

## CHAPTER 2

# CUSTOMARY TENURES

### 2.1 INTRODUCTION

To consider whether the Crown extinguished Maori interests in the river, we have first to ask what those interests were. This, and claimants' concerns that their customary association with the river be properly understood, emphasised the need for an early examination of customary tenures.

Need to define  
Maori interests

Custom also intersects with other issues introduced in chapter 1 – whether the claim should have been severed to individual hapu, whether the Government and other parties should treat with one body on Maori river interests in future, and the responsibilities of the Whanganui River Maori Trust Board to the hapu. Custom is also central to the conflict between Maori and Pakeha over rights to land and water resources, a conflict that is central to the claim.

Relevance of custom  
to other issues

### 2.2 ENGLISH LAND TENURE

This section summarises some broad principles of English law as applied in New Zealand before the turn of the century.

All land is vested in the Crown. All grants of transferable titles in fee simple, which constitutes the system of private land ownership as known today, come only from the Crown. Where land was purchased direct from Maori, the purchase was acknowledged in the form of a Crown grant.

Crown's radical title  
and 'private land'

Though the Crown grants land, it still retains the underlying or radical title. The same applies if the land was appropriated for a public purpose. The Crown's unappropriated lands are sometimes called the Crown's wastelands.

This doctrine of tenure in English law was applied in New Zealand from the commencement of colonisation – though not without prior dispute.<sup>1</sup>

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1. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, sec 4.7. The two ordinances that instigated English land tenure were the New Zealand Land Claims Ordinance 1840 (NSW) and, after New Zealand became an independent colony, the Land Claims Ordinance 1841. Prior to the former ordinance, when New Zealand was a dependency of New South Wales, it was argued before the Governor that this part of English law could not apply in New Zealand because the underlying title was already held by Maori. A system of private ownership was argued for, without the intermediary of the Crown, enabling direct purchase from Maori. The British Government did not agree.

Maori customary land	<p>After other early debates, it was also admitted that Maori held all land in New Zealand according to their customs and usages.<sup>2</sup> This was accommodated within the English legal framework by reference to established canons of colonial common law. The land was still Crown land, but the Crown's radical title was held subject to Maori customary usages until the Maori customary interest had been extinguished.<sup>3</sup> Subsequently, the Maori customary usage has been referred to as the aboriginal or native title. It is said to be a burden on the title of the Crown.</p>
Extinguishment	<p>The Maori customary burden on the Crown's radical title was largely extinguished last century by a combination of purchase, expropriation, or grant of freehold title to those Maori determined as owners. The Native Land Court was established in 1865 to give private titles to prescribed Maori for all Maori land then remaining. Leaving aside the question of seabeds, the process of reforming Maori land has been completed, with only isolated exceptions. Principally, titles were awarded according to contemporary Maori occupation.</p>
Land categories	<p>Thus, there were only two categories of land in early colonial law: Crown land (even though burdened with Maori customary interests, leased, or appropriated for a public purpose) and freehold land. This latter type is what might be called 'private' land. It arose from a Crown grant (whether to a Pakeha or a Maori). There have since been many other ways of categorising land in New Zealand.</p>
Application of English law in New Zealand	<p>Behind the application of the English doctrine of tenure was the presumption that Britain's acquisition or assumption of sovereignty over New Zealand brought with it the application of English law, or at least to the extent applicable to New Zealand circumstances. By statute, English law was deemed to apply in New Zealand from 14 January 1840, being the date when Governor Hobson issued his first proclamations.<sup>4</sup> Early arguments that the English doctrine of tenure was inappropriate to the New Zealand circumstances, whether on account of prior Maori interests or because of some early preference for Crown leaseholds, were not adopted.</p>
Rivers, lakes, sea, and foreshores – Crown, private, and 'public' interests	<p>At English common law, it was presumed that non-tidal rivers, lakes, and highways were owned by the adjoining proprietors of the land to the centre line, or to the centre point in the case of lakes. Land covered by water regimes, permanently or from time to time, was either Crown land or privately owned land but, whichever, there was no general public right of use and access.</p>

Following the tradition of English law, the Crown was presumed to hold the seabed (at that time, to about three miles), the foreshore, and the bed of the tidal

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2. The debate is further referred to in a subsequent chapter to this report. It was argued that Maori owned only those lands that they occupied and tilled and that all else was wastelands or unappropriated lands of the Crown. Though this argument was maintained for some years, it did not prevail. While it was opposed on principle, there was not the military power to enforce it against Maori, for whom every part of the country was possessed by one or other hapu.
  3. Thus, section 2 of the Land Claims Ordinance 1841 declared all unappropriated land to be Crown land subject to the rightful and necessary occupation and use thereof by the aboriginal inhabitants. In subsequent Maori affairs legislation, until the Te Ture Whenua Maori Act 1993, 'Maori customary land' was defined as Crown land held subject to Maori customary usage.
  4. The English Laws Act 1858, as re-enacted in the English Laws Act 1908.

reaches of a river as an arm of the sea.<sup>5</sup> In England, the presumption was rebuttable on proof of a long-standing private use, generally of a fishery. There was no general public right of use, however, except for navigation or fishing, and no general right of foreshore use, except as ancillary to navigation or fishing. Rather, rights of foreshore use, or littoral rights, accrued to the private owners of adjoining land.

The non-tidal parts of riverbeds, and the beds of lakes, were presumed to be owned by the proprietors of the riparian lands (lands with river frontage) to the rivers' centre lines or the lakes' centre points. This is expressed in the maxim *ad medium filum aquae*.<sup>6</sup> Again, the presumption was rebuttable as upon proof of a private fishery from immemorial time or some grant, but generally rights of fishing, or navigation in a reasonable way for a reasonable purpose, accrued not to the public but to riparian owners. Any public rights of navigation on non-tidal rivers depended upon immemorial user or dedication by a riparian landowner.

The English common law presumption that non-tidal rivers, lakes, and highways were owned by the adjoining landowners to the centre line or centre point was adopted in New Zealand from the commencement of settlement. The common law rule was no more than a presumption, however, and the view developed that the presumption may be rebutted more readily in New Zealand owing to our own circumstances. Thus, the rule was rebutted in its entirety with regard to highways. From the beginning of settlement, roads had been laid off by the Crown, and the legal opinion was that roads should be vested in the Crown.

The Crown somewhat assumed that the same would apply to rivers and lakes. Unlike highways, however, rivers and lakes were not laid off by the Crown – they had always existed. None the less, the Crown was to assert that it was the owner of navigable rivers and lakes because this was necessary to protect the 'national interest' in transportation, power supply, drainage, flood control, town water supplies, and tourism, and to avoid the private control of hunting and fishing, as had happened in England. This was not accepted by the courts. It was held that the English common law principle applied in New Zealand, but in the New Zealand circumstances, the presumption might be more readily displaced. It was so displaced by the Court of Appeal in *Muellar v Taupiri Coalmines Ltd*, in respect of the Waikato River.<sup>7</sup> There, it was considered that the presumption may be rebutted either by the terms of the Crown grants of riparian land or by attendant circumstances. In that case, the bed of the Waikato River was held to be vested in

Seas, foreshores,  
and tidal rivers

Modifications to  
suit local  
circumstance

5. Claimant counsel disputed that the tidal reaches of the river belong to the Crown in application of the English common law, but she had no need to pursue the point, since the Crown's right, for the purposes of Treaty claims, is considered in terms of the Treaty of Waitangi. She may have been referring to the English Laws Act 1858, which deemed the laws of England to have applied from 14 January 1840, but only so far as they were applicable to the circumstances in New Zealand. Arguably, the law of the Crown's presumptive right has no application, since Maori already possessed the tidal reaches.
6. Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), March 1998, sec 1.2.1 (citing H J W Coulson and U A Forbes, *The Law Relating to Waters: Sea, Tidal and Inland*, London, Henry Sweet, 1880, p 98; *Halsbury's Laws of England*, 4th ed, London, Butterworths, 1984, vol 49, p 219)
7. *Muellar v Taupiri Coalmines Ltd* (1900) 20 NZLR 89 (CA)

the Crown, even although the Crown grants were silent on the point, through a combination of attendant circumstances.

More particularly, the district had been confiscated from the native proprietors pursuant to the New Zealand Settlements Act 1863, in order to establish military settlements to maintain peace. The river was the only practicable highway for military and other purposes. Further, certain preceding Crown statutes were held to indicate the Crown's general intention to retain the beds of rivers, streams, and creeks.

Chief Justice Stout dissented. In his view, the fact that the river was navigable was insufficient to rebut the presumption of riparian ownership. Further, the Crown grants, following the form that was usual throughout the colony, did nothing to amend the common law of presumption of riparian ownership. The position as the chief justice saw it was that rivers throughout the country were privately owned but that a public right of navigation might exist by express or implied dedication.

It is of interest to note that in that case, Justice Edwards recognised the prior Maori ownership of the river. Up to the point of confiscation, he noted:

the lands were native lands, the owners of which were entitled to the full, exclusive, and undisturbed possession thereof guaranteed to them by the Treaty of Waitangi. These rights have from the time of the foundation of the colony being recognised by the Crown and by the Legislature. The Native Land Act 1862 recites the treaty, and the rights of the natives thereunder; and the whole of the legislation relating to Natives lands up to the present date recognises the existence of these rights. These are also recognised by the Native Rights Act 1865.<sup>8</sup>

Further, Justice Edwards felt that it was:

impossible to infer any dedication by the Crown (of a right of public user) so long as the soil in the river remained native land and in the possession of the native owners. To do so would be to assume that the sovereign power has not respected, but has improperly invaded, the native proprietary rights.<sup>9</sup>

*Mueller* was considered by the Court of Appeal in *In re the Bed of the Whanganui River*.<sup>10</sup> There, the Court of Appeal tended more to the view of Chief Justice Stout, effectively confining *Mueller* to its particular facts and holding that non-tidal parts of the Whanganui River were owned privately by the riparian owners.

Several decisions of the United States, Canadian, and Australian courts have held that the *ad medium filum aquae* rule with regard to lands adjoining water-courses is more readily rebutted in countries that do not have the long history of settlement that gave rise to the common law in Britain. The decisions appear to have varied on the question in relation to rivers, but they are more consistent with regard to lakes. The courts in both the United States and Canada held that the Great

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8. *Muellar v Taupiri Coalmines Ltd*, p 122

9. *Ibid*, p 123

10. *In re the Bed of the Whanganui River* [1962] NZLR 600

Lakes dividing those countries were held to the political boundary by the State and the Crown respectively. In South Australia, it was held that lakes were vested in the Crown.<sup>11</sup>

This century, the courts of New Zealand, Canada, and Australia developed the view that the *ad medium filum aquae* doctrine was more refutable outside England, that in the circumstances of those countries it does not apply to navigable waterways, and that the bed of navigable waterways is vested in the Crown. A major thought in the most recent Australian case was the idea that it was inappropriate to apply the *ad medium filum aquae* rule in countries that do not have the long history of settlement.

In New Zealand, the position with regard to rivers was resolved by statutory intervention. Following a variety of statutes permitting particular public uses, from log floating to the provision of steamer services, the beds of navigable rivers were vested in the Crown by section 14 of the Coal-mines Act Amendment Act 1903.<sup>12</sup> There were similar enactments to give the Crown the ownership of the seabed and harbour beds, but no similar enactment was made for lakes. The lack of a general statutory regime for lakes was possibly due to the trenchant opposition of the major hapu, which continued to depend on them.

Statutory  
intervention

The lakes position is instructive, for in the absence of statutory constraints, it was judicially recognised that Maori customary interests could exist in lakes independent of the ownership of the surrounding land. In the result, unless the customary interest had been extinguished, a separate 'lake title' could be given.<sup>13</sup>

Lakes

The position is confused by political intervention, but broadly the Native Land Court considered that it could award the beds of lakes to Maori upon proof of customary usages. Its jurisdiction to do so was to be upheld in the Supreme Court in *Tamihana Korokai v Solicitor-General*.<sup>14</sup> Thus, despite settler protests owing to flooding and their desire to drain the lakes for farming, the Native Land Court awarded Lakes Wairarapa and Onoke to Maori in 1883. However, after further settler protests and long negotiations, a land exchange was effected and the lakes passed to the Crown.

Drainage and public access concerns led the Crown to negotiate also for Lake Horowhenua, which had been reserved for Maori fishing by the Native Land Court in 1896. The resulting legislation (the Horowhenua Lake Act 1905 and the Reserves and Other Lands Disposal Act 1956) recognised Maori ownership of the bed but vested control in a board with Maori representation.

In the Rotorua lakes case, Maori had supplemented traditional uses with revenue-earning schemes in tourism and toll charges on users. In negotiations for the establishment of a European settlement at Rotorua, the Crown had

11. *Southern Centre of Theosophy Inc v South Australia* (1979) 21 SASR 399. The position of New Zealand lakes is discussed in White, secs 1.2-1.3.

