

CHAPTER 14

INLAND WATERWAYS

Note: A report on inland waterways has been commissioned for the Waitangi Tribunal Rangahaua Whanui Series but was not available at the time this chapter was written. The research and drafting of this chapter was undertaken by Ben White.

14.1 Introduction

The historical importance of New Zealand's inland waterways to Maori cannot be overstated. Although having an obvious economic significance as a food source and in terms of transportation, it would be a mistake to think of the importance of New Zealand's rivers and lakes solely in instrumental terms. For Maori, as with their perception of the environment more generally, inland waterways were the physical embodiment of atua – their topography often being explained in terms of the actions of ancestors. Importantly, the physical and metaphysical aspects of waterways in Maori world views are inseparable, giving rise to their status as taonga.

It was not until around the end of the nineteenth century that Maori began to seriously press claims to the ownership of rivers and lakes. Prior to that, it appears that the Crown had gradually assumed rights of control over inland waterways; rights that it believed it had acquired through royal prerogative at common law, supported by colonial statutes. In the late nineteenth century, Maori began objecting to the interference to waterways from public works and private drainage schemes, and in the early twentieth century, began pressing claims to the Native Land Court for the title of lakes to be determined.

Central to these cases, as with land tenure in New Zealand generally, was the nature of the interface between colonial principles of tenure and Maori customary tenure, and the extent to which the colonial system of tenure accommodated the latter. For, although the Crown strenuously argued that Maori customary law did not recognise the ownership of lakes, the outcome of so much litigation shows that there can be no doubt that Maori society had its own body of rules and customs relating to the ownership and management of rivers and lakes.

While pressing its perceived rights at common law to New Zealand's lakes, the Crown nevertheless had to concede pre-existing Maori rights. But in the case of rivers, the Crown was somewhat more successful in denying the rights of Maori. To a large degree, however, this was a result of legislation being passed which vested the beds of navigable rivers in the Crown. This reflects a policy of successive

governments that Parliament, rather than the courts, was the appropriate forum in which such matters should be resolved. Also it suggests that the rights the Crown assumed it held at common law, were in many instances, somewhat tenuous.

Today it is agreed by various commentators that the legal situation vis-à-vis rivers and lakes – especially as to their ownership – is at best indeterminate, if not ‘unfathomable’.¹ It is clear, however, that with the exception of a number of North Island lakes, Maori rights to New Zealand’s inland waterways have been ignored or expropriated. Purchase deeds for Maori land sometimes explicitly mentioned waters on the land. Generally, however, the Crown and settlers assumed that ownership of non-navigable streams (at least) transferred to the purchasers adjacent land, according to law principles. To that extent, payment for land was intended to include water, though this was not necessarily understood or accepted by Maori when they sold the land. With the exception of the twentieth century settlements in respect of the major North Island lakes, compensation has not generally been paid for the loss of rights to lakes and navigable waters.

14.2 Inland Waterways at Common Law

The contest for the control of New Zealand’s rivers and lakes can be typified by the attempts of successive governments to secure rights for the Crown based upon English common law. It must be asked, however, how applicable precepts of English common law were to the colony of New Zealand where Maori customary tenure was explicitly recognised as a burden upon the Crown’s title. This is particularly so in regard to the separation that is made at common law between the ownership of the bed of a river or lake, and its waters. In many court cases concerning the ownership of lakes and rivers, the Crown argued repeatedly that the ownership of the bed of a lake or river was a concept foreign to Maori customary law, and that therefore such beds could not be owned by Maori. In regard to this contention, Judge Acheson, in his 1929 decision as to the ownership of Lake Omapere, observed that:

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 surface of the country in which it is situated, and . . . 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 stream.²

1. Property and Equity Law Reform Committee, ‘Background Report on Ownership of River Bed’ in *Interim Report on the Law Relating to Water Courses*, Wellington, 1983, p 9; see also James P Ferguson, ‘Maori Claims Relating to Rivers and Lakes’, research paper for indigenous peoples and the law (laws 546), Victoria University of Wellington, 1989, Wai 167 rod, doc a-49(d), pp 266–313

It seems incredible to contend that if, in traditional Maori society, a lake or river were to become dry land, that land would not then be rightfully claimed by those who had held rights in the surrounding area.

14.2.1 Rivers

In considering the ownership of rivers, a distinction must be made between those parts of a river that are navigable, those that are tidal, and those that are neither tidal nor navigable.³ At common law, there are two sets of rights pertaining to rivers: riparian rights and the presumption of *ad medium filum aquae*; and those rights accruing to the Crown as an extension of its prerogative rights in relation to the sea. It would appear, however, that it is only the *ad medium filum* rule that confers ownership rights. The rights of the Crown to a riverbed extend only to the point that the river is tidal – beyond that it enjoys only the rights of the general public to fish, bathe, and travel upon the river.⁴

Above the point in a river where the tide ceases to ebb and flow, ownership of the bed is divided between the adjacent riparian landowners – the rights of each extending to the mid-point of the riverbed. Consequently, at common law the beds of rivers are privately owned but subject to the public's fishing and navigation rights. Unless expressly excluded, the conveyance of riparian lands includes the riverbed.⁵

14.2.2 Lakes

Where a lake is situated within a single block of land, at common law the ownership of the lake bed resides with the owner of the surrounding land. Where there is more than one riparian landowner, the legal situation is somewhat less certain. There appear to be two possibilities: ownership is determined by the *ad medium filum* rule – that is each contiguous landowner owns the lake bed to the centre point of the lake; or that the ownership resides with the Crown.⁶ The latter position does not seem to be widely held. The currency it does enjoy in New Zealand seems to have come about largely as the result of an Australian case (*Southern Centre of Theosophy v South Australia*, (1979), 21 SASR 399). In that case, the *ad medium filum* rule was considered to be inappropriate given its origin in English common law and the long history of settlement that had given rise to that doctrine. The Supreme Court

-
2. *Judgement of Native Land Court in the Matter of an Application by Ripi wi Hongi for an Investigation of Title to Omapere Lake*, 1 August 1929, London, Coward, Chance and Co, p 6
 3. G W Hinde, D W McMorland, and Sim, *Introduction to Land Law*, Wellington, Butterworths, 1986, p 195
 4. See Waitangi Tribunal, *The Pouakani Report 1993*, Wellington, Brooker's Ltd, 1993, pp 459–462 (Graeme Austin, 'Legal Submissions on the Beds of Navigable Rivers, Section 261 of the Coal Mines Act 1979', submission to the Waitangi Tribunal, Wai 33 rod, doc a41). Austin suggests that at common law the Crown enjoys some prima facie rights to a river above the point at which it ebbs and flows, if it satisfies the legal criteria of 'navigability'. While it is unclear in his text what exactly this definition is, he is adamant that such rights are not proprietary.
 5. Property and Equity Law Reform Committee, p 3
 6. Ferguson, p 20

thus ruled that the lake bed was the property of the Crown by virtue of it having always been the proprietor of the 'wastelands' of the Colony. In relation to New Zealand, Professor Brookfield contends that 'saving where the Maori customary title in a lake bed is found by the Maori Land Court to exist . . . or has been lawfully extinguished under statute, the bed in such cases generally remains the allodial property of the Crown'.⁷

