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JAMES PHILIP FERGUSON

MAORI CLAIMS RELATING TO RIVERS  
AND LAKES

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Victoria University of Wellington

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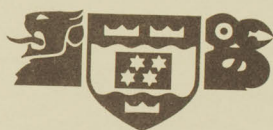


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*Te Whare Wananga  
o te Upoko o te Ika a Maui*



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## I. INTRODUCTION

The subject of rivers and lakes, and more precisely the nature of Maori claims relating to rivers and lakes, is a multi-faceted one. It concerns a resource not only of great physical and metaphysical significance to the Maori, but one of great economic and recreational value to New Zealanders as a whole. This is not an inherent conflict, however, it has historically evolved on the basis of conflict for the last 150 years.

Article Two of the English text of the Treaty of Waitangi confirms and guarantees to the Maori Chiefs and Tribes of New Zealand :

the full exclusive and undisturbed possession of their  
Lands and Estates Forests Fisheries and other properties ...

In the Maori text this reads :

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

which has been literally translated as:<sup>1</sup>

the unqualified exercise of their chieftainship over their lands, villages and all their treasures.

One major area in which the nature of this guarantee has been in issue is that of lakes and rivers. Maori rights in respect of lakes and rivers have been the subject of a multitude of judicial and legislature pronouncements over the last 150 years. This paper will address these determinations of the judiciary and the legislature in two main areas. Firstly, the extent and nature of Maori rights to ownership, and secondly, the extent and nature of Maori rights of use and control. It must be clearly noted that this paper only deals with the subject of *non-tidal* rivers and lakes.<sup>2</sup>

The paper will begin by focusing briefly on the Maori spiritual perspective of lakes and rivers, and water in general, a conception which is fundamental to understanding or resolving any Maori grievance in this area. Then the major parts of the paper will deal with the issues of ownership of rivers and then lakes, looking at the existing common law doctrines and legislation, the historical developments to the present day, and the likely bases for claims to the Waitangi Tribunal. The next section will be a consideration of the Maori rights of use and control with particular emphasis on the effect of the Treaty, followed by a brief

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1. Literal translation of the Maori text by I H Kawharu, see Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi I H Kawharu(ed) (Oxford, Auckland, 1989),319.

2. This paper is only concerned with non-tidal rivers and lakes. Tidal waters prima facie are vested in the Crown at common law and are subject to the rather different rules and issues relating to foreshores. For an examination of that area see New Zealand Law Commission Preliminary Paper 9 The Treaty of Waitangi and Maori Fisheries (Law Commission, Wellington, 1989), 68-73.

look at the possible application of the common law doctrine of aboriginal title. The paper will conclude with an overall appraisal of the present situation of Maori rights in relation to lakes and rivers with some possible directions for change.

## II. WATER - THE MAORI PERSPECTIVE

Water is conceptualised by Maori as resulting from the union of Papatuanuku, the earth mother, and Ranginui, the sky father. In its purest form water is *waiora* and is used in sacred rituals to sanctify. The rain is *waiora* and is seen as the personification of Ranginui's anguish and grief at being separated from Papatuanuku, while mist is seen as the grief of Papa. Once water is flowing freely on the ground it becomes *waimaaori* and is controlled by Tane. Salt water or *waimataitai* comes under the authority of Tangaroa, Tane's brother. All *waimaaori* or fresh water has a *mauri* or life force, unless it becomes *waimate* through damage or pollution. It is a violation of spiritual values to mix waters with different *mauri*. This was a major complaint before the Waitangi Tribunal in the *Manukau* claim where the water was extracted from the Waikato River and used in a slurry pipeline to convey ironsand to the Glenbrook Steel Mill before being discharged into the Manukau Harbour. The Waitangi Tribunal stated:<sup>3</sup>

Wai maori (fresh water) is also the life giving gift of the Gods (te wai ora o Tane) and is also used to bless and to heal. Separate water streams are used for cooking, drinking and cleaning ... Wai mataitai (salt water) is separate (te wai ora o Tangaroa). It provides food but its domestic use is limited. Conceptually each water stream carries its own *mauri* (life force) and *wairua* (spirit) guarded by separate *taniwha* and having its own *mana*. Of course the waters mix. The *mauri* of the Waikato river flows to the *mauri* of the sea, but on its landward side the *mauri* of the Waikato is a separate entity. The Maori objection is to the mixing of the waters by unnatural means, the mixing of two separate *mauri*.

The water in rivers and lakes also provided an important physical resource in terms of the extensive fisheries it sustained. The Waitangi Tribunal has recognised that rivers (and equally lakes) are *taonga* or treasured possessions both in terms of their *mauri* and as valuable resources<sup>4</sup> To the traditional Maori the two were inseparable, the unity was absolute, the physical could not be divorced from the metaphysical. In a hearing before the Rangitikei-Wanganui Catchment Board the Maori perspective of the Wanganui River was put thus :<sup>5</sup>

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3. Manukau Report (1985, Wai 8) 78-79.

4. *Ibid*, 95.

5. Wanganui River Minimum Flow Review: Report and Recommendations of the Tribunal Rangitikei-Wanganui Catchment Board and Regional Water Board, 20 September 1988, 7.

[I]n the Maori idiom, the Whanganui River is a Taonga, a most precious possession. As such the River is many things, both present and past, both physical and metaphysical, both real and unreal, at once a precious possession and a source of sustenance, a means of communication with the Gods, the Tipuna, the Kaitiaki and the Taniwha, and a manifestation of Wairua, Mana, Tapu and Noa ... Every part of the river and its environs is sacred to the Whanganui Maori - they are part of the river and the river is part of them. The water which moves in the river and its tributaries is just not water, but also the blood of the ancestors. All things are connected.

### III. RIVER OWNERSHIP

#### A. Common Law and Legislation

Prima facie at common law the owner of the riparian land (land on the river bank) owns the bed of the river to the middle line by way of the *ad medium filum aquae* doctrine.<sup>6</sup> However, New Zealand statute has vested the beds of navigable rivers in the Crown. Section 261 of the Coal Mines Act 1979<sup>7</sup> states that :

Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.

Undoubtedly the Crown wished to establish a title to river beds, and hence a right to mine, exclusive of the riparian owners, but the effect was also to establish a title exclusive of Maori customary rights. However, the actual extent of the Crown's rights to the beds of rivers under section 261 is unclear.

The Coal Mines Act defines "navigable river" as :

... a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts or rafts.

In this regard the English authorities are of little assistance due to the "specialised" meaning of "navigable" at common law.<sup>8</sup> Opinion varies on whether

6. R v Joyce(1904) 25 NZLR 98.

7. Originally enacted as s.14 of the Coal Mines Act Amendment Act 1903, and continued as s.206 of the Coal Mines Act 1925. It was enacted largely as a response to the decision in Mueller v The Taupiri Coal Mines Ltd(1900) 20NZLR 89 where the *ad medium filum* rule was rebutted due to circumstances surrounding the Crown grant and commercial use of the river. The Crown thus lacked prima facie rights to the river so the provision in the Coal Mines legislation was enacted.

8. The common law definition of 'navigable' is essentially restricted to tidal rivers. For a full discussion on the concept of navigability see G.Austin "Section 261 of the Coal Mines Act 1979" unpublished paper presented before the Waitangi Tribunal in the hearings of the Pouakani claim in 1989(Wai 33)

the New Zealand provision requires commercial use of the river or whether casual use by small boats is sufficient. The extreme difficulties of the definition were discussed in a Property Law and Equity Reform Committee Report in 1983 where they noted:<sup>9</sup>

[T]here is a possible argument that the application of this section in favour of the Crown may now be quite extensive because of modern forms of water transport (eg. jet boats) ... It is accordingly considered that the Crown in fact may well already own the beds of a large proportion, if not the majority, of the length of New Zealand rivers.

Of possible significance also to the issue of Maori ownership of rivers is the decision in *Tait-Jamieson v G C Smith Metal Contractors Ltd*<sup>10</sup> which purports to severely restrict the interpretation of section 261. In that case the High Court held that the section did not affect the presumption that a Crown grant of riparian land carries ownership of the river to the middle line, unless the grant expressly excluded the river bed. Such an interpretation would be detrimental to any Maori claims before the Waitangi Tribunal as it would mean that the beds of navigable rivers had mostly passed out of Crown hands and the Crown would be unable to return them to Maori ownership if the Tribunal so recommended. It must be noted, however, that the Court did not consider *The King v Morison*<sup>11</sup> where the Supreme Court found that in terms of the Coal Mines Act the bed of a navigable river vests in the Crown *unless* it is expressly granted in the Crown grant. In fact, if *Morison* does not represent the correct view then section 261 would be largely obsolete. Thus, with respect, *Tait-Jamieson* should not be read as decisive authority on this issue.

## B. The Wanganui River Case

The application to date of the law and the treatment of Maori rights in this area is well illustrated in the long running dispute over ownership of the bed of the Wanganui River. The action essentially arose from the activities of the Wanganui River Trust which involved the extensive destruction of Maori *pa tuna* (eel weirs) in opening the river for navigation by steamers. This destructive action continued under the authority of the Wanganui River Trust Act 1891,<sup>12</sup> despite

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9. Property Law and Equity Reform Committee Interim Report on Law Relating to Water Courses (26 April 1983) 9; but cf. Tait-Jamieson v G C Smith Metal Contractors [1984] 2 NZLR 513 where the Court appears to take a limited interpretation of the term 'navigable' in the Coal Mines Act 1979

10. [1984] 2 NZLR 513

11. [1950] NZLR 247.

12. Under the Wanganui River Trust Act 1891 the River Board was given powers to improve navigation on the river, including the power to remove all obstacles impeding navigation, and powers to erect jetties and maintain ferries. These powers were further extended in 1893, 1920 and 1922. However, the Royal Commission on the Wanganui River in 1950 found that "while this statute may be suggestive of an assumption that the ownership of the river was in the Crown, yet it is not expropriation in itself". Report of the Royal Commission on Claims made in Respect of the Wanganui River 1950 AJHR G-2, 13.

the inclusion in that Act of section 11 which purported to protect Maori rights under the Treaty of Waitangi,<sup>13</sup> and despite the vigorous protestations of members of the Wanganui tribe.<sup>14</sup> Piki Kotuku presented a petition to Parliament in 1887<sup>15</sup> and then again in 1927,<sup>16</sup> the latter claiming £300,000 compensation for various injuries and loss of rights on the Wanganui River. The 1927 petition was referred under section 34 of the Native Land Amendment and Native Land Claims Adjustment Act 1930 to the Chief Judge for an inquiry and report by the Maori Land Court. However, before any inquiry could begin, the Maori claimants abandoned the petition in favour of an application to the Maori Land Court for an investigation of the title to the bed of the Wanganui River. The application was filed in 1938 by Titi Tihu, and the portion of the river in dispute was that between the tidal limit at Raorikia and the juncture of the Wanganui and Whakapapa Rivers above Taumarunui.<sup>17</sup> On 20 September 1939 Browne J of the Maori Land Court determined as a preliminary finding<sup>18</sup> that at the time of the signing of the Treaty of Waitangi the bed of the river was customary land held by the Maori under their customs and usages.<sup>19</sup> The Crown had claimed that there was no Maori custom which recognised ownership of river beds and in essence that the Wanganui River was a public highway used by all tribes. However, such a claim was clearly unsustainable in the face of extensive evidence of the exclusive navigational and fishing rights of the Wanganui tribes and hapus.<sup>20</sup>

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13. Section 11 of the Wanganui River Trust Act 1981 stated: "Nothing in this Act contained shall affect any rights conferred upon the Natives by the Treaty of Waitangi."

14. There were several reports of Natives obstructing the work of the River Trust - 1894 AJHR C-1 80, 1896 AJHR C-1 114. Also there was an application made to the Native Land Court in 1907 by Hoana Metekingi and others to ascertain compensation for the removal of stones and earth from the river by the River Trust although it was adjourned and does not appear to have proceeded - (1907) 55 Wanganui MB 370 and 56/325.

15. 1887 AJHR I-2 8.

16. 1928 AJHR I-3 10

17. It seems it was accepted that the Crown owned the tidal stretch of the river below Raorikia based on the decision in Waipapakura v Hempton (1914) 33 NZLR 1065. There was evidently also an overlap with a claim by Hoani Te Heuheu (Tuwharetoa) at the headwaters of the Wanganui River, but it appears this claim was dismissed by Browne J in March 1939 - see comments of counsel in minutes of proceedings before the Maori Appellate Court in 1944 contained in CL 196/6, National Archives Wellington.

18. The counsel for the Maori and the Crown agreed that the investigation should proceed in stages.

19. Maori Land Court Wanganui, decision of Browne J, 20 September 1939. The decision and a transcript of the proceedings are in CL196/6 National Archives, Wellington.

20. There was extensive evidence of the construction of numerous varieties of eel weirs and other fish traps (eg. pa tuna, pa paneroro, pa ngaore) of the abundance and variety of fish (eg. koura, kakahi, tuna, ngaore, paneroro, inanga, toitoi, papanoko), and of the snaring of a variety of ducks (eg. parere, whio).



The Crown appealed against the fishing of the Maori Land Court, but the appeal was unanimously dismissed by the Maori Appellate Court in 1944.<sup>21</sup> However, before the Maori Land Court could proceed to any further stage in its investigations, the Crown applied to the Supreme Court for writs of certiorari and prohibition challenging the jurisdiction of the Maori Land and Appellate Courts to proceed with the investigation. The Crown contended that :

- (a) Maori customary title to the bed, if any, had been extinguished by the *ad medium filum aquae* doctrine.
- (b) The bed was vested in the Crown by way of section 206 of the Coal Mines Act 1925 (the predecessor of section 261 of the Coal Mines Act 1979).

