliament for five electorates, including Eastern Maori.

Rotorua Electricity wanted to ascertain the likely impact, if any, the development would have on areas of importance to Maori. Early in November 1976, its environmental consultants, Murray–North Partners, had discussions with Maurice Bird, a kaumatua representing Ngati Manawa. The consultants then wrote to Mr Bird inviting his views on an enclosed scheme statement and asking for any assistance he was able to give on the likely impact, if any, on sites of Maori or general historical interest. As far as Mr Stevens knew, Mr Bird did not respond.

Prior to the public hearing of its application to the Bay of Plenty Regional Catchment Commission for a water right, Rotorua Electricity held a series of public meetings to discuss the project with the local community. Consequently, the project was fully exposed in the news media over a period of about two years. No Maori interests objected at the public hearing. Rotorua Electricity ‘complied in full with all the numerous statutory requirements in place at the time of the Wheao scheme development’ and gave ‘local Maori an opportunity to participate and express any concerns they may have had’.

5.7 THE CROWN’S RIGHT TO EXERCISE KAWANATANGA

In this chapter, we have examined the evidence presented to us on how the Crown conferred upon itself statutory powers to control the use of rivers and falls for power generation in the national interest and how for some 80 years it exercised these powers. More particularly, we have examined how the Crown in the mid-1970s controlled and managed the use of the Rangitaiki and Wheao Rivers to encourage the development of the Aniwhenua and Wheao schemes. In conclusion, we need to consider the argument put forward by the Crown to support its exercise of statutory powers to grant water rights and generation consents for those local hydro schemes.

31. Document c11, p 6

32. Document c10, pp 2–3

The Crown said that it must have the right under article 1 of the Treaty to provide for the protection, management, and exploitation of natural resources where it would be in the national interest; that is, for the benefit of all. Article 2 rights to tino rangatiratanga would be accommodated wherever practicable, but could not give tangata whenua the right to veto or prevent power developments on the rivers.³³ Questioned as to the possibility of partnership if Maori had similar objectives as the Government, Crown counsel replied that some situations bred conflict and, where compromise was impossible, article 1 must prevail.

Evidence given by Mr Lear for the Ministry of Commerce underlined the importance of hydro-generated electricity to New Zealand's economy.³⁴ It was a renewable resource developed at a cost that was among the lowest in OECD countries. Following energy sector reforms, the Government's role was to set up the regulatory structure for the energy industry. The method of generation was, relatively speaking, environmentally friendly, though it might involve environmental modification and affect recreational uses. Furthermore, in terms of section 5 of the Resource Management Act 1991, the development of the Aniwhenua and Wheao schemes was 'sustainable management of natural and physical resources'.³⁵

Mr Brennan, on behalf of Bay of Plenty Electricity, stressed the attractiveness of the Aniwhenua scheme:

Cheaper electricity for consumers was the Board's primary reason for pursuing the project. It was estimated the scheme would be able to supply power to the Board at a lower cost than NZED bulk-supply power. Another was the security of having a local supply to supplement the NZED system.³⁶

In the event, it had been a significant factor in Bay of Plenty Electricity being able to delay the passing on of price increases to its consumers. Furthermore, the construction of a reservoir where the Rangitaiki River crossed farm land had provided the Aniwhenua Lake recreational areas and wildlife sanctuaries, which are popular with tourists and New Zealanders for trout fishing, water sports, camping, and picnicking.

Mr Stevens, on the other hand, in giving evidence for Rotorua Electricity, said that the Wheao scheme 'funded by a loan from Government under its Local Hydro Schemes Policy . . . was not profitable and necessitated a write-down of Rotorua Electricity's debt'.³⁷

The claimants alleged that the Crown, in asserting its right to expropriate their wai tipuna for power generation under article 1 of the Treaty, was trampling on their article 2 right to tino rangatiratanga over their taonga. More particularly, they alleged that the Crown had failed to consult with its Treaty partner over the construction of the Aniwhenua and Wheao Dams and the proposed Kioreweku scheme.

33. Document D5, pp 23-24

34. Document C7

35. Ibid, p 8

36. Document C11, pp 3-4

37. Document C10, p 2

Other major concerns were the diversion of the Rangitaiki River into the Wheao River and the depletion of the traditional eel fishery above the Aniwhenua Dam. In the following chapter, we examine the evidence presented to us on these concerns. Treaty issues arising from them are discussed in chapters 8 and 9.

