

CHAPTER 8

CONTROL OF USE AND MANAGEMENT

8.1 INTRODUCTION

Atihaunui decided against a Privy Council appeal over the 1962 decision. Costs and their opinion that the Privy Council would return the matter to the New Zealand Government were considerations.¹ Besides, other matters were pressing their attention by then. The most significant was a proposal mooted since at least 1955 to divert the river headwaters for hydroelectrical generation so that they passed to the north. These proposals, which led to the Tongariro power scheme, no doubt gave impetus to the Crown's opposition to the Maori river claim. In the exigencies of the time, when the country faced power shortages and 'blackouts' were a part of the New Zealand way of life, no weight at all was given to the Atihaunui claim.

Hydroelectricity,
environmental and
Maori concerns

This chapter considers the Crown's total control of the river when establishing the Tongariro power scheme and its subsequent attempts to resolve industrial, recreational, environmental, and Maori conflicts by legislating a management plan. The use of the waters for electricity generation had highlighted the fact that the river was not only a developmental resource but a vital artery of a significant water catchment ecosystem.

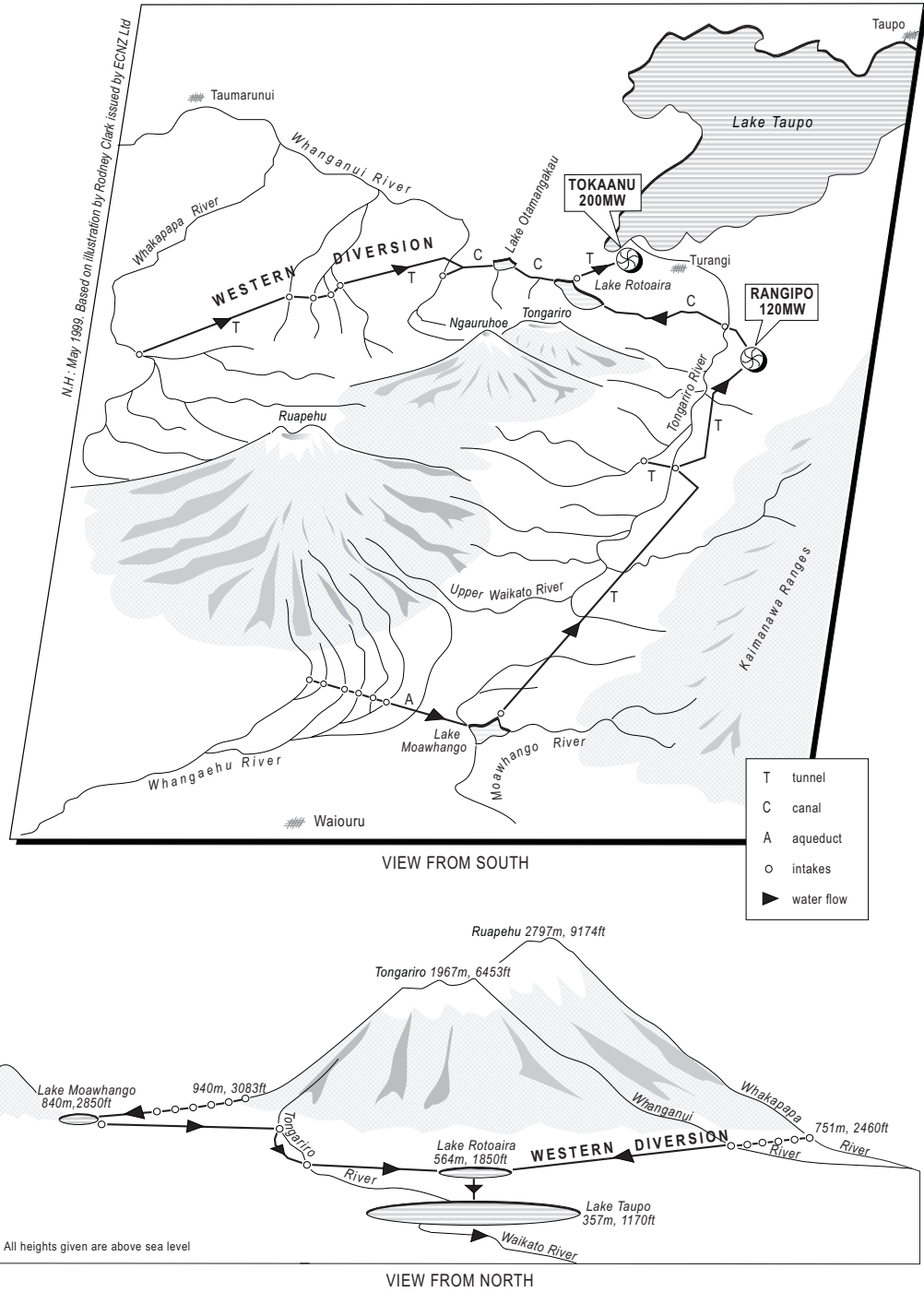
As well as the negotiations between the Crown and Atihaunui, as Atihaunui continued their claim to the river's ownership, this chapter addresses the litigation to constrain the impact of the electrical works by fixing minimum levels of river water flows; the establishment of Whanganui National Park; and the introduction to the river of a user pass system.

8.2 THE TONGARIRO POWER DEVELOPMENT PROJECT

The Tongariro power development project took water from all three major catchment areas draining the mountains of Tongariro National Park, diverting the flow to Lake Rotoaira, which would serve as a storage lake, and passing it by tunnel to drive the turbines of the Tokaanu Power Station. From there, the water passed through Lake Taupo to the Waikato River. Thus, waters naturally flowing to the Whanganui River were diverted to the north.

The project

1. Document B8, p 3



Map 4: The Tongariro power development project

Our interest is in the western diversion taking water from the Whanganui River and the Whakapapa and Mangatepopo Rivers, which led into it, thus affecting the flows and water levels of the Whanganui River entire.

Tuwharetoa and Lake Rotoaira

At the time, the main concern relating to the impact of the scheme on Maori (and those who fished for trout) was with the lakes. The Tuwharetoa interest in

Lake Taupo had been settled in the negotiations from 1924, but a Tuwharetoa right to Lake Rotoaira was also recognised. Lake Rotoaira was a private trout fishery, where Maori charged for fishing licences and could fish without licences themselves, but the project would result in fluctuating lake levels, affecting the places where trout fed. In 1956, the Maori Land Court investigated the title to the lake, vested it in 2778 owners, and appointed trustees to manage it, to continue licensing for profit, and, later, to negotiate for compensation arising from the effect of the scheme.

Even though the Whanganui River was vitally affected as well – some 97 percent of the massive flow of the Whanganui headwaters was to be diverted for electricity generation – the Atihaunui position was seen differently. Despite the fact that Atihaunui had made known their concern with the use of water for hydroelectricity from when the prospect of that was first mooted, and the litigation was still running when the project was conceived and planned, their interest was not recognised. (As has been seen, their claim was actively opposed, and eventually the Court of Appeal determined that customary Maori interest had been extinguished.)

Atihaunui interests
compared

The Crown's policy was initially laid down in the Water-power Act 1903. 'Subject to any rights lawfully held', that Act vested in the Crown the sole right to use water in lakes, falls, rivers, and streams to generate and store electricity, with the power to delegate rights to local authorities. During the second reading, Hone Heke objected that the Bill was 'going too far' and was an 'an attempt to take away Native rights'.² The Minister of Works replied that the answer to his concern was in the Bill itself: 'If there are vested interests held by the Natives or others, they would be preserved, and if required . . . would have to be paid for.'³

Hydroelectricity
and notice of Maori
concerns from 1903

Despite such protest, the Crown's exclusive right to use water to generate electricity, without specific provisions to compensate Maori, was made concrete in the Water-power Act. That Act was replaced by the Public Works Act 1905, which, with its amendment of 1906, enabled the Minister of Public Works to construct the necessary works; to raise or lower the level of any lake, river, or stream; and to impound or divert waters. Eventually, it was under the more extensive provisions of the Electricity Act 1945, administered by the State Hydro-electric Department, that Governments committed themselves to large-scale hydro schemes, as increasing power shortages became manifest during the Second World War. In 1958, responsibility passed to the Minister of Electricity.

Electricity Act 1945

In 1955, the Government commissioned a technical appraisal for the Tongariro scheme. Planning consents were not then required for such a project, and in 1958, without giving notice to Whanganui Maori or obtaining their consent, and with no limit on its duration, the Crown issued an Order in Council authorising it to take water from the Whanganui, Tokaanu, Tongariro, Rangitikei, and Whangaehu Rivers and tributaries and to raise or lower water levels.

