TE UREWERA

PART VI

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TE UREWERA

PRE-PUBLICATION

PART VI

WAI 894

WAITANGI TRIBUNAL REPORT 2015

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PREFACE

This is part v1 of a pre-publication version of the *Te Urewera* report and constitutes chapters 21 to 23 of the report. As such, parties should expect that in the published version headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Photographs and additional illustrative material may be inserted, and some maps may be modified, added, or replaced.

The Honourable Te Ururoa Flavell
Minister for Maori Development
Parliament Buildings
WELLINGTON

The Waitangi Tribunal
141 The Terrace
WELLINGTON

22 December 2015

Tena koe e te Minita Whanaketanga Maori,

'Aha Toia mai! Te Waka!'

Ka tu koe ki te kei o te waka, ka matai koe i te iwi Maori. Ka kawea tatou i nga wawata o onamata, o anamata. Ka waihoe tatou i te waka ki te pae tawhiti, whakamaua kia tina. Koutou nga kaihoe kua rere atu ki te waka o Tamarereti, haere whakangaro atu ra. Ma tatou nga urupa o ratou ma e whakatutuki i nga wawata o te iwi. Tihei Mauriora!

This is the sixth and last volume of our report in pre-publication form. In total, the report comprises approximately 3,500 pages and covers the entire body of claims that deal with the period from 1840 through to the middle of the last decade in Te Urewera.

We did not set out to write a history but it was necessary to report on 41 claims, most of them challenging and complex in the extreme. The claims were, to an extent, intertwined. The interaction between the Crown and the peoples of Te Urewera had to be reviewed in a continuing narrative, while the chapters dealt with quite different issues that arose during successive periods in the last 160 years.

The relationship between the Crown and the peoples of this district could not have got off to a worse start. Almost immediately after there was contact, the Crown wrongly confiscated a large area of Tuhoe's best land, in the Eastern Bay of Plenty. This was followed very shortly after by a devastating war in Te Urewera. Recovery in a social sense has not been rapid or easy and the awful start soured the relationship for a long time.

We do want to take this opportunity to congratulate Ngai Tuhoe, Ngati Manawa and Ngati Whare, Ngati Hineuru, and the Crown on being able to reach settlement and move forward.

Of course, in terms of the legislation underpinning the settlement, this means that our jurisdiction to make recommendations is largely gone.

This volume is made up of three chapters, and reports on:

- Environment and waterways claims
- Some specific claims
- Socio-economic claims

When we look back at the report as a whole, there are recurring themes and recurring ways in which the claimants see the relationship with the Crown:

- The claimants' search for recognition of their mana motuhake/tino rangatiratanga. This pervades all of the claims and is dealt with by us throughout the report.
- Their belief that the Crown has repeatedly made and broken promises, particularly promises made by Premier Richard Seddon over a hundred years ago and some of which was enshrined in legislation. In earlier chapters we dealt with this in relation to the Crown's grant to the peoples of Te Urewera, through the Urewera District Native Reserve Act 1896, of real powers of self-government and collective tribal control of their lands. The outcome was not the functioning partnership with the Crown that Te Urewera leaders had expected, but the Crown's abandonment of its promises to uphold their self-government, and protect their Reserve lands. In the Urewera Consolidation Scheme, Maori owners of the Reserve lands that survived the Crown's predatory purchasing were made two cornerstone promises: they would receive two arterial roads (to assist their development of modern farming enterprises) and state–of-the-art land transfer titles (to assist them develop their land). For this, they contributed over 70,000 acres of land; but the Crown dishonoured both promises. The same theme of broken promises recurs regularly in this volume.
- Their belief that Te Urewera peoples have been treated less than fairly, left behind, ignored and not been allowed to progress to the same degree as other citizens of Aotearoa. This is particularly dealt with in this volume of our report in relation to socio-economic matters.
- The claimants also believe that the Crown has ignored and usurped their customary rights, particularly their authority over their lands and waterways, and resources. Raupatu was the first example. A later example is the claimants' long struggle over ownership of the bed of Lake Waikaremoana and a struggle over rights to waterways which is still playing out in the general courts, most recently in relation to a part of the Waikato River. In our environment chapter we deal with forests, rivers and customary rights. Forests of course are particularly referred to and reserved to Maori in article two of the Treaty.

There are, of course, other themes. We do not intend to list or discuss them all. What is important, however, is to have regard to the main ones, for it gives the reader a chance to see the bigger picture both from a Crown and claimant perspective.

In the first chapter in this volume, the twenty-first in our report, we discuss environmental issues particularly in relation to forests and rivers.

We find that the word 'forests' as used in article 2 of the Treaty included not just the trees and the land upon which they stood, but also encompassed all the flora and fauna that

thrived within them. It was in that sense that the Crown was required to actively protect the forests of Maori.

We have found that the Crown has failed and the forests have been changed dramatically by introduced species. Deer, opossums and mustelids are a particular problem. Opossums and mustelids (stouts, weasels and ferrets) were introduced by the Crown itself: opossums were released in Te Urewera, mustelids in their thousands were imported into New Zealand and distributed (among other regions) to Hawke's Bay. Their spread into the pristine forests of Te Urewera was entirely predictable. The destruction caused by deer and mustelids was well established and it was well known by the 1920s. Mustelids met with particular settler opposition, except from pastoralists plagued by rabbits. Opossums, however, had supporters amongst eminent scientists, who did not think they posed a risk to forests, and it took many years before government departments were convinced otherwise. Their inaction was unwise, but in the circumstances not a Treaty breach. But the Crown's failure to take firm steps to control deer and mustelids, once their destructive impact on the forests was clear, was entirely inadequate and a breach of the Treaty.

In 1895 Premier Richard Seddon, speaking to a delegation of Te Urewera leaders in Wellington, fully acknowledged the customary rights of the peoples of Te Urewera: 'the lands are yours, the forests are yours, and the birds that flock there they are yours'. Since then, the Crown has usually acted as though this were not the case. As an example of what has happened, in the late nineteenth century in Te Urewera, bird song at the change of light was said to be almost deafening. Now there is silence broken only by the call of an occasional morepork.

Kereru are an iconic species for most New Zealanders. That is particularly so for the people of Te Urewera, for whom they were and are a taonga species, and a prized food, preserved and presented to their manuhiri in carved and decorated taha on important occasions. Kereru had clearly withstood centuries of taking in a customary way and in accordance with tikanga, and were present in Te Urewera in the nineteenth century in good numbers.

The claimants' paramount concern for kereru today is their preservation and they are not seeking to resume taking kereru at this time.

We hold that Te Urewera peoples hold a customary right to take this food. The right was taken from them by legislation a century ago. The Crown may well have been quite justified in taking this step had it been clear that the species was in decline in Te Urewera, and had there been proper consultation. Seddon knew in fact that kereru were an important food in Te Urewera, and the district was excepted at first from the operation of the Crown's laws. But by 1912 this came to an end. There were letters of protest sent from Te Urewera to Parliament and support for the people from Maori members. The prohibition on harvesting

was not well understood or enforced until in the 1930s prosecutions began, and the cost of fines hit home hard. Fowling then declined drastically. But the Crown's assumption of the right to control the taking of native birds, and prohibit the storage of huahua, to criminalise an important customary activity, while failing even to consider other ways of protecting kereru such as ensuring that food trees, miro and hinau, were preserved, has remained a deep grievance in Te Urewera.

Continuing prohibition may be justified if it can be shown to be necessary. But there are no figures or studies available to present to us. We recommend for those parties who have not settled with the Crown that the matter be investigated. We find a Treaty breach in relation firstly to the prohibition without consultation, secondly allowing the population to be degraded, and thirdly the lack of monitoring with a view to perhaps restoring a customary take. Our recommendations must be limited to claimants who have not settled their historical Treaty grievances. We do not recommend that the prohibition be lifted now. We do recommend that the Crown and appropriate parties work together to monitor the kereru population in Te Urewera, and to protect and enhance it and, if and when it is established that a limited, controlled, and culturally appropriate taking does not endanger the species, that it be allowed.

Tuna, another prized food source which there is a cultural right to take, have been significantly depleted. It seems agreed that the blocking of migration in two directions by hydro schemes, commercial fishing, and degradation of habitat are to blame. The claimants say, and we accept, that to allow damage to their fisheries in this way is a breach of the principles of the Treaty. Native species of fish have been wiped out or grievously depleted. It should be noted, however, that we do not find Treaty breach in relation to the introduction of trout.

When we consider the fate of forests, birds, eels and native fish, it can be seen that the over-arching Treaty breach is that the Crown has not properly recognised the mana motuhake/tino rangatiratanga of the people. A consequence is that the obligation of the people to be kaitiaki of their forests and rivers was thwarted and they were left powerless and pushed to the side.

And so we turn to rivers. The concept of a river as a whole entity, not broken down (as by the common law) into the water, the banks, and then the land beneath the water, has been well traversed by other tribunals. We agree with that approach to rivers in a Treaty context. Maori owned and respected these rivers, used them for traditional purposes, and they were taonga (prized possessions).

But the confusion as to who owns what is truly startling. How can the Crown or a private landowner, be they Maori or Pakeha, who has title to land adjoining a river know who owns the bed of the river or the river as a whole? For many blocks in Te Urewera it seems highly

likely that customary title to rivers has not in fact been extinguished. The land (riverbed) remains uninvestigated customary land. The consolidation commissioners whose role in the 1920s was to finalise the awards of Maori owners and the Crown respectively on the ground, following the intense years of Crown purchase of individual interests in many UDNR blocks, specifically said they had not awarded rivers to the Crown. Yet rivers and streams were used extensively as boundaries of the massive Urewera A block awarded to the Crown, which later assumed that it was self evident that it owned to the centre line in accordance with English common law. It also took ownership of riparian strips or reserves along the Tauranga River and its major tributaries. Then, in the 1950s, came its most far-reaching assertion of ownership. The Crown included all beds and waters of the riverbeds in the Urewera A block in the Te Urewera National Park. It is clear that no compensation was provided for the taking of rivers.

Much doubt remains as to who does own the riverbeds of Te Urewera. It may be that in accordance with English common law the owners of land on each side of a river own the bed of it to the centre line. That leads to particular difficulties when the bed of a river is prone to sudden and dramatic change as is the case for a number of Te Urewera rivers.

On the other hand, it may be that the bed of the river belongs to the Crown. The Crown passed legislation in 1903 providing that it owned and had always owned the beds of 'navigable' rivers. What constitutes a navigable river has been a vexed question from the beginning. Another issue is whether the legislation takes the bed of certain sections of a river or the bed of the entire river. No one can establish without long and prohibitively expensive investigation and litigation what the position is now.

For the country as a whole, rivers and their beds must constitute a sizable area. It must now always be remembered that Maori owned and exercised customary authority over the rivers. That customary right remains unless it has been lawfully extinguished. It is a breach of the principles of the Treaty for the Crown to have allowed these rights to be the subject of uncertainty and called into question. This is the opposite of actively protecting Maori rights. If it is said that the right has been extinguished for any particular part of any particular river then the Crown should clarify how it claims that this has happened. Our recommendation is that this should happen and the law reformed to conform with Treaty principles.

Whatever the current position of legal ownership, the beds of rivers are de facto in the control of central and local government. Te Urewera rivers are a good example of this. The Resource Management Act 1991 is a significant improvement on the previous regime for management of rivers. It makes provision for powers exercised by local authorities to be transferred to iwi authorities. But no management powers in respect of any rivers in Te Urewera had been transferred to iwi at the time of our hearings.

We turn now to our chapter on specific claims. Often claims that weigh heavily on people's minds relate to small parcels of land or very particular grievances arising from what are seen to be unfulfilled Crown obligations. Or the grievances may be ongoing ones: rating is an example. This chapter considers a group of discrete issues that fall within four categories:

- Public works
- Rating
- Cultural property, specifically taonga tuturu
- Schools in our district

The comparatively limited public works takings in Te Urewera reflect the sparse nature of infrastructure development throughout the region, and the fact that large-scale alienation of Maori land tended to occur in advance of such development. But it is precisely because the peoples of Te Urewera have had so little utilisable land left in their possession that the significance of further land losses for public works has been magnified. We find the Crown in breach of the Treaty for failing to build an access road to Papapounamu and other blocks, despite promising to do so and despite taking a quarter each of the affected blocks, as part of the Urewera consolidation scheme. The Tahora 2F2 block claim arose from the Crown's failure to return land taken for an access road. The land was under the control of the East Coast Commissioner. He was not part of the Crown, but had been granted power by the Crown, in breach of the principles of the Treaty, namely to alienate Maori land without the consent of its owners. He gifted the land to the Crown under section 12(3) of the Land Act 1924, when he was only a trustee, and the owners received no compensation. Also, the transaction did not include any provision for the land to be returned when it was no longer being used for its intended purpose. These two aspects of the transaction are breaches of Treaty principles, and the prejudice is manifest.

