

Kaituna River Claim

1 - Preliminary Pages

1 - Publication Information

REPORT OF
THE WAITANGI TRIBUNAL
ON
THE KAITUNA RIVER CLAIM
(Wai 4)

WAITANGI TRIBUNAL
DEPARTMENT OF JUSTICE
WELLINGTON
NEW ZEALAND

November 1984

Original cover design by Cliff Whiting,
invoking the signing of the Treaty of Waitangi and
the consequent development of Maori-Pakeha history interwoven in Aotearoa, in a
pattern not yet completely known, still unfolding.

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Wai 4
IN THE MATTER of the Treaty of Waitangi Act 1975

AND
IN THE MATTER of a claim by
SIR CHARLES BENNETT and
others in respect of a proposed nutrient pipeline to the Kaituna River

The Minister of Maori Affairs
Parliament House
WELLINGTON

FINDING OF THE WAITANGI TRIBUNAL
ON THE KAITUNA CLAIM

Waitangi Tribunal, Department of Justice, Wellington.

Kaituna River Claim

1 - Preliminary Pages

2 - Table of Contents

Contents

- 1.0 Record of Hearing
- 2.0 Introduction Lake Rotorua-A National Asset
- 3.0 The Maori Claimants
- 4.0 The Treaty of Waitangi
- 5.0 The Legal Status of the Treaty of Waitangi
- 6.0 The Treaty of Waitangi Act 1975
- 7.0 Kaituna Catchment Control Scheme
- 8.0 Land Disposal of Effluent
- 9.0 Issues Raised by the Claim
- 10.0 Recommendations of the Tribunal

Appendix Extract from the translation of the evidence of Te Irirangi Cairo Te Akiawa

Waitangi Tribunal, Department of Justice, Wellington.

Kaituna River Claim

2 - Record of Hearing

1 - People and Parties Involved

1. RECORD OF HEARING

1.1 This claim was lodged on 30 January 1978 by Sir Charles Bennett, of Maketu, the late Pokiha Hemana of Okere Falls, Tikitere Takuira Mita of Maketu, Stanley Newton of Mourea, Irikau Kingi of Rotorua City and Bob Kuni Roberts of Te Puke. They asked that the proposal for a nutrient pipeline to the Kaituna River be not proceeded with.

1.2 In February 1978 a copy of the claim was sent to the District Engineer, Ministry of Works, Rotorua, the Town Clerk, Rotorua City Corporation, and the Bay of Plenty Catchment Commission, Whakatane.

1.3 At first the claim was adjourned at the applicants' request to ascertain whether the project was to proceed and a water right was to be applied for. It was later adjourned to ascertain the outcome of certain water right applications and appeals, and also because the claimants considered that the project might not proceed irrespective of the outcome of those proceedings.

1.4 Following a decision of the Planning Tribunal of 2 December 1983 in respect of three appeals the claimants sought a hearing from this Tribunal.

1.5 Formal notice of the hearing was forwarded to the claimants and to:

The Secretary, Bay of Plenty Catchment Commission & Regional Water Board

Secretary, Arawa Maori Trust Board

Town Clerk, Rotorua District Council

Secretary, Ngati Pikiao Trust Maori Committee

T L John

The County Clerk, Tauranga County Council

The Secretary, Guardians of the Rotorua Lakes

Minister of Works and Development

Minister of Agriculture and Fisheries

Minister of Internal Affairs

Commissioner of Works and Development

Director-General, Ministry of Agriculture and Fisheries

Secretary of Internal Affairs

Commissioner for the Environment

The Director, National Water and Soil Conservation Authority

Director, Water Resources Council

Director-General, Department of Health

1.6 The claim was heard at Te Takinga Marae Mourea near Rotorua

(a) during the week commencing 23 July 1984 for the purpose of hearing the claimants and settling the issues, and

(b) during the week commencing 8 October 1984 for the purpose of hearing other interested persons and final submissions.

1.7 At the hearings the claimants were represented by H K Hingston, solicitor of Rotorua. He called a number of persons who outlined their opposition to the Kaituna Nutrient Pipeline and who spoke not only for the various hapu they represent. He called

S T Newton, kaumatua of Ngati Pikiao
J P Malcolm, member of Ngati Pikiao
T Wharehuia, kaumatua of Ngati Pikiao
Te A Welsh, kuia of Ngati Pikiao
Te I Te Akiawa, member of Ngati Pikiao
M Morehu, kaumatua of Ngati Pikiao, and
E Moke, member of Ngati Pikiao

In addition the concern and support of the Te Arawa tribes as a whole was expressed in the submissions of

A Wilson of Ngati Whakae, chairman of the Arawa Maori Trust Board

T W Vercoe of Ngati Awa and Ngati Pikiao, secretary to the Board, and

E M Schuster, weaver, Maori Arts and Crafts Institute, Rotorua

Professor I H Kawharu, who holds the chair of Anthropology at Massey University, and Bishop M A Bennett, retired Bishop of Aotearoa, were called to give submissions on the history and interpretation of the Treaty of Waitangi and P G McHugh, a Fellow

of Sidney Sussex College, Cambridge, was called to make extensive submissions on legal aspects of the Treaty and relevant aspects of customary and colonial law.

L H Moore, solicitor of Rotorua, appeared for the Rotorua District Council and made general submissions. In addition he called

G S Roberts, District Engineer (Water and Drainage)

B H Underwood, Consulting Engineer and a director of Murry-North Partners Ltd., and

Dr W F Donovan, Consulting Biologist and a director of Bioresarches Ltd.

They gave extensive technical and expert evidence on the catchment as a whole, the historical development, waste water discharges to the lakes, the sewerage programme, and the nutrient pipeline, recent research into alternative disposal systems and recent research and current developments in sewage treatment.

The Bay of Plenty Catchment Commission and Regional Water Board was represented by T G Richardson, solicitor of Whakatane. He made extensive submissions on the role of the Board and reviewed the Nutrient Pipeline in the context of the Kaituna Catchment Control Scheme as a whole. He called W A Taylor, Water Resources Engineer to the Board, who gave evidence on the background, the present position and alternatives.

A Munro, Assistant Office Solicitor, is on record as appearing for the Ministry of Works and Development with B Curtis, B Rankin and N R Watson. N R Watson, however, presented the broad submissions in which he reviewed the role of the Ministry and certain statutory and case laws. Evidence in support of the Nutrient Pipeline was given for the Ministry by the following: A K Attwood, District Water and Soil Officer, Hamilton, an engineer who detailed the background to the Kaituna Catchment Control Scheme; Dr E White, Leader, Freshwater Section, Department of Scientific and Industrial Research, Taupo, who spoke on eutrophication of the lakes and river; Dr Cameron, Chief Public Health Officer, Ministry of Works and Development, Wellington, on waste water treatment and disposal with particular reference to the Rotorua District Council's sewage treatment plant and to options for effluent disposal; C Cowie, Deputy Director of the Water and Soil Directorate of the Ministry on the current position.

C N Northover, Office Solicitor, Wellington, appeared for the Commission for the Environment. He read a declaration by H H R Hughes, Assistant Commissioner, on the impact of the pipeline on the Kaituna River and Maketu Estuary, the impairment of Maori values and difficulties associated with the disposal of waste into inland water. Evidence was then given for the Commission by Dr C D Stevenson, section leader, Water Section, Chemistry Division, Department of Scientific and Industrial Research, Petone, on land treatment and disposal options for the Rotorua sewage effluent, and Dr P P Tortell, Senior Investigating Officer, Commission for the Environment, on the effect of a discharge to the Kaituna River on the rehabilitation of the Maketu Estuary.

H S Gajadhar, office solicitor of Wellington, made submissions on behalf of the Director-General of Agriculture and Fisheries.

For the Secretary for Maori Affairs, J Walker, office solicitor, Rotorua, urged greater Government examination of matters of customary law raised by P G McHugh with a view to possible legislative reform.

C J Richmond, Principal Environment Officer for the Wildlife Service of the Department of Internal Affairs, represented the Conservator of Wildlife. He made submissions on the potential impacts of proposed sewage effluent discharges to the waters in the catchment.

Dr A Miller, Medical Officer of Health, Rotorua, made submissions on behalf of the Director-General of Health on the health risks associated with a discharge to the Kaituna River. Further and more detailed evidence was then given by D G Till, Chief Bacteriologist of the National Health Institute and branch head of the Department of Health Public Health Laboratory Services.

E J Sherring, Deputy County Engineer, appeared for the Tauranga County Council.

Dr G R Fish, scientist, of Rotorua, made submissions on behalf of the Guardians of the Rotorua Lakes on the options of the pipeline discharge and discharge to the lake after further treatment and stripping.

Dr J M Harris, scientist, of Rotorua, and chairman of the Works and Water and Drainage Committee of the Rotorua District Council, made an independent submission in support of the claim on researches into nutrient stripping as an alternative to the pipeline.

M M Tindall of Maketu made independent submissions on his researches into the effect of the Kaituna River diversion on the Maketu Estuary.

1.8 A written submission was received without an appearance by B W Wilkinson of Maketu on behalf of the Maketu Action Group.

A brief statement in support of the claim was filed by W L O'Leary of Holdens Bay, Rotorua, without appearance.

Brief statements in support of the claim were filed in identical form by residents of Maketu, Te Puke and Mount Maunganui being H E Bragg, S E Bragg, M B Battersby, T R Lewis, V T Lewis, C M Lewis, T M Lewis and J Hoogstraten.

1.9 During the course of hearing the Tribunal heard a motion for disqualification. A finding thereon was despatched to the mover and to Counsel for the claimants.

1.10 The hearing of the claim was lengthy and complex and the Tribunal would like to record the assistance it received from all parties, and the hospitality given by Ngati Pikiao. The claimants' evidence was predominantly in Maori and we record the assistance given by J P Malcolm as interpreter.

Waitangi Tribunal, Department of Justice, Wellington.

Kaituna River Claim

3 - Finding Of The Tribunal

1 - Summary

2. INTRODUCTION

2.0 We recommend that the scheme to build a pipeline from the Rotorua Waste Water Treatment Plant to the Kaituna River should be abandoned. The cost of this proposal was first estimated at about \$3 million and it is now estimated to cost between \$11 million and \$12 million. The money has been allocated but we think it can be better spent in other ways as this Report will show.

Waitangi Tribunal, Department of Justice, Wellington.

Kaituna River Claim

3 - Finding Of The Tribunal

2 - Background

LAKE ROTORUA-A NATIONAL ASSET

2.1 For the last 20 years or more concern has been expressed at the deteriorating condition of Lake Rotorua, Weed growths have flourished from time to time, scum made up of colonies of algae has disfigured the surface of the water, sedimentation has caused deposits of mud to build up on the lake-bed and the water has become more clouded to a noticeable degree than it used to be 30 years ago.

This concern has been officially recognised and since the 1960's scientific observations have been made on the lake that have become progressively more intense. From 1978 the Regional Water Board and the Ministry of Works and Development have taken samples of lake waters every two months from ten different sites. (Evidence of Mr W A Taylor - Bay of Plenty Catchment Commission).

