

Chapter 7

Geothermal Resource Legislation and the Treaty

7.1 **Introduction**

A major part of the claimants' case focused on the past and present statutory control of geothermal resources in New Zealand, particularly the Geothermal Energy Act 1953 and the Resource Management Act 1991. In essence, the claimants' argument was that the legislation has failed to accord the Treaty rights of the claimant hapu an appropriate priority.¹

It is therefore necessary to examine in some depth the relevant legislation and the arguments made to the tribunal about its effects. Attention will then focus upon the consistency or otherwise of the legislation with the Treaty.

7.2 **Legislative Control for Scenery Preservation**

7.2.1 Legislative control of geothermal resources has occurred in three broad phases. From the 1880s until the mid-twentieth century, legislation was directed at protecting or controlling thermal areas for their scenic, tourism and health values. Examples include the Thermal Springs Districts Acts of 1881 and 1883 which gave the Crown a monopoly over the acquisition of Maori land in the counties of Taupo and East Taupo, and the Scenery Preservation Act 1903 which empowered the Crown to compulsorily acquire thermal areas anywhere in the country for the purpose of scenery preservation.

7.3 **Legislative Control of Industrial Exploitation**

The Water-Power Act 1903 as a model

7.3.1 The next phase of legislative activity, beginning in 1952, focused on industrial exploitation of geothermal resources. By this time, legislation controlling the exploitation of water-power, petroleum, uranium and coal was already in force.² In each case, except that of water-power, a state monopoly over the relevant resource had been achieved by vesting ownership of it in the Crown. The Water-Power Act 1903 took a different approach, 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 (A34:35-42). 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. Section 2(1) of the Act thus provided:

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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 shall vest in His Majesty.

The Geothermal Steam Act 1952

- 7.3.2 The first legislation to control the industrial exploitation of geothermal resources also focused on electricity generation. That similarity in purpose may explain why the Geothermal Steam Act 1952 followed the model of the Water-Power Act in not vesting ownership of geothermal steam in the Crown. Section 3 of the Geothermal Steam Act 1952 provided:

Subject to the provisions of this Act, the sole right to take, use, and apply geothermal steam for the purpose of generating electricity shall vest in the Crown.

The Act gave the Crown wide-ranging powers to facilitate its own involvement in the production, transmission and sale of electricity from geothermal steam. These included powers to enter any land and do all things necessary for test and measurement purposes, to sink bores in any land and to compulsorily acquire land under of the Public Works Act 1928 (ss5 and 6).

Private enterprise was also envisaged as having a role to play. The Governor-General could grant a licence to any person to take, use and apply geothermal steam for the purpose of generating electricity (s7) and a licensee could be authorised to conduct the exploratory and other activities specified in s5.

A threat to potential and even existing users of geothermal steam for other purposes was posed by s8 of the 1952 Act. By its terms the Governor-General could declare an area of land which was, or was believed to be, a source of geothermal steam, a "geothermal steam area". Ministerial consent was then needed to sink or use a bore in the area. Pre-existing uses of any bore which continued at the same or a lesser level were generally exempt from the need for consent but the minister could direct otherwise.

Full compensation was to be paid, however, for any loss or damage suffered by any person as a result of the operation of s8 or as a result of the exercise of any other power conferred by the Act (s9).

Summary

- 7.3.3 Counsel for the claimants provided a useful summary of the effect of the Geothermal Steam Act 1952:

In essence, the Act nationalised use rights in geothermal resources insofar as electricity generation was concerned. The principal effect of this was that a licensing regime was created, so that the sinking of bores in geothermal steam areas was prohibited without Ministerial approval. Other than for the purpose of generating electricity, however, land owners remained free to sink bores on

their land and to allow others to enter their land and do likewise. To that extent at least, the Geothermal Steam Act did not affect or restrict any subsisting rights in geothermal resources. (C13:49)

Inadequacies of the 1952 Act

- 7.3.4 Within a year of its enactment, the Geothermal Steam Act proved inadequate to serve the Crown's purposes. In part, this was because the Act only controlled the generation of electricity from geothermal steam, whereas other industrial uses of geothermal steam and heat were being embarked upon or contemplated. As a result, the Crown desired broader powers to use and to licence the use of geothermal resources.

At the forefront of official consciousness at the time was the proposal of a joint venture, comprising the government and private enterprise, to use natural steam directly in a pulp and paper mill at Kawerau. This proposal had reached an impasse when the venture partners and the Maori landowners in the area (Te Teko) could not agree on the price to be paid for the land should the test bores prove successful (A34:64-65).

Another possible use of geothermal energy receiving government attention during 1952 was its potential for producing heavy water, an element in the production of atomic energy. At the urgent request of the British government, the New Zealand government had considered the suggestion that it might supply the Commonwealth with heavy water and, by late 1952, had gone so far as to identify likely test sites in geothermal areas. However, those on Maori land were again considered to pose problems because of the uncertainty over the extent of compensation payable in the event that the sites proved suitable (A34:59-64; A30:21-25).

The Geothermal Energy Act 1953

- 7.3.5 In the result, the 1952 Act was repealed and replaced by the Geothermal Energy Act 1953. Notably, the replacement Act continued to adhere to the water-power model in stopping short of vesting ownership of geothermal energy in the Crown.

Section 3(1) of the Geothermal Energy Act 1953 enlarged the Crown's statutory rights to geothermal resources by providing that, despite any contrary provision in any Act or instrument of title:

the sole right to *tap*, take, use, and apply geothermal *energy* on or under the land shall vest in the Crown, whether the land has been alienated from the Crown or not. (emphasis added)

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It was also provided, pursuant to s3(2), that all alienations of land from the Crown after the commencement of the 1953 Act were deemed to be made:

subject to the reservation of the sole right of the Crown to tap, take, use, and apply geothermal energy on or under the land, and subject to the provisions of this Act.

"Geothermal energy" was defined in s2 of the Act (as amended in 1969) to mean:

energy derived or derivable from and produced within the earth by natural heat phenomenon; and includes all steam, water, and water vapour, and every mixture of all or any of them that has been heated by such energy, and every kind of matter derived from a bore and for the time being with or in any such steam, water, water vapour, or mixture; but does not include water that has been heated by such energy to a temperature not exceeding 70 degrees Celsius.

This definition is plainly broader than that of "geothermal steam" contained in the 1952 Act. We note that "geothermal energy" included minerals in solution in geothermal systems.