12. Subsequently, section 261(2) of the Coal Mines Act 1979 was continued in force by section 354(1)(c) of the Resource Management Act 1991. There has been judicial disagreement on what 'navigable' means.

13. The position with regard to lakes is considered in White.

14. *Tamihana Korokai v Solicitor-General* (1912) 15 GLR 96

acknowledged the Maori ownership of the lakes, as noted in the Thermal Springs Act 1881. However, in 1910, the Crown sought to prevent the Native Land Court awarding titles to the lake beds when Maori sought title. In 1922, a settlement was reached vesting the lake beds in the Crown in exchange for an annuity and certain specific rights. However, the Native Land Court was to issue titles to Lakes Rotokakahi and Rotokawau, which were outside the agreement.

The preservation of scenery and generation of electricity, and public access for recreational purposes, also led to negotiations over Lake Waikaremoana. Again, the Native Land Court vested it in Maori. In a settlement of 1971 (the Lake Waikaremoana Act 1971), the lake was leased to the Urewera National Park Board.

Control of the tourist industry and the prevention of private rights in game were factors behind the Crown's negotiations for Lake Taupo. There, Maori had developed an industry in providing anglers with camp sites and charging them to fish from their land. Maori had not sought a title from the Native Land Court, when, in 1924, the Native Land Amendment and Native Land Claims Adjustment Act enabled the Crown to enter into negotiations. In 1926, the lake bed was vested in the Crown. In 1992, title was restored to the tribe but public access remained. The Native Land Court issued a title to Maori for the nearby Lake Rotoaira, and this remains, though the lake is also used for the Tongariro power scheme.

The Crown did not pursue negotiations for Lake Omapere. The Native Land Court awarded title to Maori in the face of the Crown's opposition. The decision in this case is probably the most comprehensive on the legal right of Maori to the ownership of lakes.<sup>15</sup>

A separate 'river title'?

This leaves a question of whether Maori customary interests in rivers could also have existed independently of interests in the riparian land to support a separate 'river title'. The question is deferred to later in this report in the context of certain judicial proceedings where it was raised.

Early colonial position

By the common law at the time of annexation, however, riverbeds were legally owned by the riparian owners without a public right of navigation over them. This was soon out of kilter with what was happening on the ground. Rivers were in fact being used for Government and settler purposes, irrespective of what the law provided or who owned the river banks. Public use rights were provided by legislation.<sup>16</sup> A raft of statutes followed for drainage, flood protection, and town water supply purposes. The question of a prospective Maori ownership was not considered. While the Government made laws for the protection, reform, and acquisition of Maori customary land, specific statutory recognition of Maori interests in lands covered by water was given only in respect of lakes.

Water ownership

There is no certainty in the common law on the ownership of running water. Crown counsel cited an early legal opinion that water in its natural state cannot be privately owned; that as 'a movable, wandering thing', it must 'of necessity

15. White, p 233

16. For a full review, see Michael Roche, *Land and Water: Water and Soil Conservation in New Zealand, 1941–88*, Wellington, Department of Internal Affairs, 1994, ch 1

continue common by the law of nature'.<sup>17</sup> While not stating that the Crown owns water, Crown counsel considered that the Crown manages it for the nation. However, claimant counsel argued that the legal position is not clear, and instanced occasions where, by statute or executive opinion, the Crown had recognised a Maori interest in freely flowing water.<sup>18</sup>

The English common law focused on use rather than ownership. It accorded to the owners of land abutting on rivers the right to draw on water for domestic use and stock watering, as long as the natural flow was not diminished in quantity or quality.

It is only by deeming provisions in statutes that the Crown has asserted the ownership of water for the particular purposes of specific Acts. For example, by section 3 of the Municipal Corporations Waterworks Act 1872, all waters abstracted by municipal corporations for domestic supplies were deemed to be the property of and vested in the Crown.

Statutory  
intervention on  
water ownership

However, while ownership was uncertain, in early New Zealand, the Crown assumed the right to control and license private water uses by statute. Provincial laws from at least 1864 provided the legal authority for privately owned water-powered flourmills and sawmills to use water for power. Specific water rights for mining, irrigation, and hydroelectricity were established by statute, as with the Gold Fields Act 1862, Mines Act 1877, Public Works Act 1882, Water Supply Act 1891, and Water-power Act 1903.<sup>19</sup> These, and their amendments, consolidated the Government's control over water, regulated potential conflict between farming, mining, and industrial interests, prevented monopolies, and assured public access or private usages.<sup>20</sup>

Statutory  
modifications of  
water-use law

Today, the Crown assumes the right to control, manage, and allocate water uses – in particular, under the Resource Management Act 1991 – but the legislation does not address the question of ownership.<sup>21</sup>

A popular view is that rivers were always 'public property' with the Government regulating user access. There was no legal basis for such a thing as a 'public title', as distinct from Crown land. The Crown appropriated land for public use, scenic reserves, and (following the gift of Tongariro National Park by Maori in 1887)

'Public interest'

17. *Blackstone's Commentaries on the Law of England* (1765) 2 Wm Bl 14, 18 (cited in A Angell, *Treatise on the Law of Watercourses*, p 11, and doc c21, p 8). Claimant counsel also challenged this proposition as a principle of law, but for the same reasons as above it was not pursued.

18. Roche, ch 1

19. For an overview of the Crown's power generation monopoly and its eventual relinquishment in 1987, see Waitangi Tribunal, *Te Ika Whenua Rivers Report*, Wellington, GP Publications, 1998, secs 5.1–5.4.

20. Roche, ch 1

21. The Crown's presumptive right to control water uses, including discharges as well as abstractions, was eventually provided for in more extensive form in the Water and Soil Conservation Act 1967. Section 21(1) vested in the Crown 'the sole right to dam any water or stream, or to divert or take any natural water, or discharge natural water or waste into any natural water, or to use natural water'. This and a host of water and land use laws were brought together and modified in the Resource Management Act 1991, which provides the current regime for resource consents for water uses, balancing commercial and environmental interests. ECNZ has to apply for consents to divert the Whanganui and Whakapapa Rivers under section 30(1)(e) of the Resource Management Act, although its rights granted under the previous legislation continue until the expiry date.

national parks, but the land remained Crown land.<sup>22</sup> Rivers were not appropriated for public use and the non-tidal parts were privately owned, but the Crown presumed to control the use of them just as it controls or delegates the control of private land uses today.

**Queen's chain**

Another popular view is that the public has always had a right of access along river banks, foreshores, and lake edges over what is called 'the Queen's chain'. There is no basis for this at English common law.

It has been claimed that an instruction from the Secretary of State for Colonies to Governor Hobson on 9 December 1840 is a constitutional commitment because that instruction was attached to the 'Charter under the Great Seal for the future government of New Zealand as a separate Colony'.<sup>23</sup> This is not the case. The instruction was separate from the charter and does not invoke the concept of a Queen's chain. As with all other sets of instructions issued before responsible government, they were merely a reflection of a particular administration's policy. In paragraph 43, about the establishment of the survey office, the Colonial Secretary instructed Hobson to require and authorise his Surveyor-General to:

Reserve in each county, hundred, and parish, so to be surveyed by him as foresaid, for public roads and other internal communications, whether by land or water, or as the sites of towns, villages, churches, school-houses, or parsonage houses, or as places for the internment of the dead, or as places for the future extension of any existing towns or villages, or as places fit to be set apart for the recreation and amusement of the inhabitants of any town or village, or for promoting the health of such inhabitants, or as the sites of landing-places which might at any time in the future be expedient to erect, form or establish on the sea coast or in the neighbourhood of navigable streams, or which it may be desirable to reserve for any other purpose of public convenience, utility, health, or enjoyment . . .<sup>24</sup>

Earl Grey sent similar general instructions to Lieutenant-Governor Grey with the 1846 charter.<sup>25</sup> The significance of these instructions has been exaggerated, and the responsibility for survey went to the provincial governments from 1852 until 1876. The first provision for a Queen's chain was in the Land Act 1892. Under section 110, when the Crown sold lands abutting the foreshore, lakes over 50 acres, or streams or rivers wider than 33 feet, a one-chain strip was to be reserved and

22. But see now the definition of 'Crown land' in section 2 of the Land Act 1948, as 'land vested in Her Majesty which is not for the time being set aside for a public purpose' and so on. While national parks and many reserves are still Crown land, statutory appointees undertake management, as with the Department of Conservation. Principal statutes are the Conservation Act 1987, the National Parks Act 1980, and the Reserves Act 1977.

23. Margaret O'Brien, *Community Perspectives of Riparian Management: A Case Study in Marlborough*, Department of Conservation Research Series, no 79, 1995, p 1

24. Lord John Russell to Hobson, 9 December 1840, BPP, 1840, vol 3, p 162

25. Earl Grey to Grey, 28 December 1846, BPP, vol 5, p 542. For an overview, see Joanne M Johnson, 'The Queen's Chain: The Development of Legislation', dissertation, degree of surveying, University of Otago, 1990.



vested in the Crown. This provision did not affect lands that had already passed into private ownership.<sup>26</sup>

### 2.3 MAORI CUSTOMARY TENURE – COUNSEL’S ARGUMENTS

In lengthy submissions on Maori tenure, claimant counsel argued that the Atihaunui tribal interest in the river was never properly provided for in the Native Land Court’s extinguishment of customary title. As a result, it has never been extinguished. To the extent that it may have been extinguished, the extinguishment was contrary to the principles of the Treaty of Waitangi.

Claimant counsel submitted that the river is a taonga and a possession of central significance, temporally and spiritually, to all of Te Atihaunui. It is essential to their identity, culture, and spiritual wellbeing. Historically, Te Atihaunui had asserted rangatiratanga, or control, over it.

A taonga

The river is seen as a living entity with its own personality and life-force, counsel argued, and as an indivisible whole, not something to be analysed by the constituent parts of water, bed, and banks, or of tidal and non-tidal, navigable and non-navigable portions. Past judicial determinations of Maori interests were erroneous, for they relied on such divisions, she contended. The decisions had fitted Maori interests into categories that were relevant to English law so that Maori interests had not been assessed in terms of Maori concepts. Moreover, the whole river was a traditional fishery of the Whanganui people, not just particular parts, and the whole had been used as a waterway.

A living whole

For the same reason, claimant counsel argued, *ad medium filum aquae* should not have been applied as a principle in deciding Maori interests. In addition, there were both tribal and individual interests in the river, and the Native Land Court’s determination of ‘ownership’ according to individual occupations and uses failed to provide for the tribal interest and diminished that which Maori had in fact.<sup>27</sup>

Ad medium and tribal interests

Crown counsel’s submissions were no less lengthy and detailed. She challenged the existence of a general tribal property in the river. A supposed tribal interest gave a false hierarchy of rights, making hapu and individual interests subordinate to those of the iwi, while historical records show that such proprietary interests as existed in the river were held by individuals and hapu. Practice showed a correlation between the ownership of property interests in the river and the ownership of property interests in the adjoining land, so that the principle of *ad medium filum aquae* had application in terms of Maori custom. Consistently,

Crown counsel – no general tribal property

26. The provision was later re-enacted by section 58 of the Lands Act 1948. Current provisions for public access along rivers, lakes, and seas are sections 230 and 237(f) of the Resource Management Act 1991, requiring esplanade reserves and strips on the subdivision of land, and sections 24 and 24c of the Conservation Act 1987 on marginal strips arising from the alienation of land by the Crown. For land use planning purposes, section 6(d) of the Resource Management Act 1991 identifies the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers as a matter of national importance. Many lands in private ownership continue to run to the riverbank.

27. Documents A77, D18, D20

evidence with regard to a similar situation, the sale of lands adjoining the sea, showed that Maori expected the purchasers, or the European people, to have rights in areas when the riparian or seaboard lands were sold.<sup>28</sup>

Ownership and  
spiritual dimension  
not formerly  
stressed

Crown counsel relied on a substantial and documented submission from Crown historian Fergus Sinclair, who, drawing upon archival accounts from Europeans, Maori petitions, and Native Land Court records, added that such proprietary interests as existed were interests in particular resource uses, none of which amounted to ownership of the river as such.<sup>29</sup> The claim to the ownership of the river, as distinct from particular resources or erections within it, depended upon assertions of a metaphysical and ideological nature, Sinclair argued. Such assertions and a claim to a spiritual relationship with the river were not raised until recently, and were not evident in the early record. The more modern spiritual claim was contrary to the tenor of the historical accounts where Maori expressed themselves in a practical and matter-of-fact way, and were concerned with particular interests of a more proprietorial kind.

No water ownership  
or iwi over-right

The claimants appear to claim ownership of the water as well as the bed, Sinclair submitted, and there was no evidence of any Maori custom supporting the ownership of running water. In any event, it is doubtful that Maori considered that a river could be owned; instead, Maori saw themselves as owning only particular interests in it. Further, contrary to claimant contentions, modern scholarship suggests that there was no group larger than the hapu that had a regular corporate existence and that, therefore, was able to possess a tribal right in the river as a whole.<sup>30</sup> There is also evidence that, amongst Maori, no single chief was so paramount as to be able to tell the chiefs of other hapu what to do. In the result also, it was hapu, not iwi, that made claims to ownership in the Native Land Court, and in awarding titles to the individuals of the hapu, the Native Land Court was merely giving effect to contemporary Maori preference.