2.2 Rotorua City is a great centre of tourist activity and the lake has a place of importance in the attractions of the district second only to the thermal regions. It is used for recreational purposes, and in particular for trout fishing which attracts tourists from many parts of the world. If the lake were to be allowed to deteriorate the consequences for the tourist industry would be very serious indeed. This fact is not disputed by anyone and considerable amounts of public money have been spent to protect Lake Rotorua from continued degeneration. It is recognised on all sides as being a national asset of importance.

2.3 But Lake Rotorua does not exist on its own. It is one part of a connected series of waterways that affect each other. The outflow of the lake is through the Ohau Channel which leads into Lake Rotoiti, another beautiful body of water that has long been a tourist attraction. The outflow from Rotoiti is the Kaituna River, a stretch of water that flows for about 50 km from Lake Rotoiti to the sea. It is famous for the trout pools in its upper reaches, the Okere falls not far from Lake Rotoiti and for the rapids and waterfalls to be found as it makes its way to the Maketu Estuary on the coast of the Bay of Plenty. This estuary is large and distinctive. It has an important place in Maori life and history. It has also been a resort for sportsmen who have travelled to it for many years for all kinds of aquatic recreation and for duck shooting. We heard evidence from several quarters including a spokesman for the Maketu Estuary Protection Society (Mr M M Tindall), that left us in no doubt of the general importance that should be attached to the Estuary. We were told that the Commission for the Environment has recently completed a report on the locality.

2.4 We therefore feel justified in concluding that Lake Rotorua cannot be looked upon in isolation. Regard must also be had to the rest of the water system because if Lake Rotorua deteriorates so will Rotoiti, the Kaituna and Maketu. Anyone who doubts this

finding need look no further than to the evidence of Dr Edward White, leader of the Freshwater Section of the Dept. of Scientific and Industrial Research who told us in no uncertain terms that scientific study on Lake Rotoiti shows that the "... change in dissolved oxygen status over 26 years represents massive and rapid deterioration for a lake as large as Rotoiti. I see no prospect of either arresting this deterioration, or of restoring the lake, without reducing the quantity of nutrients entering Lake Rotorua."

2.5 The Ministry of Works and Development like everyone else saw the need to reduce the quantity of nutrients entering Lake Rotorua. It therefore proposed more than 20 years ago that the whole of the treated effluent from Rotorua City's sewerage system should be piped for a distance of 20 km and poured into the Kaituna River. That proposal has been steadfastly, almost doggedly, advanced by officials of this department ever since, until it became the only option open to the Rotorua District Council and the Bay of Plenty Catchment Commission. We think this proposal was a mechanical answer to a problem that is open to other solutions of biological or chemical kinds. With hindsight it seems to us to have been the response coming from the mind of an engineer, not the response that would be forthcoming from a biologist or a chemist. Advances in sewage treatment over the last 20 years have been considerable, and in the last 10 years, so we were told, they have been remarkable. Much more is known today about the treatment of sewage effluent than was known 20 years ago when the pipeline scheme was first devised.

2.6 If the Kaituna River and Maketu Estuary are to be regarded as part of the one water system starting with Lake Rotorua, the pipeline proposed will do no more than shift the problem from the lake to the river and the estuary. We have more to say about this later, but we have concluded that the whole water system should be seen as one complete entity and that all four parts of it - the two lakes, the river and the estuary - deserve protection from contamination and deterioration.

2.7 While we have referred to the Maketu Estuary we wish to make it clear that the related question of whether the river should be re-directed through the estuary was not in issue before us. We understand that that question is currently before the House of Representatives on a petition, and we make no comment on that aspect.

Nonetheless we were called on to consider whether the existing discharges of the Affco freezing works and the dairy company into the lower Kaituna River and the proposed discharge from the Te Puke Borough Council's plant already affected or would affect the river to the point where further pollution would not matter or even to the point that the re-diversion of the river could not be an option for the Maori people.

We considered that those issues must be severed from our inquiry as we cannot presume that those particular problems are incapable of independent resolution on the consideration of the diversion question by the House.

Kaituna River Claim

4 - The Maori Claimants

1 - Objections Raised

3. THE MAORI CLAIMANTS

3.1 The claim before us is made in the names of the late paramount Chief of Ngati Pikiāo Pikiāha Hemana, by Sir Charles Bennett and four other Maoris listed above. They come from Maketu, Te Puke, Okere Falls, Mourea and Rotorua but they are not the only claimants. They speak on behalf of the whole Ngati Pikiāo people numbering over 2000 in population, one of the sub-tribes of Te Arawa. The ancestral land of Te Arawa stretches from Tongariro to the sea. The two lakes, the river and the estuary all lie within Arawa boundaries and all four bodies of water have an important place in tribal history and culture.

3.2 Te Arawa is a confederation of Maori tribes which are descended from the crew of the Arawa canoe that landed at Maketu many hundreds of years ago. From Maketu the voyagers and their succeeding generations moved inland occupying the central part of the North Island in terms of the tribal saying "... Mai Maketu Ki Tongariro ..." from Maketu in the Bay of Plenty on the sea-coast, to Mt Tongariro near Lake Taupo in the hinterland. Te Arawa comprises the tribes descended from Tuwharetoa living near Lake Taupo, and the tribes claiming descent from Tamatekapua living on the shores of the Rotorua lakes and surrounding districts down to Maketu itself. Their lands are shaped to European eyes rather like a long-handled pan, or to Maori eyes like a taha - a gourd or calabash. The wide interior lands of the central volcanic plateau and the Rotorua Lakes are in the bowl of the pan or the body of the calabash, and the Kaituna River runs down the handle of the pan or the neck of the gourd to the estuary and the sea at Maketu. Most other great Maori tribes have large expanses of coastline from which to fish and gather shellfish but Te Arawa for all the wealth of its forests, farms and horticultural development has a comparatively narrow strip of coast about 50 km in length, the main feature of which is the Maketu Estuary.

3.3 One of the sub-tribes of the Tamatekapua sector of Te Arawa is the Ngati Pikiāo, who occupy most of the northern shores of Lake Rotoiti and the land alongside the upper reaches of the Kaituna as it follows its course to the sea. Their territory merges with the Tapuika people who live alongside the lower reaches of the river and down on the coastal plain.

3.4 The Maketu Estuary has always had great importance for Te Arawa. The very name Maketu is taken from the islands from which the Arawa canoe came and is the old name for the island of Mauke in the Cooks Group.

The stern anchor of the canoe (named Tuterangi Raruru) is said to have been placed at Te Awahou, roughly where the Kaituna River flows out to sea today following the diversion cut that was made in 1957. The bow anchor (called Tokaparore) was set

down at about the place where the Kaituna River used to flow out to sea at Maketu. The tribal importance of Maketu goes back through the ages to the very beginnings of the tribe in Aotearoa.

3.5 Kai Moana (food from the sea) has great significance for the Maori. It is almost as unthinkable for a Maori to entertain guests without seafood as it is for a European to offer a meal that has no meat. Maketu and the Kaituna River have been a rich source of fish, shellfish, eels, fresh-water crayfish (koura) and many other kinds of food. The estuary has been important for this purpose for generation after generation. After the Kaituna River diversion cut was made the main flow of the river no longer made its course through the estuary. We were told by the Bay of Plenty Catchment Commission Engineer Mr W A Taylor that the consequences to the estuary have now become obvious, and his evidence that the deterioration is serious was corroboration of what Mr Tindall had said on behalf of the Maketu Protection Society. The Assistant Commissioner for the Environment, Mrs Helen R H Hughes, informed us on this subject that there is already evidence of serious contamination at the present river mouth and real anxiety has arisen that shellfish there may not be fit for human consumption.

3.6 The claimants gave evidence of their strong opposition to the pipeline proposal. They said that to pump sewage effluent into the Kaituna River was objectionable on medical, social and spiritual and cultural grounds.

3.7 Medical grounds: They brought evidence to show that no matter how "pure" the effluent was, even if the usual indicator based on a faecal coliform count was low, there was still a risk of contamination of the river and the estuary by viruses which they said could be carried by sewage effluent even after it had been treated to the high standard maintained by the Rotorua District Council which controls the Waste Water Treatment Plant.

3.8 On this point Mr D W Till, Chief Bacteriologist in the Dept. of Health gave detailed evidence before us which included reference to studies made by Professor Margaret Loutit of the University of Otago who had reported that entero-viruses were found in significant numbers in sea water near a sewage outfall, in marine sediment collected from a depth of seven metres two kilometres offshore from a sewage outfall and in mussels collected as far as 2.5 km along the coast from a sewage outfall. He then went on to say:

"...In the same series of studies it has been reported that viruses can be transported in river waters for distances up to 20 km from a sewage treatment plant outfall and still remain viable for propagation by tissue culture..."

3.9 It may be that different water temperatures in different places will have an effect upon the distance that viruses from sewage effluent will travel in river waters, but clearly this evidence supports the claimants who say that the effluent is of great concern to them on medical grounds.

3.10 Social Grounds: The second objection, that the effluent should not be discharged into the Kaituna River on social grounds, is even more obvious. None of us would willingly go bathing or boating in waters containing sewage effluent. There is a

psychological revulsion from human waste that is probably common to all the peoples of the world. Mr W R Cameron, Chief Public Health Officer in the Ministry of Works and Development, spoke of this when he said that "...animal and in particular human wastes have always been considered to be revolting..." It needs but a moment's thought for all of us to recollect from our own experience incidents in which we have recoiled from contact with waste of this kind. On a larger scale one can recall the tremendous reaction in the City of Auckland 30 years ago when a proposal was floated to pipe sewage effluent into the waters of the Waitemata Harbour. Human psychological responses to sewage effluent are deep-seated and obvious. There is no doubt that the claimants have a sound basis to their objections to the Kaituna pipeline proposal on social grounds.

3.11 Spiritual and Cultural Grounds: It was in this part of the case that we heard evidence that was highly charged with emotion and remarkably convincing. Witness after witness came forward to support the claimants in their assertion that to mix waters that had been contaminated by human waste with waters that were used for gathering food was deeply objectionable on Maori spiritual grounds. We were told of Maori custom that requires water used for the preparation of food to be kept strictly separate from any kind for other purposes. We were given examples at length of the cultural traditions that illustrate long-standing rules governing the preparation and consumption of food. Of our own knowledge we knew that these rules are projected to a far-reaching degree, even to the point that it is extremely bad manners in Maori terms for anyone even to sit on a table that is used for eating food. And it is quite unacceptable for anyone to wash clothing, even tea towels, in a sink or basin that is used for preparation of food.

3.12 Customs and traditions such as these have their origins in common sense and elementary hygiene but of course they assume much greater importance when it comes to the disposal of human waste. The Kaituna River and the Maketu Estuary have long been an important source of food as we have already pointed out, and on cultural grounds the elders of the Ngati Pikiao tribe made it clear beyond any doubt that if the pipeline is built they will have to declare the river tapu so long as the sewage effluent discharge continues. Such a declaration would make it impossible for any food to be gathered from those waters and they would suffer a very serious loss as a result. This loss is not to be calculated solely in economic terms for the worth to them of the sea food and fish from the river is a valuable and important part of their sustenance. It would be a grave loss of tribal mana for the river and the estuary to be denied to them.

3.13 Despite the vehemence of the evidence, (of which we will give an example or two a little later) we saw a real inconsistency in the Maori position and we explored it carefully.

