

CHAPTER 5

LAKE WAIKAREMOANA

5.1 Introduction

Lake Waikaremoana lies in the Urewera Mountains, 65 kilometres to the north of Wairoa. To Ngai Tuhoe, Ngati Ruapani, and Ngati Kahungunu, Waikaremoana is a sacred lake. To Tuhoe and Ruapani it is known as ‘Te-Wai-Kauakau o nga Matua Tipuna – the bathing waters of the ancestors’.¹ The lake appears to have been a focus for settlement for as long as Maori have been present on the East Coast. Traditionally it was a source of fish, water fowl and plant material, as well as being important in terms of transport. The histories of the hapu of the region are rich with stories of battles fought on the lake’s shores. While today Lake Waikaremoana is leased to the Crown (forming part of the Urewera National Park), it remains an essential aspect of the identity of the Tuhoe–Ruapani people.²

Geologists account for the lake having been formed about 2200 years ago by a huge landslide damming the Waikaretaheke River. Most of the drainage from the lake occurred through cracks and fissures in the natural rock dam.³ In the traditions of Tuhoe–Ruapani, however, the formation of the lake is attributed to the actions of the ancestor Haumapuhia.

Unsurprisingly, the Urewera – and Lake Waikaremoana in particular – made a striking impression upon early Pakeha visitors to the area. Elsdon Best, in his 1897 monograph *Waikaremoana – the Sea of Rippling Waters*, observed that ‘the Urewera country, the snow-wrapped peaks and mighty ranges, the vast forest and rushing torrents, the lone lakes and great gulches which form the leading features of Tuhoe land’ engender ‘that strange sensation of vivid interest and pleasing anticipation which is felt by the ethnologist, botanist and lover of primitive folklore’.⁴ Of Lake Waikaremoana, S Percy Smith stated that:

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1. Robert Wiri, ‘Te Wai-Kauakau o Nga Matua Tipuna: Myths, Realities and the Determination of Mana Whenua in the Waikaremoana District’, MA Thesis, University of Auckland, 1994, (Wai 36 rod, doc a4), p 11
 2. This chapter report is based primarily upon Emma Stevens’ ‘Report on the history of the title to the lake-bed of Lake Waikaremoana and Lake Waikareiti’ prepared for the CFRT in 1996. Virtually no primary research has been undertaken by the present author.
 3. Department of Lands and Survey, *Land of the Mist: The Story of Urewera National Park*, Wellington, Government Printer, p 51
 4. Elsdon Best, *Waikaremoana – The Sea of Rippling Waters: The Land, the Lake, the Legends with a Tramp Through Tuhoe*, Wellington, Government Printer, 1975, cited in Wiri, pp 11–12

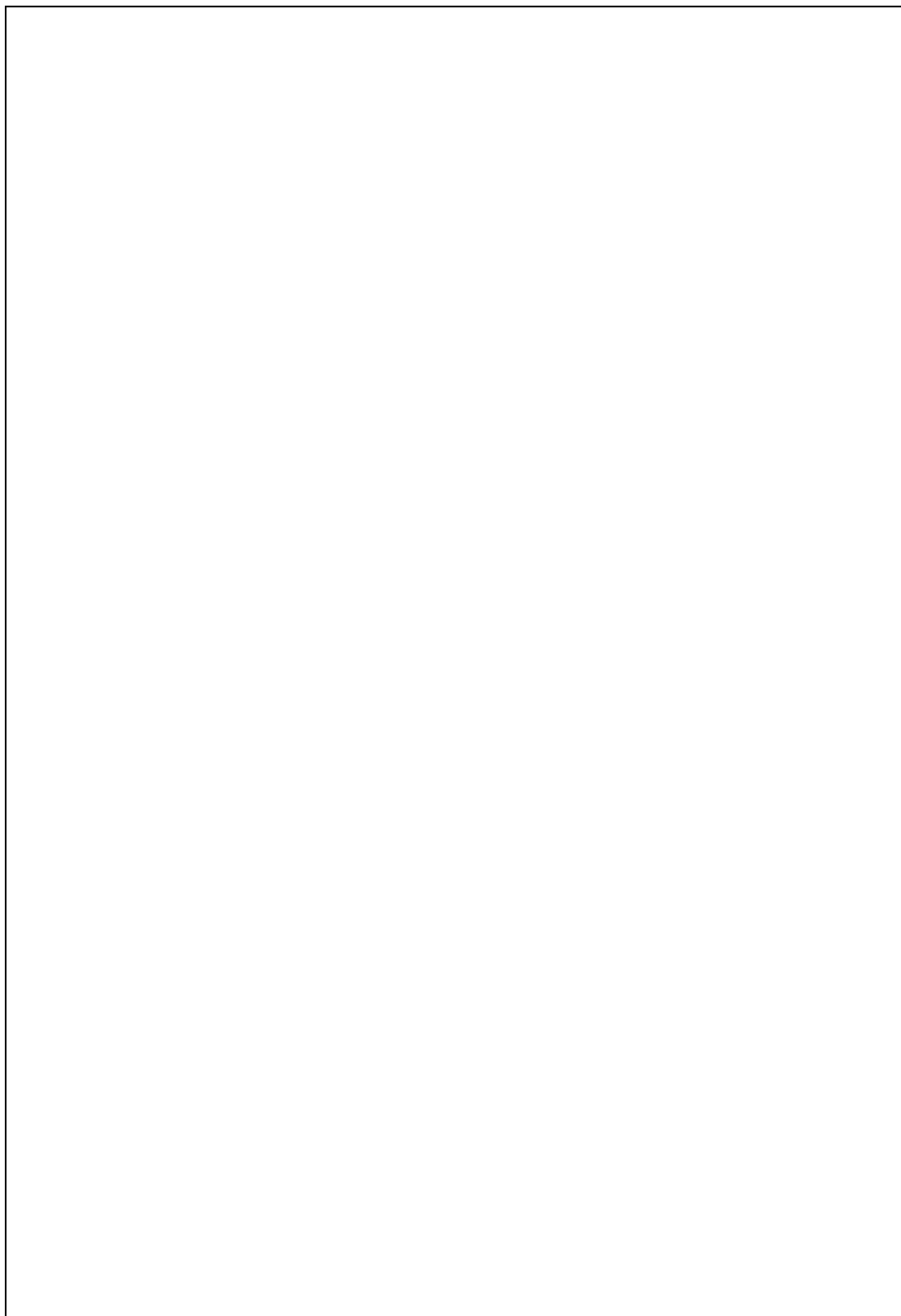


Figure 5: Lake Waikaremoana

It is acknowledged by all who have seen it to be by far the most beautiful of all the lakes of the North Island. The grandeur of the Bluffs of the eastern side, rising . . . to 1100 feet perpendicularly out of the water is unsurpassed by any cliff scenery I am acquainted with.⁵

Another Pakeha upon whom the area made a distinct impression was the author, Katherine Mansfield. Her travels through the district were the basis of her travelogue, *The Urewera Notebook*.⁶

Subsequent to a tour of the Urewera in 1894, Richard Seddon proposed that the forests of the district be protected. However, much pressure existed at the time to mill the timber resources of the Urewera. A recommendation was made to the Minister of Lands in 1916 that an area of land to the north of the lake be acquired for the purposes of scenery preservation. Although this was approved by the Minister, it was never pursued.⁷ This, at least in part, was because it was not until 1921 that the Crown reached an agreement with Maori as to what was actually Crown land and what land remained in Maori ownership. This agreement was formalised by the Urewera Lands Act. Also around this time there appears to have been a shift in public opinion towards favouring the preservation of Urewera forests – by then the largest remaining tract of virgin forest in the North Island. In spite of this though, it was not until 1954 that the catchments of Lakes Waikaremoana and Waikareiti were gazetted as the Urewera National Park. Subsequently more land has been incorporated into the park.⁸

From the late-nineteenth century, Lake Waikaremoana appears to have been a popular destination for tourists. Around 1874, accommodation was available at a lodging house that was a part of the Armed Constabulary Redoubt at the lake. In 1900, the first purpose-built tourist accommodation was constructed. By 1909, it had become an official Government tourist hostel. The hostel was run by the Tourist Hotel Corporation from 1956 until 1972 when it was closed because of financial losses. In 1930, the Government launched the boat *Ruapani* which provided a passenger service upon the lake.⁹

Lake Waikaremoana is also important in terms of hydro-electric generation. After lengthy investigations, a temporary generating facility was commissioned at Tuai in 1922. Seven years later, the main Tuai station opened. By 1943, the Piripaua generation facility, situated four kilometres southeast of Tuai, was in production. Water from the Tuai station travelled to Piripaua by way of a sequence of specially made tunnels. The third station constructed was the Kaitawa station, completed in 1947. Located between Tuai and the lake, Kaitawa necessitated the construction of twin tunnels through the natural rock dam that formed the lake.¹⁰ In order to

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5. S Percy Smith, 'Sketch of the Geology of the Northern Portion of the Hawke's Bay', *Transactions of the Proceedings of the New Zealand Institute*, vol 9, 1876, pp 565–573, cited in Wiri, p 17
 6. Katherine Mansfield, *The Urewera Notebook*, Wellington, Oxford University Press, 1978
 7. 'Lake Waikaremoana: History of Surrounding Lands', p 12, cl 200/2, cited in Emma Stevens, 'Report on the History of the Title to the Lake-bed of Lake Waikaremoana and Lake Waikareiti', CFRT research report, 1996, p 16
 8. Department of Lands and Survey, pp 39–41
 9. *Ibid*, p 41

maximise the amount of water available for generation, extensive work was undertaken to seal the leaks in the natural rock dam. Once this was achieved – around 1946 – the lake’s waters have been maintained at a permanently lowered level. As a consequence of this, the shoreline drops away much more steeply, and exposed terraces and stream mouths have become subject to erosion.¹¹ There is no evidence suggesting that the Maori owners of Lake Waikaremoana were ever consulted during the planning or construction of the Waikaremoana power schemes.¹²

Set against this history of the lake is that of the claim by Maori to the lake’s ownership. As a result of applications by Tuhoe, Ngati Ruapani and Ngati Kahungunu, the Native Land Court investigated the title to the bed of Lake Waikaremoana between 1915 and 1918. In its decision of 1918, the court ruled that all three groups held rights in the lake bed. The Crown subsequently lodged an appeal against the decision; as did Ngati Ruapani in relation to the inclusion of Ngati Kahungunu. As was the case with the Crown’s appeal in the matter of the title to Lake Omapere, there were long delays in the Government prosecuting its appeal. Eventually, though, it came before the Native Appellate Court in 1944. Despite strenuous arguments on the part of the Crown, the court upheld the Native Land Court’s 1918 decision. Similarly, Ngati Ruapani’s appeal was dismissed when it came before the court in 1947. The Crown then filed proceedings in the Supreme Court challenging the jurisdiction of both the Native Land Court in having awarded Maori title to Waikaremoana, and the Native Appellate Court in upholding the original decision. The case, however, was never prosecuted. The lake’s Maori owners first raised the issue of receiving compensation for their interests in the lake bed in 1921. However, the possibility was not considered by the Crown until 1947, and a settlement not reached until 1971. As a consequence of the lake’s owners’ refusal to sell their interests, the subsequent agreement involved leasing the lake bed to the Crown. The lease was for 50 years with a perpetual right of renewal, and ten yearly rent reviews. The rent was fixed at 5½ percent of the Government valuation of the lake. Rather than being paid to a specially constituted trust board, the rent, backdated to 1967, was paid to the already existing Wairoa and Tuhoe Trust Boards. The arrangement was given effect by the Lake Waikaremoana Act in 1971.¹³

This chapter begins with a brief survey of tribal traditions pertaining to Waikaremoana. It then proceeds to set out the main events in the Crown’s dealings with the lands in the vicinity of Lake Waikaremoana in order to establish a context in which to understand the Native Land Court’s investigations into the ownership of the lake between 1915 and 1918. This inquiry is the subject of the following section which details what transpired at the four hearings held in relation to the ownership of the lake. The chapter then proceeds to rehearse the history of the

10. G G Natusch, *Power From Waikaremoana*, Wellington, Electricorp Production, 1992, pp 11, 37, 47

11. *Lands and Survey*, p 44

12. See for example Stevens, p 26

13. *Ibid*, pp 2–4

appeals by the Crown and Tuhoe–Ruapani in relation to the Native Land Court’s decision. Attention then turns to the issue of compensation for the Maori owners’ interests and the eventual leasing of the lake bed.

