

CHAPTER 13. MAORI AUTHORITY OVER FLORA AND FAUNA ASSOCIATED WITH INLAND WATERWAYS

13.1 Introduction

This chapter outlines the impact of Crown policies and actions relating to inland waterways and the consequences of this for Maori authority over flora and fauna associated with those waterway systems in the years 1840 to 1912. The freshwater environments of concern to this chapter include lakes, rivers, ponds, springs, tarns, swamps, and wetlands – bodies of water that supported flora and fauna of importance to Maori, such as fish, birds, and a variety of plant material including rushes and flaxes. The focus of this chapter is on how the Crown acquired or assumed management and control rights over these types of inland waterways and the impact of this on Maori authority over related flora and fauna. Issues concerning the impact of agencies such as acclimatisation societies and National Park Boards are covered in separate chapters.

The Treaty of Waitangi appears to include protections for Maori authority over inland waterways especially those that sustained important habitats for flora and fauna. The Maori version of article two protects taonga in general, while the English version specifically protects fisheries. A number of recent Waitangi Tribunal reports have noted the importance of freshwater resources to Maori, for example the *Whanganui River Report*.¹ The Waitangi Tribunal has also found that resources such as lagoons and wetlands were taonga protected by the Treaty.²

The years 1840 to 1912 were an important period in the development of Crown-Maori relations over inland waterways, and in determining to what extent guarantees to Maori were balanced with the perceived needs of Pakeha settlement. It seems apparent that during this time, opportunities to provide for Maori concerns were subordinated to the needs of large-scale colonisation and settlement. The Crown played a pivotal role in this through a number of strategies intended to ensure that useful inland waterways were available for the purposes of settlers. Inland waterways and the resources they sustained were not considered to have great economic significance in themselves by Pakeha settlers, but they were important as a useful means of assisting with achieving economic prosperity through land settlement and development. This was particularly

1. Waitangi Tribunal, *Whanganui River Report*, Wellington, GP Publications, 1999

2. For example, Waitangi Tribunal, *Te Whanganui-a-Orutu Report*, Wellington, Brookers Ltd, 1995

true in the first fifty years of settlement where inland waterways were often important as transport and communications routes in providing access to land and markets. Inland waterways also provided ready sources of power for small flour, timber and flax mills, and sources of raw materials such as gravel and sand for works projects. In addition, as well as being sources of fresh water and drainage facilities in new settlements, inland waterways provided an interim means of survival for many new settlers through resources such as fisheries and wild fowl. In the first few decades of settlement Maori seemed willing to allow the use of inland waterways for such purposes to enable the new settlements to succeed. This was particularly true while Maori appeared able to compete equally for new economic opportunities and while developments such as drainage works remained fairly isolated and small scale. At the same time, many of those inland waterway resources of most importance to Maori remained intact, and in many cases Maori appeared to believe their overall mana over such waterways remained. The Crown however, increasingly sought to obtain more certain authority over useful inland waterways through a number of strategies. The three most important of these strategies were the large scale purchasing of riparian lands from Maori ownership, the assumption of Crown authority over 'navigable' inland waterways, and the Crown assertion of control and management rights over the waters of many inland waterways.

Perhaps the most important Crown strategy with regard to Maori authority over inland waterways was the policy of purchasing riparian lands simply because of the amount of land and waterways involved. This was part of an overall policy of acquiring as much land as possible from Maori for the purposes of settlement. In purchasing riparian lands, or lands adjacent to inland waterways, the Crown through the application of English common law presumptions also acquired the riparian rights associated with such land. This was based on the assumption that English common law applied in New Zealand from 1840. Having purchased the ownership of adjoining land and therefore the beds of many inland waterways, the Crown could then control riparian rights to ensure they were used to facilitate settlement. However these riparian rights in themselves did not always result in sufficient, continuing powers over inland waterways for the Crown's purposes. As a result, the Crown sought to rebut the common law presumption of private riparian ownership rights in the case of the beds of large or 'navigable' inland waterways. This was initially

based on the opportunities already available in common law to rebut such presumptions on certain grounds, in this case, the special circumstances in a new colony. The Crown asserted rights of ownership to the beds of such waterways in the 'national interest' of the new colony, insofar as they appeared to be required for economic and development purposes and in some cases backed this up with special legislation. In addition, regardless of ownership issues concerning the beds of inland waterways, the Crown asserted rights to control the management, allocation and use of the waters in inland waterways over the period 1840 to 1912, again in the national interest and to facilitate colonisation. The Crown also began delegating powers of management and use of inland waterways to various forms of settler Government. This included powers over inland waterways on Crown land for various purposes such as taking sand and gravel, modifications and diversions. At the same time the Crown appears to have failed to require those agencies to take account of Maori interests or to ensure effective Maori participation in these new forms of management. Nor did the Crown delegate anywhere near similar powers to Maori communities to manage and use waterways for example on what had become Crown land for purposes they considered important, such as continued management of traditional fisheries. As a result, the delegated powers from the Crown impacting on inland waterways were overwhelmingly concerned with facilitating settler interests, often to the detriment of Maori concerns regarding inland waterways and the flora and fauna they sustained.

13.2 Crown purchasing of riparian lands and common law implications for Maori authority over inland waterways

When the Crown assumed sovereignty over New Zealand in 1840, the orthodox legal view was that this brought with it the application of English common and statute law, at least to the extent applicable to New Zealand circumstances.³ The way English legal concepts were applied in New Zealand and the 'circumstances' that might require their modification were to have important consequences for Maori authority over inland waterways and associated flora and fauna. In general English common law reflected a society and economy that relied primarily on land utilisation, while resources such as fisheries and wild flora and fauna were gen-

3. G W Hinde, D W McMorland, and Sim, *Land Law in New Zealand*, Butterworths, Wellington, 1997, p 5

erally considered 'incidental' and largely subordinate to rights derived from land ownership. This was quite different from Maori customary views that, reflecting the structure of Maori society and economy, placed considerable importance on such resources and rights to use and manage them. The manner and extent to which these differences were resolved in the application and modification of legal concepts were an important feature of the years 1840 to 1912.

In brief, English common law presumptions concerning inland waterways followed from the primacy of land ownership and the resulting separation of waterways into separate component parts, being the beds, banks and waters. The beds and banks of waterways, including swamps and wetlands, were generally regarded as a form of land capable of being privately owned. These presumptions were also based on the ultimate authority of the Crown in land ownership, or the Crown holding radical title.⁴ As part of this, the Crown was assumed to hold authority over the seabed, the beds of the tidal reaches of rivers (presumed to be arms of the sea) and the foreshore. The common law then presumed that the beds of non-tidal inland waterways could be privately owned. Those that were located entirely within a block of land belonged to the owner of the surrounding land, much like any other land.⁵ The landowner had the same rights to the bed of such waterways as to the rest of the land in the block, and could drain, modify or develop such waterways at will.

Where the inland waterway happened to be bounded by more than one property, the law recognised the rights of all adjoining property owners to the bed of the waterway to the middle line or point. This doctrine is known as the *ad medium filum aquae* rule.⁶ The neighbouring property owners were recognised to have certain riparian rights in the waterway due to their ownership of land adjoining it. These types of rights generally related to use of the waterway such as access, the right to use water reasonably required, and the right to fisheries in the waterway. In the case of moving waters, the rights also involved the doctrines of accretion and erosion. Adjoining owners had rights to accretions of land next to their properties where this accretion resulted from slow and imperceptible natural causes. Conversely land could be lost through slow erosion. Accretion did not apply as the result of a sudden change, such as earthquake uplift or a sudden flood. In that case any newly emerged land was held to be Crown land, based on the Crown holding radical title.⁷ Title to the beds of lakes contained entirely within a single block of land resided with

4. Ibid, p 8

5. Ibid, p 383

6. Ibid, p 379. See also *Halsbury's Laws of England*, 4th ed, London, Butterworths, 1984, vol 49, p 215

7. Hinde, McMorland and Sim, pp 395–396

the landowner. Where several blocks abutted a lake, the rule of *ad medium filum aquae* applied and ownership of the lake bed was divided between the adjacent riparian landowners – the rights of each extending to the mid-point of the lake.⁸ While the beds of inland waterways were held to be owned by either the Crown if tidal, or otherwise by adjoining private riparian land owners, the question of ownership of the actual water seems to be much less certain. It seems that for waterways bounded by more than one owner the water itself was not believed to be generally capable of private ownership but was a common resource like air, subject to certain use rights.⁹

In general therefore, the common law emphasised land ownership as being crucial to ownership of associated inland waterways, with the benefits and uses of the beds of those waterways generally belonging to private riparian landowners. A number of logical consequences followed from this, including that rights to those benefits and uses would generally transfer to a new owner as the associated land was transferred. Rights based on associated land ownership could also effectively legally ‘split up’ or separate parts of a waterway according to the way land was divided between owners along the waterway. Legal interests could therefore be considered as based on the component parts of a waterway (bed, banks and water) or could be legally divided up along their lengths or circumferences. This left little room for overall considerations of waterways as whole entities, their role in sustaining flora and fauna, or their importance within wider ecological catchments.

Nevertheless part of the strength of common law presumptions was that they contained sufficient flexibility to allow for rebuttals of the general presumptions in some circumstances. For example, it was possible to successfully rebut the general presumption that riparian rights transferred with adjoining land ownership in cases where the previous landowner had clearly indicated an intention to keep fishery rights when selling adjoining land. General riparian presumptions might also be rebutted where there was a long-standing public use of a waterway ‘from time immemorial’ such as for navigation or a fishery. Special provision for public interests could also be made by dedication. This long-standing possibility of rebuttal of general common law presumptions in special circumstances may have provided an opportunity for accommodation with Maori Treaty interests particularly over inland fisheries. However it seems that the Crown made little effort in this regard being more con-

8. White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), March 1998, pp 3–4 (citing Property Law and Equity Reform Committee, *Report on the Law Relating to Watercourses*, Wellington, 1983, p 3; *Halsbury's Laws of England*, vol 49, p 215; H J Coulson and U A Forbes, *The Law Relating to Waters: Sea, Tidal and Inland*, London, Henry Sweet, 1880, p 98)

9. Hinde, McMorland and Sim, pp 556-557

cerned with presumptions that confirmed the primacy of land ownership and the encouragement of European settlement.

In a number of recent reports on inland waterways, such as the *Whanganui River Report*, the Waitangi Tribunal has found that the Treaty guaranteed Maori full customary authority over their whole water resources.¹⁰ In Maori customary terms, water resources such as rivers were regarded as single and indivisible entities, comprising the water, banks and bed as a whole. Authority over these resources was not necessarily dependent on the ownership of adjoining land and the range of customary authority and interests involved more than simply exploitation rights. These could involve for example, continuing guardianship and management rights and obligations over the waterways and associated resources. The Tribunal has noted that while common law presumptions assume that land title (including the beds of inland waterways) ultimately emanates from the Crown and depends on Crown grant, in fact customary native title preceded the Crown in New Zealand and did not rely on Crown grant. The Tribunal found that Maori customary title needed to be extinguished before the presumptions of English common law applied. This involved the whole range of customary interests, not just those limited interests that common law might recognise.

