

CHAPTER 2

WAIRARAPA LAKES

2.1 Introduction

The Wairarapa lakes lie on the plains bounded by the Tararua Ranges and the Aorangi mountains. The southern lake, Onoke, is located on the shores of Palliser Bay, whereas Lake Wairarapa lies to the north, approximately 12 kilometres west of present day Martinborough.¹ Along with associated swamps and streams, the lakes in total comprise an area in excess of 50,000 acres – the largest wetlands complex in the lower North Island.² The lakes are fed by the Ruamahanga River but it is only in times of flood that the waters are powerful enough to break through the narrow spit separating Onoke from the seas of Palliser Bay. This, however, was not always the case. A large earthquake occurred in 1855 which changed the topography of the region dramatically. One such change was that Onoke, which had previously been open to the sea most of the time, was subsequently closed for several months of the year.³ When the bar was closed, heavy autumn rain could cause the water level in the lakes to rise up to four metres – the two lakes becoming one body of water extending as far north as Martinborough – before the mass of water forced the bar open.⁴

Archaeological evidence shows that many small settlements existed in Palliser Bay as early as ad 1050.⁵ The identity of these earliest inhabitants remains uncertain, but it appears that they were displaced by the closely related groups of Rangitane and Ngati Ira upon their arrival from further north.⁶ Following a similar pattern, Ngati Kahungunu are held to have arrived from the Hawke's Bay region around ad 1500.⁷ According to Goldsmith a clear distinction between Ngati

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1. Onoke and Lake Wairarapa are also sometimes referred to as the lower and upper lakes respectively.
 2. A G Bagnall, *Wairarapa: An Historical Excursion*, Masterton, Hedley's Bookshop for the Masterton Trust Lands Trust, 1976, p 377; B J Hicks, *Investigation of the Fish and Fisheries of the Lake Wairarapa Wetlands*, New Zealand Freshwater Fisheries miscellaneous report, no 126, Christchurch, NIWA, 1993, p 6
 3. Angela Ballara, 'The Origins of Ngati Kahungunu', PhD thesis, Victoria University of Wellington, 1991, p 40
 4. Alexander Mackay, 'Report on Claims of Natives to Wairarapa Lakes and Adjacent Lands', *AJHR*, 1891, g-4, pp 5, 12, 19
 5. Janet Davidson, 'The Polynesian Foundation' in Geoffrey Rice (ed), *The Oxford History of New Zealand*, 2nd ed, Auckland, Oxford University Press, 1992, pp 9–10
 6. Ballara, pp 14–15
 7. T W Downes, 'History of Ngati Kahungunu', *JPS*, vol 24, 1915, p 60, cited in Suzanne Doig, 'Customary Maori Freshwater Fishing Rights: an Exploration of Maori Evidence and Pakeha Interpretations', PhD thesis, Canterbury University, 1996, p 190

Figure 2: Wairarapa lakes

Kahungunu and Rangitane is difficult to make by virtue of various alliances and intermarriages between the iwi.⁸ Although the occupation of these groups was disrupted by taua comprising of Nga Puhi, Te Atiawa, Ngati Tama and Ngati Toa in the 1820s, the various Rangitane–Ngati Kahungunu groups had returned to the Wairarapa lakes region by 1841.⁹

For centuries the Wairarapa lakes have been a vital food source for Maori of the area. While various species of whitebait, flounder, fin fish, and water fowl were taken, it was eels that were historically most important to local Maori.¹⁰ This significance extended beyond just the subsistence of those living near the lake as eels were an important commodity traded with groups both further north and in the South Island. When the Crown purchased large areas of lands contiguous with the lakes in the 1850s, Maori were at pains to ensure that the lakes were excluded from these sales, thus protecting their all-important fisheries.

Subsequent to the Crown purchases of the 1850s, Pakeha pastoralists gradually took up occupation of the Ruamahanga flood plain. However, whereas Wairarapa Maori attached huge value to the lake, to the settlers it was an impediment to their economic advancement. The lakes and their associated waterways were of little use for transport – the outlet to Palliser Bay being naturally closed for most of the year and the actual lakes and river being so shallow as to allow the passage of only boats with the smallest draught.¹¹ As more and more Pakeha settlers took up occupation of the ceded land and demand for arable land grew, it was not long before farms were being established on lands abutting the lake. Although this land was highly fertile as a consequence of floods depositing large amounts of silt, the floods meant that the lands were frequently inundated with water and hence unusable for up to several months each year. Thus by the 1870s, Pakeha pastoralists were bringing significant pressure to bear upon Government officials to abrogate the rights retained by local Maori that allowed them to maintain the closure of the lakes in order to control the eel fishery. Further pressure was exerted by settlers for the Government to gain control of the lake mouth as it was evident that by maintaining a permanently open channel between Onoke and the ocean, a considerable amount of extremely fertile land could be brought into production.

It was this pressure that precipitated an exhaustive campaign by the Crown to acquire rights to the lake. Although the customary title to the lakes was extinguished when they passed through the Native Land Court, the majority of owners steadfastly refused to sell their interests to the Crown. A catalyst for much initial opposition appears to have been outrage at the fact that the Government had assumed ownership of land thrust out of the lake by the 1855 earthquake. However,

8. Paul Goldsmith, Wairarapa, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), July 1996, p 1

9. Doig, pp 194–195. For a more comprehensive account of the history of the occupation of the Wairarapa plains and of those exercising rights over the Wairarapa lakes, see Doig, pp 189–196

10. Evidence of John Alfred Jury, 'Report on Claims of Natives to Wairarapa Lakes', AJHR, 1891, g-4, p 19

11. Bagnall chronicles early interest and investigations as to the possibility of maintaining a permanently open channel linking Palliser Bay with Onoke. It appears, though that nothing much came of these encounters bar an occasional short lived launch service. Bagnall, pp 377–378

eventually the Crown's persistence paid off. The attitude of successive Government officials 'that sooner or later the Maori 'mana' [over the lakes] must pass to the Crown' along with sometimes extreme pressure from local Pakeha, wore down Maori resistance.¹² Subsequent to a royal commission of inquiry undertaken in 1891, the Crown finally managed to purchase the rights of the lakes' owners. Initially it was intended that the lakes' owners would receive a grant of land in the Wairarapa. But by the time the deal was concluded, land in the Wairarapa was considered to be too expensive. Instead, part of the Pouakani block, near the present day town of Mangakino, was vested in the lakes' owners – approximately 300 kilometres from the lakes' owners' turangawaewae.

This chapter begins with a brief consideration of Maori fishing practices and the nature of fishing rights in the Wairarapa lakes. It then recounts the Crown's campaign to acquire the beds of the lakes that culminated in the 1891 royal commission and the eventual cession of the lakes.

2.2 Maori Fishing Practices in the Wairarapa Lakes

There can be no doubt as to the significance of the Wairarapa Moana eel fisheries to the nineteenth century local Maori economy. This fact was repeatedly stressed in the report of Alexander Mackay, a judge of the Native Land Court, who in 1890 was commissioned to inquire into the claims of Maori vis-a-vis the Wairarapa lakes. Alfred John Jury, appearing before the commission, stated that eels, flounder, kokopu, whitebait, and ducks were procured from the lake.¹³ But eels, it would seem, have constituted the major food resource taken from the lakes over the entire period of human occupation.¹⁴

During the course of the commission's inquiry, a memorial was prepared by the solicitors acting for the group of Maori owners opposed to both the sale of the lake and any interference with their fishing rights. The memorial stated that:

Prior to the settlement of these islands by Europeans, sheep and cattle were unknown to the aboriginal race, who derived sustenance from several kind of roots, birds, rats and fish. Fish constituted the most important article of diet; consequently whilst lands in European opinion most valuable were frequently neglected, those spots which were renowned as fishing-stations were of sepreme [sic] importance. The Wairarapa Lake was one of these.¹⁵

The importance of the Wairarapa lake fisheries to the owners appears to have been grasped by Commissioner Alexander Mackay and reflected in his report. He made the observation that while many 'persons may probably not appreciate the

12. Maunsell to Under-Secretary, Native Affairs, 26 May 1885, ma 13/97, NA Wellington

13. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 19

14. B Foss Leach, 'The Prehistory of the Southern Wairarapa', *Journal of the Royal Society of New Zealand*, vol 11, 1981, pp 28–29, cited in Doig, p 187

15. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 12

importance of the eel-fishing to the Natives', the practice had a reputable English precedent in that 'a great part of the revenue of one of the richest abbeys and cathedral churches in England was derived from eel-ponds'.¹⁶ Continuing, he spelt out the significance of the fishery to Wairarapa Maori yet further:

In the primitive state of life formerly led by the Natives the eel preserves were the most important property they possessed. Eels were a favourite food with the Maoris, and a good eel fishery like the Wairarapa Lakes is of as much value to them as the banks of the Newfoundland are to those who deal in cod-fish. To European minds cultivation may seem a more important exercise of ownership than catching eels; but you may raise crops or depasture stock anywhere, but eels can only be obtained where Nature causes them to be. Eels in olden times not only formed a large article of diet for the Natives, but they used to dry them in quantities and send them as presents to neighbouring hapus, receiving in return other kinds of food not generally procurable by the donors. It is only of late years that the possession of sheep and cattle has afforded them animal food of another description, and distracted their attention to a certain extent from their old pursuits of hunting and fishing, but not withstanding this, their eel-preserves will always remain a valuable property, more especially when the progress of settlement limits the exercise of their former pursuits to the remnant of the land retained by them.¹⁷

The importance of the fishery also extended beyond the immediate needs of consumption. Dried eels were exchanged for pounamu and dried sea fish from other areas with groups as far afield as Wellington, Napier, and Gisborne.¹⁸

In addition to stressing the actual importance of the Wairarapa eel fishery to local Maori, the report of the 1891 commission also contained much detail as to the methods by which the eels were captured at the lake mouth. Mackay noted that the outlet of the lower lake usually remained closed from the end of December until April. During these four months, eels, and other fish congregated near the outlet waiting for the water to burst out so that they could escape to the sea and breed. A much larger variety of eels were obtainable during this period than at other times. John Jury told the commission that the species of eel known as hao, te heko, and kokoputuna (migrating eel) could only be obtained at the mouth of the lake when it was in flood.¹⁹

During the eeling season at the lake mouth, large numbers of Maori congregated to fish, especially during the months of April and May.²⁰ Eels were caught there by one of three methods: simply by picking them up at night as they attempted to slither across the bar to the sea; by the use of large hinaki (woven eel pots) that were secured to weirs or stakes; or by the 'koumu' method whereby eels swam into specially dug ditches in search of salt water.²¹ Accounts of the lake mouth fishery

16. Ibid, p 5

17. Ibid, pp 5–6

18. Hohepa Aporo, Wairarapa Native Land Court minute book 9, 26 October 1888, fol 478; Mackay 'Report on Claims of Natives to Wairarapa Lakes', pp 19, 27–28, and 33

