

CHAPTER 7

LAKE OMAPERE

7.1 Introduction

The case of Lake Omapere is an intriguing episode in the saga of the contest for the control of New Zealand's inland waterways. For centuries an important fishery and site of habitation for local Maori, it appears that throughout the nineteenth century, Maori were tacitly acknowledged as being the exclusive owners of the lake. However, as a result of attempts by Pakeha settlers to lower the lake's level, Maori, from around the turn of the century, began agitating to have their title determined by the Native Land Court. Their efforts towards this end, though, were obstructed by the Government. When the court finally did investigate the title, the Crown assiduously challenged Maori rights of ownership; and after title was awarded to the Maori claimants, immediately lodged an appeal. However, the Crown's appeal was never prosecuted – the Crown eventually deciding in 1953 that the bed of the lake was in fact of no use to it. The case of Lake Omapere suggests that the Crown, after conceding that several major North Island lakes were in fact Maori-owned, was desperate to establish some case law that denied the rights of Maori to lakes – both at common law and under the Treaty of Waitangi – in order to try and secure them as part of the Crown's demesne. The Crown's decision to drop its appeal, although claimed to have been because the lake was of no value to the Crown, was in all likelihood an admission of the sound legality of the original decision.

Lake Omapere lies in a basin midway between the Bay of Islands and the Hokianga harbour, five kilometres north of present day Kaikohe. The surface of the lake covers an area of around 1200 hectares but at its deepest only measures a couple of metres. Although a small lake relative to those occurring elsewhere in New Zealand, Omapere is the largest inland body of water north of Auckland. The lake is fed by run off from adjacent lands and by freshwater springs. Geologists suggest that the lake was formed by a lava flow damming the Waitangi River.¹

The lake lies in the heart of Nga Puhi's rohe. Evidence presented before the Native Land Court during its investigation of title in 1929, suggests that the hapu of Te Uriohua were the group with the primary interest in the lake, but that several other hapu of Nga Puhi had and exercised rights in relation to the lake.²

As can be adjudged from the hearings in 1929, the lake represented a very important fishery for local Maori. As a witness before the court stated, 'The old

1. Northland Regional Council, Proposed Regional Water and Soil Plan for Northland (sec I): Discharge and Land Management, Whangarei, Northland Regional Council, 1995, p 9

Figure 7: Lake Omapere

time Maoris always valued this lake because of the eels . . . From infancy I have heard continually of the catching [of] eels in this lake.³ Another stated that ‘Omapere lake is the best lake in the district for eel’.⁴ As well as eels, kakahi or torewai (freshwater pipi) were obtained from the lake bed. With the advent of Pakeha settlement in the region, the lake became economically significant in other ways: flax and timber were procured from the margins of the lake and then transported upon it; and gum was obtained in relatively large quantities from adjoining swamps.⁵ In 1903, a swamp area on the northwestern shore of the lake was designated as a reserve for the purposes of gum digging.⁶ It appears that Maori were actively engaged in procuring gum from the reserve. In 1914 the area’s reserve status was revoked on account of all the gum that was easily retrieved having been recovered.⁷

Various pa were located either on the shores of the lake or in its immediate vicinity. Of particular note were the pa named Mawhe and Te Kahika. Mawhe, located on the promontory situated in the northeastern corner of the lake, was one of Hongi Hika’s strongholds, and according to some sources, was where he died. Te Kahika, more commonly known today as Okaihau, was the site of a major battle in the Northern Wars.

During the winter months the level of Lake Omapere would rise and adjacent farm land would be flooded. And as in the case of many lakes in the North Island, the owners of such land brought pressure to bear on the Crown to permanently lower the lake’s water level. However, unlike the situation with other lakes where pressure was being exerted by a large number of settler farmers, in the case of Lake Omapere it appears that only one property was seriously affected by the lake rising in winter. Evidence exists that around the turn of the century, the owners of Omapere estate – being the land abutting the south shore of the lake – simply assumed the right to lower the lake. Although this action precipitated a deluge of protest, interestingly this was largely from Pakeha.

The protest forced the Crown to consider the status of its rights vis-a-vis Lake Omapere – specifically in relation to controlling the outlet and hence the level of the lake. In the first decades of the twentieth century, there exists evidence of widespread confusion as to the nature of the Crown’s rights in the lake. Correspondence of various Government departments during this time shows several contradictory views. These ranged from the position that the Crown, by virtue of having purchased adjoining land, had rights to at least half of the lakebed,

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2. Ripi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8 (Transcription on the record of documents for the Muriwhenua sea fisheries claim, Wai 22, doc b38 – pagination not that of the original)
 3. Ibid, p 6
 4. Hone Toia, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8
 5. See for example Petition by W M Michie and 60 others to Minister of Internal Affairs, 5 March 1910, ls 1 22/2679, LINZ Wellington
 6. 23 July 1903, *New Zealand Gazette*, 1903, no 59, p 1623
 7. 12 February 1914, *New Zealand Gazette*, 1914, no 11, p 534; Commissioner of Crown Lands, Auckland to Under-Secretary of Lands, 4 October 1913, ls 1 22/2679, LINZ Wellington

to the position that the Crown in fact had no rights in the lake whatsoever and hence was powerless to prevent individuals interfering with its level.

Throughout this period, Maori were anxious to have title to Lake Omapere investigated by the Native Land Court in order to establish where they stood in relation to other parties claiming an interest in the lake. It appears that Maori first applied to have their title investigated by the Land Court in 1913. What followed was a succession of deliberately obstructive actions by various Crown officials to initially block the investigation, and later, once the court had decided in favour of the Maori applicants, to prevent title being issued. Eventually in 1953, the appeal that the Crown had lodged in 1929 and then repeatedly refused to prosecute was dismissed by the court and title was issued – the lake being vested in a trust pursuant to section 438 of the Maori Affairs Act 1953.

After briefly recounting Maori narratives as to the origins of Lake Omapere, this chapter proceeds to examine the importance of the lake as a traditional fishery and briefly considers the nature of Maori rights in the lake. Attention then turns to attempts to lower the lake in the period from 1900 to 1910. The next section, concerned with the subsequent decade, describes how the owners of the Omapere estate brought serious pressure to bear upon the Government to permanently lower the lake level. This forced the Crown to seriously consider its rights in relation to the lake, and eventually, around 1916, to effect a lowering of the lake. It is from around this time that Maori began seeking a determination of the lake's title by the Native Land Court. After detailing these attempts, the chapter then discusses their culmination – the 1929 inquiry and decision of Judge Acheson. The next section deals with the Crown's appeal and the tortuous sequence of events leading up to the eventual issuing of title in 1955. Finally, attention turns to the 1970s and the question as to the status of the lake's waters in relation to the Water and Soil Conservation Act 1967.

7.2 Maori Accounts of Lake Omapere's Origins

Various witnesses before the Native Land Court in 1929 recounted a narrative as to the origins of Lake Omapere. According to Nga Puhi tradition, Lake Omapere was once a swamp in which bush was growing. As Wi Hongi recounted before the Native Land Court:

On one occasion a man and his son (Ngatikoro the father and Tara the son) went to catch eels in the swamp. When the son found it was getting dark, he called out to his father that it was getting late. His father did not reply and the son thought that the father had left the bush. The son, on getting out of the swamp, set fire to the bush, and his father Ngatikoro was burnt to death.

Takauere was another son of Ngatikoro, and had died before the fire. His body had been buried in the swamp, on a rock called 'Paparoa', on [which] some trees [were] growing . . . It (the rock) was right on the track by which the Natives crossed from one side of the swamp to the other.

When the people went along to look for the body of Takauere they found that the body and the tree had both disappeared, just disappeared – not burnt. Because of this strange disappearance, this Takauere became clothed with the mana of a ‘Taniwha’, and the place became tapu. This was before the bush burnt.

Later the fire burnt as far as Paparoa rock and stopped there. The rock is still there in the lake. After the fire the lake came.⁸

Continuing under cross-examination by the Crown, Hemi Wi Hongi stated that after the fire Maori did not fish over the spot where Ngatikoro was burnt for three generations, but that for ‘a long time past there has been no “tapu” over the lake’. The fire, according to both Wi Hongi and John Webster – another witness during the 1929 inquiry – occurred 12 generations ago.⁹

Wi Hongi stated before the court that Ngatikoro had always worn the feather of the toroa or albatross, and that his demise gave rise to the whakatauki in relation to Lake Omapere that when ‘the waves look rough they are the feathers of Ngatikoro, the man who was burnt.’¹⁰

The narrative of the fire and Ngatikoro’s subsequent death was presented by witnesses before the Native Land Court as evidence of their ancestral claim to the lake. As John Webster stated: ‘The Natives always claimed this lake. They even had a “taniwha” there called “Takauere”, an alleged descendant of Ngatikoro. The Natives have always claimed the lake as “Their lake”’.¹¹

Interestingly, Judge Acheson, in his preliminary decision after the Kaikohe hearing in 1929 as to the title of Lake Omapere, stated that ‘In the absence of any evidence to the contrary . . . the court must accept the Native tradition that the lake bed was originally a swamp area covered with bush, which was burnt’ and that ‘Probably the outlets blocked up and the lake formed’.¹²

7.3 The Importance of the Lake Omapere Fishery to Maori

There can be no doubt as to the regional significance of the Lake Omapere fishery. In his decision of 1929 as to the ownership of the lake, Judge Acheson placed much emphasis upon the importance of the lake to local Maori as a food resource. He observed that to the Nga Puhi people, Lake Omapere had always been:

a well-filled and constantly available reservoir of food in the form of the shellfish and the eels that live in the bed of the lake. With their wonderful engineering skill and unlimited supply of man-power, the Maoris could themselves have drained Omapere

8. This story was also recounted before the Native Land Court in 1890 by Pere Wi Hongi – Hemi’s brother – during the investigation of the Omapere block. Hemi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 6

9. Ibid, pp 5, 6

10. Ibid, p 6

11. John Webster, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 5

12. Bay of Islands Native Land Court minute book, 5 March 1929, p 9

at any time without great difficulty. But Omapere was of much more value to them as a lake than as dry land.¹³

As proof of their continued use of the lake, witnesses before the Native Land Court in its 1929 investigation of title, gave evidence as to the nature and extent of their fishing practices. Witnesses stressed that they caught eels over the whole of the lake, ‘including the parts in front of the areas sold by the Natives to Crown and Europeans’, to emphasise the fact that in selling land abutting the lake they did not cede their rights to the lake itself.

Hemi Wi Hongi and his son Ripi described the various fisheries in Lake Omapere before the Native Land Court in some detail. According to them ‘katua’ – eels that went out to sea each year in order to breed – were caught in weirs at various outlets of the lake over a three month period each year. Hemi Wi Hongi stated that Waitanumia and Te Kuaha were the principal outlets at which katua were caught. At each of these weirs two to three thousand eels would be caught each season. Ripi Wi Hongi corroborated his father’s evidence and added that Ngaruawahia, Te Ahipara and Te Harakeke were other drains at which similar quantities of eels were caught.¹⁴

In a letter protesting at plans to interfere with the level of the lake, published in the *Northern News* in 1921, W E Bedggood described the way in which Maori caught the migrating eel:

At certain times of the year the eels leave the lake by the thousands on their way to the deep sea to breed. The Maoris became acquainted with this fact, and by spreading a funnel-shaped net across the outlet, with an eel pot at the end, were enabled to catch them by the hundred. One man stood in the water and when the pot was full handed it to his mate on the bank, who handed him another to be fastened to the net, the full one being emptied into a pit with upright sides dug for the purpose.¹⁵

In 1916, the Under-Secretary of Public Works reported to the Under-Secretary of Lands that plans to interfere with the Utakura stream outlet in order to lower the lake were ‘complicated by the fact that the outlet of the lake has been divided by the native owners into three channels, each channel being the property of a separate native tribe, and each of these channels are used for the purpose of catching eels in very large quantities at certain seasons of the year.’¹⁶ Similarly, in a letter to the Minister of Lands in 1921, Ripi Wi Hongi recounted how ‘there are three drains at that place, which were dug by our ancestors for the purposes of eel catching’. According to Wi Hongi, the Native Land Court had awarded this area of land to Maori in 1890 for the purposes of eeling, with each of the three drains belonging to a different ‘tribe’.¹⁷ Bedggood claimed that the Omapere fishery was so valuable:

13. Ibid

14. Hemi Wi Hongi and Ripi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, pp 2, 7

15. ‘Lowering Lake Omapere: An Old Resident’s Protest’, *Northern News*, 2 July 1921

16. Under-Secretary of Lands to Under-Secretary of Public Works, 3 November 1916, Is 1 22/2679, LINZ Wellington

that constant disputes for possession arose between the tribes whose property bordered the lake, which . . . about 200 years ago culminated in a war in which 600 men were slain. Then some wise man devised a means of settlement by which other outlets were dug so that each party might have one, and leave it to each individual eel to choose the one he preferred to take.¹⁸

It is unclear whether these drains are any of those named before the Native Land Court as detailed above.

Unlike katua, the variety of eel known as tautoke were caught over the whole lake. Ripi Wi Hongi stated before the Land Court that he estimated ‘more than 10,000 tautoke eels per season were caught by spearing or with lines or baskets.’¹⁹ Traditionally Maori had used baskets or hinaki to procure the tautoke eel from Lake Omapere. However, by the 1920s it appears that a method had been developed whereby they were caught from canoes using spears and torches. One witness before the Native Land Court attested that the ‘. . . Natives by using a spear and a torch now really get more eels than before’.²⁰

As well as eels, Hemi Wi Hongi claimed before the Native Land Court in 1929 that kakahi or torewai – a variety of freshwater mussel – ‘are plentiful in thousands, in any part of the lake’, and that a ‘few kawai or crayfish are caught in the creeks away from the lake’.²¹

It is apparent that the katua fishery was affected by various lowerings of the lake between 1903 and 1929. Ripi Wi Hongi stated in his evidence before the Native Land Court in 1929 that the owner of the Omapere estate had lowered the lake to bring more land into production, and that consequently the supply of eels was reduced. Wi Hongi said that there were few katua eels there now.²² The introduction of trout and carp to the lake also appears to have affected the lake’s ecology. In 1914, an inspector of forests reported local Maori having told him that numbers of crayfish in and around Lake Omapere had been greatly reduced through being eaten by introduced species of fish.²³

In concluding its hearing of the evidence of Maori claiming ownership of Lake Omapere, Judge Acheson observed that the:

. . . Court decides that it has been proved by evidence not contested by the Crown, that for many generations past the Natives interested in Lake Omapere have used the lake for eel fishing purposes on quite a large scale, many thousands of eels being captured every season. The court is satisfied that these eels constitute quite a substantial article of food diet, and that therefore the fishing rights of the Maoris were and still are of real value to them, and will have to be provided for no matter what decision the court may come to on the other questions involved.