Thus, Crown counsel saw use rights as less than English legal ownership. They were also seen as separate from authority and control. Crown counsel asked if it was correct to assume that the totality of Maori interests could be described as 'rangatiratanga'. As Sinclair had pointed out, claims on the basis of mana, or authority, and claims on the basis of descent from a remote forebear, either of which could have the effect of including the whole of a tribe, were generally rejected in the Native Land Court in favour of actual occupancies of specific areas. Accordingly, Crown counsel also sought the Tribunal's view on whether Maori interests were only rights of use and thus different from ownership in the English legal sense; whether Maori interests in the river should be severed to their component parts, with fishing interests separate from spiritual interests, for

28. Reference was made to earlier Tribunal opinion that Europeans could not be excluded from water bodies: Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Government Printer, 1985, secs 8.3, 9.2.3; *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, para 5.5.2.

29. Document C10, pp 1–4

30. Particular reference was made to Angela Ballara, 'The Origins of Ngati Kahungunu', doctoral thesis, Victoria University, 1991, of which the Tribunal has a copy.

example; and whether the component parts of the spiritual interests could be further identified.

In replying, claimant counsel challenged the distinction between authority and control on the one hand, and ownership on the other. Counsel contended that the focus had to be on rangatiratanga, or the mana to control possessions, and reiterated that thinking in categories of property interests, with the river seen only as a resource, and not as a taonga essential to the identity, culture, and spiritual wellbeing of the people, merely perpetuated the English property approach.

Claimant counsel further submitted:

- First, that the historical material Crown counsel relied on was set in no developed context; ideological beliefs had not surfaced early because there was no willingness to argue spiritual beliefs in debates with Europeans; and tribal interests were not inimical to, or inconsistent with individual use rights, but the two coexisted.<sup>31</sup>
- Secondly, the equation of ownership with occupation was too simple for the complex array of use rights that in fact existed.<sup>32</sup> Contrary to Crown counsel's submissions, group identity and united action by Atihaunui was apparent from early European accounts. In law, there is no sound distinction between 'metaphysical' and 'property' interests for the ascertainment of rights; the law does not in fact dismiss spiritual interests or other intangibles in assessing property interests; and the courts have taken full account of spiritual dimensions in the past.<sup>33</sup>
- Thirdly, the law on the ownership of running water is of recent origin, the legal position is still uncertain, and a Maori interest in running water has been acknowledged by governments in the past.<sup>34</sup>

Thus, we were faced with two different approaches: the legal approach of Crown counsel, with its inevitable compartmentalisation, and the Maori approach of claimant counsel, with its inevitable holism.

We found help in the Privy Council warning of 1921, to which Ms Elias adverted, cautioning that "There is a tendency operating at times unconsciously, to render

Custom to be seen  
in own terms

31. It was added that Justice Cooke had so found in *In re the Bed of the Wanganui River* [1955] NZLR 419, 433.

32. Document D18(a), pp 17–18

33. Intellectual property and company law, it was contended, were built on abstract concepts, and even the notion that land can be owned is itself a legal construct that does not follow from any a priori principle, as is illustrated in the Maori position that land is not owned. The common law was capable of managing the abstract concepts of distinctive cultures, reference being made to *Mullick v Mullick* (1925) 52 LR Indian Appeals 245 (the juridical status of a hindu idol) and *Bumper Development Corp Ltd v Commissioner of Police of the Metropolis and Others* [1991] 4 All ER 638 (the legal personality of a Hindu temple), and to the approach taken in New Zealand on Maori interests in rivers in *Huakina v Waikato Valley Authority* [1987] 2 NZLR 188 and *Te Runanga o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20. Likewise, there is no property in fish until captured, yet fisheries give rise to property rights.

34. It was added that the legal position on water ownership was left open in the report of the interdepartmental working party (doc A77, vol 6), p 24. Maori claims were one reason, as noted in Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 7.4.4. Statutory indications of a Maori interest in water are apparent in section 6 of the Whanganui River Trust Board Act 1988 and section 3 of the Thermal Springs Districts Act 1881.

that title [to native land] in terms which are appropriate only to systems which have grown up under English law'.<sup>35</sup>

## 2.4 RESOLVING THE ARGUMENTS

**Issues** The arguments showed the need for a comprehensive view of Maori relationships. Later, aspects will be revisited in more detail, but at this point we are mainly concerned with the central issues to which the arguments can be reduced. The first concerns how, in Maori law, the relationship is managed between broad tribal interests (if there are any), and individual or family use rights. The second relates to the two laws, and whether English 'ownership' equates best with Maori 'use', Maori 'possession', or both ('possession' in this context including the 'control' of that possessed). The third is an aspect of the second and concerns the political relationship between Maori and the Crown. The question is whether, for the purpose of applying the principles of the Treaty of Waitangi, Maori interests are to be compared with private ownership at English law, or with the underlying possession of the relevant territory, which the Crown has in England.

**Context** The questions must be answered in the context of the social framework of the affected Maori people, and not in the context of any alien structure to which Maori norms do not relate. A point-by-point examination of each of counsel's views does not provide this context, and as a specialist and inquisitorial body, we prefer to start with an overview of Maori social dynamics that posits Maori river interests within their own social fabric, leaving answers to emerge along the way. This approach also enables the other contentions, earlier mentioned, to be dealt with at the same time.

**Relevance of contemporary accounts** For now, we make some comments on methodology. While we accept submissions for the Crown that perceptions of the past must be grounded on evidence from the period in question, perceptions from the period in question are still conditioned by that which went before.<sup>36</sup> It is not enough to rely on contemporary commentaries during a time of change, when, by river intrusions, land acquisitions, and native title reforms, Maori law was being reconstructed to fit an English framework. One has still to consider the preceding philosophies of the parties to determine where each was coming from. In the same way, even today, lawyers revert to early law in deciding current rights, as Crown counsel did when debating the ownership of running water.

**Isolated accounts do not provide the underlying philosophy** Similarly, isolated observations from the historical record do not provide a sound scholastic base for deciding contemporary societal norms, especially if the evidence was not part of a discussion of social structures. Such observations disclose only snapshots, and not an underlying philosophy. The Crown argued

35. *Amodu Tijani v Secretary, Southern Rhodesia* [1921] 2 AC 399, 403 (cited in *Tē Runanga o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 26)

36. Document c10, p 88

that, because Maori had day-to-day concerns with particular properties, individual property rights prevailed as in England. However, it is only by reference to the philosophies of each culture that an over-right may be discernible, whether it is vested in a tribe or a monarch.

If isolated accounts cannot be put into a context, they are of little use in argument. They can be meaningfully used only when the context is known and the author has, from prior studies or experience, sufficient knowledge of the ethnic group to place them in perspective.

Protests about particular property infringements may establish no more than that those infringements were the immediate manifestation of the problem at the time, or most directly affected the person protesting. They do not in themselves establish that individual uses of resources had priority and that Maori law was therefore similar to that of England or that general tribal interests did not exist. Any larger implications of the infringements of property interests, if seen at all at the time, may have been more difficult to cope with. Likewise, a response for any general tribal interest may have been harder to arrange, especially if there were no permanent tribal committee to reply. A tribal response may also need to be handled in another way, for at that level, the issue is not limited to property but concerns the political status of the tribe vis à vis the status of the Crown.

Individual protest  
and wider tribal  
interests

Thus, major issues may begin with small ones. The question of who owned the bed of Lake Rotorua, for example, began with a debate on whether a certain Maori could fish for trout at the Oahu channel. The initial debate about one person's rights did not mean that the individual had priority or that there were no larger interests involved.

As to values, evidence of contrary conduct is not evidence that particular values do not pertain. The value a society places on peace and security, for example, is not negated by copious records of violence in that society – the sorts of records that might be compiled from newspaper accounts of proceedings in the courts. One must look to what people generally believe in or would aspire to, and not just to that which is sometimes done.

Underlying values

So, too, little should be made of the fact that people spoke mainly of damage to their properties, their eel weirs, for example, and in a practical and matter-of-fact way, without esoteric explanations of the spiritual dimensions of their lives. Who in our society would lecture on property regimes or religious beliefs to cope with someone who had damaged their car? It is only when the full import of events is obvious, and is seen as destructive of the culture as a whole, that the debate shifts to a higher plane.

Underlying beliefs

Finally, the question of whether Maori were unduly tardy in raising a spiritual relationship with the river is a separate question from whether a spiritual relationship with the river existed in fact.

## 2.5 MAORI INTERESTS

### 2.5.1 Customary structures

#### Three levels of interests

We now summarise our understanding of the distinctive elements of Maori custom that are relevant at this point, adopting for the moment a Western, categorised approach in order to explain. It appears to us that these items of custom are common to Maori throughout the country. The first is that use rights, personal identity, and executive functions were all seen to arise from ancestral devolution and to exist contemporaneously at the three levels of the individual, the hapu, and the people of the common descent group as a whole.

#### Importance of single, broad claim

Accordingly, in managing the current claim we have been concerned to hear both the people as a whole and the hapu individually. To deal with each hapu, separately, would prejudice any collective interests, but particular interests may still be brought into account when treating with the collective.

#### Web of customary interests

The second is that at the personal level, and to a large extent at the level of the hapu as well, use rights were most regularly in the form of a licence to access a particular resource in a certain way, at a prescribed time. They were rarely in the form known to Europeans of an individual right to access all the resources of a prescribed area, in any way, and at any time. As a result, a complex web of customary usages existed. To illustrate the point, one resource might be utilised by different persons or hapu at different times, or even by several hapu at the same time.<sup>37</sup>

#### Individual interests not absolute

Thirdly, rights to access resources were rarely absolute. The personal use of resources was surrounded by social obligations to contribute to the hapu according to its laws, and was conditioned by the ethic that mana came not from the aggregation of property rights for personal gain but from one's contribution to the community. Those persons who built an eel weir, for example, may have claimed it as theirs, not to secure an exclusive ownership but to secure the honour, or the mana, of having made it. Thus, Maori could fiercely debate the right to something but at stake was a question of mana, not an individual gain in wealth. The incidence of property accumulation as understood by Europeans was not the primary or key motivator for Maori action. The ethic or value of providing for the group was.

#### Hapu interests not absolute

The resources thus existed for the benefit of the people of the several hapu. From this, it might be extrapolated that the underlying proprietary interest was vested in the hapu, but the hapu interest was not absolute either.

Whakapapa networks were very complex. Some smaller settlements comprised members of one hapu, while larger ones usually included people from several hapu. Major hapu had a presence in more than one settlement. An incomplete list compiled from nineteenth-century records gives 52 Atihaunui hapu.<sup>38</sup>

37. See Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c1769 to c1945*, Wellington, Victoria University Press, 1988, pp 194–195. Also, the works of Ron Crocombe on land tenure in the Pacific, as referred to by claimant counsel, provide significant insights to the numerous types of use rights that were held by individuals and by large and small groups. The rights to which he refers have application to the New Zealand Maori situation: Ron Crocombe, 'Overview', in *Land Tenure in the Pacific*, Ron Crocombe (ed), Melbourne, 1971 (doc D18(a)), pp 17–18.

38. Document A47, p 26; T L Downes, *Old Whanganui*, Hawera, WA Parkinson, 1915 (doc A40), pp 163–164

Relationships between neighbouring hapu were not always cordial. A rangatira, for example, might place a rahui over part of the river as a reprisal for a provocation. It was a main responsibility of the rangatira of the river to resolve such situations, calling on the assistance of other leading rangatira if necessary.<sup>39</sup> It was also their responsibility to provide leadership in the defence of the region against threats or incursions from outside people, either by diplomacy or by military leadership. This was a real threat. Thus, a taua could get from Taumarunui to Putiki-waranui in two to three days and there were tracks on the right bank from Ngati Ruanui, Te Atiawa, and Ngati Maru, and on the left from Ngati Tuwharetoa and Ngati Kahungunu.

The hapu were related by descent, with marriages and gift exchanges renewing the bonds between them. Rangatira maintained an interest or a say in the affairs of several hapu and they needed each other for protection. Any major decision on the resources of a place or the affairs of the people as a whole might be made by the rangatira of many hapu spread over a wide area, or ultimately by rangatira from throughout the descent group's district.