19. Ibid, pp 5, 19

20. Piripi Te Maari and seven others to Native Department, 29 October 1886, (translation), ma 13/97, NA Wellington

suggest that annually it yielded as much as 20 or 30 tonnes of eels.²² As well as the seasonal fishery at the lake mouth, smaller scale operations were carried out throughout the year in both the upper lake and the rivers, streams and swamps that formed the lakes' catchment. This appears to have been mostly through the use of hinaki.²³

2.3 The Nature of Maori Fishing Rights in Wairarapa Moana

As has been established above, it would appear that Wairarapa Maori attached value to Onoke and Lake Wairarapa primarily as a consequence of the lakes' fish resources. Certainly the Crown held the view that if it acquired Maori fishing rights to the lake, objection to the opening of the lake would be removed. Suzanne Doig, in her analysis of fishing rights in the Wairarapa lakes, has contended that a definite distinction can be made in this regard between the upper and lower lakes. Whereas the lake mouth fishery was an extremely high yield seasonal fishery concentrated in a very small area, the main lake fishery existed over a much wider area and was fished throughout the year. However, as Doig has noted, the upper lake fishery was much less plentiful than that of the lake mouth.²⁴

The basis of all claims to fishing rights at the mouth of Onoke appear to be predicated upon the gifting of the Wairarapa lakes and surrounding lands by Te Rerewa to Te Rangitawhanga. Doig has shown that virtually all people who gave evidence before the Native Land Court in connection with the lakes and contiguous lands, 'agreed that the lower lake formed part of the area apportioned to Te Rangitawhanga when the lands were divided amongst the Ngati Kahungunu migrants'. Although other ancestors have been claimed as being a source of take tupuna in connection with Onoke, these putake appear to have coexisted with claims deriving from Te Rangitawhanga.²⁵ Importantly, while control of the fishery always seems to have resided with a nucleus of groups inhabiting the area in the immediate vicinity of the lake mouth, many hapu in the wider Wairarapa region had rights to use the fishery.

Largely as a result of the claim by Hiko Piata that he was the paramount chief of Onoke – a claim evidenced by the sale of the lakes to the Crown in 1876 by him and 16 others – a major issue for the 1891 royal commission was the nature of the rights to the lake. Hoani Paraone Tuninarangi explained to the commission that although some hapu had a 'direct right', others 'only had a right through others'.²⁶ Direct rights appear to have been those derived through ancestry and occupation of lands

21. Doig, p 19

22. Before the Wairarapa Lakes commission, Hoani Paraone Tuninarangi stated that 20 tonnes were caught annually. Doig, drawing on various sources, stated that the figure was 30 tonnes. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 28; Doig, p 188

23. Doig, p 188

24. Ibid, p 225

25. Ibid, p 203–204

26. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 29

abutting the lake, whereas any other type constituted an indirect right.²⁷ With regard to occupation, Tuninarangi told the commission that the ‘chiefs and hapus who owned the land on the banks of the lake had also a right to a portion of the lake opposite their respective localities’.²⁸

An example of an indirect right was that exercised by Tuninarangi’s hapu, Ngai Tahu. This was based not on a direct ancestral right or occupancy but on the marriage of Iraia of Ngai Tahu with Maraea Toatoa of Rakaiwhakairi – a hapu that held eeling rights at the lake mouth. Tuninarangi recounted before the commission how upon the occasion of the marriage, Te Kai a te Kokopu, a chief of Rakaiwhakairi, gifted lands to Iraia and his hapu that included Okourewa near the lake mouth. Thus each year members of Ngai Tahu established a temporary camp on the gifted land at Onoke and exercised their fishing rights.²⁹

Evidence also exists of groups with ancestral rights who had left the immediate vicinity of the lake continuing to exercise their fishing rights despite their non-residency. In this regard Doig has noted that the:

Onoke resource was rich enough to allow all a share in the fishery, and those with an ancestral and occupational right did not prevent the exercise of non-territorial rights.³⁰

It would seem that so long as some sort of connection could be demonstrated and that local practices were complied with, virtually any one could fish at the lake mouth. As Raniera Te Iho stated in an 1876 letter to the Native Department, ‘the entrance to the Wairarapa river is for all who wish to make an Eel fishing settlement’.³¹

Clearly the lake mouth fishery was exploited by a large number of groups by virtue of numerous different rights. But what of the claims by chiefs such as Hiko to having a paramount controlling right? Mackay asserted that Hiko did have a ‘superior control’ over the lake mouth fishery, evidenced by the fact that ‘he was the only person who could open the fishing season in the lower lake’. However, Mackay was of the opinion that upon the opening ‘ceremony being over his position was exactly similar to that of other persons of his own rank, and neither he or any of the others could or would think of performing any act that would operate detrimentally to the interest of those who possessed fishing-rights in the lake’.³² Doig concluded that although it appears that some chiefs had a wider influence than others as a consequence of their authority over various hapu in different areas:

it seems unlikely that the rights of any individual or small group could override those of the whole group with an interest in the control of the lake mouth fishery.³³

27. Doig, p 205

28. Mackay, ‘Report on Claims of Natives to Wairarapa Lakes’, p 29

29. Ibid, p 28; Ballara, p 231

30. Doig, p 207

31. Raniera Te Iho to Halse, 24 June 1876, MA 13/97, NA Wellington

32. Mackay, ‘Report on Claims of Natives to Wairarapa Lakes’, p 10

33. Doig, p 213

Although Lake Wairarapa was included in the area gifted by Te Rewa to Te Rangitawhanga, the situation with regards to Lake Wairarapa (in other words, the upper lake) and the streams and swamps in the vicinity of the lakes, was somewhat different to that of the lake mouth fishery. Again Tuninarangi stated before the 1891 commission that whereas, ‘all the people fished together at the mouth of the lake. . . it was a different matter in the creeks and rivers; each hapu had their own rights to these places’.³⁴ Similarly Doig has observed that unlike the lake mouth area, the waters and shores of the lakes appear to have been divided into areas owned and worked largely by single hapu or by groups of small, related hapu.³⁵

2.4 The Crown and the Wairarapa Lakes

In the period 1853 to 1854, the deadlock the Crown had previously found itself in with regard to its attempts to acquire lands in the Wairarapa was broken in a spectacular fashion. The deluge of purchases in this period included four blocks in the immediate vicinity of the upper and lower lakes. Of the four deeds, two – the Turakirae and Turanganui, being the lands to the east and the west of the lakes respectively – stated the lakes as a boundary. However, the actual detail of the boundaries was very vaguely stated. The sellers were adamant, subsequent to the deal being concluded, that:

the flood-line of the lake was the boundary agreed to, as they were unwilling to cede the adjacent low-lying land for fear of destroying the value of their eel fisheries.

The vendors’ claim appears to have been affirmed by the fact that land below the flood line in the Turanganui block was subsequently bought by the Crown ‘with the full knowledge that the land comprised therein was situated within the alleged boundaries of the Turanganui block’.³⁶

The exact location of the boundaries and ownership of the lake bed appears to have first been disputed following the earthquake of 1855 which caused much land to be forced up from beneath the lake. Despite assurances that the lake had been excluded from the sales, the Government assumed ownership of the land and subsequently sold it as the Te Puata Block in 1862.³⁷ The common law doctrine of accretion holds that dry land created by slow or imperceptible means – such as was caused by a drop in the level of the Wairarapa lakes – accrued to the owner of the land abutting that part of the lake. Where a lake bed is uplifted suddenly, title to the land accrues to the owner of the lake bed (though of course the owner of the riparian lands was, at common law, usually the owner of the lake bed as well).³⁸ So

34. Mackay, ‘Report on Claims of Natives to Wairarapa Lakes’, p 29

35. Doig, p 217

36. Mackay, ‘Report on Claims of Natives to Wairarapa Lakes’, pp 7,3

37. Ibid, pp 4, 9

38. See F M Brookfield, ‘Wind, Sand and Water Accretion and Ownership of the Lake Bed’, NZLJ, no 11, August 1981

the Crown's sale of the Te Puata block suggests that the Crown assumed that it was the owner of the beds of the Wairarapa lakes. Other Crown officials, however, took a contrary view that supported the notion that the lakes remained in Maori ownership. In 1874, for example, the Under-Secretary of Native Affairs, H T Clarke, in a communication to the Native Minister, submitted 'that the Government cannot equitably claim a right to the lake nor to any land which has since the cession become dry land through natural causes'.³⁹

Further, the vendors unwaveringly asserted that Donald McLean, in negotiating the sales, assured them that their fishing rights would not be interfered with in any way. Mr Russell, who acted as McLean's secretary at the time of the purchases, stated before the royal commission of 1891 that, 'Mr McLean told me that he had promised the Natives that the lake should not be opened'.⁴⁰ In fact it appears that an agreement was made that anyone opening the lake mouth could be fined. In December 1868, Raniera Te Iho wrote to a Mr Cooper asking:

that the arrangement made by the Government respecting our eel fisheries should be confirmed. That law was set up by the Government in 1853. It was the word that no one either Maori or Pakeha was to dig the stream. If anyone interferes. . . let him be tried before the Magistrate. Government said that a fine of £50 should be inflicted for that place is a bridge. . . upon which everyone can travel.⁴¹

Mackay stated of this arrangement that the 'lake was to be able to burst a channel for itself, but the hand of man was not to touch it' and that 'this rule was to be permanently observed for all time'.⁴²

Initially relations seem to have been amicable between European settlers occupying the lakes' floodplain and local Maori. In his report of 1891, Mackay stated:

That there does not appear to have been any trouble between the settlers and the Natives about opening the lake during the early occupation of the Wairarapa, as there was plenty of land available for pasturage purposes at that time, and it was not until sometime after the former had purchased the land adjacent to the lake from the Government that a disposition was manifested to prevent these lands being flooded; but even then amicable relations existed between the parties concerned, and a right to release the flood-waters was always conceded on application and payment.⁴³

However, as Mackay noted, once pastoralists acquired title from the Crown to the lands in the immediate vicinity of the lake that were most deleteriously affected by flooding, settlers began to exert serious pressure upon the Government to allow them to open the lake mouth when flood waters threatened to inundate their lands.