3.14 On the one hand the claimants were saying that to discharge the effluent into the river would lead to the waters being declared tapu. But on the other hand effluent is now being pumped indirectly into Lake Rotorua, yet no tapu has been declared on the waters of the lake. Furthermore we suspected, and we were proved to be right, that the Maori people, Ngati Pikiao and others, now fish in Lake Rotorua and in the Ohau Channel as well as in Rotoiti which receives the waters of Rotorua.

3.15 We questioned the claimants closely on this point. It was explained to us that the Ngati Pikiao people do not have an authority over Lake Rotorua. That body of water is not solely within their territory. The greater part is controlled by another sub-tribe, the Ngati-Whakaue near Rotorua City, and some other sub-tribes around other parts of the shore line. They told us that when Hongi Hika attacked Mokoia Island the bloodshed that resulted led to a tapu being placed on Lake Rotorua, but that tapu did not affect the Ngati Pikiao people. Tapu, they said, is a matter of territorial responsibility. They politely and pointedly refrained from comment on the attitude of other sub-tribes to the present situation in Lake Rotorua. But they said equally pointedly that the policy and responsibility of Ngati Pikiao was all too clear to them and the inevitable consequences all too plain. If the pipeline discharges effluent into the Kaituna River, then the river will have to be declared tapu and the waters will be closed off to them for all purposes so long as the discharge continues to flow.

3.16 Such a tapu would affect not only the fish in the water; it would also affect any vegetation that had contact at any time with the water, by which they meant not only vegetation that would be splashed by water at normal levels but anything that was covered by flood levels. They explained that along the banks of the river there grow plants of many kinds that have special value and importance. These are used for medicinal purposes and for weaving and dyeing and there was produced before us a wide range of handiwork from flax kits to feather cloaks that are made by the Ngati Pikiao people using vegetation, some of it rare, that is to be found in their tribal territory.

3.17 We spoke earlier of the depth of feeling shown in the evidence. Let us give some examples. Mata Morehu described the course of the Kaituna River from Lake Rotoiti downstream. He told us of the sequence of natural features, illustrating the history of each. He spoke with deep emotion of the place called Te Wai-i-rangi, a stretch of the water near to where the discharge is to take place as the pipeline is now planned. This spot on the river (a lovely clear pool from which the river flows on into a green tunnel of vegetation) was, he said, the place "where my ancestors returning from battle would go to the water and rid themselves of the tapu upon them after the bloodshed of warfare." He went on to speak of burial caves that line the river in the steep gorges through which it runs, all of which are sacred places to the Ngati Pikiao. If the river were to be placed under tapu these sacred places would become inaccessible. The silence in the meeting house as he spoke showed the close attention which all present, Maori and European alike, paid to his words.

3.18 Mrs Emily Schuster is a weaver of great skill and standing, not only in the local Maori community but throughout New Zealand. She conducts classes in arts and crafts and the products of her work were put before us. She spoke in detail of the raw materials she and her students gathered from the river banks and she told us, naming each, of the qualities of one type of vegetation after another. "In the Rotorua area," she said quite sadly, "we have progressed so much that the only place I can take the women is along the Kaituna River. The kiekie is essential and has to be specially treated. To get the true whiteness out of the kiakia it must be soaked in running water and the only place we can do this is the Kaituna..." Even to the untrained eye the quality of her workmanship was obvious, and the importance to her work of the flora on the Kaituna riverbanks was plainly evident. She told us that she "would lay down her life to save the Kaituna."

3.19 Another remarkable piece of evidence came from Te Irirangi Cairo Tiakiawa who recited the genealogy of his own family and the Ngati Pikiiao people. This recitation was given without resort to notes or records and was an astonishing feat of memory. But to those knowledgeable in the Maori culture it was an almost unique performance because much of what was said is quite unrecorded and is the result of generation after generation of education in the traditional Maori way, Some of those present who might well be regarded as expert in Maori history pressed upon us the importance of the accumulated knowledge and to ensure that it is not lost we have decided to incorporate the whole of this part of the evidence in a special appendix to this finding of the Tribunal.

3.20 The Acting Chairman of the Arawa Trust Board, Mr Alec Wilson, came before us to say that no less than ten members of the Board were present to support the claimants. He said that he belonged to the Ngati Whakaue people and that for them Lake Rotorua no longer provided the food that they had long been accustomed to obtain from it.

He said to us:

"... We have to come here to ask our relatives for food. It is too late for us. The damage is done, The only fish in the lake is trout. None of the native fish is left in the Utuhina Stream nor in Lake Rotorua... This is our last stand. No other Tribunal gives us the opportunity to say what we feel and allows us to speak openly... We feel we are slowly and surely being crushed under the weight of Europeanism and it was a gleam of hope for us when the Waitangi Tribunal was formed..."

3.21 But perhaps the most dramatic moment in the whole hearing was when a white-haired elderly Maori man came forward and introduced himself as Tamati Wharehuia from Te Matai, an elder of his tribe and one of a long line of Chiefs who had lived by the Kaituna River for generations. (He is also known by the European name of Bob Roberts and is one of the claimants). He told us, as the others had done, of the importance of the river, of its prominent place in tribal history, of the events that had occurred from time to time and from place to place down the whole course of the waterway. He urged upon us the need to protect it from harm and likened the river to his own people whom he had a duty to protect from harm. Then, in a ringing voice he brandished his tokotoko (staff) and said to us:

"...If this scheme goes ahead I want to make it clear that I will myself have to take direct action. I will take the patu that has been handed down to me from my ancestors generation by generation and do injury to stop this thing. After that the law must take its course with me, but that is beside the point..."

3.22 These examples from the evidence are recorded here to show the depth of feeling that this scheme has aroused and to demonstrate that on spiritual and cultural grounds the opposition of the Maori people is deep-seated, intense and to a degree implacable. But that is not the end of the matter. Our task requires us to look at the whole of the evidence to see whether there is any practical alternative.

Kaituna River Claim

5 - The Treaty Of Waitangi

1 - The Maori Viewpoint

4. THE TREATY OF WAITANGI

4.1 The Treaty of Waitangi Act 1975 includes in its Schedule the text of the Treaty in both English and in Maori. (We have already pointed out in the Te Atiawa decision that there is a misprint in the Maori version. We do not propose to advert to it again.)

4.2 The claimants called as a witness an eminent scholar, Professor Hugh Kawharu, who holds the Chair of Anthropology at Massey University and is about to take up the Chair of Anthropology at the University of Auckland. As these appointments show, Professor Kawharu's distinctions include a high reputation for his learning on Maori culture and traditions throughout the academic world; apart from his other qualifications he has been awarded no less than three doctorates.

He was called to give evidence of the meaning of the Treaty to the Maori Chiefs who signed it and to the Maori of today so that we might better understand the Maori viewpoint on the principles covered by the Treaty. He tendered to us evidence comprising 18 typewritten pages amplified by oral explanations and additions. Throughout this section of our Finding on the claim the quotations are from his evidence.

4.3 In 1840 the Maoris in New Zealand clearly outnumbered the Europeans, perhaps by as much as 100 to one. It seems to be an agreed fact of history that until the last part of the fourth decade of last century Great Britain was not eager to add New Zealand to its list of Colonies. While trade extended here from Australia and elsewhere, Her Majesty's Government was not willing to accept the financial and military burdens of colonisation when the rewards of free trade could be reaped without corresponding expense. In 1835 a petition from a confederation of Chiefs promoted by James Busby seeking annexation by Great Britain received a guarded response but no positive action, which is not consistent with a desire for acquisition of New Zealand as a Colony. Other factors became important as the decade moved on; the French settlement at Akaroa and the arrival of French Catholic Missionaries aroused the interest of France; the United States began to show some signs of waning to add New Zealand to its possessions; the fact that the country was a safe refuge for convicts escaping from Australia and the growing lawlessness resulting from a lack of Government all led eventually to the instructions of Captain Hobson R.N. that brought him to the Bay of Islands at the beginning of 1840.

4.4 The Treaty that he offered for signature was not a unique document. Great Britain had made many such treaties with indigenous peoples in North America, West Africa, South Africa and elsewhere. Whether or not one of these treaties was used as a precedent is not known but it is clear that various drafts were prepared in the English language and one at least of the Maori versions is probably a copy of one of these

drafts. It is said that James Busby, Capt. Hobson and his secretary J. S. Freeman all played some part in the composition, but Professor Kawharu told us that the Maori version was compiled solely by the Rev. Henry Williams who was the head of the Anglican Church Mission in the Bay of Islands.

4.5 Translation from English into another language is a delicate art. Translation from Maori into English is also a delicate art. Some concepts are almost untranslatable; others have a delicate nuance that must be captured precisely to pass on the correct meaning. To give an example: if one, using English, wishes to describe a person as holding firmly to his beliefs in a particular matter he may be described as "a steadfast man", "a stubborn man" or "an obstinate man". Each of these three adjectives describes a person of fixed beliefs but the nuance in each case is quite distinct. The first is complimentary of the subject, the second though complimentary is rather more neutral, and the third is clearly deprecatory.

4.6 When the Rev. Williams sought to translate into Maori Article I of the Treaty by which the Confederation of Chiefs and the Individual Chiefs who were not members of the Confederation agreed to cede to Her Majesty the Queen of England "all the rights and powers of sovereignty" which they possessed over their territories, he sought a word in the Maori language that did not exist. There was no word for "sovereignty" as known to English law, a concept foreign to the Maori culture. So he reached into the recesses of missionary Maori and drew forth the word "kawanatanga" which is to be found in the Bible translation and in the Book of Common Prayer as meaning in the English version "governance".

4.7 In Article II, by which the Crown confirmed and guaranteed to the Maori signatories the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties, Mr Williams translated the guarantee as one of "...te tino Rangatiratanga" and went on to specify the land (ratou whenua) the estates (ratou kainga) and included the English reference to "forests fisheries and other properties" in the phrase "ratou taonga katoa" (all things highly prized).

Nothing much turns upon these last three phrases for present purposes but a great deal turns upon the words "kawanatanga" (sovereignty or governance) and "rangatiratanga" which has no exact equivalent in English, just as sovereignty has no exact equivalent in English, just as sovereignty has no exact equivalent in Maori. In Professor Kawharu's view the nearest one can get to "rangatiratanga" in English is to say it means "all the powers privileges and mana of a Chieftain" - or "chieftain-ness" in the widest sense.

4.8 The Professor explained to us that the discussion at Waitangi on whether or not the Treaty should be signed would have occupied a great deal of time and the Maori participants would not be likely to have paid much attention to the written words. Their attention would have been concentrated upon the ideas and arguments expressed orally in the debate, and in this connection they would have put much faith in the opinions expressed by the missionaries.

"...Customarily the Maori has had his options shaped almost as much by the impact of the oratory and the reputation of those whom he listens to on the marae as by the merits of the options themselves. This would certainly have been the case in 1840.

Thus the missionaries' reputation as honest men, reasonably coherent in the Maori tongue and knowledgeable in the ways of the European enabled them to persuade the Maori to sign the Treaty with a degree of success far beyond that which any others, particularly Hobson, could ever have achieved..."

4.9 In agreeing to cede "kawanatanga" to the Queen of England they would have known that by so doing they would be gaining "governance", especially law and order for which the missionaries had long been pressing.