The first of these contentions essentially asserted that where the Maori had sold the riparian land they had lost their title to the river bed through the application of the common law rule. In the end the Supreme Court found it unnecessary to determine this issue as it found for the Crown on its alternative ground, that section 206 operated to vest the bed of the river in the Crown.<sup>22</sup>

This finding still left the Crown faced with the Maori claim that but for the Coal Mines Act they would still have customary title to the bed of the river and that the confiscatory nature of that legislation entitles them to compensation. The Government consequently established a Royal Commission, led by retired Supreme Court judge Sir Harold Johnston, to determine if the Maori would have been owners of the Wanganui River according to Maori custom and usage were it not for the provisions of the Coal Mines Act, and if so, if any loss or deprivation was suffered which in equity and good conscience entitled them to compensation.<sup>23</sup>

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21. The appeal had been held over during WW II. The case was heard at Wellington before Shepherd C J, Carr, Harvey, Beechey, Dykes and Whitehead J J. A transcript of the proceedings is in CL 196/6 and the decision of 20 December 1944 is in CL 196/5 National Archives Wellington.

22. The Supreme Court decision was given by Hay J. on 27 September 1949 and is reported as The King v Morison [1950] NZLR 247.

23. Gazette No.9, 9 February 1950, 155. There is some suggestion that the Maori claimants abandoned their right of appeal against the decision in Morison in return for the establishment of the Royal Commission and the payment of costs for the Maori Land Court proceedings, but there does not appear to be any record of any official agreement - see letters of 25 November 1949 Solicitor-General H E Evans to Prime Minister and 13 April 1951 Solicitor-General H E Evans to Under-Secretary for Maori Affairs, CL 196/56 National Archives, Wellington.

The Commission found that :<sup>24</sup>

Considering the use of the river by the Maori, considering the river itself with its rapids and its numerous eel weirs, it is, in my opinion, clear there should be no presumption that the bed of the river passed to the transferees of the land and that the owners of the weirs lost their right to the bed of the river.

Thus, the *ad medium filum* presumption is rebutted by the evidence of Maori customary use and ownership of the river which arises quite apart from any riparian ownership. In coming to this conclusion the Commission stated that no other right was needed than that recognised in English law. Sir Harold Johnston noted:<sup>25</sup>

[T]hat no other than a right recognised in English law need be claimed by the Maoris in their claim to the bed of the river as I think it clear that if Europeans had used the river in the same way and ownership were in European hands they would have made the same claim as now made by the Maoris ... I think in the circumstances of this case no more imaginative concept of ownership is needed to establish the Maori title arising from the erection of their eel-weirs than is in accord with English presumptions in like cases.

The presumption that Sir Harold Johnston was referring to was the common law rule that the owner of a several fishery in a river is the owner of the soil.<sup>26</sup> This presumption will prevail over the *ad medium filum* rule if the ownership of a several or exclusive fishery can be established in the river. The Commission found the extensive use of *pa tuna* and other fishing devices to the exclusion of other tribes to be conclusive evidence of the existence of a several fishery in the Wanganui River, and cited several English authorities in support of this contention.<sup>27</sup> The Commission referred to the comments of Lord Herschell in respect of eel-weirs in *Attorney-General v Emerson*:<sup>28</sup>

[T]hey are constructions or erections by which the soil is more or less permanently occupied and it is this occupation of a portion of the soil which leads Lord Hale to say they are "the very soil itself".

Similarly, referring to the headnote of *Hanbury v Jenkins*:<sup>29</sup>

A several fishery may exist either apart from or as an incident to the ownership of the soil over which the river flows; but where a fishery is proved to exist, the owner of the fishery is to be presumed, in the absence of evidence

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24. Report of Royal Commission on Claims Made in Respect of the Wanganui River, 1950 AJHR G-2,9. A transcript of proceedings before the Royal Commission is in CL 196/13 National Archives, Wellington.

25. *Idem*.

26. 18 *Halsbury* (4th ed.) para 630.

27. Above n24, 8-11.

28. [1891] AC 649, *Ibid*, 9.

29. [1901] 2 Ch.401, Above n.24, 11.

to the contrary, to be the owner of the soil ... The grant of weirs is a grant not of the mere right of fishing, but of a corporeal hereditament consisting not only of the soil on which any particular weir is constructed, but of the soil over which the river runs, and upon which there is the right to construct weirs for the purpose of taking fish.

In response to these claims of a several fishery based on English authority, Crown counsel asserted before the Royal Commission and the later Courts that the exercise of fishing rights by the Wanganui iwi was purely an incident of ownership of the subjacent riparian land and did not establish any right to the river bed separate from that to the adjoining land. This response by the Crown was largely valid in that the fishing rights were exercised on behalf of the iwi or hapu by members of the iwi or hapu who owned the riparian land after individualisation. However, it is highly questionable whether upon individualisation such rights of fishing changed, from being exercised for the benefit of the iwi or hapu as a whole, to being exercised for the benefit of an individual or group of individuals.

What is notable about the Royal Commission's view (despite its meritorious result) is the way in which Maori customs and conceptions, in this case regarding the use of *pa tuna* or eel weirs, have been moulded to fit the common law. Thus, the mere fact that Maori *pa tuna* were constructed utilising the river bed<sup>30</sup> was sufficient for the Maori claim to be addressed and upheld within the framework of English law, without any need for reference to the other physical and spiritual values the river had to the Wanganui Maori. In actuality the English cases cited in the Commission Report have their basis in a completely different legal history. In each of these case the right to a several fishery which was required to be shown had arisen from a specific grant either from the Crown or from the owner of the riparian lands. In this respect it becomes very difficult and inappropriate to apply such rules that derive from the English system of land tenure to the history of Maori customary ownership of land and fisheries in New Zealand. As I will point out later this argument is equally valid to the application of the *ad medium filum* rule.

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30. *Pa tuna* and several other forms of fish trap were constructed with rows of large stakes driven into the river bed and their detailed construction was described in evidence before the Maori Land Court in 1938. Above n 19,9. See also E Best *Fishing Methods and Devices of the Maori* (Wellington, Govt. Printer 1986, published 1929)

In any event the conclusions of the Royal Commission in this respect were ignored as the case continued its somewhat contorted process through the Courts. Basically, the Crown was not content with the result of the Commission, despite the finding that compensation should be limited to only one area, the loss of the bed as a gravel supply.<sup>31</sup> Instead special legislation was enacted to refer the matter to the Court of Appeal for determination,<sup>32</sup> later euphemistically described as "a political agitation of the matters".<sup>33</sup>

In 1954 the Court of Appeal<sup>34</sup> rejected the Crown's initial contentions<sup>35</sup> and decided that at the time of the Treaty of Waitangi and upon the acquisition of British sovereignty, the bed of the river was held by the Maori under their customs and usages. The Court also found that the passing of the Wanganui River Trust Act 1891 did not affect whatever rights in the river bed the Maori then possessed. However, it was not prepared to dispose of the alternative Crown contention, namely, the *ad medium filum* issue without obtaining fuller evidence.<sup>36</sup> Consequently further special legislation was enacted to enable the Maori Appellate Court to take further evidence on questions submitted to it by the Court of Appeal relating to Maori custom and usage.<sup>37</sup> The Maori Appellate Court gave its decision on 6 June 1958 where it concluded that there was no Maori custom whereby in the investigation of title the Court might issue a separate title to the river for the tribe as a whole while issuing individual titles for the riparian lands.<sup>38</sup>

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31. Above n14, 14-15

32. Maori Purposes Act 1951, s.36. The Crown agreed in the particular circumstances to be responsible for all costs incurred by the Maori respondents in the proceedings brought before the Court of Appeal pursuant to this Act, see letter of Morison, Spratt & Taylor to Solicitor-General, 25 June 1952, CL196/56 National Archives, Wellington.

33. Evening Post, Wellington, 6 March 1962

34. A Certificate was granted by the Court of Appeal on 9 June 1953 pursuant to s.9 of the Judicature Act 1913 allowing the case to be heard by the 1st and 2nd Divisions of the Court sitting together, and an Order-in-Council was issued to this effect on 10 June 1953 Gazette, No.34 18 June 1953, 925

35. The Crown contended that- (a) The bed of the river had always been a public highway and not land held by the Maori under their customs and usages, (b) That any rights possessed by the Maori were either fishing rights exercised in respect of each settlement only by Maori from that settlement, or navigation rights in common with all persons, (c) That on the acquisition of British sovereignty, the bed became the property of the Crown Or, alternatively that prior to the 1903 Coal Mines Act, (d) That the bed of the river passed ad medium filum on the investigation of title of the riparian lands, (e) That the bed of the river was confirmed as being Crown land by the passing of the Wanganui River Trust Act 1891.

36. In re the Bed of the Wanganui River[1955] NZLR 419, per Cooke J 438, North J 470, Hutchinson J 422, Adams J dissenting.

37. Maori Purposes Act 1954, s.6 which added s.36(5A)-(5H) to the Maori Purposes Act 1951.

38. Maori Appellate Court, Rotorua, decision of 6 June 1958. Judges Prichard, Smith, O'Malley, Jeune and Brook. A copy of the decision is in CL.196/42 and a transcript of the proceedings is in CL.196/26

Subsequently in 1962 the Court of Appeal finally disposed of the issue by adopting the views of the Maori Appellate Court and holding that the titles issued in respect of the riparian blocks included in each case a title *ad medium filum*.<sup>39</sup> As Gresson P summated:<sup>40</sup>

The evidence as to rights of passage over the river exercised by the whole tribe and the fact that the eel weirs and fishing devices placed by individuals or hapus were not rigidly limited to the portion of the river immediately adjacent to the bank occupied by the individuals or the hapu, does not, I think, negative the application of the *ad medium filum* rule ... I am of the opinion that when individual titles were substituted for the general communal right of the tribe, there attached to each grant by virtue of the presumption title to the bed of the river *ad medium filum*.

The Maori claimants did apply for leave to appeal to the Privy Council against the judgment of the Court of Appeal but this application was abandoned in July 1962,<sup>41</sup> probably due largely to the cost.

Although this appears to create an effective obstacle to similar claims in respect of rivers, a good argument may well be made in favour of a generous application of the laws so that it reflects Maori custom, which before 1840 had no conception or need of European-style notions of land ownership. The extensive evidence presented by the Maori claimants before both the courts and the Royal Commission over the 22 years from 1938 to 1960 in my opinion clearly supported the view that the river was held in tribal ownership and that there was never any intention for it to be included with the individualisation process that operated in respect of the riparian lands.<sup>42</sup> There was evidence of Titi Tihu before the Maori Appellate Court in 1958 relating to the symbolic and metaphysical regard the Wanganui tribe had towards its river:<sup>43</sup>

...[T]he traditional story relating to the rope plaited by Hinengakau, one of the children of Tamakehu, said to be the grand ancestor of the Wanganui Tribe, in order to bring peace and unity among the peoples of the river, the three strands forming the rope being represented by Tamakehu's three children, Tamaupoko (a son), Hinengakau (a daughter), and Tupoho (a son) who resided in the middle, the upper and the lower parts of the river respectively.

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National Archives, Wellington.

39. In re the Bed of the Wanganui River[1962] NZLR 600.

40. *Ibid*, 609-610.

41. Both the Maori and the Crown had filed applications for leave to appeal to the Privy Council against the 1955 Court of Appeal decision, and the Maori claimants also filed an application for leave to appeal against the 1962 decision. However, the Maori abandoned the application on 2 July 1962 and the Crown consequently did likewise.

42. Above n19, n21, n24, n38 n39.

43. Decision of Maori Appellant Court 1968. Above n38, 1

The response of the Maori Appellate Court to such evidence seemed to show a surprising lack of understanding of Maori custom and conceptions, a feeling which seems to pervade the entire proceedings of that Court. The Court stated:<sup>44</sup>

[W]e have reached the conclusion that the principal merit or significance which evidence of this class possess is to provide, *at most*, a background to an understanding of the general and cosmogonic conceptions which the *ancient Maori* had towards his property ...[T]he Maori Land Court, in conducting an investigation of title to Maori customary land, required, and would still require, to view the claims made to it for inclusion in a title to be tied *more to the foundations of practical realism rather than to those of mere symbolism...* (emphasis added).

There was also the comprehensive evidence of Maori custom and usage relating to *pa tuna* and other fishing devices which had existed in great quantities along the whole length of the river. Such *pa tuna* were owned communally by the tribe or hapu and were used by individuals on behalf of the tribe and the catch was for the whole hapu.<sup>45</sup> The decision of Browne J in 1938 emphasised the exclusive and communal nature of rights on the Wanganui River.<sup>46</sup>

The boundaries of the land of each tribe or hapu were well defined and members of that tribe or hapu had the exclusive right in common to everything within those boundaries including lakes and rivers. There were no rights of way or public roads through their territory either by river or in any other way and if one tribe wanted to pass through the territory of another, permission had to be obtained or if permission were not granted the tribe wanting to pass would be compelled to face the opposition of the owners and to force its way through ...[I]f one of the outside tribes had claimed to make use of the bed for the purpose of erecting patunas ... the claim would have been strenuously resisted by the local people and would probably have resulted in bloodshed.

The application of *ad medium filum* would destroy the tribal right of navigation and the rights of fishery that were enjoyed by the iwi or hapu as a whole.

There was also evidence placed before and accepted by the Maori Appellate Court in 1958 and the subsequent Court of Appeal to the effect that the ownership and use of *pa tuna* and other fishing devices were not necessarily restricted to hapus or members thereof occupying land directly adjacent to the position of such devices in the river.

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44. Ibid,2. But compare the comments of Dyke J in the 1944 Maori Appellate Court decision:"It is of course patent that witnesses giving evidence in 1939 of matters occurring before 1840 can only give to the Court the stories they have had handed down to them by their elders. That is how the claims to interests in native land are established and as such are accepted by the Courts on investigations to any title". Above n21,3.

