

## CHAPTER 8

# CONCLUSION

### 8.1 Introduction

The main purpose of this report is to provide an account of Crown action and policy in respect of lakes in New Zealand. Generally the Crown only asserted its perceived rights to lakes in the face of a claim by Maori to a particular lake. Otherwise it would seem that it tacitly assumed that it had title to lakes. This assumption was tied to the colonial imperative that the situation that existed in Britain where individuals held private rights in waterways, should not be allowed to pertain in New Zealand. With rivers, the Crown attempted to extend its prerogative rights on the grounds that public rights of navigation were best protected by Crown ownership of all navigable rivers. When the courts rebutted this contention, legislation was passed to vest the beds of all navigable rivers in the Crown. In respect to lakes, however, the approach of the Crown was somewhat different. When Maori pressed a claim of ownership to a particular lake – usually through making a claim to the Native Land Court – the Crown assumed a reactive stance and opposed the claim. In the lake cases that came before the Native Land Court, the Crown was generally faced with irrefutable evidence as to the Maori ownership and use of lakes. In response, Crown counsel advanced a range of arguments to the contrary that were often confused and contradictory. But ultimately the Crown failed to rebut the claims of Maori and was forced to enter into negotiations with the owners of the various lakes to which it wanted to secure title.

In order to establish an account of the Crown's actions and policies in relation to lakes, this report has been structured around a series of case studies of the major contests for the ownership and control of lakes. This methodology was adopted as a way to try and make sense of the Crown's ad hoc and reactive approach to the ownership of lakes. In this chapter the themes that emerge from the case studies are brought together in an attempt to create a clearer sense of the Crown's attitude and approach to both Maori claims to lakes, and to realising its objective of establishing itself as the ultimate owner of lakes in New Zealand.

### 8.2 Maori, Customary Law, and Lakes in New Zealand

This project did not set out to provide a definitive account of Maori customary law in relation to lakes. For one thing, the assumption that such a definitive account is

even possible is problematic in light of the regional differences that exist between iwi and the flawed assumption that a singular Maori world view exists. Further, the present author lacks the requisite skills to undertake such a project. However, in the case studies of lakes that were the object of Native Land Court inquiries, a body of evidence was found pertaining to Maori conceptions of lakes and the ways in which they were used. To a lesser extent, these Native Land Court inquiries also revealed certain aspects about the metaphysical significance of particular lakes. As with all Native Land Court evidence, it must be remembered that the evidence documented in this report was given under particular circumstances and generally with a certain objective in mind. Caution must also be had given the possibly imprecise deployment of terms and inaccurate translations by those court officials who recorded the minutes.

For all of the lakes examined in this report, it is apparent that there existed a body of customary law pertaining to their ownership, management, and use. The existence of such a body of law is evidenced by the fact that in all of the cases where the Native Land Court completed an investigation of title to a lake, it found them to be subject to a Maori customary title.

To Maori, lakes were imbued with great metaphysical importance. As Judge Acheson observed in his decision as to the ownership of Lake Omapere, to Maori:

a lake was something that stirred the hidden forces in him. It was . . . something much more grand and noble than a mere sheet of water covering a muddy bed. To him it was a striking landscape feature possessed of a ‘mauri’ or ‘indwelling life principle’ which bound it closely to the fortunes and destiny of his tribe.<sup>1</sup>

To varying extents lakes were a tenet of Maori identity. In the case of Ngati Tuwharetoa, for example, Lake Taupo features in the following tauparapara:

*Ko Tongariro te maunga,  
Ko Taupo te moana,  
Ko Tuwharetoa te iwi,  
Ko Te Heuheu te ariki.*<sup>2</sup>

Reference to lakes are also frequently made in waiata. This was a feature of the evidence received by the Native Land Court in connection with the Rotorua lakes.<sup>3</sup>

This relationship between lakes and identity was very much rooted in tribal traditions as to the origins or discovery of lakes. In the case of Taupo, for example, Ngati Tuwharetoa traditions about the beginnings of their associations with the lake and its naming are centred upon the ancestor Tia. Similarly Te Arawa trace the beginnings of their associations with the Rotorua lakes to the explorations of Ihenga. Nga Puhi hold that the actions of their ancestor Ngatikoro and his sons

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1. Bay of Islands minute book 11, 1 August 1929, p 8  
 2. Translation of English version contained in Judge Acheson’s 1929 decision in respect of Lake Omapere. Bay of Islands minute book 11, 1 August 1929, p 8  
 3. Evidence of Gilbert Mair, ‘Minutes of the Rotorua lakes Case: Application for Investigation of Title to the Bed of Rotorua Lake’, 16 October 1918, cl 174, NA Wellington, pp 168–281

account for the origins of Lake Omapere. And the history of Waikaremoana is redolent with the traditions of Ngati Kahungunu, Ngati Ruapani, and Ngai Tuhoe that account for the origin of the lake and many of its geological features.

The metaphysical significance of lakes is in all likelihood related to their economic importance. In the case of all the lakes examined in this report, the fisheries they supported were crucial components of the local economy. In many areas, especially the central North Island where the land was unsuitable for horticulture, lakes appear to have been considered as more valuable than land. And in areas where Maori had sold much of their land (such as in the Wairarapa), even greater reliance was placed upon freshwater fisheries. Lakes were also important as a source of water fowl and plant material such as raupo and flax, and were used for transport. Pa were frequently located on the shores of lakes, and in the case of Lake Horowhenua, built on specially constructed islands. Evidence also exists that taonga were sometimes stored in the mud that formed the beds of lakes.