Commencement of
investigations

2. Hone Heke, 24 September 1903, NZPD, 1903, vol 125, p 798

3. W Hall-Jones, 24 September 1903, NZPD, 1903, vol 125, p 799

Entry on land Automated water-level recorders, cableways, and footbridges were ready for installation, but some of the gauging stations had to stand on Maori land. To obviate anticipated delays in obtaining owner approvals, a further Order in Council was issued in 1958 enabling work to be undertaken without giving prior notice or obtaining consents.⁴

1962 report on benefits and costs Following a consultant's report in 1962, the scheme was to proceed in five stages, beginning with the western diversion. This would produce 629 million units a year through Tokaanu and, owing to the increased water supply, an additional 450 units through the power stations already operating on the Waikato River below Taupo.⁵

At that stage, little thought was given to the effect of the scheme on the river as a whole. The report considered that the 'diversion of 800 cusecs [22.6 cumecs], the product of 4 percent of the Wanganui River catchment, will have no significant effect on the harbour bar at Wanganui'. Major floods of the river would be unaffected by the small abstraction proposed.⁶

Approval in principle The Government approved the scheme in principle in 1964 and authorised the start of the first three stages at a cost of £46.8 million.⁷

Impact assessment At that point, there had been no public consultation. Although there were pros and cons, the advantages were seen considerably to outweigh the disadvantages – of which six were foreseen. One was the effect of reduced flows on the Whanganui, Rangitikei, and Whangaehu Rivers, and another was the effect on trout fisheries, particularly in the Tongariro River and Lake Rotoaira.⁸ The Ministry was directed to undertake discussions and further studies and to negotiate compensation with those whom it thought could be affected.

Consultation on fish As to fish, in 1955 the Ministry of Works had consulted Government departments, including the Department of Maori Affairs, and noted that the headwaters of the Whakapapa, Mangatepopo, and Whanganui Rivers 'could be improved by hydro development, and . . . there is no objection from fisheries officers to [the] proposed development on the western side of the mountains'.⁹

Following the 1962 report, the Ministry had further talks with the Marine and Internal Affairs Departments, whose experts were said to be 'thoroughly satisfied' with the proposals for fisheries affected by the scheme. Lake Rotoaira would be kept close to its natural level, although its fishery could be affected during construction. Fishing rights to the lake, the Ministry noted, were 'owned by certain Maoris who may seek compensation'.¹⁰

4. Order in Council, 29 October 1958, *New Zealand Gazette*, 1958, no 66, vol 3, p 1463

5. Document c8, p ii

6. Ibid, pp 20–21

7. Commissioner of Works to New Zealand Electricity Department, 15 July 1966, MOW92/12/67/1, pt 3 (doc A78(c), p 51); Secretary of Cabinet to Minister of Electricity, 7 April 1964, MOW92/12/67/1, pt 1 (doc A78(c), p 49)

8. Commissioner of Works to Minister of Works, 6 February 1964, MOW92/12/67/1 (doc A78(c), p 67)

9. Document A78, para 5.7.1

10. Commissioner of Works to Minister of Works, 6 February 1964, MOW92/12/67/1 (doc A78(c), p 68)

After the approval in principle, compensation was negotiated with the Tuwharetoa Maori Trust Board for fishing in the Tokaanu Stream.¹¹ Atihaunui were not consulted and received no compensation.¹²

Meanwhile, acclimatisation societies were protesting over the threat to the public fishing interest. The Minister of Electricity assured the Wellington, Auckland, and Waimarino societies in 1964 that the rivers 'will not be allowed to fall so low that the safety of fish is endangered even if this means that diversion has to be temporarily discontinued'.¹³ But there were different views on what the appropriate minimum flow should be. The Waimarino Acclimatisation Society asked for 80 cusecs (2.3 cumecs) flow in the Whakapapa River below the diversion structure. The New Zealand Electricity Department, on advice from the Ministry of Agriculture and Fisheries, considered a flow of 10 to 15 cusecs (0.28–0.42 cumecs) sufficient to maintain a continuous flow between pools. Anglers argued that flows of that order would produce unacceptable increases in water temperatures in summer, and fish would die.¹⁴

In 1965, the Electricity Department agreed with the Department of Internal Affairs to maintain minimum flows in the Whakapapa that would ensure a water temperature safe for fish. In 1973, the Minister of Electricity authorised a minimum flow of 20 cusecs (0.57 cumecs).¹⁵

Of all the issues, the Ministry considered that the abstraction of water from the Whanganui was the most controversial because of reduced flows at Taumarunui and the likely impact on the town's water supply intakes, sewage outfalls, the abattoir effluent outfall, and the operation of the Piriaka power scheme.

The Taumarunui Borough Council and the Minister of Electricity reached an agreement on compensation in September 1969.¹⁶ To protect the council's water supply and other works, liquidated damages were payable if the main daily flow at Piriaka dropped below 350 cusecs (9.9 cumecs) and much higher damages if it fell below 250 cusecs (7.1 cumecs).

In light of the council's other responsibilities, it was settled that, even if the diversion had to be temporarily discontinued, the flows in the Whanganui and Whakapapa Rivers would not be allowed to fall so low as to endanger the safety of fish. The river bed was to be kept clear of plant growth and all reasonable steps were to be taken to ensure that jet boats could continue to operate. That required a depth of at least six inches and a deepening of parts.¹⁷ However, it was agreed that there were no adverse effects on river scenery or on recreational or tourist interests, and the borough's request for £250,000 for aesthetic loss was denied.

1965 agreement on flows

Agreement with Taumarunui Borough

11. File note, January 1967, MOW92/12/67/14, pt 2, p 5 (doc A78(c), p 89)

12. Ibid, pp 3–5 (pp 87–89)

13. Draft of letter from Minister of Electricity to Auckland, Wellington, and Waimarino Acclimatisation Societies, 13 August 1964, MOW92/12/67/14, pt 3 (doc A78(c), p 71)

14. Sir Alexander Gibb and Partners, 'Tongariro River Power Development: Report on Investigations', report commissioned by Ministry of Works, April 1962, vol 1, sec 7 (doc A78(c), pp 20–21)

15. Document A78, paras 5.7.8–5.7.9

16. Ibid, para 5.8.5

17. Ibid, paras 5.8–5.9

Agreement with
harbour board and
Tuwharetoa

In other settlements, the Wanganui Harbour Board was to be compensated for any adverse effects that would have to be made good and the National Historic Places Trust was to enter into an agreement with the Tuwharetoa Maori Trust Board to carry out an archaeological programme to record and protect sites at Lake Rotoaira and on the lower Tongariro.¹⁸ The cost to the Government from all the undertakings was estimated at \$3 million in 1973.¹⁹

No consultation
with Atihaunui

But there was no consultation with Atihaunui. Their river interests were still unrecognised. In evidence before us Mr Taiaroa stated that ‘at no time during the development of the Tongariro Power Project were Whanganui Iwi or any of its representatives consulted, although the Crown were fully aware of Whanganui iwi claims’.²⁰ He said that the only meeting of which he was aware was that arranged in 1968 by the Taumarunui Borough Council to advise the public of the likely impact on the town. On that occasion, an explanation was given by the mayor and the Minister of Electricity. As well as Mr Taiaroa, Hikaia Amohia and other Maori residents were present.

In the course of the meeting, Amohia spoke of Maori ownership of the river, and asked why the Government was ‘taking water out of [it] without the approval of the Whanganui iwi’.²¹ The chairman ruled him out of order and asked him to sit. Amohia stayed on his feet and continued his explanation of the Maori claim, the legal processes it had been through, and the people’s concern over the diversion of the water. Mr Taiaroa claimed that there was no response from the Minister or the mayor, adding: ‘There was nothing particularly unusual about this reaction from the chairman of the meeting and the Minister, to an explanation of the iwi point of view. There was a total failure or unwillingness to understand.’²²

Works operative

Water diverted from the Whanganui River was first used for power generation in 1971 and from the Mangatepopo, Tawhitikuri, and Whakapapa Rivers in 1972.²³

8.3 NEGOTIATIONS ON THE PROJECT AND THE CLAIM

Attempt to revive
river claim

That year, Atihaunui revived their river claim. The issue had lain dormant after the 1962 decision, save to the extent that Atihaunui made such efforts as they could to be heard in opposition to the power project. At that time, however, there were no receptive minds within the Government, and with some desperation Titi Tihu and Hikaia Amohia applied to the Aotea Maori Land Court for a rehearing of the 1949 Supreme Court decision.²⁴ Needless to say, nothing came of that application, but by then a new Minister in the House, the Honourable Matiu Rata, was much more

18. File note, January 1967, MOW92/12/67/14, pt 2, p 5 (doc A78(c), p 89); document A78, paras 6.1–6.2

19. Document A78, para 7.2

20. Document B8, para 25

21. Ibid, para 26

22. Ibid, para 29

23. Document A78, para 4.9

24. The description of the negotiations in this section is taken from material in document B8(a), pp 1–89.

sympathetic to Maori matters. He was the first Maori to be appointed Minister of Maori Affairs since Sir Apirana Ngata.

A meeting with the Minister of Maori Affairs in 1974 opened the way to protracted correspondence and discussions with Ministers during the next 10 years. The central question as to the ownership of the Whanganui River remained the same, but there were other issues, including the ownership of riparian lands, compensation for gravel extraction, and actioning the recommendations of the 1950 royal commission.

With a change of government in 1975, matters had to start afresh. A meeting was held with the Honourable Duncan MacIntyre, the new Minister of Maori Affairs, that same year at Putiki Marae. Formal submissions were presented.