However this broader view of the range of Maori customary interests that might need to be extinguished was not a feature of Crown policy in the period 1840 to 1912. Within a few years of 1840 the Crown did adopt a policy position of acknowledging Maori customary interests in all land in New Zealand. At the same time, the Crown embarked on a programme of extensive land purchasing in order to extinguish such interests and facilitate large-scale European colonisation. The concept of land and the riparian interests that might be involved were firmly based on general common law presumptions that were held to apply in New Zealand from 1840. Through purchasing Maori land, the Crown claimed to have extinguished all Maori customary rights in that land *and associated waterways*, along with any riparian rights emanating from continued land ownership that may have been recognised in common law from 1840. Crown purchasing began with early attempts to 'complete' the claimed purchases of private immigration companies and validate pre-1840 claimed purchases. This was followed by very large 'blanket' purchases by Government officials from the mid-1840s through the 1850s. The warfare beginning in the 1860s was followed by extensive land confiscations in

10. Waitangi Tribunal, *Whanganui River Report*, 1999, pp xiii-xvii

the North Island and then the facilitation of further purchases of remaining Maori land through the Native Land Court process which became fully operational from 1865. This programme of land purchase and confiscation probably had the most impact on Maori authority over inland waterways of any Crown policies, mainly because of the very large amount of land (including riparian land) involved. By 1911 for example, it has been estimated that the amount of remaining customary Maori land had fallen to just under 200,000 acres while the majority of either customary or Crown granted Maori land had been lost from Maori control through purchase, confiscation or lease.¹¹

In cases where an inland waterway was relatively small and entirely enclosed within a purchased land block, the application of common law principles meant that on purchase, the Crown acquired the entire waterway and any rights in it. The land and any waterway within it was then considered to be Crown 'waste' land. When this land was surveyed and on-sold to Pakeha settlers, or vested in Provincial governments for settlement purposes, it could include riparian lands. Pakeha settlers who acquired such lands were free to drain or modify inland waterways within their properties at will. This impacted on many types of waterways within purchase areas and the flora and fauna they sustained, including ponds, swamps, pools, springs, tarns, and wetlands. Where blanket purchases were large enough, for example in much of the South Island, even streams, rivers and lakes could be included.

Historians such as Alan Ward have noted that Maori may not always have been fully aware of the legal implications of land purchases on their rights and authority over inland waterways.¹² In the first two decades of settlement at least, it seems that Maori may have had little idea that 'selling land' also meant that legally they were presumed to have given up all rights in streams and swamps on the land, let alone in larger waterways such as rivers and lakes. It is possible that Maori may not have minded the modification or destruction of some waterways in the interests of settlement and other economic opportunities, and in relatively small purchases such agreements may well have been negotiated. There is evidence of Maori successfully adopting new technologies such as flourmills that used water power and of assisting settlers to modify and drain areas for settlement. For example Maori contract gangs worked on draining the Wakapuaka swamp near Nelson in 1847.¹³ In the early years of settlement however much of the modification of waterways was small-scale and gen-

11. David Williams, *Te Kooti Tango Whenua: The Native Land Court 1864-1909*, Wellington, Huia Publishers, 1999, pp 57-59

12. Alan Ward, *National Overview*, vol 1, Waitangi Tribunal Rangahaua Whanui Series, Wellington, GP Publications, 1997, p 97

13. P V and N L Wastney, *Early Tide to Wakapuaka*, Nelson, Nelson Historical Society in association with P V & N L Wastney, 1977, p 46

erally limited to settler townships and small hinterlands. Maori may have considered that relatively small losses were offset by the advantages to be gained. It was also not clear at this stage how great the impact of purchasing might be, as Maori still appeared to retain authority over considerable areas of inland waterway-based flora and fauna, even on large areas of what was by then legally Crown 'waste' land.

However it seems unlikely that Maori intended to give up all rights to all inland waterways through purchases, especially the very large purchases that claimed to include whole districts and all their inland waterways, or those that involved waterways of considerable importance to Maori for the resources they sustained. Even though relevant purchase deeds may have mentioned the inclusion of some of these waterways it is still doubtful what Maori understood by their inclusion. The verbal negotiations surrounding the deeds were likely to have been most important to Maori. These often took place over many days and although poorly recorded there is evidence to suggest that in many cases Maori expected to be allowed to continue using their important waterways for a variety of purposes including transport, access and harvesting of important resources.¹⁴ Ward also cites the Waitangi Tribunal *Ngai Tahu* report finding of strong evidence that Maori expected to have continued access to inland waterways, co-existing with settler use of the land for grazing stock.¹⁵ Importantly, it seems that Maori continued to use inland waterways in many areas, even after sale deeds were made, indicating a somewhat different understanding of the extent to which customary interests might have been extinguished by the sale process.

In the early decades of settlement the legal situation may have seemed even less clear to Maori as the result of the Crown policy of reserving strips of land along many of the larger inland waterways when riparian blocks were on-sold. The Crown appears to have reserved such areas in order to provide for the needs of settlement such as public access to a waterway, or future provision for roading. In effect, the Crown was also retaining riparian ownership rights through the reserves. These marginal strips, popularly known as the 'Queen's Chain' were not made along all inland waterways but in many cases they did ensure continued access to flora and fauna such as fisheries in inland waterways for Maori, as well as providing for general public access. In more remote areas it was often Maori communities who made most use of them, for instance for seasonal white-baiting. The existence of marginal strips may well also have

14. Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today*, Bridget Williams Books, Wellington, 1999, p 115

15. Ward, *National Overview*, vol 1 p 97

helped obscure the full legal implications of riparian land purchases for Maori as such strips effectively enabled Maori to continue to have access to traditional inland waterway based resources. However as the legal riparian owner, the Crown and not Maori held management rights over the strips and could delegate them or license them at will. In addition, the marginal strips did not legally move to match natural changes to the course of a waterway. As a result a strip could well end up some distance from the new course of a waterway and could also be lost through erosion. More research is required on this, but it may well be that it was only when this kind of event happened, sometimes many years after an original land purchase, that Maori began to appreciate their customary rights might no longer have legal protections.

The situation had changed by the 1870s when more extensive Pakeha settlement and land development for farming, made the implications of the loss of riparian rights through purchases much clearer to Maori, although by this time they were in a much weaker position to physically resist. In this period there was much greater and more intensive modifications of waterways through, for example, drainage, diversion, and flood protection works. These works took place not only within settler townships but also increasingly in the larger outlying areas being developed for farming purposes. The much more extensive scale of modifications and drainage of waterways also began to have much greater ecological impact because of the interconnectedness of lakes, swamps, rivers, streams and springs within a catchment. Developments in one area could markedly affect other areas and the flora and fauna that depended on them. For instance, substantial abstractions or diversions of water from rivers could affect the viability of related springs, swamps and streams over a wide area. More extensive drainage also began to have a major impact on the viability of wetland flora and fauna and the more intensive nature of settlement resulted in much more substantial modifications and pollution of inland waterways.

Even where Maori had retained waterways in land reserved from sale, the Crown often assumed management rights and delegated these to other agencies. This effectively removed Maori control and authority over these reserves including any inland waterways they might contain, even when the land was nominally in Maori ownership. The imperative for statutory managers to derive an income from such reserves often resulted in the destruction of such waterways and associated flora and

fauna in an attempt to make the reserve suitable for 'productive' uses such as farming. A brief survey of Nelson reserves reveals this was common even when a reserve might be poorly suited to farming and might even have been originally chosen by Maori precisely for the water based flora and fauna it sustained. For instance, Mackay's Compendium of official documents relating to the Nelson district reveals that many of the reserves chosen were located near or included important waterways for managing and harvesting flora and fauna.¹⁶ However, control of these waterways was lost to Maori when they were placed under the management of agencies such as the Public Trustee. The waterways were often destroyed or substantially modified in order to develop the land for leasing for farming purposes. Many of the reserves located in or near townships were also effectively destroyed by pollution, drainage, gravel extraction and various flood control measures associated with settlement. The waterways were not legally regarded as a separate resource from the surrounding land and were given no special protections even where the waterway was known to be the reason the land itself was chosen as a reserve.

Such an example is the fate of the fishing reserves the Native Land Court made for Ngai Tahu to fulfil the Crown's obligations arising from the Crown's 1848 purchase of Canterbury and Westland (see chapter 6 above).¹⁷ These reserves took the form of fishing easements and were mostly implemented by granting reserves of land that abutted a river or lake. However, as the Waitangi Tribunal observed in its report on the Ngai Tahu claims, within 15 years of the reserves being granted, the particular fisheries upon which the reserves were based had been destroyed through waterways being lowered.¹⁸ That these fishing reserves were rendered useless was the subject of two petitions to Parliament by Te Oti Pita Mutu and 25 others in 1879 and again in 1880 (see chapter 14 of this report).¹⁹

16. Cathy Marr, 'Crown-Maori Relations in Te Tau Ihu: Foreshores, Inland Waterways and Associated Mahinga Kai', Treaty of Waitangi Research Unit, 1999, p 62

17. For further details of the process by which these reserves were made, see Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, Brooker and Friend Ltd, Wellington, 1991, p 508

18. Waitangi Tribunal, *Ngai Tahu Report*, vol 3, p 908

19. Petition of Te Oti Pita Mutu and 25 others, petition no. 160/1879/2, AJHR, 1879/2, 1-2, p 28; Petition of Te Oti Pita Mutu and 25 others, petition no. 183/1880, AJHR, 1880, 1-2, p 31. Other examples of reserves based on inland waterways can be found in Cathy Marr's report on inland waterways and foreshore issues in the Northern South Island. Marr, 'Crown-Maori Relations in Te Tau Ihu'

13.3 Crown assertion of authority over 'navigable' inland waterways

It is common to find documentary evidence of what many European settlers regarded as the more 'civilised' principles of English statute and common law being applied with considerable inflexibility when they appeared to conflict with Maori interests. In fact, as has already been al-

luded to, there appears to have been a possibility of a much greater accommodation of Maori interests, even within common law presumptions, if the Crown had chosen to pursue this. The main opportunities appear to have been in the presumption that from 1840 English common law (and statute law as well) applied in new colonies to the extent that it was applicable to the circumstances of the new colony. Colonial governments (including in New Zealand) soon took opportunities to introduce new statutes modifying common law to allow for what were regarded as new circumstances in their colonies. They also sought with some success, to persuade Courts that certain common law presumptions could be successfully rebutted in common law on account of the special circumstances of a new colony.

For example, in New Zealand it was quickly realised that the English laws of the 1840s regarding the transfer of real property were complicated, technical and often archaic and would only serve to hinder colonisation. The preamble to the Conveyancing Ordinance 1842 declared this to be 'inconvenient and...altogether unsuitable to the circumstances of this colony...' and provided for an alternative, short, straightforward form of deed of property conveyance in fee simple which came into operation in March 1842. In 1870 further reforms introduced the Torrens system of registering title in the Land Transfer Act of that year. The Crown in New Zealand (in common with other new colonies) also sought to take advantage of the possibility of rebutting common law private riparian rights to large or 'navigable' inland lakes and rivers based on the 'special circumstances' and the 'national interest' of the new colony. This resulted in some cases in what appears to be a historical variation between the application of common law in England and in the various new colonies. This can be seen for example in the development of case law over 'large' lakes. In the application of common law presumption in England it has been confirmed that the beds of large inland lakes 'even when they are so large that they might be termed inland seas' do not belong by common right to the Crown.²⁰ White has cited recent 'modern' cases in support of this.²¹ In New World colonies however the presumption is much less certain, where White has cited cases, for example in North America and Australia in which the circumstances of new colonies have been distinguished from the more settled history of Britain.²²

In New Zealand, and a number of other New World colonies, governments have sought to rebut the common law presumption of private

20. *Halsbury's Laws of England*, vol

18, p 219

21. White, pp 3-4

22. White, p 4

riparian ownership rights to the beds of larger 'navigable' inland waterways in order to meet the needs of large-scale settlement and development. This resulted in some legal debate in a number of new world colonies in the nineteenth century, including New Zealand, the United States, Canada and Australia, where governments sought to persuade Courts that private riparian rights to 'navigable' inland waterways could be rebutted on the grounds that circumstances were different in the new colonies compared with the long settled history of the common law in Britain.²³ Various jurisdictions were somewhat reluctant to accept this initially and there was some tension in the nineteenth century between the Crown view and the tendency of Courts to interpret common law presumptions in favour of private riparian ownership rights. In New Zealand this tension was evident by 1900 when the Crown was more aggressively asserting that it could rebut private riparian rights in 'navigable' inland waterways.²⁴ Although the Crown was more aggressively asserting such authority in the Courts by 1900, there is ample evidence that the Crown favoured such a position from as early as 1840. This was possibly based on previous British colonial experience where the importance of the use of 'navigable' waterways for such means as transport, access to undeveloped lands, military requirements and communications had already been recognised.

