

CHAPTER 4

ROTORUA LAKES

4.1 Introduction

The numerous lakes of the Rotorua district lie in an area of hill country approximately 80 kilometres south of Tauranga, and 50 kilometres west of Whakatane.¹ For centuries the lakes of the Rotorua district have been the centre of Te Arawa settlement. Shortly after the Arawa canoe's arrival at Maketu, Ihenga travelled into the interior in search of birds, and by chance his dog discovered Lake Rotoiti. He returned and told his kin of his discovery. Subsequently an expedition was mounted to further explore the area. On this journey Rotorua was discovered, and Ohinemutu named. Quite apart from their metaphysical significance to Te Arawa, for centuries the lakes appear to have been the mainstay of their economy. In a volcanic landscape that was ill-suited to horticultural production, the lakes and their margins were an important source of various species of freshwater fish, waterfowl, and plants.²

Throughout the mid-nineteenth century, there appears to have been both a tacit and statutory acknowledgement by the Crown of the rights of Maori in the Rotorua lakes. By the late nineteenth century, however, the lakes' importance to the country's nascent tourist industry saw the Government assuming ever greater rights in the lakes. When Te Arawa sought a legal determination of their perceived ownership rights, the Crown argued that Maori only enjoyed rights of fishing and navigation. This pattern of the Crown initially acknowledging the existence of strong Maori rights in lakes, but over time trying to limit the extent of these, is a scenario common to the contest for the ownership and control of many lakes in New Zealand.

In 1922, legislation was passed vesting in the Crown the beds and waters of 14 lakes in the vicinity of present day Rotorua. The legislation put into effect an agreement negotiated between representatives of Te Arawa and the Crown,

1. Historically attention has focused primarily upon the three largest lakes of the area; Rotorua, Rotoiti, and Tarawera. During the 1918 Native Land Court investigation of title to the Rotorua lakes, counsel for the applicants informed the court that he had only prepared the applications for Rotoiti and Rotorua, but that he would attend to the others in due time. However, the Court's inquiry was abandoned, and a settlement was negotiated that applied to Rotorua, Rotoiti, Tarawera, Rotoehu, Rotoma, Okataina, Okareka, Rerewhakaitu, Rotomahana, Tikitapu, Ngahewa, Tutaeinanga, Opouri, and Ngakaro. 'Minutes of the Rotorua Lakes Case: Application for Investigation of Title to the Bed of Rotorua Lake', 16 October 1918, p 137, cl 174, NA Wellington
2. For a detailed account of the traditional history of Te Arawa, see D M Stafford, *A History of the Te Arawa People*, Auckland, Reed Books, 1967

Figure 4: Rotorua lakes

whereby native customary title in the beds and waters of the lakes, if such a thing existed, was extinguished in exchange for the preservation of certain fishing rights, and an annuity of £6000. The agreement was arrived at after a protracted saga of litigation to determine the ownership of the lakes. From around the turn of the century, Te Arawa had made repeated applications to the Native Land Court for title to the lakes to be investigated. The Government prevented the inquiry from proceeding by refusing to supply a plan and by maintaining it was outside of the Land Court's jurisdiction to determine the ownership of lake beds. Eventually in 1912, the question of jurisdiction was removed to the Court of Appeal which ruled that such matters were in fact within the jurisdiction of the Native Land Court. The Land Court began an investigation in 1918. This was never completed, however, and the applicants succumbed to pressure from the Crown to negotiate a settlement without title having first been determined. It is apparent that the Crown favoured this option because it seemed that the Land Court would have found in Te Arawa's favour. The legislation that put into effect the settlement was carefully worded so as not to be an admission that lakes were subject to Maori customary title. Instead the Act referred only to the lakes as being 'freed and discharged from the native Customary title, if any'.³

4.2 The Rotorua Fisheries and Other Resources

Most of the evidence uncovered concerning the nature and extent of Maori rights in the Rotorua lakes is in connection with what appear to have been the two major lakes in economic terms – Lakes Rotorua and Rotoiti. Little evidence has been uncovered as to the nature of rights in the numerous smaller lakes of the Rotorua district. It is likely, though, that to a large extent, the nature of these rights would have been similar to those over bigger lakes. One likely difference though, is that the smaller lakes were probably situated entirely within the rohe of just one hapu, unlike Rotorua and Rotoiti in which several groups clearly had distinct rights.

Throughout the 1918 Native Land Court inquiry into the ownership of the Rotorua lakes, witnesses appearing in support of the Te Arawa application repeatedly stressed the economic significance of the lakes to those people. Captain Gilbert Mair, for example, a man who had lived amongst Te Arawa for most of his adult life, informed the court that birds and rats aside, the Rotorua district 'is sterile country that is unsuitable for cropping' and therefore fishing was of the utmost importance to Te Arawa. This importance extended beyond mere subsistence given that fish were bartered with iwi from other districts. Later Mair made comparisons between the Rotorua lakes and the Wairarapa lakes, which in the late nineteenth century the Government had accepted were the property of Maori. He contended that Rotoiti and Rotorua were:

3. The Native Land Amendment and Native Land Claims Adjustment Act 1922, s 27(1)

of more value to these [Te Arawa] Natives than Wairarapa Lake was to those Natives – of infinitely more value from the variety of food for one thing. Wairarapa was surrounded by fertile lands upon which unlimited quantities of food could be grown. We all know . . . that Lakes Rotorua and Rotoiti are surrounded by sterile land that does not lend itself to such cultivations as the Maori possessed in those days.⁴

Mr F Earl, counsel for the Te Arawa claimants in their applications before the Native Land Court in 1918, stated that:

Your honour will find that for their food-supply the people of the blocks surrounding these two lakes depended very much more upon the lake than upon the dry land. The lake was supplying them from the earliest times, and still supplies, an almost inexhaustible quantity of various kinds.⁵

Mair listed the various species of fish caught in the Rotorua lakes before the Native Land Court during its 1918 inquiry. These included kakahi (a kind of freshwater mussel), kokopu and koaro (fish similar to small trout), koura (freshwater crayfish), and inanga (whitebait).⁶ All the species of fish found in Rotorua appear to have also occurred in Rotoiti. However, as a consequence of Rotoiti being considerably deeper, with the exception of koura, there were fewer numbers of all species in Rotoiti.

In connection with evidence of the fishing practices of Te Arawa, much mention was made of fishing posts or tumu. These were posts that were placed in the lake to mark the boundaries of particular fishing grounds, and that were used to attach nets to whilst fishing. Tumu were sometimes carved and there were often waiata and proverbs that referred to them.⁷ Throughout the court's 1918 inquiry, the posts were frequently alluded to by various witnesses in describing the boundaries of the divisions between the parts of the lakes controlled by different hapu.

As well as extensive detail being presented to the Court as to the methods employed to catch the various species of fish in Rotoiti and Rotorua, witnesses also referred frequently to the practice of rahui. Mair, on being asked to explain the custom of rahui, responded that:

In these days it [rahui] would be called an injunction from the Supreme Court to restrain anyone from acting in a certain manner on land claimed by another person. It is a right vested in a Chief and in him was vested the power of declaring these places open. In the same way fish in the Lake on the various properties in the lake were protected by Rahui. It was to prohibit members of the tribes from fishing out of season. In like manner the sharks in Katikati harbour at Tauranga, these would be rahuied . . . No one would go venture to catch sharks without the chief of the tribe having given his permission, and those rights were applied to these lakes, and to the surrounding country in like manner. In former times, and long after the introduction of Christianity men were killed for any infringement of rahui. No law amongst the

4. Evidence of Capt Gilbert Mair, 'Minutes to Rotorua Lakes Case', pp 190–191, 246

5. Ibid, p 128

6. Evidence of Gilbert Mair, *ibid*, pp 191–196

7. Ibid, pp 189–190, *passim*

Maori was higher than that of setting up rahui, and if the rahui was thrown down it was because someone either challenged the ownership, or it had been put up by the wrong man of the tribe.⁸

The existence of a rahui was usually marked by the placement of a special post on the lake's margin. An example of a rahui on Rotoiti was given to the court during its 1918 inquiry by Wiremu Maihi Ereatara, quoting an extract from an earlier inquiry of the Native Land Court:

A rahui was set up alongside the lake, at the bight on the East side of Te Whiowhio – at [a] place called Te Whaiawa – that is in the lake itself – a post was put there. . . . That rahui was in respect of the koura. Ngatihinekura put it up when they wished to specially conserve the koura. That post was standing there when I was there and I believe that it is there still. It was a pou kaha. When the rahui was in force, arms would be fixed upon the post. . . . A new post would be put in when required.⁹

As well as being important as fisheries, the lakes and their margins were also significant as a source of birds and plants (such as raupo). Earl, counsel for the applicants in the 1918 investigation of the title of the Rotorua lakes, recounted to the Land Court how shortly after he arrived at Rotorua in 1880, he visited Rotomahana. Arriving at the lake, he was astounded at the number of fowl upon it, and was 'anxious to get a gun and get to work upon them.' However, he was prevented from doing so by the local Maori as the lake was:

held sacred so far as sport was concerned, or the pursuit of game, and was sacred to the Natives, and the only manner to secure the birds was by snares.¹⁰

The water fowl were held to be the preserve of a particular hapu, and were carefully managed to ensure the resource's sustainability.

Similar stories were recounted to the court in respect of kawa (shags) and seagulls, both of which nested on the lakes' margins. Mair described how particular hapu had exclusive rights over the birds' nesting areas, and that these rights were jealously guarded: 'no man would dare to go and interfere with them without the consent or permission of the owner of the land.'¹¹ Similarly, patches of raupo growing along the lake shore were the preserve of particular hapu. Evidence exists of rahui being declared in respect of raupo.¹²

8. Evidence of Gilbert Mair, *ibid*, pp 212–213

9. Taheke Native Land Court minute book 22, fol 192, cited in *ibid*, p 315

10. *Ibid*, p 160

11. Evidence of Mair, *ibid*, p 206

12. Evidence of Wiremu Maihi Ereatara, *ibid*, p 306

4.3 The Nature and Extent of Maori Rights in the Rotorua Lakes

4.3.1 Rotorua

While some witnesses appearing before the Native Land Court in its 1918 investigation of the title of Lake Rotorua stated that five hapu owned Lake Rotorua, others claimed they were in fact six. A possible explanation for this disparity is that some individuals afforded groups autonomous status that others considered to be subsumed by larger groups. Wiremu Maihi Ereatara listed Ngatiuenukukopako, Ngatirangiwehi, Ngatingararanui, Ngati Whakaue, Ngatirangiteaorere, and Ngatiparua as being the hapu that owned Lake Rotorua. In support of this, Ereatara recited at length the physical boundaries of the divisions between the different hapu with rights in the lake.¹³ Ereatara's evidence was broadly in accordance with that of Mair, who listed five groups and concomitant divisions. Mair held that the divisions were well known, and that in only one instance had they ever been disputed.¹⁴

Ereatara stated before the court that all the hapu with rights in the lake descended from Uenukukopako, the father of Whakaue. These groups are known as Te Ure-O-Uenukukopako. Although Te Ure-O-Uenukukopako did have ancestral rights to Rotorua, it seems the major basis of their claims stemmed from their conquest of Kauarero. In conjunction with their rights by virtue of conquest, Te Ure-O-Uenukukopako's claim to the lake was supported by what Ereatara simply described as 'mana' – being the right to work on the lake and exclude others.¹⁵

The exclusive nature of the different hapu's rights in Rotorua was stressed by all witnesses before the court in its 1918 inquiry. In response to a question from Judge Wilson, Ereatara expounded upon the nature of rights held in Lake Rotorua:

It was exclusive possession. Each hapu had an exclusive right to its own division. When I say exclusive I mean this. Take for instance the Ngatirangiwehi subdivision. Ngatiwhakaue would not dare go on the Ngatirangiwehi subdivision as a Ngatiwhakaue . . . If a hapu were seen rowing over another hapu's subdivision, questions would be asked as to why they were rowing over it. If it were found that they were going over it for the purposes of working or laying claim to it the result would be a fight. The only time they are able to go over these subdivisions is when, say Ngatirangiwehi were going over the Ngatiwhakaue portion as Ngatiwhakaue, or vice versa. Although there are Ngatiwhakaues amongst the Ngatirangiwehi they have no right to go and work the tau¹⁶ of the Ngatirangiwehi.