"...the major problem arising from the first Article turns on the issue of sovereignty, a system of power and authority (as would have been intended by the Colonial Office) that was wholly beyond the Maori experience, a network of institutions ultimately to comprise a legislature, judiciary and executive, all the paraphernalia for governing a Crown Colony.

" The Maori people's view on the other hand could only have been framed in terms of their own culture; in other words, what the Chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death. It is totally against the run of evidence to imagine that they would wittingly have divested themselves of all their spiritually sanctioned powers - most of which powers indeed they wanted protected. They would have "believed they were retaining their rangatiratanga intact apart from a licence to kill or inflict material hurt on others, retaining all their customary rights and duties as trustees for their tribal groups..."

4.10 The guarantee of their "rangatiratanga" was associated with the grant to the Crown of the right of pre-emption by the Crown of such lands "as the Proprietors thereof may be disposed to alienate" (Article II). Professor Kawharu is of opinion that this would not have assumed much importance for a Maori Chief in 1840. He goes on to say"

"...(it) is essential not to lose sight of the quid pro quo of the Treaty; that the collective surrender to the Crown of the power to govern was made primarily in return for the Crown's protection of each Chief's authority within his tribal domain..."

The right of pre-emption certainly became important later. When the Maori sold his land to the Crown for sixpence an acre and the Crown then sold the same land to settlers, almost immediately, for ten shillings an acre the Maori began to see unfairness. If the land was worth ten shillings an acre why was he not paid that price? The truth is, of course, that this policy was adopted to provide the Colonial Government with revenue - to Maori eyes, at the expense of the Maori.

4.11 We do not propose to embark upon a discussion of the ways in which the Maori claims that the Treaty has not been observed by the European. We can safely leave such matters to be decided from time to time as claims are brought before us. But we wish to adopt some observations by the Professor to draw attention to the importance of the Treaty of Waitangi to the Maori New Zealander. He can say, with absolute truth, that no other ethnic group in New Zealand has ever had such a solemn pact

made with it. The Maori New Zealander has a special place in our community so long as the Treaty of Waitangi stands in its present form.

4.12 Furthermore the Maori New Zealander can say that he and his forebears had an equally special part to play in the founding of our country. If he had not made the Treaty with the Queen of England, the European settlers would have been at his mercy - as they remained for nearly 20 years - for it was not until the 1860's or thereabouts that there was anything approaching equality in numbers between the two races. And when the Land Wars of the 1860's developed in Taranaki and the Waikato they would have been longer and more bloody if it were not for the Maori Chiefs who refused to participate in them because of the Treaty (and other reasons).

Waitangi Tribunal, Department of Justice, Wellington.

Kaituna River Claim

5 - The Treaty Of Waitangi

2 - The Legal Status

5. THE LEGAL STATUS OF THE TREATY

5.1 The Treaty of Waitangi has always assumed great importance in the eyes of the Maori. He believes that by the solemn agreement made with the Queen of England the peaceful colonisation of New Zealand became possible. He believes also that the Land Wars that occurred later in New Zealand's history were not the result of the Treaty but the result of failure to abide by it. We do not propose to go into the accuracy of those beliefs in this judgement, because the point arises squarely in another claim now before us and we will face that difficult matter in dealing with the claim (to the Manukau Harbour).

5.2 The European on the other hand generally regarded the Treaty as an historical event which does not have much impact on modern New Zealand. This view springs largely from the judicial decisions in cases when the legal consequences of the Treaty have been in question and which have led to the conclusion that it has no place in New Zealand law. Since the passing of the Treaty of Waitangi Act 1975, that conclusion may require reconsideration as we shall go on to explore later in this Finding of the Tribunal.

5.3 The legal effect of the Treaty of Waitangi has been described by the Privy Council in a passage frequently cited on this subject in the case of *Hoani Te Heu Heu v. Aotea District Maori Land Board* [1941] A.C. 308 at p. 324:

"....It is well settled that any rights purporting to be conferred by such a treaty of cession" (sc. The Treaty of Waitangi) "cannot be enforced in the Courts, except insofar as they have been incorporated in the municipal law..."

This has generally been taken to mean that the Treaty of Waitangi does not create any legal rights that the Courts can enforce.

[It should be noted that the authority thereafter cited in the judgement refers to rights that inhabitants of a territory may have had under the previous ruler, and acknowledges that any rights recognised by the new sovereign or its officers may be made good in the municipal Courts. This point may assume some importance as we proceed in this matter. See Lord Normanby's instructions to Capt. Hobson referred to in para. 5.6.7 below]

5.4 About 20 years later adopting the principle in the case just cited the New Zealand Court of Appeal re-affirmed it in *Re the Bed of the Wanganui River* [1962] NZLR 600, at p. 623 per Turner J.:

"...Upon the signing of the Treaty of Waitangi the title to all land in New Zealand passed by agreement of the Maoris to the Crown; but there remained an obligation upon the Crown to recognise and guarantee the full exclusive and undisturbed possession of all customary lands to those entitled by Maori custom. This obligation, however, was akin to a treaty obligation, and was not a right enforceable at the suit of any private person as a matter of municipal law by virtue of the Treaty of Waitangi itself. The process of recognition and guarantee was carried into effect by a succession of Maori Land Acts...."

5.5 Through the years there have been a number of examples of the Crown's solicitude towards the spirit of the Treaty. The Land Acts contained particular provisions for the protection of Maori customary and freehold land and for judicial supervision of alienations. More recently the Town & Country Planning Act 1977 has recognised the special relationship of Maori people with their ancestral land. (Sec. 3(1)(g)). Similarly the fisheries legislation from early times down to the current Fisheries Act 1983 has included a saving provision to protect existing customary fishing rights. When the claim was made to the bed of the Wanganui River it was defeated by a general provision as to the ownership of river beds in the Coal Mines Act 1925 (and its predecessor in 1903). Parliament therefore passed the Maori Purposes Act 1951 (and its successor in 1954) so as to empower the Court of Appeal to ascertain whether for the purposes of admitting a claim for compensation, the Maori claimants had been deprived of their rights to the river bed "by a side-wind rather than by express enactment". (T A Gresson J. on the subject of the foreshore in *Re Ninety Mile Beach* [1963] NZLR 461 at 477-8). Another example of the care of the Crown to observe the spirit of the Treaty of Waitangi may be found in the statute that creates our own Waitangi Tribunal.

5.6 While it has been generally accepted that the Treaty creates no rights enforceable in a Court of Law, Mr P. G. McHugh, a Fellow of Sidney Sussex College, Cambridge, appeared before us to give us the benefit of his extensive researches which have led him to a contrary opinion. He produced to us a carefully written submission of considerable scholarship taking up 108 pages of typescript accompanied by 26 pages of footnotes. We have studied this material with the care it deserves and we now attempt to summarise his argument in the following propositions:

5.6.1 The Colonial policy of the British Crown included punctilious recognition of the rights of indigenous peoples wherever the British flag was raised.

5.6.2 That policy was demonstrated as far back as 1609, and as it was put to us:

"...The Colonial Office insisted upon and constantly recognised the land rights of native peoples in the Crown's colonies although it was not until the late nineteenth century that any substantial body of English case law began to develop on the matter..."

5.6.3 The Crown's right of pre-emption to be found in the Treaty of Waitangi emerged as a policy as early as 1618 in England's first colony in North America (Virginia).

5.6.4 The Privy Council in the 18th century acknowledged this policy in the case of the colony of Connecticut when it recognised Indian rights to land and the sole

capacity of the Crown to extinguish such rights and so imported into English law the beginnings of a body of Colonial law.

5.6.5 A Royal Proclamation of 1763 affecting the North American Colonies recognised the lawful right of North American Indians to their land and declared that such land could be acquired by fair purchase or by voluntary cession and not otherwise.

5.6.6 Recognition of aboriginal title to land is also to be found in the West African settlements where treaties were concluded with native peoples in 1788, 1791, 1807, 1818, 1819, 1820, 1821, 1825, 1826, and 1827 all of which can be seen as forerunners of the Treaty of Waitangi. Similar arrangements were made from time to time in South Africa.

5.6.7 By 1840 it was a settled principle of colonial law that the land rights of aboriginal people were protected by the Crown as evidenced by Lord Normanby's Instructions to Hobson:

"...(the Maori) title to their soil and to the sovereignty of New Zealand is indisputable and has been solemnly recognised by the British Government..."

5.6.8 For nearly forty years after the signing of the Treaty New Zealand Courts recognised and accepted these principles of colonial law as to the land rights of the Maoris.

5.6.9 After the Land Wars of the 1860's New Zealand Courts departed from these principles and in the case of *Wi Parata v. The Bishop of Wellington* (1877) Prendergast C. J. enunciated the proposition that the Treaty of Waitangi

"...could not transform the natives' right of occupation into one of legal character since, so far as it purported to cede the sovereignty of New Zealand, it was a 'simple nullity' for no body politic existed capable of making cession of sovereignty."

5.6.10 The proposition contained in the case just cited was wrong being based on a concept of international law and not on the established principles of colonial law. All cases that followed it were similarly wrong for the same fundamental reason. The dictum of the Privy Council in *Hoani Te Heu Heu v. Aotea District Maori Land Board* does not refer to the principles of colonial law, but to international law and is not material to the issue to be decided in that case.

5.7 We feel bound to say that there is much force in Mr McHugh's argument. For example the statement of principle in *Wi Parata* was criticised by the Privy Council much later in 1902 in the case of *Nireaha Tamaki v. Baker* [1840-1932] N.Z.P.C.C.371 in the following passage:

"...It was said in the case of *Wi Parata v. Bishop of Wellington* which was followed by the Court of Appeal in this case" (i.e. the judgement under appeal) "that there is no customary law of the Maoris of which the Courts of Law can take cognisance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such argument to be addressed to a New Zealand Court... It is the duty of the Courts

to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them..."

This dictum was not referred to in the advice given in the case of *Hoani Te Heu Heu v. Aotea District Maori Land Board* (above) (para 5.3).

5.8 But so far as land rights are concerned the principle in *Wi Parata* came to receive a measure of statutory recognition by the Native Land Act 1909 which provided that Maori title to customary land was not to avail against the Crown and went on expressly to declare that the Crown had power to extinguish Maori title to "customary land".

5.9 Nevertheless Mr McHugh goes one step further. He argues that although the 1909 Act tends to make all that happened in the Courts before that date (so far as the land ownership is concerned) a matter of historical interest only, yet the principles of colonial law which he identifies still apply to aboriginal property rights other than land, for example, to fisheries which were not affected by the Native Land Act 1909 and its successors in the legislation. He says that the Fisheries Act 1983 (Sec. 88 (2)) expressly protects Maori fishing rights and that as a consequence the Ngati Pikiāo people have a legal basis for their claim to protect their fisheries in the Kaituna River resulting from applying the proper principles of colonial law to the Treaty of Waitangi.

5.10 No counsel appearing at our sittings made submissions in reply to Mr McHugh's arguments, and we did not hear an answer from the Justice Dept., the Crown Law Office, or any of the Government Ministries represented. The breadth of research may have presented them with a task too daunting to discharge in the time available, which is understandable. But the proposition advanced deserves close study because of its importance to all of us.