We are unable to make any finding of Treaty breach arising from the building of transmission lines across part of the Te Manawa o Tuhoe block, preventing the land from being used for forestry. We note that the Tuhoe Waikaremoana Maori Trust Board was involved in planning for the Aniwhenua hydroelectric power scheme which the lines are part of, that it also negotiated a 30-year afforestation lease with the Forest Service, and that it is clear that the Trust Board did not lose any income from the location of the lines in the first few years of the lease. (Beyond that time we have no evidence.) We find, however, that the taking of land from the Heiotahoka and Te Kopani reserve blocks to the south east of lake Waikaremoana for a hydroelectric power plant was in breach of Treaty principles, first because there was no real consultation with the owners and the Crown had insufficient regard for the fact that the owners had already lost nearly all their land, and secondly because of the Crown's process for taking the land in this case. Crown agents were rather dismissive of the land's significance for its owners, and failed also to take into account

their poverty. Given that many parts of the works were permanent structures, alternatives to purchase should have been given more consideration, and at higher levels. The hydro works project left the owners with only remnants of the remnants of their land. We consider that if the Crown needed to take land from the extremely limited acreage they retained, it had a duty to provide other suitable land in exchange.

Ongoing claims relating to rating are of importance in our inquiry district, either because of the difficulty that Maori owners have had in paying them, or because particular demands levied on lands that produce no income are felt to be unfair, or both. We consider that rates should only be imposed in the following circumstances:

- consideration should be given to rating relief for land incapable of returning a profit, such as urupa, marae, land not capable of development, and land with significant legal restrictions;
- those owning and/or using the land will receive a reasonable level of services and amenities in return;
- rating assessment takes into account past contributions (such as land, gravel, labour) made to construction and upkeep of roads and other amenities.

Where those terms are met, we consider that the imposition of rates on Maori land is not in breach of Treaty principles. We have made particular findings on the imposition of rates and levies on Ruatoki and Ruatahuna lands before 1964 (the date when the exemption from rates on most land within the Urewera District Native Reserve, provided for in the Urewera Lands Act 1921-22, ended). Our findings on general rating policy and practice are as follows:

- It is understandable that local authorities did not want to pay for roads in areas where they were collecting few or no rates. However, this does not mean that Maori landowners should have shouldered the burden of high rates or bad roads. The Crown, in the Urewera Consolidation Scheme, had taken large areas of their land to pay for roads that were never built, and the roads served the National Park as well as Maori communities. The Crown should therefore have made more of a contribution towards roads in Te Urewera, and its failure to do so was a breach of the principle of partnership with its requirement of good faith.
- We consider that it was not a breach of the Treaty principle for productive Maori land in the former UDNR to incur rates after 1964, but only if those rates related to services and amenities (other than roads) which the landowners were able to use.

Claims relating to taonga tuturu that are considered in this chapter relate to significant Te Urewera taonga that were presented to high-ranking Crown representatives on historic occasions but not returned in accordance with tikanga. Where the Crown has mislaid such taonga, we find it in breach of its Treaty duties. We commend the Crown however for its

recent return of the taiaha Rongokarae presented to Premier Richard Seddon by the Tuhoe rangatira Kereru Te Pukenui in 1894.

Three claims were before us involving schools and school property which relate primarily to issues other than education. We find that:

- The claim that the Crown's failure to meet the terms of the Tuararangaia land transfer of 1,000 acres to the Crown in 1912, in the expectation that a college would be established at Ohiwa for the benefit of Tuhoe, Ngati Awa, and Te Arawa, is well founded and a Treaty breach, and the Crown, as trustee, has not accounted for the profit that it made on the forest that it planted and was later harvested.
- We have been unable to make findings of Treaty breach in respect of the claim of the uri of Rama Te Tuhi of Tuhoe, who gifted land for playing fields for Te Whaiti school in 1938, setting four conditions that the claimants say were unfulfilled. We have no evidence on reasons why certain conditions were unfulfilled.
- We find, in respect of pine seedlings planted by the pupils at two Te Whaiti schools and one at Ruatahuna (the pupils being Maori) in the course of a Forest Service school planting project, that there was an unfulfilled agreement that at least some of the profits would eventually go to the schools, and that the Crown failed in several respects after the Forest Service was corporatised in the mid to late 1980s, breaching its duty of good faith.

Our socio-economic chapter is a sad history for the peoples of Te Urewera and damning for the Crown. It chronicles over a century of neglect, relieved only somewhat by the impact of the welfare state and of the expansion of the forestry industry. Hardship, poverty, disease and lack of opportunity pervaded the twentieth century experience of the peoples of Te Urewera. This was all the worse because it was preceded by the loss of much of the best land, a devastating war, famine, and the continuing impact of western diseases. The population dramatically reduced and then the arrival of influenza in 1918 again decimated a people under threat.

There was some improvement following the founding of the welfare state after 1935 and the expanded involvement of the State in the economy. Maori in Te Urewera and elsewhere were major beneficiaries. The timber industry in Te Urewera, improved access to education, increased welfare benefits, and better access to health care significantly improved standards of living in Te Urewera Maori communities, but this started from a very low baseline. The changes were not enough to close the huge socio-economic gaps between Maori and non-Maori. Health care might have been free, but it was geographically remote from most Maori in Te Urewera. People were documented as suffering from malnutrition right through to the 1950s. Secondary education was not easy to get to: it involved long bus journeys or boarding costs that were beyond the means of most families. Housing assistance was out of

the reach of the most impoverished communities, as it was usually only granted to those who individually owned land or could repay loans. Parents of people living today lived on dirt floors and even in caves.

The district's dependence on the timber industry and the Crown's support for it made it highly vulnerable to economic downturns and policy changes. This became clear as the Crown became increasingly sympathetic to conservationist arguments against logging of native timber, restricting and then banning the harvesting of native trees from the Whirinaki Forest. But the main blow was the restructuring and privatisation of state departments in 1984. The transformation of the Forest Service into a State-owned enterprise not only meant massive job cuts, but also the sale of the Forest Service's housing stock. At the same time, similar changes in the Post Office led to local post office closures. Ngati Manawa, Ngati Whare, Tuhoe, and other Te Urewera iwi experienced high levels of unemployment.

Thus extreme poverty continued right up to the time of our hearings. We travelled to Minginui, and saw for ourselves the abject and shocking poverty in the former timber town that had been transferred back to Ngati Whare by the Crown during privatisation of the timber industry. In the course of the hearings, I asked Crown counsel who had been to Minginui with us whether a child born there at the time had any real chance in the wider world. She agreed with me immediately that it was doubtful. I put it to her that the average New Zealander could not believe that such awful living conditions existed in New Zealand now. She agreed.

The notion of the Crown's responsibility for provision of welfare changes from time to time and is not the province of this tribunal. However, the promises in the principles of the Treaty of Waitangi include fairness and equity. The Crown acknowledged that it has a clear obligation to provide aid and social services to Maori on the same basis as other New Zealanders. Under article 3, that, in our view, is clearly the case.

To allow the peoples of Te Urewera to slip so far behind the living standards, medical care, and educational and employment opportunities of the general population falls well below a fulfilment of the Treaty promise. As a simple example, in the Waikaremoana area in the 1930s poverty was extreme and was a major concern for a number of public servants and judicial officers. Notwithstanding that, the Crown defaulted on the payment of monies that it owed to these people and it fought a fierce rearguard action in relation to the ownership of the bed of Lake Waikaremoana, which, if properly and promptly settled, would have provided an income to these people.

There were people of goodwill and humanity who did their best to provide, but the Crown never did enough and was consistently uncaring. We find a major breach and extreme prejudice in this regard.

The Crown spoke in our hearings of the distinction between equal and equitable treatment, though we think it has a much broader application than the Crown was prepared to admit. Most importantly, we do not think that the Crown's obligations under article 3 should be conceived as a duty to provide aid and services to Maori on exactly the same basis as non-Maori. Equitable provision in our view derives from unequal needs. Indeed, there were circumstances in the past when the Crown itself recognised such needs, and provided differing but broadly equitable services which were intended to improve the living standards and economic position of Maori communities.

Another crucial aspect of equitable provision is the removal of barriers which may prevent Maori from accessing social services, by delivering services that are culturally appropriate. That means that the routine marginalisation and disparagement by Crown bodies of Maori language and culture in Te Urewera until about the 1950s, especially in schools, was unacceptable. Crown policies relating to land and housing that ignored the realities of traditional land ownership and ties to ancestral land, were also unacceptable. We accept that such policies were often well-intentioned on the part of the Crown, but policies encouraging Maori to become fluent in English, or move from home to gain better access to education and housing did not have to happen at the expense of Maori language and culture or of the Crown ignoring the expressed preferences of Maori to remain in their traditional rohe.

Where aid or services are tailored to Pakeha needs, or are more accessible to Pakeha than to Maori, Maori are not receiving the same privileges as other New Zealanders. If the Crown's 'equality' provided Maori and Pakeha alike with monolingual English-language schooling, and penalised Maori and non-Maori alike for ownership of unproductive land, it can hardly be said that the impact fell equally on both groups.

We have considered the Crown's submissions to us that in assessing the adequacy of social service provision we must take into account all the prevailing contemporary circumstances, especially the cost, the location, and practical considerations. But, when we consider the particular circumstances of Te Urewera, we cannot conclude that Te Urewera should have been neglected as it was. Te Urewera is not so remote that the costs of providing services were an insuperable barrier. In addition, the neglect of communities such as Murupara and Minginui had impacts which were different from those in other, non-Maori communities that were neglected. That is partly because deprivation has been so prolonged and so marked in Te Urewera. It is because the destruction of the Whirinaki job market severely damaged the ability of the tangata whenua to maintain their ahi ka. We heard painful evidence about the profound cultural and spiritual pain felt by those who had to leave their ancestral land. Those who stayed to maintain ahi ka, and sustain the ancestral home to which others could

return, often did so at risk to their own health, and at the expense of a reasonable standard of living.

It is only recently, with greater recognition of the Treaty of Waitangi obligations, that the Crown has enabled Maori groups and organisations to play a significant role in the design or delivery of social services such as health and education. This was well overdue, and was also offset by the dramatically decreased economic capability of whanau in the inquiry district who faced the consequences of extremely high unemployment as a result of timber industry restructuring.

The Urewera District Native Reserve agreement established a Treaty relationship between the Crown and the hapu and iwi of Te Urewera, and the Crown had a particularly strong obligation to meet the commitments it made, as well as its wider obligations under the Treaty. That it largely failed to do so was a failure to meet its duties of good faith and partnership.

We find that the poor socio-economic standing of the peoples of Te Urewera is in large part a prejudice arising from the Crown's repeated and often grievous breaches of the Treaty, which we have detailed through all parts of this report.

Conclusion

As we end this report we must thank so many people without whose industry, generosity and assistance our report could not have been completed. We thank the claimants who hosted us so magnificently during our hearings. Even in the most trying times, they treated us with dignity and generosity. Even in the tumultuous entry we had into Ruatoki, we were in fact treated with respect. The tears and the laughter at our hearings will remain in our minds forever. Even when anger was shown, we knew that it was never aimed at us as a tribunal, and there was never really a moment when our proceedings were disrupted.

We want to thank the legal profession appearing for both Crown and the claimants. Crown counsel had a difficult task. She had a hard case to present and was very much on hostile ground. She remained calm, poised and her fairness and objectivity meant that we were not far into the hearing before she was on cordial terms and trusted by all the parties. All counsel had an arduous task to present huge amounts of historical evidence and law to us. We are sure they will remember this tribunal's hearings as a highlight in their career.

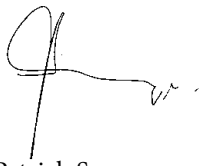
Our staff have put a great portion of their lives into this report. We, the three remaining tribunal members, are only the tip of a large iceberg, most of which floats unseen below the surface of the waters. Thank you all.

Finally, we want to pay tribute to those who have passed away during the course of our hearings and through to the completion of this report. There are many who have not lived to see the result of their labours. Wharekiri Biddle immediately comes to mind. We remember vividly the tangihanga that we attended in Te Urewera.

We turn aside to pay tribute to our kaumatua tribunal member who died during the writing of this report. Tuahine Northover was a special person. He was wise and gracious, and we had the greatest respect for him. The people of Te Urewera regarded him as a man of knowledge and a link from them to us. He made our journey through hearings and the compilation of the report so much the easier and we have felt his loss so deeply both on a personal and a practical level.

E nga kaka tarahae, e nga rearea hiere o te wao-nui kua taroretia e te ringa kaha o Aitua, rere atu ki to kahui e korihirihi ana ki a koutou, e whanga ana i a tatou. Okioki, e moe.