39. Clarke, Under-Secretary of Native Affairs to Native Minister, August 1874, cited in Memorandum to the Honorable Native Minister on position of the Wairarapa Lake purchase, nd, p 2, ma 13/97, NA Wellington

40. Ibid, p 7

41. Raniera Te Iho to Mr Cooper, 30 December 1868, ma 13/97, NA Wellington

42. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 7

43. Ibid, p 7

The Government's position at this time, however, appears to have been that Maori with an interest in the lake had an incontrovertible right to control the opening of the lake mouth. In an August 1874 letter to the Native Minister, the Under-Secretary of Native Affairs opined that 'the dry strip of land and shingle between the outlet of the lake and Kiriwai has never been ceded' and 'that the Government cannot equitably claim a right to the lake'.⁴⁴

As a result of pressure from Pakeha settlers, Herbert Samuel Wardell, a Resident Magistrate in the Wairarapa, had earlier in 1874 been instructed by the Government to attempt 'to purchase the alleged right to the closing of the lakes and to pay for this £200'.⁴⁵ With this objective in mind, Wardell interviewed a group of Maori with rights in the lake at a meeting in Featherston sometime in 1874. Those present, however, 'declined to accede to the request'.⁴⁶ This refusal caused the settlers to take the matter into their own hands. On 1 February 1875, a meeting was convened at Featherston at which a resolution was passed whereby 'they pledge[d] themselves to test the question of the right of opening the mouth of the Wairarapa lake by digging a channel for the water' to escape. Further, as was reported in the *New Zealand Times*, 'in the event of legal proceedings being taken against the persons doing so,' a pledge was made 'to subscribe the necessary funds to decide the matter in a permanent way'.⁴⁷ In response to this, McLean informed Major Atkinson that, the 'resolution of the settlers was simply preposterous and cannot be entertained for a minute'.⁴⁸ Clearly, then, the Government maintained the position that Maori retained rights in the lake sufficient to give them control of the lakes' outlet to the sea. However, the extent and nature of the rights acknowledged by the Crown are not clear; especially as to whether it was thought Maori had an undisputed customary title to the lakes.

2.4.1 The 1876 purchase

In 1875 Edward Maunsell, who had replaced Wardell as the Government's agent in negotiating the purchase of the lakes, stated that the settlers' resolution 'has created a considerable degree of excitement in the Native mind, and will be the means of rendering the negotiations difficult'.⁴⁹ However, Maunsell set about his task with great alacrity. In March 1875 at Tuhitarata, he met with those whom he considered to be 'the principal chiefs who claim the Wairarapa lakes'. Of the interview, Maunsell reported that the chiefs 'evinced a sullen reticence . . . in the expression of any opinion upon the subject of the sale' and expressed the fear that 'in the event

44. Under-Secretary of Native Affairs to Native Minister, August 1874, excerpt contained in 'Memorandum to the Honorable Native Minister on Position of the Wairarapa Lake Purchase', nd, p 2, ma 13/97, NA Wellington

45. Ibid, p 1

46. Ibid, p 7

47. Maunsell to Clarke, 8 February 1875, ma 13/97, NA Wellington; untitled, *New Zealand Times*, 5 February 1875

48. McLean to Major Atkinson, 16 February 1875, ma 13/97, NA Wellington

49. Maunsell to McLean, 9 March 1875, ma 13/97, NA Wellington

of their opposing the opening of the spit . . . the militia and volunteers would attack them'. At this meeting an offer was made to purchase the rights to both the lake and its fisheries for the sum of £800. Despite Maunsell being of the mind that those present at the meeting were 'suspicious as to the reason why the offer of the purchase was made by the Government',⁵⁰ a deed of sale was eventually executed by Hiko, Hemi Te Mihi and 15 others in Wellington on 14 February 1876.⁵¹ Maunsell recounted how at the March 1875 meeting, Hiko had complained that he had been 'unjustly deprived of his salary' of £50 per annum that he received for his work as an assessor. In his report of the meeting, Maunsell had stated that if Hiko's salary was reinstated, the chief would in all likelihood agree to the sale. Accordingly the deed of cession contained a clause that an 'annuity or pension of Fifty pounds to be paid to Hiko Piata'.⁵²

The deed stated that the signatories:

held rights over the Wairarapa Lakes . . . for the purposes of eel fishing which . . . have been protected by the Government of New Zealand, in so much that Europeans have not been permitted to use artificial means to drain off into the sea the waters confined in such lakes . . .

and that such:

eel fishery rights and other rights and interests of any kind whatsoever which we claim to have in such Lakes or in the borders of whether in land or in the waters thereof . . .

were surrendered and conveyed to the Crown.⁵³ Although the deed explicitly recognised that the vendors had a set of prior rights to the lake, these were not defined. The sale was contested from the outset on the grounds that Hiko did not have a paramount authority that enabled him to sell the entire lakes and all profit a *prendre*⁵⁴ deriving from them. Interestingly, before the 1891 commission, Maunsell recounted how his original intention, and presumably instruction:

was only to purchase the fishing-rights, so as to obtain control over the mouth of the lake, but owing to my zeal in the matter, I inserted a clause making it a cession of the land both under the water and on the margin of the lake as well.⁵⁵

50. Report by Maunsell re interview with the principal chiefs who claim the Wairarapa lakes, 24 March 1875, ma 13/97, NA Wellington

51. Turton, deed 198, pp 410–411

52. Report by Maunsell re interview with the principal chiefs who claim the Wairarapa lakes, 24 March 1875, ma 13/97, NA Wellington; Turton, deed 198, p 411

53. *Ibid*, p 411

54. A profit a *prendre* is the right to take some part of an estate such as minerals or produce of the land. The rights exists independently of the title to the land in question. They can be exclusive or held in common with others. GW Hinde, D W McMorland, and Sim, *Introduction to Land Law*, 2nd ed, Wellington, Butterworths, 1986, p 366

55. Evidence of Maunsell in Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 32

Manihera Rangitakaiwaho and John Jury were both members of the party that travelled to Wellington with Maunsell. In a report of the signing of the deed, Maunsell recounted how, en route to Wellington, Manihera had expressed the opinion that the proceeds from the sale should be divided equally between his followers and Hiko's party. Maunsell informed Manihera that he had been instructed that Hiko 'had come to arrangement viz that the 'mana' of the fisheries was held by him and that £500 [of the £800 total] was to be deposited in his name'. Being dissatisfied with how it was proposed to distribute the money, Manihera and Jury 'set up a claim for all the land reclaimed along the margin of the lake since the cession of the various blocks mentioned'. To this Maunsell recounted his response as being that the:

Government would not recognise any claims to land reclaimed since the cession and bordering on the blocks ceded. That the Government offered them a sum of eight hundred pounds for the surrender of their fishery rights and any other claims they may have, more particularly the surrender of rights in the lower lake, so that no questions would hereafter arise as to the right of the Government to open a passage for the confined waters. That if they set up claims for reclaimed lands they may as well set up claims for land cast up by volcanic action in the middle of the sea and that the Queen of England was the undoubtful and legal disposer of lakes and colonial seas. Manihera referred me then to the Treaty of Waitangi where in he says all reclaimed land became Native property. Not being conversant with the contents of that Treaty, the only reply I could give was, the Treaty had been violated by the Maori consequently it was unfair to hold the Crown to its part of the bargain.⁵⁶

Maunsell considered that Manihera and Jury's opposition resulted from them being jealous of Hiko's influential position. Further, Maunsell felt compelled to:

bring under the notice of the Government. . . the unprincipled and fraudulent practices of certain of the Wairarapa Natives not only towards the Government but also towards private Europeans and [that] this state of their morals is daily becoming more corrupt. Manihera and Ngatuers' parties more especially in this respect.⁵⁷

Before the 1891 commission, Piripi Te Maari recounted how he and others opposed to the sale of the lakes had formed a committee, and that because of this he had not been consulted vis-a-vis the 1876 sale. This committee, in response to a notice being published by the Government stating that the Crown had acquired all rights to the lake, published a reply disputing the validity of the Crown's purchase.⁵⁸ Initially it appears that Raniera Te Iho, a chief who had been granted a reserve on the shores of Lake Onoke, had been party to negotiations along with Hiko and Hemi Te Mihi. However, it appears that he subsequently regarded the proposed sale unfavourably. Maunsell stated that because Raniera 'has acted in an under [hand?] way and opposed the Government in the matter' he 'declined to

56. Maunsell to Native Department, 15 February 1876, ma 13/97, NA Wellington

57. Ibid

58. Evidence of Piripi Te Maari in Mackay, 'Report on claims of Natives to Wairarapa Lakes', pp 31, 18

bring him to Wellington or [allow him to] join in the conference held by myself and the chiefs'.⁵⁹ It appears that in negotiating the purchase, Maunsell simply did not consult those chiefs he knew to be opposed to the sale. In June 1876, Raniera Te Iho wrote to Halse stating his opposition to the sale:

I do not agree to the sale of those eel weirs at the Wairarapa – part of which belong to me . . . and of which the tribe at large knew nothing. Those weirs . . . do not only belong to two persons – but to us all, and you know yourself there are a good many persons owning those weirs and I am one of them, and upon that ground do I dispute the sale of them – the entrance to the Wairarapa River is for all who wish to make an eel fishing settlement:— . . . This sale can only be likened to a murder, the first that is known about it is that the land is gone – and I am greatly troubled by this sale:—⁶⁰

It is evident that Maunsell's assertion that Hiko had a paramount interest in the lakes may have been to a large extent informed by the fact that he was prepared to sell. Similarly, the converse would also appear to be the case; that Maunsell considered those opposed to the sale to have less significant interests in the lake than those that favoured the sale. For example, in April 1876, Maunsell wrote to the Native Department concerning a letter of complaint in connection with the sale by Manihera. Of the complaint Maunsell stated that Manihera claimed:

that I told him the Maoris had no 'mana' over the lakes. My remark to him was somewhat similar to what he states, but this took place after his refusal to sign the deed. . . My remark was it was doubtful in law whether they could claim the land under and on the margin of the lakes but I did not say that they had no fishery 'mana'.⁶¹

As will be detailed below, largely as a result of such vociferous opposition, the extent of what the sale conveyed to the Crown was later deemed by the Native Land Court to be significantly less than what the deed purported.

Subsequent to the sale, Peter Hume, a settler with an interest in the lake question, informed the Native Department that it was intended to open the lake mouth in spite of the fact that a Crown proclamation had not yet been issued. Maunsell replied that, the illegality of this action aside, 'there existed a feeling of regret in the Native mind at the sale to the Crown' and that to open the lake 'would be also an impolitic act at present for reasons which I am not prepared to divulge'.⁶² This suggests that only a month after the Crown's purported purchase of the lakes, the Government was doubting the extent of the rights that it had acquired.