45. Evidence of Hekenui Whakaraha in proceedings before Royal Commission in 1950, Above n24,60.

46. Above n19, 1-2.

The Maori Appellate Court, despite 'conceding' the special significance and mana of the river to the Wanganui tribe, found that there was no separate *take* (root) to the river as opposed to the riparian lands. The Court stated that if there was such a distinction it would have been asserted long since and recorded in the minute books relating to the investigations of title to the lands, but that no such evidence existed. However, there seems little justification for such an assumption, as there would never have been any need to assert a separate claim to ownership in the river at these earlier hearings. In those title investigations of the riparian lands, the title was to a marked and limited piece of land, this being understood not in the sense of a title derived from the Crown as all European land titles are, but a title in the sense that the Maori custom would recognise. The compiled plans of the blocks to be investigated in no instance included any part of the river, but rather the boundary lines ran along the river banks.<sup>47</sup> The hapus or iwi all had territories which extended across both sides of the river, yet in all but one case this land was separated into separate blocks on each side of the river, in many cases with different owners being placed on the title. There would be absolutely no conception in the minds of the tribe that the river itself, which provided such physical and spiritual sustenance to the tribe as a whole, would be subdivided into portions. The Maori would not be concerned with the middle line of the river when navigating canoes or erecting *pa tuna*, rather it would be the direction and strength of the current that would be all important. Yet a riparian owner entitled to the river bed *ad medium filum* would only be able to exercise those rights of fishery and navigation on his own portion of the river, with no rights across the middle line nor up and down stream beyond the cross-line of his boundary.<sup>48</sup> The Wanganui tribe clearly had no intention of creating such limited rights. To the contrary there is evidence that the river continued to be recognised and used as a tribal resource or entity belonging to the tribe as a whole and not to the individual riparian owners. There was no need to assert overall tribal ownership of the river in the early Maori Land Court hearings because it had never been challenged. Later when this position was threatened the reaction was not one of acquiescence, rather there were the series of protests that culminated in the investigation of title before the Courts.<sup>49</sup>

The final conclusion of the whole series of hearings was that there was no Maori custom by which the Maori Land Court on investigating titles could issue a separate title to the river for the tribe as a whole. This seems to somehow suggest that the operations of the Court were a reflection of Maori custom, yet the entire individualisation process which these Courts were designed to administer was clearly contrary to all notions of Maori custom which were based on communal ownership of land and resources.

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47. The inclusion of the river bed was not parked on any certificate of title and this appears to be the usual practice in New Zealand. As such the title to the river bed has been held not to be indefeasible under the Land Transfer Act 1952, see Attorney-General v Leighton[1955] NZLR 750.

48. See Strang v Russell(1905) 24 NZLR 916,930.

49. Above n14, n15, n16.

The final decision seems to implicitly recognise those ethnocentric attitudes which pervaded many Crown comments on the case. As Mason, the Attorney-General, stated in 1950:<sup>50</sup>

[W]hat a fantastic mess is made of all law of property and validity of title if they are to be upset on obscure arguments as to Maori Tribal history!

Even less subtle were the comments of Haughey, counsel for the Crown, before the Maori Appellate Court in 1958:<sup>51</sup>

[T]his Court should deprecate any attempt to introduce matters of Maori mythology into a mundane matter like this. Those matters are entirely irrelevant. I am not going to make any reference beyond that to such matters as plaited ropes and the mana of rivers and things like that.

The Court of Appeal would have done well to consider the comments of the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria*<sup>52</sup> where the approach towards which the New Zealand Courts inclined was condemned. The Privy Council stated:<sup>53</sup>

[I]n interpreting native title to land, not only in Southern Nigeria, but other parts of the British Empire much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.

The better approach was asserted by Spratt, counsel for the Maori claimants, in 1958:<sup>54</sup>

[T]his being a matter of presumption, European law could not have applied to the bed of the Wanganui River, the aboriginal owners of which knew nothing about the notion of *ad medium filum* whether in the Latin or in the English or in the Maori tongue.

However, the result in New Zealand today is one which recognises the owners of riparian lands adjacent to non-tidal rivers and streams as owning the river bed to the middle line. In the case of navigable rivers this position has been changed by section 261 of the Coal Mines Act 1979 which vests the river bed in the Crown. In this respect these individual owners of the riparian lands in 1903, when the section was first enacted, may well be entitled to some form of compensation, but as we have seen that compensation would only be payable to the individual owners,

50. Letter of 17 April 1950, Attorney-General Mason to Currie (Crown Solicitor), CL 196/70 National Archives, Wellington.

51. Transcript of proceedings before 1958 Maori Appellate Court, Above n38,60.

52. [1921] 2 AC 399. This case was also applied in *Oyekon v Adele* [1957] 1 WLR 876(PC)

53. *Ibid*, 402.

54. Above n51,65.



be they Maori or Pakeha, and not to the tribe as a whole as the customary owner of the river. Such compensation, even where it is established that individual Maori freeholders had had their rights infringed,<sup>55</sup> would only be payable by way of special legislation as there is no provision for compensation in the Coal Mines Act.<sup>56</sup> It appears that compensation was not sought by the various individual Maori owners, but instead the Wanganui Maori continued to press for the river to be vested in the tribe as a whole. In 1979 a petition was presented to Parliament by Titi Tihu, the original applicant in 1938, praying that the river be vested in nine named Wanganui tribes, but again to little avail.<sup>57</sup>

As for non-navigable rivers in New Zealand the presumption is also that the riparian owners own the river bed *ad medium filum* following the Court of Appeal ruling in the *Wanganui* case.<sup>58</sup> One major rider to this presumption arises, however, with the existence of 'marginal strips' along the banks of many streams and rivers in New Zealand. Such marginal strips trace their origins to the Land Act 1892. Section 110 of that Act provided that on the sale or other disposition of lands of the Crown a 66 foot wide strip should be reserved -

- (a) along the foreshore;
- (b) around the margins of lakes larger than 50 acres
- (c) along the banks of rivers and streams that have an average width greater than 33 feet.

This provision is presently in force in the form of section 58 of the Land Act 1948, although the specifications have changed to a 20 metre strip along foreshores, lakes over 8 hectares (20 acres) and rivers with an average width exceeding 3 metres (10 feet). Similar marginal strips are also reserved under section 24 of the Conservation Act 1987<sup>59</sup> and section 289 of the Local Government Act 1974<sup>60</sup> and all marginal strips are administered by the Department of Conservation. These marginal strips are held to :<sup>61</sup>

55. H R C Wild, Solicitor-General, wrote in 1960: "[T]he frontagers would have to establish particulars of the specific loss which they have suffered through being deprived of their portions of the river bed in question. In view of this it seems that not only would it be extremely difficult for them to substantiate any such loss but it is also unlikely that any such claim would be very large in amount," letter of 16 August 1960 Wild to Director-General of Lands, CL 196/58 National Archives, Wellington.

56. This was recommended by the Royal Commission in 1950. Above n24, 20.

57. 1980 AJHR I-3,3. Titi Tihu finally died in 1988 aged 105.

58. Above n39. The decision in this case was not limited to navigable rivers, and thus the ad medium filum rule applies to all non-tidal rivers, navigable and non-navigable.

59. Marginal strips are created over all land held under the Conservation Act 1987 that lies within 20 metres of the foreshore, lakes over 8ha and rivers with an average width over 3m.

60. Marginal strips are reserved under s.289 of the Local Government Act 1974 when any land is to be subdivided or any portion of any block of land is to be sold, save for certain exceptions relating to large blocks of farmland.

61. Conservation Law Reform Bill 1989, explanatory note.

- (a) Provide permanent access for recreational purposes to the coast, lakes and rivers; and
- (b) Provide for the conservation of natural and historical values of the strips and the adjacent bodies of water.

The presumption appears to be accepted, although there is as yet no statutory recognition of this, that such marginal strips take with them the bed of any adjoining river or stream *ad medium filum*. Thus, the beds of a great many more non-navigable rivers and streams may also be vested in the Crown through the reservation of marginal strips.

The problem arises in determining how extensive such Crown ownership actually is. There can be no general assumption as to which rivers do or do not have marginal strips. Presumably land alienated prior to 1892, when marginal strips were first created, would be free from such strips unless the land has subsequently returned to Crown ownership or been subdivided.<sup>62</sup> Also land which was sold directly to Pakeha freeholders from the original Maori freehold or customary owners without having passed through Crown hands will also not have attracted marginal strips.<sup>63</sup> There may well also be significant problems in respect of the erosion of river banks or the changing courses of rivers and the effect this has on marginal strips and the ownership of the river bed.<sup>64</sup>

The position of marginal strips becomes even more interesting with the proposed amendments contained in the Conservation Law Reform Bill 1989. This Bill involves the repeal of section 58 of the Land Act 1948 and section 24 of the Conservation Act 1987 and consolidates them within a new series of sections.<sup>65</sup> The provisions of interest are the proposed sections 24D and 24E. Section 24D allows the Crown to sell or otherwise dispose of any marginal strips which are no longer of any value in terms of conservation or the provision of public access and have consequently been declared "not to be marginal strip".<sup>66</sup> This initially seems to be

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62. Above n60.

63. The Crown's right of pre-emption was abolished in 1862, thus any Maori owners were free to sell to anyone after this date. Prior to 1862, except for a short period in 1844-1845, the Maori could only alienate land to the Crown.

64. The position appears to be that marginal strips are immovable. Thus, if the river bank erodes the strip cannot move back with the lateral bank erosion and remains on the ground where the survey plan shows it to be. However, if the river moves in the other direction away from the marginal strip the doctrine of accretion applies and the marginal strip increases in width - see National Water and Soil Conservation Authority Water and Soil Misc.Publication No.86-the Law Relating to Watercourses: Seminar Proceedings 26-27 February 1985, 40. However the proposed s.24F of the Conservation Law Reform Bill 1989 solves this difficulty by providing that marginal strips shall move with any change in their boundary, although the provision does not have any express retrospective effect.

65. Section 15 of the proposed Conservation Law Reform Bill 1989, will insert sections 24-24I into the Conservation Act 1987. Section 289 of the Local Government Act 1974 still remains in force and is declared not to be limited by the proposed s.24.

66. Such declarations are made under s.24C.

a positive move in that any Maori owners of the riparian lands could purchase the marginal strip and regain ownership of the river. However, section 24E soon dispels that possibility as it provides that ownership of the river bed is specifically retained by the Crown even after the sale of the marginal strip. Thus, for the first time we have a statutory recognition of the *ad medium filum* rule.<sup>67</sup> Section 24E provides:

Notwithstanding any other enactment or rule of law, where the Crown owns part of the bed of a non-navigable river or stream adjoining any land declared not to be a marginal strip and disposes of that land under section 24D of this Act, that part of the bed of the river or stream shall remain owned by the Crown.

A possible benefit of such a retention of ownership of the river bed by Crown may well be realised if in the future the Crown sees fit to return some rivers to their customary Maori tribal owners,<sup>68</sup> although it is doubtful that this is the motivating factor behind the provision. The sale of marginal strips may also raise the possibility of a Treaty of Waitangi issue and I will return to this point in more detail in the next section of the paper.

In conclusion I do not think one can vary too much from the words of O'Keefe:<sup>69</sup>

The law in New Zealand as to the ownership of riverbeds is indeterminate.

### C. The Treaty of Waitangi.<sup>70</sup>

There can be little argument that rivers are generally included within the terms of Article Two of the Treaty of Waitangi. It may well be that a claim to the river bed can be based on the term 'land' or *whenua* within Article Two, the river bed being simply land covered by water and being recognised as Maori customary

67. The explanatory note to s.24E states: "Section 24E continues the Crown's ownership of half of any river bed or stream bed adjoining any former marginal strip. Such rights are provided for at common law under the *medium filum* rule which presumes that where a non-tidal river is the boundary of the land conveyed, the grantee takes the bed of the river to the middle line. This section goes further and provides that the Crown will retain such ownership after disposing of a former marginal strip."

68. Yet this will also only be possible where the Crown has had marginal strips along both banks of the whole river or stream, and such situations may well be rare.

69. O'Keefe *The Law and Practice Relating to Crown Land* (1967), 266.

70. The Treaty of Waitangi generally confers no legal rights except where they have been specifically provided for by statute - see *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC.308. But cf the recent comments of Cooke P in *New Zealand Maori Council v Attorney-General* [1987] NZLR 641,656 and Chilwell J in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188,210 which point towards the Treaty as part of the social fabric of society in which legislation is to be interpreted.

land by the Courts.<sup>71</sup> However, the sounder view, in line with traditional Maori conceptions and expressed by the Waitangi Tribunal itself, is of the river as a *taonga* both in terms of its *mauri* or life force and as a valuable resource.<sup>72</sup> In the Maori view the bed, the waters and the *mauri* are indivisible - there is no distinction between the physical and the metaphysical.

Thus, under the Treaty the Maori were guaranteed '*te tino rangatiratanga*', or the unqualified possession and control, of their rivers in accordance with Maori customary preferences for as long as they wished to retain them.<sup>73</sup> The issue then arises as to whether there was a breach of the Treaty in the transmutation of Maori customary ownership into the European concept of individual ownership and the subsequent application of the common law *ad medium filum* doctrine. The Waitangi Tribunal in its *Orakei Report* in 1988 found that the Native Land Acts of 1865 and 1867 which facilitated the individualisation of customary land without sufficient provision for retaining tribal ownership were clearly inconsistent with the Treaty.<sup>74</sup> The Tribunal found that the principles of the Treaty, whereby the full authority of the Maori over their land was to be recognised, amounted to an acknowledgment by the Crown of the right of the Maori to hold their land "in accordance with long-standing custom on a tribal and communal basis".<sup>75</sup> The failure of the Crown to honour its obligations under the Treaty to protect the Ngati Whatua of Orakei in the possession of their customary lands is in many ways analogous to the Crown's failure in terms of the Wanganui tribe and the Wanganui River.

