

## CHAPTER 10

# ENVIRONMENTAL LAW AND THE TREATY TODAY

### 10.1 ENVIRONMENTAL LAW AND THE TREATY

Between 1986 and 1991, Parliament reviewed all legislation for the protection and use of New Zealand's natural resources. A new legislative framework was established for the management of natural resources, and changes were made to the way that management decisions are made and carried out. The legislative package is principally represented in the Environment Act 1986, the Conservation Act 1987, and the Resource Management Act 1991.<sup>1</sup> Our attention has mainly been directed to the last Act.

Legislative review,  
1986–91

Mr Taiaroa outlined the considerable but unsuccessful efforts of the Whanganui River Maori Trust Board to effect changes to the legislation during the period of its review and to the complex proposals for the Resource Management Act in particular.<sup>2</sup> The proposals, in his view, were to avoid giving the Treaty effect. It was also necessary to respond to public announcements that the Act did not deal with ownership. That was not in fact correct, he contended, and the effect of the proposals was to circumvent the vital component of rangatiratanga in the Treaty, which requires that the taonga possessed by Maori are not only protected to them but managed by them.

Claimants'  
contentions

The Environment Act 1986 promotes a balancing of five matters in the management of natural and physical resources: the intrinsic values of ecosystems; the values that are placed by individuals and groups on the quality of the environment; the principles of the Treaty of Waitangi; the sustainability of natural and physical resources; and the needs of future generations.<sup>3</sup> There is no requirement that management conform to Treaty principles; rather, Treaty principles are to be balanced alongside other considerations.

Environment Act  
1986 and the Treaty

The Act established the Ministry for the Environment to advise the Government and public authorities on environmental matters and policy (ss 31(a), 32) having regard to the five matters mentioned.

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1. See also the Conservation Law Reform Act 1990.
  2. The Whanganui River Maori Trust Board made submissions to those reviewing the environmental legislation (see doc B8(b), pp 134–145) and later to the select committee considering the Resource Management Bill (doc B8(b), pp 146–150).
  3. See the long title to the Act.

**Conservation Acts  
and the Treaty**

In contrast, the Conservation Act 1987 requires that Act to be administered to give effect to the principles of the Treaty (s 4). A failure to do so could be litigated in the courts.

This Act established the Department of Conservation to manage the Crown's conservation responsibilities. Conservation is defined 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.

The Conservation Law Reform Act 1990 established the New Zealand Conservation Authority and regional conservation boards to bridge the interface between the Department of Conservation and the public (s 6(a)). The main purpose of the authority was to advise the Minister of Conservation on statements of general policy under the 1987 Act and associated legislation. Also, the Conservation Authority took over the responsibilities of the old National Parks and Reserves Authority (s 112(1)). Of its 12 members, two are appointed after consultation with the Minister of Maori Affairs (s 6D Conservation Act 1987).

The Act requires conservation management strategies from the Department of Conservation for all national and historic resources under the Act (s 17(d) Conservation Act 1987) and any 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.<sup>4</sup>

Conservation boards may be appointed to advise the Conservation Authority and to approve conservation management plans and amendments (ss 6L, 6M). The conservation board for the Whanganui National Park is to have no more than 11 members and is to include one member recommended by the Whanganui River Maori Trust Board (s 6(p)(7)). Other members are appointed by the Minister.

**Resource  
Management Act  
1991**

The Resource Management Act 1991 unified and reformed dispersed legislation on land, air, and water use and brought together the responsibilities of all central Government agencies other than those for mineral extraction. Planning responsibility was delegated to regional and district councils established under the Local Government Act (No 2) 1989.

**Purpose of Resource  
Management Act**

The Resource Management Act is to promote 'sustainable management' of natural and physical resources (s 5(1)), and that is defined in section 5(2) to mean their use, development, and protection in a way, or at a rate, that enables people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety while:

- (a) sustaining the potential of physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems;
- and

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4. Section 65(8) of the Conservation Act 1987 transferred to the Minister of Conservation the power to make bylaws under the National Parks Act 1980.

- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

All persons exercising functions under the Act must recognise five principles of 'national importance' (s 6). The first four refer to the protection of coastal marine areas, wetlands, lakes and rivers, outstanding natural features, and indigenous vegetation and fauna. The fifth is 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga'.

**Resource  
management  
principles**

Also, they 'shall have regard to' eight matters (s 7). The first, kaitiakitanga, is 'the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship' (s 2).<sup>5</sup> The seven other matters include the efficient use and development of resources, protecting the heritage value of sites and buildings, and enhancing amenity values and the environment. There is also specific provision for protecting the habitat of trout and salmon (but no specific reference is made to indigenous fish).

In achieving the purpose of the Act with regard to the above principles, those with responsibilities shall 'take into account' the principles of the Treaty of Waitangi (s 8).

**Resource  
Management Act  
1991 Treaty  
provision**

The Act apportions authority to the Minister for the Environment to determine national standards for sustainable management, and to regional councils to apply those standards at the local level in regional management plans. Regional councils have responsibilities previously administered by numerous single purpose authorities acting under different statutes. They must maintain and review resource management plans, which in turn must be approved by the Minister. The beds of rivers and lakes and the coastal margins of the sea come under their jurisdiction. The Minister, in certain circumstances and in the national interest, may issue national policy statements and resource consents, with which regional councils must comply.

**National and local  
division of  
responsibilities**

Regional and district councils are also governed by the Local Government Act 1974. Section 37K, which came into force in 1989, lists nine purposes of local government of which the seventh is 'recognition of communities of interest'.

**Local Government  
Act 1974**

Counsel for the Whanganui District Council agreed that the Local Government Act makes no specific reference to Maori communities or the Treaty. He noted that provisions for Maori advisory committees were proposed during the 1988 reviews but not enacted. Then, the proposed devolution of Government functions to iwi councils under the Runanga Iwi Act 1990 did not proceed when a new government repealed that Act in 1991.

In any event, the legislation constituting local government does not provide for any particular relationship between local government and traditional tribal government, and in counsel's words 'the voice of the Treaty of Waitangi is ... silent'.<sup>6</sup>

5. Part 1 of the Resource Management Amendment Act 1997

6. Document D8, pp 4-5

**Ownership and the  
Resource  
Management Act**

From literature accompanying the proposed environmental legislation during the review stages, Atihaunui had cause to consider that the ownership of resources was not within the purview of the proposed Resource Management Act. According to Mr Taiaroa, the talk of the day was that the right of management and the duty of stewardship were more important than ownership.