In September 1876, Manihera and others petitioned Parliament concerning the sale of the lakes. They claimed that the Wairarapa lake had 'been improperly purchased by the Government commissioners, inasmuch as the majority of the

59. Maunsell to Halse, 11 February 1876, ma 13/97, NA Wellington

60. Raniera Te Iho to Halse, 24 June 1876, (translation), ma 13/97, NA Wellington

61. Maunsell to Under-Secretary, Native Department, 12 April 1876, ma 13/97, NA Wellington

62. Maunsell to Hulme, 13 March 1876, ma 13/97, NA Wellington

chiefs and their hapus objected to the sale of the same'. Upon consideration of the petition, the Native Affairs Committee were:

satisfied, from the evidence they have taken, that the majority of the owners of the lake have not joined in the sale, and they are of the opinion that it would have been better that the title should have been investigated by the Native Land Court, previous to the completion of the purchase; and the Committee are further of the opinion that the petitioners; and any other Natives who may allege a claim, ought to have an opportunity of proving their title, if they are able to do so before the Native Land Court.⁶³

The committee's recommendation was acted upon and the case came before the Native Land Court in Masterton in August 1877. However, it was dismissed by the court because there was no survey plan.⁶⁴

Dissatisfaction with the sale and ensuing state of affairs was also felt by farmers affected by the lakes' flooding. In October 1877, John Hume along with other settlers, petitioned Parliament emphasising the necessity of keeping the lake mouth open in order to mitigate the loss suffered by farmers as a result of flooding. Before the Native Affairs Committee, it was claimed that between 12,000 and 15,000 acres were affected by the flooding of the lakes each year and that this resulted in approximately £6000 of lost income. Further, the settlers appearing before the committee claimed that the economic importance of fishing to the Wairarapa Maori was much overstated and was in fact 'only a pretence'.⁶⁵ In its report, the Native Affairs Committee reiterated its recommendation vis-a-vis Manihera's earlier petition – that the matter be referred to the Native Land Court as soon as possible – and that 'the grievance complained of by both parties [be] settled with the least possible delay'.⁶⁶

2.4.2 The Wairarapa lakes and Native Land Court

In April 1880, Maunsell reported to the Under-Secretary of Native Affairs that he had attended a meeting concerning the Wairarapa lakes at which 60 Maori were present. He recounted how before the Native Land Court Piripi Te Maari had expressed his disappointment at the dismissal of the 1877 case, and:

that if the case had come before the Court, he and his tribe should enter into arrangements with the Government to finally settle the question for the good of the pakeha.

However, according to Maunsell, Te Maari went on to express his regret that he and his people:

63. 'Report on the Petition of Manihera Rangitakaiwaho and others of Wairarapa', AJHR 1876, i-4, p 17

64. Bagnall, p 379

65. LE 1/1877/5, cited in Bagnall, p 379

66. 'Report on the petition of John Hume and others, European inhabitants of the Wairarapa', New Zealand Native Affairs Committee Reports, 1872–90, p 38

had been treated lightly in the matter of the lakes by the Government and spoke bitterly at no replies [having been made] to their letter of the 15 November 1878 . . .

Consequently Te Maari was ‘uncertain whether they would again apply to the Court’.⁶⁷

Meanwhile Pakeha farmers continued to exert pressure upon the Government to settle the matter. A bad flood in 1880 had caused extensive stock losses and, to the farmers’ minds, illustrated the urgency of the matter.⁶⁸ In July of that year, George Beetham wrote to Bryce informing him that he had received a large number of complaints from settlers deleteriously affected by the flooding of the lakes. And later in 1880 he wrote to the Minister of Justice suggesting that Heaphy be commissioned to act in the matter.⁶⁹

In spite of Te Maari’s (perhaps deliberate) vacillatory position reported by Maunsell, Te Maari made an application to the Native Land Court to have his and others’ interests defined in Wairarapa Moana South. Concurrently the same application was made by Manihera Rangitakaiwaho vis-a-vis the northern lake, and by the Crown in relation to both lakes. However, when the case came before Judge Brookfield at Masterton in June 1881, Te Maari and Manihera withdrew their claims, preferring to appear as counter claimants in relation to the Crown’s claim.⁷⁰

The Crown opened its case stating that it intended to base its case on, inter alia, section 6 of the Native Land Amendment Act 1877, and the deed of 1876. (Section 6 of the Native Land Act 1877 held that the Native Minister could apply to the Native Land Court to determine the extent of interests purchased by the Crown in any block of land. Upon investigating such a claim, the court could declare such lands to be absolutely vested in the Crown.) However, the court immediately responded that under section 87 of the Native Land Act 1873, transactions of Maori land made before freehold tenure was ordered by the court are void. Therefore the deed relied upon by the Crown was invalid. The court also observed that by virtue of the 1876 deed, nothing but fishing rights passed to the Crown. And given that the right to fish was not an interest in land, such rights were not within the court’s jurisdiction.⁷¹ The Crown subsequently asked that these matters be referred to the Supreme Court.

When the matter came before the Supreme Court, the Crown sought a rule nisi to prevent the Native Land Court investigating title to the lakes. The basis of the Crown’s case, according to Mackay, was that ‘no right existed, according to Native custom, to the soil beneath a lake, nor is the same recognised by Native custom as being capable of ownership’. Justice Richmond ruled that the Supreme Court:

67. Maunsell to Under-Secretary, Native Department, 10 April 1880, ma 13/97, NA Wellington

68. Bagnall, p 379

69. George Beetham to Bryce, 6 July 1880, ma 13/97, NA Wellington; Beetham to Minister of Justice, 17 September 1880, ma 13/97, NA Wellington

70. Wairarapa Native Land Court minute book 3, 16 June 1881, fol 351

71. Report of Fitzgerald to Assistant Law Officer, 22 June 1881, ma 13/97, NA Wellington; Wairarapa Native Land Court minute book 3, 15–16 June 1881, fols 348–352

could not interfere with the Native Land Court upon any such grounds; but supposing that the applicants [the Crown] were right in their view of Native custom, there appeared to be no reason why the Native Land Court should not issue certificates of title to rights of fishing as tenements, distinct from the rights to the soil, which would then be in the Crown.⁷²

During the course of the Land Court's 1881 inquiry, an opinion appears to have been sought from the Solicitor General as to what exactly the Crown had acquired as a result of its 1876 purchase. Peculiarly though, this opinion appears not to be mentioned in the minutes of the case. The opinion, dated 13 June 1881, states 'that in the purchase by Mr Maunsell only the fishing rights over the lakes were acquired and not the lakes and the ground under the lakes'.⁷³ That the 1876 deed only conveyed to the Crown the fishing rights of 17 individuals was confirmed by the findings of the 1891 commission of inquiry into the lakes question.⁷⁴

The Crown again attempted unsuccessfully to purchase the remainder of the interests in the lakes in 1883.⁷⁵ In October of that year, the Crown brought the matter before the Native Land Court at Greytown in an attempt to get defined the rights it had acquired in the 1876 purchase. The court received evidence from Maunsell and several interested Maori, including Te Maari. In its decision the court held that the Crown had acquired the interests of the 17 signatories in both the upper and lower lakes.⁷⁶ At this hearing, all counter claimants were admitted. John Gill, the Under-Secretary of the Native Land Purchase Department, advised the Native Minister that this was 'another way of frustrating a settlement as an order including all owners will at the very least carry in the capacity of 200 names'. However, while being uncertain as to whether or not it was possible, he considered the only way to proceed was to try to buy out the interests of all the owners admitted by the Land Court.⁷⁷

There can be little doubt that the Government saw the Native Land Court as the best instrument through which to get their interests defined, ideally as a controlling or paramount interest. However, others also saw the Court as potentially useful in terms of the lakes question. In May 1883, the Clerk of the Wairarapa West County Council wrote to the Under-Secretary of the Crown Lands Office, requesting that a sitting of the Native Land Court be arranged to enable the taking of Maori land under the Public Works Act for the purposes of draining the Wairarapa lakes.⁷⁸ The council's chairman had earlier advised the Minister of Public Works of a resolution passed unanimously by the council, that the Government should take the land necessary to enable the drainage of the Wairarapa basin to proceed, pursuant to

72. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 8

73. 'Opinion of Solicitor General', 13 June 1881, cited in 'Memorandum to the Honorable Native Minister on Position of the Wairarapa Lake Purchase', nd, p 7, ma 13/97, NA Wellington

74. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 11

75. Ibid, p 8

76. Wairarapa Native Land Court minute book 4, 26 October 1882, fols 42-47

77. Gill to Native Minister (telegram), 23 October 1882, MA 13/97, NA Wellington

78. County Clerk, West Wairarapa County Council to Under-Secretary, Crown Lands Office, 10 May 1883, ma 13/97, NA Wellington

sections 24 to 26 of the Public Works Act 1882. It was stated that the Native Land Court, ‘in awarding any compensation which might be found fairly due to the Natives would effectively prevent any injustice being done to them’. The letter noted that 18,000 acres of settler’s land was flooded each year and that other land, although not inundated, was not being developed because of inadequate drainage.⁷⁹

In November 1883, the matter was again before the Native Land Court, although not with a view to County Council’s request. After hearing extensive evidence concerning ancestral rights from various Maori witnesses, the Court issued orders registering a further 122 persons as owners of the lakes on the basis of ancestral right, occupation, and use. In his decision, Judge Puckey confirmed that the 17 interests the Crown had acquired in 1876 meant that it was merely a co-owner or tenant-in-common. Clearly the Crown lacked sufficient rights to control the lake mouth.⁸⁰ Subsequent to the 1883 hearing, a certificate of title for the beds of the lakes was issued in accordance with the Native Land Court orders.⁸¹ But now that the ownership of the lake had finally been determined and the Crown had a definitive list of owners, it resumed its quest to acquire title to both Lakes Onoke and Wairarapa.

2.4.3 Crown initiative, Maori resistance, and settler pressure, 1884–85

In 1884, John Bryce, in his capacity as Native Minister, met with a group of Maori with interests in the lake. But like his predecessors, he failed to progress the matter of the Crown’s acquisition of the lakes. Similarly unfruitful was the audience John Ballance granted to a group of settlers in the following year. Matthews, the chairman of the South Wairarapa River Board, claimed of the meeting that the Minister gave nothing more than promises that the matter would be quickly settled.⁸²

In May 1885, Maunsell reported to the Under-Secretary of the Land Purchase Department, that he had:

endeavoured to purchase other shares [in the lakes] but have met with a strong feeling against selling; it appears that an agreement has been signed throughout the District that no shares shall be sold and any who depart from the agreement is to forfeit £50 payable to the non-sellers.⁸³

Maunsell had in fact been told as much the previous month during a meeting with Te Maari, who informed him of a meeting of owners at which the anti-selling resolution had been passed. Maunsell reported to the Native Department that, upon Te Maari telling him this, he had replied:

79. Chairman, West Wairarapa County Council to Minister of Public Works, 3 May 1883, ma 13/97, NA Wellington

80. Wairarapa Native Land Court minute book 4, 8–11 November 1883, fols 117–132; Doig, pp 199–200

81. Mackay, ‘Report on Claims of Natives to Wairarapa Lakes’, p 8

82. Bagnall, p 379

83. Maunsell to Under-Secretary, Land Purchase Department, 26 May 1885, ma 13/97, NA Wellington

Maories, as a rule, at meetings like this were like a flock of geese, when one cackled others followed but when they were separated it was different, hence those he [Piripi Te Maari] most relied on would not resist the temptation of receiving money for what was of little or no value to them – merely a Maori ‘mana’. He admitted this was so.⁸⁴