The application of the *ad medium filum* rule in respect of the orders and titles which issued from the Maori Land Court on investigation of the land adjoining the river is also clearly contrary to the spirit and principles of the Treaty. How could the Wanganui River, an entity which co-exists both physically and metaphysically with the tribe, possibly be segmented by notions of individual ownership and the application of an English common law doctrine of which the Maori had no actual or conceptual knowledge or need? In fact, the doctrine only received judicial recognition in New Zealand in 1900<sup>76</sup> some ten years after the majority of land adjoining the Wanganui River had been investigated. The river

71. As established in the 1938 decision of the Maori Land Court in the Wanganui River case, Above n19, and as ultimately upheld by the Court of Appeal in 1954, Above n36.

72. Manukau Report, Above n3.

73. This fundamental Treaty principle is emphasised in all the Waitangi Tribunal reports eg. Orakei Report (1987, Wai 9), 134-136.

74. *Ibid*, 28-35 and 152-154.

75. *Ibid*, 153.

76. Mueller v Taupiri Coal Mines Ltd. (1900) 20 NZLR 89, although the Court found that *ad medium filum* did not apply on the facts of the case. The doctrine was subsequently held to apply in R v Joyce (1904) 25 NZLR 98.

was never expressly included within the investigations of title to the riparian lands, nor within the resulting freehold titles. It was never the intention of the Wanganui Maori, nor could it have been within their conceptions, that the river was to pass out of tribal and communal ownership, and they have continually asserted that fact to the present day. The Wanganui tribe have not only lost the physical environment of the river, but have also lost its spiritual environment, its *mauri*, its *mana*.<sup>77</sup>

The position may well be similar for many other of New Zealand's rivers which hold a special physical and metaphysical significance for particular Maori tribes. The Ngati Awa have filed a claim at the Tribunal for the Whakatane, Rangitaiki and Tarawera Rivers. Even where a river has managed to remain in some form of tribal ownership, either where the riparian lands had not yet been investigated or where Maori tribal reserves had been created on the riparian land, the Coal Mines Act 1903 in many cases would have acted to vest the river bed in the Crown. The confiscatory nature of this legislation with no provision for consent or compensation was also a clear breach of the Treaty and may prove to be a basis of claim for several tribes.

In other cases the claim to customary or tribal ownership of rivers before the Waitangi Tribunal will be connected or intertwined with other Treaty issues. In terms of the pending claim of the Tainui relating to part of the Waikato River the claim is interconnected with the *raupatu* or confiscations of large areas of land in the 1860s. These confiscations occurred under the New Zealand Settlements Act 1863 and its various amendments, and extensive areas of the Waikato were taken including parts of the Waikato River.<sup>78</sup> The Waitangi Tribunal has already asserted to its *Manukau* decision that such confiscations were unjustified and in direct violation of the Treaty.<sup>79</sup> In the Pouakani claim presently being heard by the Waitangi Tribunal much of their lands including portions of the Waikato River were taken in the 1940s under the Public Works legislation for the purpose of hydro-electric development and thus another factor becomes involved in the issue.<sup>80</sup>

Thus, the situation will undoubtedly arise where the Waitangi Tribunal finds that particular rivers, which have both physical and spiritual significance to the Maori, have been taken or have passed out of customary ownership through Crown actions inconsistent with the Treaty of Waitangi. In such cases the appropriate ac-

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77. A claim is presently being prepared on the Wanganui River for the Waitangi Tribunal.

78. For a fuller discussion of the confiscations and associated events see M R Litchfield "Confiscation of Maori Land" (1985) 15 VUWLR 335 and D V Williams The Use of Law in the Process of Colonisation: an Historical and Comparative Study of Tanzania and NZ PhD Dar es Salaam 1984, 214-263.

79. Manukau Report, Above n3, 25-30.

80. Pouakani claim, Wai 33, hearings began in May 1989.

tion would be for the Government to re-vest those rivers which are presently in Crown ownership back in the tribes, possibly under a form of Maori organised and operated 'trust board' for the benefit of all tribal members.

In terms of the re-vesting of rivers into Maori tribal ownership some difficulty may well be encountered in regard to the proposed legislation dealing with marginal strips in the Conservation Law Reform Bill 1989.<sup>81</sup> Firstly, where the riparian land is already in some form of tribal ownership, the retention of the river bed in Crown ownership after the sale of the marginal strip to the riparian owners may well cause Maori outcry. Additionally, and in probably the majority of cases, where the riparian land is not in tribal ownership, the sale of any marginal strip will have a significant effect on any future move to re-vest the river into tribal hands. The river will be of little comfort to the Maori tribe if there is no possibility of gaining access to it by way of a marginal strip. This point becomes particularly poignant when one considers section 4 of the Conservation Act 1987 which provides:

This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

Thus, if the sale of marginal strips does proceed without any safeguards in respect of possible Waitangi Tribunal claims, then visions of a situation not too distinct from that which resulted in the *New Zealand Maori Council v Attorney-General*<sup>82</sup> decision are perceivable.

The reality may be that in many situations it will be impracticable or deemed 'politically unwise' to return particular rivers to the Maori tribal ownership. Such a situation may arise with the extensive hydro-electric development on the Waikato River. However, in such cases there should be grounds for compensation and at the very least a Maori input in terms of the future use and control of the waters. The whole issue of Maori use and control of both rivers and lakes is one which I will discuss in more detail later in the paper.<sup>83</sup>

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81. See earlier discussion in Part IIB of this paper.

82. [1987]1 NZLR 641. This case involved the proposed transfer of Crown land to State-Owned Enterprises under the Statute-Owned Enterprises Act 1986. Section 9 of that Act provided that "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." The Court of Appeal held that the transfer of land to the SOE's without adequate safeguards for Waitangi Tribunal claims was contrary to the Treaty and a breach of s.9.

83. See Part IV of this paper.

#### IV. LAKE OWNERSHIP

##### A. Common Law

Generally, the position of Maori claims to the ownership of lakes has been more favourable than that to rivers. However, the law here too is far from settled.

It is accepted at common law that where a lake is within the boundaries of a single holding of land the ownership of the lake bed is vested in the owner of that land.<sup>84</sup> In respect of other lakes whose boundaries consist of the land of more than one owner the law is less certain. One view is that the *ad medium filum aquae* doctrine applicable to rivers operates here also, so that each riparian owner's title extends to the middle of the lake.<sup>85</sup> Obviously vast practical difficulties would be presented where there are numerous riparian owners.

A differing view is provided by *Southern Centre of Theosophy Inc. v The State of South Australia*.<sup>86</sup> In that case the South Australian Supreme Court stated that while the *ad medium filum* rule might be appropriate where there has been a long history of settlement, as in England and Ireland, it ought not necessarily to express the law for Australian States where the Crown has always been "the ultimate proprietor of all the waste lands of the colony."<sup>87</sup> Although the judgment was reversed on appeal to the Privy Council they did not alter the finding that ownership of the lake was in the Crown.<sup>88</sup> Brookfield suggests that the New Zealand Courts should not find it difficult to accept the view of the South Australian Court,<sup>89</sup> the result then being that the bed of all lakes (except where the surrounding land is included in one grant) would be vested in the Crown, *but* subject to any recognised Maori customary title. However, the situation in Australia may be distinguished from that in New Zealand where it has always been accepted that there were no unoccupied or 'waste' lands as such. As Swainson, a former Attorney-General, wrote in 1859:<sup>90</sup>

[T]hey claim and exercise ownership over the whole surface of the country, and there is no part of it, however lonely, of which they do not know the owners. Forests in the wildest parts of the country have their claimants. Land

84. Coulson and Forbes The Law Relating to Waters : Sea, Tidal and Inland (Sweet, London 1880),98.

85. See Bristow v Cormican[1878] 3 App Cas.641,652 and 18 Halsbury(4th.ed.),para.634.

86. (1979) 21 SASR 399.

87. *Ibid*, 411.

88. [1982] 1 All ER 283, see Brookfield "Accretion and the Privy Council"[1982]NZLJ 173,174.

89. Brookfield "Wind, Sand and Water Accretion and the Ownership of the Lake Bed" [1981] NZLJ 365,366.

90. Recited in 1890 AJHR G-1,10.

apparently waste is highly regarded by them. Forests are preserved for birds, swamps and streams for eel-weirs and fisheries. Trees, rocks, and stones are used to define the well-known boundaries.

In fact it was asserted in *Tamihana Korokai v Solicitor-General*<sup>91</sup> that the bed of Lake Rotorua was vested in the Crown by prerogative right, but this was rejected by the Court of Appeal.

The *ad medium filum* rule also seems to have no 'official' recognition in New Zealand in respect of lakes. The proposed sale of marginal strips that exist around lakes, and along rivers and the foreshore, under the Conservation Law Reform Bill 1989 contains no equivalent provision to that for rivers which retains the Crown's *ad medium filum* ownership in the bed.<sup>92</sup> Perhaps the Crown does not intend to sell any lake marginal strips, or presumes that it owns them by simple prerogative independent of the riparian lands, or more probably that all lakes are Maori customary land except where they have been expressly sold to the Crown.

In any event, whether prima facie title to lakes is vested in the Crown or is vested *ad medium filum*, the vital issue is whether these considerations have been, or should be, over-ridden by proof of Maori customary ownership.

## B. The Lake Cases

The well-known case in this context is *Tamihana Korokai v Solicitor-General*<sup>93</sup> in 1912. It related to the ownership of Lake Rotorua and the question of whether it was within the jurisdiction of the Maori Land Court to investigate the title to the bed. The Court of Appeal rejected the Crown contentions that ownership was vested in the Crown by prerogative right and that an assertion by the Attorney-General or Solicitor-General that the land is Crown land is conclusive. The Court held that the Maori Land Court could investigate whether, according to Maori custom, the Maori were the owners of the lake, or whether they merely had a right to fish in its waters.<sup>94</sup>

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91. (1912) 32 NZLR 321.

92. Section 24E Conservation Law Reform Bill 1989, above n67.

93. Above n91, originally applications were made to the Maori Land Court for investigation of the titles to Lake Rotorua and Lake Rotoiti, however the Chief Surveyor refused to supply the requisite survey plan and thus the case was taken to the Supreme Court.

94. The Supreme Court in *Tamihana* decided it was a question of fact whether the bed of Lake Rotorua was customary land and thus was within the jurisdiction of the Maori Land Court. However, in the later case of *The King v Morison* (above n22) the Supreme Court held the ownership of the Wanganui River was a question of law relating to whether the *ad medium filum* rule applied and thus was not within the Maori Land Court's jurisdiction.



The question was then referred to the Maori Land Court where, after an adjournment during World War I, hearings began in October 1918. Unfortunately before the proceedings were completed the presiding judge, T H Wilson, died in the influenza epidemic. Finally, after a series of negotiations a settlement was reached in March 1922 between the Crown and Te Arawa (the claimant tribe) whereby the bed of Lake Rotorua and 13 other local lakes,<sup>95</sup> and the right to use the waters, was vested in the Crown. In return Te Arawa was reserved certain fishing rights and provided with compensation in the form of annual grants of £6000. This agreement was given legislative effect by section 27 of the Native Land Amendment and Native Land Claims Adjustment Act 1922.

This declaration leaves undecided the question of whether Maori customary ownership of the lake could have existed as a fact, the 1922 Act only referring to the lakes as being "freed and discharged from the Native customary title, *if any*."<sup>96</sup> However, from the records of evidence that was presented in the Maori Land Court proceedings before they were halted it appears the Crown were faced with a formidable task to prove otherwise.<sup>97</sup> The Crown's main arguments appeared to be based on the forbearance of the Maori to various European activities on the lake and on the establishment of harbour and acclimatisation authorities.<sup>98</sup> However, the legal basis for such activities was hardly Crown ownership of the lake. In fact, the Thermal Springs Districts Act 1881, which provided for the Government's development of the district<sup>99</sup> with the consent of the Maori, gave a somewhat different picture. Section 5(3) of that Act empowered the Governor to:

Treat and agree with the Native proprietors for the use and enjoyment by the public of all mineral and other springs, *lakes*, rivers and waters.

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95. The lakes affected by the settlement were Rotoehu, Rotoma, Rotoiti, Rotimahana, Rerewhakaitu, Ngakaro, Ngahewa, Okataina, Okareka, Opouri, Tarawera, Tutaeinanga and Tikitapu.

96. The Crown later asserted that the settlement was not in recognition of Maori ownership of the lakes, but rather was in recognition of the loyalty of Te Arawa in the wars of the 1860s.

97. A transcript of the proceedings before the Maori Land Court in 1918 is contained in CL 174/1 National Archives, Wellington.

98. Lake Rotorua was constituted a harbour under the Harbours Act 1878 by way of an Order-In-Council on 18 January 1906. In February 1907 a special acclimatisation district was created with Lake Rotorua as the centre and control was placed with the Tourism Department. The validity of such regulations, however, may be questioned.

99. The Thermal Springs District under the Act was extended by several proclamations and included over 17 lakes within its boundaries - see above n97,80.

However, the tolerance and forbearance of the Maori was charged against them and in aggregate was said to have resulted in their 'loss' of title. The Thermal Springs Districts Act 1881 was not used to purchase the lake, rather it was used as a tool by which the Government could gain dominance over the lakes through a policy of attrition. As one witness before the Court stated:<sup>100</sup>

By reason of recent sinister legislation there is an easier way (than purchase) of getting them (the lakes); by peaceful penetration.

Mr Earl, counsel for Te Arawa, referred to the Crown contentions rather more bluntly:<sup>101</sup>

[A] more ruthless, a more tyrannous claim was never made. It meant spoliation, monstrous spoliation pure and simple. All the past must be ignored. Why? Because the Tourist Department wanted sole and complete domination over these lakes. There could be no other reason. The lakes were not a valuable asset in 1881, but in 1909 they had become a valuable asset.

