Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.1 The issues

Figure 17: Ahuriri Estuary areas managed by the Department of Conservation. Copied from map 3 in the Department of Conservation's *Conservation Management Strategy* (Hawke's Bay conservancy, Napier, October 1994, vol 1).

The claimants state that environmental damage had been caused to Te Whanganui-a-Orotu and that environmental management, prior to the passing of the Resource Management Act 1991, was carried out without consultation with themselves or their forebears. Furthermore, since that Act came into force, there has been inadequate acknowledgement of the principles of the Treaty in dealing with environmental matters (1.2(d):7; D9:18; I9(a):1-3). In this chapter we examine these claims, with particular reference to the Ahuriri Estuary.

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.2 The esturary and its ecological importance

Of the original 3840-hectare lagoon, the Ahuriri Estuary was the only remaining water area by 1992 and had been 'extensively modified by natural and human activities' (I9(e):13).

The remaining estuarine water area covers 275 hectares at high tide. Nearest to the sea lies the inner harbour, the entrance to which still requires dredging to maintain a sufficient depth for small boats to berth at the Iron Pot. Between Pandora Bridge and the Embankment Bridge lies the lower estuary, consisting of tidal flats, shallow channels, and several islands. West of the Embankment Bridge is the narrow, stopbanked middle estuary, which becomes increasingly shallow as it approaches the Poraiti Hills. Where it swings round their base, it is known as the upper estuary. North of the lower reaches of the middle estuary is the Westshore Lagoon and a 38-hectare recreation reserve. Opposite the lagoon, to the south of the outfall channel, is the southern marsh. Most of the catchment area is farmland, with a few patches of remaining vegetation (I9(e):13-14).

John Ombler, the regional conservator of the Hawke's Bay conservancy, gave evidence on the ecological importance of the Ahuriri Estuary. 'Estuaries generally,' he said, 'are the most productive ecosystems on the earth.' The Ahuriri Estuary has 'one of the greatest concentrations of water birds relative to its size of estuarine areas in New Zealand, and has been described as one of the finest refuges for wading birds in the country' (H12:3-4). The estuary margins, the upper outfall channel and its surrounds, and the southern marsh are regarded as a very valuable wildlife habitat. The wetlands adjacent to the main road north are relatively freshwater, as is the southern marsh, and are used by large numbers of water birds, which are attracted to a habitat rich in rushes. The greatest biological diversity is found at the margins of the tidal channels, where the water is shallow.

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.3 Conflict over use and management

9.3.1 Wildlife values versus human development

Since the 1950s:

> the use of the Ahuriri Estuary has been a source of conflict between wildlife values and human activities and developments such as recreation, reclamations, channel dredging, marina proposals and motorway developments. (I9(e):15)

The tangata whenua were only marginally involved in the conflict, notwithstanding their old, unresolved claim to Te Whanganui-a-Orotu. Customary and traditional conservation values played little or no part in the system of environmental control that operated during the years of conflict.

9.3.2 The system of control and management

When this conflict began, the tidal estuary and part of the outfall channel were controlled by the Napier Harbour Board as part of its harbour endowment, and the Westshore Domain was controlled by the Napier City Council. The rest of the outfall channel and the middle and upper estuary were Crown land and were administered by the Department of Lands and Survey. Other authorities involved in planning and management were the Hawke's Bay County Council and the Hawke's Bay Catchment Board; other Government agencies involved were the Departments of Internal Affairs (Wildlife Service), Marine, Transport, Scientific and Industrial Research, and Civil Aviation. Under the legislation1 that empowered these authorities to control and manage the Ahuriri Estuary, neither the Crown nor the administering authorities were obliged to act in accordance with the Treaty principles of rangatiratanga and partnership; rather the principle of kawanatanga was absolute. While the tangata whenua could elect representatives or stand for local authorities, they do not appear to have actively exercised these democratic rights.

9.3.3 Wildlife refuge gazetted

Early in 1956, on the recommendation of a prominent member of the Ornithological Society, the estuary area was inspected by a field officer of the Wildlife Service and representatives of the Hawke's Bay Acclimatization Society, and a discussion was held with the Napier City Council and the Napier Harbour Board. Arising from this, a proclamation was prepared to have part of the 124-acre Westshore Domain, the outfall channel, and 61 acres of tidal estuary, excluding the 'islands', declared a wildlife refuge. The harbour board consented on condition it could reclaim, drain, and

improve the area under its control, which it had the authority to do under section 14(2) of the Wildlife Act 1953.

On 8 May 1958, the Ahuriri Wildlife Refuge was gazetted under the Wildlife Act (D6(a):1325, 1481). Although the reserve was under the control of the city council and the harbour board, the council delegated its authority over the portion within the Westshore Domain to a committee representing the Royal Forest and Bird Protection Society, the Hawke's Bay Naturalists Club, and the Hawke's Bay Acclimatization Society. The whole area was shown as a wildlife refuge in the Hawke's Bay County Council's 1963 district scheme.

An unofficial extension of the wildlife refuge was the adjoining 14.5218-hectare Watchman Road reserve, which had been part of the 485 acres that were taken by proclamation from the harbour board and vested in the borough council for airport purposes in 1945. It was populated by a large number and variety of wading and wetland birds and zoned for community purposes. On 8 June 1967, the city council resolved to protect the wildlife in the reserve (D6(a):1204).

9.3.4 The Hawke's Bay Wildlife Trust proposes a wildlife park

On 1 March 1967, the Hawke's Bay Wildlife Trust was incorporated with the object of preserving and protecting all native and introduced wildlife in the province and elsewhere for the benefit of the public. The nine foundation corporate members were the Napier City Council, the Dannevirke Borough Council, the Hawke's Bay Holiday and Travel Association, the Deerstalkers Association, Federated Farmers, the Hawke's Bay Acclimatization Society, the Education Board, the Royal Forest and Bird Protection Society, and the New Zealand Ornithological Society.

In 1968 the trust proposed to lease and develop the lagoon area of the 124-acre Westshore Domain as a wildlife sanctuary (D6(a):1238-1240). After clearing the proposal with the Department of Civil Aviation, the Minster of Lands approved it (D6(a):1241-1242). On 28 February 1972, the 124 acres were leased for 38 years to the trust to develop as a wildlife park (D6(a):1247-1253).

9.3.5 The residential marina proposal

By 1966 the Napier City Council, having used up the land that was acquired for housing and industry from the harbour board under the 1945 Act, proposed to reclaim and develop 55 acres of the tidal estuary. The Napier Harbour Board and Napier City (Inner Harbour) Subdivision Act 1966 was passed, authorising the board to transfer the 61 acres 3 roods to the city council for reclamation, development, subdivision, and sale (D6(a):1436).