In 1840, for example, the British Colonial Office instructed Governor Hobson to make provision for reserves out of waste land 'for public roads and other internal communications, whether by land or water', also for present or future landing places, or quays on the sea coast, or 'in the neighbourhood of navigable streams'. Such reserves were intended to be used for public purposes such as utility, health or enjoyment, and the Governor was not to allow them to be occupied by any private person for any private purposes.²⁵ Similarly, when the Crown agreed to a charter for the New Zealand Company in 1841, it required the Company to abide by any general rules and laws for the colony, including those securing general public and free access to, and use of, all seaports, landing places and navigable rivers.²⁶ Similar instructions were also sent to Governor Grey in 1846.²⁷ These original intentions were all mistakenly predicated on the belief that large areas of 'waste' land (and presumably inland waterways) were not subject to Maori customary interests and could be relatively easily acquired. This assumption proved false in the face of Maori determination and ability to insist on customary interests over the whole

23. Waitangi Tribunal, *Whanganui River Report*, pp 18-19

24. Waitangi Tribunal, *Whanganui River Report*, p 18

25. Lord Russell, instructions to Governor Hobson, 9 December 1840, *BPP*, vol 3, p 162

26. Alexander Mackay, *Compendium of Official Documents Relative to Native Affairs in the South Island*, 1873, vol 1, p 39

27. Colonial Office instructions to Governor Grey, 28 December 1846, *BPP*, vol 5, p542

country, but still indicates the Crown view on the matter.

The Crown then adopted a policy of trying to extinguish all Maori customary interests through land purchases. In doing so the Crown became the legal riparian owner of much of the land adjoining waterways in New Zealand. The Crown retained control over a significant amount of this through the establishment of reserves and marginal strips reserved from sale, as discussed above. Even so, substantial areas remained where private riparian rights still existed. In these cases the Crown increasingly sought to rebut these rights in respect of 'navigable' inland waterways. Initially this appears to have been based on a tacit assumption of authority as waterways were found to be useful for settlement. This provoked relatively little Pakeha landowner concern, given the role of the Crown in assisting with colonisation and development. Increasingly, however, Maori found themselves obliged to challenge such assumptions or have them accepted as the status quo. By the turn of the century the Crown also appears to have become more confident and aggressive in asserting its claims to authority over such waterways. As legal battles developed over various inland waterways, the situation in New Zealand evolved somewhat differently regarding 'navigable' lakes and 'navigable' rivers.

Although the term 'navigable' was used in relation to inland waterways from the very earliest Crown instructions concerning New Zealand, just what was meant by 'navigable' was always somewhat uncertain. This was particularly true of New Zealand where the characteristics of many rivers in particular, defied the application of simple definitions based on river width or the capacity of craft to negotiate a particular waterway that had evolved in relation to more placid and sluggish English rivers. In the South Island for instance, the West Coast rivers could change from small streams to wild torrents in a few hours and many of the largest rivers with their many rapids defied most efforts to negotiate them. In contrast, the meandering, braided river beds of the east coast could be over a mile wide from bank to bank but contain a myriad of interlaced and ever changing channels running over wide expanses of shingle and only merging in floods, again defying settler efforts to negotiate them. The Crown appears to have made no attempt to categorise all waterways according to their 'navigability' or not, but simply assumed 'navigability' if this was practically proven by a waterway being required for some economic purpose, whether for transport, military purposes or access. This left a reasonable degree of uncertainty over many waterways and the de-

velopment of a system whereby authority was only 'settled' one way or another when disputes arose. This may well have been an advantage from a settlement point of view as it allowed the Crown to assert authority over waterways as, and for whatever purposes might be useful for settlement. It may however, have contributed to Maori believing they still retained mana and authority over important waterways and associated resources until embroiled in bitter legal struggles with Crown or local body agencies.

The term 'navigable' was finally legally defined with regard to rivers by the 1979 Coal Mines Act. Section 261(1) held that a 'navigable river' 'is a river of sufficient width and depth (whether at all times or not) to be used for the purpose of navigation by boats, barges, punts or rafts'. This appears to have potentially included even large streams within the definition. However before this, in the absence of legal definitions, in the period 1840 to 1912 the practical application of what might constitute a 'navigable' waterway was generally left to Government survey officials acting under the overall general authority of various Lands Acts and associated survey and lands regulations. These officials seem to have practically relied on standards used in other types of survey and land use applications; most obviously the standards relied on when deciding whether to create marginal strips. Marginal strips were part of what was collectively known as the 'Queen's Chain' and were generally only made along what were considered 'navigable' waterways. The survey practice of some officials to reserve strips of Crown waste land along such waterways from on-sale to settlers seems to have begun in some parts of New Zealand as early as the 1850s.²⁸ At the same time, and even before this there were various provisions enabling the creation of reserves for public purposes (which could be alongside inland waterways).²⁹ When the provinces were abolished, clause 34 of the general survey regulations under the new Lands Act 1877 extended the practice of reserving strips to the whole country by requiring the setting aside of a reserve of 100 links frontage to all 'navigable' rivers. Similarly, survey regulations made in 1866 under the Land Act 1885 provided for 100 links frontage to be set aside along all 'navigable' rivers and coasts when Crown waste land was being surveyed.³⁰ This survey practice was later given statutory recognition in the Land Act 1892 and similar provisions were continued through a variety of later Lands Acts and are continued in the current Resource Management and Conservation Acts.

28. A S D Evans (ed), *The Law Relating to Watercourses: Seminar Proceedings*, Ministry of Works, Wellington, National Water and Soil Conservation Authority, Miscellaneous Publication, no 86, 1985, p 32

29. For example under the Lands ordinance 1841 and the Public Reserves Act 1854.

30. Regulation 27 of the Survey Regulations proclaimed in 1886 pursuant to the Land Act 1885

Some clues as to how survey officials actually decided on what was 'navigable' during this time can be gleaned from the standards applying when marginal strips were created. For example, section 110, of the Land Act 1892 provided for marginal strips to be set aside along lakes in excess of 50 acres, and all rivers and streams of an average width exceeding 33 feet. These measurements were modified over later years with section 58 of the Land Act 1948, stipulating lakes in excess of 20 acres, and rivers and streams of an average width of not less than 10 feet. The Land Subdivision in Counties Act 1946, section 11(1) contained similar provisions defining the size of an inland waterway that might be considered navigable and these were continued in subsequent Acts and amendments of a similar nature. The measurements were later translated into metric equivalents of eight hectares for lakes and three metres for rivers and streams, for example in the Local Government Act 1974. Similar provisions have been carried into the Resource Management Act 1991 and the Conservation Act. While in themselves, these measures did not define the legal limits of private riparian ownership; they appear to have been practically used by Crown officials as a ready rule of thumb when deciding what inland waterways might be considered 'navigable' for various purposes.³¹ The process of requiring marginal strips for larger inland waterways also of course enabled the Crown to gain riparian rights along 'navigable' waterways in many cases and therefore an alternative case for claiming authority over such areas.

When the Crown did face legal challenges to its assertion of ownership of the beds of 'navigable' rivers, the New Zealand Courts were at first reluctant to accept the Crown's claims that it owned them by prerogative right. Instead the Courts upheld the common law rights of riparian landowners. Therefore, after such legal actions around the turn of the century, the Crown decided to intervene legislatively with regard to rivers. Section 14 of the Coal Mines Amendment Act 1903 was enacted in response to legal disputes about coal mining in the bed of the Waikato River and was continued in section 206 of the Coal Mines Act 1925 and section 261 of the Coal Mines Act 1979. These provisions held that unless the bed of a 'navigable river' had been Crown-granted, then the bed of that river was deemed to be and to have always been, vested in the Crown. The later Resource Management Act 1991, section 354(1)(c), continued the requirement that such beds be vested in the Crown. The result of this was that by legislative intervention, the Crown asserted authority over 'navi-

31. Official correspondence, Lands and Survey, ABWN 6095 w 5021, b 686 (LS 22/5146, vol 1) NA Wellington

nable' New Zealand rivers from the early twentieth century. For other rivers and streams, the common law doctrine relating to adjoining land-owners, *ad medium filum aquae*, applies. This has not stopped Maori from asserting that their full customary interests and authority in the whole water resource of various rivers has not been explicitly or effectively challenged by a reliance on legislation claiming only title to the beds. One such river that has been subject to a long and bitter legal struggle between Maori and the Crown is the Whanganui River where the Waitangi Tribunal has recently conducted the latest in a long series of investigations.³²

In the case of 'navigable' lakes the Crown has not made similar legislative interventions. This may have been because the Courts have been more ready to accept that the beds of large lakes cannot be easily claimed through riparian ownership. In the case of smaller lakes, the Native Land Court followed traditional common law presumptions and assumed that the beds of such lakes could be investigated to establish customary interests much like any other land. This principle was eventually confirmed in the 1912 case of *Tamihana Korokai v Solicitor General*.³³ The Native Land Court has, however, tended to regard the Crown's purchase of lands abutting a lake as insufficient to extinguish the customary title to the lake's bed.³⁴ In the case of the Whanganui River though, the Maori Appellate Court and the Court of Appeal held that the customary title to the riverbed was extinguished when the Native Land Court reformed the titles to the contiguous Maori-owned lands.³⁵ As with rivers, in the period 1840 to 1912 the Crown clearly moved from tacit acknowledgement of Maori authority over many important lakes to a determination to gain exclusive control of all large waterways. However, in the case of lakes, the Crown did not resort to general legislative intervention. Instead, as numerous disputes with Maori concerning lakes developed from the 1870s, the Crown opted for negotiated settlements which were subsequently given legislative effect, rather than possibly compromising the Crown position and having to concede Maori ownership of lake beds.

32. Waitangi Tribunal, *Whanganui River Report*

33. *Tamihana Korokai v Solicitor General* (1913) 32 NZLR 321

34. For example, see White's discussion of the Rotorua Lakes and Lake Omapere. White, pp 101–102, 235–236

35. Waitangi Tribunal, *The Whanganui River Report*, chapter 7 (see especially p 195)

13.4 Crown assertion of management rights over inland waterways

The Crown also pursued a strategy in regard to inland waterways of simply asserting powers of management and governance over the whole

waterway including the waters within it; in the 'national good', where this was required regardless of title or ownership issues. This again seems to have been based on claims of Crown prerogative in a new colony. The Crown assumption of this type of authority began on a relatively small scale with provisions to assist with facilities for settler townships. The Municipal Corporations Ordinance 1842 included provisions for elected town authorities to build and control sewers, roads, waterworks and drains within townships and their neighbourhoods. These provisions enabled the use of natural waterways such as rivers and streams within townships as convenient drains and sources of water supply.³⁶ The Municipal Corporations Act 1867 contained more comprehensive provisions for municipal authorities, including powers to construct and maintain waterworks and to take water for domestic supply from any stream or reservoir. The Act deemed the waters involved to be the property of the Crown, and then delegated certain rights to corporations.³⁷ The Municipal Corporations Waterworks Act 1872 then vested water rights in the corporations themselves. At the same time various Ordinances provided for a majority of ratepayers, or owners or occupiers of freehold land, to request the establishment of Boards of Works or Roads Boards with powers to levy rates to pay for various works within settled areas. These included for example, the Public Roads and Works Ordinance 1845 and the Country Roads Ordinance 1849. Maori were generally excluded from these authorities because of the freehold property qualification.