At the same meeting, Maunsell assured Te Maari that Maori would still be allowed to fish in the lake were it to become part of the Crown’s demesne. However, to this Te Maari apparently replied, ‘that there would be no fishing grounds if the Government drained the lower lake’. According to Maunsell, the chief then proceeded to set out ‘the principal cause of our opposition to the lakes becoming Crown property’. Interestingly, the protection of their fisheries was not stated as the primary concern:

When we sold to McLean the boundary was the margin of the lakes since then large tracts of land have been raised by earthquakes. The Government without consulting us has sold to Europeans lands which ought to have been ours – we have protested against the sales. We have not received compensation. Whenever we have raised this question Government officers have produced the deeds of sale of lands bordering on the lakes where it is stated that the lake is the boundary – true – the then lake. The margin of the lake is changed since the Deeds were signed. This is our grievance against the Government.⁸⁵

At the same meeting, Maunsell questioned those present regarding an allegation that certain Maori had removed a Pakeha’s fishing nets from the lake. From the response this inquiry solicited, rights to the lakes’ avifauna also appears to have been an issue at stake. In reply to the allegation, Maunsell recounted that those present had:

denied having done so and said they would not do so to anyone. What they had done was to notify that persons trespassing for the purpose of shooting wild fowl on the lakes would be prosecuted and that they had [received] repeated applications since for permission to shoot and sell [wild fowl] in Wellington. They had however refused permission as the lakes were held in partnership between them and the Government. They did not object to a person desirous of having a day’s sport only for private use. They also objected to the wholesale and reckless destruction of birds by the use of large punt guns where many are wasted, being wounded they get away and die; total extinction being the probable result.⁸⁶

An unsourced newspaper article stated that Maori who held interests in the Wairarapa lakes had published a notice stating that any ‘persons who shall be guilty of trespassing, fishing, or shooting birds upon the lake or lakes’ will be fined between £5 and £50.⁸⁷ Subsequent to the April 1885 meeting between Maunsell and

84. Maunsell to Native Department, 20 April 1885, ma 13/97, NA Wellington

85. Ibid

86. Ibid

87. Untitled, unsourced, undated newspaper article attached to Maunsell to Under-Secretary, Native Land Purchase Department, 28 May 1885, ma 13/97, NA Wellington

Te Maari, two inquiries were made to the Native Minister, one by Te Maari and another by H T Watahoro, asking whether Europeans had been authorised to shoot birds and catch fish on the lake. A file note on the latter of these letters states that the ‘Answer given to Piripi to same question was “no”’.⁸⁸

The position adopted by Wairarapa Maori in relation to the rights of non-Maori to take birds and fish from the lake reveals much about their conception of their rights. Claiming an exclusive right to the fish and birds of the lakes was very much in accordance with the rights that accrue to the owner of a lake bed under English common law. However, at common law lakes are public highways, and the owner of a lake has no right to prevent others from navigating its waters.⁸⁹

Maunsell concluded his report of the April 1885 meeting noting that he:

had left Piripi in a friendly way and judged from his proposition to get the consent of all concerned to the sale of the lake as indicative of a withdrawal of his past opposition and that he understands that sooner or later the Maori ‘mana’ must pass to the Crown.⁹⁰

Te Maari, it should be noted, had made similar statements before but little had come of these. Clearly Te Maari desired that the entire group agree to sell rather than the Crown gradually acquiring the interests of individuals. However, it must also be asked, especially in the light of the fact that it was to be nearly two decades until a settlement was agreed to, whether he was simply telling Maunsell what he wanted to hear in order to get him off his back.

Throughout the 1880s, Maunsell continued to assert that the Crown had possibly acquired sufficient rights by virtue of the 1876 purchase to simply override the rights of those who had not sold. This somewhat optimistic view was held in spite of the rulings of the Native Land Court vis-a-vis the extent of the Crown’s interests in the lakes, and the opinion having been expressed by officials of the Native Department as early as 1879, that the 1876 purchase was perhaps defective in that ‘it did not contain the names of all the persons’ interests’.⁹¹ In May 1885, Maunsell wrote to the Under-Secretary of Native Affairs that:

The interests acquired were those of the principal chiefs who were acknowledged by Ms [sic] as the proper persons to deal with the fishery rights and I think if such interests were ascertained the Government would come out very well. Much care would have to be exercised in getting the necessary evidence to prove the ‘mana’ of Hiko, Arihia and Wiremu Kingi to deal under Maori custom with these lakes and also that there should be a sum of money provided to cover expenses of witnesses.

88. Piripi Te Maari to Ballance (telegram), 6 May 1885, (translation), ma 13/97, NA Wellington; H T Watahoro to Ballance, 19 June 1885, (translation), ma 13/97, NA Wellington; file note dated 29 June 1885 on H T Watahoro to Ballance, 19 June 1885, ma 13/97, NA Wellington

89. See *Halsbury’s Laws of England*, 4th ed, London, Butterworths, 1984, vol 18, p 268; H J W Coulson and U A Forbes, *The Law Relating to Waters: Sea, Tidal and Inland*, London, Henry Sweet, 1880, pp 72, 101

90. Maunsell to Native Department, 20 April 1885, ma 13/97, NA Wellington

91. File note by T W Lewis, 8 November 1879, ma 13/97, NA Wellington

He continued that those signatories had had strong rights to the spit between Kiriwai and Okourewa, which if defined by the Native Land Court, could be sufficient 'to enable the Government to do whatever it pleased with it'. Upon the Government opening the lake mouth, aggrieved parties:

could take legal proceedings in a Court and then the question can be tested, as to whether or not the rights or 'mana' which they assert to hold under the Treaty of Waitangi have or have not passed away[, given that] the lakes [are] now being held under Crown title and [are] subject to be dealt with under the law.

Further he contended 'that Piripi Te Maari has acted with duplicity and that he does not intend to assist in settling the long vexed question'.⁹²

Meanwhile, aggrieved farmers continued to exert pressure upon the Government to settle the lake question. In March 1886, a Pakeha settler named Buchanan wrote to the Native Minister and informed him that unless immediate action was taken, 'the settlers must unfortunately lose all their winterfeed for stock and suffer grievous damage'. Buchanan's letter mentions a pledge made by Te Maari that upon being asked by farmers to open lake in the face of impending flooding, he would do so.⁹³ A Native Department file note by Halse stated that:

Piripi Te Maari most certainly assured that whenever the lake filled to threaten a loss to any of the settlers that he would if requested see that the lake was opened.⁹⁴

However, Buchanan's letter contained an excerpt of a letter written to him by a farmer, which stated that upon such a request being made to Te Maari, the chief was unable to give 'a satisfactory answer until he saw all the natives that were fishing' and that after 'seeing them the conclusion was that they wanted to fish on the dark nights of April that would have been about five weeks'.⁹⁵

Two meetings of the Maori committee chaired by Te Maari to consider the lakes question appear to have been convened in 1886. The first, held at Papawai in April, was according to Matthews 'only a waste of breath'.⁹⁶ The second, held around October of the same year, saw the committee proposing a compromise solution to the flood problem. As Te Maari reported to the Native Department, the lake mouth fishing season extended over four months:

However, in compliance with the wish expressed by the Native Minister, that an understanding should be come to between the two races, we have decided to divide those four hinapouri [months?]. We shall retain the hinapouri of February and March, but will relinquish the months of April and May.

Continuing, Te Maari pointed out 'that the months we relinquish are the principal months in which the fish are caught'.⁹⁷

92. Maunsell to Under-Secretary, Native Department, 28 May 1885, ma 13/97, NA Wellington

93. Buchanan to Native Minister, 14 March 1886, ma 13/97, NA Wellington

94. File note by Halse, 22 March 1888, ma 13/97, NA Wellington

95. Buchanan to Native Minister, 14 March 1886, ma 13/97, NA Wellington

96. Matthews' Memoirs, cited in Bagnall, p 379

In an account of a meeting held between the Native Minister, Te Maari and Wi Hutana in November 1886, the Minister conveyed to the committee 'his thanks for the generous proposition'. However, he was still adamant that they should allow the Crown to purchase their interests in the lake, being of the opinion that it would be in the owners' 'best interest to sell'. The minister also stated the possibility of the owners being granted a reserve elsewhere in the Wairarapa. Te Maari, although undertaking to communicate the offer to the other owners, asked 'that there should be no dealing with individual owners until the whole of the owners had had a meeting on this subject and decided to sell'.⁹⁸

2.4.4 Negotiations with the Crown continue

Having reiterated in several interviews that, were the matter placed in his hands, a settlement of the lakes question would be forthcoming, Henry Bunny was appointed to negotiate the purchase of the lakes in 1887.⁹⁹ Bunny had formerly been a Member of the House of Representatives for the Wairarapa, and owned land in the vicinity of Featherston. However, the task of negotiating the purchase of the lakes proved to be somewhat more onerous than Bunny had supposed. Although reporting to the Native Minister in February 1887 that the committee of owners had agreed to settle the lakes question upon the condition that a commission be established to settle disputes,¹⁰⁰ just three months later Te Maari informed the Government that 'all the people interested in the aforesaid lake have come to the conclusion that the same be neither sold nor leased to the Government, or to any other person'.¹⁰¹

However, the Maori owners were not oblivious to the plight of the Pakeha settlers. In 1887 the committee made a proposal to the Native Minister through their solicitor, Mr Pownall. The agreement proposed was that the Crown would release its interests in the lake acquired by virtue of the 1876 purchase, and that the proper boundary of the lake be ascertained and that this be marked by posts. Upon the lake rising beyond the posts, that is when it encroached upon land not in Maori ownership, the Government would be able to open the lake mouth so as to release the floodwaters. Although this apparently would have solved the settlers' problems, no action was taken. Royal commissioner Mackay considered this to be because the matter 'involved questions that were necessary to be submitted to the Law Officers and to Parliament'. Pownall, appearing before the commission, stated that Mitchelson, the then Native Minister, 'declined to have anything to do with it, and ignored the rights of the Natives to consideration'.¹⁰² It would seem that the Crown

97. Piripi Te Maari and 7 others to Native Department, 29 October 1886, ma 13/97, NA Wellington

98. Account of meeting between Native Minister, Piripi Te Maari and Wi Hutana, 12 November 1886, ma 13/97, NA Wellington

99. Bagnall, p 380

100. Bunny to Native Minister, 24 February 1887, MA 13/97, NA Wellington

101. Piripi Te Maari to Native Minister, 13 May 1887, MA 13/97, NA Wellington

102. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 9

was not prepared to settle for anything less than the complete cession of the owners' title to the lakes.

By the end of 1887 negotiations appear to have completely broken down as a result of the Maori owners' intransigence on the question of sale.¹⁰³ Despite the owners appointing a 12-person committee to negotiate with the Crown and again interviewing the Government on the matter, it appears that the Government was considering courses of action that would force a resolution of the flooding problem.¹⁰⁴ A Native Department file note of January 1888, for example, urged that another application be made to the Native Land Court to define the extent of the Crown's interests acquired by the 1876 purchase, and that what remaining interests were necessary to control the lake mouth be taken pursuant to the Public Works Act.¹⁰⁵ However, it was to be the South Wairarapa River Board, taking the matter into its own hands, which would ride roughshod over the lake owners' rights.