While the Bill was being considered by the local Bills committee, the town clerk intimated that the council might wish to develop the area partly as a marina subdivision (D6(a):1450). About 190 sections and a large boating area were envisaged, and the Marine Department approved the scheme (D6(a):1438).

The plan put the Wildlife Service in the position of having to condone a development that would disturb bird life and contravene the Wildlife Act 1953. In 1969 the

Hawke's Bay Acclimatization Society mooted the exclusion of 61 acres from the wildlife refuge. A departmental refuge committee agreed (D6(a):1481-1482). Under section 14 of the Wildlife Act, the revocation required the consent of the occupiers and the Ministers of the Crown who were charged with the administration of the Crown land affected.

Consent was obtained from the harbour board and the Hawke's Bay Wildlife Trust, but the Napier City Council considered that the 61 acres were already severed from the refuge under the 1966 Act. Anticipating that a small group would object to the marina development, it asked that the usual procedure of advertising exclusions be restricted to the balance of the area originally gazetted. Two successive Ministers of Lands said the council should advertise, and, on 16 and 21 May 1973, notices appeared in local newspapers. Seven letters of objection were received from 12 people (D6(a):1455-1458, 1482).

In 1970 and 1971, a suggestion from the city planner that the outfall channel be developed for rowing and boating had also received some publicity and the local acclimatisation society and the Department of Lands and Survey had objected (D6(a):1353, 1358).

9.3.6 Ecology Action (Hawke's Bay) opposes marina development

In April 1973, Ecology Action (Hawke's Bay) produced a report highlighting three threats to the Ahuriri Lagoon wildlife refuge: (a) the city council's proposed marina suburb and reclamation for industrial sites and a grassed reserve; (b) the planned extension of the motorway from Taradale and Kennedy Road; and © the Wildlife Trust's development of the Westshore Pond to include a car park, a track, a curator's house, a mini zoo, a kiwi display house, and a deer park (D6(a):1256-1262). The report was well publicised, and a campaign against the marina conducted by Ecology Action and other interested parties got under way. After the Local Authorities Board had approved the raising of a $500,000 loan by the council to develop the residential marina, Ecology Action organised a petition for a poll of ratepayers, which was signed by 1056 people, and the council agreed to proceed with a poll (D6(a):1477).

9.3.7 Marina development shelved

At a meeting of the Nature Conservation Council on 12 and 13 June 1973, there was a general consensus that the lower estuary, while useful for migratory birds, was not nearly as valuable as the outfall channel and the Westshore Pond. Weighing up all the circumstances, the council considered that the abandonment of the planned marina would not be justified (D6(a):1439-1442). Talks with the Minister of Internal Affairs, Henry May, however, revealed that the Government would press for an environmental impact study. Accordingly, the city council decided to defer both the poll and the marina project, and a council subcommittee was instructed to prepare alternative schemes for the area (D6(a):1479).

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.4 Reports and Discussions on future management

9.4.1 Dr Hunnable's report

To enable the council and the harbour board to give consideration to an `acceptable development', a report was commissioned from the Auckland firm of Dr T J Sprott and Associates and prepared by Dr Hunnable.

Dr Hunnable concluded that conservation could not be achieved by leaving the area alone. The lagoons were slowly filling in and, unless something positive was done to conserve them, they would progressively become swamps and, eventually, dry land, and existing feeding grounds for birds would inevitably disappear. If the area were to become a recreation and wildlife area, a fairly complete system of control would be needed to maintain it in as natural a state as possible and prevent the water and mudflats becoming fouled and badly polluted (D6(a):1487, 1490).

9.4.2 The Kilner and Cooper report

A Kilner and R Cooper, in their Ministry of Agriculture and Fisheries report of 7 April 1975 on *Development and Protection of the Ahuriri Estuary*, pointed out that estuaries were the most productive of any ecosystems. It was important that man was conservative in his interference with the estuarine ecosystem. The extent of the contribution of the Ahuriri Estuary to fish production was unknown. When it was formed after the earthquake, the extensive wetlands associated with it had been destroyed by drainage or by being cut off from the main channel. A fairly complete system of control would be needed to maintain it in as natural a state as possible and prevent the water and mudflat body from becoming fouled and badly polluted. One authority or a board representing the various interests was needed (D6(a):1493-1503).

9.4.3 Development for recreation and other purposes

After studying Dr Hunnable's report, the council and the board decided on the development of a larger area of water for recreational and other purposes. Certain works for which approval from the Transport Department would be sought could be done without affecting the ecology. These works included excavation by the harbour board, for which an environmental report would be procured before the work was started. The board had been excavating on the south side of the estuary for fill to be used in the harbour and planned to reclaim the south side and build trawler or lighter piers.

The council and the board suggested that the control of the area and the work should be in the hands of an authority comprising themselves, the Department of Lands and

Survey, and the Department of Internal Affairs (D6(a):1506-1507). The Royal Forest and Bird Protection Society had already asked the Government to create an Ahuriri wetlands reserve, with a board to take responsibility for the whole area (D6(a):1491). Environmental interests were generally opposed to joint local authority and departmental management.

9.4.4 Environmental groups favour national protected area

A public meeting to discuss the future of the Ahuriri reserve was called by the Royal Forest and Bird Protection Society, Ecology Action, and Wai-Ora Action, a Maori conservation group associated with Ecology Action (a waiora area of water, Heitia Hiha explained, donates health and vitality). The meeting was held at the Hawke's Bay Community College and was chaired by the principal, Dr John Harre. About 200 people attended and among the guest speakers was Mr Tareha of Wai-Ora Action, who spoke on cultural aspects and early Maori history. A motion that the Ahuriri Estuary and Lagoon should become a national protected area in the form of a park or reserve was supported by 148 of those present (D6(a):1510-1512).

Early in 1976, the three groups met Professor G Knox of Canterbury University, a specialist in marine biology. He offered his services in establishing a link between his department and the community college to form the basis of a study and valuation of the estuary in total and to set out proposals for an integrated research programme (D6(a):1521-1526).

9.4.5 Steering and technical committees established

In response to public interest in the future of the estuary, in June 1973 the Napier City Council convened a meeting of representatives of involved local bodies and Government departments. Steering and technical committees were set up and charged with the investigation and assessment of existing and future land use and resources, and the impact of known and likely proposals (D6(a):1428).