5.2 Traditional Histories

According to Robert Wiri, there are three distinct phases to the tribal history of Waikaremoana. The first phase is centred around an ancestor called Mahu-tapoa-nui and his whanau. Subsequent to the eclipse of Mahu at Waikaremoana, the descendants of the eponymous ancestors Ruapani and Kahungunu emerged and dominated the second epoch. The third and final phase saw the annexation of Waikaremoana by Tuhoe.¹⁴

5.2.1 Mahu-tapoa-nui

In Tuhoe and Ngati Ruapani traditions, Mahu-tapoa-nui and his whanau were the first inhabitants of the Waikaremoana district. While most sources agree that Mahu was a descendant of Toi, Best considered him to be an ancestor of Ngati Kahungunu who arrived in New Zealand upon the Horouta canoe.¹⁵ Mahu resided with his family at Wairau Moana – now the southern arm of Waikaremoana. Mahu had eight children to his first wife, Kauariki. Of these, however, only the youngest was human, the rest being ‘tipua’ or demi-gods.¹⁶

Tuhoe–Ruapani tradition holds that Waikaremoana as we know it today was formed by the actions of Haumapuhia, a daughter of Mahu. In a version of the story recounted by Timoti Karetu, there was a sacred spring near where Mahu and his whanau resided. One day Mahu instructed his children to fetch him some water to drink. However, two of the children – Haumapuhia and Te Rangi – did not go as instructed, and those that did, took water from the sacred spring instead of the one designated for everyday usage. Upon discovering that the water was from the tapu spring, Mahu turned the offending children into stone. These are still visible today and are known as the ‘Te Whanau a Mahu’. Haumapuhia was then again asked to fetch some water – and again she ignored her father’s request. Mahu was so incensed at his daughter’s disobedience that he drowned her in the spring, turning her into a taniwha. Haumapuhia then endeavoured to escape at the northern end of the lake. In attempting this, the inlet known as Te Whanganui-a-Para was formed. Unsuccessful in that attempt, she then turned to the south and tried to leave the lake near present day Onepoto and reach the sea. Although successfully finding her way

14. Wiri’s MA thesis is the major source drawn upon in this section. Although the work is based upon extensive research and is well reasoned, it should be borne in mind that Wiri is himself of Tuhoe–Ruapani descent, and a major aspect of his work appears to be the discrediting of the claims by Ngati Kahungunu to Lake Waikaremoana and the Waikaremoana district. Wiri, p 61

15. Elsdon Best, *Tuhoe: The Children of the Mist*, 2 vols, Wellington, Polynesian Society/Reed, 1925, p 189, cited in Wiri, p 63

16. Wiri, pp 67–68

underground to the Waikaretaheke River, when she surfaced the sun had risen and the rays falling upon her caused her to be transformed into a rock.¹⁷ The rock that is Haumapuhia lies in the Waikaretaheke River but was buried by a landslide shortly before the completion of the Lake Waikaremoana power development.¹⁸ As well as forming many of the lake's geographical features, Haumapuhia's actions disturbed the lake's waters. This gave rise to the name Waikaremoana – 'the sea of rippling waters'.¹⁹ According to Best, Mahu was saddened by the fate of Haumapuhia, and thus resolved to leave the Waikaremoana district, settling at Putauaki in the Bay of Plenty.²⁰

5.2.2 Ngai Taurira

Mahu's whanau were succeeded by Ngai Taurira as the dominant group at Lake Waikaremoana. Wiri states that Ngai Taurira were a people of the northern Hawke's Bay who occupied the Upper Wairoa district as far inland as Waikaremoana. In the Wairoa region they were later subsumed by Ngati Kahungunu, and around Lake Waikaremoana, absorbed by Ruapani's descendants.²¹

There is no definitive account as to the origins of Ngai Taurira. Explanations range from them having arrived on a canoe of the same name, to them being descendants of the Maui–Potiki. Wiri considers that the scarcity of Ngai Taurira traditions in the Waikaremoana district suggests that the group did not have strong rights to land in the area. However, their association with the area is evident in several placenames that record the actions of certain Ngai Taurira ancestors. Ngati Kahungunu claim that they conquered Ngai Taurira and took possession of all their land from Wairoa to Waikaremoana.²²

5.2.3 Ngati Ruapani

Ngati Ruapani succeeded Ngai Taurira as the preeminent tribal group at Waikaremoana. Ngati Ruapani were part of the Tuhoe confederation of hapu, and the descendants of the eponymous ancestors Ruapani and Kahungunu of the East Coast region. Ruapani was a direct descendant of Pawa and Kiwa of the Horouta canoe. Tradition has it he travelled to Waikaremoana where he resided for some time, gradually acquiring the mana of his brother Tuhoropunga. There were five arranged marriages between the children of Ruapani and those of Kahungunu.²³ These marriages are the basis of Ngati Kahungunu's claim that they have mana

17. Timoti Karetu, *Te Reo Rangatira: A Course in Maori for Sixth and Seventh Formers*, Government Printer, Wellington, 1974, pp 38–40, cited and translated in Wiri, pp 71–75

18. Lands and Survey, p 17

19. Wiri, p 80

20. Best, 1925, p 191, cited in Wiri, p 76

21. Wiri, pp 82–85

22. *Ibid*, pp 85–86, 94–95

23. Hippolite records that the first daughter of Ruapani, Ruareretai, in fact married Kahungunu himself. Joy Hippolite, *Wairoa*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), November 1996, p 10

whenua in the Waikaremoana district. However, the extent to which these marriages and alliances saw Ngati Ruapani ki Waikaremoana subsumed by Ngati Kahungunu remains a contested issue to this day.²⁴

Pukehore was one of the key ancestral figures of Ngati Ruapani ki Waikaremoana. Pukehore was descended from both Ruapani and Tuhoe–Potiki, and was instrumental in defining tribal boundaries with Tuhoe to the west and Ngati Kahungunu to the east. Through a series of strategic marriages, alliances were maintained with the Tuhoe hapu of Ruatahuna and Maungapohatu.

Another important figure in the history of Ngati Ruapani was the famous warrior chief Tuwai. Tuwai lived two generations after Pukehore, and along with his sister, was instrumental in maintaining boundaries with both Tuhoe and Ngati Kahungunu. It is said that it was because of his military prowess that Ngati Ruapani maintained their authority over Lake Waikaremoana and adjacent lands. The descendants of Tuwai and Pukehore have maintained a constant presence at Waikaremoana until the present day.²⁵

5.2.4 Tuhoe, Ngati Ruapani, and Ngati Kahungunu at Waikaremoana

In order to arrive at an understanding of who holds rights in Lake Waikaremoana today, consideration must be afforded to the historical relationship between the three main iwi of the region – Tuhoe, Ngati Ruapani and Ngati Kahungunu.

According to Wiri, Tuhoe were defeated by Ngati Ruapani in a battle staged at Raehore Pa in Ruatahuna around 1660. This led to Tuhoe retaliating, attacking Ngati Ruapani at Te Ana-putaputa on the northern shore of Waikaremoana. Subsequent to this battle, it appears that Tuhoe and Ngati Ruapani joined forces against Ngati Hinganga – a section of Ngati Hinemanuhiri of Ngati Kahungunu – to avenge the killing of two Tuhoe chiefs. After fleeing from Whakaari pa in Lake Waikaremoana’s Whanganui inlet, Ngati Hinganga took refuge at Pukehuia. Tuhoe and Ngati Ruapani duly attacked them again at Pukehuia and Ngati Hinganga were defeated.²⁶

The next major battle saw the Ngati Kahungunu hapu of Ngati Hinemanuhiri attacking Tuhoe and Ngati Ruapani at a cave on the shore of Waikaremoana known as Te Ana-o-Tikitiki. In this battle it was mainly women and children who were killed, as the fighting men were at the time engaged in a battle with Ngati Kahungunu at Wairoa. In retribution for this massacre – known as ‘Te Wai-kotero a Te Ariki’ – Tuhoe and Ruapani, with the assistance of Te Arawa, waged war on Ngati Hinemanuhiri. Large numbers of Hinemanuhiri were killed, and those that escaped fled to the Wairoa district.²⁷

This battle is considered by Tuhoe–Ruapani as having strengthened their stronghold over Waikaremoana. Subsequently more and more Tuhoe began to

24. Wiri, p 117

25. Ibid, pp 117–118

26. Ibid, p 167; Lands and Survey, p 21

27. Wiri, p 169

occupy the district, reinforcing their rights attained through conquest with those of occupation. During this period, raids continued to be made upon nearby Ngati Kahungunu strongholds. In a final attempt at revenge, Ngati Kahungunu attacked Tuhoe at Te Ana-o-Tawa but suffered a heavy defeat. This appears to have been the last pre-European battle of any significance staged at Waikaremoana. Subsequently a peace arrangement was made between Tuhoe–Ruapani and Ngati Kahungunu known as Te Tatau Pounamu.²⁸ This involved a symbolic marriage between two mountains situated in the range between Waikaremoana and Wairoa known as Te Kuha Tarewa and Turi-o-Kahu.²⁹

Subsequently, Wiri argues that over several generations, Tuhoe and Ngati Ruapani became one and the same people at Waikaremoana through various intermarriages.³⁰ It should be noted though that Wiri's interpretations may be disputed by various claimant groups.

5.3 Waikaremoana Lands and the Crown

The ownership of the lands surrounding Lake Waikaremoana was an important consideration of the Native Land Court in its investigation of title to the lake between 1915 and 1918. It is therefore useful to briefly consider the history of the Waikaremoana lands – especially the Waikaremoana block – before proceeding to detail the Land Court's dealings vis-a-vis the lake.

5.3.1 Alienation of Ngati Ruapani lands in the Waikaremoana district

Vincent O'Malley has examined the alienation of Ngati Ruapani lands around the southern margin of Lake Waikaremoana in a report for the Ngati Ruapani claim before the Waitangi Tribunal.³¹ He argues that Tuhoe–Ruapani were branded 'rebels' subsequent to the New Zealand wars and the establishment of the Pai Marire religion on the East Coast. Despite the Hauhau of Tuhoe–Ruapani and Ngati Kahungunu having 'largely refrained from hostile acts', they were subjected to a military campaign by both Crown and 'loyalist' Maori forces.

Although keen to forcibly acquire title to the land owned by 'rebel' Maori in the Waikaremoana district, the Crown was reluctant to implement the 1863 New Zealand Settlement Act on the East Coast. This seems to have been because by the mid-1860s, the Act had become both a military and economic liability. Instead, in 1866, the East Coast Land Titles Investigation Act was passed. The Act provided for all 'rebel-owned' land to be forfeited to the Crown through the agency of the

28. A tatau pounamu is a type of peace established between two warring parties, the intended permanence of which being symbolised by a greenstone door. See H M Mead and O E Phillis, 'Tatau pounamu' in *Customary Concepts of the Maori*, Wellington, Department of Maori Studies, Victoria University, 1993

29. Wiri, pp 159–160, 169

30. Ibid, pp 161–164

31. Vincent O'Malley, 'The Crown and Ngati Ruapani: Confiscation and Land Purchase in the Wairoa–Waikaremoana Area, 1865–1875', October 1994 (Wai 144 rod, doc a3)

Native Land Court. By 1867 though, the Government considered that implementing the East Coast Titles Act was prohibitively expensive. Instead a policy was decided upon whereby cessions of land were obtained from particular groups in exchange for guarantees that land remaining in their ownership would not to be subject to the East Coast Titles Act. Thus, the Wairoa deed of cession was conducted at Hatepe between ‘loyalist’ chiefs and the Crown. Under this cession, between 40,000 and 50,000 acres were exchanged for the remainder of ‘rebel-owned’ lands to the south of Poverty Bay. O’Malley considers that this was effectively a forced cession: had the owners not agreed to it, the lands would have been taken under the East Coast Titles Act. The cession was confirmed by the Native Land Court in September 1868.