Accordingly, while there is strength in Crown counsel's argument that no single chief of a descent group was consistently paramount (though often a powerful rangatira might have mana over many hapu or all the hapu of a group) it does not follow that there was no tribal entity above the hapu. Tribal combinations existed (though not tribal institutions of authority), and not because of the paramountcy of one rangatira but because of the paramountcy of several when acting in concert.<sup>40</sup> It has to be remembered that a rangatira was not a chief in the generally understood sense of a single leader of a tribe. A rangatira was a leading figure who brought people together, but in any hapu there were many rangatira, and many more for the people of the descent group as a whole. In pre-European times, there was no concept of a single, personal leadership, but in 1853, a number of rangatira sought unity through the raising up of one of their number as king.<sup>41</sup> Te Anaua and Peehi Turoa were in turn visited to see if they would consent to being king, but though they supported the appointment, they declined the honour.

The recognition of a wider descent group than the hapu has in turn led to the view that the ultimate proprietary right, or the over-right of control, was vested in the iwi, or all the people of the descent group as a whole, 'iwi' meaning simply 'the people'. This, too, may overly formalise or exaggerate the position. It is certainly true that the people as a whole had an interest in the whole of the land that the descent group possessed, but we consider that there was no absolute or ultimate right anywhere, in the Western sense. Rather, there were interests at each of the three levels described, those of the individual, the hapu, and the people, and these were mediated or brought into account according to the circumstances of the case. In practice, no person or group at any level could act without considering the

Recognition of  
larger group  
identity

No one level  
paramount

39. Document D24

40. Ballara, *Iwi*, pp 179–193

41. Ibid, p 218; John Te H Grace, *Tuwharetoa: The History of the Maori People of the Taupo District*, Wellington, Reed, 1959, p 444

interests of the other two, or at least not without the risk of losing possession of what they had.

**The people**

In this claim, there was no argument that those customarily entitled to the river's benefit were the people of the hapu that line the river or lined it in former years. Although these hapu or tribes multiplied over the years, and although their structure and names changed with the passage of time, in the usual way, the people concerned were still the same. Members of the many river hapu retained the original ancestral name of Te Atihaunui-a-Paparangi, also called Atihaunui or Ngati Hau. As a collectivity, they are thus known by the name of one of the founding ancestors, Haunui-a-Paparangi, who many generations ago came with Turi on the Aotea waka to settle in the area with the original people, Nga Paerangi. Their lineage is also from certain of the Kuruhaupo waka, especially Haupipi, and there are connections to other waka as well. All find commonality under the Atihaunui title.

As the descendants of Haunui spread along the river, forming new hapu or tribes in the process, it was not unnatural that they should collectivise at more regional levels from time to time, or that these combinations should accord to the natural geographic divisions of the river in roughly its upper, middle, and lower reaches. These combinations varied according to different purposes and changing allegiances, but consistent with the Maori concern to maintain their ancestral identities, the sense of commonality under Te Atihaunui-a-Paparangi was kept.

**Levels of  
identification**

In the result, the Whanganui River Maori identified at various political levels. The first, that which we would equate with 'tribe', or the most regularly functioning political unit, was the hapu, formerly represented in a settlement or group of settlements comprised of several closely related whanau (families). They also operated or identified from time to time as a regional group, generally according to the river's upper, middle, or lower parts. Then, despite occasional hapu and regional rivalries, the hapu of the three regions also identified as a people, or iwi, under the calling of Te Atihaunui-a-Paparangi. It was clear to us from the evidence, and from visiting the many marae of the area, that these identities are maintained to this day. Although formerly 'iwi' was not a regularly functioning unit, and the people came together mainly to defend the area in war, this larger identity served to remind the people of their common origins, that they might work together when confronting an outside force.<sup>42</sup> Thus, many who spoke to us described how the people traditionally saw themselves, as one claimant researcher put it, 'both as separate groups and as a collective whole'.<sup>43</sup>

**River as a unifying  
force**

Accordingly, we agree and disagree with Crown counsel. We accept that which Fergus Sinclair pointed out, relying upon material from Angela Ballara, that in traditional society the group exercising regular corporate functions was the hapu, and not the collective entity of the people, or the iwi. However, we consider that

42. Thus, while there were battles between hapu, there was also a unity if that were required. For example, when the people as a whole were threatened during the musket wars, they joined together to repulse attacks from Te Rauparaha and others in the 1820s and the early 1830s.

43. Document A49, p 8



there was still a wider interest, though the extent to which it had a regular effect or influence may have varied from place to place over the country, according to various circumstances such as geographic dispersal and overlaps or close relationships with other major descent groups.

In Whanganui, the river added significantly to common descent as a unifying force, together with the fact that the dispersal of the people was not broadly across the ancestral territory but narrowly throughout the length of a long river flowing through a precipitous terrain. Again, a mountainous hinterland meant that overlaps with other descent groups did not apply generally throughout the tribal area and were limited mainly to the open lands at the northern and southern extremes. The river was thus a ready link between the various sections of a relatively homogeneous descent group. Although there is a record of internecine rivalry, there is also a record of concerted action, as a people. There is, therefore, a double metaphor in the 'tupuna awa' as the river that is an ancestor. While it gives vent to creation beliefs, it stresses that, just as an ancestor brings people together, so also does the river.

Accordingly, we see the social and political structure as one where, in a very real sense, Maori interests existed at the three levels of the individual, the hapu, and the people.

The political structure forms only part of the picture. The peculiarities of traditional resource-use entitlements are relevant too. Maori claimed use entitlements by reference to the actions of remote forebears and the maintenance of particular uses by later antecedents. Once more, ancestors provided the putake, or the source of the individual's entitlement to utilise a particular resource in a certain way, and so also the entitlement of their families and hapu. Accordingly, ancestors underpinned both the use entitlements and the identities of individuals and their associated groups.

Basis for resource  
uses

The river was little different from the land in that respect, as both a resource and a source of identity. The actions and usages of remote and subsequent forebears were cited for the river in the same way as for the land to legitimise particular contemporary usages or to show the connections between hapu, the interconnectedness of the people as a whole, or the connections to other descent groups. The choice of ancestor depended upon the purpose. So, also, in the case of the river, ancestors were invoked to emphasise that, while a host of river uses obtained in different parts, the people as a single entity also held the right to the river. Accordingly, when speaking of the river as a whole, three ancestors have been regularly invoked by the people when speaking amongst themselves, or to others, or to tribunals and courts, to show that, though the river flowed through many places, the river, like the people, was a single entity. The ancestors, as earlier noted (sec 1.2), were Hinengakau, who was associated with the river's upper reaches, Tama Upoko, who settled in the middle, and Tupoho, who was known for the lower part. The point is that these three ancestors were siblings, the children of Tamakehu, a leading rangatira of Te Atihaunui-a-Paparangi and his first wife, Ruaka. The children's names thus served to illustrate the people's basic unity. We

Three symbolic  
ancestors

had to keep their names in mind, for they were regularly referred to in this and earlier inquiries.

**Other symbols of  
unity**

Traditionally, this ancient sentiment of unity found expression in art, song, and proverbs. These, too, should be noted, for past advocates or adjudicators have treated the resultant symbols as fanciful and have not looked to their underlying meanings. Thus, carvings on the tribal meeting houses at Ngapuwaiwaha and Putiki, towards either end of the river, depict a rope of three strands signifying the unity of the three river sections. They also illustrate certain tribal sayings, such as, for example, that the people are ‘a spliced rope, entire from source to mouth’, which is also encapsulated in the expression ‘te taura whiri a Hinengakau (the plaited rope of Hinengakau), a reference to Hinengakau and her two brothers. It is also said, in the context of internal feuds or outside conquests, that ‘a spliced rope, if broken, is made whole again’. The symbolism was important to remind the people of their interconnectedness, the more so since the river, like the land, had different names at different places, the name ‘Whanganui’ originally applying mainly to the lower reaches. Other parts were variously called Te Awanui a Rua, Te Awanui a Tarawera, Te Wai Tahuparae, and Te Koura Putaroa.<sup>44</sup> Although the river was variously known at different places, the river’s flow was a reminder that the people, like the river, were still part of a whole.

**Boundaries and  
other groups**

We interpolate a caveat at this point. The picture of an iwi estate with defined boundaries is misleading. Though the natural geography tended to isolate the Atihaunui people, Te Atihaunui were surrounded by other major descent groups. These included Ngati Tuwharetoa at the northern headwaters, Ngati Maniapoto and Ngati Maru on the northwestern tributaries, Ngati Ruanui and Nga Rauru by the western catchment area, and Ngati Apa to the south and east. Through intermarriage, hapu on the border lands could relate to the descent groups on either side. By way of example, at the northern end, people relating mainly to Tuwharetoa might freely take tuna at Papakai or other places at the Whanganui headwaters, on account of their marital and ancestral ties, and those at Papakai might fish or hunt around Lake Rotoaira. At the southern extremity, there were blood ties with Nga Rauru to the west and Ngati Apa to the east. These relationships are a reminder that Maori identities are defined by whakapapa, not boundaries, and loyalties may fluctuate according to the temperament of the border hapu at any time.

Traditionally, these overlaps did not present a problem, for connections with other tribes were invoked to add to one’s strength and to keep the peace, not to start a war. Nor do they present a problem in this case, for the claimants are experienced in Maori protocols. We could not help but notice how senior delegates from outer groups were present at the hearings, how connections to each were recited on the marae, how their interests were acknowledged, and how their mana was maintained. Although there was the prospect of a cross-claim from Ngati Apa, the claimants acknowledged the blood ties and the matter was not pursued.

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44. Document A50, p 3; doc A77, pp 78–89

In this traditional climate, understandings may exist that make it unnecessary and uncustomary to lay down defined boundary lines. It may be sufficient to say, as Hikaia Amohia is reputed to have said with reference to Tuwharetoa, ‘the further you go up the river, the thicker the blood becomes’.<sup>45</sup>

We sound a similar warning on the boundaries of hapu, for the picture of diverse hapu utilising discrete river sections is equally at fault. Hapu, or individuals, used parts of the river at widely different places and were highly mobile. It appears that all hapu travelled south to fish kahawai at the river mouth, for example, and that groups from as far apart as Pipiriki and Taumarunui fished for tunariki at the confluence of the Ohura and Whanganui Rivers. In addition, the individual tribal members were invariably connected to more than one hapu, and their lineages could give them access to the resources of many places. Large sections of the people sometimes relocated, as did those led by Te Mamaku, who left the upper reaches to establish a pa in the centre during the musket wars of the 1820s. In those days, such overlaps or movements were not necessarily a source of friction and could add to the sense of commonality.

Hapu boundaries

This is not to say that the hapu were never located in one place. They were, and in travelling along the river, the mana of each would need to be respected. They operated from centres of interest, however undefined at the edges. Lines were drawn for cultivations, hunting areas, or war (the aukati marking not necessarily jurisdictional boundaries but defensible positions). Some recent tendencies to see hard and fast hapu boundaries appear to be an exaggeration, or fail to appreciate the existing Maori dynamic.

It is thus consistent with custom that, with the exception of only one group, the many Maori who appeared before us strongly supported the presentation of a united claim and urged that their collective concerns be managed by a group or body representative of them all. However, we did not understand this to mean that such a body had the primary right or authority over the river. The distinction, we consider, is important, and is now further elaborated on.

On hapu and iwi

It appears that, traditionally, the individuals of the hapu or individual families had the primary right of river user, although fishing expeditions or major eel weir constructions might be undertaken on a hapu or combined-hapu basis. As the Tribunal considered in the *Mohaka River Report 1992*, adopting submissions of researcher Graham Butterworth, the individual or family interest was limited by the proprietorial right of the hapu to control use and access in the area.<sup>46</sup> We also consider, however, that when the actions of one hapu were likely to affect its neighbours, a decision was most likely to be made by a meeting of the district hapu. Sometimes, there was a meeting of the rangatira for the whole river, and when one hapu was threatened by a group from outside, several hapu, or the hapu as a whole, might come to its aid. We thus concur with the opinion in the *Mohaka River Report 1992* that hapu interests in turn were either constrained or assisted by the larger

45. Brief of evidence of James Ritchie, Wai 201 ROD, doc B28, p 6

46. Waitangi Tribunal, *The Mohaka River Report 1992*, secs 2.9, 4.5.3

concerns of the principal rangatira of the several related hapu, who controlled or protected the resources of the iwi, or the people as a whole.

Relevance to this claim

Following the advent of Europeans, it was necessary that this traditional understanding should be taken a stage further. Increasingly, from the nineteenth century the river Maori, like Maori throughout the country, were, with varying degrees of success, seeking to work more often as one body to deal with outside forces. Today, such 'iwi' bodies have become common, and have emerged as established, functioning, units to represent the many hapu on those matters that affect them all. This claim provides an occasion where such iwi representation is now required, in our view, in the interests of all. None the less, a tension remains as to the respective roles of hapu and iwi bodies. In defining those roles, we think it important to recognise that, while changes have taken place, the traditional ethic has remained the same: that is, political authority moves from the bottom up. Accordingly, the legitimacy of an iwi group today, in our view, depends on its accountability to the hapu, its respect for hapu autonomy, and its sensitivity to local conditions and interests.