17. Ripi Wi Hongi to D H Guthrie, Minister of Lands, 26 January 1921, ls 1 22/2679, LINZ Wellington

18. ‘Lowering Lake Omapere: An old resident’s protest’, Northern News, 2 July 1921

19. Ripi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 7

20. Hemi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 4

21. Ibid, p 3

22. Ibid, p 7

23. Hugh Boscarven Inspector of Forests to Commissioner of Crown Lands, Auckland, 19 March 1914, ls 1 22/2679, LINZ Wellington

As well as emphatically recognising Maori fishing practices and rights in Lake Omapere, Acheson was clearly of the view that Maori's usufructuary rights in relation to the lake did not extend only to fishing, stating that the court was 'satisfied that for a long time past the Natives have dug for gum in the bed of the lake in the shallows.'²⁴

7.4 The nature of Maori Rights in Lake Omapere

Much of the evidence presented before the Native Land Court in 1929 concerned the nature and extent of the rights of the various hapu who had interests in the lake. Those hapu with rights in the lake appear to have been Te Uriohua, Ngatikorohue, Te Popoto, Te Ihutai, Honehone, and Ngatikuri.

According to Ripi Wi Hongi, these groups' rights in Omapere derived from their interests in lands adjoining the lake.²⁵ Hemi Wi Hongi, before the same court, spoke of the origins of the rights of the various groups claiming an interest in the lake, and the relationship between them:

If a number of hapus live around a lake the custom would be for all to be entitled to use any part of the lake, but that if they had actually divided the area of the lake the hapus would keep to their own areas. There would be trouble if they fished alongside land belonging to another hapu. It was because of their ownership of the land that they owned the lake. Outsiders could not fish without the consent of the proper owners.²⁶

This, however, contradicts evidence concerning the ownership of the weirs where the katua were caught. As detailed above, the Native Land Court apparently awarded the land around the Utakura stream to Maori, and that each of the three channels there belonged to a different group. Similarly, Ripi Wi Hongi speaks of the Ngaruawahia drain as belonging to the hapu of Te Popoto. But Wi Hongi, in the same statement before the Native Land Court, claimed that the drains he had listed 'belonged to all the hapus claiming the Omapere Lake today'.²⁷ A possible explanation of this disparity is that there appears to have been a sense of common purpose amongst the various hapu with interests in the lake during the Native Land Court investigations; that is, they all opposed the Crown's claim to the ownership of the lake. In this way it is possible that the hapu joined together, stressing their common interests in the face of a common threat from the Crown.

There can be no doubt that Maori perceived themselves as having indefeasible rights to the lake. As Ripi Wi Hongi observed before the Native Land Court:

The Natives claim the fish, and also the 'mana' of the lake, and also the edges of the lake. The Natives claim the water of the lake, and also the land under the lake.²⁸

24. Bay of Islands Native Land Court minute book 11, 1 August 1929, p 9

25. Ripi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8

26. Hemi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 5

27. Ibid, p 9

28. Ripi Wi Hongi, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8

7.5 Early Moves to Drain Lake Omapere, 1900–10

Relative to other lakes, little land was affected by the rising of Lake Omapere as a result of heavier rains during the winter months. However, once the most easily developed land in the vicinity of Omapere had been brought into production, some settlers became anxious that the lake's level be regulated so that its margins could be exploited. It appears that from around the beginning of the twentieth century, pressure came to be exerted upon the Crown for the lake level to be controlled to enable both the digging of gum and the lake's margins to be farmed. Previously, though, it appears that individuals had simply assumed the right to lower the level of the lake.

The earliest reference the present author has come across to the issue of who had rights to the lake was in 1903. Before the Native Land Court in 1929, John Webster recounted how in 1903, the then Native Minister, James Carroll, had visited Kaikohe and met with local Maori outside the courthouse. According to Webster:

Various matters were discussed, including the claim of the Natives to Omapere Lake. Hone Byers spoke on behalf of the Natives and referred to the uses to which the lake was put. Then Mr Carroll said that the lake belonged to the Natives, and that they should lodge an application for investigation of title. Hone Bryers did lodge an appln accdly [sic].²⁹

It has not proven possible to locate anything further on this meeting.

In 1903, the Bay of Islands County Council passed a resolution that Crown lands abutting Lake Omapere be made a county endowment, and that the council had no objections to Austrians being allowed to dig for gum on the Crown lands on the northwestern shore of the lake. Further, the council considered that 'if draining were carried out upon a satisfactory system the surrounding land now inundated by water would be improved.'³⁰

Although this proposal appears to have been supported by the then Minister of Lands, Thomas Duncan, the initiative was widely opposed by other Pakeha settlers in the district.³¹ In October 1903, John Guiniven wrote to the Premier protesting against 'the action taken by the Bay of Islands County Council to obtain an endowment at Omapere Lake'. Guiniven claimed that no one in the district wished to drain the lake. Further, he claimed that the move by the council had been precipitated by a councillor who had a gang of Austrians in his employ, for whom he was desperate to find new land upon which they could dig for gum. Guiniven continued, stating that:

There is also a large number of Natives here as Mr Carroll knows who gain a living from gum & if this was to give way suddenly they would be starving before long.³²

29. John Webster, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 5

30. Kawakawa County Clerk, Bay of Islands County Council to R M Houston, 7 October 1903, Is 1 22/2679, LINZ Wellington

31. Minister of Lands to Solicitor General, 14 October 1903, Is 1 22/2679, LINZ Wellington

32. John Guiniven to the Prime Minister, 29 October 1903, Is 1 22/2679, LINZ Wellington

Similarly, another Pakeha settler, W A Michie, wrote to R M Houston, the Member of the House of Representatives for Bay of Islands, opposing the swamps of Lake Omapere being drained and ‘handed over to the Austrians’. Like Guiniven, Michie registered his concern that were this to happen, Maori and Pakeha that derived an income from digging gum in the district would be denied this opportunity. Michie was also anxious that were the council’s plan enacted, the beauty of the lake would be ruined. And, that having Austrians settle in the area was less than desirable.³³

It would appear that nothing came of the Bay of Island County Council’s resolution. But in 1905, an owner of land adjoining the lake assumed the right to lower the level of the lake by interfering with the outlet at the western end of the lake which lay on Maori-owned land. Earle, the owner of the Omapere estate, undertook the drainage work ‘with a view to making some swamp land at the eastern end of the lake available for pasturage’.³⁴ Michie wrote to Houston informing him that this work was in progress and that, upon completion it would ‘so ruin the lake that for scenery or for any other purpose it will be for all time totally ruined’, reducing it to a ‘mere pond’. Michie claimed that all persons he had spoken to in the district were opposed to the lowering of the lake ‘as it will completely ruin the best piece of scenery in the locality and the largest lake north of Auckland.’ He also asked that as the ‘outlet of Lake Omapere runs through Native Land, cannot this land be acquired by the Scenic Department to be set aside as a scenic reserve?’³⁵

In 1910, Michie wrote to the Member for the Bay of Islands informing him that persons were again endeavouring to lower the lake – this time using dynamite to deepen the outlet. Michie asked that the Government intervene and halt the work.³⁶ It would appear that this petition resulted in the Under-Secretary of Justice ordering the Auckland Inspector of Police to investigate the matter.³⁷ The resultant report, written by Constable Cahill, stated that the work that Michie complained of was ‘just a periodical overhaul of the drains’. Cahill stated that the object of the interference was to maintain the lake at its summer level, and that it was physically impossible to lower the lake below that level.³⁸

A more detailed police report written by Sergeant Powell, upon which Cahill’s seems to be based, stated that the work being undertaken in 1910 was in fact an attempt to finish earlier work that had been undertaken in part by Maori. Cahill stated that Austrians had offered to complete the work for Earle, who, without taking any responsibility for the legality of the work, agreed to pay them upon its

33. W A Michie to R M Houston, 11 November 1903, Is 1 22/2679, LINZ Wellington

34. Report of Constable Cahill to the Inspector of Police, Auckland, relative to the lowering of Lake Omapere, 16 July 1910, Is 1 22/2679, LINZ Wellington

35. W A Michie to R M Houston, 7 November 1905, Is 1 22/2679, LINZ Wellington

36. W A Michie to V Reed, 9 February 1910, Is 1 22/2679, LINZ Wellington

37. Under-Secretary of Justice to Inspector of Police, Auckland (telegram), 12 February 1910, Is 1 22/2679, LINZ Wellington

38. ‘Report of Constable Cahill to the Inspector of Police, Auckland, relative to the lowering of Lake Omapere’, 16 July 1910, Is 1 22/2679, LINZ Wellington

successful completion. Powell noted that Earle had contemplated applying to the county council to take action on the basis that the lake was a public drain. While it was reported that Earle knew ‘nothing of the means taken by the Austrians to effect the object decried . . . if the Natives have any reasonable claim to compensation he will treat with them fairly.’ The report contended that:

The work contemplated could not by any possibility do anybody any harm but on the contrary must do good to all who own low lying land on the shores of the lake. It is believed some of the Natives at one time learned it was intended to entirely drain the lake but this is quite wildly absurd and absolutely impossible.³⁹

Around this time, the question as to the rights of the Crown in relation to Lake Omapere appears to have been considered seriously for the first time. In an internal memorandum of the Police Department dated March 1910, the opinion was expressed that Lake Omapere ‘is part of the Crown purchase of the Okaihau No 1 block’.⁴⁰ The Government was forced to further consider the question as a consequence of a petition to Parliament in March 1910 by Michie and 60 others, protesting at the lowering of Lake Omapere. The grounds upon which the signatories opposed the lowering of the lake were: that it would destroy the lake’s scenic values; endanger the lake’s fisheries; render it useless as a means of transport; and cause flooding.⁴¹ In response to the petition, the Minister of Lands, J G Ward, expressed the opinion that this was ‘not a matter in which the Government can interfere.’⁴²

In reply to Ward, Vernon Reed, the Member for the Bay of Islands, expressed his inability to understand why this was the case: ‘If the lake is public property, there is surely no one else to look after the interests of the public but the Government.’ He continued, noting that the lake had potential in terms of hydroelectric development, and that the lowering of the lake was a ‘dangerous precedent to allow to go by unchallenged’. Implicit in such an omission, he stated, was the notion that the Government had no jurisdiction vis-a-vis water power.⁴³ Ward responded, reiterating the position that it was ‘not the duty of the Crown to step in in cases of this kind,’ and that he could not ‘involve the Crown in, perhaps, a series of actions, when the Government has no standing in the matter.’⁴⁴ Interestingly then, the Government of the day appears to have been reluctant to assume any rights to the lake. It would appear though that this was not an acknowledgement of Maori having a superior right, but of the Crown’s right being secondary to that of adjacent private landowners. The matter was further complicated by the fact that the owner

39. Report of Sergeant Powell re lowering of Lake Omapere, 24 February 1910, ls 1 22/2679, LINZ Wellington

40. Memorandum of the Police Department, 8 March 1910, ls 1 22/2679, LINZ Wellington

41. Petition by W M Michie and 60 others to Minister of Internal Affairs, 5 March 1910, ls 1 22/2679, LINZ Wellington

42. Minister of Lands to V Reed, 29 July 1910, ls 1 22/2679, LINZ Wellington

43. Reed to Minister of Lands, 3 August 1910, ls 1 22/2679, LINZ Wellington

44. Minister of Lands to Reed, 22 August 1910, ls 1 22/2679, LINZ Wellington

of the Omapere estate was in fact interfering with a stream that was not on his property, but on Maori-owned land.

In connection with these early attempts to lower the lake, little evidence has been uncovered by the present author of protest by Maori. Such material is more likely to exist in the files of the Department of Native Affairs and perhaps the correspondence files of the Native Land Court – neither of which the present author has had the opportunity to peruse.

7.6 1910–22: Maori and Pakeha Agitation

In contrast to the almost ambivalent position articulated by Ward in the preceding decade, evidence suggests that in the period from 1910 till around 1916 the Crown began to consider its claim to Lake Omapere much more seriously. This was quite possibly a reaction to Maori beginning to press their claim to the lake – an application being made to the Native Land Court in 1913 to have the lake's title determined. However, the Native Land Court did not begin an investigation until 1929.

7.6.1 The Omapere estate

The period from around 1913 till 1916 saw tenacious agitation from the owner of the Omapere estate. By 1913, George Pitcaithly had acquired the property. From around this time he began to incessantly petition Parliament, seeking the Government's assistance in lowering Lake Omapere in order to bring more of his land into production.

Pitcaithly's letters to the Minister of Lands asking that he be assisted by the Crown in draining the lake and maintaining it at its summer level, number at least twelve. The arguments Pitcaithly put forward to support his contention that the Crown should assist him in lowering the lake were various. He argued that the Crown would benefit given it owned the Manawa swamp (Omapere Gum reserve), and that like his swamp land this land could be brought into agricultural production.⁴⁵ Repeatedly he emphasised how it was 'a sin to see such excellent land lying idle.'⁴⁶ In response to a report by a Government official, Pitcaithly stated that 'very little is known by the officers of the true state of affairs' and that the importance of the lake's fishery was being exaggerated – a keen angler himself, he claimed to have never seen a fish in the lake.⁴⁷

In August 1913, in a letter again asking Massey for assistance from the Government in lowering the lake, Pitcaithly addressed the issue of Maori fishing rights in the lake:

45. G Pitcaithly to Minister of Lands, 7 February 1913, Is 1 22/2679, LINZ Wellington

46. G Pitcaithly to Minister of Lands, 2 April 1913, Is 1 22/2679, LINZ Wellington

47. G Pitcaithly to Prime Minister, 2 June 1913, Is 1 22/2679, LINZ Wellington

. . . I am aware that there is some antiquated piece of Maori law which gives that race fishing rights over the waters of many of our New Zealand Lakes; but like much other Maori legislation against which you have raised your voice, it seems to have been designed to retard the development of the country rather than to assist it, and the sooner it is repealed the better . . . [However] Our request in no way infringes upon the rights of the Natives . . .