14.2.3 Water rights

At common law water is vested in no one, being a common property resource like air. According to the doctrine of riparian rights, riparian landowners can take and discharge water in accordance with their own needs. At common law, the whole flow of a river could be taken if it is to be used for domestic purposes on the riparian land. Other rights emanating from the ownership of the bed are essentially those of any landowner. These include rights to take shingle and other minerals, and rights of navigation and fishing. However, the exercise of these right must not 'injuriously' interfere with the flow or with the rights of the public.⁸

14.3 Legislative Interventions Prior to 1903

As the number of Pakeha settlers increased through the mid-nineteenth century and a new economic order based largely upon new ways of exploiting New Zealand's natural resources was established, numerous legislative provisions were made affecting inland waterways to assist development. These measures reflected a tacitly assumed set of proprietary and usufructuary rights on the part of the Crown in relation to rivers and lakes that were justified in terms of national development in the interests of an unquestioned 'public good'. This development was in many cases to the detriment of Maori.

14.3.1 Fisheries

In the 1860s, trout and salmon were introduced to several of New Zealand's rivers and lakes with a view to establishing recreational fisheries. In 1867, the Salmon and Trout Act was passed, which empowered the Governor to make regulations with a view to preserving and propagating stocks of salmon and trout. This included the powers to impose penalties for the breach of any regulations established under the Act.⁹

For Maori, the introduction of exotic fish species and the concomitant legislation to manage the new resource were disadvantageous in two respects. First, trout and

7. F M Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', *New Zealand Law Journal*, no 11, August 1981, pp 365-366

8. Ferguson, p 36; Property and Equity Law Reform Committee, p 4

9. Salmon and Trout Act 1867, s 2

salmon preyed upon indigenous fish species, in many cases seriously depleting stocks of fish and eel that were valuable food sources for Maori. Secondly, possession of salmon or trout caught by Maori while attempting to catch their traditional target species made them liable for prosecution by virtue of using ‘unauthorised’ fishing methods and by being unlicensed.

A parliamentary debate on the Maori Land Laws Amendment Bill in 1908 sheds light on the problems Maori encountered as a result of the colonial fisheries regime. Wi Pere, the member for Eastern Maori, complained on behalf of the Arawa people that their fishing rights, which they had held ‘from time immemorial’, had been disturbed by the introduction of exotic fish. Pere said they were aggrieved that the exotic fish were depleting stocks, and that they were required to obtain fishing licences for fish ‘that are absolutely no good, because they are unpalatable’.¹⁰ Similarly, some Ngai Tahu were prosecuted for catching trout when they were attempting to catch eels.¹¹

14.3.2 Timber Floating Act 1873

In 1871, a Thames Maori successfully prosecuted a case for compensation against a Pakeha settler who, as a result of floating timber down a creek, had destroyed the plaintiff’s eel weirs. The Government consequently passed the Timber Floating Act 1873.¹² Essentially, the Act required a licence to be obtained before timber was floated down a waterway and provided for compensation to be paid to riparian landowners whose properties were damaged as a result of activities carried out under the Act (see ss 3, 4). While the law was still in Bill form, several petitions were sent to Parliament by Maori expressing the fear ‘that their rights over those [affected] streams would be taken by the Queen or by the Government’ as a consequence of the legislation. Despite Maori members speaking of the possible catastrophic effects the practice could have upon Maori eel weirs, the Bill was passed into law. During the Bill’s passage, Karaitiana Takamoana, the member for Eastern Maori, recounted how the water necessary to run a Maori-owned sawmill had been diverted by Pakeha for the purposes of timber floating and, as a consequence, the mill had become inoperative.¹³

The 1873 Act was repealed by the Timber Floating Act 1884. Although this legislation again included provisions for compensation for downstream river users affected by the floating of timber, it is doubted that these provisions were made available to Maori, especially because the Act was never translated into Maori.¹⁴

10. NZPD, 1908, vol 145, p 1159

11. Anake Goodall and David Palmer, *Water Resources and the Kai Tahu Claim*, Wellington, Ministry for the Environment/Resource Management Law Reform, 1989, p 7. The Waitangi Tribunal in its *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd 1992 (at p 135) considered that the Salmon and Trout Act constituted a clear encroachment upon the Treaty rights of Ngai Tahu.

12. Alan Ward, *A Show of Justice*, Auckland, Auckland University Press/Oxford University Press, 1973, p 305

13. NZPD, 1873, vol 15, pp 1006–1011

14. CFRT Maori Land Legislation Database, Timber Floating Act 1884

14.3.3 General legislative provisions divesting Maori of control of rivers

From around 1880, a raft of legislative provisions came into effect that vested in the Crown, or its delegated authority, powers over waterways that further eroded Maori rights to their inland waterways. The question of actual ownership, however, remained untested. In 1881, the Railways Construction Act was passed. Section 34(4) of that Act vested in companies engaged in railway construction the power to alter the course or level of any non-navigable river or other watercourse or stream. This and similar provisions appear to be the beginning of the gradual displacement of Maori rights in New Zealand's waterways. The Counties Act 1883 vested in county councils the power to control and supply water for irrigation purposes. Land could be compulsorily acquired (under public works legislation) for the purposes of constructing dams to divert water into water races. These powers were later extended under the Counties Act 1886 and the Water Supply Act 1891.¹⁵

As well as vesting powers in relation to waterways in existing authorities, the legislature passed the Rivers Boards Act 1884 that provided for the establishment of specially constituted river boards who had powers to control rivers within defined river districts.¹⁶ Under section 18 of the Public Works Act 1889, the power was vested in river boards to declare rivers and streams public drains. In the case of the Wairarapa Lakes and the actions of the South Wairarapa River Board, the board was constituted primarily of Pakeha farmers anxious to bring more land into agricultural production, and acted in breach of the law, causing injury to local Maori. In the report of his inquiry into the Wairarapa Lakes in 1891, Alexander Mackay described the actions of the river board as 'an attempt by a side-wind to violate the Native rights under the Treaty of Waitangi.'¹⁷