At Putiki, the usual claim was made, but there had been a significant change. Rata had introduced the Treaty of Waitangi Act 1975, giving limited recognition to the Treaty of Waitangi. At the time, the founding members of the Waitangi Tribunal had still to be appointed, but Atihaunui added to their formal, written submissions that which they had been unable to plead in the courts – that the failure to recognise their river interests was a ‘direct breach’ of that Treaty.²⁵

The Minister rested his reply on the decision of the Court of Appeal. There had never been a separate title to the bed of the river under Maori custom, he said. Each block bordering the river had the right to the bed to the centre of the river, he noted, and any claims to be brought on behalf of such owners in 1903, when the Coal-mines Act Amendment Act was passed, would ‘have to establish details of specific loss’.²⁶

The initial operations of the Waitangi Tribunal had not inspired much confidence. Atihaunui therefore responded to the Minister with a petition to Queen Elizabeth II. This was transmitted by the member of Parliament Koro Weterere to her official secretary during the 1977 royal visit to New Zealand. The appeal was to the Crown, on whose behalf the Treaty of Waitangi was signed. The claim was reiterated, but with the additional reliance on the Treaty. Further, an appeal was made on the basis of religious freedom. The river was sacred and the statutory vesting in the Crown ‘was a direct attack on religious ritual and custom, which has always been forbidden when Great Britain extended her Government to other peoples’.²⁷ The petitioners prayed that Her Majesty would assist ‘in removing the blemish which has been cast by the Coal Mines Act on the good name of all our ancestors’.²⁸

In due course, the petition was returned to the Governor-General, who advised Hikaia Amohia in September 1978 that the ‘proper procedure’ would be for him and his fellow petitioners to make a formal petition to the House of Representatives.²⁹ This, they did.

Meetings with the new Ministers

Putiki meeting and a new criterion – the Treaty of Waitangi

Petition to Queen

25. Petition of Titi Tihu and Hikaia Amohia to her Majesty the Queen, p 1 (doc B8(a), p 9)

26. Minister of Maori Affairs to Hikaia Amohia, 23 January 1976 (doc B8(a), p 7)

27. Petition of Titi Tihu and Hikaia Amohia to her Majesty the Queen, p 1 ((doc B8(a), p 9)

28. Ibid, p 2 (p 10)

29. Governor-General to Hikaia Amohia, 5 September 1976 (doc B8(a), p 22)

Petition to
Parliament

The petition, praying that the title to the Wanganui River be vested in nine named tribes, was presented in the names of Titi Tihu and Hikaia Amohia in 1979. In his submission to the select committee, the petitioners' lawyer, Mr E D Morgan, stressed that his clients were not seeking material gain:

It bears repeating again that what is sought by the petitioners is not material gain. They do not seek compensation for loss of gravel, or the loss of fishing, or any other material losses, they do not seek rights of navigation or rights of the use of the water for the creation of power or any other of the multiple uses of water.³⁰

The petition was heard by the Maori Affairs Committee of the House in 1980. A summary of the history by the Department of Maori Affairs, produced as background for the committee, ended on a different note from previous official advice. Instead of stressing the finality of the Court of Appeal decision, it included a legal opinion that Maori landholders may not have been aware of the *ad medium* presumption when they received Crown titles. Also, it added that it could not longer be regarded as settled that the Treaty of Waitangi conferred no rights recognisable in a court of law in view of the subsequent incorporation of the Treaty in statutes.

In referring the petition to the House, the committee added a rider: 'That wherever possible the Government take account of that part of the petition which lays emphasis on the restoration of Mana O Te Turangawaewae as distinct from material rights'.³¹

Issue of 'no material
gain'

The matter had still to pass to the Cabinet Committee on Legislation and Parliamentary Questions. At that point, the then Minister of Maori Affairs, the Honourable Ben Couch, put suggestions to the Atihaunui leaders. One was that the recently established Maori land advisory committees should employ researchers to search out the details of the land claims. Another was that he was prepared to consider legislation to provide 'for the underlying ownership of the river bed to be in the names of the appropriate tribal representatives', so long as it was clear that 'material control would not pass from the Crown'.³² Further, he considered increasing Maori representation on the Wanganui River Scenic Board from one to three.

Titi Tihu and Hikaia Amohia, for the tribal leadership, agreed. They did not want 'material control of the river', they appreciated that the Minister might have difficulty with his legislative suggestion, and they proposed the 'senior Elders' who would hold title to the river and the three representatives to the scenic board.³³

Nothing had happened when, in May 1983, Titi Tihu sought gravel compensation. The Minister expressed surprise, the petitioners having disavowed

30. Submission to select committee by counsel for Titi Tihu and Hikaia Amohia (doc B8(a), p 37)

31. Maori Affairs Committee, 'Report on Petition of Titi Tihu and Hikaia Amohia', report to House of Representatives, 9 December 1980 (doc B8(a), p 44)

32. Minister of Maori Affairs to counsel for Titi Tihu and Hikaia Amohia, 28 January 1982 (doc B8(a), p 56)

33. Counsel for Titi Tihu and Hikaia Amohia to Minister of Maori Affairs, 17 February 1982 (doc B8(a), p 58)

any material gain, but he would not rule out the possibility. A lawyer replied for Titi Tihu that his client was a 'tohunga of the old school', for whom material matters are irrelevant but he had overlooked the interests of others of the tribe. The lawyer later advised him that the beneficiaries of any compensation should be all the 'tribes who form the community of the Wanganui River' and that a Maori trust board should be set up to represent them.³⁴

Meanwhile, before the Cabinet Committee on Legislative and Parliamentary Questions, the Ministry of Energy and the Treasury sought that, whatever concessions might be made, the Crown retain ownership of the riverbed, minerals, and water. The river was 'the most economic untapped hydro-electric power source in the North Island', it was argued, and while the Electricity Department had no immediate plans, there should be no restrictions that might hinder any future hydro power scheme.³⁵ The Treasury warned of the implication of any move to compensate for gravel takings. There were other 'navigable rivers' that would also qualify. European as well as Maori landowners might have claims as well. And, if it were to be conceded that the Coal-mines Act Amendment Act 1903 was contrary to the Treaty of Waitangi, new claims might well be made for 'the New Zealand coastline and tidal rivers'. It observed a change in the Maori approach from 'spiritual sovereignty or mana over the river' to a 'more direct control'.³⁶

The Minister of Maori Affairs agreed that there could be no concessions to Crown ownership of the bed but wanted the Government to confirm that it had 'always recognised the spiritual significance and the mana attached to the Wanganui River' by the tribes along its banks. He also sought authority to 'promote further consultation with the petitioners on possible recognition of mana attaching to the river'.

The petition for title to the bed of the river was declined, but the Minister was given the authority that he sought for further consultation.³⁷

**Departmental
opposition**

Decision

8.4 NEGOTIATIONS AND THE WHANGANUI NATIONAL PARK

In the subsequent negotiations, a further matter was added to the agenda on account of more Government proposals – the plan to create a national park in the Whanganui hinterland, as put up by the National Parks and Reserves Authority.³⁸

Atihaunui began to formulate their position with a tribal hui in 1983. In essence, they resolved over time to seek 50 percent Maori representation on the envisaged

**Whanganui national
park proposed**

Atihaunui position

34. Counsel for Titi Tihu and Hikaia Amohia to Minister of Maori Affairs, 20 June 1983 (doc B8(a), pp 68–69)

35. 'Whanganui River Maori "Land" Claim: Petition of Titi Tihu and Hikaia Amohia', Treasury paper, p 4 (doc B8(a), p 82)

36. 'Whanganui River Maori "Land" Claim', pp 2–4 (doc B8(a), pp 81–82)

37. Cabinet Committee on Legislation and Parliamentary Questions paper, 17 November 1983, CM(83)M38 (doc B8(a), pp 84–85)

38. The description of the Crown and Atihaunui negotiations in this section is taken from material in the submission of Archie Taiaroa (doc B8, pp 72–152).

park board and special provisions to protect archaeological sites, and that the river should be kept out of the park.³⁹

**Motunui–Waitara
report**

From about this time, a new awareness of the Treaty and of Maori interests in natural resources was to enter official consciousness, following the Waitangi Tribunal's first substantive report, made that year. The *Report of the Waitangi Tribunal on the Motunui–Waitara Claim* considered the impact of public works and development on certain reefs off the Waitara and Taranaki coasts. The proceedings had been attended by Titi Tihu and Hikaia Amohia, the latter addressing the Tribunal and drawing attention to the Whanganui River question, where similar issues arose.

**Meeting with the
authority**

The Atihaunui proposals were discussed at a special meeting of the National Parks and Reserves Authority in 1984. Concern was expressed at the proposal to exclude the river from the park. It was explained that, although the Government had not accepted the petition by Maori on the ownership of the riverbed, the Departments of Lands and Maori Affairs were negotiating with the Maori people to find a formula by which the spiritual significance of the river to Maori could be recognised, and this could be by way of special legislation in the future. However, it was thought possible to tie the river's management with the management of the adjoining land under the National Parks Act 1980.⁴⁰

**Meeting with the
commissioner**

Later that year, an Atihaunui delegation met with a commissioner of Crown lands and other officials. Among the matters discussed was Maori representation on the board responsible for the proposed park. The commissioner explained that the board in fact governed all reserves and parks from Wellington to Lake Taupo, including the Whanganui River. He thought that they should moderate their proposal to three people, because other districts would also want representation. He suggested an additional body of six Whanganui Maori, with a statutory role of advising the board. The commissioner thought that this would result in a 'very "[M]aori" national park' with a large Maori influence in its management. He also hoped that 'As far as possible the manpower we will be employing will be from your people apart from the rangers'.⁴¹

**Whanganui River
reserves trust**

Little evident progress occurred for a considerable time thereafter. In the meantime, to provide a legal entity to handle any compensation moneys and a body for Atihaunui representation, Whanganui Maori set up the Whanganui River Reserves Trust with nine members, three for each of Hinengakau, Tamaupoko, and Tupoho. Hikaia Amohia was the chairman. Further consultation was to be through the trust.