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.5 The Knox report

9.5.1 Release and recommendations

In August 1979, the technical committee published the long awaited `Knox report': *Ahuriri Estuary: An Environmental Study*. On 23 October, this was released to the public. It favoured `preserving the whole area as much as possible as a wildlife refuge and tidal wetland area with strict control over any future developments' (D6(a):1533).

The study recommended that a management plan should be developed for the estuary (with appropriate changes in the Napier and Hawke's Bay County district schemes), future public access to the estuary's borders should be thoroughly examined, and no further permits should be issued to the harbour board to extract gravel from the area. Other recommendations included:

- (a) No further dredging, reclamation, and quarrying should be allowed.
- (b) Industrial pollutants should not be discharged.
- (c) Recreational development should be compatible with wildlife values.
- (d) Proposals to develop a deer park and nocturama for introduced mammals and native birds should be reconsidered.
- (e) The canoe reserve, a site wanted by the Ahuriri Maori committee for a marae, should be kept as an open public space.
- (f) Fish farming should not be permitted.
- (g) Management plans should be developed for the Westshore Lagoon and Estuary, and further studies into such matters as the feeding patterns of birds and the water quality and flow should be carried out (D6(a):1534).

9.5.1 Planning responsibilities handed over

Future planning responsibilities were handed over to the city council and the harbour board by the steering committee on 6 May 1980, and the committee was disbanded. Members of the technical committee were retained in an advisory capacity (D6(a):1535-1537).

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.6 Ecology Action and Wai-Ora Action: Complaints and Proposals

In April 1977, Wai-Ora Action complained that the city council had not pulled down a stopbank built eight years earlier. The stopbank had drained several areas of lagoon, leaving it 'smelling like an unflushed toilet', upsetting the marine life, and preventing the ebb and flow of the tide in the nearby canoe reserve. The boundaries of the canoe reserve should be clearly defined so that it could be developed by the Ahuriri Tribal Executive for the use of the people, possibly for a marae (A6(a):1470). The mayor explained that the council had adopted an attitude of status quo since it had set up committees to inquire into all aspects of the estuary (D6(a):1471-1473).

In light of the Knox report, Ecology Action and Wai-Ora Action formulated joint proposals regarding the future of the estuary and its environs. Some people, they admitted, had felt that they had been obstructionist, but `their very real concern for the area led them to present the proposals as a constructive approach to the best way of preserving the natural character of the area'. They proposed:

- (a) the preservation of the entire wetland area from Pandora Bridge to the Maraetara/Petane area as a reserve;
- (b) a joint city and county council district scheme;
- (c) a board to represent local bodies, wildlife services, conservationist societies, industry, and tourism;
- (d) the protection of the western marsh verges under the Poraiti Hills by QEII preservation covenants; and
- (e) the removal of deer to enable the re-establishment of trees and cover for more indigenous wildlife.

These proposals would simplify management, protect both wildlife habitats and more than 30 surveyed archaeological sites on the western verges, and permit the regeneration and replanting of the western verges and the expansion of bird areas into the present deer reserve. The reserve could be made part of a wider walkway concept. Access to and enjoyment of the area could be permitted under controlled conditions. A unique educational reserve within walking distance of the city could be established (D6(a):1540-1542).

Waitangi Tribunal, Department of Justice, Wellington.

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.7 Harbour board proposals and district scheme reviews

Other interested parties were more critical of the Knox report. The harbour board proposed to carry out further excavation and reclamation work in the Humber Street pond to satisfy the growing demand for improved sailing conditions, provide a bird roost, and extend a car parking and boat launching area (D6(a):1531). A water recreation lobbying committee was elected at a meeting of about 60 people in Napier to back the harbour board in any move to dredge more of the lower estuary (D6(a):1545).

The Napier district scheme review retained the estuary as a natural wilderness area with limited public access. Only drainage and excavation works were to be allowed. A total of 12 objections and submissions was heard by the planning committee.

The Ahuriri Tribal Committee objected to the limitations that were placed on the floor size and height of the planned traditional meeting house for the canoe reserve, and Charles Mohi said that the meeting house was vital to Napier to bring people together.

During the course of the hearing, the Hawke's Bay Harbour Board presented its own harbour management plan, which advocated further dredging (D6(a):1546-1547, 1553). Its district scheme review, on the other hand, recognised the need to preserve the natural characteristics of the Ahuriri Estuary as a whole (D6(a):1546-1553).

In 1981 the harbour board obtained approval both from the Ministry of Transport to remove a shingle bank and form a single body of water that could be used by small boats and from the Planning Tribunal to resume dredging in the estuary area (D6(a):1562-1563). No objections were raised to the Planning Tribunal's approval of a reclamation of 4600 square metres of land adjacent to Humber Street for a car park and beach for the estuary ponds (D6(a):1564). A few months before the harbour board ceased to exist, it planned to remove the spit in Pandora Pond, renewing another public controversy (D6(a):1566-1567).

Waitangi Tribunal, Department of Justice, Wellington.

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.8 Draft management plan mooted

Despite a steering committee recommendation that a management plan for the estuary should be prepared, little happened until 1984, when a meeting of representatives of the administering authorities set up a working party to prepare a draft (D6(a):1569-1572). Concern over lack of progress led to new initiatives in 1989, by which time the Department of Conservation had been established and local government reorganised (see paras 8.5, 8.6).

Waitangi Tribunal, Department of Justice, Wellington.

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.9 Monocultural legislation and processes

Weighing up the evidence on the ecosystem management that operated over the Ahuriri Estuary prior to the late 1980s, we found that it was essentially monocultural. As yet, the general thrust of the Treaty of Waitangi Act 1975 ('to provide for the observance and the confirmation of the principles of the Treaty') has had no real effect. No other legislation applying to the management of the estuary contained any specific provisions obliging administering authorities to acknowledge Treaty principles or Maori interests, except section 3(1)(g) of the Town and Country Planning Act 1977, which required Maori values with respect to 'ancestral land' to be taken into account. This could conceivably have applied to the island of Tapu Te Ranga, but did not.

Relevant departments and local authorities made few, if any, attempts to consult local Maori or actively involve them in planning and management processes. Indeed, they were deemed to have no greater interest in the estuary than the Pakeha environmental lobby, which was primarily concerned with wildlife. All planning and management went on without reference to the tangata whenua, yet in the end it was the tangata whenua, in alliance with the environmentalists, who defeated the marina project.

As the Tribunal found in its report on the Manukau claim, attitudinal and legislative changes were needed for Maori interests to be acknowledged and given 'the priority guaranteed in the Treaty'.2

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.10 The new legislative and administrative framework

9.10.1 Introduction

A new legislative framework for conservation and resource management was established by the Environment Act 1986, the Conservation Act 1987, the Conservation Law Reform Act 1990, and the Resource Management Act 1991.