He went on to say in connection with non-Te Arawa tribes, that they:

13. Evidence of Wiremu Maihi Ereatara, pp 283–287

14. Evidence of Gilbert Mair, *Ibid*, pp 210–211, 205–206

15. Evidence of Wiremu Maihi Ereatara, p 283

16. A tau consists of bundles of fern that are tied to a large flax rope, one end of which is attached to a large post. The posts appear to have been either in the lake, or on the shore. After a while the tau would be pulled to the surface and fish that had become lodged in the bundles of fern removed. They were mainly used for catching kokopu. John Te H Grace, *Tuwharetoa: The History of the Maori People of the Taupo District*, Wellington, A H & A W Reed, 1959, p 511

would not be permitted on any account to go over the lake. Their only way of getting across the lake was to go to their relatives, and for those relatives to take them over the lake. They would be questioned of course as to why they were going over the lake. If it were found that they were going over the lake for some wrong reason of course they would be killed.¹⁷

Rights to the lake's fisheries were clearly exclusive. For example, Arama Raraka, a witness before the Native Land Court in 1882, discussed various fishing grounds in Lake Rotorua as part of his evidence in support of his claim to the Whakapoungakau block. He stated that:

Ringaringakatia is a pipi bank of ours in the lake, and Harangia, Hinekuia and Te Matarae are fishing grounds and no other people would attempt to take pipis or catch fish on those grounds. Death would be the penalty.¹⁸

Similarly, in 1890, a witness appearing before the Native Land Court in an inquiry into the Parawai block observed that Te Arawa 'considered the work on the Lake in the same light as the work on the land and the portion it was considered proper for a person to work was opposite to his cultivation.'¹⁹

4.3.2 Rotoiti

Before the Native Land Court in 1918, Mair stated that Rotoiti was divided into three parts and owned by three sections of people: Ngati Pikia, Ngati Tamateatutahi and Ngati Whakaue.²⁰ Ngati Pikia, in the time of eponymous ancestors Pikia I and Pikia II, had conquered the descendants of Taketakehikuroa, usurping their rights to the lake and occupying lands along the western shore of Rotoiti.²¹ Ngati Pikia were made up of four hapu – Ngati Hinekura, Ngatirangiteaorere, Ngati Kawiti, and Ngati Rongomai. The lands on the eastern and southern shores of the lake were occupied by Ngati Tamateatutahi and Ngati Whakaue respectively.²²

Ereatara described how the lake had been divided between the three groups, listing various landmarks and pou that delineated the divisions. He informed the court that these divisions were 'ancient' and that 'from olden times down to our times they have been respected.' While in the past there had been fighting in respect of defending rights to the lake, 'there has been no dispute since Ngati Pikia got possession of the lake.'²³ Mair impressed upon the court that these rights were enforceable against other groups trespassing on the lake.²⁴

17. Evidence of Wiremu Maihi Ereatara, 'Minutes of Rotorua Lakes Case', p 309

18. Rotorua Native Land Court minute book 4, fol 273, cited in *ibid*, p 303

19. Rotorua Native Land Court minute book 18, fol 204, cited in *ibid*, p 155

20. Evidence of Captain Gilbert Mair, *ibid*, pp 221–223

21. Evidence of Tieri Te Tiakao, *Ibid*, pp 322–323. See also Taheke Native Land Court minute book, fol 51, cited in *ibid*, pp 322–323

22. Evidence of Captain Gilbert Mair, *ibid*, pp 221–223

23. Evidence of Wiremu Maihi Ereatara, *ibid*, pp 288–292

24. Evidence of Gilbert Mair, *ibid*, p 224

Tieri Te Tikao also described the divisions between the different groups with rights in Rotoiti. All the points he mentioned were on the lake shore; the boundaries of the divisions being between these and the midpoint of the lake:

Our elders have always told us that the taus of both sides [of the lake] only went as far as the middle of the lake and no further. If it is found by one party that the other party's nets or taus go over the centre of the lake there are objections made.

Te Tikao stressed that each of the 'divisions is owned exclusively by each hapu' and that, 'unless by special permission', one hapu could not fish on the grounds of another – the divisions being 'on the same basis as those on the mainland.' Te Tikao went on to recount how a battle had been fought in defence of a fishing ground on a sand bar, and that two men had been killed as a consequence. Hapu were allowed to travel over parts of the lake belonging to other hapu, so long as they were not fishing or exploiting other resources. However, it would appear that such concessions were contingent upon the hapu concerned being at peace with each other. Further, groups from other iwi would be prevented from travelling on the lake unless they had a valid reason to be there – such as travelling to a tangi or hui – 'if they came for no reason at all of course it would be assumed that they came to claim the lake.'²⁵

Under cross-examination by Earl, Ereatare described the basis of Ngati Pikiāo's "take" to Rotoiti. These were conquest over the descendants of Tuhurangi, 'the strong arm' in repelling subsequent groups who attempted to usurp Ngati Pikiāo's position, and the fact that Ngati Pikiāo had worked on the lake and occupied its shores. He stated that originally Tuhurangi came to be possessed of the lake by virtue of a 'take tuku' from Ihenga to Kahumatamamoe, but that take had been 'wiped out by the conquest'.²⁶

The picture that clearly emerged from the Native Land Court's inquiry, which to the present author's knowledge is the only major source of written evidence as to the nature and extent of Te Arawa rights in the Rotorua lakes, is that Te Arawa considered themselves to have absolute ownership of the lakes. That each group excluded others from working its particular division of the lakes, and at times even prevented others from navigating the waters, clearly satisfies the English common law test of ownership that property rights are both enforceable and exclusive. The matrix of rights that existed in the Rotorua lakes is not dissimilar to contemporaneous descriptions of the way rights were held and exercised over land. As Gilbert Mair expounded to the Land Court in its 1918 inquiry:

I know from my 50 years experience in Native Land Courts in different positions, that no land in New Zealand has been held more absolutely, more completely, and more thoroughly under Maori owners' customs and rights than these two lakes, nor do I know of any piece of land in New Zealand in all my experience that has been

25. Evidence of Tieri Te Tikao, *ibid*, pp 322–331

26. Evidence of Wiremu Maihi Ereatare, *ibid*, pp 292–293

used or that can show more marks of ownership, individual or tribal than those lakes, and the surrounding lands.²⁷

The conception that Te Arawa had of themselves as being the owners of the lakes – informed largely by the existence of clearly demarcated areas of the lake and that particular hapu had the exclusive rights to fish in these divisions – is somewhat unusual in the context of other lakes in New Zealand. In the course of the present author’s research pertaining to other North Island lakes, no evidence of such clearly defined open water boundaries has been uncovered. Similarly in the case of other lakes, no evidence appears to exist of punitive action being taken against people taking fish who did not have the right to do so.

4.4 Early Pakeha Visitors to the District

From the beginning of the European colonisation of New Zealand, Rotorua seems to have held particular fascination for successive Pakeha visitors. While this was to a large degree a consequence of the spectacular geothermal activity of the region, the beauty of the lakes was also a major attraction. The first Pakeha to settle in the Bay of Plenty is believed to be Philip Tapsell, a trader who, at the invitation of Te Arawa, based himself at Maketu in 1830. By 1835 a mission settlement had been established at Rotorua by Thomas Chapman.²⁸

In 1842, Bishop Selwyn made a journey from Tauranga to the Rotorua district. He recorded how upon entering a clearing, he was confronted with:

a noble view of Rotorua Lake – the Island of Mokoia in the centre, the steam of the hot-springs rising in a thick cloud, at the north end, and the beautiful wooded hills of Tarawera, forming the background.²⁹

Similarly, William Colenso described how his party, upon:

gaining the summit of a high hill . . . had a fine prospect of the principal Lake of Rotorua – a fine sheet of water, about six miles in diameter, with a very picturesque island nearly in the midst.³⁰

John Johnson, New Zealand’s first colonial surgeon, was also struck by the sight of Lake Rotorua. During his tour of the central North Island in 1846 and 1847, he described seeing ‘a fine valley opening on the lake, which was an oblong form, reflecting on its glassy surface the surrounding hills, and the island of Mokoia’. To the surgeon’s mind it ‘was a truly magnificent scene’.³¹

27. Evidence of Gilbert Mair, *ibid*, pp 184–185

28. W A Leonard, ‘The Formation of the Te Arawa Maori Trust Board and its First Ten Years’, MA research essay, University of Auckland, 1981, p 1

29. ‘Letters from Bishop Selwyn’, 21 December 1842, in Nancy M Taylor (ed), *Early Travellers in New Zealand*, London, Oxford University Press, 1959, p 83

30. William Colenso, ‘Excursion in the Northern Island of New Zealand, in the Summer of 1841–2’; together with part of ‘Early Crossing of Lake Waikaremoana’, in *ibid*, p 34

The Reverend Richard Taylor, in his 1855 account of his impressions of New Zealand, *Te Ika a Maui*, describes a visit he made to Lake Rotomahana:

The first view of Rotomahana is very remarkable, and cannot fail to excite the traveller's astonishment. The lake lies in a great hollow, evidently a crater, flanked on the side by which we approached . . . with lofty precipices; but containing a considerable extent of low swampy land along one of the shores; the opposite bank is formed of hills, literally covered with boiling springs, emitting columns of steam, and the soil being of red or white ochre, gives the whole a most extraordinary appearance. On the lower side it has an outlet into the Tarawera Lake. There are several islands in it, some merely a few connected tufts of grass, but abounding in water fowl, ducks, pukeko, and sea birds, which appear to delight in the warmth of their abode. Two of these islands present a singular appearance, being composed of misshapen rocks and ochreous hills, filled with boiling cauldrons and jets of vapour, intermingled with manuka trees and native huts.³²

By the later nineteenth century, the area's lakes and geothermal activity (remarked upon by so many early Pakeha visitors to the area) was the basis of a rapidly expanding tourist industry. And it appears that to a large degree it was the Government's desire to control this tourist industry that led them to assert ownership rights in the Rotorua lakes.

4.5 The Thermal Springs District Act 1881

4.5.1 Tourism in Rotorua at 1880

By the late 1870s, tourism in the Rotorua region was reasonably well established. This had come about to a large extent by a road having been completed from Tauranga to Taupo via Ohinemutu. The nascent tourism industry was centred upon the region's lakes and hot springs. The pink and white terraces of the Rotomahana region were also a major attraction until they were destroyed by the Tarawera eruption of 1886.³³

Evidence exists that Maori were profiting from charging tolls for tourist access to various attractions, ferrying tourists upon the lakes, and by providing other services such as accommodation. In 1860, Alex St Clair Inglis travelled through the Rotorua district by horseback, en route from Napier to Taupo. His diary of the journey records arriving at Te Wairoa on the shores of Rotokakahi. He described Te Wairoa as being:

A large missionary settlement laid out in the form of a town, with streets[,] the houses having chimneys and little gardens and a very good road through the

31. John Johnson 'Notes from a Journal', *ibid*, pp 151–152

32. Rev Richard Taylor, *Te Ika a Maui or New Zealand and its Inhabitants*, Wertheim and Macintosh, London, 1855, pp 245–246

33. Richard Boast, 'The Legal Framework for Geothermal Resources: a Historical Study', *nd*, report commissioned by the Waitangi Tribunal (Wai 304 rod, doc a34), p 5

settlement along which we managed to spur our jaded steeds into a canter. At the side of the road near a Flour Mill a large board [was] erected with the different rates of fares for tourists on the lake.³⁴

Gilbert Mair, before the Native Land Court in the course of its 1918 inquiry into the ownership of the Rotorua lakes, recounted how Maori derived a revenue from charging tourists who wanted to visit the Okere Falls – ‘a favourite resort for tourists’ on the shores of Rotoiti. According to Mair:

Hundreds of Tourists used to go there, and the Native girls who were selected as guides used to take them over this beauty spot and a charge of eighteen pence was made for each tourist, and I never heard of a tourist begrudging it. The people living there got a nice little income which amounted to several hundred a year.³⁵

Similarly tolls were charged at Hamurana, Rotomahana and Tarawera. But after the Government’s purchase of part of Tarawera in 1901, tolls ceased to be charged there. Mair, under cross examination from Earl, agreed that the tourism centred on the Pink and White terraces ‘was a lucrative matter for the Natives’, and that Tuhourangi:

were getting quite opulent, although I never heard of the tourists objecting to the charges as being excessive. What they did object to was an innovation introduced by the hotel-keeper that the tourists had each to buy 5/- worth of rum to make supplication to a taniwha or else they would never have got to the end of their journey.

Mair continued, that before ‘the days of the hotel-keeper the “mana” of Rukuhia [the taniwha] was satisfied by simply throwing a boiled potato or a few leaves on it.’³⁶ At Whakarewarewa, local Maori had built tourist accommodation from which they appear to have derived a reasonable income.

Although the tourist trade attracted several Pakeha storekeepers and hoteliers to Rotorua, Te Arawa on the whole remained ‘jealous’ of their lands and refused to give up the freehold of them. Despite the fact that most Te Arawa allied with the Crown, it was the Komiti Nui o Rotorua – a council of Te Arawa chiefs – who held political power in the region. In many respects the region remained a zone of Maori autonomy with the settler government having little influence or authority.³⁷ Because of the refusal of Te Arawa to sell their lands, Europeans who settled in the district were forced to lease land. By 1880, the Pakeha community remained negligible and survived under Maori sufferance.³⁸ Te Arawa’s refusal to sell land was somewhat frustrating for the Government as it was retarding the development

34. Alex St Clair Inglis, Diary entitled ‘Bubbles from the Boiling Springs of Taupo’, ms-784, WTU, cited in Richard Boast, ‘Maori Customary Use and Management of Geothermal Resources’, November 1992, A report to Te Puni Kokiri on behalf of FOMA Te Arawa, (Wai 153 rod, doc a82), p 43

35. Evidence of Gilbert Mair, ‘Minutes of Rotorua Lakes Case’, pp 242–243

36. Evidence of Gilbert Mair, *Ibid*, pp 243–244

37. George Rusden, *History of New Zealand*, vol 3, Melbourne, Mullen and Slade, 1895, p 264; Boast, ‘The Legal Framework for Geothermal Resources’, p 4

38. *Ibid*, p 5

of a state-owned tourist industry based on the region's lakes and thermal attractions. Thus in 1880, Chief Judge F D Fenton of the Native Land Court was instructed by the Native Minister, James Bryce, to travel to Rotorua:

and endeavour to ascertain on what conditions the Maoris would be willing to dispose of enough land to remove the present difficulties and obviate future ones in respect to Hotel accommodation for visitors upon the lake.³⁹

4.5.2 Fenton's agreement and the Thermal Springs District Act 1881

After a fortnight of meetings, on 25 November 1880, Fenton signed an agreement with Ngati Whakaue to enable the establishment of the town of Rotorua. The agreement required the Native Land Court to determine the ownership of all of the lands in the district subject to the agreement except Ohinemutu, and for these to be surveyed. It was agreed that the sections would then be leased. The leases were for a term of 99 years and were to be sold by auction.⁴⁰

The agreement was then given legislative effect by the Thermal Springs District Act 1881. The Act's long title described it as being an act 'to provide for the settlement of the Thermal-Springs Districts of the Colony.' Importantly, in districts subject to the Act, only the Crown could acquire any estate or interest in Maori land.