Hapu and combined hapu interests

For those reasons, it appears to us, first, that individual and hapu interests, while mainly associated with one place, were not confined to that place. Individuals could have use rights in many different areas along the river's length, and hapu groups could find themselves fishing at sites far removed from their homes. The hapu, in any event, were mobile and could relocate. Persons from different hapu could also combine for fishing purposes.

In brief, the record of uses of the river by particular persons or hapu at the places near to their habitations is by no means a complete record of the river uses that applied. Persons and groups had interests in eel weirs and other structures a distance from where they lived. The whole river was a fishery, and the people of the river fished generally.

While particular hapu might block parts of a river in times of war, and while each hapu had a rangatiratanga of its own, the right of control depended ultimately on the collective authority of the people. In the final analysis, control and rangatiratanga vested in the people as a whole, and it was this collective interest that was most expressed in oral and artistic imagery.

In modern terms, representation through a single body like the Whanganui River Maori Trust Board is appropriate in this case, but there must be sensitivity to particular hapu interests and the traditions for both hapu autonomy and hapu cohesion.

### 2.5.2 A mana-based approach

The foregoing has endeavoured to explain Maori structures in terms comprehensible to lawyers in light of the preceding legal argument. A Maori approach, while reaching the same result, would not be quite the same. Professor James Ritchie, based on his experience and discussion with Maori over many years, expressed a more cultural perspective to the Tribunal in the Whanganui-a-Orotu

claim.<sup>47</sup> He has had a particular interest in the Maori perception of water regimes, and gave evidence thereon to the Tribunal as early as 1984, in the Manukau claim.<sup>48</sup> He has also given evidence for Atihaunui in the minimum flows hearings.

In the Te Whanganui-a-Orotu case, Professor Ritchie began with a discussion of the mana of the rangatira, founded on the whakapapa, or genealogies, that are central to Maori thinking, with emphasis, not on structures but on personal relationships. He then examined the complex network of whakapapa that binds people together, linking all Maori in an inclusive pattern, and that gives rise to what he called mana tangata. By whakapapa, Maori link also to the gods, and since the gods produced not only people but all life-forms, and even things that have a force of their own – the mountains, rivers, wind, and rain – Maori see themselves as related to these things in a personal way.

Land rights and  
mana

The lands of the people, then, are defined not by boundaries but by relationships. The identifiable lands of a group of Maori people are the lands of their history, the places where their tupuna are buried, all those lands that they could occupy or defend, or on which they could keep their fires alight.

Boundaries and  
relationships

In other words, to get inside the Maori world one must set aside preconceived notions of State-like territories and concepts of private ownership or rights. In the Maori scheme, relationships were more important than boundaries, the former being inclusive and the latter tending to exclude. This explains why whole hapu could change locations, moving from one part of the river to another, why individuals could leave one hapu to live elsewhere, why a rangatira could have mana in many places along the river, and why a descent group could have the control of a territory but not insist on exclusive rights of user.<sup>49</sup>

It also explains why, on two occasions, certain early Europeans, visiting Whanganui for the first time, found the people who were fishing at the river mouth were from Taupo, and belonged to the different descent group of Tuwharetoa. A European might inquire of their territorial rights. A Maori would inquire of the relationship between the Tuwharetoa and Atihaunui people.

Accordingly, Ritchie went on to explain that the next component of mana is what some term mana huaanga – the possession of riches with which to show generosity to others:

Mana huaanga

[Mana huaanga], that mana which rises from riches, the possession of resource-rich territories or waters, the fruits of the bush, its birds, the eels, gardens and waters, inland or oceanic. These not only sustained the iwi but with these good things they could make their mana material through the hospitality they could offer and the koha which they could carry when they travelled or joined others in celebration, or to mourn.<sup>50</sup>

47. Brief of evidence of James Ritchie, Wai 55 ROD, doc E2; Waitangi Tribunal, *Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, secs 1.3–1.5

48. Submissions of R Mahuta and J Ritchie, Wai 8 ROD, doc B47

49. Brief of evidence of James Ritchie, Wai 55 ROD, doc E2, paras 6.3.1–6.3.4

50. Ibid, para 6.4

The mana and tapu associated with resources and features of the land, he submitted, are something that continues even after people have been removed:

The mana associated with tapu is never destroyed but goes on forever, whoever owns the land; land on which blood has been spilt, for example, will always be tapu, even after it has been bulldozed flat and had any and every kind of engineering damage done to it.<sup>51</sup>

We add that mana was also at the heart of traditional giving. It required that things, even land, should be given freely and generously, and that recipients should respond likewise in time. This fitted notions of honour and prestige, and of maintaining one's own mana while acknowledging that of others. The point of mana in this context is that, in a society where food preservation was limited and crops could fail, survival might depend upon the obligations owed by others.

## 2.6 THE MAORI COMPREHENSION OF RIVERS

### Importance of river values and beliefs

Maori losses over the Whanganui River depend on what they in fact possessed, but certainly they possessed more than rights of use. River despoliation and a foreign management regime denigrated Maori values and beliefs, affecting Maori self-esteem. It is necessary to consider how Maori saw and related to the river, recalling again the philosophy of their place in the natural order, and the centrality of the river to everyday lives.

### River's centrality for survival and cultural growth

It should be remembered that this is the second longest river in the North Island. Its gentle gradient makes it navigable for more than 230 kilometres, and yet the river flows through mountainous terrain. It has been a home for a numerous people from immemorial time, but a home that was built around a river life. The region was marginal for major food crops, but the river, with its eels, fish, freshwater shellfish, and waterfowl, provided the staples.

The river was also the pathway to the sea, and the roadway that knitted the people spread along its banks into a single entity. People travelled by canoe as far inland as Ongarue. Journeys upstream through the many rapids took from 10 days to a fortnight, but downstream journeys could be made in three days.<sup>52</sup> Small settlements were strung out along the entire length of the river.<sup>53</sup> A map provided by the claimants lists 143 marae.<sup>54</sup> The only sizeable inland settlements away from the banks of the Whanganui were in the Turingamotu and Manganuiateao Valleys.<sup>55</sup>

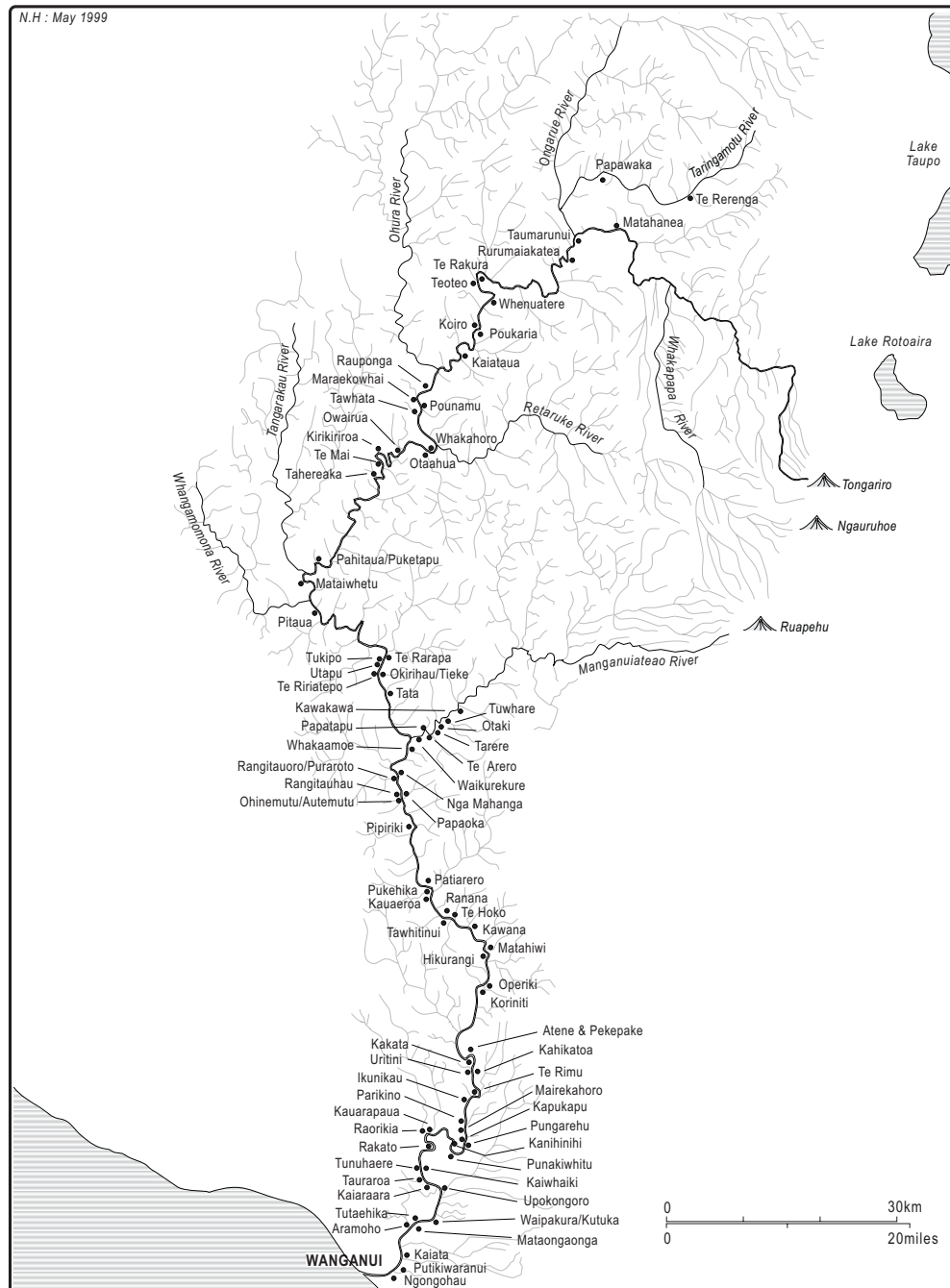
51. Brief of evidence of James Ritchie, Wai 55 ROD, doc E2, para 6.5

52. Document A47, p 9. This should be contrasted with James Belich's construction of a river journey in *I Shall Not Die: Titokowaru's War, New Zealand, 1868-1869*, Wellington, Allen and Unwin, 1995, pp 29-31.

53. Document A47, p 9

54. Document A60(a)

55. Document A47, p 10



Map 2: Pa sites on the Whanganui River. Source: doc A56.

Spring was the time for planting; summer for fishing at the mouth of the river; and autumn for taking eel and lamprey, harvesting, collecting berries, and storing food. People moved up and down the river and changed their places of residence in accordance with their seasonal calendar for gardening, fishing, and gathering food.<sup>56</sup>

56. Ibid, p 9

The mild gradient of the Whanganui River over most of its 300 kilometres and its numerous rapids made it an ideal river to fish. Down through the generations, Whanganui Maori studied the habits of the river's water creatures and became expert in trapping, preserving, and preparing them for eating. Eighteen species of native freshwater fish were found in the river and its tributaries, as well as koura, kakahi (mussels), and mawhitiwhiti (shrimp). Whanganui Maori were renowned for their pa tuna (eel weirs) and utu piharau (lamprey weirs).<sup>57</sup>

Food played a very important part in traditional hospitality, and delicacies such as dried fish taken at the mouth of the river and parrots caught in the upper reaches and preserved in calabashes in their own fat had a prized place in gift exchanges within the tribe and with other tribes.<sup>58</sup> Lavish presentations of food for important visitors were a powerful expression of the mana of the people providing them.<sup>59</sup> Ease of communication along the river facilitated these exchanges and no doubt intensified their competitive character.

Around the river had been woven many stories and beliefs. For the Atihaunui people, the river is a doctor, a priest, a larder, a highway, a moat to protect their cliff-top pa, and, with the cliffs, a shelter from winds and storms. It was, as the Tribunal said in its interim report, 'the aortic artery, the central bloodline of that one heart'.<sup>60</sup>

#### The emotive bond

The emotive bond cannot be described solely in terms of a sentimental regard for the landforms of one's country. Even the centrality of the river to the people's lives is insufficient to explain how they think of it. It is tied as well to the Polynesian comprehension of the environment, where a river can be described as a tupuna or matua as with a caring parent. This points beyond personification to fundamental beliefs.

#### Creation beliefs

As we see it, the relationship, for Maori, is first and foremost genealogical. Ancestral ties bind the people and the river. At our first hearing, Tiwha Puketapu called it the Rarangi Matua, or the 'chronological ancestral sequence which binds the celestial and temporal realms'.<sup>61</sup> Just as land entitlements, personal identity, and executive functions arose from ancestral devolution, so also it is by ancestry that Maori relate to the natural world. Based on their conception of the creation, all things in the universe, animate or inanimate, have their own genealogy, genealogies that were popularly remembered in detail. These each go back to Papatuanuku, the mother earth, through her offspring gods. Accordingly, for Maori the works of nature – the animals, plants, rivers, mountains, and lakes – are either kin, ancestors, or primeval parents according to the case, with each requiring the same respect as one would accord a fellow human being.