For much of the period up to the mid-1870s, New Zealand was governed under a provincial system. The first provinces of New Ulster and New Munster were established under the New Zealand Government Act 1846 and lasted from 1846 to 1853. These were then replaced by a new system of initially six provinces under the Constitution Act 1852, operating from 1853 to 1876. The various provinces were also delegated powers of works within their provincial districts including over inland waterways. Within townships in the provinces, the older ordinances were replaced by various Town Improvement Acts also providing powers for works such as drainage, sewage and water supplies in towns. The Nelson Improvement Act 1856, for example, enabled the Nelson Provincial Government to proclaim road districts and establish Boards of Works. These Boards had the power within towns to carry out works such as ditches, drains, and sewers, and to use natural watercourses for these purposes.

36. Marr, 'Crown-Maori Relations in Te Tau Ihu', p 86

37. Municipal Corporations Act 1867, part 20

The Boards were also given powers to enter any Crown waste lands, or any river or creek to search for, or remove any stones, gravel, sand or other materials required for various works within townships. There were some protections against the Boards' use of these powers but they only protected structures on waterways that were important for Pakeha settlement such as fords, dams, weirs and buildings. There were no legislative protections for structures important to Maori use of inland waterways, for example eel weirs in rivers.³⁸



Men digging drainage ditches in the Kaitaia Swamp, c 1910. Photographer Arthur James Northwood. From the Northwood Collection, photograph courtesy of the Alexander Turnbull Library (PAColl-3077)

The Crown continued to assert the right to control and license water rights by statute. A number of provincial laws continued to provide legal authority for the use of water from inland waterways to power various types of mill such as flourmills and saw mills. Specific water rights for mining such as in the Gold Fields Act 1862 were also introduced. The Crown made grants of land for reserves for public purposes out of Crown 'waste' land that were placed under the control of Provincial governments. The Public Reserves Act 1854, for example, provided for this type of grant from waste lands including any lands near any navigable river. A series of Waste Lands Acts and general Lands Acts also provided similar

38. Marr, 'Crown-Maori Relations in Te Tau Ihu', p 89

measures and often the land reserved to the control of Provincial governments included inland waterways. Within townships, various early town-planning provisions also provided for reserves for purposes such as recreation and public utility, often assuming Crown control of waterways for the purpose. Such an example was the Town Regulations Act 1875 that provided for reserves for recreation grounds and for purposes of utility such as gravel pits and rubbish reserves. These were often sited so as to utilise waterways, substantially modifying or polluting them in the process. Legislative provisions often also extended the powers of Provincial Councils onto Crown land including inland waterways on Crown land. For instance, the Public Domains Act 1860, enabled Provincial Councils to divert, widen or alter any watercourses on Crown land. The Provincial governments were also given increasing powers involving works on Crown lands in their districts through a variety of Provincial Councils Powers Extension Acts. These contained measures that included works involving streams, creeks, rivers, ponds or lakes. An example of this type of measure was the Provincial Councils Powers Extension Act 1865.³⁹

The Boards of Works provided for in various legislative provisions were embryonic special purpose authorities and were often given powers involving the use or modification of inland waterways or the subtraction of materials such as gravel from waterways for various works. Later amendments to the Town Improvement Acts gave the Boards control over all rivers, streams, watercourses, drains, ponds and ditches within townships, for the purposes of works, for instance the Nelson Improvement Amendment Act 1858 section 20. As the Boards began to operate in the wider districts outside townships, the Crown began to provide them with powers beyond what the Provincial governments were able to give them in the interests of facilitating developments necessary for settlement. The Highways and Watercourses Diversion Act 1858 provided Highway Boards with powers to stop or divert waterways for instance, and assume ownership of dry waterway beds. In some cases, where circumstances required, the Crown also passed special legislation to give Boards special powers of land taking, and other flood protection measures, such as the Hawkes Bay and Marlborough Rivers Act 1868. This legislation was based on the Crown assumption of authority over these waterways and rights to delegate such powers. The Highways Board Act 1871 also began the extension of rating and land-taking powers for public works purposes to Maori land. The early provisions only extended to Maori land occupied

39. For further details see Marr, *Public Works*

by other than Maori, but nevertheless the rights to undertake works such as drainage impacted on Maori leased land, such as sale reserves, many of which had originally been chosen to retain important inland waterways such as those containing eel fisheries.

From the 1870s, the Government encouraged more extensive Pakeha settlement with associated public works programmes and the development of land for agricultural and pastoral purposes. Legislative provisions involving waterways were also extended to facilitate these measures and began to impact on areas outside the settler townships. The provisions also continued to delegate such powers to settler Government, while there were no similar efforts to delegate powers to Maori committees or runanga, even in areas known to be primarily of concern to Maori, such as eel fisheries. In addition, where there were conflicts of interest between developments for farming and Maori concerns to protect waterways that sustained important harvesting areas – such as the contest for the control of the Wairarapa lakes – legislative provisions and Crown policies generally favoured settler-farming interests. The case of the Wairarapa lakes, along with other examples, are discussed in more detail below.

When the provinces were abolished in 1876, the Crown delegated many powers to local authorities and strengthened various types of district and special purpose local authorities to more effectively take on these responsibilities. Again, however, no requirements were included to ensure the authorities had regard for Maori interests, including in inland waterways and associated flora and fauna. Provisions such as the Municipal Authorities Act 1876 ensured city councils had powers to provide for services such as sewage and water supplies. This continued to involve appropriation and modification of inland waterways for example, to construct dams to provide city water supplies, and to utilise rivers and streams for sewage and drainage. The Counties Act 1876 provided for County Councils to take over works in outlying areas outside settler townships. The County Councils absorbed many of the old Roads Boards and also took over many of their powers involving inland waterways such as drainage, diversion of water and taking materials such as gravel from waterways. County Councils were also given extended powers, including land taking powers for works purposes, such as in the Public Works Act 1876.

Numerous subsequent provisions extended powers to facilitate new developments. For example, an 1883 amendment to the Counties Act provided powers to Councils to control and supply water, construct dams and utilise streams for water races, to provide irrigation for farming purposes. County Councils were also able to secure special Acts for particular development purposes. For instance, the Waimea County Council in the Nelson district secured the Waimea Riverworks Act 1889 to divert the Waimea River and reclaim part of the Waimea estuary, although in that case the powers were never used due to lack of finance. General legislation also assisted with the use of inland waterways for development purposes. The Public Works Act 1876 for instance, provided that any natural watercourse, including any non-navigable river and lake outlet, could be considered a public drain, and provided powers to build drains on any lands in the colony. Further public works powers over waters and waterways were continued in subsequent Public Works legislation such as the Public Works Act 1882. The Crown's right to control, manage and allocate water for various purposes was also extended in legislation such as the Water Supply Act 1891, the Water-Power Act 1903 and special purpose Acts such as the Mines Act 1877. The general water rights the Crown assumed under these early types of provisions would continue on into current legislation such as the Resource Management Act 1991.⁴⁰

The Crown also strengthened and gave separate statutory power to numerous special purpose authorities. Those with the most impact on inland waterways in the period up to 1912 were generally drainage boards and river boards. The Land Drainage Act 1893 provided separate statutory authority for drainage boards and provided them with extensive powers to drain lands for agricultural and pastoral purposes. Drainage Boards could be established on a successful petition of a majority of ratepayers in a district and boards were then elected by and appointed from ratepayers. Their powers included the ability to improve existing drains and build new ones and undertake irrigation works. When works were undertaken, only neighbouring landowners had legal rights of objection. There was no provision for objections from Maori if they did not own adjoining land, even if they maintained a continuing interest in a waterway such as a fishery. The Land Drainage Act 1908 continued to extend and consolidate the powers of Drainage Boards. The Acts, in common with much public works legislation, also only provided for objection rights from landowners whose properties were affected by proposed

40. For further details see Marr, *Public Works*

drainage works. There were no provisions that might protect non-land-owners whose resources might be lost or damaged as a result of such works. Drainage Boards were also constituted and run by and for rate-payers, ignoring other forms of land ownership such as trusts or Maori held land. This was even when it was known that Maori in many districts were very concerned about the possible impact of drainage and lake level lowering on resources such as eel fisheries, flax and raupo. An example is the Hokio Drainage Board's proposal to lower Lake Horowhenua by widening and deepening the lake's outlet, Hokio Stream. The drainage board had been established under the 1908 Drainage Act after a majority of ratepayers in the area had petitioned the Governor praying that the area be constituted a drainage district so that actions could be taken to alleviate flooding in the vicinity of the lake. However, the Muaupoko owners of Lake Horowhenua, concerned that the widening of Hokio Stream would deleteriously affect their eel fisheries, opposed the proposal to lower the lake. Although the 1908 legislation contained provision for landowners on whose properties works to were to be undertaken to object, there was no provision for other people whose interests may have been adversely affected to object. Consequently the Muaupoko owners of Horowhenua had no recourse under the Act.⁴¹ Maori therefore generally found they had no rights under drainage legislation when their fisheries or other resources were adversely affected, and little effective control or input into the management and decision making of such bodies.

The River Boards Act 1884 gave separate statutory authority to river boards along similar lines to drainage boards. Any river catchment could be declared a river board district following a successful petition of a majority of ratepayers in an area affected by river flooding. Ratepayers elected the members of river boards and served on them. When a river board was established, it was given control of all rivers, streams and waterways in its district. River boards were also given powers to take lands, levy rates, raise loans and enter contracts for river works. They were also assisted by Government subsidies in some cases for river and flood control works. These boards were instrumental in having large areas of wetlands drained, substantially modifying streams and rivers, and removing obstructions from waterways, such as eel and lamprey weirs. Works included diverting watercourses and building various forms of flood protection, including stop banks, drainage ditches and river diversions. It has been considered that subsequent River Board legislation such

41. White, p 77–78

as the River Boards Act 1908 effectively created partial proprietary rights for river boards in all rivers, streams and watercourses whether navigable or not, or tidal or not, within any river district constituted under the Act (sections 73, 78).⁴² In the period from the 1870s through to 1912 and beyond, river board-authorized works had a major impact on inland waterways throughout New Zealand, and the ecosystems they sustained, while at the same time significantly limiting and diminishing Maori authority over indigenous flora and fauna associated with them.

By the 1890s however, there is also evidence of the beginnings of Pakeha concern that the fundamental and widespread impact of such activities was threatening the survival of even the remnants of indigenous flora and fauna. This concern began to impact on Crown policy, especially as it coincided with the growing importance of tourism, both domestic and international, in many parts of New Zealand from the 1880s. For example, a Scenery Preservation Society was formed in Nelson in 1896. Its efforts were often supported by business organisations such as the Nelson Chamber of Commerce, which was concerned to market Nelson as a tourist destination. Many tourist and scenic attractions involved inland waterways. Some of the most popular recreation areas in Nelson were located near the Maitai and Lee Rivers, and Lake Rotoiti also became a popular camping ground. The local chamber of commerce was also instrumental in having the Aorere caves gazetted as a scenic reserve in 1907, and supported early moves to develop Maruia Springs as a tourist resort.⁴³ Many of the significant and accessible remnants of indigenous forest on mainland New Zealand were also located along or around inland waterways. As a result Crown policies began to include provisions for public works land takings for scenic purposes, such as the Scenery Preservation Act 1903, and began to delegate powers of control and management to various agencies such as acclimatisation societies, and Parks Boards. Many of the powers included control over the management and use of inland waterways and associated flora and fauna. These new agencies generally failed to include representation for Maori, even when other special interests such as chambers of commerce, were recognised and provided for. This resulted in the undermining or loss of Maori authority over these areas that were often the last areas where Maori had managed to retain traditional systems of harvesting and management of flora and fauna associated with inland waterways.