Lake Omapere certainly is a natural drainage area, and I cannot think that any rights of any one class of individuals can be used to the detriment of neighbouring land owners – as the backing up of these waters are to us.

Pitcaithly continued that:

Surely settlers of our class deserve more consideration than a few Maori eel-fishers, whose catch will be in no way affected by the granting of our request. As a proof that this question of ‘title’ quoted in your last letter, is a mere ‘dog in the manger’ piece of business, put up to obstruct us from developing our property. I may say that very occasionally, if ever, is any eeling done on the lake by the Maories . . .

The letter was concluded, however, with the contention that the opposition to the lowering of the lake had in fact arisen primarily not from Maori but from ‘old settlers’ who had forgotten about progress.⁴⁸ In light of the extensive opposition to the lowering of Lake Omapere from Pakeha settlers detailed above, and the apparent absence of any Maori protest, it would appear that Pitcaithly was possibly correct in this view. However, in 1913 Maori applied to the Native Land Court to get the title to Lake Omapere determined. This can be seen as an attempt to get their rights defined so that they could prevent the lowering of the lake.

Subsequent to this tirade, Pitcaithly wrote at least six further letters urging that the Government assist him in lowering the lake.⁴⁹ Pitcaithly’s tenacity seems to have paid off when an earlier abandoned investigation by a drainage engineer into the situation vis-a-vis Lake Omapere (see below) was ordered to be completed. In 1916, John Baird Thompson, the country’s Chief Drainage Engineer, reported to the Under-Secretary of Lands. Thompson informed the Under-Secretary that in the past, the outlet had been widened and deepened by the owners of the Omapere estate, and that also a certain amount of straightening and blasting had been undertaken. It was held that all these works had been unauthorised. In the report, the opinion was expressed that the outlet could be further widened and deepened in order to cope with the winter rains ‘without detracting from the scenic beauties’. However, Thompson concluded that with ‘only one property benefitting I could not recommend any expenditure of public monies for the purposes proposed.’⁵⁰

48. G Pitcaithly to Minister of Lands, 15 August 1913, ls 1 22/2679, LINZ Wellington

49. G Pitcaithly to Minister of Lands, 28 June 1916, ls 1 22/2679, LINZ Wellington; G Pitcaithly to Minister of Lands, nd (received by Department of Lands 22 December 1916), ls 1 22/2679; G Pitcaithly to Stewart, 29 December 1916, ls 1 22/2679, LINZ Wellington; G Pitcaithly to Minister of Lands, 4 June 1917, ls 1 22/2679, LINZ Wellington; G Pitcaithly to Minister of Lands, 3 July 1917, ls 1 22/2679, LINZ Wellington; G Pitcaithly to Minister of Lands, 22 February 1918, ls 1 22/2679

Subsequent to Thompson's report, the Under-Secretary of Lands wrote to the Under-Secretary of Public Works in connection with Pitcaithly's proposal that the Government assist in the lowering of Lake Omapere permanently to its summer level. Although noting that the proposal was feasible, it was stated that:

the matter is complicated by the fact that the outlet of the lake has been divided by the native owners into three channels . . . used for the purposes of catching eels in very large quantities at certain seasons of the year. We have been informed by the Native Land Court that . . . it would be highly injudicious to interfere in the slightest degree with these channels . . . If Mr Pitcaithly's scheme is carried out it will entirely nullify the work of the Natives.⁵¹

Pitcaithly's problem was eventually resolved by the Government agreeing to purchase the parts of his property that were prone to flooding – using the lands to settle returned servicemen upon. Obviously though, what had been Pitcaithly's problem simply became that of the new occupants. In 1920, the North Auckland Commissioner of Crown Lands wrote to the Under-Secretary of Lands and noted that since the ballot allocating the land, those now affected by the flooding 'have several times spoken to me about it and are now agitating the matter through the Returned Soldiers Association.' The commissioner expressed the view that he thought 'it necessary that something be done in the matter.'⁵²

7.6.2 The Crown seriously considers its position

In May 1913, the Chief Surveyor for the Auckland district wrote to the Under-Secretary of Lands, advising him that various Maori had lodged an application with the registrar of the Auckland Native Land Court for the title of Lake Omapere to be investigated.⁵³ This led the Assistant Under-Secretary of Lands to write to the Solicitor General requesting advice vis-a-vis the Native Land Court application. In his letter the Assistant Under-Secretary stated that:

The area held on freehold and that reserved for gum-digging, are covered by the purchase by the Crown from the Natives in the year 1858. The boundaries of this purchase are shown in the accompanying deed from which it will be seen that approximately half the margin of the lake is included therein. The deed of purchase describes one of the boundaries as being 'the lake' from which it would appear that the Crown's title ran to the centre.⁵⁴

50. Chief Drainage Engineer, Thames to Under-Secretary of Lands, 17 August 1916, ls 1 22/2679, LINZ Wellington

51. Under-Secretary of Public Works to Under-Secretary of Lands, 3 November 1916, ls 1 22/2679, LINZ Wellington

52. Commissioner of Crown Lands, Auckland, to Under-Secretary of Lands, 25 August 1920, ls 1 22/2679, LINZ Wellington

53. Chief Surveyor, Auckland to Under-Secretary of Lands, 31 May 1913, ls 1 22/2679, LINZ Wellington

54. Assistant Under-Secretary of Lands to Solicitor General, 18 June 1913, ls 1 22/2679, LINZ Wellington

In reply, the Crown Law Office basically concurred with the position set out by the Assistant Under-Secretary of Lands:

The presumption of law in such a lake is that the owners of the surrounding land own the bed of the lake to its centre. Unless there are circumstances to rebut that presumption (and on the facts stated I can find no such circumstances), it would appear that the Crown, by virtue of its original purchase from the Natives acquired a title to the Northern half of the lake.

Concomitantly it was held ‘that the Southern half of the bed of the lake belongs to the Natives who own the land fronting the southern half.’ This, it was stated, was established in the cases of the Rotorua lakes and Lake Taupo. The Assistant Under-Secretary concluded, however, that if:

there are reasons of public policy why the Natives should not be allowed to establish a title to the Lake, then it is a question of policy for the Government to consider whether it will exercise the power it has under the Native Land Act 1909 of either prohibiting the Native Land Court from entertaining the Native’s application, or of proclaiming it Crown land.

An addendum to this opinion pencilled in the margin, refers to Justice Salmond’s decision in the case of Lake Takapuna in relation to the rights of people owning land adjacent to lakes.⁵⁵

Presumably the Takapuna ‘decision’ referred to by the Assistant Law Officer was the opinion given by Salmond on the ownership of Lake Takapuna when he was Solicitor General. It appears that the question of the ownership of Lake Takapuna had arisen in connection with moves to establish regulations governing the abstraction of water from the lake. In his opinion, Salmond set out an earlier opinion given by an Assistant Law Officer. This earlier opinion stated that Lake Takapuna was no longer Crown land. This position was predicated upon the fact that all the lake’s riparian lands had passed into private ownership, and that it was believed title to the lake bed was part of these titles, *ad medium filum aquae*. Salmond, although conceding that this position ‘may very well be correct’, considered that the ‘matter is one of considerable doubt.’ He stated that in the case of rivers, the rule of *ad medium filum aquae* most certainly applied. However, whether it equally applied in the case of lakes remained ‘an unsettled question’; Salmond noting that there were ‘no authoritative decisions on this point either in New Zealand or in England.’ He contended that if this point was tested, the courts in all likelihood would hold that Crown Grants of small areas of land adjoining a lake, did not include any part of the lake. He therefore advised that the Crown should assume that it was the owner of Takapuna, ‘leaving it to the riparian owners . . . to take proceedings in the Law Courts for the establishment of their claims’. Salmond noted that no such claims had ever been made in New Zealand and that there was no reason for the Crown to assume that any would be, or that any such

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

claims are valid. He therefore recommended that if any legislation was contemplated in respect to the abstraction of water from Takapuna, that this should be proceeded with on the basis that the lake is Crown land.⁵⁶

In July 1913, the Under-Secretary of Lands had instructed J B Thompson, a Land Drainage Engineer based in Thames, to investigate the feasibility of lowering Omapere to its summer level.⁵⁷ However, in view of the application to the Native Land Court for title to the lake to be investigated, the Under-Secretary informed Thompson that the question of title would 'have to be decided before any action can be taken to lower the waters of the lake'.⁵⁸ Similarly, in a reply of September 1913 to one of Pitcaithly's various letters, the Under-Secretary stated that the question of title must first be settled, and that it appeared that the Government had no legal rights to the lake.⁵⁹ This position was clearly contrary to the opinion of the Crown Law Office detailed above.

The decision of the Under-Secretary of Lands to suspend the investigation suggests that the proceedings being initiated by Maori interested in the lake were being treated seriously. But in fact the Lands Department deliberately obstructed the Land Court's inquiry. In a letter to the Under-Secretary in September 1913, the Chief Surveyor of the Auckland Lands District stated that he did:

not consider that it is at all expedient that the natives should be allowed to establish any title to the lake and I am therefore refusing to supply the plan for the investigation of the title until the question of the ownership has been definitely settled.

Further, he urged that the lake should be declared Crown land under section 85 of the Native Land Act 1909.⁶⁰

The following year the Under-Secretary of Lands again expressed the view that the Crown's rights in the lake were tenuous:

it is doubtful if the Crown has any jurisdiction over the Lake except the portion that fronts the Omapere Gum Reserve, and if therefore the owners of the land around the outlet choose to authorise blasting and drainage operations with a view to lowering the level of the lake, and thereby draining and reclaiming the low-lying land in the vicinity, it is not at present clear that they are acting illegally, neither does it appear that the Government has any power to prevent such drainage operations.⁶¹

To this the Auckland Commissioner of Crown Lands replied that he was of the opinion that the Crown claimed the freehold of the lake.⁶² But in a subsequent letter

56. Solicitor General to Under-Secretary of Lands (re Lake Takapuna), 19 August 1913, Wai 187/4, Waitangi Tribunal

57. Under-Secretary of Lands to Land Drainage Engineer, Thames, 8 July 1913, ls 1 22/2679, LINZ Wellington

58. Under-Secretary of Lands to Land Drainage Engineer, Thames, 31 July 1913, ls 1 22/2679, LINZ Wellington

59. Under-Secretary of Lands to Pitcaithly, 16 September 1913, ls 1 22/2679, LINZ Wellington

60. Chief Surveyor, Auckland to Under-Secretary of Lands, 5 September 1913, ls 1 22/2679, LINZ Wellington

61. Under-Secretary of Lands to Auckland Commissioner of Crown Lands, 12 May 1914, ls 1 22/2679, LINZ Wellington

to the Under-Secretary of Lands, the commissioner stated that in furnishing this opinion he had overlooked the Crown Law Office's opinion of July 1913. In light of this he submitted that:

the Crown, being only owners of a part of the lake . . . does not prevent steps being taken to preserve our riparian rights. I am not aware that any statutory power exists or is necessary to enable the Crown to obtain an injunction to prevent the abstraction of water. The English common law would probably be sufficient, but this is a point upon which the Law Office would be able to advise.

The commissioner stated that in summer, evaporation from Lake Omapere had a beneficial effect upon adjacent Crown lands. He was also of the view that if it were decided to allow the level of the lake to be lowered, that this should be done by a drainage board and not private individuals.⁶³

It is evident that much confusion existed amongst Government officials as to the status of the Crown's rights vis-a-vis Lake Omapere. Generally it is agreed that at common law, title to lakes is shared between riparian owners, *ad medium filum*.⁶⁴ In New Zealand though, it seems that parts of the Crown did not wish this situation to pertain, preferring that instead lakes be vested in itself. In the case of Omapere, while some Government officials seem to have been seized of this rather nebulous policy, others continued to adhere to the position at common law. The opinion stated in June 1914 by the Auckland Commissioner of Crown lands relates to the situation at common law vis-a-vis water rights. This holds that riparian owners can take water in accordance with their own needs so long as this does not interfere with the integrity of the waterway, or with the rights of the public. Presumably the commissioner considered that if the ownership of the lake was shared between the Crown and private land owners, water could not be abstracted from the lake by private landowners if it jeopardised the integrity of the lake, or injuriously affected the Crown.⁶⁵

The uncertain nature of the Crown's rights was confirmed by a further opinion furnished by the Crown Law Office in July 1914. In a letter to the Under-Secretary of Lands, the Solicitor General stated that for reasons set out in the Lake Takapuna case, he disagreed with the opinion of the Crown Law Office dated 11 July 1913. Although conceding that the 11 July opinion 'may quite possibly be correct', he was of the mind that 'the matter is far too doubtful to express any confident conclusion on it one way or the other'. Significantly, his letter expressed doubt that Maori customary title extended over such waterways as Lake Omapere and

62. Auckland Commissioner of Crown Lands to Under-Secretary of Lands, 15 May 1914, Is 1 22/2679, LINZ Wellington

63. Auckland Commissioner of Crown Lands to Under-Secretary of Lands, 9 June 1914, Is 1 22/2679, LINZ Wellington

64. G W Hinde, D W McMorland and Sim, *Introduction to Land Law*, (2nd ed) Wellington, Butterworths, 1986, pp 196–197; James P Ferguson, 'Maori Claims Relating to Rivers and Lakes', Research paper for Indigenous Peoples and the Law (LAWS 546), Victoria University, 1989 (Wai 167 rod, doc a49(d): 266–313), p 20

65. Hinde, McMorland and Sim, pp 556–557

suggested that instead they simply held fishing rights. Also the opinion was expressed that there was insufficient authority to extend the *ad medium filum* rule in this instance and, that even if this were not the case, there was no evidence that those who sold lands abutting the lake to the Crown in 1858 were the sole owners of the lake originally. The Solicitor General was of the opinion, though, that if the Crown owned no part of the bed of the lake, as the owner of adjoining land it had sufficient riparian rights to prevent the diminution of those rights by drainage – contending that the situation with regard to riparian rights was vis-a-vis lakes no different to that of rivers.⁶⁶

Although the research undertaken by the present author is by no means comprehensive, it appears that the Crown did not further consider its position vis-a-vis Lake Omapere until the Native Land Court investigation of title in 1929.