#### Codes of conduct

Consistent with this, fishing codes were extremely precise, not only to ensure the peaceful sharing of resources or to maintain stocks but more fundamentally to

57. Document A49, pp 14–15

58. E Shortland, *Traditions and Superstitions of the New Zealanders*, 2nd ed, London, Longman, 1856, p 214

59. Document A47, p 26

60. Paper 2.10, p 1

61. Document A51, p 2



keep faith with the gods, to maintain water purity, and to avoid any appearance of greed or disrespect. Propitiatory karakia, or prayers, regularly preceded expeditions. New nets were first blessed and then made whakanoa to avoid spiritual contamination. Rules of personal hygiene were punctiliously observed – there were places for bathing and places for religious ceremonies. Fish were not processed or consumed within the watercourse, fish waste was deposited in defined middens, and waste was generally not discharged to water but returned to the cleansing qualities of the land. Times for fishing different species were maintained, the sharing of catches was informally but still definitely required, and food was preserved, not least for personal consumption but to show gratitude to the gods by the sumptuous hosting of visitors. Codes of conduct for the regulation of society were all bound up with rituals of identity between people and the deity.

From the detailed cosmogony of the Maori, it follows further that all things have a mauri, a life-force and personality of their own, and it was certainly the case that a river was seen to be so endowed. Again, the mauri or the natural bent of a thing was to be respected. People could not alter it or fundamentally change its character without an appropriate propitiation of the associated ancestral god, by ritual and with evidence that the change was necessary for the wellbeing of the related people.<sup>62</sup> Conversely, if the mauri of a river or a forest, for example, were not respected, or if people assumed to assert some dominance over it, it would lose its vitality and force, and its kindred people, those who depend on it, would ultimately suffer. Again, it was to be respected as though it were one's close kin.

**Mauri beliefs**

A group may have another mauri again. A tree has a mauri, but so also does the forest, of which it is part. Likewise, a person has a mauri, while there may be another again for a group to which that person belongs. The mauri of the group may be stronger or preferred, for it is rare that Maori will examine the component parts of a thing without first looking to the ahua, or the shape and appearance of the whole. We thus noticed that when the claimants spoke of the river, or referred to its mana, wairua (spirit), or mauri, they might in fact have been referring not just to the river proper but to the whole river system, the associated cliffs, hills, river flats, lakes, swamps, tributaries, and all other things that serve to show its character and form. Sometimes this was explicitly stated, as with the people at Tieke, or in the submissions of claimant counsel. Thus, it appeared to us that when Maori and Pakeha spoke of the 'Whanganui River' they were not necessarily talking of the same thing. For Maori, it included all things related to the river: the tributaries, the land catchment area, or the silt once deposited on what is now dry land.

It follows that, in rendering native title in its own terms, the river is to be seen as an indivisible whole, not something to be analysed by the constituent parts of water, bed, and banks, or of tidal and non-tidal, navigable and non-navigable portions, as may be necessary for the purposes of English law. The following

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62. Customary precepts and the conditions enabling natural resource development were considered by the Tribunal in the *Report of the Waitangi Tribunal on the Manukau Claim*, sec 7.2, following submissions thereon from R Mahuta and J Ritchie (Wai 8 ROD, doc B47).

observations of the Native Land Court in 1929 with regard to the title to the bed of Lake Omapere are apposite:

The bed of any lake is merely a part of that lake, and no juggling with words or ideas will ever make it other than part of the lake. The Maori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soils that comprise a mountain. In fact, in olden days he would have regarded it as a rather grim joke had any strangers asserted that he did not possess the beds of his own lakes.

A lake is land covered with water, and it is part of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream.<sup>63</sup>

With regard to the mauri of water bodies, the court had this to say:

[to Maori] a lake was something that stirred the hidden forces in him. It was . . . something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a 'mauri' or 'indwelling life principle' which bound it closely to the fortunes and destiny of his tribe.<sup>64</sup>

#### River as tapu

The river might also be described as tapu, or sacred, though in these proceedings the matter was debated. In evidence before the Maori affairs select committee in 1980, the elder Titi Tihu considered that the river, or the water in the river, was not strictly tapu, though the river contained tapu sites.<sup>65</sup> However, it really depends upon the level at which one is thinking at the time. There is a sense in which all life forms and significant natural phenomena are sacred on account of the scheme we have described; that is, as part of the earth mother or the works of her offspring gods. Certainly, the river was seen as deserving of high respect and as having mana or power. This could apply to all rivers, but the Whanganui River, perhaps because of its length and the large attendant population, was held in special esteem. It was prayed to and was used in ritual, for healing, or as a medium to keep contact with the gods. Its awesome nature was enhanced by the many who had populated its length for generations, for in the result, numerous ancestral spirits came to be held within its flow. Accordingly, it is still regularly prayed to for healing purposes, as a prelude to an undertaking of some kind, or simply as a matter of course.

We understood that some parts of the river were especially sacred on account of a past event – a battle with many deaths, for example. It was also usual that each village had its own wai tapu, or sacred place, where children were dedicated to the

63. *Application by Ripi Hongi and Other Natives for Investigation of Title* unreported, 1 August 1929, Judge Acheson, Native Land Court (Bay of Islands Native Land Court minute book, vol 2, pp 253–278), p 7. For a commentary on that decision, see White, sec 7.8.3.

64. *Ibid*, p 8

65. 'Memorandum for the Select Committee on Maori Affairs in Support of the Petition of Titi Tihu and Hikaia Amohia Regarding the Bed of the Whanganui River', MA7/6/188, NA Wellington (doc B26, pp 517–518 )

gods in *tohi* (baptism) rites, where the sick were cleansed of spiritual or physical afflictions, and where warriors or tribal emissaries were prepared for pending tasks. Other parts had become synonymous with famous ancestors of some 20 or so generations ago. Their spirits have also mingled with the spirit of the river itself, the people maintaining a substantial record of ancestors within a complex spirit world.

There is no shortage of early writings to support the contention that watercourses loomed large in the religious practices and beliefs of the Maori people. The following account from Elsdon Best refers to the use of water in ritual functions, with particular reference to baptism and spiritual cleansing:

Water as tapu and  
tapu sites

It may be said that water entered largely into Maori ritual performances; both aspersion and immersion being practised. Near every village some stream or pond was utilized as a *tapu* place at which ceremonies of what we may term a religious nature were performed. Such a place was termed the *wai tapu* [or] *wai whakaika* . . . At this stream many rites were performed. In many cases those who took part in such a performance stood in the water, in some cases waist-deep. In performing certain ritual the *tohunga*, or priests, cast off their garments, and, clad in nothing more than a bunch of leaves, entered the water and took their stand at a place where the water surrounded them. The idea prompting this act was the desire for what may be termed spiritual insulation; all contaminating influences were avoided by this means.<sup>66</sup>

Best then illustrates the importance that Maori placed on water that was pure or unpolluted, and how, in earlier days, it even had to be utilised, for religious purposes, at its natural place:

The Maori folk would never have consented to our form of baptizing infants, simply because the water employed in the rite was contained in a vessel fashioned by human hands. This would affect its efficacy or potency; hence our Maori always turned to the *wai matua o Tuapapa*, as he termed it – virgin water as it flows from the earth – when utilizing water in his religious ceremonies. This was the only water free from polluting tendencies. When the Maori first saw the Christian form of christening, the sprinkling of water contained in a vessel made by human hands, his verdict was '*Kaore i hangai*' – meaning that it did not comply with the demands of ancient custom and propriety. Pure water is that produced by Para-whenuamea (personified form and origin of water); it must be used in its natural font. Thus the baptism of infants was performed at a *wai tapu*. In old-time Babylonia water was considered as the primal element from which life came; and in the superior cosmogonic myths of the Maori we note that, ere the earth was formed, all was water, and that io, the Supreme Being, abode in space. In native teachings it was said that the welfare of all things depends upon water; without it nothing can flourish. When Tane ascended to the heavens in order to obtain the three baskets of knowledge, he was compelled to twice undergo the *tohi* ceremony in *tapu* water ere he could be admitted to the divine presence.<sup>67</sup>

66. Elsdon Best, *Maori Religion and Mythology*, 2 vols, Wellington, Government Printer, 1976, vol 1, p 343

67. Best, pp 343–344

**Water and other  
rites and rituals**

Best's account also describes similar water rites for those about to engage in battle (*wai taua*), for those made *tapu* by attending a *tangi* (*atahu* rite), and for scholars graduating from a *tapu* school. With regard to proceedings to cure physical or spiritual sickness, he refers to the *whakahoro* rite, a rite well known to the Whanganui River people, as the name for the settlement of Whakahoro shows. It was, as Best's informant expressed it, '*hei muru i ona hara, hei whakamarama i tona ngakau*' ('to condone or abolish his faults, to enlighten his mind'). Spiritual cleansing was essential to healthy living. In Best's representation of Maori religion, man could himself be a descendant of the gods, and when he placed himself in the hands of the gods, he had to approach them in a fit and proper condition.<sup>68</sup> There were further rites associated with childbirth, the removal of *tapu* through contact with death or disease, and for giving protection when making a journey, especially into another tribe's territory.

**Role of taniwha**

Cementing the association of the people and the river is the presence of *taniwha*, revered water creatures of extraordinary powers, and *ngarara*, or giant reptiles, which, or who, control the watery domains of particular river caves or beds. These were sometimes deceased forebears whose spirits had taken a *taniwha* form, but in any event, they were relatives, for both people and *taniwha* are descendants of the god Tane. More *taniwha* appear to have been recorded for the Whanganui River than most rivers, again presumably because of its length and the many settlements along its banks.<sup>69</sup> The *taniwha* are fondly revered, even if they are feared, having been part of the landscape for a long time. Tutangatakino of the Te Ohu district, for example, a *taniwha* about 30-feet long, who, it was said, could swallow a person whole, had guided the Aotea waka from Hawaiki numerous generations ago and was the pet of the commander's grandson, whom he carried on his back.<sup>70</sup> His usual lair is beneath *Petipetiaurangi*, a large flat rock on the upper river, where still today river travellers leave a placatory branch offering.

Like humans, the *taniwha* differed in temperament, but unlike humans their forms were much more various and might change. Some were friendly, others threatened lives, but the more troublesome often had cause to be aggrieved. All were superhuman. Some of them could alter the landscape, or the river course, by lashing with their tails. Others were more likely to trouble river travellers. The appearance of some foretold of disaster or death, while others indicated good fortune. Yet, they were mortals, not gods. *Mangapuera* of Ahuahu, *Otarahura* of Ruapirau, and *Tutaeporoporo* of (now) Shakespeare cliffs near Wanganui City were all *taniwha* that were killed by Maori forebears in daring expeditions to curb

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68. Ibid, pp 213–215

69. We understand that the Waikato River is also famous amongst Maori for its *taniwha*. It is said that there is a *taniwha* at every bend: '*Waikato taniwha rau, he piko he taniwha, he piko he taniwha*'. Having regard to Maori poetry, however, in this instance, '*taniwha*' may refer to each or all of the *taniwha* proper, the numerous *kainga* along the river, the power of the river, and the power of the associated people.

70. Another account of this is recorded at section 3.2.9, where Anihera Henry considers that Tu Tangatakino came in the form of a whale and from Rapanui.

their excesses. Te Maru, a taniwha of Koroniti, was destroyed in a flood in about 1850.

Through the settlers' disbeliefs, and their assessment of taniwha in their own cultural terms, Maori became reluctant to talk of them. This was not always so, however, and there were earlier Europeans who recorded various details. Some Europeans claimed to have had personal encounters. Elsdon Best recorded how a survey party was surprised by the taniwha Kawautahi at Retaruke late last century. They gave a fairly detailed description.<sup>71</sup> Reed records a claim that the taniwha Ratata, of Ohauti, was captured by a Pakeha in 1878 and later escaped.<sup>72</sup> Mihiatakai was sighted in 1861.

Whatever doubts may be harboured of such accounts are not relevant at this point. The important fact is that Maori both believed in and relied on the existence of their taniwha. Still today, twigs and other tokens of respect are left near their lairs on passing by, and the taniwha continue to be spoken to as human beings. That which some might find incredible is a given for the local people, a natural part of the river life.

Most importantly, there was a taniwha for each settlement, and they served to show the right and title of the occupants, and to secure compliance with their law. Though often malevolent, and sometimes indiscriminate in their slaughter, the taniwha were seen as protectors and guardians of both the river and the people. It may have been with that in mind that Titi Tihu advised the Maori affairs select committee in 1980 that the taniwha are 'a local embodiment of the spirit of the river people'.<sup>73</sup> In other accounts, however, the taniwha were tangible. They punished those of the hapu who breached the river-use laws and those from outside the hapu who entered the area with hostile or disrespectful intents. Even today, many Maori are not comfortable when travelling on rivers that are not their own unless in the company of a local person conversant with the ways and whereabouts of these beings.