Under section 5(3), the Governor was empowered to 'treat and agree with the Native proprietors for the use and enjoyment by the Public of all mineral or other springs, lakes, rivers and waters.' Section 6(7) vested in the Governor the power to:

manage and control the use of all mineral springs, hot springs, ngawha, waiariki, lakes, rivers and waters, and fix and authorise the collection of fees for the use thereof . . . with the consent of the Native proprietors, to be ascertained in such manner as he may think fit.

Prima facie, these sections were an overt acknowledgement by the Crown that the lakes of the Rotorua district were the property of Maori. Mair informed the Land Court during its 1918 inquiry that Fenton would never have secured the agreement of Ngati Whakaue had there been any suggestion that the lakes were not Maori property. Had the Government asserted this, Mair claimed a situation would have arisen that would have been more serious than the Waitara affair.⁴¹ By 1883, a district of over 600,000 acres centred upon Rotorua had been proclaimed under the Act.⁴²

Although under the Thermal Springs District Act it was only Ngati Whakaue who were required to put their lands through the Native Land Court, the previous

39. Bryce to Fenton, date illegible, ma 13/79, NA Wellington, cited in Boast, 'The Legal Framework for Geothermal Resources', pp 6–7

40. Ibid, pp 9-11

41. Evidence of Gilbert Mair, 'Minutes of Rotorua Lakes Case', pp 233–237

42. *New Zealand Gazette*, 1881, vol 2, no 1267, pp 1375–1376; *New Zealand Gazette*, 1883, vol 1, no 411, p 480

reluctance of the other hapu of Te Arawa to do the same appears to have subsided. By 1900, title to the vast majority of the land in the vicinity of the Rotorua lakes had been determined by the Land Court and been Crown granted. During this period of Land Court activity, some of Te Arawa made attempts to get title to lakes abutting their land included in the land's title. The following section briefly examines the status of the lands surrounding the Rotorua lakes, and looks at how the Native Land Court dealt with the issue of the lakes' ownership in relation to contiguous lands.

4.6 The Status of the Lands Abutting the Rotorua Lakes Around 1918

Between 1881 and 1913, virtually all of the lands surrounding Lake Rotorua passed through the Native Land Court. These blocks, along with Mokoia, were awarded variously to Ngatiwhakaue, Ngatirangiwehehi, Ngatiparua, Ngatirangiteaorere, and Ngati Uenukukopako. These were the same hapu who claimed ownership of the lake. Earl argued before the Native Land Court in 1918, that the Court's earlier inquiries into the ownership of lands abutting the lake showed 'that the exercise of rights of ownership over the lake was the dominating factor in the determination of title to the adjoining land.'⁴³

The Rotorua township lands within the district proclaimed under the Thermal Springs District Act were initially leased under the Act. However, the lessees eventually stopped paying rent and began agitating to be afforded the opportunity to acquire the freehold. After a decision by the Supreme Court that Ngati Whakaue could not sue for rent arrears, it appears that they acquiesced to selling their lands. It is possible that they agreed to sell in order to acquire desperately needed capital which they had been denied by the lessees' refusal to pay their rent.⁴⁴ Thus in the 1880s and 1890s, most of Ngati Whakaue's lands were alienated to the Crown – the Thermal Springs District Act having introduced a right of Crown preemption for lands affected by the Act. The deeds for blocks abutting the lake did not include any interests in the lake.

The titles to all of the blocks in the immediate vicinity of Rotoiti were awarded to hapu of Ngati Pikiāo by the Native Land Court.⁴⁵ Although it appears that the Crown grants did not include title to any parts of the lake, it has not proved possible to broadly establish the extent to which these lands were retained in Maori ownership or were alienated.

With respect to Lake Rotoehu, applicants to the Land Court between 1899 and 1900 for title to lands surrounding the lake, asked that the lake be included in the awards for the riparian blocks. The court refused, however, stating that 'it did not intend to include large lakes in orders – [as] they belonged to "te katoa"'. The court's refusal precipitated an intimation from the applicants that they intended to bring separate actions in respect of the lakes of the area. The lands were duly

43. 'Minutes of Rotorua Lakes Case', pp 128–132

44. CFRT Database, Thermal Springs District Act 1881

45. 'Minutes of Rotorua Lakes Case', pp 133–140

awarded to the Ngati Pikia applicants.⁴⁶ Similarly, Lakes Rotoma, Ngahewa, Okataina, Tikitapu, Rotokawau, and Rotokakahi were expressly excluded from the Land Court orders, survey plans, and partitions pertaining to the blocks abutting the lakes. Rotokakahi was surrounded by both Crown and Maori-owned land, whereas the land in the immediate vicinity of Ngahewa and Rotokawau was all Maori land.⁴⁷

Prior to the Tarawera eruption of 1886, Lake Rotomahana was in fact dry land. The eruption dammed various rivers, and over the course of several years, the lake was formed. As a consequence, the boundary of a block of land ran through the middle of the lake. The lake, however, was later excluded from the block. In 1918, the blocks abutting the lake were in both Crown and Maori ownership.⁴⁸

Unlike other lakes in the area, parts of Tarawera and all of Rotokawa were acquired by the Crown. In December 1901, the Native Land Court ruled that part of Tarawera was included in the Crown's purchase of the Ruawahia no 1 block.⁴⁹ The purchase deed describes the block as being bounded 'towards the southwest by portion of Tarawera Lake', and the attached plan clearly shows the boundary running through the lake. Although it is not expressly stated in the deed that the bed of the lake was included in the purchase, the acreage given on the attached plan clearly included the portion of the lake within the boundary.⁵⁰ Earl later claimed that the inclusion of part of Tarawera in the purchase was 'an absolutely convincing precedent' as to the lakes in the area being Maori property.⁵¹ Rotokawa was included as part of a larger area of land ceded to the Crown by its Maori owners in lieu of survey liens.⁵² At common law, where lakes are situated within a single block of land, ownership of the lake bed resides with the owners of the land. Thus title to the lakes Rerewhakaitu, Tutaeinanga, and Okareka passed to the Crown when it purchased the blocks in which the lakes are situated.⁵³

Inconsistencies are evident in the way that the Crown dealt with lakes when land was purchased that was bounded by a lake shore. While generally the lake was excluded, part of Tarawera was included in the purchase of an adjoining block. An argument used by the Crown in claiming ownership of lakes in other parts New Zealand, was that by virtue of the common law doctrine of riparian rights, ownership of the lake bed passed with the title to abutting lands. Thus if the Crown acquired such lands, it also held rights in the lake bed. This argument appears not to have been made in the case of the Rotorua lakes. The instances in New Zealand

46. Typescript of Maketu Native Land Court minute book 16, fols 164–167, cl 200/27, NA Wellington; 'Lakes Case: Details of Lands Included in or Abutting on Lakes Referred to in Mr Earle's Address', cl 200/25, NA Wellington, p 4; Tania Thompson, 'Interim Report: Rotorua Lakes Research', report commissioned for the legal firm of O'Sullivan Clemens Briscoe and Hughes, March 1993, p 7

47. 'Lakes case: Details of Lands Included in or Abutting on Lakes', cl 200/25, NA Wellington, pp 3–6

48. *Ibid.*, p 4

49. Order in favour of HM (under section 78 of the Native Land Court Act 1894), 12 December 1901, Ruawahia no 1, LINZ

50. Crown purchase deed for Ruawahia no 1 block, LINZ

51. 'Minutes of Rotorua Lakes Case', p 66

52. Ashley Gould, 'Lake Rotokawa' report commissioned by the Crown, (Wai 153 and Wai 154 rod, doc b1) p 36, *passim*

53. 'Lakes Case: Details of Lands included in or Abutting on Lakes', cl 200/25, NA Wellington

where such a case was argued generally involved lands adjoining a lake that were ceded to the Crown in the 1850s and 1860s. Lakes Wairarapa and Omapere are examples of this. That such arguments were never made in respect of the Rotorua lakes is probably related to the fact that the lands in the Rotorua district were ceded much later. By this time, deeds and other documentation of land sales were generally much less ambiguous and would clearly show whether lakes were included or not. Further, by the 1880s and 1890s, when most of the purchases in the Rotorua area appear to have been transacted, Te Arawa were fully seized of the economic potential of the lakes in terms of tourism, and appear to have been anxious to preserve their rights to them. Whether Crown land purchase agents attempted to acquire parts of any other of the lakes as part of land purchases, as happened in the case of Tarawera, is not known.

4.7 Challenges to Te Arawa's Rights and Authority in Respect of the Lakes

During the late nineteenth century, it appears that the Crown began to assume greater and greater rights in the lakes. By the first decades of the twentieth century, this gradual assumption can be seen as having taken the form of a tacit assertion of ownership. Concomitant with this was the increasing contempt with which the Crown regarded Te Arawa's rights in the lakes.

By around 1908, the Government was running its own tourist launch service upon Lake Rotorua. Further, when a Te Arawa chief, William Rogers, acquired a launch with the intention of setting up a passenger service, he was asked to pay royalties to the Town Board or similar such authority. The fee was paid, but under protest that he was being asked to pay for the right to operate a launch on his own lake. The Government's actions in setting up a launch service and requiring other operators upon the lake to pay a toll, were done without the consent of the lake's Maori owners. Section 6(7) of the Thermal Springs District Act held that the Governor could manage and control lakes in the district, including the collecting of fees for the use thereof, so long as the Maori proprietors consented. The Government's launch operation suggests that it was no longer prepared to accept that the lakes were exclusive Maori property. By the early twentieth century, Te Arawa had begun to wonder if their rights were not subject 'to a slow process of destruction'.⁵⁴

That the Crown had come to see itself as the rightful owners of the lakes was evident in a statement made by the Prime Minister, Richard Seddon, when he visited Rotorua around 1906. On that occasion, Gilbert Mair was Seddon's interpreter. Before the Native Land Court in 1918, Mair recounted the Prime Minister's message to Te Arawa:

54. 'Minutes of Rotorua Lakes Case', p 15

He came to unveil monuments of two chiefs, shortly before his death. It must have been 1909. He then told the Natives for the first time that they had no claim to the lakes. . . . He stood inside the railing of the monument of Te Petera te Pukuata. He told them that the Europeans had complained about the Natives fishing, or wanting to fish which was equally criminal, and that they had no claim to the lakes. It passed away under the Treaty of Waitangi to the Government. To make the blow fall easily upon them he would build freezing works round the lakes and up at Taupo and the tourists would be enjoined to place all their surplus fish in these freezing works for the benefit of the Arawa people. The Arawa could not believe it. They could not believe their ears. They thought it must be a huge joke. Directly the meeting was over they rushed over to me to know what the meaning was. I could not believe it either. It seemed so impossible; it was beyond my mind to grasp.⁵⁵

4.7.1 The impact of trout upon customary fisheries

Another major abrogation of Maori rights in the Rotorua lakes was the introduction of trout and the consequent management of the fishery. It appears that Maori were not consulted in connection with either. Trout were introduced during the 1880s as part of the Government's effort to promote tourism in the region. As was detailed above, though, pursuant to section 6(7) of the Thermal Springs District Act, any action ordered in respect of the management and control of lakes within a proclaimed district required the consent of the Native proprietors. In 1918, the secretary of the Rotorua Acclimatisation Society confirmed that 'he believes no permission was sought from the Natives to place the [trout] fry in the Lake.'⁵⁶

The presence of trout in the lakes and rivers of the Rotorua district appears to have had a radical effect on the freshwater ecology, causing dramatic reductions in the numbers of the indigenous species upon which Te Arawa had relied so heavily as a food source. Mair, who confessed to having been involved in the introduction of trout to Lake Rotorua, recounted to the Native Land Court how their introduction had the result of practically destroying the Maori food supply in the lakes.⁵⁷ In his personal papers he described the impact of the trout upon indigenous fish as having been so serious that:

The position of natives in this area is worse than it has ever been, and they are absolutely without hope. Through the introduction of trout their bounteous food supply of Native fish has been destroyed. These European fish swarm in these lakes so numerously that they are unfit for food and merely serve to give sport (so called) to tourists in knickerbockers while the Native owners are sometimes on the verge of starvation.⁵⁸

55. Evidence of Mair, *ibid*, p 238. Mair was clearly mistaken as to the date, however, as Seddon died in 1906.

56. Hawthorne to Prenderville, 7 October 1918, cl 174/2, NA Wellington

57. Evidence of Gilbert Mair, 'Minutes of Rotorua Lakes Case', p 209

58. 'Memo on Subjects re Te Arawa Tribe', Gilbert Mair Papers, ms-Papers 0092-15, ATL, cited in Manatu Maori, *History of the Rotorua Lakes Settlement and resource materials*, Wellington, Research Unit Manatu Maori, 1990, p 16

As well as introducing trout to the region, the Government set up a regime to manage the species. This required fishers to be licensed, and restricted the methods that could be employed in catching the fish. Thus Maori were liable for prosecution if they caught trout without a licence, even if the trout were caught as by-catch while traditional methods were being employed in an effort to catch indigenous species.