**1985 proposals to
Minister**

By August 1985, when there had been no response from the Honourable Koro Wetere, the then Minister of Lands, to the proposals put to him the previous November, Amohia had to be restrained from leading a land march in protest. Then, in November 1985, the Minister announced approval in principle to the

39. Document B8(a), pp 72–74

40. Minutes of a special meeting of the National Parks and Reserves Authority, 3 May 1984 (doc B8(a), pp 99–104)

41. Document B8(a), pp 94, 98, 110–111

Whanganui national park. Support, he said, was widespread and included the Wanganui Regional Development Council. He announced that he would meet the 'Wanganui River tribes' at Taumarunui in December to ensure that they were briefed, adding:

I want to discuss the question of the most appropriate name for the park, traditional rights, such as fishing, and the claim to the river itself, establishing a Maori advisory body, Maori membership of the park board, the question of the taking of metal from the river, and, indeed, all matters which impinge on the Maori people and their centuries long involvement with it.⁴²

With all the matters of importance to them still unresolved, the trust hardened its position. On 3 February 1986, it put up a claim for not less than \$4 million for gravel compensation.⁴³ On 18 February, it met the Minister to present him with three resolutions:

1986 gravel claim
and proposals

1. That the Wanganui River *not* be included in any proposed national park in the Wanganui River region.
2. That the proposed Wanganui park be administered, maintained and managed by representatives of the Wanganui river tribes with the assistance of government.
3. That no name can be decided for the proposed Wanganui national park by the Maori tribes of the Whanganui river region until satisfactory assurances is given to those Maori tribes by government in regard to numbers 1 and 2 above. [Emphasis in original.]⁴⁴

The Minister replied on 3 April that, in his view, the first two resolutions were not 'practical'. If the river were not included in the park, there would be no grounds for the trust to be involved in its administration, in his view, and he believed that it was 'very much in the interests of the people of the Wanganui River to have the river managed as part of the park so that your people can be involved with decision-making and management issues'. He hoped to achieve that by involving the trust as an adviser to the Wellington National Parks and Reserve Board. He was also proposing a Maori appointment on the National Parks and Reserves Board. That would require a legislative amendment, and he had authority to promote it during the coming parliamentary session. That would enable him to establish a trust board and to deal with 'cultural and traditional matters'. For that to happen, the legislation would need to be agreed to by the middle of the year. He was not yet able to respond on the question of compensation for gravel extraction, but he confirmed that he supported 'a payment ... to cover the question of metal extraction'.⁴⁵

Minister's
alternative
proposals

In May 1986, the trust replied, reaffirming the two resolutions to which the Minister had taken exception. It remained their unanimous position that the river

Trust's response

42. Press release from Minister of Lands, 13 November 1985 (doc B8(a), p 106)

43. Counsel for the Wanganui River Reserve Trust to Minister of Lands, 3 February 1986 (doc B8(b), p 109)

44. Submission presented to Minister of Lands, 18 February 1986 (doc B8(a), p 116)

45. Minister of Maori Affairs and Lands to Archie Tairaoa, 3 April 1986 (doc B8(a), pp 119-120)

not be included in the proposed park until their ‘original claims’ to the river were resolved and that the proposed park be maintained and managed by representatives of the Whanganui River tribes assisted by the Government. The trust named three of its members to work with officials on legislative details and on the matter of compensation.⁴⁶

Minister’s response

Then, on 10 September, the Minister proposed and advised the trust that:

- the riverbed would not be included in the park but that the legislation would ‘tie in management activities affecting the river with the procedures for managing the park’.
- the legislation would ‘recognise the spiritual value and mana’ of the river to the Whanganui Maori people.
- the Government would not agree ‘to total management of the proposed park by the trust board or any other body representing exclusively the Whanganui tribes’. However, the trust and its representative on the National Parks and Reserves Board would ‘have a very real say in matters which affect Maori cultural values and spirituality’.
- he was obliged to formally gazette the park and could not wait much longer to give it a name.
- finality on gravel compensation would take time to resolve, but that there was enough evidence to support an interim payment to enable the trust to employ a researcher to investigate the matter more fully.
- the trust’s agreement to proceed on the basis above would be without prejudice to future claims to the bed of the river or other lands.⁴⁷

Trust settles name

In reply, the trust proposed, on 14 October, that the new park be called Whanganui National Park.

Competing legislative drafts and gazetting of park

After consultation with the trust, the draft legislation provided for a Whanganui River National Park Board and a Whanganui River Maori Trust Board, with three of the 12 members of the park board to be appointed by the Minister on the recommendation of the trust board. Clause 8 of the draft required the park board:

to seek and have regard to the advice of the Whanganui River Maori Trust Board on all matters bearing on Maori custom and usage, cultural values or spiritual significance. The Whanganui River Maori Trust Board may further offer advice to the Whanganui National Parks & Reserves Board on any matter with the river & its environs.⁴⁸

On 22 October 1986, the Minister confirmed that the establishment of the national park would not prejudice further negotiations to obtain ‘customary Maori title’ to the bed of the river.⁴⁹

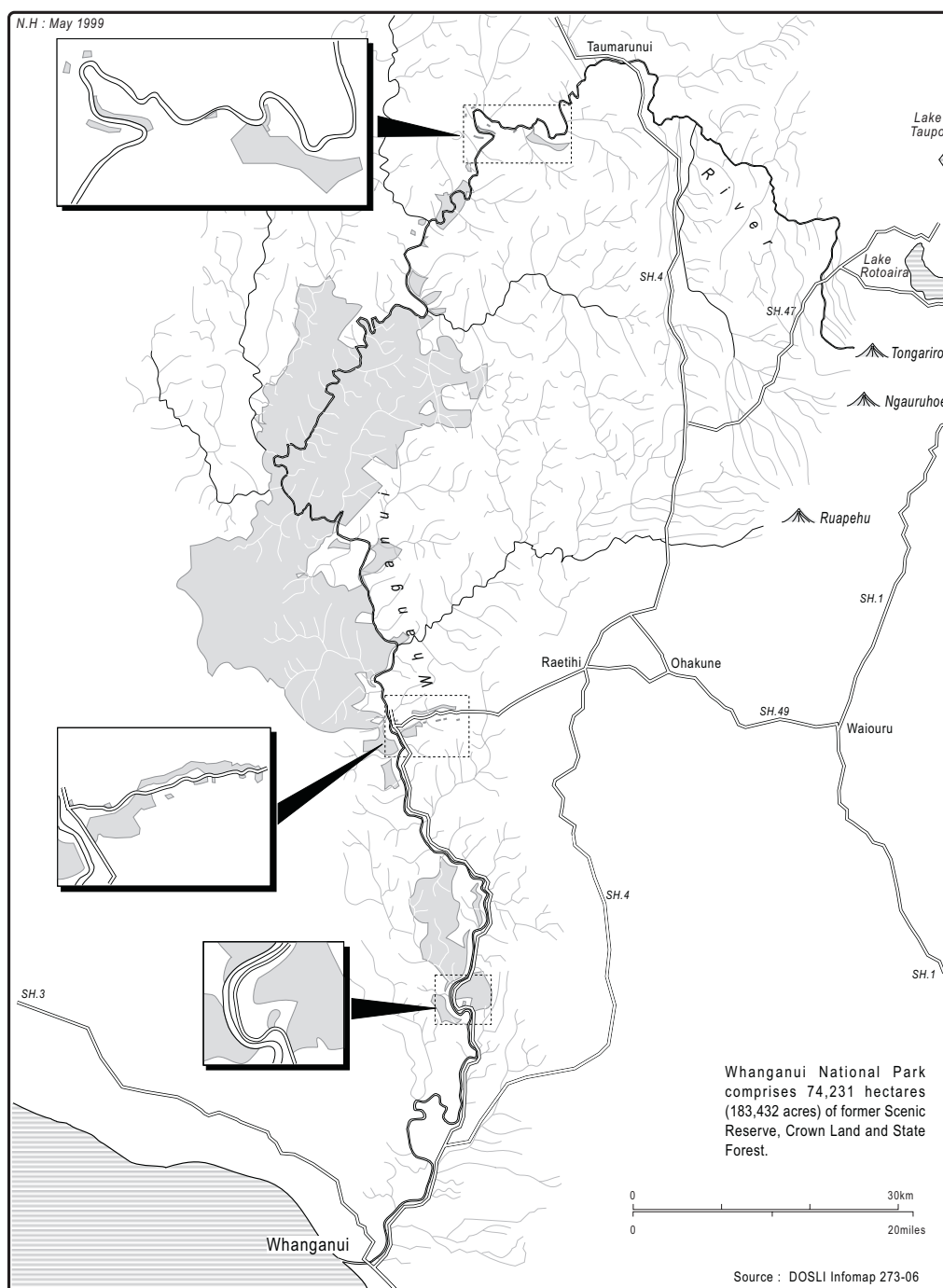
On 10 November 1986, the trust solicitors submitted an amended draft of the legislation, including a requirement for an inalienable title, deemed to be a

46. Department of Maori Affairs to Minister of Maori Affairs and Lands, 9 May 1986 (doc B8(a), pp 121–122)

47. Minister of Lands to Maurice Takarangi and Archie Taiaroa, 10 September 1986 (doc B8(a), pp 128–129)

48. ‘Draft of Legislation for the Whanganui River’, attached to Cooney Lees and Morgan to commissioner of Crown lands, 10 November 1986 (doc B8(a), p 141)

49. Minister of Lands and Maori Affairs to Maurice Takarangi, 22 October 1986 (doc B8(a), pp 134–135)



Map 5: Whanganui National Park

‘customary title’ to issue to the trust for specific parts of the Whanganui, Ongarue, and Retaruke Rivers and strengthening the provision for the park board to have regard to the trust’s advice.⁵⁰ The Minister rejected it. The Whanganui National Park was gazetted on 6 December 1986.