In *Faces of the River*, David Young describes an encounter with a taniwha by Titi Tihu at age eight. As Titi's uncle lay ailing, his mother demanded that he row upstream to Ohura to fetch medicine. Fearful of rowing the long distance in the dark, he none the less went and was confronted by Tutangatakino with 'two great eyes ... like the signal lamps on the big Pakeha fireboats'. Rather than being consumed, as Titi expected, Tutangatakino guided him safely to the next village. Years later, Tutangatakino visited him at a marae near Waitara, assisting him to raise the ridgepole of a new meeting house, astonishing workers the next morning that this was done single-handedly.

As the grandson and chosen child of the tohunga, prophet, and leader Te Kere Ngataierua of Tawata, who died in 1901, Titi was renowned for his intimate acquaintance with the Maori spiritual world and with Maori prophecies. Young comments that, between them, Te Kere and Titi Tihu spanned a sweep of time from

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71. Best, vol 2, p 503

72. A W Reed, *Treasury of Maori Folklore*, Wellington, Reed, 1963, p 313

73. 'Memorandum for the Select Committee'

when Europeans were unknown on the river to when Titi acquired his own jetboat.<sup>74</sup>

In evidence before the Native Land Court in 1938, Hekenui Whakarake described the taniwha Koruana, who lived at Okirihau and Taumatamahoe. Then, with apparent reference to several taniwha and more particular reference to Koruana, he said:

The elders of the Taniwha were all tohungas. According to my elders these tohungas recited incantations the purport of which was to give this man power to go into the river and when he acquired the necessary power he went into the river in the form of a human being. He jumped into the rivers and disappeared for some considerable time then he reappeared and was seen sitting on a rock in the river. When people who saw him approached him he disappeared again. He lived in this particular part of the river for some years then he left that part and was seen going in the direction of Rotoaira.

Judge: When was he last seen?

Hekenui: I cannot say when he was last seen. Some of my elders saw him going in the direction of Rotoaira.

Mr Morison [counsel]: Have you ever heard of Tutaeporoporo and who was he?

Hekenui: Yes, he reveals himself in the Wanganui River in the form of a Totara at Sandy Hook. A relative of mine by marriage tried to lift him out of the river but did not succeed. He may still be there.<sup>75</sup>

Some of the claimants saw the taniwha as under threat, just as the people are threatened in their river control. It was said, in a matter-of-fact way, that certain taniwha have shifted on account of river pollution or the loss of river flows through water abstractions for hydroelectric and other schemes. Some said the taniwha had not been seen for many years. Whatever the situation, however, this much is clear – the taniwha are part of the rich tapestry of history and lore that the river brings to mind. They are part of the mix that binds the people and the river together.

Ancestral  
association

Ancestors do the same. The naming of ancestors for any part of the river becomes a validation of authority. It is by this process, by myths and legends, stories and song, and the recitation of ancient karakia and genealogies, that Maori continue to assert their river entitlements.

Water, purity,  
mixing, and non-  
interference

Water, whether it comes in the form of rain, snow, the mists that fall upon the ground and leave the dew, or the spring that bursts from the earth, comes from the longing and loss in the separation of Rangi-o-te-ra and Papatuanuku in the primal myth. The tears that fall from the sky are the nourishment of the land itself. The life-giving water is founded upon a deep quality of sentiment that, to Maori, puts it beyond the realm of a mere useable commodity and places it on a spiritual plane.

As to the purity of water regimes, to which we have already adverted, we adopt this overview from Professor James Ritchie in evidence before the Tribunal on the Te Whanganui-a-Orotu claim:

74. David Young and Bruce Foster, *Faces of the River*, Wellington, TVNZ Publishing, 1986, pp 11–12

75. Document A77, vol 1(1), p 12

Water has mauri, essential sanctity, both as wai maaori and as wai tai. Water must be kept in its natural state as far as it is possible to do so. The explanations of the origin of water, its different forms, types and so on, in Maaori science, emphasise that ethic. Water, as wai ora, sustains, protects and enhances life. It is avoided if unclean – whether physically or spiritually. It cannot be purified without effort; human effort is not enough, the enlistment of aid beyond the secular is required. . . . It is only through the agency of Papa-tu-a-nuku and her offspring Tangaroa, and his mokopuna Tuutewehiwehi that the mauri of desecrated water can be restored. . . . Desecration of water was powerfully sanctioned and the human agencies to enforce them were the kaitiaki, the taniwha of the hapuu and the rangatira. The connection between upstream contamination or other pollution of food sources was known and rigorously policed and sanctioned.<sup>76</sup>

He further argued that water was viewed from its origin to the ocean as one system. Estuaries were considered special places and there were often taniwha there, whose primary role was to reinforce conservation.

Professor Ritchie went on to develop his theme that in water management an ethic of least interference applied. It was an ethic that resulted from a highly complex set of origin explanations and that placed limitations on the human right to exploit and defined the parameters of safe and reasonable use. There was a particular aversion to the contamination of water from human and food wastes, as the Tribunal has noted in several earlier reports.

Referring back to earlier evidence in the Manukau claim in 1984, Professor Ritchie described the difficulties created for Maori when modern works mix water regimes. In this case, we are concerned with the transfer of Whanganui River water to Lake Taupo and the Waikato River through the Tongariro power scheme. If not mediated in an appropriate Maori way, this is spiritually offensive to Maori people, as the Tribunal in the Manukau claim was to find. It also violated the political harmony between the people of different places, disturbed the exercise of their rangatiratanga over their traditional resources, and affected conservation practices and the productivity of the resources in question.<sup>77</sup>

The relationship between the people and the river might therefore be described as god given, at least in their eyes, calling for respect between people and the natural world as Maori saw it, and in which the river is a living being or tupuna with its own mauri and spiritual integrity. People speak and listen to it, for the water is so much their blood as to produce a state of communication.

Ethic of respect

76. Brief of evidence of James Ritchie, Wai 55 ROD, doc E2, paras 8.1–8.2; *Te Ika Whenua Rivers Report*, secs 6.2.1, 11.3.1. Maori water classifications include waiora, the purest form of water from Ranginui, the sky father, which contains the source of life and wellbeing; wairoa, or rainwater made pure for human consumption through contact with Papatuanuku, or mother earth; waimaaori, freely running fresh water or water that is clear or lucid; waikino, in the temporal sense being turbulent water, as in a gorge or rapids and, in the spiritual sense, water with a dangerous mauri, in that it has been polluted or debased; waimate, in the temporal sense being a sluggish backwater and, in the spiritual sense, water that has lost its mauri and become dead; and waitai, seawater, or water that has returned to Tangaroa in the natural process of generation, degradation, and rejuvenation. The spiritual implications are considered in an appendix to the brief of evidence of James Ritchie.

77. Brief of evidence of James Ritchie, Wai 55 ROD, doc E2, paras 8.1–8.2

Mana, and the value placed on mana, made respectful behaviour a natural part of everyday life, something not confined to ceremony and ritual, and it was respect, first and foremost, that was accorded the river. This ethic of respect is a central dynamic throughout the Pacific.

**A taonga** The river is thus seen as a taonga – as an ancestral treasure handed down, as a living being related to the people of the place, where that relationship has been further sanctioned and sanctified by antiquity and many ancestral beings. It governed their lives, and like a tupuna, it served both to chastise and to protect. There are stories of those who were punished by the river for transgressions and of those who have encountered its protective power. It was something that they treasured, and though they had possession and control in fact, they did not see it in those terms; rather, they saw themselves as users of something controlled and possessed by gods and forebears. It was a taonga made more valuable because it was beyond possession.

**Not a commodity** On this view of things, the river was not a commodity, not something to be traded. It was inconceivable that such a thing could be done or that anything other than the pre-existing order could continue to prevail.

**A symbol of identity** The river as a line of communication between otherwise isolated communities was a further factor in determining both the relationship of the people to the river and their relationship to each other. The river wends its way through precipitous terrain, providing access to fertile lands at diverse places and to the riches of a forest otherwise barely penetrable, but the river is the common link for all. Identity with the river, like the threads of kinship, provides an inescapable unity and loyalty – whatever the disputes over eel weirs, the destruction or theft of canoes, trespassing, or simple differences of view. It pulls them back together, no matter how much they are torn apart internally. Without the river, others may not have seen them as a single people, and conversely, it is the river that makes them unique.

The triple metaphor where land, water, and people are treated as one and the same is common to all Maori and parts of Polynesia. The land is usually represented by a sacred place, a mountain especially, the water by a significant lake, river, or ocean. It is by Ruapehu and the Whanganui River that Atihaunui are known.<sup>78</sup>

**Psychological consequences** Accordingly, what was denied the people, in the subsequent disregard of their association with the river, was not merely a right of user but their status and esteem, and the foundation for their existence as a people. It was central to their lives and to their identity.

Professor Ritchie's evidence in *Te Whanganui-a-Orotu*, already referred to, describes the psychological consequences seen when people are deprived of that which has deep cultural value, when the object of their concerns remains evident before them, and when, as a result, the loss cannot be worked through and put to

78. Though geographers give the Whanganui River as commencing at Ngaruahoe, with tributaries feeding also from Tongariro and Ruapehu, Maori had many names for the river at different places, and several tributaries with particular names are still seen to be part of the river system. While recognising the connections to Tongariro and Ngaruahoe, local Maori tend to follow a mental path from Ruapehu along the Whakapapa River, which feeds into the Whanganui River near the Hohotaka blocks, and associate the Whanganui River with Ruapehu.



rest. The grief becomes transmitted through generations and institutionalised, and a deep sadness is evident in visiting sites redolent with meaning and memories. The songs, stories, and speeches on marae keep old associations alive, and anguish is never far away:

Anonymous, faceless action or simply denial by some unidentifiable ‘them’ cannot even be confronted to any effect. Helplessness becomes a habit. Psychologists even have a name for it; ‘learned helplessness’ is that special kind of helplessness which arises from low status, powerlessness, the imputation that somehow you have brought it on yourself, learning how to be a victim. It exists amongst colonised people everywhere, amongst contemporary minorities and has a subtle corroding effect upon self-esteem and competence.<sup>79</sup>

The reaction, he thought, expressed itself in many ways: in an anger that lashes out at any target that gets in the way, in hostility to the surrounding social environment, in a search for charismatic saviours, in a devaluation of traditional leadership and values, or in an obsession with power, either to attack it or to seek it. The world became alienating, where formerly Maori success was attributed to the gods, who were seen as positively supporting humankind. The Maori ethos brimmed over with beneficence and confidence. The world had been trustworthy, orderly, and good.

The antidote to current feelings of powerlessness, deprivation, alienation, and distrust, in Professor Ritchie’s view, was twofold. Maori had first to ‘own’ the grievance, understanding the cause and bringing the past back into the present. It was then necessary to re-establish the mana of the people, ‘from here on and forever’.<sup>80</sup>

## 2.7 CONCLUSIONS ON MAORI CUSTOMARY TENURE

We thus conclude the above sections on Maori social structure, customary interests, and comprehension of the river with these findings:

- The river was a taonga of central, material, and spiritual significance to the Atihaunui people and the constituent hapu that lined its banks.
- Within the river, whanau and hapu maintained usages both near to where they lived and, generally, at many places throughout its length.
- Activities were also undertaken collectively by persons from several hapu.
- Resource use was conditioned by social obligations to the hapu.
- Fishing was also undertaken by persons outside the Atihaunui descent group, probably on the basis of long-standing arrangements built on kin connections.
- The river as a whole was a fishery, and the whole of the river was important as a waterway.

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79. Brief of evidence of James Ritchie, Wai 55 ROD, doc E2, p 13

80. Ibid, p 15

- It was inconsistent with Maori river interests, according to their philosophy, that those interests might be determined according to divisions of tidal or non-tidal, navigable or non-navigable portions, or the severance of water, banks, and bed.
- While hapu exercised particular control rights from time to time, ultimate control and rangatiratanga vested in the people as a whole.
- The river claim should be treated as one claim, and Maori representation should be effected through one body, the Whanganui River Maori Trust Board, for purposes related to the claim with the board continuing to be accountable to all the river hapu.

## 2.8 THE INTERPLAY OF MAORI AND ENGLISH CUSTOMS

We have yet to consider the arguments on the interplay of Maori and English laws. These are dealt with further in succeeding chapters, for they go to the essence of the claim. For now, however, some further review is required of particular legal submissions.

Was the river 'owned'? Did the Native Land Court fail to provide for tribal interests?

The first, as raised for the Crown by Fergus Sinclair, is that the river could not be 'owned' in Maori law. The second, as argued by both claimant and Crown counsel is whether the Native Land Court failed to provide for tribal interests when issuing titles for the riparian lands. Sinclair submitted these questions were in the ideological realm, but they are answerable by considering the appropriate principles to apply.

### 2.8.1 River 'ownership'

Constructs of 'ownership' and 'possession'

We accept that, in the Maori scheme, rivers were not 'owned' in the English sense of the term, bearing in mind that 'land ownership' is not a universal law but a particular construct of some cultures. The same of course applied also to the land. It, too, was not owned in the technical sense of English law. In that respect, Maori made no distinction between land and water regimes – they were all part of that which the tribe possessed.