After Te Kooti escaped from the Chatham Islands, Tuhoe–Ruapani provided refuge for him in the Urewera. For this, Tuhoe–Ruapani found themselves subjected to a military campaign of even greater severity and duration than what they had experienced in 1865 and 1866. The Government, dependent upon the military support of Kahungunu ‘loyalists’ in this campaign, found itself under renewed pressure to honour the Wairoa cession and transfer to the ‘Kupapa’ some of the Wairoa block that had been confiscated from the ‘rebels’. Consequently in 1872, Samuel Locke negotiated an agreement with 18 individuals – only one of whom was Tuhoe–Ruapani. The Wairoa block was subdivided into four blocks. The boundaries of the subdivisions were based upon natural features rather than traditional boundaries. The customary ownership of the land was not investigated. Quite apart from the injustice of the subdivision, O’Malley considers that Locke acted illegally in doing this because most of the lands actually lay outside of the East Coast confiscation district. Lake Waikaremoana formed part of the northern boundary of three of the four subdivisions: the Waiau, Tukurangi, and Taramarama blocks. The fourth subdivision – the Ruakituri block – lay to the northwest of the lake.³²

Although the owners of the four subdivisions were never issued with Crown grants, they were able to lease the lands to Pakeha farmers. This raised the ire of many Tuhoe–Ruapani who protested on several occasions. In 1874, upon being advised to do so, they sought an investigation of the lands by the Native Land Court. However, in the same year the Crown decided to acquire the four blocks. By the time the Court was scheduled to open its inquiry in 1875, it appears that Josiah Hamlin had already finalised the lands’ purchase with the Ngati Kahungunu owners. The Tuhoe–Ruapani chiefs subsequently decided to withdraw their claims to the land before the Native Land Court. O’Malley suggests that this was partly because of the purchase agreement, but also that the court had no jurisdiction under the East Coast Act. This would have meant that Tuhoe–Ruapani would almost certainly have been deprived of their lands even if they had been found to have been the customary owners. As a consequence of the purchases, the ‘loyalists’, who had no customary interests in the land, received £1500; and the Pakeha who had leased

32. Hippolite, p 45

the land, £8000. Tuhoe–Ruapani received £1250 and were granted 2500 acres of reserves. These were situated in the Ruakituri, Taramarama and Tukurangi blocks. None of them were anywhere near the lake and were gradually whittled away over the years.³³

5.3.2 The Waikaremoana block

Throughout the 1880s and 1890s, Te Urewera Maori remained hostile to the opening of their rohe to Pakeha settlement. They actively opposed surveying, road making, and general development. In 1894, Seddon and Carroll toured the district, advocating that the area be opened up for Pakeha settlement.³⁴ Shortly afterwards the Urewera District Native Reserve Act 1896 was passed. This Act provided for a commission to sit and determine the ownership of hapu lands within the Urewera Native Reserve. This appellation included the Waikaremoana block. Despite the fact that much of the reserve abutted Lake Waikaremoana, the lake itself had been expressly excluded from the reserve.

The first Urewera Commission sat between 1899 and 1902. It determined that Tuhoe–Ruapani were the owners of the Waikaremoana block, and that no Ngati Kahungunu had rights in the lands. Ngati Kahungunu subsequently appealed this decision. This led to the Crown appointing a second Urewera commission. In 1907, the second commission, which included nobody of Tuhoe descent, reported to the Government that it approved of the inclusion of 118 Ngati Kahungunu appellants.³⁵ One of the main reasons afforded for the inclusion of Ngati Kahungunu in the Waikaremoana block was that the commission considered, upon the evidence of Wi Pere, that the tribal boundary between Tuhoe and Ngati Kahungunu was the Huiarau range to the west of the lake. A corollary of this was that Tuhoe–Ruapani of Lake Waikaremoana were considered to be a powerful hapu of Ngati Kahungunu, and that the Waikaremoana district was regarded to be within Ngati Kahungunu's rohe.³⁶

Final orders were made by the Native Minister, James Carroll, in 1907. These formed the basis of the titles to the Waikaremoana block.³⁷ In 1909, the Urewera District Native Reserve Amendment Act was passed. This provided for the conversion of the Urewera title orders into freehold orders pursuant to the Native Land Act 1909.

In 1913, Hurae Puketapu and 84 others petitioned Parliament requesting that an inquiry be made into the boundary of Lake Waikaremoana. Subsequently, Rawaho Winitana stated before the Native Land Court during its investigation of Lake Waikaremoana's title, that the petitioners had requested that the lake be made a part of the Urewera District Reserve. The Native Affairs Committee made no

33. Wiri, pp 136–137, 168–173

34. Lands and Survey, p 39; Wiri, p 266

35. Wiri, pp 251, 267

36. Ibid, p 268

37. Stevens, p 9

recommendation vis-a-vis Puketapu's petition on the grounds that the claimants had not exhausted all the legal remedies available to them.³⁸ Presumably the committee meant that the petitioners could pursue a claim to the lake through the Native Land Court.

In order to facilitate an exchange of interests between the Crown and 'non-sellers', a consolidation scheme was set up for the Urewera District Reserve under the Urewera Lands Act 1921. The Act also validated all purchases and acquisitions of land that the Crown purported to have made within the Urewera. Under the consolidation scheme, two reserves that had been set aside in 1875 (Whareama and Ngaputahi) were acquired by the Crown, despite opposition from members of Ngati Ruapani. In 1925, fourteen reserves were finalised for Ngati Ruapani along the shore of Lake Waikaremoana. These were later rendered inalienable by an Order in Council.³⁹ The Urewera Lands Act also made provision for the Waikaremoana block to be vested in the Crown – it having been earlier 'decided that the Crown should acquire the Waikaremoana catchment for scenic and tourist purposes'. Subsequently the Waikaremoana block was acquired by the Crown.⁴⁰

5.4 The Native Land Court's Investigations into the Ownership of Lake Waikaremoana, 1915–18

From the late-nineteenth century, the Crown acted as if it were the legal owner of Lake Waikaremoana. Various the Government stocked Lake Waikaremoana with trout, managed the fishery through licensing anglers and the appointment of rangers, ran a tourist launch service, and provided tourist accommodation on the lake's shore. However, it appears that it was not until 1913 that the Crown expressed any interest in formally acquiring title to Lake Waikaremoana. In that year, Crown commissioners that had been appointed to investigate the state of forestry in New Zealand proposed that Lake Waikaremoana be made a scenic reserve.⁴¹

But also in 1913 an application was made to the Native Land Court by Rawaho Winitana, Mei Erueti and Matamua Whakamoe for an investigation to be made into the ownership of Lake Waikaremoana.⁴² In a Native Affairs Department memorandum concerning the application, it was noted that 'the applicants are members of the Tuhoe tribe, and ask that the application be heard at Waikaremoana, or failing that at Taneatua.'⁴³ On 8 June 1914, a counter claim to the lake was lodged by Hukanui Watene and Rutene Tuhi of Ngati Kahungunu ki Wairoa.⁴⁴

38. AJHR, 1913, i-3, p 10; Wairoa Native Land Court minute book 25, fol 47, cited in Stevens, p 10

39. Stevens, p 12–13

40. Evelyn Stokes, J Wharehuia Milroy and H Melbourne, *Te Urewera, Ngai Iwi, Te Whenua, Te Ngahere: People, Land and Forests of the Urewera*, Hamilton, University of Waikato, 1986, p 71

41. 'Report on Forest Reserves', AJHR, 1913, c-12, p ix

42. Wiri, p 302

43. Memorandum, 25 September 1913, ma 8/4, NA Wellington, cited in Wiri, p 302

44. Wiri, p 302

5.4.1 First hearing, 1915

Despite the Tuhoe applicants' request that the court sit at Waikaremoana, the first hearing of the Native Land Court's investigation into the title of the lake was held in Frasertown, near Wairoa. Commencing on 18 August 1915 with Judge Robert Jones presiding, the court had before it seven applications for ownership served by Tuhoe and Ngati Ruapani, and a further eleven by Ngati Kahungunu. The Tuhoe–Ruapani claimants were represented by Rawaho Winitana, and the Ngati Kahungunu applicants by J H Mitchell, Tuehu Pomare and Haenga Paretipua.⁴⁵ While both claimant groups asserted that they had rights to Lake Waikaremoana on the basis of ancestry and occupation, Tuhoe–Ruapani further claimed on the grounds of conquest.⁴⁶

The hearing was dominated by the presentation of evidence pertaining to ancestral rights to Lake Waikaremoana and of the boundary between Tuhoe–Ruapani and Ngati Kahungunu. However, the first matter considered was the question raised by Mitchell of whether or not the Native Land Court had jurisdiction to investigate the ownership of lakes. In response, Judge Jones stated that:

The Court holds that it has jurisdiction to hear the matter unless it is prohibited by proclamation, it is Crown land, is taken under [the] Public Works Act or a title has already been issued. None of these things as far as the Court is aware has happened. Under these circumstances the Court will proceed but some questions may arise as to the question of whether the Native custom and usage applies to the bed of the lake. This is of course open for evidence to be given upon.⁴⁷

Although Jones was in no doubt that the matter of Lake Waikaremoana's ownership was within the Native Land Court's jurisdiction, as shall be seen, this was later strenuously disputed by the Crown in its appeal against the Native Land Court's initial decision.

The spokesperson for the Tuhoe–Ruapani claimants was Hurae Puketapu. He recited the whakapapa of several descendants of Ruapani including Tane-potakataka, Pukehore, Tuwai, and Wairau. Puketapu told the court that these people and their descendants had occupied the Waikaremoana district permanently over successive generations, and that the mana of the lake had always resided with them.⁴⁸ Puketapu then proceeded to describe the tribal boundary between Ngati Ruapani and Ngati Kahungunu to the south and east of Lake Waikaremoana. In doing this he listed a great number of places located on the boundary between Te Apiti and Pukehuru-huru that had been named by ancestors such as Pukehore and Tuwai, and expounded upon the history of each place.⁴⁹

45. Wairoa Native Land Court minute book 25, fol 47, cited in Stevens, p 14

46. Wiri, pp 303–304

47. Wairoa Native Land Court minute book 25, fol 48, cited in Stevens, p 15

48. Wairoa Native Land Court minute book 25, fols 54–62, cited in Wiri, p 304

49. Wairoa Native Land Court minute book 25, fol 62, cited in Wiri, p 304

Upon the completion of the presentation of Tuhoe–Ruapani evidence, the Ngati Kahungunu claimants were called upon to present theirs. The main spokesperson for Kahungunu was Hukanui Watene whose evidence focused upon an ancestral claim to Waikaremoana under two ancestors – Tamaterangi and Makoro. While concurring with certain points along the Huiarau boundary recited by Puketapu, Watene rejected others and proceeded to give his version. According to Wiri, the boundary given by Watene was the same one Wi Pere recounted before the Urewera commission in 1906. Effectively this was a Tuhoe–Ngati Kahungunu boundary which ignored Ngati Ruapani – relegating them to the status of a sub-tribe of Kahungunu. Upon the completion of Ngati Kahungunu’s evidence, the case was adjourned until the following year – the boundary issue being left open.⁵⁰

Subsequent to the first hearing, Judge Jones wrote to Jackson Palmer, Chief Judge of the Native Land Court, requesting that the evidence presented to the Urewera Commission be made available to the present inquiry. Palmer, in sending Jones his personal copy of the evidence, stated in an explanatory note that:

there have been many efforts by petition to parliament by both Ngati Kahungunu and Ngai Tuhoe since the decision to re-open the question of the tribal boundary each wanting to get more from the other tribe. I strongly advised the Native Affairs Committee and the Minister not to allow the matter to be re-opened as the boundary was most carefully considered by the second Commission whose decision was acted upon by the Minister in his said order which is final under section 10 of the said Act. The matter can only be reopened by Act of Parliament and this the Native Affairs Committee had always refused to recommend and have always thrown out the petitions sent up to the present time. I also refused to reopen the matter under section 50 when it was in force.⁵¹

Presumably Chief Judge Palmer could have taken this opportunity to prohibit the Native Land Court from investigating the title to Lake Waikaremoana. In her history of Lake Waikaremoana, Emma Stevens, contends that given that the chief judge resided in Wellington, he would have had ample opportunity to take up any concerns he may have had with the Crown Law Office and other Government officials.⁵²

5.4.2 Second hearing, 1916

By the time the case resumed in August 1916, Judge Jones had, with some apparent difficulty, managed to procure from the Chief Surveyor a sketch plan showing the boundaries of the lake.⁵³ At the previous hearing, Judge Jones had remarked that although ‘two telegrams had been sent and ample time allowed, the sketch has not been sent.’ This, the judge surmised, appears to have been because the Crown

50. Wiri, p 305

51. Chief Judge Native Land Court to Judge Jones (note), 3 August 1916, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, pp 16–17

52. Stevens, p 17

53. Ibid

considered itself to have a claim to the lake and the Department of Lands had therefore been advised to withhold the plan.⁵⁴

The second hearing was entirely taken up with the presentation of evidence by the Ngati Kahungunu claimants. Hukanui Watene was the first witness called. At the first hearing Watene had stated that Kahungunu based their ancestral claim to Waikaremoana on the ancestors Tamaterangi and Makoro. However, at the second hearing, Watene claimed that the basis of his ancestral claim derived from the ancestor Mahu-tapoa-nui.⁵⁵ Interestingly though, Mahu left the Waikaremoana district to reside in the Bay of Plenty after the saga with Haumapuhia, and thus may have abandoned his rights to the lake. Consequently, local Waikaremoana people, although being descendants of Mahu, do not claim ownership of the lake under his mana.⁵⁶ Other Ngati Kahungunu witnesses called included Mitchell and Peta Hema. Hema claimed Ngati Kahungunu had rights to the lake by virtue of having sold the Tukurangi, Taramarama, Waiau and Ruakituri blocks that lie to south and east of Lake Waikaremoana in 1875.⁵⁷ The hearing was adjourned on 26 August 1916.