Under the Public Works Act 1894, rivers could be brought under the 'control' of local authorities, although the Act stopped short of explicitly extinguishing title. The extent and nature of local authorities' control was tested in the 1901 case of *Taranaki Borough Council v Brough*, in which Justice Conolly ruled that such control of rivers could not deny 'ownership which at common law extends to the centre of the river bed in non-navigable rivers'.¹⁸

As well as the powers that existed within the main public works legislation enabling land to be drained, special land drainage legislation was enacted. In a similar fashion to the River Boards Act, the Land Drainage Act 1893 provided for the establishment of drainage districts over which specially constituted boards were empowered to drain lands (such as swamps) to enable them to be brought into agricultural and pastoral production. As well as such general legislation, specific Acts were passed to enable the drainage of particular areas such as the Hauraki

15. Cathy Marr, *Public Works Takings of Maori Land, 1840–1981*, Report for the Treaty of Waitangi Policy Unit, Wellington, December 1994, p 105

16. River Boards Act 1883, s 74. Under section 76 boards were empowered to compulsorily acquire land under the Public Works Act for the purposes of river works.

17. AJHR, 1891, G-4, 'Report on Claims of Natives to Wairarapa Lakes', pp 5, 14

18. *Taranaki Borough Council v Brough* (1901) 2 GLR 160, cited in Austin, p 464

Plains Acts of 1908 and 1926 and the Ellesmere and Forsyth Reclamation and Akaroa Railway Trust Act 1876.¹⁹

Such legislative measures can be seen as statutory modifications of the rights to the use and control of rivers that riparian landowners and others enjoyed at common law. The question of the actual ownership of New Zealand's rivers, however, was left open – the Crown having simply assumed the right to legislate to the derogation of Maori rights. But by the turn of the century, the Government was forced to confront the issue more squarely.

14.4 The Ownership of Riverbeds in New Zealand

14.4.1 The coal mines legislation

In 1903, the beds of navigable rivers were vested in the Crown by section 14 of the Coal Mines Act Amendment Act 1903. This provision arose as a consequence of the decision of the Court of Appeal in the case of *Mueller v The Taupiri Coalmines Ltd*, which concerned the rights to mine the bed of the Waikato River. This case involved consideration of the proposition that the vesting of riverbeds in riparian owners *ad medium filum aquae* is rebuttable if the river is navigable. The plaintiff, the Auckland Commissioner of Crown Lands, sought a declaration that certain lands beneath the Waikato River that the defendants had been mining were in fact Crown lands. The defendants had justified their actions by virtue of being the riparian landowners *ad medium filum*.

Although the rights of the Crown were upheld by the majority of the judges, Chief Justice Stout issued a vigorous dissenting judgment to the effect that the navigability of a river did not detract from the riparian owner's proprietary rights in the riverbed. In arriving at their decision rebutting the common law position, the remaining judges stressed: that in New Zealand the Crown has a role as a trustee over lands of such public importance as those in question; the historical circumstances of the original Crown grant; and the fact that the section of river in question had been navigated for commercial purposes.²⁰

In the 1900 case *Re Beare's Application*, the rights of the riparian owners were upheld against the Crown's contention that the bed of the Arahura River was Crown land. The case resulted from the question as to whether or not mining licences could be granted for a section of the river that ran through a native reserve. In upholding the rights attaching to the riparian owners, Chief Justice Stout made much of the fact that for all intents and purposes the river was neither 'a public highway or such [a] navigable river as makes the bed of the river Crown lands'.²¹ This decision, as with that in *Mueller v Taupiri*, suggests that, prior to the enactment of the Coal Mines Amendment Act 1903, the Crown lacked *prima facie* rights to the beds of non-tidal rivers.²²

19. Marr, p 106; Goodall and Palmer, p 15

20. *Mueller v the Taupiri Coal Mines Ltd* (1900) 20 NZLR 89, cited in Austin, pp 462–464

21. *Re Beare's Application* (1900) 2 GLR 242, cited in Austin, p 463

Section 14 of the Coal Mines Amendment Act was an addition to a controversial piece of legislation pertaining to the rights and working conditions of miners, and it appears to have received scant attention in the parliamentary debates concerning the Bill. The provision was re-enacted in the Coal Mines Acts of 1905, 1908, 1925, and 1979. Although those Acts are now repealed, anterior vestings pursuant to the coal mines legislation are preserved by section 354 of the Resource Management Act 1991. An important issue is whether section 14 of the Coal Mines Act 1903 and its subsequent re-enactments were declaratory of the situation under common law or confiscatory. It has been asserted that, when compared to common law, the provisions appear to be confiscatory'.²³ This raised the question of entitlement to compensation for riparian owners' rights – recourse that it appears Maori did not seek at the time the provision was enacted. In a 1993 decision concerning claims to dams on the Wheao and Rangitaiki Rivers by Te Runanganui o Te Ika Whenua, the Court of Appeal stated that the:

vesting of the beds of navigable rivers in the Crown provided for . . . [in] 1903 and succeeding legislation might not be sufficiently explicit to override or dispose of the concept of a river as taonga, meaning a whole and indivisible entity, not separated into bed, banks and waters.²⁴

In connection with the coal mines legislation, much attention has necessarily centred around definitions of 'navigability' under the Acts. In various cases brought before the courts concerning this question, definitions employed have tended towards a narrow construction of the term to mean navigation for commercial purposes. In the Court of Appeal's 1955 decision in *Leighton's Case*, the Supreme Court's earlier narrow definition of what by then was section 206 of the Coal Mines Act 1925 was upheld. Justice Fair, in delivering the decision, justified taking such an approach in terms of the provision being confiscatory and 'as such should be construed no wider than was strictly necessary to achieve its object'.²⁵ The Property and Equity Law Reform Committee alerted attention to further problems in the definition of 'navigability' caused by the advent of modern forms of water transport (such as jet boats). These, they suggested, have extended the vesting provision 'at least in theory, far beyond what was possible at 1903' when the section was originally enacted.²⁶

In 1903, pursuant to the Water Powers Act 1903, the sole right to generate electricity using water power was also vested exclusively in the Crown.