The matter came to head in 1908, when the Reverend Manihera Tumatahi was fined £5 for fishing without a licence in the Ohau channel. Reverend F A Bennet, later to be the Bishop of Aotearoa, publicly voiced his disapproval of this fining. He considered it to be a grave injustice that Tumatahi had been punished for fishing from his own land in his own lake for fish introduced to the lake without his or any other Te Arawa's consent. W A Leonard, in his paper on the formation of the Arawa District Trust Board, states that Bennet's condemnation was echoed by many other local Maori chiefs and leaders, and that Tumatahi's conviction precipitated numerous meetings amongst Te Arawa to consider the matter of fishing rights and the ownership of the lakes.⁵⁹

When the Stout–Ngata commission on Maori land sat in Rotorua around 1908, Te Arawa seized the opportunity to air their concerns regarding the Crown's tacit assertion that Te Arawa did not own the lakes of the Rotorua area. Of particular concern was the abrogation of their fishing rights. Twenty-two members of Ngati Whakaue prepared a memorandum which was presented to the commissioners. In their submission it was stated that Te Arawa had come to regard the Thermal Springs District Act as the 'Magna Charta' of their liberties; the Act 'assumed in us a right to the properties enumerated, for which the Government had to treat with us', and that clearly included the Rotorua lakes. The memorandum continued, stating the importance of the lakes' fisheries to Maori, and how these had been seriously affected by the introduction of trout. It was held that the injustice they suffered was even worse given that Maori were now compelled to obtain a licence to take fish from the lakes affected by the Thermal Springs District Act. Further, it was contended that lakes were within the ambit of properties guaranteed to Maori under the Treaty of Waitangi. The memorandum appealed for Te Arawa to be able to take any fish from the lakes for food, as of right. In conclusion it was stated that Te Arawa had become 'very suspicious of the pakeha law and justice'.⁶⁰

In its interim report on the Native lands of the Rotorua county, the commission observed that it could not be denied that Te Arawa had 'suffered a grievous loss by the destruction of the indigenous fish' by trout. As a remedy for this injustice, it was recommended that free licences be issued to the heads of Te Arawa families. It was proposed, however, that it would be illegal to sell any trout caught.⁶¹

59. Manatu Maori, p 16; Leonard, p 12

60. 'Memorandum on general matters affecting the Arawa Tribe for the information and consideration of the Native Land Commission, now sitting at Rotorua.', AJHR, 1908, G-1E, pp 6–7

61. 'Native Land and Native Land Tenure: Interim Report of the Native Land Commission, on Native Land in the County of Rotorua', *ibid*, p 5

The commission's recommendation vis-a-vis Te Arawa fishing rights was included in the 1908 Native Land law Amendment Bill. The bill included provision for 20 fishing licences to be granted to Te Arawa at a nominal fee. During the bill's passage through Parliament, Wi Pere, Member for Eastern Maori, after remarking generally on the inattentiveness of the other members whenever he spoke, and offering to resume his seat if no one was interested in what he had to say, proceeded to discuss the parts of the Bill that affected Te Arawa. According to Pere, one of Te Arawa's:

principal grievances related to their fishing rights. From time immemorial this tribe have had fishing-rights, but since the introduction of fish that are not natural to the waters of this country those rights have been disturbed, and they have been asked to take out licenses entitling them to fish in the streams. Recently these pakeha fish have been introduced into these streams; but they are absolutely no good, because they are unpalatable. So far as the Maori taste and desire is concerned, they are not fit to eat.

Pere was of the mind that:

no license should be required by a Maori to fish. A Maori should have a free rod and he should be allowed to go and fish in these streams when it suits him. I repeat that these pakeha fish are lean things and not fit to eat, and I should tell you that the only fish fit for food in this country are the inanga, the kokopu, and the tuna: these are relishable fish and good to eat; but the pakeha fish should be destroyed, and they should not be allowed to propagate, because they destroy the inanga, the kokopu and the tuna.⁶²

However, the provision to grant licences specifically to Te Arawa did not appear in the 1908 Native Land Laws Amendment Act. Instead it seems that the Fisheries Amendment Act 1908 was passed solely to make provision for the granting of licences to Te Arawa. Under the Act the Governor could issue trout fishing licences to members of Te Arawa for use within the district proclaimed under the Thermal Springs District Act 1908. The number of licences that could be issued under the Act was limited to 20, and recipients of a licence were not to be charged more than 5 shillings.⁶³ The present author has not had the opportunity to determine what the ordinary licence fee was, or whether any licences were in fact granted to any Te Arawa individuals under the 1908 Amendment Act.

In 1913, Pita Heretini was convicted for taking trout out of season from Lake Rotorua. Before Mr Dyer SM, Heretini pleaded that he had a customary right guaranteed by the Treaty of Waitangi to take fish from the lake. Dyer, however, was not impressed. He was reported as having said that:

it was not the duty of any court, in dealing with statutes relating to Natives, to decide if there had ben any infringement of that [Treaty of Waitangi] . . . If Parliament had dealt unfairly with the natives . . . that was the business of parliament.

62. NZPD, 1908, vol 145, p 1159

63. The Fisheries Amendment Act 1908, s 2

Heretini was fined £5 plus 12s in costs.⁶⁴

4.7.2 The Native Land Act 1909

Further doubt was cast upon the security of Te Arawa's rights in the Rotorua lakes by the passing of the 1909 Native Land Act. The Act, drafted by the Solicitor General, John Salmond, included 'a battery of privative and other clauses aimed at making Maori assertions of customary title non-justiciable against the Crown.' The Act reflected Salmond's resistance to Maori claims being dealt with in the judicial system, his preference being that they be settled politically.⁶⁵ The Act has, in part, been seen by some commentators as an attempt by the Crown to secure rights to the Rotorua lakes in order to ensure the viability of a state-owned and run tourist industry.⁶⁶ When the matter of title to the Rotorua lakes finally came before the Native Land Court in 1918, Earl argued 'that certain clauses in that Bill were drawn for the specific purpose of defeating the claim of the Arawa's to' the Rotorua lakes.⁶⁷

Of particular concern were sections 85, 87 and 100. Pursuant to section 87, native customary title was deemed to have been lawfully extinguished for all land which had been in the continual possession of the Crown for ten years or more. Under section 85, any proclamation declaring Crown land to be free from customary title had to be accepted as being conclusive proof of that fact. Section 100 of the Act vested in the Governor the power to prohibit the Native Land Court from ascertaining the title to any area of customary land. Through these provisions, the potential existed for the Rotorua lakes to be declared free of customary title and thus become the property of the Crown.

When the 1909 Native Land Act was in bill form, evidence exists that some Te Arawa petitioned Parliament opposing it on the grounds that it could be used to deny their ownership of the lakes.⁶⁸ Te Arawa were also concerned that Ngata appeared to be in support of the bill. In 1909, Tai Mitchell wrote to Ngata:

You have actively supported the movement of bringing the matter [of the Rotorua lakes] before the proper authorities for investigation and now the whole thing is to be squashed in a back-door fashion and our rights over customary lands guaranteed by a solemn treaty are to be confiscated without compensation. What argument can justify such an extreme course?

The letter concluded: 'Nui atu te pouri me te tangi – there is great sadness and lamenting'.⁶⁹

64. 'Old fishing rights: Treaty trout and the Maori', *Dominion*, 25 September 1913, p 8

65. Alex Frame, *Salmond: Southern Jurist*, Wellington, Victoria University Press, 1995, pp 112–113, 115

66. See for example Thompson, p 9; Manatu Maori, p 13

67. 'Minutes of Rotorua Lakes Case', p 17

68. Manatu Maori, pp 14–15

69. Tai Mitchell to Ngata, 22 November 1909, aakm 869/84b, NA Wellington, cited in Manatu Maori, p 14

4.8 Te Arawa Apply to the Native Land Court

Around 1910, on the advice of both Apirana Ngata and Earl, an application was made to the Native Land Court for an investigation of the title to the Rotorua lakes.⁷⁰ Initially the application met with a form of ‘tacit resistance’ on the part of the Crown with the Survey Office refusing to supply the necessary plan to enable the inquiry to proceed. When the Chief Surveyor absolutely refused to issue the necessary plan, the applicants, again apparently on the advice of Ngata and Earl, removed the matter to the Supreme Court.⁷¹

Earlier Te Arawa had beseeched the English Attorney General to intervene, asking for his support in connection with the dispute as to the ownership of the bed of Lake Rotorua. The appeal to the English government, published in the *Appendices to the Journals of the House of Representatives*, was written by C B Morison, and was on behalf of a committee appointed by tribes of the central North Island that claimed to represent some 29,000 Maori. Morison had been instructed to present a memorial asking for the support of rights assured to Maori by the Treaty of Waitangi, and to inform the Attorney General of an impending Privy Council appeal by Maori against claims by the Government to the bed of Lake Rotorua. Harcourt, of the English Attorney General’s office, wrote to the Governor of New Zealand on 21 July 1911. His letter stated that it was not possible for the English Attorney General to intervene in any matter that was to come before the Privy Council.⁷² Exactly what this impending appeal to the Privy Council was remains a mystery to the present author.

When Te Arawa filed proceedings with the Supreme Court in connection with the Rotorua lakes, the case was immediately removed to the Court of Appeal. Presumably this was because the matter was considered to be of such import. The case, *Tamihana Korokai v Solicitor General*, came before the Court in July 1912. The plaintiff’s contention was ‘that he had a right to go to the Native Land Court claiming under the Native Land Act, a freehold title to Lake Rotorua’. In response, Salmond for the Crown, held ‘that his assertion that the land was Crown land concluded the matter, and that the Native Land Court could not proceed to make inquires as to whether the land was Native customary land.’⁷³ Earl was later to suggest that the position that the Crown took in *Tamihana Korokai v Solicitor General* was:

Because the Tourist Department wanted sole and complete domination over the Lakes. There could have been no other reason. The lakes were not a valuable asset in 1881, but in 1909 they had become a valuable asset. . . . It was not the thing to have Maoris coming and saying we own this land and Lakes. It was not convenient that the Natives should have any rights at all.⁷⁴

70. Manatu Maori, p 13; ‘Minutes of Rotorua Lakes Case’, p 16; Thompson, p 12

71. Leonard, p 13; ‘Minutes of Rotorua Lakes Case’, p 16

72. L Harcourt to Governor the Right Honourable Lord Islington, 21 July 1911, AJHR, 1912, a-2, p 56

73. *Tamihana Korokai v Solicitor General*, NZGLR, vol 15, 1912, p 96

74. ‘Minutes of Rotorua Lakes Case’, p 19

The court, after a detailed consideration of the Treaty of Waitangi, common law and relevant domestic legislation, found unanimously in favour of the plaintiff. Chief Justice Stout stated:

I am of the opinion that the Native Land Act recognises that Natives have a right to their customary titles . . . I know of no statutory authority that the Attorney-General as Attorney-General, or the Solicitor-General as Solicitor General, has to declare that land is Crown land . . . What the customary title to the bed of Lake Rotorua may be must be considered and determined by the only Court in New Zealand that has jurisdiction to deal with Native titles – the Native Land Court .⁷⁵

Similarly, Sir Joshua Williams ‘caustically observed’ that:

However worthy a person the Solicitor-General may be, he can hardly contend that he has been invested by his Sovereign with the power of disregarding treaties and overriding Acts of Parliament.⁷⁶

Justice Edwards opined that:

if the Crown desires to set up its title as a bar to the investigations by the Native Land Court in its ordinary jurisdiction of claims by Natives, it must either be prepared to prove its title or it must be able to rely upon a proclamation in accordance with the 85th section of the Native Land Act 1909.⁷⁷

Exactly why the Crown had not issued a proclamation under the Native Land Act 1909 declaring that the lake was Crown land freed from any customary title is unclear to the present author. It would seem that the only basis upon which the Crown could have issued such a proclamation was by virtue of having continuously occupied the lake for 10 years prior to 1909, as was provided for by section 87. Presumably then the Crown considered that it could not sustain such a claim were it to be challenged in court by the lake’s owners. Shortly after the decision was issued, Salmond set sail for England on Crown Law Office business. Before leaving he wrote to the Attorney General:

It is possible that this matter [the Rotorua Lakes affair] may require my attention during my absence in England . . . It is I think essential that under no circumstances should Natives obtain freehold orders and freehold titles in respect of such waters. An Order in Council should therefore be issued under s.100 of the Native Land Act prohibiting the Native Land Court from investigating the title and making freehold orders. Any Natives who feel themselves aggrieved by any such prohibition will have their remedy by petition to Parliament for compensation . . .