7.6.3 Moves to acquire land surrounding Lake Omapere

As detailed above, the main outlet of Lake Omapere – the Uakura stream – lay on Maori-owned land. The ownership of this land was seen as an important factor in relation to who had rights in the lake – the thinking being that whoever owned this land could control the level of the lake. However, whether this was in fact legally correct is unclear. At common law it would seem that if the owners of the lake suffered as a consequence of the lake level being altered, they could seek redress.

In February 1914, Reed, the Member for the Bay of Islands, wrote to Massey asking that the land surrounding the Omapere outlet be purchased by the Crown. In his letter, Reed expressed the fear that were this land acquired by Pakeha, the control of the lake would fall into their hands – Reed being of the opinion that the Government should control the lake outlet because of its significant utility and scenic values.⁶⁷

The view that Lake Omapere was of aesthetic significance was not shared by the Inspector of Forests, who was charged to investigate the possibility of the Crown acquiring the Maori land at the outlet of Lake Omapere. Reporting to the Auckland Commissioner of Crown Lands in March 1914, he stated that ‘the land is a barren treeless waste, and quite useless for scenic purposes.’ However, he considered that for purposes of ‘utility it should be acquired, as by doing so, it will prevent interested persons from draining the lake.’ Further, he reported that there ‘was a Maori camp at Uakura and they asked that the lake not be interfered with’. The inspector also stated the idea that evaporation from the lake made the surrounding atmosphere more humid, and that this had a beneficial effect upon nearby lands.⁶⁸

The next year, Reed again mooted that land surrounding Lake Omapere be acquired by the Crown – this time for the purposes of a recreation reserve. On this occasion some of the 100 acres in question appears to have formerly been part of

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

67. Reed to Massey, 7 February 1914, Is 1 22/2679, LINZ Wellington

68. Inspector of Forests to Auckland Commissioner of Crown Lands, 19 March 1914, Is 1 22/2679, LINZ Wellington

the Omapere kauri gum reserve on the north western shore of the lake, but did not include the Utakura outlet. After being approached by Reed, Massey replied that the ‘area applied for for recreation purposes appears to be excessive and I have decided to defer consideration of the matter’, although he did state in relation to the former reserve ‘that it is proposed to cut [it] up for settlement purposes as soon as a surveyor is available.’⁶⁹

7.6.4 The Government lowers the lake

The Government was again forced to consider the question of Maori rights to Lake Omapere when, in around 1916, the Okaihau branch railway was constructed. The railway, running between Okaihau and Kaikohe, traversed the western margin of the lake, crossing the Utakura stream immediately below the outlet. Pressure was brought to bear upon the Government that the large labour force based in the Omapere area engaged in the construction of the railway, be used to undertake earth works with the object of lowering the lake.

In a memorandum from the Public Works Department to the Under-Secretary of Lands dated 3 November 1916, it was stated that the Native Land Court had informed the department ‘that in connection with our railway works it would be highly injudicious to interfere in the slightest degree’ with the eel channels at the Utakura outlet. Consequently it had been ‘arranged to deviate the line so that no interference whatever should be caused.’⁷⁰ However, Pitcaithly, in one of his many letters urging that the lake be lowered, informed the Member for the Bay of Islands that the Public Works Department, presumably in the course of constructing the railway, had ‘fallen foul’ of the Maori who owned the eel weirs at the Utakura outlet by filling up one of the channels – ‘thus robbing a certain tribe of its right’.⁷¹

In March 1918, the Chief Drainage Engineer wrote to the Under-Secretary of Lands in connection with the possibility of the lake being lowered through altering the Utakura outlet. In his letter the commissioner drew attention to the eel weirs at the outlet being ‘a trouble’ and that it was ‘more than likely the natives would have a case were they removed.’ It was recounted how the Kawakawa Drainage Board had removed some eel weirs and that damages had been awarded against the board to the order of £150. In light of this, the commissioner advised that it ‘seems unwise for this Department to place legal machinery in motion for the sake of one individual’ – being the owner of the Omapere estate.⁷²

Subsequent to the Crown’s purchase of the parts of the Omapere estate affected by flooding around the end of the First World War, the North Auckland Commissioner of Crown Lands wrote to the Under-Secretary of Lands. He informed the Under-Secretary that he had recently visited the Utakura outlet and

69. Massey to Reed, 17 May 1915, ls 1 22/2679, LINZ Wellington

70. Under-Secretary of Public Works to Under-Secretary of Lands, 3 November 1916, ls 1 22/2679, LINZ Wellington

71. Pitcaithly to Stewart, 29 December 1916, ls 1 22/2679, LINZ Wellington

72. Chief Drainage Engineer to Under-Secretary of Lands, 11 March 1918, ls 1 22/2679, LINZ Wellington

that a party of Public Works Department labourers were still camped there engaged in building the railway. The commissioner urged ‘that immediate steps be taken to have the work of lowering the lake put in hand and that the Public Works Department be asked to deal with the matter.’⁷³

In 1920, O N Campbell, who had succeeded Thompson as Chief Drainage Engineer, reported to the Under-Secretary of Lands on the feasibility of lowering Lake Omapere. Campbell considered that ‘the whole of the lake could if necessary be drained’ and that ‘from a financial point of view this seems a sound proposition’ – his calculations suggesting that ‘3000 acres of Lake bed could be reclaimed at a cost of approximately £7 an acre’. But in light of the considerable opposition to this course of action in the district, and that the question of ownership of the lake bed was still unresolved, he recommended that the lake just be lowered rather than completely drained. This, he considered, would have no detrimental effect upon the eel fishery.⁷⁴ Subsequent to the Under-Secretary of Lands receiving this report, he ordered that the work to lower the lake be undertaken, and placed £700 on the supplementary estimates for this purpose.⁷⁵

It is apparent that by February 1921, the work had begun. In that month Sir William Herries, the then Native Minister, received a telegram from Tau Henare informing him that some excavations were underway at the outlet to Lake Omapere and asking whether or not the Government had authorised this action.⁷⁶ Around this time, Ripi Wi Hongi wrote to the Minister of Lands, D H Guthrie, regarding the proposal to drain the lake. Although stating that the draining of the lake would be a ‘calamity’, Wi Hongi was more concerned that each hapu’s drain be affected equally so as not to relatively advantage or disadvantage one hapu more than another. He asked, therefore, that all three should be deepened to the same extent. Wi Hongi stated that eel fishing remained very important to the Maori economy of the area because ‘the cost of living is very high now, [and] this is one way the Maories can sustain themselves’.⁷⁷

The next year, Hone Toia wrote to Tau Henare, the Member for Northern Maori, registering his opposition to the drains being deepened and demanding compensation: ‘We object to the drain being dug on this portion unless the sum of £3000 is paid because the Native Land Court awarded us this stream.’⁷⁸ Toia’s complaint was investigated by the Chief Drainage Engineer. He reported to the Under-Secretary of Lands that ‘the Natives have suffered no injustice and consequently are not entitled to any compensation on account of the works we have carried out at Lake Omapere.’ Further, Campbell stated that ‘the three existing

73. North Auckland Commissioner of Crown Lands to Under-Secretary of Lands, 25 August 1920, Is 1 22/2679 34C

74. Chief Drainage Engineer to Under-Secretary of Lands, 26 October 1920, Is 1 22/2679, LINZ Wellington

75. Under-Secretary of Lands to North Auckland Commissioner of Crown Lands, 5 November 1920, Is 1 22/2679 35c

76. Minister of Lands to Under-Secretary of Lands (telegram), 3 February 1921, Is 1 22/2679, LINZ Wellington

77. Ripi Wi Hongi to Guthrie, Minister of Lands, (translation) 26 January 1921, Is 1 22/2679, LINZ Wellington

78. Hone Toia to Tau Henare, 7 January 1922, Is 1 22/2679, LINZ Wellington

outlets were deepened to a like depth in order that no one tribe would have any advantage over the other'. It was also claimed that while the water level had been lowered, there was the same volume of water flowing through the outlet, and that therefore the fishery remained unaffected. Campbell considered that the real grievance was not the present works but the fact that Maori had not been paid for lands taken for the purposes of railways and roads in the area, and that the question of the ownership of the lake bed had not been settled.⁷⁹

Before the Native Land Court in 1929, both John Webster and Hone Toia recounted the lowering of the lake at the time that the Okaihau railway was constructed. According to Webster:

The Government wanted to lower the level of the lake when the Okaihau railway was put through. The engineers ascertained that the depth of the lake was 14 feet, and they then set about making an outlet. The Natives through Hone Toia and others objected to the Minister in Wellington, and the draining was stopped. Later the engineers deepened the three outlets from the lake, thus interfering with the eel weirs of the Natives, and again the work was objected to by the Natives and was stopped by the Minister.⁸⁰

Similarly, Hone Toia recounted how he remembered:

. . . Public Works men working at blasting to deepen the outlets from the lake. The PW men were removing the metal to Okaihau. I went to them and asked for compensation first but I was not paid. I stopped them from lowering the level of the lake further. I also stopped the people who wanted to use the water for electric power purposes.⁸¹

During this time, as was the case around the turn of the century, there is evidence of Pakeha opposition to the waters of Lake Omapere being lowered. In July 1921, an interesting letter appeared in the *Northern News* concerning the lake. Its author, WE Bedgood, bemoaned that:

the day has passed when any great value is set on Nature's gift so far as scenery is concerned: everything has to give way to provide for another cow or sheep being raised, and for this reason many of our natural beauty spots have been sacrificed.

Bedgood expressed the fear that were the lake lowered six feet, as he believed was the intention, the lake would become 'a raupo swamp, with a channel down the middle.'⁸² In response to this claim, the Chief Drainage Engineer informed the Under-Secretary of Lands that the intention was to lower the lake by just under four feet, not the six feet claimed by Bedgood.⁸³ The Bay of Islands

79. Chief Drainage Engineer to Under-Secretary, 3 February 1922, Is 1 22/2679, LINZ Wellington

80. John Webster, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 5

81. Hone Toia, Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8

82. 'Lowering Lake Omapere: An Old Resident's Protest', *Northern News*, 2 July 1921

83. Chief Drainage Engineer, Auckland, 30 July 1921, Is 1 22/2679, LINZ Wellington

Acclimatisation Society also registered its opposition to the lake being interfered with in a letter to Reed.⁸⁴

7.7 Early Native Land Court Action

The first application by Maori to have the title of Lake Omapere investigated by the Native Land Court was filed in 1913. However, it was not until 1929 – 16 years later – that the matter finally came before the court. To a large extent this delay appears to have been effected by various agents of the Crown conspiring to prevent the application being heard.

In 1921, the Auckland Commissioner of Crown Lands informed the Under-Secretary of Lands that a petition asking that the title to Lake Omapere be investigated, had been referred to the Registrar of the Tai Tokerau Native Land Court. In relation to this petition, the commissioner told the Under-Secretary that:

As the ownership of the lakes beds [sic] is still under consideration, I have up until the present refused to compile a plan for investigation purposes in respect of Lake Omapere, and should be glad of your direction as to what attitude I am to adopt in regard to supplying a plan for this purpose.

It was stated that even were it considered desirable to provide a plan to the Native Land Court, this was impossible given that an accurate survey plan of the lake could not be made until such time as the drainage works underway at the time had been completed.⁸⁵ The Under-Secretary of Lands replied that the plan must be prepared once the lowering of the lake was completed – which according to an earlier letter of his, was anticipated to be in January 1922.⁸⁶

By this time Maori who were anxious to have the Native Land Court investigate the title of Lake Omapere had engaged a solicitor, E C Blomfield. A memorandum prepared by the Native Minister's private secretary dated September 1922, stated that Tau Henare had received a letter from Blomfield asking that Henare see either the Minister or Under-Secretary of Lands:

and arrange so that no objection is made to the issue of a sketch map by the Survey Department at Auckland, without which the investigation of title to the lake could not take place.

According to the memorandum, the Native Minister considered the issue to be 'a lakes matter' and referred it to the Attorney-General, Sir Francis Bell. Bell, replying to the Minister in November 1921, stated that he did 'not think any

84. Secretary, Bay of Islands Acclimatisation Society to Reed, 15 July 1921, Is 1 22/2679, LINZ Wellington

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

86. Under-Secretary of Lands to North Auckland Commissioner of Crown Lands, 21 October 1921, Is 1 22/2679; Chief Drainage Engineer to Under-Secretary of Lands, 3 February 1922, Is 1 22/2679, LINZ Wellington

facilities should be granted to enable an application to be made to the Native Land Court for title to the bed of Lake Omapere.⁸⁷

Subsequent to this, the matter was brought before the Native Minister at the Treaty of Waitangi hui held in the Bay of Islands on 29 March 1922. Tau Henare, on behalf of Nga Puhi, asked:

That the Government permit and facilitate the investigation by the Native Land Court of the customary title to the respective lake-beds by providing plans upon which such investigation could be proceeded with.

This precipitated the matter being referred to the Under-Secretary of Native Affairs, Chief Judge Jones. Jones reported to the Minister that the:

... Supreme Court has held that the Natives are entitled to have their claims to lake beds investigated by the Native Land Court. The rules of the court require that before any investigation shall be undertaken, an approved plan or sketch plan of the land shall be produced. The only legal way this can be got is through the Survey Department. I understand that instructions have been issued that no facility is to be given for the preparation of it should a plan be required. With all due deference, this seems to me opposed to the rights the Natives have conferred upon them by statute, to have such rights investigated.