The other side of the coin, however, is that environmental laws are not a denial of private ownership, no matter how much they may constrain property use. They cannot deny to Maori the rights of property ownership that English law has extended to all British subjects since the beginnings of the creation of a royal justice system in the twelfth century.<sup>7</sup>

Kaitiakitanga rights do not amount to ownership for example. If Atihaunui are entitled to ownership of the river, the concept of kaitiakitanga is not enough. That concept and other principles of environmental law cannot be used to deny them their just entitlements.

The legislation, in fact, dealt with ownership issues that were crucial to Atihaunui interests. Thus, while the Crown's ownership of the bed of the Whanganui River is by virtue of the Coal-mines Act Amendment Act 1903, ownership was confirmed when the coalmines legislation was repealed. Section 354(1) of the Resource Management Act 1991 provides that, notwithstanding the repeal of section 21 of the Coal Mines Act 1979, the beds of all navigable rivers remain vested in the Crown. If ownership is not important and kaitiakitanga is all that matters, why was the Crown's ownership preserved?

The same was done in section 354 of the Resource Management Act for the Crown's ownership of the sole right to take and use geothermal energy (vested in the Crown by section 3 of the Geothermal Energy Act 1953) and its sole right to divert, take, or use natural water (vested in the Crown by section 21 of the Water and Soil Conservation Act 1957).

Under the Act, ownership rights could also be created. For example, an esplanade reserve arising from subdivision along the bank of any river or the margin of any lake is to vest in the territorial authority (s 230(1)), and in certain circumstances foreshores and the beds of rivers and lakes are to vest in the Crown (s 235).

Thus, during the review of legislation, the trust submitted that Maori Treaty rights were being further prejudiced by the proposals. It submitted that, instead, all persons exercising powers under the Act should have a duty to ensure that Maori have decisive power of management over their taonga and that all decisions and actions are consistent with the Treaty.

## 10.2 WATER CONSERVATION ORDERS

**Why the claimants  
objected**

Ownership must be settled, in the claimants' views, before anything else is done. That is the substance of their complaint about a current application for a water

7. P Spiller, J Finn, and R Boast, *A New Zealand Legal History*, Wellington, Brooker's Ltd, 1995, pp 4–6

conservation order. Each new assertion of statutory authority impinges upon Atihaunui traditional rights and inculcates in the public mind that the river is publicly owned. Each formulation of a legal right or sanction, especially after public hearings have been held, entrenches that assumption and prejudices recovery by the river's proper owners.

Concern for their river compels their attendance at hearings or consultations, but each appearance reinforces their role as supplicants, not decision-makers, as one of several groups with interests often competing, and involves costs and a loss of status.

That is why they opposed the application for a water conservation order at this time – not because the objectives are necessarily wrong but because it conflicts with and diminishes their own recognition. These concerns apply equally to the process for settling regional and other management plans.

The Royal Forest and Bird Protection Society applied to the Minister for the Environment for a water conservation order pursuant to section 201 of the Resource Management Act 1991.<sup>8</sup> Section 199 describes the purpose of an order and what it may provide:

**Purpose of the application**

(1) Notwithstanding anything to the contrary in Part 11, the purpose of a water conservation order is to recognise and sustain—

(a) Outstanding amenity or intrinsic values which are afforded by waters in their natural state:

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(2) A water conservation order may provide for any of the following:

(a) The preservation as far as possible in its natural state of any water body that is considered to be outstanding:

(b) The protection of characteristics which any water body has or contributes to, and which are considered to be outstanding,—

(i) As a habitat for terrestrial or aquatic organisms:

(ii) As a fishery:

(iii) For its wild, scenic, or other natural characteristics:

(iv) For scientific and ecological values:

(v) For recreational, historical, spiritual, or cultural purposes:

(c) The protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori.

However, a water conservation order may impose restrictions or prohibitions on a regional council's powers to regulate water levels and flows.<sup>9</sup>

**Practical consequences**

8. Document D3, p 19. Statutory provision for water conservation orders was introduced by the Water and Soil Conservation Amendment Act 1981. Those provisions were replaced by part 1X of the Resource Management Act 1991.

9. A water conservation order is made under section 214 for any of the purposes set out in section 199. For specific powers, see section 30(1)(e), (f) and section 200.

<b>Treaty limitations</b>	The empowering opening – ‘notwithstanding anything to the contrary in Part 11’ – suggests an independent code so that water conservation orders may set aside requirements to take account of Treaty principles when applying statutory principles for environmental management.
<b>Process</b>	<p>Any person may apply for a water conservation order (s 201). This was not always so. Under the prior Water and Soil Conservation Act 1967, only Ministers of the Crown and certain public bodies could apply.</p> <p>The Minister may reject applications or send them forward for hearing by a specially appointed tribunal. He is to consult with the Ministers of Maori Affairs and Conservation before the tribunal members are appointed (s 202).</p> <p>The special tribunal must have regard to the requirements of section 199; the needs of primary and secondary interests and of the community, national, and regional policy statements; the New Zealand coastal policy statement; and regional or district plans or proposed plans.</p> <p>After the tribunal has reported to the Minister, any aggrieved party may refer the matter to the Environmental Court, which is then to hold a public inquiry. If, after this process, a water conservation order is recommended, the Minister may still reject it but is obliged to lay reasons before Parliament (ss 213–215).</p> <p>No water conservation order may affect or restrict any resource consent granted before the order is made (s 217). In this case, this means that the 1990 minimum flow order would remain in force until its expiry in 2001; that is, the diversion of water for the power scheme could continue, at least until that year.</p>
<b>Conclusion</b>	Upon our reading of the law, there is no assurance that the order sought will or could recognise the full interests of Atihaunui in the river. We also accept the claimants’ position that the process, no matter how good the objective, is diminishing of their status. They may need to weigh this, however, with whether other gains may be made.
<b>Grant of urgency</b>	<p>As mentioned at section 1.4.5, it was the application for a water conservation order for the Whanganui River that triggered Atihaunui to bring this claim and seek an urgent hearing. In granting urgency, the Tribunal found that the claimants were prejudiced in being put to a form of proceedings, the propriety of which was a central issue in contention.<sup>10</sup> Accordingly, the Tribunal recommended that the Minister for the Environment take no steps to appoint a special tribunal to hear and report on the application for a water conservation order until the Waitangi Tribunal had reported.</p> <p>Crown counsel subsequently advised us that the Minister for the Environment had consented to a stay on any further action pending the Tribunal’s report.<sup>11</sup> The Royal Forest and Bird Protection Society has not objected to this stay.</p>

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10. Paper 2.10, pp 7–8 (see app IV)

11. Paper 2.18(6)

### 10.3 TONGARIRO POWER DEVELOPMENT CONSENTS PROJECT

The same concerns of status have affected Atihaunui in negotiations to settle the diversion of water for the future in what is called the Tongariro power development consents project.