22. Austin, p 464

23. Ibid, p 466

24. *Te Runanganui o Te Ika Whenua Incorporation Society v Attorney-General* (1994) 2 NZLR 20, 21

25. Austin, p 465

26. Property and Equity Law Reform Committee, p 7

14.4.2 The Whanganui River

A major determinant in the jurisprudence vis-à-vis the ownership of rivers in New Zealand is the Maori claim to the Whanganui River. Conflict concerning rights in the river first came about in the nineteenth century as a result of the destruction of eel weirs upon the river by the Wanganui River Trust to improve its navigability. The trust was later to be empowered by statute to improve and maintain the navigability of the river.²⁷ While this legislation is suggestive of an assumption of ownership on the part of the Crown, it is not, in itself, considered to be expropriatory.²⁸

The actions of the trust precipitated vigorous protests by various Whanganui River Maori. A 1927 petition to Parliament by Pikikotuku in which a claim for damages totalling £300,000 was made was referred to the Native Land Court for investigation under provisions contained within the Native Land Amendment and Native Land Claims Adjustment Act 1930. But before the petition had been investigated, the claimants abandoned the petition and in 1938 applied to the Native Land Court for the actual title to the river to be investigated.

During the court's investigation, the Crown argued that there was no Maori custom recognising the ownership of riverbeds and that the Whanganui River was merely a public highway used by various iwi. In the face of extensive evidence from the applicants of exclusive navigational and fishery rights, however, Judge Browne issued a preliminary finding in 1939 that, at 1840, the bed of the Whanganui River was customary Maori land.²⁹ The Crown immediately appealed this determination, but because of the Second World War, the hearing of it was delayed until 1944. When the Native Appellate Court did sit to consider the Crown's case, the appeal was unanimously dismissed.

Before the Native Land Court could continue its investigation of the river's title, the Crown challenged the jurisdiction of both the land court and the appellate court to proceed with their investigations, applying to the Supreme Court for writs of certiorari and prohibition. The Crown contended that by selling their riparian lands Maori had lost their title to the riverbed as a consequence of the *ad medium filum* rule and that the bed was vested in the Crown pursuant to section 206 of the Coal Mines Act 1925. The Supreme Court did not bother to determine the first issue, finding in favour of the Crown upon their second contention.

Implicit in the court's decision was the notion that, were it not for the Coal Mines Act, the river would still be Maori customary land. This raised the spectre of compensation for the expropriation that the coal mines legislation had effected. To determine whether or not the river – were it not for the Coal Mines Act – was Maori customary land, and whether consequently Whanganui iwi were eligible for compensation, the Government established a royal commission chaired by Sir Harold Johnston.³⁰

27. See Wanganui River Trust Act 1891. The powers under this Act were extended in 1920 and 1922. Ferguson, pp 4–5

28. See Ferguson, p 4, n 12

29. Ibid, p 5

Reporting to Parliament in 1950, the commission found that, in selling riparian lands, Whanganui Maori did not surrender their rights to the bed of the river. Thus the doctrine of *ad medium filum* was rebutted by evidence supporting Maori customary use and ownership. In arriving at this conclusion, Johnston drew on the common law principle that the owners of several fisheries (which, in the case of the Whanganui, eel weirs were held to be) are the owners of the riverbed at that point, and that this prevails over the *ad medium filum* rule.³¹ Although finding in favour of the river's Maori owners, the commission has been criticised for the way in which the mere existence of eel weirs was deemed to accord with principles of English common law without any reference to or consideration of the wider physical and cultural significance and values associated with the river.³²

The Government left in abeyance the findings of the royal commission, the matter eventually being referred to the Court of Appeal.³³ In 1954, the Court of Appeal ruled, that at the time of the signing of the Treaty of Waitangi, the bed of the river was in Maori customary ownership. However, the Court declined to decide upon the Crown's contention that Maori had lost their right to the riverbed as a consequence of having sold their riparian lands, without first obtaining more evidence. Thus legislation was passed so that the Maori Appellate Court could receive further evidence upon Maori customs and usage relating to the Whanganui River. In June 1958, the appellate court found that there was no Maori custom upon which the issuance of a tribal title to the river could be justified when the riparian lands had been granted individually.³⁴ What the court would have found had the lands abutting the river been vested tribally remains unclear.

The matter was finally disposed of by the Court of Appeal in 1962. It adopted the 1958 findings of the Maori Appellate Court and held that the titles issued for the river's riparian lands included a title to the riverbed *ad medium filum*. Although leave was applied for by the Maori claimants to take the matter to the Privy Council, the application was abandoned in July 1962, presumably due to the prohibitive expense.³⁵

The result of this protracted litigation was the conclusion that there was no Maori custom supporting the tribal ownership of rivers upon which the Maori Land Court could issue a title to an entire river in the name of a tribe. In arriving at their conclusions, the various courts involved in the matter of the title to the Whanganui River, eschewed matters of mythology and spiritual connections with the river, focusing on evidence that indicated a custom comparable with common law concepts of property.

30. Ferguson, p 6

31. AJHR 1950, g-2, 'Report of Royal Commission on Claims made in respect of the Wanganui River', p 9

32. For example see Ferguson, p 8

33. Section 36 of the Maori Purposes Act 1951 was enacted to enable the matter to be referred to the Court of Appeal.

34. Ferguson, p 10

35. Ibid, p 62

14.4.3 Marginal strips

Another consideration in respect of the ownership of rivers (and lakes) is the existence of marginal strips, more commonly known as the ‘Queen’s chain’. The strips came about as a result of the Land Act 1892, which provided that, upon the sale of lands owned by the Crown with a natural water boundary, a 66-foot strip would be reserved along the foreshore, around the margins of lakes larger than 50 acres, or along the banks of rivers and streams with an average width of more than 33 feet.³⁶ This provision was continued by section 58 of the Land Act 1948. Although not expressly recognised by statute, marginal strips may include title to the bed of the waterway they adjoin, *ad medium filum*. This gives rise to the possibility that many more rivers may be vested in the Crown than just those that are navigable.³⁷

14.5 The History of Lake Ownership in New Zealand

Unlike rivers, where common law principles have been applied as to the ownership of their beds, claims by Maori to the ownership of lakes have been dealt with on an ad hoc basis. Despite claims to Maori ownership having been strenuously denied by the Crown, in many cases the Crown was forced to concede these claims and to secure negotiated settlements with the owners, which were subsequently given effect to by statute.