Section 9(1) of the Act required a licence to be obtained from the minister before any person could "sink any bore or tap, take, use or apply geothermal energy for any purpose". By virtue of s9(4), a licence was deemed to be a contract between the licensee and the Crown and enforceable by and against either party accordingly. It is notable that the licensing regime was conducted completely at the minister's discretion (s9(3)), there being no statutory criteria governing licensing decisions nor any provision for public participation, objection or appeal. In particular, there was no recognition of any Maori interests in geothermal resources nor any provision for conserving those resources.

The Act did, however, recognise pre-existing Maori and others' uses of geothermal energy. It exempted domestic uses of geothermal energy "including cooking, heating, washing and bathing" which were served by shallow bores (not exceeding 61 metres in depth) from the need for a licence, unless the minister directed otherwise "having regard to the public interest". Also exempt, unless the minister directed otherwise, was any pre-existing use of geothermal energy for any purpose, provided it continued for the same purpose and to a similar or lesser extent (ss9(1)(b) and 9(1)(c)).

While the Crown was exempt from the need for a licence in certain circumstances (s11(1) and (5)), licensed and unlicensed uses could be subject to a rental payable to the Crown (s10). Another new provision, in s12, authorised the minister to order any bore to be closed for specified purposes, including that it was dangerous or detrimentally affecting other bores, supplies of geothermal energy or a tourist attraction.

As with the 1952 Act, the Geothermal Energy Act 1953 conferred on the Crown and its

delegates powers to enter onto any land for the purposes of investigating geothermal energy (s6). The Governor-General was also authorised to take land under the Public Works Act, this time for the purpose of tapping and using geothermal energy in connection with any public work (s7).

A new but related provision, apparently devised with the Kawerau situation in mind, was enacted in s8 (A34:78). Under this section, where the Minister of Finance and the minister responsible for the Act certified that the establishment of an industrial undertaking using geothermal energy was of national importance and should be located within a specified area, the Governor-General could declare that s8 applied to the undertaking. Thereafter, the Governor-General could take any land or any estate or interest in land or certain other rights (such as an easement) over land in the specified area for the benefit of the persons responsible for the establishment of the industrial undertaking, under the Public Works Act. The persons responsible for the industrial undertaking would then be liable for any compensation payable as a result.

As with the 1952 Act, compensation was required to be paid for any loss or damage suffered as a result of the Act's operation (s13). Unlike the earlier Act, however, the 1953 Act spelled out that compensation was not payable in respect of geothermal energy unless, at the commencement of the Act, it was of actual benefit to the owners or occupiers of the surface land (s14). This provision was evidently inspired by the Crown's concern, already a live issue with regard to the proposed Kawerau pulp and paper mill, that the common law's view of landowners' rights could require compensation for loss of the right to appropriate geothermal energy (A34:64-65; A30:23).

Summary

7.3.6 Relying on the evidence of Mr Boast (A34:76-78), counsel for the claimants provided the following summary of the purpose of the 1953 Act:

The purpose of the Geothermal Energy Act 1953 (and its predecessor, the Geothermal Steam Act 1952[]) was to put geothermal resources on a similar statutory footing to electricity generation from *water*. As noted by Boast, the legislative framework therefore links geothermal resources with water, rather than with other *energy* resources such as petroleum, coal or uranium. Interestingly, the legislation does not vest the ownership of the geothermal resource in the Crown - as the Petroleum Act 1937 currently does with regard to petroleum - but instead treats it as an energy resource akin to water. The fact that water itself is an energy resource highlights the conceptual difficulties of adequately categorising geothermal water (particularly in view of its mineral content).

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In essence, the Act appears to be based on an assumption that the geothermal resource is analogous to groundwater, so that common law rights in respect of groundwater were of some relevance. S.3 becomes operative at the very point when the resource, considered in this sense, becomes a property right - namely at the point of abstraction. Leaving aside the limited exceptions outlined above [provided for in s9], it was necessary under the 1953 Act to obtain a licence from the Crown before abstracting geothermal fluid (and at that point obtaining property rights in the fluid). In that sense, the Act did not simply vest use and management rights in the Crown while leaving private property rights unaffected. Its intent, rather, was to make the existence of private property rights in the resource dependent upon obtaining a licence from the Crown. (A53:38-39)

7.4 **Legislative Control for Conservation Purposes**

Water and Soil Conservation Act 1967

- 7.4.1 The third phase of legislative activity affecting geothermal resources is characterised by its focus on conservation. The Water and Soil Conservation Act 1967 vested the sole right to use all "natural water" in the Crown (s21). Originally, "natural water" was defined (in s2) to include geothermal steam, but an amendment in 1981 specified that "water or steam or vapour heated by geothermal energy, whatever its temperature" were all "natural water". This produced the result, confirmed in the Court of Appeal in *Keam v Minister of Works and Development*,³ that applicants wishing to extract or use geothermal water needed to obtain both a licence under the Geothermal Energy Act and a water right, from a regional water board, under the Water and Soil Conservation Act.

In his general summary of the Water and Soil Conservation Act, the Crown's witness Craig Lawson, Manager of the Resource Management Directorate of the Ministry for the Environment, made the following points:

Section 21 of this Act vested the sole right to use water in the Crown. The Act contained a general presumption against the use of water - water rights needed to be granted by regional water boards (later to become regional councils) for specific uses of water. While water rights were generally granted for periods between 5 and 20 years, there were no statutory limitations on the period for which they could be granted. This Act did not provide for rentals for the use of water....

The granting of water rights by regional water boards (and regional councils) followed an open process with a right of appeal. The Act provided for the review of water rights during their term where the quality of the receiving water was classified or where minimum flows were defined (ss 26K and 24D(2)). (B43:2-3)

While the 1967 Act did not expressly recognise Maori interests in water, in 1987 the High Court held that the Treaty of Waitangi and evidence of Maori values were legitimate extrinsic aids to the Act's interpretation.⁴

The Resource Management Act 1991

Purpose

- 7.4.2 The most recent enactment, the Resource Management Act 1991, repeals the Water and Soil Conservation Act 1967 and most of the Geothermal Energy Act 1953. It has the long title "[a]n Act to restate and reform the law relating to the use of land, air, and water" and its purpose is stated in s5(1) to be "to promote the sustainable management of natural and physical resources".

"Sustainable management" is defined in s5(2) to mean:

managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety while -

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Guiding principles

- 7.4.3 Sections 6, 7 and 8 list matters which must be heeded by persons exercising functions and powers under the Act. Section 6 lists five matters of "national importance" which shall be recognised and provided for by those persons. The first four focus broadly upon the protection of marine areas, outstanding natural features and indigenous vegetation and fauna. The fifth matter of national importance which is to be recognised and provided for is:

The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

Section 7 lists eight matters which persons exercising functions and powers under the Act "shall have particular regard to". The first is "kaitiakitanga", defined in s2 to mean:

the exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself.