The evidence of Maori ownership and use of the lake, of the numerous *tumu* (fishing posts) and fishing grounds, was extensive and comprehensive, and none was more convincing than that given by Captain Gilbert Mair who spent most of his life living and working among the Arawa. His expertise on Maori custom and history was recognised by the Arawa who were prepared to "stand or fall by the evidence to be given by him without any reservation whatever."<sup>102</sup> Mair had himself been granted an exclusive fishing ground, *Te Ruru*, by the Arawa in gratitude for his actions in leading Te Arawa troops against Te Kooti in 1870. His evidence was uncompromisingly emphatic.<sup>103</sup>

[N]o land in New Zealand has been held more absolutely, more completely and more thoroughly under Maori owners' customs and rights than those two Lakes (Rotorua and Rotoiti), nor do I know of any piece of land in New Zealand in all my experience that has been used or that can show more marks of ownership ... Every square yard of the lake and its bed was used by the Natives ... I could have gone around and pointed out 700 names myself ...

Even Prenderville, counsel for the Crown, was finding Mair a difficulty. During the case he wrote to the Solicitor-General, Sir John Salmond:<sup>104</sup>

Captain Mair has commenced his evidence. A lot of it is irrelevant but Earl says it is relevant to his case to prove long occupation. Besides the old man is very garrulous and will not answer a question without a long explanation.

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100. Evidence of Captain Gilbert Mair, Above n97,247.

101. Above n97, 19.

102. Comments of Earl, Maori counsel, above n97,168.

103. Above n97, 185.

104. Letter of 25 October 1918 Prenderville to Sir John Salmond, contained in CI 174/2 National Archives, Wellington.

The Courts never had to make a decision on the ownership of Lake Rotorua, but any doubts as to the Maori claim would have been hard to justify. As one commentator stated:<sup>105</sup>

If Judge Edwards (a Court of Appeal Judge in *Tamihana Korokai*) had heard the evidence, given in the subsequent trial before the Native Land Court, of the rights alleged to have been exercised over lakes or portions of lakes in the Rotorua District, of the partition of spheres over the same, of the jealousy with which these were guarded from trespass and invasion, he would not have expressed any doubt as to the existence or efficacy of the Native Customs and usages prior to the Treaty of Waitangi. It is true that no Maori jurist had evolved the abstraction of the lake bed - the land under the water - being the real object of ownership and not the mere water covering it. But had some engineer arisen in that early community to drain the water off, there can be no doubt that the pre-existing fishing rights and boundaries would have been found effective to establish ownership and even parcelling out of the lake bed.

A similar agreement was also reached between the Crown and Tuwharetoa in 1926.<sup>106</sup> Under this agreement the bed of Lake Taupo and the Waikato River to the Huka Falls was vested in the Crown in return for £3000 per year plus a share of various licence fees and the reservation of certain fishing rights. The Governor-General was also empowered to declare any part of the bed of any river or stream flowing into the Lake to be Crown land.<sup>107</sup> In this agreement the Crown again did not acknowledge any Maori customary title. However, in a 1965 case relating to the agreement the Maori Land Court expressed the view that the bed of Lake Taupo had belonged to the Maori contrary to the assertions of "speakers for successive Governments".<sup>108</sup>

There has, however, been litigation which has successfully upheld Maori ownership of certain lakes. In a comprehensive judgment by the Maori Land Court in 1929 Lake Omapere in Northland was held to be in the customary Maori ownership of the Ngapuhi tribe.<sup>109</sup> The Court stressed that:

Lake Omapere ... has been to the Ngapuhis for hundreds of years a well-filled and constantly available reservoir of food in the form of shellfish and eels that live in the bed of the lake (p.261).

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105. Board of Maori Ethnological Research "Maori Claims To Certain North Island Lakes" (1929) *Te Wananga - Journal of the Board of Maori Ethnological Research* 128, 135.

106. Native Land Amendment and Native Land Claims Adjustment Act 1926, s.14. The settlement followed negotiations between the Maori and the Crown, under s.24 of the Native Land Amendment and Native Land Claims Adjustment Act 1924, which were held at Tokaanu and Wellington in 1925 and 1926.

107. Section 14(4)(a) of the 1926 Act. The writer has been unable to find any instances of this power being used.

108. *In re the Beneficiaries of the Tuwharetoa Maori Trust Board*(1965) 44 Tokaanu MB 130,142.

109. *Lake Omapere* (1929) 11 Bay of Islands MB 253.

According to ancient Maori custom and usage, the supreme test of ownership was possession, occupation, the right to perform such acts of ownership as were usual and necessary in respect of each particular portion of the territory possessed. In the case of a lake the usual signs of ownership would be the unrestricted exercise of fishing rights over it, the setting up of eel-weirs at its outlets, the gathering of raupo or flax along its borders, and the occupation of villages or fighting-pas on or close to its shores (pp.262-263).

Moreover Lake Omapere was tribal territory, and therefore, according to established Maori custom and usage, no individual or group of individuals had the right to alienate any portion of its bed ... There can thus be no presumption either in law or in fact that the sales of some lands to the Crown adjoining Lake Omapere carried with them rights to portions of the lake or of its bed (p.266).

These last comments expressly rebut the application of the *ad medium filum* rule to lakes where Maori customary ownership can be proven. In the case of Lake Omapere only one-third of the adjoining lands were still in Maori ownership, the rest having been sold to the Crown and Pakeha freeholders. Although ownership to the Lake was decided with reference to customary occupation of the riparian lands, the sales of areas of that land were held not to affect title to the lake bed, which had remained in Maori tribal ownership. The Court said the sales were of particular areas of land well defined as to area and boundaries and could not possibly have been intended to include portions of the adjoining lake bed.

Yet it appears such determinations are often ignored. The Crown lodged an appeal against the Maori Land Court decision but there were continuous delays and adjournments without the case being heard. In 1946, seventeen years after the Maori Land Court judgment to the effect that the Ngapuhi had an unquestioned title to the Lake they were still petitioning for the firm establishment of that title.<sup>110</sup> Also in 1946 the Registrar of the Maori Land Court wrote to the Crown asking when the appeal was to be proceeded with. The Crown's somewhat feeble response was that the Under Secretary for Lands and Survey had intended for some time to arrange a conference with the Native Department but that it had not yet been possible to arrange for this to take place!

Finally the Prime Minister held a conference on 30 June 1947 in which it was decided the appeal should not proceed and that negotiations should be entered into with the Ngapuhi. However, before matters had proceeded in this respect the *Wanganui River* case reached the Supreme Court. Consequently the Attorney-General recommended that further consideration of Lake Omapere be delayed until the outcome in that case was known as it was hoped it would clarify the position in relation to Maori claims to subsaqueous land. The Prime Minister was agreeable with this suggestion and both the appeal and the actions of a cabinet sub-committee which was considering the 1946 petition were held over.

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110. 1946 AJHR I-3,8. This was a petition by Erua Pou and others of Kaikohe for legislation confirming Maori ownership of Lake Omapere.

As the *Wanganui River* case became drawn out so the Crown continued its attempts to delay the *Omapere* appeal, in 1953 successfully opposing an application by the Maori claimants to strike out the appeal.<sup>111</sup> It does not appear that the appeal was ever heard, but in 1955 the Maori Land Court made an order vesting Lake Omapere in a group of trustees on behalf of "all persons of the Ngapuhi tribe".<sup>112</sup> It appears that this order may not yet have been transformed into a legal title, and a claim in respect of Lake Omapere is presently being filed with the Waitangi Tribunal.

In the case of Lake Waikaremoana the situation is somewhat more settled. Maori customary ownership of Lake Waikaremoana was established by the Maori Land Court in 1918.<sup>113</sup> Again extensive evidence was presented of exclusive Maori customary use and ownership of the lake and strangely the Crown chose not to appear in opposition. The Crown did, however, appeal the decision, firstly, on the ground that there was no evidence to justify the Court's finding and it was thus acting outside its jurisdiction, and secondly, that ownership of the lake had passed with the sale of the adjoining land to the Crown. In an interim decision on 4 April 1944 the Maori Appellate Court quickly rejected the Crown's first contention.<sup>114</sup>

The Crown was aware of the application to the Court but for some reason, which we are not concerned to discover, its representatives refrained from attending Court or offering any evidence of title in the Crown. Under these circumstances the Court had before it the uncontradicted evidence of the Natives' witnesses ... [W]e are of the opinion that sufficient material was presented to the Court to justify its conclusion that at the time of the signing of the Treaty of Waitangi, Lake Waikaremoana was land held by Natives under their customs and uses and, therefore, that the Court acted within its jurisdiction in making its order.

The Court's final decision was equally conclusive on the Crown's alternative contention:<sup>115</sup>

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111. This is referred to in miscellaneous correspondence contained in CL 196/56. A full chronology of the Lake Omapere dealings from 1921-1951 is contained in CL196/72 National Archives Wellington..

112. *In re Lake Omapere*, Tokerau District Maori Land Court, Clarke J. Decision of 22 February 1955, see (1955) 29 Bay of Islands MB 112, (1956) 30 Bay of Islands MB 168 and 202.

113. The application for investigation of title was filed in 1915. It was originally heard by Jones J in 1915 and 1916 (transcript of proceedings in CL 200/33 National Archives, Wellington) but after he was made Chief Judge the hearings continued before Gilfedder J in 1917 and 1918. Gilfedder made an interim decision on 25 August 1917 which was made final on 6 June 1918 (both decisions and a transcript of proceedings are in CL200/4). The citations of the decisions are (1917) 29 Wairoa MB175 and (1918) 29 Wairoa MB 270.

114. (1944) 8 Wellington ACMB 14, 26. The delay between 1918 and 1944 was due to a variety of factors caused by both parties.

115. Decision of 20 September 1944, (1944) 8 Wellington MB 30.

The questions of the application of the *ad medium filum* rule, highway of necessity, and the effect of conveyances or memorials of ownership are of great interest, but are not applicable to the present case ... In the course of years many rules and presumptions have become incorporated in English law but we are of the opinion that in New Zealand these are of no effect if it is found they in any way conflict with the customs and usages of the Maori people. We consider that these rights once established are paramount and freed from any qualification or limitation which would attach to them if the rules and presumptions of English law were given effect to.

Consequently an order was made vesting ownership of the lake in several hundred named members of the Tuhoë and Ngati-Kahungunu tribes.<sup>116</sup> The Crown prepared a statement of claim for the Supreme Court, along similar lines to the one filed in *The King v Morison* regarding the Wanganui River, for writs of certiorari and prohibition. The Crown's task however, was a formidable one and the signs were showing. The Attorney-General Mason wrote to the Solicitor-General in December 1944:<sup>117</sup>

Please have a clause drafted for legislation making impossible the further raising of absurd Maori claims such as these to lakes and rivers where the adjoining land has been sold. Litigation will have suggested to you what is required. Perhaps the thing is simply to say that the boundary of land shall be *ad medium filum*, unless it be shown that the adjacent water has been expressly excluded at some stage or other. And even where express exclusion, the statute of limitations might run against the express exclusion.

The decision on whether to proceed with the Supreme Court claim was delayed, while the Crown awaited the outcome in the *Wanganui River* case. The Crown was then faced with section 68 of the Maori Affairs Act 1953 which limited the ability to challenge decisions of the Maori Land Court or Maori Appellate Court to within 10 years of the date of a decision. Thus, the Crown's right was due to expire on 20 September 1954. Ultimately, the *Wanganui River* case was not completed by this date and the Cabinet decided not to proceed with any action in the courts.<sup>118</sup> The Crown then entered into negotiations to buy the lake from the Maori owners, but this proposal was rejected. Subsequently the lake was leased to the Crown for a period of 50 years, the Crown undertaking to administer the lake as part of the Urewera National Park.<sup>119</sup>

The Maori ownership of Lake Rotoaira was also confirmed by a Maori Land Court decision in 1956.<sup>120</sup> The initial application was made in 1937 but was sub-

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116. An appeal by some of the Maori claimants concerning the size of shares in the lake was dismissed on 22 April 1947, see (1947) 27 Gisborne ACMB 46.

117. Letter of 14 Decembr 1944 Mason to Cornish, Ch.20029 National Archives, Wellington.

118. Memorandum of 14 September 1954 Hutchens for Secretary of Cabinet to Minister of Maori Affairs, CL200/29 National Archives, Wellington.

119. Lake Waikaremoana Act 1971.

120. *In re Lake Rotoaira* (1956) 34 Tokaanu MB 112 and 34/299.

ject to numerous delays caused by both the Crown and the Maori claimants. When the case was finally heard the Crown conceded that the lake was land held by the Maori claimants under their customs and usages, but once again "without prejudice to the view of the Crown upon the ownership of other bodies of water." The lake is presently vested in Maori trustees on behalf of the Maori beneficial owners with special rights relating to fishing and the restriction of access.<sup>121</sup>

Lake Wairarapa was probably the first lake to come under question when it evidenced a dramatic dispute between the interests of the Maori and the local settlers in the 1880s. The Maori wanted the outlet to the lake kept sealed in order to maintain their eel fishery, yet this resulted in the seasonal flooding of settlers' lands. A Crown attempt to buy the Maori rights in 1876 only resulted in the acquisition of a small number of fishing rights in the lake, and the Maori Land Court proceeded to vest the lake in 139 Maori owners in 1883. The conflict continued and resulted in the establishment of a Royal Commission which produced a lengthy report.<sup>122</sup> Its findings, however, were unequivocal.<sup>123</sup>

[T]he Natives are the undoubted owners of both the upper and lower lakes ... [N]either the Government nor any of the local bodies are legally authorised to interfere with the opening of the lake to the detriment and injury of the fishery and other proprietary rights guaranteed to the Natives ... [S]uch infringement on their rights, without their consent, or the payment of compensation for the injury done, is a grievous wrong, and contrary to the rights of property.

