

Chapter 8

Conclusions and Recommendations

8.1 **Introduction**

The claimants' grievances fall under two main heads. The first concerns the propriety of the acquisition by the Crown of the land and hot springs on the approximately four acre block at Ngawha. This was for some time a domain and is now a recreation reserve in the name of the Crown. The second set of grievances centres around certain provisions of the Geothermal Act 1953 and the Resource Management Act 1991 and their claimed inconsistency with the rights of the claimants under the Treaty of Waitangi.

A critical question which goes to the heart of the claimants' grievances is whether, as they assert, they presently own or have rangatiratanga over the whole of the Ngawha geothermal resources both surface and sub-surface within the geothermal field. We will record our findings and conclusions on this central issue first and then discuss each of the two major heads of grievances.

8.2 **The Nature and Extent of the Claimants' Taonga**

8.2.1 At the time of the signing of the Treaty of Waitangi in 1840, and for centuries previously, the hot springs of Ngawha and the underlying resource which fed these springs were a sacred taonga of Ngapuhi. The hapu of Ngawha, with possibly some other hapu of Ngapuhi, were the occupiers of and held rangatiratanga over what is now known as the Ngawha geothermal field including all surface geothermal springs within the field. Moreover the various hapu, by virtue of their occupation and possession of the land above the sub-surface geothermal system, had rangatiratanga over the sub-surface and whatever it contained, even though this was necessarily almost wholly unknown then. They certainly knew that the hot springs were fed from the underground resource. They knew of their discovery by Kareariki and of the subsequent manifestation of the taniwha, known to this day by the name Takauere, as a protector of the resource.

As we have earlier noted, such beliefs, whether allegory, myth or history, serve to impart ownership rights, certainly on the basis of discovery and subsequent unbroken occupation and control, over whatever resource was regarded as essential for the people's well-being. And none has been more valued by Ngapuhi than the springs at Ngawha.

8.2.2 As we have seen, between 1873 and 1894, individualisation of title of the Tuwhakino and Parahirahi blocks and partition of the latter, resulted in a substantially greater part of this land passing from Maori ownership. The whole of the Tuwhakino block, on which were hot springs adjacent to those on Parahirahi C1 (now known as the Spa pools), was

sold to Europeans. In addition, the Crown acquired almost all Parahirahi B block on which were to be found all the hot springs and other thermal manifestations on that block. The Crown also believed (erroneously in our view) that it had purchased some four acres in Parahirahi C block on which were to be found some of the highly prized Ngawha hot springs.

The claimants and their counsel strongly urged before us that notwithstanding the loss of this land they have to this day retained ownership and rangatiratanga over the whole of the Ngawha geothermal resource, including the hot springs on the Tuwhakino and Parahirahi B blocks which were alienated by 1894. They say this is the consequence of their ownership of and rangatiratanga over the hot springs and pools on Parahirahi C block, a part of which they were wrongfully deprived of by the Crown.

For reasons which are discussed in some detail in chapter 4 and briefly noted below, the tribunal has been unable to agree that, since 1894, the claimants have retained ownership and rangatiratanga over the whole of the Ngawha geothermal resource. We do agree however that since that time the claimants have retained ownership and rangatiratanga over the Ngawha hot springs on the one acre currently vested in the trustees of Parahirahi C1 Maori reservation. And as will shortly be noted, they are entitled to the return and reinstatement of ownership and rangatiratanga over the four acres vested in the Crown as a recreation reserve, which is an integral part of the Ngawha springs formerly comprised in Parahirahi C block.

- 8.2.3 When in 1894, the Crown acquired ownership of that part of Parahirahi B block on which hot springs were situate, the Maori owners lost the right of access to the land and the hot springs on the land. As a consequence, the tribunal finds that they necessarily lost the right 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).
- 8.2.4 Likewise, the tribunal has concluded that the final result of the two sale transactions whereby the owner Heta Te Haara disposed of all the land in the Tuwhakino block and surrendered the right of access to certain pools in the northern block, was that his interest and any interest of his hapu in the hot springs and pools on that block and the underlying resource was completely extinguished. Te Haara parted with the right of access to the land and the hot springs on the land. Consequently, 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 block (4.6.9).
- 8.2.5 It follows from the findings recorded in the preceding two paragraphs that once ownership of a significant part of the geothermal component (the surface hot springs and pools and other manifestations) is severed from that of other surface components, as has occurred in the Ngawha region, no one owner of some only of the surface components can validly claim the right to use and control the whole of the resource in and under the geothermal field. The present day owners, whether private or public, of the alienated surface of the geothermal resources in Parahirahi B block and the Tuwhakino block

must necessarily have the right to use and control at least the surface components on land owned by them (subject always to any statutory provisions affecting them) (4.6.14).