The remaining seven matters include such general ones as the efficient use and development of resources, the protection of the heritage value of sites and buildings and the maintenance and enhancement of the quality of the environment. Also included is

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the more specific matter of protecting the habitat of trout and salmon.

Section 8 provides:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Geothermal resources: section 354

7.4.4 With regard to geothermal resources, the Resource Management Act repeals all the key provisions of the 1953 Geothermal Energy Act which were outlined in 7.3.5 above with the exception of s12, which authorises the minister to order the closure of bores.⁵ Of primary interest is that s3 of the 1953 Act, which vested in the Crown the sole right to tap, take, use, or apply geothermal energy, is repealed. However, s354 of the 1991 Act, which is headed "Crown's existing rights to resources to continue", continues the effect of the earlier provision in the following manner:

354(1) Without limiting the Acts Interpretation Act 1924 but subject to subsection (2), it is hereby declared that the repeal by this Act or the Crown Minerals Act 1991 of any enactment, including in particular -

(a) Section 3 of the Geothermal Energy Act 1953;

...

shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

(2) Any person may -

(a) Take, use, dam, divert, or discharge into any water; or

...

to which the Crown has a right, interest, or title without obtaining the consent of the Crown, if the taking, use, damming, diversion, or discharge by that person does not contravene this Act or regulations.

The "water" referred to in s354(2) includes "geothermal water" which is in turn defined in s2 to mean:

water heated within the earth by natural phenomena to a temperature of 30 degrees Celsius or more; and includes all steam, water, and water vapour, and every mixture of all or any of them that has been heated by natural

phenomena.

Mr Lawson of the Ministry for the Environment explained his understanding of the reason behind s354, as it affects geothermal resources:

The reform recognised that several iwi had lodged claims with the Waitangi Tribunal relating to the ownership of geothermal resources. The Government agreed that the Resource Management Law Reform was not the appropriate place to resolve ownership grievances, and that issues relating to Maori ownership of resources would not be dealt with in the reform. The Government also agreed to continue the vesting of the sole right to allocate the resource with the Crown until those issues were resolved. Other provisions in the Act were designed to ensure that the interests of Maori were adequately provided for. (B43:5)

Leaving aside for the present counsel's arguments as to the precise meaning of s354, it is clear that the section envisages that, after the commencement of the Resource Management Act, uses of geothermal water of the kind listed in s354(2) can be legitimately undertaken only in accordance with the Act's regulatory scheme.

Management of geothermal resources

7.4.5 The first feature of the Act's regulation of geothermal water is that it confers upon regional councils the functions of controlling water and discharges of contaminants. Sections 30(1)(e) and 30(1)(f) provide:

30.(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

...

- (e) The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including -
 - (i) The setting of any maximum or minimum levels or flows of water:
 - (ii) The control of the range, or rate of change, of levels or flows of water:
 - (iii) The control of the taking or use of geothermal energy:
- (f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water;

The remainder of the Act's scheme with regard to geothermal resources centres on the provisions in ss14 and 15. Section 14(1), which applies to non-coastal water, to heat or

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energy from such water and to heat or energy from the material surrounding any geothermal water, prohibits their taking, use, damming or diversion unless allowed by s14(3). The relevant parts of that provision authorise the activities when they are expressly allowed by a rule in a regional plan⁶ or a resource consent.⁷ A further exception with regard to geothermal water is created when the water, heat or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment (s14(3)(c)).

Section 15 of the Act prohibits the discharge into the environment of contaminants and, in one case, water, unless it is expressly allowed by a regional plan, resource consent⁸ or regulations or comprises an existing lawful activity as defined in s20. The definition of "contaminant", which is capable of applying to any substance, energy or heat, focuses on the likelihood that the discharge will produce a change in the condition of the water, air or land into or onto which it occurs (s2). Section 15 is thus apt to apply to a variety of discharges from uses of geothermal resources.

As noted, in exercising functions under the Act all bodies, including regional councils, are required to have due regard to the matters listed in ss6, 7 and 8. An additional direction relating to resource consents is contained in s104(1). There, it is provided that consent authorities must have regard to any actual and potential effects of allowing the activity in considering an application for a resource consent.

The following extracts from the evidence of Mr Lawson provide a helpful summary of the foregoing provisions in the Resource Management Act and also introduce other relevant features of the Act:

15. When considering which level of government would have responsibility for management of particular resources, Government decided that this should be placed as close as appropriate to the community of interest affected by decisions taken on that resource.
16. Government confirmed that the management of water should continue on a catchment based approach and that geothermal energy management should be administered together with water management. Regional councils, therefore, have the responsibility for the control of the taking or use of water including geothermal energy (s.30(1)(e)).
17. The Act provides regional councils with the requirement to produce a regional policy statement and the ability to develop statutory plans for water and geothermal resources. In doing so, a Council is subject to Part II of the Act which requires that:
 - it recognise and provide for, as a matter of national importance, the relationship of Maori and their culture and traditions with their ancestral lands, waters, sites, waahi tapu, and other

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taonga (s.6(e));

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- it have particular regard to Kaitiakitanga (s.7(a)) and the recognition and protection of the heritage values of sites, places or areas (s.7(e)); and]
 - it take into account the principles of the Treaty of Waitangi (s8).
18. In addition, for both the instruments referred to above, regional councils are to have regard to iwi planning documents (s.61(2)(a)(ii) and s.66(2)(c)(ii)). In preparing a regional policy statement there is also a requirement that the policy statement state matters of resource management significance to iwi authorities (s.62(1)(b)). Councils are also required to consider the desirability of preparing a regional plan when there are significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources (s.65(3)(e)).
19. The RMA also provides for the granting of resource consents for use of geothermal energy. Such consents cannot be granted for periods longer than 35 years. Section 14 provides that the use of geothermal energy is only permitted if authorised by a resource consent or a rule in a regional plan, or for uses in accordance with tikanga Maori.
20. When an application for resource consent to use geothermal energy is lodged, it must be accompanied by sufficient material setting out the potential impact of the consent (s.88). Additional information can be requested (s.92). The application is generally notified and, as the Act provides for open standing, any person can make a submission to the council (s.96).
21. When considering an application for a resource consent, a regional council remains subject to Part II of the Act and must act in a manner consistent with any plan it has developed (s.104). The Act provides appeal rights to all persons who made submissions on the application (s.120).
22. Geothermal licences and water rights granted under the previous legislation are deemed to be resource consents (ss.386 and 387). Some previously permitted uses of geothermal energy may continue for up to three years after the commencement of the Act, or until a regional plan provides otherwise (s.418).
23. The Act also provides other opportunities to Maori to influence the management of geothermal resources:
- A local authority may transfer some of its functions under the Act to an iwi authority (s.33(1));
 - Geothermal aquifers of outstanding value can be protected by

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water conservation orders;

- Heritage orders can protect geothermal surface features;
- The Crown may make an appropriate national policy statement with which regional policy statements, regional plans and district plans must not be inconsistent[; and]
- The Minister for the Environment may also recommend to the Governor-General the making of regulations prescribing national environmental standards (s.43).