Although lakes were used in a variety of ways, it was in terms of their fisheries that they appear to have been most valued. Consequently, complex systems of rights existed in connection with lake fisheries. Of the lakes studied in this report that had eels in them, there were two types of fisheries: those based at the outlet of lakes, and others situated in the lakes themselves. In the case of Horowhenua and Omapere, the outlet fisheries were jealously guarded and could only be used by particular groups – each of which had their own named weirs. But the Wairarapa outlet fishery appears to have been used by a wide range of groups from the greater Wairarapa area, although those groups resident at the mouth had control of the fishery. As for the fisheries in the lakes themselves, in some cases (such as Omapere and Horowhenua) any group with rights in the lake was free to fish anywhere. With other lakes such as Rotorua, Rotoiti, Wairarapa, and Taupo, they were divided up between various groups who held exclusive rights in their particular part of the lake. Generally rights were held in those areas of the lake which abutted a hapu's lands. In its inquiry as to the ownership of the Rotorua lakes, the Native Land Court received a huge amount of detailed evidence concerning the boundaries between the different hapu's sections of Rotorua and Rotoiti. Witnesses also told the court that in the past, punitive action had been taken against people caught fishing in another group's part of the lake.

Fishing rights in lakes were generally held at the hapu level. As with land, the basis for such right was most commonly descent from a particular ancestor who developed the fishery, and the continued use of the resource. Other bases upon which groups claimed fishing rights included conquest, marriage, and gift. As for the actual nature of the rights, some clear themes are apparent. Witnesses giving evidence before the Native Land Court, generally talked about fishing rights in lakes in terms which we might describe as usufructuary rights. Importantly though, these do not appear to have been subject to a superior 'ownership' right. When an ownership right was claimed, this appears not to have been in accordance with a western conception of ownership, but simply an assertion of an ultimate right. In this way, ownership of the fishery seemed to flow from the right to use the resource.

This is in contrast to the European model of ownership where use rights derive from the ownership of the resource. But as Suzanne Doig cautions in her treatise on Maori fishing rights, one must be wary of trying to reduce Maori customary rights to accord to western conceptions of ownership. Rather she posits a conceptualisation in terms of community rights whereby residence in particular place and membership or affiliation with particular kin groups confers a right to use the various resources of the community.<sup>4</sup>

Maori also actively managed lake resources. It is apparent that high ranking chiefs controlled access to fisheries, and in the case of some lakes, enforced their exclusive rights by taking punitive action against poachers. Rahui appear to have been frequently declared to ensure the sustainability of resources such as fish, raupo, and water fowl, and sometimes following the death of a person in a lake. That Maori exercised their rights in lake in such ways was considered to be evidence of the strength of their rights and that lakes were subject to customary ownership.

In many respects, the matrices of rights held by Maori in relation to lakes were not dissimilar to contemporaneous accounts of the way in which rights were held in land. This was particularly apparent in the case of the Rotorua lakes. Gilbert Mair, a Pakeha witness who appeared in support of the claimants, was of the opinion ‘that no land in New Zealand has been held more absolutely, more completely, and more thoroughly under Maori owners’ customs and rights than these two lakes’.<sup>5</sup> It is likely that Maori saw their rights to lakes as being coterminous with their rights to adjacent land and that no arbitrary distinction was made between the two. That the Crown argued so strenuously that lakes were not subject to customary ownership is hard to credit.

### 8.3 Colonial Imperatives and Common Law

A crucial consideration, given that lakes were subject to a customary tenure, is the interface between this title and principles of common law. In this interface a big factor was the ideology that was driving the colonisation of New Zealand. For many, the colonisation of the New World presented an opportunity to depart from some British legal traditions that were thought to be undesirable. Of particular importance was the idea of establishing a relatively egalitarian society in which the public had greater access to, and opportunities to exploit, the natural environment. An important manifestation of this objective was that the Crown considered that it should be the owner of waterways so as that it could act as a trustee to ensure that the public enjoyed rights of navigation, bathing, and fishing. Also it was thought that where possible, private rights should not be allowed to exist in fish and other game so that people other than landowners could have access to these resources.

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4. Suzanne Doig, ‘Customary Maori Freshwater Fishing Rights: an exploration of Maori evidence and Pakeha interpretations’, PhD thesis, Canterbury University, 1996, pp 317–321, 328–329

5. Evidence of Gilbert Mair, ‘Minutes of the Rotorua lakes case’, pp 184–185

Realising these objectives in New Zealand, however, required some significant departures from English common law. Importantly, at common law the prerogative rights of the Crown do not extend to lakes, irrespective of whether or not they are navigable. Rather the ownership is shared between riparian landowners *ad medium filum*. In New Zealand the Crown has always recognised that all lands of the colony were subject to a Maori customary title. Regardless of the fact that customary title was not recognised as extending to lakes, English common law holds that by virtue of being the proprietors of lands abutting lakes, Maori were the owners of the beds of the lakes themselves.

In New Zealand, the perceived need for certain lands and waterways to be vested in the Crown to secure public access has been a recurring theme throughout the nineteenth and twentieth centuries. But throughout the nineteenth century, Maori seem to have been content to allow Pakeha to use their lakes so long as certain conditions were adhered to. In Rotorua, for example, Te Arawa allowed Pakeha to travel upon the lake, and initially did not object when trout were introduced by acclimatisation societies.<sup>6</sup> Similarly in the Wairarapa, Pakeha were not prevented from shooting waterfowl upon the lakes so long as they were only taking birds for their own needs and not selling them. Interestingly in this instance Maori claimed not only the ownership of the lakes but of the birds as well.<sup>7</sup>