During the second hearing the question of the Native Land Court's jurisdiction vis-a-vis Lake Waikaremoana appears to have again played upon Judge Jones's mind. On 12 August, Jones wrote to Chief Judge Palmer stating that nothing had been demonstrated to the court that denied Maori the right to have their claim heard. However, he stated that he remained open minded regarding any reason why the court should refuse to exercise its jurisdiction on this occasion.⁵⁸ Stevens considers that this letter constituted an open invitation to the Crown to appear during the proceedings and present its case before the court.⁵⁹

In closing the second hearing, Judge Jones informed the court that an application had been received from the Tuhoe–Ruapani claimants asking that the Ngati Kahungunu applicants be prevented from going onto the lake until the court's investigation had been completed.⁶⁰ Jones was referring to two letters of 15 and 20 July 1916, whereby a court order was requested to prevent Te Haenga Paretipua – the conductor of the Ngati Kahungunu case – from going upon the lake and wandering upon the lands of Tuhoe–Ruapani.⁶¹ It appears that the application was made because Ngati Kahungunu were allegedly interfering with boundary markers around the lake. Jones' response was to suggest that neither party should go on to

54. Cited in Native Appellate Court minutes, 25 March 1944, ma 5/13/78/1, rdb, vol 59, p 22354, NA Wellington

55. Wairoa Native Land Court minute book 27, fol 287, cited in Wiri, p 306

56. Wiri, p 306

57. Wairoa Native Land Court minute book 27–28, fols 331–305, cited in Wiri, pp 307–308

58. Jones to Chief Judge Native Land Court (memo), 12 August 1916, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 17

59. Stevens, p 17

60. Wairoa Native Land Court minute book 28, fol 27, cited in Wiri, p 308

61. Mahaki Tapiki, Hurae Puketapu, Matamua Whakamoe, Tuahine Noa, Wahanui Na and others to Judge Jones, 15 July 1916, ma 8/3/484, NA Wellington, cited in Wiri, pp 308–309; Mahaki Tapiki, Hurae Puketapu, Matamua Whakamoe, Tuahine Noa, Wahanui Na and others to Judge Jones, 20 July 1916, ma 8/3/484, cited in Wiri, pp 308–309

the Waikaremoana block until such time as the case was concluded. This was objected to by Tuhoe–Ruapani because they had livestock on this land and would consequently be unfairly disadvantaged. Although at the time their protests were disregarded, it is unclear to the present author as to whether or not the proposed prohibition was ever implemented or observed.⁶²

5.4.3 Third hearing, 1917

Subsequent to Kaho Hapi and 41 other Tuhoe–Ruapani petitioning Parliament for the Native Land Court’s investigations into Lake Waikaremoana to be resumed, the court resumed its inquiry on 24 July 1917, again at Frasertown.⁶³ On this occasion the recently appointed district judge, Michael Gilfedder, presided. Evidence presented again focused upon the issue of the boundary between Ngati Kahungunu and Tuhoe–Ruapani. Eria Raukura – at the time the leading tohunga of the Ringatu faith – appeared at this sitting and corroborated the evidence of Hurae Puketapu.⁶⁴ Upon the completion of the presentation of both parties’ evidence, Judge Gilfedder issued an interim decision. In doing so he observed that:

If as alleged by the Tuhoe–Ruapani people the Ngati Kahungunu had no ancestral right across the boundary line laid down by the former how come they came to be included in the Waikaremoana Block and to have Te Kiwi and Te Rara set aside for them along side or near the reserves set apart for Tuhoe and the Ureweras in the block sold to the Crown. It seems reasonable to assume that those who had right Ancestral and occupatory to the lands bordering on the lake should be considered to be the best entitled to the lake if such be found to belong to the Natives instead of the Crown. By intermarriages the various hapu are now very much mixed. It appears that if there be a stronger claim to the lake by one party over the other – the Tuhoe–Ruapani’s is the stronger and it is apparent that for the last generation the Ngati Kahungunu’s have been seeking to get a footing in the lands of others.

Both suggested boundary lines cannot be right but both may be wrong and there is no convincing evidence to warrant this Court in deciding that either of the alleged dividing lines is correct.

The Court therefore considers that each of the three contending parties has some ancestral right to this region and that the extent of area must depend upon occupation. Lists of names and evidence of occupation will be received and heard and an interlocutory judgement will be given – to be made final if it is ascertained that the lake belongs to the Maoris and not the Crown.⁶⁵

The issuing of a final freehold order was postponed pending further argument and a final decision.⁶⁶

62. Wairoa Native Land Court minute book 28, fol 27, cited in Wiri, p 309

63. Petition of Kaho Hapi and 41 others to Minister of Native Affairs, 9 April 1917, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 18

64. Stevens, p 18

65. Wairoa Native Land Court minute book 29, fol 78, cited in Stevens, p 19

66. Salmund to Under-Secretary of Native Affairs, 13 September 1917, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 20

The applicants then submitted lists of persons they wished to be included in the title. In total the court was presented with 42 lists – nine from Tuhoe–Ruapani, and 33 from Ngati Kahungunu. The court then received further evidence in support of these lists. This material was heard by Judge Jones and Matamua Whakamoe of Waikaremoana who had acted as an assessor during the 1917 proceedings. Of the 33 East Coast lists received by the court, 19 were dismissed on account of the evidence of occupation being inadequate, or because the basis of their ancestral claim was considered to be incorrect.⁶⁷ The investigation was adjourned for a third time on 3 August 1917.

Although the Crown again did not appear during the third hearing, there can be no doubt that the Government was aware that the investigation was in progress. On the same day as the Court had resumed its inquiry (24 July 1917), Sir J G Findlay informed the Native Minister, W H Herries, that he had received a request from Maori of Waikaremoana that the Crown desist from purchasing land in the Waikaremoana Block until such time as the Native Land Court's investigation into the title of the lake had been completed. Clearly both the Native Minister and the chief judge of the Native Land Court were aware of the Native Land Court's investigation of the title to Waikaremoana.⁶⁸

5.4.4 The general issue of Maori claims to lakes

In the Court's interim ruling set out above, Gilfedder alluded to a decision being made in the future as to whether New Zealand's lakes belonged to Maori or the Crown. Earlier in the day's proceedings he had stated that it was the intention of the Crown to convene a panel of Native Land Court judges in order to consider the issues and make a decision upon the matter.⁶⁹ It appears this idea had been mooted by the Solicitor General, John Salmond, earlier in June 1917. Clearly, it was hoped that such a forum would determine that as a matter of law, title to lakes resided in the Crown and not Maori. In setting out his reasoning for convening a special court, Salmond stated that it was 'unreasonable to suppose that this Treaty or legislation was intended to vest [lakes] in the Natives as exclusive owners thereof to the destruction of the interests of the Crown and the public in the navigation of such waters'.⁷⁰

In September 1917, Salmond stated that he considered the matter of the application currently before the Native Land Court vis-a-vis Lake Waikaremoana to be a suitable opportunity for the issue of Maori title to lakes to be decided upon once and for all. In a letter to the Under-Secretary of Native Affairs, Salmond expressed concern that Gilfedder was not cooperating, having gone ahead and issued an interlocutory decision awarding Maori the title to Waikaremoana.

67. Wiri, p 312

68. J G Campbell to Minister of Native Affairs, 24 July 1917, ma-mlp 1910/28/1 pt 2, NA Wellington, cited in Stevens, p 18

69. Wairoa Native Land Court minute book 29, fols 18–19, cited in Wiri, p 310

70. Salmond to Under-Secretary, Lands Department, 11 June 1917, cited in Stevens, p 20

Salmond also requested that the under-secretary be authorised to require Gilfedder to give notice to the Crown Law Office of any further order in relation to the application to the title of Waikaremoana. This was so that the Crown Law Office, by way of an appeal, could protect the interests of the Crown.⁷¹

In November 1917, the proposed meeting of Native Land Court judges to consider the issue of lake ownership was postponed until March the following year.⁷² However, the sitting of the special court was never in fact convened.

5.4.5 Fourth hearing, 1918

The Native Land Court resumed its inquiry into Lake Waikaremoana in May 1918. On this occasion, Judge Gilfedder stated that the ‘project to set up a special tribunal to settle the legal question as to whether the lakes belonged to the Natives or the Crown had ended in smoke’. Further, it was observed that ‘the Crown have had ample opportunity if they thought it fit to oppose the application of the Natives’ and that his order would soon be made final ‘as the matter cannot be hung indefinitely’.⁷³

On 6 June 1918, Gilfedder delivered his final decision, ruling that the Maori applicants were the owners of Lake Waikaremoana. As had been earlier intimated by the Court, 22 lists were settled as being final – 8 Tuhoe–Ruapani and 14 Ngati Kahungunu. The balance of shares was in Tuhoe–Ruapani’s favour: in total their eight lists comprised 389 shares, whereas Ngati Kahungunu’s totalled 146.⁷⁴

In relation to these interlocutory orders, Wiri draws attention to a discrepancy that appears to exist between them and the court’s interim decision of 3 August 1917. He considers that by stating in his interim decision of 1917 that Tuhoe–Ruapani had the stronger claim, Gilfedder clearly discredited Ngati Kahungunu’s claim. However, 14 lists of Kahungunu owners ‘still managed to worm their way in to the lake’.⁷⁵ In analysing the Court’s decision, Wiri compares the Judge’s interlocutory decision vis-a-vis each list in 1917 with his final judgement of the following year. In almost every case it was stated in 1917 that the evidence of occupation was weak if existent at all. Under the terms of the Native Land Act 1909 under which the investigation of Waikaremoana was conducted, ownership of lands before the court was to be determined in accordance with Maori custom. In the case of Ngati Kahungunu and Waikaremoana, the relative paucity of conclusive evidence of both occupation and ancestry suggests that Ngati Kahungunu’s claim was perhaps somewhat more tenuous than is implied by the extent of the shares they were awarded.⁷⁶ Wiri’s interpretation, of course, may be challenged by claimants before the Waitangi Tribunal.

71. Salmond to Under-Secretary of Native Affairs, 13 September 1917, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 20

72. Judge Palmer to Judge Jones, 14 November 1917, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 21

73. Wairoa Native Land Court minute book 29, fol 234, cited in Stevens, pp 21–22

74. ma 8/3/484, NA Wellington, cited in Wiri, p 320

75. Wiri, pp 312–313

76. Ibid, pp 314–319

Three weeks subsequent to the Court's final judgement, the Crown lodged an appeal against the decision on the basis that 'the said lake is not Native customary land but is Crown land free from Native title'.⁷⁷ Tuhoe–Ruapani also appealed against the inclusion of the 14 lists of Ngati Kahungunu owners in the final order.