50. ‘Draft of Legislation for the Wanganui River’ (doc B8(a), pp 137–142)

Interim gravel
payment

In 1987, the Department of Lands and Survey made an interim payment of \$140,500 for the costs of establishment and for the first year of operation of the Whanganui River Maori Trust Board, noting this as ‘the only interim payment that will be made towards the final cost for settlement for metal extraction from the Whanganui River, [and] is made on a without prejudice basis’.⁵¹

Whanganui River
Maori Trust Board
established

The Whanganui River Maori Trust Board Act 1988 confirmed a board of nine members appointed on the recommendation of the Minister of Maori Affairs and operating as a Maori trust board under the Maori Trust Boards Act 1955. The beneficiaries were the descendants of Tama Upoko, Hinengakau, and Tupoho. In addition, under section 6 the board would:

from time to time negotiate with the Government, or any other body or authority concerned, for the settlement of all outstanding claims relating to the customary rights and usages of te iwi o Whanganui, or any particular hapu, whanau, or group, in respect of the Whanganui River, including the bed of the river, its minerals, its water, and its fish.

1990 – trust board
members on park
authority reduced

Then, in 1990, the Conservation Law Reform Act amended the Conservation Act 1987 and abolished the National Parks and Reserves Authority, as well as all national parks and reserves boards, and under section 6A substituted the New Zealand Conservation Authority, with the Minister of Conservation to establish not more than 19 conservation boards. It provided that the board, whose area of jurisdiction included the Whanganui National Park, was to consist of not more than 11 members, one appointed on the recommendation of the Whanganui River Maori Trust Board (s 6P(7)). This reduced the trust’s representation from three to one.

Section 30(2) of the National Parks Act 1980 was amended under section 113 of the Conservation Law Reform Act 1990 to provide that:

The Board having jurisdiction in respect of the Whanganui National Park shall, in carrying out its functions,—

- (a) Have regard to the spiritual, historical, and cultural significance of the Whanganui River to the Whanganui iwi; and
- (b) Seek and have regard to the advice of the Whanganui River Maori Trust Board on any matter that involves the spiritual, historical, and cultural significance of the park to the Whanganui iwi.

No sooner had the board been established than it and its establishment funds were to be absorbed in litigation to restore the river’s flow, but we first digress to note the complex legislative regime for the river’s governance at the time.

51. Director-General of Lands and Survey to Touche Ross and Company, 30 March 1987 (doc B8(a), pp 152–153)

8.5 THE STATUTORY REGIME

During the negotiations, the trust had to cope with many officials. From 1967, the Water and Soil Conservation Act brought several Government departments and the many local bodies, drainage boards, and catchment boards under one statutory umbrella. The National Water and Soil Conservation Authority, comprising seven members and chaired by the Minister of Works, had a very broad responsibility for the quality, conservation, allocation, and use of natural water, including sea water, for soil conservation, and for the control of multiple uses of water and the drainage of land.

Under its aegis, the Water Allocation Council, comprising officials from the Departments of Agriculture, Internal Affairs, Electricity, Works, and Health and representatives of municipal and county councils, drainage and catchment boards, Federated Farmers, and the Manufacturers' Federation, dealt with the numerous day-to-day issues that arose over the use of water. The previously existing Soil Conservation and Rivers Control Council was brought under the administration of the Act. There was no provision for the formal representation of Maori interests on any of these statutory bodies. The management, conservation, and use of water was, by the Act, assumed to be a matter to be arrogated exclusively to the Crown. The Water and Soil Conservation Organisation was the administrative arm of the authority.

The bed of the river continued to be vested in the Crown under the Coal Mines Act 1979, and the Crown's land interest was administered by the Department of Works under the Public Works Act. Under the Harbours Act 1950, the Wanganui Harbour Board administered the Whanganui River up to the tidal limit. The Water and Soil Conservation Organisation administered the surface waters of the river under delegation from the Department of Transport. The Marine Department had charge of fisheries. The Department of Health had powers under the Waters Pollution Act 1953. The Department of Internal Affairs had duties under the Native Plants Protection Act 1934. The Department of Lands had responsibilities under the Reserves Act 1977 and the National Parks Act 1980, together with the National Parks and Reserves Authority. The Department of Maori Affairs had obligations for the welfare of Maori communities.

8.6 RIVER FLOWS LITIGATION

Severe impacts on the river became noticeable after the Tongariro power development project became operative in 1971. At that time, the diversion was controlled by the Electricity Department and Division for the Crown, and the Crown had a perpetual right to divert water by the 1958 Order in Council, as validated by section 31 of the Water and Soil Conservation Amendment Act 1973.

By an agreement of March 1988, pursuant to section 23 of the State-Owned Enterprises Act 1986 and section 3 of the Electricity Operators Act 1987, the Crown

Overview

transferred, broadly speaking, all its assets and business in electricity generation to the Electricity Corporation of New Zealand Limited (ECNZ). It became the responsibility of ECNZ, not the Crown, to produce electricity in New Zealand.

Electricity generation now occurs in a deregulated environment. As part of its agreement with the Crown, ECNZ stated its intention to apply within 15 years for water rights to replace those formerly held in perpetuity.⁵² It was one thing to take water, however, and another to take water so as to seriously prejudice interests downstream. The Water and Soil Conservation Act 1967 enabled applications to be made to limit the amount abstracted.

Legal proceedings to set minimum flow levels began in 1977 and were reactivated at various times to 1992. In protracted litigation, Atihaunui argued that the river be restored to its natural flows, other organisations urged that the flow be increased, while ECNZ sought protection for its interest in hydro generation.

The Water and Soil Conservation Act 1967 had made major changes to the delegation of the Crown's assumed responsibilities for the management of rivers. It established the National Water and Soil Conservation Authority, which was empowered to fix the minimum acceptable flow and the maximum range of flow of any river (s 14(3)(o)) on the recommendation of local catchment boards constituted as regional water boards (s 20(5)(d)). There was no appeal from the authority's decision.

In 1977, the New Zealand Canoeing Association applied to the authority for increased water flows in the Whakapapa and Whanganui Rivers, and its application was referred to the Rangitikei-Whanganui Catchment Board for investigation. Atihaunui made submissions. They were concerned about the effect of changes in the river on Maori cultural associations and the discharge of sewage.⁵³

The board reported in 1982 with a flow management plan, which the authority adopted in 1983. It fixed minimum flows at Te Maire, about 17 kilometres below Taumarunui, at 22 cumecs from 1 December to 14 February and for the days of Easter each year, and 16 cumecs for the rest of the year. There was provision for the Electricity Department to seek a lower minimum flow in times of national power shortage. The decision applied for five years and expired in 1988.⁵⁴

In March 1987, the catchment board sought to fix new minimum flows before the 1988 expiry date. The authority was abolished in March 1988 and the catchment board was itself empowered to do this, but an appeal lay to the Planning Tribunal. The board (by then known as the Central Districts Catchment Board) conducted a consultative process, hearing the 76 witnesses of 16 parties with interests in the Whanganui River.

By this time, the Whanganui River Maori Trust Board had been established with a statutory basis to provide representation for Maori. Calling 13 witnesses at a

52. *Electricity Corporation of New Zealand Limited and Whanganui River Maori Trust Board v Manawatu-Wanganui Regional Council* 29 October 1990, Planning Tribunal decision w70/90 (doc A6), p 67

53. Document B8, para 73

54. *Electricity Corporation v Manawatu-Wanganui Regional Council*, p 8

hearing at Ngapuwaiwaha Marae, Taumarunui, the trust urged that all diversions cease and natural flows be restored.⁵⁵

The board fixed minimum acceptable flows for five years expiring on 31 October 1993. The intake to the upper Whanganui River immediately downstream of the western diversion was fixed at 100 percent of the natural flow. The intake to the Whakapapa River at the footbridge recording site was fixed at a minimum flow of 8.5 cumecs between 1 December and 30 April and 4.2 cumecs for the rest of the year, subject to the flows being naturally available. ECNZ was able to seek a lower minimum flow at times of national power shortage.