In June 1888, the chairman of the South Wairarapa River Board wrote to the Native Minister advising that the board, acting under powers delegated to it by the South Wairarapa County Council, had declared the outlet to the Wairarapa lakes a 'public drain'. But 'it was thought best, before taking further steps, to communicate with you, with a view to obtaining your sanction'.¹⁰⁶ In a file note in connection to this letter, Lewis, despite being of the opinion that the question should be considered by Cabinet, appears to have considered the idea to have been fundamentally sound:

The River Board or County should also accept all the responsibilities of dealing with the opening of the lake and any proceedings or claims that might arise thereafter. On this understanding I am of the opinion that to give the required permission is the best and perhaps the only reasonable way of settling this officially.¹⁰⁷

Of the declaration Bagnall has expressed disbelief that '1000 years of Polynesian history and 100,000 tuna could be dismissed in this fashion'.¹⁰⁸ However, aside from the injustice of the way in which Wairarapa Maori's customary rights were abrogated, in terms of strict law it would appear that the river board was in fact acting illegally. As was made apparent in a subsequent Court of Appeal case concerning the lakes, it was not until the next year that County Councils were empowered to exercise such powers.¹⁰⁹

103. Ibid, p 6

104. Buchanan to Native Minister, 11 March 1888, MA 13/97, NA Wellington; Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 9

105. File note, 23 January 1888, MA 13/97, NA Wellington

106. Bock to Native Minister, 22 June 1888, MA 13/97, NA Wellington

107. File note by Lewis, 23 January 1888, ma 13/97, NA Wellington

108. Bagnall, p 380

109. *Piripi Te Maari v Matthews and another* (1893) 12 NZLR 13, 23

2.4.5 The South Wairarapa River Board

In 1884, the River Boards Act was passed. The purpose of the Act was to authorise the undertaking of flood control works. The Act provided for catchments to be constituted as river districts, upon the Governor being petitioned by not less than two-thirds of ratepayers in an area affected by flooding. All rivers, streams, and other watercourses within a proclaimed district that were subject to flooding, came within the board's jurisdiction. Boards could compulsorily acquire lands necessary for flood protection works, levy rates, and raise loans. Boards were free to enter into contracts for the carrying out of any work permitted under the Act.¹¹⁰

Two years after the passing of the Act, the South Wairarapa River Board was constituted to control the flooding of the Wairarapa lakes. Presumably it was thought that lakes came within the meaning of watercourse under the Act (this was not defined in the Act). The 1891 commission of inquiry described the establishment of South Wairarapa River Board as 'an attempt by a side-wind to violate the Native rights under the Treaty of Waitangi, but for the time it was not successful as section 74 of the Act was, upon competent authority pronounced ineffectual to meet the case'.¹¹¹ According to Mackay, the river board simply did not have the power to act as it proposed. Neither the River Boards Act 1884 or the Public Works Act 1882 empowered a board to release flood waters. Mackay was of the view that 'the property on which the trespass is made belongs to the petitioners, and the interference with their fishing rights is an infraction of the second article of the Treaty of Waitangi'.¹¹² This was supported by the Solicitor General, who in March 1888 opined that:

The only body that has power to carry out drainage-works is a County Council . . . The power is to execute 'drainage-works of any sort', but these must be taken to mean drainage in the ordinary sense of removing superfluous water from land for the purposes of improving it. It does not appear to me that altering a large natural reservoir like the Wairarapa Lake . . . can be said to be within the meaning of the drainage-works contemplated by the Counties Act . . . All I can say upon the question . . . is that there is a legal power to execute 'drainage-works', but that, in my opinion, a work of such presumed magnitude and effect as draining a large lake was not contemplated by the Act.¹¹³

In a letter to the Minister of Native Affairs, the clerk of the South Wairarapa River Board described the committee of owners' 1888 proposal to allow the lake to be opened during the months of April and May as being entirely unsatisfactory. Further, were it implemented, the ' . . . Natives would then possibly have a right to

110. River Boards Act 1882, ss 6, 44, 68, 74, 88, 110

111. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 14

112. Ibid, p 5

113. Cited in Ibid, p 5

keep the lakes closed during those two months'.¹¹⁴ It is clear that the river board was simply not prepared to compromise its assumed right to control the lake mouth.

In June 1888, the river board attempted to open the lake for the first time. Although the river board had requested the presence of the police on the occasion, Lewis was of the opinion that the lakes' Maori owners were unlikely to use force.¹¹⁵ On the agreed day, 33 men accompanied by two police constables set to work opening the lake mouth. Upon the arrival of a group of owners led by Piripi Te Maari, much tense discussion ensued. Eventually Te Maari struck upon the idea of getting Matthews to sign a statement acknowledging the Maori owners' protest and advising that Supreme Court action was to follow. At this juncture hands were shaken and the lake mouth was opened.¹¹⁶ The day's events caused Matthews to remark to his workers that the 'Natives have behaved like gentlemen. Had a body of Europeans come . . . there would have been a very different state of affairs'.¹¹⁷

It appears, however, that the Supreme Court action that Te Maari foreshadowed was abandoned in favour of the 1891 royal commission of inquiry. One of the owners' grievances investigated by the commission was the actions of the river board. According to Hemi Te Miha:

Since the River Board took the matter in hand the settlers have not consulted us. We are substantially injured by the Action of the Board in opening the lake without consulting us, especially when we are engaged in fishing. The Board pays no heed to us, although we have asked them to delay the opening of the lake; although we may be fishing there at the time, they will not even grant us a week's delay.¹¹⁸

Various other witnesses appearing before the 1891 commission attested to the fact that the opening of the lake mouth by the Board had resulted in dramatically reduced catches of eels.¹¹⁹

In 1889, an amendment to the Public Works Act was passed that supposedly gave the river board the necessary power to artificially open the lake. Section 18 of the Amendment Act extended to those exercising powers under the principal Act, 'the power of making, constructing and maintaining an outlet to any lake or other water body not having navigable communication with the sea or any navigable river'. Mackay claimed that the section was intended to give the Wairarapa River Board the 'power to violate treaty obligations'. Further, his report stated that the Act was never translated into Maori as was required under standing order 366, and that the aforementioned provision, having an apparent exclusive application to the Wairarapa, should have been included in a private or local bill rather than a public bill.¹²⁰ Had such a course of action been taken, the Bill would have:

114. Bock, (Clerk, South Wairarapa River Board) to Native Minister, 22 January 1887, ma 13/97, NA Wellington

115. Bock to Native Minister, 28 June 1888, ma 13/97, NA Wellington; File note by Lewis, contained in Bock to Native Minister, 28 June 1888, ma 13/97, NA Wellington

116. Bagnall, p 381

117. Matthews, cited in Bagnall, p 381

118. Evidence of Hemi Te Miha in Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 22

119. See for example the evidence of Aparo Henare and Hoanai Paraone Tuninarangi, *ibid*, p 28

been attended in its passage into law by the formalities requisite in cases where the rights of individuals are promoted, or local interests threatened, and where those private or local interests are those of the aboriginal race, solemnly guaranteed by treaty and protected by Standing Order.¹²¹

It would appear that section 18 of the amendment Act was included specifically to give the South Wairarapa River Board statutory authority to open the outlet of the lake. It was noted by the Court of Appeal that the wording of section 18 of the Act (passed in September 1889), was almost identical to the wording of ‘the instrument of delegation’ (dated January 1889), that delegated the necessary powers to open the lake mouth to the river board from the South Wairarapa County Council.¹²²

Despite the legal situation and protest from the lakes’ Maori owners, the lake mouth continued to be opened under the instructions of the river board. In the face of threatened resistance by Maori, the Native Minister, Edwin Mitchelson promised that upon a submission being made to Parliament, a commission would be convened to investigate their grievances. Subsequently a special commission was established in 1890. But because it was unable to complete its investigations through lack of time, a Royal Commission was established at the end of 1890.¹²³

2.4.6 1891 royal commission on the Wairarapa lakes

As is evident from the preceding text, the report of Commissioner Alexander Mackay was a most thorough investigation into the Wairarapa lakes question and the Crown’s endeavours to acquire a controlling interest in them. In the memorial submitted to the commission by counsel for the lakes’ Maori owners, their grievances were set out as being:

1. That, in consequence of the selfish and wholly unjustifiable pressure of certain European settlers, the Government, by which may be termed a fraud upon the legislature, has deprived them [the lakes’ owners] of the fishery-rights solemnly guaranteed by the Treaty of Waitangi.
2. That the Government of New Zealand has wrongfully seized and sold a large area of land in and around the margin of the Wairarapa Lakes which the Native owners never ceded to the Crown.¹²⁴

The conclusions that Mackay arrived at, however, were somewhat contradictory. On the one hand it was held, ‘That the Natives are the undoubted owners of both the upper and lower lakes and the spit between Okourewa and Kiriwai’, and:

120. The present author has been unable to locate a copy of the parliamentary standing orders that were in effect in 1889. However, standing order 366 that is in effect today, appears to be an amendment of the standing order 366 referred to by Mackay. Today standing order 366 states that the ‘Speaker may order that bill introduced into the House . . . be translated and printed in another language’, Standing Orders of the House of Representatives, September 1996

121. Mackay, ‘Report on Claims of Natives to Wairarapa Lakes’, p 14

122. *Piripi Te Maari v Matthews and another* [1893] 12 NZLR 13, 23

123. Mackay, ‘Report on Claims of Natives to Wairarapa Lakes’, pp 14–15

124. *Ibid*, p 15

That neither the Government or any of the local bodies are legally authorised to interfere with the opening of the lake to the detriment and injury of the fishery and other proprietary rights guaranteed to the Natives by a solemn pact with the Imperial Government, and that such infringement of their rights without their consent, or the payment of compensation for the injury done, is a grievous wrong, and contrary to the law of property.