#### 8.4 Early Crown Action in Relation to Lakes

It is argued in this report that an imperative during the colonisation of New Zealand was that the Crown should be established as the owner of all lakes and other waterways. But in the nineteenth century there were many instances when the Crown acknowledged Maori as the owners of lakes. It would seem that the Crown tacitly assumed the ownership of lakes but acknowledged the existence of Maori rights when it felt that it had no choice. When the Native Land Court investigated the title of lakes Rotorua and Rotoiti, it was told that had the Crown asserted in the 1880s that the lakes were not Maori property, a situation would have arisen that would have been more serious than the Waitara affair.<sup>8</sup> Judge Acheson made a similar point in his decision as to the ownership of Lake Omapere. He considered that had the Crown stated that it intended to claim the ownership of the lakes during the negotiations surrounding the Treaty of Waitangi, Nga Puhi most certainly would not have signed.<sup>9</sup> It would seem that at times the Crown did not challenge the rights of Maori to lakes because it was anxious to maintain the peace and secure Maori support for colonial rule.

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6. Rotorua lakes case, pp 83–108, 110–123

7. Maunsell to Native Department, 20 April 1885, ma 13/97, NA Wellington; Untitled, unsourced, undated newspaper article attached to Maunsell to Under-Secretary, Native Land Purchase Department, 28 May 1885, ma 13/97, NA Wellington

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

9. Bay of Islands minute book 11, 1 August 1929, p 23

An important consideration in this respect is the way that lakes were treated in early Crown purchases of land abutting lakes. The fashion in which the Crown executed such purchases of land was at best erratic – there appears to have been little attempt to acquire land by way of a systematic or consistent approach. When detailed instructions were issued to purchase officers, these were frequently ignored, or at best only loosely adhered to. Therefore it is not surprising that there was no consistent approach to dealing with lakes when land surrounding them was purchased. In the South Island, for example, the 1848 Crown purchase of Canterbury and Westland (Kemp Purchase) made no mention of the Crown having acquired title to the many lakes that fell within the purchase boundaries. Although verbal promises were made that Ngai Tahu's access to their mahinga kai would be preserved (many of which were based on lakes), title to the lakes appears to have passed to the Crown.<sup>10</sup> But the verbal guarantees that were made to the vendors notwithstanding, under English common law, title to the lakes would presumably have passed to the Crown by virtue of acquiring all the land surrounding the lakes.

Lakes were, however, explicitly included in the 1853 Murihiku Purchase which included all of Southland and Fiordland.<sup>11</sup> Alexander Mackay's translation of the original deed described the boundary of the purchase and stated that all this land passed to the Crown, along 'with the anchorages and landing-places, with the rivers, the lakes, the woods, and the bush'.<sup>12</sup> Another example of when Maori rights to lakes were explicitly extinguished was the 'blanket purchase' of Ngati Toa's interests in the Northern South Island. In August 1853 the North Island chiefs of Ngati Toa signed a deed that 'entirely and forever' transferred their lands in the South Island to the Queen. As Grant Phillipson has observed, although no districts or boundaries were specified in the deed, other resources associated with the land were listed in detail: 'its trees, lakes, waters, stones, and all and everything either above or under the said land and all and everything connected with the said land'.<sup>13</sup>

The 1853 deeds for the Murihiku and Ngati Toa purchases can be seen as having been carefully worded so that they made no explicit acknowledgement that lakes were subject to Maori ownership. The Ngati Toa deed spoke of the land along with 'its lakes', the Murihiku deed referred to 'giving up' and 'alienating' the land along with the lakes contained within the boundaries described. But equally the deeds can be viewed as being an acknowledgement of Maori rights to lakes – that they were theirs to sell. However, regardless of whether or not such purchases constituted a full relinquishment of the vendors' rights to lakes within the purchase boundaries, in many cases, Maori would have expected to have been able to continue to use lakes.

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10. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 1, Wellington, Brooker and Friend, 1991, pp 51–53

11. *Ibid*, p 99

12. A Mackay, translation of the Murihiku deed, *A Compendium of Official Documents relative to Native Affairs in the South Island*, vol 1, Wellington, 1871, p 287, cited in Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, p 609

13. Mackay, translation of the Ngati Toa deed of sale, 10 August 1853, *Compendium*, vol 1, p 307, cited in Grant Phillipson, *The Northern South Island*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release) June 1995, p 127; Phillipson, p 127

But even if the vendors of land were initially able to continue exploiting their mahinga kai, as more and more Pakeha took up occupation of surrounding lands, Maori were increasingly confined to what lands they had retained. The problem this created for Maori was noted by Alexander Mackay, in an 1881 report on the state of Ngai Tahu. He observed that ‘besides curtailing the liberties they formerly enjoyed for fishing and catching birds,’ the increased settlement of Pakeha in the midst of Ngai Tahu ‘has also compelled the adoption of a different and more expensive mode of life, which they find very difficult to support’. After drawing attention to the deleterious effect imported fish had had on Ngai Tahu’s fisheries, Mackay observed that ‘on going fishing or bird-catching, . . . [Ngai Tahu] are frequently ordered off by the settlers if they happen to have no reserve in the locality.’<sup>14</sup>

In the Wairarapa, unlike in the South Island, the owners of land abutting lakes Wairarapa and Onoke explicitly refused to part with their lakes when they alienated their lands in the 1850s. This resistance was motivated by the fear that parting with the lake would lead to a loss of rights in their all-important eel fisheries. From this time, the hapu that occupied the Wairarapa flood plain were intransigent on the point that they held the ownership of the lakes. The history of the contest for the control of the Wairarapa lakes evinces the theory that where Maori were resolute in claiming the ownership of a particular lake, the Crown capitulated and purchased the owners’ interests. In the Native Land Court’s investigation of title to Lake Omapere, Crown counsel argued that there were various exigent factors that were a consideration in the Crown’s acknowledgement of Maori rights to the Wairarapa lakes – in particular the possibility of a breach of the peace in connection with the opening of one of the lakes to release floodwaters.<sup>15</sup> It is likely that if Pakeha settlers had not brought pressure to bear upon the Government to secure the necessary rights to control the outlet of the lake, its ownership would not have been investigated and it would have remained in Maori ownership.