14.5.1 Wairarapa lakes

Subsequent to the sale of lands abutting the Wairarapa Lakes in the 1850s, settlers taking up occupation began to pressure the Government to keep the outlet of the lower lake permanently open to prevent the flooding of their lands each winter.³⁸ Local Maori had a vital interest in the annual flooding as it presented an optimum opportunity for the capture of huge amounts of eels – a commodity that it would appear was a mainstay of the local economy. Beginning in 1874, the Crown began a campaign to acquire rights in the lake sufficient to enable it to control the outlet of the lake. In 1876, the rights of 17 Maori were acquired by the Government for £800. This purchase, however, was later deemed to have secured the Crown only the fishing rights of the 17 individuals and not the entire title to the lakes, as the Crown initially claimed.³⁹

Upon applications being made to the Native Land Court by both Maori and the Crown, investigations were undertaken as to the title of the lake, the court issuing

36. Land Act 1892, s 110

37. Ferguson, p 15

38. Lake Wairarapa lies to the north and Lake Onoke to the south abutting Palliser Bay. The lakes are sometimes referred to as the northern and southern lakes respectively.

39. A G Bagnall, *Wairarapa: An Historical Excursion*, Masterton, Hedley’s Bookshop for the Masterton Trust Lands Trust, 1977, pp 378–379

its decision in 1883. A list of 122 owners was issued by the court which, in conjunction with the 17 interests acquired by the Crown, brought the total number of interests to 139.⁴⁰ Subsequently, Crown officials continued unsuccessfully in their attempts to acquire rights to the lake.

Precipitated largely by complaints by Maori that the South Wairarapa River Board had assumed the right to open the lake mouth at will, a royal commission was established in 1891 to investigate their grievances. Commissioner Alexander Mackay found that Maori were indisputably the owners of both the lakes, but that they were not justified in exercising those rights in such a way as to allow the adjacent lands they had sold to the Crown to periodically flood. Mackay recommended a solution whereby Maori allowed the lake mouth to be opened in the face of an impending flood, a concession for which they were to be compensated.⁴¹

The river board kept up its pressure on the lakes' Maori owners, even opening the lake mouth in the face of a Maori physical presence.⁴² In 1896, largely as a consequence of the river board's pressure, the Crown managed to negotiate the purchase of the lake owners' interests. The agreement, given effect to in 1908, saw the owners receiving £2000 and a reserve of 30,486 acres in the Pouakani block near present-day Mangakino.⁴³

14.5.2 Lake Horowhenua

Subsequent to a royal commission in 1896 into the status of various subdivisions of the Horowhenua block (including block 11, which included Lake Horowhenua⁴⁴), legislation was passed that, inter alia, vested Lake Horowhenua and a one-chain strip of land around its margin in the Muaupoko tribe.⁴⁵ The Native Appellate Court then proceeded to determine the owners of the lake block, eventually vesting it in trustees for the benefit of Muaupoko.⁴⁶

As a result of demands from increasing numbers of Pakeha settlers in the Horowhenua that the lake be made available for recreational purposes, the Lake Horowhenua Act 1905 was passed, which declared the lake to be a recreational reserve 'for both races, in as far as possible to do so without unduly interfering with the fishing and other rights of the Native owners'.⁴⁷ Under the Act, a board was created to administer the reserve, a third of whose members were to be Maori of Muaupoko descent. Furthermore, the free and unrestricted access and fishing rights of the Maori owners were protected, so long as the exercise of such rights did not interfere with the full and free use of the lake for recreational purposes.

40. Wairarapa mb 4, 8–11 November 1883, fol 117–132

41. AJHR, 1891, G-4, 'Report on claims of Natives to Wairarapa Lakes', p 11

42. Bagnall, pp 381–382

43. *Ibid*, p 377

44. Keith Pickens sets out the history of the ownership of Lake Horowhenua in Dr Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei, and Manawatu*, Wellington, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), August, 1996, pp 271ff

45. Horowhenua Block Act 1896

46. Reserves and Other Lands Disposal Act 1956

47. Lake Horowhenua Act 1905, preamble

Tension between Muaupoko and the Government arose in the 1920s as a result of drainage work associated with the lake. During this period, the lake level was lowered, damaging freshwater shellfish beds around the lake's margin and destroying many eel weirs in the Hokio Stream, the lake's main outlet. This work apparently was illegally carried out by the local drainage board. Rights to the reclaimed land that resulted from the lowering of the lake were contested between the Muaupoko and Pakeha members of the lake board. Another source of irritation for Muaupoko was that farmers were grazing the lake's one-chain marginal strip, thereby destroying flax that grew along the lake's margin.⁴⁸ Consequently, a committee of inquiry was established at the request of the domain board to investigate, *inter alia*, the rights of Muaupoko to the lake. The committee was chaired by Judge Harvey of the Native Land Court and received submissions from the domain board, the Levin Borough Council, Muaupoko, and various Pakeha individuals and interest groups. Reporting to the Minister of Lands, Harvey listed clear evidence in support of Maori ownership up until the legislation of 1916 and 1926 affecting the lake, observing that 'it may be that these amendments have taken away the Native's title if so they have done it in a subtle manner mystifying alike to Domain Board and Natives'.⁴⁹

Throughout the later 1930s and 1940s, various unsuccessful attempts were made at settling the impasse that had developed. Matters were made more difficult by the fact that by the late 1930s, the domain board had ceased to function owing to the fact that no Maori were willing to accept nomination. The 1950s saw further meetings and representations to the Government in an attempt to settle the issue of the lake's ownership and associated rights.⁵⁰ In 1956, legislation was passed that confirmed Maori owned the lake bed, the one-chain marginal strip, and the Hokio Stream, and vested these areas in trustees appointed by the Maori Land Court. The surface of the lake was declared to be a public domain along with 13 acres of lake frontage. The domain board was also reconstituted. The Act required that half of the board's eight members be of the Muaupoko tribe.⁵¹

14.5.3 Rotorua lakes

In 1880, Ngati Whakaue negotiated an agreement with the Crown whereby they could retain their lands under customary ownership and lease them to the Crown. However, the Native Land Act 1909, with its extensive provisions for the extinguishment of customary title, saw Ngati Whakaue become somewhat anxious as to the security of their tenure in relation to the powers of the Crown.⁵² Thus, an application was made to the Native Land Court by Ngati Whakaue for the title to the Rotorua Lakes to be determined.⁵³ But because the Surveyor-General refused to

48. Anderson and Pickens, pp 278–279

49. 'Judge Harvey's report to the Honorable Minister of Lands', 10 October 1943, ma accession, w2459 5/13/173, p 3, cited in Anderson and Pickens, p 279

50. Anderson and Pickens, p 281

51. Reserves and Other Lands Disposal Act 1956, s 18(2–12)

52. *Ibid*, p 109

supply the necessary plans required for the investigation to proceed, in 1912 the applicants removed the matter to the Supreme Court.⁵⁴ In the case that ensued, *Tamihana Korokai v Solicitor General*, the court ruled in favour of the applicants, holding that it:

is a question for the Native Land Court in the first instance to determine upon proper evidence whether any particular piece of land is Native customary land or not, and in ascertaining this it may determine whether or not the Maoris were the owners of the bed of any lake or part thereof according to Native custom, or whether they had not merely a right to fish in its waters.⁵⁵

An application was immediately made to the Native Land Court for the title to the Rotorua lakes to be investigated. The court's inquiry though was delayed because of the First World War, finally getting under way in 1918. But before proceedings had been completed, the judge adjudicating in the inquiry, T H E Wilson, died. Rather than continue the investigation, the Government entered into negotiations with Te Arawa. In 1922, an agreement was reached whereby the beds of Lake Rotorua and 13 other nearby lakes, along with the right to use their waters, were vested in the Crown. In exchange, Te Arawa had reserved to them certain fishing rights and were to be paid an annuity of £6000.⁵⁶ The agreement was given effect to by section 27 of the Native Land Amendment and Native Land Claims Adjustment Act 1922.