1988 minimum flows

An intent was to produce flows at Te Maire that were always above the 22 cumecs of the 1983 decision. In recognition of Atihaunui concerns, the Whanganui intake on the western diversion would close to restore the natural flow there, the Whakapapa diversion would be controlled to achieve the minimum flows specified, and the diversions from the other four tributaries of the Whanganui would continue.⁵⁶

The Whanganui River Maori Trust Board and ECNZ lodged separate appeals with the Planning Tribunal against the catchment board's decision. The tribunal was to travel extensively through the catchment area, sitting for 84 days and hearing 105 witnesses.

Planning Tribunal appeal

The trust board's position was the same – the river's natural flow should be the minimum acceptable flow or, effectively, there should be no diversion of water from the Whanganui River at all. It called 24 witnesses in support.

Parties

According to the submissions of ECNZ, that would be unfair and unreasonable. Calling 40 witnesses, it sought restoration of the 1983 levels for a five-year term.

The Manawatu–Wanganui Regional Council, substantially supporting the decision under appeal, was respondent as successor to the regional water board that made the decision.

Counsel for the Minister for the Environment took a neutral stance, while the Minister of Conservation, calling 23 witnesses, wanted to restrict the water abstracted for power even more, to ameliorate perceived damage to the ecological systems, the human uses, and the river's intrinsic values.

The Wanganui River Flows Coalition combined a number of farming, recreational, and environmental interest groups. Calling eight witnesses, it supported the flow proposed by the Minister of Conservation, urging the tribunal to focus upon restoring the natural rhythms of the river system and seeking to restore the river to a natural and healthy appearance.⁵⁷

The tribunal observed of the Maori case that a full flow was sought because of the status of the river:

Planning Tribunal on the Maori case

as taonga, as whenua, and of kainga, (all concepts redolent of sustenance); and its spiritual, cultural and practical significance to the mana, wairua and mauri of the

55. Ibid, p 9; doc B8, para 73; doc D7, p 7

56. *Electricity Corporation v Manawatu–Wanganui Regional Council*, p 9; doc D7, p 7

57. Ibid, pp 3–5, 10–15

tangata whenua, and their responsibilities as rangatira and kaitiaki in respect of it which, it was submitted, are protected by the Second Article of the Treaty of Waitangi.

It was claimed that diversion of the headwater tributaries without their consent, without consultation of or acknowledgment of any kind of the mana and kaitiaki role of the tangata whenua, and without regard to their spiritual and cultural identity with the river, was an affront to the mana which the Whanganui iwi derive from the river. Adverse physical consequences of diversion on fisheries, navigation, and appearance of the river were also relied on.

It was submitted that this is a case where the Treaty of Waitangi obligation should be enforced rather than compromised, because compromise (it was said) is not really possible while the mana of the people remains unacknowledged. Countervailing interests could only prevail if they are of greater importance than a breach of a treaty.⁵⁸

**Decision on
legislative purpose**

After extensive legal debate, the tribunal determined that:

the purpose of fixing a minimum acceptable flow of the natural water of a river is the conservation of resources of natural water so that they are protected against harm and waste, and are available to meet as many demands as possible, so that their benefits can be enjoyed and shared by all interests to the best advantage of the nation and of the region in which they exist in the course of nature. The essence of it is the conservation of valuable resources. The demands, benefits and interests which are relevant will vary from one case to another; but they will generally include instream values, and the cultural values of the tangata whenua.⁵⁹

**Limitations on
Treaty recognition
provisions**

The trust board had submitted that priority should be given to the preservation of the character of rivers in their natural state and to the preservation of taonga of great spiritual, cultural, and material significance. It contended that there was a powerful presumption that the natural flow is to remain intact, a presumption derived from a construction of the legislation in the light of Treaty principles and from section 2 of the Water and Soil Conservation Amendment Act 1981. It could be rebutted only by the most compelling proof of public interest, and then only to the minimum extent possible. While accepting the relevance of spiritual, cultural, and traditional relationships, on its construction of the Water and Soil Conservation Act 1967, the tribunal was unable to accept that such values, or rights under the Treaty of Waitangi, could be given priority.

The Planning Tribunal, after referring to section 9 of the State-Owned Enterprises Act 1986, which provides that nothing in that Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi, and section 4 of the Conservation Act 1987, which states that that Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi, held that neither the Treaty nor the sections referred to imposed any obligation on ECNZ.⁶⁰

58. *Electricity Corporation v Manawatu–Wanganui Regional Council*, p 12

59. *Ibid*, p 199

60. *Ibid*, pp 57, 69–72, 74, 78

Figure 17: Patiarero (Hiruharama), circa 1890s. Photograph courtesy Alexander Turnbull Library (Wanganui Museum collection, G1123½).

The Planning Tribunal concluded:

That is not to preclude a decision-maker giving great weight to Maori cultural and spiritual values, in those cases where the evidence, of the kind referred to by Mr Justice Chilwell in the *Huakina* case, justifies it. However, what counsel were contending for was a presumption, and an extra weighting of the scales, in favour of retaining the natural flow independent of the weight the evidence might indicate. That would, in our opinion, be to distort the purpose of the Water Act [Water and Soil Conservation Act 1967]. To the extent that it is the claim of Te Atihau-nui-a-Paparangi that that is their entitlement under the Treaty, and that the Water Act fails to provide for the Crown's obligations under the Treaty in that respect, then those are claims which this Tribunal lacks jurisdiction to adjudicate upon.

For those reasons we do not accept the submissions of the Coalition and of the Trust Board for primacy for an ecological baseline; for priority for preservation of instream values, or for preservation of rivers in their natural state, or for preservation of taonga of great significance.⁶¹

Others who argued that the legislation gave a bias to their particular concerns enjoyed no more success. On the tribunal's reading of the law, no primacy, preference, priority, or bias could be accorded the conservation of instream values, ecology, or the natural flow of the river, as had been argued for the Minister of

**Balancing act
required**

61. Ibid, pp 78–79

Conservation; and contrary to submissions of ECNZ, no priority could be given to national interests over local and regional concerns or to the existing use rights of ECNZ over present or future uses.

In brief, a balancing was required and matters were to be given the weight that the decision-maker judges that they deserve in the circumstances of the particular case.⁶² Thereafter, in sequential chapters the tribunal gave careful consideration to Maori cultural and spiritual values; the natural features of the river; recreation and tourism; and the contribution of the western diversion to the welfare of New Zealanders and the economics of electricity generation.

Balancing act
applied

The tribunal's balancing of several concerns in a detailed and extensive evaluation is now summarised.⁶³

The river is a taonga of central importance for Atihaunui and, were there not competing interests, their concerns would be sufficient to justify restoration of the natural flow.

So, too, the river's natural features are adversely affected to a considerable degree. The natural pattern of flows is altered in a number of respects, particularly reduced minimum flows, reduction in seasonal variations, reduced peak flows in medium-flow events, reduced number of peak events, and truncated recessions. Water clarity is affected, and so is the transport and deposition of sediment. Spalling of papa ledges is increased and that affects the quantity of mud silts in the river. A substantial limitation of the diversions would alleviate this, increase the habitat for endangered blue ducks, improve trout spawning conditions in a valued fishery, improve the native fishery, and enhance scenic values. Were there no competing purposes, these too would present a good case to restore the natural flow.

Recreation and tourism, taken alone, did not amount to a case for the full restoration of natural flows, but they did provide a substantial basis for an increase.

The tribunal, however, had to consider the value to the nation of 'its water resources'. The western diversion contributes to the supply for the Tokaanu power station and has a flow-on effect for the Waikato hydro stations and cooling at one geothermal and two thermal power stations. Loss of hydroelectric generation, were the diversion seriously reduced, would be made up by thermal generation, which would involve the emission of greenhouse gases and the depletion of non-renewable resources, which, though relatively minor, would be contrary to sound resource management policy. A substantial net economic cost would also be borne by the public. The western diversion structures have substantial life remaining, although the perpetual nature of the entitlement for the diversions is qualified by its susceptibility to suspension or restriction to maintain minimum flows, and by the current holder's intention to apply for replacement water rights. These make a powerful case against fixing minimum flows that would suspend or restrict the diversions.

62. *Electricity Corporation v Manawatu–Wanganui Regional Council*, pp 79–82

63. *Ibid*, pp 175–197

In striking a balance, the tribunal would guard against a tendency to ascribe less weight to non-economic considerations than to economic ones, even if the latter are difficult to quantify fully.

The tribunal concluded that the diversion has considerable value for the nation and elimination would be at cost to the country and ECNZ. However, there were such grave adverse effects that minimum flows needed to be fixed to eliminate or mitigate them, and the flows permitted by the board should be reduced, despite the commitment made to the diversion in lawful expectation of a perpetual entitlement. The board's regime favoured the national interest at the expense of regional interests. Substantial sums had been spent on fisheries and environmental protection and the region had not been adequately compensated.⁶⁴

Planning Tribunal's
conclusions

The board's decision was cancelled, and the tribunal fixed the minimum flow of the Whakapapa River at the footbridge flow-gauging station from 1 June 1991 at three cumecs or the natural flow of the river, whichever is the lower. It fixed the minimum flow of the Whanganui River at the Te Maire flow-gauging station from 1 June 1991 for the period from 1 December in each year to 31 May in each following year at 29 cumecs or the natural flow of the river, whichever is the lower.