Ultimately settlement was reached in 1896 whereby the lakes were surrendered to the Crown in return for £2000 and the reservation of land in the Pouakani block near Taupo.<sup>124</sup>

Lake Horowhenua is another example of the settlement of conflicting interests between the Crown and the Maori, this time involving Maori retention of ownership. Originally a dispute between rival Maori claimants was settled by a Royal Commission in favour of the local Muaupoko tribe.<sup>125</sup> Over time public utilisation of the lake was considered necessary and the result of negotiations was the Horowhenua Lake Act 1905. The Muaupoko remained beneficial owners of the lake under a group of trustees, but the Act placed control of the lake in a Domain Board and further provided that:

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121. Maori Purposes Act 1959, Part I.

122. Royal Commission on Wairarapa Lakes 1891 AJHR G-4.

123. *Ibid*, 11.

124. Reserves and other Lands Disposal and Public Bodies Empowering Act 1907, s.53. Reserves and other Lands Disposal and Public Bodies Empowering Acts 1914 s.57. Native Land Amendment and Native Land Claims Adjustment Act 1921, s.12.

125. Report of the Horowhenua Commission 1896 AJHR G-4.

The Native owners shall at all times have the free and unrestricted use of the lake and of their fishing rights over the lake, but so as not to interfere with the full and free use of the lake for aquatic sports and pleasures.

In 1956 Maori ownership was strengthened by the legislative recognition of the trustee arrangement and requirement that the Domain Board consist of half Maori-recommended persons.<sup>126</sup> This arrangement is still in operation today.

An additional point of interest in terms of Maori ownership of lakes has been the determination of whether ownership lies with the tribe as a whole, or only those members of the tribe who occupied the adjoining lands. In a decision of the Maori Land Court pertaining to Lake Taupo, it was held that a reference in the settlement Act to the beneficiaries as "the members of the Tuwharetoa Tribe or their descendants" was a reference to "the members of the Tuwharetoa Tribe whose lands bordered the lake or their descendants".<sup>127</sup> The Court placed much reliance on the provisions of the statutory settlement and on the negotiations which preceded, as well as noting that a similar approach was taken in the *Lake Rotoaira*<sup>128</sup> and *Lake Waikaremoana*<sup>129</sup> cases. The validity of such determinations in terms of a reflection of Maori custom is difficult to determine. Certainly those members of the various tribes whose land did touch on the lake would have a strong claim to the lake based on customary usage, but whether this can be used as the exclusive criteria is another matter.

In the *Waikaremoana* decision the possibility of other members of the tribe having rights in the lake was not ruled out. In the interim judgment of the Maori Land Court in 1917, which was made final in 1918 and ultimately upheld on appeal in 1944 and 1947, Gilfedder J stated:<sup>130</sup>

It is assumed however that the hapus or persons that had best right to surrounding lands bordering on the Lake should have a better title to the Lake than those whose occupatory rights are in lands more remote.

Thus, it is not an exclusive presumption, but rather the question should be determined on a case by case basis according to evidence of customary usage of the lake. In the case of Lakes Taupo, Rotoaira, Waikaremoana and Wairarapa ownership was determined in favour of certain named members of the respective tribes. In the case of Lake Horowhenua beneficial ownership of the lake was in certain individuals, but the Muaupoko tribe as a whole was recognised as having fishing rights.

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126. Reserves and other Lands Disposal Act 1956, s.18.

127. In re Beneficiaries of the Tuwharetoa Maori Trust Board(1965) 44 Tokaanu MB.130.

128. Above n120.

129. Above n116.

130. Interim decision of Maori Land Court on 25 August 1917, (1917) 29 Wairoa MB.175.



However, a different approach was used in the case of Lake Omapere,

In the *Lake Omapere* decision  
ownership was vested in the Ngapuhi tribe as a whole.<sup>131</sup>

It is perhaps this tribal approach that best reflects the notions and values of Maori customary ownership. Having ownership divided among sometimes thousands of individual Maori based on the often arbitrary determinations of the Maori Land Court on investigation of the riparian lands is really a perpetuation of early policies designed to break down customary ownership. The Te Arawa realised this in their 1922 Lake Rotorua settlement and deliberately subordinated individual and sub-tribal claims and interests to the common good, utilising the settlement for communal purposes and communal benefit. As one writer stated:<sup>133</sup>

It was left to the common sense and public spirit of its leaders to develop the scheme in detail with full appreciation and assessment of all the elements.

Overall, although recognition of Maori customary ownership of lakes has been favourable, it is difficult to extract any general principles. The picture is one of inconsistency both in approach and in solution. The ownership issue has been the subject of numerous Court hearings, Royal Commissions, and direct negotiations, in some cases ownership has been surrendered to the Crown, in others it has been retained either by the tribe or by individual Maori owners. Such inconsistencies are also not aided when the Crown retains such unfettered discretions as that found in the Coal Mines Act 1979 and the Petroleum Act 1937. These provisions empower the Minister of Energy to grant various mining or exploration rights over:<sup>134</sup>

All land that is the bed of a lake if it is held by or on behalf of the Crown or if, *in the opinion of the Minister, it is not clearly established who is the owner of the land.* (emphasis added).

### C. The Treaty of Waitangi

There can be little doubt, having regard to the Maori spiritual perspective of all water, that lakes are also *taonga* and thus within the ambit of the guarantees and protection of Article Two of the Treaty of Waitangi. Lakes were seen as a great resource, both physically and spiritually, by the Maori who lived around their shores.

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131. Above n112.

133. Above n105, 139-140.

134. Coal Mines Act 1979, s.21(1)(k) and Petroleum Act 1937, s.29(1)(p), the latter also extended to include the bed of rivers.

In the *Lake Omapere* case Acheson J described the Maori conception of lakes.<sup>135</sup>

To the spiritually-minded and mentally gifted Maori of every rangatira tribe, a lake was something that stirred the hidden forces in him. It was (and, it is hoped, always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a "mauri" or "indwelling life principle" which bound it closely to the fortunes and destiny of his tribe. Gazed upon from childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people.

As we have seen the ownership of many of New Zealand's lakes, probably the majority, has been settled either by the Courts or by agreement by the Crown and the Maori customary owners. It is likely then that the actual ownership of lakes will not be a major source of complaint to the Waitangi Tribunal. When it does arise it will undoubtedly be connected with many other issues. One situation in which the issue of ownership of certain lakes has arisen is in the extensive Ngai Tahu claim presently being heard by the Waitangi Tribunal. The claim largely revolves around the series of large scale land purchases by the Crown in the South Island between 1844 and 1860. In the Murihiku Purchase of 1853 the Crown claim it purchased the whole of Southland right across to the Fiordland coast. Ngai Tahu dispute this and allege that the agreement only extended westwards as far as the Waiarau River and did not include Fiordland. The Fiordland area in dispute is almost entirely National Park and includes both Lake Te Anau and Lake Manapouri. Ngai Tahu claim that the term "Murihiku" used in the purchase document does not include Fiordland, which was traditionally known as '*Te Whakatakanga oo Te Karehu oo Tamatea*' and which is "one of the cradles of Ngai Tahu mythology and tradition".<sup>136</sup> If the Ngai Tahu claim is well-founded there is no reason why tribal ownership should not be recognised, the Ngai Tahu tribe itself stating that the National Park status would not be affected.

Other claims may arise before the Tribunal where the terms of particular settlements between the Crown and the Maori are challenged as being contrary to the Treaty. In some cases the Crown may not have fulfilled its obligations, either in terms of financial payments or environmental protection. There may also be cases similar to that pending with Lake Omapere where the Maori Land Court's determination of Maori tribal ownership appears not to have been recognised or implemented, thus preventing the effective exercise of that tribal ownership.

In the case of lakes, as with rivers, the majority of claims is likely to relate to their use and control, and more particularly the failure of the present legislative and administrative systems to adequately recognise and safeguard Maori customary use and control of both lakes and rivers.

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135. Above n109, 260.

136. Tipene O'Regan "The Ngai Tahu Claim" in Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi IH Kawharu (ed)(Oxford, Auckland, 1989) 234, at 245.

## V. MAORI USE AND CONTROL

### A. Fishing Rights

The main corollary to Maori customary ownership of lakes and rivers, and a factor which has been extensively cited in claims to such ownership, has been Maori rights of usage, particularly fishing rights.<sup>137</sup> Both rivers and lakes have traditionally provided a valuable resource in terms of their fisheries. In the *Wanganui River* and the *Lake Rotorua* cases, for example, there was comprehensive evidence of the great quantity and variety of eels and fish that existed and of their importance as the primary source of sustenance of the respective tribes. The Waitangi Tribunal has on several occasions expounded the status of Maori fisheries as *taonga* and thus, the obligations on the Crown to recognise and safeguard them under the Treaty of Waitangi.<sup>138</sup>

However, history has seen the voicing of numerous Maori claims and grievances in this area. These have generally involved allegations of the destruction or diminution of river and lake fisheries by a variety of European activities. A clear example was the indiscriminate destruction of *pa tuna* (eel weirs) and other fish-traps on the Wanganui River in the 1880s and 1890s by the Wanganui River Trust to provide a passage for boats. As the Maori Land Court commented:<sup>139</sup>

The local Natives used the bed of the river from time immemorial for the erection of eel weirs and other fish traps yet these were indiscriminately and, so far as the Court can see, without any right or justification, destroyed or done away with to provide a passage for river steamers. Any protest by the unfortunate people who owned the eel weirs remained unheeded.

Lakes and rivers were exploited in numerous ways, all usually to the detriment of Maori fisheries. Gold mining had a devastating impact on the Ohinemuri River where it was claimed cyanide deposits had destroyed the river as a fishing ground.<sup>140</sup> The effect of hydro-electric development was felt in lakes and rivers throughout the country, resulting in changes in the flows, levels and temperatures of the water destroying many fishing grounds. In a recent review of the flow levels of the Wanganui River there was clear evidence of the drastic reduction in the numbers of many freshwater fish due to the effects of the Tongariro Power Development.<sup>141</sup>

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137. Lakes and rivers were also used extensively for snaring and capturing ducks and other birdlife, and there may also be grounds for claiming these rights under the Treaty of Waitangi in a similar way to customary fisheries.

138. See especially Motanui Report(1983, Wai.6) and Muriwhenua Fishing Report(1988-Wai.22)

139. Maori Land Court, Browne J, decision of 20 September 1939,2.

140. 1906 AJHR I-4,2.

141. Rangitikei-Wanganui Catchment Board and Regional Water Board Wanganui River Minimum Flow Review : Report and Recommendations of the Tribunal 20 September 1988, 8-9.

Pollution has also been a major source of grievance over the years. The Waitangi Tribunal in the *Kaituna Report* found that the proposal to discharge effluent into the Kaituna River would detrimentally affect the fisheries of the Ngati Pikiao in both practical and spiritual terms.<sup>142</sup> The Waikato River which once boasted a great fishery now receives the stormwater and sewage from 21 towns, heated effluent from two coal-based power stations and the run-off from 90 million litres of animal wastes daily.<sup>143</sup>

Such cases involving clear interference with Maori fishing rights have usually resulted in compensation being completely ignored or only token in nature. In the case *Mohi v Craig*<sup>144</sup> the Supreme Court ordered compensation to be paid to a Maori owner of eel-fishing rights which were affected by the floating of timber downstream by timber mills. However, the jury protested that:<sup>145</sup>

[T]he law has in this case been made the instrument of spoliation and oppression, which shocks every sentiment of natural justice, we should be highly gratified if the Legislature would devise and carry into effect a measure calculated to repair such intolerable wrong.

Consequently, the Timber Floating Act 1873 was enacted which permitted the floating of timber down streams and rivers, and limited compensation to only immediate damage.

Generally, fishing rights in non-tidal rivers and lakes are taken to flow from ownership of the underlying bed.<sup>146</sup> In New Zealand the reality is that the majority of river and lake beds are now vested in the Crown, and as such there are only public rights of fishing which are subject to the various limitations imposed by fisheries regulations and legislation. Although Maori customary fisheries are protected under the Treaty of Waitangi this has no legal effect except where it has been specially provided for in statute. Thus, where rivers or lakes are in Crown ownership or control the Maori prima facie have no fishing rights other than that of the general public.

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142. *Kaituna Report* (1984, Wai 8), 39.

143. Young and Foster *Faces of the River* (Auckland 1986), 112.

144. Unreported, see (1873) 15 *New Zealand Parliamentary Debates* 1172.

145. *Idem*.

146. New Zealand Law Commission Preliminary Paper 9 *The Treaty of Waitangi and Maori Fisheries* (1989), 74.

However, there has been some legislation which has specifically recognised certain Maori fishing rights. As discussed earlier the settlements between the Crown and the Maori over Lake Taupo,<sup>147</sup> Lake Horowhenua,<sup>148</sup> and the Rotorua Lakes<sup>149</sup> all involved the statutory reservation of certain Maori fishing rights. The fishing rights of the Muaupoko in Lake Horowhenua are further preserved in terms of eel fisheries by clause 3 of the Fisheries (Central Area Amateur Fishing) Regulations 1986. Such reservations only allow the taking of indigenous fish species and often then on strict terms, such as only by traditional fishing methods<sup>150</sup> and not for the purpose of sale.<sup>151</sup> This fishing right was in many cases very limited because the introduction of exotic fish, especially trout, by acclimatisation societies had destroyed or reduced many indigenous fish species. Such a complaint was made to the Stout-Ngata Commission in 1908 in respect of Lake Rotorua.<sup>152</sup>

[T]he fish of the Pakeha was introduced, and after years throve and multiplied, so much so that the indigenous fish have been almost destroyed. In the lakes and rivers ... where we were accustomed to fish at will, and where our native fresh-water fish supply has been destroyed by imported fish we are compelled by the Crown to pay a heavy license fee for the privilege of taking food. We do not fish for pleasure ... If the foreign fish have supplanted our native fish in these waters ... we appeal for due and sympathetic recognition of our claims to take fish for food in these lakes and rivers. It is not a privilege we have any desire to abuse by the indiscriminate taking of fish.