- 8.2.6 A critical question is whether the sub-surface components of a geothermal resource are capable of ownership. If the sub-surface geothermal fluid is isolated from the remainder of the underground components of the resource for the purpose of considering the question of ownership, the tribunal considers that 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 group 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).

The question of what degree of protection should however be given to the highly valued taonga comprising the hot springs and pools in the care and trusteeship of the trustees of the Parahirahi C1 Maori reservation and the adjoining Crown owned recreation reserve springs and pools should they be returned to Maori ownership is noted later (8.4.2).

- 8.3 **Did the Crown Acquire Its Interest in Parahirahi C Block in Breach of the Treaty?**
This question involves the first of the two main heads of grievances of the claimants and has been fully considered in chapter 3. The short answer is, yes.

- 8.3.1 The finding of the tribunal is that the Crown was under a duty to take adequate steps to protect the owners' interests in Parahirahi C block and that it failed in its obligation under the Treaty to do so. In particular the Crown failed to protect the owners by not fully ascertaining the nature and very special value of Parahirahi C and ensuring that they did in fact wish to alienate this sacred taonga (3.14.6).

- 8.3.2 The tribunal has further found that it has not been established that the owners willingly and knowingly alienated Parahirahi C block or the hot springs taonga located on the block, it not being clearly and unambiguously indicated in the deed of sale that this was intended. Applying the contra proferentem rule, the owners ought not to be deprived of their taonga in the absence of such intention being clearly and unambiguously made known to them by the Crown. Accordingly, the acquisition of Parahirahi C block was in breach of article 2 of the Treaty which guarantees to Maori their tino rangatiratanga over their taonga for so long as they wish to retain the same in their possession. As Mr Justice Somers observed in the *New Zealand Maori Council* case "a breach of a treaty provision must in my view be a breach of the principles of the Treaty".¹ It follows that the claimants have been prejudicially affected and will continue to be so affected by the wrongful acquisition of the four acres now held by the Crown as a recreation reserve.

Given the extremely high value consistently placed on the five acre block by the hapu of Ngawha the tribunal considers the four acres in the block acquired by the Crown in breach of the Treaty should be returned to Maori.

- 8.4 **Does the Geothermal Resource Legislation Adequately Protect the**

Claimants' Treaty Rights in the Ngawha Geothermal Resource?

- 8.4.1 The claimants have urged strongly that it does not. We agree. Their criticisms relate first to certain provisions of the Geothermal Energy Act 1953 in particular s3, and to s354 of the Resource Management Act 1991 which preserves existing rights of the Crown to geothermal resources under the 1953 Act. Secondly, the claimants say that the Resource Management Act fails to recognise and provide adequately for tangata whenua rights in respect of geothermal resources. In particular they are critical of the management regime and the absence of any requirement that those making decisions under the Act are to act in conformity with Treaty principles.

While the tribunal has found that 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 of immense value to them, and indeed of all Ngapuhi, especially for their healing powers.

Although the hapu of Ngawha no longer have an exclusive interest in the underlying geothermal resource, they nonetheless 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. As we have earlier observed, it is totally unrealistic to isolate or divorce their interest in the Ngawha hot springs from the geothermal resource which finds expression in them (7.5.2).

- 8.4.2 The Crown is under a Treaty duty to protect the claimants' taonga at Ngawha. The degree of protection to be given to Maori resources will depend upon the nature and value of the resource. The tribunal considers that 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 of whether, as the claimants maintain, the Resource Management Act and in particular the management regime established by the Act ensures that the claimants' Treaty rights in respect of their geothermal resource are fully protected.

We reiterate here that the Treaty was between Maori and the Crown. The Crown obligation under article 2 to protect Maori rangatiratanga is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or regional authorities. If the Crown chooses to so delegate, it must do so in terms which ensure that its Treaty duty of protection is fulfilled.