5.5 The Investigations of the Appellate Court

5.5.1 Delays and adjournments, 1918–44

Although the appeals of the Crown and Tuhoe–Ruapani were lodged a matter of days after the Native Land Court's decision in relation to Lake Waikaremoana, it was not until 1944 that the Crown's appeal was heard, and a further two years in the case of Tuhoe–Ruapani's. By this time, as well as the Crown's appeal, there were a total of eight appeals from Tuhoe–Ruapani, and two from Ngati Kahungunu opposing the Tuhoe–Ruapani appeals.⁷⁸ Stevens considers that these delays were largely due to the Government's failure to proceed with the case, although initially Tuhoe–Ruapani did request an adjournment because they were engaged in trying to protect their lands to the north of the lake.⁷⁹ It appears that the lake's owners were concerned about how the Crown's Waikaremoana consolidation scheme and proposed acquisition of the Waikaremoana Block could affect their rights to the lake. The fear was that by virtue of the Crown acquiring lands contiguous with the lake, it could make a claim to the ownership of the lake bed in accordance with the doctrine of *ad medium filum aquae*.⁸⁰

In June 1921, the Native Appellate Court sat at Wairoa. On this occasion, a solicitor for the Crown, J Prenderville, asked that the Crown's appeal in relation to Waikaremoana be heard before that of the Tuhoe–Ruapani claimants, and that it be heard in Wellington. The representatives of Tuhoe–Ruapani and Ngati Kahungunu, after some discussion, agreed unanimously. The appeals of Tuhoe–Ruapani and Ngati Kahungunu were thus adjourned sine die, and the Crown appeal set down to come before the Appellate Court in August of that year.⁸¹

It appears, however, that the matter did not come before the Appellate Court again until 1922. On this occasion the hearing of the Crown's appeal was again postponed. This was because of the negotiations that were underway in connection with the Urewera consolidation scheme, and because Francis Dillon Bell, the Attorney General, was travelling overseas at the time and he did not want the case to be heard in his absence. Bell considered himself to be 'one of the few who have any considerable knowledge of the principles which guided the Courts in similar matters in the early days'.⁸²

77. ma 8/3/484, NA Wellington, cited in Wiri, p 320

78. Wiri, p 321

79. Stevens, pp 22–23

80. R J Knoght, Native Lands Department Draughtsman to Under-Secretary Lands, 21 June 1921, ma 29/4/7A, NA Wellington, cited in Stevens, p 23

81. Stevens, p 23

In 1924, it is evident that the Crown was undertaking research in preparation for the hearing of its appeal. In February of that year, Prenderville wrote to the Crown Solicitor in Gisborne, asking that he be provided with the names of any persons residing on or near to Lake Waikaremoana who might be able to furnish information pertaining to the use of the lake by Maori for fishing and boating. This information apparently was to be used in support of the Crown's contention that Maori custom did not support the notion that lakes were land covered with water.⁸³ Accordingly, arrangements were made by the Crown's Solicitor in Gisborne for his office's interpreter to undertake the investigations – for which he was to be paid a special fee.⁸⁴ The outcome of the interpreter's investigations remains unknown. Subsequently, Prenderville unsuccessfully endeavoured to arrange a fixture for the Crown's appeal to be heard the next year.⁸⁵

The files of both the Crown Law Office and Native Affairs Department suggest that the Crown's appeal was simply left to lie for the next 10 years. In February of 1935, the Solicitor General, H H Cornish, wrote to both the Attorney-General and the Minister of Native Affairs to clarify the Crown's position in relation to the appeal. He drew their attention to the existence of appeals by the Crown to decisions of the Native Land Court awarding title to both Lakes Omapere and Waikaremoana, and that an inquiry had been received from the Native Land Court asking whether or not the Crown intended to proceed with its appeals. Although he was confident the court would not dismiss the appeals for want of them being prosecuted, he urged that a decision be made to either proceed with them or that they be abandoned. Another option Cornish raised was for the Crown to circumvent the whole issue by passing special legislation vesting the beds of lakes in the Crown. In this regard, it was noted that:

The opinion of Sir Francis [Bell] is that the appeals should be gone on with. He also thinks that it is premature to legislate at this stage and that the Crown would be in no worse a position for purposes of legislation after a decision (even though adverse) of the Appellate Court than it is now.

Cornish continued, stating that although he understood the Crown wished to proceed with its appeal, it was not purely a legal issue and that matters of Government policy may also be involved.⁸⁶ Clearly the Crown was prepared to wrest title to Waikaremoana from its Maori owners by whatever means necessary.

In August 1935, the hearing of the Crown's appeal set down for that month was postponed – this time at the request of Lake Waikaremoana's Maori owners.

82. Attorney General to Cabinet (memo), 21 March 1922, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 24

83. Prenderville to Crown Solicitor, Gisborne, 15 February 1924, cl 200/13, NA Wellington, cited in Stevens, p 254

84. Crown Solicitor, Gisborne to Prenderville, 27 February 1924, cl 200/13, NA Wellington; Prenderville to Crown Solicitor, Gisborne, 4 March 1924, cl 200/13, NA Wellington, cited in Stevens, pp 254–255

85. Stevens, p 25

86. Solicitor General to Attorney General and Minister of Native Affairs, 15 February 1935, cl 200/15, NA Wellington, cited in Stevens, p 28

Apirana Ngata, on behalf of the owners, approached the Crown Law Office requesting a postponement to give the owners an opportunity to discuss the proposals forwarded by the Government at a recent hui at Ruatoki.⁸⁷

At this time the Crown clearly remained intransigent in its position that title to the lake resided with the Crown and not the Maori owners as determined by the Native Land Court. Further, as is evident in the following correspondence, the Crown appears to have been anxious not to act in any way that could be construed as an admission of Maori rights in the lake. In 1938, Whena Matamua, the secretary of the Ruapani Maori Labour Party Committee, requested from the Department of Internal Affairs details of the revenue the Crown derived at Waikaremoana from fishing licences, the Government launch, other boat hire fees, private launch fees, the Government-owned Lake House, and hunting licence fees. This information was wanted for the Labour Maori Conference that was to be held in June of 1938, where presumably the Maori claim to Lake Waikaremoana was to be discussed.⁸⁸ In relation to Matamua's request, the Acting Minister of Native Affairs was advised by his under-secretary that as:

the matter stands at present it would be unwise to . . . supply any information asked for as such an action might be interpreted as an admission by the Crown of the title of the lake being in the Natives.⁸⁹

In June 1938, Ngati Ruapani twice petitioned the Prime Minister, M J Savage, requesting that the Government dispose of its appeal in order that their title could be made permanent.⁹⁰ The petitions, however, appear to have had little effect – the hearing of the Crown's appeal being again delayed in 1939; this time because the Solicitor General was occupied with other matters.⁹¹ In 1943, H G R Mason, the Minister of Native Affairs and Attorney General, wrote to the Prime Minister in connection with both the Lake Waikaremoana and Whanganui River appeals. He noted that Maori were of the opinion that 'fabulous sums of money' could be involved were their interests confirmed, but that he considered compensation for their interests could not be of great magnitude because of the large legal costs that were being incurred by the Crown.⁹²

In a memorandum to the Solicitor General dated 24 February 1944, Prenderville set out three possible courses of action he considered that the Crown could take in the matters of the Whanganui River and Lake Waikaremoana appeals. The first option was to negotiate a compromise similar to what had been reached in the cases

87. Crown Solicitor to Chief Judge, Native Land Court, 4 August 1935, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 28

88. Whena Matamua to Under-Secretary, Department of Internal Affairs, 15 April 1938, ma 5/13/78, NA Wellington, cited in Stevens, p 28

89. Under-Secretary Native Department to Acting Minister of Native Affairs, 1 June 1938, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 29

90. Petition of Karu Rangihau and others, 13 June 1938; Petition of Natau Ihimaera and others, 13 June 1938, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 29

91. Stevens, p 29

92. Mason to Prime Minister, 29 October 1943, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 29

of the Rotorua and Taupo lakes, whereby an annual payment was made to the tribes, and the wider issue of the lakes' ownership ignored. Secondly, legislation could be passed that declared all rivers and lakes, unless expressly granted by the Crown, were and always had been vested in the Crown. The final option proposed was to simply proceed with the appeals. Prenderville contended that if the Crown's appeals were prosecuted and subsequently dismissed, the Crown would be forced to purchase the interests of the Maori owners. However, in spite of this, Prenderville expressed reluctance at seeking a further adjournment.⁹³

5.5.2 The Native Appellate Court's hearing of the Crown's appeal, 1944

Finally, on 25 March 1944, the Crown's appeals in connection with both Lake Waikaremoana and the Whanganui River came before the Native Appellate Court. Chief Judge G F Shepherd presided over a Court that included five other Native Land Court judges. The Solicitor General, H H Cornish, appeared for the Crown, assisted by J Prenderville. S A Wiren and D G B Morison represented the Waikaremoana and Whanganui owners respectively.

The session opened with the consideration of the Crown's application for yet another adjournment. In support of the Crown's application, the Solicitor General stated that an exceptional work load at the Crown Law Office, staff illness and the recent death of a Crown solicitor had meant that little preparation had been undertaken for the purposes of the present case. In response, Wiren stated that if the Crown had appeared at the time of the Native Land Court investigation into the title of Waikaremoana, it would now have been saved from incurring considerable trouble and expense. Since the lodging of its appeal, Wiren submitted that the Crown had:

not done anything to see that the Maoris received justice. By justice I mean the right of a British subject to have his case dealt with by a court and his rights determined.⁹⁴

Wiren continued, informing the court that the owners would be prejudicially affected were a further adjournment granted. This was because at the time, the Public Works Department was interfering with the lake – modifying it for the purposes of hydro-electric generation. Until such time as the owners were awarded a freehold title, the owners could receive no remedy. So long as the lake remained customary land, only the Crown could bring charges of trespass.⁹⁵ The court duly ruled that the Crown's appeal in relation to Waikaremoana would be heard on 4 April.

Convening the following month, the court proceeded to hear the Crown's opening submission presented by Cornish. This focused primarily on the aspect of the Crown's appeal concerning jurisdiction. His proposition was that the Native

93. Prenderville to Solicitor General (memo), 24 February 1944, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 30

94. Native Appellate Court minutes, 25 March 1944, ma 5/13/78/1, rdb, vol 59, p 22,340, NA Wellington,

95. Ibid, p 22,341

Land Court's 1918 decision was a nullity because Judge Gilfedder had failed to determine upon 'proper evidence' that the land subject to the investigation was customary land.⁹⁶ In support of this he cited the Court of Appeal's decision in *Tamihana Korokai v the Solicitor General* concerning Lake Rotorua. Cornish quoted the decision, where it stated that:

It is a question for the Native Land Court in the first instance to determine upon proper evidence whether any particular piece of land is native customary land or not, and in ascertaining this it may determine whether or not the area described in the application as Lake Rotorua or any part of it is or is not a navigable lake and if so whether according to native custom the Maoris were and are the owners of the bed of such lake or whether they had and have merely a right to fish in the waters thereon.⁹⁷

Cornish then proceeded to refer to the judgement of Justice Edwards in the above case. In support of the notion that the extent of customary title is necessarily limited, Cornish drew attention to Edwards' view that there was 'an inherent probability that there was no intention either by the Treaty of Waitangi or by the statutes to cause detriment to the public' by way of depriving the Crown of important rights such as navigation. This, Cornish argued, could be extended to include hydro-electric development such as was now an issue in the case of Waikaremoana.⁹⁸

Cornish contended that the Department of Lands and Survey's refusal to supply a sketch plan of the lake was clear evidence that the Crown considered it had a claim to the lake. Further, quoting from the minutes of the land court's investigation of the lake's title, it was demonstrated that there was an awareness on the part of the judge of the important legal questions involved in the claim to Lake Waikaremoana. The Crown, according to Cornish, adopted the position that until such time as the generic legal questions had been settled, there was no need to supply the necessary plan. However, in proceeding with the investigation, the court had unfortunately 'put the cart before the horse' in order 'to save the natives inconvenience'. Apparently the owners had arrived at Frasertown in anticipation of the hearing going ahead – 'no doubt at some inconvenience and expense, and the court did not like to disappoint them.'⁹⁹

The Solicitor General then returned to the matter of the need for determinations of title by the Native Land Court to be based upon 'proper evidence' as the Court of Appeal had ruled in *Tamihana Korokai v the Solicitor General*. He contended that in the case of Lake Waikaremoana, the evidence upon which the court made its interlocutory decision in favour of the Maori owners was in fact 'improper'. It was argued by Cornish that the only piece of evidence that was received by the court that supported the idea that Maori had a conception of the customary ownership of the bed of Waikaremoana (as required by *Tamihana Korokai v the Solicitor*

96. Ibid, p 22,352

97. Ibid, p 22,353

98. Ibid, p 22,352

99. Ibid, p 22,354

General), was given by Hukanui Watene. However, Watene had given this evidence under cross-examination by H T Mitchell. No mention was made of the customary Maori ownership of the lake bed in Watene's original 'spontaneous and untutored' evidence. Further, Cornish pointed out that Mitchell was representing one of the other Kahungunu claims, and hence had an interest in demonstrating the customary ownership of the lakebed identical to that of Watene.¹⁰⁰

Another position adopted by the Crown in its appeal that it had forwarded in the case of other North Island lakes, was that Maori had only a piscary right in relation to Waikaremoana, and that this did not equate to the ownership of the lake bed. Cornish submitted:

that strict proof of a custom is necessary . . . which implies, if it exists, a considerable power of abstract reasoning. We Europeans reached this conception . . . of ownership of the bed of a lake after many centuries of experience, centuries of experience which of course, the Maori never had. We did not come to this conception all at once. It is an artificial conception and therefore one will expect proof of it to be strict.