Question of status

The 1990 minimum flows order was continued in force after the Resource Management Act 1991 replaced the Water and Soil Conservation Act 1967, but section 386(3) of the Resource Management Act placed a 10-year time-frame on all existing authorisations. We were told that this means that ECNZ must obtain a new resource consent for water abstractions to continue by 1 October 2001 at the latest.<sup>12</sup> The Tongariro power development consents project is an attempt to find an agreement on the matter.

Reason for project

W R Howie, the fuel resources strategy manager for ECNZ, confirmed that the corporation had embarked on a process for the renewal of all resource consents for the entire Tongariro power development, including those in the Whanganui catchment area. Corporation policy is to pursue a consultative process. Costs and investigations are funded by ECNZ and information is shared by all parties. The intention is to seek agreement on the terms and conditions for the new resource consents, and holds the prospect of an agreed application.<sup>13</sup>

ECNZ position

K R Chapple for the Royal Forest and Bird Protection Society described the society's position.<sup>14</sup> It should first be recalled, as was mentioned at section 3.3, that the society has a record of involvement. In 1986, it successfully campaigned to stop various power boards damming a tributary, the Whanganui a te Ao. In 1987, it formed the Whanganui River Flows Coalition, and in 1988, it coordinated and presented over 1200 submissions to the river flows hearing. For reasons to do with costs, it adopted a background role, vigorous none the less, during the Planning Tribunal (Environment Court) hearings, and the society contributed to expenses.

Forest and Bird position

In 1990, the society began an energy campaign to publicly promote its view that the degradation of the Whanganui and other rivers was directly related to the wasteful uses of electricity. In 1993, it lodged its application for a water conservation order. Mr Chapple described the water diversion to us as 'one of the more notable acts of environmental vandalism in New Zealand'.<sup>15</sup>

Mr Chapple traced his involvement in the consents project to a public meeting at Turangi in 1991 held both to discuss a public consultation process for ECNZ resource consents and to form a steering group to plan ongoing consultations and address relevant issues. He described further meetings, the election of a management group, the establishment of working parties for conservation, fisheries, recreation, and operations, and the areas of recommended study.

Consultation with Maori was seen as important, and minutes and information were sent to Tuwharetoa, Ngati Apa, Ngati Raukawa, and the Whanganui River

12. Document D7, p 10

13. Document D5, paras 4.2–4.4

14. Document D3, pp 11–16

15. Ibid, p 14

Maori Trust Board. At the time of his evidence in 1994, these groups, Mr Chapple said, had not formally entered the consultation process.

Regional Council  
position

The Manawatu–Wanganui Regional Council, through Dr Brent Cowie, supported consultation, believing it a prerequisite for Resource Management Act applications. Dr Cowie thought that the four named iwi were represented at the meeting when the management group was appointed but considered that, despite every encouragement, Atihaunui had not joined the process.<sup>16</sup>

However, the Whanganui River Maori Trust Board did attend a meeting that his council had convened at Taumarunui in January 1993. At this meeting, the board continued its argument for the reinstatement of the natural flow. ECNZ would not comply with this request, and in Dr Cowie's view could not be compelled to do so.

Atihaunui position

Mr Taiaroa gave a different picture. He spoke of a pragmatic concern for the Whanganui intake and a conceptual concern for status. He referred to the compromise required of buying into a process that does not address fundamental property rights and ownership.<sup>17</sup>

After the High Court decision of June 1992, he said, ECNZ and others proposed the consultation project for an agreement on the way the new minimum flows would be implemented. Under discussion at subsequent meetings were the sequence and times when the various intakes would be closed to achieve the minimum flows directed.

Mr Taiaroa considered that, of the five tributaries affected – Okupata, Taurewa, Tawhitikari, Mangatepopo, and Whanganui – the Whanganui intake contributed a very small proportion of the waters being removed. Present at a meeting at the offices of the Ruapehu District Council on 14 January 1993 were representatives of the regional council, ECNZ, the Department of Conservation, the Whanganui River Maori Trust Board, the tangata whenua, the Royal Forest and Bird Protection Society, and the Plateau Guides. Mr Taiaroa sought the permanent closure of the Whanganui intake. Though that alone would not meet Atihaunui concerns, a reply was expected on that first.

His proposal, he said, was consistent with what the catchment board and its special tribunal had considered in 1988 as necessary in view of Atihaunui concerns. He claimed support for this stance from the Department of Conservation and, later, from the regional council.

On 21 January 1993, ECNZ wrote to the regional council regretting that closure of the Whanganui intake was not an option and saying that closing it would create major operational difficulties, especially since 'Any freshes occurring in the Whanganui headwaters would be lost to ECNZ for electricity generation purposes'.<sup>18</sup> These were the freshes that the river needed, in Mr Taiaroa's opinion. They provided the variations in the river that would give 'some semblance for Maori of its old character'.<sup>19</sup> However, he considered that:

16. Document D7, p 10

17. Document B8, pp 53–56; doc B8(c), p 327

18. ECNZ to Manawatu–Wanganui Regional Council, 21 January 1993 (doc B8(c), pp 332–334)

19. Document B8, para 203



No attempt was made to discuss or overcome these problems with us – the ECNZ decision closed the matter off, and no further support was forthcoming from other members of the group for the Whanganui iwi position.<sup>20</sup>

He became unwilling to participate further in the project.

Mr Taiaroa then referred to the conceptual inhibition that was equally important in his view:

The TPD Consultative Committee continues to send us reports of their meetings and have invited us to participate, but there is the need first to get the correct levels of authority in terms of the Whanganui River clarified first.<sup>21</sup>

He considered that Atihaunui relations with many of the district councils and others at a local level are good and that meetings are conducted with humour and courtesy but:

in the end when decisions are made about our tupuna taonga, Te Awa O Whanganui, it is not us who makes them, and our rangatiratanga is liable at any time to be overridden, and we again become submitters to others about Te Awa and have to justify ourselves.<sup>22</sup>

#### 10.4 REGIONAL POLICY STATEMENTS AND PLANS

A further indication of how Atihaunui traditional authority is subsumed is found in the making of regional policy statements and plans.

Regional policy statements provide an overview of a region's resource management issues and its proposals for the integrated management of the region's natural and physical resources (s 59). Regional plans are written to assist a regional council to carry out its functions (s 63).

