THE NGAWHA GEOTHERMAL RESOURCE REPORT 1993

WAITANGI TRIBUNAL REPORT 1993

THE NGAWHA GEOTHERMAL RESOURCE REPORT 1993

WAI 304

WAITANGI TRIBUNAL REPORT 1993

The cover design by Cliff Whiting invokes the signing of the
Treaty of Waitangi and the consequent interwoven development of
Maori and Pakeha history in New Zealand as it continuously
unfolds in a pattern not yet completely known

A Waitangi Tribunal report
ISBN 1-86956-284-4
www.waitangitribunal.govt.nz
First published 1993 by Brooker's Ltd, Wellington New Zealand
This edition published 2006 by Legislation Direct, Wellington, New Zealand
Printed by SecuraCopy, Wellington, New Zealand
Set in CG Times

Contents

List of Figures

The Honourable Minister of Maori Affairs
Parliament Buildings
Wellington

Te Minita Maori

Tena koe e te rangatira

This is the tribunal's report on the Ngawha geothermal claim. The report is the first concerned with a geothermal resource and we are currently considering further claims by the Te Arawa people in and around Rotorua.

At the request of the claimant trustees of the Parahirahi C1 Maori reservation and the hapu of Ngawha whom they represent, the tribunal granted urgency to the hearing of their claim. This was because a joint venture partnership comprising the Bay of Islands Electric Power Board and the Taitokerau Maori Trust Board has sought consents under the Resource Management Act 1991 to exploit the Ngawha geothermal resource for the purpose of electricity generation. The claimants are opposed to such a development. They fear it may harm their taonga, the hot springs and pools at Ngawha.

The report is concerned with two main claims. The first concerns the propriety of the Crown acquisition of some four acres on which are situate hot springs and pools formerly owned by the hapu of Ngawha. This land is vested in the Crown as a recreation reserve. The second concerns the question of whether the Geothermal Energy Act 1953 and the Resource Management Act 1991 adequately protect the claimants' rights under the Treaty of Waitangi to the geothermal resource at Ngawha.

Our findings and recommendations are recorded in chapter 8 but a full appreciation of the quite complex and novel issues involved can only be had by a perusal of the whole report.

Note re references

There are two types of references used in the text of this report. The more common references are those which begin with a letter of the alphabet, for example (A4:11). These are references to the tribunal record as contained in the Record of Inquiry listed in appendix 3. The example above refers to document A4 (the "A" series of documents are those documents admitted to the record preceding and including the first hearing) at page 11. Other references in the text are made to paragraphs within this report, for example, (8.2.1) refers to chapter 8 paragraph 8.2.1.

Also note that where a paper has been quoted in which capital letters and/or underlining have been used, these have been changed to italics.

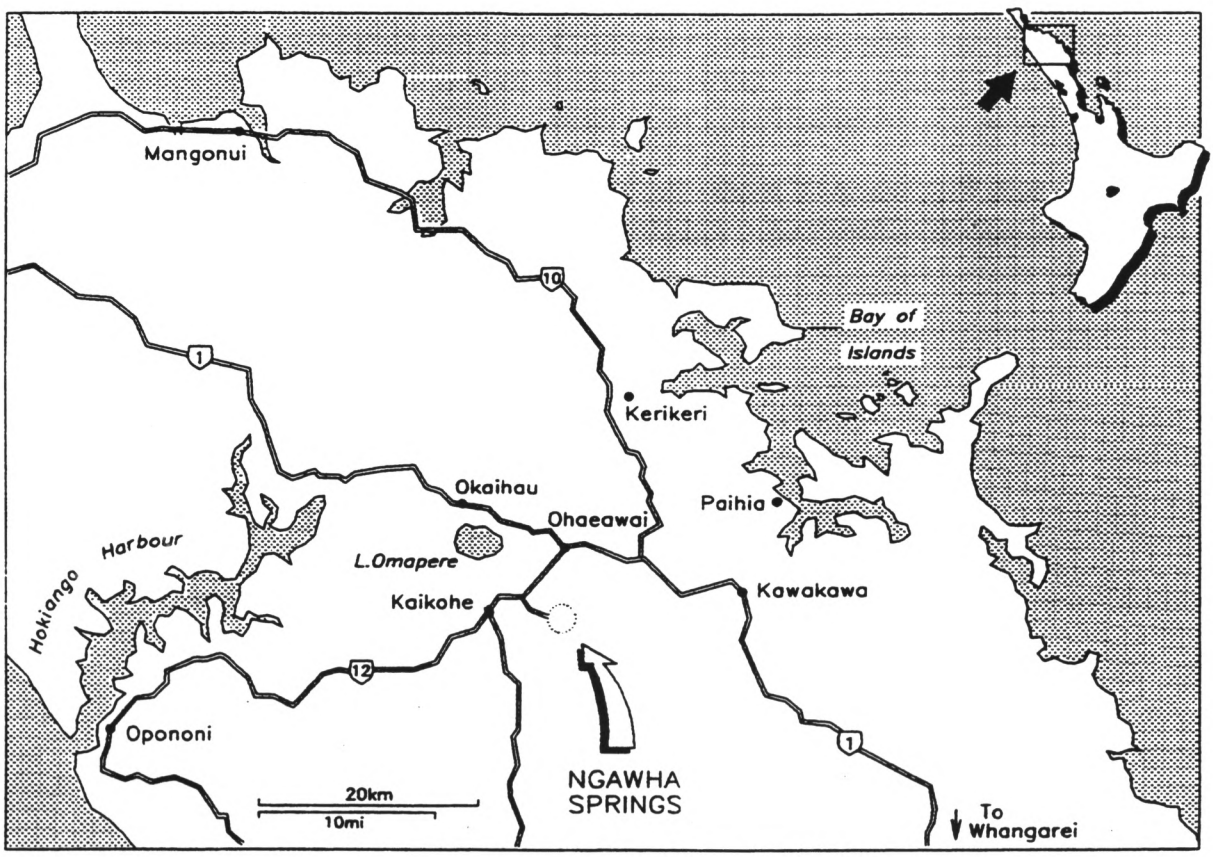


Figure 1: Location map

Chapter 1

The Geothermal Claim

1.1 What the Claim is About

1.1.1 This claim concerns the ownership of and the right to control the Ngawha geothermal resource. It covers the hot springs at Ngawha and the whole of the underlying geothermal resource in the Ngawha geothermal field. The field is extensive, covering between 25 and 50 square kilometres. Most of the land overlying the resource is now owned by the Crown or non-Maori owners. The claim is for the Ngawha geothermal field in its entirety. The field is located some six kilometres east of Kaikohe. The resource has the potential to generate a significant amount of electricity. Such a development is strongly opposed by the claimants.

The claimants

1.1.2 The claim in its final amended form is brought by the trustees of Parahirahi C1 Maori reservation for the whanau and hapu having an interest in the Ngawha geothermal resource. More specifically it is brought by named claimants for and on behalf of some ten hapu of the Ngapuhi iwi. These hapu are Ngati Hine, Te Hikutu, Te Uri Taniwha, Te Mahurehure, Te Uriohua, Ngati Rehia, Ngai Tawake, Ngati Hau, Ngati Rangi and Ngati Tautahi. These claimants have been collectively referred to as "Nga hapu o Ngawha". The claimant hapu see themselves as kaitiaki of the hot springs at Ngawha while acknowledging that the resource is shared by all of the numerous hapu of Ngapuhi.

Nature of the resource

1.1.3 The geothermal resource comprises both surface and sub-surface manifestations at Ngawha. The hot springs which are said to have miraculous healing powers are the principal surface component of the resource. It is claimed that Maori believed there to be an inter-connectedness between the springs at Ngawha and other surface manifestations, for example at Omapere. The traditions explain this inter-connectedness through the taniwha Takauere who is said to live at Omapere but whose tail is said to 'whip' at Ngawha and at other places. This, it is said, in traditional terms was a recognition that the Ngawha springs were not a single isolated or discrete phenomenon. In traditional Maori terms the springs are the face or eye of the resource but its whatumanawa or heart is below the ground and connected to other surface manifestations in the district. Hence the Maori tradition that the underground aquifer and its primary surface manifestation at Ngawha are parts of a single phenomenon which, it is said, they have always considered to be a taonga.

1.1.4 There are numerous surface features within and around the Parahirahi C1 Maori reservation, the adjoining Crown-owned Ngawha Hot Springs Recreation Reserve and the privately owned Spa area and Ngawha Springs Hotel, all of which are located near the centre of the known geothermal anomaly (see figure 3). These features include areas of surface hydrothermal alteration, sinter deposits, hot and cold springs, gas vents and mercury deposits. There are upwards of 30 hot springs, many of which are used for bathing. There are several other sites in the region where warm springs have been identified. These include springs known as the Kaikohe Warm Springs on the Kopenui stream about three kilometres north-east of Kaikohe; Lake Omapere Hot Soda Spring, a man-made dug pool on the shore flats of Lake Omapare about six kilometres north-north-east of Kaikohe; Neilson's Soda Springs near Highway 12 about two kilometres north-north-west of Ngawha Springs village and Te Pua Springs located about four and a half kilometres north-north-east of Kaikohe. There appears to be a difference of opinion among scientists as to the relationship of these discharges to the Ngawha geothermal reservoir (A31:36; B37:9).

A taonga of nga hapu o Ngawha

1.1.5 The claimants say the Ngawha geothermal resource is a taonga. They reject the notion that the resource is in some way severable or divisible. The resource is seen by them as one entirety, the surface and sub-surface components being inextricably linked one to the other. In short, it is viewed as one holistic whole.

To whom does the Ngawha geothermal resource belong?

1.1.6 Kaumatua witnesses for the claimants consider that the taonga belongs to the hapu of Ngapuhi. From time immemorial it is said, the hapu of Ngapuhi and beyond have attended the springs of Ngawha to partake of their healing powers. The hapu of Ngawha, as kaitiaki of that resource, have nurtured it so as to ensure continued access. Management and control of the resource and hence rangatiratanga is, however, said to be the prerogative of the hapu of Ngawha, the people on the ground.

1.2 Development of the Claim

First Ngawha geothermal claim (Wai 53)

1.2.1 On 9 March 1989 a claim dated 5 February 1989 by Wiremu Tairua was received by the tribunal. The claimant was at the time chairman of trustees for the Parahirahi C1 trust. He is a member of Te Uriohua and Takotoke hapu of Ngapuhi and brought the claim on behalf of himself, his two hapu and other hapu of Ngapuhi namely, Ngati Rangi, Ngai Tawake, Ngati Kura, and Matarahurahu. The claimants sought the return of substantial parts of the former Parahirahi block on part of which were some of the Ngawha springs. In particular, they sought the return of four acres formerly part of Parahirahi C block. This is now vested in the Crown and known as the Ngawha Hot Springs Recreation Reserve. They claim that the owners did not agree to the sale of this land or of the hot springs situate on it. In addition the

claimants sought a recommendation that the Crown should not enter into any arrangement or agreement with other parties to prospect for or license geothermal bores without the agreement of the Maori owners of those geothermal areas.

Second Ngawha geothermal claim (Wai 123)

1.2.2 In December 1989 a claim dated 12 December 1989 was filed with the tribunal by Charles Brown and Susanne Robertson both of the Te Uriohua hapu of Ngapuhi for themselves and certain direct descendants of their hapu. Their claim was made in association with that of Mr Tairua (Wai 53) and was said to be in essence the same as that of Mr Tairua with the added point that, with regard to the original ten owners of the Parahirahi block, they claimed direct connections to that group by virtue of the fact that one Rukia Koao was a member of the original ten owners.

Third Ngawha geothermal claim (Wai 153)

1.2.3 On 6 May 1991 an amended statement of claim, Wai 153, on geothermal resource rights was filed with the tribunal on behalf of the foregoing claimants in Wai 53 and Wai 123 and also some 18 other claimants belonging to Te Arawa and Ngati Tahu. The claim sought findings as to the ownership of the geothermal resource in areas covered by the various claims and recommendations that no geothermal licences or resource rights be granted or existing uses continued that affect hydro-thermal fields in which Maori retain an interest without the consent of the Maori owners and that appropriate amendments be made to existing legislation.

Request for an urgent hearing

1.2.4 On 2 September 1992 the tribunal received a request from counsel for the Wai 53 claimants for an urgent hearing of claims concerning the Ngawha geothermal field. The claimants were concerned that resource consents were being sought by a joint venture comprising the Bay of Islands Electric Power Board and the Taitokerau Maori Trust Board under the Resource Management Act 1991 to exploit the Ngawha geothermal resource for the purpose of electricity generation. They are opposed to such a development. The tribunal agreed to the request for an urgent hearing.

Fourth Ngawha geothermal claim (Wai 304)

1.2.5 On 8 September 1992 a new and final statement of claim was filed on behalf of the trustees of Parahirahi C1 Maori reservation as noted in 1.1.2 above. This followed the tribunal granting an urgent hearing. The new statement of claim was filed in substitution for claim Wai 53 and the amendment to that claim in Wai 153 referred to in 1.2.3. The new claim was separately registered as Wai 304.

1.2.6 The new statement of claim seeks findings by the tribunal that:

- the Treaty guarantees ownership and rangatiratanga in respect of the Ngawha geothermal resource ("the resource") to nga hapu o Ngawha;

- ownership and rangatiratanga of the resource do not depend upon title in the surface land;
- the resource may not be exploited by third parties without the prior consent of nga hapu o Ngawha;
- the right to manage the resource is, in terms of Treaty principles, vested in nga hapu o Ngawha;
- nga hapu o Ngawha retain ownership of and rangatiratanga over the resource;
- the acquisition of surface title by the Crown pursuant to acts, policies and omissions in breach of principles of the Treaty did not involve the transfer of Maori ownership of the resource;
- the clear Maori intention to reserve Parahirahi C containing the Ngawha springs in Maori title is conclusive evidence of the Maori intention to retain the resource; and
- the grant of resource consents to the joint venture applicants would be in breach of the claimants' rights of ownership and rangatiratanga over the resource unless and until the consent of nga hapu o Ngawha is procured.

In addition, the claimants sought an urgent recommendation that the Far North District Council and Northland Regional Council should not proceed to consider the joint venture applications until the claim is heard and reported upon by the tribunal.

1.2.7 On 9 October 1992 an amended statement of claim (Wai 58) was filed by Sandra Gates on behalf of Matilda Saies and hapu and Tarawau Kira and hapu seeking that claim Wai 304 be extended to include the interests of the iwi of Ngapuhi ki Whaingaroa. No evidence was given or submissions made in support of this claim.

1.3 Reports Commissioned by the Tribunal

1.3.1 At the request of the claimants the tribunal commissioned Nicole Butler, Thomas Lumb, Te Aroha Henare, Richard Boast and Morris Love, to investigate and report at the tribunal's expense into land history, scientific questions, kaumatua evidence, customary tenure and the geothermal resource and the impact of the Resource Management Act 1991 respectively. In addition the tribunal commissioned Rosemary Daamen, a tribunal researcher, to report on the title origin, devolution and block histories of the lands that encompass the Ngawha geothermal field;[1] Judge Kevin Cull to provide an overview of the work of Ms Daamen; Professor Patrick Hohepa to provide a report on his understanding of the linguistic and traditional background of the terms ngawha, waiariki, ngawhaariki and of the traditional evidence of the discovery of the Ngawha geothermal field and related matters and Dr David

Williams to provide a legal opinion on certain statutory provisions relating to the Crown purchase of the greater part of the Parahirahi block.

All such commissioned reports were subsequently produced in evidence before the tribunal.

1.4 When and Where the Claim was Heard

1.4.1 The first hearing of the claim took place at the Kotahitanga marae, Kaikohe, between 12 and 16 October 1992. Prior to the hearing, extensive public notice was given and in addition notice was sent to interested persons and bodies. Particulars are recorded in the Record of Hearing (appendix 2). Opening submissions were presented by counsel for the claimants. The claimants were represented by Joseph Williams assisted by Victoria Petraska. Malcolm Parker assisted by Annsley Kerr appeared for the Crown. Peter Salmon QC represented the joint venture partnership of the Bay of Islands Electric Power Board and the Taitokerau Maori Trust Board. At this hearing extensive evidence was given by kaumatua (see appendices 2 and 3) and in addition by Mr Boast, Ms Butler, Mr Lumb and Mr Love. During the week the tribunal inspected the hot pools at the Ngawha Hot Springs Recreation Reserve and on the Parahirahi C1 Maori reservation and Lake Waiparaheka, Lake Omapere and well Ng 13.

The second hearing took place at Kaikohe between 14 and 18 December 1992 when Mr Williams assisted by Mrs Petraska appeared for the claimants; Mr Parker assisted by Harriet Kennedy appeared for the Crown and Mr Salmon appeared for the joint venture. Evidence was heard from witnesses on behalf of Wai 123 including the kaumatua Hita Hape and Victoria Brown, Mrs Robertson, Raymond Edwards and Te Ruru Ihaia Kahiwai. Evidence relating to Wai 304 was given by Professor Hohepa, Judge Cull, Ms Daamen and Dr Williams (the latter two read with consent of counsel by Thomas Bennion, a tribunal legal officer). Mr Salmon called evidence from Sir Graham Latimer, David George, Roger de Bray and Dr Arnold Watson. Margaret Beadle, one of the owners of the Spa Hotel property at Ngawha Springs on the adjoining Tuwhakino block, gave evidence in opposition to the joint venture and as to her family's ownership of their property including the hot springs thereon. Mr Parker made an opening statement for the Crown on 16 December and later called evidence from Craig Lawson, Dr Donald Loveridge and (by consent) the evidence of Dr Douglas Sheppard was read by Ms Kennedy. During the week the tribunal inspected the hot springs and lake on Mrs Beadle's Tuwhakino block property and also the Ngawha recreation reserve adjoining the Parahirahi C1 Maori reservation.

On 20-21 January 1993 in Auckland the tribunal heard final submissions from counsel for the claimants, Nicola Ngawati for Ms Brown and Mrs Robertson (Wai 123), counsel for the joint venture and for the Crown.

1.5 Recommendations

The role of the tribunal has been to determine whether, and if so to what extent, the Crown has acted in breach of Treaty principles in respect of its acquisition of the land and hot springs now part of the Ngawha recreation reserve and whether the provisions of the Geothermal Energy Act 1953 and the Resource Management Act 1991 are inconsistent with the principles of the Treaty and if so, whether claimants' interest in the Ngawha geothermal resource has been or is likely to be prejudicially affected by any such breaches. Our conclusions and recommendations are brought together in chapter 8.

References

1. This was later limited to the Parahirahi block.

Chapter 2

Ngapuhi and Ngawha

2.1 The Claimants

2.1.1 The claimants are the trustees of Parahirahi C1 Maori reservation for and on behalf of the whanau and hapu having an interest in the Ngawha geothermal resource and specifically the following hapu of Ngapuhi:

- Tamehana Tamehana for and on behalf of Ngati Hine hapu;
- Ellen Reihana for and on behalf of Te Hikutu hapu;
- Rewa Marsh for and on behalf of Te Uri Taniwha hapu;
- Bob Cassidy for and on behalf of Te Mahurehure hapu;
- Ron Wihongi for and on behalf of Te Uriohua hapu;
- Tu Kemp for and on behalf of Ngati Rehia hapu;
- Katarina Sarich, Te Arama Pou, Te Haua Witehira, Manga Tau for and on behalf of Ngai Tawake hapu;
- Werata Hauraki for and on behalf of Ngati Hau hapu;
- Bishop Waiohua Te Haara for and on behalf of Ngati Rangi hapu; and
- Joe Pinemau for and on behalf of Ngati Tautahi hapu.

Seven of the foregoing submitted evidence and appeared before the tribunal. Their evidence was supported by that of nine other kaumatua and kuia. The genealogical and geographic spread of the claimants and the other elders extended over the entire Ngapuhi tribe. Although no hapu mandate to speak was offered or requested, the tribunal would accept that the claimants and the other elders did have ties either directly or indirectly to all of the 136 or more hapu of Ngapuhi.

As a claimant group they became known as nga hapu o Ngawha; but they did not on that basis claim exclusive ownership of the Ngawha geothermal resource or that rangatiratanga over the resource was vested solely in them. On the contrary, they asserted that the resource is, and always has been, shared by all the hapu of Ngapuhi.

2.1.2 A further claim was lodged by Mr Brown and Mrs Robertson and is recorded as Wai 123. These persons claimed on their own behalf and that of the direct descendants of Ihaia Hita. Their claim focused on the question of ownership of the Ngawha springs. They endorsed the relief and recommendations sought by nga hapu o Ngawha, but only in so far as they recognised the status of the claimants as descendants of Ihaia Hita and members of Te Uriohua, being at the same time owners and kaitiaki of the Ngawha springs. Since they rejected the assertion that the

Ngawha springs resource was owned in common by all Ngapuhi, they decided to lodge a separate claim limiting it to themselves and to those who are both descendants of Ihaia Hita and members of Te Uriohua.

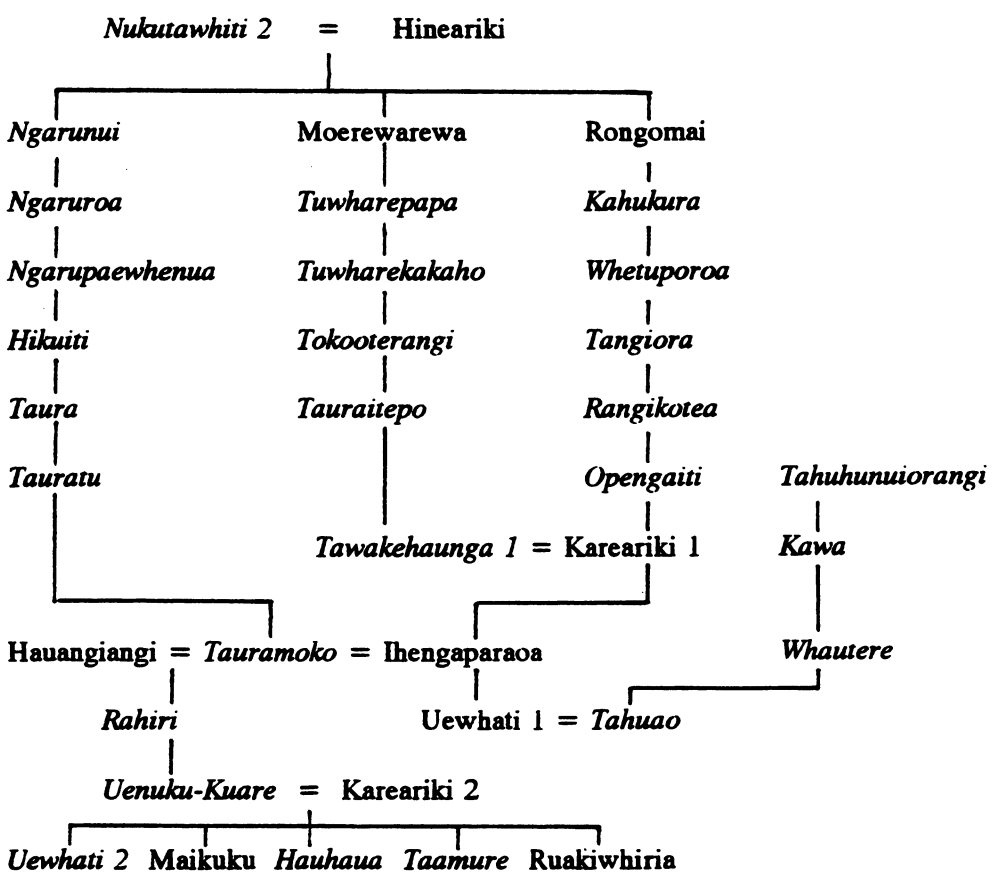
2.2 Ngapuhi and Ngawha[1]

2.2.1 The tribunal was told many times that the Ngawha geothermal resource is a taonga (valued possession, see 2.6) and a taonga for all of Ngapuhi. It was also told that its primary surface manifestation at Ngawha was discovered by the Ngapuhi ancestress Karearikì. It was Karearikì who first recognised the benefits of the springs at Ngawha for the healing of ailments and in the treatment of the after effects of child birth. The kaumatua who gave evidence in person all claimed descent from the union between Karearikì and her husband Uenuku-kuare.

2.2.2 Professor Hohepa gave the following genealogy and commentary:

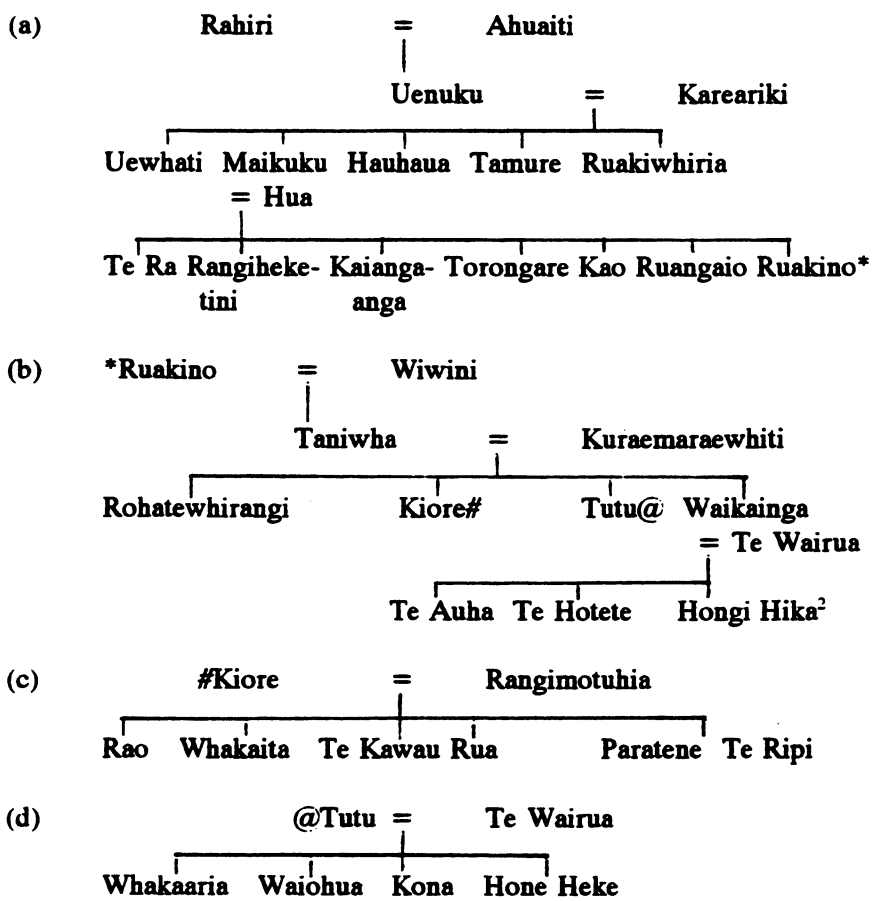
6.0 *The Genealogy of Karearikì*

1. The majority of the elders who gave evidence stated that Karearikì found and developed the geothermal pools. Which of the several Karearikì is the relevant one?



2. There are two Karearikí in the above genealogy, the first one married Tawakehaunga the first. That was not the Karearikí who discovered the Ngawha pools. And Tawakehaunga 1 was not the progenitor of Ngaitawake (or Ngaitewake) as we know it. That Tawakehaunga was born several generations later. Karearikí 2 is a great-grand-daughter of Karearikí 1, and that Karearikí married Uenukukuare, the first son of Rahiri. It was Karearikí 2 who discovered the geothermal pools. Their children have been recorded in the evidence of the elders, all were born at Pouerua, at Ngawha, and in other parts of Taiamai, according to the various accounts. It was those children, and their descendants, who created almost all the hapu o Ngapuhi. (B25(a):14-15)

For example, kaumatua Rewi Maihi gave the following account (A54(f)):



This appears to be supported in its essentials by other kaumatua evidence such as that provided by Ronald Wihongi (A54(a)).

2.2.3 It was said that the Ngawha springs form a central component in the cultural relationship between the hapu of Ngapuhi and their traditional territory. These hapu see themselves as kaitiaki (guardians, see 2.5) of the springs at Ngawha, especially the hapu of Te Uriohua and Takotoke who have traditionally lived in and about the springs area. But by the same token these springs have also been used by all of the hapu of Ngapuhi down from the time of Karearíki to the present. Counsel for the claimants elaborated:

> To whom does the Ngawha geothermal resource belong? Kaumatua witnesses for the claimants took the view that the taonga was a taonga belonging to the hapu of Ngapuhi. See eg. evidence of Ngati Haua Paora Witehira (A54(N)). Professor Hohepa cast his net wider, saying that the geothermal resource was "a taonga of every descendant of Karearíki" (notes of cross-examination by Mr Salmon QC). This would have included all of the tribes of the Taitokerau.
>
> Professor Hohepa was adamant however that this was not an end to the matter. The mana and rangatiratanga in respect of the Ngawha geothermal resource belonged, in his view, to the hapu who are the actual Kaitiaki of that resource. All of the key decisions in respect of that taonga rested, in his view, with the hapu on the ground. Thus, although all of the Taitokerau tribes derive cultural and spiritual sustenance from Ngawha and although all might claim a right of access to Ngawha, the ultimate prerogative of management and control vests in the hapu of Ngawha. The paradigm proposed by Professor Hohepa reflects the way in which the hapu of Ngawha have administered their resource. You have heard in evidence that, from time immemorial, the hapu of Ngapuhi and beyond have attended the springs in order to partake in the healing powers of that resource. The hapu of Ngawha, as kaitiaki of that resource, have nurtured it so as to ensure continued access. Management and control is however the prerogative of the hapu of Ngawha. The fact that they have managed and controlled the resource for the benefit of all does not diminish the prerogative itself. (C13:21-22)

2.2.4 Use in these terms was held to reflect a belief in the quite magical qualities of the waters of Ngawha. But it also reflected the fact that Ngawha has traditionally been seen as lying at the crossroads between the eastern and western sectors of Ngapuhi, people who over the centuries travelled to visit each other and to support each other in times of trouble. Te Uriohua and Takotoke, in particular, have long been recognised as occupying this pivotal position.

2.2.5 It was further explained that Ngapuhi have always believed in a connection between the surface manifestation of the resource at Ngawha and other surface manifestations, for example at Omapere. This inter-connectedness was first established and maintained by the taniwha Takauere who was said to live at Omapere, but whose tail would "whip" at Ngawha and at other places. Kaumatua Paengatai Wihongi put it this way:

> I etahi wa, ka huri he wiwi e tere ana. E anga atu ana te wai, e tere ake ana te wiwi. I etahi wa ka karawhiu te hiku ki Te Ngawha. He Kaitiaki i nga waiariki I etahi wa ka karawhiu te hiku ki Hokianga, ki Te Waimate. E karawhiu ana hoki ki nga roto o Te Ngawha. Ko nga tohu, ko nga tumutumu o nga kauri kei kona tonu ana. (A54(m))

Such metaphorical allusion expresses the idea that the Ngawha springs are not a single isolated or discrete phenomenon. They are indeed the face or eye of the taonga, but its whatumanawa or heart is below the ground and connected to other surface manifestations throughout the tribal district. In sum, the Ngapuhi tradition asserts that the underground aquifer and its primary surface manifestation at Ngawha is a unity, and one which has always been considered a taonga.

2.3 Ngapuhi Iwi

Since the basis of the claim lies in the foregoing statement that the Ngawha springs are a taonga of the Ngapuhi tribe, we continue with a brief account of the tribe, relying on the commissioned evidence of Professor Hohepa and on evidence submitted to us by the elders at the Kotahitanga marae. The three major frames of reference for Ngapuhi identity appear to be those of:

- geographical boundary;
- migration canoe; and
- genealogical linkage.

Geographical boundary

2.3.1 Professor Hohepa quotes the following extended proverb, in which a ring of mountains are the "chiefly landmarks of Ngapuhi":

> The house of Ngapuhi was erected so that Papatuanuku, the earth mother, is the floor. The mountains are the pillars [and] Ranginui, the skyfather gazing down, is the roof. Puhanga Tohora (Whale spume) looks to Te Ramaroa a Kupe (Kupe's eternal beacon); Te Ramaroa looks to Whiria (Plaited), the taproots of strife, and the bastion of Rahiri (Ngapuhi's founding ancestor); Whiria looks at Panguru and Papata - to where the trees lean, standing in the westerly winds; Panguru-Papata - looks at Maungataniwha (the *Taniwha* mountain range), Maungataniwha looks at Tokerau (Hundred worms or north) Tokerau - looks at Rakaumangamanga (multi branched tree); Rakaumangamanga - looks at Manaia (named after an ancestor Manaia); Manaia - looks at Tutamoe; and Tutamoe looks at Puhanga Tohora. (B25(a):3)

These mountains stand as ramparts watching the territory between them; and they stand as symbols of the mana of Ngapuhi.

Migration canoes

2.3.2 (a) Matahourua

"Kupeariki is the person, Matahourua is the canoe, Ngapuhi is the *iwi*" (B25(a):3). Matahourua was a double hulled canoe (the name itself means double hulled), while Kupe means navigator. The wives of Kupe were Hineiteaparangi and Kuramarotini. Kupe sailed to Aotearoa from Hawaiki after battles with Hoturapa and after he had stolen Hoturapa's wife, Kuramarotini. He had decided to voyage here to search for the fish of his ancestor, Maui-Tikitiki-o-Taranga. Legend has it that while Kupe was navigating the sea of Tawhaki he saw something glistening in the eastern part of the ocean. On sailing closer he saw that it was a mountain whose cliffs shone in the setting sun. He named the mountain Te Ramaroa, the eternal beacon of Kupe. Much later the harbour was named Hokianga, the returning place of Kupe (B25(a):3-4).

The original population of Ngapuhi, then, would have been made up of settlers brought by Kupe. Professor Hohepa told us that according to Tuhirangi Ngapua the name Ngapuhi itself was a reference to the two puhi (chiefly virgins), Kupe's wives, Hineiteaparangi and Kuramarotini (B25(a):5). After many adventures Kupe and a few of his canoe companions went back to Hawaiki. The majority however remained to hold the land.

Professor Hohepa cited a genealogy from Kupe to the principal ancestor of Ngapuhi, Rahiri, recorded by Aperahama Taonui in 1848:

Kupe
Matiu
Makaro
Maea
Maahu
Nukutawhiti
Papatahuriiho
Papatahuriake
Mouriuri
Morekareka
Morakitu
Whiro
Toi
Apa
Raurukitahi
Kauea who was made a taniwha and travelled below the earth: his exit is south of Kerikeri
Ta ***Kauea*** ko
Te Tokooterangi
Te Rangi Taumuhumuhu
Te Rangi Tauwhanga
Te Hekana

Poupa
Maroro
Te Ika Tauirangi
Awa
Awanuiarangi
Rakeitapunui
Tamakitera
Puhimoanaariki
Te Hauangiangi
Rahiri (B25(a):5)[3]

(b) Ngatokimatahourua/Ngatokimatawhaorua
"Nukutawhiti is the person, Ngatokimatawhaorua the canoe and Ngapuhi is the iwi" (B25(a):6). The origin of the name Ngatokimatawhaorua refers to the adzes (nga toki) which were used to refashion Kupe's canoe, Matahourua, subsequent to its return to Hawaiki. Kupe's sailing instructions were handed down through several generations to Nukutawhiti and Ruanui, who thus eventually came together direct to Hokianga. The wives of Nukutawhiti were Hineariki and Aniwaniwa or Niwa. His esoteric minders or taniwha were Niua and Araiteuru, while his other main minder, Puhimoanaariki, returned to Hawaiki. Puhimoanaariki was also known as Puhi Te Aewa (Puhi the surfer) because of her having to surf to avoid the nets of Kahukura when she was leading Ngatokimatawhaorua from Hawaiki. This taniwha Puhimoanaariki is also credited with being the origin of the name Ngapuhi. Her second name is the origin of Ngati Te Aewa, the name adopted by Ruanui's people as their tribal name (but later replaced by the tribal names Te Rarawa and Te Aupouri) (B25(a):6-9).

(c) Mamari
"Ruanui is the man, Mamari (or Ngatokimatawhaorua) the canoe and Ngapuhi is the iwi" (B25(a):9). Mamari was also a double hulled canoe and Nukutawhiti was the ritual expert or tohunga. One account has it that Mamari came before Ngatokimatawhaorua and was escorted here by the two taniwha Niua and Araiteuru; and then on arrival the two taniwha went back to fetch Ngatokimatawhaorua. It is said that Ruanui was an in-law relation of Nukutawhiti.

When the descendants of Ruanui became more numerous and they separated from the descendants of Nukutawhiti, they took the name Ngati Te Aewa, then Ngati Ruanui, and much later, Te Rarawa. Because of the wars between other descendants of Nukutawhiti and Ruanui, Te Aupouri also came into being. In the light of such ties it is not possible to separate Te Rarawa and Te Aupouri completely from Ngapuhi (B25(a):9-10).

(d) Mataatua

"Toroa is the man, Mataatua is the canoe and Ngati Awa the people. Puhi is the man, Mataatua is the canoe and Ngapuhi is the people" (B25(a):10). It was Toroa's younger brother, Puhi, who brought Mataatua to Northland after an argument with him over gardens and agricultural lands in the vicinity of the canoe's land fall in the Bay of Plenty. When the Mataatua reached Tokerau it sank in the Taipa river where it remains to this day.

Some say it is this Puhi (Puhiariki), the grandfather of Rahiri, who is the foremost progenitor of Ngapuhi (B25(a):10-11).

(e) Takitimu

One of the kaumatua in his evidence named Takitimu as a canoe of Ngapuhi. This canoe under the command of Tamatea-mai-tawhiti first landed at Awanui near Kaitaia and later sailed down the East Coast before finally returning to the north. From the children of Tamatea-mai-tawhiti and his wife Te Kura come Takitimu links to all the tribes of Taitokerau. These include the ancestors Puhikaiariki and Puhimoanaariki (B25(a):11).

2.3.3 Whatever the canoe or ancestral origin, all major descent lines converge on Rahiri and his two sons Uenuku-kuare and Kaharau. It was these three who determined the mana, the genealogies and the territory of Ngapuhi. The name 'Ngapuhi' itself can, however, claim many origins. First of all there are the chiefly women (nga puhi), Hineiteaparangi and Kuramarotini. Secondly there is the taniwha Puhimoanaariki and her secondary name Puhiteaewa.

Thirdly there are Puhimoanaariki, Puhikaiariki and Puhitaniwharau - brothers in some accounts, successive generation names in others - all making claim to the name 'Ngapuhi'. Fourthly there is the Puhi of the Mataatua canoe. There may yet be others.

Genealogical linkage

2.3.4 While the foregoing paragraphs indicate a range of common origins and territory the totality does not add up to a clear unitary structure, either pyramidal or segmentary in outline. There is, for instance, no single founding ancestor, dynasty, mountain, lake or even canoe providing a symbolic origin. There are, on the other hand, significant political units among the Ngapuhi people and these are the hapu (which may be glossed as subtribe). Hapu are descent systems which interlock such that any individual is likely to belong to a multiplicity of hapu. Moreover there is indeed leadership in hapu, albeit of a charismatic kind. It will depend in any one case more on a leader's capacity to meet the needs of the group than on claims to a superior lineage or to primogeniture.

As a consequence, hapu units within and between the major sectors of Ngapuhi are in a state of dynamic equilibrium, waxing, waning and coalescing as they have done for centuries. Professor Hohepa quotes the Ngapuhi idiom "Ngapuhi-kowhao-rau" (Ngapuhi of the 100 holes) by way of explaining hapu autonomy within the maximal group (Ngapuhi) that is the '100' holes of a fishing net, where each hapu represents a kowhao, and the whole net is Ngapuhi.

Beyond the mundane issues of control over people and property, there are also the shared histories, spirituality, metaphysical "minders", guardians and landscapes. In Ngawha all are present, and it is precisely this, Ngapuhi say, that makes the Ngawha springs and the total geothermal resource a taonga for them. It is unique. Indeed it is a talisman for the whole tribe; hence their long held and ardent desire to have it protected.

2.3.5 As already indicated, Nukutawhiti and Ruanui and their followers settled in and about Hokianga after their arrival from Hawaiki, apparently not without a good deal of enmity festering between them. Several generations after the death of Nukutawhiti and Ruanui, Rahiri, a descendant of Nukutawhiti, married Ahuaiti and begat Uenuku-kuare who married Karearikì: the "discoverer" of the Ngawha springs (2.4.2).

2.3.6 Uenuku grew up with his mother at Pouerua, Ngawha and Waitangi. When adult he went in search of his father Rahiri. He found him in Hokianga, and also his step-brother Kaharau. Inevitably these two sons of Rahiri quarrelled, which in turn led to a division of territory between them and their followers. Professor Hohepa says the two sectors of Ngapuhi were created here, with Uenuku's descendants at Taumarere and those of Kaharau at Hokianga. These are the two parts of Ngapuhi mentioned in the proverb:

> **Ka mimiti te puna o Hokianga, ka toto ki Taumarere; ka mimiti te puna ki Taumarere, ka toto ki Hokianga.**
>
> **(When the spring of Hokianga dries up, that of Taumarere fills up; When the spring of Taumarere dries up, that of Hokianga fills up.)**

This refers to the ancestral human spring which, because of kinship links, flows from Hokianga to Taumarere providing support in adversity. At the same time the proverb also refers to the underground waterways linking Hokianga and Taumarere, the pathway of taniwha.

2.3.7 Maikuku, the first daughter of Uenuku-kuare and Karearikì, was raised as a puhi at Ruarangi near Waitangi. Her protected home was a cave below the village. News of her beauty and fame reached Huatakaroa of Tokatoka at Whangaroa and so he came to court her. They married and one of the descendants of their union, Te Ra, named

his hapu after his father,"Te Uriohua (takaroa)". The children of Maikuku and Hua provide genealogical links to all the major hapu from Hokianga to the Bay of Islands, to Whangarei, and to Whangaroa. They include Ngai Tawake, Ngati Tautahi and Ngai Takotoke, prominent claimants to Ngawha together with Te Uriohua.

2.4 The Springs

Discovery

2.4.1 We introduce this section by quoting a proverb given us by kaumatua Manga Tau, for it seems to encapsulate the traditional, and also contemporary, Ngapuhi view of Ngawha:

> Ko Moi te maunga
> Ko Ngawha te tangata
> He aroaro wahine
> He ara mahana (A54(l))
>
> Moi is the mountain
> Ngawha is the person
> The passage to the womb of a woman
> Is a warm passage (B36)

Metaphorically, a claim is being made, first for the association of warmth with the most vital part of the female body and thus with the source of human life itself, that is the Ngawha waters are life giving and healing; and second, for the association of these waters with a source deep within the Earth Mother, Papatuanuku.

2.4.2 Professor Hohepa's authority on the discovery of the Ngawha springs is Hemi Whautere. Whautere identifies himself thus:

> My father's name is Witehira Tauahiku, from Mataraua, Kaikohe, a chief of Ngapuhi. My name as I stand is Hemi Whautere, from Mataraua, Kaikohe, and Ngapuhi... I want to talk about some old stories, about an important *taonga* within Ngapuhi, about the chiefly bathing waters, to which the [people of] the land hurry to those bathing waters. The reason I want to talk about those waters is because it has been discovered that the important *taonga* is there in New Zealand, giving wellbeing and health for the people according to those who witness it, be they Pakeha or Maori, and also to me, standing here. (B25(a):33-34)

We continue with a summary from Professor Hohepa's translation of Whautere's account. Karearikl lived with her husband, Uenuku-kuare, and their children in the area which at that time, said to be the 16th century, was covered in bush and rich in bird life. One day Karearikl came upon the springs, tested them and discovered their curative powers, particularly those giving relief to mothers with post-parturition pains. Karearikl later killed some of her female slaves who thereupon became taniwha in a nearby lake, collectively taking the form of a kauri log known to this

day by the name Takauere. After Karearikl lost her pet dog Kaipahau (killed for food), she kept hearing his spirit barking night and day.

Whether allegory, myth or history, such statements serve to impart ownership rights, certainly on the basis of discovery and subsequent unbroken occupation and control over whatever resource was regarded as essential for the people's well-being. And none has been more valued by Ngapuhi than the springs at Ngawha.

Taniwha

2.4.3 Taniwha loom large in Ngapuhi thinking and are referred to by many of their elders. The most relevant taniwha for this case is the log Takauere. Professor Hohepa says they are regarded as "esoteric minders", protectors of important places, which then have their importance enhanced by the presence of taniwha. Taniwha have their own idiosyncracies, sexual characteristics and innate powers. They may create their own routes (above and below ground) and their own forms. Thus Takauere not only travels underground to nearby Lake Omapere, he can also expand so that his head is there and the presence of his tail may be seen 'whipping' in the lakes adjoining the springs as noted above.

2.4.4 One of the more profound aspects of the taniwha phenomenon is that it expresses the traditional view, confirmed by kaumatua Karewa Marsh, Ronald Wihongi, Anaru Sarich, Ngatihaua Witehira and others, that the underground resource and its surface manifestation is holistic and undivided. There can be no springs with all their miraculous healing powers that do not derive from a source deep within Papatuanuku. Karewa Marsh quotes the following aphorism:

> Ko te Ngawha te kanohi o te taonga, engari ko tona whatumanawa, ko tona mana hauora, no raro.
>
> Ngawha is the eye of the taonga, but its heart, its life giving power, lies beneath (the surface). (A54(d))

And she adds that "I know in my heart that this is so".

2.4.5 It is asserted that only ancestors of exceptional mana can create or summon and control taniwha. Kupe, Nukutawhiti and Ruanui all had such powers. Taniwha-creating mana came down to Karearikl and possibly to her daughter Maikuku. Karearikl's actions in despatching her slaves, whence Takauere, are significant. Her dog, Kaipahau, is also significant. He becomes another minder of the pools. Both Kaipahau and Takauere and other mokaikai (minders) have changed the whole characteristics of the pools in the eyes of Ngapuhi to more than pools of medicinal and personal value, indeed to objects of esoteric protection over the mana, tapu and wairua of the Ngapuhi people.

2.4.6 All the traditional accounts of the evolution of Ngapuhi from the time of their arrival from far distant Hawaiki allow the proposition that the Ngawha springs and the total geothermal resource have lain within Ngapuhi territory and under continuous Ngapuhi control. The tribunal heard no contrary view.

2.4.7 Ngapuhi history points conclusively to the discovery of the springs themselves by one Karearikl. And as already stated Karearikl can be located on the genealogical map of Ngapuhi, both as a descendant of the founding ancestors of the tribe and as a famed ancestress in her own right.

2.4.8 But for Ngapuhi the springs have always been much more than a resting place at the cross roads in their territory. They have been revered and protected for their seemingly miraculous life giving powers. That this should have been so for generations of their forebears imparts a spirituality, indeed a tapu quality, to the springs for the Ngapuhi of today. They see themselves as trustees of a tribal taonga and thus speak of it as much in metaphorical as in colloquial terms. We turn, therefore, to consider the question of trusteeship.

2.5 Rangatiratanga and Kaitiakitanga

2.5.1 In the context of Treaty claims and Treaty issues generally, the word in Maori most commonly used as an equivalent to trusteeship is rangatiratanga. The meaning of rangatiratanga has been explored at length since the New Zealand Maori Council submitted its *Kaupapa : Te Wahanga Tuatahi* to government in February 1983. In *Kaupapa* it offers a philosophical basis for relating the Treaty of Waitangi to Maori land tenure - a basis, moreover, for all current Maori land legislation. And at the heart of this is the following statement about the nature of rangatiratanga:

> Just as the Crown has found meaning in the concept of sovereignty, so the Maori people find meaning in the concept of rangatiratanga. In the Treaty, the Maori people's 'full' 'exclusive' and 'undisturbed possession' (of 'lands', 'estates', 'forests', 'fisheries', and 'other properties') is rendered by: 'te tino Rangatiratanga'. However, while rangatiratanga may indeed mean 'possession', it also means much more than that, today, as in 1840. In its essence it is the working out of a moral contract between a leader, his people, and his god. It is a dynamic not static concept, emphasizing the reciprocity between the human, material and non-material worlds. In pragmatic terms, it means the wise administration of all the assets possessed by a group for that group's benefit: in a word, trusteeship. And it was this trusteeship that was to be given protection, a trusteeship in whatever form the Maori deemed relevant.[4]

And with respect to landed assets it adds:

> The rights and privileges granted to the Maori people in the Treaty apply in the fullest sense to land. The protection afforded by the Crown - the guarantees - are needed as much today as ever.