Chief Judge Jones concluded that ‘there seems no valid reason why the courts should not be permitted to inquire into the respective claims to them.’⁸⁸

According to the same memorandum, Blomfield again wrote to Tau Henare in 1922 asking that Henare assist the claimants in getting the Survey Department to provide the plans required for a hearing to proceed. Blomfield informed Henare that, if necessary, the claimants were prepared to meet the costs of preparing this plan. Blomfield cautioned that on the authority of previous case law, the claimants had the right to go to the Supreme Court to compel the Native Land Court to investigate their claim. Subsequent to this letter, Henare asked that the Minister of Lands be approached to authorise the Survey Department to compile a plan sufficient to enable an investigation of the title to Lake Omapere. He suggested that the inquiry take place that year and the Native Land Court issue ‘an interlocutory order’, which the Crown could appeal if they so wished. Henare stated that were such an appeal made, it could be argued before the Native Appellate Court concurrent with the Crown’s appeal of the decision in the case of Lake Waikaremoana.⁸⁹

It would appear that Coates, the Native Minister, heeded the advice that legally, Maori could not be prevented from having their title to a lake determined. In September 1922 he ordered that the Survey Department prepare a plan to enable the Native Land Court to investigate title to Lake Omapere.⁹⁰

87. Memorandum to the Native Minister from Private Secretary, 6 September 1922, Is 1 22/2679, LINZ Wellington

88. Ibid

89. Ibid

7.8 The 1929 Inquiry of the Native Land Court

Although Coates instructed that the necessary plan be prepared in 1922, the investigation of title to Lake Omapere did not begin until 1929. The reasons for this further seven year delay remain unclear to the present author.

On 5 March 1929 the court, presided over by Judge Acheson, sat in Kaikohe and heard the evidence of those Maori claiming title to the lake. The court then adjourned to Auckland where, on 19 June 1929, the legal issues of the case were argued. Six weeks later, the decision of Judge Acheson was issued.

7.8.1 The Kaikohe hearing, 5 March 1929

The hearing at Kaikohe involved Maori giving evidence as to the basis upon which they asserted their rights to the lake. As this evidence has been drawn on heavily in the earlier section of this chapter detailing the nature and extent of Maori rights in Lake Omapere, it is not described in any great detail here.

After an hour's adjournment to enable the several applicants to consider the relationship between their various claims to the lake, it was announced to the court that Mr Blomfield would represent three claims, and in conjunction with Mr Webster and Mr Guy, a further two. However, the court was told by Blomfield that he was authorised to represent all Maori in their claims against the Crown in relation to Lake Omapere, and that he thus proposed 'to lead the evidence on behalf of all the Natives . . . against the common enemy the Crown.' The minutes of the Kaikohe hearing state that the inquiry was for the hearing of applications 11 to 27 – presumably meaning that in total there were 16 claims in relation to Lake Omapere.⁹¹

At the outset of the Kaikohe hearing, Crown counsel set out the Crown's contentions in the case before the court. The court minutes record that it was asserted that: Maori custom does not recognise ownership of lake beds; that consequently the beds of lakes belong to the Crown; and further, that by virtue of acquiring lands abutting Lake Omapere, the Crown had acquired the lake bed in those parts of the lake, along with riparian rights to the use of water and the right of navigation.⁹² As was later pointed out by claimant counsel, the Crown's argument was somewhat confused; illustrating how uncertain the matter of title to lakes was. Although claiming that the Crown owned all lakes, they still felt it necessary as a fall back position to set up a case that the Crown owned part of Lake Omapere by virtue of its owning lands adjoining the lake.⁹³

For the claimants, Blomfield pointed out that the Crown conceded that it had never directly purchased the lake, and that therefore there was 'more onus upon the

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

91. Bay of Islands Native Land Court minute book 11, 5 March 1929, pp 1–2

92. Ibid, p 1

93. Bay of Islands Native Land Court minute book 11, 19 June 1929, pp 12–13. The pagination is that of a typed copy of the court minutes contained in ls 1 22/2679, LINZ Wellington.

Crown to prove its right to the lake than there is on the Natives to prove their ownership'.⁹⁴ In his decision of August 1929, Judge Acheson summarised the claimants' position as being that:

Omapere had always been Maori owned, that the Crown had never claimed it prior to the present hearing and that there existed no evidence that the Crown had acquired any rights in the lake, that there existed no presumption in law that the Crown had rights to lakes such as Omapere, that Omapere was customary Maori land and as such it had not been legally possible for the Crown to acquire it, and [that] the Treaty preserved such proprietary rights as were being asserted in the case of Omapere.⁹⁵

During the course of the day, four witnesses were heard: Hemi Wi Hongi, Ripi Wi Hongi, Hone Toia, and John Webster. Their submissions were concerned primarily with establishing that Maori had enjoyed continuous and uninterrupted occupation of the lake. Mr Parore stated that the claimants he was representing 'support the evidence given already as to use and occupation' and that they did 'not wish to take up some time by calling further evidence.' Webster, who as well as giving evidence was representing some claimants, stated the same.⁹⁶

At the end of the day's inquiry, Acheson concluded that the evidence of use and occupation of Lake Omapere by Maori was irrefutable. He stated that the:

... Court decides that it has been proved by evidence not contested by the Crown, that for many generations past the Natives interested in Lake Omapere have used the lake for eel fishing purposes on quite a large scale, many thousands of eels being captured every season. The court is satisfied that these eels constitute quite a substantial article of food diet, and that therefore the fishing rights of the Maoris were and still are of real value to them, and will have to be provided for no matter what decision the court may come to on the other questions involved. The Court also holds that it is proved that the Natives fished and still fish for eels over the whole lake and its shores, and not merely in a few well defined outlets on the western side of the lake. The Court is also satisfied that for a long time past the Natives have dug for gum in the bed of the lake in the shallows. The Court has seen them digging, and it has inspected the shores of the lake at various points, and it has seen a number of places where eels are caught. In the absence of any evidence to the contrary both at this hearing, and at previous hearings affecting Omapere lands, the court must accept the Native tradition that the lake bed was originally a swamp area covered with bush, which was burnt. Probably the outlets blocked up and the lake formed.⁹⁷

Acheson then announced that at the request of both the applicants and the Crown, the court would adjourn to Auckland to consider 'some most important legal questions'. These were listed as including: the effect of the Treaty of Waitangi; the claims of the Crown to all lakes and lake beds; the rights of the owners of lands

94. Ibid, p 2

95. Bay of Islands Native Land Court minute book 11, 1 August 1929, pp 1-2

96. Bay of Islands Native Land Court minute book 11, 5 March 1929, p 8

97. Ibid, p 9

adjoining lakes; and the right of the Crown to lower or raise the level of lakes for hydroelectric purposes.⁹⁸

7.8.2 The Auckland hearing, 19 June 1929

The matter of the title to Lake Omapere next came before the Native Land Court in Auckland on 22 May 1929. Although the hearing was immediately adjourned until 19 June, the court did consider the request of the Crown that Europeans who owned land adjoining the lake be afforded the opportunity to be heard. The request, objected to by Blomfield acting for the Maori applicants, was disallowed by the court. In making this ruling, the court stated that even if such parties were admitted to the proceedings, it was ‘probable that the court will decide after hearing arguments that the European owners of land adjoining the lake have no status in these proceedings and cannot be heard.’⁹⁹

The Court, reconvening a month later, embarked upon an involved two day inquiry into the legal issues relevant to the ownership of Lake Omapere. Early in the first day’s proceedings, Blomfield set out the contentions of those Maori interested in the lake:

[First] . . . that the lake, until some twelve generations ago, more or less, was land covered with bush and of a swampy nature.

Secondly, that until the land became a Lake, it was occupied and owned by the Claimants. . . .

Thirdly, that the area has since it became a Lake, been extensively used through its entirety as a fishing ground by the claimants and is still so used.

Fourthly, that there is no evidence before the court that the Crown has ever purchased or acquired the area.

Fifthly, that the Claimants have always asserted their claim even to the Native Minister in 1903 and have endeavoured to have the title investigated by the court.

Sixthly, that the Native Land Court has never investigated that title.

Seventhly, that when the Crown commenced to drain the lake, the claimants actively objected.

Eighthly, there is no evidence before the court that the Crown ever claimed the lake until the present proceedings.

[And] Ninthly, . . . that the level of the lake has been lowered and foreshore created along its boundaries by the drainage operations.¹⁰⁰

Blomfield then proceeded to state what he adduced as being the Crown’s position in the case.¹⁰¹ He considered that it was apparent that the Crown, in not recognising the Maori customary ownership of lake beds, considered that the beds of lakes belonged to it. And that notwithstanding, through having purchased lands

98. Ibid, pp 9–10

99. Bay of Islands Native Land Court minute book 11, 22 May 1929, pp 91–92

100. Bay of Islands Native Land Court minute book 11, 19 June 1929, pp 4–5

101. These, along with the claimants’ contentions set out above, were included in the preamble to Acheson’s decision, issued on 1 August 1929. Bay of Islands Native Land Court minute book 11, 1 August 1929, pp 1–3

contiguous with the lake, the Crown had title to those parts of the lake bed that adjoined such lands. Blomfield added that the Crown also claimed that it had acquired riparian rights that conferred upon it the right to take water and possibly the right of navigation.¹⁰²

Blomfield then proceeded to set out the case of the Maori owners in the matter. Of key importance to his submission was the notion that ‘by virtue of the Treaty of Waitangi’, Lake Omapere was customary land. In support of this contention, he cited the cases of *Tamaki v Baker* (Court of Appeal in 1901) and *Mangakahia v The New Zealand Timber Company* (Supreme Court during 1881 and 1882). It was argued that this contention, in conjunction with the precept that a lake was simply land covered with water, meant that the court must work from the assumption that Omapere was customary Maori land unless otherwise shown.¹⁰³

In relation to the spectre of riparian rights, Blomfield submitted that given that Omapere ‘is customary land and that the title has never been investigated . . . no principles of English law apply with respect to adjoining owners’. It was also pointed out that the Crown’s claim to riparian rights illustrated the rather confused and uncertain nature of its case:

First of all the Crown says the whole of the lake belongs to us because we own everything. Secondly, if it does not belong to us in that way, we own some of it. Thirdly, that if that is not so, we have riparian rights.¹⁰⁴

Following the completion of the applicants submission, the Crown then proceeded to state its case. Central to its argument was the notion that in order to:

establish a claim to the bed of Lake Omapere, the claimants must satisfy the court, first of all that native custom in the district recognised absolute ownership of the lake to specific individuals or a specific collection of individuals, and secondly that such a right has obtained legal recognition or validity in Native land legislation.

Much was also made of the fact that the lake was navigable. Although reference was made to the Coal Mines Act 1925, this was only in terms of a definition of what constituted a navigable body of water, and not in relation to the significance of what navigability meant in terms of the Crown ownership of lakes.¹⁰⁵

Another argument put forward by the Crown was that the basis of claims such as that by the present applicants to Omapere, lay ‘not in Native custom, but in advice of European legal advisers who have been acting for Natives in recent years’. Further, the Crown contended that official documents relating to Maori tenure disclosed nothing to indicate that Maori contemplated the ownership of lake beds. In particular, counsel for the Crown stressed that the ‘doctrine that the lake is land covered by water is borrowed from English law, and was not in contemplation by the Natives.’¹⁰⁶

102. Bay of Islands Native Land Court minute book 11, 19 June 1929, p 5

103. Ibid, pp 5–6

104. Ibid, pp 12–13

105. Ibid, pp 19–20

Upon being questioned by Judge Acheson, Meredith, for the Crown, admitted that there had been no investigation of title to Omapere. But he was quick to add:

that Native title is not universal and that it is not strictly true that the whole of New Zealand, whether land or water is necessarily the subject of the native title.¹⁰⁷

In arguing that Maori custom did not recognise the ownership of lakes, Crown counsel made a distinction between exclusive ownership of a lake, and the existence of rights of fishing and navigation in the same body of water. It was contended that in the case of Lake Omapere, no evidence had been produced to demonstrate the existence of 'exclusive proprietary rights of ownership in this lake bed.' While Acheson pointed out that fishing rights were clearly part of ownership, Meredith countered that one could fish without necessarily having ownership rights.