42. Hinde, McMorland and Sim, p 378

43. Marr, 'Crown-Maori Relations in Te Tau Ihu', p 152 (citing J McAloon, *Nelson A Regional History*, Whatamango Bay, Cape Catley in association with the Nelson City Council, 1997, p 143)

13.5 Practical examples of the Crown assertion of authority over inland waterways

The major strategies adopted by the Crown in asserting control over inland waterways in the interests of large-scale European settlement have been outlined separately above to assist in highlighting possible issues. In practice, however, it was characteristic of the Crown, in applying strategies to individual situations, to pursue one or a combination of these strategies at one time and even to change them over time depending on circumstances. For example the Crown often simultaneously engaged in attempts to acquire common law riparian rights through land purchasing, while at the same time simply assuming rights of management and control over the use of the bed and waters of a waterway for various settlement purposes. The application of policies also reveals an increasing determination on the part of the Crown to gain sole authority over inland waterways. In the early decades of settlement, when Maori were still capable of effective armed resistance, the issue was often left vague, or Maori rights in waterways were tacitly acknowledged. However, from the 1860s and certainly by the turn of the century the Crown had begun to deny the existence of Maori rights and authority in inland waterways. Instead, the Crown began to assert authority over such waterways more aggressively, whether through legal actions concerning the ownership of beds or by simply asserting authority and management rights over the waters in the 'national interest'.

13.5.1 Examples of the assertion of Crown authority through riparian interests in swamps and 'small' inland waterways

The major means of Maori loss of authority over swamps and smaller inland waterways appears to have been through land purchase. Where the purchases were large this could include significant waterways. In the Nelson district, for instance, after the Crown 'completed' the early New Zealand Company purchases, the Nelson Grant book shows many examples of Crown grants to settlers and the Provincial government including riparian rights to various waterways granted within the purchased areas.⁴⁴ The 'eel pond' in Nelson was one such inland waterway that had presumably been sustaining a traditional eel fishery. It was considered to

44. Nelson Crown Grant Book, G1, LINZ, Nelson

have been included within the waste or unappropriated lands of the Crown as a result of the purchase. Consequently Maori lost control of the eel pond fishery. The land block surrounding the eel pond was Crown-granted to the Superintendent of Nelson Province in 1856 as a reserve for purposes of public utility for 'cattle, meat, fish and other markets'.⁴⁵ Subsequently the Provincial government authorised the use of the pond for the acclimatisation of introduced fish such as salmon and trout. The pond was eventually inherited by the Nelson City Council, becoming part of what is now the Queen's Gardens in Nelson. Even relatively large inland waterways also appear to have been considered acquired by the Crown due to their location within the large Nelson purchases. For example, the Crown's legal ownership of the large interior lakes, such as Lake Rotoiti and many of the rivers in the district appears to have been initially based on the acquisition of riparian rights through the purchase of surrounding lands.⁴⁶

In some cases it seems as though Maori may well have accepted that smaller waterways and swamps could transfer to those they had agreed could use the land, especially when they wished to encourage small groups of Pakeha settlers. Maori also assisted in the clearance and drainage of some swamp areas to promote European style cultivation and settlement. However it also seems clear that certain waterways and swamps, even if not large or 'navigable', still remained important to Maori both culturally and economically because of the resources they sustained. This appears clear even from evidence such as Maori agreement to many proposed reserves from purchases precisely because they contained important water based resources such as eel fisheries. There is also evidence of continued Maori use of swamps and waterways on Crown waste lands even after purchases were made. It is not at all clear that Maori either contemplated or accepted the loss of these waterways and the flora and fauna they sustained. As discussed above in chapters 6 and 7, there is some evidence that in verbal negotiations over purchases, Maori were assured that traditional access and use rights might remain as long as they did not interfere with the needs of settlers.

As early economic success declined and Maori became increasingly marginalised economically they were forced to return in many cases to a reliance on traditional resources such as fisheries. At the same time they found that more intensive European settlement, relying in many cases on

45. Nelson Crown Grant Book, G1, grant no 224, 1856, LINZ, Nelson.

46. Marr, 'Crown-Maori Relations in Te Tau Ihu', p 71

the early blanket purchases, increasingly conflicted with the use of such resources. This increased as local and provincial authorities were given increasing powers in areas such as drainage without being required to have regard for what were known to be important traditional fisheries. The Ngai Tahu Report cites evidence of Ngai Tahu complaints about the impact of drainage on eel fisheries as early as 1865.⁴⁷ From the 1870s there was much more extensive modification of smaller inland waterways and swamps. For much of the period under review, although the final result was an enormous modification of such waterways and swamps overall, much individual drainage and modification work seems to have been relatively small scale and incremental. More research is required in this area, but it appears that the most important characteristic of this period was the creation of a legislative framework that enabled large-scale modifications to swamps and inland waterways to take place. This was based on the assumption that all Maori interests had been extinguished as the result of purchases, and that no vestigial rights to resources such as fisheries survived. While enabling legislation was passed, for instance the 1908 Hauraki Plains Act, most of the very large-scale work on drainage projects like that undertaken in Hauraki took place largely after 1912 when better technology was available.

13.5.2 Examples of Crown assertion of authority over larger 'navigable' inland waterways

In the case of the larger inland waterways, the Crown response to conflicts between Maori interests and Pakeha demands for settlement is often clearer. The larger inland waterways by their nature were also of often relatively greater importance to Maori because of the abundance of flora and fauna they sustained and the generally more central role they played in the traditional economy of the groups exercising authority over them. Many were also capable of providing Maori with significant economic alternatives when land ownership was lost, and new ways of participating in new economic developments such as the development of the tourism industry. The history of a group of large inland waterways, the Whanganui River, and the Wairarapa and Rotorua lakes are briefly outlined below for the period 1840 to 1912, with a focus on practical examples of Crown strategies outlined above.

47. Waitangi Tribunal, *Ngai Tahu Report*, vol 3, p 868 (citing evidence from Tony Walzl on complaints to the Provincial Superintendent of Canterbury in September 1865 concerning lake drainage works undertaken by a sheep station ruining a traditional eel fishery)

A 'Navigable' River: The Whanganui River Example

The Waitangi Tribunal has recently reported on Crown breaches of the Treaty with regard to the Whanganui River.⁴⁸ As with the rest of New Zealand, the Crown and settlers assumed that common law presumptions applied from 1840 with the Crown acquisition of sovereignty. Attempts were made to extinguish Maori customary authority but in the case of the river, these appear to have been based on assumptions that were not made explicit to Maori. In the earliest years of settlement there seems to have been some presumption that private riparian rights around the mouth of the river may have been transferred to settlers as a result of the New Zealand Company purchase. This purchase was later 'completed' and extended as a 'blanket' purchase by Crown official Donald McLean. The Waitangi Tribunal has found that there is no clear evidence that McLean's purchase deed itself attempted to extinguish any Maori customary rights in the lower reaches of the Whanganui River.⁴⁹ The Tribunal notes that this may have been because McLean was simply assuming common law presumptions. Because the Pakeha settlement was located at the river mouth, he may well have assumed that the tidal lower reaches of the river were held by the Crown as an 'arm' of the sea. It also seems possible that as the Whanganui was clearly a 'navigable' river, McLean may have assumed the Crown could claim authority on that basis, although at the time the Courts may have been less likely to support this view. As the Tribunal also notes, it was common practice for officials like McLean not to push the matter explicitly anyway, knowing Maori would not agree and wishing to avoid jeopardising the land sale.⁵⁰ The Tribunal has found that it is not at all clear that the Maori descent groups who claimed customary authority over the river, known collectively as Atihaunui, willingly gave up authority over the river as part of the purchase. In fact, purchase negotiations concerning the district may well have assured them that they would retain their customary interests in the river.⁵¹ Evidence of subsequent events also shows that the Atihaunui people believed they had retained authority over the river regardless of the purchase, including the lower reaches.⁵² Nor is it clear that English legal applications separating the bed and waters of the river were likely to have been comprehensible to Maori at the time. At heart was the question of whose law applied or whether the two perceptions could be merged. The history of the evolution of Crown authority over the Whanganui River in the years 1840 to 1912 reveals that the Crown simply assumed that English law had to pre-

48. Waitangi Tribunal, *Whanganui River Report*

49. *Ibid*, p 145

50. *Ibid*

51. *Ibid*, p 141

52. *Ibid*, p 142

vail, while Maori sought to maintain some form of customary authority.

In the first decades after 1840 Maori and Pakeha used the Whanganui River without major disputes concerning ownership or authority. River waters and tributaries were widely used for transport and for such purposes as powering flax and flourmills. Maori participated in this, owning their own mills near Pipiriki for example, and gaining an income from providing virtually all the river transport for Europeans until the early 1890s. Maori and Pakeha developed an economic interdependency on the lower reaches of the river. Maori allowed settlers to use river waters and shared the 'beach' landing place and market near the settler township without apparently feeling their overall authority over the river was threatened.⁵³ At the same time, apart from the river coastal flats, Maori retained ownership of all the lands adjoining the river and therefore could claim common law riparian rights.⁵⁴ Many Atihaunui people shared a general Maori concern about the extent of Government land purchases by the late 1850s, but also recognised the importance of the coastal Pakeha settlement at Wanganui to the continued development of economic opportunities. The Tribunal has found that as a result there were a variety of responses to the later wars with Whanganui Maori fighting on both sides.⁵⁵ The Tribunal also found that even through the wars Whanganui Maori continued to assume rights to control river passage and the wars themselves did not result in the removal of these rights.⁵⁶

During the 1870s the Government undertook more extensive settlement and land development programmes throughout New Zealand, including in the Whanganui district. This was accompanied by wide-ranging legislative provisions and the activities of institutions such as the Native Land Court. In response, Whanganui Maori became actively involved in a variety of attempts to preserve their autonomy and authority through for example, the Kingitanga movement, various forms of Maori parliament and district runanga. Measures also included exerting traditional forms of authority over the river including rahui and the use of aukati.⁵⁷ As the Tribunal has noted, however, these attempts were largely ineffective against the impact of Native Land Court operations.⁵⁸

As part of the policy of facilitating more extensive settlement of the Whanganui district, the Crown began to assert increasing power over the Whanganui River. One strategy from 1871 was to acquire as much land as possible from Maori in the district between Whanganui and Taupo for colonisation and settlement as soon as it had passed through the Native

53. *Ibid.*, p 148

54. *Ibid.*, p 149

55. *Ibid.*, p 151

56. *Ibid.*, p 157

57. *Ibid.*, pp 158-161

58. *Ibid.*, p 162

Land Court. Most of the Maori customary land in the Whanganui district was purchased in the years between 1871 and 1900.⁵⁹ For example, the large Waimarino no 1 block was purchased in 1887 containing significant stretches of the left bank of the river. Later investigations revealed, however, that most of the riparian blocks acquired through purchase bordered the river on one side only and none of the grants purported to confer the bed of the river or any part of it to the purchasers.⁶⁰

At the same time the Crown had also begun to assume authority over the river and its waters through a variety of legislative provisions. Many of these provisions began in the earliest period of settlement and related to waters within Wanganui township and the tidal reaches of the river, assumed to be under Crown authority anyway. These included general provisions for municipal corporations relating to water supply and drainage as well as rights to water usage for such activities as flour, flax and timber mills. From the 1870s, the Crown began to assert much wider powers over the river. These included the Timber Floating Act 1873 and a series of general measures as outlined earlier to provide for powers such as flood control, drainage and various other kinds of works such as bridges and roads necessary for settlement. The Waitangi Tribunal has also identified a number of legislative provisions specific to the Whanganui River.⁶¹ These were the Wanganui Bridge and Wharf Act 1872, the Wanganui River Foreshore Grant Acts of 1873 and 1874 and the Wanganui Harbour and River Conservators Board Act 1876. As the Wanganui township was located near the mouth of the river these were also concerned with issues concerning the foreshore, harbour and tidal reaches of the river. The Wanganui Bridge and Wharf Act 1872 was largely concerned with the provision of a bridge across the river, primarily for military purposes.⁶² The Wanganui River Foreshore Grant provisions authorised the Governor to grant parts of the bed of the river to the Superintendent of Wellington Province under the provisions of the Public Reserves Act 1854. The Wanganui Borough later took this over from Wellington Province. The Wanganui Harbour and River Conservators Board Act 1876 established a board to control and manage the Wanganui bridge, wharf and all the navigable waters of the Whanganui River as far as the railway bridge. There was no separate representation provided for Maori on the board.⁶³ These powers were then inherited by a local harbour board, again with no special provision for Maori representation although, as the Tribunal has noted, evidence of a variety of Maori