> Maori land has several cultural connotations for us. It provides us with a sense of identity, belonging and continuity. It is proof of our continued existence not only as a people, but as the tangatawhenua of this country. It is proof of our tribal and kin group ties. Maori land represents turangawaewae.
>
> It is proof of our link with the ancestors of our past, and with the generations yet to come. It is an assurance that we shall forever exist as a people, for as long as the land shall last.[5]

For its part, the Waitangi Tribunal has discussed the meaning and significance of rangatiratanga in many of its reports, sometimes at considerable length. In its *Ngai Tahu Sea Fisheries Report 1992* the tribunal quoted from a very full discussion of rangatiratanga in the tribunal report on the *Muriwhenua Fishing Report 1988* and added certain comments of its own. This tribunal adopts what has been said in these two reports in so far as it is relevant to the issues before it. An important element of rangatiratanga is described in the *Muriwhenua Fishing Report* and may be repeated here:

> "Te tino rangatiratanga o o ratou taonga" tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but [over] persons within the kinship group and their access to tribal resources.[6]

Finally, the tribunal in its *Ngai Tahu Sea Fisheries Report*, which adopts the foregoing passage, also noted that rangatiratanga "includes management and control of the resource".[7]

2.5.2 Having regard to the present case, however, such discussion needs to be extended to embrace other aspects and concepts of the tribal political system: as they were at 1840, and then during the lengthy period following the advent of the Maori Land Court in 1865 down to the present. During this time the Maori people have been introduced to the processes (and consequences) of, inter alia, individualisation of tribal title, title 'improvement' and the formation of trusts.

2.5.3 As was to be accepted later by the Maori Land Court, recognition of 'title', in pre-contact times, was based on the twin factors of discovery or conquest, and occupation. One without the other would have been insufficient. A tribal or subtribal group that could successfully assert and sustain such a claim would be regarded as exercising their 'mana whenua' (literally authority over the land). Having first

secured a domain for itself, a group would then set about ensuring its political integrity and its survival. The effectiveness of its organization to achieve these ends would in turn be proportional to the effectiveness of its rangatiratanga in all relevant spheres of social action. Thus the care for and fostering of resources was an integral part (but only a part) of rangatiratanga, and where resources were clearly demarcated, the rangatiratanga in respect of them could equally well be described as kaitiakitanga (guardianship).

2.5.4 It may also be noted that given the ends of group integrity and survival, sharing in the common wealth did not mean that shares in an arithmetic sense were ever allocated to individuals, let alone shares with the contingent right to transfer them out of the group altogether. If rights in, and access to, resources *were* transferred it was always done by the chiefs and elders, the rangatira and kaitiaki, for a political purpose, such as to cement an alliance.

And like alliances in general they had to be maintained by an on-going reciprocity. Otherwise, of course, rangatiratanga (and kaitiakitanga) could be lost in war; nothing was permanent or immutable either in the realms of the sacred or the secular.

2.6 Taonga

2.6.1 Resources, the objects of protection and conservation, acquired a value heightened by the formal attention paid to them by ritual prohibition and sanction, mythical explanation and the like. Accordingly they were known as taonga (valued possession or anything highly prized) and invested with an aura of spirituality. The word 'anything' is used advisedly for taonga may include any material or non-material thing having cultural or spiritual significance for a given tribal group. Previous cases before the tribunal have thus included land, forests, fisheries, the Maori language and literature - all regarded as taonga, objects of guardianship, management and control under the mana or rangatiratanga of the claimant group, hapu or iwi.

2.6.2 Such a nexus then, of hapu, rangatiratanga, kaitiakitanga and taonga was given explicit recognition in the Treaty. Moreover, no Maori signatory to the Treaty could have had reason to doubt that the Crown would protect that nexus for as long as the Maori required it.

Article 2 of the Treaty is clear on this point. That said, the present case is novel to the extent that the taonga is a geothermal resource. What therefore remains to be considered is whether the foregoing general statements can be applied to this particular resource.

2.6.3 Kaumatua evidence is relevant. For example, Ngatihaua Witehira said:

> Our ancestors [knew] that the heart of Ngawha is underground. They are channels of hot water flowing underground. They knew and believed that it was one taonga.

> underground and up on the surface of the ground. It has been said that the hot pools represent the eye of the taonga. But its heart is in, is within the depths of mother earth. If we abuse the very heart the pain will affect the heart, the eyes. It is all one treasure [taonga]. It belongs to all tribes of Nga Puhi - these are the histories of those taniwha. These are the histories of this taniwha like Takauere who moves underground from hot springs to hot springs. (B36; A54(n))

Here the resource is held to be a unity and a taonga, subject to the jurisdiction of Ngapuhi hapu.

And again, another kaumatua, Kereama Rankin said:

> The Springs, indeed the entire underground geothermal resource is a taonga to us. You have heard of its miraculous healing powers and I can confirm in my long experience as Kaitiaki of that taonga, that everything that these Kaumatua have told you is the truth. I believe that its healing powers, God-given, are sourced deep within in our Mother Earth. Any interference in that spiritual source is a desecration of our taonga. (A54(q))

For Mr Rankin, a kaitiaki like his father before him, the geothermal resource is a unitary taonga about which, furthermore, there is a profound sacred quality over and above that of the secular. The special powers of the pools lie not in the pools themselves, but are God-given and derive from the underground resource. For both kaumatua, too, the taonga is held to be possessed of a life-force or mauri (for example having a 'heart' exercising healing powers); yet another basic ingredient in the traditional guardianship, management and control exercised under rangatiratanga.

A final observation may be made regarding the unitary character of the geothermal resource. Since the springs themselves lay within the territory over which Ngapuhi had always exercised unchallenged their rangatiratanga, it follows that in their view such rangatiratanga would have extended over the entire resource equally above and below the surface of the land and throughout the extent of its manifestation. This, we believe, was the position at 1840 and, the claimants say, it is still the case today. On all major counts, then, the Ngawha springs and the underground resource are a taonga for Ngapuhi.

2.7 Individualisation of Title

2.7.1 On the other hand, the foregoing propositions have also to be seen in the light of the actions of the Maori Land Court involving the award of title to the land in and about the springs and the subsequent orders of succession, partition, and sale.

Transactions involving the Parahirahi blocks will be dealt with in detail in the next chapter. However a preliminary point might be made with respect to the award of

title to the claimants to any block of tribal land. As may be understood from the statement above about the pre-Maori Land Court era, the simple act of awarding title and naming individual owners has generally dissolved in one stroke the rangatiratanga and kaitiakitanga over the land and its resources. It has exposed individuals to the responsibilities of being both owners and trustees of the tribal heritage at the same time without, however, requiring them to be accountable to beneficiaries, and without protecting them from their own possible prodigality and loss of their community's means of survival.

2.7.2 In the present case there has been the added consequence of the owners failing to be informed of the implications of the separation in law of the springs from the underground resource, further undermining their value system and regard for their taonga. That some of the owners nevertheless have long appreciated the predicament that they were facing in these terms and have wished to find some resolution is perhaps remarkable. We pursue these themes in outline, limiting ourselves to reactions by Ngawha-based rangatira to opportunities as they found them; opportunities at odds with those which had traditionally governed tribal life.

2.7.3 The first recorded commercial intrusion into the Ngawha area would appear to have resulted from Pakeha interest in exploiting the mineral resources there. This in turn brought about a series of surveys. Figure 2 shows ten blocks of land owned by Ngawha and associated hapu which were surveyed between 1868 and 1895 (A45). The first three blocks to be surveyed were to the north of Tuwhakino. They were Ngatokaturua (1868), Waikahikatea (1868) and Waiwhariki (1869). Then followed the survey of the Tuwhakino block in 1872 immediately to the north of the Parahirahi block and the Otutaorau and Tokakopuru blocks to the east of Parahirahi in 1873 followed by the Parahirahi block later in 1873 (3.2.1).

The surveys having been completed thus far, Heta Te Haara, Paora Ngai and Wi Raukawa, all of Ngati Rangi, then applied to the Maori Land Court to have the ownership of the Tuwhakino block determined. This was done on 15 July 1873. The block was 1086 acres in extent. On its southern margin a triangular area of five acres was cut out and included in the Parahirahi block. This small area later became the Parahirahi C block, discussed in chapter 3.

2.8 Ownership and Sale

2.8.1 The result of the application was the immediate award of title to Heta Te Haara solely. Thus in one swift decision the court converted one man's rangatiratanga into a valuable personal estate, severed from all other tribal considerations. It was also sufficient to set in train a series of leases and subdivisions, the granting of mining rights to Pakeha prospectors and ultimately, during the next 20 years, sale. It can be noted that when in 1894 Te Haara sold the final 621 acres of his estate, he made no reservation of the hot springs on the land. Alienation was total (3.5).

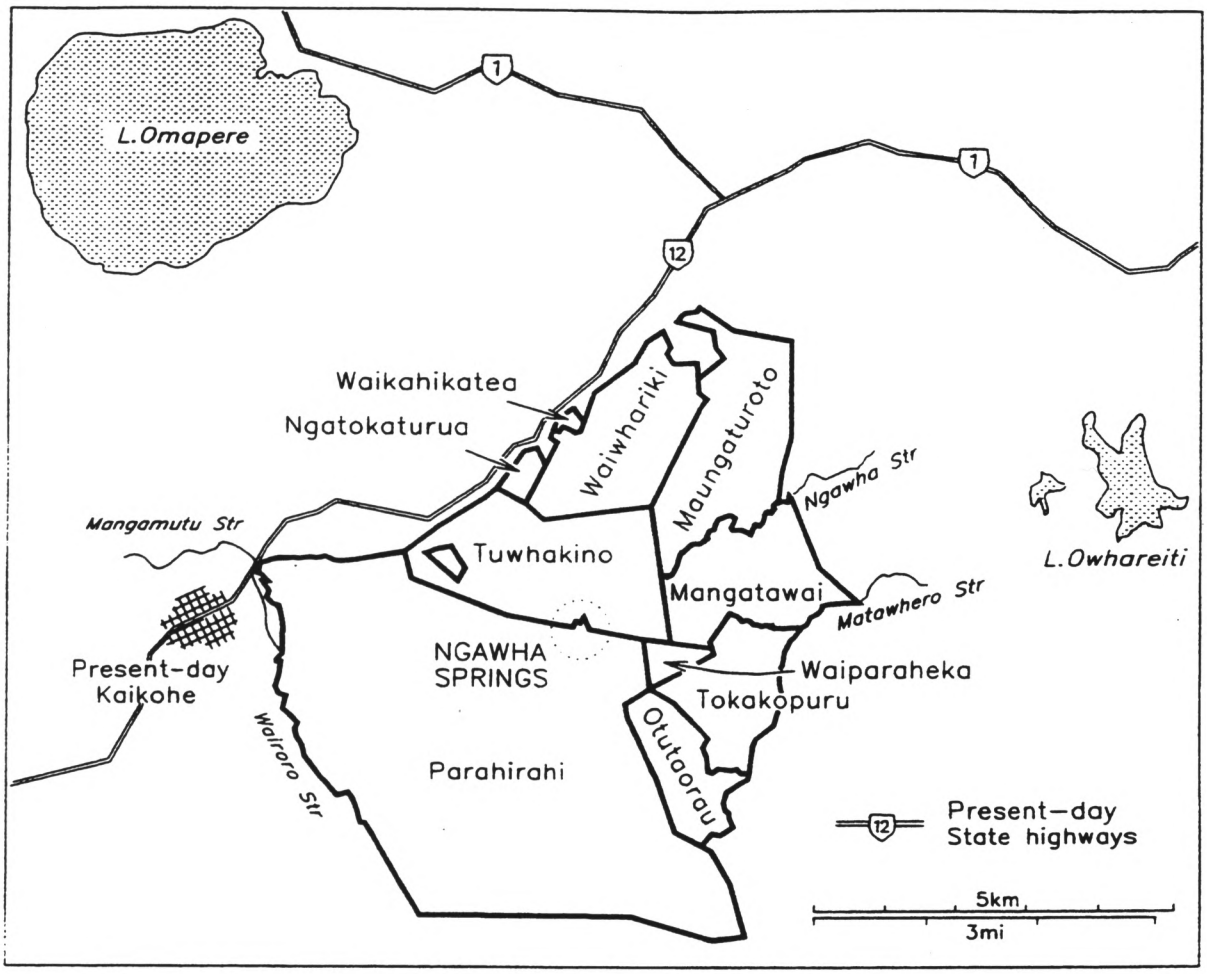


Figure 2: Maori land blocks at Ngawha

2.8.2 However, there was still the Parahirahi block and in this instance not one, but 37 owners were named on the memorial of ownership: 36 of Te Uriohua and one of Ngati Rangi hapu. At this time, November 1874, there was a restriction on alienation (3.6.2). Early in the following year various owners applied to the court to have the Parahirahi block subdivided and to settle the question of whether or not owners had equal shares (3.7.3).

2.8.3 What is apparent, then, is the pivotal role filled by the court in making kaitiaki into "owners" and determining the extent of their kaitiakitanga. Nevertheless what these kaitiaki did manage to achieve was a reservation of the five acre Parahirahi C block plus the springs they contained, and an inalienability of it without the assent of the Governor (3.7.7). Yet rangatira (and kaitiaki) were now inextricably caught up in a web of legal constraints and commercial opportunities. For example one, Hirini Taiwhanga, became a free ranging entrepreneur, acting as middle man between the

Land Purchase Office and his co-owners while at the same time taking a commission for his trouble (3.8.3).

2.8.4 The record also shows how owners were dividing themselves into sellers and non-sellers, with the latter appearing to have at least some regard for exercising a guardianship role over the springs, as distinct from being dissatisfied with a low price being offered for their shares. Kaumatua Ronald Wihongi put it this way:

> This [Parahirahi block] was the land that was bored by the Government. In the past ... nine years. Our ancestors lived on this land. Five acres of this property was surveyed from the main block of Parahirahi for bathing pools. That is why it is called Parahirahi C. The purpose for which it was surveyed out, it was because our ancestors knew, that if these pools were surveyed out, they will hold on to their sacred [possession] forever. Their desire was that they should retain the whole of their sacred possession. The hot springs above the ground, and all the ... hot streams under the ground. In their minds, if they were to hold on to where the outlet of this sacred possession was, they will retain it all, right down into the bowels of the earth. That was why they had this great desire to hold on to the five acres of Parahirahi C forever more. It was because of the sacredness, the prestige and the awe, of the hot water and pools of the Ngawha, "the hot pools of Ngawha". They knew immediately, the bubbling hot waters, the waters of Ngawha were those that came from the very heart of the earth. They knew the stories about Takauere. Who went underground, from Ngawha, to that hot pool. He had to swim in warm water, hot water, these are the waters under the ground and the waters above the ground. They are one and the same, waters under the ground and waters above the ground, they are one and the same. There is no importance to the Ngawha if there [are] no swirling hot pools underneath. (B36:52-55; A54(a))

2.8.5 However, in 1894 the hapu found themselves bereft of four of the five acres in Parahirahi C referred to by Mr Wihongi, together with their kaitiakitanga over the taonga the land enclosed, for it had all passed to the Crown by deed of purchase. The circumstances of this are discussed in the following chapter. Thus in a relatively short time surveys, subdivision, the award of title to groups of co-owners, ignorance of procedure, pressure from the Crown and others to sell, reduced to 804 acres (including the one acre left in C block) the rangatiratanga and kaitiakitanga hitherto exercised for centuries over a turangawaewae several thousand acres in extent. Today only 15.05 acres remain as Maori freehold land (3.18.2).

2.9 Reaction to Loss

2.9.1 Some, however, were not persuaded that this was in fact the case and they continued to occupy the land around the springs, that is, the four acres adjoining their own one acre. More than that, in 1926 they petitioned Parliament to enquire into the apparent loss of the four acres. It was to no avail. Undaunted, 11 owners of the one acre block, known as Parahirahi C1, then sought to reserve it. This time, 23 December 1926, they were successful.

2.9.2 By August 1935 nine of the 12 original owners[8] in Parahirahi C1 were dead and not succeeded to. Judge Acheson held a sitting of the Native Land Court at Kaikohe on 27 August 1935 to supervise the election of a committee of management. The judge did not appoint successors to the deceased owners because the "large gathering present" was reportedly unanimous in the view that sales of interests might take place if succession orders were made. The court was asked not to appoint successors. Twelve representatives of the original owners then met and elected from their number a committee of five. The court recommended the issue of an order-in-council under s298(1) Native Land Act 1931 appointing them a committee of management for the Native reservation (Parahirahi C1) (A50(a):99-100). The minutes of the meeting also record that it was decided by the hui that two honorary European members be appointed to the committee by the domain board (which in December 1934 had been set up under s34 of the Public Reserves, Domains and National Parks Act 1928 to administer the four acres) on the condition that the board allow two committee members to act as honorary members of the domain board. It was hoped this would lead to good relations and management of the two hot springs areas. The meeting "expressly stipulated" that none of the foregoing arrangements was to be taken as a waiver of their claim to the balance of the original Parahirahi C block. They continued to claim that it was never sold by them, but was included in the land awarded to the Crown "without their knowledge or consent" (3.15.7).

As the previous paragraph indicates, there was to be no resiling from efforts to recover the four acres, begun with the 1926 petition and followed in 1929 and 1931. Each failure prompted another attempt, a pattern continued through the war years of 1939, 1941, 1942, 1944 to 1946. Leaving aside detail for further discussion, something may be said at this juncture about the rangatiratanga and kaitiakitanga of the Ngawha hapu, chief among them being the Uriohua and Ngati Rangi.

2.9.3 Where customary land tenure had been part and parcel of tribal political organisation with chiefs and elders holding rights of administration for the tribal good, individualisation of title through the Maori Land Court gave unfettered rights to those fortunate enough to be named as owners. It would seem from the record that there was comparatively little desire to exercise rangatiratanga and kaitiakitanga over land in general whenever alienation was in prospect. As against that, however, there has also been a clear intention to retain trusteeship over the springs, at least on the Parahirahi block. This intention has been steadfast over at least two generations to date and underlined by a continuous stream of petitions and protests, not over the comparatively vast acreage surrounding the springs acquired by the Crown, but certainly over the four acres of the five acre Parahirahi C block containing the springs themselves.

2.9.4 The sense of rangatiratanga and kaitiakitanga held by the descendants in the land would appear to be further demonstrated by their acts of occupation of the Crown's four acres (until evicted) and by their deliberate setting up of a management

committee for the one acre Parahirahi C1 block instead of allowing a further diminution of trusteeship through succession to deceased owners. At least this much has been consistent and is reflected in the personnel of the claimants, the witnesses, and the character of the claim made in the petitions for the return of the four acres in the Parahirahi C block.

We may now look more closely at the roles of the Crown and the Court in the acquisition of the land at Ngawha.

References

1. According to Professor Hohepa, Ngawha is a self-explanatory descriptive placename, that is, a place that has boiling springs as well as other volcanic activity (B25(a):29).

2. Hongi Hika, Paratene Te Ripi and Hone Heke were all sponsors and supporters of the Anglican faith among the Ngapuhi people; they believed that the springs are a God-given healing resource and that Ngapuhi have the stewardship of it.

3. Aperahama Taonui "He Pukapuka Whakapapa mo nga Tupuna Maori" ms 120, Auckland Institute and Museum Library, Auckland, p 59ff

4. New Zealand Maori Council *Kaupapa: Te Wahanga Tuatahi* (Wellington, New Zealand Maori Council, 1983) p 5

5. Above n 4 p 10

6. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (*Muriwhenua Fishing Report*) (Wellington, 1988) p 181

7. "The Ngai Tahu Sea Fisheries Report 1992" (Wai 27) 5 *WTR* (Wellington) p 100

8. Tane Haratua's share, mentioned in the court records, does not appear on the court order itself, where it was incorrectly added to that of Tane Marupo (A50(a):54; B35:44; B34:101-102). The court order, therefore, lists 11 rather than 12 owners.

Chapter 3

The Crown's Acquisition of Parahirahi Block

3.1 Introduction

The kaumatua evidence related in the previous chapter has demonstrated the centuries-long association of the claimant hapu with what are generally known as the Ngawha hot springs. That they were a sacred taonga not only to these hapu but all of Ngapuhi is readily apparent. At the time the Treaty was signed in 1840, hapu of Ngapuhi occupied land in and for some distance around these taonga. Some hapu resided in the immediate vicinity. They were the kaitiaki. At that time the land was unsurveyed. But as with Maori land everywhere, all land, hot and cold springs, lakes, rivers and other natural features bore a distinctive name often recalling historical incidents or commemorating the names of ancestors.

Locality of the springs today

3.1.1 The main hot springs of Ngawha tend to be concentrated in a relatively small area (see figure 3). Barbara Simpson, an independent science consultant specialising in geothermal and underground water, describes the amount of surface activity associated with the Ngawha geothermal field as being remarkably small given the known potential of the reservoir. But she refers to numerous surface features within and around the Ngawha Hot Springs Recreation Reserve, the Spa area, and the Ngawha Springs Hotel. Those immediately adjacent to the recreation reserve, indeed part of the same group of surface features, are owned by the trustees of Parahirahi C1 Maori reservation. All the above springs are located near the centre of the known geothermal anomaly (A31:36). In addition there are a number of outlying springs, some of which are probably part of the Ngawha system, and yet others which, because they are remote and derivative in relation to the main system, are unlikely to be affected by exploitation of the deep reservoir. The various springs are discussed in more detail in the next chapter (4.4.2).

Early European accounts of the springs

3.1.2 One of the earliest published European references to the springs at Ngawha, then known as the Ohaeawai Hot Springs, appears to have been a book by William Wade, originally published at Hobart in 1842. He referred to them as "sulphurous lakes, warm near the margin, with adjoining pools of warm or boiling water". And, later, to the springs at this place being "resorted to by diseased natives from the Bay of Islands, who bring baskets of provisions with them, and remain on the spot to use the sulphur warm-bath till a cure is effected".[1]

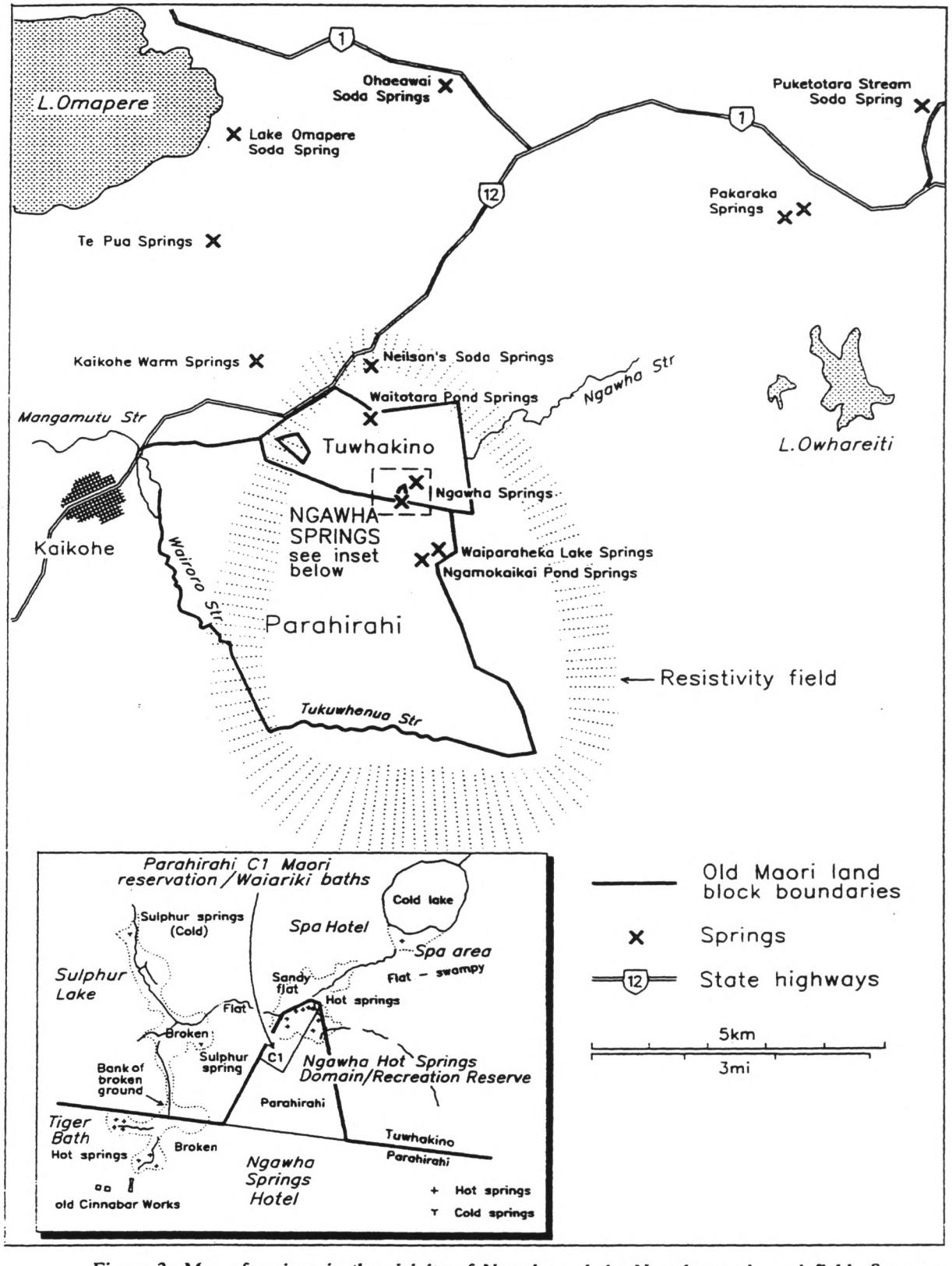


Figure 3: Map of springs in the vicinity of Ngawha and the Ngawha geothermal field. *Sources:* **B37:12; B31:35-36. Inset: Map of springs around Parahirahi C1 (drawn early this century). Place names and hotels have been added in larger print.** *Sources:* **B14:33; C2:87; C7:14-15; A36:99**

3.1.3 The noted Austrian geologist Ferdinand von Hochstetter (1829-1884) visited New Zealand as part of an Austrian government expedition in 1859 (A52:11-12). Hochstetter, like Wade, noted the Maori use of the springs at Ngawha:

> Volcanic activity must be considered extinct in the Bay of Islands Zone. A few hot springs and solfataras that lie a few miles south of Waimate, in a remarkable crater-like depression in the ground on the shores of two small lakes in Otaua district, are the last after-effects. Sulphur incrustations and efflorescences of alum and salammoniac here cover the soil, hot steam gushes forth from the earth at many points, and many warm springs and mud pools of 130° to 168°F surround the shore of Ko-huta-kino, the smaller of the two lakes. The natives have made use of these springs with good results for many kinds of illness, and although the nearby surroundings offer no charm at all as landscape, yet perhaps in time to come the healing properties of this Waiariki (as the natives call natural warm baths) will bring it a reputation among the European colonists as well. (B34(a):120)[2]

Dr Donald Loveridge, a Crown historian, noted that Ko-huta-kino is possibly the Lake Tuwhakino of today.

The presence of minerals

3.1.4 Dr Loveridge noted in his evidence that Hochstetter did not mention the presence of mercury, but it was soon realised that various forms of this metal were present there (B34:6).

The first published account to mention Ngawha mercury appears to be by a Captain F W Hutton in a paper read to the Auckland Institute in 1870.[3] Hutton noted that on a visit in 1869 he had found veins containing both quicksilver (metallic mercury) and cinnabar (mercury ore) and deposits of sulphur.

Mercury was also found by visitors in about 1870 and in 1872 samples of quicksilver and cinnabar were taken. The commercial potential of the Ngawha - Tuwhakino deposits was thought by some to be significant (B34:7). As will be seen, exploitation by Europeans was soon to follow.

3.2 Surveying the Land

3.2.1 As noted above (2.7.3) figure 2 shows ten blocks of land owned by Ngawha and associated hapu which were surveyed between 1868 and 1895 (A45). The first three blocks to be surveyed were to the north of Tuwhakino. They were Ngatokaturua (1868), Waikahikatea (1868) and Waiwhariki (1869). Then followed the survey of the Tuwhakino block in 1872 immediately to the north of the Parahirahi block and the Otutaorau and Tokakopuru blocks to the east of Parahirahi in 1873 followed by the Parahirahi block later in 1873.

3.2.2 It is clear that the survey of the Tuwhakino and Parahirahi blocks was encouraged by the interest of Europeans in prospecting and hopefully exploiting mineral resources in the district. The survey of the other blocks in the vicinity may well have been due to the same interest. One of those interested in the mercury deposits in the Ngawha springs area was the Pakeha John White.

An agreement to lease the Parahirahi block

3.2.3 On 16 December 1872 Wiremu Hongi Te Ripi and nine other leading members of Te Uriohua hapu agreed in writing to lease to John White an area of land then known as "Te Ngawha Tuhakino" (later defined as the Parahirahi block).[4] The principal purpose of the lease was to be the mining of quicksilver. The agreement proposed that:

- the lessors would receive one quarter of all proceeds from the mining and could inspect the lessee's books;
- the lessors retained the right to dig kauri gum and the lessee the right to all trees and forests;
- the lessors' descendants were to inherit all houses and other structures on the land when the lease expired 100 years later in December 1973; and that
- "One place should remain for Maori in Te Ngawha as a place for their sick to go, so that there are two bathing holes, the long one and the broad one." (B35:125)

Parahirahi block surveyed

3.2.4 The agreement with White also provided that Wiremu Hongi Te Ripi and his people would apply to the Native Land Court for the issue of a Crown grant for the land "Te Ngawha Tuhakino". All land had to be surveyed before ownership could be determined by the Native Land Court. No doubt in order to facilitate the completion of the lease to White, Wiremu Hongi Te Ripi and his people arranged for "Te Ngawha Tuakino" to be surveyed. Cheal's survey plan contained 5955 acres but after 858 acres (to become the Tukuwhenua block) was cut out in the southern portion, the block was reduced to 5097 acres (B35:6). Figure 4 shows this and an endorsement by Judge Maning noting the change of name from "Ngawha Tuakino" to Parahirahi block. This may have occurred when the plan came before the Native Land Court on 16 July 1873 (B35:8).

Tuwhakino block surveyed

3.2.5 Meanwhile the survey of the Tuwhakino block had been completed the previous year, 1872. The southern boundary of this block adjoined what would become the Parahirahi block. This survey plan was produced in the Native Land Court on 15 July 1873, one day before the court hearing on the Parahirahi block. Heta Te Haara,

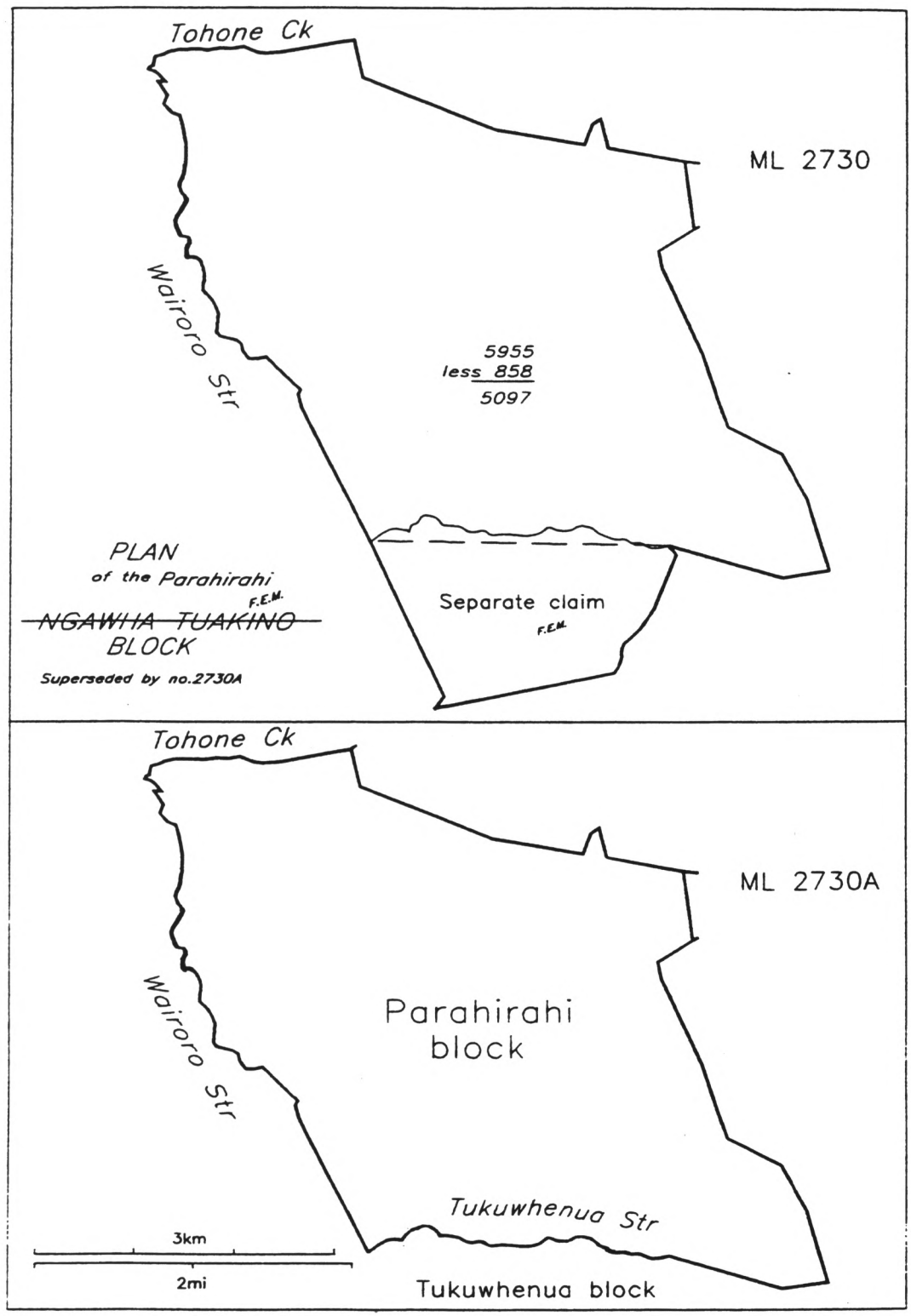


Figure 4: Diagrams of Cheal's survey and compiled plans ML 2730 and ML 2730A of the Parahirahi block, 1873. ***Source:*** **B35:7 (original held at DOSLI Auckland)**

a prominent Ngati Rangi chief and Paora Ngai and Wi Raukawa of Ngati Rangi applied to have the ownership of the Tuwhakino block determined by the court (B17:5). The block contained 1086 acres (A46:9). This excluded a wahi tapu, Orauruwharo, of 32 acres (A45:4). Along the southern boundary the plan showed a small triangular block of five acres had been cut out of the Tuwhakino block. This small area later became Parahirahi C block.

Dr Loveridge has expressed the opinion that there was clearly some kind of interaction between Te Haara and the members of Te Uriohua hapu who applied to have the ownership of the Parahirahi block settled by the court, as to the boundaries of the two blocks. As Tuwhakino was surveyed first, he thought this to be the only way to account for the triangle of five acres on the common boundary referred to above (B34:8-9). Dr Loveridge went on to say:

> Given the presence of the springs within the triangle, it looks very much as if the Parahirahi group demanded and received this area of springs as their 'share' in a division of the geothermal resources of the Ngawha area between themselves and Heta Te Haara. It would appear that the larger portion of these resources were nonetheless within the Tuwhakino block. (B34:9)

An alternative view is that this allocation of the hot springs had been in existence for many years if not centuries as between the respective hapu and the boundary line, no doubt straightened by survey, simply reflected this.

The tribunal believes this alternative view to be an equally credible explanation of how the triangular five acres came to be cut out of the Tuwhakino block. Whether Dr Loveridge is correct in believing that the larger portion of the geothermal resources was within the Tuwhakino block is an open question in the absence of accurate information as to the surface manifestations at the time. The tribunal accepts that there were a significant number of hot springs in close propinquity in each of the two blocks at the time, as indeed there are today.

3.3 The Court Determines Ownership of the Tuwhakino Block

On the day before the determination of ownership of the Parahirahi block went through the court the entire Tuwhakino block of 1086 acres was awarded to Heta Te Haara alone on 15 July 1873. The certificate of title was signed on 20 February 1874 but the Crown granted Tuwhakino to Te Haara as from 15 July 1873 (A44:75).

3.4 Subsequent History of the Tuwhakino Block

Because of the presence of hot springs on the Tuwhakino block immediately adjoining those on the Parahirahi block, it is necessary to consider briefly how the owner Heta Te Haara dealt with his property including the springs.

Heta Te Haara leases the block

3.4.1 On 20 May 1874 two leases of the land by Heta Te Haara to one William Earl were registered on the title. Dr Loveridge told us that Earl had plans to extract mercury from the land but as far as is known nothing came of them for a decade. One local historian, Kay Boese, attributed this to a drop in mercury prices (B34:12).[5] These two leases, numbered 64 and 65, have not been found so their contents are unknown. In any event they were surrendered on 28 January 1878 when a new lease registered number 201 was granted by Te Haara to Earl. This lease, dated 11 December 1876, was for the entire block of 1086 acres. It included:

> all mines, metals, metallic ores, minerals and mineral springs of what nature or kind soever lying or being upon within or under the said land. (A44:80)

The lease was for a term of 21 years at a yearly rental of £100. It gave the lessee extensive powers to mine and extract minerals. In return Earl was to pay Te Haara a royalty of ten percent on the gross value of any minerals taken from the land. A certificate of satisfaction was given by Trust Commissioner Theodore Haultain pursuant to s6 of the Native Lands Frauds Prevention Act 1870 (A44:79).

Heta Te Haara sells part of the Tuwhakino block

3.4.2 In the meantime Te Haara subdivided the Tuwhakino block into two parts, the northern part consisting of 465 acres and the southern portion, adjoining the Parahirahi block, of 621 acres. On 5 July 1878 Te Haara transferred the northern block of 465 acres to William Earl (A44:104). Lease 201 was surrendered on 12 September 1879 (A44:83). The memorandum of transfer contained the following provision:

> Also reserving unto the said Heta Te Haara the right to use the waters contained in the two pools or lakes known by the names of Waima and Waipaoa and coloured blue on the plan hereon .... (A44:104)

On 10 April 1884 by memorandum of transfer Heta Te Haara surrendered the foregoing reservation to William Earl (D1) and the transfer was registered and a new title free of this encumbrance was issued to Earl on 14 May 1885 (A44:104-105).

The record shows that in May 1888 Earl sold the northern block to three purchasers described as gentlemen of Sydney (A44:105). Boese wrote that the purchasers planned to start cinnabar mining operations in 1889 but nothing actually came of the venture (B34:71).

Te Haara leases the hot pools on the remainder of the block

3.4.3 On 10 April 1884 Te Haara leased the remaining 621 acres to Earl for five years. This document, numbered 904, leased to Earl:

> All and singular the mineral medicinal chemical and other springs of water whatsoever now existing on the said piece or parcel of land and the absolute and exclusive right to the use and enjoyment of the said springs .... (A44:83)

The lease contained the following provisions relating to access to the hot springs:

> The Lessor doth hereby grant to the Lessee for the use of himself and his tenants, servants and work people and also for the use and benefit of all persons going to and from the said springs hereby demised with the permission and approbation of the Lessee full and free liberty of ingress egress and regress passage and way with or without horses cattle carriages carts or vehicles of any description whatsoever through over and upon all and singular the existing tracks roads or pathways from the Government Roads near the said lands and from the adjacent lands of the Lessee being other portion of the said block of land to the said springs And also liberty and power for the Lessee his agents servants and work people and all persons whomsoever having the permission of the Lessee at any time or times during the continuance of this Lease to enter into and upon and to the exclusion of all other persons to occupy such part or parts of the Lands firstly hereinbefore mentioned surrounding or in the vicinity of the said springs as may be necessary or convenient for the purpose of using and bathing in the said springs And also the right of fencing such land so occupied and erecting bath houses and other buildings thereon to the intent that the Lessee shall have vested in him full convenience for the exercise and protection in the enjoyment of his exclusive privilege of using and bathing in the said springs Provided however that there shall not be occupied or fenced under the foregoing powers surrounding or in the vicinity of any one spring an area of more than Ten acres and there shall not in the aggregate of the lands so occupied or fenced a greater quantity than Ten acres. (A44:84)

The lease also authorised the lessee, on the expiry or earlier determination of the lease, to remove the bath house buildings, fences and fixtures from the land (A44:84).

This lease was also given a certificate of satisfaction by Trust Commissioner Haultain pursuant to the Native Lands Frauds Prevention Act 1881 (A44:86).

In November 1888 a further lease, numbered 905, was registered from Heta Te Haara to William Earl, Arthur Bull and David Hean in respect of the same land. It was subject to lease 904 (which was principally concerned with the hot springs) but included:

> all mines, beds, veins and seams of mercury or quicksilver and all oils of every description and all other mines, minerals, oils metals ores and substances containing or supposed to contain minerals or metals whatsoever within under or upon the land. (A44:107)

The result of the two leases was that Te Haara had leased both the hot springs and bathing pools and the right to mine all minerals including mercury on the 621 acre block adjoining the Parahirahi block.

On 27 July 1892 Heta Te Haara leased the 621 acre Tuwhakino block to George Patterson. The lease was registered as number 1134 on 16 December 1892. It was an unusual document, the principal provisions of which were as follows:

- Te Haara leased the land to Patterson for 21 years at the yearly rental of one shilling if demanded;
- Patterson was not to sublet without the permission of Te Haara;
- Patterson was to permit Te Haara during the term of the lease to have the use and occupation of the land conjointly with Patterson; and
- Patterson had the right at any time during the term of the lease to purchase the land from Te Haara for the sum of £900.

The lease contained a certified translation in Maori of the terms of the lease (D2).

3.5 Heta Te Haara Sells the Remainder of the Tuwhakino Block

In due course Patterson exercised his right of purchase. On 8 January 1894 a transfer of the 621 acres from Heta Te Haara to George Patterson was registered on the title (A44:108). With this sale Heta Te Haara had parted with the balance of the 1086 acre Tuwhakino block. No reservation in relation to the hot springs on the land sold was made by Te Haara.

3.6 The Court Determines Ownership of the Parahirahi Block

3.6.1 As indicated in 3.2.4 an application to the Native Land Court to determine ownership of the Parahirahi block of 5097 acres came before the court on 16 July 1873. The same day Judge Maning ordered that a certificate of title of Wiremu Hongi Te Ripi, Hirini Taiwhanga, Renata Pure, Umu Whakaita, Whai Te Hoka, Marara Ianga, Hira Kauaea, Rukia Koao, Te Teira Raumati and Katarina Te Awa to the Parahirahi block be made under the provisions of s17 of the Native Lands Act 1867 and issued to the Governor. In addition a further 17 owners were listed on the court records (A50(a):1-2).

3.6.2 On 10 September 1874 the Governor by order in council ordered a rehearing by the Native Land Court of the order determining ownership of the Parahirahi block made by Judge Maning the previous year (A32(b)). As with the earlier 1873 hearing, none of the records of the court proceedings for this rehearing have been located. On 5 November 1874 Judge H A H Monro sat with an assessor and five days later ordered that a memorial of ownership be issued to the ten named in the former order and a

further 27 owners. This order was made pursuant to the Native Land Acts of 1873 and 1874. The 27 included all but two of those already listed in the court records by Judge Maning and added an extra 12 owners making 37 in all (A32(c); B2:1-3). The sealed order signed by Judge Monro does not contain any restriction on alienability but the subsequent memorial of ownership signed by the judge on 10 November does (B35:9-10). As required by s48 of the Native Land Act 1873 the memorial of ownership stated:

> And it is hereby ordered that the above named owners under this memorial may not sell or make any other disposition of the said land except that they may lease the said land for any term not exceeding twenty one years in possession and not in reversion .... (B2:1)

The memorial identified 36 of the owners as belonging to Te Uriohua hapu of Ngapuhi and one to Ngati Rangi of Ngapuhi (B2:1-2).

3.7 The 1885 Subdivision of Parahirahi Block

3.7.1 From 1875-1883 a number of applications were made for subdivision of the block. These were heard from 1878-1885, with several court sittings being scheduled to be held on the matter in 1885. The tribunal researcher Rosemary Daamen noted that the material available in this period is sketchy, but clearly indicates some dissension among the owners over this issue (B35:10,14). The subdivision of the block into Parahirahi A, B and C was finally agreed to in October 1885. Both Parahirahi A and C were to be inalienable except with the assent of the Governor.

3.7.2 The first application for subdivision of the Parahirahi block appears to have been made by Renata Pure and others on 16 February 1875 (B14:83). About a month later Renata Pure again applied, this time with Wi H Te Ripi, Hirini Taiwhanga and others (B14:84). In December 1878 a hearing for the subdivision was opened but adjourned (B5:1-2).

On 18 February 1880 Hiku applied for subdivision of the Parahirahi block (B14:78). Kato Whakaita in turn made an application on 9 April 1883 and again on 31 May (B14:76-77). A hearing for subdivision was set down for January 1885 but none of the parties were present and it was noted that the division was still not settled (B11:23).

3.7.3 On 7 February 1885 the court sat at Waimate to consider a division of the block and to settle the interests of the owners listed in the memorial (B6:4-9). As Dr Loveridge pointed out, the principal issue at these hearings was the question of whether the 37 listed owners had an equal share or whether a portion of them should be designated as "lesser" owners having a smaller interest (B34:14). The court record noted that in order to commence proceedings it assumed that the interests of all the owners named in the instrument of title were equal (B34(a):48).

However Hirini Taiwhanga who appeared for 25 out of the 37 owners denied the equality of interests. The opposition appears to have been led by Hiku. In his "interim" judgment, delivered on 10 February 1885 Judge Puckey after reviewing the evidence concluded that:

> The reasons given appear to the Court not to be such as to warrant it awarding different proportions to the respective owners.
>
> The finding of the Court therefore is that the interests of each of the 37 owners named in the Memorial of Ownership are equal. (B6:18)

Two days later the court issued its decision. The court divided the Parahirahi block between two groups. The first included 24 owners, and was awarded Parahirahi A containing 24/37th of the land. Parahirahi B containing 13/37ths of the block was allotted to the remaining 13 owners (B34(a):50-51).

3.7.4 Hiku later complained to the court on 24 April 1885 that the division of Parahirahi was unfair to him and several others and he asked the court to remedy the situation. The court required Hirini Taiwhanga to attend the court the next Monday, 27 April. Taiwhanga and others who were summoned failed to appear. While the court minutes do not show what happened next it appears that the February division order was suspended, as requested by Hiku, and the Parahirahi case was adjourned.

3.7.5 It also appears that a number of other owners were not happy with the subdivision proposed by the court. On 16 February 1885 six of them wrote to the chief surveyor advising they did not agree to a surveyor subdividing Parahirahi. They were informed that if the court ordered a subdivision, presumably referring to the upcoming October court hearing, a surveyor would be sent, but not otherwise (B19:48,50).

The court orders a subdivision

3.7.6 On 15 October 1885 Judge Edward Puckey sat with an assessor at Waimate to determine the subdivision of the Parahirahi block on the application of Kato Whakaita. The plan before the court was ML 2730A (A45:8). The court minutes record what transpired at the hearing as follows:

> The Judge reminded those present of the proposal made at the former sitting for the division of the Block into two equal portions; one for sale or lease and one to be retained; the Ownership of these two parcels to be identical.
>
> It did not appear that this proposal was now in favour with some of the owners; Hiku objecting thereto.
>
> The Court was willing to allow them time to discuss the question, provided it appeared probable that such discussion would lead to an agreement.