24. The Act provides for the making of Regulations prescribing the circumstances and manner in which the holders of resource consents shall be liable to pay for geothermal energy (s.360(1)(c)). These royalties are to be received by regional councils and paid into the Crown Bank Account (s.359). The previous royalty (rental) regime established under the Geothermal Energy Act continues under the Resource Management (Transitional, Fees, Rents and Royalties) Regulations 1991. These apply only to the Rotorua field users.
25. Geothermal royalties have been used for two main purposes: as a resource management tool (depletion rate modifier), and as a rental resource (source of economic rent). The Ministry for the Environment is currently reviewing the role of royalties in the management of the Rotorua geothermal field. (B43:6-10)

Heritage and water conservation orders

- 7.4.6 The heritage and water conservation orders mentioned by Mr Lawson are provided for, respectively, in Parts VIII and IX of the Act. A heritage order (a provision in a district plan of a territorial authority) may be obtained by, amongst others, the Minister of Maori Affairs or a local authority, either acting on their own motion or on the recommendation of an iwi authority (s187). One purpose for which heritage orders may be obtained is to protect any place of "special significance to the tangata whenua for spiritual, cultural, or historical reasons" (s189(1)(a)). The decision of the relevant territorial authority as to whether or not a heritage order is justified is appealable to the Planning Tribunal (ss191 and 192).

Any person may apply to the minister for the making of a water conservation order (s201(1)) and, unless the minister rejects the application after such inquiry as is considered necessary, a special tribunal shall be appointed to consider the submissions made to it upon the matter and to report its conclusions. Upon the submission of an interested party, the Planning Tribunal must hold a public inquiry in respect of the tribunal's report (ss202-213). The minister may make a recommendation to the Governor-General for a water conservation order where that is consistent with the report of the special tribunal or, on appeal, the Planning

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Tribunal. The minister may also decline to so recommend, contrary to such reports (ss214 and 215).

7.5 **Geothermal Resource Legislation and the Treaty**

The claimants' grievances

7.5.1 In paragraph 6 of their statement of claim the claimants allege that any grant of resource consents to exploit the Ngawha geothermal resource will directly contravene the title and rangatiratanga of nga hapu o Ngawha to the resource and will deny their right to act as kaitiaki of this taonga. Accordingly they seek findings by the tribunal that:

- ownership of and rangatiratanga over the Ngawha geothermal resource is and remains vested in nga hapu o Ngawha; and
- the grant of resource consents to the joint venture applicants would be in breach of those rights unless and until the consent of nga hapu o Ngawha is procured.

We add for the sake of completeness that the claimants sought an urgent recommendation that the Far North District Council and Northland Regional Council should not proceed to consider the joint venture applications until this claim is heard and reported upon by the tribunal. While it is very doubtful that the tribunal has jurisdiction under s6(3) of the Treaty of Waitangi Act 1975 to make such a recommendation, the need has not arisen, as no date for hearing the joint venture application has been set by the district council.

Nature and extent of the claimants' present interest in the Ngawha geothermal resource

7.5.2 The claimants seek a finding that ownership of and rangatiratanga over the Ngawha geothermal resource is and remains vested in nga hapu o Ngawha.

The tribunal has found that at the time of the Treaty, and for a long time before 1840, the hot springs of Ngawha and the associated sub-surface geothermal system were a sacred taonga over which the hapu of Ngawha had rangatiratanga (4.5.3). In this sense they `owned' the Ngawha geothermal resource.

The tribunal has further found:

- that when in 1894 the Crown acquired ownership of that part of B block on which hot springs were situated, the Maori owners lost the right of access to that land and the hot springs on the land. As a consequence they necessarily lost the rights of management and control or rangatiratanga over the surface and sub-surface components of the geothermal system on and under the alienated land (4.6.5);
- that when by 1894 Heta Te Haara had disposed of all the land in the Tuwhakino block, his interest and any interest of his hapu in the hot springs and pools and

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the underlying resource was completely extinguished. As a consequence Maori no longer had any right of management and control or rangatiratanga over the surface components of the geothermal system or the sub-surface components under the alienated land in the Tuwhakino block (4.6.9); and

- that if the geothermal fluid is isolated from the remainder of the underground components of the resource for the purpose of considering the question of ownership, once ownership of the surface components has been severed there is no basis for allocating the right of ownership of or rangatiratanga over the whole of the sub-surface geothermal fluid to the owner of only one set of hot springs or pools. No one such owner or groups of owners can validly claim the exclusive right to manage and control the underground fluid or, in all circumstances, to exercise a veto over its extraction and use (4.6.16).

As a consequence the claimants no longer own or have rangatiratanga over the entire Ngawha geothermal resource. Instead they own and have rangatiratanga over the land and springs contained in the one acre block that is part of the former Parahirahi C block. As well, the tribunal has found that the claimants were wrongfully deprived of the remaining four acres of the block in that they have never voluntarily relinquished ownership of and rangatiratanga over the land and springs in that block. We have recommended that the Crown should return the four acres presently known as a recreation reserve. Once returned to the rightful owners, rangatiratanga over the whole of the hot springs and the land in the former Parahirahi C block will be restored to the claimants. For the purposes of our ensuing discussion we are assuming that this will occur.

While, therefore, the claimant hapu no longer have an exclusive interest in the whole of the Ngawha geothermal resource, we have accepted without hesitation that the hot springs in the five acre Parahirahi C block are a taonga handed down by the claimants' tupuna which are of immense value to them, especially for their healing powers.

Although the claimant hapu no longer have an exclusive interest in the sub-surface geothermal resource they necessarily retain a substantial interest in the resource. The preservation of their taonga, the Ngawha hot springs, necessarily depends on the preservation and continued integrity of the underlying resource which manifests itself in their hot springs and pools. It is totally unrealistic to isolate or divorce their interest in the Ngawha hot springs from the geothermal resource which finds expression in them.