Regional policy statements must provide for such of the matters in part 1 of the second schedule to the Act as are applicable, including matters significant to iwi (s 62(1), (2)). The statements and plans may provide for the taking and diverting of water and may control the quality, level, and flow of water in a river. They may also provide for cultural heritage sites and wahi tapu (clauses 1 and 4 of the second schedule).

The Manawatu–Wanganui Regional Council covers an extensive area from south of Levin and Eketahuna to Hawke's Bay, Taranaki, Waikato, and beyond Taumarunui to Waitomo.<sup>23</sup> All or parts of the Stratford, Ruapehu, Wanganui, Rangitikei, Manawatu, Horowhenua, and Tararua District Councils are included, and each has its own responsibilities under the Resource Management Act.

Content and  
purposes

20. Ibid, para 204

21. Ibid, para 206

22. Ibid, para 207

23. Proposed regional policy statement for Manawatu–Wanganui Regional Council (doc A79), map 1, p 9

**Process** During the preparation of a proposed policy statement or plan, the council must consult with affected tangata whenua through iwi authorities and tribal runanga (part 1 of the first schedule) and have regard to any relevant planning document recognised by an iwi authority (s 61(2)).<sup>24</sup>

The proposed regional policy statement or plan must then be publicly notified. Any person may make submissions, a summary of the submissions must be publicly notified, a hearing is to be held, the council's decision is to be notified, and the matter may be taken to the Environment Court.<sup>25</sup>

At the time of our sittings, the regional council had released its proposed policy statement, submissions had been received, and hearings were under way.

**Atihaunui  
reservations**

Mr Taiaroa was a member of the regional council until October 1993, was for some years the deputy-mayor of Taumarunui, and for a time chaired Te Roopu Awhina, the consultative body representing iwi in the regional council's area. He was involved in planning processes.

Mr Taiaroa formed the opinion that the regional council, the district councils, and the Planning Tribunal are insufficiently informed in Maori knowledge and law to manage the river (or presumably to understand and give effect to Atihaunui cultural preference).<sup>26</sup> Discussions between the regional council and Te Roopu Awhina had resulted in some provisions in the proposed regional policy statement that issued in September 1993, he acknowledged, and the discussions provided an opportunity to educate the regional council.

To avoid compromising their position, however, Mr Taiaroa felt once more that Atihaunui needed to pull back from processes when their proper status was not recognised and where the governing Act accorded no priority to Treaty and Maori concerns. He submitted that:

It was my view, however, that Maori were not accorded any or significant authority in relation to decisions to be made, and I became concerned that the range of activities under the Resource Management Act which the Regional Council was undertaking were likely to prejudice the position of iwi, because the more that was done to establish new laws and plans which do not accord iwi a proper place, the less likely it is that the damage to our position can be repaired.

I therefore attended a meeting of the Manawatu Wanganui Regional Council on 20 July 1993 and advised at the time that the iwi had made application to the Waitangi Tribunal for an urgent hearing of their claims because the Crown had stopped negotiating, and there seemed to be a multiplicity of activity in relation to the river, that would prejudice the iwi. The iwi had no confidence that their interests would be protected and their rangatiratanga and Treaty rights would be properly recognised. I asked them to delay action so that a solution could be found and the Tribunal could make its recommendations.

24. Both regional policy statements and plans are to be prepared and changed in accordance, among other matters, with part 11 of the Resource Management Act 1991 (ss 61, 66).

25. See part 1 of the first schedule to the Resource Management Act 1991

26. Document B8, paras 140, 141, 150

However, the Council approved its proposed Regional Policy Statement at its meeting on 17 August 1993, and submissions were called for. The steam roller was moving.<sup>27</sup>

The 'steam roller' is the process earlier described for public submissions and hearings. In this process, Mr Taiaroa submitted, Maori submissions rank with those of other members of the public.

The trust board notified its objections to the proposed regional policy statement in only general terms until the Atihaunui status had been considered and resolved with the Crown, and the Crown had given proper recognition to Atihaunui Treaty rights.<sup>28</sup>

Dr Cowie for the regional council advised that the council lacked jurisdiction to accede to the trust board's request for deferment. The council had notified its proposal and began hearing submissions on 20 July 1994. He also referred to the trust board's subsequent notice that it opposed submissions by Federated Farmers but without identifying its particular concerns. He expressed the council's disappointment that the trust board had not used the submission and hearing process to voice its concerns.<sup>29</sup>

**Council could not defer inquiry**

In illustration of the Act's deficiencies, Mr Taiaroa referred to some particular submissions. In one, it is argued that the Treaty of Waitangi is to be 'taken into account', which effectively means, the submission contends, that it must be balanced with other matters with which it may conflict. The submission continues that partnership requires compromising differences to reach consensus. To 'take into account' does not mean to give effect to, it was noted.

**Maori rights are seen to be compromised**

In Mr Taiaroa's view, if this submission is correct, it shows how Maori must compromise their Treaty rights if they enter into the planning process and how adjudicators are required to give the Treaty less than its proper force and effect. He contended that the status of the Treaty, like the status of Atihaunui, must be recognised and secured before all else.

Dr Cowie referred to an inference in Mr Taiaroa's submissions that the council should delegate control of the Whanganui River to the Whanganui River Maori Trust Board. He said that there were practical, technical, and legal difficulties in this, and he pointed to the high level of expertise required in modern land and water management.

**Council's reply – ownership and control compared**

He then asserted that the issue of resource ownership and rangatiratanga needed to be separated from that of resource management. He pointed to gravel extractions to show the distinction between ownership and control. A resource management consent to abstract gravel does not amount to a licence to do so, he said. Permission from the resource owner is still required.

27. Ibid, paras 155–157

28. Ibid, para 160

29. Document D7, para 48

We thought that put matters simply and presented the case for Atihaunui ownership of the river to be recognised in law. It stated the relationship between resource management and private ownership – that a use of property may not be allowed if it offends sound environmental management but the use of a property is also not allowed if the owner of the property does not agree. That seems a sound principle and points to the essential question – Who owns the river?

However, we understood Dr Cowie to contend further that ‘iwi advocacy and guardianship’ can most efficiently and reasonably be achieved through the Act’s consultation, submission, and hearing processes.<sup>30</sup> That is another matter and one that is not so clear, for it compromises Atihaunui river ownership, if ownership is what they are entitled to.

Is balancing  
required by the  
Treaty or by the  
Resource  
Management Act?