> After some conversation on the question, the Court stood adjourned from 11.15 am to 12.15 pm.
>
> On the re-opening of the Court, the Presiding Judge asked whether a decision had been agreed upon.
>
> Hiku replied that they had decided upon a scheme. A small parcel of about 6 acres near the NE angle containing some hot springs to be cut off, and vested in the whole of the owners: the remainder of the block to be divided equally by a line from NW to SE; such two last named blocks, also to be vested in the whole of the owners named in the Memorial, and the various Succession Orders that had been made from time to time; - being 43 in number.
>
> It did not however appear that the owners were unanimous in their acceptance of this scheme.
>
> After much discussion the Court rose for the Midday Recess.
>
> The Court having resumed at 3 pm. It was announced that the scheme above defined had been adopted and agreed to by all.
>
> The Court therefore accepted it as a 'Voluntary' arrangement[6] and made the Orders following in accordance herewith. (A32(g))[7]

3.7.7 Judge Puckey then ordered that Parahirahi A, of 2546 acres, Parahirahi B, also of 2546 acres, and Parahirahi C, of five acres, each be granted to the same 45 named Maori owners, constituting 37 individual interests (being the interests of the 37 original owners) (A32(g)). He further ordered that A and C blocks:

> may be leased for any term not exceeding twenty-one years, but shall be otherwise inalienable except with the assent of the Governor. (B11:21,22)

No restriction on alienability was placed on B block. Figure 5 is a diagram of the three blocks.

3.7.8 It seems reasonable to conclude that the subdivision and apportionment finally approved by the court was by way of a compromise between contending parties. Hiku, it appears, was concerned that the small triangular block intruding into the neighbouring Tuwhakino block was severed from the two main blocks A and B. This area had been reserved to the owners in the 1872 agreement to lease with White. When C was severed it was restricted as to alienation along with A where most of the kainga were situated. We infer from the limited information available that the agreement to sever the hot springs area of five acres from B block, together with the restriction imposed on it, reflects the concern of the owners to set aside and protect this treasured amenity. The restriction imposed by the court pursuant to s4 of the

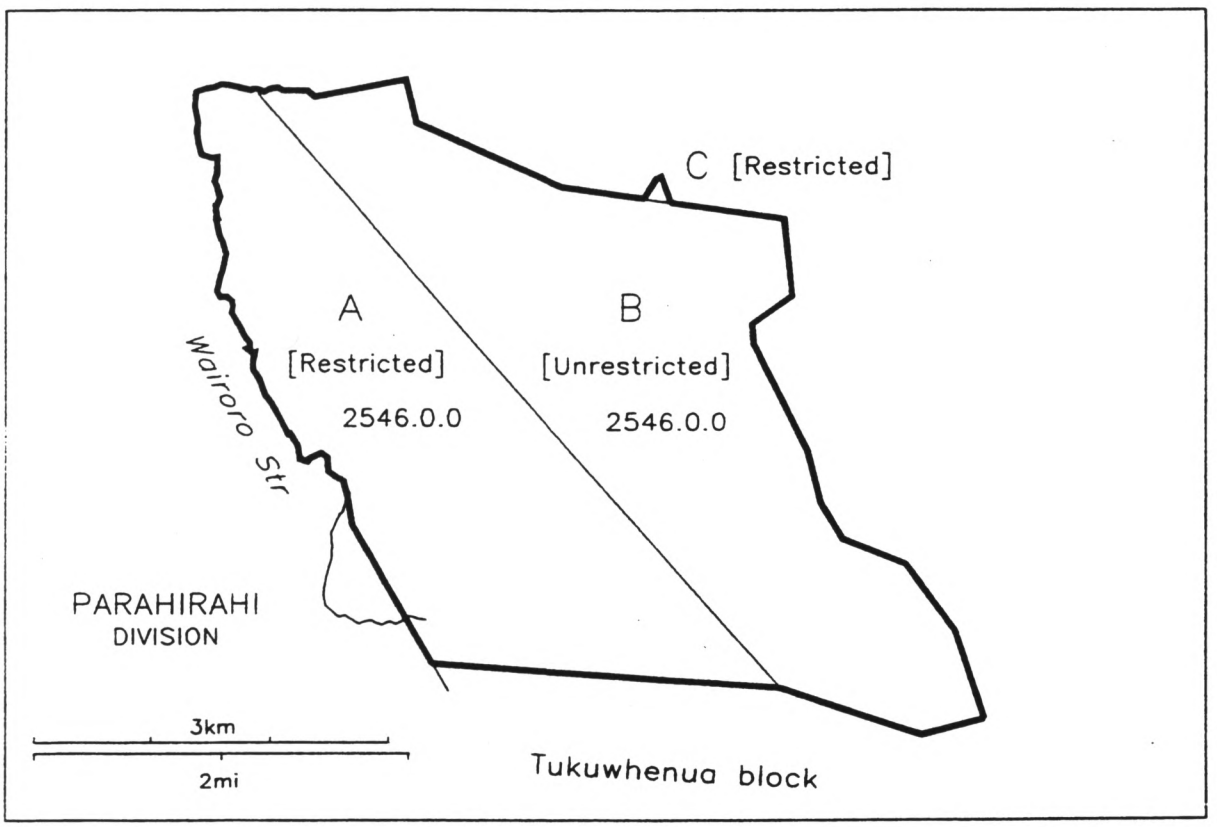


Figure 5: Diagram illustrating the tracing showing A, B and C subdivisions of the Parahirahi block, October 1885. *Source:* B35:13 (original held in Northern minute book 7, p 157, Maori Land Court, Whangarei)

Native Land Division Act 1882 was, however, a qualified, not an absolute prohibition on alienation of the two blocks by the owners. Alienation with the assent of the Governor was permissible.

3.8 Negotiations and Purchase of Parahirahi Blocks 1885-1894

3.8.1 Less than a month after the court's October decision subdividing and determining ownership of the Parahirahi block, two owners, through their solicitor, expressed interest in selling their shares. The original correspondence cannot now be found but a summary of the contents is still held on file (B35:18). On 14 November 1885 W A Carruth, a Whangarei solicitor, inquired of the Native Land Purchase Office whether the government was "prepared to purchase interests of Kataeo and Pokai in Te Ngawha or Parahirahi Block". He indicated they could be purchased by the Crown for £1 per acre. It seems the solicitor also indicated that 'negotiations' of

some kind relating to Parahirahi were in progress (B19:47). "Kataeo" was Ka Te Ao, an owner on the 1885 list, and it seems likely that "Pokai" was Komene Poakatahi, another such owner (B34:24). The Under-Secretary of the Land Purchase Department wrote on 25 November to the Assistant Surveyor-General S Percy Smith inquiring whether he knew of any negotiations and whether he thought the land "should for any special reason be acquired by Government" (B19:47). Smith replied on 30 November. He made no mention of any negotiations. He said he knew the block, which he described as "sterile in the extreme and the gum which gave it a value formerly is about exhausted". As for any "special reasons" for the Crown acquiring the land he had:

> never heard of mercury having been found on the Block, though, it has been found on that immediately to the North, where the hot springs are [i.e. Tuwhakino]. I think it would be running too great a risk to purchase for £1 an acre on the chance of mercury being on the unsubdivided portion offered.

He concluded that the block "has no value except for chance minerals" (B19:47).

Three months later, on 12 March 1886, the department advised Carruth: "the Government cannot entertain the idea of purchasing at the price named by you (20s per acre) and does not care to negotiate" (B34(a):21).

3.8.2 Dr Loveridge suggested that the principal reason for the three month delay in rejecting Carruth's proposal may have been that in the meantime the Crown had received a better offer (B34:26). On 29 April 1886 the Crown paid Hirini Taiwhanga £25 as an "advance on account of interest in Parahirahi blocks A, B and C at six shillings per acre" (A44:252). At 6s an acre his share was worth £41 6s 6d. As will be seen later, he was eventually paid the balance due at this rate. It appears the government was still in doubt about the desirability of proceeding with the purchase of the block. On 7 July 1886 T W Lewis, the Under-Secretary of the Land Purchase Office, at the direction of Native Minister John Ballance, wrote to Dr James Hector the Director of the Geological Survey. Dr Hector had studied and written about the "Ohaeawai Mercurial Springs" a decade earlier. Lewis advised Hector that the Parahirahi block had been offered for sale to the government and on behalf of the minister sought advice as to "whether sufficient is known of the mineral deposits to enable you to make any recommendations on the subject" (B34(a):21). Hector's report to Lewis of 12 July 1886 was not encouraging. He gave a general description of the geology of the area (largely derived from his 1878 published article on the topic) during which he noted that "the only mineral of interest which occurs in the district is the metal mercury which escapes with steam at the plan marked 'Hot Springs'".[8] He concluded his letter by saying:

> Except for their powerful medicinal ... properties, these springs have no particular value. Endeavours have been made I believe to collect the mercury, but the quantity

> present is too small to pay for working.
>
> In other respects the "block" has no especial value as far as I am aware .... (B34(a):57)

Dr Loveridge has expressed the opinion that pressure of some kind seemed to have been exerted in this period to move the Taiwhanga proposition forward. Lack of documentary evidence prevents any firm conclusion. As Dr Loveridge points out, the Assistant Surveyor-General and the Director of the Geological Survey held much the same opinion about the potential value of the Parahirahi block: that the land was worthless, and the mercury deposits in the vicinity were unlikely to be of any commercial value (B34:28).

Notwithstanding this advice the Crown in July 1886 went ahead with plans to acquire the whole block but on the basis of a purchase price of 3s an acre instead of the 6s per acre the Crown had earlier agreed to pay Taiwhanga for his interest. This no doubt reflected the unfavourable reports of Smith and Hector.

3.8.3 It appears that sometime during the latter half of July the Crown advised Taiwhanga that it was willing to enter into an arrangement with him for the purchase of the block. Taiwhanga wrote to the Land Purchase Office on 7 August 1886. Regrettably the documentation (including Taiwhanga's letter of 7 August) is not extant but a copy of a letter of 19 August 1886 from Under-Secretary Lewis to Taiwhanga is still on file. It reads:

> In reply to your letter of the 7th instant [August] in which you intimate your acceptance of the offer made by the Government of three shillings per acre for the Parahirahi Block, and ask for certain advances thereon, I have the [honour] by direction of the Hon the Native Minister to inform you that the several owners will be paid for their shares separately, and that a deduction will, if agreed to, be made from each to meet the expenses to which you refer.
>
> Meanwhile no further advances can be authorised. (B34(a):22)

Several points emerge from this letter:

- The price of 6s per acre initially offered was now halved;
- Taiwhanga appears to be acting on behalf of all the owners of the block whose interests would be available at a fixed price per acre;
- It appears Taiwhanga proposed that the total payment of £764 11s (for 5097 acres at 3s per acre) would be paid to him in a lump sum. This would have amounted to £20 13s 3d for each of the 37 full shares; and

- Taiwhanga proposed to deduct a certain sum for "expenses". A letter of 20 August 1886 from Under Secretary Lewis to James Clendon, a Resident Magistrate in Whangarei employed on occasion as a purchasing officer, referred to a proposal by Taiwhanga for a "stoppage" (deduction) of 10d per acre from each share for the purpose of settling them. Taiwhanga was thus proposing to retain more than a quarter of the sum to be paid by the Crown for the block (£212 7s 6d out of £764 11s) in his own hands presumably to be used at least in part, to settle certain existing "private claims" against the property (B34:30).

3.8.4 The Land Purchase Office still lacked very precise information about parts of the block they were now committed to attempt to purchase. In particular they were puzzled by the small triangular Parahirahi block C which protruded from the northern boundary into the Tuwhakino block. Patrick Sheridan, a Land Purchase Department official, sent a telegram to the Assistant Surveyor-General on 2 September 1886:

> Parahirahi C block contains 5 acres only. Is it a burial ground or kainga intended to be reserved from sale. Entire [block] is to be purchased at three shillings per acre. Do you think the five acres should be reserved. (B19:46)

Assistant Surveyor-General Smith, on 21 September 1886, advised the department that:

> Parahirahi C was a little bend in boundary line - evidently purposely made but is not a kainga or wahi tapu. I think very probably [it] is a hot or mineral spring. It is restricted - would advise purchase. (B19:45)

No mention is made of any need to obtain the assent of the Governor to the purchase. Possibly this was because it was thought such assent was not necessary in the case of a Crown purchase or perhaps because it was assumed such assent would be given as a matter of course. There was also apparently no concern to check why such a small, unusually-shaped area may have been reserved, or whether, as it was presumed the area contained hot springs, the springs had a special value.

In any event the Land Purchase Department officials drew up a deed late in September 1886 providing for the Crown's acquisition of Parahirahi blocks A, B and C (B34:35).

Further, on 7 October 1886 there was published in the *Gazette* a notification pursuant to the Government Native Land Purchase Act 1877 that negotiations by or on behalf of Her Majesty the Queen had been entered into for the purchase or acquisition of certain blocks of Native land in the North Island including Parahirahi block containing 5097 acres referred to in the schedule (A50(a):18). Once such a

notice had been gazetted it became unlawful for anyone other than the Crown to purchase or acquire from the owners any right, title, estate or interest in such land or in any manner to contract for any such purchase or acquisition. Whether this notice, issued in the name of William Jervois the Governor of New Zealand, constituted evidence of the implied assent of the Governor to the purchase of the Parahirahi blocks A, B and C will be referred to later in this chapter (3.16.6).

3.9 The Parahirahi Deeds

3.9.1 In anticipation of successful dealing with the owners of the Parahirahi blocks the Land Purchase Department drew up two deeds intended to be identical but in fact varying in one or two matters of detail. The two deeds were closely analysed by Dr Loveridge (B34:33-40). One set has the identifying marks "*Auck A*", "*Auck B*" and "*Auck C*" added in pencil on the upper right hand column of the pages and the other is similarly labelled "*Auck M*", "*Auck N*" and "*Auck O*". Dr Loveridge refers to these two documents as "*ABC*" and "*MNO*" respectively. In his opinion, which is accepted by the tribunal, none of the differences between the two deeds could be described as significant; the content of each page of the *MNO* deed being exactly the same as that of its counterpart in the *ABC* deed (B34:34-35). However Dr Loveridge points out that the *MNO* deed (as it stands) can be considered the definitive version for present purposes, as it alone bears the following handwritten certification on page *O2*

> **Produced by Capt. Mair in support of Crown Claim this 19th day of October at Kawakawa**
>
> **[signed] R S Bush, Recorder (B34(b):*O2*)**

Dr Loveridge noted that although the *ABC* deed was also taken to the October 19 hearing by Captain Gilbert Mair, its presence seems not to have been officially recorded by the court in any way.

3.9.2 Considerable criticism was levelled by counsel for the claimants at the form of the deeds and the manner in which signatures were obtained. Strong criticism was directed in particular at the legitimacy of the Crown purchase of Parahirahi block C (the five acre hot springs block). This and related questions are fully considered later in this chapter (3.14). Suffice it to say at this stage that the deeds:

- were undated;
- purported to be a sale by the owners whose names and signatures were subscribed on the deeds, to the Crown for £764 11s of 5097 acres Parahirahi A, B and C;
- were drawn up in contemplation of an outright sale of the whole block at 3s per acre;

- had a tracing of plan 2730 which showed the earlier unsubdivided Parahirahi block of 5097 acres and a written description of the area which made no reference to the later Parahirahi blocks A, B and C and which bore no reference to any restrictions on alienability of the land; and

- were never signed by or on behalf of the Crown.

3.9.3 In the meantime, we chronicle in summary form the Crown's somewhat protracted process of obtaining signatures of the great majority of the owners over the years 1886 to 1894. We note that relatively few of the Native Land Purchase Department's records relating to the Parahirahi blocks for the period before 1894 appear to have survived to the present. An exception however is certain financial records relating to the Crown's purchase of interests in the blocks, to be found in the department's accounts journal which has survived. These recorded payments to owners by the Crown for their interests and, unless otherwise indicated, were noted to be payments made "in full for interest in Parahirahi block" (B34:41; B35:23). We should also record that the sum paid for each full share was £20 13s 3d. For a lesser share, for instance a 1/6th share, the proportionate sum of £3 8s 10d was paid.

Purchase of shares, 1886-1887

3.9.4 The first purchases were made on 10 December 1886 when seven owners received payment in full for their interest in the Parahirahi block. On 28 December 1886 three further owners were paid in full and on 5 February 1887 ten more owners were paid including one owner, Henare Hamiora Hau, who sold two shares. Hirini Taiwhanga had earlier received £25 on account of his share which he had originally agreed to sell at 6s an acre (£41 6s 6d) (B34:42-46; B35:19,23) but had not signed the deeds (B34:59-61; B35:16,25-26).

As Dr Loveridge points out, by the time the February payments had been completed, 20 of the 45 owners named in the 1885 Native Land Court orders for Parahirahi A, B and C had signed the deeds, or had them signed on their behalf, within the space of two months. Including Taiwhanga, these 21 individuals had held the equivalent of 17 full shares out of the 37 extant - some 46 percent of the total interest (B34:46).

In March 1887 four more owners (including Hirini Taiwhanga's brother Te Matenga Taiwhanga) received payment. On 20 May 1887 a further purchase was made, followed by two more on 22 and 26 August 1887 and one on 19 September 1887. Following succession orders made on 19 October 1887 most of the shares involved were purchased by the Crown. Four other purchases were made on 28 October (B34:48-51; B35:23-24).

By the end of October 1887, as Dr Loveridge shows, the Crown had spent £588 6s 5d on the acquisition of all the interests of 31 of the 45 owners named in the 1885 orders plus half the interest of one other of those owners. This amounted to the

equivalent of 27 5/6th of the 37 shares in the blocks - some 75.2 percent in all (B34:51-52). James Clendon was the purchasing officer for all these purchases (B34(a):25). Dr Loveridge comments that at this point the Crown's purchase of the Parahirahi block ground to a halt (B34:53).

Taiwhanga seeks further payment

3.9.5 It appears that on 13 July 1887 Hirini Taiwhanga wrote to the Minister of Justice complaining that the Crown owed him money "on account of the Parahirahi block". The letter was sent on to Ballance, Native Minister, and on 23 July 1887 Lewis of the Land Purchase Department wrote to Taiwhanga. He stated:

> I am directed by Mr. Ballance to inform you in reply that there is no money due to you on account of the Parahirahi block. The value of your interest in the land was twenty pounds thirteen shillings and three pence, the amount being paid to you being twenty-five pounds. (B34(a):23)

In short, the department was treating Taiwhanga on the same basis as all other owners selling to the Crown. Taiwhanga renewed his complaints in a further letter to the Native Minister of 25 January 1888. By this time he had become the MHR for Northern Maori following the election in September 1887. The new Native Minister, Edwin Mitchelson, replied on 28 January 1888 advising that the government could not re-open his claims connected with the Parahirahi block, adding that:

> the negotiations for the purchase of the land cannot be relinquished nor can the Crown forego any of the interests which it has acquired. (B34(a):24)

It is not known what Taiwhanga's claims were (other than the additional purchase money sought). It seems clear however that Taiwhanga, for whatever reason, had become disenchanted with the Crown purchases and sought their reversal. It is reasonable to infer that this marked change of attitude on the part of Taiwhanga would have contributed significantly to the falling away of sales to the Crown.

By mid-1888 there were some 13 "non-sellers" whose total interest in the Parahirahi land amounted to the equivalent of nine full shares (B34:57).

3.10 The Crown Applies to the Court to Ascertain its Interest in the Parahirahi Block

3.10.1 On 16 October 1888 Native Minister Mitchelson filed an application to the Native Land Court to have it:

> cause the Interest acquired by or on behalf of Her Majesty in the Block of Land noted in the margin [Parahirahi] and more particularly described in the memorial of ownership thereof to be ascertained at the next sitting of the Native Land Court at Whangarei. (B14:75)

This application was made under s7 of the Native Land Court Act 1886 Amendment Act 1888. It does not appear to have been brought on for hearing for some time.

Taiwhanga paid a further sum

3.10.2 On 21 March 1889 Hirini Taiwhanga was paid the further sum of £16 6s 6d being the "balance due on share of Parahirahi Block". This amounted in all to a payment to him of 6s an acre as had originally been promised in April 1886. In return Taiwhanga undertook to sign the deed when called upon. Despite a request from Native Minister Mitchelson in July that Taiwhanga should call on his office to sign the deed, he failed to do so. Hirini Taiwhanga died in November 1890 on the day of his re-election as member for Northern Maori. The deed was unsigned by him at the date of his death. Notwithstanding the settlement with Taiwhanga, the Crown did not seek an early hearing of its application to the court. It was ultimately set down for hearing at Kawakawa on 27 July 1892 but was then adjourned at the request of the Crown (B35:26).

3.10.3 Another reason attributed by Dr Loveridge for the Crown not pressing for an early hearing of its application to the court was the possibility that it would not get all the portions it wanted. In 1893 Patrick Sheridan, then the Under-Secretary of the Land Purchase Department, wrote to R M Houston MHR for the Bay of Islands expressing the view that:

> The land is described as being of little or no value except as to some quicksilver springs situated in one particular locality which on partition might be awarded to the non-sellers. otherwise the Government would at once take steps to have the interests acquired by the Crown defined. (B34(a):25-26)

Apart from one set of purchases involving the share of a deceased owner spread over September, November and December 1890, no further purchases were made for more than three years.

3.11 Crown Resumes Purchases in 1894

3.11.1 In May 1894 Clendon was authorised to renew his efforts to purchase the remaining Parahirahi shares (B34(a):26). But he was told by Sheridan in a letter of 4 May 1894 that Hone Heke MHR promised the minister that he would endeavour to arrange the sale of those shares and that on Sheridan:

> offering to detail an officer to assist him he threatened to withdraw from the arrangement if any other person interfered. You had better therefore proceed to work cautiously if at all. (B34(a):26)

It seems Clendon took no active steps for some months. Meanwhile Patterson, the owner of the portion of the Tuwhakino block adjacent to the northeastern boundary of Parahirahi C, renewed representations he had made the previous year to Houston.

In his letter of 27 June 1894 to Houston, Patterson enclosed a plan to illustrate exactly what he wanted at Parahirahi. He expressed confidence that if Houston could get him the piece he wanted he would get a large company floated to thoroughly test the place which would mean a "big thing" for the district. In his letter he stated:

> The [Parahirahi block C] I pointed out to you on the map in the land office cuts right into my block and tends to damage the sale or floating of a company as long as it is in the native hands. I would like to get this piece, also about 50 or 100 acres adjoining it [in Parahirahi block B, including lakes Ngamokaikai and Waiparaheka (see B35:28)]. (B24(a):51)

In written comments on the sketch plan accompanying his letter Patterson noted that C, which cut into his block, was the part of Parahirahi that "I want particularly". He also wanted the bigger area (an adjoining part of Parahirahi block B) "to make my position secure" (B24:52-53).

Evidently Hone Heke had not been successful in persuading the remaining owners to sell their interests. Representations by Houston on behalf of Patterson may also have had some effect. In any event, the Crown took steps to have its adjourned application revived. A notice in the *Gazette* advised that the Native Land Court would sit at Whangarei on 15 October 1894 to hear the minister's application "for the definition of the interest of the Crown" in the Parahirahi block.[9] The application in question was 88/2677 which was originally filed in 1888 (B24:50).

3.11.2 Early in August 1894 Sheridan telegraphed to Clendon advising that the Crown application "to cut out interests of non sellers" would be heard in October and asking Clendon if he could make any progress in the meantime. Sheridan added that Robert Bush would hear the case as Clendon was ineligible, having purchased the land.

It should be noted that Bush, like Clendon, acted at times as a Land Purchase Department representative in the north. He was nominally the agent-in-charge of the Parahirahi negotiations in 1892-93 (B34(a):70)[10] but seems never to have been actively involved with the case. His name is not mentioned in any of the surviving correspondence relating to purchasing activities (B34:79 n 1).

Clendon reported on 6 August 1894 expressing his regret at the minister's decision to cut out the interests of non-sellers, being:

> persuaded from my intimate knowledge of this locality and of these natives that the very good positions of the block most desirable and valuable to the govt will be the excised parts. (B24(a):48)

He further advised he would be going to Kaikohe very shortly to "get all interests I can in [P]arahirahi" (B24(a):48).

3.11.3 In Sheridan's earlier letter of 4 May 1894 to Clendon he set out a list of non-sellers and the value of their respective interests (B34(a):26). This list has been revised by Dr Loveridge who, after providing a more complete list of owners and their respective shares, concluded that at the end of July 1894 the total interest involved amounted to the equivalent of eight full shares (B34:81).

On 8 August 1894 Clendon secured two quarter interests and expected two or three more on the 20th when he next visited Waimate (B24:47). In fact nothing further eventuated until 4 September 1894 when he purchased a further quarter interest for £5 3s 3d (B34(a):35). This was the same rate of 3s per acre as had been adopted by the Crown from the inception of its purchases with the notable exception of Hirini Taiwhanga. However it appears price was becoming a sticking point in Clendon's negotiations.

On 28 September 1894 he telegraphed Sheridan:

> Several of the owners in paurahi [sic] would sell their interests but they require better price. Will hon. the Min[r] authorise more than the 3/. per acre agreed on by late Hirini Taiwhanga? (B24:45)

Further telegraphed messages ensued until early in October 1894 Sheridan advised Clendon that he could increase the price of outstanding shares to £30 (B24:41). This represented an increase of just under 50 percent, raising the Crown's purchase price close to 4s 6d per acre. On 8 October 1894 Clendon effected two more purchases of part shares at the rate of £30 per acre. One of these was from Hiku for a "half full interest in Parahirahi Block" (B34:85). No further purchases took place before the court hearing at Kawakawa on 19 October 1894.

3.12 The Deed of Purchase

As earlier noted two virtually identical deeds were signed by all the sellers except for Hirini Taiwhanga. Presumably in reliance on an assurance from Taiwhanga that all owners would sell their interests, the deed was drawn up in contemplation of an outright sale of the block at 3s per acre. This was not achieved. There were several non-sellers.

Several other documents were attached to the deed which was presented to the Native Land Court on 19 October 1894. These included a copy of the treasury voucher for Hirini Taiwhanga for £16 6s 6d as the balance due to him on the Parahirahi block (A44:245) together with a note attached from Sheridan to Mitchelson concerning the terms of the payment. Also attached was a statement by one MacFarlane, one of the many witnesses to the deed, countersigned by Clendon confirming he had seen Lawton, one of the other witnesses to the deed, witness the deed. Lawton had since died. The last article in the collection of papers is the duplicate deed on which is recorded the notation that the deed was "produced by

Capt. Mair in support of Crown Claim this 19th day of October at Kawakawa" (B34(b):*O2*).

Various defects in the deed will be discussed further when the tribunal considers whether the owners knowingly sold their interest in Parahirahi block C. At this point we turn to the court hearing of the Crown's application for the definition of its interest in Parahirahi blocks A, B and C.

3.13 The 1894 Native Land Court hearings

3.13.1 The court opened its proceedings to define the Crown's interest in the Parahirahi blocks at Whangarei on 15 October 1894. Recorder Bush presided, assisted by a Native Assessor Reha Aperahama. Gilbert Mair represented the Crown. The court minutes note that Hone Ngapua handed in a letter from Tane Haratua asking that the case be adjourned either to Kawakawa or Waimate "as the old people could [not] come here being infirm"; Ritete Poi supported the proposal. The court adjourned to confer with the chief judge and the following day the recorder advised that the case would be adjourned to Kawakawa for hearing on 19 October 1894. He warned that the case would proceed on the 19th whether they appeared or not and there would be no further adjournments (A50(a)33-34).

3.13.2 Mair went straight away to Kawakawa and as he later reported to Sheridan:

> On the 17th and 18th I visited the natives at their settlement and sent urgent notices to the natives informing them of the adjournment and the date of hearing. (B24:28-29)

On 19 October 1894 Mair told the court that:

> On arriving at Kawakawa on the 16th Oct I telegraphed to the non sellers at their respective addresses Kaikohe and Ngawha, and I have been assured that the telegrams were delivered - I rode myself to Orumahue to give te Tane notice - The only person to whom I could not give notice was [Makareta] who lives at Dargaville -her brother was informed. I propose to call Mr Goffe who also gave Heni notice. (B1:40)

William Goffe, a licensed interpreter who had helped Clendon with the early October 1894 purchases, said in evidence:

> When Mair and I arrived here we sent telegrams - I went on in the evening when I saw Te Manihera and asked him if he had received telegrams from Capt. Mair re the adjournment of the Court from Whangarei to Kawakawa at request of Tane and [Ngapua] - Manihera said he had received the telegrams. I also told Manihera that if they did not attend, the land would be dealt with - I was employed in this purchase and amongst others I saw Te Hiku who said he was willing to sell a part of if not the whole of his interests. he sold a part of it. All the natives concerned were all

> aware of the Court Sittings at Whangarei, and when speaking to them I suggested they should attend at Whangarei [?Kawakawa] because if they did not do so the Court would proceed with the subdivision in their absence. (B1:40)

At this stage the hearing was adjourned at the request of Tane and Ngapua (B1:40).

3.13.3 When the court resumed Mair presented to the court three lists of non-sellers. Each list named ten people who were non-sellers of all three blocks. They were Wiremu Te Ripi senior, Mikara Te Ripi (subsequently noted to have sold interests in Parahirahi A and B); Wiremu Te Ripi junior, Hemara Tupe, Akinihi Wi Te Hira, Manihera Erika, Heni Tuwhai, Makareta Poakatahi, Te Tane Marupo, Te Tane Haratua and Hone Tuhirangi. Hiku is listed as a non-seller for A having sold his interests in B and C (A50(a):35). In fact Mair was mistaken in believing Hiku had sold his interest in Parahirahi C as he was included in the list of owners of C1 block at the hearing (A50(a):54). During the course of the hearing on 19 October Mikara Te Ripi, one of the ten owners, sold her 1/6th share in Parahirahi A and B blocks.

The court noted that Hoani (Hone) Ngapua (alias Hone Tuhirangi; B10:2) and Te Tane Haratua appeared with "no appearance of the other non-sellers" (B1:40).

It appears unlikely that these two were the only non-sellers present at the hearing. Clearly Mikara Te Ripi was present as she received a payment (B35:40). It is likely that Hiku was also there as Mair's exclusion of him from Parahirahi C was corrected. For other reasons given by Dr Loveridge it is also likely that at least two others were present (B34:90-91). The most likely explanation is that only Hone Tuhirangi and Te Tane Haratua addressed the court but other non-sellers were present. There is no evidence that any "sellers" were present at the hearing or indeed that they had been notified of it.

When it came to cutting out the area to which the non-sellers were entitled, Tane and Ngapua considered the area of Parahirahi B at the "far end" of the block was of inferior quality and asked to have it near the acre in C. We note that Mair had earlier advised the court that the Crown had purchased a little over four acres of Parahirahi C but was willing to take only four acres leaving one acre for the non-sellers. Tane and Ngapua requested that their own shares be separated from the others. The court record states:

> Eventually it was agreed between Capt Mair, Tane and Ngapua in Court, that Tane and Ngapua should receive 412 acres 3 roods and 14 perches in Parahirahi A and nothing in Parahirahi B[,] the interests in the latter Block to be conveyed by them to the Crown in consideration of this concession. (B1:40)

Three days later, Mair in a letter reporting on the court hearing to Sheridan, stated:

> When the Court opened on the 19th I found that the non-sellers wanted the best of the block including all the Cinnabar workings. The Court was adjourned from time to time to enable me to arrange outside and after a great deal of disputing and delay the several subdivisions as shown on the attached plan were finally settled. The eight hundred and six acres cut off for the natives include their houses[,] stores and cultivations, many of the natives being resident on the land, but these portions are of no special value to the Crown.
>
> I am informed by Mr Goffe and others who have an intimate knowledge of the block that the 4290 acres awarded to the Crown, contain all the Quicksilver deposits and are therefore, the most valuable portion of the estate. Very probably several of the non-sellers will now want to dispose of their small interests, but unless all join in the sale, the expense of the several subdivisions will not be materially lessened. The natives were paid £1 per acre for the adjoining blocks by the European purchases and had an exalted idea of the value of this land. (B24:29)

Mair noted that this had been "an exceptionally difficult matter to settle" (B24:29).

It seems likely that "the best of the block including all the Cinnabar workings" which Tane and Ngapua wanted was the land in Parahirahi B adjacent to the hot springs in Parahirahi C. Evidently Mair succeeded in talking them out of this (B35:46-47). During the course of the hearing on 19 October Tane and Ngapua (Hone Tuhirangi) surrendered their respective interests in Parahirahi B block for which each was paid £5 (A50(a):43-44). In fact, as Dr Loveridge has pointed out, this £5 was simply a nominal sum to symbolize the surrender of any interest in B for they did not actually lose any of the acreage accruing to a full share as a result of the payment by the Crown (B34:96).

It should also be noted that Mair in his letter to Sheridan quoted above referred to 806 acres being cut off "for the natives" included "their houses, stores and cultivations", many of them being resident on the land (B35:42,47). We conclude that the land set aside for the non-sellers included most of the land on which the "sellers" were living. In short the non-sellers were providing the living area for the "sellers" as well as themselves. At the same time the Crown had obtained "all the quicksilver deposits and, therefore, the most valuable portion of the estate".

The court subdivides Parahirahi blocks A, B and C

3.13.4 The court allocated 412a 3r 14p (Parahirahi A1) to Te Tane Haratua and Hone Tuhirangi; 13a 3r 2p to Akinihi Wi Te Hira (Parahirahi A2) and Parahirahi A3 of 225a 1r 16p was vested in Wiremu Te Ripi senior, Wiremu Te Ripi junior, Hemara Tupe, Heni Tuwhai, Manihera Erika, Makareta Poakatahi and Hiku (A50(a):49,50,52).

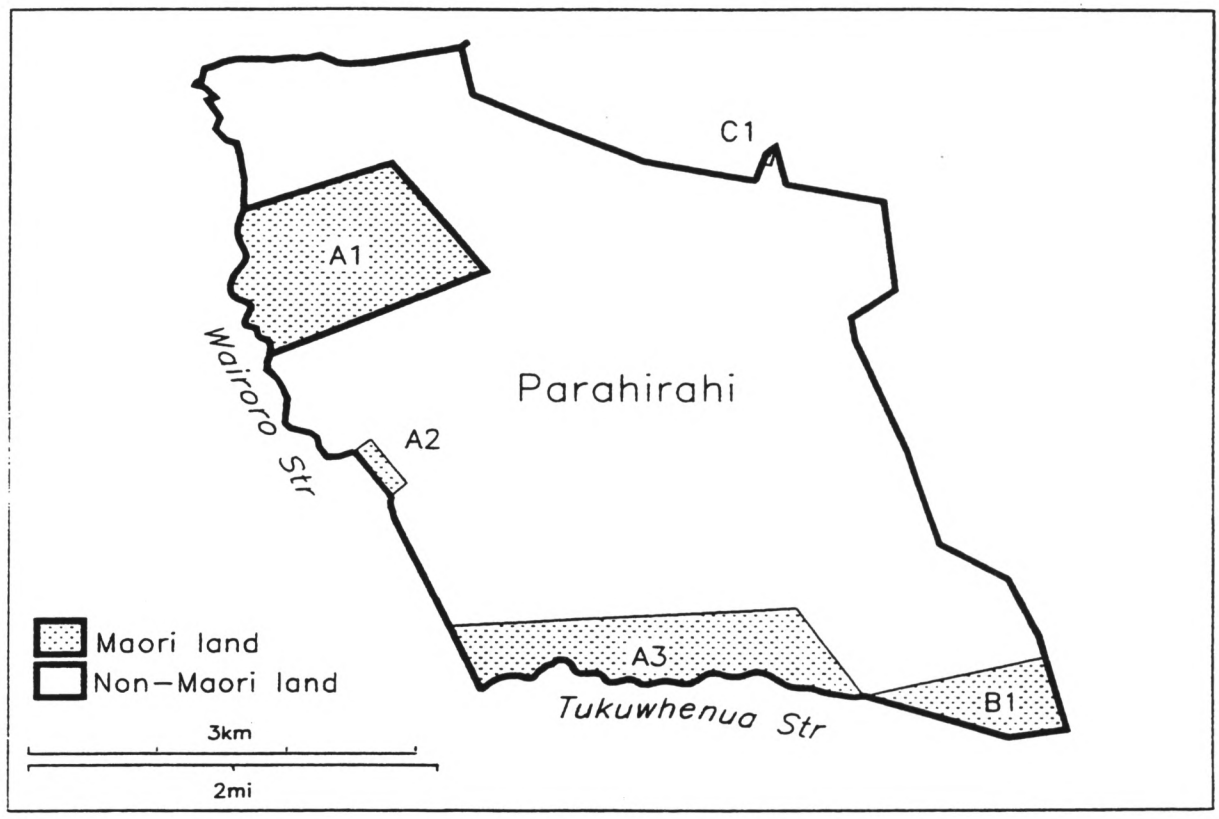


Figure 6: Diagram illustrating the 1895 subdivision of Parahirahi block. *Source:* B35:43 (original held in Parahirahi block order file no 2, Maori Land Court, Whangarei)

Parahirahi B1 of 150a 2r was vested in Wiremu Te Ripi senior, Wiremu Te Ripi junior, Te Hemara Tupe, Heni Tuwhai, Akinihi Wi Te Hira, Manihera Erika and Makareta Poakatahi.

Parahirahi C1 of one acre was vested in Wiremu Te Ripi senior, Mikara Te Ripi, Wiremu Te Ripi junior, Hiku, Te Hemara Tupe, Tane Marupo, Heni Tuwhai, Tane Haratua, Akinihi Wi Te Hira, Hone Tuhirangi, Manihera Erika and Makareta Poakatahi.

Parahirahi D, "the whole of the residue of Parahirahi A, B and C containing 4293 acres", was vested in Her Majesty. Figure 6 illustrates the 1894 court subdivision of Parahirahi blocks A, B and C.

A1-3, B1 and C1 were each made "subject to restrictions already imposed by order dated the 15th day of October 1885, namely that "the land may be leased for any term not exceeding 21 years but shall be otherwise inalienable except with the assent of the Governor". The order for Parahirahi D to be vested in the Crown was numbered 1886 (B24:8). On 23 July 1895 Parahirahi D was proclaimed Crown land

(A44:227). This left the tangata whenua with around 804 acres of the original 5097 acre block, ownership being vested in the very few non-sellers.

3.13.5 It appears that only non-sellers were notified by the Crown of the hearing to be held at Kawakawa on 19 October 1894 (B1:40). This raises the question of whether, given the highly valued taonga comprising the hot springs in Parahirahi block C, all having an interest, "sellers" as well as non-sellers, should have been notified that the Crown was seeking partition in its favour of the block. This is fully considered later (3.14).

A further question is whether non-sellers were awarded the areas they wished to retain. Mair told Sheridan the non-sellers wanted the best of the block including all the cinnabar workings. But the Crown succeeded in securing the quicksilver deposits, which were the most valuable portion of the estate (B24:28-29). Te Tane and Ngapua, who asked for their area to be near Parahirahi C (presumably an area of B on which were the cinnabar workings) did not get what they wanted. Instead they were prevailed on to surrender their interest in B block (B35:46).

The other non-sellers who retained an interest in B block (Parahirahi B1 of 150a 2r) were, in the words of the surveyor Neumann who worked on the survey of the Parahirahi subdivisions, left with:

> nothing but worthless kauri gum land, very broken, and utterly unfitted for cultivations in any part, and therefore not suited for the purpose it was intended. The land N[orth] of A No 3 would be better adapted for a Maori reserve. (B19:27)

The 1897 exchange

3.13.6 On 22 August 1895 Sheridan wrote to the Surveyor-General, S Percy Smith, advising that it had been mentioned to him that "one or two small kaingas were through some misunderstanding included in the portion of the Parahirahi block [block D] awarded to the Crown". He asked that the matter be looked into and the kainga reserved for the natives if possible. He went on:

> They are willing to give up an equivalent in the portion of the block in which their interests have been located but as the land is of little or no value except in the locality of the quicksilver springs it is hardly worth our while to make any demand of the kind. (B24:79)

In the event in November 1897, after considerable correspondence, an area of 77a 1r 17p was deleted from Parahirahi A1 block and vested in the Crown (B10:27) in exchange for a similar area of land immediately to the north which was vested in Tane Marupo alias Te Tane Haratua (2/3rd share) and Hone Tuhirangi (1/3rd share) (B10:9-10).[11] Figure 7 illustrates the exchange.

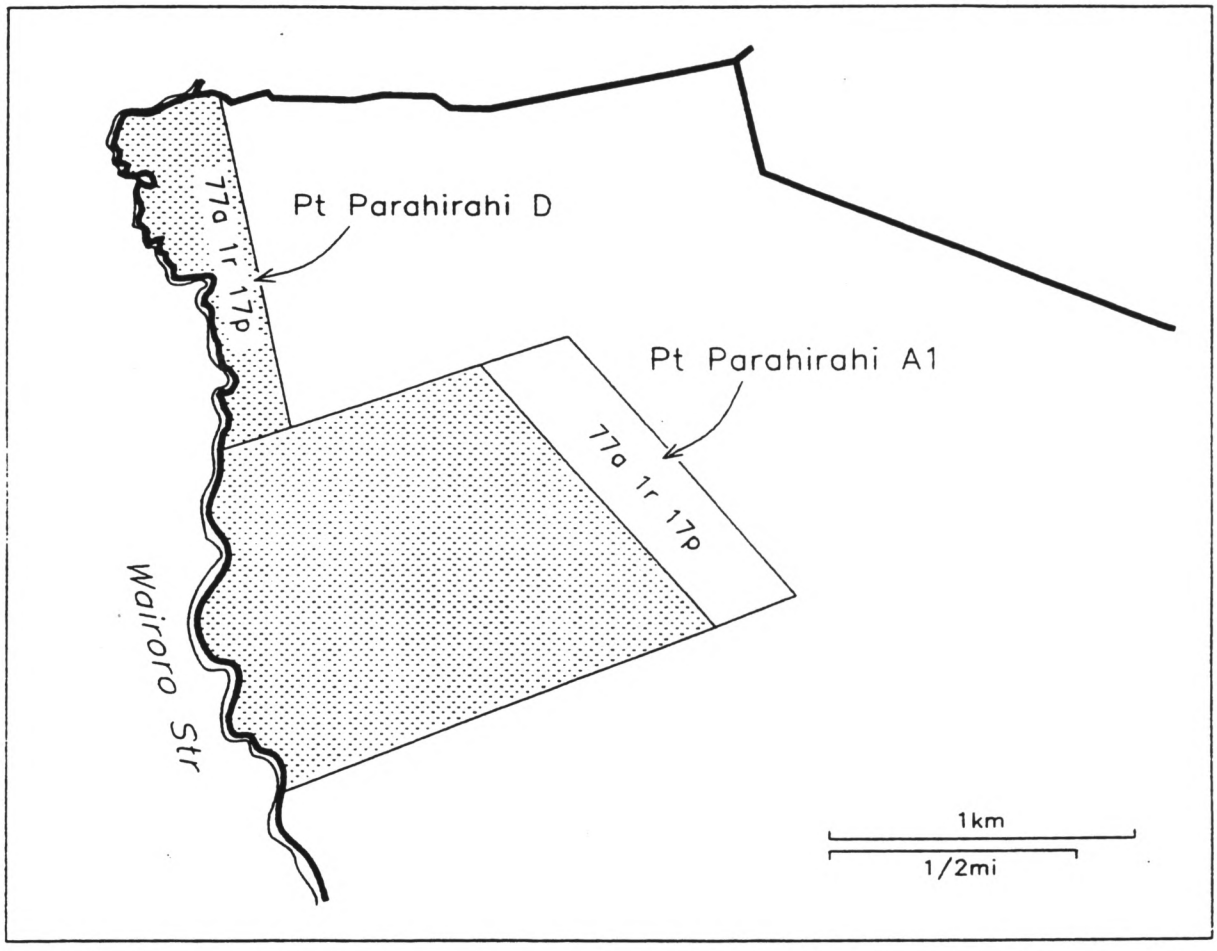


Figure 7: Diagram of the 1897 exchange. *Source:* B35:52

The new area vested in the Maori owners was the land which the surveyor Neumann had earlier said was "better adapted for a Maori reserve" than B1 which was unfitted for cultivation. The majority of B1 however remained.

It seems apparent that the relatively few tangata whenua at the October 1894 hearing did not appreciate that some of their kainga and cultivations had been excluded and vested in the Crown. This may well have been a consequence of the somewhat pressured negotiations conducted by the Crown agent Mair during the course of the Native Land Court hearing on 19 October 1894. Unfortunately, no relief was afforded those left with an interest in the new Parahirahi B1 block of which Neumann was so critical (3.13.5).

3.14 Did the Crown Acquire its Interest in Parahirahi C Block in Breach of the Treaty?

3.14.1 As we have seen, a number of the hot springs in the Ngawha area were on the Parahirahi C block. They had been known to and used by the hapu of Ngawha for centuries. They were highly prized for their medicinal and curative powers. They were undoubtedly a sacred taonga of exceptional value as the preceding chapter 2 makes abundantly clear. Many kaumatua who appeared before us spoke movingly of the spiritual and physical powers of the Ngawha springs. We cite here one further instance. Waiorooro Pene told us:

> The bathing pools at Ngawha are treasured as sacred possession handed down by the ancestors. They are healing waters for all people, Maori, European and everyone else. From the time I was born I went to the Ngawha Springs to bathe, for physical well being as well as spiritual healing. (B36; A54(b))

Mr Williams, counsel for the claimants, in his closing address submitted that the central question is not whether the resource is a taonga but rather the extent of that resource. We accept his submission that the taonga includes the surface manifestation of the underlying resource. He further submitted that the taonga must also include the sub-surface components of the resource. Many of the kaumatua he said spoke of the unity of the resource.

3.14.2 Crown counsel however submitted that it was quite clear that it was the healing springs alone which were taonga at the time of the Treaty of Waitangi and it was the springs which Maori at the time would have understood as taonga in terms of the Treaty guarantees. The idea that Maori wanted to retain ownership of or control over an underground geothermal reservoir is, Crown counsel suggests, an idea born of hindsight and 20th century scientific knowledge. We consider this question further in the next chapter. In the meantime, it appears to be common ground that at least the hot springs of Ngawha in Parahirahi C block were a taonga, not only at the time of the Treaty, but also when the Crown embarked on the purchase of the Parahirahi block in 1886. The tribunal, while leaving for further consideration the question of whether at these times the taonga included the underground geothermal reservoir (4.5), finds that the Ngawha hot springs in what was to become Parahirahi block C were in 1840 and remained in 1885 and the ensuing years a highly valued taonga of the Maori owners.

3.14.3 Mr Williams submitted that in all the circumstances it cannot be shown that the Crown acquired the four acres of Parahirahi C in a manner consistent with its Treaty obligations. In particular he stressed that it cannot, in all the surrounding circumstances be said that the Maori owners evinced a clear and unambiguous intention to alienate their interests either in Parahirahi C or in the underlying geothermal resource (C13:44-46). This question became an important issue before us.

Before considering this submission it is necessary to consider the Treaty rights of the Maori owners in respect of the taonga in the form of the hot springs on Parahirahi C. Clearly not only the springs but the land under and around them was a taonga.

Article 2 of the Treaty guarantees to Maori:

> the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession ....

The Maori version guarantees to Maori:

> te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa

The essential question is whether the owners willingly and knowingly alienated Parahirahi block C. The Crown relies on the deed of purchase to which it obtained signatures over an eight year period from 1886 to 1894. The claimants on the other hand point to various defects in the deed of purchase, and to the circumstances surrounding the Crown's method of obtaining signatures as being inconsistent with the Treaty and with the free and willing consent of the owners.

3.14.4 Before considering the deed and its completion we should briefly review the extent of the Crown's knowledge of the Ngawha springs and the enquiries which it made about the Parahirahi block in general and the springs in particular. All but one of the original 37 owners identified by the Crown belonged to Te Uriohua hapu of Ngapuhi and one to Ngati Rangi hapu of Ngapuhi. The Crown was in no way involved in the application to the court for an order determining ownership of the Parahirahi block which was made by the leading chief Wiremu Hongi Te Ripi and others (B14:86). By the time the Native Land Court determined the subdivision of the Parahirahi block in October 1885 the three blocks A, B and C were each granted to 45 named Maori owners, constituting some 37 individual interests (being the interests of the 37 original owners (3.7.7). Again, the Crown was in no way involved in these proceedings.

As we have seen, less than a month after the court's October 1885 decision the Crown received advice from the solicitor Carruth that two owners were interested in selling their shares (3.8.1). On receipt of this letter the Land Purchase Office sought the opinion of S Percy Smith, the Assistant Surveyor-General, as to whether there was any special reason for the government acquiring the block. Smith claimed to know the block and described it as sterile in the extreme. As to "special reasons" for acquisition by the Crown he said he had never heard of mercury being found on the block though it had been found immediately to the north where the hot springs are (that is, Tuwhakino) (3.8.1).