Naku noa, na



Patrick Savage
Presiding Officer

ABBREVIATIONS

AJHR	*Appendix to the Journals of the House of Representatives*
app	appendix
ch	chapter
comp	compiler
doc	document
DOSLI	Department of Survey and Land Information
DOC	Department of Conservation
DSIR	Department of Scientific and Industrial Research
ECNZ	Electricity Corporation of New Zealand
ed	edition, editor
fn	footnote
fol	folio
GPS	global positioning system
GV	Government valuation
LINZ	Land Information New Zealand
ltd	limited
MA	Department of Maori Affairs file, master of arts
no	number
NZED	New Zealand Electricity Department
NZFS	New Zealand Forest Service
NZPD	*New Zealand Parliamentary Debates*
NZLR	*New Zealand Law Reports*
p, pp	page, pages
para	paragraph
PEP	Project Employment Programme
pt	part
RDB	*Raupatu Document Bank*
s, ss	section, sections (of an Act of Parliament)
sec	section (of this report, a book, etc)
sess	session
TEP	Temporary Employment Programme
UCS	Urewera Consolidation Scheme
UDNR	Urewera District Native Reserve
UDNRA	Urewera District Native Reserve Act
UNESCO	United Nations Educational, Scientific, and Cultural Organisation
vol	volume

'Wai' is a prefix used with Waitangi Tribunal claim numbers.

Unless otherwise stated, footnote references to claims, papers, and documents are to the Wai 894 (Te Urewera) record of inquiry, a copy of which is available on request from the Waitangi Tribunal.

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CHAPTER 21

KA KOINGO TONU TE IHO O TE ROHE: ENVIRONMENT AND WATERWAYS

21.1 Introduction

> the lands are yours, the forests are yours, and the birds that flock there they are yours.
>
> —R Seddon, Premier of New Zealand, addressing delegation of Te Urewera leaders, 7 September 1895[1]

> we strongly object to the Crown taking our rivers.
>
> —Tikareti Te Iriwhiro and 175 others, petition to Parliament, 1922[2]

21.1.1 The environmental claims of the peoples of Te Urewera

Since the 1890s, massive changes to the environment and the waterways of Te Urewera have taken place, and the exercise of mana motuhake, of tino rangatiratanga by hapu and iwi over all the resources of their rohe was undermined as the authority of the Crown and its agencies reached into its heartland. In their negotiations with the Crown in 1895 – which culminated in the Urewera District Native Reserve Act 1896 – Te Urewera leaders sought protection for their lands, forests, birds, their streams and fish, and their way of life; and the premier, Seddon, indicated his willingness to meet their wishes. We discussed the negotiations and agreement in detail in chapter 9, but left the issue of its scope in respect of natural resources to be addressed in the present chapter.

The claimants' disillusionment with the Crown's use of its authority in Te Urewera stems from soon after this watershed agreement with the Crown. They believe that the Crown broke its agreement to confirm and guarantee their customary rights to manage wildlife and other natural resources within their rohe, and failed also to grant them authority over any new species which might be introduced .

This chapter considers three major topics:

1. 'Urewera Delegation, Notes of Evidence', 7 September 1895, p 39 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), p 203
2. Tikareti Te Iriwhiro and 175 others, petition 341/1922, circa September 1922 (Campbell, supporting papers to 'Land Alienation, Consolidation and Development' (doc A55(b)), p 219

21.1.1

- Crown interventions in the environment of Te Urewera from 1895 to 1954;
- the management of Whirinaki Forest, and the extent to which Maori had influence and authority in its management; and
- the extent to which the Crown has asserted ownership, authority and control over Te Urewera rivers.

Other important issues relating to Crown management of the lands, forests and waterways of Te Urewera have been dealt with earlier in our report. In chapter 18, we looked at the nature and impact of land development from the 1930s on and, at about the same time, the Crown imposition of restrictions on milling timber, and the impact of those restrictions on the peoples of Te Urewera. In chapter 16, we addressed the creation and Crown administration of the Park, the Crown's efforts to eradicate introduced species in the park, and the claimants' ability to access their land-related natural resources inside the park (but not their birds, rivers or fisheries, which were left for the present chapter). And chapter 20 concerned Lake Waikaremoana, a taonga of great importance to Tuhoe, Ngati Ruapani, and Ngati Kahungunu, and the long legal battle of the claimants against the Crown to secure recognition of their title to the Lake. Up until 1971, they asserted, the Crown treated the lake as its own possession, without permission or payment to the Maori owners.

In particular, we were anxious to meet the claimants' wish that we report on their claims about Te Urewera National Park, as they negotiated their Treaty settlements with the Crown, and to deal with the creation of the park as the culmination of a long and fraught history of land loss in the nineteenth and early twentieth century. This has meant dealing with some major environmental claims out of sequence. The present chapter should be read together with the four chapters mentioned above. Claims relating to rivers and other waterways are of great importance in their own right, and sit with those about Lake Waikaremoana. In respect of environmental claims about Ohiwa Harbour, however, we have limited jurisdiction, as we explain below. Claims about the management of Whirinaki Forest sit alongside those addressed in the National Park chapter. And claims about Crown restrictions on the taking of native birds, and Crown introduction of exotic fish and animals foreshadow claims about restrictions on peoples' use of resources in the national park after its creation. There is no analytical problem, however, in dealing with the pre-1954 issues out of sequence, in this chapter. It is simply the case that the two chapters should be read together.

In the period before the national park was established in 1954 (as we discussed in chapter 16), the Crown's interventions in Te Urewera impacted on its peoples and its biota in three major ways:

- The Crown assumed full control of the environment for the purposes of water and soil conservation, deciding that forests would be reserved to protect existing low lying farmland and Lake Waikaremoana. It kept its own lands in forest, and used legislative controls to prevent Maori from milling theirs. (We have discussed this already in our report in chapters 16 and 18).

- The Crown asserted the right to control indigenous birds, from 1895 to 1922. In a policy move which affected Maori everywhere, the Government introduced restrictions on the taking of native birds. Initially the Government made exceptions for Te Urewera, though (as we shall see) these soon came to an end. The taking of kereru, tui, and other birds, and the storage of huahua for gifting and for hakari – central to the way of life in Urewera – were criminalised. Up till 1930, Maori customary law still controlled the hunting of birds in practice, but after that Parliament's law began to be enforced in the former heartlands of Te Urewera, and kereru ceased to be a major food source for Te Urewera peoples.
- In the wake of the UDNR agreement the Crown either introduced or facilitated the introduction of exotic species to Te Urewera. Seddon and Crown officials had begun to see the possibilities of the district as a tourist attraction. From the late 1890s, trout, deer, and opossums were introduced into the rohe – with very destructive results for forests, plants, native birds, and fish. With the deer came new game reserves at Waikaremoana and Rangitaiki, and new regulations on who could hunt there. There were some compensatory benefits (deer, for instance, became an important food especially by the 1930s–1950s, as the Crown began to prosecute those who broke its laws prohibiting the taking of kereru, and the fines proved a very effective deterrent).

What was inexplicable to the claimants, in all of these policies, was that a distant Government with little or no knowledge of an environment which was their home and on which they depended for food, healing, weaving, building, and carving, should make and enforce policies which took no account of their way of life. Above all, the new policies took no account of their kinship, their whanaungatanga, with their physical and spiritual world, or of tikanga, the customary law which until that time had regulated sustainable takes of birds, eels, fish, and plants, and their distribution within the community. It was as if their specialised knowledge, built up over generations, their own conservation practices, and the obligations of kaitiakitanga did not exist. Over the years that followed, Te Urewera leaders were not consulted about changes to the law, or acclimatisation of new species. The attempts of Maori members of Parliament to explain to their fellow politicians, for instance, why laws regulating the taking of kereru were badly framed, and why it was unjust to impose on Maori, who depended on birds for food, laws designed for the hunting practices of settlers who shot birds only for sport and recreation, made some headway. But the policy was not changed. Many years later, the Crown's restrictions on any customary take of kereru in Te Urewera, and its failure to justify such restrictions by showing that they are necessary to maintain the viability of the kereru population, remain a deeply felt grievance.

In our inquiry, the Crown has denied that its policies related to the taking of indigenous species within Te Urewera were or are in breach of Treaty principles; rather they are a 'reasonable exercise of the Crown's authority under Article 1 to balance competing interests,

and govern to conserve natural resources'.[3] Nor have Crown policies relating to exotic species been in breach of Treaty principles; to the extent that they have caused damage in Te Urewera, the Crown has since the 1930s taken 'timely steps . . . to ameliorate and control that'.[4] But the Crown did concede that the introduction of brown and rainbow trout into Te Urewera, which the Crown facilitated, has damaged native fish populations.[5]

This chapter also examines the deep political and cultural conflict over managing the forests and waterways that slowly played out in Te Urewera over generations. In chapter 16 we have already seen how that conflict gathered momentum after the establishment of Te Urewera National Park in the heart of the rohe in 1954, when the Crown decided to preserve the watersheds, protect the low-lying Bay of Plenty farmlands, and the unique scenic 'wilderness' of the district. Conflict became increasingly bitter over the next 50 years, as Maori found their access to customary food gathering within the park restricted in ways they had not expected, their authority ignored, and their input into management decisions confined to informal minority representation on the park board. From 1980 their influence was further diluted as new Government structures were introduced for the management of national parks.

In this chapter, we consider the parallel history of Whirinaki Forest. Like the national park land, the Whirinaki lands had been secured by the Crown through means of which we have been highly critical in earlier chapters. But this land and its valuable timber – totara, miro, rimu, matai, kahikatea, and tawa – was destined for commercial use. The Crown established a State forest there in 1932, and began milling soon afterwards. The forest provided badly needed employment for local people, who became skilled foresters, though over the decades that followed they were not, they claim, consulted about or involved in management of the milling of the forest. They have raised concerns about their marginalisation as kaitiaki, the destruction of wahi tapu, and the survival of native bird populations.

By the 1970s, in response to growing public opinion against native timber milling, the Forest Service switched from clear felling to selective logging, in a move which the Whirinaki people and the workers of Minginui village supported. Conservationists hoped to add the remaining forest to Te Urewera National Park – a move the Maori forest workers as well as the Forest Service opposed, and successfully prevented. Local residents accused conservationists of 'attempting to exterminate our lifestyle and our very existence within this forest'.[6] But native logging was stopped altogether in 1982, the State forest was transformed into the Whirinaki Forest Park in 1984, and the Crown's original plan of replacing native milling with exotic timber milling was jettisoned. Seventy years after the unsuccessful attempts of Maori to preserve their rights to take native birds for food, there was still a

3. Crown counsel, closing submissions, June 2005 (doc N20), topic 29, p 3
4. Crown counsel, closing submissions (doc N20), topic 29, p 3
5. Crown counsel, closing submissions (doc N20), topic 30, p 2
6. Evelyn Stokes, J Wharehuia Milroy, and Hirini Melbourne, *Te Urewera: Nga Iwi Te Whenua Te Ngahere, People, Land and Forests of Te Urewera* (Hamilton: University of Waikato, 1986) (doc A111), p 239

deep gulf between local realities and distant attempts to impose ways of dealing with the Te Urewera environment. Here we consider the claimants' issues (in particular those of Ngati Whare), which focused on the Crown's lack of consultation with them about the management of Whirinaki Forest, and about restricting and then stopping native logging in the forest.

We consider the Crown's response too. In respect of past policies and practice, it conceded that it did not always consult with Ngati Whare over changes to native logging activities; and it accepted that the Forest Service damaged or destroyed archaeological sites in the Whirinaki Forest during logging activities. But it argued that Crown bodies had subsequently improved their practices, and that currently there was legislative protection for wahi tapu, and for tangata whenua involvement in their management. It did not accept that hapu were currently excluded from management of and employment in the Whirinaki Forest Park.

The third topic covered in this chapter is the claims about the curtailing of the exercise of tino rangatiratanga over rivers, streams, and other waterways in Te Urewera, which has been a long-standing grievance of the claimants.

Here we consider their claims, arising from: the application of introduced common law relating to ownership of river beds; statute law such as the Coal-mines Act Amendment Act 1903 which deemed the beds of navigable rivers always to have been vested in the Crown; and the special circumstances of the Urewera Consolidation Scheme. In the course of the scheme (as we saw in chapter 14) the Crown acquired a huge block of land representing thousands of small shares in many UDNR blocks that it had purchased in an aggressive campaign over a number of years. The claimants allege that their rivers were wrongly acquired in the consolidation scheme that followed (the UCS), as the Crown later claimed ownership of adjoining riverbeds by application of the *ad medium filum* rule, and in addition laid out extensive marginal strips or riverbank reserves, thus extending its claims to further lengthy stretches of riverbed. No payment was made for river beds acquired in these ways. The Crown, however, did not concede that it had wrongly acquired river beds, or that it should have paid for them. To the peoples of Te Urewera, presumptions of the common law – which they said were foreign to them, and were not explained – have been used simply to deny their ownership of rivers and any say in the management of them. It is uncertain how the Coal-mines legislation actually applied in Te Urewera. It is uncertain whether the Crown did acquire ownership of rivers and streams in its consolidated block, Urewera A, particularly since Te Urewera leaders protested at the time, and were assured that the Crown had not acquired rights to rivers within its award.