5.11 Tempting though it may be to reach a final conclusion on Mr McHugh's interesting argument, we do not propose to make any ruling on the matter. Our statutory authority is to make a finding as to whether any action of the Crown, or any statute of Order in Council is inconsistent with the principles of the Treaty. This wide power enables us to look beyond strict legalities so that we can in a proper case, identify where the spirit of the Treaty is not being given due recognition. Furthermore it may be that the very issues raised by Mr McHugh will come before the Courts again and it would not be seemly for this Tribunal to make a legal finding on a matter that may require the attention of the High Court, the Court of Appeal or (even more likely) the Privy Council itself.

5.12 Notwithstanding that attitude, we wish to record our indebtedness to Mr McHugh for his care and thoroughness which have helped us greatly to see the Treaty of Waitangi in its full historical perspective.

Kaituna River Claim

5 - The Treaty Of Waitangi

3 - The 1975 Act

6. THE TREATY OF WAITANGI ACT 1975

6.1 The enactment of the Treaty of Waitangi Act 1975 gave the Treaty a new status. Before the passing of that Act it had had no legal effect. After the passing of that Act the situation was quite different. Sec. 6(1) of the Act provides as follows:

"6. Jurisdiction of the Tribunal to consider claims - t(1) Where any Maori claims that he or any group of Maoris of which he is a member is or is likely to be prejudicially affected-

(a) By any act, regulations or Order in Council, for the time being in force, or

(b) By any policy or practice adopted by or on behalf of the Crown and for the time being in force or by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(c) By any act which, after the commencement of this Act is done or omitted, or is proposed to be done or omitted, by or on behalf of the Crown-

and that the Act, regulations, or Order in Council, or the policy practice or act is inconsistent with the principles of the Treaty, he may submit that claim to the Tribunal under this section..."

6.2 Section 6 (6)(a) provides that the Tribunal has no jurisdiction in respect of "anything done or omitted before the commencement" of the Act. The statute came into force on October 10, 1975. From that date onwards any Act of Parliament that comes into force and prejudicially affects a Maori confers upon that Maori the right to make a claim if it can be shown that the statute in question is in conflict with the principles embodied in the Treaty. So also with any Regulation or any Order in Council. Furthermore if any act is done or is omitted on behalf of the Crown after October 10, 1975 and that act or omission prejudicially affects any Maori then a claim can be made. These are statutory rights enjoyed by Maori New Zealanders which have been conferred upon them because of the Treaty of Waitangi.

6.3 But, it seems to us, the Treaty of Waitangi Act has another more far-reaching effect. Any "policy of the Crown" that prejudicially affects a Maori gives rise to the right to make a claim. If the continuation in force of an Act of Parliament is the result of a policy of the Crown (to keep that Act in force) then any Act on the statute books that prejudicially affects a Maori may give rise to a claim no matter when it was passed by Parliament. The only limitation is that no claim can be made in respect of an act (i.e. action) that was done or omitted before October 10, 1975. The conclusion

that may be drawn from Sec. 6 of the Treaty of Waitangi Act 1975 is that any Act, Regulation or Order in Council that is now in force may give rise to a claim if it prejudicially affects a Maori no matter when that Act, Regulation or Order in Council came into being. (Sec. 6(1)(a)).

6.4 Furthermore it seems necessarily to follow that any Bill, or proposed Regulation or Order in Council or any proposed policy of the Crown must be measured against the principles of the Treaty because if any such legislation or policy conflicts with the principles of the Treaty and prejudicially affects a Maori, a claim could be made.

This is a remarkable result. From being "a simple nullity" the Treaty of Waitangi has become a document of importance approaching the status of a constitutional instrument so far as Maoris are concerned. It is not truly a constitutional instrument because conflict between an Act of Parliament or Regulation and the Treaty does not render the statute null and void. But it does expose the Crown to the risk of a claim that the statute in question is in conflict with the Treaty and to that extent it would seem prudent for those responsible for legislation to recognise the danger inherent in drafting statutes or regulations without measuring such instruments against the principles in the Treaty.

6.5 This leads us to the conclusion that there is ample room for the view that the Treaty of Waitangi is no longer to be regarded as "a simple nullity", that it is now part of an Act of Parliament, that it is in the nature of a statutory instrument and not something to be taken lightly by those responsible for introducing new legislation or enforcing legislation that already exists.

Waitangi Tribunal, Department of Justice, Wellington.

Kaituna River Claim

6 - The Kaituna Catchment Control Scheme

1 - A Survey Of All The Evidence

7. KAITUNA CATCHMENT CONTROL SCHEME

7.1 The Bay of Plenty Catchment Commission has wide responsibilities that include the whole catchment surrounding Lakes Rotorua and Rotoiti, the Kaituna River and the Maketu Estuary. In conjunction with the Ministry of Works and Development and with the Rotorua District Council it has sought and obtained approval for the Kaituna River Major Scheme. This development is already well under way and involves expenditure, including the Kaituna Pipeline (which is part of the Scheme) of twenty million dollars or thereabouts. For the last six years the Commission and the District Council have implemented the scheme and both bodies are extremely anxious that their expenditures should not be jeopardised by this Finding. They have explained that their respective ratepayers have had the benefit of a subsidy from the Government in the ratio of 7 to 1, and they were plainly very concerned during the hearing that this subsidy should not be disturbed. We gathered quite clearly that the subsidy is dependent upon full implementation of the Scheme (which includes the pipeline), and that the Ministry has made it clear that if the Scheme is not completed as planned (including the pipeline) then the subsidy is at risk. It needs only to be so stated for one to see that the Ministry may be seen as paying the piper and calling the tune. We return to this aspect later in this Finding.

7.2 The pollution of Lake Rotorua (and of Rotoiti) is not caused solely by the effluent from the Rotorua Waste Water Treatment Plant. The phosphorus and nitrogen nutrients in that effluent are an important part of the pollution but another very important source of nutrients is in the surplus water that runs off the farmland surrounding the lakes. Fertiliser spread on the pastures does not always penetrate the soil. Heavy rains cause surface flows on the land that pick up the fertiliser and wash animal droppings with it into watercourses that find their way into the lakes. The amount of nutrients contributed to the lakes in this way is not measurable, but the associated silts washed into Lake Rotorua each year have been variously estimated by expert opinions at amounts ranging from 30,000 tonnes to 50,000 tonnes per annum. If these figures are right it is not a matter for surprise that Lake Rotorua is silting up. Many of the streams flowing into the lake have their source in springs and carry minerals that also contribute to enrichment.

7.3 Apart from the pipeline the Upper Kaituna Scheme includes policies to fence off the watercourses from stock and to replace them with piped water supplies for the farms affected by such programmes. It also includes a policy of "retiring" land from farming use so that water running off such land will not carry nutrients into the lake. This is done by fencing off considerable areas which are then planted with trees. The evidence did not cover the point in detail but we were told by Counsel that the fencing of watercourses and retiring of land is very far advanced and has been going on for

about six years. It was explained to us that the cost has been very considerable and both the District Council and the Catchment Commission are anxious to ensure that the plans so carried into effect are not adversely affected by any recommendation we might decide to make.

7.4 The Lower Kaituna Catchment Scheme is largely concerned with controlling the effect of flooding that occurs on the coastal plain near the lower reaches of the river. We were told by Counsel for the Catchment Commission that thousands of hectares of land will benefit from a variety of flood-water control measures both directly and indirectly. These measures are wide ranging but they include the construction of stopbanks, widening river channels, the digging of major drains and installation of flood-gates and flood pumps to control ground water levels. The whole scheme in both the Upper and Lower Kaituna districts is imaginative and far reaching. An important part of the work for our purposes is the prevention of water run off from pasture land surrounding the lakes.

7.5 We made a particular point of enquiring whether the Scheme could go ahead without the pipeline. We were told that it could, and that the other benefits did not in any way depend upon the pipeline, although Ministry of Works witnesses emphasised to us that without the pipeline Lake Rotorua (and indirectly Lake Rotoiti) would continue to deteriorate. That was obvious if nothing was done to reduce the nutrients introduced into the lakes from the Waste Water Treatment Plant, and we grasped the point accordingly. But for our purposes we were assured that if the pipeline idea were to be abandoned the rest of the Scheme could continue. In other words it was clear to all that the Scheme as a whole did not depend upon the construction of the pipeline.

7.6 Counsel for the Catchment Commission, Mr T. S. Richardson, put forward typewritten submissions that had been carefully, even meticulously prepared. They were extremely helpful to us and we wish to acknowledge the courtesy he extended to the Tribunal by taking such care to acquaint us with all the relevant facts. He did not mince matters when it came to dealing with the claimants' case based on spiritual and cultural values.

He said:

"...I have already made reference to the positive benefits which would flow on to the Maori people from the Scheme as a whole. I do not intend to demean the depth of the spiritual feelings which have been expressed to this Tribunal by discussing compromise. I suggest that the forcefully presented case for the Maori people does establish that the traditional rights ... are part of the Taonga Maori..."

Mr Richardson was acknowledging in this part of his submissions that the evidence we had heard of the effect on Maori spiritual and cultural values of discharging sewage effluent into the Kaituna River was almost unanswerable. But he went on to point out that what had been agreed to in 1840 could not possibly have included an understanding of the complexities of society 140 years later and urged upon us the importance of protecting the lakes from further harm.

7.7 Developing this point he went on to say:

"...The pipeline offers a measure of certain security to Lake Rotorua in the immediately foreseeable future. Rotorua District Council has the alternative of continuing to discharge into Lake Rotorua until June 1996 so long as it complies with its Water Right but it must be recognised that the debate over Lake Water quality is likely to continue and that there are likely to be other significant "events" which could militate against any continued discharge into the lake beyond that time. Moreover, to some extent, that option simply has the effect of transferring the Maori cultural and spiritual problem from one fishery to another. It avoids rather than comes to terms with the issues raised at this enquiry..."

One might, with all courtesy, make the reply that the pipeline does exactly the same thing in reverse - it has the effect of transferring the Maori cultural and spiritual problem from one fishery (i.e. Lake Rotorua) to another (i.e. the Kaituna River).

7.8 We had begun to wonder how the pipeline scheme arose in the first place. Towards the end of the hearing the District Engineer for the Rotorua District Council, Mr G. S. Roberts, supplied us with the answer. Speaking of the time when the waters of Lake Rotorua were about to be classified he told of a meeting in Rotorua in 1965 attended by interested parties when the topic was publicly discussed and the consequent need for the Rotorua City Council to provide a sewage treatment plant was raised as a resultant expense.

He said:

"...In 1965... it was suggested by a Ministry of Works Officer at that meeting that my Council could well consider piping effluent to the Kaituna River and that the cost of the pipeline could be partly offset by a reduction in (the cost of) the degree of treatment required..."

He went on to say that the Tauranga County Council did not look favourably on such a suggestion and that his Council never seriously considered it. We should add that from our enquires the Rotorua District Council seems to have acted with a high sense of responsibility throughout this matter and has done its very best to protect the lakes from pollution as far as its finances have enabled it do so.

The Ministry of Works on the other hand seems to have fixed its attention on Lake Rotorua to the exclusion of the river and the estuary and has, right from the very outset seen only one solution - the pipeline - on which it has persistently insisted.