Before the Crown responded to this offer (which it later rejected) it was approached by Hirini Taiwhanga, a leading Te Uriohua chief, with an offer of sale of the Parahirahi block. It appeared to the Crown he was acting with authority from the owners (3.8.3).

In July 1886 the Crown was still in doubt about the desirability of purchasing the block and sought the opinion of Dr Hector the Director of the Geological Survey. Hector in his reply gave a general description of the area noting that the only mineral of interest occurring in the district was mercury which escapes with steam at a place marked "Hot Springs" on the sketch map enclosed with his letter but not now on the file. "Except for their powerful medicinal properties", he said, "the springs have no particular value" (3.8.2). It appears Hector identified the hot springs as being on the Parahirahi block. Notwithstanding these reports the Crown in July 1886 went ahead with its plans to acquire the whole block but on the basis of 3s an acre instead of 6s an acre previously offered to Taiwhanga. The Crown however rejected a suggestion by Taiwhanga that he should be paid the total purchase price for the 5097 acres in blocks A, B and C. He was advised the Crown would pay the owners separately (3.8.3).

3.14.5 The Land Purchase Department still lacked very precise information about parts of the block and in particular was puzzled by the small triangular Parahirahi C block which protruded from the northern boundary line into the Tuwhakino block. It sought further information from Assistant Surveyor-General Smith. He was asked whether it was a burial ground or kainga intended to be reserved from sale, and whether it should be reserved. Smith advised (erroneously) that it was not a kainga or wahi tapu. He added that he thought very probably it was a hot or mineral spring; that it was restricted and he advised purchase (3.8.4). Shortly thereafter, on 7 October 1886, notice in the name of the Governor was published in the *Gazette* that the Crown had entered into negotiations for the purchase of the Parahirahi block of 5097 acres.

The Crown at this time still did not know why the Native Land Court had cut out the five acre Parahirahi C block. Smith did not know either. He thought it was a hot or mineral spring. Instead of pursuing its enquiries further the gazette notice was published. The Land Purchase Department was aware that the court had subdivided Parahirahi block into three; two blocks, A and B, each of 2546 acres and C of five acres only and of an odd shape. It had been told by the Assistant Surveyor-General that it was restricted although he nonetheless recommended purchase. Had the Land Purchase Department directed its enquiries to the Native Land Court registry it would have learned from the court minute book that the earlier proposed subdivision into only two equal portions, one for sale or lease and one to be retained, had been rejected by some owners. Instead a small parcel (to become C block) "containing some hot springs" was to be cut off and its sale prohibited except with the assent of the Governor. This would, we believe, have brought to the notice of the Land

Purchase Department that Parahirahi C block was of special significance because of the presence of the hot springs. They already knew from Dr Hector's report that they had "powerful medicinal properties".

The tribunal has in various reports stressed the duty imposed on the Crown under the Treaty of Waitangi actively to protect Maori interests. The Court of Appeal in 1987 endorsed this view. The president of the court, Sir Robin Cooke, then said:

> the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support this proposition and are undoubtedly well-founded.[12]

3.14.6 The tribunal after carefully weighing the matter, and being conscious of the need to avoid reliance on hindsight, considers that the Crown was under a duty to take adequate steps to protect the owners' interests in Parahirahi C block and that it failed in its obligation under the Treaty so to do. The Land Purchase Department carried its enquiries a certain distance but appears to have made no enquiries either of the Native Land Court or of the people who knew best, the owners of the land. Its officers appeared to attach little if any importance to Dr Hector's advice that the hot springs had "powerful medicinal properties".

Had enquiries been made of the owners, preferably in a meeting with them all, it is inconceivable that the extremely high value they, in common with the hapu of Ngawha and indeed the whole of Ngapuhi, placed upon the hot springs on Parahirahi C block would not have been made known to the Crown.

The tribunal considers that in all the circumstances the Crown failed in its duty under article 2 of the Treaty adequately to protect the owners by not fully ascertaining the nature and very special value of Parahirahi C and ensuring that they did in fact wish to alienate this sacred taonga.

We have earlier described how the Crown set about the acquisition of Parahirahi blocks A, B and C by approaching individual owners (3.9, 3.10 and 3.11). We turn now to a fuller discussion of the deed of purchase and the defects in it. These include:

- The deed (B34(b)) was incomplete. It was not dated nor was it signed on behalf of the Crown.

- The deed is confusing. It refers on the first page to "5097 acres Parahirahi A, B and C as the same is more particularly described in the schedule hereto and delineated on the plan drawn on this Deed and coloured red". But the plan on the deed does not show Blocks A, B and C. It is a plan of the land

before it was subdivided, a plan which had been superseded. Nor does the plan indicate that blocks A and C were restricted as to their alienation. Further the written description of the land in the schedule makes no reference to the three blocks A, B and C but is a description of the land before subdivision.

- The deed refers to the purchase price as being £764 11s for the 5097 acres. But nowhere in the deed is the purchase price actually paid to the individual owners for their respective interests in the three blocks shown or referred to. At the back of the deed under a heading in English of "a clear statement in the Maori language of the contents of this Deed" is a summary in Maori of the deed. A translation of this summary in evidence before us provides in part as follows:

> This deed written on the [blank] of the [blank] of the year 188[blank], Queen Victoria being one party, with the Maori people of the colony of New Zealand whose names and signatures have been written below (they have signed after this, as the sellers) being the other party. They agree to the payment of 764 pounds and eleven shilling paid by the Queen to them the sellers on the completion of this deed (the giving up of the land also being agreed on).
>
> Those sellers hereby sell to the Queen the block of land in the Province of Auckland, being the greater part of the survey district known by the name of Parahirahi A, B and C, and comprising [5097] acres more or less, as shown on the map attached to this deed with the red border, with the payment and the number. All of that land, the mana and the use, is for the Queen and her descendants forever after because of the writing of the names of those sellers on the day and year put below. (B35:126)

Then follows a description of the boundaries, mainly in measurements of links which are unlikely to have been comprehensible to the signatories.

Nowhere in the deed or in the statement of its contents in Maori is it made clear that the actual sum to be paid to the signatories is a small part only of the sum of £764 11s. Nor is there any explanation that the sum paid to signatories is at the rate of 3s per acre for their respective interests in the land.

- There is no reference to the highly valued taonga, the hot springs, as being included in the sale. Nor is there any evidence that individual sellers were told they were included in the sale. Presumably they were all expected to know that the springs were in block C although that block was not shown on the deed map. A vigilant observer might have noticed the small unidentified triangular intrusion into the adjoining Tuwhakino block and identified it as

the site of the hot springs, but that is no more than surmise.

- When the deed was drawn in or about September 1886 there was inserted under the heading "Name of the Vendors" in the middle column the names of all the individuals listed in the orders for Crown grants for Parahirahi blocks A, B and C by the Native Land Court on 15 October 1885. As Dr Loveridge noted, these are not in fact the names of "vendors" at all. They were the names of owners. Some died during the nine year period signatories were being sought by the Crown. But as Dr Loveridge has said, it seems certain the names were entered in the column in the expectation (or, we would add, the hope) that all these people were prepared to sell their interest in the three Parahirahi blocks.

  An individual owner approached by the Crown after seeing the names of all the owners prominently set out in the deed, might well have thought that they had all agreed to sell their interests unless the Crown agent was careful to point out that this was not the case. We have no evidence of what the Crown purchasing agent actually told the owners.

- There is nothing in the deed to indicate that, if all owners were not prepared to sell their interests, the Crown might apply to the court to partition out the undivided interests of the sellers from the block for itself.

3.14.7 Judge Kevin Cull was commissioned by the tribunal to give oversight evidence on the alienation of the Parahirahi block. Judge Cull was particularly critical of the deed which he considered to be a legal nullity. In addition to a number of the foregoing criticisms of the deed, Judge Cull stressed that had the Crown endorsed on the deed the plan before the court when the subdivision orders were made, it would have shown not only the boundaries of each block but also the word "Restricted" (see figure 5) clearly endorsed on Parahirahi A and C (B33:8).

It is difficult to avoid the conclusion that the deed and the plan were confusing and misleading. Given the special significance of C block to the owners the tribunal is left unsatisfied that all owners who signed the deed were in fact aware that they were parting with their rights to this block and the taonga in the form of the hot springs located on it.

Judge Cull may very well be correct in his opinion that the deed of purchase was a legal nullity. The Crown, while putting the deed forward at the Native Land Court hearing on 19 October 1894, did so in reliance on s66 of the Native Land Court Act 1886 which was in force at the time. It provides:

> Where the Crown claims to be interested under any deed, contract, or other document, the same shall, on production be admitted in evidence in any case in the Court, and have due effect given thereto, notwithstanding any law to the contrary.

It is clear from this provision that the Crown was entitled to rely on the so-called deed as any "other document" and to have due effect given to it in association with the other documents which accompanied it. While the court, acting under s7 of the Native Land Court Act 1886 Amendment Act 1888, had jurisdiction to make the orders in favour of the Crown and the non-sellers, this does not excuse or justify the failure of the Crown to ensure that the owners who signed the deed fully understood that they were being called to part with their valued taonga on Parahirahi C block.

3.14.8 The Waitangi Tribunal had occasion in its 1992 *Mohaka River Report* to consider the effect of an ambiguity in a deed of sale of land adjoining the Mohaka river. The question was whether the deed of sale included the river. The tribunal stated:

> We think that the only reasonable conclusion is that the deed was ambiguous in its reference to the river boundary. That ambiguity must we think be resolved in favour of Ngati Pahauwera. Such a resolution is in accord with the contra [proferentem] rule that when a document is ambiguous the words are to be interpreted against the party who drafted it or whose document it is. Applying the rule does we think produce a just result because Ngati Pahauwera should not be deprived of their taonga unless all or part of the river was clearly and unambiguously included within the terms of the deed. Because the Crown, through its agent McLean, did not make this clear, the Crown must accept the consequence that the river was not included.[13]

3.14.9 The tribunal concludes that it has not been established that the owners willingly and knowingly alienated Parahirahi C block or the hot springs taonga located on the block, it not being clearly and unambiguously indicated in the deed of sale that this was intended. Applying the contra proferentem rule the owners ought not to be deprived of their taonga in the absence of such intention being clearly and unambiguously made known to them by the Crown. Accordingly, the acquisition of Parahirahi C block was in breach of article 2 of the Treaty which guarantees to Maori their tino rangatiratanga over their taonga for so long as they wish to retain the same in their possession. As Mr Justice Somers observed in the *New Zealand Maori Council* case "a breach of a Treaty provision must in my view be a breach of the principles of the Treaty".[14]

Given the extremely high value consistently placed on this five acre block by nga hapu o Ngawha the tribunal considers the four acres in the block acquired by the Crown in breach of the Treaty should be returned to Maori.

3.14.10 As we have seen (3.13.5) a few only of the non-sellers were present at the hearing on 19 October 1894 when the court gave effect to the deed and awarded 4293 acres

(including four acres from block C) to the Crown in what became Parahirahi block D. There is no evidence to suggest that any 'sellers' were present at the hearing. Given that the procedure adopted by the Crown and its stop/start nature had spread the purchase process over some eight years it would surely have been prudent for the Crown to have given notice of the hearing to all owners including all who had signed the deed. The hot springs were of great importance to them all. Had even some 'sellers' been present as well as some 'non-sellers' the court would almost certainly have been apprised of the need to retain block C in Maori ownership. While the Crown appeared to take reasonable steps to ensure the 'non-sellers' were advised of the court hearing no effort was made to notify any 'sellers'.

3.14.11 The tribunal is reinforced in its view that the Crown failed to make it sufficiently clear to owners that it was acquiring block C and the hot springs that went with it by the later series of protests and petitions by the local Maori people claiming that they had not sold Parahirahi C block. In fact members of the local hapu continued to live on the former block C near the hot springs, especially those who were dependant on the healing qualities of the waters. As we will see the Maori occupiers were not evicted from the Crown-owned four acres until 1962.

3.15 The 1926 Reservation of Parahirahi C1 and a Petition to Parliament

3.15.1 In the 1920s ownership of the small remaining block of one acre known after the 1894 subdivision as Parahirahi C1, and owned by the non-sellers, came under threat. The following account of the reservation of the C1 block and the subsequent eight petitions in respect of the four acres owned by the Crown and related matters is drawn from a comprehensive survey in the report of tribunal researcher Rosemary Daamen (B35:71-123).

3.15.2 In June 1924 the Clerk of the Kaikohe Town Board suggested to the Minister of Health that the Maori-owned springs in Parahirahi C1 be acquired as a national asset. The reason given was that the springs "possess curative properties of great value, a fact that is being demonstrated year after year". It was argued that they should become government property and that "their wonderful healing properties should be made available to all sufferers" (A50(a):139). In March of 1926 the Bay of Islands County Council clerk wrote to the Chairman of the Native Land Purchase Board suggesting the government acquire Parahirahi C1 "the section on which the principal springs in use are situated" owned by 11 Maori, "some of whom are deceased and with one exception no successors have been appointed". It was proposed that this section be reserved "for the Public use for all time", along with the springs on the adjoining Crown-owned four acres. It was pointed out that the springs were "very much used by sufferers from various ailments, particularly those suffering from rheumatism" (A50(b):6).

It seems likely that in response to threatening proposals such as these that an application to make Parahirahi "C" a reserve, or to make it inalienable under s232 Native Land Act 1909 was filed with the court on 6 April 1926 by Manihera Kauwhata and Wiremu Te Ripi (B14:31-32).

First petition concerning Parahirahi C

3.15.3 On 12 July 1926 Manihera "Kaiwhata"[15] and others sent a petition to Parliament (petition 3 of 1926). This was to be the first of a long line of eight or so petitions concerning Parahirahi C. The petition:

- protested against the acquisition by the Crown of four acres from this block;
- referred to the restriction against alienation except by lease imposed on the land in 1885; and
- sought an inquiry by the Native Land Court into the reasons for removal of the restriction and the acquisition of the four acres by the Crown (A50(b):7).

We note in passing that no complaint is made concerning the purchase by the Crown of Parahirahi blocks A and B; only the acquisition of C is questioned.

The Native Minister responded to the petition, which he described as a letter, as follows:

> The position is that the restriction against alienation did not apply to the Crown. The Crown bought interests in all the three Blocks, A, B and C. The portion the Crown bought was defined in 1894 and orders issued in the name of the Crown for all the interests it had purchased as the Parahirahi D Block.
>
> It is now too late to interfere with what was settled in conjunction with the elders. (A50(b):17)

We believe the minister was misinformed in claiming that the matter was settled in conjunction with the elders. As we have seen, there were very few owners present at the October 1894 hearing.

The application to make Parahirahi a reserve

3.15.4 This application was first heard by Judge Frank Acheson on 14 June 1926. However, the application had been advertised under the wrong Act and the judge directed it be re-advertised correctly (B35:73a). He thought it advisable to adjourn the case however:

> as the Natives are applying to have the return of four acres awarded to the Crown on partition in 1895. Parahirahi C originally contained 5 acres. but 4 ac were awarded to the Crown in 1895 on ground of purchase of interests and Natives allege that no interests in C were ever sold. C was reserved for all the people and was subject to restrictions against private alienations. (B30:1)

The adjourned application came before Judge Acheson again on 1 September 1926. Ripi Wi Hongi appeared for the 11 owners in support of their application to have Parahirahi C1 block set apart and reserved as a Native reservation. Manihera Kauwhata gave evidence that the area contained "some of the hot springs at Ngawha" and was used for health purposes. He said the owners were afraid that the hot springs "might be taken by the pakehas". He stated that a large hui had been held and that all had agreed to the land being made a native reservation. Judge Acheson noted:

> The block contains some hot springs which are in continual use all the year round by Natives, including the owners who are alive and the next of kin of such owners as are dead.
>
> The block is in continual and common use by the owners as a village and a bathing place. There are several houses and a number of whares on the land.
>
> The Court has inspected the block and is strongly of the opinion that the block and the springs thereon should be reserved for the use of Natives only. There are numerous similar springs on Crown and European land adjoining the C No. 1 block. (A50(a):95)

Accordingly he recommended that an order in council be issued under s232 of the Native Land Act 1909 setting apart and reserving Parahirahi C1 for the common use of the owners thereof as a bathing place, village, place of scenic interest, spring, building site or for the common use of the owners in any other manner (A50(a):95). By notice in the *Gazette* of 23 December 1926 Parahirahi C1 block was duly set apart as a Native reservation "for the common use of the owners thereof as a village and a bathing place" (A32:U).

The 1929 and 1931 petitions

3.15.5 Late in 1929 the tangata whenua began to fence the boundaries of the whole of the former Parahirahi block C. They were stopped by a local inspector. This was followed up by Ripi Wi Hongi and others sending a petition on 23 November 1929 to Sir Apirana Ngata then Native Minister. They asked the minister to institute an inquiry as to the manner in which Parahirahi C was vested in the Crown (A50(b):22). So far as is known nothing came of it.

In 1931 a further petition to Parliament was made by Ripi Wi Hongi and others. The petition included the following statements:

5 That your petitioners are owners or successors of the original owners of the Parahirahi Block and say that the natives who signed the transfer to the Crown did not understand that Parahirahi C was included in the said transfer or that they were transferring interests in the said Parahirahi C Block to the Crown the said Block being understood by them to be inalienable by virtue of Judge Puckey's order before mentioned ....

7 That the Crown on this partition wrongly asked for portion of Parahirahi C Block which was not intended by any of the native owners to have been sold to the Crown and at the hearing of the aforesaid application the said Gilbert Mair stated that the Crown had acquired a little over 4 acres in Parahirahi C Block but was willing to take four acres leaving one acre for the native non-sellers.

8 That none of the owners who signed the transfer to the Crown was present at the Court when the order for Parahirahi D in favour of the Crown and residue orders in favour of the native non-sellers were made nor were they then aware that such orders were made.

9 That your petitioners have never since admitted the rights of the Crown to any portion of Parahirahi C Block and have always claimed the whole of such block and it has been occupied by your petitioners for over forty years and is still occupied by them and has always been regarded by them as being inalienable by virtue of Judge Puckey's order aforesaid.

10 Your petitioners have since discovered that the Crown claims the four acres aforesaid [and] applied to the Native Land Court to have the error rectified but have been advised by the Court that it has no jurisdiction to deal with the matter.

The petitioners asked that the Native Land Court be asked to cancel the orders of 19 October 1894 in so far as Parahirahi C block was concerned and to revest the block in the original owners or their successors (A50(b):24-25).

Again, it appears that nothing came of this petition.

Ngawha Hot Springs Domain created

3.15.6 On 14 December 1934 under s34 of the Public Reserves, Domains and National Parks Act 1928 an area of 4a 2r 8p being the area of Parahirahi C acquired by the Crown in 1894, was brought under Part II of the Act to be "managed, administered and dealt with as a public domain".[16] Title to the land is registered in the name of Her Majesty the Queen as a reserve for recreation under Part II of the 1928 Act. The land was to be known as the Ngawha Hot Springs Domain. The area of land in the certificate of title is 1.8413 hectares (D3). On 18 February 1979 a notice in the

Gazette pursuant to the Reserves Act 1977 classified the domain land as a reserve for recreation purposes.[17] This gazette notice is noted on the certificate of title 24D/1409 (D3).

New committee of management for Parahirahi C1

3.15.7 By August 1935 nine of the original 12 owners in C1 were dead and not succeeded to. Judge Acheson held a sitting of the Native Land Court at Kaikohe on 27 August 1935 to supervise the election of a committee of management. The judge did not appoint successors to the deceased owners because the "large gathering present" was reportedly unanimous in the view that sales of interests might take place if succession orders were made. The court was asked not to formally appoint successors. Twelve representatives of the original owners then met and elected from their number a committee of five. The court recommended the issue of an order in council under s298(1) Native Land Act 1931 appointing them a committee of management for the Native reservation (Parahirahi C1) (A50(a)99-100). The minutes of the meeting also record that it was decided by the hui that two honorary European members be appointed to the committee by the domain board, on the condition that the board allow two committee members to act as honorary members of the domain board. It was hoped this would lead to good relations and management of the two hot spring areas. The meeting "expressly stipulated" that none of the foregoing arrangements were to be taken as a waiver of their claim to the balance of the original Parahirahi C block. They continued to claim that it was never sold by them, but included in Parahirahi D "without their knowledge or consent" (A50(a):99-101).

In June 1936 the arrangement for two honorary European members to be added to the Native Committee was cancelled, the reason being that the European domain board had not reciprocated (A50(b):32). The domain board included only one representative from the Maori community in 1935 (C2:133; C4:67; B28:10).

3.16 The 1939, 1941, 1942 and 1944 petitions

The 1939 petition

3.16.1 This petition was addressed to Prime Minister Savage by Ripi Wi Hongi and others. They sought an inquiry as to whether the Crown became lawfully possessed of Parahirahi C block. They referred to it as being "absolutely inalienable" and said that it was reserved as a "marae" for the waters on the block in which the people bathed (A50(b):34).

The reply written on behalf of the Native Minister stated:

- that the restriction against alienation did not apply to the Crown;

- in 1894 the Native Land Court partition of the three blocks awarded Parahirahi D block, which contained a portion of C block including some of the springs, to the Crown; and

- if the petitioners still desired a Native Land Court inquiry a petition to Parliament would be required (A50(b):33).

The 1941 petition

3.16.2 On 30 April 1941 the Under-Secretary of the Native Department wrote to the Registrar of the Maori Land Court concerning a letter from Manihera Kauwhata of Ngawha to the Hon P K Paikea which had been referred to the Native Minister. The letter stated that a meeting had been held on 29 March 1941 by the Ngawha Wai Ariki Committee. The letter asked that Mr Paikea request the Minister of Native Affairs to instruct the Native Land Court to sit and hear the claim by Maori to the ownership of Parahirahi "C2 - Four acres" (B15:45). Nothing came of the request.

The 1942 petition

3.16.3 On 4 June 1942 Hirini Taiwhanga Heremaia and 48 others petitioned Parliament concerning Parahirahi C block (A47:6-9). They sought an inquiry by the Native Land Court into the title to the four acre "Parahirahi C2". This land they said was part of a native reserve called Parahirahi C1 of five acres and the four acres had been taken by the government leaving one acre remaining to the Maori owners. They claimed they were the owners of the four acres and it was not sold, leased or mortgaged by them at any time (B14:18). A report from the chief surveyor, Lands Department was sent to the Native Affairs Committee of the House in October 1942. It said the four acres were purchased not taken by the government and pointed out there was no Parahirahi block C2. The four acres had been part of the former block C not C1 which was the one acre block (A47:1-3).

On 25 August 1943 the committee referred the petition to government for inquiry.[18] On 6 December 1943 the petition was referred to the court for inquiry and report (A50(b):38; B14:17). The court hearing did not take place until 1945.

The 1944 petition

3.16.4 In the meantime a further petition by Hone Heke and Tamati Mahia was lodged prior to the hearing of the 1942 petition. This petition was also concerned with Parahirahi C block. It claimed the four acre block was wrongly taken and included in Parahirahi D when acquired by the Crown. The petitioners and their parents were the rightful owners of the Parahirahi block and did not sell their rights. They sought a Native Land Court inquiry into the ownership of the whole of Parahirahi C block (A50(b):37). The Paikea made representations on behalf of the petitioners to the Minister of Native Affairs who responded by letter of 6 February 1945. The minister gave a broad survey of the original 1885 subdivision and the further subdivision by the court in October 1894 and left this information to speak for itself.

The 1945 Prichard inquiry

3.16.5 In May 1945 Judge Prichard presided over the inquiry into the 1942 petition. Sittings were held at Kaikohe on 3 and 4 May 1945 during which the judge inspected the land. The petitioners were represented by an agent, L W Parore, and the Crown by Wright of the Lands and Survey Department.

In his report the judge first set out the history of the Parahirahi block of 5097 acres commencing with the memorial of ownership to 37 Maori by Judge Monro on 5 November 1874. Next he summarised the 15 October 1885 subdivision by Judge Puckey into blocks A, B and C. He then outlined the further partition orders made by Recorder Bush on 19 October 1894 when the non-sellers were awarded A1, A2, A3, B1 and C1; the residue, in D, going to the Crown. The petition, he said, referred to the four acres being undivided interests in Parahirahi C awarded to the Crown by Bush, this land being, at the time of the inquiry, a recreation reserve under the control of a domain board (B1:79).

The judge stated the petitioners' concerns shortly as being:

(a) that the natives selling thought that they were signing for A and B only and not for C which was originally partitioned for five acres so that it might be retained by the native race forever; and

(b) that the sale is invalid because the Crown purchased while the partition order was expressed to be inalienable except by lease for a term not exceeding 21 years (B1:80).

At the hearing Parore, unlike his witnesses, incorrectly stated that the Parahirahi block was subdivided into A, B, C and D in 1885. This error is repeated throughout his submission (B28:1). It is unfortunate that the petitioners were not able to be represented by counsel at this hearing.

In a very brief summary Judge Prichard noted the salient points in the evidence of the petitioners as follows:

- *Hirini Taiwhanga Heremaia* whose father was an owner remembers partition into C - 5 acres. He and others first knew of claim of Crown to 4 acres of it when Crown prevented natives erecting fences - apparently between 1920 and 1930. The natives then petitioned Parliament -12th July 1926. His father did not, when fence question arose, know of sale of interests in C. Various owners told him they did not sell.

- *Here (Hori) Pue* who remembers signing to sell but says it was for A and not for C. He does not remember signing to sell B.

- *Ripi Wi Hongi* whose father was a seller and "did not tell me that officer of Government came to buy C [...] he sold A and B".

- *Whautere Wi Te Hira* whose parents were non-sellers and so put in C. Various owners told him they did not sell. Hoani Ngapua who was present at Kawakawa when the Crown's 4 acres were cut off joined in the discussions after the trouble over the fence but did not mention the cutting out and that he was present.

- *Wiremu Hongi Te Ripi junior* was a non-seller and says that officer of Government asked him to sell A - not B and not C. (B1:80)

The judge concluded that the doubts over this block appeared to have arisen from the fact that after 1894 the Crown took no steps to show outwardly its ownership except to have the survey completed. He noted that the Maori all denied having seen the surveyors. He continued:

> Various natives continued to live on the 4 acres and were so living when the Crown interfered over the erection of the fence and they continue so to live up to the present time. If no natives had sold one would have expected the two non-sellers who appeared at Kawakawa on 19th October 1894 to have raised the question that their relatives had not sold.
>
> The instrument of sale was signed by over 40 natives. It was carefully drawn, was handled by experienced officers and was correctly witnessed - in most cases by witnesses of standing and has stood very many years before being questioned and in my opinion the petitioners have not reasonably established that the native sellers thought they were signing for A and B or alternatively for A only. (B1:80)

It appears that no criticism was made of the deed at the hearing. This is not surprising given the lack of legal representation of the petitioners. We are unable to accept the view of the court that the document was "carefully drawn". It was almost certainly a legal nullity and was quite inappropriate for the method of purchase. As we have shown it was ambiguous, indeed confusing. Of course the judge was not concerned with the Treaty rights of the petitioners nor does he appear to have appreciated that this was a highly valued taonga of the Maori owners. Unlike the judge on the evidence and representations before him, we have come to a different conclusion on the basis of the much more comprehensive evidence, both Maori and official, placed before us. We have also, unlike Judge Prichard, had the benefit of full legal argument.

The next question adverted to by the judge was "the legal one that subdivisions A and C were declared to be inalienable and that nevertheless the Crown obtained ownership" (B1:80). The judge appears not to have known that there was not an

absolute prohibition on alienation and that it was permissible with the assent of the Governor. He did however note the publication in the *Gazette* in 1886 of the "notification of the entry into negotiations for the purchase of Native Lands in the North Island" which included the Parahirahi block. He also referred to the later (post purchase) proclamation of 25 July 1891 declaring as Crown land the area awarded the Crown on partition. He continued:

> There can be no doubt that the land did become Crown Land and that the native title was, by the proclamation extinguished. The argument of the Crown is that prior to 1893, it was not the custom, where the Crown was purchasing, to remove the restrictions though it was the custom where a private individual was the alienee. In other words the Crown relied on the notice of entry into negotiations, the payment of purchase money and the issue of the subsequent proclamation as completing the transaction. This course seems, for example, to have been followed in the case of the following blocks:
>
> | | | |
> |---|---|---|
> | Rarotonga | Gazette 1897 | Page 1747 |
> | Pokapu | Gazette 1897 | Page 1747 |
> | Takanga 2 | Gazette 1880 | Page 452 |
>
> The natives having received the purchase money and the Crown being in a position to have the restrictions removed and the land having legally become Crown Land it cannot now be claimed that because as it were of a defect in their title the natives should be granted the land back or paid further purchase money. If this were so most Crown purchases of that period would require to be re-opened on this technicality. (B1:81)

The restriction on alienation of C block was imposed by the court on 15 October 1885 pursuant to s4 of the Native Land Division Act 1882 and provided:

> In the matter of an order of this Court, bearing even date herewith, directing the issue of a Crown grant in favour of certain persons in respect of the land known as Parahirahi C.
>
> It is directed that the said Crown grant be issued, subject to the restrictions, conditions and limitations following:
>
> 1. That the land the subject thereof may be leased for any term not exceeding twenty-one years, but shall be otherwise inalienable except with the assent of the Governor. (B11:22)

The first point to be noted is that for the Crown to purchase, the assent of the Governor was required. It was not necessary to have the restriction itself removed; provided it was complied with, the purchase could proceed.

The second is that the qualified restriction on alienation made by the court in 1885 was clearly within its powers under s4 of the Native Land Division Act 1882 which provided that the court on an application for division of land may order "any conditions, restrictions or limitations" in respect of such division.

3.16.6 The notice published in the *Gazette* on 7 October 1886 was given pursuant to s3 of the Government Native Land Purchase Act 1877. It was issued in the name of Jervois, the Governor of New Zealand. It stated that negotiations by or on behalf of Her Majesty the Queen had been entered into for the purchase of certain blocks of land including Parahirahi block containing 5097 acres (3.8.4). It is arguable that this notice issued in the name of the Governor constitutes at least the implied assent of the Governor to the purchase of the Parahirahi block by the Crown. On the other hand in a legal opinion commissioned by this tribunal Dr David Williams argued to the contrary. However, the tribunal finds it unnecessary to come to a concluded opinion on the question as for reasons already given it is not satisfied that the owners of Parahirahi block C willingly and knowingly alienated the block (3.14.10).

3.16.7 By way of conclusion Judge Prichard stressed that something should be done to safeguard the future of the one acre still owned by Maori. He correctly noted that in time the domain board would take steps to evict "these squatters" with the consequential danger of the one acre becoming overcrowded to the possible detriment of the hot springs on C1. He recommended the Crown Lands Department be consulted to see whether four acres in the nearby "considerable area of Crown land" could be made available as a papakainga for the erection of dwellings in return for a prohibition on further residence on the one acre reserve. Although the matter was discussed by officials nothing came of Judge Prichard's recommendation.

Petition of 1946

3.16.8 Petition 59 of 1946 from Hirini Taiwhanga Heremaia and 273 others being representatives of a portion of the Ngapuhi iwi sought a royal commission into matters affecting the title to Parahirahi C and D previously reported on by Judge Prichard in respect of the 1942 petition. The reason a royal commission was sought was the difficulty the petitioners faced of obtaining the documents and plans for their inspection. It was thought a royal commission would overcome this problem. (A50(b):49). Nothing resulted from the petition.

3.17 Eviction from the Domain

For generations if not centuries, the people of Ngawha had lived in close proximity to the hot springs to take advantage of the healing waters. Some whare were on what became the one acre C1 block, others were on the remaining four acres which became the domain. In August 1961 the Minister of Lands approved of action being taken to evict those living on the Crown owned domain (B1:76). In May 1962 summonses issued by the domain board were served on those living there. After various adjournments a lengthy hearing took place in the Magistrates Court at

Kaikohe on 28 February 1964. Mr Herd SM upheld the Crown's entitlement to the domain and found the defendants to be trespassers. They were given a month to vacate the premises on the domain (C2:18-20; C4:63-65).

3.18 Conclusion

3.18.1 We have discussed the eight petitions by or on behalf of the owners of the C1 block. It is noteworthy that none complained of the acquisition by the Crown of blocks A and B. Their grievance related solely to Parahirahi C block. The eight petitions over the period from 1926 through to 1946 were each based on the conviction of the petitioners that the owners had not knowingly sold any part of block C. In a report dated 19 April 1973 the Secretary for Maori Affairs J M McEwen advised the Minister of Maori Affairs in response to a letter from Mrs Hoana Rapatini concerning Parahirahi C block that:

> The matter dealt with in the letter is the acquisition by the Crown in the 80s of last century of 4 acres in the Parahirahi block, on which are located some of the Ngawha Springs. This has been brought up many times in the past. The records show that in 1926 and every few years thereafter there has been some form of complaint and plea for the return of the land. (B1:49)

The owners have maintained that position to the present day.

Although the petitions in themselves are in no way determinative of the matter, the tribunal considers they add weight to the long held and strong conviction of the claimants that Parahirahi C was not sold to the Crown.

3.18.2 In 1885 the local hapu of Ngawha owned the whole of the 5097 acre Parahirahi block. Today three small areas remain within the block as Maori freehold land. These are:

(a)	Parahirahi C1	-	0.4047 hectares
(b)	Wahi tapu	-	0.1011 hectares
(c)	Parahirahi A2	-	5.5847 hectares

This amounts to 15.0502 acres or approximately 0.3 percent remaining Maori freehold land (B35:117).

Approximately 58.75 percent of the original block is now in private ownership (2994.5 acres) and 40.16 percent (2047.18 acres) is owned by the Crown (B35:117-119). Figure 8 is a plan of present-day ownership of Parahirahi block.

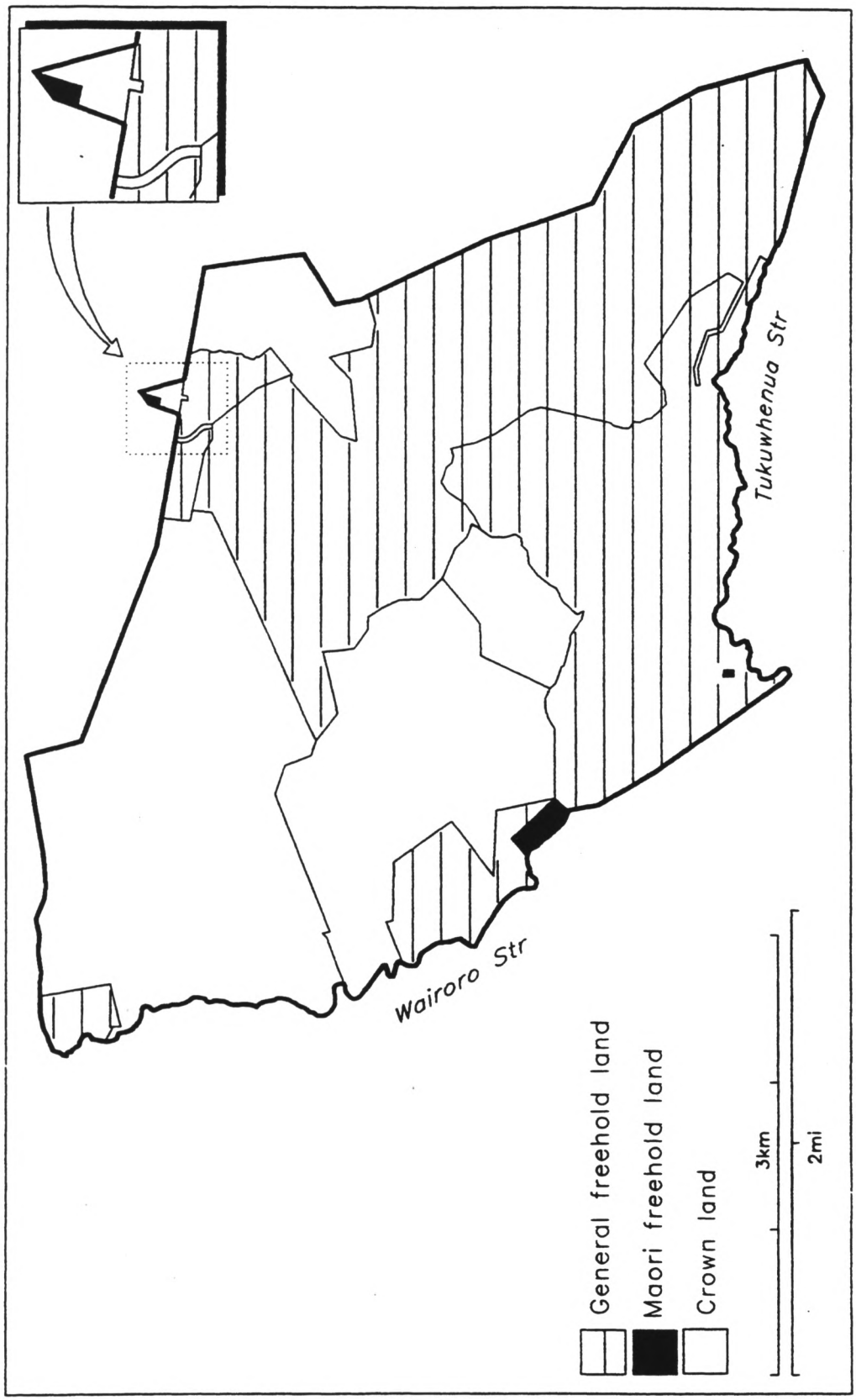


Figure 8: Plan of present-day land ownership of Parahirahi block. *Source:* B35:118 (original at B27(b)

3.19 Recommendation

3.19.1 For reasons which it has given in preceding paragraphs 3.14.6 and 3.14.9 the tribunal has found that the Crown acted in breach of its Treaty duty to protect the owners' interests in Parahirahi C block and that it also acted in breach of article 2 of the Treaty in not ensuring that the owners willingly and knowingly alienated Parahirahi C block and the hot springs taonga located on the block.

The tribunal accordingly recommends that the portion of the former Parahirahi C block acquired by the Crown and now vested in Her Majesty the Queen as a reserve for reservation purposes pursuant to the Reserves Act 1977 comprising 4a 2r 8p (1.8413 hectares) be returned to Maori ownership.

3.19.2 The tribunal thinks it likely that it would be the wish of the trustees of the Parahirahi C1 Maori reservation and the whanau and hapu whose interests they represent that, should such land be returned by the Crown, it be vested in the trustees (commonly known as the "Waiariki Trustees"). The tribunal however makes no recommendation as to whom the four acre block should be returned as this is essentially a matter to be determined by the Maori people concerned.

In making this recommendation the tribunal is mindful of the relatively recent history of the administration of the recreation reserve, until recently known as the Ngawha Hot Springs Domain, which we now record.

- In July 1965 the Bay of Islands County Council was appointed as the Ngawha Hot Springs Domain Board (C4:11). The dwellings on the domain had been removed by this time following the court order in the previous year (C4:15-16).

- In 1967 the development of Ngawha Springs was discussed at a meeting organised by the Northland Travel Association. It was noted there that Maori had willingly cooperated with the old domain board to run the springs largely as a joint venture with takings to be shared on a percentage basis, and a further meeting with representatives of the Maori trustees was suggested (C2:3).

- In 1969 and 1971 far-reaching development plans were drawn up (C9:10-53). The latter at least combined the operation of C1 and domain pools. Newspaper articles show that the Maori trustees were to be asked for their co-operation in 1971 for the development plans (C5:30), and to be included in discussions regarding the payment of fees (C5:29). In February 1973 in light of the development of pools the council expressed concern about the Maori dispute as to the ownership of the former block C (C5:22-23). It was noted that a certificate of title to the domain land had not been issued to the Crown; this was done in April 1973 (C5:21;D3).

- In June 1974 the new facilities at the domain were opened to the public (C5:17).

- In January 1979 pursuant to the provisions of the Reserves Act 1977 the domain was classified a recreation reserve and became the Ngawha Hot Springs Recreation Reserve (C5:14).

- In April 1980 the county council noted that the recreation reserve land was running at an increasing loss and mooted leasing it or selling it to private enterprise. It asked the Commissioner of Crown lands to advise it on the possibility of the operations being removed from council control and responsibility (C5:13).

- Leasing was considered the only viable option (C5:11) and a management plan for the recreation reserve was drawn up in accordance with provisions of the Reserves Act 1977 and adopted in October 1987 (C6:3; C10:15-24). Tenders were invited for the lease of the recreation reserve in April 1988 (C5:5). However, the claim to this tribunal by the Maori committee, now called the Waiariki trustees, prevented the leasing of the land (C6:3-4).

- In March 1989 a draft management contract was drawn up between the Bay of Islands County Council and the Waiariki trust for a term of 12 months (C10:7-11). This contract was to be reviewed at the completion of the year term (C10:5).

- Following local government reform, the Far North District Council took over administration of the recreation reserve (C5:1).

- In June 1991 the recreation reserve pools were being managed on the council's behalf by the Waiariki trust as an interim measure. It was then considered that, as the tribunal hearing was "some considerable time off" and much work was needed on the reserve but no one was keen to fund it in the face of uncertainty, the council would give a limited term lease to the Waiariki trust to keep the complex operating yet enable the council to review the situation after the claim was considered (C6:3-4).

- In September 1992 it was realised that the recreation reserve was in fact supposed to be administered by the Department of Conservation although the council had been running it for years (C6:1).

- At present, the Waiariki baths and the recreation reserve baths are separated only by a wooden fence. They share a common car-park, both have their own changing sheds, and both contain a number of differently coloured hot pools, each believed to have different healing powers. On one side of the fence, the

baths are Maori-owned and managed by the Waiariki trustees. On the other side of the fence, the baths are Crown-owned and also managed by the Waiariki trustees.

3.19.3 The tribunal believes that the long-standing grievance of the hapu of Ngawha calls out for resolution by the Crown. The claimants and those they represent, past and present, have never wished to part with this most treasured taonga of the whole of Ngapuhi. Even now they are acting as kaitiaki of all the hot springs and pools on the five acre block they so carefully set aside more than 100 years ago in 1885. Repeated efforts through much of this century have been made to regain the four acres vested in the Crown in 1894.

The tribunal finds it difficult to envisage a stronger claim than this for remedial action by the Crown. Good faith, fairness and the honour of the Crown we believe are compelling reasons for the acceptance of our recommendation for the reinstatement of the rangatiratanga of the hapu of Ngawha in whatever form is thought appropriate by them over all the hot springs of Ngawha on the former Parahirahi C block.

References

1. W R Wade *Journey in the Northern Island of New Zealand: Interspersed with Various Information Relative to the Country and People* (Christchurch, Capper Press, 1977) pp 161-162

2. F von Hochstetter and C A Fleming (translator and editor) *Geology of New Zealand: Contributions to the Geology of the Provinces of Auckland and Nelson* (Wellington, New Zealand Government Print, 1959) p 45

3. F W Hutton "On the Occurrence of Native Mercury near Pakaraka, Bay of Islands" *Transactions of the New Zealand Institute* vol 3, 1870, pp 252-253

4. Both Te Ngawha Tuhakino and Ngawha Tuakino (below) appear in these earlier references to the Parahirahi block.

5. Kay Boese *Tides of History: Bay of Islands County* (Whangarei, Bay of Islands County Council, 1977) p 368

6. See s56 of the Native Land Court Act 1880 which authorised the court to record in its proceedings any arrangements voluntarily arrived at amongst the Maori themselves and to give effect to such arrangements.

7. Northern minute book 7 pp 155-156, Maori Land Court, Whangarei

8. The sketch-map referred to here was enclosed with his letter but is not now on the file.

9. NZG 1894 II pp 1404-1405

10. AJHR 1893 G-4 p 3

11. The original proposal had been for an exchange of 206 acres (B35:50).

12. *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641, 664

13. "The Mohaka River Report 1992" (Wai 119) 6 *WTR* (Wellington) p 40

14. Above n 12 p 693

15. Although Manihera 'Kaiwhata' appears to be the same person as Manihera 'Kauwhata' (mentioned above), this document uses Kaiwhata, as do a number of subsequent records.

16. NZG 1934 p 4342

17. NZG 1979 p 264

18. AJHR 1943 I-3 p 8

Chapter 4

The Modern Geothermal Resource

4.1 Introduction

This claim is made in respect of the Ngawha geothermal resource. Paragraph 2 of the statement of claim says that for the purposes of the claim the Ngawha geothermal resource means the Ngawha geothermal field in its entirety.

In 1840, neither Maori nor Europeans had any scientific knowledge of the geothermal field. In Ngawha in particular the field was not assessed and its approximate extent determined until resistivity studies were carried out by scientists of the Geophysics Division of the Department of Scientific and Industrial Research in 1966 and 1977 (A36:36). It would have been apparent to any observer at any time that if hot water was emerging at land surface it could only be from underground. But an understanding of the underground geothermal system which gives rise to the hot springs is a product of 20th century scientific investigation. While much is now known of the sub-surface geothermal resource much is yet to be learned.

4.2 The Ngawha Geothermal Field

4.2.1 The tribunal received evidence from several well qualified scientists in respect of the Ngawha geothermal system of which the geothermal field is part.

The claimants called Thomas Lumb who is currently in practice as an energy resource consultant concentrating on geothermal energy.[1] Mr Lumb described the Ngawha geothermal field as being the only high temperature (above 225°C) field in New Zealand known to exist outside the Taupo volcanic zone in the central North Island. In terms of the field's area as defined by resistivity surveying it is the largest in the country, but despite its size does not rank as highly as others in terms of energy capacity (A51:2).

The size of the field

4.2.2 Mr Lumb explained that the most common method, world-wide, of delineating geothermal fields and determining their size is to carry out an electrical resistivity survey. This effectively maps the distribution, in the ground, of rocks of varying electrical properties. Hot geothermal fluids readily conduct electricity and so rocks containing such fluids show up as regions of low electrical resistivity. Resistivity is the inverse of conductivity. Commonly the resistivity found within a field is less than one tenth of that of the surrounding region, and the geothermal field boundary determined by this method generally has fairly sharply defined sections. Mr Lumb stated that Ngawha is somewhat different in this respect in that, although there is

clearly a resistivity "anomaly" associated with the field, it is not as well defined as most other fields. As a consequence inner and outer limits of the boundary zone of the Ngawha geothermal field (see figure 3) have been assessed in the range of 25 to 50 square kilometres. Mr Lumb noted that the uncertainty over the area of the field must be reflected in uncertainty over the field's energy capacity (A51:3-4).

4.2.3 A statement of evidence by Dr Douglas Sheppard on behalf of the Crown in respect of the Ngawha geothermal system was produced in the absence of the author in the Antarctic. All counsel consented to this procedure.[2] In his paper Dr Sheppard described the current scientific understanding of what a geothermal system is and then applied this to the Ngawha system.

4.3 The Nature of Geothermal Systems

4.3.1 Dr Sheppard described the complexity of geothermal systems which are a part of hydrological systems. In appendix 4 we set out his account of the geological, chemical and other components of the processes which happen to cause geothermal systems. His purpose in doing this was not only to enable the tribunal to gain a reasonable understanding of such processes but also to illustrate that a geothermal "resource" does not stand alone. It is part of much larger systems which involve as essential components the climate of a region, the hydrology and types of rocks in a region, the regional and even global geological processes that result in the way the geology of a region has formed, and not least, that this is a continuous and dynamic process that is changing and evolving (B37:3-4).

Dr Sheppard emphasised that in the light of such a concept, the definition of the limits and boundaries of a geothermal system becomes somewhat difficult. Thus he said:

> The system as a whole is more than, for instance, the surface features, and in the same sense, the system is more than hot water and rock reservoir. While a "resource" may be able to be defined in terms of the volume of water which is hot enough to be exploited, and that will depend on engineering criteria as much as anything else, this bears little relation to the physical realities of the system itself in terms of sources and influences. (B37:4)

Ngawha as a System

4.3.2 It is important that the Ngawha system should be explained and understood. The tribunal can do no better than set out here Dr Sheppard's excellent description in his own words:

> 3.1 The Ngawha geothermal system exists in the crust to an undefined depth below the Ngawha Springs area and its environs. It is comprised of physically separate but linked parts, and this structure is caused by the nature of the rocks and formations, and the faulting pattern in the area.