The claimants argued that there is no evidence that any rivers in the inquiry district have been alienated from Maori to the Crown in a manner consistent with the Treaty – that is, by mutual and informed agreement. In their view, the Crown has either wrongfully acquired

title to their rivers, or has left the state of ownership of rivers in utter confusion – no one knows which river beds belong to the Crown and which do not. We consider their claim, and the Crown's response that riverbed ownership is a question of law which could be determined by the Maori Land Court and the High Court. The Crown did concede that tangata whenua 'are likely to hold title to the beds of a number of non-navigable rivers'.[7] It did not, however, address the effects of the Coal-mines legislation on river ownership.[8]

The Crown's overall position was that, '[s]ubject to submissions on confiscation and consolidation', there is no evidence of any particular Crown acquisition of any riverbed in the inquiry district that is contrary to the principles of the Treaty.[9]

The claimants were also critical of what they considered was the Crown's assumption of exclusive authority over their rivers by statute, and what they considered was its poor management of them. Maori owners were directly affected by the Crown's inadequate management of gravel extraction from riverbeds, erosion and flood protection and pollution. Claimants pointed to the Crown's assertion of control over natural water by water and soil legislation, and by the Resource Management Act 1991, which established a new system of administration of natural resources. Despite the RMA's acknowledgement of Treaty obligations and of the rights of tangata whenua, they said, the new regime has left the peoples of Te Urewera powerless in respect of decision-making and management of their own waterways and customary fisheries. The Crown conceded that consultation on some river issues was inadequate before 1991, but was confident that the resource management regime now provides for tangata whenua interests in management of the environment, and for consultation with them.

This was unacceptable to the claimants, who were particularly disappointed that the Crown did not address 'the uncertainty of rights of ownership and management of rivers arising from the legal regime applying to rivers'.[10]

We address these major issues below.

21.1.2 Ohiwa Harbour

Claims in relation to Ohiwa Harbour, which mostly related to environmental management, would ordinarily have been addressed in this chapter. We have, however, limited jurisdiction in respect of Ohiwa Harbour.[11] The harbour is inside the eastern Bay of Plenty confiscation district, reported on by the Tribunal in the *Ngati Awa Raupatu Report* (1999). We received several claims concerning the harbour, in particular Wai 1012 (Hohepa Kereopa and others on behalf of Ngati Raka, Te Hapu Oneone, and Tamakaimoana, within the Nga

7. Crown counsel, closing submissions (doc N20), topic 30, p 2
8. Crown counsel, closing submissions (doc N20), topic 30, p 17
9. Crown counsel, closing submissions (doc N20), topic 30, p 2
10. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 44
11. The Tribunal set out its jurisdiction in memorandum and directions, 14 March 2002 (paper 2.15), p 4.

Rauru grouping), Wai 339 Te Upokorehe, and Wai 36 Tuhoe. The claims were the basis of a separate topic in our statement of issues. We explain here why we are unable to make findings on most of the issues.

We can comment briefly on issues raised about Crown recognition of Tuhoe customary issues since the raupatu, and on the extent to which any role was provided for Tuhoe hapu and Te Upokorehe in the administration and management of the Ohiwa Harbour under the legislation in place before 1991. The harbour was first actively managed by the Opotiki County Council with the power of a harbour board (under the Harbours Act 1923, section 11) from 1925–1957. The Whakatane Harbour Board gained control of the eastern side of the harbour in 1966 after constructing a new wharf at Port Ohope. The Opotiki County Council retained harbour powers on the western side.[12] Until the mid-1980s there was no provision or recognition of the specific or unique interests and rights of Maori in Ohiwa whatsoever. But after increased Maori protest during the 1980s things began to change. From 1989 an advisory committee on the harbour to the Whakatane and Opotiki District Councils was formed, with council representatives alongside Tuhoe, Ngati Awa, and Whakatohea. Councils then delegated their powers to the committee in 1990.[13]

We are limited in what we can conclude about issues raised for the Resource Management Act era as to the extent of consultation with the claimants about planning for the future administration and management of Ohiwa Harbour, and the administration of reserves by the Department of Conservation. Ewan Johnston, who wrote a historical report on Ohiwa issues, found some attempts to consult with tangata whenua from the mid 1990s.[14] Tuhoe seem to have been consistently recognised alongside other iwi by Environment Bay of Plenty as having an interest in the management of the Harbour.[15] The Ministry of Fisheries has recognised Tuhoe as having a customary non-commercial interest in the fishery.[16] As of 1997, DOC administered more than 20 reserves in the Ohiwa Harbour area. As at 2003, there was little evidence of particular iwi/hapu roles in this or in the management of resources by DOC in the area. The Crown, in closing submissions, pointed however to DOC's *Conservation Management Strategy for Bay of Plenty Conservancy 1997–2007* and its acknowledgement that consultation with tangata whenua is an important aspect of conservation management. The strategy stressed the commitment of DOC to the practical expression of the principles of the Treaty of Waitangi.[17]

12. Ewan Johnston, 'Ohiwa Harbour'(commissioned research report, Wellington: Waitangi Tribunal, 2003) (doc A116), pp 269–271
13. Johnston, 'Ohiwa Harbour' (doc A116), pp 273–274
14. Ewan Johnston, summary of report and responses to questions, 12 December 2004 (doc J2), p 10 (counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 267)
15. See, for instance, B N Hughes, *Draft Ohiwa Harbour and Catchment Scoping Report* (Whakatane: Environment B O P, 2002). See also Johnston, 'Ohiwa Harbour' (doc A116), p 15, n 2
16. Terry Lynch, brief of evidence, 4 April 2005 (doc M14), pp 16–17
17. Crown counsel, closing submissions (doc N20), topic 35, p 11

Overall, we lack sufficient evidence covering the period post-1991 to be able to draw any conclusions with confidence.

In respect of non-environmental issues, we have already considered the impact of raupatu on the customary interests of the peoples of Te Urewera in and around Ohiwa Harbour (see chapter 4).

We note two remaining issues. We are unable to resolve the issue of the interests of the Mokomoko whanau lands confiscated at Ohiwa, as it draws in wider Whakatohea interests on which we do not have sufficient evidence.

We are also unable to inquire into the issue of Crown offers to Ngati Awa in 2002 regarding cultural redress in the Ohiwa Harbour. As we signalled in our statement of issues, the Tribunal has already issued the Ngati Awa Settlement Cross-Claims Report, finding that there was no breach in respect of the Crown's cultural redress. The matters that remain are matters for Tuhoe and Te Upokorehe who alone, as we indicated in chapter 4 of our report 'are in a position to describe their relationship'.[18]

We turn next to set out the specific issues for consideration in this chapter.

21.2 Issues for Tribunal Determination

After evaluating the evidence and submissions, we have determined that the following issues are essential for us to determine before we can make our Treaty findings:

- What is the relationship of the peoples of Te Urewera with their environment and waterways, and how have they exercised authority over resources and waterways under customary law?
- To what extent did the UDNR agreement recognise the authority of Te Urewera peoples over the environment of Te Urewera and its waterways?
- What were the Crown's major interventions in the environment of Te Urewera before the establishment of the National Park in 1954? Were those interventions conducted with the agreement of, or with due regard to the interests of, the peoples of Te Urewera?
- What influence and authority have Maori had in the management of Whirinaki Forest?
- How has the Crown exercised authority and control over Te Urewera rivers, and has it taken due account of the rights and interests of the peoples of Te Urewera?

18. Charles Aramoana, brief of evidence, 14 January 2005 (doc J46); Tamati Kruger, claimant translation of transcript of oral evidence, 17 January 2005, Tauarau Marae, Ruatoki (doc J48(a)), pt 1, p 7; J W Milroy, S Melbourne, and T R Nikora, 'The Bay of Plenty Confiscation and the Tuhoe Tribal Boundary'(commissioned research report, Rotorua: Tuhoe-Waikaremoana Maori Trust Board, 1995) (doc A123), p 7; Jeffrey Sissons, 'Waimana Kaaku: A History of the Waimana Block'(commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A24), pp 8–10

21.3 What is the Relationship of the Peoples of Te Urewera with their Environment and Waterways, and How Have they Exercised Authority over Resources and Waterways under Customary Law?

Summary answer: *The peoples of Te Urewera express their relationship with their environment, with their whenua, their maunga, ngahere, awa, and roto, in terms of whanaungatanga or kinship, and whakapapa. The environment is inhabited by animate and inanimate beings, each infused with mauri (a living essence or spirit), and to all of whom people are related by a web of common descent, commencing ultimately from the coupling of Ranginui and Papatuanuku. People's sense of tribal identity, of turangawaewae, is closely shaped by the history of their ancestral relationships over many generations with their whenua, their maunga, their awa. Relationships with the awa, roto and ngahere are also integral to their life and culture- renowned for their rich resources, especially fish and birds. Some relationships, those with taonga species, have been particularly important. Tuna and kereru are two such species, and the tikanga for catching, preserving, distributing and consuming them, reflect the respect in which they are held. They are valued as prized foods, and as upholding the mana of hapu who place them before their manuhiri, or gift them on important occasions. The responsibilities of kaitiakitanga, which fall on the whole tribal community, extend to caring for and conserving the mauri of all living beings. Whanau, hapu, and iwi have exercised authority over the land and its resources in accordance with established rights. The harvesting of many species of birds, and gathering of bush and river resources was managed by rangatira within a framework of customary law and practice. The practice of rahui ensured that food resources were conserved. Waterways and their resources were –and are- of immense importance to the peoples of Te Urewera. Hapu and iwi exercised mana over rivers and waterways, the arteries of life in the region, which provided resources important both in their economy and to their identity. Thus tributaries and streams were also important both to eel fisheries, and for catches of raumahehe (known elsewhere as koaro), kokopu and inanga, all important foods. Customary practices were developed and applied to imported species such as pigs, deer, trout and morihana (carp). New technologies might be used, or introduced species might simply be taken by traditional methods.*

21.3.1 Introduction

In chapter 2 of our report, where we gave an overview of the tribal histories of the peoples of Te Urewera, we also considered their relationships with the natural world, with land, forests, and waterways. We looked at how Te Urewera communities developed ways of protecting the resources of the land and waters, and of protecting their rights to those resources. That discussion was based on the extensive evidence we received from the claimants themselves.

21.3.2

Here we draw on and expand our discussion, as context for the key issues examined in this chapter: the extent to which the Crown recognised the customary authority of Te Urewera peoples over resources of land and waterways; and the nature and impact of the Crown's early interventions, following the UDNR agreement of 1895–96, in the natural world and the Te Urewera environment.

The two questions we address in this section are:

- What is the relationship of the peoples of Te Urewera with their environment and waterways?
- How have the peoples of Te Urewera exercised authority over resources and waterways under customary law?

21.3.2 What is the relationship of the peoples of Te Urewera with their environment and waterways?

(1) *Whenua, turangawaewae*

Hiki ake te kohu e	The mist lifts
Ko Hinepukohurangi	It is Hinepukohurangi
Tapapa ana ki nga koawa	Lying in the valleys
Hei kakahu mo Papatuanuku	As clothing for the earth
Ka hora nei te moenga	The bed is laid
Mo te tipua nei a Te Maunga	For this tipua Te Maunga
Ki runga o Onini e	At Onini[19]
Ka hono ki a Hinepukohurangi	And he joins with Hinepukohurangi
Huraina nga rarauhe	Lift up the bracken fern
Kia puta ko Nga Potiki	To reveal the children of Potiki
Nga uri o Te Maunga	The descendants of Te Maunga
Nga tamariki o te kohu	The Children of the Mist[20]

In our hearings, the peoples of Te Urewera spoke of their relationship with the environment, with their whenua, their maunga, ngahere, awa, and roto, in terms of whanaungatanga or kinship. The Ruatahuna people, for example, expressed their identity with the land in terms of their descent from their mountains and the mist:

> if you know where those mountains come from then that is where we come from.

19. Onini, the claimants told us, is near the present Ruatahuna village.

20. Quoted in Tuawhenua Research Team, 'Ruatahuna: Te Manawa o te Ika: Part 1: A History of the Mana of Ruatahuna from Early Origins to Contact and Conflict with the Crown', 2003 (doc B4(a)), p 5; adapted from translation by Kaa Williams.