In response to certain of these claims the Crown allowed trout to be taken. In Lake Rotoaira the Maori owners were given the right to take any fish without a licence.<sup>153</sup> In Lake Taupo a limited number of trout licenses were issued without charge each year to members of the Tuwharetoa tribe.<sup>154</sup>

Also of significance here, but as yet untested in terms of freshwater fisheries, is section 88(2) of the Fisheries Act 1983. This section applies equally to inland fisheries as it does to sea fisheries and provides:

Nothing in this Act shall affect any Maori fishing rights.

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147. Native Land Amendment and Native Land Claims Adjustment Act 1926, s.14(2).

148. Reserves and other Lands Disposal Act 1956, s.18(5).

149. Reserves and other Lands Disposal Act 1922, s.27(2)

150. Rotoaira Trout Fishing Regulations 1986, cl.47(2).

151. Above n147, n149.

152. 1908 AJHR G-1E,7.

153. Maori Purposes Act 1959, s.14.

154. Native Land Amendment and Native Land Claims Adjustment Act 1926, s.14(9)(c).

Despite its effect being greatly limited by judicial decisions since its enactment in 1877,<sup>155</sup> albeit in a rather different form, the section has been recently revitalised by the decision in *Te Weehi v Regional Fisheries Officer*.<sup>156</sup> *Te Weehi* is basically authority for the view that section 88(2) safeguards the existence of traditional Maori fishing rights, over sea fisheries at least, unrestricted by the regulatory regime of the Fisheries Act 1983 until such rights are expressly extinguished. This decision may well provide the basis for allowing Maori to catch exotic fish without compliance with fisheries regulations, especially when one considers the extensive destruction of native fish, and therefore traditional Maori fisheries, as a result of the introduction of such foreign fish species.

Of possible persuasive value here are the landmark United States' decisions in *United States v State of Washington*<sup>157</sup> (the 'Boldt' decision) and *United States v State of Washington - Phase II*.<sup>158</sup> In the *Phase II* decision the tribal share of the fisheries resource guaranteed under the Indian Treaty was held to include hatchery-bred, artificially propagated fish because non-Indian activity had resulted in the degradation and destruction of the natural fishery habitat.<sup>159</sup> Analogies could easily be drawn between this and the New Zealand situation where native fish stocks have been largely destroyed by Pakeha developments. The Boldt decision is also important in its findings that if the control of fisheries is necessary in the cause of conservation, then the State must first direct its attention to restricting the non-Treaty commercial and recreational fishermen, and only if such a restriction is not sufficient for the needs of conservation can the State turn its attention to the Treaty fishermen. The Court essentially found that commercial and recreational fishermen have only a privilege to take fish, but the Treaty fishermen have a right to do so.<sup>160</sup> These principles were further developed in the *Phase II* decision where it was found the Treaty right is a right to catch fish, not to go fishing in the hope of catching something, and as such the State's obligations extended to ensuring its environmental policies are not to the detriment of the tribal fishery resource.<sup>161</sup>

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155. The Section was first enacted in the Fish Protection Act 1877, s.8, albeit in a rather different form, and was continued in the Fisheries Act 1908, s.77(2). The decision in *Waipapakura v Hempton* (1914) 33 NZLR.1065 held, that s.77(2) only protected those Maori fishing rights that were specifically established by statute, and did not itself give rise to any such rights.

156. [1986] 1 NZLR 681.

157. 384 F Supp.312(1974). This decision was upheld by the US Supreme Court in *State of Washington v Washington State Commercial Passenger Fishing Vessel Assoc.* 443 US 658, 61L L Ed823, 99 SCt 3055(1979).

158. 506 F.Supp. 187 (1980).

159. *Ibid.*198.

160. Above n157,332.

161. Above n158,203.

The application of such Treaty-based rights in New Zealand may well be affected by a determination of whether the rights recognised in section 88(2) are those protected by the Treaty of Waitangi or refer to rights stemming from the common law doctrine of aboriginal title.<sup>162</sup> *Te Weehi* was suggestive of aboriginal title rights, while a recent decision, *Ministry of Agriculture and Fisheries v Hakaria & Scott*,<sup>163</sup> point towards the Treaty although in a somewhat restricted manner.<sup>164</sup> The proposed inclusion of the freshwater fisheries legislation, including an equivalent to section 88(2), within the Conservation Act 1987<sup>165</sup> may give more emphasis to a Treaty-based approach with regard to lake and river fisheries, because section 4 of that Act requires it to be administered in accordance with the Treaty of Waitangi.

## B. Water Rights

One issue which has not been given much consideration by commentators is the extent of Maori rights to the water itself, as opposed to the river or lake bed or the fisheries. At common law ownership of water is vested in no one, rather it is a common property resource of all, like the air. In New Zealand ownership of water appears to be equally undefined, being vested neither in the Crown, nor in the owners of the river or lake bed, nor in the holders of water rights. Prior to the Water and Soil Conservation Act 1967 rights to use the water resource were based on common law riparian rights whereby any person owning land adjacent to a river or lake could use, take, or discharge water. The entire flow of a stream could be taken for domestic purpose or purposes connected with the land, but not for purposes unconnected with the use of the riparian land.<sup>166</sup> However, the Water and Soil Conservation Act 1967 effectively extinguished the major common law rights to use water, and all rights to the use of water were vested in the Crown. Under the Act, Regional Water Boards have wide powers to grant individual rights to dam rivers or streams, to divert or take natural water, or to discharge natural water or waste into any natural water. However, no actual ownership rights are expressed in the statute.

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162. See Part IV of this paper.

163. Unreported, 19 May 1989, District Court Levin. CRN 8031003482-3.

164. See Mai Chen "Customary Maori Fishing Rights"[1989] NZLJ233.

165. Section 17 of the Conservation Law Reform Bill 1989 proposes to include the new sections 26A-26ZN into the Conservation Act 1987. The proposed s.26ZE states "Nothing in this Act shall affect any Maori fishing rights."

166. Resource Management Law Reform. Working Paper No.2 Analysis of Existing Statutes: Departmental Views. Part III, Water and Soil Conservation Act 1967, Appendix 3.

The issue as to Maori customary rights is certainly not addressed by the 1967 Act. Nonetheless, there are grounds for arguing that the Maori have ownership of the waters, especially in those cases where the lake or river bed is already in Maori ownership. To the Maori the bed of lakes and rivers and the water flowing above were a single spiritual and physical entity. The water and the subaqueous land were indivisible and could not be conceptualised as the separate and administratively-unconnected resources that are recognised in the European system. This exact point is presently being disputed in regard to Lake Horowhenua between the Muaupoko trustees and the Conservation Department, and there is the possibility of the matter being taken to the High Court for determination.<sup>167</sup> Support for the contention may be found in the 1955 ruling of the Maori Land Court in the *Lake Omapere* case<sup>168</sup> where both "the land and the water" known as Lake Omapere were vested in trustees on behalf of the Ngapuhi tribe, as well as the right "to sell the water to any person, corporation, local or Municipal Authority or Government Department".

If such a proposition does find support either by the courts or the Waitangi Tribunal the consequences could be very interesting. Any Maori 'owners' of water may have the right to use and control that water unrestricted by the regulatory regime of the Water and Soil Conservation Act 1967. The power of Regional Water Boards to grant water rights may not be effective over any 'Maori-owned' water, or alternatively the Maori 'owners' may be able to veto any such grants. Maori 'owners' may also be able to validly grant or sell water rights to other persons without official approval under the Water and Soil Conservation Act. The idea is not so far-fetched - the Maori Land Court order of 1956 vesting Lake Rotoaira in a group of trustees empowers those trustees to:<sup>169</sup>

[M]ake arrangements or contracts with the Crown or any other Department thereof for the use of the water from the said Lake for hydro-electric or other purposes to arrange and decide on behalf of the Maori beneficial owners upon the conditions affecting the right to carry out such works, including fixing the consideration payable to the owners thereof.

Also of interest in reference to the question of water rights is the situation with regard to Indian water rights in the United States. Indian rights to water are based on the Winters Doctrine following the 1908 case *Winters v United States*.<sup>170</sup> However, the vast differences in the systems of water rights in the United States from those in New Zealand make the comparison of little more than interest value. In the United States there are two major systems of water rights - the riparian system in the water-abundant Eastern State and the 'appropriative' (first user) system of the water-scarce Western States. The Indian Winters Doctrine

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167. The Dominion, Wellington, 5 May 1989.

168. Above n112, but note that this Order does not appear to have been acted on and a Waitangi Tribunal claim may be pending.

169. *In re Lake Rotoaira*(1956)34 Tokaanu MB.299.Order of 6 December 1956.

170. 207.US.564(1908).



rights fits somewhere in between the two and is restricted purely to rights of access to sufficient water to irrigate all the "practicably irrigable acreage" of the Indian reservations. These rights may be leased but not sold.<sup>171</sup>

The consequences of Maori ownership of waters are far-reaching. The Waikato River, for example, in addition to its numerous hydro-electric projects, supplies water to over 20 industries and to more than 200 individual irrigation users, and receives even greater discharges.<sup>172</sup> The issues are complex, but they will have to be carefully addressed by all interested parties in the near future.

### C. Water Administration

The foundation of the present system of water conservation and regulation is the Water and Soil Conservation Act 1967. It has already been clearly established that the Treaty of Waitangi guaranteed Maori the full authority to use and control their resources - their *taonga*, including rivers and lakes - in accordance with Maori custom. The Crown's obligation here is not a passive one, rather they must actively protect the Maori in the ownership, use and control of their *taonga*. In return for the Maori right of *te tino rangatiratanga* or 'full authority,' the Crown obtained the right of *kawanatanga* or 'governorship'. One of primary findings of the Waitangi Tribunal has been that the Crown has exceeded its right of *kawanatanga*, in many cases to the complete exclusion of *rangatiratanga*. In the *Muriwhenua Report* the Tribunal explained:<sup>173</sup>

The cession of sovereignty or *kawanatanga* gives power to the Crown to legislate for all matters relating to "peace and good order"; and that includes the right to make laws for conservation control. Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike. The right so given however is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second.

Thus, the Crown does have some general authority over resources, but it is contrary to the Treaty to have legislation "without adequate regard to the Crown's Treaty undertakings".<sup>174</sup>

The Water and Soil Conservation Act 1967 is evidence of such a failure to adequately safeguard Maori rights within the legislative and administrative processes. There is no provision within the Water and Soil Conservation Act

171. The Winters Doctrine is concisely discussed in Canby *American Indian Law* (West Publishing Co. Minnesota, 1988), 277-294.

172. Above n143, 112.

173. *Muriwhenua Report* (1988, Wai.88) 232.

174. *Ibid.* 227.

1967 that requires specific account to be taken of Maori cultural and spiritual values. This situation was highlighted in the case *Minhinnick v Auckland Regional Water Board and Waikato Valley Authority*<sup>175</sup> where the Planning Tribunal felt unable to take into account Maori cultural and spiritual values that transcend the mere physical environment. This failure was a major source of concern in both the *Manukau and Motanui* reports.

The position has been somewhat alleviated by the recent High Court decision in *Huakina Development Trust v Waikato Valley Authority & Bowater*<sup>176</sup> where it was held that Maori cultural and spiritual values are relevant in the context of decision-making processes under the Water and Soil Conservation Act 1967. In doing so the Court placed much emphasis on the importance of the Treaty as part of the "fabric of New Zealand society" in which legislation is to be interpreted.<sup>177</sup> However, this decision is only authority for the view that Maori values are relevant, but it does not accord them any over-riding priority. In this regard it is interesting to note the comments of the Waitangi Tribunal in the recent *Mangonui Sewerage Report*.<sup>178</sup>

The Treaty ... requires a balancing of interests in some cases, and a *priority for Maori interests in others* (emphasis added).

Thus, it may be argued that in certain circumstances the significance of Maori cultural and spiritual values may be paramount to all other interests and as such that even a balancing approach is inappropriate. Such a view is largely speculative at this point in time, but it may be a direction for development by the Courts or the Waitangi Tribunal in the future.

Even the legislative recognition of the relevance of Maori cultural and spiritual values will not resolve problems of insensitivity or ignorance without adequate provision for actual Maori participation in the management and control of New Zealand's water resources. This will involve participation in the administration and decision making under the Water and Soil Conservation Act 1967.<sup>179</sup> There should be Maori input and representation, not only at the regional level, but in the control of specific water resources. This is particularly important in situations where it is not practical to return a lake or river to Maori ownership. This was emphasised in response to the 1979 petition concerning the Wanganui River where the Maori Affairs Committee stated:<sup>180</sup>

175. Unreported Planning Tribunal decision No.A116/81, 16 December 1981.

176. *Huakina Development Trust v Waikato Valley Authority*[1987] 2 NZLR.188.

177. *Ibid*, 210.

178. *Mangonui Sewerage Report*(1988, Wai 17),7.

179. The Waitangi Tribunal on p108 of its *Manukau Report*(1985, Wai.8) stated that "it is not satisfactory to have token Maori representation. All too easily will such bodies merely assert a 'democrate' right for the majority to outvote the minority which will perpetuate grievances and bring no better results in the future than those that have been produced in the past."

That wherever possible the Government take account of that part of the petition which lays emphasis on the restoration of *Mana o Te Turangawaewae* as distinct from material rights.

A draft management plan for the Whanganui National Park in 1987 guaranteed the Maori people statutory involvement in the management of the park and the river bed.<sup>181</sup>

180. *R v Symonds* (1849-1852) NZPCO 307.