In the case of the Wairarapa lakes, the Crown repeatedly argued that the only rights Maori held in the lakes were those of fishery – an argument that the Crown was later to make in respect of many other North Island lakes. The way in which the Crown acted in relation to the Wairarapa lakes throughout the nineteenth century is consistent with the view that Maori only held fishing rights in the lakes. For example, when Pakeha farmers proposed lowering the lake to mitigate the flooding of land that abutted the lakes, the Government stepped in to prevent them from doing so because of guarantees that had been afforded Maori that their fishing rights would be protected. Similarly it was thought that by extinguishing the fishing rights of Maori, title to the lake would reside with the Crown. When the question of the jurisdiction of the Native Land Court to investigate title to the lake came before the Supreme Court, the Crown argued that ‘no right existed, according to Native

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14. A Mackay to Under-Secretary of Native Department, 6 May 1881, AJHR, 1881, g-8, p 16, cited in Grant Phillipson, *The Northern South Island*, part ii, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release) October 1996, p 25

15. Bay of Islands minute book 11, 19 June 1929, p 42

custom, to the soil beneath a lake, nor is the same recognised by Native custom as being capable of ownership.<sup>16</sup>

A corollary of the position that Maori did not own the beds of the Wairarapa lakes, was that they belonged to the Crown by virtue of its radical title. That the Crown considered itself to be the owner of the bed of the Wairarapa lakes is evidenced in the way that it treated lands that were uplifted by the 1855 earthquake. In 1862, it sold lands that prior to the earthquake had been part of the lake bed. Under the common law doctrine of accretion, lake bed that is exposed by sudden uplift accrues to whoever owns the lake's bed as opposed to the owner of the riparian land to which the accretion adjoins (although of course they could be one and the same). When the Crown sold land that was formerly part of the bed of Lake Wairarapa, it clearly considered itself to be the owner of the lake bed, and that the rights of Maori were confined to those of fishing. In connection with the question of who had rights to the accretion caused by the earthquake, Edward Maunsell, the Crown agent charged with negotiating the purchase of the lake, declared 'that the Queen of England was the undoubted and legal disposer of lakes and colonial seas.'<sup>17</sup> But this view was by no means universal. In 1874, for example, the Under-Secretary of Native Affairs opined in relation to Lake Wairarapa that the Crown 'cannot equitably claim a right to the lake'.<sup>18</sup> This view was in accordance with English common law and reflects the tension that existed between these principles and the view that the Crown should be the owner of lakes in New Zealand.

But whereas the Crown actively tried to limit Maori rights in the Wairarapa lakes to those of fishery, around the end of the nineteenth century, it actually acknowledged the Maori ownership of various lakes. In 1898, for example, Lake Horowhenua was vested in Muaupoko. Why this was done remains unclear to the present author. One possible explanation is that the lake was entirely situated within a block that had been awarded to Muaupoko, and therefore according to common law, would be the property of the land owners. But there was no reason for the Crown to have explicitly vested the lake in Muaupoko – the issue could have just been left to lie. Even though the lake was vested in its Maori owners, the Crown later argued that the ownership of the lake had passed to the Crown. But as numerous officials pointed out, it was patently clear that this was not the case.

As well as Horowhenua, the Crown also acknowledged that other lakes were in Maori ownership around the turn of the century. In 1901 it purchased the Ruawahia No 1 block near Rotorua. This appellation included part of Lake Tarawera. Before the Native Land Court in 1918, counsel for Te Arawa claimed this to be a strong precedent of the Crown having recognised Maori ownership of lakes in the area. As with Horowhenua, it is not clear exactly why the Crown acknowledged that the bed of Tarawera was Maori property. Although these instances do go against the

16. Alexander Mackay, 'Report on Claims of Natives to Wairarapa Lakes and Adjacent Lands', AJHR 1891, g-4, p 8

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

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

Crown's general ambition to establish itself as being the owner of lakes in New Zealand, it does emphasise the confused and uncoordinated approach of the Crown in relation to lakes. Elsewhere around this time, the Crown was simply assuming the right to manage and control lakes. With regard to lakes in the central North Island the Government was running launch services, assisting acclimatisation societies to stock them with trout, and making provisions for the management of trout fisheries, including the licensing of anglers. This assumption of control and abrogation of Maori rights precipitated Te Arawa applying to the Native Land Court to have their title to the lake investigated. This was one of many applications made by Maori shortly after the turn of the century in respect of lakes in the North Island. In the face of these applications the Crown became focused on defeating the ownership claims of Maori and establishing itself as the owner of lakes. But that is not to say that the means by which the Crown sought to realise this goal were not confused, uncoordinated, and in many instances, contradictory.

### 8.5 The Native Land Court Cases and the Position of the Crown

Between 1915 and 1929 the Native Land Court investigated the titles of the Lakes Rotorua, Rotoiti, Waikaremoana, and Omapere. It is apparent that from around 1910, in the face of these claims, the Crown began to more seriously consider the nature of its rights to lakes, and invested much energy in trying to defeat the claims of Maori. In this period the Crown more consistently took the line that its prerogative rights extended to the ownership of lake beds. But many Crown officials continued to espouse the common law position that the Crown held no rights to the beds of lakes per se.