> If you can trace where the mist comes from and if you can age it then you have discovered how long we have been here and where we come from. . . . we are the descendants of these mountains and the mist. . . . We are this land and we are the face of the land.[21]

Hinepukohurangi and Te Maunga came together at Onini to have their son Potiki I, from whom Nga Potiki and thus Tuhoe trace their descent. And, as the Tuawhenua researchers explained: 'The names of these original tipuna embody the mist and the mountains of the Urewera, thus connecting Potiki I and his descendants symbolically but directly with their natural land and environment.'[22]

Tamati Kruger, speaking at Ruatahuna of Te Manawa o te Whenua, reminded us that if the tail of the fish that Maui pulled from the sea is at Ngapuhi, and the head is with Te Ati Awa at Poneke, the heart of the fish is at Ruatahuna. He told us:

> The people came from the land, the mist and the natural elements. Without the land people would never survive. . . . The people's mana is drawn from the land, the heart of Te Ika a Maui.
>
> Te whenua refers to the earth, the land, and the placenta all that nurtures the beginning and existence of life. Regarding 'te ewe o te whenua', when a child is born that (te ewe) is at the end of its umbilical cord joining it to its mother, for feeding it. Without this nourishment, one cannot live. Likewise without the land, humankind cannot survive. Our ancestors have told us, 'The land is the life-blood of people.'[23]

These traditions reflect powerfully the generations-old relationship between people and the environment inhabited by animate and inanimate beings, each infused with mauri (a living essence or spirit), and to all of whom they are related by whakapapa, a web of common descent.

People's long history of identity with the land and waterways through their tipuna has been carefully preserved, updated, and passed on to younger kin through whakapapa, pepeha, whaikorero, waiata, whakairo, place names; and that knowledge was crucial to the sense of identity of whanau, hapu, iwi. Te Hue Rangi of Ruatoki stressed the importance of waiata to Tuhoe:

> Ko te waiata tawhito te whakaaroha o te ngakau ki te whenua ano ki te tangata. Ko te waiata tawhito he korero i te tohu whenua, he korero i te tohu Mana motuhake o te tangata ki te whenua . . . Me timata mai au i roto i nga waiata whenua. Na te mea, koinei te mea nui ki a Ngai Tuhoe, ko te whenua. Na tetahi pepeha e whakaatu ki a koe. Anei "he pukenga maunga, he pukenga wai, he pukenga tangata, he rerenga korero".

21. Tamati Kruger, summary of evidence for the Tuawhenua Research Team, 11 May 2004 (doc D28), pp 4–5
22. Tuawhenua Research Team, 'Ruatahuna', Part 1 (doc B4(a)), p 7
23. Tamati Kruger, summary of evidence for the Tuawhenua Research Team, 11 May 2004 (doc D28), p 2

21.3.2(1)

> The waiata of Tuhoe are the symbols of love and connections to the land and to people. The waiata tawhito of Tuhoe are statements expressing links to the land and the mana of a person over the land . . . I shall commence [discussion] in the waiatas pertaining to the lands because this is the thing most precious of all to Tuhoe and I shall show by this saying: a gathering of mountains, a gathering of water, a gathering of people, and there will be debate and intellect.[24]

The importance of turangawaewae to identity, of belonging to a tribe, a region, and marae, was underlined by Stokes, Milroy, and Melbourne. In whaikorero, especially during tangihanga, tribal allusions which identify the speaker with his tribe and region are essential. John Rangihau explained why:

> If they are strangers then they indicate where they come from. They indicate by telling the local people of their sacred mountains, of their tribes, of their rivers and their lakes, and each of these has a meaning for the local people. As the person recites the lake or the river or the mountain the old men shake their heads wisely. They are not doing this for effect. They are shaking their heads and associating themselves with the visitor because the Maori gives a life-force, a life-style to his mountains and to his rivers; and for the host people, as they look around and see their own mountains shrouded in mist or with the sun playing on them, immediately there is conjured up within them all that their own people have told them as part of their own history.
>
> This is why our place names are so precious to us. . . . it is history because it is part and parcel of our living, something which has an emotive force of its own which pulls at the person who is listening. And for me and for others the mountains seem to look down . . . sometimes benignly . . . sometimes with anger . . . You feel the different moods of the very hills that surround you because it is part of you.[25]

This deep and fundamental sense of belonging to a tribal people, their land, and their place begins with the creation whakapapa, commencing with the coupling of Ranginui and Papatuanuku, and the acts of their offspring. The late Hohepa Kereopa of Tuhoe spoke of Tane, who separated his parents and created his world:

> Wood, trees, insects, birds, animals and other things . . . For each thing that Tane created, [he] imposed the mana, authority, sanctity on that thing so that those things would have godly aspects within them, and Tane would remain as the parent of all these creations.

24. Te Hue Rangi, 21 January 2005, transcription of simultaneous English interpretation of evidence presented in te reo, Tauarau marae, Ruatoki
25. Stokes et al, *Te Urewera* (doc A111), p 11

> Ka hanga a Tane tana ao, rakau, ngarara, manu, kararehe, aha ake, aha ake, aha ake . . . Mō ia kaupapa i hangaia e Tane, ka whakanoahia e Tane, he mana, he mauri, he tapu kia noho rātou, he atua anō kia rātou anō, ka noho a Tane hei matua ora mō ngā manu atua.[26]

Mr Hohepa spoke also of Te Miina o Papatuanuku, the cleansing waters of Papatuanuku, which begin with the mists, rising from her warmth. Then:

> When it is nightfall the dew begins to fall on the surface of the earth . . . All the rivers converge together from the valleys which follows the descent of the waterfalls forming into the miina or the cleansing waters whose role is to gather all the impurities together [from the body of Papatuanuku] and carry them to the river mouth.[27]

Thus the rivers flowed down the valleys of Papatuanuku to the sea, 'to that other ancestor of ours, to Tangaroa and his families of fish, food'.[28] Finally, as a 'cleansing for the children of Tangaroa, the crest of the moon is lifted creating the mist and clouds, allowing the process to begin again'.[29]

And counsel for Nga Rauru o Nga Potiki stated:

> The land, sea and sky are all part of the united environment, all having a spiritual source. It is by divine favour that the fruits from these resources become theirs to use. As Nga Roimata a Ranginui [the tears of Ranginui] descend to settle on Papatuanuku, they gather in the many rivulets of her form, flowing through her and over her . . . The waters of the heavens mingle with those of the earth, and it is from this union that fertility is maintained.[30]

Ani Te Whatanga Hare of Ngati Haka Patuheuheu spoke of Maori relationships with the land, and with the mountains and waterways in these words:

> I ahu mai te tangata i a '*Papatuanuku*', i roto i nga korero tuku iho, a te Maori . . . He aronganui, motuhake, to te Maori, ki tona whenua, ki tona turangawaewae. Ko te '*whenua*' he '*oranga wairua*', he '*oranga tinana*', he '*oranga hinengaro*' no te tangata. . . . Ko nga '*Whakaheteri*', ko '*Nga–Whaka-A–Rohe*', '*Pou Rahui*', i nga whenua Maori, ko nga Pae Maunga, Ko nga Awa, Ko nga Toka, ko nga Koawaawa, ko nga Pari Tahataha, ko nga Wairere, ko nga Ngahere, ko nga Roto, ko nga Moana . . . Ma te '*Whenua*', ka herea nga kawai whaka-papa, o te tangata, ki tena Hapu, ki tena Iwi, ki tena Waka. [Emphasis in original.][31]

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26. Hohepa Kereopa, 26 November 2003, transcription of simultaneous English interpretation of evidence presented in te reo, Tataiahape marae, Waimana
27. Waitangi Tribunal, The Stage 1 Report on the National Freshwater and Geothermal Resources Claim (Wellington: Legislation Direct, 2012), p 35
28. Hohepa Kereopa, transcription of simultaneous English interpretation of his evidence (based on doc B15), 26 November 2003
29. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p 35
30. Counsel for Nga Rauru o Nga Potiki, opening submissions,6th hearing week, 16 August 2004, para 9
31. Ani Te Whatanga Hare, brief of evidence, 8 December 2003 (doc B27), pp 12–13

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> Man comes from Papatuanuku according to the Maori traditional stories . . . Maori have a distinct understanding of their land, of their place. The land, the whenua, is a spiritual sustenance, it's a physical sustenance and it's a sustenance for the mind of the man' . . . The sentinels over the Maori lands are the mountain ranges, the streams, and rivers and rocks. . . . The streams, the cliffs, the banks of the rivers, and the waterfalls, the forests, the lakes and the seas . . . It is through the land that genealogy ties people to their hapu, to iwi and to waka.[32]

The peoples of Te Urewera thus have ancestral relationships also with their maunga, rivers, and other waterways. For Tuhoe, Maungapohatu is the 'identifying landmark'. The rangatira Tukuaterangi explained over a century ago that 'Maori mana, identity and prestige are embodied in that whole mountain . . . All our ancestral mana from time immemorial is enshrined in that mountain'.[33] Colin Pake Te Pou of Tuhoe, speaking at our Waimana hearing, named 'the hills that are boundless, according to the elders', and explained that the hills of Te Urewera, 'according to our ancestors, are travelling places for the spirits in the old times, from those times, and . . . is still current today'.[34]

We turn next to consider the relationship with rivers and other waterways in more detail.

(2) *Rivers and other waterways*

For the purposes of our discussion in this chapter, the people's relationships with their rivers are of particular importance.

Huka Williams of Ruatoki spoke of the significance of the Ohinemataroa River to Tuhoe, beginning with the whakapapa of Hinemataroa from Wainui, a child of Rangi and Papa. Wainui, she said, is the god of the waters, and Tangaroa the god of foods within the water.[35]

Hakeke McGarvey also talked of the Ohinemataroa River:

> All of us of Tuhoe are descendants of Hine-mata-roa of Nga Potiki. Our ancestral claim is from this source to ourselves, and to our continuing occupation and trusteeship . . . The Ohinemataroa has always belonged to Tuhoe mai ra ano, and the people belong to the river. In terms of ownership the river doesn't belong to any one individual but to us all. All of Tuhoe can whakapapa to our tupuna, Hinemataroa and the river belongs to all of Tuhoe.[36]

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32. Ani Te Whatanga Hare, 11 December 2003, transcription of simultaneous English interpretation of evidence presented in te reo (doc B27, pp 12–13), Tataiahape marae, Waimana
33. Tukuaterangi was giving evidence to the Urewera commissioners in 1899. (Urewera Minute Book 3, 28 March 1899, fol 182, translation by Stokes et al, *Te Urewera* (doc A111), p 12)
34. Colin Bruce Pake Te Pou, oral evidence, Tataiahape marae, Waimana, 10 December 2003 (simultaneous English interpretation)
35. Irene Huka Williams, oral evidence, simultaneous translation, Tauarau marae, Ruatoki, 20 January 2005
36. Hakeke Jack McGarvey, brief of evidence, 2005 (doc J33), pp 1–2

The river 'is a taonga . . . which carries its own separate mauri (life force) and is guarded by the taniwha that inhabit it'.[37] The taniwha in Ohinemataroa River, among them Waerore at Waikirikiri, Tauke at Otenuku, and Marie at Te Rewarewa, are also Tuhoe tipuna.[38]

Mr McGarvey explained the spiritual significance of Ohinemataroa for Tuhoe; people are still baptised in its waters, and traditional healing and cleansing takes place there:

> I recall as a child having to assist an elderly aunty to the river when she was unwell. She was bathed with the waters and karakia were said to cleanse her of her illness. This practice has continued and I, myself, have been in sports teams who have stopped at the river and cleansed ourselves and used the appropriate karakia for strength and it has worked.
>
> The use of the river in this way reaffirms our connections to our tupuna Hinemataroa and provides a continuity with all our tupuna. Because all Tuhoe share that whakapapa, the river is a taonga that connects us all to each other.[39]

Huka Williams told us about the significance of the streams (nga koawa) of the Ohinemataroa River, and the associations of tupuna with places by the streams. Among them was Oheu, which 'was a place for sacred ceremonies, of coming of age', where the tohunga would also take people for healing.[40]

Ngati Whare kaumatua explained the whakapapa relationship between their maunga, their river, and its streams, beginning with the relationships among their maunga:

> Tuwatawata married Moerangi and begat Maungataniwha, to the south, Mapouriki to the east, Otohi, Tikorangi to the west, Titokorangi, Rangiahua and Tawhiuau. These are some of the sacred landmarks of Te Whaiti-nui-a-Toi. They (the mountains) are all male.