The river, like the land, was transmitted from ancestors, from the original ancestress, Papatuanuku, the earth mother, through the first people to the current occupying tribes, and was bound to pass to the tribes' future generations. For the same reason, the river, like the land, was not a tradeable item. Whether speaking of the land or the river, the right to benefit from them was the same. The right was not absolute, for example. The use of resources from either was conditional upon contribution to the hapu.

Could strangers entering the territory assume rights of river user? In custom, the answer was no. Outsiders had no right except by leave, although leave might be implied through some blood connection, long-standing arrangement, or prior acknowledgement of the local hapu. Strangers might also acquire rights by joining

one or other hapu, but then they would cease to be strangers. While customarily new recruits were related by blood or marriage, the incorporation of outsiders was a known Polynesian trait to strengthen the tribe and maintain a competitive edge. None the less, as was more fully considered in the *Muriwhenua Land Report*, the underlying 'title' to the land did not depart from the collective of hapu, save for violence or abandonment, and the right of personal use and occupation remained conditional upon continued contribution to the tribal weal.<sup>81</sup>

In short, whether with regard to the land or the river, Maori saw themselves as permitted users of ancestral resources. With regard to the prospective threat from other descent groups, they thought in terms of 'possession' and 'control'. Within their own hapu, their use of resources was always conditional on obligations to ancestral values and future generations, but they did not think in terms of 'ownership' at English common law, with its rights of use and alienation independent of the local community.

Possession and control

It does not follow that, in matching Maori and English laws, Maori were to be deemed to own nothing. Nor would it follow that as a result, and save for violence, the Crown must be deemed to own all. One would still have to inquire of the legitimacy of that assumption, and in that context, and since English ownership includes the right of possession, whether that result was agreed.

Equation of ownership with possession

It was obvious and sensible that English 'ownership' was to be equated with Maori 'possession'. The framers of the Treaty of Waitangi took that view. They did not assume that what Maori had might be the same as a private landowner in England, and so they wrote in article 2:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their *possession*; . . . [Emphasis added.]

The distinction is a fine one. In the *Concise Oxford Dictionary*, to 'possess' means to 'hold as property, own', while to 'own' means to 'have as property, possess'. The difference appears to be that one may own without possessing and possess without owning. The difference is not important for the present debate.

The evidence is clear that the Whanganui River is part of that which Te Atihaunui possessed by right of immemorial occupation. It must therefore be taken as part of that which they owned.

In brief, Maori 'rights' in either land or waterways can be seen to be based on usage and possession, from which, according to the law as settled in the Native Land Court, ownership derives. Under English common law, the reverse applies. Generally use rights flow from ownership. A modern Maori focus on 'property' and 'rights' reflects how they were forced to reconceptualise their customs to make them cognisable in English law.

81. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, sec 2.3.1

Referring then to Crown counsel's questions on customary land and river interests, and relating those to the Treaty of Waitangi (which is discussed in chapter 9), the first question was whether Maori interests were mere rights of user or amounted to ownership in the English legal sense. The answer is that they are more than use rights and include the incidences of English ownership, save those of free transferability or escheat to the State. But they are also more, for there exists, in the hapu and the descent group as a whole, the right to manage and control according to tribal preference and to be left in quiet possession.

The Treaty of Waitangi does not change any of this, save that it introduces the concept of alienation.

Counsel's second question was whether the Crown is correct in assuming that it is appropriate to describe 'this bundle of interests' as rangatiratanga.

We see rangatiratanga not as the sum total of use or ownership rights but as expressive of political autonomy in the management of the total of the people's affairs.

Crown counsel next asked whether it is appropriate, in terms of the principles of the Treaty, to value these interests in the river in their component parts; for example, to treat fishing interests as separate from spiritual interests in the water.

The answer is no. Though they may be severally seen, there is a spiritual element to all parts of life. Though some things are tapu and some things are noa, all is spiritual in origin.

Crown counsel's fourth question asked whether the component parts of the spiritual interests can be further identified. To enumerate all the component parts of the complex Maori spiritual world, even limited to the purposes of this case, would be demanding, risky, and probably unfruitful. It was difficult enough to attempt the same in respect of English land tenure. At this stage, we think it sufficient to say that as a spiritual power and force, the river should be looked at as a single entity, respected as a living being, and recognised for its authority in the lives of the Maori river people. In addition, specific significance will attach to particular places on account of tohi rites, taniwha, ancestors, or the like.

#### Ownership of water

As to the matter raised by Crown counsel in section 2.3, that there was no Maori custom on the ownership of water, the same considerations apply: that is, 'ownership' was not integral to the Maori scheme. Counsel went on to say, however, that, as something freely flowing, it was not 'possessed' in the sense that it was contained. English legal authority was cited in support.

In terms of law, that which Maori possessed must be determined by reference to that which they possessed in fact, and not by reference to that which may be legally possessed in England. Claimant counsel raised this point, with which we concur. We consider that, if the river is regarded as a whole, as we think it must be in terms of Maori possessory concepts, the water is an integral part of the river that was possessed, and was possessed as well. Though its molecules may pass by, as a water regime it remains.

Indeed, the river would be meaningless without it. The river was a waterway. The whole river was a fishery. It was the habitat of creatures to which Maori were

related, from fish to taniwha. The emphasis on water purity for ritualistic and other reasons has also been described. The water was treasured as the gift of Ranginui just as much as the land was respected as part of Papatuanuku. The water was their water, at least until it naturally escaped to the sea, at which point its mauri or character changed.

Other aspects of this question are considered in section 9.2.

### 2.8.2 The Native Land Court and tribal interests

Claimant counsel submitted that the Native Land Court dealt with particular uses but not the tribal interest, which remained unextinguished as a result. Crown counsel's response was to deny that a tribal interest existed. We have already found against that. Mention is made, however, of the submission that the Native Land Court process was further evidence that there was either no tribal interest or that individual or local interests had such priority as to render any tribal interest virtually nugatory. Reliance was placed on evidence that only local land claims were put up to the Native Land Court, that there was little or no mention of tribal interests, and that the Native Land Court was giving effect to Maori preferences as they were at that time.

Whether the tribal interest was provided for

We consider that only local claims were put, with little reference to tribal interests as a result, for the simple reason that, having regard to the Native Land Court process itself, there was little other practical option. In addition, we doubt that the court was giving effect to contemporary Maori practice.

Native Land Court 'policy'

There may have been some areas where the Native Land Court process was accepted with alacrity, but the greater evidence by far is that Maori generally were strongly opposed to the court but eventually had to submit to it. The court would sit at a distance from the place of protest, if need be, and award lands to whoever came in, if no one else attended to oppose.

Protest against the operation of the court

Just a few examples need be considered, from reports the Tribunal has already written. They come from Auckland and the large pan-tribal conference at Kohimarama, where Paora Tuhaere warned of the system where the laws of the ancestors were relegated to those of the court. They extend to Maketu, in the Bay of Plenty, where an attempt was made to prevent a judge's ship from landing. The examples extend inland to the Rohe Potae, which includes a significant part of the Whanganui River catchment area, where a boundary was placed by the Maori King, beyond which the Native Land Court was not to proceed – though eventually it did. Particular opposition from Atihaunui and their attempts to retain all their land as one are detailed later in this report (see secs 5.3.1, 5.4).

The single most important factor in Maori opposition was undoubtedly the projected loss of tribal control.

None the less, the court came in. Though strictly there was provision for the award of tribal titles for lands exceeding 5000 acres, the reality was quite different. The chief judge of the Native Land Court's opposition to tribal awards has been documented in the *Report of the Waitangi Tribunal on the Orakei Claim*. In his view,

Bias against tribal control

the whole point of this major exercise in land tenure reform was to secure individual ownership, and any tribal award could only have been a temporary expedient.

Survey and land  
sales

Further, Maori had to survey the parcels of land for which titles were sought, with a prescribed scale of costs. For Atihaunui, the survey of the whole of their territory would not have been economically feasible. The territory extended on both sides of the Whanganui River for some 227 kilometres and covered more than a million acres. If, as the Maori Appellate Court suggested in 1958, it was open to the tribe to apply to the Native Land Court for an investigation into the whole of its tribal territory, section 13 of the Native Lands Act 1865 required that a survey of these lands be produced to the court before it could make a decision. Such a survey had to be made by a surveyor licensed by the Governor on an approved scale and with proof that the boundaries of the lands had been distinctly marked on the ground.

Even for much smaller blocks, survey costs were advanced by the Crown or, later, by private persons. This was also because sales, or sometimes leases, had been negotiated beforehand, even though the 'ownership' had not been finally settled. The purchaser simply trusted that the court would award titles on the basis of existing occupancies, or would uphold the interests of the party that the would-be purchaser was sponsoring.

In the result, though the customary occupations were referred to in court, and were debated, the litigants might be expecting to share not in the land but in the proceeds of its alienation.

Bias against claims  
based on mana or  
remote forbears

Looking to the broad climate, this was not a court where general tribal interests could expect a receptive hearing. Moreover, as Fergus Sinclair pointed out, claims based on mana, that is, on the basis of some right to control on behalf of a hapu or larger descent group, or on remote ancestors, which also would have brought in all of the hapu or descent group, were rejected. If people went into the court to win, it would follow that general tribal interests would not figure much in their submissions. The case would be framed to suit the mindset of the adjudicator, and evidence of custom manicured to suit the terms of English law, with more emphasis on local use and occupation.

Native Land Court  
preference for local  
occupations

It was largely in reliance upon the Native Land Court record that Crown counsel claimed the primacy of private proprietary interests over tribal interests in Maori custom, even to the extent of excluding the latter. This points to the major flaw of the Native Land Court process in adopting that priority itself. It was as though local use rights and tribal rights were seen as conflicting – as though there could be one but not the other.

English and Maori  
over-rights and use  
rights

In fact, as claimant counsel argued, in Maori custom the two coexisted, each dependent upon and tied into the other. It is not unusual that we are comfortable with dualities and ambiguities in our own social structure, because we understand them, but intolerant of the same in other cultures, for we understand them more easily if they are rendered simplistically. For their part, Maori are comfortable with ambiguities in their own language and culture, for they know how to apply them,

but may struggle with English concepts. The meaning of the Crown as the Legislature, Executive, and judiciary, and not the monarch, is an example. They may also struggle with the concept of the Crown's radical title.

Although there is a danger in using analogies, it may help to consider that the Crown's radical title in English law and titles from the Crown as evidence of private ownership are conceptually similar to the over-right of a descent group that permits of individual user. It may also help to consider that English law is no more than a development of over-right and use-right situations. It may be further considered that what the Atihaunui people had in fact was both imperium (territorial authority) and dominium (ownership).

An alternative scheme to that provided for by the Native Land Court would have been to award land to bodies representing the descent group, which in turn would apportion particular controls to constituent hapu. After some protests and petitions, a scheme along those lines was legislated for for the Urewera district. It was one of the few districts still unaffected by Native Land Court operations at that time. Even there, however, the scheme was short-lived and the Native Land Court eventually got in.

Tribal titles

Crown counsel contended that use rights were more in accord with ownership rights at English law. Here again, in our view, the equation had properly to be with 'possessions'. The use-right approach excluded that which Maori had in fact, while 'possessions' allows for all that they possessed, use-rights included.

### 2.8.3 The national interest

It appears that Maori interests were overlooked, disregarded, or not considered to exist in the raft of water use and management statutes that have already been adverted to (see secs 2.2, 3.3). To the extent that they were considered, it was sometimes argued or assumed that the steps taken to provide for public access or use were justifiable in what is called the national or public interest. The same arguments are made today with industrial, agricultural, recreational, environmental, and public work interests in mind. Maori and Pakeha interests are seen as on the same footing, in that both must yield to the national interest or the common good.

In the historical context, however, when, for example, the choice was between butterfat or eels, as in the Wairarapa lakes case, or, as in the lakes of Taupo and Rotorua, between Maori or Crown control of tourism or hunting and fishing, the national interest was invariably that of the Pakeha and was in conflict with Maori economies.<sup>82</sup> We know of no principle of English or New Zealand law, however, whereby legitimate interests of a property kind, once proven, can be expropriated in the national interest without compensation, and there are some principles of law that would limit the extent to which private rights may be taken away.

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82. *Muriwhenua Land Report*, sec 2.3.1

**2.8.4 Conclusion**

We conclude that claimant counsel was correct in contending that the Native Land Court process dealt only with usages at one end of the spectrum, and that a tribal right also existed. It follows that that process did not extinguish the tribal interest.

The immediate consequence for Maori was that they were deprived of the right to develop structures for the people as a whole, if they wished, for governance and the maintenance of tribal assets, including the river. There is some evidence that, even at the time of the Native Land Court adjudications on land titles, that is the direction in which Te Atihaunui, like the hapu of other descent groups, were heading. There is reference to this in subsequent chapters.