One of the first public expressions of the Crown's claim to the beds of lakes in New Zealand was made by Seddon when he visited Rotorua around the turn of the century. According to Gilbert Mair, Seddon told Te Arawa 'that they had no claim to the lakes' as their title had 'passed away under the Treaty of Waitangi to the Government.'<sup>19</sup> Presumably Seddon's logic was that in acquiring sovereignty under the Treaty, the Crown had acquired the allodial title to New Zealand. Although this allodial title was subject to the existence of Maori customary title, this did not extend to the ownership of lakes.

Seddon's remarks, combined with what Te Arawa considered to be a subtle erosion of their rights by the Crown, resulted in them applying to the Native Land Court to have their rights to their lakes determined. The reaction of the Crown was to refuse to supply the necessary plans to enable the investigation to proceed. This resulted in Te Arawa filing proceedings with the Supreme Court seeking a determination that they had a right to have the title to the bed of Lake Rotorua investigated by the Native Land Court. The case, *Tamihana Korokai v the Solicitor General*, was removed to the Court of Appeal where it was heard in 1912. For the

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19. Evidence of Gilbert Mair, 'Minutes of the Rotorua Lakes Case', 16 October 1918, p 238, cl 174, NA Wellington

Crown, John Salmond, the Solicitor General, argued that lakes were a part of the demesne of the Crown. He stated:

that his assertion that the land [being the bed of Lake Rotorua] was Crown land concluded the matter, and that the Native Land Court could not proceed to make inquires as to whether the land was Native customary land.<sup>20</sup>

The court, however, did not accept Salmond's argument. It held that Te Arawa had a right to have the title to Lake Rotorua determined, and that the mere assertion that the land in question was Crown land was insufficient to prevent such an investigation.<sup>21</sup> An important outcome of the case was the Appeal Court's ruling that lakes were undoubtedly within the jurisdiction of the Native Land Court.

Despite being rebuffed by the Court of Appeal, Salmond continued to posit the theory that the Crown was the owner of lake beds. In 1913, for example, he wrote an opinion concerning the ownership of Lake Takapuna on Auckland's North Shore. In this opinion, he claimed that it was doubtful that the rights of people who owned land abutting the lake extended to the lake bed. The opinion was written in response to an earlier opinion of the Crown Law Office in which it was held that the lake was no longer Crown land because all the lake's riparian lands had passed out of Crown ownership. This was a view that Crown officials frequently articulated in relation to Lake Omapere at this time. In response to demands that the owners of land abutting Lake Omapere be prevented from lowering the lake, it was contended that 'the Government has no standing in the matter', that it was 'not the duty of the Crown to step in in cases of this kind', and that apart from the part of the lake adjoining the small amount of remaining Crown land, the Crown had no jurisdiction over the lake.<sup>22</sup> In the case of Takapuna, Salmond considered that the question of whether the title to lake beds in New Zealand was shared *ad medium filum aquae* between riparian owners was 'one of considerable doubt.' Salmond claimed that there had been no authoritative decision on this matter either in New Zealand or England. In light of this doubt he advocated that the Crown should assume that it was the owner of the bed of lake Takapuna, 'leaving it to the riparian owners . . . to take proceedings in the Law Courts for the establishment of their claims.'<sup>23</sup> Although Salmond was correct in stating that there was no authoritative decision on the matter in New Zealand, his claim that the same was true in England was manifestly wrong.<sup>24</sup>

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

21. *Ibid*, pp 106, 109

22. Minister of Lands to Reed, 22 August 1910, ls 1 22/2679, LINZ Wellington; Under-Secretary of Lands to Auckland Commissioner of Crown Lands, 12 May 1914, ls 1 22/2679, LINZ Wellington

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

24. See for example *Bristow v Cormican* (1877) 3 App cas 641, cited in *Ibid*; H J W Coulson and U A Forbes, *The Law Relating to Waters: Sea, Tidal and Inland*, London, Henry Sweet, 1880, p 98; *Johnston v O'Neill*, (1911) AC, 552 at 578, cited in E J Haughey, 'Maori Claims to Lakes, River Beds and the Foreshore', NZULR, vol 2, April 1966, p 32

The following year, Salmond made the same argument in respect of Lake Omapere. In doing so he rejected the view of other Crown officials that the Crown shared title to the bed of the lake with other riparian owners – a view which was in accordance with English common law. In asserting that the Crown owned the bed of Lake Omapere, he expressed doubt that Maori customary title extended over lakes, and suggested that instead they simply held fishing rights. However, as in his Takapuna opinion, Salmond conceded that ‘the matter is far too doubtful to express any confident conclusion on it one way or the other’.<sup>25</sup>

### 8.5.1 Maori ownership of lakes and public policy

Despite the Crown’s uncertainty as to the extent of its rights in relation to lakes, from around this time, it was frequently stated that the Crown, as opposed to Maori, should as a matter of public policy be the owners of lakes. Salmond in particular articulated this view in respect of the Rotorua lakes. In 1914, in light of the proposed hearing of Te Arawa’s claim by the Native Land Court, he cautioned that:

it is quite out of the question to allow freehold titles to be obtained by the Natives to such waters. Such titles would enable the Natives to exclude the whole of the European population from all rights of fishing, navigation and other uses now enjoyed by them.<sup>26</sup>

After the Native Land Court inquiry had been abandoned and the Crown was negotiating a settlement in respect of the Rotorua lakes, Salmond continued to warn against the dangers of Maori securing title to lake beds. In 1920 he stated that:

As a matter of public policy it is out of the question that the Natives should be permanently recognised as the owners of the navigable waters of the Dominion. It would not seem to be a matter of serious difficulty to avoid this result by making some form of voluntary settlement with the Natives and vesting these Lakes by Statute in the Crown.<sup>27</sup>