Salmond advised, however, that this course of action was only to be taken once the Native Land Court had determined the preliminary question of ‘whether such

75. *Tamihana Korokai v Solicitor General*, NZGLR, vol 15, 1912, p 106

76. Frame, p 116; *Tamihana Korokai v Solicitor General*, NZGLR, vol 15, 1912, p 106

77. *Ibid*, p 109

waters are by Maori custom the subject of exclusive proprietary rights', and found in the affirmative.⁷⁸

Another application was made to the Native Land Court immediately after the decision was issued in *Tamihana Korokai v Solicitor General*. However, the case did not come before the Native Land Court until 1918. Initially proceedings were delayed because the Native Land Court still did not have a plan of the lakes at its disposal. This, it appears, was the result of the Lands Department having been instructed not to furnish the Court with the necessary documentation.⁷⁹ In 1913, the Under-Secretary of Lands asked the Crown Law Office how it thought the Crown should proceed in the matter of the application before the Land Court. Replying in May 1913, H H Ostler suggested that he:

be instructed to appear before the Court to argue the point that by Native Custom there can be no ownership of the bed of large inland lakes such as Rotorua. Meantime I think it advisable that the Order in Council under section 100 of the Native Land Act 1909 should be prepared, so that, if necessary, it can be passed and gazetted at short notice.⁸⁰

Whether such an order in council prohibiting the Native Land Court from investigating the title to the Rotorua lakes was ever drafted is not clear. But if it was, it was never implemented.

In 1914, World War I broke out and proceedings were further delayed until 1917. In August 1914, Salmond wrote again to the Attorney General informing him that the Prime Minister had instructed that the necessary plans were to be provided to the Native Land Court to enable the inquiry to proceed. Further, Salmond noted that he had been directed to appear before the Court to contest Te Arawa's claim; and to argue that their rights in the Rotorua lakes, like those of all Maori in New Zealand's lakes, were only those of fishing and navigation. Salmond cautioned that he thought it:

possible that the full seriousness of the situation created by these claims is not quite realised by the . . . Prime Minister. It is to be observed . . . that the question related not merely to Lake Rotorua but to all rivers and lakes, foreshores and tidal waters in the Dominion. In the second place it is quite out of the question to allow freehold titles to be obtained by the Natives to such waters. Such titles would enable the Natives to exclude the whole of the European population from all rights of fishing, navigation and other uses now enjoyed by them. In the third place I think it exceedingly doubtful whether any such contention as that which I am now instructed to raise before the Native Land Court could be maintained. If these cases are allowed to go before the Court in their present form it may be anticipated that the Court will hold that by native custom the Natives own not merely the land but the waters of this country and freehold titles will be issued accordingly.

78. Salmond to Attorney General, 4 November 1912, CLO Wellington, case file 84, cited in Frame, p 118

79. Judge Brown to Chief Surveyor, 17 May 1913, Is 22/2019, LINZ, cited in Thompson, p 12; Thompson, footnote 18, p 12

80. H H Ostler to Under-Secretary of Lands, 17 May 1913, Wai 32/4, Waitangi Tribunal

Salmond continued, bemoaning the fact that section 100 of his much cherished 1909 Native Land Act had been repealed, and that as a consequence, the option of prohibiting the Land Court's inquiry was not open to the Government.⁸¹ Salmond clearly considered that the Crown's case would fail, and was of the mind that securing the Crown ownership of New Zealand's rivers and lakes was of such importance that a political settlement should be sought.

Salmond's pessimism as to the likelihood of the Crown's case being rejected by the Native Land Court, was at least in part, a result of advice he had sought and received from ethnologists Percy Smith, Elsdon Best and Te Rangi Hiroa. Smith, professing no great knowledge of the Rotorua area, simply stated that where there were fishing posts, individual fishing rights were likely to exist.⁸² Elsdon Best's response considered remarks made by Wi Maehe te Rangikaheke about fishing posts in the Rotorua lakes. Best contended that the presence of fishing posts was denotative of rights existing in the actual lake bed. This was qualified though by his remark that 'the idea in a Maori's mind would undoubtedly be associated with, not the submerged land, but the food supply in the water'.⁸³ Te Rangi Hiroa opined that:

the tumu in the lake were used like surveyors' pegs in modern times: they marked off the parts of the lake that belonged to the various families and subtribes . . . it was far more valuable to the old time Maori than any equal area of land.⁸⁴

Salmond's search for evidence of 'limited rights' had been in vain.

By 1917, the matter of the ownership of Waikaremoana was before the Native Land Court. In view of this and the applications in respect of the Rotorua lakes, Salmond began agitating for a special court to be constituted to determine what he saw as the preliminary question of whether Maori custom recognised the exclusive ownership of navigable waterways, or if in fact they only possessed rights of fishery and navigation. Again Salmond's pragmatic concerns with public policy and welfare seem to be foremost. He argued that it was unreasonable to suppose that the intent of the Treaty of Waitangi was to vest lakes such as Rotorua and Waikaremoana in specific hapu, and that the public were to be excluded from the enjoyment of such waterways.⁸⁵

Salmond's advice that a special court be constituted to consider the general question of lake ownership, and that section 100 of the Native Land Act be reinstated, was not heeded. This led him to conclude that 'there would seem to be nothing to be done except to allow the claims of the Natives to be adjudicated upon by the Native Land Court'.⁸⁶ The Crown was clearly concerned that the Native

81. Salmond to Attorney General, 1 August 1914, 'CLO Opinions Relating to Lands Department 1913–1915', CLO Wellington, cited in Frame, p 119

82. Percy-Smith to Salmond, 14 April 1910, CLO Wellington, Case File 84 and 84A, cited in Frame, p 122

83. clo 174/2, NA Wellington, cited in Frame, pp 122–123

84. 'Maori Food-Supplies of Lake Rotorua', *Transactions of the New Zealand Institute*, vol LIII, 1921, pp 433–451, cited in Frame, p 123. (It is noted that the article was based on evidence collected prior to World War I)

85. Solicitor General to Under-Secretary of Lands, 'Lakes Rotorua and Waikaremoana', 11 June 1917, clo opinions, vol 6, LINZ

Land Court would decide against its rights in the Rotorua lakes. Early in October 1918, E Hawthorne of the Lands Department wrote to the Crown Law Office:

I feel somewhat unhappy about this Lake Rotorua business. So far I have not been able to obtain any fresh evidence of uses by the Crown, although I have put in a considerable amount of time in the search. . . . The Crown had certainly . . . used the Lake as if it were public property, but the question we shall have to answer will be: By what authority did the Crown do these things? The use of the lake by the Crown and public is insignificant in comparison to the use of the Lake by the Natives since time immemorial, and personally I cannot see that evidence of public uses is going to help us very much. All talk of Native ‘mana’ over the Lake is nonsense: ‘mana’ is a purely personal thing, and does not apply to either land or water. . . . It would have been far better to have winked at a little poaching, but the Tourist Department are not remarkable for insight into the Native mind (or anything else) . . . the only rights of Native tribes or hapus over the Lake itself are rights of fishing.⁸⁷

Finally then, in October 1918, the matter of title to the Rotorua lakes came before the Native Land Court.

4.9 1918 Native Land Court Inquiry

On 16 October, the Native Land Court sat in Rotorua to investigate the titles of lakes Rotorua and Rotoiti. Judge T W Wilson presided, and counsel were F Earl for the applicants, and J Prenderville for the Crown. Salmond was content to remain in Wellington and let the inquiry run its own course but instructed Prenderville that he would travel to Rotorua in order to make the Crown’s closing submission.⁸⁸ There appears to have been some confusion as to what exactly the application before the court pertained to. Midway through the inquiry, the matter was addressed by Earl. He stated that he had only prepared applications in respect of Rotorua and Rotoiti, and that although applications in relation to other lakes in the area existed, he knew nothing of the state of these. He informed the Court that once the applications for Rotoiti and Rotorua had been dealt with, he would turn his attention to the other lakes in the district.⁸⁹

The inquiry began with Earl’s opening address. Central to Earl’s case was that there had been no assertion by the Crown, either at the time of the Thermal Springs District Act 1881, or in the subsequent 20 years, that it owned the Rotorua lakes. Earl maintained that whenever Pakeha went to ‘a beauty spot’ throughout the 1880s and 1890s they were charged a small fee by the local Maori. That this was never challenged by the Government, was testament to Te Arawa’s undisputed possession.⁹⁰ In essence, Earl contended, the case came down to three questions

86. Salmond, Opinion for Lands Department, 28 March 1918, ‘Opinions Relating to Lands Department 1916–1918’, CLO Wellington, cited in Frame, p 122

87. E Hawthorne, Department of Lands to Prenderville, 5 October 1918, cl 174/2, NA Wellington

88. Salmond to Prenderville, 16 October 1918, cl 174/2, NA Wellington, cited in Frame, p 124

89. ‘Minutes of Rotorua Lakes Case’, p 137

that he would seek to answer in the presentation of his case. First, there existed a need to establish:

the nature and extent of the title to the Lakes, as navigable and food producing lakes.

Secondly, it had to asked:

whether the customary title to the Lakes passed to the Natives by the confirmation and guarantees of the Treaty of Waitangi, or whether that title or any such title was excepted or excluded from the operation of the Treaty of Waitangi and the confirmation and guarantee therein contained.

And thirdly:

if that customary title was not excluded from the confirmation and guarantees of the Treaty of Waitangi, has it since the date of the Treaty been lost, forfeited or otherwise destroyed?⁹¹

In introducing the case, Earl stressed Te Arawa's loyalty to the Crown over time, particularly in having fought with Government troops during the wars of the 1860s. In briefly traversing the history of the Rotorua lakes since European colonisation, Earl argued that the first challenge to Maori rights in the lakes was the prosecution of Manihera Tumatahi for catching trout without a licence. Previous to that, he stated, the Thermal Springs District Act and the Government's tolerance of Maori charging Pakeha visitors to travel upon the lake, were proof of its acknowledgement of Maori ownership and control of the lakes.⁹²

Earl's attention then turned to the Treaty of Waitangi. He argued that under the Treaty, only sovereignty passed to the Crown, not any resources or territory.⁹³ In support of the notion that article 2 guarantees included lakes, Earl detailed Hobson's instructions and various authorities on the Treaty. The Treaty, he reasoned, would clearly not have been signed were it stated at the time that article 2 did not cover lakes.⁹⁴ Interestingly though, Te Arawa in fact did not sign the Treaty. With regard to the Wairarapa Lakes, the fact that title to them was investigated by the Native Land Court and later purchased by the Crown, was to Earl's mind, conclusive proof that Maori had legally cognisable rights in lakes:

If they admit Wairarapa to have been the property of the Natives, and buy the Natives out, why should they deny our rights to Rotorua and Rotoiti? I am afraid that the only answer is that it is very convenient for the Tourist Department to have domination over the lakes, and very inconvenient to have the natives claiming interests which it was thought they would forget all about.⁹⁵

90. Ibid, pp 11–12

91. Ibid, p 21

92. Ibid, pp 2–15

93. On the transcript of the minutes of the Land Court's 1918 inquiry, there appears a marginal note that states: 'Acquired the whole dominion subject to Natives proving titles.' Salmond's biographer, Alex Frame, considers that there is no doubt that this note was written by Salmond. Frame, p 124

94. Ibid, pp 22–34

Earl continued, citing various other precedents of the Crown recognising Maori ownership of lakes, including some in the Rotorua area. The Thermal Springs District Act was discussed in this context as being an explicit recognition of Maori ownership of the lakes.⁹⁶

Having described ways in which Maori used the lakes, Earl proceeded to discuss the legal situation vis-a-vis rights of fishing and navigation. Earl contended that the public had no fishing rights unless such rights had been expressly granted. This was based on the premise that the fisheries possessed by Te Arawa were ‘several fisheries’ – that is they were exclusive rights. He stated that Maori had tolerated Pakeha trespassing upon the lake because their presence was not injurious to Te Arawa’s interests. This tolerance, however, did not convey a right to Pakeha or the Crown, nor did it constitute a surrender of rights on the part of Te Arawa. Although Earl conceded that the public may have rights of navigation at common law, these did not confer rights to the bed of the lake. ‘If the Crown is going to rely on English Law,’ Earl surmised, ‘it appears to me that it is in a very parlous position.’ Attention was drawn to the possibility of the Crown invoking section 87 of the Native Land Act 1909. Under this ‘wretched’ and ‘cruel’ section, customary title was deemed to have been lawfully extinguished for land that had been continuously in the possession of Crown. Earl suggested that the only bases upon which the Crown could possibly claim that it had possessed the Rotorua lakes were in relation to the establishment and management of the lake’s trout fishery, and because Pakeha had been able to freely navigate the lake’s waters. He stressed, however, that these ‘paltry acts’ by the Crown did not qualify as acts of possession. He considered that the fact that the lake’s owners had allowed the Crown to act in such ways was testament to the ‘native character’ – characterised by their ‘slowness to take action, their general dilatoriness, and their patience and tolerance.’⁹⁷

Continuing in the second week of the hearing, Earl briefly recounted some of Te Arawa’s traditional history, before going on to give details of the ownership of lands contiguous with both Rotorua and Rotoiti. He argued that if his ‘clients are found to have had the lands surrounding the lake awarded to them, and if their “takes” upon the ascertainment of the titles to the land were to a large extent dependant upon the uses of the lake itself, then surely I have established a strong presumption that the lake belonged to those people in certain shares between themselves.’⁹⁸ In concluding his opening submission, Earl presented evidence of hapu fighting to protect their rights in the lake – proof that they were in fact exclusive (exclusivity being an important test of European-style ownership). Further detail followed of Te Arawa history and evidence relating to the capture of water fowl upon the lakes.⁹⁹ Like fish, the taking of birds was considered to be an important act of ownership.