9.10.2 The Environment Act 1986

Under the Environment Act 1986, the Parliamentary Commissioner for the Environment was obliged to take full and balanced account of the principles of the Treaty of Waitangi when monitoring the environment and advising public authorities on environmental management.

9.10.3 The Conservation Act 1987 and the Conservation Law Reform Act 1990

The Conservation Act 1987 defined conservation as the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations. Section 4 of the Act stated, 'This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.'

The principal Act established the Department of Conservation, and the Conservation Law Reform Act 1990 established the New Zealand Conservation Authority and advisory conservation boards to bridge the interface between the Minister and the Department on the one hand and the public on the other. The main purpose of the authority was to advise the Minister on statements of general policy under the Act and associated legislation. The Rangitikei-Hawke's Bay Conservation Board had jurisdiction over Hawke's Bay and, consequently, over the Ahuriri Estuary.

9.10.4 Conservation management strategies

Under section 17(2)(d) of the Conservation Act 1987, which was inserted by the Conservation Law Reform Act 1990, the Department of Conservation was required to prepare conservation management strategies for all the areas that it managed and all national and historic resources within its care.

The purpose of a conservation management strategy was 'to implement general policies and establish objectives for integrated management of natural and historic resources, including any species managed by the Department' under the Wildlife Act

1953, the Marine Reserves Act 1971, the Reserves Act 1977, the Wild Animal Control Act 1977, the Marine Mammals Protection Act 1978, the National Parks Act 1980, the New Zealand Walkways Act 1990, and the Conservation Act 1987.3

9.10.5 The Resource Management Act 1991

The Resource Management Act 1991, which came into force on 10 October 1991, `restated and reformed the law relating to the use of land, air, and water'.4 The purpose of the Act was `To promote the sustainable management of national and physical resources' (s 5(1)). In contrast to the Water and Soil Conservation Act 1967, special provisions for the protection of Maori values and interests were made.

The Act required `all persons exercising powers and functions under it, in relation to managing the use, development, and protection of natural and physical resources' to `take into account the principles of the Treaty of Waitangi' (s 5). The relationship of Maori, their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga' was recognised and provided for as a matter of `national importance' (s 6(e)). Other specified matters of national importance were the protection of major environmental features (coasts, lakes, mines, landscapes, indigenous vegetation, and habitats of indigenous fauna) and the enhancement of public access to such areas. All persons exercising powers and functions under the Act were to have particular regard to `kaitiakitanga' (s 7(a)), meaning `the exercise of guardianship' and, in relation to a resource, including `the ethic of stewardship based on the nature of the resource itself ' (s 2).

Issues in this claim concerning the claimants' tino rangatiratanga over their taonga, Te Whanganui-a-Orotu, clearly fall within the scope of the special provisions in the 1991 Act. So do issues concerning environmental damage to Te Whanganui-a-Orotu and lack of consultation and inadequate acknowledgement of Treaty principles in environmental management. Before examining these issues, we need briefly to review the evidence we were given on management plans and processes affecting the Te Whanganui-a-Orotu area under the new legislation.

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.11 Management plans covering the Te Whanganui-a-Orotu area

9.11.1 The Ahuriri Estuary management plan

In 1989 the Department of Conservation and the Napier City Council agreed to initiate the development of a management plan for the Ahuriri Estuary (see fig 17). A steering committee 'comprising representatives of central and local government agencies (officials), local Maori people, and environmental interest groups' collected available information and research findings and prepared an issues document for public consultation. Thirty-eight submissions were received. On 17 July 1990, a joint committee comprising three members of the Napier City Council, three members of the Hawke's Bay Regional Council, and two members of the Hastings District Council was formed to oversee a 'consultation and submission phase' and the preparation of a draft plan and to recommend its adoption by the constituent authorities.

In preparing the draft, the joint committee recognised that it might need to be amended to reflect the changes that the Resource Management Act 1991 and the *New Zealand Coastal Policy Statement*, due to be released for public comment by 1 October 1992, would bring.

A draft management plan, dated December 1991, was made available for public comment and submissions, and, 'after many months of careful deliberation and public consultation', a revised and expanded plan dated September 1992 was completed in a way that generally recognised the Resource Management Act. It was intended to provide strategic guidance to management agencies when carrying out their respective functions, powers, and duties under that Act (I9(e):17).

The plan was presented in a series of issues and policies relevant to the management of the estuary and its catchment (I9(e):3). The third of the series was headed 'Maori Traditional Features/Values/Uses'. Its objective was:

> To identify and provide as appropriate for the protection and enhancement of Maori traditional features, values, and resource use in the Ahuriri Estuary and its catchment. (I9(e):25)

Four issues affecting Ngati Kahungunu needed to be taken into account by management agencies: opportunities for Maori to access and use their traditional resources; the identification of and protection for traditional Maori resources and values; the mitigation and, where possible, elimination of water pollution; and the protection of ancestral lands, water, wahi tapu, and other taonga.

Management policies were to ensure that such traditional sites and kaimoana and other resources were identified and protected in full consultation with the tangata whenua. Management authorities were to take into account the principles of the Treaty of Waitangi. Iwi were to consider the preparation of their own management plan for the estuary, having regard to the objects of the *Ahuriri Estuary Management Plan*. The Napier City Council was to ensure that the use of the canoe landing reserve was to remain compatible with the natural values of the northern side of the estuary; development of the site would not be permitted (I9(e):26-27).

9.11.2 The conservation management strategy

The conservation management strategy was prepared by the Department of Conservation during 1992 and 1993, in consultation with the Rangitikei-Hawke's Bay Conservation Board, and referred to the New Zealand Conservation Authority in 1994. It defined management objectives for the Ahuriri conservation areas to include the protection of important natural and historical values and, subject to this, the facilitation of public access to and use of them. Continuation of opposition to uses and developments, it noted, would have a negative impact on these values. The importance of the area for the tangata whenua and consultation with and inclusion of them in management planning and interpretation should be recognised (H12: attachment 1).

9.11.3 Hawke's Bay Regional Policy Statement 1994

Te Whanganui-a-Orotu lay within the area administered by the Hawke's Bay Regional Council, the Napier City Council, and the Hastings District Council, all of which had authority delegated by the Crown (in the exercise of its Treaty rights of kawanatanga) to manage natural and physical resources under the Resource Management Act 1991.