3.2 The major rock units below Ngawha are present as layers, thinning to the east. The top geological formation below Ngawha Springs is composed of lake sediments and basalt lava flows. These have created the surface that we see, which is essentially a basin with overlying ridges of the lava. The springs and gases emerge through the old lake sediments and around the edges of the lava flows. The sandy lake sediments are full of cracks and the fluid seems to flow through these.

3.3 Below the shallow layers is a thick layer (about 500m) of sedimentary rocks of a very mixed and confused character, in a matrix of clays and mudstone. This layer to a large extent prevents the flow of water and gas through it from below, except in small quantities, and it is thought that these flows occur in fault zones, where there is much cracking and perhaps movement to keep the cracks open. The alignment of these faults is thought to be northeast-southwest, because of the alignments of springs and gas seeps in this direction.

3.4 While this "caprock" limits the quantity of water that can flow upwards through it, it also contains within it water which is essentially a mixture of deeper fluid and groundwaters. Some scientists believe that this water is continuous and very widely spread, extending some distance particularly to the north and east.

3.5 Beneath the "caprock" is a great thickness of the rock known as greywacke. The base of the greywacke has not been intercepted by drillholes (one of which was drilled for 3,300 m). Somewhere in or underneath the greywacke there is a heat source, probably a hot magma body, which provides the heat for the geothermal system. The greywacke is faulted over large distances, and this is thought to allow water to flow through. The geothermal "resource" targeted by the drilling in the early 1980s is within this greywacke. The water itself is thought by some scientists to come from the northeast, get heated and acquire dissolved components somewhere below the Ngawha area, circulate quite slowly in the cracks and faults in the greywacke, and drain away to the southeast, at some depth (perhaps 1000m or more).

3.6 Somehow the water becomes saturated with the gas carbon dioxide, perhaps from the magma, or from the greywacke, or both. As the water rises in the crust, the pressure lessens and the gas comes out of solution, so that the fluid becomes two phase, that is, a liquid and a gas phase are both present. Because the [water] in each rock unit has a different chemical composition, we can determine the origins of each water that we sample. We know that some of this gas and water gets through the relatively impermeable caprock because we see the same waters and gases in the springs, diluted and modified to some extent, as we get from the wells which take water from below the caprock.

3.7 We can consider there to be four types of water in the Ngawha geothermal system:

(a) that from within the greywacke, which is characterised by being dominated by borate and chloride as dissolved components;
(b) that from the caprock, which has more bicarbonate and less of the borate and chloride;

(c) that from the surface or near surface, especially in pools, which has more sulphate in it than the others;

(d) rainwater, which soaks into the ground and flows over the surface. It contains little dissolved matter.

Most springs, particularly outside the Ngawha Springs basin, are of type (b) water. One or two, in the early 1980s, were hotter and had more type (a) water. All springs are diluted by rainwater to various extents, depending upon the recent rainfall, and the characteristics of the springs itself.

3.8 In addition to the water, gases reach the surface in unusually large quantities. The gas is mostly carbon dioxide, but can contain a few percent of hydrogen sulphide, and traces of other gases. These gases are presumed to come from beneath the caprock with some of the water phase, and percolate through the groundwaters above, chemically altering them as well as heating them, forming the type (b) waters. At the surface, the gases affect ponded waters by depositing sulphur causing the suspended white matter and sulphur muds, and forming sulphate when in contact with air.

3.9 The composition of all the pools and springs at and about Ngawha can be explained in terms of these processes. The waters in the surface features are derived from waters, gases and dissolved components from all depths within the system, whether the system be defined broadly or restrictively. (B37:4-5)

4.3.3 It appears to the tribunal that there are difficulties in isolating the hot water which emerges at the surface or which might be extracted below ground by drilling, from other essential components in the system, for instance, the rain water which feeds the system; the heat source, probably a hot magma body, which provides the heat for the geothermal system; the rising molten material (magma); the chemical and other interaction of hot waters with rocks and the variety of chemicals and gases present, sometimes in solution. All would appear to be essential components of the geothermal resource within the Ngawha system. Presumably ownership or rangatiratanga over all such components is claimed by the claimants.

4.3.4 Dr Arnold Watson a principal of KRTA Ltd, a firm of consulting engineers specialising in geothermal energy developments in New Zealand and overseas, was called by counsel for the Ngawha joint venture comprising the Bay of Islands Electric Power Board and the Taitokerau Maori Trust Board.[3]

On the question of over what area a geothermal resource extends, Dr Watson noted that the resistivity boundary is not a true boundary; geothermal fluid extends outside the boundary but in small amounts. The definition of "small" he said, is rather arbitrary but is related to technological issues. The area in question extends well away from the surface springs. He agreed with Mr Lumb's estimate that the area of the Ngawha resource is in the range of 25 to 50 square kilometres (B39:5). He added that the resistivity boundary is not a hard and fast boundary. It is an area in which geothermal fluids are known to have been present. Only if wells are drilled can you

actually know whether they are still there.

4.3.5 In their statement of claim the claimants say in relation to their title to and rangatiratanga in respect of the Ngawha geothermal resource:

> 4.1 The Ngawha Geothermal Field is a taonga of immense cultural and spiritual significance to Nga hapu o Ngawha.
>
> 4.2 The traditions of our people abound with references to this sacred taonga.

Dr Watson was of the opinion that para 4.2 implies that the existence of the field was known to early generations of Maori people. He pointed out that geothermal fields are localised areas where heat from great depth leaks to the surface. The field, he said, is the surface area above a region where heat has risen from great depth by natural convection. The extent of the 'field' in his opinion is related to how deep one can drill wells. There is hot water to be found at 600 metres depth beneath the area within the Ngawha resistivity boundary (see figure 3). Dr Watson stated that if one was able to drill to 6,000 metres (six kilometres) depth beneath Kaikohe, it is probable that some hot water or steam would be found. While wells of this depth are drilled for oil and gas, the technology is too expensive to be used for geothermal developments. If, however, it proved possible to drill to those depths for geothermal energy, the definition of the geothermal field, Dr Watson says, would have to be extended. This is because the word field is related to the technology to be used.

Dr Watson went on to point out that well drilling technology is relatively recent, within the last 150 years, and the technology available to past generations of Maori was limited to shallow digging:

> If the concept of a field had been used, it would have been defined as the area immediately surrounding springs where the hot water could be found by digging. (B39:6)

In response to questioning Dr Watson agreed that Maori would have observed changes to springs and recognised that they were due to some underground phenomenon. He accepted that Maori realised that something was going on under the surface of which they were not fully aware.

In answer to Dr Watson's suggestion that more precise exploration techniques may be available in the future, claimants' counsel submitted that the claimants would be entitled to any "larger" field to the extent that such "larger" field continues to be part of the identifiable geothermal taonga. If that were to happen, he said, it would simply demonstrate that the physical resource was larger or more complex in its relationships than is currently realised (C13:7).

4.4 Surface Hydrothermal Activity

4.4.1 As indicated in the previous chapter, the principal Ngawha hot water springs are in close proximity to each other in the Ngawha Springs locality (see figure 3). They are

- Parahirahi C1 Maori reservation comprising one acre, sometimes described as the Maori area and more recently as the Waiariki baths;
- the immediately adjoining domain area of approximately 4 acres owned by the Crown. Previously part of the original Parahirahi C block, it became part of Parahirahi D;
- the Spa Hotel area, also adjoining the Parahirahi C1 reservation, in the private ownership of the Ginn/Beadle family. This is on the Tuwhakino block; and
- the Ngawha Springs Hotel site, also now in private ownership, formerly part of Parahirahi B block.

There are more than 20 hot springs, many of which are used for bathing, on these four sites.

Outlying Springs

4.4.2 Barbara Simpson in a paper which includes a brief description of the Ngawha geothermal anomaly (A31:34-37) refers to several other sites in the region of the main Ngawha springs (see figure 3). These are described as:

- Kaikohe warm springs on the Kopenui stream about three kilometres north-east of Kaikohe;
- Lake Omapere hot soda springs on the shore flats of Lake Omapere about six kilometres north-north-east of Kaikohe. This spring she described as a man-made dug pool;
- Neilson's soda spring near Highway 12 about two kilometres north-north-west of Ngawha Springs village; and
- Te Pua springs about four and a half kilometres north-north-east of Kaikohe.

Ms Simpson expresses the view that all these natural discharges are probably related to the Ngawha geothermal reservoir. In her opinion they are most probably fed by shallow sub-surface outflows from the central resource (A31:36).

Dr Sheppard in discussing outlying springs (B37:9-10) stated that there are a large number of warm or gassy springs in the region about Ngawha. Some scientists, he says, believe that many of those close to Ngawha Springs are a part of that system.

He provided a map prepared by officers of the New Zealand Geological Survey in 1987 showing where these springs and seeps are. They are shown on figure 3.

The springs (other than the Ngawha Springs) shown on the map produced by Dr Sheppard are:

- Puketotara stream soda spring;
- Pakaraka springs;
- Ohaeawai soda springs;
- Lake Omapere soda springs;
- Te Pua springs;
- Neilson's soda springs;
- Waiparaheka lake springs;
- Waitotara Pond springs; and
- Ngamokaikai Pond springs.

Of the four springs mentioned by Ms Simpson, only the Kaikohe warm springs are omitted from Dr Sheppard's list. The Waiparaheka lake springs and the Ngamokaikai Pond springs are within the Parahirahi block. The Waitotara Pond springs are within the Tuwhakino block (see figure 3).

Dr Sheppard considered that the springs at Te Pua, Omapere, Pakaraka, Ohaeawai, and others within ten kilometres of Ngawha Springs, may well be "an integral part of the system, as distant expressions". Dr Sheppard continued:

> Because their chemical compositions are similar to each other and to the caprock (intermediate level) waters, a common source has been postulated. This does not necessarily mean that the waters flow from, say, the Ngawha Springs area, to the outlying places, but it could mean that they are formed in the same way from similar original components by being linked into deeper parts of the system. Such springs are in the north and northeast of the system, perhaps a reflection of the regional hydrology, faulting structures and geological formations. Because they are remote and derivative in relation to the main system, direct and definable effects of exploitation of the deep reservoir on the outlying springs will be unlikely. (B37:9-10)

Presumably the claimants claim ownership and rangatiratanga over all those outlying surface springs within the Ngawha geothermal field. These include the springs within Parahirahi and Tuwhakino blocks mentioned above as well as Neilson's soda springs.

4.5 *The Extent of the Geothermal Taonga*

In the previous chapter (3.14.2) the tribunal recognised that the hot springs of Ngawha in Parahirahi C block were a highly valued taonga, not only at the time of the Treaty, but also when the Crown embarked on the purchase of the Parahirahi blocks in 1886. But we left open for further consideration the question of whether at these times the taonga included the underground reservoir.

4.5.1 At 1840 all the Ngawha hot springs together with the outlying springs within the geothermal field were on land in the possession of the claimant hapu. But as we have seen, the Ngawha geothermal field, when it came to be appraised and defined very approximately in the later 1970s, covered an area of between 25 and 50 square kilometres. In 1840, we believe, all of this area was in the occupation of the hapu of Ngawha, with perhaps some additional hapu of Ngapuhi.

While those familiar with the springs must have been aware that the hot water emerging in the springs came from an underground source neither they nor anyone else had any knowledge of the nature or extent of the complex geothermal system which produced the springs and gases in and around the Ngawha hot springs area. Nor of course did they or anyone else have any knowledge of the extent of what is now known as the Ngawha geothermal field. Even today scientists are able to define the area with no greater certainty than to give lower and upper limits of 25 and 50 square kilometres.

The claimants in their statement of claim say at paragraphs 4.1 and 4.2 (see appendix 1) that the Ngawha geothermal 'field' is a taonga of immense cultural and spiritual significance to nga hapu o Ngawha, whose traditions abound with references to this sacred taonga. Such knowledge as nga hapu o Ngawha had in 1840, or at the time of the sales, of what lay underground was largely encapsulated in the myth of the taniwha Takauere discussed in our earlier chapter 2 (2.4.3).

The claimants' statement of claim then moves from the references to the geothermal 'field' to the geothermal 'resource' and goes on to claim that:

- the Ngawha geothermal resource is central to the mana and mauri of the claimants' people and they are kaitiaki of it (4.3); and
- the Ngawha geothermal resource is a taonga protected by article 2 of the Treaty of Waitangi (4.4).

4.5.2 The evidence of the kaumatua was directed principally at the Ngawha hot springs on the Parahirahi C block. The reason for this appears in the evidence of Ronald Wihongi cited in chapter 2 (2.8.4). His ancestors, he said, wanted to:

> retain the whole of their sacred possession. The hot springs above the ground, and all the ... hot streams under the ground. In their minds, if they were to hold on to where the outlet of this sacred possession was they will retain it all, right down into the bowels of the earth. That was why they had this great desire to hold on to the five acres of Parahirahi C forever more.

He referred to the stories about the taniwha Takauere who went underground from Ngawha. The waters under the ground and the waters above the ground are one and the same in his view.

The concentration on the Ngawha hot springs or pools situate on what became Parahirahi C and the linkage of the underground waters to those pools, to the exclusion of those in adjacent or outlying areas, appears to reflect the fact that it was those particular pools which were so greatly prized by Ngapuhi. It was to those pools, it seems, they resorted for their healing and beneficial powers. It may help to explain why no restriction of any kind was placed on the sale of Parahirahi B block, although there were, and still are, hot springs on that land close to the Parahirahi C block hot springs. It may also explain why the neighbouring Tuwhakino block and the hot springs there (now known as the Spa Hotel springs) were also sold and have been in non-Maori ownership for the last 100 years.

The position at 1840

4.5.3 To revert however to the position at 1840. At that date and for some long time previously, the hot springs of Ngawha and the waters coming to the surface there were a sacred taonga. At this date also, the hapu of Ngawha with perhaps some other hapu of Ngapuhi were, we believe, the occupiers of, and held rangatiratanga over, what is now known as the Ngawha geothermal field including all surface geothermal springs within the field. Moreover, the various hapu, by virtue of their occupation and possession of the land above the sub-surface geothermal system, had rangatiratanga over the sub-surface and whatever it contained even though this was necessarily almost wholly unknown then. We do not accept the suggestion of Crown counsel (3.14.2) that it was the healing springs alone which were taonga at the time of the Treaty and not also the underground geothermal reservoir. As kaumatua Ngatihaua Witehira told us (2.6.3):

> Our ancestors [knew] that the heart of the Ngawha is underground. They are channels of hot water flowing underground. They knew and believed that it was one taonga underground and up on the surface of the ground. (B36; A54(n))

4.6 The Position at 1894

4.6.1 As was foreshadowed in chapter 2, and as we have related in chapter 3, Maori sought and obtained individualisation of title to the Tuwhakino and Parahirahi blocks

in 1873 and 1874 respectively. Between 1878 and 1894 Heta Te Haara sold the whole of the Tuwhakino block. In 1885 the Parahirahi block was subdivided into three blocks (Parahirahi blocks A, B and C) and in 1894 the Native Land Court awarded Parahirahi D block of approximately 4293 acres to the Crown. This area included a portion of each of the three previously existing A, B and C blocks. In short, by 1894 the whole of the Tuwhakino block had passed from Maori to European ownership. In addition the Crown had acquired the greater part of Parahirahi B block on which were situate all the hot springs and other geothermal manifestations on that block. It also believed it had purchased some four acres in Parahirahi C block on which hot springs were also present.

4.6.2 Nga hapu o Ngawha in their statement of claim assert they were guaranteed ownership and rangatiratanga over the Ngawha geothermal resource so long as it is their wish to retain the same (appendix 1: 4.5). Later in the claim it is said:

- the Crown did not acquire ownership of the Ngawha geothermal resource in its acquisition of the Parahirahi block (5.6);
- Maori did not indicate any wish to alienate the Ngawha geothermal resource (5.7); and
- the fact that Maori sought the complete and inalienable reservation of the Ngawha Springs area in the Parahirahi C block is conclusive evidence that Maori in fact intended to retain the Ngawha geothermal resource (5.8).

4.6.3 We propose to deal with each of these claims. Before doing so however, we observe that the claimants appear nowhere to have defined what they mean by the geothermal resource. Counsel for the claimants in his closing address submitted that the Ngawha geothermal resource is a taonga. In support he referred to the evidence of kaumatua which he said made this abundantly clear (C13:12-15). Some of this evidence is cited in the earlier chapter 2. At the conclusion of this evidence counsel for the claimants submitted there could be no doubt but that the Ngawha geothermal resource is a taonga. As all the cited evidence relied on by counsel related exclusively to the hot springs or pools on Parahirahi C block we conclude that the claim to the "Ngawha geothermal resource" is based on the claimants' ownership of or rangatiratanga over the hot springs or pools located on Parahirahi C.

Counsel next submitted that the central question is not whether the resource is a taonga. It is the extent of that resource. He went on to say there is no doubt that the taonga includes the surface manifestations of the "underlying resource". He submitted that the taonga must also include the sub-surface components of the resource. He invoked the evidence of those kaumatua who spoke of the unity of the resource. Counsel also invoked the evidence of Professor Hohepa, who was also of the view that the concept of "Ngaawhaa" extended beyond mere surface pools. He said that it included volcanic activity and encompassed geothermal energy "in its

widest sense" (B25(a):29).

Because of the central importance of the question of what constitutes the Ngawha geothermal resource, we set out a lengthy statement by counsel for the claimants in his closing address:

> The evidence is clear that in a spiritual and perhaps indefinite sense (from a physical point of view), Maori conceived that the Ngawha was much greater than the pool through which it bubbled up to the surface. The stories of the intrepid subterranean voyages is evidence of this. Professor Hohepa's rendition of ngawha as geothermal energy confirm that the Maori concept of Ngawha extended traditionally to include the less tangible subterranean aspects of the resource. So does his lateral expansion of Ngawha beyond the immediate pools themselves. Thus, even in traditional times and without a clear physical conception of the underground component of the resource, Maori took a characteristically holistic approach to the taonga. Maori understood that the surface features were no more than the eye of something much greater. That eye was connected to other surface manifestations in the region. The genius of the Western legal tradition is its ability to deconstruct resources whether they be land or other resources, to separate them subdivide them and apportion rights or interests in the parts. Estates in land are separated into surface sub-surface and air space. They are subdivided in time - that is into leasehold estates, life interests and fee simple estates. Rights to certain resources within the land are divided as between the State and the landowner or third party transferees. It is easy for lawyers trained in the Western tradition to conceive of surface manifestations of the geothermal resource being something different from the underground resource itself. In Maori terms, this approach is totally inappropriate. It is as appropriate as saying that the waterfall is separate from the river. As is so often the case, the Maori view accords with the physical reality. Even the Crown accepts that the underlying geothermal resource stands apart from the surface land title above (B48 para 5). In Maori conception and in scientific fact, the surface pools are no more than a window into the resource. They traditionally "exploited" that window, and therefore the resource itself, to the maximum extent that they were able in accordance with their own cultural priorities. There is simply no basis upon which the surface and sub-surface components of this taonga can be severed. They are one thing. (C13:18-19)

We would observe in relation to the penultimate sentence quoted that while it is readily apparent there is a clear and obvious connection between the hot springs and the sub-surface system of which they are a very small part, this does not mean that the *ownership* or rangatiratanga over some of the hot springs cannot be severed from others if the parties so agree. It appears to the tribunal that this is in fact what happened both in relation to some hot springs on Parahirahi block B and to all hot springs on the adjoining Tuwhakino block.

Did the Crown acquire ownership of the springs on the Parahirahi B block?

4.6.4 As we have seen, the Native Land Court determined ownership of the Parahirahi block of 5097 acres on 5 November 1874. Thirty-six owners were identified as belonging to Te Uriohua hapu and one to Ngati Rangi hapu (3.6.2). Both are

claimant hapu. This decision has not been challenged by the claimants, who include Ngati Rangi.

On 15 October 1885 the Native Land Court ordered that the Parahirahi block be subdivided into Parahirahi A and B blocks, each of 2546 acres and Parahirahi C block of five acres. Ownership of each of the three blocks was granted to the same 45 named Maori owners, being the surviving original owners and the successors of those who had died since November 1874. The court ordered that A and C blocks were to be inalienable except with the consent of the Governor. No restriction was placed on the alienation of B block (3.7.7).

On 19 October 1894 the court subdivided Parahirahi blocks A, B and C by allocating some 804 acres to non-sellers in new blocks A1-3, B1 and C1. The balance of 4293 acres, being the residue of the former Parahirahi A, B and C blocks, was vested in the Crown. This included all of the former B block except 150a 2r at the southern end which became B1. The Tiger Bath springs and the springs now known as the Ngawha Springs Hotel springs, formerly part of Parahirahi B block, were now on the new Parahirahi block D vested in the Crown. While criticism has been made of the failure of the court to award some land on B block adjacent to Parahirahi C, to Wiremu Te Ripi and other non-sellers, all subsequent complaints in the form of petitions and representations have been directed solely at the acquisition by the Crown of the Ngawha domain area of approximately four acres.

Counsel for the claimants submitted that in respect of the Parahirahi transaction there was not in all the circumstances, a clear and unambiguous intention to extinguish rights in the geothermal resource. He further submitted that the only part of the transaction relevant to this question is that relating to Parahirahi C. He suggested that the Crown has sought to place some reliance on the apparent willingness of the owners to alienate the B block in proposing that it is only the pools which are a taonga. This, counsel suggested, was presumably because the sulphurous lakes are situated on the block. He submitted that there is no substance in that proposition because it is the pools which the claimants say are the eye of the resource. They provide the access to the resource and its healing powers. He concluded by submitting that, to the extent the transactions in respect of Parahirahi are relevant to the issue of rights in the wider geothermal resource, it is the Parahirahi C alienation which must provide the focus (C13:34). This proposition appears to be based on the premise that all the pools (the "eye" to the resource) are to be found on Parahirahi C block. But as we have seen that is not the case. Some were on Parahirahi B block, some on the Tuwhakino block and at least one on another block within the geothermal field (see figure 3).

The Crown submission to which counsel for the claimants was responding, contended that Parahirahi B block has geothermal activity in the form of other springs and two lakes. The reference to the springs is presumably to those now known as the Ngawha Springs Hotel hot springs and the Tiger Bath hot springs. The

two lakes (one of which was inspected by the tribunal) are cold water but bubbling lakes and evidently part of the geothermal system. While Maori were presumably aware that those lakes are part of the geothermal system there can be no doubt that the springs on Parahirahi B were known by them to be part of the system or resource. The Crown submitted that because of the sale of Parahirahi B the owners were selling access to the geothermal field. The Crown further contended that it was the healing springs alone (on Parahirahi C block) which were taonga at the time of the Treaty (C16:59-60). As earlier indicated, the tribunal does not accept this last mentioned contention (4.5.3).

The tribunal has difficulty with the claimants' contention that their ownership or rangatiratanga over the whole of the Ngawha geothermal resource and field stems from, and is the consequence of, their ownership and rangatiratanga over the hot springs or pools on Parahirahi C block, of a part of which they were wrongfully deprived. The tribunal considers that this too narrowly states the basis for the rangatiratanga of the claimant hapu over the Ngawha geothermal resource. As we have stated earlier (4.5.3), in 1840 their rangatiratanga over the resource was based not merely on their rangatiratanga over the hot pools on Parahirahi C block but rather over the land overlying the Ngawha geothermal field and all the hot springs on such land.

The claimants' view is that the surface manifestations are inextricably linked one with the other and there is no basis on which the surface and sub-surface components can be severed. If this is so, however, it must follow there can be no severance of ownership or rangatiratanga over any surface component.

In fact such severance did take place when the Crown acquired ownership of that part of Parahirahi B block on which the Ngawha Springs Hotel hot springs and the Tiger Bath hot springs are situated. The cold bubbling lakes were an additional element. If, as is well established, the surface hot springs or pools are linked to the sub-surface system, then if the sub-surface component is capable of ownership, the purchaser of a surface component would necessarily acquire an interest in the sub-surface component. Such a purchaser would also of course acquire the right to exclude others from access to the surface component on the property or indeed to the sub-surface of such property.

4.6.5 When in 1894 the Crown acquired ownership of that part of B block on which hot springs were situate the Maori owners lost the right of access to the land and the hot springs on the land. As a consequence they necessarily lost the rights of management and control or rangatiratanga over the surface and sub-surface components of the geothermal system on and under the alienated land.

The attitude of the owners to the alienation of Parahirahi B block differed markedly from that in respect of block C. When in 1885 the Native Land Court partitioned the Parahirahi block into blocks A, B and C it was C block which was the principal

focus of attention. The reason, it appears, was that it was the hot springs or pools on this small five acre block which were especially valued by the Maori owners for their healing and other qualities. On the evidence available to us we infer that the owners of Parahirahi B block had no wish to retain it because they did not place the same value on the surface geothermal manifestations on that block as they did on those on C block.

That the claimants' case is based on the critical importance of C block, not B block, is evident from the submission already quoted that the fact that Maori sought the complete and inalienable reservation of the Ngawha Springs area in the Parahirahi C block is conclusive evidence that Maori in fact intended to retain the Ngawha geothermal resource. The tribunal is unable to accept this proposition which appears to be based on the premise that all the surface manifestations of the geothermal resource (the "eye" of the resource) were located solely on Parahirahi C block. In fact they were also present on Parahirahi B block and the Tuwhakino block. We turn now to the Tuwhakino block.

Did ownership of the hot springs on the Tuwhakino block pass to new owners?

4.6.6 In chapter 3 we related in some detail the history, so far as it is relevant for the purpose of the claim, of the Tuwhakino block. We briefly re-state the main points:

- Heta Te Haara, a prominent Ngati Rangi chief, together with Paora Ngai and Wi Raukawa also of Ngati Rangi, applied to have ownership of the Tuwhakino block determined by the court.

- Along the southern boundary a small triangular block of five acres was cut out of the Tuwhakino block and included in the Parahirahi block. This small area later became Parahirahi C block.

- On 15 July 1873 the entire Tuwhakino block of 1086 acres was awarded to Heta Te Haara alone. A certificate of title was issued in 1874.

- In 1876 Te Haara leased the entire block to one William Earl for 21 years. It included "all mines, metals, metallic ores, minerals and *mineral springs*". (emphasis added)

- Te Haara subdivided the block into two parts. On 5 July 1875 Te Haara transferred the northern block of 464 acres to Earl. The memorandum of transfer reserved to Te Haara "the right to use the waters contained in the two pools or lakes known by the names of Waima and Waipaoa".

- In 1884 a memorandum of transfer was registered against the title in which Te Haara surrendered the foregoing rights to use the waters in the two pools or lakes. A new title free of this encumbrance was issued to Earl on 14 May 1885.

- In April 1884 Te Haara leased the remaining 621 acres which adjoined the northern boundary of the Parahirahi block to Earl for five years. The lease included all the mineral, medicinal and other springs of water existing on the land and "the absolute and exclusive right to the use and enjoyment of the said springs". Earl was given the right to permit others to enter on the land for the purpose of using and bathing in the springs and to erect bath houses and other buildings.

- In 1892 Te Haara leased the 621 acre Tuwhakino block to George Patterson who was to permit Te Haara, during the 21 years term of the lease, to have the use and occupation conjointly with Patterson. Presumably this would have enabled Te Haara to use the hot springs if he wished. Patterson had the right at any time during the term of the lease to purchase the land from Te Haara for £900.

- Two years later Patterson exercised his right of purchase and a transfer of the 621 acres from Te Haara to Patterson was registered in January 1894. With this sale Te Haara parted with all interest in the 1086 acre Tuwhakino block. No reservation in relation to the hot springs or pools on the land sold was made by Te Haara.

4.6.7 Counsel for the claimants in discussing the Tuwhakino block suggested that the apparent division of pools between that block and the Parahirahi C block may well have indicated that the underlying resource was shared as between Te Haara's hapu (Ngati Rangi) and the Uriohua and Takotoke hapu of Parahirahi (C13:33). The tribunal would comment that at that time, more than 100 years ago, it is highly unlikely the respective owners of Parahirahi C block and the Tuwhakino block would have adverted to their interest in the underlying resource about which they knew virtually nothing. What is clear is that following the Native Land Court order of 15 July 1873 vesting the Tuwhakino block in Heta Te Haara and the further court order of 10 November 1874 vesting the Parahirahi block in 37 named owners, ownership of the hot springs or pools in the respective blocks was clearly divided between a group of owners (Parahirahi) and Te Haara (Tuwhakino). Te Haara lost no time in subdividing his block and in alienating the northern part.

4.6.8 Counsel for the claimants further submitted there was no evidence to indicate one way or the other whether in alienating the Tuwhakino block, Te Haara intended to alienate the rights of his hapu in the resource. This assumes that his hapu retained an interest in the resource. The submission overlooks the actual transactions entered into by Te Haara. It overlooks that in 1876 Te Haara leased the entire block for 21 years including the mineral springs. No reservation was made for access by him or his hapu Ngati Rangi. It further overlooks that although Te Haara, when he sold the northern block to Earl in 1878, reserved the right to use the two pools or lakes known as Waima and Waipaoa, he made no such reservation on behalf of his hapu. He surrendered his right of access to these pools or lakes in 1884 and made no

reservation in favour of his hapu. Also overlooked is that when Te Haara transferred to Patterson his interest in the southern block containing the hot springs or pools adjoining those in Parahirahi C block, he made no reservation of access to the hot pools whether for himself or his hapu.

4.6.9 The tribunal concludes that the final result of the two sale transactions whereby Te Haara disposed of all the land in the Tuwhakino block and the surrender of the right of access to pools in the northern block, was that the interest of Te Haara and any interest of his hapu in the hot springs and pools and the underlying resource was completely extinguished. Te Haara parted with the right of access to the land and the hot springs on the land. Consequently Maori no longer had any right of management and control or rangatiratanga over the surface components of the geothermal system or the sub-surface components under the alienated land in the block. Ownership of the surface components vested absolutely in the new owners and was protected by the indefeasibility provisions of the Land Transfer Acts.

4.6.10 The tribunal notes at this point that claimants' counsel in his opening submissions (A53) discussed the question of the application of the common law relating to ground water. He also submitted that the claim to ownership of the subterranean geothermal resource is in the nature of a claim to non-territorial aboriginal title. Having discussed both issues however, Mr Williams preferred to rely on his claim that the Treaty guarantees to the hapu of Ngawha a right in the nature of ownership of the geothermal resource and a right to exercise rangatiratanga as kaitiaki of the resource in accordance with their practices. He submitted that the English common law fails to understand or recognise the Treaty guarantee and must be rejected as incapable of ensuring that the Treaty guarantees are fulfilled. The doctrine of aboriginal title he said, may well apply to ameliorate the situation but he submitted that even that doctrine lacks sufficient sophistication to adequately protect the Treaty rights (A53:24).

We would observe that a determinative answer to either of these matters can come only from the High Court. The jurisdiction of the tribunal is to hear and determine claims based on alleged breaches of the Treaty. We propose therefore to concentrate on those questions and avoid unnecessary distraction.

4.6.11 Counsel for the claimants further submitted that the alienation of the Tuwhakino block by Te Haara could not possibly have affected the rights held by the Ngawha hapu in the resource:

> Their rights in the resource are pervasive, that is they apply to the whole of the resource. The reason being that the resource itself is not physically or conceptually subdivisible. Even if Te Haara's clear and plain intention was to extinguish his interest, or more accurately the interest of his hapu in the resource; and even if that intention was consistent with the wishes of his hapu (and we have absolutely no evidence on any of these matters), then the remaining rights of the Ngawha hapu must necessarily still be sufficient to use and control the resource. The rights might

> have been shared, but they are practically not severable. (C13:33)

It is necessary to consider these various propositions in some detail as they lie at the heart of the claimants' case. The claim is that notwithstanding the complete and final alienation of all his interest in the Tuwhakino block by its owner Te Haara, the Ngawha hapu (of which Te Haara's hapu Ngati Rangi is one) nevertheless retain their rights in "the resource". The geothermal resource, however defined, includes the surface hot springs and pools. Those on Tuwhakino were disposed of absolutely by the lawful owner Te Haara to new owners. Those owners, or their successors, whoever they are at any given time, own the hot pools and other surface manifestations, if any, on their land. Further, they can exclude any one else from access to them including nga hapu o Ngawha.

4.6.12 The tribunal heard evidence from Margaret Beadle (her family name being Ginn) one of the owners of the Spa Hotel property at Ngawha Springs on the Tuwhakino block. The Beadle property is immediately adjacent to the hot springs on the Parahirahi C1 Maori reservation and the Crown-owned four acre domain. Mrs Beadle told us that the Spa Hotel complex is privately owned with its own mineral hot pools adjacent to Lake Tuwhakino (on the property) and operates as a health resort (B47:1,4). Mrs Beadle was very critical of the geothermal drilling in the late 1970s and early 1980s which she said seriously affected the pools which went cold and became lifeless without gases and steam. She notes that she and her family have not been consulted by the joint venture as to what "we want to do with our geothermal resource" (B47:2). She was apprehensive of further adverse effects on the family's hot pools and supported the claimants in their opposition to the joint venture proposal. Mrs Beadle concluded by saying:

> Our Lands, our Pools, our Thermal Valley, our Geothermal Resource is our Taonga.
>
> Our treasure is precious to me and it is precious to my family. It is precious to those of my family who are living and it was very precious to those who are not living.
>
> Taonga's have been talked about a great deal at this hearing and I seek to protect mine, for myself, for my family, for future generations and for the enjoyment of all. (B47:3)

There is no doubt in Mrs Beadle's mind that she, not the hapu of Ngawha, owns the pools and other surface components of the geothermal system on her family property and that she and her family have at least an interest in the underground components not being utilised in such a way that would have a deleterious effect on their pools. The tribunal is not persuaded by the submissions of claimants' counsel that the Ngawha hapu still have rights in the surface components of the geothermal resource on the Ginn/Beadle family property. It follows that the rights of the Ngawha hapu in the geothermal resource are not pervasive as claimed by claimants' counsel. His reason is that the resource itself is not physically or conceptually subdivisible. In the view of the tribunal this is plainly incorrect. The surface manifestations in the form

of hot springs, pools or thermal lakes are clearly subdivisible. What may not be subdivisible are the underground components, including the rainwater which penetrates the system, the magma, the vast array of rocks of various temperatures, the gases, fluids and steam and the minerals both in and out of solution. We consider below whether these components of the complex and only partly known elements which go to make up the geothermal resource are indeed capable of ownership.

4.6.13 Counsel for the claimants in the passage quoted above, finally submitted that even if Te Haara's clear and plain intention was to extinguish his interest, or more accurately the interest of his hapu in the resource, and even if the intention was inconsistent with the wishes of his hapu (on which matter counsel claimed there was absolutely no evidence) the "remaining" rights of the Ngawha hapu must necessarily still be sufficient to use and control the resource. The rights he said "might have been shared, but they are practically not severable".

The tribunal is of the opinion, on the evidence before it, that Te Haara's clear and plain intention was to extinguish his interest in the geothermal resource in so far as it related to the Tuwhakino block.

The tribunal is further of the opinion that when ownership of the Tuwhakino block (which necessarily included ownership of the hot springs and other thermal surface manifestations on the block) was alienated, any then existing interest of the hapu of Ngawha in the land and all geothermal components on and under it was extinguished. They necessarily lost any right of access to the land and the hot springs on the land. As a consequence they necessarily lost any right of management and control or rangatiratanga over the surface and sub-surface components of the geothermal system on and under the alienated land.

The tribunal also has difficulty with the final submission of claimants' counsel that the "remaining right" of the Ngawha hapu must necessarily still be sufficient "to use and control the resource". By "the remaining rights" of the Ngawha hapu, counsel presumably means their present rights in Parahirahi C1 (the one acre block) and to the four acre domain block at present owned by the Crown (but which this tribunal considers was not sold by the Maori owners and should be returned to Maori). The rights, he said, might have been shared, but they are practically not severable.

The tribunal for reasons it has given, considers the rights to the surface component of the geothermal resource, are severable. Their severance was completed when Te Haara transferred them along with the land, to the European purchasers.

The effect of severance of a significant part of the geothermal resource

4.6.14 The tribunal considers that once ownership of a significant part of the geothermal components, such as the surface hot springs and pools and other manifestations, are severed from that of other surface components, as has occurred in the Ngawha region, no one owner of some only of the surface components can validly claim the

right to use and control the whole of the resource in and under the geothermal field. The present day owners, whether private or public, of the alienated surface of the geothermal resources in Parahirahi B block and the Tuwhakino block must necessarily have the right to use and control at least the surface components on land owned by them (subject always to any statutory provisions affecting them). Counsel has recognised that rights "might have been shared". If he was implying that rights in the alienated surface components continued to be shared following their being vested in separate individual Maori owners, we cannot agree. Once severed and separately owned, the right to use and control the surface component no longer lay with the previous owners.

In chapter 2 of this report we have recorded the adoption by the tribunal of what was said in the *Ngai Tahu Sea Fisheries Report 1992* and the *Muriwhenua Fishing Report 1988* as to the meaning and significance of rangatiratanga. There it is noted from the *Muriwhenua report* that one of the three main elements embodied in the guarantee of rangatiratanga is that authority or control is crucial. The *Ngai Tahu Sea Fisheries Report* also noted that rangatiratanga includes management and control of the resource (2.5.1).

In so far as the Maori owners of such alienated land previously held rangatiratanga over it and the geothermal resource on and under such land they necessarily lost such rangatiratanga and the associated rights of control when they disposed of the land.

In the foregoing discussion the tribunal has considered the effect of alienation of surface components on part of the former Parahirahi B block and of all such components on the Tuwhakino block. We foreshadowed that the question of ownership of the sub-surface components perhaps raised different questions.

Are sub-surface components of the geothermal resource capable of ownership?

4.6.15 A critical question is whether the sub-surface components of the resource are capable of ownership. Our views on this topic cannot be in anyway definitive. As we have indicated, at 1840 and prior to the vesting of ownership of various parts of the field in separate owners, various hapu held rangatiratanga over the whole of the resource by virtue of their management and control of the land surface of what is now known as the geothermal field and of the hot springs and pools on the land. But since the alienation of part of the resource in the form of surface components and of the land on which they are situate, neither the hapu of Ngawha nor the trustees of the Parahirahi C1 Maori reservation have any right, or indeed power, to exercise management or control over such surface components for they no longer have rangatiratanga over them. Nor indeed do they have any right to access them.

4.6.16 As to the underground component of the "resource" there are problems in sorting out the various elements. Is it realistic for instance to segregate out ownership of the underground geothermal fluid from all the components which go to produce it? As we have seen from the scientific evidence the geothermal system is highly complex

with many inter-related components. If, however, the subsurface geothermal fluid is isolated from the remainder of the underground components of the resource for the purpose of considering the question of ownership, the tribunal considers that once ownership of the surface components has been severed there is no basis for allocating the right of ownership of or rangatiratanga over the whole of the sub-surface geothermal fluid to the owner of only one set of hot springs or pools. No one such owner or group of owners can validly claim the exclusive right to manage and control the underground fluid or, in all circumstances, to exercise a veto over its extraction and use. The question of what degree of protection should, however, be given to the highly valued taonga comprising the hot springs and pools in the care and trusteeship of the trustees of the Parahirahi C1 Maori reservation and the adjoining Crown-owned recreation reserve pools, should they be returned to Maori ownership, is considered later in chapter 7 (7.6).

References

1. Mr Lumb holds a bachelors degree in geology and a masters degree in applied geophysics and was a DSIR scientist for over 27 years. For over half of that time he was involved in the overall management of the department's geothermal work.

2. Dr Sheppard has a MSc in geochemistry and a PhD in chemistry. He has been employed since 1977 as a geochemist by the Chemistry division of the DSIR and since July 1992 by one of its successors, the Institute of Geological and Nuclear Sciences Ltd. He has been involved in investigations on geothermal systems in New Zealand, Indonesia, California, Alaska and the Azores and has published widely on geothermal and volcanic geochemistry, nine of these on the Ngawha system which he has studied extensively.

3. Dr Watson holds a BSc in Mechanical Engineering and a PhD from the University of London in heat transfer by natural convection. He has had wide experience both as a University lecturer and consultant on geothermal resources in Japan, the Philippines, Papua New Guinea, Indonesia and Vanuatu as well as to the United Nations. He has been in New Zealand since 1980 when he joined KRTA.

Chapter 5

Treaty Principles

5.1 Introduction

5.1.1 If the tribunal finds that any claim submitted to it under s6 of the Treaty of Waitangi Act 1975 is well-founded it may recommend remedial action by the Crown. Before it can find a claim to be well-founded the tribunal must be satisfied:

- that the claimant has established a claim falling within one or more of the matters referred to in s6(1) of the Act,
- that the claimant has been or is likely to be prejudicially affected by any such matters, and
- that any such matters were or are inconsistent with the principles of the Treaty.

All three elements must be established before the tribunal can find a claim to be well-founded.

In previous reports the tribunal has formulated various Treaty principles which it considered applicable to the particular claims under consideration. The Court of Appeal, notably in the *New Zealand Maori Council* case already referred to (3.14.5) has also formulated certain Treaty principles. Not all principles are relevant to any given claim. In the present case we believe two leading principles are applicable to the claims in respect of the Ngawha geothermal resource. We consider each in turn.

The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga

5.1.2 In the *Ngai Tahu Sea Fisheries Report 1992* the tribunal saw this principle as fundamental to the compact or accord embodied in the Treaty and as of paramount importance. It was described as over-arching and far-reaching being derived directly from the provisions of articles 1 and 2 of the Treaty. Included in it are several concepts which have earlier been characterised as principles but which we believe are better seen as inherent in or integral to this basic principle. Specifically we refer, in the context of the present claim, to:

- the Crown obligation actively to protect Maori Treaty rights
- the tribal rights of self-regulation

- the rights of redress for past breaches
- the duty to consult

The Ngai Tahu sea fisheries tribunal elaborated as follows:

> Implicit in this principle is the notion of reciprocity - the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands, forests, fisheries and other valuable possessions for so long as they wished to retain them. It is clear that cession of sovereignty to the Crown by Maori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Maori land but of much more, including fisheries.
>
> Rangatiratanga was confirmed and guaranteed by the Queen in article 2. This necessarily qualifies or limits the authority of the Crown to govern. In exercising sovereignty it must respect, indeed guarantee, Maori rangatiratanga - mana Maori - in terms of Article 2.
>
> The Crown in obtaining the cession of sovereignty under the Treaty therefore obtained it subject to important limitations upon its exercise. In short, the right to govern which it acquired was a qualified right.[1]

Crown duty of active protection

5.1.3 The duty of active protection applies to all the interests guaranteed to Maori under article 2 of the Treaty. While not confined to natural and cultural resources, these interests are of primary importance. There are several important elements including the need to ensure:

- that Maori are not unnecessarily inhibited by legislative or administrative constraints from using their resources according to their cultural preferences
- that Maori are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms
- that the degree of protection to be given to Maori resources will depend upon the nature and value of the resource. In the case of a very highly valued rare and irreplaceable taonga of great spiritual and physical importance to Maori, the Crown is under an obligation to ensure its protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected. The Ngawha geothermal springs fall into this category. The value attached to such a taonga is essentially a matter for Maori to determine.
- that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms

which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.

Tribal right of self-regulation

5.1.4 The tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga. The tribunal in the *Motonui-Waitara Report 1983* put it this way:

> "Rangatiratanga" and "mana" are inextricably related words. Rangatiratanga denotes the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences.
>
> We consider that the Maori text of the Treaty would have conveyed to Maori people that amongst other things they were to be protected not only in the possession of their fishing grounds, but in the mana to control them and then in accordance with their own customs and having regard to their own cultural preferences.[2]

In discussing this concept the tribunal in the *Muriwhenua Fishing Report 1988* said:

> In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government.[3]

By way of elaboration, the Muriwhenua tribunal emphasised (among other matters) that:

- the Treaty guaranteed tribal control of Maori matters, including the right to regulate access of tribal members and others to tribal resources.

- the cession of sovereignty or kawanatanga enabled the Crown to make laws for conservation control and resource protection, being in everyone's interests. These laws may need to apply to all alike. But this right is to be exercised in the light of article 2 and should not diminish the principles of article 2 or the authority of the tribes to exercise control. In short, sovereignty is said to be limited by the right reserved in article 2.[4]

Crown duty to redress past breaches

5.1.5 If failure by the Crown to protect the rangatiratanga of a tribe or hapu results in detriment to Maori there is an obligation on the Crown to make redress. This was recognised by Mr Justice Somers in the *New Zealand Maori Council* case.[5]

Duty to consult

5.1.6 Before any decisions are made by the Crown, or those exercising statutory authority on matters which may impinge upon the rangatiratanga of a tribe or hapu over their

taonga, it is essential that full discussion take place with Maori. The Crown obligation actively to protect Maori Treaty rights cannot be fulfilled in the absence of a full appreciation of the nature of the taonga including its spiritual and cultural dimensions. This can only be gained from those having rangatiratanga over the taonga.

We turn now to the second Treaty principle applicable to this claim.

5.2 The Principle of Partnership

This principle was firmly established by the Court of Appeal in the *New Zealand Maori Council* case where it was authoritatively laid down that the Treaty signifies a partnership and requires the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith.

The basis for the concept of the partnership was stated by the Muriwhenua tribunal:

> It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of partnership.[6]

While the needs of both cultures must be provided for and compromise may be necessary in some cases to achieve this objective, the Treaty guarantee of rangatiratanga requires a high priority for Maori interests when proposed works may impact on Maori taonga.[7]

References

1. "The Ngai Tahu Sea Fisheries Report 1992" (Wai 27) 5 *WTR* (Wellington) p 269

2. *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6)(*The Motunui-Waitara Report*)(Wellington, 1983) p 51

3. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22)(*Muriwhenua Fishing Report*)(Wellington, 1988) p 187

4. Above n 3 pp 230-232

5. *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641, p 693

6. Above n 3 p 192

7. See *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (Wai 17)(*Mangonui Sewerage Report*)(Wellington, 1988) p 60

Chapter 6

The Joint Venture Proposal

6.1 Introduction

6.1.1 On 9 July 1992 an application seeking consents pursuant to the Resource Management Act 1991 to exploit the Ngawha geothermal resource for the purpose of electricity generation was made by a joint venture comprising the Bay of Islands Electric Power Board and the Taitokerau Maori Trust Board.

Nga hapu o Ngawha have lodged submissions in opposition to the joint venture application with the local authorities and they allege, in their statement of claim to this tribunal, that any grant of resource consents to exploit the Ngawha geothermal resource will directly contravene their title to and rangatiratanga of the Ngawha geothermal resource, and will deny their right to act as kaitiaki of this taonga.

The claimants seek the following findings from us:

- that ownership of and rangatiratanga over the Ngawha geothermal resource is and remains vested in nga hapu o Ngawha; and

- that the grant of resource consents to the joint venture applicants would be in breach of those rights unless and until the consent of nga hapu o Ngawha is procured.

Originally it was envisaged that the Parahirahi C1 block trustees (more commonly referred to as the Waiariki trustees) would participate in the joint venture. As will be seen they withdrew from the joint venture and the Taitokerau Maori Trust Board continued with it.

6.1.2 Evidence concerning the joint venture proposal was called by the claimants, the Crown and the joint venture. Before considering the claims relating to the joint venture application for consents to exploit the Ngawha geothermal resource, it is necessary to review this evidence.

6.2 Formation of the Joint Venture

6.2.1 Sir Graham Latimer stated (B38:1-4) that early in 1991 Wiremu Tairua, then chairman of the Waiariki trust, invited Sir Graham, as Chairman of the Taitokerau Maori Trust Board and Taitokerau District Maori Council, to attend a meeting of the Waiariki trustees. The meeting was to discuss Maori participation in a proposed

joint venture with the Bay of Islands Electric Power Board to tap the Ngawha geothermal resource. Sir Graham was aware that there had already been preliminary discussions between Mr Tairua and the power board, represented by its chief executive officer, Roger de Bray.

In the result, Sir Graham attended two meetings at Mr Tairua's invitation, the first on 25 April 1991 and the second some time between 8 and 13 May 1991. Mr Tairua was present on both occasions, and Sir Graham named four other Waiariki trustees (including the present chairman, Kereama Rankin) who were present at either or both meetings. He also named two representatives of the Ngawha Maori committee who were present at both meetings.