59. *Ibid*

60. *Ibid*, p 163

61. *Ibid*, p 166

62. *Ibid*

63. *Ibid*, p 168

responses to works undertaken clearly reveals that Maori still expected to have a say in how the river was used and controlled.⁶⁴

As the tourism industry began to grow, the Whanganui River was dubbed the 'Rhine of the South' and became an important attraction for both domestic and international tourism. The introduction of steamers on the river required considerable works clearing snags and in some cases diverting channels and modifying rapids. These works began to have an impact on many parts of the river and on traditional fisheries, including the direct destruction of eel and lamprey weirs as snags but also considerable changes to the river ecosystem through, for example, changes in river flows and the removal of materials such as gravel, stones and logs. The Government encouraged and facilitated these works through enabling powers as well as the provision of financial assistance and subsidies. The Wanganui River Trust Act 1891 was enacted with the objectives of preserving natural scenery along the river margins and keeping the river in a fit state for navigation in the stretch of river within its jurisdiction from Raorikia extending one mile either side of the river to a point four miles from its source. This district at the time was estimated to include over 200,000 acres.⁶⁵ The trust could also erect jetties and make landing places in the area, and declare land within its district reserved for public domain. Instead of having the power to levy rates, the trust was given a land endowment. Its membership included representatives from central and local government and local business, but there was no special provision for Maori representatives to be on the trust. And although section 11 stated that nothing in the Act affected any Treaty rights or Maori land that had not been investigated by the Native Land Court, there was no requirement for the trust to consult Maori.

Under trust authority, works were carried out that included removing or destroying a number of large and ancient eel and lamprey weirs. When Maori attempted to stop such works, the Police were brought in and Maori were charged with a variety of offences, some of which were later dropped. As a result of Maori non-cooperation with the river works the Government passed amending legislation in 1893 giving more extensive powers to the board to remove stones and other materials from the river bed and banks, including from customary Maori land. Maori members of Parliament protested the increased powers but were told that Maori could not stand in the way of the 'national interest' or block use of one of the 'colony's assets'.⁶⁶ Maori responded by building new weirs and continuing

64. *Ibid.*, p 180

65. *Ibid.*, p 170

66. *Ibid.*, p 172

to obstruct works. At subsequent meetings between Whanganui River Maori and Government ministers and officials, Maori were told that they must not take the law into their own hands. This would not be tolerated and instead Maori were expected to consult and reach agreement with the Government over the river. Protests then seemed to have turned to petitioning Parliament, as recounted by the Waitangi Tribunal, although again this met with little success.⁶⁷

In pursuit of its responsibilities with regard to river scenery the Trust was also given increasing powers including to have Maori land taken for the purposes of scenic reserves. The Crown also began passing more general legislation to preserve scenery such as the Scenery Preservation Act 1903. Parliamentary debates reveal that this legislation was largely prompted by scenery issues along the Whanganui River. The legislation provided for the establishment of a scenery preservation commission to identify lands to be reserved for historic, thermal or scenic purposes. The cutting or removal of timber or otherwise damaging reserves was made an offence. Land for such reserves could be taken under provisions of the Public Works Act 1894 which by then were clearly discriminatory towards Maori land and customary land in particular. The idea of Maori representation on the scenery preservation board was considered and then abandoned. A later 1910 amendment enabled the Under Secretary of the Native Department to sit on the Board, another part of the long process of having Government agencies 'sit in' in place of direct Maori representation.

By the late nineteenth century, therefore, the Crown had gained effective practical control of the river and delegated much of this power of management and control to settler agencies without ensuring that Maori were able to effectively participate in new forms of decision making. In fact where Maori interests such as the maintenance of eel weirs and traditional fisheries were in conflict with Pakeha commercial interests the Crown clearly supported Pakeha interests to the detriment of Maori authority and concerns. As noted by the Tribunal, in the face of effective Crown and settler assertion of control of the river, Maori were increasingly obliged to resort to the only opportunities left available to them by claiming ownership of the river bed, either in terms of English law, or rights guaranteed by the Treaty. By the late nineteenth century, however, the Crown was increasingly asserting the right to rebut private riparian ownership of the beds of larger or 'navigable' inland waterways. In the

67. *Ibid*, pp 184–187

case of rivers, as already indicated, the Crown intervened with legislative provisions under section 14 of the Coal-Mines Act Amendment Act 1903. This was a response to legal issues concerning coal mining on the Waikato River. However, the enactment had the effect of making all beds of 'navigable rivers' including the Whanganui River and therefore all associated minerals, to be deemed to be and always have been vested in the Crown unless the Crown had granted them to someone else. This did not stop efforts by Whanganui River Maori to obtain recognition of their authority over the river and a very long and protracted battle has most recently led to the current Waitangi Tribunal report.

'Navigable' lakes examples

In the cases of the larger inland lakes the Crown used similar strategies to assert authority in the period between 1840 and 1912 although not using the same statutory intervention that established general Crown ownership of the beds of navigable rivers. The Crown became involved in a large number of legal battles with Maori over authority over lakes in the period up to 1912. Although many of the eventual 'settlements' of these cases took place well outside this time period, the various strategies employed by the Crown become quite clear during this time. Some of the major lakes cases include Lake Horowhenua which was reserved to Maori for fisheries by the Native Land Court in 1896. However in response to Pakeha pressure over drainage and public access issues, the Crown began a long series of negotiations with Maori owners to gain control of the lake. A statutory settlement was made in 1956, which recognised Maori ownership, but vested control of the lake in a Board with Maori representation. The Crown also negotiated a settlement with Ngati Tuwharetoa over Lake Taupo in return for annual compensation payments and certain fishing rights which was given statutory authority by the Native Land Amendment and Native Claims Adjustment Act 1926, (section 14). In the case of Lake Omapere in Northland, the Native Land Court investigated and determined title to the lake bed in 1929. The Crown resisted giving effect to the judgment however, until 1955 when the Native Land Court made an order vesting the lake in trustees on behalf of the whole of Nga Puhi. Lake Waikaremoana was also subject to a long dispute with the Crown appealing Native Land Court determinations of title. A negotiated

settlement was eventually made in 1971 under the Lake Waikaremoana Act 1971.

Two particular examples of lake cases have been chosen for brief analysis in this chapter as they reveal Crown strategies over assuming control. The first example is the Wairarapa lakes case which reveals the Crown response to the conflict between a well established, important traditional Maori fishery and the demands of Pakeha settlers for the Crown to facilitate the more intensive development of pastoralism. The southern lake, Onoke, is located on the shores of Palliser Bay while Lake Wairarapa lies to the north about twelve kilometres west of present day Martinborough. Along with associated streams and swamps, the lakes complex covered around 50,000 acres, being the largest wetlands complex in the lower North Island. The lakes are fed by the Ruamahanga River, which in flood can be powerful enough to break through the narrow spit separating Onoke from the seas of Palliser Bay. The area was also dramatically affected by the 1855 earthquake that resulted in Lake Onoke, previously open to the sea most of the time, being closed for several months of the year. When the bar was closed, heavy autumn rains could cause the lake level to rise sufficiently for the two lakes to become one body of water extending as far north as Martinborough, before the mass of water forced the bar open.⁶⁸

The Wairarapa lakes system provided a vital source of fish, and to a lesser extent waterfowl for Maori of the region. The fisheries included various species of whitebait, flounder, fin-fish, and of particular importance, eels. As well as an abundant seasonal fishery at the lake mouth, there were also smaller-scale fisheries that were used throughout the year in the upper lake and the rivers, streams, and swamps that formed the lakes' catchment.⁶⁹ The rich resource was of immense importance to Maori for a variety of traditional reasons including establishing and maintaining relationships and enhancing mana through trade and gift giving, as well as a being an immediate source of food. The Crown 'blanket' purchases of the 1850s included some blocks in the immediate vicinity of the upper and lower lakes, although it is not clear any rights to the lakes themselves were included.⁷⁰ The Crown did assert common law rights to land uplifted in the 1855 earthquake based on Crown radical title and subsequently sold the land as Te Puata block in 1862.⁷¹

Pakeha pastoralists began moving into the district from the 1850s. In pastoral terms the system of lakes and swampland was not regarded as a

68. White, p 29

69. Ibid, pp 32-34

70. Ibid, p 36

71. Ibid

rich resource, but more an impediment to land development. The waterway system was not particularly useful for transportation purposes and although the land was fertile, it was prone to substantial flooding. There is evidence that at this time the Crown acknowledged Maori rights in the lakes.⁷² Moreover Maori claimed that Donald McLean had assured them when he was negotiating block purchases that their fishing rights would not be interfered with in any way, and it seems there was agreement that the lake should not be opened by any other than natural causes.⁷³

By the 1870s as settlement became more extensive, demand for suitable pastoral land in the area increased. As a result the Crown began attempting to purchase riparian lands as title was investigated and determined by the Native Land Court. Pastoralism also became more intensive however and the potentially fertile low-lying lands around the lakes also began to seem more attractive to pastoralists who could see many hundreds of acres could be drained and made productive for farming. This however conflicted even more sharply with the interests of Maori who wished to continue operating and managing their important lakes fishery. In particular, the rich eel fishery dependant on the annual flooding of the lakes, as huge numbers of eels accumulated behind the bar ready to migrate to the sea, and at the same time providing a huge harvest for Maori. As settlers began acquiring land closest to the lakes and therefore land that was most prone to serious flooding, the conflict increased. Pakeha pastoralists began to pressure the Government to facilitate their interests at the expense of Maori interests in the fishery. In particular, they wanted the Government to allow the lake mouth to be opened to relieve the threat of floods and to open a permanent channel between Onoke and the ocean to enable large areas of fertile land to be developed for farming. In the mid 1870s the Government still appeared to agree that Maori had the right to control the opening of the lake mouth through ownership of the land and shingle between the lake and Kiriwai. It is not clear however, to what extent the Government recognised Maori customary title to the lakes themselves.⁷⁴

In response to Pakeha pressure, the Government set about negotiating with Maori and in 1876 claimed to have purchased Maori rights in the lakes and fisheries, even though customary ownership had not yet been determined by any Land Court investigation. Many Maori claiming rights in the lakes immediately contested the claimed purchase. It soon became apparent that Government officials had only negotiated with

72. *Ibid*, p 36

73. *Ibid*, p 37

74. *Ibid*, pp 37-38

those known to favour the sale and it was not at all clear what rights the Crown could claim to have purchased.⁷⁵ Petitions were made to Parliament and the Native Affairs Committee of Parliament found that the majority of owners had not joined the sale and the Crown should have waited for the Native Land Court to determine title before attempting the purchase.⁷⁶ A hearing in the Native Land Court at Masterton in 1877 was then dismissed for lack of a survey plan. At the same time Pakeha farmers were agitating for the lake mouth to be opened, arguing that they stood to suffer more economic harm through flooding than Maori stood to lose through the loss of their fishery.⁷⁷