Mr Taiaroa referred to part 4 of the proposed regional policy statement which includes a Maori view of resource management and covers the principles of the Treaty of Waitangi. He welcomed the reference to the guarantee to iwi and hapu of full chieftainship or authority over their land, resources, and taonga but noted that, according to the document, this is to be balanced against ‘the Crown’s right to make laws and govern, and by extension, the devolved responsibilities of Regional Councils’.<sup>31</sup>

Dr Cowie disputed the submission that Atihaunui lacks any effective recognised authority in relation to the river. He thought it clear from the objectives and policies in the proposed policy statement that the rangatiratanga of iwi and their ability to manage their taonga in accordance with the Act are fully recognised by the council.<sup>32</sup>

However, this does not reconcile with his conclusions. It also conflicts with the council’s interpretation of Treaty principles in part 4 of its proposed policy statement. These express the view that the rights conferred on Maori by article 2 of the Treaty are to be balanced with the right to govern conferred on the Crown by article 1.

That puts the Treaty out of context and does not reflect what the Crown and Maori actually agreed. As we see it, the Crown assumed the governance on the basis of its promise that Maori authority or rangatiratanga over their possessions would be guaranteed. It is not that Maori rangatiratanga was to be qualified by a balancing of interests but, rather, that the assumption of sovereign rights was qualified by a promise to protect and guarantee the full authority, or rangatiratanga of Maori, over all that they possessed, for as long as they wished to retain the same in their possession. Governance was conditional, but the prior rights of Maori were expressed as protected absolutely.

It may very well be that the Resource Management Act 1991 requires a balancing, and as a result, the council itself may be constrained. The balancing act is a

30. Document D7, para 69

31. Document B8, para 169

32. Document D7, para 76

statutory requirement, however, and should be attributed not to the Treaty but to its source – the statute.<sup>33</sup>

We intend no other criticism of the regional council's proposed statement. A genuine concern to provide for Maori interests is self-evident. The conflict is between the Treaty and the Act and arises from the Crown's failure to acknowledge and protect the Maori ownership of the Whanganui River, or at least to give to Maori rights of private property ownership – the same rights and protection as are given to Europeans. There is nothing the regional council can do about that, however. It is a matter between Maori and the Crown.

We have examined the objectives in this part of the proposed policy statement and consider that none contains an assurance that effect will be given to the Treaty rights of Atihaunui in relation to the river. With the exception noted, however, this derives not from an omission in the proposed policy statement but from the terms of the legislation.

Having regard to the legislation, Mr Taiaroa and Atihaunui are justified in their misgivings about subscribing to a process wherein their Treaty rights are compromised. That is not to say, however, that they should not be involved. It is for them to judge whether, within the limitations of the system, there are still benefits to be gained and whether submissions can be prefaced as being without prejudice to their claim to rights of private ownership and ultimate control.

Section 30 of the Resource Management Act 1991 confers extensive powers on regional councils, among other matters, to control water use and diversion and the flow of water in rivers. Chapter 3 of part 5 of the proposed regional policy statement contains policies for managing the region's water resources. Among the significant issues identified is the contamination of water in the Whanganui River near Wanganui by agricultural, human, and industrial effluent. It adverts to the adverse effects of extreme water flows and notes that abstraction for hydroelectric power generation can exacerbate the effects of periods of low flow. Competing demands on water resources can lead to conflicts between different uses.

Chapter 4 of part 5 deals more particularly with lakes, rivers, and wetlands, and includes activities that affect natural water flows in rivers and streams. On this topic, it says:

Dams or major diversions of rivers or streams can have major effects on instream values. These include fisheries and recreational uses, and in some cases upon Maori spiritual and cultural values. Dams create lakes behind them and often dewater

Part 5 of the  
proposed policy  
statement

33. The same gloss on rangatiratanga appears in other words in paragraph 4.8 of the proposed policy statement. Paragraph 4.8 sets out certain objectives and its policies with respect to them. These state 'To recognise the tino rangatiratanga of nga iwi of the Manawatu-Wanganui region, as affected by the council's exercise of kawanatanga, in the development of their own resources'. The paragraph also sets out methods for implementing policies. It is stated that the regional council shall actively protect the resource management interests of nga iwi, amongst other things, by 'considering' their resource management interests in resource consent decisions. This would appear to be consonant with the Act, but it is not consonant with the Treaty, which guaranteed to Maori continued control or rangatiratanga of their own resources.

sections of river below the dam. Their effects on fisheries and wildlife values are well documented. They can prevent the migration of various species within the river, destroy the habitat of those species that inhabit fast-moving waters and interfere with various types of recreation.

In this Region these issues are largely associated with the Tongariro Power Development. Resource consents will be required for all the Tongariro Power Development by 1 October 2001. The Moawhangao River is completely dammed with only a small residual flow below the dam. Its waters are diverted north to the Tongariro River. Twenty-two small tributaries of the Whangaehu River are diverted into the Wahianoa Aqueduct and then through to Lake Moawhangao and the Tongariro River. Much of the low flows of five small tributaries in the headwaters of the Whanganui River and the Whanganui River itself are diverted northwards into Lake Otamangakau and from there into Lake Rotoaira and the Waikato power system. Much of the base flow of the Whakapapa River is diverted into the same system.

Following the Whanganui River minimum flows decision, at least three cubic metres per second must be passed down the Whakapapa always. Similarly, downstream flows at Te Maire on the Whanganui River must not fall below 29 cubic metres per second, except, where this would occur naturally.

Inter-catchment transfer of water within the Tongariro Power Development impinges strongly in some cases on Maori cultural and spiritual values. This is particularly so for the Whanganui River, which the Whanganui River Maori consider to be 'beheaded'.<sup>34</sup>

One of the clauses in the proposed policy statement would commit councils to preserving the natural character of rivers. This is except for the case where modification is reasonably required to mitigate the effects of natural hazards, provide for the social and economic wellbeing of communities, or provide for essential public utilities and services, provided that any adverse effects are adequately avoided, remedied, or mitigated.<sup>35</sup>

In deciding whether to grant a new resource consent for the Tongariro power development diversion, the regional council will be guided by the above policies, or those that might replace them when the statement becomes operative. It will also have regard to section 8 of the Resource Management Act, which requires it to take into account (but not necessarily apply) the principles of the Treaty (assuming this section applies, as was raised in the earlier discussion of section 199).

Before leaving this topic, we would not wish it to be thought that we consider the regional council to have acted otherwise than in good faith. It has been faced with the impossible task of reconciling the statutory mandate conferred on it by the Resource Management Act with the meaningful recognition and implementation of the Treaty rights of Whanganui Maori. The Crown has failed to provide that the statutory powers must be exercised in a manner consistent with the Treaty rights of Atihaunui. Until such time as that is done, regional councils and other authorities

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34. Proposed regional policy statement, pp 92–93

35. Ibid, p 94

exercising powers and functions under the Act will lack the requisite authority and obligation actively and effectively to recognise and implement Maori Treaty rights in and over their rivers. As the Act stands at present, the Whanganui iwi, although consulted by the regional council, has no power of decision over its tupuna awa. In short, it is simply another 'submitter' before a series of decision-making bodies and courts, with no assurance that its Treaty rights will be implemented.