Sir Graham understood that at these meetings the Waiariki trustees clearly assumed a mandate for the Ngawha people. He was satisfied that the trustees backed the concept of a joint venture geothermal development with the power board, and that the trustees' involvement reflected the appropriate level and extent of consultation. He also referred to two subsequent meetings, neither of which he attended: the first involving the power board and held at the Ngapuhi runanga offices and another held at the Ngawha Springs public hall.

On 13 May, after the second meeting, Mr Tairua wrote to Sir Graham:

> **After your departure it was decided by those present that a joint venture would be authorised.**
>
> **Because you are a person of action and [have] no time to spare, too many trustees would be a hindrance and not a help.**
>
> **The Task Force members from Ngawha can report to the trustees and the trustees can report to the people at large at a specially convened hui if required.**
>
> **... The "*Ngawha geothermal task force*" should be comprised of six [personnel] only.**
>
> | | |
> |---|---|
> | *Sir Graham Latimer* | *Chairman* |
> | *Wiremu Tairua* | *Deputy chairman* |
> | *Wiremu Puriri* | *Legal representative* |
> | *Paddy Reihana* | *Task force* |
> | *Hetaraka Aperahama* | *Task force* |
> | *George A Ruka* | *Task force* |
>
> **If this does not meet your criteria please telephone...** (B38:8)

Of the Ngawha people proposed as members of the task force, it appears that only Mr Tairua was at the time a Waiariki trustee.

Mr Rankin told us (A54(q):3-4) that he was first advised of the joint venture proposal in about April of 1991 and was initially supportive of it. He emphasised, however, that the proposal was not put to the wider trustee body until July 1991 and that the trustees as a group never agreed to it.

As a result of the two meetings Sir Graham attended, steps were taken to join the Taitokerau Maori Trust Board with the Waiariki trust in the proposed joint venture with the power board. Sir Graham stated that there were further discussions which included the power board and that in due course a joint venture agreement was prepared which was circulated and discussed with the Waiariki representatives.

On or by 5 June 1991, the trust board and the Waiariki trust formed a company called Grenside Developments Ltd for the purposes of the joint venture. On that date a meeting of four of the company's directors, including Mr Tairua and Mr Rankin, resolved:

- that the company approve the transfer of half its shareholding (50 $1 shares) to the trustees of the Parahirahi C1 trust (the Waiariki trust);
- to appoint Mr Tairua and Mr Rankin as directors; and
- that the company execute under seal the joint development agreement with the power board for the Ngawha geothermal project (B38:10).

On the same day, Grenside Developments Limited executed the joint venture agreement with the Bay of Islands Electric Power Board. Mr de Bray, who had taken on the additional role of project manager of the joint venture, stated that the joint venture company was formed with the power board holding 50% of the shares and the trust board and Waiariki trustees holding 25% each (B40:2).

Mr Tairua and Mr Rankin signed two other documents that day (B38:11-12). The first is a declaration that they hold 50 shares in Grenside Developments Limited as bare trustees for the beneficiaries of the Parahirahi C1 trust. The second document, which is expressed "to give effect to clause 9.2 of the joint venture agreement", assigns to Grenside Developments Limited "on behalf of the Parahirahi C1 trustees otherwise known as Waiaraiki [sic] Trust":

> the Trust's entitlement to commercial rights present or future arising out of the Trust's claim brought before the Waitangi Tribunal for return by the Crown of interests in the Parahirahi Block. (B38:12)

At some later date the name of Grenside Developments Limited was changed to Taitokerau Ngawha Limited.

Mr Rankin stated that from July 1991 he became more and more troubled with the joint venture proposal. Eventually he withdrew his support, believing that his tupuna came to remind him who he was and to tell him that the taonga was too sacred to be desecrated in the way that was being proposed. At that time, he said, the Waiariki trustees indicated to the Taitokerau Maori Trust Board and to the Bay of Islands Electric Power Board that they were opposed to any exploitation of their taonga (A54(q):4).

He produced a copy of a letter, dated 27 August 1991, which he had written to Sir Graham Latimer as Chairman of the Taitokerau Maori Trust Board. Signed by all the Waiariki trustees except Mr Tairua, the letter refers to a 4 August meeting of the Waiariki trustees at which it was decided that they "should terminate the partnership". It then asks the trust board to join the Waiariki trustees "in the process of bowing out quietly without publicity". The letter refers to the signatories' lack of knowledge of any arrangement established between Mr Tairua and the trust board and maintains that the trustees had no part in it. The concluding paragraph of the letter seems to assume that the trust board would withdraw its support for the Ngawha development. It states that the power board should seek the proper planning consent and landowners' consent and "give us the opportunity to object via the proper channels" (A54(q):7).

Also produced by Mr Rankin was a response signed by Wiremu Puriri for the Secretary of the Taitokerau Maori Trust Board, dated 9 September 1991. It acknowledges the receipt of a copy of a letter similar in contents to the letter of 27 August above and of the same date, but sent to the power board. It informed Mr Rankin that the Taitokerau Maori Trust Board was committed to proceeding with the joint venture and that it would do so on behalf of its beneficiaries, which include the people of Ngawha (A54(q):8).

Sir Graham told us that the Taitokerau Maori Trust Board has at all times been fully supportive of the geothermal development initiative.[1] The eight members of the trust board, including two appointed to represent Ngapuhi, unanimously support the joint venture and it is Sir Graham's belief that they have reported to the people they represent in relation to the venture. He added that the Taitokerau District Maori Council also supported the trust board's involvement (B38:3).

Following the June 1991 formalisation of the joint venture, a joint venture committee had been appointed, the Maori representatives being Sir Graham and Mr Puriri for the trust board and Mr Tairua and Mr Rankin for the Waiariki trustees. Sir Graham said that Mr Rankin attended two meetings but did not attend thereafter. He also said that it became apparent to him towards the end of 1991, and more so in 1992, that Mr Rankin had second thoughts about the wisdom of the proposed development. Sir Graham referred to "ructions" within the Waiariki trust which resulted in Mr Rankin replacing Mr Tairua as chairman and said that the Waiariki trustees then sought to

resile from their earlier commitment by correspondence to Sir Graham, Mr Puriri and the power board (B38:4).

In response to questions from counsel for the claimants, Sir Graham acknowledged that he had received a letter from Mr Rankin by July 1991 which stated Mr Rankin's opposition to the development and that by this time that opposition had been made public. He also acknowledged receipt of Mr Rankin's 27 August 1991 letter.

Mr de Bray stated that the original joint venture partners, the power board, the trust board and the Waiariki trust, pursued the development project from July 1991 until February 1992, during which period considerable monies were committed to the evaluation of the project and the preparation of the resource consent application. In February 1992, the Waiariki trust notified the joint venture that it would no longer support the application but, although that notification expressed reservations as to the scientific evidence or, perhaps, the size of the development, the power board had never been given a reason to justify the Waiariki trust's change of position. Since February 1992, he stated, the remaining joint venture partners have pursued the resource application (B40:7-8; C12(c):11).

In response to questions from counsel for the claimants, Mr de Bray recalled the letter sent by Mr Rankin to the power board and signed by all the Waiariki trustees except Mr Tairua. He remembered that it talked of the power board possibly being left with a white elephant and of the cultural effects of development upon the springs. He could not remember the letter's date but intimated that the power board would not necessarily have understood it to spell the end of the joint venture because, as he explained, the power board dealt with its joint venture partner through Grenside Developments Limited, to whose directors it still sends circulars advising of the venture's progress (C12(c):3).

Some time subsequent to August 1991, the share capital of Taitokerau Ngawha Limited was increased to $10,000 to meet its expenses. When the Waiariki trust declined to take up its share of the pro rata allocation, the Taitokerau Maori Trust Board increased its own share to something in the order of 95% (B38:4). Sir Graham Latimer stated that he believed Mr Tairua holds the remaining 5%.

6.3 Waitangi Tribunal's Jurisdiction Regarding the Proposed Development

6.3.1 Counsel for the joint venture submitted at the very outset of the hearing of the claim that it was not for the Waitangi Tribunal to decide whether the proposed development would impact upon the springs. He argued that the technicality of the evidence that would be required to assess that matter was not only outside the tribunal's expertise but was directly within the jurisdiction of the local councils (and, on appeal, the Planning Tribunal) which would consider the joint venture's resource consent applications under the Resource Management Act 1991.

For these reasons, counsel objected to the degree of technicality of parts of the written evidence of Thomas Lumb, a witness for the claimants whose brief of evidence had been made available prior to the hearing.

Counsel for the claimants agreed that the Waitangi Tribunal did not need to make any findings about the joint venture proposal's impact upon the springs. However, in his submission, the tribunal needed to be aware of the context in which the claimants made their claim, including the joint venture's application for resource consents which was the reason urgency had been granted to the claim.

6.3.2 In the result, claimants' counsel conceded that the sections of Mr Lumb's written evidence which specifically discussed the possible environmental impact of a geothermal development such as that proposed by the joint venture, would be replaced by more general evidence as to the potential effects of any development of the Ngawha resource. In response to that evidence, the counsel for the joint venture called as witnesses Mr de Bray and Dr Arnold Watson, principal of KRTA Ltd, the firm of consulting engineers engaged by the joint venture to study the Ngawha geothermal resource and prepare its resource consent application. The Crown commissioned Dr Douglas Sheppard, a geochemist with the Institute of Geological and Nuclear Sciences Limited, to comment on Mr Lumb's evidence.

6.4 The Joint Venture Proposal: Overview

6.4.1 The evidence of Mr de Bray provided a general overview of the joint venture proposal. An engineer with commerce and management qualifications, he explained that the Ngawha joint venture was formed with the primary intention of developing the geothermal resource for electricity generation (B40:1). He considered secondary uses of the resource to promote local industry, such as the use of heat and the extraction of minerals, are also possibilities (C12(c):4-10).

The joint venture company's objective is to control and manage the resource in compliance with the Resource Management Act 1991. To achieve this, it expects to have to make payments to the Crown for use of the resource itself and for the use of existing Crown equipment and bores, and payments to landowners for access to the resource. The company would install pipeline equipment and maintain monitoring regimes as required by resource management consents.

The company's revenue would be derived from granting access to the geothermal fluid to users. Being 100% geared (funded by borrowed capital), he claimed the company's structure will allow participation in the use of the resource by local groups who might not otherwise have access to the large amount of capital required for its development (B40:2). The charges to users would return a dividend to the joint venture partners.

From the outset, the joint venture company set clear guidelines in several areas:

- the project would proceed only if economically viable;
- any effect on the Ngawha hot springs must not be significant and must not exceed seasonal variations; and
- the project must be environmentally responsible without discharges of fluids.

Mr de Bray also stated that the scientific information available on the Ngawha geothermal resource is insufficient to predict the environmental effects of a large power development in the 25-100 megawatt output range. Because of this and the capital expenditure required for such a development, the joint venture company proposes to install a pilot plant of nominally eight megawatt generation capacity. Several of the existing wells in the area are individually capable of this output so may be used in turn to supply geothermal fluid. There are also a sufficient number of existing wells available for reinjection of the quantity of geothermal fluid required for the pilot development.

From the scientific evidence available, Mr de Bray said that the joint venture company has a very high level of confidence that the pilot development can be sustained by the resource without detriment to it or to the surrounding environment. In addition, because the pilot development will be essentially a means of large scale testing of the resource's capacity to sustain a long term and larger development, it will, after about two years of operation, disclose sufficient information about the resource to enable decisions to be made about a bigger development and its design.

The joint venture company's applications for resource consents have been made with a 24 megawatt development in mind. That size development would allow maximum use of the existing wells and is the largest which can be envisaged using the type of plant equipment that is proposed to be used. To allow a margin over the requirements of a 24 megawatt development, the resource consents applied for have been set at four times the eight megawatt requirement for the taking and discharge of geothermal fluid.

A list of the resource consents applied for by the joint venture company is contained in Part I of the four volume "Assessment of Environmental Effects" prepared by KRTA Limited in support of the applications (A43:3). Each consent applied for is for a period of 35 years. Amongst those sought are consents:

- to take up to 35,000 tonnes per day of geothermal fluid on a continuous basis;

- to inject up to 35,000 tonnes per day of geothermal fluid, condensate and gas on a continuous basis;
- to discharge geothermal fluid and condensate to holding ponds for well testing, power plant startup and shutdown and other purposes, such discharges to be later reinjected to deep wells and the quantities to be limited by the above two applications;
- to discharge intermittently up to 1,500 tonnes per day of rainwater from holding ponds;
- to intermittently inject up to 4,400 tonnes per day of water or drilling fluid during the course of drilling, working over or testing geothermal wells;
- to intermittently take up to 3,000 tonnes per day of water from the Ngawha stream for drilling purposes, subject to leaving a minimum residual flow;
- to intermittently discharge up to 650 tonnes per day of drilling waste to holding ponds;
- to discharge to the Ngawha and Waiparera streams up to 650 tonnes per day of treated drilling waste water which complies with receiving water standards;
- to discharge gas and water vapour into the atmosphere for short periods during testing and continuously from the pilot plant, subject to noise restrictions and the permissible limits for concentration of noxious gases;
- to install well testing equipment and pilot power plant;
- to construct and use holding ponds;
- to construct roads and pipelines and, where appropriate or required, bunding along pipeline routes and pumping stations;
- to construct electrical transmission lines;
- to construct permanent and temporary chemical storage facilities; and
- to dispose of, by burial, solid wastes consisting of well workover debris, mud and cuttings for any future drilling and such minor quantities of power station sludge as may occur.

6.5 Scientific Evidence

Claimants' evidence

6.5.1 As noted in chapter 4 (4.2.1) Mr Lumb is an energy resource consultant concentrating on geothermal energy. His evidence for the claimants, so far as is relevant here, focused on the potential impact of any development of the Ngawha geothermal field upon the Ngawha springs, the geothermal reservoir and the external environment. Relying on a study conducted by Dr Mark McGuinness, a Senior Lecturer in Mathematics at Victoria University of Wellington, Mr Lumb summarised some of the potential effects as follows:

> 3.1 *Impact on the Ngawha Springs*
>
> ...
>
> (a) *Effects due to temperature changes:*
>
> Temperature changes will produce the largest effects. They will be centred on reinjection wells and will consist of the cooling of a roughly circular region around the well. As more water is reinjected the region will grow at a rate that is dependent upon the quantity of fluid that is reinjected. The effect that this cooling would have on the springs themselves would depend on the distance of the injection well from the springs. If it were such that the cooled area reached the part of the field that feeds the springs then they will be affected. The cooling is likely to turn off the source of steam and gas that presently heats and drives the springs. There is clear evidence of two-phase (i.e steam and liquid water together in equilibrium) regions presently under the caprock and these are believed to be critical to the continuation of the hot springs at the ground surface. If cooling to this extent occurred, complete recovery would not be expected for a long time and would depend on the natural regional flow across the exploited part of the field. A rough calculation suggests that it would take over 150 years for a cooled region 500m across to be replenished by the regional flow used by Dr McGuinness in his calculations.
>
> (b) *Effects due to pressure changes*
>
> As noted above, the region of the reservoir in which production is most likely to take place has a high permeability. Because of this changes in pressure will be transmitted quite readily throughout this region and they will not become concentrated around the production and injection wells. Overall pressure changes would be due to the net removal of fluid from the reservoir and, because it is expected that most fluid would be reinjected, this would be quite small. If the non-condensible gases (mainly carbon dioxide) are not reinjected a 1% loss of fluid would result which Dr McGuinness concludes would have a negligible impact, even for a 300-400 kg/s development.

3.2 *Impact on the reservoir as a whole*

> The remarks above apply also to the broader reservoir. Pressure impact will be small, and temperature impact will be in regions that grow from the injection wells. There will be marked local effects around the injection wells, modified by the effect of a regional movement of fluid across the reservoir.

3.3 *Possible impacts on the external environment*

> As it is assumed that any development will involve the reinjection of virtually all geothermal fluid, there would be no expected external impact on any part of the environment, except that resulting from the possible discharge of non-condensible gases into the atmosphere. (A51(e):2-3)

The next section of Mr Lumb's evidence dealt with the possible impacts of an accident or operational failure during which geothermal fluid could well enter the environment. Dismissing the argument that such events are "unlikely" to happen, he maintained that they do happen and, indeed, that in the absence of specific controls imposed on the release of "dangerous" geothermal components during drilling, testing, plant shutup or shutdown, similar problems can occur during particular times of otherwise normal operation (A51(a):14-19).

Acknowledging limitations of time, facilities and personal expertise, Mr Lumb's brief overview of the environmental and health and safety effects of a "worst case" accident or spillage drew mainly on the studies carried out during investigations of the early 1980s. He stated:

> The principal risks following a major accident or spillage will come from the chemicals or the heat in the geothermal fluid. The most important chemical constituents of environmental concern at Ngawha are mercury and boron, both being present in much higher concentrations here than in other geothermal fields (both up to 50 times the concentration at Wairakei). (A51(a):16)

After mentioning the well-known effects of mercury poisoning, Mr Lumb gave closer attention to the effects of water being contaminated by boron, noting that information available does not address the question of how long an organism must be exposed to high levels of the toxic element before an effect is noted or becomes serious.

Mr Lumb also pointed out that there may be risks even if no development takes place:

> Several wells have already been drilled into the Ngawha geothermal field and the physical integrity of those wells must be expected to deteriorate with time.

> Wellcasings or well-heads could corrode to the point where they are incapable of containing the geothermal fluids under the pressure that exists in the field. The consequences of the blow-out that could occur in such an event are not necessarily limited to the effects of an uncontrolled discharge of fluid, but also include the danger posed to those whose job it would be to bring the blow-out under control. (A51(a):15-16)

In an addendum to his evidence, Mr Lumb focused on the relationship between the surface features of a geothermal area, such as hot pools and springs, and the geothermal reservoir. Emphasising that surface features are merely the surface expression of the reservoir which exists at depth, Mr Lumb stated that there are a number of changes in the surface activity that are quite characteristic of a geothermal field under exploitation. He proceeded to explain, in greater detail, the means by which temperature and pressure changes may occur in an exploited geothermal field and concluded, with respect to Ngawha:

> Any development involving other than the natural surface flow will have some effect on the surface springs. The effect may be small, if the reinjection wells are far enough from the springs, and the effect may take many years to become manifest, but it is not possible to say that there will be *no* effect. It is quite clear that effective protection of the Ngawha Springs will depend critically upon the appropriate management of the deep reservoir. (A51(b):4)

Joint venture's evidence

6.5.2 As earlier indicated (4.3.4), Dr Watson gave evidence on behalf of the joint venture. He was employed to lead a team studying the Ngawha geothermal resource and preparing the resource consent application to the Far North District Council and Northland Regional Council.

Commenting on Mr Lumb's assessment of the potential effects of development on the Ngawha geothermal resource, Dr Watson stated that the level of the proposed development was chosen for having a negligible impact on the resource, that is, an impact that will be sustainable in the long term. He accepted Dr McGuinness's results, reported by Mr Lumb, that changes in pressure due to both the proposed pilot and maximum developments will be negligible as will be the effect due to discharging the gas to the atmosphere rather than reinjecting it.

Dr Watson also accepted, as a best estimate at the moment, the results of Dr McGuinness's calculations about local temperature reduction around the reinjection wells. He pointed out that, scientifically speaking, Dr McGuinness's estimates in this regard were crude, being based on assumptions rather than actual information about the subsurface flows. In response to questions from counsel for the claimants, Dr Watson elaborated that it was for the very reason that information about the subsurface flows was so limited that a pilot scheme was proposed. He stated that

what was predicted would not be allowed to eventuate because the pilot scheme would monitor and prevent damage to the springs (B39:10; C12(d):7).

With regard to impacts on the external environment, Dr Watson referred to Mr Lumb's earlier quoted conclusion that, except for the possible discharge into the atmosphere of non-condensible gases, there would be no expected external impact on any part of the environment. He pointed out that the Resource Management Act requires that environmental (and other) issues be considered in detail and that the joint venture's "Assessment of Environmental Effects", a public document, dealt with these comprehensively (B39:10-11).

On the matter of accidental damage, Dr Watson referred to the same document's detailed treatment of the effects of a spillage of geothermal fluid. Contingency plans and steps that can be taken in design and construction to minimise those effects were discussed in the "Effects" document but more attention would be given to those matters at the time of detailed design. He also pointed out that there are no contingency plans in place at present to deal with the effects of possible wellhead failure, a risk which has existed since the wells were drilled between 1977 and 1983 (B39:11).

As to effects on the springs themselves, Dr Watson stated that they are important to local people and need to be protected, and that preservation of the springs has been a major factor in planning the development. However, he added that there is a need to place them in perspective and take a balanced view in assessing their importance. In particular, he thought some people might overrate the springs' value as a tourist attraction which, in his own view "is small compared to others in New Zealand, and is insignificant in world terms" (B39:12).

Dr Watson explained that it is because the springs are a local feature of importance, are important to Maori, are said to have medicinal qualities and have been used by local people historically and recently, that the development had been planned with their protection in mind. That protection extended to the eventual size of the development, the pilot stage and the use of the well Ng 13, which reportedly has the greatest effect on the springs. That well would be tested last in the development programme, Dr Watson stated, by which time it should be able to be predicted how it might affect the springs. If it proved necessary, Ng 13 would be used sparingly (B39:12).

Responding to Dr McGuinness's opinion that the springs could be affected if cold reinjected fluid reaches the two-phase region of the resource which feeds them, and especially to Mr Lumb's conclusion that it is not possible to say there will be no effect on the springs from development, Dr Watson maintained that their opinions failed to acknowledge present variations in the springs and to address the issues of what amounted to an "acceptable" effect on them and whether the joint venture was

capable of managing the resource within such constraints (B39:12-13).

Dr Watson defined an acceptable effect on the springs as one that is much smaller than the natural short term variation due to the weather. He stated:

> If this effect takes place, it will be undetectable by bath users, but detectable by instruments. In practice it will be difficult to separate out the natural variations from those due to the development, and a considerable amount of scientific effort will be involved. It will be necessary to correlate measurements on the springs with measurements of well discharge rate, temperature and probably chemistry. This has been anticipated, although detailed plans have not yet been formulated. The use of the wells in the pilot scheme has been planned to produce the least effect first, by using wells farthest from the springs first, and then Ng 13 for reinjection before discharge. (B39:13)

In response to questions from claimants' counsel, Dr Watson elaborated that the planned use of Ng 13 was for testing only and that although it was not necessary to use it in the pilot scheme, it was important to test it to see what effects were produced. He explained that the joint venture was well aware of the potential for Ng 13 to affect the springs, because of the fact that the bottom of that well was only 200 metres from the springs, and that the proposed test use of Ng 13, which would be monitored, aimed to produce a small measurable effect on the springs so that more could be learned about how to use the resource and preserve the springs (C12(d):10-11).

Dr Watson concluded:

> I accept that there will be some effect on the springs, but believe that it will be much smaller than the natural variations. The Joint Venture have taken steps to make this well known to local people, through the press, open days and the Effects Statement. I know of no way to estimate the effect by calculation, although the physical mechanisms by which the effects will be produced have been identified. I believe that the effects can be held to acceptable limits, at least for the pilot development and probably for the maximum planned development by following the planned development programme. (B39:13)

Crown evidence

6.5.3 The Crown commissioned the Institute of Geological and Nuclear Sciences to comment on Mr Lumb's submission to the tribunal. We have earlier referred to certain evidence of Dr Sheppard, who prepared the commentary.

At the outset of his evidence Dr Sheppard stated that he considered Mr Lumb's statement covered the issues well, and that he wished to place a different emphasis to complement, elaborate and clarify some of Mr Lumb's points and issues raised by others who had been heard by the tribunal (B37:1).

Of relevance for present purposes is the fact that between 1980 and 1983 Dr Sheppard conducted a monitoring programme on the springs at Ngawha, including Omapere Soda Spring, the Lakes Waiparaheka and Ngamokaikai, and the drainages, measuring temperatures, water and gas chemical composition, and flows. Focusing particularly on the impact on the environment of human activity over the last century, Dr Sheppard concluded at that time:

> A survey of the available scientific literature describing the Ngawha thermal features and comparison with those features today shows that, as far as can be judged, the location of the features has changed little, but that the features themselves have been modified by bath excavation, and mining operations earlier this century. The hottest features have been modified, or are controlled, by flooding with cold water in order that they might be used as baths.
>
> The chemical composition of the bath waters reflects a hydrological balance between the two supply waters - one a shallow extensive high magnesium-bicarbonate water, the other the high chloride-boron water derived from the deep geothermal fluids. The compositions of the baths is influenced by various management practices on the baths, by the rainfall of the preceding few days, and by surface drainage.
>
> The gases are similar in composition to the gases from the deep geothermal wells. An interesting variation in helium content of the gases, apparently related to the discharge from a deep well, was observed and confirmed. No other consequence of these discharges was observed in the springs, but given the small total discharge of the tests and the relative impermeability of the cap of the system this is not altogether surprising.
>
> The analyses presented... serve primarily as an indication of the natural variability of the springs, baths and wells examined. (B37:7-8)

Dr Sheppard had recommended as a result of his study that any future programme should closely monitor three specific aspects of thermal features in the area so that long term changes distinguishable from the natural variability might be detected. He had added at the time:

> It is to be expected that sustained, large volume discharge will have a dramatic effect on the present surface manifestations of the field, but at Ngawha this may be delayed, and be of quite a different character to the reduction in liquid output, and change in character experienced in other fields e.g. Wairakei, Larderello (Italy), Ohaaki. The difference is to be expected because of the presence of large amounts of gas, both dissolved and in vapour/steam pockets, and the impermeability of the deep capping rock formation. (B37:8)

In his evidence to the tribunal, Dr Sheppard stated that none of the recommendations arising from his 1980-1983 study had been implemented and that he had no reason

to modify his earlier conclusions. He continued:

> Because it is apparent that the flow of water *and gas* through the caprock is important in the supply of material and heat to the surface springs, as well as to the intermediate water body (or bodies), it is important that attempts to predict the responses of the system take this into account. In this regard, it is conceivable that the reinjection of all of the extracted mass of material into the reservoir as a part of any development may not ensure that there are no noticeable effects at the surface. (B37:8-9)

After giving his opinion that the mobility of two-phase mixtures in confining media, such as narrow cracks and channels in rocks, would seem to be very susceptible to pressure changes, as predicted by Dr McGuinness's calculations (B37:9), Dr Sheppard said:

> The estimation of significance of effects produced by new exploitations of the system is a difficult matter, and it may well be that there is a level of exploitation of the deep reservoir which will have insignificant effects on the surface phenomena. I don't know what this level is, and do not have the means to determine it. It would seem that a cautious approach should be taken if the desire is to protect the taonga claimed by the hapu. We must, however, also realise that changes may take some time to manifest themselves, and that because of the nature of the system, remedial management measures may not be effective at least in the short term. (B37:9)

Of further relevance in the present context are the concluding paragraphs of Dr Sheppard's evidence:

> The monitoring programme which I conducted showed up no changes in the springs and pools which were clearly attributable to the discharge of the wells during the period. I am aware that statements have been made by pool owners and managers that they noted such effects. Since my sampling was on a monthly basis with some sampling at closer intervals, I could well have missed some of these incidents. The management of the temperature of the pools by pumping of water out of and into them could well mask these effects. The features which I monitored which were not managed in this way did not show any effects which I could attribute to the well testing programme. The variability in the springs and pools which was observed was considered to be due to factors such as rainfall (or the lack of it), air temperature, or even natural variability in the springs themselves, which must be expected.
>
> The excavation of spring sites for the creation of pools for bathing, and the pumping of the waters, constitutes [what] should be considered as a significant exploitation of the system which results in a modification of the surface features of the system, which is not capable of being rectified to the original state. (B37:10)

Claimant, joint venture and Crown reactions to the scientific evidence

6.5.4 (a) Claimants

From the kaumatua evidence given to the tribunal in the first week of hearing, it was plain that the claimants were deeply concerned about the potential for physical damage being caused to the Ngawha springs by the joint venture development. It was also plain that their concern extended beyond physical effects upon the springs to other interferences which they believed were threatened by the joint venture's proposal. As was recorded in chapter 2, kaumatua spoke of the desecration of their taonga by interferences with its heart or spiritual source.

The inability of scientific evidence to allay the claimants' concerns about the physical and metaphysical effects upon the springs is revealed by kaumatua Ronald Wihongi's response to questions from Crown counsel as to the reasons for the claimants' opposition to the joint venture proposal. Having agreed with counsel that he was concerned that all the proper minerals remain in the pools and that the pools retain their several temperatures, Mr Wihongi stated that the claimants would not agree to the development proposal even if the mineral content and temperatures of the pools could be protected. Explaining why this was so, he stated:

> I will say this, I stand in place of my ancestors, and anything that happens to desecrate those pools I will not agree to, as they would not have agreed to in their day. Because this resource was given to us by God so therefore I will never agree to have them desecrated by anyone.
>
> ...
>
> I know if there was drilling done, underground and above, it must affect the source of supply of the spring. (B36:II:10; A54(a))

Crown counsel's next question was:

> If it does not affect the source of supply of that spring, is that a desecration?

Mr Wihongi responded:

> To me, that question is not relevant, or correct. (B36:II:10; A54(a))

(b) Joint Venture

There was some discrepancy in the reactions of the joint venture partners to the scientific evidence of the possible impact of the proposed development upon the springs. Mr de Bray, for the power board, stated that the joint venture intended to proceed without commissioning any further scientific evidence, adding that the Resource Management Act will almost inevitably lead the local council to take

independent scientific advice as part of its review of the proposal's content (C12(c):13).

Sir Graham Latimer and Professor Hohepa for the trust board, expressed reservations about their satisfaction with the scientific evidence. In his written evidence Sir Graham stated:

> It was agreed by all parties from the start that the proposal would only proceed to actual development if we were satisfied that there would not be an adverse effect on the Springs. Appropriate scientific and other studies that have been undertaken to this point indicate that there will be no adverse effect. (B38:5)

In response to questions from claimants' counsel, however, Sir Graham said that while he felt comfortable with the feasibility study that had been done, he would like it to be counter-checked, and if it was found that there were any effects on the springs, the Taitokerau Maori Trust Board would withdraw from the joint venture. He elaborated that he was not concerned only with environmental or physical effects, because the healing and spiritual aspects of the pools were just as important.

Counsel for the claimants then asked for Sir Graham's reaction to the kaumatua view that the healing powers (or mauri) of the pools would be detrimentally affected by development. Sir Graham replied that he would want scientific evidence before he was satisfied that there would be an effect and that, without meaning disrespect, he too was a kaumatua and had his own opinion.

Professor Hohepa, who was commissioned by the tribunal to give expert evidence but who is also a member of the Taitokerau Maori Trust Board, elaborated orally on his written evidence, adding comments about the acceptability of the scientific evidence before the joint venture partners. He stated that one scientist had shown that one bore had effects on the springs and that there was a need for more scientific data. In his view, the days of using resources because they are there have gone and the joint venture had to be certain about the effects the proposal could have. He acknowledged that a lot of kaumatua and kuia had expressed concern about the proposal and that he had to reflect their concern. He added that this would be the first time there had been a significant shift in the use of geothermal energy in Northland and expressed his desire to "get it right the first time". He concluded this part of his evidence by stating that he thought the joint venture needed more time for scientific evidence before the proposal was furthered. He stated that the trust board would ensure there had been full and adequate scientific evidence because there are too many things that can go wrong.

In his closing submissions counsel for the joint venture, after referring to the Waitangi Tribunal's emphasis upon partnership in the use of resources, stated:

> The joint venture represents such a partnership and fundamental to its approach to the use of the resource is the preservation of the integrity of the pools. That was established as a principal criteria of use in the first discussions held between the Power Board and the Waiariki Trustees (see the evidence of Sir Graham Latimer) and was endorsed when the Tai Tokerau Maori Trust Board became involved. Mr Rankin notes that "The Chairman was very conclusive in his, the way he spoke. He said that if anything should go wrong with the Springs we would stop altogether."
>
> It is clear from the evidence of Mr de Bray and Dr Watson that the proposal for the use of the field has been designed to be very sensitive to the ongoing integrity of the pools. (C15:6)

Counsel added at that point that the joint venture proposal would ensure that nothing went wrong with the pools. In response to a question from the tribunal about the comments made by Sir Graham Latimer and Professor Hohepa, expressing a desire for further scientific evidence before the proposal proceeded, counsel acknowledged that those members of the Taitokerau Maori Trust Board did seem to want further assurances. He said that the concerns of the trust board were Maori concerns but it seemed to him, as counsel, that the guarantees given were as good as could be given. He stated that he was not aware of any development proposal which is so strongly supportive of the particular resource.

(c) The Crown

The Crown did not comment upon the scientific evidence. Its view of the claimants' concerns in this respect was subsumed within its argument that the Resource Management Act 1991 made ample provision for sustainability of the geothermal resource and the protection of the claimants' interests (C16:81-83).

References

1. In response to questions from counsel for the claimants, Sir Graham explained that in 1974 the Taitokerau District Maori Council had voted against developing the Ngawha geothermal resource and that the present trust board had to rescind that motion in order to approve the proposed development.

Chapter 7

Geothermal Resource Legislation and the Treaty

7.1 Introduction

A major part of the claimants' case focused on the past and present statutory control of geothermal resources in New Zealand, particularly the Geothermal Energy Act 1953 and the Resource Management Act 1991. In essence, the claimants' argument was that the legislation has failed to accord the Treaty rights of the claimant hapu an appropriate priority.[1]

It is therefore necessary to examine in some depth the relevant legislation and the arguments made to the tribunal about its effects. Attention will then focus upon the consistency or otherwise of the legislation with the Treaty.

7.2 Legislative Control for Scenery Preservation

7.2.1 Legislative control of geothermal resources has occurred in three broad phases. From the 1880s until the mid-twentieth century, legislation was directed at protecting or controlling thermal areas for their scenic, tourism and health values. Examples include the Thermal Springs Districts Acts of 1881 and 1883 which gave the Crown a monopoly over the acquisition of Maori land in the counties of Taupo and East Taupo, and the Scenery Preservation Act 1903 which empowered the Crown to compulsorily acquire thermal areas anywhere in the country for the purpose of scenery preservation.

7.3 Legislative Control of Industrial Exploitation

The Water-Power Act 1903 as a model

7.3.1 The next phase of legislative activity, beginning in 1952, focused on industrial exploitation of geothermal resources. By this time, legislation controlling the exploitation of water-power, petroleum, uranium and coal was already in force.[2] In each case, except that of water-power, a state monopoly over the relevant resource had been achieved by vesting ownership of it in the Crown. The Water-Power Act 1903 took a different approach, seemingly inspired by the common law rule that water, whether on the surface of land or underground, is incapable of being owned until it is abstracted or "captured", at which point it becomes the property of whoever abstracted it (A34:35-42). Consistent with that common law rule, the Water-Power Act vested in the Crown, not ownership, but the sole right to use surface water as a source of power. Section 2(1) of the Act thus provided:

> Subject to any rights lawfully held, the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power shall vest in His Majesty.

The Geothermal Steam Act 1952

7.3.2 The first legislation to control the industrial exploitation of geothermal resources also focused on electricity generation. That similarity in purpose may explain why the Geothermal Steam Act 1952 followed the model of the Water-Power Act in not vesting ownership of geothermal steam in the Crown. Section 3 of the Geothermal Steam Act 1952 provided:

> Subject to the provisions of this Act, the sole right to take, use, and apply geothermal steam for the purpose of generating electricity shall vest in the Crown.

The Act gave the Crown wide-ranging powers to facilitate its own involvement in the production, transmission and sale of electricity from geothermal steam. These included powers to enter any land and do all things necessary for test and measurement purposes, to sink bores in any land and to compulsorily acquire land under of the Public Works Act 1928 (ss5 and 6).

Private enterprise was also envisaged as having a role to play. The Governor-General could grant a licence to any person to take, use and apply geothermal steam for the purpose of generating electricity (s7) and a licensee could be authorised to conduct the exploratory and other activities specified in s5.

A threat to potential and even existing users of geothermal steam for other purposes was posed by s8 of the 1952 Act. By its terms the Governor-General could declare an area of land which was, or was believed to be, a source of geothermal steam, a "geothermal steam area". Ministerial consent was then needed to sink or use a bore in the area. Pre-existing uses of any bore which continued at the same or a lesser level were generally exempt from the need for consent but the minister could direct otherwise.

Full compensation was to be paid, however, for any loss or damage suffered by any person as a result of the operation of s8 or as a result of the exercise of any other power conferred by the Act (s9).

Summary

7.3.3 Counsel for the claimants provided a useful summary of the effect of the Geothermal Steam Act 1952:

> In essence, the Act nationalised use rights in geothermal resources insofar as electricity generation was concerned. The principal effect of this was that a licensing regime was created, so that the sinking of bores in geothermal steam areas was

> prohibited without Ministerial approval. Other than for the purpose of generating electricity, however, land owners remained free to sink bores on their land and to allow others to enter their land and do likewise. To that extent at least, the Geothermal Steam Act did not affect or restrict any subsisting rights in geothermal resources. (C13:49)

Inadequacies of the 1952 Act

7.3.4 Within a year of its enactment, the Geothermal Steam Act proved inadequate to serve the Crown's purposes. In part, this was because the Act only controlled the generation of electricity from geothermal steam, whereas other industrial uses of geothermal steam and heat were being embarked upon or contemplated. As a result, the Crown desired broader powers to use and to licence the use of geothermal resources.

At the forefront of official consciousness at the time was the proposal of a joint venture, comprising the government and private enterprise, to use natural steam directly in a pulp and paper mill at Kawerau. This proposal had reached an impasse when the venture partners and the Maori landowners in the area (Te Teko) could not agree on the price to be paid for the land should the test bores prove successful (A34:64-65).

Another possible use of geothermal energy receiving government attention during 1952 was its potential for producing heavy water, an element in the production of atomic energy. At the urgent request of the British government, the New Zealand government had considered the suggestion that it might supply the Commonwealth with heavy water and, by late 1952, had gone so far as to identify likely test sites in geothermal areas. However, those on Maori land were again considered to pose problems because of the uncertainty over the extent of compensation payable in the event that the sites proved suitable (A34:59-64; A30:21-25).

The Geothermal Energy Act 1953

7.3.5 In the result, the 1952 Act was repealed and replaced by the Geothermal Energy Act 1953. Notably, the replacement Act continued to adhere to the water-power model in stopping short of vesting ownership of geothermal energy in the Crown.

Section 3(1) of the Geothermal Energy Act 1953 enlarged the Crown's statutory rights to geothermal resources by providing that, despite any contrary provision in any Act or instrument of title:

> the sole right to *tap*, take, use, and apply geothermal *energy* on or under the land shall vest in the Crown, whether the land has been alienated from the Crown or not. (emphasis added)

It was also provided, pursuant to s3(2), that all alienations of land from the Crown after the commencement of the 1953 Act were deemed to be made:

> subject to the reservation of the sole right of the Crown to tap, take, use, and apply geothermal energy on or under the land, and subject to the provisions of this Act.

"Geothermal energy" was defined in s2 of the Act (as amended in 1969) to mean:

> energy derived or derivable from and produced within the earth by natural heat phenomenon; and includes all steam, water, and water vapour, and every mixture of all or any of them that has been heated by such energy, and every kind of matter derived from a bore and for the time being with or in any such steam, water, water vapour, or mixture; but does not include water that has been heated by such energy to a temperature not exceeding 70 degrees Celsius.

This definition is plainly broader than that of "geothermal steam" contained in the 1952 Act. We note that "geothermal energy" included minerals in solution in geothermal systems.

Section 9(1) of the Act required a licence to be obtained from the minister before any person could "sink any bore or tap, take, use or apply geothermal energy for any purpose". By virtue of s9(4), a licence was deemed to be a contract between the licensee and the Crown and enforceable by and against either party accordingly. It is notable that the licensing regime was conducted completely at the minister's discretion (s9(3)), there being no statutory criteria governing licensing decisions nor any provision for public participation, objection or appeal. In particular, there was no recognition of any Maori interests in geothermal resources nor any provision for conserving those resources.

The Act did, however, recognise pre-existing Maori and others' uses of geothermal energy. It exempted domestic uses of geothermal energy "including cooking, heating, washing and bathing" which were served by shallow bores (not exceeding 61 metres in depth) from the need for a licence, unless the minister directed otherwise "having regard to the public interest". Also exempt, unless the minister directed otherwise, was any pre-existing use of geothermal energy for any purpose, provided it continued for the same purpose and to a similar or lesser extent (ss9(1)(b) and 9(1)(c)).

While the Crown was exempt from the need for a licence in certain circumstances (s11(1) and (5)), licensed and unlicensed uses could be subject to a rental payable to the Crown (s10). Another new provision, in s12, authorised the minister to order any bore to be closed for specified purposes, including that it was dangerous or detrimentally affecting other bores, supplies of geothermal energy or a tourist attraction.

As with the 1952 Act, the Geothermal Energy Act 1953 conferred on the Crown and its delegates powers to enter onto any land for the purposes of investigating geothermal energy (s6). The Governor-General was also authorised to take land under the Public Works Act, this time for the purpose of tapping and using geothermal energy in connection with any public work (s7).

A new but related provision, apparently devised with the Kawerau situation in mind, was enacted in s8 (A34:78). Under this section, where the Minister of Finance and the minister responsible for the Act certified that the establishment of an industrial undertaking using geothermal energy was of national importance and should be located within a specified area, the Governor-General could declare that s8 applied to the undertaking. Thereafter, the Governor-General could take any land or any estate or interest in land or certain other rights (such as an easement) over land in the specified area for the benefit of the persons responsible for the establishment of the industrial undertaking, under the Public Works Act. The persons responsible for the industrial undertaking would then be liable for any compensation payable as a result.

As with the 1952 Act, compensation was required to be paid for any loss or damage suffered as a result of the Act's operation (s13). Unlike the earlier Act, however, the 1953 Act spelled out that compensation was not payable in respect of geothermal energy unless, at the commencement of the Act, it was of actual benefit to the owners or occupiers of the surface land (s14). This provision was evidently inspired by the Crown's concern, already a live issue with regard to the proposed Kawerau pulp and paper mill, that the common law's view of landowners' rights could require compensation for loss of the right to appropriate geothermal energy (A34:64-65; A30:23).

Summary

7.3.6 Relying on the evidence of Mr Boast (A34:76-78), counsel for the claimants provided the following summary of the purpose of the 1953 Act:

> The purpose of the Geothermal Energy Act 1953 (and its predecessor, the Geothermal Steam Act 1952[)] was to put geothermal resources on a similar statutory footing to electricity generation from *water*. As noted by Boast, the legislative framework therefore links geothermal resources with water, rather than with other *energy* resources such as petroleum, coal or uranium. Interestingly, the legislation does not vest the ownership of the geothermal resource in the Crown - as the Petroleum Act 1937 currently does with regard to petroleum - but instead treats it as an energy resource akin to water. The fact that water itself is an energy resource highlights the conceptual difficulties of adequately categorising geothermal water (particularly in view of its mineral content).

> In essence, the Act appears to be based on an assumption that the geothermal resource is analogous to groundwater, so that common law rights in respect of groundwater were of some relevance. S.3 becomes operative at the very point when the resource, considered in this sense, becomes a property right - namely at the point of abstraction. Leaving aside the limited exceptions outlined above [provided for in s9], it was necessary under the 1953 Act to obtain a licence from the Crown before abstracting geothermal fluid (and at that point obtaining property rights in the fluid). In that sense, the Act did not simply vest use and management rights in the Crown while leaving private property rights unaffected. Its intent, rather, was to make the existence of private property rights in the resource dependent upon obtaining a licence from the Crown. (A53:38-39)

7.4 Legislative Control for Conservation Purposes

Water and Soil Conservation Act 1967

7.4.1 The third phase of legislative activity affecting geothermal resources is characterised by its focus on conservation. The Water and Soil Conservation Act 1967 vested the sole right to use all "natural water" in the Crown (s21). Originally, "natural water" was defined (in s2) to include geothermal steam, but an amendment in 1981 specified that "water or steam or vapour heated by geothermal energy, whatever its temperature" were all "natural water". This produced the result, confirmed in the Court of Appeal in *Keam* v *Minister of Works and Development*,[3] that applicants wishing to extract or use geothermal water needed to obtain both a licence under the Geothermal Energy Act and a water right, from a regional water board, under the Water and Soil Conservation Act.

In his general summary of the Water and Soil Conservation Act, the Crown's witness Craig Lawson, Manager of the Resource Management Directorate of the Ministry for the Environment, made the following points:

> Section 21 of this Act vested the sole right to use water in the Crown. The Act contained a general presumption against the use of water - water rights needed to be granted by regional water boards (later to become regional councils) for specific uses of water. While water rights were generally granted for periods between 5 and 20 years, there were no statutory limitations on the period for which they could be granted. This Act did not provide for rentals for the use of water....
>
> The granting of water rights by regional water boards (and regional councils) followed an open process with a right of appeal. The Act provided for the review of water rights during their term where the quality of the receiving water was classified or where minimum flows were defined (ss 26K and 24D(2)). (B43:2-3)

While the 1967 Act did not expressly recognise Maori interests in water, in 1987 the High Court held that the Treaty of Waitangi and evidence of Maori values were legitimate extrinsic aids to the Act's interpretation.[4]

The Resource Management Act 1991

Purpose

7.4.2 The most recent enactment, the Resource Management Act 1991, repeals the Water and Soil Conservation Act 1967 and most of the Geothermal Energy Act 1953. It has the long title "[a]n Act to restate and reform the law relating to the use of land, air, and water" and its purpose is stated in s5(1) to be "to promote the sustainable management of natural and physical resources".

"Sustainable management" is defined in s5(2) to mean:

> managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety while -
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Guiding principles

7.4.3 Sections 6, 7 and 8 list matters which must be heeded by persons exercising functions and powers under the Act. Section 6 lists five matters of "national importance" which shall be recognised and provided for by those persons. The first four focus broadly upon the protection of marine areas, outstanding natural features and indigenous vegetation and fauna. The fifth matter of national importance which is to be recognised and provided for is:

> The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

Section 7 lists eight matters which persons exercising functions and powers under the Act "shall have particular regard to". The first is "kaitiakitanga", defined in s2 to mean:

> the exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself.

The remaining seven matters include such general ones as the efficient use and development of resources, the protection of the heritage value of sites and buildings and the maintenance and enhancement of the quality of the environment. Also included is the more specific matter of protecting the habitat of trout and salmon.

Section 8 provides:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Geothermal resources: section 354

7.4.4 With regard to geothermal resources, the Resource Management Act repeals all the key provisions of the 1953 Geothermal Energy Act which were outlined in 7.3.5 above with the exception of s12, which authorises the minister to order the closure of bores.[5] Of primary interest is that s3 of the 1953 Act, which vested in the Crown the sole right to tap, take, use, or apply geothermal energy, is repealed. However, s354 of the 1991 Act, which is headed "Crown's existing rights to resources to continue", continues the effect of the earlier provision in the following manner:

> 354(1) Without limiting the Acts Interpretation Act 1924 but subject to subsection (2), it is hereby declared that the repeal by this Act or the Crown Minerals Act 1991 of any enactment, including in particular -
>
> (a) Section 3 of the Geothermal Energy Act 1953;
>
> ...
>
> shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.
>
> (2) Any person may -
>
> (a) Take, use, dam, divert, or discharge into any water; or
>
> ...
>
> to which the Crown has a right, interest, or title without obtaining the consent of the Crown, if the taking, use, damming, diversion, or discharge by that person does not contravene this Act or regulations.

The "water" referred to in s354(2) includes "geothermal water" which is in turn defined in s2 to mean:

> water heated within the earth by natural phenomena to a temperature of 30 degrees Celsius or more; and includes all steam, water, and water vapour, and every mixture of all or any of them that has been heated by natural phenomena.

Mr Lawson of the Ministry for the Environment explained his understanding of the reason behind s354, as it affects geothermal resources:

> The reform recognised that several iwi had lodged claims with the Waitangi Tribunal relating to the ownership of geothermal resources. The Government agreed that the Resource Management Law Reform was not the appropriate place to resolve ownership grievances, and that issues relating to Maori ownership of resources would not be dealt with in the reform. The Government also agreed to continue the vesting of the sole right to allocate the resource with the Crown until those issues were resolved. Other provisions in the Act were designed to ensure that the interests of Maori were adequately provided for. (B43:5)

Leaving aside for the present counsel's arguments as to the precise meaning of s354, it is clear that the section envisages that, after the commencement of the Resource Management Act, uses of geothermal water of the kind listed in s354(2) can be legitimately undertaken only in accordance with the Act's regulatory scheme.