The Hawke's Bay Regional Council had the responsibility for those matters of regional significance that were relevant to resources and the environment. This responsibility included the preparation of a regional policy statement to provide an overview to which plans and actions of the city and district councils and the Department of Conservation must conform.

The policy statement that was proposed in March 1994 included a chapter on 'The Maori Dimension', which defined and clearly acknowledged the regional council's statutory obligation to identify Maori values and interests and ensure that they were treated in accordance with the requirements set out in the 1991 Act. `Within the terms of the Treaty principle of Te Tino Rangatiratanga O Te Hapu/Iwi Maori, each hapu/Iwi in Hawke's Bay,' it said, 'has the right to determine what these values and interests are' (I9©:29). The challenge was to identify the resource management issues that concerned Maori, and, in consultation with them, work out ways in which they could best be resolved within the framework provided by the Act.

To obtain suggestions on ways in which matters of significance to hapu and iwi could be addressed within the framework of the Resource Management Act, the regional council sought support, cooperation and guidance from Te Runanganui O Ngati Kahungunu Incorporated, the Takitimu District Maori Council, the Kahungunu Maori Executive, the regional council's Maori committee, and others. Hui were held during

the early consultation period, and the chapter on 'The Maori Dimension' was prepared and included in the proposed policy statement. The chapter itself did not represent the completion of the process of consultation. Rather, it established a framework and starting point for the development of a new relationship under the 1991 Act, based upon cooperation and understanding (I9©:30). (Because the 'Maori Dimension' chapter contains valuable background material on matters relating to resource management pertinent to the present claim, we have included some extracts from it, with comment, in appendix V.)

9.11.4 The 1994 regional coastal plan

The water of the Ahuriri Estuary up to one kilometre above the Taipo Stream confluence is owned by the Crown and administered by the Hawke's Bay Regional Council under the Resource Management Act 1991, the *New Zealand Coastal Policy Statement*, and its own regional policy statement.

Under the Resource Management Act, the Hawke's Bay Regional Council produced a proposed regional coastal plan in September 1994, which focused on promoting the sustainable management of the natural and physical resources within the coastal marine area. The plan was prepared in full consultation with the community of Hawke's Bay. Included among the five major groups consulted were iwi authorities and hapu/iwi.

In the pursuit of the establishment of a practical framework for sustainable resource management that incorporated Maori ethics for coastal environmental protection, the regional council was required to take into account the relevant provisions of the Resource Management Act.

For the regional coastal plan to comply with the spirit of the Act, the partnership principle of the Treaty, which recognised 'rangatiratanga' and other principles, had to be taken into account, 'to allow proper participation by Ngati Kahungunu and its constituent Hapu in the management/decision making process'.5 (To indicate how it proposed to comply with the requirements of the Act and Treaty principles, a summary of the relevant parts of the plan is included in appendix V).

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.12 New consultative processes

9.12.1 Maori committees

In accordance with the duty to consult the tangata whenua under the new legislative framework, the local authorities that were jointly responsible for environmental management and planning in the Te Whanganui-a-Orotu area established Maori committees to advise their respective councils.

The first was the Maori standing committee of the Hawke's Bay Regional Council, mooted in 1988 and set up in August 1990. It was based on the existing iwi structure, which consisted of four taiwhenua (tribal areas) of Te Runanganui O Ngati Kahungunu, namely, Wairoa, Te Whanganui-a-Orotu, Heretaunga, and Tamatea. The committee consisted of 15 members, 12 Maori representatives, and three elected councillors. Iwi representation was equal for the four taiwhenua (I9(d):10-11).

We understand that the Hastings District Council also has a Maori advisory standing committee, which was established on 24 June 1991. It consists of 12 Maori members drawn from 24 marae in the area and chosen by representative committees. Minutes of the Maori advisory committee are presented at council meetings and its resolutions have the status of standing committee recommendations.

The idea of having a Maori advisory committee to the Napier City Council was mooted in 1991, and the committee met for the first time in February 1992. We understand that the committee consisted of six members (four Maori and two city councillors). The Maori members were nominated by four main groups, namely, the Ahuriri Tribal Executive, Maori wardens, the Maori Women's Welfare League, and taiwhenua of Te Whanganui-a-Orotu, and by any other Maori group operating in the city. Originally, taiwhenua of Te Whanganui-a-Orotu organised a hui, at which the four members were elected from about 12. The city council provided support for the Maori advisory committee, and council subcommittees provided agendas on subjects that they were debating. Maori advisory committee recommendations were made to council subcommittees. The Maori advisory committee members had no direct voice in the council.

9.12.2 The findings of the Parliamentary Commissioner for the Environment

In June 1992, the Parliamentary Commissioner for the Environment, Helen Hughes, summarised her case study findings on Hawke's Bay Regional Council initiatives on iwi consultation in her report *Proposed Guidelines for Local Authority Consultation with Tangata Whenua*. Her findings on these initiatives in respect of Te Whanganui-a-Orotu taiwhenua were:

1. Insufficient resources . . . resources need to be provided (by council).
2. Tangata Whenua need more information on legislation and planning processes.
3. Maori values and views of environmental management are not accepted as valid in the planning system.
4. Maori decision-making structures and values need to be combined with the Pakeha system.
5. Maori Standing Committee seen as only viable alternative given resources of Iwi and Council, but Maori have no voting rights and Iwi representatives cannot act as advocates when issues of concern to Maori are taken to full Council.
6. Council should not assume that the committee has the sole right to articulate Iwi and hapu opinion; the Council should still consult directly with those concerned.
7. The consultation process needs to be outcomes oriented and monitored for effectiveness. Central government should also ensure the system they have set in place is effective.6

9.12.3 Relationships with local authorities

According to Heitia Hiha, there has been `a great change in natural resource management' to fulfil the requirements of the Resource Management Act 1991 (D21:12). The regional council's standing committee was the first, and had been used by the Parliamentary Commissioner for the Environment as 'a kind of standard towards what Standing Committees should be like'. The Hastings district standing committee had 'even gone further' (D44(9):21). He and Marjorie Joe were on the Napier committee and were concerned that one of the councillors used the committee 'as his media launching pad'. The two city council members were councillors, not employees, who were required to work under the Act.

Te Whanganui-a-Orotu was within the City of Napier boundary, but all their marae were inside the Hastings district boundary. The Hastings committee was 'a very active group' and had put in 'some very good submissions'. It had appointed a Maori liaison officer, who worked right next to the planning department. Consequently, Maori people had quick contact with anything that was going on in that area (D44(9):21).