181. *Aboriginal Title in New Zealand Cases* (1994) 3 Canterbury LR 213; 'The Legal Status of Maori Fishing Rights in Tidal Waters' (1994) 14 VUWLR 247; 'Maori Fishing Rights and the Public Fisheries Act' (1993) 6 Otago LR 62; 'Aboriginal Services and the Land Transfer Act 1952-1980' in VUWLR 313; 'Aboriginal Title Returns to the New Zealand Courts' (1989) NZLLJ 36; 'The Legal Basis for Maori Claims against the Crown' (1988) 18 VUWLR 1; Dr. *Aboriginal Rights of the New Zealand Maori Community* Law 110 Thesis Cambridge 1987.

182. *Alger* 136.

183. [1984] 2 SCR 335, 15 DLR (40) 321.

184. See comments above 170.

185. In the *Te Rau Maori Report* (1986 Wa 77) the Waitangi Tribunal found that the Maori had a right to guaranteed protection under the Treaty.

186. The return of *mana* (sovereignty) and the restoration of *te tino rangatiratanga* (the full authority) under the Treaty immediately give rise to questions of the distribution of power or authority.

187. Waitangi Tribunal in its *Marlborough Report* (1986 Wa 77) recognized that the Maori had a right to guaranteed protection under the Treaty. The Tribunal stated that the Maori had a right to guaranteed protection under the Treaty.

180. 1980 AJHR I-3,3.

181. Newstel Log; Radio NZ.7.00am News 21 December 1987.



## VI. ABORIGINAL TITLE

The common law doctrine of aboriginal title essentially provides that where the Crown obtains sovereignty, by either cession or conquest, it does so subject to the pre-existing rights of the indigenous people. Thus, the Maori would have a legal right to the continued recognition of their 'aboriginal rights', until they have been expressly extinguished by either legislation or voluntary cession. The doctrine received some recognition in New Zealand in the 1847 decision *R v Symonds*,<sup>182</sup> but did not come under any degree of scrutiny again until the recent *Te Weehi*<sup>183</sup> decision and the extensive writings of Doctor Paul McHugh.<sup>184</sup> The doctrine has, however been extensively developed in Canada where the leading case has been *Guerin v the Queen*.<sup>185</sup>

The distinction from the Treaty of Waitangi is that the aboriginal title doctrine gives a legal right until extinguished by statute or cession, whereas the New Zealand Courts have said the Treaty, despite its political or moral status, gives nothing in law except where specifically provided for.<sup>186</sup> The aboriginal title doctrine rights are not however, completely synonymous with rights under the Treaty. The aboriginal rights doctrine is largely limited to customary property rights, whereas the Treaty goes beyond this to recognise rights to intangible properties<sup>187</sup> and to some degree of political autonomy.<sup>188</sup> I do not intend to discuss these issues in any further detail, but rather to briefly describe the possible application of the aboriginal title doctrine to the situation of lakes and rivers.

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182. *R v Symonds* [1840-1932] NZPCC 387.

183. 'Aboriginal Title in New Zealand Courts'(1984) 2 Canterbury LR 235; 'The Legal Status of Maori Fishing Rights in Tidal Waters'(1984) 14 VUWLR 247; 'Maori Fishing Rights and the North American Indian' (1985) 6 Otago LR 62; 'Aboriginal Servitudes and the Land Transfer Act 1952' (1988) 16 VUWLR 313; 'Aboriginal Title Returns to the New Zealand Courts' [1987] NZLJ 39; 'The Legal Basis for Maori claims against the Crown'(1988) 18 VUWLR 1; The Aboriginal Rights of the New Zealand Maori at Common Law PhD Thesis Cambridge 1987.

184. Above n156.

185. [1984] 2 SCR 335, 13DRLR (4th)321.

186. See comments above n70.

187. In the Te Reo Maori Report (1986 Wai 11) the Waitangi Tribunal found that the Maori language is a taonga guaranteed protection under the Treaty.

188. The cession of kawanatanga(governorship) and the reservation of te tino rangatiratanga(the fall authority) under the Treaty immediately gives rise to questions of the distribution of power or sovereignty. The Waitangi Tribunal in its Muriwhenua Report (1988,Wai.22) recognised that the Crown's sovereignty is limited by the guarantee of rangatiratanga, and vice versa. The Tribunal stated "[W]e are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to separate sovereignty but to tribal self-management on lines similar to what we understand by local government".(p187).

## A. Territorial Rights

The aboriginal title doctrine recognises the right of indigenous people to the full ownership, use and occupation of their customary lands in accordance with their own customary preferences. This right has been comprehensively extinguished by section 155 of the Maori Affairs Act 1953 which provides that :

Except so far as may be expressly provided in any other Act, the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any other manner as against Her Majesty the Queen ...

However, it has been indicated that Section 155 will be repealed, the result being that customary title may still avail against the Crown. This is significantly aided by a provision in the Limitation Act 1950 which provides that limitations do not run in relation to Maori customary land.<sup>189</sup>

However, this does not operate to save Maori customary title to rivers and lakes. The transmutation of Maori customary title into Maori individual ownership by the Maori Land Courts in many cases operated to extinguish aboriginal title, while the sales of both rivers, (albeit through the implied *ad medium filum*) rule, and lakes, extinguished the rights in other cases. Section 261 of the Coal Mines Act 1979 and its statutory predecessors also operated to effectively extinguish aboriginal rights over rivers. Thus, the aboriginal title doctrine has been effectively extinguished in terms of any territorial rights over lakes and rivers.

## B. Non-Territorial Title

A non-territorial aboriginal right may still arise over lakes and rivers even after the Maori customary title has been lost. In the case of lakes and rivers such a non-territorial right would usually take the form of a customary fishing right. Such non-territorial aboriginal rights found recognition in the *Te Weehi* decision, where it was held that in the absence of express statutory extinguishment Crown land can be burdened by such a right. Williamson J was aided in coming to his conclusions in *Te Weehi* by the existence of section 88(2) of the Fisheries Act 1983 which effectively safeguards "any Maori fishing rights". Although such a provision is not necessary to support an aboriginal title claim it is worth noting that section 88(2) also applies to inland waters. Thus where lakes and rivers are in Crown ownership non-territorial fishing rights may still exist, and these are not affected by Section 155 of the Maori Affairs Act 1953. Section 261 of the Coal Mines Act 1979 also seems to only have the effect of extinguishing any territorial title, and therefore also does not affect non-territorial aboriginal rights.

There is also the argument raised by McHugh that such non-territorial aboriginal rights are valid over land that is owned by private landholders.<sup>190</sup> The argument

189. Limitation Act 1950,s6(1).

190. P McHugh 'Aboriginal Servitudes and the Land Transfer Act 1952' (1986)16 VUWLR 313.

essentially is that where such land, including in some cases rivers and possibly lakes, was transmuted from Maori customary land to Maori freehold land two separate tenures were created - firstly, there is the land itself, held under English tenure by the Maori freeholders; and secondly, there are the non-territorial rights held under customary tenure by the customary owners. The freehold title created by the process of the land through the Maori Land Court is therefore separate from the customary tenure under which the non-territorial rights are still held. Thus, the Maori freehold owners are a separate class from the Maori customary owners and on the alienation of the freehold land only the freehold title passes, the customary non-territorial title still remaining with the customary owners.

The issue is really only of concern in the case of rivers where there is still the possibility of private ownership, whereas most if not all lakes are either vested in the Crown or in Maori owners. There is still the possibility that the registration of a title under the Land Transfer system would give an indefeasible title free from such customary non-territorial rights, although McHugh does argue against this.<sup>191</sup> However, there is no such problem in respect of rivers because the case *Attorney-General v Leighton*<sup>192</sup> held that title to river beds was not indefeasible.

Thus, there may still be the possibility of non-territorial aboriginal fishing rights existing in privately owned rivers, as well as, in those rivers and lakes that are in Crown ownership. Although the aboriginal rights doctrine does provide some possibility of legally enforceable rights, the more preferable approach is one that focuses on the Treaty as the source of Maori rights in New Zealand. Although Treaty rights are not, as yet, prima facie enforceable in law, they are more comprehensive and capable of growth and development, and are increasingly gaining recognition by the judiciary and the legislature.

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191. Ibid.329.

192. [1955] NZLR 750.

## VII. THE WAY AHEAD

As this paper has outlined there have been a multitude of Maori claims and grievances in respect of rivers and lakes and to the large part these remain as yet unresolved. In general terms, the status of lakes and rivers as *taonga* cannot be questioned. The Maori traditional conception of rivers and lakes is of a single entity, incorporating both the physical and the metaphysical, an entity embodying *wairua, mauri and mana*, inextricably linked with the people themselves. The Treaty of Waitangi guaranteed the right of the Maori, for as long as they wished, to retain their rivers and lakes in accordance with longstanding custom on a tribal basis. The Crown's obligation is not merely passive, but extends to the active protection of the Maori people in the ownership and use of their waters. Clearly, reality has not seen the fulfillment of this guarantee.

The law relating to the Maori ownership of both lakes and rivers remains to a significant degree unsettled. In the case of rivers, as epitomised by the saga of the Wanganui, the questionable application of the common law *ad medium filum aquae* doctrine together with section 261 of the Coal Mines Act 1979 has effectively stripped the Maori of a tribal resource whose spiritual and cultural value cannot be overstated. As for the case of lakes, where the dominant theme has been largely one of negotiation, the results have also been by no means fair, either in terms of the recognition of rights or the compensation for their denial.

Even apart from the issue of ownership, Maori rights and values in both the use and control of lakes and rivers have been largely ignored. Large scale pollution and hydro-electric development have also been to the severe detriment, both physically and spiritually, of Maori water and fisheries resources. The administration of water resources has also been, until very recently,<sup>193</sup> to the absolute exclusion of Maori values or participation.

Where Maori claims to the ownership of lakes and rivers are found to be well-founded there should be every effort on the part of the Government to return these lakes and rivers to tribal ownership. The form of tribal ownership should be dependent on the wishes of the tribe themselves not the arbitrary views of Government. Lakes and rivers should be vested in genuine Maori trust boards elected by tribal members *and* accountable to the tribe itself, and the proposed devolution of government functions to iwi authorities may be useful here. In many cases the lakes and rivers involved may form parts of existing or proposed National Parks and the public interest in retaining them as such is an important one. However, there need be no conflict of interest between tribal ownership of

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193. See Huakina Development Trust v Waikato Valley Authority as discussed earlier in Part V(C) of this paper; and Wanganui River Minimum Flow Review: Report and Recommendations of the Tribunal, Above n141, 6-7, 17, 19-23.

lakes and rivers and their National Park status,<sup>194</sup> and the two could exist in unison in a genuine partnership relationship between the tribe and the Department of Conservation.

In other cases the return of Maori ownership may not be practicable, either where there is extensive hydro-electric developments, or where third parties have established proprietary interests,<sup>195</sup> and then the focus must be on negotiated monetary settlement. In the present Resource Management Law Reform the issues relating to resource ownership have been excluded from the review process.<sup>196</sup> Such ownership issues are fundamental and must be resolved before any effective general review can take place.

Regardless of whether lakes and rivers are presently in Maori or Crown ownership, or whether they will be returned to Maori ownership in the future, there must be a firm recognition of Maori spiritual and cultural values in the Water and Soil Conservation legislation and the administration of that legislation must incorporate active Maori participation at all levels - legislative and executive, central, regional and local. Changes are occurring as evidenced in the recent decision of the Rangitikei-Wanganui Catchment Board Tribunal which recommended that Electricorp's diversion of water from the Wanganui River should be reduced by 50%, and placed much significance on Maori spiritual, cultural and traditional fishing values.

It should not be a case of what might have been. There are major steps that can and must be taken to recognise and restore Maori ownership and values. The issues are complex and the solutions may not be easy - it is estimated that the cost of cleaning up Lake Horowhenua from the effects of over 30 years of sewage discharge will be around \$20 million.<sup>197</sup>

The ownership, use and control of lakes and rivers, and their waters and fisheries, must be resolved. In many cases the issues will be tightly interwoven with other Maori claims and will have arisen through differing historical developments. There can be no single-handed approach. Each lake and each river, the values associated with it and the attendant conflicts of use will be peculiar to that par-

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194. Ngai Tahu have stated that National parks should stay parks even if tribal ownership is confirmed, but wish to maintain an active share of the administration, employment, training and commercial development of the parks. Above n136, 257. and the two could exist in unison in a genuine partnership relationship between the tribe and the Department of Conservation.

195. The Waitangi Tribunal has emphasised on several occasions that it is contrary to the spirit of the Treaty that the resolution of one injustice should create another.

196. Resource Management Law Reform People, Environment and Decision Making: The Government's Proposals for Resource Management Law Reform. (Ministry of the Environment, Wellington, 1988),32.

197. The Evening Post, Wellington, 5 September 1989.



ticular lake or river. The future resolutions of these issues will rest on the determinations of both the Waitangi Tribunal and the Courts and on a positive and equitable accord between Maori and the Government.

*Attorney-General v Emerson* [1891] AC 649

*Attorney-General ex Hutt River Board v Leighton* [1955] NZLR 750

*Baker v Carnigan* (1875) 3 App Cas 641

*Canada et al v The Queen* [1984] 2 SCR 351, 13 DLR (4th) 221

*Chubb v Jenkins* [1901] 2 Ch 401

*Minister Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC)

*Business Development Trust v Waikato Valley Authority & Boswell* [1987] 2 NZLR 183

*De Jong v Morrison* [1950] NZLR 247

*Malley v The Tairāpiti Coal Mining Ltd* [1902] 20 NZLR 89

*McWhirter v Auckland Regional Water Board and Waikato Valley Authority Planning Tribunal Decision No A116/81*, 16 December 1981

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