The settlement that was reached in 1922 was carefully worded so as not to be an admission that Te Arawa had held customary title to the lake.<sup>28</sup> As the Minister of Lands had advised Ngata in 1920, an admission of Te Arawa’s title could not be entertained because such an admission ‘would bind the Government in similar claims to other lakes’.<sup>29</sup>

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

26. Salmond to Attorney General, 1 August 1914, clo Opinions relating to Lands Department 1913–1915, clo Wellington, cited in Alex Frame, *Salmond Southern Jurist*, Wellington, Victoria University Press, 1995, p 119

27. Solicitor General to Under-Secretary of Lands, 29 April 1920, clo Opinions, vol 7, LINZ, cited in Tania Thompson, ‘Interim Report: Rotorua Lakes Research’, report commissioned for the legal firm of O’Sullivan Clemens Briscoe and Hughes, March 1993, p 16

28. See Native Land Amendment and Native Land Claims Adjustment Act 1922, s 27(1)

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

In the case of all the lakes studied in this report that were subject to Native Land Court inquiries, this imperative of ‘public policy’ was considered to be so important that Crown officials attempted to prevent the inquiries going ahead by refusing to supply the necessary plans. In 1913 for example, in connection with Nga Puhi’s application to the land court to have the title to Lake Omapere determined, the Chief Surveyor of the Auckland 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.<sup>30</sup> Similarly in the case of the Wairarapa lakes, the Rotorua lakes, and Lake Waikaremoana, the Department of Lands refused to supply plans and thereby prevented the land court hearings from getting underway.

### **8.5.2 Arguments of the Crown before the Native Land Court**

Of the three major claims in respect of lakes that were heard by the Native Land Court in the twentieth century, the Crown was only initially heard in relation to Nga Puhi’s claim to Lake Omapere. In the case of the Rotorua lakes, the inquiry was abandoned at the instigation of the Crown and a settlement reached. When the matter of title to Lake Waikaremoana was heard by the land court between 1915 and 1918, the Crown elected not to appear. Rather it lodged an appeal with the Native Appellate Court, which largely due to vacillation on the part of the Crown, was not heard until 1944. On this occasion the Crown’s argument was finally heard.

At the outset of the land court’s investigation of Lake Omapere in 1929, the Crown set out its contentions in respect to the case. The court minutes record an assertion by Crown counsel that Maori custom did not recognise the ownership of lake beds, and that consequently the beds of lakes belong to the Crown. Further, it was claimed that by virtue of acquiring lands abutting the lake, the Crown had acquired part of the lake bed along with the right of navigation and the right to use the lake’s waters.<sup>31</sup> When the case was resumed in Auckland later that year, claimant counsel pointed out that the Crown’s argument was somewhat confused. Although the Crown claimed it owned all lakes, it still felt it necessary to set up a case that it owned part of Lake Omapere by virtue of owning lands adjoining the lake.<sup>32</sup> That such a fall back position was considered necessary, illustrates the uncertainty with which the Crown regarded its assumed rights.

At the Auckland hearing the Crown presented its case in detail. In arguing that Maori custom did not recognise the ownership of lakes it was stressed that the

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

31. Bay of Islands minute book 11, 19 June 1929, p 1

32. Bay of Islands Native Land Court minute book 11, 19 June 1929, pp 12–13

‘doctrine that the lake is land covered by water is borrowed from English law, and was not in contemplation by the Natives.’ Further it was claimed:

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.<sup>33</sup>

Crown counsel contended that the onus was therefore on Maori to establish their title, otherwise the lake was a part of the demesne of the Crown. In the case of Omapere it was held that no such title existed. Maori only had a right of fishery that derived from the ownership of land adjacent to the lake.<sup>34</sup> Mention was also made of the fact the lake was navigable; counsel argued that it was preposterous to propose that Maori had exclusive rights to navigable waters, as navigation was an ordinary condition of sovereignty. Given the conviction that ‘rights of navigation should be vested in the Public’, it was advocated that a ‘restricted’ reading of the Treaty of Waitangi in relation to waterways was both necessary and justified.<sup>35</sup>

Ten years earlier, in 1918, the land court issued an interlocutory decision that Lake Waikaremoana was Maori customary land. Three weeks later the Crown lodged an appeal on the basis that ‘the said lake is not Native customary land but is Crown land free from Native title’.<sup>36</sup> When the appeal was finally heard 26 years later, Crown counsel argued that strict proof of the customary ownership of the lake was necessary, and that such evidence had not been adduced before the Land Court in its initial inquiry. Therefore it was held that ‘equitable as well as the legal interest is in the Crown . . . [and] the Native case fails by its own infirmity.’<sup>37</sup> As in the case of Lake Omapere, counsel argued that in the public interest there was a need for the ambit of article two of the Treaty of Waitangi to be constructed narrowly. It was held that there was an inherent improbability that by the Treaty, the Crown had not intended to deprive the public of such important rights as navigation.<sup>38</sup>

In these cases the Crown then was basing its claim on two main principles. First, in acquiring sovereignty to New Zealand, the Crown acquired the radical title to the whole country, subject to the existence of Maori customary title. But because it was held that Maori customary title did not extend to the ownership of lakes, they were the property of the Crown. And secondly, the guarantees of article 2 of the Treaty of Waitangi were limited by the ‘public’s interest’. Therefore it could not have been intended that the Treaty would secure Maori the ownership of lakes and deprive the Crown and public of rights of navigation. At English common law, though, the owner of the bed of a lake could not prevent the public from navigating the lake’s

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33. Bay of Islands minute book 11, 19 June 1929, pp 21–22