A consequence of this was to cancel the provision in the board's decision that had fixed the minimum flow of the Whanganui River immediately downstream of the western diversion intake at 100 percent of the natural flow in the upper Whanganui River.

The tribunal considered that a combination of the two measures would involve the least restriction on the diversion that was necessary for the instream uses. It would involve an appropriate readjustment between the interests of the nation and those of the region. In proportion to the total diversions, the loss of water for electricity generation would not be high, in its view, and the effect on the strategic utility of the Tokaanu Power Station for special functions would be minor.

The Whanganui River Maori Trust Board, ECNZ, and the Minister of Conservation made separate appeals to the High Court, which were heard in 1992. The Planning Tribunal decision was upheld.⁶⁵

8.7 THE TREATY DEBATE

The issues before the Waitangi Tribunal are of another kind. We can accept and are much assisted by the Planning Tribunal's assessment and application of the facts and law, as upheld in the High Court. The substantive questions before us are whether the Crown's assumption of the river's control through the enactment of a statutory regime, and particular initiatives like the Tongariro power development scheme, are consistent with the principles of the Treaty of Waitangi and, if these were proper exercises of the Crown's authority under the Treaty, whether the

Issues in claim

64. Ibid, ch 9

65. Document D7, p 8

regime itself takes adequate account of Maori Treaty interests. Here, we set out the arguments and the evidence that we received.

Evidence on the diversion's impact

Archie Taiaroa emphasised the deleterious effects on the river's mauri, made worse, in his view, because the diversion is near the snow-covered peaks that supply the freshest and clearest water. The impact is more at times of lower flows, but river freshes, the benefit of which ECNZ wishes to retain, are also important. These flow variations were well known to his tupuna and 'helped us to read the river, and give it life'.⁶⁶

We were presented with other evidence, as well, on fisheries, the stability of river banks, discolouration and water quality, navigability, tourism, recreational uses, and scenic and other natural qualities. It was helpful as background, but none added to the opinions before the Planning Tribunal, as recorded in its decision.

Submissions of Marian Melhuish

The reports of technical witnesses before the Planning Tribunal, put into our record by the Crown, especially those stressing the importance of electricity to the New Zealand economy, were the subject of submissions by Marian Melhuish, a recognised expert in the economics of the electricity industry, who was called by the claimants.⁶⁷ This was in the context that, if the Waitangi Tribunal found that the Crown's implementation of the diversion were contrary to the principles of the Treaty of Waitangi, the Tribunal should not resile from recommending that that diversion should be closed.

Ms Melhuish argued that a significant proportion of electricity could, over time, be replaced by alternative sources of generation, by other fuels, by investment in energy efficiency, and by energy management practices. While recognising hydroelectric power as an important source of energy, she considered that existing generation or load growth could be met in alternative ways. She instanced the use of fossil fuel and the expansion of the Cook Strait cable.

Ms Melhuish also stressed the prospect of reducing demand through efficiency and agreed with an estimate by the Energy Efficiency and Conservation Authority that at least 15 percent of 1994 electricity consumption could be saved by both investment and management methods. She stated that ECNZ estimated in 1988, based on consultation with energy efficiency consultant Amory Lovins, that savings of 58 percent were technically possible. This figure had been revised several times, but there was no dispute that savings of around half the electricity being used in 1994 were technically feasible. She argued that it is now widely accepted that market barriers are preventing cost-effective energy efficiency and conservation from being implemented. To overcome this, the Government established the Energy Efficiency and Conservation Authority to devise strategies to help overcome market barriers to energy efficiency.⁶⁸

Ms Melhuish also explored the possibilities of wind generation, as shown by the performance of the ECNZ wind turbine. Estimates of cost-effective wind generation for this country were said to vary from about 6 percent of present generation to

66. Document B8, para 43

67. Documents C5-C9; doc D17

68. Ibid, paras 4.4-4.6

about 40 percent. Various local power companies had recently become interested in the generation of electricity. Proposals actively being considered by local companies amounted to at least 7000 gigawatt-hours per year, 10 times the power available from the western diversion.⁶⁹

On the other hand, Planning Tribunal evidence had emphasised the importance of the western diversion to the Tongariro power scheme and of the Tongariro power scheme to the national energy generation system. This had stressed the integrated relationship between the western diversion flows and the peaking capacity of the Waikato River system. While acknowledging the high value that resulted from the ability of the Waikato system to meet peak demand loads, the witness noted that the ability to respond to peak loads could be replaced by alternatives. She instanced an alternative to flexibility in the timing of supply of electricity to meet peak demands – namely, flexibility of demand, which can be achieved through ‘time-of-day pricing’ (high prices at peak times and low prices when demand is low).⁷⁰

Ms Melhuish has been an active participant in developing a wholesale electricity market to encourage this flexibility. She has recognised that it will take many years fully to implement the necessary market mechanisms but has noted that they are already under way. She has predicted that the economic benefits will be extremely large, as will the environmental benefits, because it is peaking power that requires highly variable river flows, which lead to alternating scouring and drying of river beds.

Ms Melhuish concluded by observing that the western diversion provided a very small amount of the total power needs of New Zealand.⁷¹ In her opinion, both its energy supply and its flexible peak-flow function could be substituted by a number of other means. If its contribution were cancelled or substantially reduced, other alternatives would be available.

Claimant counsel contended that the western diversion arose from an action of the Crown that was contrary to the principles of the Treaty of Waitangi, since, by the Treaty, the ownership and control of the river had been preserved to Atihaunui and not willingly relinquished. Had Treaty interests been considered, the project would not have gone ahead. There was no consultation with Atihaunui at any stage.

Likewise, the assumption of control of water in the Water and Soil Conservation Act 1967 was contrary to Treaty principles in that it failed to presume prior Maori rights. Moreover, the consultation and hearing processes involved had committed Atihaunui to huge expenses they would not have incurred had their rangatiratanga been recognised, as the Treaty requires.

Crown counsel acknowledged that Atihaunui had not been consulted prior to the commencement of the Tongariro power development scheme but stressed the

Claimant counsel's
arguments

69. Ibid, paras 4.7–4.8

70. Ibid, para 8.4

71. Ibid, para 11. The Planning Tribunal decision of 1990 found that the water diverted from the Whanganui River had value for the generation of about 3.5 percent of the then national generation of electricity: *Electricity Corporation v Manawatu–Wanganui Regional Council*, p 204.

importance of the western diversion for hydroelectric power in the North Island and the power demands of the time. In the exigencies of the day, it was a legitimate exercise of *kawanatanga* for the Crown to take the steps that it did to meet the anticipated demands of society. Given the continued use of electricity in preference to coal-fired power, the continued authorisation of the diversion of the waters from the Whanganui River was argued to be a valid exercise of the Crown's Treaty powers. We note, however, that the Crown sold its interest in electricity generation to ECNZ, relinquishing its own rights to take water. Thus, the diversion now occurs in a deregulated environment and where the generation of electricity is left to the operation of market forces.

Crown counsel further contended that the enactment of the Water and Soil Conservation Act 1967 was also a valid exercise of the Crown's article 1 powers. In submissions directed principally at the Resource Management Act 1991, but which are also applicable to the Water and Soil Conservation Act, she stressed that resource management laws need to apply to all persons equally if they are to succeed.

Claimants' reply

Claimant counsel accepted that the Crown has a residual right under the Treaty to pass laws for conservation purposes and in the wider public interest, where necessary. But it did not follow that authority in the first instance needed to be exercised by the Crown or its local government delegates. It could be exercised by the *iwi*, as was appropriate in terms of the Treaty, and the Crown had the power to intervene in the national interest by legislation, if need be.

Claimant counsel observed that, while the Crown asserts that it is necessary for it to manage resources under its article 1 powers, it has passed on that power to delegates in the form of local authorities. If, as Crown counsel claims, such authorities are independent of the Crown, then such delegation constitutes a serious Treaty breach, the Crown abdicating its Treaty responsibility actively to protect Maori interests.

We observe in relation to this last submission that there was no provision in the Water and Soil Conservation Act 1967 that required the catchment board, regional water board, or, on appeal, the Planning Tribunal to comply with or consider Treaty principles along similar lines to the requirements in section 9 of the State-Owned Enterprises Act 1986, section 4 of the Conservation Act 1987, or section 8 of the Resource Management Act 1991.

Claimant counsel contended that the Crown submissions are based on the assumption that control of natural resources rests with the Crown and was ceded to the Crown as a necessary incident of *kawanatanga*. She noted that the Waitangi Tribunal in the Mohaka River claim rejected a similar submission.⁷² A corollary of the Crown submission was that *rangatiratanga* excluded any concept of authority, control, responsibility, or stewardship in respect of natural resource *taonga* from the signing of the Treaty. This was unsustainable. Maori would have no more than a right to be consulted and considered, as was wrongly the situation under the

72. Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 5.5.2

Resource Management Act. It would place natural resources outside the protection of article 2, with its recognition of rangatiratanga, and solely within the province of article 1, where the Crown has all the say.