The mauri of the Ngawha hot springs

7.5.3 It has already been concluded from the kaumatua evidence that the geothermal resource is possessed of a life force or mauri (2.6.3). It would accord with the claimants' beliefs therefore, that their interest would be rendered ineffectual if the springs, and more particularly their mauri, from which emanates their healing properties, were to be damaged:

Mauri is a special power possessed by [the God] Io which makes it possible for everything to move and live in accordance with the conditions and limits of its existence. Everything has a mauri, including people, fish, animals, birds, forests, land, seas, and rivers; the mauri is that power which permits these living things to exist within their own realm and sphere. No one can control their own mauriauri or life-essence. to the effect of the proposed development on the mauri of the hot springs. It focused rather on the possible or likely measurable effects on the springs of development of the underlying resource, both short term and long term, and the efforts that could be taken to minimise such effects. As appears from the summary of the scientific evidence in chapter 6, none of the scientists were able to give a guarantee that development would produce no physical effect upon the springs. Indeed Dr Watson, the leading expert in support of the proposed joint venture development, explained that it was intended to produce small measurable effects upon the springs, undetectable to users, so that further effects could be prevented.

The tribunal appreciates that at the forthcoming hearing of the joint venture's application for a resource consent to develop the Ngawha geothermal resource, much more detailed evidence, scientific and otherwise, is likely to be presented to the regional council. We also accept that it is not for this tribunal to decide whether the proposed development would in fact impact upon the springs and if so, to what extent; this being outside the tribunal's expertise and being a matter for the bodies appointed under the Resource Management Act to consider and adjudicate upon. But having said that, the tribunal, on the facts presented to us, considers that the claimants' concerns about the proposed development damaging their taonga are entirely understandable and reasonable. Those concerns were necessarily directed at the proposed joint venture development which would utilise bores, already drilled, situated in reasonably close proximity to the springs. The bottom of one such bore is a mere 200 metres from the springs. We make no comment on any situation other than that before us. If a less substantial use of the geothermal resource had been proposed or if the proposed development were to be centred at a distance remote from the taonga, for instance, it may be that scientific evidence would have or should have allayed the claimants' concerns.

7.6 **The Application of Treaty Principles**

7.6.1 As our earlier discussion of Treaty principles demonstrates, rangatiratanga over a taonga denotes the mana of Maori not only to possess, but to control and manage it in accordance with their own cultural preferences. While the cession of sovereignty or kawanatanga enables the Crown to make laws for conservation control and resource

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protection, that right is to be exercised in the light of article 2 of the Treaty. It should not diminish the principles of article 2 or the authority of the tribes to exercise control. In short, the tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga.

The tribunal in its *Radio Frequencies Report* spoke of a hierarchy of interests in natural resources:

based on the twin concepts of kawanatanga and tino rangatiratanga. First in the hierarchy comes the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Secondly comes the tribal interest in the resource. Then follows those who have commercial or recreational interests in the resource.⁹

Also relevant to the claimants' concerns over the proposed development is the duty of the Crown to ensure that they are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms. The duty extends equally to the mauri of the Ngawha Springs taonga.

As earlier indicated (5.1.3) the degree of protection to be given to Maori resources will depend upon the nature and value of the resource. In the case of a very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori, the Crown is under an obligation to ensure its protection, save in very exceptional circumstances, for so long as Maori wish it to be so protected. The Ngawha geothermal springs fall into this category. The value attached to such a taonga is essentially a matter for Maori to determine.

- 7.6.2 The tribunal would distinguish the degree of protection due to a geothermal resource such as the Ngawha Springs taonga, from that due to land. Zoning provisions, for instance, which restrict the use of land to certain purposes whether commercial, residential or farming, do not affect the integrity or very existence of the land. It remains intact. Experience in Wairakei and elsewhere, including Rotorua, has demonstrated only too well the relatively fragile nature of geothermal springs and

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pools and their sensitivity to exploitation of the underlying geothermal fluid and steam.

If, as it should be, priority is to be given to protecting Maori rangatiratanga over a highly valued and irreplaceable taonga such as the Ngawha hot springs there may well be no alternative to refusing consent to contentious proposals for exploitation of the underlying resource. We would reiterate that the value to be attributed to such a taonga is essentially a matter for those having rangatiratanga over it to determine.

- 7.6.3 The tribunal has recognised that in conformity with the Treaty principle of partnership, the needs of both cultures must be provided for and compromise may be needed in some cases to achieve this objective. At the same time the Treaty guarantee of rangatiratanga requires a high priority for Maori interests when proposed works may impact on Maori taonga (5.2).

In the particular circumstances of this claim the tribunal has no doubt that if the Treaty's article 2 guarantee is to be given a meaning compatible with Maori culture and spiritual values, as plainly it must, the Crown's obligation to manage geothermal resources "in the wider public interest" must be constrained so as to ensure the claimants' interest in their taonga is preserved in accordance with their wishes. We are unaware of any exceptional circumstances or overriding public interest which would justify any other conclusion which might leave it open for the claimants' interest in their taonga to be harmed or rendered ineffectual. Limited local benefits such as might accrue from exploitation of the Ngawha geothermal resource for the purpose of electricity generation would be insufficient to justify placing the claimants' Treaty rights to the protection of their taonga in jeopardy. It would need to be established, if such was possible, that any approved interference with the underlying resource, could not and would not impinge upon the claimants' rangatiratanga over the taonga and the mauri of the taonga.

7.7 **Are the Claimants' Treaty Rights Protected by the Geothermal Resource Legislation?**

Geothermal Energy Act 1953

- 7.7.1 As we have seen s3(1) of the Geothermal Energy Act 1953 appropriated to the Crown the sole rights to tap, take, use and apply geothermal energy on or under the land. Section 9 required a licence to be obtained from the minister before any person could sink any bore or tap, take, use or apply geothermal energy for any purpose. The Act did, however, recognise pre-existing Maori and others' use of geothermal energy for domestic purposes such as cooking, heating, washing and bathing (7.3.5).

All key provisions of the 1953 Act earlier outlined in 7.3.5 were repealed by the Resource Management Act except for s12 which authorises the minister to order the closure of bores (see s362 and the eighth schedule of the Resource Management Act). The sections repealed included s3 referred to above. However, s354(1) of the 1991 Act, which has its head-note "Crown's existing rights to resources to continue", declares that the repeal of s3 of the 1953 Act:

shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

Section 354(2), however, provides that any person may take, use, dam, divert, or discharge into any water to which the Crown has a right, interest, or title without obtaining the consent of the Crown, if the taking, use, damming, diversion, or discharge by the person does not contravene the Act or regulations.