The maunga have a close relationship with the tapu river of Ngati Whare, Whirinaki, and the stream and tributaries to which the river gave birth; 'these streams are the children and grandchildren of Whirinaki', and they meet at Te Whaiti-nui-a Toi ('the Narrowing of the Great Canyon of Toi'), in the valley. The streams, he told us,

> represent the tears of Tuwatawata and Moerangi who weep for their children who are living on this side of the river, namely, Tikorangi, Maungataniwha and Mapouriki, they are all males. They married the female mountains up the Okahu river and begat Otamapotiki, Pokapoka, Tapiri, Kopuatoto descending down to the Mangawiri river and out to Putakotare. These are the sacred landmarks of Te Whaiti-nui-a Toi. These rivers represent the tears of Tuwatawata and Moerangi who weep for their children.[41]

37. Counsel for Ruatoki claimants, amended consolidated particularised statement of claim, 8 October 2004 (SOC 1.2.8(b)), p 123
38. For further discussion of these taniwha see chapter 2.
39. Hakeke Jack McGarvey, statement of evidence, 2005 (doc J33), p 3
40. Irene Huka Williams, oral evidence, simultaneous English interpretation, Tauarau marae, Ruatoki, 20 January 2005
41. Jack Tapui Ohlson, mana whenua brief of evidence, September 2004 (doc G30), pp 4–5, 6

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Waterways are also of great importance to Ngati Ruapani. We have already discussed the immense significance of Lake Waikaremoana to hapu and iwi in chapter 20. But there were also rivers and wetlands. Maria Waiwai gave korero tuku iho for the Kahui Tangaroa Stream that flowed into the Waikaretaheke River, and the species that lived within it:

> Kahui Tangaroa is our river. The name comes from the legend of Haumapuhia, who found the outlet and was caught there when dawn broke. We believe the taniwha that formed Lake Waikaremoana was Haumapuhia. She was unsuccessful in reaching the sea before dawn, so she made herself comfortable in Waikaretaheke River, an outlet from Te Wharawhara Waikaremoana. As time went by, her grandfather Mahu felt sorry for Haumapuhia, so he prayed to Tangaroa the sea god to send some kai for her. Eels, crayfish, shellfish and other creatures came up the waterways for Haumapuhia's survival.[42]

James Waiwai spoke of the people's relationship with the eels of the wetlands near the river, before the Whakamarino Lake was constructed in the course of the hydro scheme:

> Before the Whakamarino Lake was built, there used to be a swamp on the far side. It was a rich eeling place, a swamp which was fed by Kahui Tangaroa, the gathering place of the children of Tangaroa. In the evenings, you could see the fires where people were eeling. They'd eel in the evenings, sleep by the fires and in the mornings they would return to their marae with the eels they'd caught.[43]

Speakers for Ngai Tamaterangi told us of their spiritual relationship with the Waiau River. Charles Manahi Cotter remembered a story from one of his uncles about when there was a flood. The waka went missing and was found in the middle of the Waiau River on its way to the Wairoa River:

> My uncle called out to it '*Wai te kauri – hoki mai*'. According to [him] the waka the turned around on its own against the current and came to him. . . . This is significant and is an indication of our mana and relationship with the Waiau.[44]

There were prized puna (springs) and ngawha (hot springs) that were spiritually important too. Lorna Taylor told us that the water from their puna on the papakainga at Waimako pa is 'sacred and is essential to our wellbeing'. It is used for 'karakia, rongoa, kai and cleansing and has been since time immemorial'.[45] Tei Ruawai Hema, giving evidence for Ngai Tamaterangi, spoke of a 'beautiful fresh water spring on Tukurangi'. This spring is 'not known by many people', but Ngai Tamaterangi would 'stop to rest at the spring on hunting

42. Maria Whakatiki Tahu Waiwai, brief of evidence, not dated (doc H18), p 5
43. James Anthony Waiwai, brief of evidence, not dated (doc H14), p 24
44. Charles Manahi Cotter, brief of evidence, not dated (doc I25), pp 11–12
45. Lorna Taylor, brief of evidence, 18 October 2004 (doc H17), p 10

trips'.[46] Such hunting expeditions are one of the primary ways through which the people maintain relationships with their taonga today.

And the Waikokopu ngawha (hot springs), as we outlined in chapter 15, was a taonga of Ngati Haka Patuheuheu and of Tuhoe. Ani Hare of Ngati Haka Patuheuheu gave the korero tuku iho for the ngawha. She recalled a karakia sent by Ngatoro-i-Rangi to his tipuna in Hawaiki, and the arrival of the fire guardians, Te Pupu and Te Hoata, who 'left a trail of volcanic fire or mineral springs' on their journey inland from Whakaari (White Island). She also spoke of the importance of the ngawha for medicinal and healing purposes.[47]

(3) *Ngahere*

Relationships with the ngahere (forests) are also of great importance. The forests of Te Urewera have preserved much of the ancestral landscape in our inquiry district in a way that is now very rare. Stokes, Milroy, and Melbourne stated that:

> The forest (ngahere) was and still is an integral part of Tuhoe life and culture. It is called te wao nui a Tane, the great forest of Tane, te wao tapu a Tane, the sacred forest of Tane Mahuta, the child of Ranginui the Sky Father and Papatuanuku, the Earth Mother. It was Tane Mahuta who heaved his parents apart to let in light so that all beings could flourish on earth. Papatuanuku supports the growth of the forest, the trees reaching toward the sky, and Rangi sheds tears, rain, in his grief for Papatuanuku and so helps nourish the forest growth.[48]

The importance of these relationships was and is evident in the significance attached to the spiritual powers of tipua trees. Taneatua, in his travels inland generations ago, came upon a hinau tree at Te Kohuru, near Ohaua-te-rangi, and chanted a karakia, to 'cause children to be conceived';[49] Wharekiri Biddle explained that the tree, named Te Iho-o-Kataka, had assisted many previously barren couples over the years.[50] At Ruatoki, there were two named trees at Owhakatoro: Te Whanau a Kuramihirangi, representing shelter for the offspring of Kuramihirangi; and Whangai Manuhiri, symbolising the fertility of the area, and visited by people to revitalise their mauri.[51]

Individual berry trees prized for the birds they attracted, or for their timber, were named too. Best wrote of miro trees that:

46. Tei Ruawai Hema, brief of evidence, 29 November 2004 (doc I27), para 2.2
47. Anitewhatanga Hare, brief of evidence, 15 March 2004 (doc C17(a)), pp 29–31
48. Stokes et al, *Te Urewera* (doc A111), p 22
49. Paitini Tapeka in Elsdon Best, QMS [178], ATL (Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 36)
50. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4 (a)), p 36
51. 'Ruatoki: 'Te Whenua i Puritia, Te Whenua i Tawhia', Te Puna Rangahau o Anamata (2005), Appendix for brief of evidence of Tamati Kruger, 10 January 2005 (doc J29(a)), p 63

> every tree of this species is well known by the subtribes on whose land it stands, and most of such trees are known by distinct names, as also are any trees of other species – kahikatea, matai, rata etc. – that were much resorted to by birds, and were for that reason favourite snaring – trees.[52]

The bush in the Ruatahuna region 'was renowned for its bounty and was referred to as te roi a Ruatahuna'.[53] The kahikatea forest at Kiritahi was famous as a place where koko were snared, and Te Weraiti and Te Tukuroa were other well 'famed areas for hunting birds'.[54] Forests were rich in a range of resources. The old people caught kiore (native rats) in traps made from supplejack after fattening them up; in fact, the phrase Mr Ohlson used was '[i] whakatipu kiore nga pakeke i Tarapounamu'; '[m]y elders cultivated the native rat at Tarapounamu'. The people 'used to chew upon the tawa berries and mash the hinau berries which they then fed to the . . . rats'.[55] And the forest also provided different varieties of ti kouka (cabbage tree), aruhe (fern root), pikopiko (fern fronds), watercress, puha, tohetaka (native dandelions), and the berries and leaves of kotukutuku, tutu, karamuramu, hinau, and makomako trees.[56] Miriama Howden, in her evidence for the Tuawhenua claim, spoke of the importance of the forest for food and rongoa:

> When we would go to the bush we would gather huhu grubs which were a delicacy for us. We would gather pikopiko . . . which were and still are a special food for us. You would pick them only in season. We would gather karamuramu for medicine, and tataramoa for tonics and other things too . . . For every illness at that time, a plant or tree could be found as a medicine, as an ointment, or for bathing – the bush would provide for all these things.[57]

(4) *Taonga species*

Relationships with taonga species are particularly important. The Wai 262 Tribunal, considering the nature of such species, suggested that they have:

> matauranga Maori in relation to them[; that t]hey have whakapapa able to be recited by tohunga[; that c]ertain iwi or hapu will say that they are kaitiaki in respect of the species. . . . In essence, a taonga species will have korero tuku iho, or inherited learnings . . .[58]

52. Quoted in Stokes et al, *Te Urewera* (doc A111), p 26
53. Rehita Taputu, brief of evidence, 11 May 2004 (doc D25), p 2
54. Tamati Kruger, summary of evidence for Tuawhenua Research Team, 'Ruatahuna: Te Manawa o Te Ika, Part 1', 11 May 2004 (doc D28), p 26
55. Jack Tapui Ohlson, mana whenua brief of evidence, September 2004 (doc G30), p 10
56. Robert Wiri, *The Lands of Te Whaiti-Nui-a-Toi: The Ngati Whare Mana Whenua Report*, 4 December 2000 (doc A29), p 140
57. Miriama Howden, brief of evidence, 11 May 2004 (doc D26), p 4
58. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity*, *Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, pp 114–115

Some taonga species, the Tribunal added, 'are emblematic of community or cultural identity', often with mystical or spiritual functions. They act as 'spiritual guardians (kaitiaki in a different sense of that word) of the iwi or hapu in question'.[59]

In Te Urewera there is a range of relationships with taonga species. We discuss two in particular.

(a) ***Kaitiaki:*** First, there are particular birds which are tipua or kaitiaki, and therefore of great significance to the peoples whose spiritual guardians they are. Jack Tapui Ohlson told us of Hineruarangi, kaitiaki (protector) of Ngati Whare, a 'woman from ancient times', a tipua, who takes the form of a shag, a 'completely white' bird; when she flies 'it is a sign that a chief within the Ngati Whare district has died'.[60]

We heard also of two white owls, Kahu and Kau, who were 'predictive birds', (tipua, that is, with mystical powers). For the people of Ruatoki, these tipua foretold whether the coming season would be a good one for taking birds. If they appeared when birds had been killed and were being cooked, it was a good sign for the coming season; and when the first birds were being prepared for preservation, if the owls did not appear, or returned and then flew away, a poor season would follow.[61]

The kawau (black shags) are a taonga for nga iwi o Waikaremoana, revered for their importance as kaitiaki.[62] The ruru (morepork) is one of several whanau kaitiaki of Ngai Tamaterangi, each of whom has a particular role.[63] And the kaahu (native hawk) is important to Ngati Manawa and to Ngati Whare.[64] Wiremu Bird, discussing the Ngati Manawa ancestral house Apa Hapai Taketake, explained that the kaahu adorned the ama on the taranui of the whare: 'in our mythology [the kaahu] levelled the plain of Kaingaroa'.[65] Jack Ohlson of Ngati Whare said that Kaingaroa was known as Te Kainga o te Kahu; '[t]he kahu is the kaitiaki of Kaingaroa'.[66]

(b) ***Tuna and kereru:*** Secondly, there are species which are taonga because of their great importance as food sources, and as 'kai rangatira', the prized foods that uphold the mana of a people who are famed for serving them to manuhiri and for exchanging them in trade

59. Waitangi Tribunal, *Ko Aotearoa Tenei*, *Te Taumata Tuarua*, vol 1, p 117
60. Jack Tapui Ohlson, Manawhenua brief of evidence, September 2004 (doc G30), pp 5–6; Mr Ohlson sourced his account of Hineruarangi to Pahiri Matekuare; Hiwawa Whatanui, Elsdon Best papers, Maori notebook no 1, qMs-0178, ATL, Wellington (Wiri, *The Lands of Te Whaiti-Nui-a-Toi* (doc A29), p 105)
61. Evidence of Tamarau Makarini, Urewera minute book 4, 8–10 March 1900, fols 2–17 quoted in Stokes et al, *Te Urewera* (doc A111), p 23. The interpretation of tipua is as given in Stokes et al, *Te Urewera* (doc A111), p 22.
62. Counsel for Nga Rauru o Nga Potiki (Waikaremoana), amended consolidated particularised statement of claim, 16 April 2004 (SOC 1.2.1(a)), p 134
63. Charles Manahi Cotter, brief of evidence, 11 December 2003 (doc 125(a)), p 25
64. Wiremu Bird, brief of evidence, 11 August 2004 (doc F33), p 11; Jack Tapui Ohlson, second brief of evidence, September 2004 (doc G36), para 19
65. Wiremu Bird, brief of evidence, 11 August 2004 (doc F33), p 11
66. Jack Tapui Ohlson, second brief of evidence, September 2004 (doc G36), para 19

with other iwi. We refer here to two such species, tuna and kereru, which are of particular importance in this chapter.