## 10.5 REGIONAL PLAN FOR THE BEDS OF LAKES AND RIVERS

The regional council's discussion document on a regional plan for the beds of lakes and rivers was placed in evidence.<sup>36</sup> We are unaware whether the council has proceeded with a proposed regional plan. Mr Taiaroa submitted that:

Again, this document deals with the Whanganui iwi tupuna taonga, the Whanganui River, in critical ways. It deals with matters relating to gravel extraction, river control schemes, boundaries, the regional plan, recognition and protection of areas of national importance, sedimentation, river bed degradation, recreational uses and works in the river to protect against erosion and the like. All matters intimately associated with the river and with the people of the river.

The document sets a framework for future decision-making about the river. Yet at the same time Whanganui iwi along with all other people are being asked to 'submit' their views on this. Nowhere in the initial discussion document is there a place for the Whanganui iwi to be involved in that process except as submitters.<sup>37</sup>

As in the case of the proposed regional policy statement, the regional council, in deciding on the regional plan for the beds of lakes and rivers, is not required to do more than 'take into account' the Treaty interests of the Whanganui iwi. The iwi has no assurance that the regional council will act consistently with Treaty principles. It is under no statutory or other legal requirement to do so.

## 10.6 SEWAGE, PORT DEVELOPMENT, CHANNELLING, AND REGULATING

Matters relating to sewage, port development, and channelling that also fall within the ambit of the Resource Management Act 1991 were raised to show the diversity of Atihaunui concerns and how the planning process circumscribes their Treaty interests.

### 10.6.1 Sewage discharge

From the early development of Wanganui, sewage and stormwater were combined and discharged directly into the river without treatment. Taumarunui did the

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36. Manawatu-Wanganui Regional Council, *Regional Plan for the Beds of Lakes and Rivers: Discussion Document*, Palmerston North, Manawatu-Wanganui Regional Council, March 1993 (doc A11)

37. Document B8, paras 176-177

same. Atihaunui, following the Maori cultural imperative for pure water and the discharge of animal wastes on land, have repeatedly objected.<sup>38</sup>

In 1989, the catchment boards compelled the district to upgrade treatment. When the city council's water right lapsed in 1989, the board granted only a two-year right for further discharge and required the district council to establish a consultative waste water working party to deal with the problem.<sup>39</sup> The working party included representatives of the Whanganui River Maori Trust Board, the district council, and the Department of Conservation. It reported in October 1990.

Eventually, the district council adopted the working party's proposal, and the regional council granted consents for the project in 1992. The consents run for a 15-year period, ending in July 2007. The initial construction of interceptors was to remove about 95 percent of non-sewage discharges into the river.

When completed, the scheme will greatly improve water quality in the lower river. It will, belatedly, minimise a proven health risk and a culturally offensive practice.

In Taumarunui, the then catchment board granted short-term rights to the Ruapehu District Council on the condition that it took steps to upgrade its sewage treatment. Mr Taiaroa advised us that Taumarunui now has a system by which sewage is filtered through the soil and cleansed before the traces enter the river.<sup>40</sup>

It seemed to us that the sewage cases highlight the advantages of the planning process in compelling necessary changes.

### 10.6.2 Wanganui port development

The Wanganui port development is an ongoing project, which was first mooted in 1990. The proposal is for a channel cut through the south spit, for some 2½ kilometres of the present river mouth, to divert the river away from the port, create a blue-water port, and recover some 40 hectares of land for port operations.<sup>41</sup> In Mr Taiaroa's view, the circumstances illustrate the conundrum for Atihaunui. With all goodwill, the regional council involved the trust, but by agreeing to take part, the trust found itself in a position not of making decisions, or sharing in decision making, but of making submissions to someone else, who would eventually decide.<sup>42</sup>

The council was concerned to address Maori and environmental interests from an early stage. The Whanganui River Maori Trust Board was included in the project team, which was constituted in 1991. In mid-1993, when the first stage of the team's work was drawing to a close, a general meeting with Maori was arranged. The feeling of the meeting was that Maori should explore the implications of the scheme and a paper should be filed. This was duly done.

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38. Document B8, para 193

39. Document D7, pp 3–4

40. Document B8(c), pp 285–323

41. Ibid, pp 339–345

42. Document B8, pp 56–57



Figure 20: Looking up the river from the city, circa 1880s.  
Photograph courtesy Alexander Turnbull Library (W J Harding collection, G213½).

The recollection of the council's planning director, who was at the meeting, was that those present became concerned with Treaty implications and the ownership of the riverbed.

Mr Taiaroa advised the Tribunal that the team made no response to the Maori paper and there was no further discussion. On inquiry, it was learnt that the Maori position paper had simply been attached to a summary report submitted by the team to the district council.

In evidence to us, the planning director submitted that the regional council had made no decisions on the port development and it was unlikely to proceed in the near future. Before it did so, there would need to be the full participation of the tangata whenua, as required by the Resource Management Act 1991.

In Mr Taiaroa's view, this was not shared decision making or discussion but the collation of a Maori position as a prelude to Resource Management Act procedures where, as the planning director had said, 'Maori people would be fully involved in that ... process along with a large number of other interested and affected parties'.<sup>43</sup>

We take Mr Taiaroa's point, but we would still place value on maintaining consultations and participation in investigatory teams, so that, at the least, different points of view may be understood.

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43. Document D10, para 9

The case also highlights, however, that discussions and understandings may not be significantly advanced so long as Maori ownership of the river is unrecognised and the usual incidents of ownership are not seen to apply.

### **10.6.3 Coastal permit to dredge a channel in the Whanganui riverbed**

This case illustrates how Maori usages may be accommodated by the planning process but that this may also obscure the failure to accommodate the larger Treaty interest, the guarantee of rangatiratanga, and a full, exclusive, and undisturbed possession.

In 1993, the Minister of Conservation granted a coastal permit to dredge a channel 75 metres wide by 380 metres long in the Whanganui riverbed, pursuant to section 119 of the Resource Management Act 1991.<sup>44</sup>

The applicant for consent was Ocean Terminals Limited, which manages the Wanganui port. To enable it to dredge the channel, it was necessary to divert the Whanganui River by breaching the basin wall (the natural spit at the entrance to the river) over a length of 100 metres. The regional council appointed a hearings committee. Mr Taiaroa stated that, in order to participate in this process, the Whanganui River Maori Trust Board had to object to the application. It appears that the company had not previously consulted it.