It is apparent from submissions of counsel that the meaning and effect of s354 is by no means clear. No doubt it will call for an authoritative interpretation by the High Court in due course. It does, however, seem clear to the tribunal that, whatever may be the precise meaning of s354(1), the uses of geothermal water of the kind listed in s354(2) can be legitimately undertaken only in accordance with the Act's regulatory scheme.

The claimants' argument

7.7.2 Counsel for the claimants argued that s3 of the Geothermal Energy Act was in breach of the Treaty of Waitangi by its expropriation of the most vital elements of the claimants' rights of ownership, rangatiratanga and kaitiakitanga with respect to the geothermal resource at Ngawha. The Act, it was argued, did not even consider the existence of tangata whenua rights or interests in geothermal resources. Instead, it was premised upon the assumption that property rights in geothermal energy were analogous to those recognised by the common law in ground water and so did not arise until capture or abstraction. In arrogating to the Crown sole use rights (rather than ownership) in the energy component of geothermal resources (as opposed to the resources themselves), the Act did not validly extinguish the claimants' prior ownership rights to the resource itself, it was argued, but seriously affected the claimants' rights by expropriating the most important incidents of ownership of the resource (C13:55-58).

Counsel for the claimants submitted that while the precise effect of s354 of the Resource Management Act 1991 was not entirely clear, its underlying intention is to continue the expropriating effect of s3 of the 1953 Act. He further submitted that, to the extent that s354 is intended to preserve the Crown's rights in geothermal energy, the section continues to expropriate a substantial portion of the claimants' rights in breach of the Treaty.

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Moreover, claimants' counsel submitted that in seeking to preserve its vested rights via s354, the Crown has demonstrated its desire to preclude any other claim to ownership or rights in respect of the geothermal resource. In other words, the Crown has not only failed to recognise the claimants' prior Treaty rights in the resource, it has deliberately perpetuated the monopoly rights vested in itself, knowing of this and similar Treaty claims to the geothermal resource. Mr Williams further submitted that the Crown's failure to recognise and provide for Treaty rights in the resource at the time it enacted the Geothermal Steam and Geothermal Energy Acts in breach of the Treaty was a woeful omission; but the Crown's attempts to preserve its position, being fully aware of the rights asserted by the tangata whenua under the Treaty are, he submits, particularly repugnant (C13:61).

The Crown's argument

7.7.3 Counsel for the Crown denied that the Geothermal Energy Act had expropriated any rights of the claimants. He argued that, prior to the 1953 Act, the application of the common law rules relating to water would have been appropriate to determine property rights in geothermal resources. By those rules, there was no ownership of geothermal water until it was captured and abstracted either in the form of geothermal water (fluid) or steam. The maxim of the common law that a landowner has title from the centre of the earth to the sky was not apt to be applied to geothermal resources, in the Crown's view, because their very nature makes them incapable of ownership. Accordingly, the claimants did not own the Ngawha geothermal resource (B48:1-2; C17:23-24).

The Crown further argued that even if the claimants were considered to have some ownership rights in the underlying resource, the 1953 Act, while clearly affecting those rights, did not expropriate them. Referring to the dictionary definition of "expropriate" as "to take away property from its owner" or "to dispossess", the Crown maintained that the 1953 Act did neither of these and was consistent with the Crown's role of kawanatanga (C16:77,78).

Having reviewed the main provisions of the Act, counsel for the Crown submitted that, accepting for the moment that the claimants had some ownership right to the Ngawha geothermal resource, nothing in the 1953 Act operated as an expropriation of those rights. The only impositions on the claimants would have been:

- (a) the necessity to obtain a licence; or
- (b) the possibility of their having to pay royalties should they wish to use the field in a way which required a licence.

He pointed out that there is nothing in the Act which would prohibit a landowner from charging a royalty over and above any royalty payable under s10 of the 1953 Act.

In relation to s354 of the Resource Management Act 1991 Crown counsel submitted that the section ensures the retention of existing use rights of the Crown established under

the Geothermal Energy Act 1953. He stated that the section would apply, for example, to the existing bores drilled by the Ministry of Works in the Ngawha area and observed that none of those was on the claimants' land (C16:81).

The Crown emphasised that the Resource Management Act does not address issues of ownership of resources, but issues relating to their use. The regulation of such important issues as sustainable management of, and access to, resources, it was submitted, is properly determined by legislation rather than by individuals although it was acknowledged that in the case of geothermal resources, access to them is affected by ownership of the surface land (C16:83).

- 7.7.4 The tribunal notes at the outset that the submissions of counsel for the claimants are based on the premise that the claimants own or have rangatiratanga over the whole of the Ngawha geothermal resource both above and below ground. The Crown, on the other hand, while recognising that the surface hot springs on the one acre vested in the Waiariki trustees are a taonga of the claimants, disputes that they have any interest in the underlying resource which gives rise to the springs at Ngawha.

For reasons noted above (7.5.2), the tribunal has found that the claimants no longer own or have rangatiratanga over the entire Ngawha geothermal resource. But they do own and have rangatiratanga over the land and springs on the one acre block vested in the Waiariki trustees and, once the adjoining four acres presently known as a recreation reserve are returned to the rightful owners by the Crown, they will have rangatiratanga over the whole of the former Parahirahi C block. Moreover, as we have earlier indicated, while the claimant hapu no longer have an exclusive interest in the sub-surface geothermal resource, they do retain a substantial interest in it. The preservation of their taonga, the Ngawha hot springs, necessarily depends on the preservation and continued integrity of the underlying resource.

The tribunal does not uphold the claimants' contentions that s3 of the Geothermal Energy Act 1953 was in breach of the Treaty in that it expropriated the claimants' rights of ownership, rangatiratanga and kaitiakitanga with respect to the greater Ngawha geothermal resource. This is because they no longer had such rights over the whole of the resource.

There is, however, one respect in which, in terms of s6 of the Treaty of Waitangi Act, the claimants have been, and are likely to be, prejudiced by Crown action in exercise of its powers under s3 of the 1953 Act. This is the drilling of bores by the Crown, some in close proximity to the claimants' hot springs at Ngawha. It is those bores which the joint venture proposes to use, if it obtains the necessary resource consents under the 1991 Act, to exploit the underlying geothermal resource for the generation of electricity.