At this point, Meredith questioned the preliminary decision of the court that the lake was customary Maori land (made after the hearing at Kaikohe) because it was based purely on evidence of fishing.¹⁰⁸ Acheson contested this point, stating that Maori had dug gum from the lake, and that they had 'done far more than fish.' However, despite being pressed by the Crown to elaborate upon these other uses, Acheson did not specify what they actually were, other than to state that it 'was taken for granted that occupation was admitted and that there has been nothing brought forward by the Crown to disprove the position.' The Crown, in response to the question from the court as to what conditions constituted proof of ownership, replied that ownership would mean:

that the actual owners would have the right to fish and they would be the only persons to have the right to fish all over it and they could not be restricted if they owned the lake.¹⁰⁹

The Crown again restated the position that Maori must establish their title before the lake was removed from the demesne of the Crown, and that in the case of Omapere, there was only a right of fishery and that this right only existed in connection to the ownership of land adjacent to the lake. This led to further debate about the difference between normal land and land covered with water. Acheson queried whether in this regard, land covered with water was any different to land covered by forest in which Maori gathered food. In suggesting that in fact they were analogous, Acheson stated that this was supported by common law. Rebutting this, Crown counsel contended that the issue was not the situation under English law, but whether Maori traditionally recognised the ownership of lake beds. In support of the position that usufructuary rights did not necessarily equate with ownership, Meredith argued that the incontrovertible use of sea fishery resources by Maori did

106. Ibid, pp 21–22

107. Ibid, p 22

108. Ibid, p 27

109. Ibid, pp 28–29

not confer upon them ownership of the sea. Judge Fenton's Kawaurenga judgement (Native Land Court, 1870) was cited in support of this.¹¹⁰

Crown counsel proceeded to argue that it was preposterous to propose that Maori had exclusive rights to navigable waters. It was asserted that it could never have been contemplated by the Legislature that Maori would have such exclusive ownership of navigable waters, given the position that 'rights of navigation should be vested in the Public'. Hence Crown counsel advocated that a 'restricted' reading of the Treaty of Waitangi in relation to waterways was both necessary and justified. Rights of navigation, it was contended, were an ordinary condition of sovereignty.¹¹¹

Prenderville, who acting for the Crown along with Meredith, then proceeded to outline the situation vis-a-vis other North Island lakes, the title of which had been contested by Maori.¹¹² Of the lakes discussed, Prenderville considered that it was only in the case of Lake Wairarapa that the Crown actually recognised Maori rights to the whole lake and had accordingly extinguished them by purchase. However, Crown counsel stressed that there were various exigent factors that were a consideration in this acknowledgement of Maori rights to the Wairarapa lakes – especially the possibility of a breach of the peace in connection with the opening of the lake to release floodwaters.¹¹³

In reply, Blomfield asserted that the Crown was simply claiming all land as the demesne of the Crown, a corollary of which was that the onus was upon Maori to prove otherwise. Blomfield drew attention to the fact that in presenting its case, the Crown had assiduously ignored significant case law. In particular, reference was made to *Tamaki v Baker* – a case that he claimed established the principle 'that the mere assertion [of title] by the Crown amounted to nothing.' Blomfield stated that this principle was affirmed when the case was reheard by the Court of Appeal.¹¹⁴

Further, Blomfield contended that the whole of the Crown's case as presented by Meredith was 'shattered', if he considered what happened when a small lake contained within a single block of land came before the Native Land Court. According to Blomfield, in such instances, the land along with the lake is invariably awarded to the land's traditional owners. He also stated that it was irrelevant as to whether or not a lake was navigable.¹¹⁵

During the second day of the Auckland hearing, Professor John Arthur Bartrum, a geologist at the University of Auckland, was questioned extensively in connection with the manner in which Lake Omapere was formed. This, it appears, was an attempt to reconcile scientific accounts as to the origins of the lake with those of various witnesses at the Kaikohe hearing.¹¹⁶

110. Ibid, pp 30–32

111. Ibid, pp 34–35

112. Ibid, pp 37–44

113. Ibid, p 42

114. Ibid, p 45

115. Ibid, pp 45–46

116. Ibid, pp 51–62

The hearing concluded with a lengthy exposition by Judge Acheson in which he made a further interim statement of findings. Although a formal written decision was to follow – considered necessary by Acheson given the likelihood that the outcome would be taken on appeal – he considered it desirable that parties be given an intimation as to the likely outcome.¹¹⁷

As had been made evident in the previous two days' proceedings, Acheson was emphatic as to the extent of the Crown's demesne in New Zealand:

I wish to say definitely that the Crown has no inherent right to the beds of the lakes. It has no inherent right in England to beds of lakes, and there would need to be some very definite statutory or other provisions in New Zealand to confer upon the Crown greater rights in respect to the beds of lakes than the Crown has in England.

And specifically in relation to Lake Omapere, it was observed – in concurrence with the submissions of counsel for the applicants – that:

the claim of the Crown that this bed of the Omapere Lake is Crown land has not been supported by any evidence whatsoever and [that] two well known cases *Tamaki v Baker* and *Tamihana v Solicitor General* quite clearly establish the point that the Crown was not entitled to have its rights assumed. It must prove that it is entitled to the bed of the lake.¹¹⁸

From Acheson's closing statement it is apparent that in his final decision, great weight was to be placed upon the Treaty of Waitangi. Acheson discussed at some length the importance of taking into account Lord Normanby's instructions to Hobson in seeking an understanding of the circumstances in which Maori acquiesced to the Treaty. In particular he drew attention to the oft quoted position that Maori sovereignty and title to the soil of New Zealand had been solemnly recognised by the British Government. Acheson was clearly of the mind that article two of the Treaty, when read in connection with these instructions, undoubtedly included lakes.¹¹⁹

Acheson was equally dismissive of the Crown's contention that Maori interests in Omapere extended only to fishing rights:

To the Maori, as we nearly all know, a Lake was a Lake. It was something besides, something that stirred the hidden memories in a tribe or an individual, and it is impossible to believe that those thousands of Maoris who were inhabiting the Pahs, who had been born in sight of the Lake, it is impossible to believe that these Maoris had not loved Lake Omapere for the sake of the Lake itself, and regarded it as a treasured possession. And nothing can make me believe that they would look upon it in such a mean way as to regard it only as an occasional source of food supply for the tribe.

117. Ibid, p 63

118. Ibid

119. Ibid, pp 64–65

Further, in light of this perceived attachment, Acheson observed that it was hard to entertain the notion that Maori would have contemplated abandoning ownership of the lake to the Crown, and that if the Crown had pressed its claim within 20 years of the signing of the Treaty of Waitangi, ‘there would have been more trouble to cope with than it would have cared to undertake at the time’.¹²⁰

Acheson, ‘having held that this land is customary land, and having rejected the claim of the Crown to the bed of the lake’, proceeded to briefly set out a number of other points that were later expanded upon in his written decision of 1 August 1929.¹²¹

7.8.3 Acheson’s decision

On 1 August 1929, Judge Acheson’s written decision as to the title of Lake Omapere was issued. There can be no doubting the significance of this decision. While the ruling that Maori use and occupation of the lake had been continuous and uninterrupted since 1840, and that the lake was incontrovertibly Maori customary land, was in itself significant, what was truly remarkable about the decision was the reasoning in connection with the Treaty of Waitangi that underpinned it. Acheson ruled that the Native Land Court was bound to take notice of the Treaty, and that its provisions most certainly guaranteed Maori the ownership of lakes. Such findings led the Waitangi Tribunal, in its 1995 report on the Whanganui-a-Orotu claim, to observe that the ‘1929 decision of Judge F O V Acheson of the Native Land Court was in our view one of the most perceptive judgements in the legal history of this country.’¹²²

The issues pertaining to the title of Lake Omapere were considered to be of such importance, that the court dealt with them at great length. Acheson stated ‘that in order to facilitate future reference to its decision on various points, the court will deal with the issues in the form of specific questions and answers.’¹²³ The following section sets out each question and answer.

(1) Did the ancient custom and usage recognise ownership of the beds?

The question ‘Did the ancient custom and usage of the Maoris recognise ownership of the beds of lakes?’ elicited an emphatic ‘Yes!’. To Acheson’s mind, ‘this answer necessarily follows from the more important fact that Maori custom and usage recognised full ownership of lakes themselves.’¹²⁴ In setting out his rationale for this decision, it was observed that:

The bed of any lake is merely a part of that lake and no juggling with words or ideas will ever make it other than part of the lake. The Maori was and still is a direct thinker and he would see no more reason for separating a lake from its bed (as to the

120. Ibid, p 66

121. Ibid, p 71

122. Waitangi Tribunal, Te Whanganui-a-Orotu Report, Wellington, Brookers, 1995, p 207

123. Bay of Islands Native Land Court minute book 11, 1 August 1929, p 7

124. Ibid, p 7

ownership thereof) than he would see for separating the rocks and the soils that comprise a mountain. In fact in olden days he would have regarded it as a rather grim joke had any strangers asserted that he did not possess the beds of his own lakes.

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

All the old authorities are agreed that the whole surface of the North Island of New Zealand was held in definite ownership, according to Maori custom and usage, by the various tribes and their component parts. The Native Land Court has proved the truth of this time after time in every district.¹²⁵

In support of this position, Acheson cited various case law and other authorities including former Chief Justice Sir William Martin, and the first Attorney-General, William Swainson. In summary, Acheson observed that:

nowhere throughout those judgements or opinions has he found the slightest suggestion by inference or otherwise that the ancient custom and usage of the Maoris did not provide for the full ownership of lakes in exactly the same manner as for the ownership of mountains and forests.¹²⁶

Of the parts of the country with which he was most familiar, Acheson noted ‘that it was taken for granted that the lakes were tribal property’ and that importantly, lakes were not ‘regarded merely as sources of food supply or merely as places where fishing rights might be exercised’.¹²⁷ In support of this he stated how lakes ‘to the spiritually-minded and mentally-gifted Maori’ were ‘a striking landscape feature possessed of a ‘mauri’ or ‘indwelling life principle’ which bound it closely to the fortunes of his tribe.’¹²⁸

This was not to say, however, that Acheson did not place emphasis upon the importance of Omapere as a food resource. In emphasising the significance of water-based food resources, he cited the 1870 Kauwaeranga judgement in which Chief Judge Fenton observed that the reliance of many iwi upon kaimoana, meant that water resources were often valued more than the land. Lake Omapere, Acheson said:

has been to the Nga Puhi a well-filled and constantly available reservoir of food in the form of the shellfish and the eels that live in the bed of the lakes. With their wonderful engineering skill and unlimited supply of man-power, the Maoris could themselves have drained Omapere at any time without great difficulty. But Omapere was of much more value to them as a lake than as dry land.

However, he was at pains to distance himself from the position of Justice Edwards’ in the case of *Tamihana Korokai v Solicitor General* (in the Court of Appeal during 1912 and 1913). In this decision Edwards contended that it was probable there was

125. Ibid

126. Ibid, pp 7–8

127. Ibid, p 8

128. Ibid, p 8

no Maori custom that recognised any greater right to navigable waters than that of fishing.¹²⁹

(2) Was Lake Omapere effectively occupied and owned by the Ngapuhi tribe?

This question was ‘Was Lake Omapere at the time of the Treaty of Waitangi (1840) effectively occupied and owned by the Ngapuhi Tribe in accordance with the requirements of ancient Maori custom and usage?’ Again, Acheson was in no doubt that Omapere was the property of Nga Puhi: ‘The occupation of Omapere was as effective, continuous, unrestricted, and exclusive as it was possible for any lake occupation to be.’ Further, he contended that by:

no process of reasoning known to the Native Land Court would it be possible to convince the Ngapuhis that they and their forefathers owned merely the fishing rights and not the whole lake itself.

It was stated that in the case of lakes, the usual tenets of Maori ownership would be the:

unrestricted exercise of fishing rights over it, the setting up of eel weirs at its outlets, the gathering of raupo or flax along its borders, and the occupation of villages or fighting-pas on or close to its shores.

According to Acheson, the evidence received at the Kaikohe hearing:

was quite sufficient to show that all the signs of ownership set out above had been shown effectively and continuously for many generations past in respect of Omapere. Fishing for eels had been carried out all over the lake and not merely in a few defined spots. Eel weirs had been set up in the outlets. Freshwater shell-fish had been gathered. It is quite certain that raupo was gathered from the lake fringe for the thatching of houses, and flax for the making of cloaks and mats. Without doubt also, although no evidence was given along these lines, the old time Maoris must have snared wild-fowl in the reeds and swamps along the shores and used the lake for the canoeing and other aquatic pleasures and exercises universal among the Maoris of other days.

In conclusion, Acheson observed that:

the Ngapuhis used and occupied Lake Omapere for all purposes for which a lake could reasonably be used and occupied by them, and [that] the Native Land Court says that much less use and occupation would be ample, according to ancient custom and usage, to prove actual and effective ownership of the lake, bed and all.¹³⁰

(3) Must native title be legally extinguished?

The question was: ‘Must Native title be extinguished in accordance with the law before it can be disregarded by New Zealand Courts?’ In stating that customary title

129. Ibid, pp 9–10

130. Ibid, pp 10–11

had to have been legally extinguished before it could be disregarded by the courts, Acheson remarked that he could not see upon what basis the Crown could contend that the Native Land Court could not require the Crown to prove that title had been extinguished.¹³¹

(4) Has native title been extinguished?

Following on from the third question, this question was: ‘Has the Native title to Lake Omapere been extinguished in accordance with the law?’ Acheson considered whether or not title to Lake Omapere had in fact been legally extinguished, and he was in no doubt that it had not been extinguished. In support of this, Acheson stated that the Crown admitted that title had:

not been extinguished by proclamation, or by confiscation arising out of any act of rebellion, or by sale by the Natives, or by cession to the Crown, or by abandonment by the Natives, or by any action of the executive, Government, or by any Statute of Parliament, or by the issue of a Crown Grant.

Concomitantly, Acheson was emphatic that there was no evidence of the Crown having any rights in the lake. Of the Crown’s contention that rights in Omapere had accrued to it because the Crown had purchased adjacent lands, he observed that:

This contention has no merit whatever. The sales to the Crown were of particular areas of land well defined as to area and boundaries, and could not possibly have been intended to include portions of the lake-bed adjoining.

Acheson concluded that there:

can thus be no presumption either in law or in fact that the sales of some lands to the Crown adjoining Lake Omapere carried with them rights to portions of the lake or of its bed.¹³²

(5) Has the New Zealand legislature recognised native ownership of lakes?

The question was: ‘Has the New Zealand Legislature at anytime given recognition to Native ownership of lakes?’ Acheson considered that by inference, Parliament had recognised Maori title to lakes. In support of this he cited section 21 of the Native Lands Act 1873. This section provided for the preparation of maps showing the different tracts of country in possession of the various hapu at the time of the signing of the Treaty of Waitangi. The Act specified that the maps were to show, inter alia, the positions of lakes. While it had not proved possible to locate any maps prepared under the 1873 Act for the Nga Puhī territory, Acheson expressed the opinion that if one existed, it would certainly have shown Lake Omapere. Attention was also drawn to the legislative recognition of Maori rights in the cases of Lakes Taupo, Rotorua, and Poukawa.¹³³

131. Ibid, p 11

132. Ibid, pp 13–14

133. Ibid, p 14

(6) Is the Native Land Court bound to the Treaty of Waitangi?

The question was: ‘Is the Native Land Court bound to take judicial notice of the provisions of the Treaty of Waitangi?’ In ruling that the Native Land Court needed to have regard for the Treaty, Acheson stated that the Treaty had received statutory recognition by the New Zealand legislature, and that both the Supreme Court and the Privy Council had taken judicial notice of it. Various case law and statutes were cited in support of this.¹³⁴

(7) Do the provisions contained in article 2 extend to the ownership of lakes?