At the hearing, Mr Taiaroa, on behalf of the trust board, stated that the board, for the hapu and iwi of the river, should be considering and making the decision on the applications, not the regional council. He further stated that the board strongly objected to the granting of the consents unless conditions were imposed to ensure that sacred sites, traditional fishing resources, shellfish-gathering areas, and water quality were protected and maintained, and that the tangata whenua be a part of the monitoring process.<sup>45</sup>

The Putiki Marae Committee also objected, on the grounds that the applicants never properly consulted them, the area is used for traditional food gathering, and it is culturally important to them. They would entertain consents on condition that further consultation was carried out, effects on mahinga kai were monitored, and the tangata whenua were involved in protecting the traditional fishing resource.

While the coastal permit granted by the Minister contains a number of conditions, mainly of a technical nature, none of those sought by either the Whanganui River Maori Trust Board or the Putiki Marae Committee is included.

Mr Taiaroa cited this decision as another instance of the real decision being taken out of the hands of the iwi.

We appreciate the weight of his final observation that ‘assurances recorded in minutes of committee meetings that to protect iwi interest, the Resource Management Act processes will be used, only serves to increase our concern’.<sup>46</sup>

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44. Document B8(c), pp 367–369

45. Ibid, p 362

46. Document B8, para 218

#### 10.6.4 River channel project

The Whanganui River Users Group is an incorporated body established in 1993, which liaises with others interested in the river. It supports the formal recognition of the Whanganui iwi as guardians of the river and as having a primary role in all matters affecting it.<sup>47</sup>

The group promotes the river channel project. This project is to clear snags from rapids, increase the navigability of the river, and enhance tourism prospects. It is hoped to restore the river channels to the depths achieved during the busy days of the riverboat era.

Counsel for the group stated that the Whanganui River Maori Trust Board has at all times made it clear that it does not seek to restrict public access but wishes to be a principal party in developing and administering the necessary regulations for the river's use and maintenance. In turn, the group has made it clear that it would not proceed with the project if Atihaunui were opposed.

The trust board chairman expressed misgivings that, when planning consent was sought for clearance work, the board would once again be 'submitters' and the outcome would be in the hands of a regional council or tribunal, neither of whom needs give effect to the Treaty.

However, the Whanganui River Users Group said that it would not seek a resource consent unless the board agreed. Instead, an application was drafted in terms agreed to by them both, and at the time of our hearing was the subject of ongoing discussions.

The group appeared before us to urge that we recommend an arrangement to elevate the iwi organisation from supplicant or consultative party to equal decision-maker.

Mr Taiaroa contended that the matter raises questions of standards and authority. The standards that the iwi might wish to apply are not necessarily those of the regional council or the Planning Tribunal, and neither can the trust agree to act merely as an agent under some other authority. It is its independent authority in respect of the river that is in issue.

#### 10.6.5 River control bylaws

Bylaws to control commercial boating were formerly administered by the three affected district councils of Wanganui, Ruapehu, and Stratford, which in turn had authorised their administration by the Department of Conservation and the Whanganui River Maori Trust Board.<sup>48</sup> These bylaws were the Whanganui River Control By-Laws 1991.

The Whanganui River Maori Trust Board and the Whanganui River Users Group were agreed that bylaws were required and that the control of navigation should not be under a voluntary regime.

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47. Document D2

48. Document C20; see the agreement dated 10 July 1992 between the Whanganui River Maori Trust Board and the Department of Conservation (doc C20, pp 91–94).

Under the Resource Management Act 1991, the local bylaws lapsed and responsibilities passed to the Crown. The Water Recreation Regulations 1979 now apply, as they do to any water body in New Zealand not controlled by bylaws or by a rule in a regional plan. The Ministry of Transport's Maritime Division administered these regulations in 1994, but this is now one of the functions of the Marine Safety Authority. The regulations cover such matters as boat speeds and swimming from jetties.

Mr Taiaroa submitted that the formulation and administration of bylaws for the river should be shared between Atihaunui and the Crown.

### 10.7 THE APPLICATION OF THE TREATY

The Resource Management Act 1991 has contemporary importance to Atihaunui. In 2001 or before, they will face a further resource application for headwater abstraction and a review of minimum flows and levels. At present, proceedings are current or pending for a regional policy statement, a regional plan for the beds of lakes and rivers, a regional coastal plan, and a water conservation order. There are proposals for port development and channelling. Before these are discussed, they say, the voice of the Treaty should be properly heard and their river interests should be properly recognised.

#### Crown arguments

Crown counsel saw the claim as pondering the balance between the Crown's governance and Maori rangatiratanga. The Crown must control resources in the interests of conservation and the wider public, they submitted, and this must override the claimed Maori interests, save to the extent that they can be provided for. The Resource Management Act was therefore a legitimate exercise of the Crown's article 1 powers, and it was appropriate to provide for Treaty responsibilities as in section 8. The Act was legislated only after several years' consultation.

#### Claimant arguments

Ms Elias for the claimants submitted that the Treaty guaranteed to Maori full authority over their taonga – the Whanganui River in this instance – and that this required that Maori authority and management should prevail, except in extreme cases of national interest.

Ms Elias further submitted that:

The Crown submissions are based on the assumption that control of natural resources rests with the Crown and was ceded to the Crown as a necessary incident of kawanatanga. This is the submission advanced in *Mohaka* and rejected by the Tribunal because its corollary is that rangatiratanga from the signing of the treaty excluded any concept of authority, control, responsibility or stewardship in respect of natural resources which are taonga. Instead, Maori have a right to be consulted and considered, [which is] the solution of the Resource Management Act. The submission of the Crown in effect is that natural resources fall outside the Article 11 protection of tino rangatiratanga and are solely within the province of Article 1. The Crown seeks a finding that the Treaty deprived Maori of authority over natural

resources. Such an argument is inconsistent with the Treaty language and contemporary understanding of it.<sup>49</sup>

We find this a persuasive submission.

Counsel for the Manawatu–Wanganui Regional Council noted that section 8 obliges the council to take the Treaty of Waitangi into account. He accepted that Atihaunui have no absolute assurance that priority will be given to their interests but submitted that the regional council is obliged to give them considerable weight. Regional policy statements and plans require the council to consult with the affected tangata whenua. These and the planning process enabled the claimants to have ‘an effective voice’, he submitted, and a role in influencing management decisions.