However, it was also stated that the Maori owners were not justified in allowing the lands they sold to the Government to flood, causing injury to the Pakeha settlers who had by then acquired the lands.¹²⁵

In terms of a possible solution to the problems faced by the settlers, Mackay made a number of suggestions, none of which involved the expropriation of the Maori owners' rights in the lakes. Instead he recommended that an agreement be sought with those Maori with interests in the lakes, whereby the lake mouth, upon being closed for a period longer than two months, or in the event of an impending flood, could be opened, provided Maori were not engaged in fishing at the time. Further, either an annuity or a lump sum was to be paid to them for this concession. Another suggestion was that a cement weir be built to enable the opening of the lake without allowing large numbers of eels to escape to the sea. With regard to land between the lake margin and the flood-line in the Turanganui block, Mackay recommended that the Crown compensate the lakes' owners for all land that had passed in to European ownership but for which no consideration had ever been paid to Maori.¹²⁶

On 30 July 1891, James Carroll asked the Government when the report of the Wairarapa lakes commission was to be laid before the house, noting that 'the Natives had expected this report for sometime' and that 'they were very anxious indeed to see it'. In response, the Native Minister, Alfred Cadman, informed the house that the commission's report was currently being printed, and that he expected it to be released 'about the end of the week'.¹²⁷ The parliamentary debates, however, do not record the report being tabled in Parliament. The next reference to the report was not until 16 August 1893. On that occasion Parata, the member for southern Maori, asked the Government whether it intended to take any action to give effect to the commission's recommendation. Carroll responded that any decision in the matter was contingent upon the outcome of litigation presently before the courts (detailed below). He observed that:

the Government were anxious at one time to see the Natives with a view of settling this matter, but the Natives, although they knew the intentions of the Government, did not approach them, preferring rather to go into Court.¹²⁸

The river board, however, was not prepared to wait for the machinations of either central Government or the courts to arrive at a solution guided by Mackay's maxim

125. Ibid, p 11

126. Ibid

127. NZPD, 1891, vol 72, p 620

128. NZPD, 1893, vol 81, p 85

that ‘justice is itself the great standing policy of civil society’.¹²⁹ Instead in 1892, the Board prepared for another show of strength, apparently with the support of the Government.¹³⁰ On 11 May 1892, a group of Pakeha settlers and a party of over 100 Maori assembled at the lake mouth – both parties accompanied by their lawyers. Police Inspector Thomson informed the gathering that any physical contact would be regarded as assault. But in reply to a question from one of the Maori present, he said that the laying of hands upon shovels did not constitute such a violation of the law. It was made clear to all that any breach of the peace would result in the immediate arrest of the offending party.¹³¹ According to Bagnall:

No sooner did the first party of about a dozen shovellers start to open the trench than several lithe young men stepped forward. Each man seized hold of one of the shovels, firmly and effectively preventing the Europeans from ‘further working it’.

The settlers demanded that the offenders be arrested, but Thomson replied that he could not as the Maori were simply resisting passively. Matthews recounted that ‘the Europeans stood looking like fools for a time’ before deciding upon a change of tactics.¹³² The Pakeha then linked arms and formed a circle around those digging. Thomson assured the crowd that anyone who broke the circle would be arrested. However, a group of Maori women proceeded to dive between the settlers’ linked arms into the ditch ‘kicking and scratching furiously and bringing down large quantities of sand’.¹³³ In the end, it was suggested by either Thomson or Menteth, the solicitor representing the lakes’ Maori owners, that if the river board ‘summonsed one of Maori party for obstruction it would be just as effective and certainly less abrasive than a technical assault’. After more ‘grasping of shovels’ the settlers were convinced of the wisdom of the proposal. Upon Izard, counsel for the river board, undertaking to initiate a prosecution for obstruction, the Maori party withdrew any further opposition and performed a haka. Bagnall states the haka was one ‘of triumph’. But why this would be so remains unclear to the present author given that as they celebrated, the settlers completed the trench and the waters were released into Palliser Bay. An alternative reading of the event was that the haka was performed as a challenge.

Various legal complications meant that it was to be a year before the case was brought before a court. In the interim, Te Maari along with ten others, petitioned Parliament, praying ‘that their rights in connection with the Wairarapa Lakes may be protected, and that they may receive compensation for land wrongfully occupied by the Crown’. However, by the time the petition was considered by the Native Affairs Committee the matter was before the courts and consequently the committee declined to make any recommendations.¹³⁴

129. Mackay, ‘Report on Claims of Natives to Wairarapa Lakes’, p 11

130. Bagnall, pp 381–382

131. Ibid, p 382

132. Ibid, p 382; Matthews, cited in Bagnall, p 382

133. *New Zealand Times*, 17 May 1892, cited in Bagnall, p 382; Matthews, cited in Bagnall, p 382

134. Petition 244/1892, AJHR, 1893, i-3, p 3

Upon application to the Supreme Court, the case brought by Te Maari was removed to the Court of Appeal. The action was a claim for damages for alleged trespass against the defendants – Matthews and Barton (the river board's contractor) – in opening the channel in May 1892. Further, the action challenged the legal basis upon which the river board asserted rights to open the channel.¹³⁵ Four of the court's five judges ruled in favour of the defendants. Much of the appellant's case turned around the contention that the outlet of the lake was not a 'natural watercourse' within the meaning of the Public Works Act 1882. Further, Menteath contended, possibly erroneously in terms of legislation, that:

The Treaty of Waitangi expressly confirmed and guaranteed to the Natives the full, exclusive and undisturbed possession of their fisheries. The Treaty of Waitangi was a pact in the nature of a treaty binding on the Crown as representing the colony, and has been recognised throughout the legislation in regard to Native lands.

Also, he argued that the 'normal condition of the lake is the full condition. It is not flooded but full.'¹³⁶ However, with the exception of Justice Conolly, his arguments held little sway. And although noting some irregularities in terms of the authority of the river board, the court dismissed the case.

As well as advising that he intended to take the case to the Privy Council, Te Maari again petitioned Parliament in 1893 asking for compensation for losses Maori had sustained in connection with the Wairarapa lakes. It was also pointed out that he, along with the other 138 owners of the lakes had had no voice in the formation of the river board, and subsequently, no representation upon it. Hence their interests and property rights were in the hands of the 22 ratepayers that constituted the board.¹³⁷ The Native Affairs Committee, noting that the whole question had been investigated by the 1891 royal commission, reported that:

It is clear that the Natives have been wronged, and the only question is whether the local bodies interested or the Government should compensate them. The Committee is of [the] opinion that it should be done by the Government, as the land was sold to the settlers, and provision made in the Public Works Act which enabled the local body to open a channel from the lake to the sea, and thus the proprietary rights of the Natives were interfered with.

The committee recommended that the Government should either try and purchase the rights of the Maori owners, or compensate them for any injury suffered.¹³⁸ It appears that the Court of Appeal did not grant the necessary approval for Te Maari to take his case to the Privy Council.¹³⁹

Te Maari and five others petitioned Parliament again in 1895 in connection with the same matter. The Native Affairs Committee stated that it had considered the

135. *Piripi Te Maari v Matthews and another* (1893) 12 NZLR 13, 14

136. *Ibid*, 17–19, 21

137. Bagnall, p 383

138. Petition 444/1893, AJHR, 1893, i-3, pp 21–22

139. Bagnall, p 383

same question in relation to the 1893 petition, and quoted its report issued in that year. The committee stated its regret that the Government had paid no attention to its previous recommendation, and said it would ‘most urgently recommend that the undoubted grievances under which the Natives labour should be redressed’.¹⁴⁰

Piripi Te Maari died in August 1895, not living to see the settlement of the Wairarapa lakes conflict. Commentators such as Bagnall, Ballara, and Carter have seen this as a tragedy given that Te Maari did not survive to witness his victory.¹⁴¹ However, it must be asked if in fact he would have seen the eventual outcome as a victory, given that in what transpired, the Crown purchased all the Maori owners’ interests. This clearly was not what he was seeking in the case he brought before the Court of Appeal or in his petitions of 1893 and 1895. Upon his death, Tamahau Maupuku appears to have assumed the mantle that Te Maari had carried vis-a-vis the lakes question.

On 13 January 1896, an agreement was signed at Papawai whereby the lakes were ‘surrendered and assured to Her Majesty the Queen’ in consideration for which the Crown was to pay £2000 ‘and shall out of any lands which shall come into the possession of the Government . . . make ample reserves for the benefits of the Native owners’.¹⁴² Following the Native Land Court giving the decision legal effect, a huge picnic was held by the Maori owners at Pigeon Bush. Over 1000 people were in attendance including the then Premier Richard Seddon and his family, other members of the Cabinet, and Pakeha settlers. By comparison, the reciprocal picnic held a fortnight later was apparently somewhat of an anticlimax.¹⁴³ Unfortunately, it did not prove possible to locate any further information about the sale of the lakes. Thus several important questions – such as who was party to the sale, why they agreed to sell, and whether the settlement was freely negotiated – remain unanswered and require further research.

Many years ensued until effect was given to the agreement. In 1907, legislation was passed authorising the Government to purchase land to exchange for the Wairarapa lakes. The Act noted that it had originally been intended to grant the owners of the lakes reserves abutting the lake, but that it become ‘inexpedient’ to do so. The Government was authorised to spend £3000, and the Act specified that the land purchased was to be inalienable.¹⁴⁴ Bagnall notes that initially it was hoped that part of the Whangaimoana subdivision in the Wairarapa could be secured for the owners of the Wairarapa lakes, but that these lands proved to be too expensive. The Pouakani Block, just north of Lake Taupo, was then mooted as an alternative. Although the various hapu had reservations on account of the block’s distance from the Wairarapa, Bagnall claims that a change of Government in 1912 made it expedient for them to acquiesce to the proposal. The Native Land Court proceeded to place the names of 130 Ngati Kahungunu on the Pouakani title as ‘an “aroha”

140. Petition 180/1895, AJHR, 1895, i-3, p 19

141. Bagnall, p 383; Angela Ballara and Mita Carter, ‘Te Maari o-Te-Rangi, Piripi’, in *Dictionary of New Zealand Biography* W H Oliver (ed), vol 1, Wellington, Department of Internal Affairs, 1990, p 468

142. *New Zealand Times*, 8 and 20 January 1896, cited in Bagnall, p 383

143. Bagnall, pp 383–384

144. Reserves and Other Lands Disposal and Public Bodies Empowering Act 1956, s 53

from the Government'. On 22 January 1915, Judge Gilfeder made an order vesting 30,486 acres of the Pouakani block in Arete Tamahau and 229 others with no restrictions upon alienation. A number of the owners later settled on this land.¹⁴⁵ It appears that the grant of the Pouakani lands was the only consideration made to the owners of the lake, and that no money was paid.