The Geothermal Energy Act 1953 gives the Crown the sole use rights of the energy component of geothermal resources. It does so without any recognition of any rights of Maori in the resource and makes no provision to ensure that any Treaty rights of Maori

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will be protected as required by article 2 of the Treaty. The Act simply ignores any such Treaty rights and gives the Crown the legal right if it so chooses, to act without regard to such rights. There was no requirement for instance, that in sinking bores in close proximity to the claimants' hot springs at Ngawha, the Crown should first ensure that the claimants' Treaty rights were fully protected. One such bore is within 200 metres of the claimants' taonga.

In the course of submissions on s354 of the Resource Management Act, Crown counsel stated that the section would ensure the retention of the existing use rights of the Crown under the 1953 Act including, for example, the existing bores drilled by the Ministry of Works in the Ngawha area.

The finding of the tribunal

- 7.7.5 The tribunal finds that the Crown has acted in breach of Treaty principles in failing to ensure that the Geothermal Act 1953 and s354 of the Resource Management Act 1991, which preserves existing rights to geothermal resources under the 1953 Act, contain adequate provisions to ensure that the Treaty rights of the claimants, in their geothermal resource at Ngawha, are fully protected. As a consequence the claimants have been, and are likely to continue to be, prejudiced by such breach.

Resource Management Act 1991 management regime

- 7.7.6 Counsel for the claimants acknowledged that the 1991 Act represents an advance on the previous regime to the extent that it allows input by Maori into the process of control and management and introduces more stringent conservation standards. Counsel submitted, however, that the Act fails to recognise and provide adequately for tangata whenua rights in respect of geothermal resources (C13:62-63).

Part II of the Act sets out the purpose and principles of the legislation in ss5 to 8. Claimants' counsel was strongly critical of these provisions, which he characterised as a "hierarchy of considerations", with the various criteria being listed in descending order of importance. These are:

- the purpose of the Act is to promote the *sustainable management* of natural and physical resources (s5);
- in achieving the purpose of the Act everyone exercising functions and powers under it, in relation to the use, development, and protection of natural and physical resources "shall recognise and provide for" the following matters of *national importance*. These are set out in paragraphs (a) to (e). None is given priority over the other (s6);
- anyone acting as in s6 shall also "have particular regard to" (a) kaitiakitanga and other matters set out in paragraphs (b) to (h) (s7); and
- anyone acting as in s6 shall "take into account" the principles of the Treaty of

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Waitangi (s8).

As counsel put it, s6 imposes a mandatory obligation on decision-makers to "recognise and provide for" matters of "national importance". Section 7 has less injunctive force; decision-makers need only have "particular regard" to "other" matters (which in turn are presumably of less than *national* importance). Section 8 in turn merely requires decision-makers to "take into account" Treaty principles. All of these matters are subordinate to the over-riding importance of achieving the central purpose of sustainable management of resources (s5).

7.7.7 Claimants' counsel maintained that the reference to the Treaty in s8 of the Resource Management Act is a "watered down" version of the reference found in s9 of the State Owned Enterprise Act 1986, which states:

Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

Counsel further suggested that the Resource Management Act reference is even more diluted than that found in s4 of the Conservation Act 1987, which provides:

This Act should be interpreted and administered to give effect to the principles of the Treaty of Waitangi.

Other provisions of the Act which specifically mention Maori interests, or provide for Maori participation in the management regime, also attracted criticism. It was argued that the Act's exemption from the need for a water permit of uses of geothermal water, heat and energy which are "in accordance with tikanga Maori" (s14(3)(c)) is unclear in its meaning and anyway is significantly limited by s15's requirement that a discharge permit is necessary to discharge geothermal water, heat or energy (C13:70-71).

It was also argued that the provisions which make it possible for "iwi authorities" to be delegated certain powers of local authorities, and to have input into regional policy statements or plans, are very limited in that they make such input a mere possibility. Moreover, those provisions are fraught with difficulty, it was said, not only because of the lack of definition of an "iwi authority" but also because of the expense involved for any Maori group endeavouring to participate in the regime created by the Act (C13:71-72).

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Other features of the Act's regime which were criticised for failing to give adequate recognition to Maori interests in geothermal resources included:

- the power of the Minister of the Environment to "call-in" applications for resource consents (and thereafter appoint a board of inquiry to report and recommend upon any such applications pursuant to s146) where a proposal is of national significance having regard to the Treaty of Waitangi (s140(2)(h));
- the manner in which heritage orders and water conservation orders may be obtained; and
- the discretionary powers of a regional council to notify iwi authorities of water permit applications (s93(1)(f)), except where approvals have been obtained from those whom the regional council considers will be adversely affected by the permit (s94(2)) (C13:72-75).

7.7.8 Crown counsel's defence of the Resource Management Act regime as being adequate to protect the claimants' interests in the Ngawha geothermal resource was based on the view that the underground resource is incapable of ownership. Acknowledging, however, that the claimants have a guardianship role, Crown counsel argued that their aims are adequately provided for by s14(3)(c) of the Act (exempting communal use in accordance with tikanga Maori from the need for a water permit) and, with regard to resource consents, the requirements in ss7, 8 and 104 (by which regard must be had to kaitiakitanga, the principles of the Treaty and any actual and potential effects of allowing the activity).

The fact that the Act did not require the claimants' consent to proposed uses of the Ngawha geothermal resource meant, the Crown stated, that the extent to which the claimants could exercise kaitiakitanga was not as great as they would wish. However, it was said this was a consequence of the Crown's right of kawanatanga (C16:81-83).

7.7.9 It is readily apparent that the Resource Management Act is a very considerable improvement on the Geothermal Energy Act 1953 in terms of its concern to ensure that consideration is given to Maori interests in geothermal resources. But, for reasons we will now give, we consider the Act fails adequately to ensure that Maori Treaty rights in geothermal resources are protected.

It should be emphasised at this point that the Treaty was between Maori and the Crown. In return for the powers ceded to Maori by the Crown in article 1, the Crown, in article 2, guaranteed to protect Maori rangatiratanga over their taonga. This obligation is a continuing one and cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local authorities. As we have indicated in our earlier chapter on Treaty principles, if the Crown chooses to so delegate, it must do so in terms which ensure its Treaty duty of protection is fulfilled (5.1.3).

(a) Section 6

Section 6 of the Resource Management Act does require persons exercising functions and powers under the Act 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.

Water includes geothermal water (s2) and this provision clearly extends to the claimants' taonga of the hot springs at Ngawha. It is not easy to determine the precise meaning and scope of this provision, and it received little attention from counsel. Indeed Crown counsel referred to ss7, 8 and 104, but placed no reliance on this provision. Whatever its meaning, it does not amount to or create an obligation to comply with the Crown's Treaty duty to protect the claimants' rangatiratanga over their highly valued taonga at Ngawha. A requirement to "recognise and provide for" does not equate with r duyyprinciples in the decision-making process under the Act is a comparatively modest one.