Cornish continued that in the investigation of the Native Land Court concerning Lake Waikaremoana:

The Maoris had an opportunity of proving the usage. They were told [by the Court that] they had to prove it not once but twice or thrice. They did not do it. All the circumstances point to the fact that they could not do it. Therefore the result is the land, if it is land, remains free of native customary title. Therefore the equitable as well as the legal interest is in the Crown . . . [and] the Native case fails by its own infirmity.¹⁰¹

Thus according to the Crown, the determination of the Native Land Court in the matter of the title to Lake Waikaremoana was a nullity because it was made upon improper evidence. Further, if this was so, it was argued that the appeal was in fact outside of the Appellate Court's jurisdiction, and that therefore it should go before the Supreme Court.¹⁰²

Cornish informed the court that the aspects he had thus far argued were only a part of the Crown's appeal, and that further time would be required to prepare its 'affirmative appeal'. These aspects presumably dealt with the substantive legal issues. In response, the Chief Judge stated that 'after a lapse of years the matter had assumed very great importance' and that 'it was up to the Crown in the past 26 years to initiate proceedings'. The Crown, he stated, 'had no excuse for not having done so.'¹⁰³

S A Wiren, on behalf of the lake's owners, then responded to the Crown's submission, expressing surprise that after such a long delay the Crown was adopting the position that the 1918 decision was a nullity. In disputing the Crown's

100. Ibid, pp 22,355–22,356

101. Ibid, pp 22,357–22,358

102. Ibid, p 22,362

103. Ibid

submission that there was no admissible evidence of ownership, Wiren stated that the ‘whole evidence was redolent with the uses that Maori made of Lake Waikaremoana.’ He contended that ‘the lake was much more valuable than anything else’ the Maori owners had, and that there was evidence before the Native Land Court that:

they used it for fishing, for trapping birds, that they had their canoes on it, that their forts were around it, and . . . that they used this lake for purposes of attack and defence.¹⁰⁴

Wiren then proceeded to detail some of the evidence presented during the Native Land Court’s investigation in connection with uses made of Lake Waikaremoana.¹⁰⁵

Next Wiren addressed the Crown’s contention that Watene’s evidence given under cross-examination was inadmissible because Mitchell and Watene did not have conflicting interests. He asserted that the Native Land Court could regulate itself in terms of what was acceptable evidence, and pointed out that the Supreme Court could cross-examine upon matters not initially mentioned. Thus, Wiren opined, it was quite proper for Mitchell to have questioned Watene in such a way as to better establish his case.¹⁰⁶ The contention that the claimants only held a piscary in Lake Waikaremoana was also summarily dismissed.¹⁰⁷ Wiren argued that rather than being a right to fish in another person’s lake, the claimants’ right of fishery derived from their ownership of the lake bed. British case law was cited in support of this – at English common law, the owners of a lake have exclusive rights to all fish within their lake. Wiren also contended that, in the matter before it, the Native Land Court could have regard to decisions made in relation to other North Island lakes (such as Wairarapa and Rotorua) where Maori had been found to be the customary owners.¹⁰⁸

Finally, Wiren pointed out that there existed no presumption in English law as to the Crown ownership of lakes, and that unless there had been a cession, grant or purchase, the Crown had no rights. Given that no evidence of any such Crown right was presented in the case of Lake Waikaremoana, Wiren submitted that the judge ‘was entitled to rely on the evidence which was before him given by the Maoris, and that [this] was quite sufficient and established a prima facie case.’¹⁰⁹ The court then proceeded to deliver its decision. It was stated that:

The Crown was aware of the application to the Court but for some reason . . . its representatives refrained from attending Court or offering any evidence of title in the Crown. Under these circumstances, the Court had before it the uncontradicted evidence of the Natives’ witnesses. Having examined the claims and the

104. Ibid, p 22,364

105. Ibid, pp 22,365–22,366

106. Ibid, p 22,365

107. A piscary is the right to fish in another person’s waters. Peter Spiller, *Butterworths New Zealand Law Dictionary*, 4th edition, Wellington, 1995, p 219

108. Ibid, pp 22,366–22,367

109. Ibid, pp 22,368–22,369

uncontradicted evidence adduced at the hearing, and after giving full consideration to the submissions of the Solicitor General in this matter, we are of the opinion that sufficient material was presented to the Court to justify its conclusion that at the time of the signing of the Treaty of Waitangi, Lake Waikaremoana was land held by Natives under their customs and usages and, therefore, that the Court acted within its jurisdiction in making its order.¹¹⁰

The hearing was adjourned until 21 April 1944 to allow the Solicitor General to apply either for a writ of certiorari or a writ of prohibition in the Supreme Court.¹¹¹

5.5.3 The position of the Crown Law Office

In her report, Stevens details various miscellaneous papers pertaining to the Crown's appeal on the case of title to Lake Waikaremoana. These papers are significant in that they show the arguments of the Crown Law Office that purported to support the notion that the Crown owned lakes in New Zealand.

One paper held that the Treaty of Waitangi did not extend to Maori a guarantee of their exclusive possession of navigable and tidal waters. Such a guarantee, the paper held, would have potentially paralysed the water traffic of the country and was thus forbidden in the public interest which 'required the reservation of these "lands" in the interests of all.'¹¹² The same paper also noted that since 1898 the Crown had exercised rights of ownership over Lake Waikaremoana; having stocked it with fish, granted fishing licences, and employed rangers to look after the fishery.¹¹³ Further, a draft of the Crown's appeal stated that these rights of the Crown had been strengthened by its purchase of the Taramarama, Tukurangi, Waiau, and Waikaremoana blocks.

In this draft, the position was argued that in its 1918 decision, the Native Land Court had been wrong in its belief that Maori custom recognised separate property in the bed of a navigable lake. Further, even if Maori custom did make such a recognition, it had not been legally recognised or validated under the Native Land legislation:

Native title is not in itself entitled to legal recognition. Nor has the Treaty in itself any legal force or efficacy. Native custom, Native title and the Treaty are in force in law only in so far as they have been given legal validity by the Native land legislation of the colony.

It was stated that only evidence of fishing and marginal occupation had been presented to the court. And, that such usufructuary rights should not be confused

110. Ibid, p 22,377

111. A writ of certiorari requires proceedings be removed from an inferior court to a superior court for the purposes of review. An order of prohibition prevents an inferior court from exercising any jurisdiction that by law it is not empowered to exercise. Spiller, pp 44, 235

112. File note, cl 200/7, NA Wellington, cited in Stevens, p 35

113. Ibid

5.5.4 Inland Waterways: Lakes

with ownership rights as defined in England, where the concept of a Crown grant was a key determinant. As the draft appeal stated, the:

. . . English idea of ownership of land beneath water is essentially a feudal idea and is an abstraction that was made possible only by the theory of a Royal grant of such land to the owner of the upland adjoining the water.

This contrasted with the Maori view of a lake as being a body of water rather than as land covered with water. Consequently it was argued that ‘a people which thought of a river or lake not of land but in terms of water and the space covered by water could not possibly have the conception of ownership of land lying beneath the water.’ It was also contended by Crown Law Office officials that the motivation of the Maori seeking title to Lake Waikaremoana was simply to cause inconvenience to the Pakeha population – it being held that there was no Native interest other than ‘the interest of preventing the public from navigation, recreation and European fisheries.’¹¹⁴

5.5.4 The Native Appellate Court’s decision

On 20 September 1944, the Native Appellate Court delivered its final judgement in relation to the Crown’s appeal against the Native Land Court’s 1918 decision as to the title of Lake Waikaremoana. In this decision, the chief judge stressed how the issues before the court had to be considered in the context of New Zealand as opposed to English law. He observed that:

The questions of the application of the *ad medium filum* rule, highway of necessity and the effect of conveyances and memorials of ownership are of great interest, but are not applicable to the present case. There is an abundance of authority that in New Zealand the rights of Natives are safe-guarded without reference whatsoever to the incidence of English law. The Natives successfully established their title to Lake Waikaremoana once they satisfy the Court that it was held by them in accordance with their ancient customs and usages unless it be shown that this title has been extinguished. This cannot be shown by the mere assertion of title by the Crown but satisfactory proof must be adduced to the Court. In the course of years, many rules and presumptions have been incorporated in English law but we are of the opinion that in New Zealand these are of no force or effect if it is found that they in any way conflict with the customs and usages of the Maori people. We consider that these rights once established are paramount and freed from any qualification or limitation which would attach [to] them if the rules and presumptions of English law were given effect to.¹¹⁵

The court continued, stating that it considered the matter before it to be ‘very simple’:

114. Draft of the Lake Waikaremoana appeal, cl 200/11, NA Wellington, cited in Stevens, pp 35–36

115. cl 200/16, NA Wellington, cited in Stevens, p 37

We have already decided that Lake Waikaremoana can be considered as native customary land and that sufficient evidence was adduced to the Native Land Court upon which it could proceed to make freehold orders. We can find nothing in the submissions of the Solicitor General to vary this view and the appeal of the Crown must fail.¹¹⁶

The judgement of the Appellate Court was still not accepted by the Crown Law Office. Shortly after the decision on the Crown's appeal was issued, the Solicitor General wrote a paper outlining the issues in dispute in general terms. A major pragmatic concern appears to have been the possible need to compensate the Maori owners. It was stated, that if comparisons were made between Waikaremoana and the Rotorua and Taupo settlements, it would be said that Waikaremoana was of greater public value – presumably because of the hydro-electric development in the district. It was noted that the payment of an annuity of £2000 to the owners of Waikaremoana in exchange for them surrendering their rights to the bed had already been proposed.

The Solicitor General also refused to accept the Appellate Court's determination that Lake Waikaremoana was customary land, urging that the 'decision ought to be got rid of.' Essentially it was argued by Cornish that upon 'the proclamation of British sovereignty, all the soil of New Zealand was vested in the Crown' and that the 'guarantees under the Treaty are good in law only so far as they have been recognised by Parliament.' Further, it was stated that Parliament was quite entitled 'to legislate in derogation of the Treaty as it has done in respect of fisheries', and that the Treaty 'cannot be appealed to as a source of rights'.¹¹⁷

Incredibly then, in spite of the Native Land Court's 1918 decision and the subsequent upholding of that decision by the Native Appellate Court – made up of six Native Land Court judges – the Government still disputed that Lake Waikaremoana was Maori customary land.

5.5.5 The Native Appellate Court's hearing of the Ngati Ruapani appeals, 1946

Between 8 May and 16 May 1946, the Native Appellate Court sat again to hear the appeals pertaining to the lists of owners settled by the Native Land Court in 1918. On this occasion D G B Morison presided as chief judge, Wiren again appeared for the Tuhoe–Ruapani appellants and H E McGregor represented the Ngati Kahungunu respondents. By this time, with the exception of Pita Tauaho, all of the original Ngati Ruapani appellants had died.¹¹⁸

Wiren proceeded to systematically go through all of the lists that Tuhoe–Ruapani appellants objected to, detailing the grounds upon which they were opposed.¹¹⁹ Wiri considers that the Tuhoe–Ruapani objections to the lists of Ngati Kahungunu

116. Ibid, cited in Stevens, p 38

117. Report dealing in general terms with the issue in dispute, cl 200/10, NA Wellington, cited in Stevens, p 39

118. Extract from Tairawhiti Native Appellate Court minute book 27, RDB, vol 59, p 22,379

119. Ibid, pp 22,379–22,386

owners were: that there was inadequate evidence of occupation to justify their inclusion; that there was a tribal boundary between Tuhoe–Ruapani and Ngati Kahungunu well to the south, west and east of Lake Waikaremoana; that Ngati Ruapani are a separate tribe from Ngati Kahungunu who were conquered by Tuhoe; and that the lists of Ngati Kahungunu had been included by the Government in the early blocks because of their assistance to the Crown during the Hauhau wars.¹²⁰

On 22 April 1947, the court delivered its decision in relation to the Tuhoe–Ruapani appeals. Chief Judge Morison observed that:

the Court is irresistibly drawn to the conclusion that Ngati Kahungunu and Ngati Ruapani are not separate *tribes* but that Ngati Ruapani is a powerful hapu of the Ngati Kahungunu tribe. This being so, it follows that there can be no *tribal* boundary between N’Ruapani hapu and N’ Kahungunu tribe. This Court is satisfied that the tribal boundary between Ngati Kahungunu and Tuhoe is along the Huiarau range set up by Wi Pere and found by the Commission in 1906. [Emphasis in original.]