Since his work on the Maori advisory committee began, Heitia Hiha continued, it had not addressed many issues as far as Ahuriri was concerned. It should have been consulted about the production of the video *Ahuriri Looking Ahead*, in which Maori people were recognised only because of their historical association with the area, not, as they should have been, as owners of the lagoon, or pipi gatherers, or partakers of other benefits (D21:12). The video showed how they had been marginalised.

Such marginalisation, he added, still continued (D44(9):10). The Crown transferred its alleged interests to local body type organisations, which disregarded their Treaty rights and the principle of partnership. Local authorities refused to recognise them, except when it was historically or culturally appropriate, and that prejudicially disadvantaged them. Local authorities were managing the resource without consulting them. For example, they were denied access to Te Whanganui-a-Orotu by locked gates in the pump house area, which was a bountiful site for herrings, and by `No

parking' signs where they went fishing, though parking days were arranged for duckshooters (D44(9):2-3).

Marjorie Joe instanced the failure of the city council to consult them before beginning works that uncovered a midden of pure white pipi shells on Te Ihu o Te Rei. A hui told the council to stop and close up the midden (D26:3; cf H9).

9.12.4 The proposed motorway extension

One of the important issues that local Maori had addressed was Transit New Zealand's proposed motorway extension from Taradale to the Hawke's Bay Airport across the Ahuriri channel. By 1993, Transit New Zealand was planning an extension, not only to provide a better link from the south but also to relieve the noise and congestion in the Pandora Bridge area. It wanted to build a new bridge on the western side of the estuary because the Pandora Bridge could not cope with the traffic. Under the Resource Management Act 1991, it was obliged to consult with local iwi (D15).

According to Heitia Hiha, Transit New Zealand went to a meeting at Waiohiki Marae to discuss where the motorway should go, and gave them four proposals. The one they considered ran through the industrial area and endowment land presently being farmed and alongside the old Embankment Bridge and the road skirting the western side of the Westshore motor camp. Approval for this route was sought from the Napier City Council. If the people had their way, they would not have had a bridge going across that area because it was so important. Transit New Zealand had surveyed the shellfish beds, and Malcolm Hart of the Health Department had given them figures that showed that the beds were 160,000 times more polluted than shellfish beds that had been shut down up north. Yet they hoped that when the pollution was cleared, and that part of the estuary received its mauri back, they would be able to gather kaimoana. They wanted a bridge spanning the whole area so that the natural flow of water would continue, not a culvert type of bridge which would constrict the flow (D44(9):22-23).

In the first instance, they wanted to discuss the kind of construction and whether a bridge could be built across the Ahuriri channel without affecting any of the shellfish beds. They wanted to get a reasonable sized waka up the channel. The drainage of the area concerned them; the area would have to be properly drained so that there would be no run-off from the bridge or crossway into the estuary to further contaminate the shellfish. They wanted to partake in the planning and decision-making at all stages, but preferred that the construction did not go ahead (D44(9):4-6); see also E5:61-62).

9.12.5 Legislation to enable the council to sell or lease lands vested in it

A second important issue that the Maori advisory committee had addressed was the introduction of the Napier Borough Endowments Amendment Bill 1993 (D33) into Parliament, which would have empowered the Napier City Council to sell or lease certain lands that were vested in it pursuant to the Napier Borough Endowments Act 1876 for industrial and residential development. The Bill was deferred when it reached its second reading (D44(9):9). The land involved included Pukemokimoki (see para 6.2).

According to Heitia Hiha, the claimants attended a full council meeting to show their concern about this legislation, and `managed to persuade them to refrain from taking any further action . . . until such time as the claim was determined by the Waitangi Tribunal'. They were lucky that one of the councillors advised his colleagues that, just the night before, he had read a 1947 report (presumably E12), produced by the then town clerk, mentioning that Pukemokimoki had never been sold.

Underlying the claimants' concern over this issue was the feeling that they should have some input not only into the disposal of land vested in the Napier City Council, which had been reserved for them or reclaimed from Te Whanganui-a-Orotu, but also over the development of the whole area. The wool stores on the old Te Pakake Pa site, for example, were going to be changed into residences. The Port Railway Station nearby was changed into a kind of museum. It was all right for them to take part in the spiritual and environmental side of resource management, but when it came to the business development side, they were not part of it (D44(9):10). None the less, their rangatiratanga, mana, and kaitiakitanga over Te Whanganui-a-Orotu extended to these matters, as did the Treaty principles, particularly the principle of partnership (D44(9):30-32).

Neither the Napier City Council nor the Hawke's Bay Regional Council gave evidence on the lands vested in them by virtue of the Local Government (Hawke's Bay Region) Reorganisation Order 1989 under the Local Government Act 1974. Through their solicitors they notified the Tribunal of their interest and formal participation in the hearing of the claim and of their intention not to appear or take an active part in the proceedings unless requested. Due representation by the Crown was deemed sufficient. The Napier City Council further advised through its solicitors that it had no intention of affecting any Tribunal hearing by conducting land sales (2.85).

9.12.6 The claimants' view of the consultative system and process

Claimant evidence on the relationship of the Maori advisory committee and the Hawke's Bay Regional Council suggested to Mr Young that Maori were not being given the standing or the finance or an effective voice in the council's management of resources. He cited the opinion of Mana Cracknell that:

> The Maori Standing Committee as a consultative system and process operates on the premise that the Pakeha members of the Committee, when advocating for Maori within the structure of regional government, will perform their dual role with objectivity.

He noted that a similar opinion was espoused by Shaun Kerrins, a research student in anthropology, who detailed `examples of cultural blindness and dominance by regional councillors based on interviews, media statements, [and] by discussion during the local body election campaign' (E5:67).

Heitia Hiha thought that the unfortunate thing about the Maori advisory committee in Napier was that council officers were required to take account of Treaty principles when working under the Resource Management Act 1991 but councillors, who were elected by the people, said, `Well who are these, this Advisory committee to tell us what to do?' (D44(9):21).

Summing up, it could be said that the claimants viewed the new consultative system and processes under the Resource Management Act with scepticism and a lack of confidence. Their two prime concerns were the failure of the consultative process to carry the Maori view through to action, and the narrow range of topics that the councils considered appropriate for tangata whenua input.

9.12.7 Relationships with the Department of Conservation

Evidence on working relationships between the Department of Conservation and the tangata whenua was given by several witnesses and through supporting papers (D40(6)). 'We seem to be in partnership with the Department of Conservation, that's the area we seem to fulfil,' said Heitia Hiha. It was not just the estuary and that side of it that concerned them, but the development of the whole area (D44(9):22).