The Act was carefully worded so as not to be an admission that lakes generally were subject to Maori customary title, referring only to the lakes as being 'freed and discharged from the native Customary title, if any'. It is apparent though that the Crown would have been faced with 'a formidable task in proving otherwise'. In the face of extensive evidence of use and occupation by the applicants, the Crown's case was based primarily upon the forbearance of the local Maori towards European activities on the lake.⁵⁷

14.5.4 Lake Waikaremoana

By the early twentieth century, it is evident that the Crown was prepared to go to extreme lengths to prevent title to any more lakes being awarded to Maori. In November 1912, the Solicitor General, John Salmond, advised that 'under no circumstances should Natives obtain freehold titles' to lakes and rivers, and that section 100 of the Native Land Act 1909 (which he had drafted) should be invoked to prevent the land court from making such investigations.⁵⁸ Subsequent to the repeal of section 100 in 1913, Salmond advised that were the Native Land Court to

53. For a fuller discussion of the history of the Rotorua Lakes, see Tania Thompson, 'Interim Report: Rotorua Lakes Research', report commissioned for the legal firm of O'Sullivan Clemens Briscoe and Hughes, March 1993.

54. Ferguson, p 21

55. *Tamihana Korokai v Solicitor General* (1912) 15 GLR, 95

56. Ferguson, p 22

57. Ibid, p 22

find in favour of Maori in relation to inland waterways, Parliament should be asked to pass legislation vesting such lakes in the Crown and to provide compensation for the applicants in lieu of the actual issue of freehold titles to the waters in question.⁵⁹

It was in this political context that the Native Land Court investigated the claims of Tuhoe–Ruapani and Ngati Kahungunu ki Wairoa to the title of Lake Waikaremoana. Between 1915 and 1918, the court received a large corpus of evidence concerning traditional associations and uses of the lake. Interestingly, the Crown did not appear during any of these hearings. In 1918, Judge Gilfedder ruled that both claimant groups had interests in the lake. This precipitated immediate appeals from the Crown, who disputed that the lake bed was Maori customary land, and Tuhoe–Ruapani, who objected to Ngati Kahungunu’s inclusion on the title to the lake.⁶⁰

In a memorandum to cabinet, the Attorney-General, Sir Francis Dillon Bell, drew attention to the implications of Gilfedder’s decision in the matter of Lake Waikaremoana, expressing concern as to the status of the Crown’s rights to generate electricity from the lake’s waters. He stated that:

By the Treaty of Waitangi the whole fee simple of the land of New Zealand became vested in the Crown, subject to the Native right. The Native right in respect to these waters was the exclusive use by certain tribes and hapus, but as in the case of the shores of the sea and navigable rivers of New Zealand, the bed of the waters was in no sense vested in the tribes and hapus, which have the rights over the waters. The contrary view confuses the question of Maori right which is a matter of custom determinable by the Native Land Court, with the legal result in England of ownership of fishing rights and marginal occupation.⁶¹

Subsequent to Gilfedder’s decision, the Crown continued to act as the legal owner of the lake, issuing fishing licences, further developing tourist services, and expanding the hydro-electric scheme which used the lake’s waters.

The Crown’s appeals finally came before the Native Appellate Court in 1944. Its case centred around its contention that it was outside the Native Land Court’s jurisdiction to inquire into the title of Lake Waikaremoana and that its 1918 decision had been made upon improper evidence. It was suggested that, at most, this evidence supported the existence of Maori fishing rights in the lake. Given the Crown’s contention that the 1918 land court decision was a nullity, the Crown argued that the appeal was therefore outside the jurisdiction of the appellate court. On 20 September 1944, the Native Appellate Court handed down its decision, dismissing the Crown’s appeal and upholding the Native Land Court’s 1918 decision. In doing so, the court observed that there existed ‘an abundance of authority that in New Zealand the rights of Natives are safe-guarded without reference whatsoever to the incidence of English law’.⁶²

58. Solicitor General to Attorney-General, 4 November 1912, cited in Emma Stevens, ‘Report on the history of the title to the lake-bed of Lake Waikaremoana and Lake Waikareiti’, Crown Forestry Research Trust research report for the Wai 144 claim, p 21

59. Salmond to Under-Secretary of Lands, 11 June 1917, in Crown Law Office opinions, vol 6, LINZ

60. Stevens, p 2

61. Attorney-General to Cabinet, 21 March 1922, cl 196/10

Although the Crown decided to apply to the Supreme Court for writs of certiorari and prohibition in connection with the Waikaremoana decision, these had not been proceeded with by 1954, by which time the statutory 10-year period in which decisions of the Native Appellate Court had to be challenged had passed. The Government then decided to seek a negotiated settlement. Deliberations and negotiations concerning a settlement began in the late 1940s, continuing throughout the 1950s and 1960s. Because of tenacious opposition from the lake's owners, the Government was forced to abandon its hope of acquiring the freehold of the lake and had to settle instead for a lease arrangement.⁶³ In 1970, an agreement was reached between the owners and the Government whereby the lake was to be leased to the Crown for a period of 50 years with a perpetual right of renewal, backdated to 1967. The rental was to be set at 5½ of the lake's value and there were to be 10-year rental reviews. The Lake Waikaremoana Act was passed the following year, giving effect to the lease agreement. The Act vested the lake in the Tuhoe–Waikaremoana and Wairoa–Waikaremoana Trust Boards, to whom the rent was to be paid on behalf of the lake's owners.⁶⁴

14.5.5 Lake Taupo

In the 1890s, trout were introduced to Lake Taupo. The fish soon became important to Ngati Tuwharetoa both as a source of food and because they attracted tourists, who Maori were able to charge for the right to fish in their streams and camp on their land. Problems arose, however, when fisheries regulations were enforced, and Maori fishing without a licence were prosecuted. In an effort to resolve the problem, the Native Minister was authorised by statute to consult with Tuwharetoa with a view to reaching a settlement.⁶⁵