Management of geothermal resources

7.4.5 The first feature of the Act's regulation of geothermal water is that it confers upon regional councils the functions of controlling water and discharges of contaminants. Sections 30(1)(e) and 30(1)(f) provide:

> 30.(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
>
> ...
>
> (e) The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including -
>
> (i) The setting of any maximum or minimum levels or flows of water:
>
> (ii) The control of the range, or rate of change, of levels or flows of water:
>
> (iii) The control of the taking or use of geothermal energy:
>
> (f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water;

The remainder of the Act's scheme with regard to geothermal resources centres on the provisions in ss14 and 15. Section 14(1), which applies to non-coastal water, to heat or energy from such water and to heat or energy from the material surrounding any geothermal water, prohibits their taking, use, damming or diversion unless allowed by s14(3). The relevant parts of that provision authorise the activities when

they are expressly allowed by a rule in a regional plan[6] or a resource consent.[7] A further exception with regard to geothermal water is created when the water, heat or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment (s14(3)(c)).

Section 15 of the Act prohibits the discharge into the environment of contaminants and, in one case, water, unless it is expressly allowed by a regional plan, resource consent[8] or regulations or comprises an existing lawful activity as defined in s20. The definition of "contaminant", which is capable of applying to any substance, energy or heat, focuses on the likelihood that the discharge will produce a change in the condition of the water, air or land into or onto which it occurs (s2). Section 15 is thus apt to apply to a variety of discharges from uses of geothermal resources.

As noted, in exercising functions under the Act all bodies, including regional councils, are required to have due regard to the matters listed in ss6, 7 and 8. An additional direction relating to resource consents is contained in s104(1). There, it is provided that consent authorities must have regard to any actual and potential effects of allowing the activity in considering an application for a resource consent.

The following extracts from the evidence of Mr Lawson provide a helpful summary of the foregoing provisions in the Resource Management Act and also introduce other relevant features of the Act:

> 15. When considering which level of government would have responsibility for management of particular resources, Government decided that this should be placed as close as appropriate to the community of interest affected by decisions taken on that resource.
>
> 16. Government confirmed that the management of water should continue on a catchment based approach and that geothermal energy management should be administered together with water management. Regional councils, therefore, have the responsibility for the control of the taking or use of water including geothermal energy (s.30(1)(e)).
>
> 17. The Act provides regional councils with the requirement to produce a regional policy statement and the ability to develop statutory plans for water and geothermal resources. In doing so, a Council is subject to Part II of the Act which requires that:
>
> - it recognise and provide for, as a matter of national importance, the relationship of Maori and their culture and traditions with their ancestral lands, waters, sites, waahi tapu, and other taonga (s.6(e));

- it have particular regard to Kaitiakitanga (s.7(a)) and the recognition and protection of the heritage values of sites, places or areas (s.7(e))[; and]

- it take into account the principles of the Treaty of Waitangi (s8).

18. In addition, for both the instruments referred to above, regional councils are to have regard to iwi planning documents (s.61(2)(a)(ii) and s.66(2)(c)(ii)). In preparing a regional policy statement there is also a requirement that the policy statement state matters of resource management significance to iwi authorities (s.62(1)(b)). Councils are also required to consider the desirability of preparing a regional plan when there are significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources (s.65(3)(e)).

19. The RMA also provides for the granting of resource consents for use of geothermal energy. Such consents cannot be granted for periods longer than 35 years. Section 14 provides that the use of geothermal energy is only permitted if authorised by a resource consent or a rule in a regional plan, or for uses in accordance with tikanga Maori.

20. When an application for resource consent to use geothermal energy is lodged, it must be accompanied by sufficient material setting out the potential impact of the consent (s.88). Additional information can be requested (s.92). The application is generally notified and, as the Act provides for open standing, any person can make a submission to the council (s.96).

21. When considering an application for a resource consent, a regional council remains subject to Part II of the Act and must act in a manner consistent with any plan it has developed (s.104). The Act provides appeal rights to all persons who made submissions on the application (s.120).

22. Geothermal licences and water rights granted under the previous legislation are deemed to be resource consents (ss.386 and 387). Some previously permitted uses of geothermal energy may continue for up to three years after the commencement of the Act, or until a regional plan provides otherwise (s.418).

23. The Act also provides other opportunities to Maori to influence the management of geothermal resources:

- A local authority may transfer some of its functions under the Act to an iwi authority (s.33(1));

- Geothermal aquifers of outstanding value can be protected by water conservation orders;

- Heritage orders can protect geothermal surface features;

- The Crown may make an appropriate national policy statement with which regional policy statements, regional plans and district plans must not be inconsistent[; and]

- The Minister for the Environment may also recommend to the Governor-General the making of regulations prescribing national environmental standards (s.43).

24. The Act provides for the making of Regulations prescribing the circumstances and manner in which the holders of resource consents shall be liable to pay for geothermal energy (s.360(1)(c)). These royalties are to be received by regional councils and paid into the Crown Bank Account (s.359). The previous royalty (rental) regime established under the Geothermal Energy Act continues under the Resource Management (Transitional, Fees, Rents and Royalties) Regulations 1991. These apply only to the Rotorua field users.

25. Geothermal royalties have been used for two main purposes: as a resource management tool (depletion rate modifier), and as a rental resource (source of economic rent). The Ministry for the Environment is currently reviewing the role of royalties in the management of the Rotorua geothermal field. (B43:6-10)

Heritage and water conservation orders

7.4.6 The heritage and water conservation orders mentioned by Mr Lawson are provided for, respectively, in Parts VIII and IX of the Act. A heritage order (a provision in a district plan of a territorial authority) may be obtained by, amongst others, the Minister of Maori Affairs or a local authority, either acting on their own motion or on the recommendation of an iwi authority (s187). One purpose for which heritage orders may be obtained is to protect any place of "special significance to the tangata whenua for spiritual, cultural, or historical reasons" (s189(1)(a)). The decision of the relevant territorial authority as to whether or not a heritage order is justified is appealable to the Planning Tribunal (ss191 and 192).

Any person may apply to the minister for the making of a water conservation order (s201(1)) and, unless the minister rejects the application after such inquiry as is considered necessary, a special tribunal shall be appointed to consider the submissions made to it upon the matter and to report its conclusions. Upon the submission of an interested party, the Planning Tribunal must hold a public inquiry in respect of the tribunal's report (ss202-213). The minister may make a recommendation to the Governor-General for a water conservation order where that is consistent with the report of the special tribunal or, on appeal, the Planning

Tribunal. The minister may also decline to so recommend, contrary to such reports (ss214 and 215).

7.5 Geothermal Resource Legislation and the Treaty

The claimants' grievances

7.5.1 In paragraph 6 of their statement of claim the claimants allege that any grant of resource consents to exploit the Ngawha geothermal resource will directly contravene the title and rangatiratanga of nga hapu o Ngawha to the resource and will deny their right to act as kaitiaki of this taonga. Accordingly they seek findings by the tribunal that:

- ownership of and rangatiratanga over the Ngawha geothermal resource is and remains vested in nga hapu o Ngawha; and

- the grant of resource consents to the joint venture applicants would be in breach of those rights unless and until the consent of nga hapu o Ngawha is procured.

We add for the sake of completeness that the claimants sought an urgent recommendation that the Far North District Council and Northland Regional Council should not proceed to consider the joint venture applications until this claim is heard and reported upon by the tribunal. While it is very doubtful that the tribunal has jurisdiction under s6(3) of the Treaty of Waitangi Act 1975 to make such a recommendation, the need has not arisen, as no date for hearing the joint venture application has been set by the district council.

Nature and extent of the claimants' present interest in the Ngawha geothermal resource

7.5.2 The claimants seek a finding that ownership of and rangatiratanga over the Ngawha geothermal resource is and remains vested in nga hapu o Ngawha.

The tribunal has found that at the time of the Treaty, and for a long time before 1840, the hot springs of Ngawha and the associated sub-surface geothermal system were a sacred taonga over which the hapu of Ngawha had rangatiratanga (4.5.3). In this sense they 'owned' the Ngawha geothermal resource.

The tribunal has further found:

- that when in 1894 the Crown acquired ownership of that part of B block on which hot springs were situated, the Maori owners lost the right of access to that land and the hot springs on the land. As a consequence they necessarily lost the rights of management and control or rangatiratanga over the surface and sub-surface components of the geothermal system on and under the alienated land (4.6.5);

- that when by 1894 Heta Te Haara had disposed of all the land in the Tuwhakino block, his interest and any interest of his hapu in the hot springs and pools and the underlying resource was completely extinguished. As a consequence Maori no longer had any right of management and control or rangatiratanga over the surface components of the geothermal system or the sub-surface components under the alienated land in the Tuwhakino block (4.6.9); and

- that if the geothermal fluid is isolated from the remainder of the underground components of the resource for the purpose of considering the question of ownership, once ownership of the surface components has been severed there is no basis for allocating the right of ownership of or rangatiratanga over the whole of the sub-surface geothermal fluid to the owner of only one set of hot springs or pools. No one such owner or groups of owners can validly claim the exclusive right to manage and control the underground fluid or, in all circumstances, to exercise a veto over its extraction and use (4.6.16).

As a consequence the claimants no longer own or have rangatiratanga over the entire Ngawha geothermal resource. Instead they own and have rangatiratanga over the land and springs contained in the one acre block that is part of the former Parahirahi C block. As well, the tribunal has found that the claimants were wrongfully deprived of the remaining four acres of the block in that they have never voluntarily relinquished ownership of and rangatiratanga over the land and springs in that block. We have recommended that the Crown should return the four acres presently known as a recreation reserve. Once returned to the rightful owners, rangatiratanga over the whole of the hot springs and the land in the former Parahirahi C block will be restored to the claimants. For the purposes of our ensuing discussion we are assuming that this will occur.

While, therefore, the claimant hapu no longer have an exclusive interest in the whole of the Ngawha geothermal resource, we have accepted without hesitation that the hot springs in the five acre Parahirahi C block are a taonga handed down by the claimants' tupuna which are of immense value to them, especially for their healing powers.

Although the claimant hapu no longer have an exclusive interest in the sub-surface geothermal resource they necessarily retain a substantial interest in the resource. The preservation of their taonga, the Ngawha hot springs, necessarily depends on the preservation and continued integrity of the underlying resource which manifests itself in their hot springs and pools. It is totally unrealistic to isolate or divorce their interest in the Ngawha hot springs from the geothermal resource which finds expression in them.

The mauri of the Ngawha hot springs

7.5.3 It has already been concluded from the kaumatua evidence that the geothermal resource is possessed of a life force or mauri (2.6.3). It would accord with the claimants' beliefs therefore, that their interest would be rendered ineffectual if the springs, and more particularly their mauri, from which emanates their healing properties, were to be damaged:

> Mauri is a special power possessed by [the God] Io which makes it possible for everything to move and live in accordance with the conditions and limits of its existence. Everything has a mauri, including people, fish, animals, birds, forests, land, seas, and rivers; the mauri is that power which permits these living things to exist within their own realm and sphere. No one can control their own mauri or life-essence.[9]

For the claimants, the interconnectedness of the surface and sub-surface components of a geothermal system makes unacceptably high the risk of the springs and their mauri being damaged as a result of any further development of the Ngawha geothermal resource.

The scientific evidence could not address the claimants' concern as to the effect of the proposed development on the mauri of the hot springs. It focused rather on the possible or likely measurable effects on the springs of development of the underlying resource, both short term and long term, and the efforts that could be taken to minimise such effects. As appears from the summary of the scientific evidence in chapter 6, none of the scientists were able to give a guarantee that development would produce no physical effect upon the springs. Indeed Dr Watson, the leading expert in support of the proposed joint venture development, explained that it was intended to produce small measurable effects upon the springs, undetectable to users, so that further effects could be prevented.

The tribunal appreciates that at the forthcoming hearing of the joint venture's application for a resource consent to develop the Ngawha geothermal resource, much more detailed evidence, scientific and otherwise, is likely to be presented to the regional council. We also accept that it is not for this tribunal to decide whether the proposed development would in fact impact upon the springs and if so, to what extent; this being outside the tribunal's expertise and being a matter for the bodies appointed under the Resource Management Act to consider and adjudicate upon. But having said that, the tribunal, on the facts presented to us, considers that the claimants' concerns about the proposed development damaging their taonga are entirely understandable and reasonable. Those concerns were necessarily directed at the proposed joint venture development which would utilise bores, already drilled, situated in reasonably close proximity to the springs. The bottom of one such bore is a mere 200 metres from the springs. We make no comment on any situation other than that before us. If a less substantial use of the geothermal resource had been

proposed or if the proposed development were to be centred at a distance remote from the taonga, for instance, it may be that scientific evidence would have or should have allayed the claimants' concerns.

7.6 The Application of Treaty Principles

7.6.1 As our earlier discussion of Treaty principles demonstrates, rangatiratanga over a taonga denotes the mana of Maori not only to possess, but to control and manage it in accordance with their own cultural preferences. While the cession of sovereignty or kawanatanga enables the Crown to make laws for conservation control and resource protection, that right is to be exercised in the light of article 2 of the Treaty. It should not diminish the principles of article 2 or the authority of the tribes to exercise control. In short, the tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga.

The tribunal in its *Radio Frequencies Report* spoke of a hierarchy of interests in natural resources:

> based on the twin concepts of kawanatanga and tino rangatiratanga. First in the hierarchy comes the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Secondly comes the tribal interest in the resource. Then follows those who have commercial or recreational interests in the resource.[10]

Also relevant to the claimants' concerns over the proposed development is the duty of the Crown to ensure that they are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms. The duty extends equally to the mauri of the Ngawha Springs taonga.

As earlier indicated (5.1.3) the degree of protection to be given to Maori resources will depend upon the nature and value of the resource. In the case of a very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori, the Crown is under an obligation to ensure its protection, save in very exceptional circumstances, for so long as Maori wish it to be so protected. The Ngawha geothermal springs fall into this category. The value attached to such a taonga is essentially a matter for Maori to determine.

7.6.2 The tribunal would distinguish the degree of protection due to a geothermal resource such as the Ngawha Springs taonga, from that due to land. Zoning provisions, for instance, which restrict the use of land to certain purposes whether commercial, residential or farming, do not affect the integrity or very existence of the land. It remains intact. Experience in Wairakei and elsewhere, including Rotorua, has demonstrated only too well the relatively fragile nature of geothermal springs and

pools and their sensitivity to exploitation of the underlying geothermal fluid and steam.

If, as it should be, priority is to be given to protecting Maori rangatiratanga over a highly valued and irreplaceable taonga such as the Ngawha hot springs there may well be no alternative to refusing consent to contentious proposals for exploitation of the underlying resource. We would reiterate that the value to be attributed to such a taonga is essentially a matter for those having rangatiratanga over it to determine.

7.6.3 The tribunal has recognised that in conformity with the Treaty principle of partnership, the needs of both cultures must be provided for and compromise may be needed in some cases to achieve this objective. At the same time the Treaty guarantee of rangatiratanga requires a high priority for Maori interests when proposed works may impact on Maori taonga (5.2).

In the particular circumstances of this claim the tribunal has no doubt that if the Treaty's article 2 guarantee is to be given a meaning compatible with Maori culture and spiritual values, as plainly it must, the Crown's obligation to manage geothermal resources "in the wider public interest" must be constrained so as to ensure the claimants' interest in their taonga is preserved in accordance with their wishes. We are unaware of any exceptional circumstances or overriding public interest which would justify any other conclusion which might leave it open for the claimants' interest in their taonga to be harmed or rendered ineffectual. Limited local benefits such as might accrue from exploitation of the Ngawha geothermal resource for the purpose of electricity generation would be insufficient to justify placing the claimants' Treaty rights to the protection of their taonga in jeopardy. It would need to be established, if such was possible, that any approved interference with the underlying resource, could not and would not impinge upon the claimants' rangatiratanga over the taonga and the mauri of the taonga.

7.7 Are the Claimants' Treaty Rights Protected by the Geothermal Resource Legislation?

Geothermal Energy Act 1953

7.7.1 As we have seen s3(1) of the Geothermal Energy Act 1953 appropriated to the Crown the sole rights to tap, take, use and apply geothermal energy on or under the land. Section 9 required a licence to be obtained from the minister before any person could sink any bore or tap, take, use or apply geothermal energy for any purpose. The Act did, however, recognise pre-existing Maori and others' use of geothermal energy for domestic purposes such as cooking, heating, washing and bathing (7.3.5).

All key provisions of the 1953 Act earlier outlined in 7.3.5 were repealed by the Resource Management Act except for s12 which authorises the minister to order the closure of bores (see s362 and the eighth schedule of the Resource Management

Act). The sections repealed included s3 referred to above. However, s354(1) of the 1991 Act, which has its head-note "Crown's existing rights to resources to continue", declares that the repeal of s3 of the 1953 Act:

> shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

Section 354(2), however, provides that any person may take, use, dam, divert, or discharge into any water to which the Crown has a right, interest, or title without obtaining the consent of the Crown, if the taking, use, damming, diversion, or discharge by the person does not contravene the Act or regulations.

It is apparent from submissions of counsel that the meaning and effect of s354 is by no means clear. No doubt it will call for an authoritative interpretation by the High Court in due course. It does, however, seem clear to the tribunal that, whatever may be the precise meaning of s354(1), the uses of geothermal water of the kind listed in s354(2) can be legitimately undertaken only in accordance with the Act's regulatory scheme.

The claimants' argument

7.7.2 Counsel for the claimants argued that s3 of the Geothermal Energy Act was in breach of the Treaty of Waitangi by its expropriation of the most vital elements of the claimants' rights of ownership, rangatiratanga and kaitiakitanga with respect to the geothermal resource at Ngawha. The Act, it was argued, did not even consider the existence of tangata whenua rights or interests in geothermal resources. Instead, it was premised upon the assumption that property rights in geothermal energy were analogous to those recognised by the common law in ground water and so did not arise until capture or abstraction. In arrogating to the Crown sole use rights (rather than ownership) in the energy component of geothermal resources (as opposed to the resources themselves), the Act did not validly extinguish the claimants' prior ownership rights to the resource itself, it was argued, but seriously affected the claimants' rights by expropriating the most important incidents of ownership of the resource (C13:55-58).

Counsel for the claimants submitted that while the precise effect of s354 of the Resource Management Act 1991 was not entirely clear, its underlying intention is to continue the expropriating effect of s3 of the 1953 Act. He further submitted that, to the extent that s354 is intended to preserve the Crown's rights in geothermal energy, the section continues to expropriate a substantial portion of the claimants' rights in breach of the Treaty.

Moreover, claimants' counsel submitted that in seeking to preserve its vested rights via s354, the Crown has demonstrated its desire to preclude any other claim to ownership or rights in respect of the geothermal resource. In other words, the Crown has not only failed to recognise the claimants' prior Treaty rights in the resource, it has deliberately perpetuated the monopoly rights vested in itself, knowing of this and similar Treaty claims to the geothermal resource. Mr Williams further submitted that the Crown's failure to recognise and provide for Treaty rights in the resource at the time it enacted the Geothermal Steam and Geothermal Energy Acts in breach of the Treaty was a woeful omission; but the Crown's attempts to preserve its position, being fully aware of the rights asserted by the tangata whenua under the Treaty are, he submits, particularly repugnant (C13:61).

The Crown's argument

7.7.3 Counsel for the Crown denied that the Geothermal Energy Act had expropriated any rights of the claimants. He argued that, prior to the 1953 Act, the application of the common law rules relating to water would have been appropriate to determine property rights in geothermal resources. By those rules, there was no ownership of geothermal water until it was captured and abstracted either in the form of geothermal water (fluid) or steam. The maxim of the common law that a landowner has title from the centre of the earth to the sky was not apt to be applied to geothermal resources, in the Crown's view, because their very nature makes them incapable of ownership. Accordingly, the claimants did not own the Ngawha geothermal resource (B48:1-2; C17:23-24).

The Crown further argued that even if the claimants were considered to have some ownership rights in the underlying resource, the 1953 Act, while clearly affecting those rights, did not expropriate them. Referring to the dictionary definition of "expropriate" as "to take away property from its owner" or "to dispossess", the Crown maintained that the 1953 Act did neither of these and was consistent with the Crown's role of kawanatanga (C16:77,78).

Having reviewed the main provisions of the Act, counsel for the Crown submitted that, accepting for the moment that the claimants had some ownership right to the Ngawha geothermal resource, nothing in the 1953 Act operated as an expropriation of those rights. The only impositions on the claimants would have been:

(a) the necessity to obtain a licence; or

(b) the possibility of their having to pay royalties should they wish to use the field in a way which required a licence.

He pointed out that there is nothing in the Act which would prohibit a landowner from charging a royalty over and above any royalty payable under s10 of the 1953 Act.

In relation to s354 of the Resource Management Act 1991 Crown counsel submitted that the section ensures the retention of existing use rights of the Crown established under the Geothermal Energy Act 1953. He stated that the section would apply, for example, to the existing bores drilled by the Ministry of Works in the Ngawha area and observed that none of those was on the claimants' land (C16:81).

The Crown emphasised that the Resource Management Act does not address issues of ownership of resources, but issues relating to their use. The regulation of such important issues as sustainable management of, and access to, resources, it was submitted, is properly determined by legislation rather than by individuals although it was acknowledged that in the case of geothermal resources, access to them is affected by ownership of the surface land (C16:83).

7.7.4 The tribunal notes at the outset that the submissions of counsel for the claimants are based on the premise that the claimants own or have rangatiratanga over the whole of the Ngawha geothermal resource both above and below ground. The Crown, on the other hand, while recognising that the surface hot springs on the one acre vested in the Waiariki trustees are a taonga of the claimants, disputes that they have any interest in the underlying resource which gives rise to the springs at Ngawha.

For reasons noted above (7.5.2), the tribunal has found that the claimants no longer own or have rangatiratanga over the entire Ngawha geothermal resource. But they do own and have rangatiratanga over the land and springs on the one acre block vested in the Waiariki trustees and, once the adjoining four acres presently known as a recreation reserve are returned to the rightful owners by the Crown, they will have rangatiratanga over the whole of the former Parahirahi C block. Moreover, as we have earlier indicated, while the claimant hapu no longer have an exclusive interest in the sub-surface geothermal resource, they do retain a substantial interest in it. The preservation of their taonga, the Ngawha hot springs, necessarily depends on the preservation and continued integrity of the underlying resource.

The tribunal does not uphold the claimants' contentions that s3 of the Geothermal Energy Act 1953 was in breach of the Treaty in that it expropriated the claimants' rights of ownership, rangatiratanga and kaitiakitanga with respect to the greater Ngawha geothermal resource. This is because they no longer had such rights over the whole of the resource.

There is, however, one respect in which, in terms of s6 of the Treaty of Waitangi Act, the claimants have been, and are likely to be, prejudiced by Crown action in exercise of its powers under s3 of the 1953 Act. This is the drilling of bores by the Crown, some in close proximity to the claimants' hot springs at Ngawha. It is those bores which the joint venture proposes to use, if it obtains the necessary resource consents under the 1991 Act, to exploit the underlying geothermal resource for the generation of electricity.

The Geothermal Energy Act 1953 gives the Crown the sole use rights of the energy component of geothermal resources. It does so without any recognition of any rights of Maori in the resource and makes no provision to ensure that any Treaty rights of Maori will be protected as required by article 2 of the Treaty. The Act simply ignores any such Treaty rights and gives the Crown the legal right if it so chooses, to act without regard to such rights. There was no requirement for instance, that in sinking bores in close proximity to the claimants' hot springs at Ngawha, the Crown should first ensure that the claimants' Treaty rights were fully protected. One such bore is within 200 metres of the claimants' taonga.

In the course of submissions on s354 of the Resource Management Act, Crown counsel stated that the section would ensure the retention of the existing use rights of the Crown under the 1953 Act including, for example, the existing bores drilled by the Ministry of Works in the Ngawha area.

The finding of the tribunal

7.7.5 The tribunal finds that the Crown has acted in breach of Treaty principles in failing to ensure that the Geothermal Act 1953 and s354 of the Resource Management Act 1991, which preserves existing rights to geothermal resources under the 1953 Act, contain adequate provisions to ensure that the Treaty rights of the claimants, in their geothermal resource at Ngawha, are fully protected. As a consequence the claimants have been, and are likely to continue to be, prejudiced by such breach.

Resource Management Act 1991 management regime

7.7.6 Counsel for the claimants acknowledged that the 1991 Act represents an advance on the previous regime to the extent that it allows input by Maori into the process of control and management and introduces more stringent conservation standards. Counsel submitted, however, that the Act fails to recognise and provide adequately for tangata whenua rights in respect of geothermal resources (C13:62-63).

Part II of the Act sets out the purpose and principles of the legislation in ss5 to 8. Claimants' counsel was strongly critical of these provisions, which he characterised as a "hierarchy of considerations", with the various criteria being listed in descending order of importance. These are:

- the purpose of the Act is to promote the *sustainable management* of natural and physical resources (s5);

- in achieving the purpose of the Act everyone exercising functions and powers under it, in relation to the use, development, and protection of natural and physical resources "shall recognise and provide for" the following matters of *national importance*. These are set out in paragraphs (a) to (e). None is given priority over the other (s6);

- anyone acting as in s6 shall also "have particular regard to" (a) kaitiakitanga and other matters set out in paragraphs (b) to (h) (s7); and

- anyone acting as in s6 shall "take into account" the principles of the Treaty of Waitangi (s8).

As counsel put it, s6 imposes a mandatary obligation on decision-makers to "recognise and provide for" matters of "national importance". Section 7 has less injunctive force; decision-makers need only have "particular regard" to "other" matters (which in turn are presumably of less than *national* importance). Section 8 in turn merely requires decision-makers to "take into account" Treaty principles. All of these matters are subordinate to the over-riding importance of achieving the central purpose of sustainable management of resources (s5).

7.7.7 Claimants' counsel maintained that the reference to the Treaty in s8 of the Resource Management Act is a "watered down" version of the reference found in s9 of the State Owned Enterprise Act 1986, which states:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

Counsel further suggested that the Resource Management Act reference is even more diluted than that found in s4 of the Conservation Act 1987, which provides:

> This Act should be interpreted and administered to give effect to the principles of the Treaty of Waitangi.

Other provisions of the Act which specifically mention Maori interests, or provide for Maori participation in the management regime, also attracted criticism. It was argued that the Act's exemption from the need for a water permit of uses of geothermal water, heat and energy which are "in accordance with tikanga Maori" (s14(3)(c)) is unclear in its meaning and anyway is significantly limited by s15's requirement that a discharge permit is necessary to discharge geothermal water, heat or energy (C13:70-71).

It was also argued that the provisions which make it possible for "iwi authorities" to be delegated certain powers of local authorities, and to have input into regional policy statements or plans, are very limited in that they make such input a mere possibility. Moreover, those provisions are fraught with difficulty, it was said, not only because of the lack of definition of an "iwi authority" but also because of the expense involved for any Maori group endeavouring to participate in the regime created by the Act (C13:71-72).

Other features of the Act's regime which were criticised for failing to give adequate recognition to Maori interests in geothermal resources included:

- the power of the Minister of the Environment to "call-in" applications for resource consents (and thereafter appoint a board of inquiry to report and recommend upon any such applications pursuant to s146) where a proposal is of national significance having regard to the Treaty of Waitangi (s140(2)(h));

- the manner in which heritage orders and water conservation orders may be obtained; and

- the discretionary powers of a regional council to notify iwi authorities of water permit applications (s93(1)(f)), except where approvals have been obtained from those whom the regional council considers will be adversely affected by the permit (s94(2)) (C13:72-75).

7.7.8 Crown counsel's defence of the Resource Management Act regime as being adequate to protect the claimants' interests in the Ngawha geothermal resource was based on the view that the underground resource is incapable of ownership. Acknowledging, however, that the claimants have a guardianship role, Crown counsel argued that their aims are adequately provided for by s14(3)(c) of the Act (exempting communal use in accordance with tikanga Maori from the need for a water permit) and, with regard to resource consents, the requirements in ss7, 8 and 104 (by which regard must be had to kaitiakitanga, the principles of the Treaty and any actual and potential effects of allowing the activity).

The fact that the Act did not require the claimants' consent to proposed uses of the Ngawha geothermal resource meant, the Crown stated, that the extent to which the claimants could exercise kaitiakitanga was not as great as they would wish. However, it was said this was a consequence of the Crown's right of kawanatanga (C16:81-83).

7.7.9 It is readily apparent that the Resource Management Act is a very considerable improvement on the Geothermal Energy Act 1953 in terms of its concern to ensure that consideration is given to Maori interests in geothermal resources. But, for reasons we will now give, we consider the Act fails adequately to ensure that Maori Treaty rights in geothermal resources are protected.

It should be emphasised at this point that the Treaty was between Maori and the Crown. In return for the powers ceded to Maori by the Crown in article 1, the Crown, in article 2, guaranteed to protect Maori rangatiratanga over their taonga. This obligation is a continuing one and cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local authorities. As

we have indicated in our earlier chapter on Treaty principles, if the Crown chooses to so delegate, it must do so in terms which ensure its Treaty duty of protection is fulfilled (5.1.3).

(a) Section 6

Section 6 of the Resource Management Act does require persons exercising functions and powers under the Act to "recognise and provide for" various matters "of national importance" including:

> **The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.**

Water includes geothermal water (s2) and this provision clearly extends to the claimants' taonga of the hot springs at Ngawha. It is not easy to determine the precise meaning and scope of this provision, and it received little attention from counsel. Indeed Crown counsel referred to ss7, 8 and 104, but placed no reliance on this provision. Whatever its meaning, it does not amount to or create an obligation to comply with the Crown's Treaty duty to protect the claimants' rangatiratanga over their highly valued taonga at Ngawha. A requirement to "recognise and provide for" does not equate with a duty to ensure compliance with the Crown's obligation to guarantee the claimants' Treaty rights to its taonga. Any suggestion that this provision should be construed as requiring those exercising functions and powers under the Act to ensure that the Crown's Treaty obligations are fully met, is, it appears to the tribunal, incompatible with the later s8 which requires only that the principles of the Treaty are to be taken "into account". We add that no such suggestion was made by Crown counsel.

(b) Section 7

Section 7 of the Act requires persons exercising functions and powers under the Act to have "particular regard to - (a) Kaitiakitanga". Kaitiakitanga is defined by s2 as meaning:

> **the exercise of guardianship; and in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself.**

In our earlier discussion of rangatiratanga and kaitiakitanga we noted that the care for and fostering of resources was an integral part (but only a part) of rangatiratanga, and where resources were clearly demarcated, the rangatiratanga in respect of them could equally well be described as kaitiakitanga (literally guardianship) (2.5.3).

The claimant hapu of Ngawha undoubtedly have rangatiratanga and kaitiakitanga over their taonga at Ngawha. The Crown has a duty under the Treaty to guarantee their rangatiratanga and kaitiakitanga for so long as they wish to retain it. Section 7, however, requires those exercising functions and powers which could, depending

on how they are exercised, have the effect of harming or even destroying the claimants' taonga at Ngawha, only to have "particular regard" to the claimants' kaitiakitanga over their taonga. Such a requirement does not equate with the Crown's Treaty duty to protect the claimants from such an outcome. The tribunal notes that immediately after the reference in paragraph (a) to kaitiakitanga, paragraph (b) refers to "the efficient use and development of natural and physical resources". So, while the decision-maker is to have particular regard "to kaitiakitanga", he or she is also to have the same regard to the efficient use and development of natural resources. No priority is accorded the claimants' Treaty rights.

(c) Section 8
Section 8 of the Act requires persons exercising functions and powers under the Act to "take into account" the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Implicit in the requirement to "take into account" Treaty principles is the requirement that the decision-maker should weigh such principles along with other matters required to be considered, such as the efficient use and development of geothermal resources (to which "particular regard" must be given under s7). The role or significance of Treaty principles in the decision-making process under the Act is a comparatively modest one.

It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed.

Claimants' counsel was also critical of other features of the Act's regime. We have recorded these in 7.7.7. It is not necessary for the purposes of this claim that we consider his submissions on these provisions. Suffice it to say that if the recommendation which we propose to make is implemented by the Crown, his criticisms may lose much of their force.

7.7.10 Before stating our findings it is desirable that we should comment on the evidence of Morris Love who was called by the claimants. It should be noted at the outset that Mr Love considers that the geothermal resource, both surface and sub-surface, at Ngawha and elsewhere, is a taonga of Maori and the Crown's assumption of the sole rights to use that resource in the Geothermal Energy Act 1953 is in breach of article 2 of the Treaty.

To remedy this alleged breach, Mr Love, in a carefully considered paper, argued for a new regime under the Resource Management Act which would in his view appropriately recognise the respective interests of Maori and the Crown in the geothermal resource.

In essence, under Mr Love's proposed regime, Maori having rangatiratanga over a geothermal resource which is established to be a taonga, would be the holder of the use rights, and as such, would hold the final rights of veto on any use of the resource. He summarises his proposal as follows:

> In this proposed regime then, iwi would hold the sole right to use the geothermal resource. The practical effect of that is that two decisions (or permits if you like), would be required - one from the iwi for the use right (the allocation decision and the setting of management parameters), and one from the regional council for a resource consent which would consider the external effects of the resource development. This arrangement would recognise the rangatiratanga of the iwi in allocating use rights as well as the needs of the Crown, through regional councils to control external effects, ensure sustainable management of the resource and protect the interests of third parties. The allocation process would not be final but always conditional on the kaitiaki or tribal guardians being able to maintain their kaitiaki role. (A49:7)

We make no comment on the appropriateness of this proposal, which is stated in general terms, except in relation to the claimants' Ngawha geothermal resource. In their case, Mr Love's assumption that the claimants own or have rangatiratanga over the whole of the Ngawha geothermal resource has not been substantiated. As a consequence, Mr Love's basic premise that the claimants are entitled to the sole use right of the resource does not apply. This makes his proposals inapplicable to the claimants' taonga at Ngawha.

Tribunal findings

7.7.11 At the time of the signing of the Treaty in 1840 Maori were almost totally dependent for their sustenance and livelihood on the natural resources of Aotearoa. Maori nurtured and protected those resources. Kaitiakitanga was an essential element of rangatiratanga. It is inconceivable that Maori would have signed the Treaty had they not been assured that the Crown would protect their rangatiratanga over their valued resources for as long as they wished. In return they exchanged the power of governance. The Ngawha springs are of immense value not only to the claimant hapu of Ngawha but to all of Ngapuhi. The Crown is under a clear duty under the Treaty to ensure that the claimants' taonga is protected. The partnership which the Treaty embodies and represents requires no less.

The tribunal finds that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.

The tribunal further finds that the claimants have been, or are likely to be, prejudicially affected by the foregoing omission, and in particular by the absence of

any provision in the Act giving priority to the protection of their taonga and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish. The omission of any such statutory provision is inconsistent with the Treaty duty of the Crown, when delegating powers of governance to local and regional authorities, to ensure that it does so in terms which will guarantee that the rangatiratanga of the claimants in and over their taonga is recognised and protected as required by the Treaty. In the absence of such a provision, a development such as that proposed by the joint venture to exploit the underlying Ngawha geothermal resource may be permitted and may result in interference with or damage to the claimants' hot springs at Ngawha.

Recommendation

7.7.12 The tribunal recommends that an appropriate amendment be made to the Resource Management Act providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi.

References

1. This relied on the Waitangi Tribunal's jurisdiction, pursuant to s6(1)(b) of the Treaty of Waitangi Act 1975, to consider claims by Maori that they have been or are prejudicially affected by legislation which was or is inconsistent with the principles of the Treaty.

2. The Acts were the Water-Power Act 1903, the Petroleum Act 1937, the Atomic Energy Act 1945 and the Coal Act 1948.

3. *Keam* v *Minister of Works and Development* [1983] 1 NZLR 319

4. *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188

5. See s362 and the eighth schedule of the Resource Management Act 1991.

6. This plan would be prepared by a regional council pursuant to section 65.

7. The appropriate resource consent would be a water permit (s87(d)).

8. The appropriate resource consent would be a discharge permit (s87(e)).

9. C Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Auckland, Oxford University Press, 1991) p 83

10. "Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies 1990" (Wai 26 and Wai 150) 3 *WTR* (Wellington) p 42

Chapter 8

Conclusions and Recommendations

8.1 Introduction

The claimants' grievances fall under two main heads. The first concerns the propriety of the acquisition by the Crown of the land and hot springs on the approximately four acre block at Ngawha. This was for some time a domain and is now a recreation reserve in the name of the Crown. The second set of grievances centres around certain provisions of the Geothermal Act 1953 and the Resource Management Act 1991 and their claimed inconsistency with the rights of the claimants under the Treaty of Waitangi.

A critical question which goes to the heart of the claimants' grievances is whether, as they assert, they presently own or have rangatiratanga over the whole of the Ngawha geothermal resources both surface and sub-surface within the geothermal field. We will record our findings and conclusions on this central issue first and then discuss each of the two major heads of grievances.

8.2 The Nature and Extent of the Claimants' Taonga

8.2.1 At the time of the signing of the Treaty of Waitangi in 1840, and for centuries previously, the hot springs of Ngawha and the underlying resource which fed these springs were a sacred taonga of Ngapuhi. The hapu of Ngawha, with possibly some other hapu of Ngapuhi, were the occupiers of and held rangatiratanga over what is now known as the Ngawha geothermal field including all surface geothermal springs within the field. Moreover the various hapu, by virtue of their occupation and possession of the land above the sub-surface geothermal system, had rangatiratanga over the sub-surface and whatever it contained, even though this was necessarily almost wholly unknown then. They certainly knew that the hot springs were fed from the underground resource. They knew of their discovery by Karearikl and of the subsequent manifestation of the taniwha, known to this day by the name Takauere, as a protector of the resource.

As we have earlier noted, such beliefs, whether allegory, myth or history, serve to impart ownership rights, certainly on the basis of discovery and subsequent unbroken occupation and control, over whatever resource was regarded as essential for the people's well-being. And none has been more valued by Ngapuhi than the springs at Ngawha.

8.2.2 As we have seen, between 1873 and 1894, individualisation of title of the Tuwhakino and Parahirahi blocks and partition of the latter, resulted in a substantially greater

part of this land passing from Maori ownership. The whole of the Tuwhakino block, on which were hot springs adjacent to those on Parahirahi C1 (now known as the Spa pools), was sold to Europeans. In addition, the Crown acquired almost all Parahirahi B block on which were to be found all the hot springs and other thermal manifestations on that block. The Crown also believed (erroneously in our view) that it had purchased some four acres in Parahirahi C block on which were to be found some of the highly prized Ngawha hot springs.

The claimants and their counsel strongly urged before us that notwithstanding the loss of this land they have to this day retained ownership and rangatiratanga over the whole of the Ngawha geothermal resource, including the hot springs on the Tuwhakino and Parahirahi B blocks which were alienated by 1894. They say this is the consequence of their ownership of and rangatiratanga over the hot springs and pools on Parahirahi C block, a part of which they were wrongfully deprived of by the Crown.

For reasons which are discussed in some detail in chapter 4 and briefly noted below, the tribunal has been unable to agree that, since 1894, the claimants have retained ownership and rangatiratanga over the whole of the Ngawha geothermal resource. We do agree however that since that time the claimants have retained ownership and rangatiratanga over the Ngawha hot springs on the one acre currently vested in the trustees of Parahirahi C1 Maori reservation. And as will shortly be noted, they are entitled to the return and reinstatement of ownership and rangatiratanga over the four acres vested in the Crown as a recreation reserve, which is an integral part of the Ngawha springs formerly comprised in Parahirahi C block.

8.2.3 When in 1894, the Crown acquired ownership of that part of Parahirahi B block on which hot springs were situate, the Maori owners lost the right of access to the land and the hot springs on the land. As a consequence, the tribunal finds that they necessarily lost the right of management and control or rangatiratanga over the surface and sub-surface components of the geothermal system on and under the alienated land (4.6.5).

8.2.4 Likewise, the tribunal has concluded that the final result of the two sale transactions whereby the owner Heta Te Haara disposed of all the land in the Tuwhakino block and surrendered the right of access to certain pools in the northern block, was that his interest and any interest of his hapu in the hot springs and pools on that block and the underlying resource was completely extinguished. Te Haara parted with the right of access to the land and the hot springs on the land. Consequently, Maori no longer had any right of management and control or rangatiratanga over the surface components of the geothermal system or the sub-surface components under the alienated land in the block (4.6.9).

8.2.5 It follows from the findings recorded in the preceding two paragraphs that once ownership of a significant part of the geothermal component (the surface hot springs

and pools and other manifestations) is severed from that of other surface components, as has occurred in the Ngawha region, no one owner of some only of the surface components can validly claim the right to use and control the whole of the resource in and under the geothermal field. The present day owners, whether private or public, of the alienated surface of the geothermal resources in Parahirahi B block and the Tuwhakino block must necessarily have the right to use and control at least the surface components on land owned by them (subject always to any statutory provisions affecting them) (4.6.14).

8.2.6 A critical question is whether the sub-surface components of a geothermal resource are capable of ownership. If the sub-surface geothermal fluid is isolated from the remainder of the underground components of the resource for the purpose of considering the question of ownership, the tribunal considers that once ownership of the surface components has been severed there is no basis for allocating the right of ownership of or rangatiratanga over the whole of the sub-surface geothermal fluid to the owner of only one set of hot springs or pools. No one such owner or group of owners can validly claim the exclusive right to manage and control the underground fluid or, in all circumstances, to exercise a veto over its extraction and use (4.6.16).

The question of what degree of protection should however be given to the highly valued taonga comprising the hot springs and pools in the care and trusteeship of the trustees of the Parahirahi C1 Maori reservation and the adjoining Crown owned recreation reserve springs and pools should they be returned to Maori ownership is noted later (8.4.2).

8.3 **Did the Crown Acquire Its Interest in Parahirahi C Block in Breach of the Treaty?**

This question involves the first of the two main heads of grievances of the claimants and has been fully considered in chapter 3. The short answer is, yes.

8.3.1 The finding of the tribunal is that the Crown was under a duty to take adequate steps to protect the owners' interests in Parahirahi C block and that it failed in its obligation under the Treaty to do so. In particular the Crown failed to protect the owners by not fully ascertaining the nature and very special value of Parahirahi C and ensuring that they did in fact wish to alienate this sacred taonga (3.14.6).

8.3.2 The tribunal has further found that it has not been established that the owners willingly and knowingly alienated Parahirahi C block or the hot springs taonga located on the block, it not being clearly and unambiguously indicated in the deed of sale that this was intended. Applying the contra proferentem rule, the owners ought not to be deprived of their taonga in the absence of such intention being clearly and unambiguously made known to them by the Crown. Accordingly, the acquisition of Parahirahi C block was in breach of article 2 of the Treaty which guarantees to Maori their tino rangatiratanga over their taonga for so long as they

wish to retain the same in their possession. As Mr Justice Somers observed in the *New Zealand Maori Council* case "a breach of a Treaty provision must in my view be a breach of the principles of the Treaty".[1] It follows that the claimants have been prejudicially affected and will continue to be so affected by the wrongful acquisition of the four acres now held by the Crown as a recreation reserve.

Given the extremely high value consistently placed on the five acre block by the hapu of Ngawha the tribunal considers the four acres in the block acquired by the Crown in breach of the Treaty should be returned to Maori.

8.4 Does the Geothermal Resource Legislation Adequately Protect the Claimants' Treaty Rights in the Ngawha Geothermal Resource?

8.4.1 The claimants have urged strongly that it does not. We agree. Their criticisms relate first to certain provisions of the Geothermal Energy Act 1953 in particular s3, and to s354 of the Resource Management Act 1991 which preserves existing rights of the Crown to geothermal resources under the 1953 Act. Secondly, the claimants say that the Resource Management Act fails to recognise and provide adequately for tangata whenua rights in respect of geothermal resources. In particular they are critical of the management regime and the absence of any requirement that those making decisions under the Act are to act in conformity with Treaty principles.

While the tribunal has found that the claimant hapu no longer have an exclusive interest in the whole of the Ngawha geothermal resource, we have accepted without hesitation that the hot springs in the five acre Parahirahi C block are a taonga of immense value to them, and indeed of all Ngapuhi, especially for their healing powers.

Although the hapu of Ngawha no longer have an exclusive interest in the underlying geothermal resource, they nonetheless retain a substantial interest in the resource. The preservation of their taonga, the Ngawha hot springs, necessarily depends on the preservation and continued integrity of the underlying resource which manifests itself in their hot springs and pools. As we have earlier observed, it is totally unrealistic to isolate or divorce their interest in the Ngawha hot springs from the geothermal resource which finds expression in them (7.5.2).

8.4.2 The Crown is under a Treaty duty to protect the claimants' taonga at Ngawha. The degree of protection to be given to Maori resources will depend upon the nature and value of the resource. The tribunal considers that in the case of a very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori, the Crown is under an obligation to ensure its protection, save in very exceptional circumstances, for so long as Maori wish it to be so protected. The Ngawha geothermal springs fall into this category. We would stress that the value attached to such a taonga is essentially a matter for Maori to determine (7.6.1).

In the particular circumstances of this claim the tribunal has no doubt that if the Treaty's article 2 guarantee is to be given a meaning compatible with Maori culture and spiritual values, as plainly it must, the Crown's right or obligation to manage geothermal resources in the wider public interest must be constrained so as to ensure the claimants' interest in their taonga is preserved in accordance with their wishes. We are unaware of any exceptional circumstances or overriding public interest which would justify any other conclusion which might leave it open for the claimants' interest in their taonga to be harmed or rendered ineffectual (7.6.3).

8.4.3 It is against this background that the tribunal has considered whether the claimants' Treaty rights are protected by the geothermal resource legislation. We refer first to s3 of the Geothermal Energy Act 1953. It was this section which enabled the Crown, through the agency of the Ministry of Works, to drill a series of bores in the Ngawha geothermal field. The right to such bores is protected by s354 of the Resource Management Act 1991. One such bore is within 200 metres of the claimants' taonga and others are in relatively close proximity. It is these bores which the joint venture proposes to use if it obtains the necessary resource consent under the 1991 Act to exploit the underlying geothermal resource for the generation of electricity.

The Geothermal Energy Act 1953 gives the Crown the sole use rights of the energy component of geothermal resources. It does so without any recognition of any rights of Maori in the resource and makes no provision to ensure that any Treaty rights of Maori will be protected as required by article 2 of the Treaty. In short, the Act simply ignores any such Treaty rights. As a consequence, should the joint venture application prove successful, and the Crown bores be used to extract geothermal fluid, the claimants' taonga may be placed in jeopardy entirely against their will.

8.4.4 Accordingly, the tribunal has found that the Crown has acted in breach of Treaty principles in failing to ensure that the Geothermal Act 1953 and s354 of the Resource Management Act 1991, which preserves existing rights of the Crown to geothermal resources under the 1953 Act, contain adequate provisions to ensure that the Treaty rights of the claimants in their geothermal resource at Ngawha are fully protected. As a consequence the claimants have been and are likely to continue to be prejudiced by such breach (7.7.5).

8.4.5 We turn next to the question of whether, as the claimants maintain, the Resource Management Act and in particular the management regime established by the Act ensures that the claimants' Treaty rights in respect of their geothermal resource are fully protected.

We reiterate here that the Treaty was between Maori and the Crown. The Crown obligation under article 2 to protect Maori rangatiratanga is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local or regional authorities. If the Crown chooses to

so delegate, it must do so in terms which ensure that its Treaty duty of protection is fulfilled.

8.4.6 Our consideration of the provisions of the Resource Management and in particular Part II, which sets out the purpose and principles of the Act, leaves us with no option but to conclude that the Crown has not, in delegating extensive powers to local and regional authorities under the Act, ensured that its Treaty duty of protection of Maori interests will be implemented. On the contrary, it appears that in promoting this legislation, the Crown has been at pains to ensure the decision-makers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed (7.7.9).

8.4.7 We repeat here our finding that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.

8.4.8 The tribunal has further found that the claimants have been or are likely to be prejudicially affected by the foregoing omission and in particular by the absence of any provision in the Act giving priority to the protection of their taonga and confirming their Treaty rights, in the exercise of their rangatiratanga and kaitiakitanga, to manage and control it as they wish. The omission of any such statutory provision is inconsistent with the Treaty duty of the Crown, when delegating powers of governance to local and regional authorities, to ensure that it does so in terms which will guarantee that the rangatiratanga of the claimants in and over their taonga is recognised and protected as required by the Treaty. In the absence of such a provision a development such as that proposed by the joint venture to exploit the underlying Ngawha geothermal resource may be permitted and may result in interference with or damage to the claimants' hot springs at Ngawha (7.7.11).