Another witness for the claimants, Kurupo III Te Pakitu Tareha, described the project to restore Otatara Pa for local hapu. The project was being sponsored by the conservation corps of the Ministry of Youth Affairs and administered by the Department of Conservation in cooperation with Waiohiki Marae (see para 1.7.3). 'In a nutshell,' he said, 'we were alarmed at the degradation of the environment within our traditional boundaries, so we decided to do something about it' (E17:1; D40(b):45-48, 58). He and his corps members had worked on a beautification programme of the lower estuary that was initiated by Toro Waaka, cleaning up rubbish, planting native trees, and completing a walkway round it; they had also worked in the Te Pakake area. `Through projects of this type and through this claim,' he concluded, `we are trying to restore the land, the waters and the mauri of these places to what they once were' (E17:3).

Mr Ombler gave evidence that, in preparing the non-statutory Ahuriri Estuary management plan, the Department of Conservation and the three local authorities had `involved other groups from the community in a steering committee'. In his view, both the Conservation Authority and conservation boards, which approved conservation management plans and strategies, were `citizen bodies appointed by the Minister of Conservation'. He noted that both had tangata whenua nominees (H12:6-7) (see para 9.11.1).

On the other hand, Nigel Hadfield, who was involved in the planning of the Ahuriri management plan, said:

> There were about 10 pakehas, academic sort of people. . . . It was quite intimidating because these people were representing their big organizations and they were challenging each other half of the time . . . to come in with a Maori view was not easy. Basically they were looking for a rubber stamp . . . that's how I saw it. (D40:4)

Pamela Bain, a conservancy archaeologist, gave evidence of the partnership between the Department of Conservation and hapu of Te Whanganui-a-Orotu in the Otatara project and of the association of Te Runanga O Ngati Kahungunu with Mark Allen, a University of California archaeologist, in the locating, mapping, and gathering of historical material on pa sites and the training of young people on research (see para

2.2.6). Excavation, she said, could be conducted only with the permission of the tangata whenua and the Historic Places Trust (H9).

It seems to us that shared concerns of the Department of Conservation and the claimants have provided solid ground for practical cooperation. Concerns listed by the department in 1990 were: the proposed motorway development through the ecologically important southern marsh area; the dredging both of channels and of the area between the Pandora and Embankment Bridges; the possible future expansion of the airport; future industrial development; land use practices within the catchment area; water quality and discharges into the estuary; the protection of archaeological and historical sites; and restoration work.7

9.12.8 Closing submissions on consultation issues

In closing, Ms Wickliffe addressed the issues concerning environmental management and planning prior to, and after, the Resource Management Act 1991 was passed. The legislation, she said, once used to allocate management rights to natural resources, was:

> a breach of the letter and spirit of the Treaty of Waitangi. [It] conferred on central government exclusive control to manage and or delegate the management of Te Whanganui-a-Orotu without regard to the Crown's duty to actively protect Maori interests and without regard to the wishes of the Claimants.

It was also a direct breach of the letter and spirit of the Treaty in that it failed to recognise or give effect to the claimants' rights to rangatiratanga and full authority over Te Whanganui-a-Orotu (I9(a):2).

The Ahuriri Estuary management plan, she said, made provision for tangata whenua matters but made no attempt to address seriously any transfer of management responsibility to the claimants, notwithstanding section 33 of the Resource Management Act allowing them to do so. The relevant authorities had deemed it their prerogative to effect a policy whereby no development on the canoe reserve of the claimants was to be permitted. Evidence given to the Tribunal illustrated that tangata whenua needs in relation to Te Whanganui-a-Orotu were being broadly balanced against other interests in the lagoon. This had occurred because of the inadequacy of the statutory regime, for which the Crown was responsible (I9(a):5).

The duty of the Crown to actively protect:

> requires that where they delegate the responsibility of managing natural resources to other agencies then the Crown must ensure that there is adequate protection for tangata whenua interests provided for in the relevant legislation.

Legislation of this type should ensure the protection of Maori rangatiratanga over, and protection for, taonga. Failure to provide statutory definition is therefore an omission of the Crown in terms of section 6(1) of the Treaty of Waitangi Act 1975 (I9(a):5).

Since the passing of the Resource Management Act, Ms Wickliffe continued, there was no clear evidence that the policy of the Crown had been to ensure that those acting pursuant to the Act did give these matters the weight required by Treaty provisions (I9(a):5).

She quoted section 20 of the New Zealand Bill of Rights Act 1990, which provided that:

> A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture . . . of that minority.

Clearly, the Bill of Rights Act established `in the form of statute a clear recognition of minority rights which protect, inter alia, their tino rangatiratanga and taonga' (I9(b):6).

She submitted that:

> the continued failure to adequately provide for recognition of Maori rangatiratanga over taonga through the general inadequacy of section 8 of the Resource Management Act and the continued failure to address the measures necessary to ensure the protection of taonga so that Maori may enjoy their culture is in breach of the Bill of Rights Act and New Zealand's obligations at international law under the International Covenant on Civil and Political Rights. (I9(a):6)

She commented that Te Whanganui-a-Orotu was `in a particularly vulnerable state', which was directly attributable to past breaches by the Crown of its obligation to Maori, such breaches being at least in part due to legislative action. She then quoted from a Privy Council decision on this point:

> While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. Again, if as in the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations and may extend to the situation where those breaches are due to legislated action. (I9(a):7-8)8

Section 8 of the Resource Management Act 1991 needed amending in order to give effect to the principles of the Treaty (I9(a):7):

> The Act must be broadened to permit the development of a regime that will involve the tangata whenua in a real and significant way in the management of this resource [Te Whanganui-a-Orotu]. (I9(a):8)

There were successful examples of joint management regimes in other jurisdictions with comparable indigenous populations. Basically, these regimes envisaged joint

management, with significant indigenous representation on the relevant management boards. It would be an indictment on the Crown if a similar standard of participation in management could not be met in New Zealand (I9(a):8).

On the issue of title to the estuary, now under the management of the Department of Conservation, she submitted that the current policy of the Government permitted the vesting of title in resources of significant size. A recommendation from the Tribunal in this respect would be entirely consistent with that policy (I9(a):8).

Waitangi Tribunal, Department of Justice, Wellington.

Te Whanganui-a-Orotu Report 1995

9 The Ahuriri Estuary: Environmental and Management Issues

9.13 Does the new structure for environmental management adequately protect the Tangata Whenua's treaty rights?

9.13.1 The principle of consultation

Clearly, the requirements of the Resource Management Act 1991 and the Conservation Act 1987, as regards Maori issues, cannot be met without consultation with the tangata whenua. In reflecting upon the appropriateness of the consultations that have taken place with the claimants in respect of the Te Whanganui-a-Orotu area, we have been mindful of the duty of the Crown to consult its Treaty partners in accordance with the principle of consultation formulated in various Tribunal reports and in the courts, notably by Justice Richardson in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at page 683:

> In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision which is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith.