The Native Minister, J G Coates, subsequently undertook negotiations on behalf of the Government. While the initial negotiations were not concerned with the ownership of the lake bed (the owners being apparently more interested in securing a financial return from the trout fishery), the final agreement vested the waters and the bed of Lake Taupo in the Crown.⁶⁶ Other terms of the agreement included a provision that the Government would pay a specially constituted trust board an annuity of £3000 along with half of the revenue generated over £3000 from fishing licence and camping fees. In addition, the owners of land bordering tributaries to the lake would be eligible for compensation for income they had previously derived from fishers and campers. The agreement was given effect to by the Native Land Amendment and Native Land Claims Adjustment Act 1926. Although the Act

62. Stevens, pp 30–34; cl 200/16, cited in Stevens, p 37. The Appellate Court convened again in 1946 to hear the Tuhoe–Ruapani appeals against the inclusion of Ngati Kahungunu in the title to the lake. The appeals were dismissed, again the Native Land Court's 1918 decision being upheld.

63. Stevens, pp 43–51

64. Ibid, pp 42–45

65. Native Land Amendment and Native Land Claims Adjustment Act 1924, s 29

66. Brian Bargh, *The Volcanic Plateau* Wellington, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), November 1995, pp 111–116

included provision for compensation to be assessed, it was not until further legislation was passed in 1946 that a commission of inquiry was held. The Lake Taupo Water Claims Compensation Court duly sat and awarded a total of £45,600 ‘in full satisfaction of the claims advanced’ by Maori for compensation in respect ‘of certain rivers and streams in the Taupo district’.⁶⁷

14.5.6 Lake Omapere

Lake Omapere, situated in a basin midway between the Bay of Islands and the Hokianga, has for centuries been an important eel fishery and site of habitation for sections of the Ngapuhi iwi. It appears that the rights of Maori in the lake were tacitly acknowledged throughout the nineteenth century. But shortly after the turn of the century, increased pressure from Pakeha for pastoral lands meant that there were incessant demands made upon the Government for control of the lake to be wrested from Maori so as that its level could be controlled and the flooding of lands abutting the lake in winter prevented. Such moves were opposed both by local Maori, who feared the effect lowering the lake would have upon their eel fisheries, and by some Pakeha, who were concerned with preserving the lake’s scenic values.

Possibly as a consequence of this perceived threat to their rights, in 1913 local Maori applied to the Native Land Court for the title of Lake Omapere to be investigated. This obligated the Crown to seriously consider the nature and extent of its rights in the lake. Initially, the position forwarded by the Crown Law Office was that, by virtue of owning riparian lands, the Crown had rights *ad medium filum*, which it shared with Maori who had retained some land contiguous to the lake. However, it was considered that, if for reasons of public policy Maori should be prevented from establishing title to the lake, the Government should consider exercising its powers under the Native Land Act 1909 to prevent the Native Land Court from investigating title, or to simply proclaim the lake to be Crown land.⁶⁸ In 1914, the Solicitor General expressed the opinion that ‘the matter is far too doubtful to express any confident conclusion on it one way or the other’. Although doubting that Maori custom recognised the ownership of lakes such as Omapere, he similarly expressed the opinion that there was insufficient authority to extend the *ad medium filum* presumption. He was confident, however, that the riparian rights accruing to the Crown as a consequence of it owning lands abutting the lake gave the Government sufficient authority to prevent private landowners from interfering with the lake’s level.⁶⁹

Although the provisions of the Native Land Act were not invoked to prevent the land court’s inquiry, its investigation was obstructed by the refusal of the North Auckland Commissioner of Crown Lands to supply the requisite survey plan.⁷⁰

67. ‘Annual Report of the Department of Internal Affairs for the Year Ended 31 March 1949’, AJHR, 1949, H-22, p 26

68. Assistant Law Officer to Under-Secretary of Lands, 11 July 1913, Is 1 22/2679

69. Solicitor General to Under-Secretary of Lands, 22 July 1914, Is 1 22/2679

70. North Auckland Commissioner of Crown Lands to Under-Secretary of Lands, 21 October 1921, Is 1 22/2679

Subsequent to the Minister of Native Affairs' ordering that a survey plan be prepared,⁷¹ the Native Land Court's investigation of Lake Omapere finally got under way in 1929.

The court sat first in Kaikohe, where extensive evidence as to the customary ownership of the lake was presented by the applicants. The court then reconvened in Auckland, where the substantive legal issues were considered. The arguments presented by counsel for the Crown against the Maori claim to the lake were that: the rights of Maori in Omapere were limited to fishing rights; that the Treaty of Waitangi vested in the Crown the radical title to all land; that rights of navigation accrued to the Crown in the public interest; and that it was incumbent upon Maori to demonstrate that they had exclusive proprietary rights in the lake bed.⁷²

On 1 August 1929, Judge Acheson issued his decision as to the title of Lake Omapere, ruling incontrovertibly that the lake was Maori customary land. The decision is notable in that much of Acheson's reasoning underpinning the decision was based on the guarantees extended to Maori under the Treaty of Waitangi. It was held variously: that Maori custom recognised the ownership of lake beds; that Omapere was effectively and continuously occupied and owned by Ngapuhi; that their title had never been legally extinguished and therefore could not be disregarded; that precedents existed for the Crown's recognition of Maori ownership of lake beds; and that the Native Land Court was bound to take judicial notice of the Treaty of Waitangi – article 2 of which was held to guarantee Maori ownership of lakes.⁷³

Although the Crown immediately lodged an appeal against Acheson's decision, it was never prosecuted. Finally, on 27 October 1953, the Crown announced that it was abandoning its appeal. On this occasion, the Crown was censured by the presiding judge of the Maori Appellate Court, who suggested that the appeal had been used as a lever by the Crown to effect a settlement, and that such an action was 'reprehensible and an abuse of the process of the Court'.⁷⁴

In 1940, at the request of the owners, Lake Omapere had been constituted as a tribal reserve pursuant to the Native Purposes Act 1937. Subsequent to the passing of the Maori Affairs Act 1953, the trust was converted to a tribal reserve under section 438 of that Act.⁷⁵

As a consequence of a proposal by the Kaikohe Borough Council to take water from Lake Omapere for domestic supply in the 1970s, the legal status of the lake's ownership and waters was reconsidered. In relation to this, Judge Nicholson of the Maori Land Court opined that Omapere was not a lake as understood in English law but rather Maori customary land. Further, he considered that, although the Crown