34. Ibid, p 31

35. Ibid, pp 34–35

36. MA 8/3/484, NA Wellington, cited in Robert Wiri, ‘Te Wai-Kaukau o Nga Matua Tipuna: Myths, Realities and the Determination of Mana Whenua in the Waikaremoana District’, MA Thesis, University of Auckland, 1994, (Wai 36 rod, doc a4), p 320

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

38. Ibid, p 22352

waters – like rivers, lakes are held to be public highways and are navigable for all persons.<sup>39</sup>

That in the case of Lake Omapere the Crown felt it necessary to establish a claim in terms of it owning some riparian lands, shows how uncertain it was of its prerogative rights. This is hardly surprising in light of the outcome of the Waikaremoana investigation in favour of Tuhoe, Ngati Ruapani, and Ngati Kahungunu, and the likely outcome of the Rotorua application had the inquiry been completed.<sup>40</sup> It would seem that generally the Native Land Court was in no doubt that lakes were subject to Maori customary title. The land court and Appellate Courts' decisions in respect of Lakes Omapere and Waikaremoana show the Land Court upholding the rights of Maori and virulently opposing the Crown's claim that it was the owner of all lakes. The Maori Land Court also investigated the ownership of Lake Rotoaira (near Lake Taupo) between 1955 and 1956, finding that Ngati Tuwharetoa were the lake's customary owners.<sup>41</sup> In light of these decisions, it would not be totally outrageous to argue that in the twentieth century the Maori Land Court was in fact a constant defender of rangatiratanga in respect of lakes.

### 8.6 The Twentieth-Century Lake Settlements

By the first decades of the twentieth century, the Crown was clearly determined that, if at all possible, Maori should not be recognised as the customary owners of any lakes in New Zealand. Hence in the cases where the land court had found (or was likely to find) that Maori were the customary owners of lakes, the Crown set about securing settlements in which the rights of Maori to the lake bed in question were extinguished. In return Maori variously received grants of land, guarantees of their fishing rights, and compensation. This approach reflected a view on the part of the Crown that the issue of the ownership of lakes should be resolved politically rather than judicially. This certainly was the view of Salmond.<sup>42</sup> That the Crown wanted to keep the question out of the courts can be seen as symptomatic of its parlous position in terms of common law support for its claim to the ownership of lakes.

As is detailed in the chapter of this report on the Rotorua lakes, the Government, considering that the Native Land Court would find in favour of Te Arawa, pressured the applicants to enter into direct negotiations. The deal that was reached extinguished the native title (if such a thing existed) to 14 lakes in the vicinity of Rotorua, guaranteed Te Arawa fishing rights in the lakes, and granted them an

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39. See Coulson and Forbes, pp 72, 101

40. That the Native Land Court would find in favour of Te Arawa were it to complete its inquiry was the view of Salmond. See Solicitor General to Under-Secretary of Lands, 29 April 1920, clo Opinions, vol 7, LINZ, cited in Thompson, p 16

41. John Koning, *Lake Rotoaira: Maori Ownership and Crown Policy Towards Electricity Generation 1964–1972*, Wellington, Waitangi Tribunal research series no 2, 1993, p 4

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

annuity of £6000.<sup>43</sup> In the case of Lake Taupo, title to the lake was never determined by the Native Land Court. The history of the lake, though, would suggest that the Crown had in many respects tacitly acknowledged the rights of Tuwharetoa. From the turn of the century, Maori owning land abutting the lake continued to exercise control over the increasingly important trout fishery through charging anglers to fish from, and camp upon, their land. The fear that such lands could fall into the hands of foreigners motivated the Government to expropriate whatever rights Tuwharetoa had in the lake. The resulting settlement was very similar to that between the Crown and Te Arawa – again being carefully worded so as not to be an admission that the lake bed was Maori customary land. But unlike the Te Arawa settlement, Tuwharetoa managed to secure ongoing benefits through a provision in the agreement that they were to receive half of all revenue generated from licence fees.<sup>44</sup>

The Crown, however, never secured the ownership of Lakes Waikaremoana, Rotoaira, Horowhenua, and Omapere. Despite being put under considerable pressure by the Crown, the Maori owners of Lake Waikaremoana refused to sell. After protracted negotiations that lasted from 1947 until the early 1970s, the owners eventually agreed to lease the lake to the Urewera National Park Board. The lease was confirmed by legislation in 1971.<sup>45</sup> In the case of Lake Omapere, the Crown abandoned its appeal of the Native Land Court's decision because it no longer considered the lake to be of any value to it. Presumably for the same reason, it never sought to acquire title to the lake. With Horowhenua, the Crown, after recognising the Maori ownership of the lake, later tried to claim that the ownership had somehow passed to it. However, this was clearly not the case, and legislation confirming that the lake remained the property of Muaupoko was passed in 1956.<sup>46</sup> In the case of Lake Rotoaira, because it was included in the Tongariro power scheme, the Crown attempted to purchase it in the early 1970s. The owners, however, refused to sell. Instead an agreement was reached whereby the owners were divested of the power to jeopardise in any way the power scheme. In return the Crown promised not to compulsorily acquire the lake. No compensation was paid under this agreement.<sup>47</sup>

The various settlements and lease arrangement secured by the Crown in respect of certain lakes are an acknowledgement on the part of the Crown of the existence of Maori rights in those lakes. However, the Crown was at pains to word settlement deeds so as that they did not explicitly acknowledge that the beds of lakes were Maori customary land. But presumably a corollary of the acknowledgement that the vendors had rights which they could sell or lease, was that where they have not been purchased, these rights remain intact.