**Regional council's arguments**

He thought it unlikely that the regional council would transfer its resource management responsibilities for the river to iwi. He submitted that in terms of section 33, the regional council better represents ‘the appropriate community of interest’ for the Whanganui catchment area, is in a better position to exercise integrated management over the whole catchment area, and has better technical capability and expertise for resource management functions.<sup>50</sup> He submitted that transfer may lead to conflicts of interest between the iwi’s ownership or advocacy role and resource management functions.

He referred to an explanation of objective 2 in the proposed regional policy statement, which considers that there are few situations where the council could transfer functions to iwi. It was said that this would be appropriate only where an iwi authority clearly owns a particular resource and has sufficient wherewithall to manage it in accordance with the Act.

We consider that the essential point, as was earlier stated, is that the Crown assumed the governance of New Zealand on the basis of a promise that Maori authority or rangatiratanga over their possessions would be guaranteed. It thus subscribed to a tenet of English law as old as the Magna Carta that private property interests are respected, and to a principle of colonial common law that dates at least from the 1600s that, upon British annexation of other lands, the same applies to the properties of the indigenous people.

**Tribunal's opinion**

The principles are the same in the Treaty of Waitangi, but as it was expressed, Maori were guaranteed the ‘rangatiratanga’ over that which they possessed. The meaning of that term was discussed in section 9.2. Applied to this claim, it means that the Whanganui River should be managed by the iwi, as claimant counsel contended.

Maori rangatiratanga is not therefore to be qualified by a balancing of interests. It is not conditional but was expressed to be protected, absolutely. It is rather that governance is qualified by the promise to protect and guarantee rangatiratanga for as long as Maori wish to retain it.

49. Document D20, para 60

50. Document D6, para 40

We do not therefore accept that the Crown's right or duty to control and manage resources overrides Atihaunui ownership of, and rangatiratanga over, the river. The effect of that is to negate, largely if not wholly, that guaranteed to Atihaunui.

This finding follows previous Tribunal opinion.<sup>51</sup> Though it has been considered that the guarantee may be overridden in exceptional circumstances in the national interest, the national interest in conservation is not a reason for negating Maori rights of property. In similar vein, the national interest in conservation does not negate the property interests of other citizens, even without the benefit of protective Treaty covenants. Resource management may have the effect of constraining private ownership but cannot be used to deny its existence.

We disagree with Crown submissions that section 8 of the Resource Management Act provides for recognition and implementation of the Crown's Treaty duties. It does not require those with responsibilities under the Act to give effect to Treaty principles but only to take them into account. This is less than an obligation to apply them. When ranked with the competing interests of others, this means that guaranteed Treaty rights may be diminished in the balancing exercise that the Act requires.

A comparison with section 4 of the Conservation Act 1987 may be useful. This requires the Department of Conservation to give effect to the principles of the Treaty in managing the Crown's conservation responsibilities. There may be good reason for the distinction, but it has not been made apparent to us. Possibly, something may be made of the fact that the department manages a given estate while the Resource Management Act defines the rights of citizens. The Tribunal has commented on this difference in earlier reports.<sup>52</sup>

In this case, functions under the Resource Management Act are generally exercised not by the Crown but by bodies that the Crown has established. The point has been well made, however, in earlier Tribunal reports, from 1983, that the

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51. Thus, see Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, Wellington, Brooker and Friend Ltd, 1993, pp 33–34:

In the case of a highly valued, rare and irreplaceable taonga of great spiritual and physical importance, such as the taonga of the claimants [thermal hot pools and springs], the Crown is under an obligation to ensure its protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected.

Also see Waitangi Tribunal, *Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, sec 15.2.1(3):

Maori insistence on their right to retain tino rangatiratanga over their land resulted in the inclusion of article 2 in the Treaty, and was a measure of the depth and intensity of their relationship to their land and other natural resources. It follows that if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Maori in article 2 it should be only in exceptional circumstances and as a last resort in the national interest.

52. See Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 7.7.9(c):

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



Figure 21: A pa tuna at Koiro was exposed in November 1998. It was last used in 1911.  
Photograph courtesy Whanganui River Maori Trust Board.

Crown's duty of active protection of Maori property interests is not avoided by legislative or other delegation. If the Crown chooses to so delegate, it must do so in terms that ensure that its Treaty duty of protection is fulfilled.<sup>53</sup>

The principle of partnership was referred to, but that too cannot be used to replace or water down the Treaty's clear terms. A partnership of Crown and Atihaunui may be necessary to manage the river's resources in today's more complex world, but that is a separate matter. It is one that the trust board and the Government may care to negotiate.

We earlier commented that resource management laws may have the effect of constraining private ownership but cannot be used to deny its existence. The converse is also true. Contrary to the tenor of some claimants' submissions, we consider that the Resource Management Act is not a vehicle for asserting property rights that have not been established by title or overt recognition. Though the Act is not entirely neutral on ownership – amongst other things, section 354 maintains the Crown's statutory ownership of the riverbed – the scheme of the Act is directed not to ownership but to resource management.

That, however, points to the fundamental flaw in the application of the Resource Management Act to the Whanganui River, as Mr Taiaroa was continually at pains to say, that nothing should be done about the river except that ownership is settled first. That has been at the root of Atihaunui grievance for about 150 years and is the heart, the core, and the pith of this claim.

We find that:

- The Crown failed to ascertain the Treaty rights of the claimant iwi, Te Atihaunui-a-Paparangi, in the Whanganui River, including its ownership of the river, before enacting the Resource Management Act 1991.
- The Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision that ensures that all persons as identified in section 2 of the Act exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are to do so in a way that is consistent with, and gives effect to, the Treaty of Waitangi.

The Resource Management Act authorises:

- the control by regional councils of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body;
  - the making of water conservation orders by the Governor-General by Order in Council on the recommendation of the Minister for the Environment; and
  - the making of regional policy statements and regional plans for the beds of lakes and rivers by regional councils.
- All such powers and others may be exercised in respect of the Whanganui River without the consent of Atihaunui and without any obligation to ensure

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53. See, for example, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, p 34



that such powers are exercised in a way that is consistent with, and gives effect to, the Treaty rights of the claimants.

- As a consequence of the foregoing acts and omissions of the Crown and provisions of the Resource Management Act 1991, the Crown has failed to protect the Treaty rights of Atihaunui to exercise their rangatiratanga over their river for so long as they wish; failed to facilitate the Treaty right of Atihaunui to manage and control and exercise autonomy over their river; and failed to act reasonably towards their Treaty partner, in accordance with Treaty principles.

The Tribunal further finds that, as a consequence of the foregoing acts and omissions of the Crown and legislative provisions referred to, the claimant iwi Atihaunui has been, and is likely to be, seriously prejudiced by such Treaty breaches.