At another hearing before the Native Land Court in 1881, the Court found that the 1876 Crown deed was invalid as Maori freehold tenure had still not been determined at the time. The Court found that the deed had only purchased the fishing rights of 17 individuals. The Crown then unsuccessfully sought a ruling in the Supreme Court that it was outside the jurisdiction of the Native Land Court to investigate customary title to the beds of lakes, as 'no right existed, according to Native custom, to the soil beneath a lake, nor is the same recognised by Native custom as being capable of ownership'. The Supreme Court found that it could not interfere, although it left open the possibility that should the Crown might be correct in its view of Native custom.⁷⁸

The Crown then resorted to attempting to purchase the remaining interests in the lakes in 1883. First it had to seek new Native Land Court hearings to have the interests it had acquired defined and to determine who were the customary owners. In November 1883 the Native Land Court found a further 122 persons had interests in the lakes and the Crown lacked sufficient interests to control the lake mouth.⁷⁹ Now however the Government had a list of owners it could pursue in order to purchase interests. The Crown attempted to negotiate for the remaining interests but efforts were rejected by the owners who reminded the Government it had a duty to also protect their interests. Owners also complained of the Crown assertion of control of land uplifted by the earthquake and the failure of Government to assist with efforts to stop the destructive methods used by Pakeha in shooting wild fowl on the lakes. Maori did not appear to object to Pakeha taking a reasonable number of birds for sport, but opposed methods which were clearly threatening the viability of bird populations and undermining Maori management methods. Maori owners continued to assert authority over

75. *Ibid*, p 40

76. *Ibid*, p 41

77. *Ibid*, p 42

78. *Ibid*, p 43

79. *Ibid*, p 44

the lakes by erecting signs prohibiting trespassing, fishing or bird shooting on the lakes.⁸⁰ The owners were apparently unconvinced of Crown promises to protect the fishery and Crown purchasing efforts were largely unsuccessful. In fact the Crown acknowledged that Maori had taken active measures among themselves to dissuade any owners from selling.⁸¹

Meanwhile aggrieved settlers continued to pressure the Crown to support their interests. Some local authorities made apparently unsuccessful early efforts to have the required land taken for public works purposes. Other settlers threatened to undertake work to open the lakes themselves. In response to settler pressure, Maori owners offered a number of compromises. In 1886 they offered to cut the traditional four month eel season in half, giving up the two best months of April and May to allow the lake mouth to be opened in time for autumn rains.⁸² The Government acknowledged they had made a generous offer, but remained adamant the lakes would be purchased. In 1887 Maori tried again, offering that if the Government would return the interests purchased in 1876, they would have the high water level of the lakes marked with poles and if water levels went higher they would immediately open the mouth and release the floodwaters. Although as White notes, this seems to have provided a solution to the settlers' problems, the offer was spurned and no official action was taken.⁸³ By this time, the Government appeared to be determined to settle for nothing less than the complete cession of Maori interests in the lakes.

Maori still apparently sought to negotiate a compromise solution with Crown officials and in 1888 established a further committee to continue negotiations. The Government however appears to have decided to abdicate responsibility for finding a solution in favour of allowing settler dominated agencies, with powers delegated from the Crown, take the matter into their own hands and act entirely in their own interests without regard to Maori rights. The small, settler-controlled South Wairarapa River Board decided to use the local authority powers it had to declare the lakes a 'public drain' and informed the Government of its intention. Revealingly, when Native Affairs, the one department charged with responsibility for Maori interests, was informed of the Board decision in 1888, the Under-Secretary supported the move, commenting that letting the local body take responsibility was perhaps the only 'reasonable way' of settling the matter. The River Board also rejected the Maori proposal of closing the season early as entirely unsatisfactory, not least because Maori

80. *Ibid.*, pp 45-6

81. *Ibid.*, p 45

82. *Ibid.*, p 48

83. *Ibid.*, p 49

would then still have rights to close the lakes in the other two months. The Board was not prepared to tolerate any allowance of Maori authority over the lakes at all.

The South Wairarapa River Board had been established in 1886 under the authority of the River Boards Act 1884, with the objective of controlling the flooding of the Wairarapa lakes. It was unclear however if the Board powers at this time stretched to the opening of lakes. In 1888 the Solicitor General doubted whether altering a large natural reservoir such as the lakes really came within the meaning of 'drainage works' under legislation of the time.⁸⁴ Nevertheless in June 1888 the River Board decided to enforce the opening of the lake anyway. Workers, with a police escort, set to work opening the mouth. Local Maori owners arrived, and after tense discussions they notified the Board they intended to take Court action but they did not physically resist the work. The Court action was apparently abandoned in favour of a commission of inquiry. In the meantime the opening of the lake severely reduced the eel fishery. The Board finally got legal authority to carry out the work in a Public Works Act amendment in 1889 that gave authority to Boards to make lake outlets. In spite of its apparently general nature, the amendment appears to have been Government support for the Board intended to specifically meet the Wairarapa Lakes issue. It was also apparently never translated into Maori.⁸⁵

An 1891 Commission of Inquiry report found that Maori held customary ownership of both the lakes and the spit between them and the sea. Nevertheless the commissioner also found, somewhat oddly, that the Maori owners were not justified in allowing the lands they sold to the Government to flood, causing injury to the Pakeha settlers who had then acquired the lands. The Commission suggested a number of compromises that did not involve the entire rejection of Maori rights. These included suggestions of periodic openings that still allowed fishing and in return for payments of concessions for fishing lost in the opened times. An alternative suggestion was a concrete weir that would enable the lake to be opened without releasing so many eels. Further it was recommended that Maori be compensated for all land acquired for which nothing had been paid. The Government apparently received the report in 1891 but declined to table it on the grounds that Court action was pending. In the meantime the River Board continued to force open the lake in defiance of Maori attempts to stop it, refusing to wait for the Commission

84. *Ibid*, pp 50-51

85. *Ibid*, pp 51-2

report or Court or Government action. The Board also refused to consult with Maori about opening times that might have delayed the impact on fisheries. The Government appears to have supported the Board's actions and made no attempt to restrain it, even though the Board relied on powers delegated from Government. Maori legal action went to the Court of Appeal but although the Board's irregular actions were noted, the case was dismissed. Maori were left with petitioning Parliament claiming they had suffered losses as a result of the Board action, while they had no say in the formation of the Board and no representation on it. Although they had customary interests in the lakes and it was the lake fishery they were concerned with, the Board was constituted by 22 ratepayers owning land in the vicinity.

In response to petitions, the Native Affairs Committee found that the Maori owners of the lakes had suffered wrongs, the only question being whether the River Board or Government should compensate them. The Committee believed the Government should take ultimate responsibility because it had sold the flood prone land to settlers in the first place and it had passed the legal provisions by which the local body was enabled to act. The Committee recommended the Government should purchase the rights of the owners or compensate them.⁸⁶ Finally after further petitioning, an agreement was signed at Papawai in 1896 by which the lakes were surrendered to the Crown in return for cash and 'ample' reserves from Government lands. It must have seemed something of a hollow settlement for the owners who had been refusing to sell to protect their now destroyed fishery. It was many years before the Government gave effect to the agreement. Apparently the Government originally intended to grant the owners some reserves abutting the lake, but then decided it was 'inexpedient' to do so. In 1907 legislation was eventually passed authorising the Government to spend a sum of money to purchase land in exchange for the lakes.

The Crown response to conflicting interests over the Wairarapa Lakes in the period 1840 to 1912 was therefore to increasingly encourage and facilitate settler interests in gaining control of and modifying the lakes, to the detriment of Maori interests in an important traditional fishery. The Crown allowed settler acquisition of flood-prone land for farming even though it knew farming and drainage would inevitably conflict with the use of the waterways by Maori. Comprises had still clearly been possible, but by the late nineteenth century the Crown had moved to a position of

86. *Ibid*, pp 55-56

insisting that Maori could retain no interests at all in the lakes. In establishing various forms of local authority the Crown had also enabled such agencies to effectively exclude Maori and in the process ensure they acted entirely in settler interests, including rejecting any kind of shared authority in managing inland waterways with Maori. In the case of the South Wairarapa River Board, even when the Crown had advice that the Board was probably acting beyond its legal powers it abdicated responsibility for the issue to the Board and appears to have encouraged rather than restrained its actions. It also moved to provide additional legislative authority for the Board actions in opening the lakes. The final settlement of the lakes issue occurred outside the time frame of this chapter but appears to have given owners few reasons to be assured of Crown protection of their interests. The Government failed to purchase other land in the Wairarapa for the owners as it proved too expensive. Instead in 1922 the Government finally granted the owners some land in the Pouakani block, situated miles away, just north of Lake Taupo. The Crown purchase of this block was itself subject to claims of Treaty breaches by Maori and has been reported on by the Waitangi Tribunal. In 1922 the land granted to Wairarapa Maori was mostly undeveloped scrub land, only marginal for farming and with little opportunity for the development of an alternative fishery. Ironically years later some river edge land in the grant was taken under public works provisions by the Government, and flooded.⁸⁷

The Crown clearly had difficulties with upholding traditional Maori rights and usages of waterways and fisheries that conflicted with the demands of pastoralism and farming. These industries were the mainstays of the developing colonial economy and crucial to continued Pakeha settlement and expansion. They were also the industries in which large numbers of Pakeha settlers wished to participate. The Crown may have had more chance of protecting and facilitating opportunities for Maori in some of the more peripheral industries that at the same time required forms of land and waterway use that could more easily accommodate traditional Maori systems of management and harvest of indigenous flora and fauna. The tourism industry was a much smaller sector of the economy than pastoralism or farming in the late nineteenth century, although there was considerable optimism for its potential. It could never be more than a niche industry however while the demands of farming predominated systems of land use. It was based largely on the exploitation of scenic and natural wonders, along with smaller commercial fish-

87. *Ibid*, p 57

ing and hunting industries, and therefore generally required land that was inaccessible, unsuitable or unavailable for development for farming purposes.

In the case of the Rotorua Lakes, both Maori and Pakeha recognised that it was the waterways that were more important than the potential of the surrounding lands which were poorly suited to cultivation or agriculture. The conflicts over use that developed were not between land development and waterway use, as was the case with the Wairarapa Lakes. Instead, with the Rotorua lakes, conflicts were generally over how the lakes were to be controlled and used. Te Arawa were concerned to maintain authority over the lakes to both manage traditional fisheries that had been an economic mainstay for centuries and at the same time develop new ventures involving tourism. Pakeha interests were concerned with developing a new exotic sports fishery in the lake at the expense of indigenous flora and fauna, and of participating in the tourism industry. The Crown itself also appears to have been determined to extend Pakeha settlement and dominance into the district and take full control of the developing tourism industry in the 'national interest' while increasingly refusing to admit Maori customary rights in the larger lakes.