7.9 The Catchment Commission and the District Council have looked at matters quite differently. We have noted carefully the extent to which both bodies have gone, especially the Council, to explore possible alternatives. There was placed before us an impressive series of reports - three in this year alone - compiled by consultants retained by the Council exploring alternative ways of treating the effluent. We were not given precise figures but it is fairly safe to say that the Council has spent many thousands of dollars on consultants' fees to improve its waste water treatment and to make sure that no reasonable means of improvement is unexplored. By contrast we gained the distinct impression that the Ministry has not put anything like the same effort into such enquires. For example, we questioned some of the witnesses called by the Ministry of Works - senior officials - and asked what studies had been done on recent innovations, especially of a biological or chemical kind. We feel bound to say

that the answers we received, in both the words used and in the manner that they were uttered, did not inspire us with confidence.

7.10 To make matters plain we should say that each member of this Tribunal had the distinct impression that so far as the Ministry was concerned its officials were inflexibly of the view that only the pipeline scheme was acceptable and that nothing else could possibly do. In this we think they are not right. And we have reason to believe that both the Rotorua District Council and the Bay of Plenty Catchment Commission think they are not right either. Both bodies have separately and together made it clear to us that they have been drawn along the pipeline path by the departmental insistence that unless they accept the pipeline idea they would not be able to get the heavy government subsidy. That subsidy is important to them both because without it their ratepayers would never have been able to afford to finance the Kaituna River Major Scheme. The Ministry has controlled the subsidy. The subsidy has controlled the Scheme.

7.11 We think that philosophy is a distortion of what ought to be the case. The Scheme should be geared to the best possible protection for Lake Rotorua as a national asset. The subsidy reflects the importance which Government policy has rightly placed upon the Lake. But we say that Government policy should recognise not only the importance of Lake Rotorua - which is undeniable - but also the importance of Lake Rotoiti, the Kaituna River and the Maketu Estuary, because as we have said all four bodies of water are part of the one system, and all are a national asset.

7.12 It is on this point that we diverge from the view taken by the Ministry. It seems clear that nearly 20 years ago the Ministry through its officials saw the Kaituna River as being of comparatively little importance (see para. 7.8). This opinion we do not accept for reasons we have already given. Quite apart from the affront to Maori spiritual and cultural values, we say that common sense demands that every reasonable possible step be taken to protect the whole water system, and not just a part of it. The question that necessarily arises is what alternative exists if the pipeline is to be abandoned as an unacceptable scheme.

7.13 The key point in this whole matter is that certain nutrients - phosphorus and nitrogen - are enriching the lakes and causing eutrophication. Some proportion is caused by pastoral run off and natural flows, some proportion is caused by waste water effluent. No one seems able to apportion the quantities from each source because the pastoral run off cannot be accurately measured. Steps have been taken to reduce the run off but it may take several years before the trees that have been planted on the land that has been retired will reduce the flow of nutrients from pasture. Steps should therefore be taken to reduce the nutrients coming from the other source - the waste water effluent.

7.14 In 1975 Swedish consultants advised the Rotorua District Council to use a chemical process to reduce the flow of phosphorus, then thought to be the important element in eutrophication. As a result alum was added to the treatment process giving a third stage of treatment to Rotorua's sewage scheme. This process worked well for several years, but the increase in the quantity of effluent has been a difficulty and whereas it had been possible to extract up to 75% of the phosphorus for a time the

tanks now in use are not big enough to maintain that level of success. The present Water Right requires the Council to treat the effluent in such a way that no more than 7.5 tonnes of phosphorus are discharged into the lake annually. But recently the Council's experts informed it that the annual discharge is running at 15 to 20 tonnes per annum. (Mr Taylor, Water Resources Engineer to the Catchment Commission). If the alum treatment is to continue the plant must be increased in size, with consequent capital expense to the Council.

7.15 Nitrogen remains a problem. There is a difference of opinion among the experts as to whether nitrogen or phosphorus is the main cause of eutrophication. The best view at the moment seems to be to remove both elements. Sewage treatment knowledge has advanced rapidly in the last 10 years and we were told of a biological treatment called the Bardenpho process which seems to have been effective in South Africa and elsewhere. This first came to our attention in a private submission made to us by the Deputy Mayor of the Rotorua District Council, Dr J. M. Harris D.Sc., whose evidence was later confirmed by Mr B. E. Underwood, a consulting engineer and a member of the firm of consultants retained by the Rotorua District Council. He had supplied a series of reports to the Council which were also given to us. These showed that of recent years the Bardenpho process has come to be used in 40 plants around the world as at the time the report was prepared, mostly in South Africa and North America. The process is one of biological nutrient stripping effective under stringent conditions with both phosphorus and nitrogen. He said that only 3 or 4 plants had stripped phosphorus to the high degree needed to meet the Water Right for discharge into Lake Rotorua, but that more recently a process had been developed which indicated that more plants had been able to achieve the required performance. He was commendably cautious but in response to our questions told us that the advances in technology over the last 10 years have been very significant, and he expressed the view that the same kind of progress is likely to continue over the next decade.

7.16 Dr W. F. Donovan of Bioresearches Ltd referred also to the particular qualities of Sulphur Bay. At present the treated effluent from the City's Waste Water Treatment Plant is discharged to the Puarenga Stream and enters the lake at the bay a short distance away. He noted the acid conditions of the bay and that the phosphorus discharge from the plant appeared to be largely removed as the stream water flowed across it. A reduction in coliform bacteria was also attributed to a die-off in Sulphur Bay waters. In brief, the potential of the treatment plant effluent in terms of its nutrient concentration to lake waters is reduced by the passage of the effluent through that bay. We noted also that for those same reasons Sulphur Bay does not support fish or plant life. It is associated with thermal activity, has a visibly cloudy appearance and is not used by the Maori people or the general public for recreational or food-gathering purposes. Dr Donovan considered that if there were to be any discharge to the lake a discharge to Sulphur Bay would be an appropriate point both for its unusual chemical properties and for the lack of public use.

7.17 The Rotorua District Council is permitted under its present Water Right to discharge effluent into Lake Rotorua until 1996. It is about to embark upon a further development of its Waste Water Treatment Plant (Stage IV). Its District Engineer, Mr Roberts, informed us that if discharge into Lake Rotorua is to continue the Council would prefer to adopt a biological nutrient stripping process (Bardenpho or something similar) rather than a chemical stripping procedure. It has made financial provision to

enable work to proceed as soon as a final decision is reached as to whether the pipeline is to be built or not.

7.18 We are not qualified to assess with academic nicety all the technical data available - that is for expert opinion and expert advice. But we are required to make a Finding that takes into account in a common-sense way all the information placed before us, We are unanimously agreed that the pipeline proposal should not proceed - not only because it offends Maori spiritual and cultural values as it undoubtedly does - but because it is out of date and needlessly expensive. The cost of its construction has risen from \$3 million to about \$12 million. The biological nutrient stripping process is much less costly in terms of capital, and at least comparable in terms of annual expense. We were told that the cost of the pipeline and the extension to the Treatment Plant is estimated to amount in total to \$16,774,000. But the cost of those extensions and establishment of the biological nutrient stripping process is only \$9,500,000 (as estimated on current costs). This is a much cheaper proposition in capital expenditure, a saving of over \$7,000,000. The annual cost depends upon the level of subsidy which requires to be arranged with the Health Department. At present the Department has no allocation for a biological nutrient stripping process - no doubt because it is too new (in New Zealand) to fit an existing category. But if it received the current subsidy of 14% (as we think it most certainly ought to do) then the annual cost of running the process will be \$1,295,000 as against an estimate for the pipeline of \$1,165,000, an extra annual cost of \$130,000. If the subsidy allowed is increased to a ratio of 3 to 1 (because of the importance to the Nation of protecting the lakes) it will cost even less than the estimates say would be the annual maintenance cost on the pipeline.

7.19 This survey of the evidence leads us to conclude that as matters have been put before us, technological advances offer an alternative to the pipeline proposal, that both phosphorus and nitrogen nutrients must be stripped from effluent discharged into Lake Rotorua, that a biological nutrient stripping process is available to achieve that objective, and that it will provide a saving of \$7 million in capital expenditure, if it is established in place of the pipeline.

Waitangi Tribunal, Department of Justice, Wellington.

Kaituna River Claim

7 - Other Solutions

1 - Land Disposal Of Effluent

8. LAND DISPOSAL OF EFFLUENT

8.1 Dr C. D. Stevenson gave evidence on behalf of the Commission for the Environment in which he recommended that research be undertaken immediately to dispose of Rotorua's effluent on the land instead of discharging into water. Mr G. S. Roberts, District Engineer for the Rotorua District Council, gave us a useful table showing how different communities in New Zealand deal with waste water, and we produce it here.

TABLE VI

METHOD OF WASTEWATER TREATMENT AND RECEIVING WATERS FOR PRINCIPAL TOWNS OF NEW ZEALAND

Town Treatment Receiving Water

Whangarei Secondary Whangarei Harbour
North Shore Secondary and Ponds Stream
Auckland Secondary and Ponds Manukau Harbour
Hamilton Primary and disinfection Waikato River
Taupo Secondary Waikato River
Rotorua Tertiary Lake Rotorua
Tauranga Secondary Tauranga Harbour
Mt Maunganui Ponds Sea
Whakatane Ponds Sea
Gisborne Comminution Sea
Napier Comminution Sea
Hastings Comminution Sea
New Plymouth Secondary and Sea
disinfection
Wanganui Comminution Sea
Palmerston Nth. Primary Manawatu River
Feilding Secondary Stream
Porirua Nil Sea
Wellington Nil Sea and Harbour
Hutt Valley Milliscreen Sea
Nelson Ponds Sea
Blenheim Ponds Wairau River
Christchurch Secondary and Ponds Estuary
Timaru Comminution Sea

Dunedin Primary and disinfection Sea
Invercargill Primary Estuary

8.3 The table shows that no sizeable community in New Zealand uses land disposal to get rid of waste water effluent. It also shows how many principal towns and cities have no treatment or very little treatment for their sewage. Finally it shows that Rotorua treats its effluent to a third stage process of purification and so exceeds the standards of most other places in New Zealand.

8.4 In 1978 Mr Roberts attended a conference in Melbourne on land methods of waste water disposal and he put before us several possibilities of which he had learned then. It is probable that advances in this matter have been made over the last six years and we listened to his evidence recognising that much other information may now be available that was not known to him. He told us that there are three main types of land disposal:

8.4.1 Slow rate - which is simply an irrigation system that allows effluent to soak into the ground and in many cases vegetation growing as a result is cropped to produce a financial return. For the quantity of effluent coming from the Rotorua Treatment Plant a great deal of land would be necessary if this process were adopted. It does not seem to be a practical alternative in this case.

8.4.2 Overland Flow - which allows effluent to flow over land that has been graded or terraced with the result that increased rates of infiltration or soakage are possible and a greater quantity of effluent can be handled as a result. But even so the amount of land required, perhaps 1000 hectares, would make this a most expensive proposition. It does not seem to be a practical alternative either.

8.4.3 Rapid Infiltration - which allows effluent to soak into the ground from a number of specially constructed basins at various points and at rates of infiltration far greater than the other two types. It was estimated orally in evidence and therefore on a fairly imprecise basis that perhaps 30 hectares of land could be sufficient to deal with a quantity of effluent like Rotorua's rate of production.