8.8 THE FACILITIES USER PASS

What better evidence of river ownership than charging an entrance fee? Maori did it instinctively from the 1850s, demonstrating in practical form their presumption that the river was theirs. The Department of Conservation intended nothing of the sort when it introduced the facilities user pass in 1993, requiring a fee of everyone using the facilities it provided in the Whanganui National Park.

Pass as assertion of ownership

Symbols are important, however, and the pass was perceived by some as a river entrance fee.⁷³ After all, the hundreds who access the park each year nearly all go in by river and the available facilities are the huts that cling to the river's edge.

To all intents and purposes, the claimants say, the pass is for the river, which is the more significant facility, and the pass is a poor show considering the negotiated agreement that the river was specifically not part of the park. They did not agree with the system when it was discussed with them; indeed, it would be more in line with some Maori views if the department paid them rent for the public use of the river.

Crown counsel noted that the relevant bylaws apply to a riparian strip 250 metres from the river. She argued that the Crown had consulted in good faith and the department had since built on or upgraded eight of the 13 affected sites.⁷⁴ There are also restrictions on camping outside designated areas, but the bylaw does not apply to those camping on Maori land or other privately owned land.

Pass as payment for facilities

The pass and bylaws assist environmental control and apply to the use of facilities, not to the use of the river or the park.

Part of the problem was the lack of Atihaunui involvement in park management, despite the proposals made during the negotiations. Crown counsel indicated that the Crown was willing to explore the possibilities of further developing the involvement of Atihaunui with management processes relating to visitors to the river and its environs, but the Crown could not depart from its duties to manage riparian areas with conservation values.⁷⁵

It appears to us more important to settle first who owns the river.

8.9 THE TREATY NEGOTIATIONS

For several great tohunga like Titi Tihu, who was known to members of this Tribunal, money was secondary to the spiritual dimension to their lives. Spiritual

Gravel question

73. Document B8, para 233

74. Document D19(c), para 38

75. Ibid, para 216

matters must be settled first. To other tohunga of no lesser ranking, money appeased spiritual transgressions when it served as utu, that which restores harmony and balance through recognition of a wrong. We suspect that it may reflect Titi's views that claims to gravel compensation were not as strenuously urged as the claim for a riverbed title, even though payment would at least be a passing recognition of customary possession. In any event, compensation had still to be paid, and it appeared that a very substantial sum would be involved. Almost 40 years to the day since the 1950 royal commission had recommended payment to Atihaunui for gravel takings, with a process for settling quantum, the Minister of Justice proposed negotiations to settle all Atihaunui Treaty claims in a letter to the trust dated 13 July 1990.⁷⁶ Furthermore, the Government now had a negotiation structure with the potential to settle in one comprehensive plan all outstanding issues: the river, the gravel, the Atihaunui land, the management of the park, and compensation for anything wrongly done in the past.

Offer of negotiations

Though Atihaunui policy was to negotiate directly too – they had still to file the river claim at that time – after three years of trying, the negotiations did not get far off the ground. The claimants thought it necessary to explain this; also their pursuit of the present claim, which, from the Government's point of view, put an end to the negotiations. In the claimants' eyes, this was not a breach of the good faith in dealings between Maori and the Crown that the Court of Appeal has spoken of since 1987.

Why this claim was brought

The trust's understanding was that the Crown's decision to enter negotiations assumed a 'measure of agreement about the basic issues of the claim', though the areas of agreement were not known.⁷⁷ For the Crown, the Treaty of Waitangi Policy Unit prescribed a three-phased process, which had not been agreed to by the trust. The first was to complete a 'framework agreement' by about March 1991, but supervening Government decisions upset the timetable.⁷⁸

Mohaka question

Owing to budget restrictions, agreement could not be reached over a suitable level of funding for research, legal advice, and consultation. None the less, in August 1992, the policy unit agreed to monthly meetings with the trust, subject to a proviso. The Waitangi Tribunal report on the Mohaka River claim was expected (it was released that November) and negotiations had to be confined to 'administrative matters such as the Framework Agreement and budgets' until the Government could make a policy decision on any of the Mohaka Tribunal's recommendations.⁷⁹

The trust thought that the *Mohaka River Report 1992* might be of some assistance but that the particular history and river associations of Atihaunui must be dealt with on their own merits and, further, that decisions in principle on the Mohaka case should not be made until the Whanganui position was known and had been fully considered. Still, the trust approved the framework agreement. The Crown,

76. Minister of Justice to Archie Taiaroa, 13 July 1990 (doc B8(b), p 69)

77. Document B8, para 84

78. Negotiations manager, Treaty of Waitangi Policy Unit, to Archie Taiaroa, 13 March 1991 (doc B8(b), p 72)

79. Treaty of Waitangi Policy Unit to claimant counsel, 10 September 1992 (doc B8(b), p 76(b))

however, would not.⁸⁰ Consultations continued into 1993, but a basis could not be established that was satisfactory to both sides.

To the Government, it was first necessary to consider the national implications of the Mohaka report for the management of rivers and lakes before Whanganui rights could be considered. The trust had still to sign the framework agreement and by March was becoming alarmed at the absence of any Government response. In April, the trust was advised by letter that, for the Government to be better informed of the implications of Maori water resource claims, Ministers needed 'more information about the sort of outcomes that iwi may seek from negotiations and how they envisage the practical implementation of tino rangatiratanga over natural resources'.⁸¹ Three years had elapsed since the original invitation to negotiate and there had been no progress.

Generic policy issue

The trust prepared a detailed memorandum for the Minister reminding him that it had a statutory power and duty 'to negotiate with the Government . . . for the settlement of all outstanding claims relating to the customary rights and usages of te iwi o Whanganui'.⁸² It urged that the Crown demonstrate good faith by agreeing to minimum negotiating rules, including a set timetable with monthly meetings, a recognised Crown team, a broadly agreed agenda, settlement of funding, and a Crown moratorium on further river proceedings during negotiations.⁸³

Trust's memorandum

As to 'the sort of outcomes that iwi may seek from negotiations and how they envisage the practical implementation of tino rangatiratanga over natural resources', the trust suggested that rangatiratanga meant the right to determine use of the river, the right to any income therefrom with the associated risks and rewards, and the resolution of ownership in their favour.⁸⁴ It added that these were matters for negotiation, and the means for achieving them are several and need not clash with the Crown's Treaty aspirations and responsibilities.

Finally, the trust sought urgency owing to Government policies under the Resource Management Act 1991, the prospective transfer of the Crown's hydro generating assets to third parties, and the possibility of privatisation.

The Minister of Justice met a deputation of the trust on 30 April. On 18 May, he advised the trust that the Cabinet Committee on Treaty of Waitangi Issues had decided to defer the signing of the 'draft Framework Agreement' until it had decided its position on 'river issues in general'. It was considering 'a generic approach to Treaty claims to natural resources such as rivers, lakes, geothermal energy and the conservation estate'.⁸⁵

80. Claimant counsel to Treaty of Waitangi Policy Unit, 14 September 1992 (doc B8(b), p 76(d)); Whanganui River Maori Trust Board to Minister of Justice (doc B8(b), p 77(a)); Barnery Haaami, Kaiwhakahaere, to Minister of Justice, 20 October 1992 (doc B8(b), p 78)

81. Treaty of Waitangi Policy Unit to claimant counsel, 7 April 1993 (doc B8(b), p 85)

82. Archie Taiaroa to Minister of Justice, 31 March 1993 (doc B8(b), pp 8(a), 86-88)

83. Section 6 of the Whanganui River Trust Act 1988

84. Treaty of Waitangi Policy Unit to claimant counsel, 7 April 1993 (doc B8(b), p 85)

85. Minister of Justice to Archie Taiaroa, 18 May 1993 (doc B8(b), p 89)

**Application for
water conservation
order**

Then, in June, the Royal Forest and Bird Protection Society applied for a water conservation order for the Whanganui River.⁸⁶ The trust saw this and other pending proceedings as showing yet again how the customary rights of Atihaunui were not recognised and were unprotected.⁸⁷ Archie Tairaro, the trust chairman added, in his evidence to us:

about the Resource Management Act and the Regional and Local Authorities we deal with, I regret having to be negative about the processes under the Act, that recognise some may be trying to do their best. However, in the end, when iwi are talking about their tupuna taonga, especially for us of the Whanganui River, to do so with those who would make decisions over it without Whanganui iwi themselves having the proper authority, is simply not in accordance with custom or the Treaty. We are also doing so in the circumstances where we have few resources to meet those of the bodies with whom we are dealing. For proper decisions to be made in the interest of everybody, tino rangatiratanga Maori must be recognised. Iwi will then be much better placed to live and act for themselves and with others in the interest of the community as a whole. The present situation is a tangle compounded by well-meaning efforts which frustrate the ultimate objective of Maori and leave things much as they always were, somewhat redecorated.⁸⁸

Final meeting

The trust chairman discussed his concerns with the Minister on 29 June, urging that negotiations be no longer delayed. The Minister advised the trust to take such steps as it thought 'appropriate to protect the river'.⁸⁹

In July, the trust filed this claim and sought an urgent hearing.

86. Document D3, p 2

87. Document A1, p 4

88. Document B8, para 228

89. Ibid, para 102