Tuna are a taonga for Ngati Manawa. Hapimana Higgins told us that Murupara, the township, is named after the taniwha Murupara, who was a tuna. Ngati Manawa, he said, 'has always had an important relationship with the tuna':

> Our tribal identity is closely linked to our relationship with the tuna, our rivers, and our natural resources . . .
>
> Ngati Manawa is famous for its tuna, and this reputation is expressed to us when we travel to other tribal groups. . . . In this way it is important to the mana of Ngati Manawa.[67]

Mr Higgins, whose evidence we have quoted in detail in chapter 2, stressed that knowledge of hinaki and of eeling places in local rivers and creeks was shared within whanau, 'right down to the young ones'. His family had two hinaki. One was named Rawiri 'after our tupuna', and Rawiri 'had a reputation of filling itself overnight when set by people who had knowledge of the river'. Tuna were also caught by torchlight, 'replicating an old style of eeling' by their tipuna, who carried flame torches at night; and by threading worms on a flax webbing to entrap the tuna by its teeth. Mr Higgins explained how he had been taught to set a hinaki, looking for the right conditions in the river waters, for logs or great trees in the water where eels might rest, the care needed in baiting, and also the importance of choosing the right weather conditions and the right phase of the moon.[68]

Karakia before going eeling, and eeling in accordance with tikanga, was important:

> My father believed that the karakia was not to encourage the eel to come into your hinaki, but rather to ensure you were doing it for the right reasons.[69]

And it was also important how your catch was distributed:

> What was also a way of life was the tikanga of sharing. Dave [Emery, renowned for his ability to catch large eels] was one of those gentlemen who would eat one, give you one, and then give one away. That is an important tikanga passed down to us; because we all learnt from those examples that that was how you were expected to conduct yourself and that's how he was.[70]

We had evidence too of Ngati Manawa gathering each March at Rangipo in the Kaingaroa area to farewell the eels with appropriate karakia, as they departed on their migration to the

67. Hapimana Albert Higgins, brief of evidence, 11 August 2004 (doc F31), p 2
68. Hapimana Albert Higgins, brief of evidence, 11 August 2004 (doc F31), pp 3–6
69. Hapimana Albert Higgins, brief of evidence, 11 August 2004 (doc F31), p 8
70. Hapimana Albert Higgins, brief of evidence, 11 August 2004 (doc F31), pp 2, 8, 9

ocean to spawn.[71] The life cycle of the tuna was, and is, well known, and the knowledge has been handed down to the present generations.

Noera Tamiana explained that eeling was 'not a simple matter'. At Ruatahuna, preparatory work began during the day, including the gathering of torches for the night-time fishing. These consisted of weathered, 'gummy wood', called mapara. The mapara were then distributed along the river or stream 'so we would have a continuous supply along our fishing expedition'. Early in the morning, the young people would also dig for worms. Then, flax was scraped 'in a special way' to prepare strands of hitau, which were attached to a manuka stick (with the worms threaded through as bait). Later at night, from about 8.30 to 10 pm, this particular tool was used to fish for eels in the rivers. After that time, the eels slept in the shallows and were caught using another tool, a wooden spear with 'a thin bit of steel cut into a comb with prongs on it'. Finally, very late at night, the eels began their run and were caught by 'gaffing them, using a hook and swinging them out of the water'.[72] Mr Tamiana added:

> The skills and traditional tools we have are skills that everyone here knows. These things are part of our life, self-sufficiency and sustainability.[73]

Tuna are a taonga of Ngati Ruapani also. As such, there are important tikanga associated with them. Maria Waiwai told us that when she caught eels with her kuia, and learned to clean and cook them, '[t]he para and the bones were buried to prevent the dogs from desecrating them, a mark of respect for that food resource'.[74] Neuton Lambert of Ngati Ruapani and Tuhoe told us how well the old people knew the eel species:

> They knew the science of each [type of] eel; and respected that. Their tikanga accounted for all aspects of the eel life cycle, so that our relationship with the eels was harmonious.[75]

Many kaumatua spoke to us of tikanga in relation to catching foods of the forest and the waterways, and of the importance of conserving foods, of taking only what was needed, and of returning the first catch to the water. Mr Cotter of Ngai Tamaterangi stated that some of the catch from the Waiau River was returned for the taniwha Haumapuhia.[76] And James Doherty of Ngati Tawhaki told us that when eels were caught in the Okahu River, 'you kill it, rub the slime onto leaves and return . . . [them] to the hole. This will ensure the tuna will come back.'[77]

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71. Merata Kawharu and Rapata Wiri, Te Mana Whenua o Ngati Manawa (doc C11), p 39; Te Runanga o Ngati Manawa, site visit booklet (doc F38), p 8
72. Noera Tamiana, brief of evidence, 10 May 2004 (doc D15), pp 5–6
73. Noera Tamiana, brief of evidence (doc D15), p 7
74. Maria Whakatiki Tahu Waiwai, brief of evidence, not dated (doc H18), p 4
75. Neuton Lambert, brief of evidence, 11 October 2004 (doc H57), p 6
76. Charles Manahi Cotter, brief of evidence, not dated (doc I25), p 25
77. James Edward Doherty, brief of evidence, 11 May 2004 (doc D27), p 3

21.3.2(4)(b)

Kereru and kaka, Tuhoe stated, are taonga species for them. These birds sustained them physically and also sustained their mana, providing 'the lavísh hospitality for which [they] are renowned'.[78] Dr Coombes quoted Wharekiri Biddle as stating that kereru were 'sacred to Tuhoe', who harvested them on a seasonal and controlled basis.[79] During the nineteenth century, huahua (the delicacy prepared by boning the birds and preserving them in their own fat) was often gifted, or served on special occasions. The Tuawhenua researchers noted that: 'Te huahua was often stored and presented in taha, ornamentally carved and decorated, symbolically representing the mana of the hapu or chief.'[80] Rehita Taputu called te huahua 'a food of aristocrats'.[81] And huahua was also in high demand for trade with other tribes; by the 1860s kaka formed the 'base of a roaring trade' and 'commanded huge returns of European goods'.[82]

Kereru were taken in various ways. Te Kurapa of Ngati Tawhaki, a fighting chief, was also renowned as a great fowler, and his prowess is depicted on the rafter of the great wharenui at Mataatua, Ruatahuna, high up on miro trees, spearing kereru.[83] Rehita Taputu, giving evidence for the Tuawhenua claim, told us that:

> My ancestors would know the times of year that the foods of the birds were ready, and therefore where to put the troughs for catching the birds. The troughs would be hung up, the nooses attached and then they were filled with water.
>
> On other trees the long spears (tao) would be hung up. Some in front, others to the sides and behind. You were ready then for spearing birds landing from any direction.[84]

Tuhoe informants told Elsdon Best that such spears were about 25 feet long.[85] An account of a whare whapiko rau huka by Tamarau Waiari of Tuhoe is given by Best. This was a hut erected and set apart solely for the making of bird snares, undertaken by men who were fowlers.[86]

Pahiri Matekuare of Ngati Whare described the making of the traps known as waka kereru or pigeon troughs. Kereru feed on miro berries during the winter; the birds become thirsty and were caught when they drank at waka kereru.[87] They were only allowed to be

78. Counsel for Wai 36 Tuhoe, particularised statement of claim, 4 March 2003 (SOC 1.2.2), p 228
79. Brad Coombes, 'Cultural Ecologies of Te Urewera 1: Making 'scenes of nature and sport' – Resource and Wildlife Management in Te Urewera, 1895–1954'(commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A121), pp 137–138
80. Tuawhenua Research Team, 'Ruatahuna: Te Manawa o Te Ika, Part 2', 2004 (doc D2), p 232
81. Rehita Taputu, brief of evidence, 11 May 2004 (doc D25), p 3
82. Tuawhenua Research Team, 'Ruatahuna', Part 1 (doc B4(a)), p 172
83. Tuawhenua Research Team, Ruatahuna', Part 1 (doc B4(a)), pp 134–135
84. Rehita Taputu, summary of evidence, 11 May 2004 (doc D25), pp 2–3
85. Elsdon Best, *Forest Lore of the Maori: With Methods of Snaring, Trapping, and Preserving Birds and Rat, Uses of Berries, Roots, Fern-root, and Forest Products, with Mythological Notes on Origins, Karakia Used, Etc* (Wellington: Government Printer, 1942, reprinted 1977), p 156
86. Elsdon Best, *Forest Lore of the Maori*, pp 149, 408
87. Robert Wiri, 'The Lands of Te Whaiti-Nui-a-Toi: The Ngati Whare Mana Whenua Report' (doc A29), p 134

caught during winter.[88] Jack Ohlson, referring to Ngati Whare's use of waka (troughs) and snares in the old days, added that these traditional catching methods were lost in the early part of the twentieth century. But the waka remained, and the pigeons still landed on them, and they could then be shot.[89]

The taking, preserving, and consuming of kereru was strictly controlled by tikanga. Dr Wiri cited Te Mauniko Eparaima of Te Kuha pa of Waikaremoana, who gave an account of the role of women in lifting the tapu of the kereru when the first catch of the season was killed:

> When those birds were cooked the women were given a bird each to eat. Only after the women had finished eating were the men permitted to eat. Because of the sanctity (of the wood-pigeon) men were prohibited from eating the first birds that were caught in the bush. It was the role of the women to clear the way.[90]

Ngati Whare tikanga was similar. Mr Ohlson told us that: 'When the kereru were fat, our tikanga was that only the women would get the fat kereru, or would at least get it first.' He explained that:

> Kereru was a form of medicine for Ngati Whare women, especially when the women were hapu [pregnant]. If they ate kereru while they were hapu, they'd have no troubles giving birth, there would be no birth pains, and the baby would come through the birth canal easily.[91]

Hohepa Kereopa of Tamakaimoana stated that when the first birds were caught, and were placed in the sacred fires, they were for the home people. The men bit into the head, 'so that the spirit of that bird will not know where it's going'; then the legs were eaten 'so that the bird cannot walk'. The bird was broken up then, and the rear-end given to the women to eat; the men got only the bones. But the preserved kereru were intended above all for manuhiri. They were brought onto the marae ceremonially before a feast, during a haka; that, Mr Kereopa said, is the prayer for the manu. When the birds were offered onto the table, the guests would 'grab the oil, the grease from the Kereru and rub it on their hands so that the life essence of the mauri has been absorbed into the people':

> Koira te karakia o te manu, kua hora ngā kai ki ngā manuhiri ki runga i te tēpu, kua haere ngā mea mātau, ngā mea mātau. Kua karo atu i te hinu o te kereru, kua pani ki ngā ringa, kua te mahunga. Kua whakahoki te mauri ki runga tonu i a rātou.[92]

88. James Edward Doherty, summary of evidence, 11 May 2004 (doc D27), p 7
89. Jack Tapui Ohlson, second brief of evidence, September 2004 (doc G36), para 14
90. Robert Wiri, 'The Lands of Te Whaiti-Nui-a-Toi' (doc A29), p 135
91. Jack Tapui Ohlson, second brief of evidence, September 2004 (doc G36), paras 12–13
92. Hohepa Kereopa, transcript of simultaneous English interpretation from te reo evidence, 26 November 2003, Tataiahape marae, Waimana

21.3.2(4)(b)

Maria Waiwai emphasised that 'there was never any waste, every part of the bird had an important use'. The meat was eaten, the claws used for colouring and makeup, and the feathers for cloaks.[93] And James Doherty said that after the birds were brought home, his grandmother Heeni Moetu Kawana 'would pluck them and separate the feathers, those for making Korowai and the rest went to making pillows'.[94]

Te Whenuanui Te Kurapa of Tuhoe, giving evidence for the Tuawhenua claim, spoke of catching pigeons, tui, and other birds with his father, and bringing them back to where his father was waiting. 'From the first birds,' he said, 'we would pluck the tail feathers and stick them in the ground to return the life force of the bird back to the earth.' He added:

> With everything we did in the bush, collecting medicines, gathering foods, hunting, fishing, eeling, and travelling through the bush, there were traditions and rules that we had to have regard for. These have been important practices for me and my family to follow, to protect us, and to provide for us. These things are all traditions that were handed from my father to me.[95]

As we shall discuss later in the chapter, the tikanga for taking kereru and other birds was well known to the Crown because it was described often in Parliament. Back in 1900, for example, Sir James Carroll explained:

> the Natives never kill birds out of the proper season; they never shoot a bird unless it is fat, and fit for the pot. They bag properly and do not wound birds by loose and reckless killing. They preserved all their bushes under their old laws, and no one was allowed to transgress. Their old game-laws were strict enough, I tell you, and until the particular day arrived for opening, and when the proper ceremony had been performed and the ban removed no one was allowed to go out into the bush and kill except at the risk of his life.[96]

We will discuss these aspects of tikanga further in the next section of our chapter. Here, we simply note that tribal leaders in Te Urewera used rahui to control the times and places for hunting, so that the birds were taken with the maximum benefit for the well-being of the people and the mana of the hapu, and for the conservation of the resource. This was a duty of those whose task it was to care for the community and for the resource, and who assumed the responsibility of kaitiaki of the kereru.