8.5 It was urged upon us that the best way of dealing with Rotorua's effluent would be to combine biological nutrient stripping to remove the phosphorus and nitrogen and then to dispose of the effluent by the rapid infiltration process. Dr Stevenson thought this to be a practical possibility but when we raised it with witnesses from the Ministry of Works they explained that such a combination had not been studied. The claimants had suggested in a non-scientific way that the effluent could be piped or taken by road tanker to forest areas and disposed of by spray irrigation.

8.6 The first thing to be remarked upon these possibilities is that the quantity of effluent to be disposed of is very large - we were told it could be visualised as about 1000 tonnes of water every hour 24 hours a day for 365 days of the year. No doubt that was a generalisation but it was of help to us to grasp the volumes of waste water that are involved. Road tanker transport would, we think, be prohibitively expensive, and a pipeline may be as costly as the Kaituna proposal that is now in question. Furthermore it was suggested, not necessarily in an authoritative way, that spray irrigation in the forest could cause the trees to develop surface roots systems without a

properly developed taproot system and so make them vulnerable to uprooting in storms or high winds.

8.7 We were given examples of land disposal systems operating in other parts of the world. Most of them seem to be used in arid country, which may make them inapplicable to the Rotorua district, but Melbourne has used land disposal for many years and we were told that Christchurch did so from 1880 to 1962. We are inclined to suspect that little attention has been focused on land disposal in New Zealand because water disposal is so much easier and because of the ready access in this country to lakes, rivers and the sea. It may be that increasing quantities of effluent now demand much closer attention to the ecological consequences of water disposal, especially in the case of inland towns like Rotorua. We think that the consequences of putting raw sewage into the sea as is done in Wellington and elsewhere are becoming recognised as harmful and the point we make is that water disposal may not be as acceptable in the future as it has been presumed to be in the past.

8.8 Land disposal for Rotorua's effluent would be ideal as a means of reducing enrichment in the lakes. We cannot recommend it as a course to be adopted because we do not have enough information to make such a finding. Wide issues are raised by such a process - for example will groundwaters be contaminated by heavy metal deposits, would spray irrigation spread viruses through an aerosol effect and endanger health, would toxic substances of one kind or another enter the food chain through vegetation growing on land disposal areas?

8.9 We can only conclude that much more could be done to explore the possibility of land disposal of Rotorua's effluent and we recommend accordingly that urgent research work be undertaken to see whether this process combined with biological nutrient stripping will prove to be the solution for Lake Rotorua's problem of nutrient enrichment in the longer term.

Waitangi Tribunal, Department of Justice, Wellington.

Kaituna River Claim

8 - The Claim

1 - Issues Raised

9. ISSUES RAISED BY THE CLAIM

9.1 In this hearing, as in others, the Waitangi Tribunal has been careful to adopt a procedure that is uncomplicated, straightforward and fair to all parties. Claims can be made in the simplest of ways, a mere letter is sufficient in most cases so long as it is full and explicit enough for our staff to identify persons and parties who could be affected by it. We have eschewed strict procedural rules because it is our belief that the Tribunal should be easily accessible and its hearings so conducted as to be comfortable for those who have the right to ask its assistance. Cross-examination of witnesses is unusual and is permitted only by special leave of the Tribunal, but members of the Tribunal put such questions as they think are necessary. We hold our sittings on an appropriate marae - in this case Te Takinga Marae of the Ngati Pikiao on the western shore of Lake Rotoiti. Witnesses are free to speak in Maori or in English and as far as can be done we follow the protocol of the marae. All our sessions begin and end with a karakia (prayer) led by an elder of the marae, and all present eat together in the whare kai (dining room) during the adjournment in the middle of the day.

9.2 This procedure, so informal to a trained lawyer accustomed to the formalities of the pleadings and practice of the Courts, must be governed by a sense of fairness to parties affected by a claim. They come to a hearing knowing little about the details of the case because there may be no formal detailed statement of claim as required in Court procedure. To protect those parties we listen to all the claimant's witnesses and at the end of the claimant's case we identify all the relevant issues that the claimant has raised or which we think, in our jurisdiction as a Commission of Inquiry, ought to be explored. Usually we ask counsel for all parties to confer and submit to us issues they agree upon and offer argument in respect of others on which they cannot agree. This was done in the hearings before us and we settled the issues as set out below to which we give our answers in the light of this Finding. Once the issues have been settled we adjourn the hearing to allow the parties affected by the issues to prepare their respective cases in reply. By this procedure we believe we have found a satisfactory way to combine the advantages of informality with a proper degree of fairness to all concerned.

9.3 We now set out the issues in this case and our answers to each with added reasons where necessary.

9.3.1 ISSUE 1

Is the pipeline proposal the result of an action, policy or practice by or on behalf of the Crown, and if so, what is that action, policy or practice?

ANSWER: Yes. The Ministry of Works explicitly acknowledged by its Counsel Mr N. R. Watson that the construction of the pipeline to the Kaituna River was a policy of the Crown within the meaning of Sec. 6 of the Treaty of Waitangi Act 1975. This admission was properly made and is the foundation for our jurisdiction in this matter.

9.3.2 ISSUE 2

Will the proposed Kaituna River discharge prejudicially affect the claimants or is it likely to prejudicially affect them in all or any of the following ways:

(a) By contravening their spiritual or cultural values?

ANSWER: Yes. The evidence on this point was virtually unchallenged. See for example the admission of Counsel for the Bay of Plenty Catchment Commission (para. 7.6 above).

(b) By reducing the quality or quantity of their fisheries in the Kaituna River, the Maketu Estuary or the sea adjacent thereto?

ANSWER: Yes. If the pipeline is built and effluent discharged as proposed we accept that the Ngati Pikiāo will be obliged to impose a tapu on the river with the result that the quality and quantity of their fisheries will be reduced to their disadvantage. As to the estuary we refer to para. 2.7.

(c) By rendering the catch of these fisheries unacceptable on spiritual or cultural grounds?

ANSWER: Yes for reasons already given.

(d) By rendering plant and other resources in and about the river less suitable for traditional purposes?

ANSWER: Yes. See the evidence of Mrs Schuster and others (para. 3.18 above).

9.3.3 ISSUE 3

Is the pipeline proposal inconsistent with the principles of the Treaty of Waitangi in the light of the Tribunal's findings above:

(a) In 1940 was the Kaituna River owned and had it been owned for many generations by the Ngati Pikiāo sub-tribe and the Te Arawa?

ANSWER: Yes.

(b) Did these traditional rights of ownership carry with them the free and uninterrupted right to fish the river, the estuary and the sea, together with the use and enjoyment of the flora adjacent to it?

ANSWER: Yes.

(c) Have these traditional rights continued uninterrupted to this day?

ANSWER: Yes.

(d) Is the discharge into the Kaituna River of sewage effluent no matter how scientifically pure, contrary to Maori cultural and spiritual values?

ANSWER: Yes.

(e) Does the Treaty of Waitangi guarantee the continued enjoyment and undisturbed possession of the Taonga Maori?

ANSWER: Yes.

(f) Are the traditional rights referred to in paragraph (b) above part of the Taonga Maori?

ANSWER: Yes.

9.3.4 ISSUE 4

Having regard to the scheme as a whole, are there any practicable alternatives to the Kaituna pipeline (in this context practicable alternatives have to be considered in the light of Maori values as well as sound engineering practice)?

ANSWER: Yes. We refer to para. 7.13 et seq. of this Finding. Even this means of disposal is in the nature of a compromise. To mingle the effluent with the waters of Lake Rotorua is offensive to Maori spiritual and cultural values. But to find a practical solution we note and emphasise that the waters of Sulphur Bay are not used for any purpose (see para. 7.16) and this is the most practical course we can recommend in the absence of land disposal which is the preferred alternative, but which is not currently available.

9.3.5 ISSUE 5

In terms of S.6(1)(a) of the Treaty of Waitangi Act is the Water and Soil Conservation Act 1967 an Act for the time being in force which prejudicially affects the claimants in that it fails to make provision for, and hence implement and recognise the provisions of the Treaty of Waitangi?

ANSWER: Yes. The Water and Soil Conservation Act 1967 and related legislation does not contain any provision to enable Regional Water Boards or the Planning Tribunal to take into account Maori spiritual and cultural values. By contrast, the Town & Country Planning Act 1977 does make such provision in Sec. 3(1)(g). This gap in the Water and Soil legislation puts Maori objectors at a disadvantage and does not reflect the principle contained in Article II of the Treaty of Waitangi by which the Crown guaranteed to Maori New Zealanders, ("...to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof...") the full exclusive and undisturbed possession of their Fisheries and other properties. Water quality is an integral part of fishery protection and a discharge at one place may have far reaching

effects in some other place to which the water in question flows. For example there are polluting discharges in the lower reaches of the Kaituna River under water rights granted to a dairy factory and a freezing works. Objections to these water right applications on Maori spiritual and cultural grounds were disallowed because the Tribunals had no jurisdiction to take them into account.

The Ministry of Works and Development, which is responsible for administering this legislation, informed us that it will recommend an amendment to the relevant legislation to remedy the omission which we find is in conflict with the principles contained in Article II of the Treaty of Waitangi.

Waitangi Tribunal, Department of Justice, Wellington.

Kaituna River Claim

8 - The Claim

2 - Recommendations

10. RECOMMENDATIONS

We Recommend

10.1 TO THE HONOURABLE THE MINISTER OF MAORI AFFAIRS THAT notice be taken of the Finding of this Tribunal that the policy of the Crown by which a pipeline is to be constructed to discharge effluent from the Rotorua District Council Waste Water Treatment Plant into the Kaituna River is contrary to the principles of the Treaty of Waitangi.

10.2 TO THE HONOURABLE THE MINISTER OF WORKS AND DEVELOPMENT

10.2.1 THAT the policy of the Crown by which a pipeline is to be constructed to discharge effluent from the Rotorua District Council Waste Water Treatment Plant into the Kaituna River be abandoned as being contrary to the principles of the Treaty of Waitangi,

AND

10.2.2 THAT research be undertaken into the possibility of disposing of such effluent by discharging the same on the land in a suitable and practical manner instead of discharging the same into Lake Rotorua,

AND

10.2.3 THAT the Water and Soil Conservation Act 1967 and related legislation be amended to enable Regional Water Boards and the Planning Tribunal properly to take into account Maori spiritual and cultural values when considering applications for grant of water rights, the renewal thereof or objections to such applications.

10.3 TO THE HONOURABLE THE MINISTER OF WORKS AND DEVELOPMENT

and

TO THE HONOURABLE THE MINISTER OF HEALTH

10.3.1 THAT the present subsidy granted for the Kaituna River Major Scheme be altered to enable the Rotorua District Council to treat the effluent from its Waste Water Treatment Plant by a suitable biological or chemical stripping process without

loss of that subsidy so that phosphorus and nitrogen can be removed from that effluent up to the standard required by the water right now granted permitting the District Council to discharge such effluent into Lake Rotorua.

10.4 TO THE HONOURABLE THE MINISTER IN CHARGE OF THE
PARLIAMENTARY COUNSEL'S OFFICE

10.4.1 THAT the attention of the Chief Parliamentary Counsel and other appropriate officers be drawn to the Finding of this Tribunal with particular reference to the consequences of legislation being enacted that is in conflict with the principles of the Treaty of Waitangi.

DATED at Wellington this 30th day of November 1984.