8.5 Recommendations Pursuant to s6(3) of the Treaty of Waitangi Act 1975

8.5.1 Our recommendations fall under two heads. The first concerns our findings that the Crown acted in breach of its Treaty duty to protect the owners' interests in Parahirahi C block and that it also acted in breach of article 2 of the Treaty in not ensuring that the owners willingly and knowingly alienated Parahirahi C block and the hot springs taonga located on the block.

We *recommend* that the portion of the former Parahirahi C block acquired by the Crown and now vested in Her Majesty the Queen as a reserve for recreation purposes pursuant to the Reserves Act 1977, comprising 4 acres 2 roods 8 perches (1.8413 hectares), be returned to Maori ownership.

As indicated in 3.19.2 the tribunal thinks it likely that it would be the wish of the trustees of the Parahirahi C1 Maori reservation and the whanau and hapu whose interests they represent that, should such land be returned by the Crown, it be vested in the trustees (commonly known as the 'Waiariki trustees'). The tribunal however makes no recommendation as to whom the four acre block should be returned as this is essentially a matter to be determined by the Maori people concerned.

8.5.2 Our second recommendation relates to our findings concerning the Geothermal Energy Act 1953 and the Resource Management Act 1991 recorded in 8.4.3 and 8.4.4 above.

We *recommend* that an appropriate amendment be made to the Resource Management Act 1991 providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi.

As Part II of the Resource Management Act is presently worded, those exercising powers and functions which may impact on Maori natural resource taonga are not required to ensure that Maori Treaty rights are accorded their appropriate standing. Accordingly, such rights are at risk of being depreciated or outweighed by other considerations and as a consequence Maori Treaty rights are not given the protection which article 2 requires. We see no alternative to the amendment we have recommended if Treaty breaches are to be avoided in the implementation of the Resource Management Act.

In accordance with s6(5) of the Treaty of Waitangi Act 1975, the director of the tribunal is requested to serve a sealed copy of this report on:

(a) the claimant trustees of Parahirahi C1 Maori reservation;
(b) the Minister of Maori Affairs,
the Minister of Justice,
the Minister for the Environment,
the Minister of Conservation;
(c) the Solicitor-General;
(d) Mr Williams (counsel for the Wai 304 claimants);
(e) Mr Salmon (counsel for the joint venture);
(f) Ms Ngawati (counsel for the Wai 123 claimants);
(g) the Far North District Council; and
(h) the Northland Regional Council.

References

1. *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641, 693

Addendum - Wai 123

Before concluding our report it is desirable that we should briefly discuss an associated claim, Wai 123, brought by Charles Brown and Susanne Robertson, both of Te Uriohua hapu, for themselves and the direct descendants of Ihaia Hita. The principal witness for these claimants was Victoria Brown (B42), who produced copies of various documents (B42(a) to (k)), many of which had previously been put in evidence by other witnesses. The tribunal was left in some doubt as to the precise nature of the claim but was fortunate in receiving at a later date helpful submissions by Nicola Ngawati (C14) who was engaged as counsel by the Wai 123 claimants when final submissions were heard by the tribunal.

Ms Ngawati confirmed that the claimants in Wai 123 specifically endorsed and supported the submissions and evidence presented by nga hapu o Ngawha counsel and witnesses. She added, however, that certain differences existed between the two claims. In a summary of these differences counsel stated:

- that claim Wai 123 was filed by descendants of Ihaia Hita, being members of Te Uriohua hapu. The claim was made on the basis that the claimants are descended from Ihaia Hita, said to be a paramount chief of Ngapuhi who had an existing interest in the Ngawha springs and one of the original ten owners. The difference between the claims made in Wai 123 and Wai 304 (submitted by nga hapu o Ngawha) is that the latter claim is made on behalf of other hapu in addition to Te Uriohua; and

- the claimants in Wai 123 dispute the claim that the Ngawha Springs resource was owned "in common" by all of the northern tribes. They say that the Ngawha springs were owned traditionally by the descendants of Ihaia Hita and the hapu of Te Uriohua.

Counsel advised that the claimants in Wai 123 ask that the tribunal should recognise that the claimants and descendants of Ihaia Hita, as members of the Te Uriohua hapu, are the true and historic owners/kaitiaki of the Ngawha geothermal springs. Related findings are sought.

Counsel for the Wai 304 claimants in his reply suggested that as the claimants in Wai 123 are at one with his claimants in seeking to protect the Ngawha geothermal resource the tribunal may not need to decide any conflicting claims between the ten stated hapu of Ngawha inter se. We note that at the re-hearing on 10 November 1874 Judge Monro in listing the 37 owners found that 36 were of Te Uriohua and one, Komene Poakatahi, was of Ngati Rangi (B2).

There is a conflict between the evidence of the claimant hapu of Ngawha on the one hand and the claimants in Wai 123 on the other. The tribunal is however not the appropriate forum in which to resolve this conflict, nor, given the fact that the springs in Parahirahi C1 are vested in trustees, does it seem necessary to do. Moreover, if the tribunal's recommendation that the recreation reserve vested in the Crown (part of the former Parahirahi C block) is returned to the people and vested in the trustees of C1 is acted upon, the descendants of Ihaia Hita will, along with all other members of Te Uriohua, regain the mana over the Ngawha Springs area. We have no reason to believe that the claimants in Wai 123 would wish to disturb the present s439 reservation.

Dated this 15 day of June 1993

G S Orr, presiding officer

I H Kawharu, member

J R Morris, member

W M Taylor, member

Appendix 1

The Statement of Claim

Statement of Claim in Respect of
the Ngawha Geothermal Resource

1. *The Claimants*

The claimants are:

The Trustees of Parahirahi C1 Maori Reservation for and on behalf of the whanau and hapu having an interest in the Ngawha Geothermal [R]esource.

Tamehana Tamehana for and on behalf of Ngati Hine hapu.

Ellen Reihana for and on behalf of Te Hikutu hapu.

Rewa Marsh for and on behalf of Te Uri Taniwha hapu.

Bob Cassidy for and behalf of Te Mahurehure hapu.

Ron Wihongi for and on behalf of Te Uriohua hapu.

Tu Kemp for and on behalf of Ngati Rehia hapu.

Kataraina Sarich, Te Arama Pou, Te Haua Witehira, Manga Tau for and on behalf of Ngai Tawake hapu.

Wereta Hauraki for and on behalf of Ngati Hau hapu.

Bishop Waiohua Te Haara for and on behalf of Ngati Rangi hapu.

Joe Pihemau for and on behalf of Ngati Tautahi hapu.

The claimants are collectively referred to in this statement of claim as "Nga hapu o Ngawha".

2. In this Statement of Claim, the Ngawha Geothermal Resource means the Ngawha geothermal field in its entirety.

3. *Nga Hapu o Ngawha Do Hereby Claim* under the Treaty of Waitangi Act 1975 that we are Maori and that we and our hapu having rights in the Ngawha Geothermal Resource have been and continue to be prejudicially affected by the various ordinances, acts, regulations, orders, proclamations, notices and other laws and by the various policies, practices and omissions adopted by or on behalf of the Crown which were or are inconsistent with the terms and the principles of the Treaty of Waitangi in the following particulars:

4. *Title to and Rangatiratanga in Respect of the Ngawha Geothermal Resource*

4.1 The Ngawha Geothermal Field is a taonga of immense cultural and spiritual significance to Nga hapu o Ngawha.

4.2 The traditions of our people abound with references to this sacred taonga.

4.3 The Ngawha Geothermal Resource is central to the mana and mauri of our people and we are kaitiaki of it.

4.4 The Ngawha Geothermal Resource is a taonga protected by Article 2 of the Treaty of Waitangi.

4.5 Nga hapu o Ngawha were guaranteed ownership of and rangatiratanga over the Ngawha Geothermal Resource so long as it was our wish to retain the same.

4.6 Ownership and rangatiratanga are not dependent upon title to the surface land and are based upon a separate Treaty guarantee.

4.7 Ownership of the Ngawha Geothermal Resource denotes an exclusive right to utilise the Resource or to consent to utilisation of the Resource by others.

4.8 Rangatiratanga in respect of the Ngawha Geothermal Resource denotes the right to manage it in accordance with the priorities of the hapu having rights in it.

Wherefore We Claim:

4.9 The Crown has failed to recognise the cultural and spiritual significance of the Ngawha Geothermal Resource to Nga hapu o Ngawha and to make proper provision for its protection.

4.10 The Crown has failed to recognise and protect the ownership of Nga hapu of Ngawha of the Ngawha Geothermal Resource.

4.11 The Crown has failed to recognise the right of Nga hapu o Ngawha to manage the Ngawha Geothermal Resource in accordance with our own priorities.

Wherefore We Seek the Following Findings:

4.12 A finding that the Treaty guarantees ownership and rangatiratanga in respect of the Ngawha Geothermal Resource to Nga hapu o Ngawha.

4.13 A finding that ownership and rangatiratanga do not depend upon title in the surface land.

4.14 A finding that the Ngawha Geothermal Resource may not be exploited by third parties without the prior consent of Nga hapu o Ngawha.

4.15 A finding that the right to manage the Ngawha Geothermal Resource is, in terms of the principles of the Treaty, vested in Nga hapu o Ngawha.

5. *Alienation of the Parahirahi Block*

5.1 From 1873 to 1948 the Crown progressively acquired substantially the entire Parahirahi Block upon which a substantial proportion of the Ngawha Geothermal [R]esource is located.

5.2 The methods used in acquisition included:

(a) Acquisition of land declared to be inalienable.
(b) Acquisition of land pursuant to the Public Works Act or its predecessors including acquisition of the land for public works where no public works were in fact undertaken.
(c) Avoiding tribal title by acquiring undivided interests from individual members of Nga hapu o Ngawha.
(d) Aggregating those interests and partitioning them as a single block.
(e) Effectively playing off individual hapu members against each other.
(f) Acquisition of land without properly obtaining the consent of the individual land owners.

5.3 As a result of the acts, policies and omissions referred to at 5.2 herein, Nga hapu o Ngawha stand possessed now of 1 acre of the original Parahirahi Block comprising some 5097 acres.

5.4 the remaining one acre is known as the Parahirahi C1 Reservation and contains a portion of the Ngawha Geothermal Springs.

Wherefore We Claim

5.5 The Crown acted in breach of the principles of the Treaty of Waitangi by progressively acquiring substantially the whole of the Parahirahi Block through all or any of the acts, policies and omissions referred to herein.

5.6 The Crown did not acquire ownership of the Ngawha Geothermal Resource in its acquisition of the Parahirahi Block.

5.7 Maori did not indicate any wish to alienate the Ngawha Geothermal Resource.

5.8 The fact that Maori sought the complete and inalienable reservation of the Ngawha Springs area in the Parahirahi C Block is conclusive evidence that Maori in fact intended to retain the Ngawha Geothermal Resource.

Wherefore We Seek the Following Findings

5.9 A finding that Nga hapu o Ngawha retain ownership of the Ngawha Geothermal Resource.

5.10 A finding that the acquisition of surface title by the Crown pursuant to acts, policies and omissions in breach of the principles of the Treaty of Waitangi did not involve the transfer of Maori ownership of the Ngawha Geothermal Resource.

5.11 A finding that the clear Maori intention to reserve Parahirahi C, containing Ngawha Springs, in Maori title is conclusive evidence of the Maori intention to retain the Ngawha Geothermal Resource.

6. *Resource Management Consents*

6.1 By Part III of the Resource Management Act 1991 Parliament delegated to the Far North District Council and the Northland Regional Council the power to grant consents necessary for third parties to exploit the Ngawha Geothermal Resource.

6.2 By application dated 9 July 1992 a Joint Venture comprising the Bay of Islands Electric Power Board and the Taitokerau Maori Trust Board sought consents pursuant to the Resource Management Act to exploit the Ngawha Geothermal Resource for the purpose (inter alia) of electricity generation.

6.3 Nga hapu o Ngawha have lodged submissions in opposition to the applications referred to (an example of which is attached hereto as exhibit 1).

6.4 Any grant of resource consents to exploit the Ngawha Geothermal Resource will directly contravene the title and rangatiratanga of Nga hapu o Ngawha to the Ngawha Geothermal Resource and will deny the right of Nga hapu o Ngawha to act as kaitiaki of this taonga.

Wherefore We Claim:

6.5 Any grant of the resource consents sought by the Joint Venture will directly contravene the Waitangi Tribunal claim lodged herein and will pre-empt any rights which may be found to subsist in Nga hapu o Ngawha by virtue of the principles of the Treaty of Waitangi.

6.6 No consideration of the Joint Venture applications by the Far North District Council and the Northland Regional Council should proceed until the claim of Nga hapu o Ngawha is heard before this Tribunal and any rights found to subsist in Nga hapu o Ngawha by virtue of the principles of the Treaty of Waitangi have been duly adjudicated upon.

We Seek the Following Findings:

6.7 A finding that ownership of and rangatiratanga over the Ngawha Geothermal Resource is and remains vested in Nga hapu o Ngawha.

6.8 A finding that the grant of resource consents to the Joint Venture applicants would be in breach of those rights unless and until the consent of Nga hapu o Ngawha is procured.

7. *In Consideration of the Foregoing We Seek the Following Urgent Recommendation:*

7.1 An urgent recommendation that the Far North District Council and Northland Regional Council should not proceed to consider the Joint Venture applications until the claim of Nga hapu o Ngawha is heard before this Tribunal and duly reported upon.

8. *Amendment of Claim*

8.1 We reserve the right to further particularize our claim and to seek further findings and recommendations as the claim progresses.

Dated at Auckland this 8th day of September 1992

J V Williams, Counsel for the Claimants

Appendix 2

Record of Hearing

2.1 Appointments

The tribunal was constituted to comprise:

Gordon Stewart Orr (presiding officer)
Ian Hugh Kawharu
Joanne Robin Morris
William MacDonald Taylor

Mrs Rewarewa and Te Aroha Beaumont assisted the tribunal as interpreters.

Rosemary Daamen assisted the tribunal as staff researcher; Hine Henry and Lynette Fussell were the claim administrators.

2.2 Hearings and Appearances

1 Te Kotahitanga marae, Kaikohe, 12-15 October 1992

For the Wai 304 claimants:

Joseph Williams, Victoria Petraska

For the Crown:

Malcolm Parker, Annsley Kerr

Also appearing:

Peter Salmon QC - joint venture
Hohepa Solomon - Te Arawa geothermal claimants

Submissions and evidence were received from:

Ronald Wihongi	A54(a)
Waiorooro Pene	A54(b)
Twinnie Padlie	A54(c)
Karewa Marsh	A54(d)
Hohepa Cassidy	A54(e)
Rewi Maihi	A54(f)
William Dalton	A54(g)
Hoterene Pine Mau	A54(h)
Anaru Sarich	A54(i)
Tamehana Tamehana	A54(j) and A54(k)
Manga Tau	A54(l)
Richard Boast	A52 and A52(a)
Paengatai Wihongi	A54(m)
Ngatihaua Witehira	A54(n)
Hetaraka Aperahama	A54(o)
Taoko Wihongi	A54(p)
Kereama Rankin	A54(q)
Mereana Williams	A54(r)
Nicole Butler	A50, A50(a) and A50(b)
Rima Edwards	
John Lumb	A51(a) to A51(e)
Morris Love	A49

Site visit to the Ngawha Hot Springs Recreation Reserve, Parahirahi C1 Maori reservation, Lake Waiparaheka, Lake Omapere and well Ng 13.

Documents A1 to A56 were admitted to the record.

2 Kaikohe District Returned Servicemen's Association, 158 Broadway, Kaikohe, 14-18 December 1992

For the Wai 304 claimants:

Joseph Williams, Victoria Petraska

For the Crown:

Malcolm Parker, Harriet Kennedy

Also appearing:

Peter Salmon QC - joint venture
Joseph Malcolm - Te Arawa geothermal claimants

Submissions and evidence were received from:

Victoria Brown	B42
Hita Hape	
Graham Rankin	
Susanne Robertson	
Te Ruru Ihaia Kahiwai	
Raymond Edwards	
Professor Patrick Hohepa	B25
Sir Graham Latimer	B38
Rosemary Daamen	B35
Judge Kevin Cull	B33
Dr David Williams	B41 and (a)
David George	B45
Roger De Bray	B40
Douglas Blakely	
Dr Arnold Watson	B39
Margaret Beadle	B47, (a) and (b)
Craig Lawson	B43
Dr Donald Loveridge	B34, (a) and (b)
Dr Douglas Sheppard	B37
Hohepa Solomon	B46

Thomas Bennion read the evidence of Rosemary Daamen and Dr David Williams.

Site visit to the hot springs and lake on Margaret Beadle's Tuwhakino block property, the Ngawha recreation reserve and the Parahirahi C1 Maori reservation.

Documents B1 to B48 were admitted to the record.

3 Auckland District Court, Department of Justice, 3 Kingston Street, Auckland, 20-21 January 1993

For the Wai 304 claimants:

Joseph Williams, Victoria Petraska

For the Crown:

Malcolm Parker, Harriet Kennedy

Also appearing:

Peter Salmon QC	- joint venture
Nicola Ngawati	- Wai 123 claimants
Joseph Malcolm	- Te Arawa geothermal claimants

Documents C1 to C17 were admitted to the record.

Documents D1 to D3 were admitted to the record following this hearing.

Appendix 3

Record of Inquiry

Record of Proceedings

1. **Claims**

1.1	Wai:	304
	Date:	8 September 1992
	Claimant:	Tamehana Tamehana and others on behalf of nga hapu o Ngawha
	Concerning:	Ngawha geothermal resource
1.2	Wai:	58 (d)
	Date:	9 October 1992
	Claimant:	Sandra Gates on behalf of Matilda Saies, Tarawau Kira and their hapu
	Concerning:	Ngawha geothermal resource
1.3	Wai:	123
	Date:	12 December 1989
	Claimant:	Charles Brown and Susanne Robertson
	Concerning:	Ngawha geothermal resource

2. **Papers in Proceedings**

2.1 Tribunal direction regarding the request for an urgent hearing, 2 September 1992

2.2 Memorandum of counsel for claimants on hearing dates and time frame, 8 September 1992

2.3 Tribunal direction on appointment of tribunal, 9 September 1992

2.4 Minute of pre-hearing conference, 15 September 1992

2.5 Public notice and notification list of hearing, 16 September 1992

2.6 Memorandum on behalf of Te Arawa claimants, 8 October 1992

2.7 Memorandum from counsel for the joint venture (comprising the Taitokerau Maori

Trust Board and the Bay of Islands Electric Power Board), 14 October 1992

2.8 Memorandum from Joseph Malcolm on behalf of Tuhourangi and Ngati Uenu Ku Kopako (supported by Federation of Maori Authorities, Te Arawa), 12 October 1992

2.9 Public notice of the second hearing, 14 December 1992

2.10 Public notice of the second notice for the second hearing, 14 December 1992

2.11 Tribunal directions on discussion of issues, 7 December 1992

2.12 Submission by the Wai 153 claimants on geothermal resource ownership, 8 December 1992

2.13 Statement of issues as re-drafted by the tribunal, 22 December 1992

2.14 Opening submission of Crown counsel, 14 December 1992

2.15 Public notice of the third hearing, 20 January 1993

2.16 Draft issues on behalf of the joint venture, 23 December 1992

2.17 Closing submission of counsel for claimants, 20 January 1993

2.18 Submission of counsel for Wai 123 claimants, 20 January 1993

2.19 Closing submission by counsel for the joint venture, 20 January 1993

2.20 Closing submission of Crown counsel, 21 January 1993

2.21 Submission of counsel for claimants in reply, 3 March 1993

3. **Research Commissions and Agreements**

3.1 Authority for claimants to commission research by Nicole Butler, Te Aroha Henare and Thomas Lumb, 15 September 1992
(a) amendment to research direction, 8 October 1992

3.2 Authority for claimants to commission research by Richard Boast, 30 September 1992

3.3 Authority for claimants to commission research by Morris Love, 30 September 1992

3.4 Directions of tribunal to commission research by Judge Kevin Cull, 5 October 1992

3.5 Memorandum of tribunal on the proposal to commission research by Rosemary Daamen, 7 October 1992

3.6 Directions of tribunal to commission research by Professor Patrick Hohepa, 9 October 1992

3.7 Directions of tribunal to commission research by Dr David Williams, 8 December 1992

4. **Transcripts**

4.1 Transcripts of the evidence of Professor Hohepa (B25(a))

4.2 Transcripts of the kaumatua evidence given at the first hearing, 12-15 October 1992 (B36)

4.3 Transcripts of the cross-examination of witnesses at the second hearing, 14-18 December 1992 (C12)

Record of Documents

NB: A number of the documents placed in the A series of this record prior to the first hearing (held at the Waitangi Tribunal Division in Wellington) are copies of unpublished conference papers which have subsequently been published. For the convenience of those from outside Wellington interested in these papers, the reference given below is to the published document only.

A **First hearing at Kotahitanga marae, Kaikohe, 12-15 October 1992**

A1 J Healy and R James "Geothermal Energy in New Zealand - Summary" reprinted from "Circum-Pacific Energy and Mineral Resources" *American Association of Petroleum Geologists Memoir* no 25, 1976, pp 130-134 [Wai 153, A6]
(registrar)

A2 J Healy "Geothermal Prospects Around the Pacific" reprinted from "Circum-Pacific Energy and Mineral Resources" *American Association of Petroleum Geologists Memoir* no 25, 1976, pp 110-117 [Wai 153, A7]
(registrar)

A3 B F Houghton, E F Lloyd and R F Keam *The Preservation of Hydrothermal System Features of Scientific and Other Interest: a Report to the Geological Society of New Zealand* (Wellington, Nature Conservation Council, 1980) [Wai 153, A9]
(registrar)

A4 Dr E Stokes "Power Stations on Maori Land" *People & Planning* vol 15, September 1980, pp 10-13 [Wai 153, A10]
(registrar)

A5 Dr E Stokes "Maori Values in Geothermal Areas" in R F Keam ed *Geothermal Systems: Energy, Tourism and Conservation Seminar Proceedings* (Wellington, Nature Conservation Council, 1982) [Wai 153, A11]
(registrar)

A6 P Gresham et al *Management of Geothermal Resources: Issues and Options* (Wellington, Commission for the Environment, 1983) (Issues and Options Paper no 1983/1) [Wai 153 A13]
(registrar)

A7 Geothermal Coordination Group, Department of Scientific and Industrial Research (DSIR) "Compilation of Departmental comments On Existing Legislation" paper attached to L Clelland, Geothermal Coordination Group to Director-General, DSIR, 15 June 1988, (unpublished) [Wai 153, A17(a) and (b)]
(registrar)

A8 Dr E Stokes "Public Policy and Geothermal Energy Development: The Competitive Process on Maori Lands" in University of Waikato School of Social Sciences et al *New Zealand and the Pacific: Structural Change and Societal Response* (Wellington, Social Sciences Research Fund Committee, 1987) [Wai 153, A18]
(registrar)

A9 Geothermal Coordination Group, DSIR "Resource Management Law Reform - Phase 2" paper attached to L Clelland, Geothermal Coordination Group to the Convenor of the Core Group on Resource Management Law Reform of the Ministry for the Environment, 26 September 1988, (unpublished) [Wai 153, A23]
(registrar)

A10 T Tutua-Nathan "Maori Issues Relating to the Geothermal Resource" [nd] Waikato Catchment Board, Hamilton (unpublished) [Wai 153, A24]
(registrar)

A11 Ngati Whakaue Working Party to the Minister of Energy, Minister of Maori Affairs and Minister for the Environment [nd], on "Claim by Ngati Whakaue - Exemption from Geothermal Rentals" [Wai 153, A25]
(registrar)

A12 Treasury report on "Management of Geothermal Energy Resources" in Secretary to the Treasury to the Minister of Finance, 19 May 1987, [Wai 153, A27]
(registrar)

A13 J McCraw "Maori Legends as an Aid in Teaching Earth Sciences" *New Zealand Science Teacher* no 65, spring/summer 1990, pp 45-47 [Wai 153, A29]
(registrar)

A14 J McCraw "The Early Maori as an Earth Scientist" Geological Society of New Zealand conference paper, Napier, November 1990 (unpublished) [Wai 153, A30]
(registrar)

A15 Crown Law Office "Use of Geothermal Steam by Tasman Pulp and Paper Company Ltd" in "Opinions" vol 125, 4 May - 7 August 1953, pp 359-367, Crown Law Office, Wellington [Wai 153, A31]
(registrar)

A16 A D Tarlock and R L Waller "Geothermal Bibliography" *Land and Water Law Review* vol xiii, no 1, 1977, pp 349-369 [Wai 153, A32]
(registrar)

A17 G Griffith "Indian Claims to Groundwater: Reserved Rights or Beneficial Interest?" *Stanford Law Review* vol 33, 1980-1981, pp 103-130 [Wai 153, A33]
(registrar)

A18 J L Merrill "Aboriginal Water Rights" *Natural Resources Journal* vol 20, 1980, pp 45-70 [Wai 153, A34]
(registrar)

A19 Janet Owen "Scientific Conservation Values of Geothermal Areas in New Zealand" *Landscape* vol 7, May 1980 pp 2-5 [Wai 153, A35]
(registrar)

A20 R P Boast "The Treaty of Waitangi and Natural Resources: A Case Study" Whakahokia Te Mauri conference paper, Palmerston North, 30 May - 1 June 1990 (unpublished) [Wai 153, A36]
(registrar)

A21 "Report of the Interdepartmental Committee to Consider the Interests of Government Departments in the Possible Use of Geothermal Resources in New Zealand" [nd], (unpublished) [Wai 153, A38]
(registrar)

A22 Correspondence between Dr E Stokes and the Ministry of Energy on geothermal energy licences and mining tenures, July 1989, [] [Wai 153, A39]
(registrar)

A23 Natural Resources Unit, Manatu Maori *The Ownership, Management and Development of the Geothermal Resource: a Discussion Document* (Wellington, Manatu Maori, 1991) [Wai 153, A47]
(registrar)

A24 R P Boast "The Developing Law Relating to the Treaty of Waitangi and Environmental Law" in J E Dixon et al *Proceedings of Ecopolitics III Conference* (Hamilton, University of Waikato Environmental Studies Unit, 1988) pp 24-34 [Wai 153, A49]
(registrar)

A25 Commissioner of Works to Minister of Works, 23 July 1953, ED 2/0/22/3, National Archives, Wellington, on geothermal energy taking at Te Teko for pulp and paper purposes
(a) Attorney-General to Cabinet, 21 March 1922, MA1 5/13/242 pt 4, A2459, National Archives, Wellington, on Maori ownership of lake beds and electric power generation [Wai 153, A54 and A54(a)]
(registrar)

A26 Evidence of P Maxwell on the Maori use of geothermal energy
(a) appendices [Wai 153, A56 and A56(a)]
(counsel for claimants)

A27 R P Boast *Resource Management Law Reform: Geothermal Energy: Maori and Related Issues* (Wellington, Ministry for the Environment, 1989) (Working Paper no 26) [Wai 153, A57]
(registrar)

A28 I Rockel *Taking the Waters: Early Spas in New Zealand* (Wellington, Government Printing Office, 1986) [Wai 153, A58]
(registrar)

A29 J Cowan *Maori Place Names of the Thermal Regions and their Meanings* (Rotorua, Rotorua Post, 1945) [Wai 153, A59]
(registrar)

A30 T Bennion "New Zealand Law and the Geothermal Resource" 22 July 1991, Waitangi Tribunal Division, Wellington (unpublished) [Wai 153, A60]
(registrar)

A31 Evidence of B Simpson on a possible strategic plan for future management and development of the geothermal resource [Wai 153, A61]
(counsel for claimants)

A32 Documents on the history of the Parahirahi block from the Maori Land Court, Whangarei compiled by R Wilson [Wai 153, A64(b)]
(registrar)

A33 B Yardley "The Successful Alchemist" *New Scientist* vol 10, August 1991, pp 20-24 [Wai 153, A65]
(registrar)

A34 Evidence of R P Boast on the legal framework for geothermal resources - a historical study [Wai 153, A66]
(a) supporting documents [Wai 153, A66(a) and (b)]
(counsel for claimants)

A35 T Bennion "Consolidated legislation affecting geothermal energy as at 1 October 1991" 1 October 1991, Waitangi Tribunal Division, Wellington (unpublished) [Wai 153, A67]
(registrar)

A36 P R L Browne et al *The Ngawha Geothermal Area* (Wellington, Science Information Division of the DSIR, 1981) (DSIR Geothermal Report 7) [Wai 153, A68]
(registrar)

A37 J V Lawless et al *Geothermal Energy for New Zealand's Future* (Wellington, Science Information Division of the DSIR, 1981) (DSIR Bulletin 229) [Wai 153, A71]
(registrar)

A38 M A Mongillo and L Clelland *Concise Listing of Information on the Thermal Areas and Thermal Springs of New Zealand* (Wairakei, Geothermal Coordination Group, 1984) (DSIR Geothermal Report 9) (extracts) [Wai 153, A72]
(registrar)

A39 Far North District Council notification of application for a resource consent under s93(2) of the Resource Management Act 1991, received 13 July 1992, Far North District Council, Kaikohe [Wai 153, A74]
(registrar)

A40 C Gunn "Geothermal Resource Management Under The Resource Management Act 1991"; M P Hochstein and D H Freeston "Geothermal Resource Management Concepts"; K J Youngman "Geological Control on the Location of Geothermal Systems in the Taupo Volcanic Zone"; D A Edmunds and R P Boast "Geothermal Resources and the Law" in D H Freeston et al *Proceedings of the 13th New Zealand Geothermal Workshop, 1991* (Auckland, University of Auckland, 1991) pp 45-49, 51-56, 183, 279-283 [Wai 153, A76]
(registrar)

A41 A J Bradbrook "Environmental Controls Over Geothermal Energy Exploitation" *Environmental and Planning Law Journal* vol 4, 1987, pp 5-25 [Wai 153, A77]
(registrar)

A42 T Tutua-Nathan "Maori Tribal Rights to Ownership and Control: The Geothermal Resource in New Zealand" *Applied Geography* vol 12, 1992, pp 192-198 [Wai 153, A78]
(registrar)

A43 KRTA Ltd to Mrs Robertson, 20 July 1992, on the proposed development and application for resource consents
(registrar)

A44 Papers relating to Wiremu Tairua's Maori Land Information Office (MLIO) application for information on the alienation of Parahirahi, Tuwhakino, Waiparaheka, Tokakopuru, Otutaorau and Kohewhata blocks from Maori ownership (extracts) and supporting documents (produced by Department of Survey and Land Information (DOSLI) Auckland) (full copy), 4/1/72/13, Maori Land Court, Whangarei.
(registrar)

A45 Maori land plans, DOSLI, Auckland:

ML 870	"Plan of Ngatokaturua" surveyed by J Russell, received 16 March 1868
ML 1164	"Plan of Waikahikatea" surveyed by J Russell, received 14 December 1868
ML 1533	"Waiwhariki" surveyed under the supervision of Sidney David Taiwhanga, 30 June 1869
ML 2624	"Plan of Tuwhakino block" surveyed by R A Fairburn, October 1872
ML 2752	"Plan of Otutaorau" surveyed by R A Fairburn, March 1873
ML 2753	"Plan of Tokakopuru" surveyed by R A Fairburn, March 1873
ML 2730	"Plan of the Parahirahi block" (originally the Ngawha Tuakino block) surveyed by P E Cheal, 8 April 1873
ML 2730A	"Parahirahi block" Cheal, 8-15 December 1873
ML 4807A	"Mangatawai block" surveyed by R A Fairburn, February 1880
ML 3680	"Waiparaheka block" surveyed by R A Fairburn, March 1880
ML 4807B	"Plan of Mangatawai Nos 1 & 2" surveyed under H J Sealy's supervision, 2 July 1883
ML 6589	"Sketch plan of Maungaturoto or Tuhakino" compiled in office, 9 April 1895

(registrar)

A46 Maori land plan register entries for blocks listed in A45, Maori land plan register, DOSLI, Auckland
(registrar)

A47 Papers on petition 12 of 1942, Hirini Taiwhanga Heremaia and 48 others' petition regarding Parahirahi C block, Le 1 1/1942/8, National Archives, Wellington (extract)
(registrar)

A48 Report on the alienation of land at Ngawha, Maungaturoto, Waiwhariki, Waikahikatea, Ngatokaturua and Mangatawai blocks 6825-C2030-1, DOSLI, Auckland
(registrar)

A49 Evidence of Morris Love on the distribution of rights to the geothermal resource
(counsel for claimants)

A50 Evidence of Nicole Butler on the alienation of the Parahirahi block
(a) supporting papers
(b) supplementary evidence
(counsel for claimants)

A51 (a) Statement of evidence of Thomas Lumb on the Ngawha geothermal resource
(b) addendum
(c) Dr Mark McGuinness "Reservoir Modelling of Development Impacts at Ngawha" 8 October 1992
(d) L K Constable "Ngawha geothermal resource" 4 October 1992
(e) amendments to A51(a)
(counsel for claimants)

A52 Evidence and supporting papers of Richard Boast on Ngawha Springs, October 1992
(a) further supporting papers
(counsel for claimants)

A53 Opening submission of counsel for claimants, 12 October 1992

A54 Kaumatua evidence on behalf of nga hapu o Ngawha:
(a) Ronald Wihongi
(b) Waiorooro Pene
(c) Twinnie Padlie
(d) Karewa Marsh
(e) Hohepa Cassidy
(f) Rewi Maihi
(g) William Dalton
(h) Hoterene Pine Mau
(i) Anaru Sarich
(j) Tamehana Tamehana
(k) Tamehana Tamehana
(l) Manga Tau
(m) Paengatai Wihongi
(n) Ngatihaua Witehira
(o) Hetaraka Aperahama
(p) Taoko Wihongi
(q) Kereama Rankin
(r) Merana Williams
(counsel for claimants)

A55 Statements of technical evidence on behalf of nga hapu o Ngawha (A49-A51)
(counsel for claimants)

A56 Site visit itinerary for first hearing
(counsel for claimants)

B Second Hearing at Kaikohe District Returned Servicemen's Association, 158 Broadway, Kaikohe, 14-18 December 1992

B1 Parahirahi C1 block 16 Omapere SD, 7/2/165, land claims and alienations series box 2, head office Maori affairs closed files (held in storage) (extracts)
(registrar)

B2 Memorial of ownership for the Parahirahi block, 10 November 1874, deed book, Maori Land Court, Whangarei
(registrar)

B3 Parahirahi block record sheet and Parahirahi A2 and C1 schedules of ownership orders and memorial schedules, Parahirahi title binder 138, Maori Land Court, Whangarei (extracts)
(registrar)

B4 Omapere SD block XV record sheet, Omapere title binder 98, Maori Land Court, Whangarei (extract)
(registrar)

B5 Northern minute book 3, pp 379 - 380, Maori Land Court, Whangarei
(registrar)

B6 Northern minute book 6, pp 258 - 260, 283 - 297, 316 - 317, Maori Land Court, Whangarei
(registrar)

B7 Northern minute book 54, pp 286 - 288, Maori Land Court, Whangarei
(registrar)

B8 Bay of Islands minute book 4, p 62, Maori Land Court, Whangarei
(registrar)

B9 Bay of Islands minute book 32, pp 95 - 97, 325 - 328, 380 -381, Maori Land Court, Whangarei
(registrar)

B10 Parahirahi block order file no 1, Maori Land Court, Whangarei (extracts)
(registrar)

B11 Parahirahi block order file no 2, Maori Land Court, Whangarei (extracts)
(registrar)

B12 Omapere SD block order file, Maori Land Court, Whangarei (extracts)
(registrar)

B13 Order assessing compensation for portions of sections 1A and 2, block XV Omapere SD taken under the Public Works Act 1928, 15 August 1958, order binder, Maori Land Court, Whangarei (extracts)
(registrar)

B14 Parahirahi block correspondence file MA BI 414 (applications only), Maori Land Court, Whangarei (extracts)
(registrar)

B15 Parahirahi block correspondence file MA BI 414, Maori Land Court, Whangarei (extracts)
(registrar)

B16 Parahirahi block correspondence file MA BI 414A, Maori Land Court, Whangarei (extracts)
(registrar)

B17 Tuwhakino block correspondence file MA BI 85 (land transfer vol 9 fol 11, part of land sold to William Earl), Maori Land Court, Whangarei (extracts)
(registrar)

B18 Tuwhakino block file MA BI 85 (court correspondence), Maori Land Court, Whangarei (extracts)
(registrar)

B19 Parahirahi block 1885 - 1898, BABN, 1108, Box 92, file 2215, National Archives, Auckland (extracts)
(registrar)

B20 Parahirahi A2, BAAI, A139, Box 168, file 5079, National Archives, Auckland (extracts)
(registrar)

B21 Parahirahi B1, BAAI, A139, Box 184, file 5372, National Archives, Auckland (extracts)
(registrar)

B22 Section 1A block XV Omapere SD, BAAI, A139, Box 239, file 6346, National Archives, Auckland (extracts)
(registrar)

B23 "Quicksilver mining rights - Agreement with chiefs of Kaikohe - dated 6/12/72", NZ MS 714/2 no 35 in John White "Papers and memoranda relating to the Maori; collected, and in many instances written by John White. Collated and arranged by

George Graham and John Barr - Maori section volume II", Auckland City Library, Auckland
(registrar)

B24 Supporting papers to the evidence of Dr Donald Loveridge (see B34)
(Crown counsel)

B25 Evidence of Professor Patrick Hohepa on linguistic and traditional background to the claim
(a) translation of evidence
(registrar)

B26 Submission of Ngati Te Ara/Ngati Kopaki Whanau Trust, 7 October 1992, in support of the opposition to resource consents
(registrar)

B27 (a) Schedule of present-day land holdings within the Parahirahi block prepared by DOSLI, Auckland

(b) Plan of present-day land holdings within the Parahirahi block (excluding the Ngawha township) prepared by Department of Survey and Land Information, Auckland, is held at the Waitangi Tribunal Division, Seabridge House, 110 Featherston Street, Wellington
(registrar)

B28 Minutes of the 1945 inquiry into petition 12 of 1942, Bay of Islands minute book 19 pp 343-354, Maori Land Court, Whangarei
(registrar)

B29 Minutes of the 1892 hearing into the application of Matenga Taiwhanga for succession to Hirini Taiwhanga's interests in Parahirahi A, B and C and the hearing of the Native Minister's application for the Crown's interests in Parahirahi to be determined, Judge Von Sturmer's minute book 3 pp 13-14, Maori Land Court, Hamilton
(registrar)

B30 Copy of the minutes of the June 1926 hearing considering application for Parahirahi C1 to be set aside as a reserve and made inalienable, Bay of Islands minute book 7 pp 160-161, Maori Land Court, Whangarei
(registrar)

B31 Minutes of the hearing to determine compensation for land taken from Parahirahi A1 in 1948 (Bay of Islands minute book 24 p 257), Parahirahi block order file no 1, Maori Land Court, Whangarei
(registrar)

B32 Ministry for the Environment *Review of Rotorua Geothermal Royalties* (Wellington, Ministry for the Environment, 1992)
(registrar)

B33 Evidence of Judge Kevin Cull on the alienation of the Parahirahi block
(registrar)

B34 Evidence of Dr Donald Loveridge on the acquisition of Parahirahi D block
(a) supplementary evidence (see also B24)
(b) deed no 1886
(Crown counsel)

B35 Evidence of Rosemary Daamen on the alienation of the Parahirahi block
(registrar)

B36 Transcripts of kaumatua evidence given 12-15 October 1992
(registrar)

B37 Evidence of Dr Douglas Sheppard on the Ngawha geothermal system
(Crown counsel)

B38 Evidence of Sir Graham Latimer on the joint venture
(counsel for the joint venture)

B39 Evidence of Dr Arnold Watson on the proposed Ngawha geothermal energy development
(counsel for the joint venture)

B40 Evidence of Roger de Bray on the joint venture and proposal for development
(counsel for the joint venture)

B41 Evidence of Dr David Williams providing a legal opinion on the effect of the restriction on alienation provisions on Parahirahi blocks A and C
(a) Supplementary opinion
(registrar)

B42 Submission of Victoria Brown on the position of Wai 123 claimants in relation to the Wai 304 claim, 14 December 1992
(registrar)

B43 Evidence of Craig Lawson on statutory provisions relating to resource management
(Crown counsel)

B44 Opening submission of counsel for the joint venture (comprising the Taitokerau Maori Trust Board and Bay of Islands Electric Power Board), 16 December 1992

B45 Evidence of David George of Kaikohe in support of the proposed geothermal development at Ngawha
(counsel for the joint venture)

B46 Submission of Hohepa Solomon on the position of the Federation of Maori Authorities (FOMA) (Te Arawa) in relation to the Wai 304 claim, 8 December 1992
(registrar)

B47 Evidence of Margaret Beadle on the position of the Spa Hotel (Tuwhakino) proprietors in relation to the Wai 304 claim
(a) Commissioner of Crown Lands to Mr Ginn, 9 July 1969
(b) Secretary of Mines to Mr Ginn, 24 May 1976
(registrar)

B48 Opening submission of Crown counsel, 14 December 1992

C **Third hearing at Auckland District Court, Department of Justice, 3 Kingston St, Auckland, 20-21 January 1993**

C1 Evidence of R P Boast on the hot lakes: Maori use and management of geothermal areas from the evidence of European visitors
(a) annexures: 1831-1847

(b) annexures: 1850-1884
(counsel for claimants)

C2 Ngawha hot springs domain, L&S 8/12 vol 1, Department of Conservation, Whangarei extracts on the 1925 - 1961 identification of huts on the domain, the fencing in of C by local Maori, proposals for the development of the domain and surrounding area and the eviction of those living on the domain
(registrar)

C3 Ngawha springs domain court proceedings, L&S 8/3/169/1, Department of Conservation, Whangarei extracts on hearings regarding the 1942 petition and the eviction of those living on the domain in the early-mid 1960s (includes 1895 plan of reserves and 1926 Maori opposition to proposal that the Crown buy the remainder of C)
(registrar)

C4 Ngawha springs domain, L&S 8/3/169 vol 1, Department of Conservation, Whangarei extracts on 1960s proposal for development of the domain, eviction of those living there and moves to the change of management of the domain (registrar)

C5 Ngawha springs domain, L&S 8/3/169, Department of Conservation, Whangarei extracts on 1970 - 1991 planned development of the domain, issue of title, reserve classification and plans to lease
(registrar)

C6 Ngawha springs recreation reserve, LRC 313, Department of Conservation, Whangarei extracts on draft 1991 lease of the reserve by the Far North District Council to the Waiariki Trust Incorporated, shift of administration to the Department of Conservation
(registrar)

C7 Ngawha hot springs (file closed November 1960), Bay of Islands County Council file 12/14, Far North District Council, Kaikohe extracts on 1935-44 consideration of proposals for Ngawha to be a government spa, 1949 consideration of board membership, 1959 Maori complaint regarding roadway
(registrar)

C8 Ngawha hot springs, Bay of Islands County Council file 12/14, Far North District Council, Kaikohe extracts on 1960s eviction, membership of the domain board and domain development
(registrar)

C9 Ngawha Township, file 31/N/1, Far North District Council, Kaikohe contains 1969 and 1971 development plans
(registrar)

C10 Ngawha hot springs, Bay of Islands County Council file 12/14, 15 September 1980 - 31 May 1989, Far North District Council, Kaikohe extracts on 1980s management plan and proposed lease
(registrar)

C11 Ngawha hot springs, Bay of Islands County Council file 12/14, Far North District Council, Kaikohe extract entitled "Tikanga Maori" iwi and resource management decision making, Ngawha geothermal resource case study, received August 1989
(registrar)

C12 Transcripts of cross-examination in the second Ngawha hearing held 14-18 December 1992:
(a) Craig Lawson
(b) Dr Donald Loveridge
(c) Roger De Bray
(d) Dr Arnold Watson
(registrar)

C13 Closing submission of counsel for claimants, 20 January 1993
(a) translation of evidence

C14 Submission of counsel for Wai 123 claimants, 20 January 1993

C15 Closing submission of counsel for the joint venture, 20 January 1993

C16 Closing submissions of Crown counsel, 21 January 1993
(a) Native Land Court Acts Amendment 1889 (extracts)
(b) J1/1894/173, National Archives, Wellington
(extracts)

C17 Counsel for claimants submission in reply, 3 March 1993

D Papers Admitted Following the Third Hearing

D1 Transfer 7067, 14 May 1885, Heta Te Haara to William Earl,
Land and Deeds, Auckland
(registrar)

D2 Lease 1134, 16 December 1892, Heta Te Haara to George Patterson, Lands and Deeds, Auckland
(registrar)

D3 Ngawha Hot Springs Domain Certificate of Title, 24D/1409,
Land and Deeds, Auckland
(registrar)

Appendix 4

Extract from Evidence of Dr Sheppard

(B37:2-3)

2 *The Nature and Setting of Geothermal Systems*

2.1 Geothermal systems are a part of regional hydrological systems. The water in geothermal systems is derived mostly from outside the immediate geothermal system, and ends up outside the system. Geothermal systems may or may not discharge water, steam, gases and minerals to the ground surface. They differ from the usual subsurface hydrological system in that they are at higher temperatures than the waters around them. The heat is derived more or less directly from the hot sub-crust or upper mantle deep beneath them. In some places, the waters are warmed by general conductive heating from below, and because they are warm and less dense, they rise towards the earth's surface. On the way they react with the rocks through which they are passing, and carry away some of the components of the rocks. Hot waters react more rapidly with the rocks than cold waters.

2.2 In some places the heat is carried from depth by rising molten material (called magma) which can penetrate right through the crust to form volcanoes and lava flows during volcanic eruptions. The heat carried by these rocks is dispersed in part into the crust and can be carried away by the waters that are able to circulate there. This is why many geothermal systems are associated with volcanoes: that at Ketetahi on Tongariro is a good New Zealand example.

2.3 These connections of geothermal systems with magma (liquid or solidified after cooling) are not always obvious. Quite often, the magma body does not reach the surface. In this situation, the heat is transported at least in part by the circulation of groundwaters, which in addition to picking up heat, may leach volatile and soluble chemicals from the magma. This is the situation at Ngawha. Because the waters are hot and have dissolved chemicals in them which help attack the rocks, these waters react with the other rocks through which they travel, and lose and gain chemicals in a complex way which we only partially understand. The end results are the waters which are discharged at the surface and are encountered by wells at depth. The chemical composition can be characteristic of the depth at which the water is encountered, and different systems have different chemical compositions.

2.4 The water which saturates the upper few kilometers of the crust is, in most places, derived from rainwater. The rainwater may have fallen some distance away, and travelled on the surface and underground in response to gravity. Once water is underground (hence "groundwater"), it can travel through the cracks and pores in the rocks, and in some places, caverns and tunnels. It can become trapped and be

under pressure, giving artesian waters; it can emerge at low points as springs; and it can be heated and rise to the surface or circulate, in response to heating, for instance. Movement of water in groundwater systems can be very slow, and timescales of thousands or tens of thousands of years are usual for the waters to flow through geothermal systems.

2.5 For water circulation in a system to occur, as well as a heat source, waters must be able to pass through the rock pores and channels. This is called permeability, and while virtually all rocks are permeable, some are more permeable than others. This can be related to the material of which the rocks are made (a coarse sandstone will be more permeable than a fine mudstone, all other things being equal), and by how many cracks there are.

2.6 Cracking in rocks occurs by many mechanisms, for instance, because they are being bent, because they are being heated, because they are being sheared. In some places in the surface layers of the earth, forces are at play which cause rafts of rock to move around, causing earthquakes, and as they do they can be torn apart or pushed together, with resulting fractures. When these are large enough, they are called faults. Regions where this happens can become weakened and the crust can become thin as well as weak. When this happens, volcanic activity is frequently found. A good example is the Bay of Plenty-Rotorua-Taupo area. There seems to be a similar situation, on a smaller scale, around Ngawha.

Index

ISBN 1-86956-284-4