95. Ibid, pp 37–41

96. Ibid, pp 63–83

97. Ibid, pp 83–108, 110–123

98. ‘Minutes of Rotorua Lakes Case’, p 128

99. Ibid, pp 124–140

On 24 October 1918, Earl called Captain Gilbert Mair to take the stand. Earl told the Court that he placed very great reliance upon Mair's evidence, and that he was not aware of a man dead or alive who knew more than Mair did about the Te Arawa people and the ownership of the Rotorua lakes. It is apparent that the Crown expected Mair's evidence to be difficult to counter. Shortly after the beginning of the hearing, Prenderville wrote to Salmond, informing him that Mair would be one of the applicants' principal witnesses. Prenderville stated: 'I don't know how we can combat his statements unless I can get him to contradict himself.' A few days later, Prenderville reported to Salmond that:

Captain Mair has begun his evidence. A lot of it is irrelevant but Earl says it is relevant to his case to prove long occupation. Besides the old man is garrulous and will not answer a question without a long explanation.¹⁰⁰

Mair was clearly of the mind that the Rotorua lakes were held as absolutely and completely under Maori custom as any land in New Zealand – exactly what the Crown hoped to disprove.

Mair presented extensive detail to the court of the divisions that existed between the various parts of the lakes belonging to the various hapu, and of the location of a huge number of sites on the lakes including fishing grounds, tumu and urupa. He stated that whereas once he could have remembered between 700 and 800 places in and around the lakes, now he could only remember about 200.¹⁰¹ His evidence also included detail of waiata about the lakes; the impact of trout upon the lakes' ecology; the practice of rahui; the capture of shags; Te Arawa charging tourists tolls; and the thermal springs district legislation. The tenor of Mair's evidence was very much in accordance with the applicants' contention that they held and exercised exclusive proprietary rights in the lakes of the Rotorua region.¹⁰²

The next witness called was Wiremu Maihi Ereata, a claimant to both Rotorua and Rotoiti. Taking the stand on 30 October, Ereata proceeded to describe the nature of the rights that the various hapu held in Lake Rotorua, and the divisions that existed between the various groups' parts of the lake.¹⁰³ Continuing his submission the following day, he gave similar detail in respect of Rotoiti, including waiata relating to the history of the lake's occupation. Maps were then produced of Rotoiti and Rotorua that had been prepared by the applicants, and Ereata proceeded to give detail as to the various sites and landmarks that appeared on them. In total, around 250 sites and landmarks were shown on the maps. In the course of his evidence, mention was also made, inter alia, of war canoes on the lakes, rahui in respect of raupo and kakahi, battles that had been fought in connection with the lakes, and urupa. Frequent references were made to extracts from Land Court minute books which contained details of the lakes.¹⁰⁴

100. Prenderville to Salmond, 25 October 1918, cl 174/2, NA Wellington, cited in Frame, p 124

101. Evidence of Gilbert Mair, 'Minutes of Rotorua Lakes Case', p 207

102. Ibid, pp 168–281

103. Evidence of Wiremu Maihi Ereata, ibid, pp 282–287

104. Ibid, pp 288–322

Tieri Te Tikao of Ngati Pūkiao next took the stand. Te Tikao had originally been one of the plaintiffs in the court action against the Solicitor General in 1912. He gave evidence as to the origins of Ngati Pūkiao's claim to Rotoiti, and described the boundaries between the parts of the lake owned by the three hapu that claimed the lake by descent from the ancestor Pūkiao. In doing this, he referred to various fishing grounds, tumu, and other sites on the lake's shore. He stressed that the different fishing grounds were owned exclusively, and that battles had been fought in defence of these rights. Te Tikao's evidence concluded what was to be the only hearing of the application.¹⁰⁵

In the evidence of Gilbert Mair and the two Te Arawa witnesses, an intimate knowledge of the actual lake bed was demonstrated. In describing the divisions between the parts of the lakes belonging to different hapu and the location of fishing grounds, reference was frequently made to their location in relation to features on the lake bed such as shelves, submerged rocks, and sand banks. Specific sites on the lake were also referred to in terms of the relative depth of the lake in different parts. Mair, under cross examination by the Crown, was asked whether some lakes were thought to be bottomless by Te Arawa, to which Mair replied 'no'.¹⁰⁶ Clearly the Crown was keen to argue that the lake beds were incapable of ownership given that they were considered to be bottomless. However, this was not the case. Quite to the contrary, witnesses appearing before the court in 1918 demonstrated that they had a considerable knowledge of the beds of both Rotorua and Rotoiti.

In November 1918, just days after the first hearing had concluded, Judge Wilson died in the infamous influenza epidemic of that year. Despite Wilson being replaced on the case by Judge Rawson (and later Judge Ayson), and Earl proposing at least three fixtures between late 1919 and early 1920, the court never reconvened to complete its inquiry.¹⁰⁷ The Crown's vacillation was the subject of complaint by the Department of Lands in October 1919:

It's all very fine for your Chief [presumably Salmond] to say don't do this or that. Any one could say as much. Why doesn't he tell us exactly what to do. Apparently he is relying upon tiring the Natives out and so disheartening them with delay and expenses that they will at length chuck up the sponge. He seems to be trying to bluff them that he has a royal flush. Suppose they see him? What then! That *de novo* stunt of his is staggering – what about us poor blighters having to go through this again. . . . the Natives were forced to bring their case partly owing to the fat headed inquisitorial attitude of the rangers employed by the Tourist Department and partly in the hope of getting a bit . . . all that remains is to rid them of the unappreciated attentions of the fishing rangers and the case will fade into limbo.¹⁰⁸

The Crown's vacillation in resuming the inquiry was a result of its preference to enter into direct negotiations for a settlement. The Crown favoured this option

105. Evidence of Tieri Te Tikao, *ibid*, pp 322–341

106. Evidence of Gilbert Mair, *ibid*, p 268

107. Leonard, p 21

108. Knight, Lands Department Auckland to Prenderville, 21 October 1919, cl 174/2, NA Wellington

because it considered itself likely to lose the case, and for the Native Land Court to find in favour of Te Arawa. In April 1920, the Solicitor General wrote to the Under-Secretary of Lands:

It is advisable that the continuance of this litigation be put to an end if possible by some settlement with the Natives. I think it is probable that the final result of the litigation will be the making of freehold orders by the Native Land Court giving them title to these lakes as being Native freehold land. . . . As a matter of public policy it is out of the question that the Natives should be permanently recognised as the owners of the navigable waters of the Dominion. It would not seem to be a matter of serious difficulty to avoid this result by making some form of voluntary settlement with the Natives and vesting these Lakes by Statute in the Crown.

Although concluding his letter with the admission that he had no information as to the attitude of Te Arawa on this matter, Salmond was clearly of the opinion that this should not be a consideration – a political rather than a judicial outcome should be sought. The possibility that, were the Land Court to continue its inquiry, a further precedent could be set as to lake beds being capable of ownership under Maori customary law, was a prospect Salmond seemed desperate to avoid.¹⁰⁹

4.10 Negotiations For Settlement

Subsequently, the Crown managed to convince Te Arawa to enter into negotiations by a number of means. The Government asserted that even if Maori were found to be the owners of the lake bed, the Crown would not purchase their interests but take them by proclamation. And were such a course of action adopted, Te Arawa might have received little or no compensation. The Government also suggested that the litigation before the Land Court might go on interminably at exorbitant cost.

Thompson records that in July 1919, the Department of Tourist and Health Resorts had suggested a settlement be negotiated. It was claimed that Te Arawa were tired of the litigation and its costs, and that they were anxious to reach a settlement.¹¹⁰ Even though Earl was still trying to secure another fixture for the continuation of the Land Court's inquiry, Salmond advised the Government to adopt MacDonald's proposal that Te Arawa's fishing rights be preserved in exchange for an acknowledgement that the Crown owned the lakes.¹¹¹ Consequently, on 12 May 1920, Prenderville was authorised by the Minister of Lands to negotiate a settlement along those lines.¹¹² R Knight, of the Lands Department in Auckland, counselled that every effort should be made to close the matter while the conditions were favourable. He considered that Te Arawa should

109. Solicitor General to Under-Secretary of Lands, 29 April 1920, clo Opinions, vol 7, LINZ, cited in Thompson, p 16

110. MacDonald to Attorney General, 12 July 1919, cl 174/2, NA Wellington, cited in Thompson, p 16

111. Solicitor General to Under-Secretary of Lands, 29 April 1920, clo Opinions, vol 7, LINZ, cited in Thompson, p 16

112. Minister of Lands to Prenderville, 12 May 1920, 226 Box 5B, LINZ Wellington

not be given ‘too much time for negotiating . . . [as] Natives always want to get more than they should especially when they are backed up by interested Europeans.’¹¹³ The following week, Knight wrote to Prenderville stating that he thought between £5000 and £6000 ‘would be required to indemnify the Natives and satisfy little baksheesh demands’. Knight was of the view that as soon as a basis for settlement had been agreed to by the Government, a meeting at Rotorua should be convened with Earl ‘and his dingbats and finally and formally dispose of the affair’.¹¹⁴

Earl ‘and his dingbats’ declared their terms of settlement on 20 May 1920. In return for Te Arawa surrendering their claims to the lakes, they asked that the Government recognise the existence of Maori freehold rights over lakes in the Rotorua district; that legal costs incurred in pressing their claim be refunded; and that money be granted for the purposes of education and housing. Also Te Arawa sought guarantees that their fishing rights would be preserved, that protection would be afforded to sites of particular importance, and that Lake Rotokakahi would be excluded from the settlement. It was stated that Te Arawa would forgo all hapu divisions and treat with the Government as one tribe. Similarly, compensation received from the Crown would be used for the benefit of the whole tribe.¹¹⁵ On the same day as the proposed terms of settlement were issued, Ngata wrote to the Minister of Lands, David Henry Guthrie, informing him of the proposed terms.¹¹⁶ Although initially the Crown maintained negotiations were to be conducted between the Attorney General and Earl, the latter was later able to arrange for Ngata to be admitted to the process as a negotiator for Te Arawa.¹¹⁷

Of Te Arawa’s proposal, Guthrie responded that an admission of Te Arawa’s title could not be agreed to. His reasoning was that such an admission ‘would bind the Government in similar claims to other lakes’, and that the ‘only basis of negotiation for settlement could be that the right to the bed of the lake is sufficiently doubtful both to claimants and [the] Crown as to be the subject of reasonable compromise.’¹¹⁸ In respect of the proposed terms the Auckland Commissioner of Crown Lands was less circumspect: ‘Ngata’s proposals . . . are too absurd to merit serious consideration.’ He made the point that even if the Land Court found in favour of Te Arawa, it would be a:

pyrrhic victory as the Crown has no intention whatever of purchasing the Lakes or paying compensation for them. . . . If this fantastic attempt at blackmail is their last word we had better proceed with the case.¹¹⁹

113. Knight to Prenderville (telegram), 15 May 1920, cl 174/2, NA Wellington

114. Knight to Prenderville, 21 May 1920, cl 174/2, NA Wellington

115. ‘Memorandum Containing the Proposals of the Arawa Claimants for a Settlement in the Case re Lake Rotorua and other Lakes in the Thermal Springs District’, 20 May 1920, ma1 5/13/242, NA Wellington, cited in Thompson, pp 16–17

116. Ngata to Guthrie, 20 May 1920, 226 box 5B, LINZ Wellington

117. Manatu Maori, pp 22–23

118. Guthrie to Ngata, 22 May 1920, 226 box 5B, LINZ Wellington

119. Auckland Commissioner of Crown Lands to Prenderville, 21 April 1920, cl 174/2, NA Wellington

Towards the end of May, the Attorney General reiterated the position of the Auckland Commissioner of Crown Lands: the Crown had no intention to buy the lake bed if the Land Court found that it was Maori property. He stated, though, that so long as public rights were safeguarded, the Crown would not defeat or diminish those Te Arawa rights that did exist.¹²⁰

The first meeting between Te Arawa and the Crown for the purpose of negotiating a settlement was held at Ohinemutu on 13 December 1920. The previous day a conference was held between Bell, Prenderville, Knight, Earl and Ngata. At that conference Ngata informed the Crown of the growing divisions within Te Arawa, and that Ngati Pikiao and other hapu with rights in Tarawera and Rotomahana now wanted separate settlements in respect of their interests. Bell expressed the view that unless a single Te Arawa-wide settlement could be reached, it would be better to continue with the Land Court inquiry. However, he cautioned that this would be ‘disastrous’ for Te Arawa. It appears that resuming the Land Court inquiry was an increasingly unattractive option for Te Arawa. At the meeting, Ngata stated that in view of the inter-tribal differences that were emerging, that were it resumed, the court inquiry would take even longer to complete. This would subject Te Arawa to even greater costs. He considered though, that ‘the most intelligent of the Natives [concerned] recognised that the public must have the Lakes.’ Bell concluded, therefore, that the only issue of contention between the Crown and Ngata was one of cost – all that remained to be done was to agree upon a price.¹²¹ The actual meeting took place the following day. Bell reiterated the Crown’s position and stated Te Arawa had a choice between a settlement now or resuming the Land court inquiry. Of the latter option, he cautioned:

The Government is not afraid of the law. The Government pocket is full, and it has able lawyers to represent it in the Courts. You will never frighten the Government by threatening it with the law, and even if you could . . . you certainly could not frighten the Attorney General.