E.T. Durie Sir Graham Latimer
Chief Judge of the Maori MEMBER OF THE TRIBUNAL
Land Court
CHAIRMAN

P. B. Temm Q.C.
MEMBER OF THE TRIBUNAL

THE SEAL OF
THE WAITANGI TRIBUNAL

Waitangi Tribunal, Department of Justice, Wellington.

Kaituna River Claim

9 - Appendices

1 - Appendix

APPENDIX

My name is Te Irirangi Te Pou O Uruika Tiakiawa; this is my full name and the name under which I was baptised.

In commencing I wish to take the discussion back to the beginnings of time to our ancestor Puhaorangi mentioned by an earlier speaker and Puhaorangi who descended from the skies came down to earth and there espied Te Kura-i-Monoa who was already the wife of Toi Te-Huatahi. Puhaorangi cohabited with her and begat Ohomairangi a male. Ohomairangi because of the circumstances of his birth is known by several names. Ohowhakataretare and Ohomatakamokamo. Ohomairangi had a son whom he named Muturangi and this is the Muturangi of historical renown whose pet happened to be an octopus and whilst at sea Kupe happened to come upon it and endeavoured to slay it. The octopus fled and careered throughout the ocean with Kupe in pursuit. It headed in the direction of Aotearoa finally ending up in Cook Strait where Kupe caught it and slew it.

Now Muturangi had a son whom he called Taungarangi. Taungarangi had Mawake and Mawake had Uruika the first. Uruika the first had Rangitapu and Rangitapu had Atuamatua. Atuamatua took to wife three women, the first of whom was Waiheketua. From Waiheketua he begat Rakauri and Rakauri had Ngatoro-i-rangi the navigator of the Arawa canoe. Atuamatua begat from his second wife Okarikarua, Houmaitawhiti who had Kahumatamomoa, then Paeko then Tamatekapua. Tamatekapua the captain of the Arawa canoe had at one stage four wives and then decided to take a fifth wife in Te Motuotaku from the Mataatue canoe, and from his fifth wife he had Kahumatamomoe. Now Houmaitawhiti in the Islands had a pa called Tumuwahakairia and it was to here on the completion of the construction of the canoe that they dragged it. There were several people involved and their axes have gone down in history, some of them being Hauhau te Rangi and Tutauru.

We come to the point of the migration and the canoe set sail from a point called Waikuta. During the course of the voyage across the Pacific, Ngatoro-i-rangi had a practice of climbing on to the roof structure of the house to take his bearings from the stars and other heavenly bodies. During one of these exercises Tamatekapua perceived that a rope was tied to Kearoa's hair which Ngatoro-i-rangi held as he went out on to the building. Tamatekapua removed the rope and tied it to the Kaimamoa before ravishing the wife of Ngatoro-i-rangi. He was eventually caught on one of these evenings and in his wrath and anger Ngatoro-i-rangi determined to scuttle the canoe and to send it to the bottom of the sea, and so he called upon the Gods of the Universe with whom he was in communication and so the hurricanes came, the storms came and the waves began to rise and the canoe was on the point of going down.

The womenfolk began to wail and children began to cry; Ngatoro-i-rangi finally relented and felt very sorry for his people that he appeased the waters and commanded the elements to desist and the waters were again calmed. The canoe arrived eventually at Whangaparaoa and from there it followed the coastline of the Bay of Plenty up past the Coromandel Peninsula and finally landed in the area of the Waitemata Harbour. Having landed there Ruaeo arrived on the scene soon afterwards. He had been deceived back in the Islands into staying behind and at the point, this point in history, Ruaeo had come upon Tamatekapua determined to chastise him. In their man to man battle Tamatekapua's nose bled and the island in the harbour was named after that incident, Te Rangi i Toto Ai Te Ihu Tamatekapua, in brief, Rangitoto.

The canoe returned from Waitemata towards the Bay of Plenty and at a point around Matata, Ngatoro-i-rangi released the two birds, Mumuhu and Takereto. These two birds were instrumental in navigating the canoe to New Zealand. The canoe returned from Matata and then we come to the point where he climbs Tongariro mountain; having ascended Tongariro mountain he was overcome with cold and snow and so he called forth for heat and fire from his people in Hawaiki where everything was tropical, and his two sisters Te Hoata and Te Pupu brought him some heat and they travelled underground, under water emerging at White Island; down again emerging in Rotorua; down again emerging at Wairakei and eventually arriving at Tongariro and Ngauruhoe.

In the meantime Tamatekapua on the canoe had arrived at Whakatane and espied the Mataatua canoe already in occupation there. He returned to Maketu where the Arawa canoe was finally beached and the people settled down to live. They had been at Maketu for some time when an ancestor by the name of Tuarotorua journeyed inland to explore the place. He arrived in this area here and discovered Lake Rotorua finally settling at Kawaha Point. Tamatekapua eventually moved further north to Moehau and died there.

Around about the time of Tuhoromatakaka's death Ihenga courted his female cousin and then with his family, also came inland to explore the area and he came by way of the track known as Ohakomiti down to Paripari-Te-Tai when his dog, after disappearing for some time reappeared and vomited up whitebait, then Ihenga realised he was near water. He journeyed on until finally landing on the shores of the lake which, because of the size of the particular bay, he was deceived into thinking the lake was a small lake. He called it Lake Rotoiti. They journeyed on around Lake Rotoiti and came towards the Ohau Channel which of course was un-named at the time. Ihenga's dog called Ohau drowned in the upper reaches of the channel at a place called Parewharewhatanga and in memory of his dog, Ihenga, named the channel Ohau. He journeyed on to the next lake, Lake Rotorua, which had as a name at the time, Nga-Wai-Karekare-O-Marupunganui. Marupunganui being the chief of the people, domiciled around these parts at the time, he later renamed the lake, Rotorua.

I mentioned these ancestors and this historical background to establish that we are the owners of these lakes and the river in question.

Tamatekapua had Kahumatamomoe; he married Hineitapaturangi and they begat Tawakemoetahanga; he married Tuparewhaitaita and they begat Uenukumairarotonga; he married Te Aokapurangi and begat Rangitihi.

Rangitihī Whakahirahira Rangitihī the garlanded one.

Upoko-i-Takaia ki Te Akatea whose head was bound up after injury with a vine. Rangitihī had four wives who were all princesses. Three of the wives were from Tapuika who lived on the lower reaches of the Kaituna River and they were all sisters to each other. The fourth wife was from Marumamao Mataatua descent. From his first wife, the first of the sisters Rongomaiturihuia Rangitihī had Rotorua and Tauruao. Now Rotorua had Whakairikawa, Whakairikawa had Tuteata. Tuteata had Rangikawekura, whom we shall mention later.

Tauruao a female married Tanemoetara from Whakatohea and Whanau-a-Apanui. Their descendants include Sir Apirana Ngata and the Anaru families. Rangitihī had from his second wife Kahukare two sons Rangihakaeke and Rangiaohia. Rangihakaeke and Rangiteaorere and Rangiaohia in the honoured ancestor of Ngati Rangitihī, From this third wife Papawharanui he had Tuhourangi. From his fourth wife Manawakotokoto he had three sons Rakeiao, Te Kawatapuārangi and Apumoana.

Te Kawatapuārangi married Rangikawekura mentioned earlier and they begat Pikiāo the first. Pikiāo the first had Rakeiti their first born was Te Epaorehua a female. Their second born was also a female; their third born was another female Te Tiukahapa. At this point Kawatapuārangi began to despair because he had no male heir to take his fame abroad and he put it to his son Pikiāo like this:

"Pikiāo-nui-a-kawa, i aitia koe i to wahine kia whiwhi he tane, ma wai taku kauae e to ki uta".

"Pikiāo you have cohabited with your wife but who will take my fame abroad".

He advised his son Pikiāo to abandon his wife and to go to Mount Pirongia in the Waikato and there approach a certain chief Ruaroa who had a maiden daughter Rereiao whom he might take to wife. Pikiāo took the advice and left. In leaving, his wife took umbrage and murmured, "Pikiāo you might continue to cohabit with me, the capacity to bear children is still with me". And this is borne out in the classical saying kei te tuhera tonu Te Awa-i-Takapuhaia, which is the name given to the stretch of water leading down into the Kaituna River.

Pikiāo married Rereiao and begat Hekemaru whose descendant is now sitting on the throne in Waikato. On his return to his first wife Pikiāo was confronted with a son that was born in his absence. Because of his irritation at the delay in getting a son he named the child Kawiti meaning the curve on the tattoos of my brow and from Kawiti my grandfather Hone is descended. Hone married Tamara and begat Ru and from Ru to myself. This gives me my grounds for expressing my outright objection to the proposal to release effluent into the Kaituna River, and we might talk about Pikiāo the second the son of Tamakari. He had Parua who married Waiwaha. Again we come down to my grandfather Hone and Tamara eventually to myself.

These are my ancestors on the Ngati Pikiāo side. I might say that one of my other ancestors married from far away from north Auckland a girl from there and they had 22 children, and I conclude my genealogy on this note. In discussing the Kaituna

River in particular there are rocks and fishing shoals associated with it. My elders Tiakiawa and Koma Tapsell and others would go to Maketu to fish and I would go with them. My grandfather would survey the seas and point out places where fish would likely be and so we took pioke which apart from eating was useful for the oil that could be applied to wood to preserve carvings. We took tamango which is a small fish. At a place called Otukehu a pa which is now called Te Awhe there is a tree which marks the spot. It is not far from Pukemaire. All these places are spoiled by pollution from the Tarawera River. There are other food shoals at Motiti and Moutohora known for their mussels. We don't only take fish for tangis. There is a place called Rahokatia between Motiti and Maketu. It is known for Kanai and Kahawai. It is not the practice to fish every day, we take fish only on three days in the month. And the month is the period of Huetanguru from September 25, 26 and 27 nights after the new moon.

Other speakers have spoken about the waters in the Kaituna. They say the water is pure but not by my thinking. This problem of effluent is a pakeha one. In the old days the ablution blocks called Paepaeturua were built away in remote places from the Marae because of the tapu nature of those places. Faeces might be used for sorcery purposes to hurt people through incantations and I have incantations that I know. Places where there was impending death were also placed under tapu, There is a rock in the sea which is known for mussels and Pirara. It is approached from Tetumu just off shore. I took a group there recently while we were staying at Whakaue marae.

I hope that these points will substantiate that we own this river, we have always owned it, we have never really surrendered ownership that authorities do as they please.

Waitangi Tribunal, Department of Justice, Wellington.

Kaituna River Claim

9 - Appendices

2 - List Of Reports

LIST OF REPORTS OF THE WAITANGI TRIBUNAL

Wai-1 Fishing Rights (Hawke) March 1978
Wai-2 Waiau Pa Power Station February 1978
Wai-4 Kaituna River November 1984
Wai-6 Motunui-Waitara March 1983
Wai-8 Manukau July 1986
Wai-9 Orakei November 1987
Wai-10 Waiheke Island June 1987
Wai-11 Te Reo Maori April 1986
Wai-12 Motiti Island May 1985
Wai-15 Fishing Rights (Te Weehi) May 1987
Wai-17 Mangonui Sewerage August 1988
Wai-18 Fishing Rights (Lake Taupo) October 1986
Wai-19 Maori 'Privilege' May 1985
Wai-22 Muriwhenua Fishing June 1988
Wai-25 Maori Representation (ARA) December 1986

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