The question was: ‘Are the words, “Lands and Estates, Forests, Fisheries and other properties, which they may collectively or individually possess”, contained in Article Two of the Treaty of Waitangi ample in their scope to extend to the ownership of lakes?’ Acheson was clearly of the opinion that lakes came under the ambit of article two of the Treaty of Waitangi. In discussing this article and the fact that lakes were not included in the resources listed, Acheson again cited the case of *Tamihana Korokai v Solicitor General*. In this decision Justice Edwards stated that ‘a lake, in contemplation of the English law, is merely land covered by water, and will pass by the description of land.’ Further, it was contended that the specific reference to fisheries in article two conferred to Maori rights that were supplementary to what else was guaranteed by article two. Acheson stated that these fishing rights were not a limitation upon any other rights Maori held.¹³⁵

(8) Did the parties of the Treaty contemplate that the natives would be entitled to the bed of Lake Omapere?

The question was: ‘Did the parties to the Treaty of Waitangi contemplate at the time of the signing, that the Natives would be entitled to the bed of Lake Omapere?’ The notion that subsequent to the signing of the Treaty, Maori would be divested of their title to Lake Omapere, was dismissed as nonsensical:

common sense dictates that neither they nor the Crown’s representatives could have imagined for one moment that, in all the vast tribal territory between the Bay of Islands and the Hokianga, there was one spot right in the centre, called lake Omapere, which was not owned by the Tribe and would be claimed by the Crown.

Acheson observed, that had Maori considered that they were to lose their title to the bed of Lake Omapere, the chiefs of Nga Puhi would not have signed the Treaty and that their numbers would have been sufficient to ensure the rejection of the Treaty at Waitangi on 6 February 1840. Acheson contended that the only right Maori gave up in signing the Treaty, was the right to sell to parties other than the Crown.¹³⁶

134. Ibid, pp 14–18

135. Ibid, pp 18–20

136. Ibid, pp 20–21

(9) Did the parties to the Treaty contemplate that the Crown would claim title to the lake?

The question was: ‘Did the parties to the Treaty of Waitangi contemplate at the time of signing that the Crown would claim Lake Omapere or its bed?’ In a similar fashion to the previous question, Acheson outrightly dismissed the idea that parties to the Treaty would have considered the possibility that subsequent to its signing, the Crown would claim title to Lake Omapere:

There was no common law right of the Crown to lakes or to the beds of lakes in England, so it is impossible to suppose that the Crown’s representatives who were negotiating with the Maoris took it for granted that New Zealand lakes would belong to the Crown as a matter of right.

In support of this, Acheson quoted at length various case law as well as the instructions under which Hobson was acting when he executed the Treaty. Of the officials who transacted the Treaty, Acheson claimed that it was:

impossible to believe that these representatives believed that the Crown had a right to the beds of Omapere and other lakes, yet deliberately refrained from drawing attention of the Natives to that right.

Further, he expressed incredulity that the Crown knew of such a right from the time of the signing of the Treaty, but refrained from pressing a claim for 90 years.¹³⁷

(10) Has ownership of the lake been effective, continuous, and unrestricted?

The question was: ‘Have the occupation and the ownership of Lake Omapere by the Ngapuhis ceased to be effective, continuous and unrestricted since . . . 1840?’ Judge Acheson was unequivocal that the Maori occupation and ownership of Lake Omapere had remained undisturbed since 1840. In support of this finding, reference was made to the uncontested evidence received at the Kaikohe hearing as to the nature and extent of Maori fishing practices on the lake; that Maori in recent years had been digging for kauri gum in the shallows at the western end of the lake; and that it was admitted by the Crown ‘that the Natives have never been disturbed or restricted in their use of the lake up to the present day.’

Acheson claimed that further evidence of the undisturbed occupation of the lake existed in the fact that:

on the only two occasions on record where officers of the Crown actively interfered with the Lake (by slightly lowering its level), the Native leaders at once made emphatic protests to the Native Ministers in Wellington, with the result in each case that the operations were stopped.

Thus the Natives have not only asserted their own rights continuously, but they have secured the stopping of acts by Crown officers that might possibly have been construed into acts of ownership if permitted.

137. Ibid pp 21–24

The court received evidence from both Hone Toia and John Webster that when the Government was in the process of lowering the lake, they intervened and the work was stopped. But despite this it seems that the lake's level was in fact lowered. Also cited as supporting the contention of Maori ownership and possession having been continuous and undisturbed, was the fact that Maori with interests in the lake had been campaigning for many years to have the Native Land Court investigate the title to the lake – 'they have certainly not slept on their rights, or as the Maori would express it, allowed their fires to die out.'¹³⁸

(11) Is Lake Omapere customary land?

The question was: 'Is Lake Omapere in fact 'customary land' within the meaning of Section Two of the 'Native Land Act, 1909'?' Acheson ruled that there could be no doubt that Lake Omapere was customary land within the meaning of section 2 of the Native Land Act 1909.¹³⁹

Having worked through the eleven questions, Acheson ruled incontrovertibly that Lake Omapere was Maori customary land. However, the making of a final order was held over pending the disposal of any appeal against the preliminary determination, and the hearing of further evidence from Nga Puhi to determine who should be included on the title to the lake.¹⁴⁰

7.9 The Crown's Appeal and Other Native Land Court Proceedings

As Acheson had foreseen, on 11 September 1929, the Crown appealed the Native Land Court's decision as to the title of Lake Omapere. However, just as the Crown had obstructed the initial inquiry, it deliberately delayed proceedings subsequent to the lodging of the appeal. It would be a further 24 years before the Crown's appeal was disposed of.

When the appeal first came before the Appellate Court in 1930, the Crown immediately applied for an adjournment which was duly granted. It appears that it was six years before the Crown's appeal again came before the court.¹⁴¹

In 1935, however, an application by the Public Works Department for approval to clear out the outlets of Lake Omapere was heard by the Native Land Court.¹⁴² The partial obstruction of the lake's outlets was apparently causing several hundred acres of Pakeha-owned land to be inundated with water. Part of the problem appears to have been that Maori were leaving their eel weirs in the outlets for the whole of the year, not just the few months of the eeling season. The Court reported that Maori present at the hearing:

138. Ibid, pp 24–25

139. Ibid, pp 25–26

140. Ibid, p 26

141. Auckland Maori Appellate Court minute book 12, 27 October 1953, f ol 347

142. Bay of Islands Native Land Court minute book 14, 31 August 1935, fols 324–325

agree to the weirs being removed except during the eeling seasons. They agree also to the drains being cleared but object to the drains being widened or deepened. They object to anything being done that might cause a rush of water from the lake and lead to [the] scourin[g of] the channels.

In light of this, the court agreed ‘on the spot to the outlets being clear[ed] but not deepened or widened.’¹⁴³ When in May 1936 the matter of the Crown’s appeal next came before the court, an adjournment was again granted upon the request of the Crown. Two months later, a similar course of events transpired and the hearing of the appeal was adjourned again. The matter next came before the Appellate Court in 1939. At this hearing the court made a statement that one of the major principles of British law is that justice should not be unduly delayed, and that the present case before the court had been delayed by ten years because of the non-prosecution of the Crown’s appeal.¹⁴⁴

7.9.1 Application to have Lake Omapere made a tribal reserve, 1940

In July 1940, the matter of Lake Omapere was again before the Maori Land Court – this time to hear an application that the lake be made a tribal reserve. In setting out the history of the case subsequent to Acheson’s 1929 decision, the court expressed the opinion that:

the appeal should have been dismissed long ago [because of] non-prosecution, or, better still, taken to the Privy Council for a final and binding pronouncement upon the important issues involved. Having waited eleven years, the court cannot wait any longer for the disposal of the appeal, but must in justice to the Natives make its final decision today.¹⁴⁵

Mr L W Paraone, acting for Maori with interests in the lake, reported to the court that the initial intention was that the lake would be vested in those individuals with proof of ancestral right, and whom had financed the 1929 Native Land Court inquiry. However, as discussions proceeded:

the leaders and the people gradually realised that the Native interest was paramount and that they should seek first the strength and the welfare of the Ngapuhi tribe. Accordingly the contributors finally decided to join the others and deal with Omapere solely from a tribal point of view, leaving it to recoup the contributions for the funds subscribed for the 1929 case.¹⁴⁶

Paraone stated how the people of Nga Puhi ‘all realised the necessity of making Omapere Lake into a Reserve to be guarded against alienation for all time, especially against purchase or taking by the Crown.’ He recounted how at a meeting held to discuss the matter, those present had become:

143. Ibid, fol 325

144. Auckland Maori Appellate Court minute book 12, 27 October 1953, fol 347

145. Bay of Islands Native Land Court minute book 18, 31 July 1940, fol 103

146. Ibid, fols 98–99

fully conscious of the great tribal importance of this matter. It was felt that the spirit of ancestors long dead had returned to the tribe and was guiding the people to unity amongst themselves.

Further, Paraone observed that this ‘must be the first time that the Ngapuhi have come to a unanimous decision’, and that it was proof of the survival of the ‘the tribal spirit’.

It was envisaged that the lake would be used to earn revenue which would then be used for tribal purposes. In order to protect the lake against being alienated or taken by proclamation, it was asked that the court make a recommendation that an order be issued under section 5 of the Native Purposes Act 1937 making the lake a Native reserve. It was stated that ‘later we may have to move for an Act of Parliament to close up all holes by which we may lose this lake.’ Interestingly, Paraone reported that it was the intention of Nga Puhi to admit a trustee from Ngati Whatua, Te Rarawa, Te Aupouri, and Ngati Kahu – these being iwi ‘usually associated with Ngapuhi in all matters affecting the Maori people’.¹⁴⁷

Upon being satisfied that a full representation of Nga Puhi were present and that the matter had been adequately discussed amongst themselves, the court decided to ‘recommend that ‘Omapere Lake’ be created a Native Reservation’ under section 5 of the 1937 Native Purposes Act.¹⁴⁸

Subsequent to the court’s recommendation, Eru Pou and 20 others petitioned Parliament, praying that their title to Lake Omapere be established, and that the lake be made a tribal reserve. The Native Affairs Committee recommended that the petition should be referred to the Government, and ‘that the question of the ownership of subaqueous land claimed by Maoris should be brought to finality.’¹⁴⁹ By 1953, the lake had been made a tribal reserve. The court appointed two panels of trustees – one being patrons, the other executives. The trustees were instructed by the court to complete the title to the lake by having a survey undertaken.¹⁵⁰

7.9.2 The Crown’s appeal is dismissed

Although the Land Court went ahead and made Lake Omapere a tribal reserve, the Crown’s appeal against the court’s 1929 decision remained. On 23 June 1953, the appeal again came before the Maori Land Court, but was adjourned until 24 August that year. The court stated that the present adjournment appeared to have been because the Whanganui River claim was presently to be heard, and that Crown Counsel considered that this case bore directly upon that of Lake Omapere. The Judge, however, was critical of the delay, saying he was doubtful as to the relevance of the Whanganui case to the present matter.¹⁵¹

147. Ibid, fols 98–101

148. Ibid, fols 103–104

149. Petition 102/1945, AJHR 1945, i-3, p 8

150. Bay of Islands Maori Land Court minute book 30, 10 February 1956, fol 168

151. Auckland Maori Appellate Court minute book 12, 23 June 1953, fols 335–356

After yet another adjournment,¹⁵² the Appellate Court sat again to hear the Crown's appeal on 27 October 1953. On this occasion the Crown announced that it had abandoned the appeal for practical reasons – specifically that it was by then 'not considered that the ownership of the soil under Lake Omapere has any value to the Crown.' However, they were quick to add that the abandonment of the appeal 'is not to be taken in the future as an admission of the correctness of the decision given in this case.'¹⁵³ In response, Mr Henderson, counsel for the owners, stated that:

It might be thought that we should accept this decision without ado. But I must express most vehement protest at the action of the Crown over the years and especially today.

. . . I feel that I must say the Crown's actions from the date of the Judgement 24 years ago until this present day can only be termed as being quite unconscionable and such an abuse of the process of this Court as to lead to a denial of Justice.

Further, in the course of recounting the history of the Crown's appeal against the 1929 decision, Henderson remarked that:

. . . I think it is fair comment to say that it has taken the Crown an inordinately long time to reach this conclusion which is in no way shared by my clients. One wonders why the Crown should not have said this 25 years ago and why the Crown has had to wait until all persons who originally made the application have died before they could legally be declared the owners of what they considered was an extremely valuable right. The Crown's attitude is quite clearly that the Maoris can have the lake solely for the reason that the Crown does not want it itself and after 25 years I would submit that that should not be countenanced by this Court in any way.

After giving every indication of preparing for a major legal battle and calling the court together this year – this is the third occasion the Crown has called the whole matter off by saying the subject matter of the appeal isn't worth fighting about. All that would be bad enough if the contest was between private persons. But when one party is the Crown and is under the most special obligations to afford protection to the Maori rights then I suggest that the position is quite intolerable.¹⁵⁴

The court reconvened the next day and the Crown's appeal was unconditionally dismissed. Upon this occasion, the court again criticised the Crown, claiming it was unjustified in delaying the issue of title to Lake Omapere by 25 years. It was contended that:

It would appear from the course of proceedings that the appeal may have been intended to be treated as a lever for negotiation for a settlement of some sort with the Maori owners. If that is so it is reprehensible and an abuse of the process of the court.

152. Auckland Maori Appellate Court minute book 12, 24 August 1953, fol 337

153. Auckland Maori Appellate Court minute book 12, 27 October 1953, fol 347

154. Ibid

The Court looks to the Crown's advisers in these matters to be motionless in setting an example to be followed in the use of the court's procedure.