The Rotorua lakes case has been outlined in some detail by Ben White.⁸⁸ In brief, the Rotorua lakes district contained numerous lakes of which the two most important were Lakes Rotorua and Rotoiti. The lakes and their margins were an important source of freshwater fish, waterfowl and plants. The inland water resource was important to Te Arawa not just for meeting direct needs such as food but as a source of gifts and trade for a variety of cultural purposes.⁸⁹ The Rotorua Lakes supported a wide variety of freshwater fisheries including whitebait, fin-fish, and freshwater mussels and crayfish. The resource and rights of fishery were carefully divided between various hapu who exercised exclusive rights to certain parts of the fishery and controlled access to various parts of the lakes.⁹⁰ Other important resources sustained by the waterways such as wild fowl, and plant species such as raupo were also subject to traditional management and use rights. Management of the fisheries, bird hunting and plant harvesting was also undertaken through methods such as rahui to conserve certain species for particular periods.⁹¹

Throughout the mid-nineteenth century the Crown appears to have acknowledged Te Arawa rights in the Rotorua Lakes. By the late nineteenth century however, the Crown appeared to be determined to limit as

88. *Ibid*

89. *Ibid*, p 91

90. *Ibid*, p 96

91. *Ibid*, p 93

much as possible any acknowledgement of customary rights in the lakes, especially as the Crown appeared determined to control the developing tourism industry in the district. Tourism in the region began developing as early as the 1870s and Maori began taking an active role in opportunities provided, gaining an income from charging for services such as guiding tourists, providing access to certain attractions and providing accommodation.⁹² Te Arawa generally refused to sell their lands although they did lease some to Pakeha hoteliers and storekeepers to assist with the development of tourism. The settler Government had little practical influence or authority in the area that was controlled by the powerful council of Te Arawa chiefs, Komiti Nui o Rotorua. Even by 1880, the Pakeha community in the district was very small and largely subject to overall Maori authority.⁹³

The Crown appears to have regarded continued Maori authority over the region as an unwanted obstruction to the more intensive development of tourism in the area and in wider political terms a block to the overall assertion of Pakeha dominance throughout the North Island. In 1880 the Government sent the Chief Judge of the Native Land Court on a mission to negotiate an agreement with Te Arawa hapu to allow the establishment of the township of Rotorua. The Thermal Springs District Act 1881 gave legislative effect to the eventual agreement, the long title describing it as an Act to provide for the settlement of the Thermal-Springs district of the Colony. Under section 5(3) of the Act, the Governor could negotiate with the Maori owners for the public to be able to use and enjoy all the mineral or other springs, lakes, rivers and waters in the district. Section 6 enabled the Governor to manage and control these, and to fix and authorise fees for their use, with the consent of the Maori owners. This seems to have been an explicit acknowledgement by the Crown of Maori authority over the inland waterways involved, and indicates that without such an acknowledgement the Government would have been unable to expand its influence into the region. By 1900, most of the land in the vicinity of the Rotorua lakes had passed through the Native Land Court.⁹⁴ Although most township land was supposed to have been leased under the Act, the Crown failed to ensure rentals were paid and various hapu found themselves unable to legally recover rent arrears through Court action. As a result many were forced to sell their lands to the Crown, including land near the lakes, through the imposition of Crown pre-emption in the district.⁹⁵

92. *Ibid*, p 9893. *Ibid*, p 9994. *Ibid*, p 10095. *Ibid*, p 101

In terms of riparian rights to land adjoining waterways, White has gathered evidence that indicates riparian rights did go to owners of smaller waterways while the Native Land Court generally refused to include rights to the beds of large lakes in riparian land awards. A number of lakes were therefore expressly excluded from Land Court orders, survey plans and partitions applying to land blocks adjoining them.⁹⁶ This seems to have followed general Court policies that the beds of larger lakes should be treated separately from normal assumptions of riparian ownership. The difference between large and small lakes was not always clear in practice however and the Court also seems to have applied the rule inconsistently at times, awarding the Crown not only smaller lakes within land purchased but in some cases parts of the beds of quite large lakes as a result of riparian ownership of adjoining land. For example, the Crown acquired Lakes Rerewhakaitu, Tutaeinanga and Okareka by purchasing land blocks that entirely surrounded them. The Crown also appears to have acquired part of Lake Tarawera apparently by virtue of purchasing blocks of land adjoining parts of the lake.⁹⁷ In other cases where lakes were entirely surrounded by Maori land, or a mix of Maori and Crown land, the Native Land Court expressly excluded the lakes from title awarded to lands adjoining the lakes.

The separation of the issue of ownership of the beds of the larger lakes from riparian lands led to further actions to have ownership recognised. These were dealt a blow with the Native Land Act 1909 including provisions aimed at making Maori assertions of customary title unenforceable against the Crown. These included provisions that any land the Crown held possession of for ten years or more could be declared freed of customary title and any proclamation declaring Crown land free of such title was to be considered conclusive proof of the fact. The Crown could also prohibit the Native Land Court from ascertaining the title to any area of customary land. At the time, the provisions were regarded as having special relevance to the Government's attempts to gain control of the larger Rotorua lakes for tourism purposes and Te Arawa opposed the proposed bill.⁹⁸ Te Arawa also appealed to Britain for assistance in their claims to the lakes although direct intervention was refused.

Around 1910 Te Arawa applied for a hearing to investigate title of the Rotorua lakes. This was met with passive resistance in the form of obstructions on technicalities by the Crown and in response the matter was taken to the Supreme Court and then removed to the Court of Appeal.

96. *Ibid*, p 101

97. *Ibid*, p 102

98. *Ibid*, pp 106–107

The case *Tamihana Korokai v Solicitor General* came before the Court in 1912.⁹⁹ The Court found in favour of the plaintiff, upholding the possibility of Maori customary rights in the beds of lakes and the authority of the Native Land Court to investigate such title. This provided a setback to Crown policies and further Native Land Court proceedings on the issue were again delayed apparently again at least partly by Crown obstruction until outside the time period of this chapter.¹⁰⁰ A hearing was begun in 1918 but never completed and again delayed by various Crown actions. Subsequently the Crown managed to convince Te Arawa to negotiate a settlement in 1922.¹⁰¹

While the issues of ownership of the lake beds remained largely unsettled during the period to 1912, the Crown still increasingly assumed rights to control and manage the lakes and the developing industries associated with them in the period, even in contravention of the legislative agreement. At the same time the Crown increasingly denied Maori authority or interests in the lakes. White has shown that by 1908 the Government was running its own tourist launch on Lake Rotorua, while requiring any competitors including Te Arawa who attempted to establish a similar service, to pay fees to do so.¹⁰² This was done without the consent of Te Arawa owners of the lakes, even though the 1881 legislation required it. Another abrogation of Te Arawa rights in the Rotorua Lakes was the introduction of trout by acclimatisation societies and the subsequent management of the trout fishery. Again Te Arawa were not consulted over this and their permission was not sought although legislatively it was required.¹⁰³ The trout were introduced during the 1880s as part of the Government's efforts to promote tourism in the area. The trout had a major impact on the freshwater ecology of the lakes causing dramatic reductions in the indigenous fisheries. The Government also established a system of licensing and control of the trout fishery, leaving Maori liable to prosecution if they caught trout even if as an accidental by-catch while they were engaged in traditional fishery harvests.¹⁰⁴ This was bitterly opposed by Te Arawa who protested against the Government actions. As a result of protests the Stout Ngata Commission recommended in 1908 that free licences be issued to Te Arawa families but on-selling of any fish taken should be prohibited.¹⁰⁵ The Fisheries Amendment Act 1908 included provision for fishing licences for Te Arawa. Up to 20 licences were provided for, with a maximum of five shillings to be charged for each licence. The provisions were very limited

99. *Tamihana Korokai v Solicitor General* (1913) 32 NZLR 321

100. White, p 109

101. *Ibid*, pp 117-121

102. *Ibid*, p 103

103. *Ibid*, p 104

104. *Ibid*, p 104

105. AJHR, 1908, G-1ε, pp 5-7, cited in White, p 105

however and fell far short of enabling Te Arawa to continue participating in the management of tourism ventures associated with the lakes or of a commercial role in the new fishery that had effectively replaced their own.



Group of anglers after a fishing trip on Lake Rotorua, c 1903. Photographer unknown. Tesla Studios collection, photograph courtesy of the the Alexander Turnbull Library (PA1-o-502-03).

In the case of the Rotorua lakes there seems to have been every opportunity for the Crown to develop some kind of joint venture partnership with Te Arawa in the growing tourist industry that might have allowed Te Arawa to continue managing some lakes for traditional purposes and others to meet the needs of the new tourism industry. Instead the Crown, after at first appearing to acknowledge Maori rights in the lakes then increasingly rejected any Maori authority over them, controlling much of the tourist industry itself and delegating powers over managing the new sports fishery to Pakeha groups such as the local acclimatisation society or local government agencies. The Crown also engaged in a variety of strategies including attempting to gain ownership of the lake beds through buying riparian land, rebutting private riparian ownership of the beds of large lakes, and contesting the jurisdiction of the Native Land

Court to investigate title of the beds of the larger lakes. At the same time in the period 1840 to 1912 the Crown also simply asserted rights to manage the lakes increasingly rejecting the idea of Maori authority over them.

13.6 Conclusion

The inland waterways of New Zealand comprise a range of habitats that historically have sustained a wide range of indigenous flora and fauna that were, and in some cases still are, of huge importance to Maori, both materially and culturally. It is clear though that to Pakeha settlers and the Crown, waterways were often seen as an impediment to the establishment of a pastoral economy in New Zealand. To realise this objective waterways had to be modified to prevent flooding, bring wetlands into agricultural production, and to supply water for both domestic and agricultural needs. The history of Crown actions in relation to waterways is the history of such interventions; a history that saw the habitat of biota valued by Maori radically altered, and in some cases, completely destroyed. But as well as pragmatic factors, Crown actions and policies in relation to waterways were also driven to a certain extent by ideological imperatives. An important principle in this regard was that there should be more democratic access to waterways and their fisheries than there was in England where privately owned, and hence exclusive waters and fisheries were not uncommon.¹⁰⁶ There was also an ideological aspect of bringing the country into agricultural production tied up with subduing the wilderness and recreating a pastoral landscape more akin to Europe – creating a ‘Britain of the south’.

So in terms of the indigenous flora and fauna of waterways, it was at the level of habitat that Crown actions and policies had the most impact. Much of this chapter has therefore focused on the contest between the Crown and Maori for the control of this habitat – there being an acute nexus at common law between the ownership of the beds of waterways and the ability to manage, preserve and use the flora and fauna they support. In order to realise the objectives of securing democratic access to waterways and the bringing the landscape into agricultural production, the Crown generally sought to establish itself as the owner of waterways in New Zealand. This was achieved through three main strategies that

106. See White, p 252

were applied selectively to individual waterways as circumstances dictated. The most common approach was for the Crown to acquire riparian rights from Maori by purchasing large areas of land abutting or surrounding inland waterways. This was based on the Crown's assumption that the principles of English common law applied completely to inland waterways in New Zealand. Around this time the Crown also began advancing claims to the ownership of waterways based on prerogative rights. This was based on the principle that the Crown could rebut general common law presumptions that vested ownership of the beds of waterways in riparian landowners when there was a supposed greater 'national interest' at stake. The third strand of policy was for the Crown to simply assume management rights over waterways, again in the national interest, for the purposes of development and settlement. Ironically these were often in direct contravention of the principles of common law – principles that it appealed to liberally in different circumstances when it thought they supported its claims to ownership. The Crown also increasingly began to delegate these assumed rights and responsibilities to local authorities such as drainage and river boards. Significantly these agencies were generally dominated by settler interests, and it appears that the Crown made no provision for Maori participation in their decision-making processes. Consequently by 1912 Maori retained control of very few waterways, and often enjoyed only the rights of the general public to aquatic resources.

In some cases though the Crown did accommodate Maori fishing rights in the new ownership regimes it established in respect of waterways. In its fervour to extinguish Maori claims to the ownership of the beds of waterways, the Crown historically asserted that the extent of Maori rights in waterways was confined to those of fishing.¹⁰⁷ Consequently it made various concessions to preserve Maori fishing rights – both nationally through legislation, and at a local level via fishing reserves and easements.¹⁰⁸ However, both of these provisions proved grossly inadequate to meaningfully preserve Maori fishing rights. The legislative provisions were never fully given effect to, and as is described above in this chapter, arrangements for fishing reserves made no provision to protect the actual fisheries which were often destroyed by the drainage of swamps and lakes. What is evident though is that the common law had the ability to protect Maori fishing rights, and it must be asked why this did not happen more often. The answer may lie in the fact

107. See White, pp 255–262

108. Legislation affecting fisheries is discussed in chapter 10 of this report on acclimatisation and wildlife management.

that fundamentally, the preservation of Maori rights in waterways, was to a large degree, inimical to the realisation of a successful pastoral economy in New Zealand – a goal that was unquestioningly seen by the Crown and the majority of Pakeha settlers as being in the ‘national interest’.