71. Addendum (7 September 1922) to Memorandum to the Native Minister from Private Secretary, 6 September 1922, ls 1 22/2679

72. Bay of Islands mb, no 11, 19 June 1929, pp 19–22 (pagination is that of a transcription of proceedings in LS 1 22/2679, not that of the original)

73. *Judgement of Native Land Court in the Matter Title to Omapere Lake*, pp 6–23

74. Auckland Appellate Court mb, no 12, 28 October 1953

75. Bay of Islands mb, no 18, 31 July 1940, ff 98–105; Bay of Islands mb, no 29, 22 February 1955, fol 112; Bay of Islands mb, no 30, 8 March 1955, fol 202

by virtue of the Water and Soil Conservation Act 1967 had the sole right to use the lake's waters, the Crown did not own the water as such, and was legally required to defer to the lakes' owners in order to gain access to the lake to draw water.⁷⁶

14.5.7 Lake Rotoaira

Lake Rotoaira is a relatively small lake situated between Lake Taupo and Tongariro. Traditionally a highly prized eel fishery, the lake became an internationally renowned trout fishery with the introduction of trout to the central North Island in the late nineteenth century. From the mid-1920s, it appears that Rotoaira was considered for inclusion in various proposed hydro-electric developments. Finally, in 1964, the Tongariro River development – which included Lake Rotoaira – was approved. The scheme was completed in December 1973.⁷⁷

In 1937, an application was made to the Native Land Court for the title to Lake Rotoaira to be investigated. The Crown, at the time embroiled in proceedings concerning Lakes Omapere and Waikaremoana, deliberately obstructed the inquiry. Eventually, in 1943, the Crown allowed the inquiry to proceed, while at the same time seeking to make the proviso that the outcome of the investigation would not set a precedent for the ownership of the beds of other inland waterways.⁷⁸ In 1956, the court found the applicants to be the customary owners, later vesting the lake in 11 trustees under section 438 of the Maori Affairs Act 1953. The trustees were vested with the authority to utilise and develop the resources of the lake and regulate fishing activity. Further, the trustees were deemed to be the group with which the State Hydro-Electric Department was to treat in relation to negotiating for the use of the lake's waters for electricity generation.⁷⁹

John Koning records that, as the Tongariro power scheme proceeded, it became apparent that the Lake Rotoaira trout fishery would be much more seriously affected than had first been anticipated. Consequently, it was feared that this could give rise to large claims to compensation from the lake's owners. In 1970, the Ministry of Works was authorised to enter into negotiations with the Lake Rotoaira trustees for the purchase of the lake. In negotiations with the Crown from 1970 to 1972, the owners remained vehemently opposed to the sale of the lake.⁸⁰ Eventually an agreement was signed in November 1972, by which the trustees were divested of the power to do anything that could jeopardise the power scheme and the right to compensation under the Public Works Act. In return, the Crown agreed not to

76. Judge Nicholson to Secretary, Northland Catchment Commission, 6 July 1973, Wai 22, doc b8; 'Local Bodies Rebuked by Maori Court Judge', *Northern Advocate*, 16 November 1974

77. John Koning, *Lake Rotoaira: Maori Ownership and Crown Policy Towards Electricity Generation 1946–1972*, Wellington, Waitangi Tribunal Research Series, 1993, no 2, pp 2, 5–6

78. *Ibid*, p 4

79. *Ibid*, pp 4–5

80. Heads of agreement, Ministry of Works and Ngati Tuwharetoa, 30 November 1972, Waitangi Tribunal masterfile, Wai 178/0

compulsorily acquire the lake under the public works legislation.⁸¹ Under this agreement, no compensation was paid.

14.6 Conclusion

There can be no question as to Maori Treaty rights in respect of inland waters, whether as fisheries in the English version of the Treaty, or 'taonga' in the Maori version. Maori invariably lived close to the coast or inland waters and commonly had access to both. Ancestral and spiritual associations with inland waterways were, along with those with mountains, key determinants in Maori tribal identity.

The Crown was reluctant, in the colonial period, to recognise such rights as being real or compensable. Governments either assumed prerogative rights in respect of larger bodies of water or applied the principles of riparian rights in respect of smaller streams, lakes, and swamps, which were considered to have passed with the land when it was purchased. Maori did not share these views – particularly in respect of lakes. In the litigation that arose from the late nineteenth century, and in settlements made in respect of Lakes Taupo, Rotorua, Horowhenua, Waikaremoana, Omapere, and Rotoaira, there appears to have been a recognition of Maori rights to lake beds and fisheries, and the principle of negotiating for such rights seems clearly to have been established. (Water appears to remain at common law a common property resource with various restraints upon its use.)

In respect of rivers, the *ad medium filum* presumption has been discussed by the Waitangi Tribunal in the *Mohaka River Report* – where the purchase deeds to the land seem, in some instances at least, to extend to the banks and not to the middle of the river – and is currently being considered in respect of the Whanganui River. In its *Whanganui-a-Orotu Report 1995*, the Tribunal regards lagoons and wetlands as being taonga.

The loss of mahinga kai and damage to rivers regarded as wahi tapu by a range of development works is complained of in many claims. Certainly, the public works legislation and related legislative provisions affecting swamp drainage and the diversion and control of streams, together with the principle of riparian rights, caused Maori rights to be increasingly overridden after 1870. Countless drainage and diversion schemes affected the waterways, as did countless acts of pollution, wittingly or unwittingly. For such acts, compensation was rarely thought to be payable. In hindsight, the economic returns from much of this effort was limited. Maori farmers were more inclined to leave swamps and eeling streams intact, though they too had to drain land to run stock and cultivate crops.

In that the Crown generally treated the ownership of non-navigable streams and swamps as passing with the title to the land, the issue of rights to such waterways is bound up with any settlements made in respect of the land. However, some explicit regard should be had to the specific ecological and other associations Maori

81. Heads of agreement, pp 14–18

undoubtedly had with inland waters and the flora and fauna they supported. Undoubtedly, the loss to Maori of their rights to many waterways has been very heavy over the past 150 years of settlement – heavier in some respects than the loss of land. The question of public access to waters is, however, of the highest importance to the community generally, whether the owners of adjacent lands are now Maori or Pakeha. In settlements yet to be reached, such public rights will need to be protected through the upholding of the Queen’s chain or other modes of access. This, to some degree at least, need not be incompatible with respect for and restoration of Maori customary fishing and other rights, and Maori involvement by right, in controlling authorities, in recognition of customary mana over inland waters.