As the Tribunal observed in the *Ngai Tahu Report 1991*:

> in some areas more than others consultation by the Crown will be highly desirable . . . In the contemporary context, resource, and other forms of planning, insofar as they may impinge on Maori interests will often give rise to the need for consultation.9

In the *Te Ika Whenua Energy Assets Report 1993*, the Tribunal expressed the view that:

> . . . the test as to what consultation is necessary depends upon the effect of the legislation.
>
> . . . The lack of consultation with the claimants means that we cannot say that the Crown has put itself in a position to make an informed decision, that is a decision which is sufficiently informed as to the

relevant facts and law to be able to say that it has had proper regard of the impact of the principles of the Treaty.10

9.13.2 Local authority consultation: Te Whanganui-a-Orotu

Claimant evidence on the new committee structure and process operating in the Hawke's Bay region and in Napier city in the 1990s clearly indicated to us that the Treaty rights of the claimants were not being adequately protected in the Ahuriri Estuary Te Whanganui-a-Orotu area. While the 1992 Ahuriri Estuary management plan and the 1994 Hawke's Bay regional policy and coastal policy statements represent a significant change in attitude to tangata whenua values, interests, and inputs, we have yet to see how far these words will be matched by action.

Certainly, the consultation process adopted by the Hawke's Bay Regional Council in the preparation of its proposed policy statements and the establishment of Maori advisory standing committees by the local authorities were encouraging developments. In both instances, the tangata whenua demonstrated a continued willingness to work through the existing system to achieve Treaty objectives. On the other hand, there was disquieting evidence that the Maori advisory committee structure and process were not achieving the objectives set out in these proposed policy statements.

In practice, the local authorities did not appear to be adequately fulfilling their statutory obligation to protect the Treaty rights of the tangata whenua in environmental management and planning issues. The present system for local authority consultation with tangata whenua did not seem to measure up to the Treaty principle or to the proposed guidelines published in June 1992 by the Parliamentary Commissioner for the Environment (I9(d)). Yet the Resource Management Act 1991 was 'a strong signal to decision-makers that tangata whenua have a special status and are not considered just another interest group' (I9(d):4).

As the parliamentary commissioner has indicated, the structure and the process must evolve, and require continuous monitoring to maintain and increase their effectiveness. Utmost good faith must be the guiding rule for the consultative process, from the setting up of a committee to the seeking and, hopefully, achieving of a final consensus. Clearly this has not been demonstrated during consultation with the tangata whenua regarding their taonga Te Whanganui-a-Orotu.

9.13.3 Department of Conservation consultation: Ahuriri Estuary

Despite the opposition of environmental interests generally to joint local authority and departmental management (see para 9.4.3), it was largely continued by the Napier City Council and the Department of Conservation in the development of a management plan for the Ahuriri Estuary. Although local Maori and environmental groups were represented on the steering committee that was set up in the early stages, this fell well short of an appropriate mechanism for tangata whenua input. The ratio of local Maori to others on the committee certainly did not demonstrate partnership. The tangata whenua were not given any special consideration, but were merely considered as another environmental group. The process did not take place in a forum conducive to tangata whenua participation where they felt at ease, for example, at a hui held on a

marae. The joint committee subsequently set up to oversee the preparation of the management plan represented the three local authorities concerned, in recognition of the need for 'political input'. No provision was made for tangata whenua input, even though the Ahuriri Estuary was, and is, their taonga.

9.13.4 Lack of tangata whenua representation on the Conservation Authority and conservation boards

The present system of ministerial appointment of members of the Conservation Authority and conservation boards, which approve management plans, does not conform to the spirit of partnership.11 The likely result is a ratio of two tangata whenua out of 12 members on the authority and three out of up to 12, or possibly 15, members on the board. We consider this inappropriate on any basis. The structure of these vitally important bodies clearly contravenes the Treaty principle of partnership. The Conservation Law Reform Act 1990 needs to be amended to give effect to Treaty principles as provided for in section 4 of the Conservation Act 1987.

9.13.5 Inadequate recognition of Treaty principles in resource management

In our view, claimant evidence of what has been and is occurring in the claim area in respect of environmental management and planning processes clearly indicates that the structure established under the Resource Management Act 1991 itself is inappropriate.

The Maori committees set up by the local authorities are advisory only. Some powers relative to tino rangatiratanga over taonga should be delegated to them. If consensus cannot be reached between the committee and the council, limited council powers of veto may be appropriate as a last resort. The Maori membership of the Napier Maori advisory committee does not seem to represent the tangata whenua adequately, even though a large part of their taonga, Te Whanganui-a-Orotu, is now within the city boundaries.

The range of issues delegated to the Maori committee must not be restricted to cultural considerations alone. Maori interests clearly include hapu/iwi sustainable resource development.

We endorse the findings in the *Ngawha Geothermal Resource Report 1993*12 that (para 8.4.6):

> the Crown has not, in delegating extensive powers to local and regional authorities under the Act, ensured that its Treaty duty of protection of Maori interests will be implemented. On the contrary, it appears that in promoting this legislation, the Crown has been at pains to ensure the decision-makers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed.

Paragraph 8.4.7:

> We repeat here our finding that the Resource Management Act is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.

As in the Ngawha claim,[13] we have found in the present claim that the claimants have been or are likely to be prejudicially affected by the foregoing omission and, in particular, by the absence of any provision in the Act giving priority to the protection of their taonga (Te Whanganui-a-Orotu) and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish.

In the present climate, we think that the resource management and conservation management structures are themselves impediments to Treaty principles and utmost good faith. The way in which they operate in the claim area reflects what Sir Kenneth Keith, president of the New Zealand Law Commission, described to the New Zealand Institute of Advanced Legal Studies Conference in February 1995 as 'a top down view of law and administration', rather than 'a bottom up view'.[14] He went on to suggest that:

> We should draw on the extensive experience of individuals, families, tribes, and many of other groups organising themselves within a State or indeed across several States.[15]

The Tribunal commends this suggestion to the local authorities and the Department of Conservation, which are managing the resources of Te Whanganui-a-Orotu and conserving the Ahuriri Estuary essentially from 'a top down view'. They should seek to act as a catalyst for 'a bottom up view'.

Waitangi Tribunal, Department of Justice, Wellington.