In his somewhat bullying speech, Bell informed the meeting that the Crown had decided to settle because it had been convinced of the merits put forward in Ngata’s proposal.¹²² However, as has been shown above, the Crown appears to have initiated negotiations for a settlement, and that this option was favoured because it was sure the Court would find in Te Arawa’s favour.

By around this time, cracks were appearing in the Te Arawa coalition. Thompson records that Ngati Tura and Ngati Te Ngakau, hapu with claims to Lake Rotorua, were reluctant to give up their individual claims, and that Ngati Pikiao continued to demand a separate settlement.¹²³ As a consequence of their demands, Bell met with

120. Memorandum of Attorney General, Sir F D Bell, 27 May 1920, cl 174/2, NA Wellington

121. Notes on a conference between the Attorney General and representatives of the Arawa natives, relative to the control of the lakes, 12 December 1920, ma1 5/13/242, NA Wellington, cited in Thompson, p 18; Notes of meeting between Crown and Te Arawa Representatives, 13–14 December 1920, 226 box 5B, LINZ Wellington

122. Bell’s speeches from meeting, Rotorua, 13 December 1920, aamk 869/84c, NA Wellington, cited in Thompson, p 19

Ngati Pikiao in January 1921 at Otaramarae. At this meeting Bell reiterated that the Crown would not deal with individual hapu but only with Te Arawa as a whole. Again he challenged them to think about what they would gain by continuing with the Land Court inquiry, even if the court found in their favour. Earl, present at the meeting in his capacity as counsel for Ngati Pikiao, urged that his clients come under a general Te Arawa settlement. In response, Ngati Pikiao reminded Earl that they paid his fees, and that therefore he was to follow their instructions and not dictate terms.¹²⁴

Bell and Guthrie met again with Ngati Pikiao two days later. At this meeting, the chief Morehu asked how it was that the Crown had accepted a gift of land at Mourea for a scenic reserve from Ngati Pikiao without the consent of the whole of Te Arawa, but that the Crown could not treat separately with Ngati Pikiao in connection with their lakes? Bell simply reiterated the Crown's position that it would negotiate only with Te Arawa as a single entity, and that it was willing to resume the Native Land Court inquiry if necessary. He reminded them that 'the Government had a long purse but it wished to save the Maoris any further expense by coming to some mutually agreeable settlement.'¹²⁵ The following month, the garrulous Knight of the Lands Department in Auckland, in supporting the hard line taken by Bell, described Ngati Pikiao as 'the bad eggs of the Arawas'; further pointing out that they were 'the mob who joined the Hauhaus in 1866.' Presumably in reference to the meetings between Ngati Pikiao and the Crown the previous month, he recounted how Earl had said 'that they were fools not to come in with the others and that he would have nothing more to do with them if they did not amend their ways.'¹²⁶

In October 1921, Earl, on behalf of Te Arawa, put forward a proposal that he thought would accommodate the dissenting hapu. It was mooted that as payment for Te Arawa's ownership rights in the lakes, a lump sum of £120,000 be paid into a specially constituted trust which would administer the money for the benefit of the whole of Te Arawa. In the event of any hapu being dissatisfied with the administration of the monies, they could apply to the Government to have their share paid directly to them.¹²⁷ In the absence of the ownership of the lakes being determined by the Native Land Court, how these relative shares would have been computed remains unclear.

A final meeting between the Crown and Te Arawa was held at Tarewa on 2 March 1922. In opening the meeting, Earl informed those present that the terms of the settlement had been extended to include reparation promised by previous governments in respect of Te Arawa's loyalty during the wars of the 1860s, and for injustices they had suffered in relation to their lands generally. Bell informed those present that, as a consequence of the recent economic recession, Te Arawa could

123. Ibid, p 19

124. Notes of meeting, Otaramarae, 29 January 1921, 226 box 5B, LINZ Wellington; Knight to Prenderville, 9 February 1921, cl 196/72, NA Wellington, cited in Thompson, pp 19 –20

125. Notes of meeting, 31 January 1921, 226 box 5B, LINZ Wellington

126. Knight to Prenderville, 9 February 1921, cl 196/72, NA Wellington

127. Earl to Bell, 28 October 1921, 226 box 5B, LINZ Wellington

not expect to receive what they were demanding. Presumably in view of the vexed question of lake ownership nationally, and the desire that the outcome of these negotiations did not prejudice other cases, Bell informed the meeting that the deal would admit nothing in terms of Te Arawa ownership of the lake:

I thought I had made it plain that the very basis of the agreement was that we did not admit you had anything to sell and therefore we had nothing to buy.¹²⁸

Bell stated that the options were for Te Arawa to accept a settlement as originally proposed, or, if they wished to extend the scope of any settlement to include other grievances, a commission of inquiry could be constituted to investigate such matters. He made it clear, however, that the question as to the ownership of the lakes would be placed squarely outside of the jurisdiction of any such commission. Perhaps in light of this fetter upon a commission of inquiry, Earl strongly urged Te Arawa to accept the settlement. In light of the financial constraints upon the Government, he urged that an annual payment be made rather than a lump sum. He stressed that the annuity should not be fixed so that when the economy improved, the amount could increase.¹²⁹ By March 1922, a settlement agreement had been signed by Earl, Ngata, Levin and Bell. The agreement contained five clauses:

1. Crown would admit rights of Te Arawa fishing grounds and burial reserves while Te Arawa would admit that the fee simple of all the lakes vested in the crown;
2. Rotokakahi would be controlled by a special board set up for this purpose;
3. Te Arawa would receive 40 trout fishing licenses at a nominal fee;
4. No trading of indigenous fish would be permitted; and
5. £6000 would be paid annually to a Board, for the benefit of the entire tribe.¹³⁰

After the heads of agreement had been signed, Ngata described his reward to be:

the feeling of pride in my associates with the finest broadest and most humane settlement of any Native question of recent years and in the fitting end to many years of careful negotiation and diplomacy.¹³¹

Thompson states that between June and October 1922, the Government corresponded with Earl and Ngata (in his capacity as negotiator for Te Arawa) vis-a-vis the drafting of legislation to put into effect the heads of agreement. Immediately before the legislation was passed into law, Native Minister Coates visited Rotorua and met with representatives of Te Arawa to ensure that they were amenable to the proposed legislation.¹³²

128. Notes of meeting, 2 March 1922, Tarewa, Rotorua, 226 box 5B, LINZ Wellington; Notes of a conference between Bell and Te Arawa at Tarewa, Rotorua on 2 March 1922, 13 March 1922, ma 1 5/13/242, NA Wellington

129. Notes of meeting, 2 March 1922, Tarewa, Rotorua, 226 box 5B, LINZ Wellington; Notes of a conference between Bell and Te Arawa at Tarewa, Rotorua on 2 March 1922, 13 March 1922, ma 1 5/13/242, NA Wellington

130. Memorandum for Cabinet, 'Proposed arrangements with respect to Arawa claims', 24 March 1922, cl 174/2, NA Wellington

131. Ngata to Mitchell, 25 March 1922, cited in Leonard, p 24

So rather than insisting that the Native Land Court complete its investigation into the ownership of the Rotorua lakes, Te Arawa agreed to negotiate with the Crown and eventually reached a settlement in connection with the lakes. Although there were several reasons why Te Arawa agreed not to pursue its court case, there can be little doubt that in making the decision to negotiate, the further costs of litigation were highly significant. Had the land court completed its inquiry and found in favour of the applicants, the Crown, in all likelihood, would have appealed the decision. And as became evident in the case of both the Lake Waikaremoana and Lake Omapere Native Land Court decisions, the disposal of the Crown's appeal could have dragged on interminably, at exorbitant expense to Te Arawa. The Attorney General's repeated assertions that the resources available to the Crown to fight the case were infinite, can be seen as carefully calculated to play upon Te Arawa's concerns as to the legal costs of their claim.¹³³

Questions also surround the issue of who made the decisions to negotiate and on what terms. Particularly relevant is the nature of any mandate the Te Arawa negotiators, Earl and Ngata, enjoyed from the constituent Te Arawa hapu with rights in the various lakes. Earl appears to have had considerable influence over Te Arawa and to have exerted pressure on them to negotiate a settlement directly. Unfortunately no material has been uncovered pertaining to any process by which Earl and Ngata consulted with the various groups who surrendered their rights in the eventual settlement. Who paid Earl's fees, for instance, is an important consideration in terms of whose interests he represented. Evidence certainly exists that there were groups unhappy with a general Te Arawa settlement, but there are few details as to why they ceased to press their rights to have individual settlements.

4.11 The Native Land Amendment and Native Land Claims Adjustment Act 1924

On 31 October 1922, the Native Land Amendment and Native Land Claims Adjustment Act, section 27 of which embodied the agreement between Te Arawa and the Crown, was passed into law. The second schedule of the Act listed the lakes that were affected by the settlement. These were Rotorua, Rotoiti, Rotoehu, Rotoma, Okataina, Okareka, Rerewhakaitu, Tarawera, Rotomahana, Tikitapu, Ngahewa, Tutaeinanga, Opouri, and Ngakaro.

As well as vesting in the Crown the beds and waters of the 14 lakes, pursuant to section 27(1) of the Act, they were 'freed and discharged from the Native customary title, if any'. This was contingent upon all islands in the lakes not previously alienated being reserved to Te Arawa, and that the Governor could reserve to Te Arawa any portion of the lake bed or any part of the foreshore that was

132. Coates letter, 17 October 1922, aamk 869/84c, NA Wellington, cited in Thompson, p 27

133. By 1924, the legal costs incurred by Te Arawa in prosecuting its case were held to be £1385. Letter from Secretary, Arawa District Maori Trust Board, 26 June 1924, cited in Leonard, p 25

Crown land. Section 27(2) reserved to Te Arawa their fishing rights in respect of indigenous fish, but specified that no such fish could be sold. Section 27(3) provided for the annuity of £6000, payable from 1 April 1924. It was stated that the annuity had to be confirmed by further legislation. Why this provision was included is not known by the present author. Provision for the establishment of a trust board to administer the annuity was made in section 27(4). Significantly, the annuity was not indexed to inflation.

In 1923 and again in 1924, legislation was passed amending the 1922 Act in respect of the Arawa Trust Board. The 1923 amendment confirmed the payment of the annuity as was required by section 27(3) of the 1922 Act.¹³⁴ Section 15 of the Native Land Claims Adjustment Act 1924 granted the Arawa Trust Board the power to purchase or sell land, subdivide, let lands for Maori settlement, farm lands, lend money, and act as guarantors.

Evidence exists that throughout 1923, several Te Arawa protested to the Government, expressing concern that their hapu ownership rights had been sold out by the agreement between Te Arawa and the crown – an agreement that they had had little or no involvement in negotiating, and had certainly not signed.¹³⁵

Most comments made about the settlement, however, were positive. Much was made of the fact that a single bilateral settlement had been reached, and that the rights and interests of individual hapu had been subordinated for the ‘common good’ of Te Arawa. In 1920, Ngata had written to Tai Mitchell vis-a-vis the negotiations. Ngata described the lakes contest as a ‘test of partisanship’, and stressed how important it was ‘to stick to every item of the kaupapa and in the kaupapa to stick to the principle of sacrificing individual and hapu rights for the larger good of the Arawa Tribe.’¹³⁶ In a paper Ngata subsequently wrote on Te Arawa, he stressed the ‘dominant provision’ of the lakes settlement as being that the money was not to be distributed amongst individuals, but instead was made a tribal fund.¹³⁷

4.12 The Arawa District Trust Board

The Arawa District Trust Board was a body corporate with perpetual succession and a common seal. Its members were appointed by the Governor General, who could also make stipulations in relation to various matters, including the administration of funds. However, the board had the power of decision as to what were appropriate objects for the investment of its funds. In respect of borrowing

134. The Native Land Amendment and Native Land Claims Adjustment Act 1923, s 13

135. See for example Taima Te Ngahue to Native Minister, 28 March 1923, ma1 5/13/242, NA Wellington; Heke Hakopa and 39 others to Native Minister, 13 January 1923, ma1 5/13/242, NA Wellington; Te Miri o Raukawa Tauwahika to Governor General, 28 May 1923, ma1 5/13/242, NA Wellington; Under-Secretary Native Affairs to Native Minister, 11 April 1923, ma1 5/13/242, NA Wellington; T Savage to Prime Minister, 20 October 1924, aamk 869/84c, NA Wellington, all cited in Thompson, p 23

136. Ngata to Mitchell, 12 June 1920, cited in Leonard, p 27

137. A T Ngata, ‘The Te Arawa Tribe – A History’, ma 31/8, NA Wellington, cited in Manatu Maori, p 26

money, the consent of the Native Minister was required. The formation of the Arawa District Trust Board has been noted as being the first time in New Zealand's history that responsibility to administer a substantial sum of money was vested in a Maori authority. And Leonard argues that the Government allowed the board a surprising degree of freedom in its activities.¹³⁸

Initially the board was to have 12 members, but this was increased to 15 to enable adequate representation of the various sub-tribal interests. The district was divided into wards on the basis of previously determined hapu boundaries. The numbers of representatives from each hapu in the different wards were determined proportionally according to their relative land interests. Within each ward, representatives were elected.¹³⁹

Given that the Trust Board's genesis lay in the lakes settlement, it is perhaps unsurprising that the board viewed the agreement very positively. The board's first chairman, Tai Mitchell, wrote to Coates recording that the 'board expresses its warmest thanks to the Honourable J G Coates, Native Minister, for placing on the statute book the legislation giving effect to the settlement of the lakes question.'¹⁴⁰ Similarly, at the board's inaugural meeting, the motion was passed that:

The board places on record its appreciation of the services rendered by the late Captain Gilbert Mair, the Honorable A T Ngata, Messrs F Earl KC and R Levin in the promotion of the Arawa lakes case and the final settlement of the same.¹⁴¹

Further, the board asked Prime Minister Massey to take the following message of gratitude to King George on behalf of Te Arawa:

We thank you and Parliament for this year's legislation, fulfilling all promises and engagements made to the Arawas since the signing of the Treaty of Waitangi, thus again proving that England's stated word is a sacred bond capable of fulfilment.