Therefore the court considered:

that no Ngati Kahungunu should be excluded from the list of owners solely upon the ground that he is a member of a particular tribe, and unless the appellants can satisfy the Court that the Native Land Court was not justified in finding that they . . . had the necessary ancestral or occupatory rights the appeals of the Ngati Ruapani must fail.¹²¹

In arriving at this decision it was clear that the court had placed much emphasis upon the occupation of lands abutting the lake. The Native Land Court had investigated the ownership of lands to the south of the lake in 1875, awarding them to Ngati Kahungunu who promptly sold them to the Crown. It would appear that these lands in fact belonged primarily to Ngati Ruapani.¹²² This was accepted by the Appellate Court as being adequate proof of the ownership of these lands, and sufficient justification for the inclusion of Ngati Kahungunu in the lists of owners of the lake.¹²³ Stevens considers that the further recognition of Ngati Kahungunu rights in the Waikaremoana district by the Native Appellate Court in 1947 can be seen as having compounded the earlier injustice Ngati Ruapani suffered when Ngati Kahungunu sold Ruapani tribal lands to the south of the lake.¹²⁴ This question has yet to be considered by the Waitangi Tribunal.

On 10 September 1947, the judgements of the Appellate Court rejecting the appeals of both the Crown and Tuhoe–Ruapani were finalised. Thus under section 65 of the Native Land Act 1931, Lake Waikaremoana was ruled to be the property of the 354 Maori owners.¹²⁵

120. Wiri, pp 323–324

121. Extract from Tairawhitit Native Appellate Court minute book 27, RDB, vol 59, p 22,410

122. See O’Malley for a detailed discussion of this.

123. Extract from Tairawhiti Native Appellate Court minute book 27, RDB, vol 59, p 22,410

124. Stevens, p 41

125. ma 8/3/484, NA Wellington, cited in Wiri, p 326

5.6 Compensation

Once the question of the ownership of Lake Waikaremoana had been settled, attention turned to the issue of how to get Maori to surrender their rights to the lake, and the extent of compensation they should receive for such a cession. This question has yet to be considered by the Waitangi Tribunal.

5.6.1 Negotiations for compensation

According to the Minister of Native Affairs, J G Coates, the possibility of the Maori owners of Lake Waikaremoana receiving compensation for their interests was first raised back in 1921. On this occasion the owners offered to surrender their rights if the Government granted a sum of money for educational and other purposes.¹²⁶ It appears, however, that the matter was not actually considered by the Government again until 1947 – subsequent to the 1918 land court decision being upheld by the Native Appellate Court.

In January 1947, a conference was held in the office of the Prime Minister, Peter Fraser, to discuss matters relating to Lake Waikaremoana. Fraser expressed the opinion that although the Appellate Court decision was erroneous, he believed the matter of compensation needed to be dealt with. G P Shepherd, the Under-Secretary of Native Affairs and the Chief Judge of the Native Land Court who had presided in the Appellate Court hearing over Lake Waikaremoana, opined that because the lake was now private property, the Government would be required to negotiate a purchase. It appears that the Attorney-General, H G R Mason, had offered the owners £1000 as an annual grant on behalf of the Government, but that Rangī Mawhete of the Maori Land Court had informed the Government that a figure of £6000 was closer to what the owners now wanted.¹²⁷

In 1949, the matter of compensation for the owners of Lake Waikaremoana was again brought to Fraser's attention – this time in his capacity as the Minister of Maori Affairs. In a memorandum from his under-secretary, Fraser was informed that the owners were interested in coming to an arrangement with the Government with regard to the future use of the lake for the purposes of hydro-electric generation, fishing and tourism.¹²⁸ Later that year, representations were made to the Minister at the Wairoa Hotel. H E McGregor, representing people who appear to have been mainly Ngāti Kahungunu owners, informed Fraser that following discussions with Tuhoe, the owners had decided to propose that the Government effect a settlement similar to that in the case of Lakes Taupo and Rotorua whereby an annuity was to be paid to the owners in perpetuity. Apparently upon being consulted, Wiren, the solicitor acting for the Tuhoe owners, had suggested that an annual payment of £1000 be made.¹²⁹

126. J G Coates to A T Ngata, 13 June 1921, ma 29/4/7A, NA Wellington, cited in Stevens, p 43

127. Notes of a conference held in the Prime Minister's room, 29 January 1947, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 43

128. Under-Secretary of Maori Affairs to Minister of Maori Affairs, 1 February 1949, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 44

In the same year, however, it is apparent that moves were being entertained by the Crown to quash the earlier decisions of the Native Land Court and Native Appellate Court. The Solicitor General had proposed filing proceedings with the Supreme Court to obtain a writ of certiorari in order that the Lake Waikaremoana Court decisions could be annulled. However, given that the Government was considering passing legislation governing Maori claims to lakes and rivers, the papers were not filed. But although the proposed legislation did not go ahead, the matter of title to Lake Waikaremoana was not referred to the Supreme Court despite such proceedings being initiated in respect of the Whanganui River. The Under-Secretary of Maori Affairs was duly cautioned that in any talks with the owners of Lake Waikaremoana regarding possible compensation, the owners should be made aware that the legal issues relevant to the case could still be revisited.¹³⁰

In August of 1949, Fraser met with Wiremu Matamua and Sam Rurehe at Nuhaka (near Mahia). Fraser, in response to a request from Matamua and Rurehe that the lakes' owners be paid an annuity of £10,000, informed them that cabinet would never agree to such a sum. However, he informed them that he did not favour an appeal being made to the Supreme Court in the matter of Lake Waikaremoana, and that he would ask the Government to accept the Appellate Court's decision. Upon being informed by Matamua that Maori in the area owned little land, Fraser raised the possibility that land could be exchanged for the lake. He undertook to make inquiries as to what lands were available in the district.¹³¹

Subsequently a meeting was convened in October 1949 at Kohupatiki, Hastings, attended by a delegation from the Department of Maori Affairs. In opening the meeting, Turi Carroll of Ngati Kahungunu stated that the owners wanted the Government to offer them a price for their rights. McGregor, on behalf of the owners, informed the delegation that the owners had decided to waive their individual rights of ownership, and that any funds procured would be used for the general benefit of the people. It was hoped that such monies could be used to alleviate the poverty of those living near the lake – by providing housing, improving marae, and acquiring land suitable for farming. It appears that the idea forwarded in August by Fraser of the lake being exchanged for land was rejected by those present in favour of an annual payment in perpetuity.

In proceeding to discuss a possible rental, the owners urged that the Government consider the lake's scenic value and the destruction of their fish feeding grounds caused by the lowering of the lake. McGregor proposed £6000 as a tentative figure. The Minister, although assuring the meeting that he was anxious to settle their claim, stated that nothing could be done until a basis for the claim was established.¹³² Presumably by this he meant a proper valuation of the lake from which a rental could be computed.

129. Notes of representations made to the Minister of Maori Affairs at the Wairoa Hotel, 16 June 1949, ma 5/13/78 pt 2, NA Wellington, cited in Stevens, p 44

130. Memorandum for the Under-Secretary of Maori Affairs, 11 July 1949, ma 5/13/78 pt 2, NA Wellington, cited in Stevens, p 44

131. Notes of an interview with the Minister of Maori Affairs, 27 August 1949, ma 5/13/78 pt 2, NA Wellington, cited in Stevens, p 45

Despite Fraser's undertaking in August 1949 to get the Government to accept the Native Appellate Court findings in connection with Lake Waikaremoana, the 1950s again saw the prospect of the case being relitigated. In 1950 the Maori Land Court requested that the chief surveyor supply a plan of the lake to enable the freehold title of Lake Waikaremoana to be completed.¹³³ But before the plan was supplied, the Under-Secretary of Maori Affairs instructed the Solicitor General to file the necessary proceedings to prevent this happening.¹³⁴ The following year at Ruatoki, another representation was made to the Minister of Maori Affairs asking that the matter of compensation for Lake Waikaremoana be finalised.¹³⁵

In 1954, the Crown filed a statement of claim with the Supreme Court in relation to Lake Waikaremoana. The statement requested that a writ of certiorari be served upon the Chief Judge of the Maori Land Court by which the papers relating to Lake Waikaremoana could be obtained, and ultimately the courts' decisions could be quashed. Further, it was asked that the chief judge be prevented from taking any steps towards giving effect to the decisions.¹³⁶ However, later in the same year, the Crown abandoned the proceedings.¹³⁷

Negotiations for compensation resumed in 1957, by which time it appears that the owners had finally received the freehold title to the lake. In that year, Wiren, on behalf of the owners, proposed that an annuity of £4500 be paid to Lake Waikaremoana's owners. Of this figure, £1500 represented payment for past uses of the lake made by the Crown.¹³⁸ The Department of Maori Affairs responded that the matter required consideration by the Department of Lands and Survey, and the State Hydro Electric Department. Further they advised that comparisons with the Rotorua and Taupo cases were not particularly relevant.¹³⁹

Throughout the late 1950s, the Government continued to deliberate over whether the lake should be acquired, and if so, what constituted an appropriate value for the Maori owners' interests. In 1959 the Director General of the Department of Lands and Survey stated that he had considerable difficulty in actually finding a substantial reason why the Government should even buy the lake. Although disagreement appears to have existed between Lands and Survey and the Electricity Department as to the value of the lake, in 1959 the sum of £10,000 for the purchase of the lake bed, plus £2000 for the islands in the lake, was recommended in a paper presented to Cabinet.¹⁴⁰ In a subsequent Cabinet meeting of June 1961, the purchase

132. Notes of representations made to the Right Honourable Peter Fraser, Minister of Maori Affairs, 8 October 1949, ma 5/13/78 pt 2, NA Wellington, cited in Stevens, p 46

133. E B Corbett, Minister of Maori Affairs to Apirana Ngata, 12 July 1950, ma 5/13/78 pt 2, NA Wellington, cited in Stevens, p 46

134. Under-Secretary Maori Affairs to Solicitor General (memo), 5 July 1950, ma 5/13/78 pt 2, NA Wellington, cited in Stevens, p 46

135. Notes of an interview, 16 April 1951, ma 5/13/78 pt 2, NA Wellington, cited in Stevens, p 46

136. Statement of claim, cl 200/1, NA Wellington, cited in Stevens, p 15

137. Stevens, p 47

138. Secretary of Maori Affairs to Minister of Maori Affairs, 27 August 1957, ma 5/13/78 pt 2, NA Wellington, cited in Stevens, p 47

139. Stevens, p 47

of the lake bed, the islands within Lake Waikaremoana, and 15 Maori-owned reserves abutting the lake for a lump sum of £25,000 was approved.¹⁴¹

A meeting was then held in Wellington in August 1961 between Wiren; J R Hanan, the Minister of Maori Affairs; and R G Gerard, the Minister of Lands. Wiren inquired as to how the figure of £25,000 had been arrived at, and informed the Ministers that the owners favoured the payment of an annuity in perpetuity rather than a lump sum payment. In response to his question as to why the Crown wanted to purchase the Maori-owned reserves, Wiren was told that this would enable the development of tourist resorts, and ‘clean up’ Crown ownership of lands in the area. Gerard stated that he considered the islands should be a part of the national park.¹⁴²

A proposal was then made by the owners whereby an annual payment of £3250 was to be made to a trust board. This figure was to include the islands but their title would remain with the Maori owners. Cabinet duly rejected the proposal and made a counter offer of a one-off payment of £30,000 for the sale of the lake bed and the islands excluding Patekaha. This island appears to have been excluded because of it being a Ngati Ruapani urupa. The proposed purchase also no longer included the reserves. At a meeting of 72 owners held at Wairoa in November 1966, the Government’s offer was unanimously rejected.¹⁴³

In October 1968, the Valuer-General supplied a special valuation for Lake Waikaremoana. The report covered the lake’s history, lake levels, fishing revenue, boating facilities, and tourist attractions. In arriving at the valuation, regard was had for the value of the lake itself, improvements, and land that had been exposed by the lowering of the lake’s level.¹⁴⁴ In total the lake was valued at \$143,000. This figure did not include the value of the water in the lake because pursuant to section 306 of the Public Works Act 1928, the sole right to use water for the purposes of generating electricity was vested in the Crown.¹⁴⁵

Cabinet subsequently authorised negotiations for the purchase of the lake bed for \$143,000. However, at a meeting of owners held at Wairoa in September 1969, the offer was rejected. Instead the owners proposed a 50-year lease with a perpetual right of renewal and with the rental set at six percent of the lake’s valuation. The owners favoured the lease being backdated to 1957.¹⁴⁶

140. Director General, Department of Lands and Survey to Secretary of Maori Affairs, 22 January 1959, ma 5/13/78 pt 3, NA Wellington, cited in Stevens, pp 47–48; Secretary of Maori Affairs to Minister of Maori Affairs (memo), 28 July 1959, ma 5/13/78 pt 3, cited in Stevens, p 48

141. Minister of Maori Affairs to Wiren, 21 July 1961, ma 5/13/78 pt 3, NA Wellington, cited in Stevens, p 48

142. Notes of a deputation held in Minister of Maori Affairs’ rooms, 9 August 1961, ma 5/13/78 pt 3, NA Wellington, cited in Stevens, p 48

143. Secretary of Cabinet, Prime Minister’s Office to Minister of Lands, 9 April 1962, ma 5/13/78 pt 3, NA Wellington, cited in Stevens, p 49; Statement of proceedings of meeting of assembled owners, Lake Waikaremoana block, 16 November 1966, ma 5/13/78 pt 3, cited in Stevens, p 49; Stevens, p 49

144. A lowered lake level had been maintained since around 1946 as part of the Waikaremoana hydro-electric generation scheme.