- 8.4.3 Our consideration of the provisions of the Resource Management Act rest in their taonga to be harmed or rendered ineffectual (7.6.3).
- 8.4.4 It is against this background that the tribunal has considered whether the claimants' Treaty rights are protected by the geothermal resource legislation. We refer first to s3 of the Geothermal Energy Act 1953. It was this section which enabled the Crown, through the agency of the Ministry of Works, to drill a series of bores in the Ngawha geothermal

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field. The right to such bores is protected by s354 of the Resource Management Act 1991. One such bore is within 200 metres of the claimants' taonga and others are in relatively close proximity. It is these bores which the joint venture proposes to use if it obtains the necessary resource consent 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 will be protected as required by article 2 of the Treaty. In short, the Act simply ignores any such Treaty rights. As a consequence, should the joint venture application prove successful, and the Crown bores be used to extract geothermal fluid, the claimants' taonga may be placed in jeopardy entirely against their will.

8.4.5 Accordingly, the tribunal has found 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 of the Crown 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 (7.7.5).

8.4.6 We turn next to the question of whether, as the claimants maintain, the Resource Management Act and in particular the management regime established by the Act ensures that the claimants' Treaty rights in respect of their geothermal resource are fully protected.

We reiterate here that the Treaty was between Maori and the Crown. The Crown obligation under article 2 to protect Maori rangatiratanga is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or regional authorities. If the Crown chooses to so delegate, it must do so in terms which ensure that its Treaty duty of protection is fulfilled.

8.4.7 Our consideration of the provisions of the Resource Management and in particular Part II, which sets out the purpose and principles of the Act, leaves us with no option but to conclude that the Crown has not, in delegating extensive powers to local and regional authorities under the Act, ensured that its Treaty duty of protection of Maori interests will be implemented. On the contrary, it appears that in promoting this legislation, the Crown has been at pains to ensure the decision-makers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed (7.7.9).

8.4.8 We repeat here our finding 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.

8.4.9 The tribunal has further found 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 (7.7.11).

8.5 **Recommendations Pursuant to s6(3) of the Treaty of Waitangi Act 1975**

8.5.1 Our recommendations fall under two heads. The first concerns our findings that the Crown acted in breach of its Treaty duty to protect the owners' interests in Parahirahi C block and that it also acted in breach of article 2 of the Treaty in not ensuring that the owners willingly and knowingly alienated Parahirahi C block and the hot springs taonga located on the block.

We *recommend* that the portion of the former Parahirahi C block acquired by the Crown and now vested in Her Majesty the Queen as a reserve for recreation purposes pursuant to the Reserves Act 1977, comprising 4 acres 2 roods 8 perches (1.8413 hectares), be returned to Maori ownership.

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As indicated in 3.19.2 the tribunal thinks it likely that it would be the wish of the trustees of the Parahirahi C1 Maori reservation and the whanau and hapu whose interests they represent that, should such land be returned by the Crown, it be vested in the trustees (commonly known as the 'Waiariki trustees'). The tribunal however makes no recommendation as to whom the four acre block should be returned as this is essentially a matter to be determined by the Maori people concerned.

- 8.5.2 Our second recommendation relates to our findings concerning the Geothermal Energy Act 1953 and the Resource Management Act 1991 recorded in 8.4.3 and 8.4.4 above.

We *recommend* that an appropriate amendment be made to the Resource Management Act 1991 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.

As Part II of the Resource Management Act is presently worded, those exercising powers and functions which may impact on Maori natural resource taonga are not required to ensure that Maori Treaty rights are accorded their appropriate standing. Accordingly, such rights are at risk of being depreciated or outweighed by other considerations and as a consequence Maori Treaty rights are not given the protection which article 2 requires. We see no alternative to the amendment we have recommended if Treaty breaches are to be avoided in the implementation of the Resource Management Act.

In accordance with s6(5) of the Treaty of Waitangi Act 1975, the director of the tribunal is requested to serve a sealed copy of this report on:

- (a) the claimant trustees of Parahirahi C1 Maori reservation;
- (b) the Minister of Maori Affairs,
the Minister of Justice,
the Minister for the Environment,
the Minister of Conservation;
- (c) the Solicitor-General;
- (d) Mr Williams (counsel for the Wai 304 claimants);
- (e) Mr Salmon (counsel for the joint venture);
- (f) Ms Ngawati (counsel for the Wai 123 claimants);
- (g) the Far North District Council; and
- (h) the Northland Regional Council.

References

1. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 693