According to the Waitangi Tribunal, at the time the Pouakani block was vested in the hapu of Ngati Kahungunu who had formerly been owners of the Wairarapa lakes, the block was undeveloped Crown land, covered in scrub, with a little bush on the southern margins and in the river valleys. *Pinus radiata* was later planted on parts of the block. In the 1960s, a substantial area of scrub was included in a development scheme and converted into farmland. It is ironic that years after the exchange, some 439 hectares of the riverbank margins of the land granted to the 'Wairarapa Natives' was taken under the Public Works Act and much of it flooded for hydro-electric power purposes.¹⁴⁶

2.5 The Catchment in the Twentieth Century

Although the eels that were so cherished by Wairarapa Maori remained in the lakes, their future now lay in the hands of the Government. In 1900, a survey of the catchment was undertaken. Based on its findings, a proposal was developed whereby the Ruamahanga would be diverted into Lake Onoke, and a permanent outlet be maintained at the lake mouth. However, the magnitude of the proposed works appear to have been beyond the financial resources available to both local and central government at the time. Throughout the next several decades, the South Wairarapa River Board and the newly constituted Kahutara River Board undertook several small-scale projects such as the construction of stop banks and the diversion of the Turanganui River into Lake Onoke. Subsequent to the enactment of the Soil Conservation and Rivers Control Act 1941, the Wairarapa Catchment Board was established. Gradually this board took over the functions of the various river boards in the area. In the mid-1950s a comprehensive scheme for the entire lower catchment was proposed. As with the 1900 scheme it involved the diversion of the Ruamahanga into Lake Onoke, and the construction of a barrage to control the lake mouth. The scheme would reclaim 13,000 acres and relieve another 30,000 acres from the perennial threat of flooding. The scheme went ahead with the barrage eventually being opened in March 1974.¹⁴⁷

Over 120 years after pastoralists began farming the Wairarapa flood plain, their goal of maintaining a constantly open outlet from the lake to the sea was realised. However, as was noted in a 1993 governmental fisheries report, the:

145. Bagnall, p 384; *New Zealand Gazette*, 1916, no 47, p 1105

146. Waitangi Tribunal, *Pouakani Report*, Wellington, Brooker and Friend, 1993, p 301

147. Bagnall, pp 384–386

important historical fishery for eels, based on fishing downstream migrants in April and May when the barrier bar to Lake Onoke was closed, no longer exists because the bar is maintained in an open state.

On the other hand, a permanently open outlet to the lake has meant that there are now larger numbers of various other fish in the lakes than there were previously. The lakes also now support a commercial eel fishery.¹⁴⁸

2.6 Conclusion: Eel versus Sheep

The contest between Wairarapa Maori and Pakeha settlers over the right to control the Wairarapa lakes was, in many respects, typical of conflicts that emerged in nineteenth century New Zealand between Maori and Pakeha over the control of waterways. As Pakeha began farming recently acquired land that abutted waterways controlled and used by Maori, the right to control waterways became a hotly contested issue. In the case of the Wairarapa lakes, the desire of Pakeha settlers to end the periodic inundation of their lands caused by the lake flooding was in direct opposition to the interests of Maori whose major fishery was centred on the annual flooding of the lakes; in short, a conflict that can be typified as one between eel and sheep.

It would seem difficult to overstate the importance of the Wairarapa lakes to the local Maori economy. Eels caught in the lake were not only important for immediate consumption, but were traded throughout the lower North Island. Whereas land was seen as being the key economic resource by Pakeha, Wairarapa Maori appear to have regarded their lakes and associated fisheries as being ‘the most important property they possessed’.¹⁴⁹ When Wairarapa Maori eventually agreed to part with many of their lands in the mid-1850s, they sought and were granted guarantees that their rights to the lakes remained unaffected. But the significance of waterways to Wairarapa Maori was not purely in economic terms. The continued exercise of fishing rights constituted an important link with the past in that rights were predicated on the actions of their ancestors.

The Wairarapa lakes saga was the first significant contest between Maori and Pakeha as to the ownership and control of a major lake. For this reason, an important aspect of the contest was what it revealed about the Crown’s position vis-a-vis Maori rights to waterways. When in the mid-1850s Maori received guarantees that their rights to the Wairarapa lakes remained unaffected by the sale of their riparian lands, the Crown was explicitly acknowledging that Maori had rights in the lakes. But in the subsequent history of the Wairarapa lakes the nature and extent of these rights were never clearly defined. From the time of the sales till the mid-1880s, the Crown’s position seems to have been that Maori had an irrefutable right

148. B J Hicks, ‘Investigation of the Fish and Fisheries of the Lake Wairarapa Wetlands,’ New Zealand Freshwater Fisheries Miscellaneous Report no 126, Christchurch, NIWA, 1993, pp 1–2

149. Mackay, ‘Report on claims of Natives to Wairarapa Lakes’, p 5

to control the outlet of the lakes. But what this right was predicated upon in the Crown's view, is unclear. However, it was more likely to have been as consequence of the guarantees afforded at the time of the sales of riparian lands, than because the Crown considered Maori to be the absolute owners of the lakes.

When the Crown attempted to purchase the lakes from 17 individuals in 1876, what rights the vendors were surrendering other than those of fishing was not clear. The deed acknowledged that the signatories 'held rights over the Wairarapa Lakes . . . for the purposes of eel fishing' and that such 'eel fishery rights and other rights and interests of any kind whatsoever' were surrendered and conveyed to the Crown.¹⁵⁰ However, it soon became apparent that whatever the nature of the rights were that the Crown had acquired from Maori, it had not succeeded in acquiring the rights of all Maori with interests in the lake. Hence the Crown turned to the Native Land Court to determine the extent of what rights it had acquired, along with what rights it had not. The court, however, refused to hear the Crown's case. It held: that it could only determine the extent of interests acquired from Maori by the Crown if the land had already passed through the Native Land Court; that under the 1876 deed, nothing but fishing rights passed to the Crown; and that it was not in the Native Land Court's jurisdiction to determine the extent of rights other than those in land.

The Crown then sought to prevent the lakes' Maori owners from having their title determined by applying to the Supreme Court for a rule nisi preventing the Native Land Court from investigating the ownership of the lakes. Mackay recounted that the basis of the Crown's case was that 'no right existed, according to Native custom, to the soil beneath a lake, nor is the same recognised by Native custom as being capable of ownership'. Although this position was frequently articulated in the early twentieth century in respect of other lakes, this is the only instance uncovered by the present author that this was the view of the Crown in the nineteenth century. Importantly, the Supreme Court considered that it could not interfere in the matter and that the Native Land Court must ascertain Maori custom, but foreshadowed the possibility that the Land Court could find that Maori held fishing rights in the lake while title to the lake bed resided in the Crown.¹⁵¹

The Native Land Court finally determined the ownership of the Wairarapa lakes in 1883, ruling that there were 139 Maori with interests in the lake – 17 shares of which the Crown had acquired by virtue of its 1876 purchase. Subsequently a certificate of title as issued for the bed of the lake and the customary title was extinguished.

In the history of the Wairarapa lakes, an issue over which rights to the actual lake bed were discussed at very early on, and in which a conflict between customary and common law was plainly evident, was that of accretion. Maori were incensed that parts of the lakebed uplifted by the 1855 earthquake were assumed by the Crown and subsequently sold. Under English common law the Crown would have been entitled to the accretion only if it had title to the lake bed. That the Crown sold land

150. Turton, deed 198, pp 410–411

151. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 8

uplifted by the 1855 earthquake evinces its attitude that it owned the beds of the Wairarapa lakes. Although Maori protested about this on numerous occasions, they received no compensation. It is clear from this protest that they considered the land beneath the lake to be their property as an incident of owning the lake.¹⁵² As Judge Acheson observed in his 1929 decision as to the ownership of Lake Omapere, the bed of a lake is merely a part of the whole lake, and Maori ‘would have regarded it as a rather grim joke had any strangers asserted that he did not possess the beds of his own lakes’.¹⁵³

Throughout the conflict over the control of the Wairarapa lakes, the Crown was determined to acquire title to the lakes. It is not apparent though that this was necessary to alleviate the problems farmers faced when the lakes flooded each year. Both Piripi Te Maari and Mackay proposed that Maori retain ownership of the lakes but allow floodwaters to be released when they were threatening adjacent farmlands. However, this proposal was rejected outright by the Crown which was of the view that it was in the owners’ ‘best interests to sell’.¹⁵⁴ This policy – that lakes should be vested absolutely in the Crown – can be seen as an attempt by New Zealand’s Colonial Governments to avoid the situation that existed at common law whereby lakes were the private property of riparian land owners.

It could be argued that the Crown, in also not wanting the control of the Wairarapa lakes to fall into the hands of the pastoralists who owned the lakes’ riparian lands, were not favouring the interests of the agricultural sector. However, this was in fact manifestly untrue. Presumably a corollary of the guarantees afforded Maori when they sold their riparian lands was that pastoralists who subsequently acquired the lands from the Crown, did so on the basis that they were periodically subject to flooding. But once the full extent of the farmers’ difficulties became apparent, the Government places extreme pressure on Maori to give up their rights in the lake and control of its mouth to the Crown. Suddenly the idea of a ‘national interest’ gained currency – an interest that just so happened to align with the agenda of pastoralists. A later summary of the saga of the Wairarapa lakes by Francis Dillon Bell illustrates the prevalent Pakeha view:

Maori, like the European, must submit, for the public good, to accept full monetary compensation for rights which barred a public work. . . . Drainage was only another example of the same principle. It was impossible to permit a Maori to hold up the whole drainage of a plain, to prevent the straightening of a river, to prevent the reclaiming of swamp land and turning it into productive land. It was not alone the land immediately affected that must suffer for the public good; the whole of the land above and below it suffered if the drainage was to be held up by a lagoon or stream. . . . in the case of the Wairarapa Lake the Maoris did for many years so hold the lake

152. See for example Maunsell to Native Department, 15 February 1876, ma 13/97, NA Wellington; Maunsell to Under-Secretary, Land Purchase Department, 26 May 1885, ma 13/97, NA Wellington

153. Bay of Islands Native Land Court minute book 11, 19 June 1929, fol 5

154. Piripi Te Maari and seven others to Native Department, 29 October 1886, ma 13/97; Account of a meeting between Native Minister, Piripi Te Maari and Wi Hutana, 12 November 1886, ma 13/97, NA Wellington; Mackay, ‘Report on claims of Natives to Wairarapa Lakes’, p 11

until they recognised the necessity of settlers, and they then accepted full compensation.¹⁵⁵

Bell's account of the Wairarapa lakes episode suggests that Maori suddenly became aware of the errors of their way – that they must submit to the interests of the settlers – and willingly agreed to the sale. Another way of looking at it, however, was that the resistance of the owners of the lake was worn down over time. In many respects, the tactics the Crown adopted in acquiring title to the lakes were typical of the way it went about acquiring title to various blocks of land around the country. The 1876 'deed of purchase' exemplified such tactics. The Crown agent secured the signatures of Hiko Piata and Hemi Te Mihi – chiefs who were keen to sell the lake and who claimed to have paramount interests in the lake – along with 15 of their followers. No attempt appears to have been made by the Crown to substantiate the chiefs' claims of having paramount rights. Piripi Te Maari claimed before the 1891 commission that he and others had not been consulted in connection with the sale because they were opposed to the sale.¹⁵⁶ Little detail as to the circumstances surrounding the eventual agreement reached in 1896, pursuant to which the lakes passed to the Crown, was uncovered by the present author. However, the agreement by Wairarapa Maori has to be seen as the culmination of an exhaustive campaign by the Crown to extinguish Maori rights to the lakes.

155. NZPD, 1912, vol 161, p 1117

156. Mackay, 'Report on Claims of Natives to Wairarapa Lakes', p 18

Figure 3: Lake Horowhenua