The court ordered the Crown to pay costs of £150 to the respondents.¹⁵⁵

7.9.3 Lake Omapere becomes a section 438 trust

In 1953, the Maori Affairs Act was passed. Section 438 of that act provided for any Maori freehold or customary land to be vested in a trust, regardless of whether or not it had been formally constituted as a Maori reserve. Subsequent to the passing of the 1953 Act, the Lake Omapere trust was converted to one under section 438 – the Maori Land Court issuing a draft 'intended final order' on 22 February 1955.¹⁵⁶ It has not yet proven possible to find a copy of this draft in order to examine its exact terms, but it is apparent that it included not only the lake bed but also the lake's waters.

In the process of finalising the terms of the section 438 order, it was referred to the State Hydro Electric Department, the Marine Department and the Department of Lands and Survey. While Lands and Survey had no objections to the terms of the order, the other two departments raised concerns as to possible conflicts with existing legislation in relation to hydro developments and fisheries. Consequently the Minister of Maori Affairs declined to approve the order unless it was made subject to the provisions of both the Public Works Act 1928 and the Fisheries Act 1908.¹⁵⁷ This resulted in a further Maori Land Court hearing on 8 March 1956 at which the court directed that the trust order be amended so that it was subject to those Acts.¹⁵⁸

In a letter dated 3 August 1973, reference was made to the fact that in 1956, an order of the Maori Land Court had vested in the trustees' both the lake's bed and its waters.¹⁵⁹ The letter does not specify what is comprised in the order, and the original section 438 order has not been located.

7.10 The 1970s

Around 1973, the Kaikohe Borough Council applied to the Northland Catchment Commission – the agency charged with allocating water rights in Northland – for a permit to enable it to extract water for domestic supply from Lake Omapere. The application led to a reconsideration of the nature and extent of the rights of the Lake Omapere owners. On 1 June 1973, the Secretary of the Northland Catchment

155. Auckland Maori Appellate Court minute book 12, 28 October 1953

156. Bay of Islands Maori Land Court minute book 29, 22 February 1955, fol 112

157. Maori Affairs (Head Office) to District Officer, Whangarei, 23 February 1956, ma 1, 5/13/184 (Wai 22 rod, doc b8)

158. Bay of Islands Maori Land Court minute book 30, 8 March 1956, fol 202

159. Connell Trimmer Lamb and Gerard to Secretary, Northland Catchment Commission, 3 August 1973, (Wai 22 rod, doc b8)

Commission wrote to the commission's solicitors asking, in light of section 21(1) of the Water and Soil Conservation Act 1967, whether:

any decision by the Maori Land Court to vest the lake in certain "Trustees of Lake Omapere" does not constitute an express authorisation in respect of any body of water under the authority of any particular Act of Parliament.

Essentially the issue was whether the right to take water from Lake Omapere resided solely with the Crown, or whether this right was vested in the lake's trustees.¹⁶⁰

The solicitors' reply was contained in a letter to the commission dated 20 June 1973. In their opinion:

ownership of the lakebed is quite irrelevant. Section 21(1) of the Water and Soil Conservation Act 1967 vests all natural water in the Crown irrespective of ownership of the river, lake or stream bed. Any right to sell water vested in the trustees prior to the 1967 Act would be no different from the right that then existed for a European owner to sell water from a lake on European land.

. . . we are of the opinion that the right of any Maori trustees to sell such water, if conferred by the Maori Land Court, would not avoid the intended purpose of the 1967 Act which was to vest such water in the Crown.¹⁶¹

Clearly confusion existed between the status of section 21(1) of the Water and Soil Conservation Act 1967 – whereby the Crown vested in itself the sole right to allocate water – and the terms of the section 438 vesting order for Lake Omapere.

Judge Nicholson of the Tokerau Maori Land Court, however, took a contrary position to that of the commission's solicitors. In a letter to the commission of July 1973, he registered his 'complete disagreement' with the solicitors' opinion. While concurring with the position that the court order for Lake Omapere was now subject to the Water and Soil Conservation Act, he contended that the Act did not vest all natural waters in the Crown but the rights to use such waters. He stated that the opinion was incorrect in claiming 'that the Borough Council need not make any application to the trustees for the taking [of water].' Nicholson's position was that while the Crown had the sole right to take water from the lake, there was no way in which this could be done without physically accessing the lake:

It must be emphasised that Lake Omapere is not a 'lake' as understood in English law, but is Maori customary land. The Crown has the sole right to take, divert, use etc., the natural water, but it has no right to trespass on the land vested in the trustees and no such right has been delegated to the Commission.¹⁶²

160. Secretary, Northland Catchment Commission to Connell, Trimmer, Lamb and Gerard, 1 June 1973, (Wai 22 rod, doc b8)

161. Connell, Trimmer, Lamb and Gerard to Secretary, Northland Catchment Commission, 20 June 1973, (Wai 22 rod, doc b8)

162. Judge Nicholson to Secretary, Northland Catchment Commission, 6 July 1973, (Wai 22 rod, doc b8)

This elicited the response from the catchment commission's solicitors that there could be no doubt that the waters of Omapere were natural waters as defined by section 2 of the Water and Soil Conservation Act, and that they therefore came under the ambit of the Act. It was stated that:

Prior to the passing of the 1967 Act, the trustees for Lake Omapere, under clauses 3, 4, 5 and 7 of the Maori Land Court Order of 1955 were empowered to sell water; erect water works; promote hydro electric works; drain the whole or any part of the lake. [However,] The sole right to do these things is now vested in the Crown. No compensation is payable under the Act for the loss of these rights by the Maori trustees. The trustees, if they now wish to do any or all of these things, must apply to your Commission for the appropriate right, subject to the usual rights of objection.

In relation to the question of access, attention was drawn to the provision under section 24h of the Water and Soil Conservation Act whereby easements could be compulsorily acquired.¹⁶³

In November 1974, the matter came to a head when Judge Nicholson called a hearing of the Maori Land Court in relation to the Kaikohe Borough Council's intention to abstract water from the lake without the consent of the lake's trustees. Nicholson was reported in the *Northern Advocate* as having said that it was a matter of 'conduct and courtesy' and that the owners were 'just being ignored'. He commented that some people 'seem to think that just because an area is Maori land, they can do anything they like.' The article quoted Nicholson as having told the newspaper that the 'Catchment Commission had been "led astray by some entirely erroneous legal advice" that the Kaikohe Borough Council could take water from the Lake without first asking the trustees.' (This presumably was the opinion of Connell et al detailed above).

Judge Nicholson told the paper that the commission had passed this legal opinion on to the Kaikohe Borough Council who had begun to make arrangements to take water without the consent of the lake's owners. According to Nicholson:

The proper procedure . . . was for the . . . Council to first make a contract with the trustees of the land and then to obtain the approval of the Northland Catchment Commission for the use of the water. . . . If you are going to touch my land, you ask me not some other fellow. That's what should have been done here. The Commission can say someone can use the water but they can't say they can get to the water. To get to the water, you have to cross the land.

The *Northern Advocate* reported that at the conclusion of the sitting, the Mayor of Kaikohe formally apologised to the trustees for failing to consult them, and stated that he accepted the judge's rebuke.

A factor in the failure of the catchment commission and the borough council to consult with the lake's owners, identified by Nicholson, was that the lake was vested in twenty trustees – some of whom were dead. All trustees, according to

163. Connell Trimmer Lamb and Gerard to Secretary, Northland Catchment Commission, 3 August 1973, (Wai 22 rod, doc b8)

Nicholson, needed to be signatories to any contract in relation to the lake. He considered it desirable, therefore, that a smaller executive group of trustees be appointed in order that such matters as were currently before the court could be more easily dealt with in the future. This was agreed to by those trustees present, and a six-member trust was constituted.¹⁶⁴

The question as to the ownership of both the bed and waters of Lake Omapere was again considered in 1984. In July of that year, H N Austin, the Member of the House of Representatives for the Bay of Islands, wrote to the Minister of Lands inquiring as to the status of the lake.¹⁶⁵ In response, Koro Wetere reported that he had been informed by the Director General of Lands that the bed of the lake was unencumbered Maori freehold land vested in a trust under section 438 of the Maori Affairs Act 1953. With regard to the waters of the lake, Wetere's letter stated that 'they have the same ownership as the bed of the lake', and that:

this opinion was confirmed by the Maori Land Court in 1955 which after investigating the status of the waters included the waters along with the bed of the lake in the above mentioned vesting order.¹⁶⁶

7.11 Conclusion

The history of Lake Omapere reveals much about the evolving position of the Crown in relation to the ownership and control of lakes in New Zealand. A consideration of the lake's history in the twentieth century illustrates how the Crown attempted to develop a basis by which it could claim title to lakes in New Zealand. However, in the instance of Omapere, this enterprise was somewhat difficult in the face of irrefutable evidence of continuous use and occupation of the lake. When title to Omapere was eventually determined by the Native Land Court in 1929, the evidence of Maori ownership was held by Judge Acheson to be more than sufficient to rebut the Crown's claim of proprietary rights. His decision, considered to be one of the most perceptive judgements in New Zealand's legal history, makes it plain that lakes are clearly within the ambit of article two of the Treaty of Waitangi. Interestingly, Lake Omapere remains in Maori ownership to this day. Although the Crown lodged an appeal against the 1929 Land Court decision, this was never prosecuted. And unlike lakes such as Wairarapa, Taupo and those of the Rotorua region, the Crown did not effect a settlement whereby title passed to the Crown. The reason for this is probably the same as why the Crown abandoned its appeal against the Native Land Court's Omapere decision – the lake was simply considered to be of no value to the Crown.

Events in the early-twentieth century in respect to Lake Omapere illustrate how the Crown attempted to establish that its prerogative rights extended to lakes. But

164. 'Local bodies rebuked by Maori court judge', *Northern Advocate*, 16 November 1974

165. H N Austin to Minister of Lands, 19 July 1984, ls 1 22/2679, LINZ Wellington

166. K T Wetere to H N Austin, nd, draft, ls 1 22/2679, LINZ Wellington

although some Government officials seem to have pursued this policy, it is apparent that others favoured the prevalent common law position – namely that title was shared, *ad medium filum*, between riparian owners. The Crown first considered the extent of its rights as a consequence of pressure from Pakeha settlers to lower the lake's water level. As with the Wairarapa lakes, when the lake level rose, adjacent farmland was flooded. However, in the case of Omapere, only one landowner appears to have been deleteriously affected by the flooding.

Clearly confusion existed amongst officials as to whether the Crown had sufficient rights to lower the lake's water level. In 1910, the Minister of Lands expressed the view that the Crown had no rights in the lake whatsoever.¹⁶⁷ Others, however, thought that as a consequence of having purchased some of the lake's riparian lands, the Crown owned the part of the lake bed subjacent to those lands.¹⁶⁸ Around 1913, the Solicitor General, John Salmond, began pushing the idea that lakes belonged to the Crown. In relation to Lake Takapuna, he considered that the extent to which riparian rights extended to the ownership of the bed of a lake was very uncertain. He therefore advocated that the Crown should simply assume title to the lake and be prepared to defend its rights in court if any riparian owners challenged the Crown's right.¹⁶⁹ Shortly after this opinion, statements were made to the effect that the allodial title of the Crown extended to lakes. However, in stating this, the Solicitor General stressed that the extent and nature of Crown rights in relation to lakes remained very doubtful.¹⁷⁰

When the matter of the title to Omapere came before the Native Land Court in 1929, Crown counsel, in accordance with the Solicitor General's opinion, argued that the beds of lakes belonged to the Crown. This seems to have been largely predicated upon the contention that Maori custom did not recognise the exclusive ownership of lakes.¹⁷¹ However, Judge Acheson was unequivocal in rejecting the Crown's arguments, and upheld the claim of Nga Puhi to the exclusive ownership of Lake Omapere. In making this determination, the lake was held to be 'customary land' within the meaning of the Native Land Act 1909. Much of the reasoning that underpinned the decision was based upon guarantees extended to Maori by article two of the Treaty of Waitangi. In this regard, Acheson maintained that lakes most definitely came within the ambit of article two, and that the Native Land Court was bound to take judicial notice of the Treaty's provisions. He maintained that had Nga Puhi thought they would have been divested of Lake Omapere subsequent to the enactment of the Treaty, there is no way they would have signed the document. The

167. Minister of Lands to V Reed, 29 July 1910, Is 1 22/2679, LINZ Wellington

168. Memorandum of the Police Department, 8 March 1910, Is 1 22/2679, LINZ Wellington; Assistant Under-Secretary of Lands to Solicitor General, 18 June 1913, Is 1 22/2679, LINZ Wellington; Under-Secretary of Lands to Auckland Commissioner of Crown Lands, 12 May 1914, Is 1 22/2679, LINZ Wellington

169. Solicitor General to Under-Secretary of Lands, 19 August 1913, Wai 187/4, Waitangi Tribunal

170. Auckland Commissioner of Crown Lands to Under-Secretary of Lands, 15 May 1914, Is 1 22/2679, LINZ Wellington; Solicitor General to Under-Secretary of Lands, 22 July 1914, Is 1 22/2679, LINZ Wellington

171. Bay of Islands Native Land Court minute book 11, 5 March 1929, p 1; Bay of Islands Native Land Court minute book 11, 19 June 1929, pp 19–20

notion that the Crown's prerogative rights included title to lakes was dismissed on the basis that at common law, the Crown had no right to lakes or their beds.¹⁷²

In the case of Omapere, as with Waikaremoana and the Wairarapa and Rotorua Lakes, the Native Land Court can be seen as having defended Maori rights. Apart from the 1929 decision, evidence exists that on at least two occasions the court advised the Government in connection with public works that to interfere with Nga Puhi's eel weirs would be 'highly injudicious'.¹⁷³ The way in which various Crown officials conspired to prevent the investigation of title to Omapere suggests that the Crown was concerned the land court would make another decision that held lakes to be customary Maori land. And it can be said that the land court's eventual decision further jeopardised the Crown's attempts to establish itself as being the owner of lakes in New Zealand.

172. Bay of Islands Native Land Court minute book 11, 1 August 1929, pp 7–23

173. Under-Secretary of Public Works to Under-Secretary of Lands, 3 November 1916, ls 1 22/2679, LINZ Wellington; Under-Secretary of Public Works to Under-Secretary of Lands, 3 November 1916, ls 1 22/2679, LINZ Wellington