145. Stevens, pp 50–51

146. *Ibid*, p 51

This offer was duly put to the Secretary of Maori Affairs and Assistant Director General of Lands at a meeting with the committee of owners the following year. The Assistant Director General argued that were the lease backdated to 1957, the owners would have to settle for a lower rental, and that given the rent was to be fixed for 50 years, this would ultimately be to the owners' disadvantage. Thus the owners agreed to a lease being granted from 1 July 1967, with the rental set at 5½ percent of the lake's value. The owners were assured that their rights of access to the lake would not be affected.¹⁴⁷ The lease arrangement was confirmed in a letter to the owners' lawyers from the Minister of Lands in May 1970. The lease was to include the lake bed, islands within the lake excluding Patekaha, and the dry land between the water's edge and the title boundary.¹⁴⁸ The agreement afforded Maori no fishing rights above and beyond those of the general public. Although it appears that fishing rights were not an issue for the owners in the negotiations, the present author is not certain on this point.

5.7 The Lake Waikaremoana Act 1971

Throughout 1970, much correspondence occurred between officials of the Department of Lands and Survey, the Department of Maori Affairs, and counsel for the Lake Waikaremoana owners concerning the lease of Lake Waikaremoana and the form that the necessary legislation validating the lease should take. One of the major issues appears to have been whether a trust board should be specially constituted to administer the rental received, or whether existing trust boards should be used. The owners, however, strongly favoured using the existing Wairoa and Tuhoe Maori Trust Boards. Rent paid in respect of the lease would be divided between the two boards according to the number of shares of the owners affiliated with each. Also, adding 'Waikaremoana' to the names of each trust board was mooted as a possibility.¹⁴⁹

Finally on 21 August 1971, a deed executing the lease was signed by the Minister of Lands, Duncan MacIntyre, and Sir Turi Carroll along with the other nine members of the owners' committee. The agreement reached was that the lake be leased to the Urewera National Park Board for a period of 50 years with a perpetual right of renewal. The annual rental was initially set at 5½ percent of the Government valuation, with provision for it to be reviewed every 10 years. The lease was to be backdated until 1 July 1967.¹⁵⁰

The legislation to confirm the lease was introduced to Parliament in November 1971. During the debate concerning the bill, the Maori members stated their approval as to the extent of consultation that had been undertaken with the Maori

147. Assistant Director General of Lands to Minister of Lands, 12 May 1970, ma 5/13/78 pt 4, NA Wellington, cited in Stevens, pp 51–52

148. Minister of Lands to Messrs Lusk, Willis, Sproule and Gallen, 14 May 1970, ma 5/13/78 pt 4, NA Wellington, cited in Stevens, p 52

149. Stevens, pp 54–57

150. Wiri, pp 329–330

owners in the negotiation of the lease. The Lake Waikaremoana Act was passed on 16 December 1971. Under sections 5 and 6 of the Act, the Tuhoe and Wairoa Trust Boards became respectively the Tuhoe–Waikaremoana Maori Trust Board and the Wairoa–Waikaremoana Maori Trust Board. Section 14 held that rent payable under the lease was to go to the two trust boards according to the respective shares of their beneficiaries. As per the agreement, the Act made no mention of the owners' fishing rights.

Subsequent to the passing of the Act, there appears to have been some confusion amongst the Lake Waikaremoana owners as to how it would be implemented. According to Judge K Gillanders Scott of the Maori Land Court, Rotorua, 'the only thing certain is the uncertainty of thinking and understanding on the part of probably the majority of the Maori persons concerned with Lake Waikaremoana.' While a number of owners expected to receive payment according to their share holding; others understood that the Act precluded the distribution of rent to individuals. Another point of confusion identified by the judge was whether the lake bed remained the property of the owners; or whether it now formed part of the assets of the two trust boards.¹⁵¹

After discussion between the District Land Registrar, the Maori Trustee, and the Gisborne Maori Land Court, it appears that by 1973 it had been decided, at least by the Department of Maori Affairs and the Maori Land Court, that the lake bed was now to be regarded as European freehold land.¹⁵² This was reasoned by the registrar of the Gisborne Maori Land Court on the basis that no Maori now owned the lake as the freehold was now vested in the Wairoa–Waikaremoana and the Tuhoe–Waikaremoana Maori Trust Boards.¹⁵³ In 1973, the Maori Land Court in Gisborne advised that it no longer held the title to the lake, and that any inquiries should be directed to the trust boards.¹⁵⁴

The view that the lake's freehold was now vested in the trust boards. however, was disputed by the lawyers for the Tuhoe–Waikaremoana Maori Trust Board. They considered that a correct interpretation of the Lake Waikaremoana Act was that the owners only intended the revenues from the lake to go to the trust boards, and not the ownership of the lake itself. It was maintained that the retention of ownership was important for the owners because of the 'special feeling Maori people have for their ancestral land'.¹⁵⁵ The Maori Trustee's office saw things somewhat differently – specifically that the intention of the Act was to vest the lake bed in the trust boards absolutely and not in trust. The owners, upon the assent of the Act, became beneficiaries of the trust boards whose primary object was to deal with the rental from the boards' assets.¹⁵⁶

151. Judge Gillanders Scott to Registrar, Maori Land Court Gisborne, 2 May 1973, ma 8/3/484 vol 2, NA Wellington, cited in Stevens, p 60

152. Stevens, pp 60–61

153. Attewell for Registrar, Gisborne Maori Land Court to the Secretary, Tuhoe–Waikaremoana Maori Trust Board, 27 March 1974, ma 8/3/484 vol 3, NA Wellington, cited in Stevens, p 61

154. Stevens, p 61

155. Urquhart, Roe and Partners to the Registrar, Gisborne Maori Land Court, 16 May 1974, ma 8/3/484 vol 3, NA Wellington, cited in Stevens, p 62

Because the lake forms a part of the Urewera National Park, the management of Lake Waikaremoana is the responsibility of the Department of Conservation.

5.8 Conclusion

Like so many North Island lakes, Waikaremoana has been the object of a complex and drawn-out legal wrangle as to whether it is the property of Maori or the Crown. But unlike many other lakes in New Zealand, the impetus for the Crown seeking the ownership of Waikaremoana was not in order to gain control of its catchment so as to be able to bring swamp land into production and reduce the incidence of flooding. Instead the Crown's campaign was driven by other aspects of a supposed 'national interest' – the preservation of scenery and the generation of electricity. But underpinning these rationales was the imperative, evident in the case of all major North Island lakes, that the Crown considered that it should be the owner of lakes – irrespective of the fact that this view was at variance with common law.

Prima facie, the evidence of Maori ownership and control of Lake Waikaremoana would seem irrefragable. A centre of settlement for Urewera and East Coast Maori for centuries, Waikaremoana has been used for fishing, birding, navigation, and as a means of defence. Further, islands situated in the lake are designated urupa. But utility aside, the area is redolent with the history of various Tuhoe, Ruapani, and Kahungunu ancestors – the actions of whom have given shape to the landscape and given rise to the names of various topographical features. But despite this evidence of use and ancestral association, the Crown endeavoured to construct a case that held that title to the lake in fact belonged to it. Interestingly, in doing this, the Crown in part relied upon evidence of use similar to the evidence adduced by Maori before the Native Land Court in its inquiry in the years from 1915 to 1918. The fact of having stocked the lake with fish, issued licences to anglers, employed rangers to police the fishery, and run a launch service upon the lake were held to be evidence of the exercise of ownership rights on the part of the Crown.¹⁵⁷ Interestingly though, the Crown vigorously denied use of the lake by Maori as being evidence of the fact that they owned it.¹⁵⁸

But as in the case of other North Island lakes, the claim of the Crown to be the owner of Lake Waikaremoana can be seen as somewhat confused, relying upon various divergent principles. Before the Native Appellate Court and other fora, the Crown argued its case for being the owner of all lakes, and if not, why it should be. A key tenet of its case before the Appellate Court was that, because Maori had no conception of lakes as being land covered with water, how could Maori customary ownership extend to lake beds? Concomitantly it was held that upon the

156. J H Dark for the Maori Trustee, to Department of Maori Affairs Gisborne, 23 May 1974, ma 8/3/484 vol 3, NA Wellington, cited in Stevens, p 63

157. See for example file note, cl 200/7, NA Wellington, cited in Stevens, p 35

158. Native Appellate Court minutes, 25 March 1944, ma 5/13/78/1, rdb, vol 59, pp 22,357–22,358, NA Wellington,

proclamation of British sovereignty in New Zealand, the Crown acquired radical title subject to Maori customary title where it existed. Instead of ownership rights, the Crown maintained that Maori simply held a bundle of usufructuary rights in Lake Waikaremoana.¹⁵⁹ But despite the Crown being so adamant on this point, other fall-back positions were articulated. The idea was stated that even if lakes were a property as was guaranteed by article two of the Treaty of Waitangi, the ambit of these guarantees was limited by public goods such as navigation and the generation of hydro-electric power.¹⁶⁰ The Crown also trotted out its riparian rights argument: that as a consequence of owning lands abutting the lake, the Crown owned part of the lake bed *ad medium filum aquae*.

Once the Appellate Court had upheld the Native Land Court's original decision that Lake Waikaremoana was Maori property, some more pragmatic reasons as to why Maori should not be granted title to the lake became apparent. The view was expressed that the motivation of Maori to receive title to the lake was simply to inconvenience Pakeha by preventing them from fishing in and travelling upon the lake.¹⁶¹ And the prospect of Maori being able to exclude others from the lake gave rise to the need for the Crown to purchase these rights and concern that this would be at exorbitant expense to the Crown.

But alternatives to purchasing the lake were considered. The possibility of passing special legislation vesting all navigable lakes in the Crown – in much the same fashion as the Coal Mines Legislation had in respect to rivers – was mooted by Crown Law Office officials.¹⁶² Mother alternative was to lodge an appeal against the Appellate Court's decision in the Supreme Court. Although a statement of claim was lodged in the Supreme Court seeking a writ of certiorari, the Crown did not proceed with it. However, it could be argued that the threat of such legal action and confiscatory legislation in respect of lakes possibly pressured the Waikaremoana owners to agree to a settlement.

The eventual settlement in respect of Lake Waikaremoana confirmed that Tuhoe–Ruapani and Ngati Kahungunu were the owners of the lake, and made provision for the lake to be leased to the Urewera National Park Board. But unlike the settlements vis-a-vis Lake Taupo and the Rotorua lakes, the owners of Lake Waikaremoana enjoy no fishing rights above and beyond those of the general public. Although fishing rights appear not to have been an issue for the owners during negotiations with the Crown, the present author is not certain on this point.

159. Ibid, pp 22,357–22,358; ma 8/3/484, NA Wellington, cited in Wiri, p 320

160. 'Report Dealing in General Terms with the Issue in Dispute', cl 200/10, NA Wellington, cited in Stevens, p 39; Stevens, p 20

161. 'Draft of the Lake Waikaremoana Appeal', cl 200/11, NA Wellington, cited in Stevens, pp 35–36

162. Solicitor General to Attorney General and Minister of Native Affairs, 15 February 1935, cl 200/15, NA Wellington, cited in Stevens, p 28