It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed.

Claimants' counsel was also critical of other features of the Act's regime. We have recorded these in 7.7.7. It is not necessary for the purposes of this claim that we consider his submissions on these provisions. Suffice it to say that if the recommendation which we propose to make is iy s2 as meaning:

the exercise of guardianship; and in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself.

In our earlier discussion of rangatiratanga and kaitiakitanga we noted that the care for and fostering of resources was an integral part (but only a part) of rangatiratanga, and where resources were clearly demarcated, the rangatiratanga in respect of them could equally well be described as kaitiakitanga (literally guardianship) (2.5.3).

The claimant hapu of Ngawha undoubtedly have rangatiratanga and kaitiakitanga over their taonga at Ngawha. The Crown has a duty under the Treaty to guarantee their rangatiratanga and kaitiakitanga for so long as they wish to retain it. Section 7, however, requires those exercising functions and powers which could, depending on how they are exercised, have the effect of harming or even destroying the claimants' taonga at Ngawha, only to have "particular regard" to the claimants' kaitiakitanga over their taonga. Such a requirement does not equate with the Crown's Treaty duty to protect the claimants from such an outcome. The tribunal notes that immediately after the reference in paragraph (a) to kaitiakitanga, paragraph (b) refers to "the efficient use and

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development of natural and physical resources". So, while the decision-maker is to have particular regard "to kaitiakitanga", he or she is also to have the same regard to the efficient use and development of natural resources. No priority is accorded the claimants' Treaty rights.

(b) Section 8

Section 8 of the Act requires persons exercising functions and powers under the Act to "take into account" the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Implicit in the requirement to "take into account" Treaty principles is the requirement that the decision-maker should weigh such principles along with other matters required to be considered, such as the efficient use and development of geothermal resources (to which "particular regard" must be given under s7). The role or significance of Treaty principles in the decision-making process under the Act is a comparatively modest one.

It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed.

Claimants' counsel was also critical of other features of the Act's regime. We have recorded these in 7.7.7. It is not necessary for the purposes of this claim that we consider his submissions on these provisions. Suffice it to say that if the recommendation which we propose to make is implemented by the Crown, his criticisms may lose much of their force.

- 7.7.10 Before stating our findings it is desirable that we should comment on the evidence of Morris Love who was called by the claimants. It should be noted at the outset that Mr Love considers that the geothermal resource, both surface and sub-surface, at Ngawha and elsewhere, is a taonga of Maori and the Crown's assumption of the sole rights to use that resource in the Geothermal Energy Act 1953 is in breach of article 2 of the Treaty.

To remedy this alleged breach, Mr Love, in a carefully considered paper, argued for a new regime under the Resource Management Act which would in his view appropriately recognise the respective interests of Maori and the Crown in the geothermal resource.

In essence, under Mr Love's proposed regime, Maori having rangatiratanga over a geothermal resource which is established to be a taonga, would be the holder of the use rights, and as such, would hold the final rights of veto on any use of the resource. He summarises his proposal as follows:

In this proposed regime then, iwi would hold the sole right to use the geothermal resource. The practical effect of that is that two decisions (or permits if you like), would be required - one from the iwi for the use right (the

allocation decision and the setting of management parameters), and one from the regional council for a resource consent which would consider the external effects of the resource development. This arrangement would recognise the rangatiratanga of the iwi in allocating use rights as well as the needs of the Crown, through regional councils to control external effects, ensure sustainable management of the resource and protect the interests of third parties. The allocation process would not be final but always conditional on the kaitiaki or tribal guardians being able to maintain their kaitiaki role. (A49:7)

We make no comment on the appropriateness of this proposal, which is stated in general terms, except in relation to the claimants' Ngawha geothermal resource. In their case, Mr Love's assumption that the claimants own or have rangatiratanga over the whole of the Ngawha geothermal resource has not been substantiated. As a consequence, Mr Love's basic premise that the claimants are entitled to the sole use right of the resource does not apply. This makes his proposals inapplicable to the claimants' taonga at Ngawha.

Tribunal findings

- 7.7.11 At the time of the signing of the Treaty in 1840 Maori were almost totally dependent for their sustenance and livelihood on the natural resources of Aotearoa. Maori nurtured and protected those resources. Kaitiakitanga was an essential element of rangatiratanga. It is inconceivable that Maori would have signed the Treaty had they not been assured that the Crown would protect their rangatiratanga over their valued resources for as long as they wished. In return they exchanged the power of governance. The Ngawha springs are of immense value not only to the claimant hapu of Ngawha but to all of Ngapuhi. The Crown is under a clear duty under the Treaty to ensure that the claimants' taonga is protected. The partnership which the Treaty embodies and represents requires no less.

The tribunal finds that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.

The tribunal further finds that the claimants have been, or are likely to be, prejudicially affected by the foregoing omission, and in particular by the absence of any provision in the Act giving priority to the protection of their taonga and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish. The omission of any such statutory provision is inconsistent with the Treaty duty of the Crown, when delegating powers of governance to local and regional authorities, to ensure that it does so in terms which will guarantee that the rangatiratanga of the claimants in and over their taonga is recognised and protected as required by the Treaty. In the absence of such a provision, a development such as that proposed by the joint venture to exploit the underlying Ngawha geothermal resource may be permitted and may result in interference with or damage to the claimants' hot springs at Ngawha.

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Recommendation

- 7.7.12 The tribunal recommends that an appropriate amendment be made to the Resource Management Act providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi.

References

1. This relied on the Waitangi Tribunal's jurisdiction, pursuant to s6(1)(b) of the Treaty of Waitangi Act 1975, to consider claims by Maori that they have been or are prejudicially affected by legislation which was or is inconsistent with the principles of the Treaty.
2. The Acts were the Water-Power Act 1903, the Petroleum Act 1937, the Atomic Energy Act 1945 and the Coal Act 1948.
3. *Keam v Minister of Works and Development* [1983] 1 NZLR 319
4. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188
5. See s362 and the eighth schedule of the Resource Management Act 1991.
6. This plan would be prepared by a regional council pursuant to section 65.
7. The appropriate resource consent would be a water permit (s87(d)).
8. The appropriate resource consent would be a discharge permit (s87(e)).
9. "Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies 1990" (Wai 26 and Wai 150) 3 *WTR* (Wellington) p 42