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43. The Native Land Amendment and Native Land Claims Adjustment Act 1922, s 27

44. The Native Land Amendment and Native Land Claims Adjustment Act 1926, s 14

45. The Lake Waikaremoana Act 1971

46. Reserves and Other Lands Disposal Act 1956, s 18

47. Heads of Agreement, Ministry of Works and Ngati Tuwharetoa, 30 November 1972, Wai 178/0, Waitangi Tribunal, pp 14–18

Although it is argued in this report that in New Zealand the Crown pursued a policy of establishing itself as the owner of lakes – or at least of attempting to defeat the claims of Maori to the same – the cases of Omapere and Horowhenua stand out as evidence to the contrary. By the time the Crown abandoned its appeal against the Omapere decision, it appears that no further applications had been made to the Maori Land Court in respect of lakes other than Tuwharetoa's to Rotoaira (lodged in 1937). It can be argued that the Crown's push to establish itself as the owner of lakes only really manifested itself in the face of claims by Maori. Otherwise the Crown was happy to simply assume it held the ownership of lakes. That the Crown never seriously sought to extinguish the owners' interests in Horowhenua can perhaps be explained in terms of the lake not being considered to be of particular value or importance to the Crown, as was the case with Lake Omapere.

It must be asked though why the Crown did not try harder to establish itself as the owner of all lakes in New Zealand. After the Native Land Court issued its interlocutory decision in respect of Waikaremoana, an option considered by the Government was to pass legislation that vested the beds of all lakes in the Crown.<sup>48</sup> In 1903 legislation had been enacted that vested the beds of all navigable rivers in the Crown.<sup>49</sup> A reason why no such legislation was passed in relation to lakes may have been that the Crown did not want to make itself liable to pay compensation to the Maori owners of lakes. Although no compensation has ever been paid to Maori for the beds of rivers that were effectively confiscated under the coal mines legislation, a crucial difference was that the Native Land Court had ruled that the beds of several lakes were Maori customary land. This may have meant that the Crown would have been liable to pay compensation to Maori if lakes were vested in the Crown by statute.

### 8.7 The Limits of Ownership

If the customary rights of Maori in most lakes remain undisturbed, it must be asked what this ownership amounts to today? Although the Crown never formally acquired title to lakes in New Zealand, it assumed the right to legislate in respect of waterways. And as has been argued in the first chapter of this report, the history of this legislation is one of the abrogation of Maori rights. Various legislation was passed that provided for flood protection, swamp drainage, irrigation, domestic water supply, and electricity generation. The objective of much of this legislation was to promote settlement, and bring more land into agricultural production. As well as many of the public works undertaken under this legislation having a deleterious effect upon the ecology of inland waterways, especially Maori fisheries, large amounts of Maori-owned land were compulsorily acquired. Another issue is

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48. See for example Solicitor General to Attorney General and Minister of Native Affairs, 15 February 1935, cl 200/15, NA Wellington, cited in Stevens, p 28; Prenderville to Solicitor General (memo), 24 February 1944, ma 5/13/78 pt 1, NA Wellington, cited in Stevens, p 30

49. The Coal Mines Act, s 14

the way in which the Crown vested powers in various local authorities to undertake public works that interfered with rivers and lakes. Importantly, no legislation that affected waterways acknowledged any pre-existing Maori rights, or made any specific provision for the payment of compensation for such. In connection with such 'land improvement' initiatives, it was held that Maori rights were on the same footing as those of Pakeha; both of which had to give way to the 'national interest'. But it so happened that this national interest was synonymous with the interests of Pakeha farmers. Also, provisions to protect traditional Maori economic activity were clearly antithetical to these goals.

The Crown's view that Maori rights in lakes were confined solely to those of fishing found expression in legislation governing fisheries in New Zealand. But although guarantees of Maori fishing rights featured in fisheries legislation from 1877, the courts proved reluctant to give meaningful effect to these provisions. Despite the courts' intransigence in not recognising any Treaty rights in respect of freshwater fish, Maori continued to argue that they had rights in freshwater fisheries under the Treaty. Another injury Maori suffered under this legislation was that much of it was angled towards the acclimatisation and management of trout – the presence of which had a serious effect upon stocks of indigenous fish caught by Maori. But where the Crown was anxious to secure the ownership of a particular lake bed (such as in the case of Lakes Taupo and the Rotorua lakes), it did afford guarantees to the lake's Maori owners of their rights to indigenous fish. Also free trout fishing licences were awarded to the lake's Maori owners. This can be seen as a recognition of the effect of the introduction of fish to the lakes on native fisheries. Hence it would appear that where it was felt that protecting Maori fishing rights was necessary in order to get the owners of a particular lake to agree to sell their interests, the Crown was willing and able to afford such guarantees.

There can be no doubting that Maori held rights in respect of lakes under the Treaty of Waitangi. Be it as 'taonga' in the Maori version, or 'fisheries' in the English version, Maori were guaranteed the exclusive possession of lakes. But the history of Crown action in relation to lakes shows that the Crown acted in a variety of ways to abrogate these rights in an attempt to convert the New Zealand landscape in to 'productive' land, and to secure in itself rights of ownership. In terms of the latter of these objectives, however, the Crown has been largely unsuccessful. The title to only a handful of lakes in New Zealand is beyond doubt, and all of those that are vested in the Crown were each a result of protracted negotiations and special legislation. That the Crown has not established itself as the owner of all lakes is not surprising, though, when regard is had to the extent of its rights at English common law, and that undeniably lakes are subject to Maori customary title. But despite the Crown being relatively unsuccessful in establishing itself as the owner of lakes in New Zealand, it was more successful in securing rights of management and control. In this way, though Maori remain the customary owners of many lakes, this ownership does not amount to much in the way of rights in such things as fisheries and water.