Massey duly took this message to England and presented it to King George v.¹⁴²

In his paper on the Arawa District Trust Board, Leonard details its activities in its first ten years of operation. During this time there is evidence of money being used for, inter alia, the maintenance of marae, improving water supplies, health, education, providing assistance to farmers, housing, pensions, and the promotion of Maori arts. Later the board acquired two farms near Maketu and made large investments in these properties.¹⁴³

In 1934, a commission investigated all Government departments and other agencies involved in administering Maori affairs, including the Arawa Maori Trust Board.¹⁴⁴ The commissioners found evidence of impropriety surrounding the

138. Leonard, p 28

139. Ibid, p 28

140. Mitchell to Coates, aamk 869/84c, NA Wellington, cited in Manatu Maori, p 27

141. aamk 869/781B, NA Wellington, cited in Manatu Maori, pp 27–28

142. Letter of Governor Jellicoe, 17 December 1923, ma w2459 5/13/242, pt 4, NA Wellington, cited in Frame, p 128

143. Leonard, pp 29–32, 34–35

144. See Native Affairs Commission, 'Report of the Commission on Native Affairs', AJHR, 1935, g-11

involvement of the board's chairman, Tai Mitchell, in various land boards and development schemes in the Rotorua area, and implicated him in the mismanagement of various land purchases. Further, it was observed by the commission that Ngata, in his capacity as Native Minister, had approved the vesting of disproportionately large amounts of money in the Waiariki Land Board, which employed Mitchell. The possibility of Mitchell having influenced Ngata was not discounted by the commission. The commission also identified evidence of irregular accounting practices in the payment of workers in various trust board projects and unemployment schemes run by the board. Mitchell appears to have been involved in all of these matters. Complaints were made to the commission by some of the board's members that they did not know in any detail how the board's funds were expended. The accusation was also made that Ngata had interfered with the process by which nominations were made for seats on the board.¹⁴⁵ The commission's report focused unsurprisingly on financial impropriety, and recommended that the board be subjected to greater financial control by central government.¹⁴⁶

4.13 Discussion of the Settlement

As with any settlement, the way in which it is administered is an important consideration. Pan-iwi authorities are always vulnerable to capture by individuals who operate to better their personal or hapu interests. This certainly appears to have been the case with the Arawa District Trust Board – at least in its first 10 years of operation. Prima facie it would appear that not all hapu of Te Arawa benefited equally, despite them having been pressured by the likes of Ngata and Earl to enter into a Te Arawa wide settlement rather than one on a hapu by hapu basis.¹⁴⁷

In 1924, an annuity of £6000 was a significant sum of money. Had the annuity been indexed to inflation, it is considered that it would have been worth \$168,120 in 1982, and around \$400,000 in 1993.¹⁴⁸ Importantly, though, the figure was fixed. There have, however, been two increments since 1922: upon the introduction of decimal currency in 1967, the annuity was increased to \$12,000; and around 1976, there was a further increment of \$6000 per annum. That the annuity was not indexed to inflation, despite Earl requesting this during negotiations, would appear to be an injustice. In light of the current value of the tourism industry centred on the Rotorua lakes today, an annuity of \$18,000 is a rather insignificant sum. The inequity is even greater when it is considered that in accepting the annuity and the settlement in respect of the lakes, Te Arawa forfeited their rights to own and control

145. Leonard, pp 36–41

146. Ibid, pp 41–42

147. Ibid, p 42

148. J T Ward, H J Baas, 'The Real Value of Compensation by Annuity', Department of Economics, University of Waikato, app to Manatu Maori; Frame, p 128

much of the tourist trade based upon the lakes. It is not surprising then, that today, Te Arawa are attempting to renegotiate the lakes settlement with the Crown.

Apparently some members of Te Arawa have interpreted the settlement as a rent in perpetuity, rather than an extinguishment of Te Arawa's rights.¹⁴⁹ Of similar settlements made around this time where an annuity was paid in perpetuity, Richard Hill has observed that it seems possible that they 'were regarded by their recipients as a kind of "symbolic rent" in lieu of – even pending – the return of the land.'¹⁵⁰ The Crown, however, appears to have denied that the annuity bore any relation to the beds of the Rotorua lakes whatsoever. During negotiations with the owners of Lake Taupo, Coates sought to downplay the precedent set by the annuity that the Crown paid to Te Arawa. This, he was reported as having claimed, 'was not a payment for the beds of Rotorua lakes, but was made in consideration of the services rendered to the Crown by the Arawa people in the Maori War days.'¹⁵¹

The provision within the Native Land Claims Adjustment Act 1922 that guaranteed to 'the Natives' the right to take indigenous fish from the lakes was an important aspect of the settlement. However, it was not clear from the Act whether this was an exclusive right, or whether Pakeha and other Maori were able to take indigenous fish from the lakes. It appears though that the Rotorua Trout Fishing Regulations in force from around the time of the settlement until 1990, specified that this right was vested exclusively in Te Arawa. However, since the passage of the Conservation Law Reform Act in 1990, trout fishing regulations no longer exist, and no provision for preventing non-Te Arawa from taking indigenous fish has been instituted.¹⁵²

4.14 Conclusion

The history of the ownership and control of the Rotorua lakes stands out as a crucial episode in the history of Maori claims to lakes in New Zealand. Although the Native Land Court had earlier determined the ownership of the Wairarapa lakes, it was not until the matter of the Rotorua lakes was considered by the Court of Appeal that it was enunciated with any certainty that it was within the jurisdiction of the Native Land Court to determine the ownership of lakes.¹⁵³ And the subsequent Native Land Court inquiry, although never completed, produced a corpus of evidence that clearly established that lakes were capable of being the exclusive property of particular hapu.

Although Gilbert Mair's contention that he was aware of no land in New Zealand that has 'been held more absolutely,' or that 'can show more marks of ownership'

149. See Manatu Maori, p 33

150. Richard Hill, 'Settlements of Major Claims in the 1940s: A Preliminary Historical Investigation', unpublished paper, 1989, p 13, cited in Manatu Maori, p 33

151. *Evening Post*, 23 April 1926, cited in Bargh, p 113

152. Personal communication, Christopher Richmond, Department of Conservation Head Office, Wellington, 30 January 1998

153. *Tamihana Korokai v Solicitor-General*, NZGLR, vol 15, 1912

than the Rotorua lakes, seems somewhat extreme, it was supported by evidence received by the land court in 1918.¹⁵⁴ Partly because their lands were so infertile, Te Arawa's economy relied heavily upon the biota of their lakes. Various species of fish and birds were caught in large numbers, and the plants growing in the lakes' margins were used in a variety of ways. An important aspect of the way in which rights were held in Rotorua and Rotoiti was that particular hapu held exclusive rights to defined parts of the lakes. In this respect, the land court received a huge amount of evidence concerning the specific location of open water boundaries. Also witnesses recounted how punitive action was taken against groups caught poaching in another hapu's part of the lake. A clear picture emerged during the Native Land Court's inquiry of rights being held in a similar fashion to how rights were conceived of in relation to land. Importantly this satisfied the criteria of European-style ownership that rights were exclusive.

It was not until around the turn of the century that the Crown made any intimation that it disputed Te Arawa's claim to the lakes and in fact appeared to have recognised Te Arawa authority in the Thermal Springs District Act 1881. Because of the area's unsuitability for agriculture, conflicts over the right to control the lakes did not arise as they had elsewhere in New Zealand as farmers sought to drain their lands and limit the effects of flooding. Instead, a catalyst for the Crown wanting to gain control of the lakes was its desire to acquire rights in what had become the basis of an increasingly valuable tourist industry. From the mid-nineteenth century, Maori had been major players in the development of a tourist industry in the Rotorua region. Te Arawa derived revenue from providing accommodation and transport upon the lake, guiding tourists, and charging tourists tolls to travel over their lands and lakes. In respect to their lakes, these actions were seen as important assertions of ownership that for decades went unchallenged by the Crown.¹⁵⁵ The desire of Te Arawa to retain their autonomy was such, that to enable the town of Rotorua to be established, the Government had to pass special legislation acknowledging Te Arawa's ownership of their lands and lakes.¹⁵⁶ The rights of Te Arawa to their lakes also appear to have been acknowledged when Lake Tarawera was included in the purchase of abutting lands, although the land court had specifically excluded the lakes from titles to riparian blocks.¹⁵⁷

However, in spite of these tacit and explicit acknowledgements, the Crown gradually began to assume greater and greater rights in the lakes that eventually took the form of a tacit assertion of ownership. Trout were introduced to the lakes, for example, and a regime to manage them instituted, and the Government began to charge the owners of tourist boats a levy to operate on the lakes. By the first decades of the twentieth century, actions of the Crown that appear to have been concerned with the development of a state-owned and operated tourist industry, converged with the evolving position of the Crown that it should be the owner of all

154. Evidence of Gilbert Mair, 'Minutes of Rotorua Lakes Case', pp 184–185

155. See for example *ibid*, pp 11–12

156. The Thermal Springs District Act 1881

157. See Ruawahia no 1

lakes in New Zealand. In response to this, Te Arawa applied to the Native Land Court to have its title to the Rotorua lakes determined. However, as a consequence of the Department of Lands refusing to issue the necessary survey plan, the matter was brought to the attention of the English Attorney General, and then taken to the Court of Appeal.

The case that ensued, *Tamihana Korokai v Solicitor General*, is, along with Judge Acheson's decision in respect of Lake Omapere, one of the key pieces of case law supporting the notion that Maori claims to lakes are justiciable in the New Zealand courts. By the time the case was heard in 1912, the Crown was actively asserting the view that upon declaration of British sovereignty in New Zealand, the Crown acquired the radical title to the whole dominion, subject to the existence of customary title. And significantly in the case of lakes, it was considered that no such customary title existed. The Court of Appeal, however, unhesitatingly rejected this position. It was held that the Crown simply asserting title to a particular piece of land was insufficient to prevent the investigation of the title to such land, and that the ascertainment of whether a piece of land was held under Maori customary title was a question for the Native Land Court in the first instance. And importantly in relation to the latter, the court took the view that it was within the jurisdiction of the court to determine this in respect of Lake Rotorua.¹⁵⁸

Although the Native Land Court began an investigation of the title to the Rotorua lakes, it was never completed. Instead the Crown, through employing considerable pressure, managed to convince Te Arawa to enter into an agreement concerning the ownership of the lakes. Under the agreement Native title to the lakes – if such a thing existed under English law – was extinguished in exchange for an annuity and various other rights being confirmed.¹⁵⁹ It is apparent that this course of action was favoured by the Crown because it was convinced that, had the Native Land Court completed its investigation, the court would have ruled that the lakes were Maori customary land.¹⁶⁰ In the interests of establishing the Crown as being the owner of all lakes in the country, the last thing the Crown wanted was a precedent being set by the land court determining that the Rotorua lakes were the absolute property of Maori. But as the history of the contest for the control of lakes in New Zealand shows, the Crown's attempts to deny (as opposed to acquiring) the claims of Maori to their lakes were to be almost entirely unsuccessful. That Te Arawa are presently trying to renegotiate the Rotorua lakes settlement reflects their dissatisfaction with the original agreement. Despite Te Arawa's counsel having requested during the negotiations of the 1922 agreement that the annuity be indexed to inflation, this was not done. Neither was there any provision for Te Arawa to receive a share of revenue generated from the lake from such things as the sale of fishing licences (as there was in the settlement reached between Ngati Tuwharetoa and the Crown). Hence Te Arawa have not managed to secure any ongoing benefits. Since the mid-

158. *Tamihana Korokai v Solicitor General*, NZGLR, vol 15, 1912, p 95

159. The Native Land Amendment and Native Land Claims Adjustment Act, s 27

160. See for example Solicitor General to Under-Secretary of Lands, 29 April 1920, clo, Opinions, vol 7, LINZ Wellington, cited in Thompson, p 16

1970s they have received a paltry \$18,000 per annum. Further, it appears that not all Te Arawa hapu have shared equally in what money has been received.