93. Maria Whakatiki Tahu Waiwai, brief of evidence, not dated (doc H18), p 16
94. James Edward Doherty, brief of evidence, 11 May 2004 (doc D27), p 8
95. Te Whenuanui Te Kurapa, brief of evidence, 11 May 2004 (doc D21), pp 4–5
96. James Carroll, 16 August 1900, NZPD, 1900, vol 113, p 36 (Coombes, 'Cultural Ecologies 1' (doc A121), p 153)

(5) *Kaitiakitanga*

The conservation of prized resources was but one of the important responsibilities entailed by kaitiakitanga, which in turn was shaped by the fundamental relationship between the people and their turangawaewae. As Hohepa Kereopa put it:

> You have all heard the words spoken today: I am Te Urewera . . . and my task in this world is to care for Te Urewera, and all aspects pertaining to us all today . . . as a guardian. Who on earth said that I [would] be a chief over my ancestor Papatuanuku? Who said I would be in control of the traditions of my ancestors? But the thing for me is to care for Papatuanuku . . .[97]

As we noted in chapter 2, it was not only the physical environment and its lifeforms that had to be protected: their mauri had to be cared for and conserved also, for the survival and well-being of all. And we cited Poai Raymond Burne:

> Ka hoki aku whakaaro ki te wa i nga koroua i manaaki ana te ngahere. Tino mohio ratou ki te titiro i te ahuatanga o te rakau ki mua i te turakitanga. Kaore e patu rakau noa iho. Ko te mea nui te tatai whakapapa; te wairua o te manaakitanga kia ora ai tatou katoa nga tamariki o Papatuanuku hei tirohanga ma te kanohi.
>
> My thoughts reach back in time when my koroua was responsible for protecting the forest. They had a deep understanding pertaining to the rituals before cutting trees: the spiritual aspects, the genealogy so that we would find sustenance, the children of Papatuanuku.[98]

Te Okoro Joe Runga stated that:

> All waterways contain and are conduits of Mauri, which our kaumatua understood well. Any practical use of waterways was guided by our recognition of the mauri within it and flowing through it.[99]

These relationships are evident in the respect in which other living beings – each with their own mauri – were held. Dr Rose Pere expressed it in these words:

> To our old people everything had a life force that made it unique and everything had as much divine right to exist as they did. For in the understandings that have been passed down to us here in Waikaremoana, orally and experientially, for thousands of years, we know that we are related to everything and everybody throughout the length and breadth of the universe.[100]

97. Hohepa Kereopa, transcription of simultaneous English interpretation of oral evidence given at Tataiahape marae, Te Waimana, 26 November 2003
98. Poai Raymond Nelson Burne, transcription of simultaneous English interpretation of evidence, 16 September 2004, Murumurunga marae, Te Whaiti; see also Poai Raymond Nelson Burne, brief of evidence (doc G18), p 12
99. Te Okoro Joe Runga, amended brief of evidence, 30 November 2004 (doc I19), p 6
100. Rangimarie Pere, brief of evidence, 18 October 2004 (doc H41(a)), p 5

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Rehita Taputu of Ruatahuna spoke also of practices for collecting and preparing rongoa:

> First of all there was karakia, and those on the expedition to gather medicines would not partake of food. For some medicines, you only pick the leaves on which the sun shines. You also have regard for the fact that it has both male and female elements. Some medicines you have to dig up as they are under the soil.
>
> Thus the collecting of foods and medicines was not a simple matter. But this was how our people kept good health and flourished – by carefully using and managing the resources of Ruatahuna provided by the bush, by the land.[101]

All of these statements embody the value of kaitiakitanga the obligation, as the Wai 262 Tribunal put it, arising from the kin relationship in te ao Maori between 'all the myriad elements of creation', to nurture or care for a person or thing. 'It has a spiritual aspect, encompassing . . . an obligation to care for and nurture not only physical well-being but also mauri.'[102] The Tribunal found a close, reciprocal relationship between mana and kaitiakitanga:

> In the human realm, those who have mana (authority) must exercise it in accordance with the values of kaitiakitanga – acting unselfishly, with right mind and heart, and using correct procedure. Kaitiakitanga is an obligation not just of individuals but of the community as well.[103]

We turn now to consider the exercise of authority over resources and waterways in Te Urewera.

21.3.3 How did the peoples of Te Urewera exercise authority over resources and waterways under customary law?

Tamati Kruger, giving evidence for Tuhoe, emphasised the significance of the korero we had heard on the peoples' absolute right to take food from the bush and from rivers:

> A, ka nui te mihi, tena tetahi ki te patai he aha hoki te kiko o wera korero, e tu ake nei te hunga i te wa e tipu ana ratau nga kai i tangohia e ratau mai te Ngahere, mai te awa, e korero ana mo te whakatipu kai. Tena te tangata e patai, 'He aha te kikokiko o wera korero ki ta tatau hui?' Ko taku whakautu, 'Koina te kanohi o te Mana Motuhake'. Koina tona kanohi. Koina te ohonga mai i te ata i runga i te mohio kai a koe te mana. Kai tou whanau, kai tou hapu, kai tou iwi. Kare koe e haere ki wahi ke ki te inoi, ki te patai, tena, ka ahei koe ki te

101. Rehita Taputu, brief of evidence, 11 May 2004 (doc D25), p 3
102. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 17
103. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 38

haere ki te tango kai mai tetahi wahi. Tena ka ahei koe, a, ki te haere ki te tiki rongoa mai te ngahere.

I am very pleased if somebody was to ask what was the purpose of those talks those people who stood up to talk about the period they were growing up, the foods they extracted from the bush, from the river, they were talking about growing food. If a man was to ask what [was] the purpose of those talks to our meeting, my reply will be, 'that is the face of Mana Motuhake. That is its face.' That is its awakening in the morning, knowing that you have the mana. It belongs to your family, it belongs to your sub-tribe, it belongs to your tribe. You don't have to go somewhere to beg to ask for permission to pick food from a place, if you are allowed to get medicine from the bush.[104]

That is an unequivocal statement of the rights of whanau, of hapu and iwi to exercise authority over resources and waterways. In chapter 2 we discussed the origin of rights to the land and its resources in ancestral relationships with the land (take tipuna), in discovery (take kite hou), sometimes in conquest (raupatu), and always with long established 'occupation' (ahi ka or ahi ka roa).

We cited the evidence of many speakers from the various claimant groups in our inquiry, and we noted that that evidence related to a complex body of knowledge required for the forest economy and society of Te Urewera to work. It reflected Maori philosophies – understandings of the relationships between people and the natural world, respect for the mauri of all things.

Mana whenua (authority over the land – or, as Tuhoe explained it, economic power), we concluded, depended on various factors:

- the knowledge accumulated over generations of the movements and habits of birds, kiore, tuna, and other species which were so important in the economy, and of the most effective methods of their capture; and
- the exercise of authority by rangatira to ensure successful takes of available resources in season, through organisation at whanau and hapu level, and through setting of rahui to protect resources.

Here, in the context of mana whenua, we consider first the exercise of authority over resources.

Tuhoe, their counsel stated, 'has exercised rangatiratanga over the natural resources of Te Urewera since time immemorial'. They had both exercised and defended their rights to manage their natural resources.[105]

The Tuawhenua claimants expressed the relationship between the exercise of authority and the use of resources in these words:

104. Tamati Kruger, transcript of additional evidence at hearing week four (te reo Maori) (doc D44), pt 1, pp 1–2; Tamati Kruger, transcript of additional evidence at hearing week four (English), 17 May 2004 (doc D44(a), pt 1, p 1, Mataatua marae, Ruatahuna

105. Counsel for Wai 36 Tuhoe, closing submissions, 30 May 2005 (doc N8(a)), p 150

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> Until intervention by the Crown from the 1860s, they enjoyed several centuries of uninterrupted authority over their lands, resources and destiny. . . . Te mana motuhake is the distinctive authority of the hapu of the Tuawhenua, attuned to their environment in the Urewera and their Nga Potiki and Tuhoe culture, that created laws to regulate the exercise of power, relationships between individuals and groups, the allocation of and access to resources and, broadly, the ways in which [the] people lived.[106]

Rangatira, in other words, had to manage whanau and hapu relationships as well as the customary economy. And, as the Tuawhenua researchers emphasised, careful management was necessary to ensure the Te Urewera bush ('a massive farm for Tuhoe') produced food and other resources sustainably: 'The taking and utilisation of bush resources were strictly controlled by season, rahui and tikanga.'[107]

Rehita Taputu, in his korero about Te Wao Tapu Nui a Tane, stated that when the forest still stood everywhere:

> each hapu and whanau [of the Ruatahuna valley] knew where their areas were for obtaining food, and how to conserve these foods. Thus the mana motuhake of our ancestors worked in a way to not only protect our food resources, but also to ensure that every one got a fair share. Our ancestors thrived.

The gathering of most foods 'was controlled by certain practices and rules' – which applied particularly in the case of fowling, since the birds of the bush were 'treasured foods'.[108]

For Ngati Whare, the food sources provided by the ancient podocarp forest at Whirinaki included the many species of birds who fed there, whether on berries, nectar, worms, or insects: kereru, kaka, koko, kiwi, kakariki (native parakeet), koekoea (long-tailed cuckoo), pipiwharauroa (shining cuckoo). Weka, and whio and parera (ducks) were also taken.[109]

As we mentioned above, bird harvesting 'was managed within a framework of customary law and practice', which included the use of rahui or placing a tapu on particular species.[110] The start of the hunting season was based on the signs of the maramataka (seasonal calendar), which the old people carefully observed, including the arrival of the migratory birds such as the long-tailed cuckoo, and the blossoming of the rata trees whose nectar birds like the kaka flocked to.[111] The role of a rangatira in respect of bird hunting was to organise the

106. Counsel for Tuawhenua, amended statement of claim, 3 March 2003 (SOC 1.2.12), p 4
107. Tuawhenua Research Team, 'Ruatahuna', Part 1 (doc B4(a)), p 169
108. Rehita Taputu, brief of evidence, 11 May 2004 (doc D25), p 2
109. Counsel for Ngati Whare, closing submissions, 9 June 2005 (doc N16); Jack Tapui Ohlson, mana whenua brief of evidence, September 2004 (doc G30), pp 8–9; Jack Tapui Ohlson, second brief of evidence (doc G36), pp [4]-[6]; Robert Wiri, 'The Lands of Te Whaiti-Nui-a-Toi' (doc A29), pp 128, 134–137
110. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p 283
111. Jack Tapui Ohlson, manawhenua brief of evidence, September 2004 (doc G30), pp 11–13

harvest and storage, selecting those who would be involved, and setting the limits for the catch.[112]

Jack Ohlson of Ngati Whare, talked of earlier times when whanau and hapu moved round their rohe, visiting 'food producing forests', to 'follow . . . the food supply through the seasons'.[113] They occupied areas beside the rivers like Whirinaki, Mangamate, and Otuwairua.[114] Ngati Whare gave evidence of many mahinga kai sites visited seasonally in a cycle called te takina nekeneke, and of large numbers of pa, kainga, mahinga manu (bird hunting sites), awaawa mahinga kai (water resource sites), and wahi tapu situated throughout Te Whaiti Nui a Toi – reflective of their customary rights and interests.[115] Mr Ohlson gave a whakatauki about the bird hunting cycle:

> He whenua pua, ko te puawai o te kai. He whenua puehu, ka kore tatau e kaha ki te tiaki i wenei whenua, ana ka puehu.

As he explained it:

> the land which is frequented by birds, this refers to the abundance of the food resources. The land which turns to dust, if we are not careful in conserving our land, the result will be that it will turn to dust.

Thus, when bird-hunting was finished:

> they placed prohibitions upon those hunting grounds so that the food resources would not be abused and depleted. It was left for the high-priest [tohunga] to place prohibitions upon those areas so that the food-resources could be conserved.[116]

Ngati Whare, Mr Ohlson said, 'practised rahui a lot to protect all of our resources'; it was 'our own form of conservation'. And it was long practised. He instanced a hui in the late 1960s, when the Maungapohatu people asked Ngati Whare to provide kereru for a hui which the Minister of Forestry was to attend. Ngati Whare put a rahui on a certain part of the forest where kereru were plentiful, so that others would not take the birds there. Rahui were also put on Horomanga Stream for that purpose, 'so that only one iwi could take eels from there'.[117] In short, 'Ngati Whare . . . regulated access to resources since the time of [their

112. Rongonui Tahi, notes in English, 22 June 2004 (doc E26), p 2; Rehita Taputu, brief of evidence, 11 May 2004 (doc D25), pp 2–3
113. Jack Tapui Ohlson, second brief of evidence, September 2004 (doc G36), para 10; Jack Tapui Ohlson, Manawhenua brief of evidence (doc G30), p 8
114. Jack Tapui Ohlson, Manawhenua brief of evidence, September 2004 (doc G30), pp 7–8
115. Map book for Ngati Whare claim, September 2004 (doc G33); Wiri, 'The Lands of Te Whaiti-Nui-a-Toi' (doc A29), fig 6.7
116. Jack Tapui Ohlson, manawhenua brief of evidence, September 2004 (doc G30), pp 8, 12
117. Jack Tapui Ohlson, second brief of evidence, September 2004 (doc G36), paras 18, 20

tupuna] Wharepakau to ensure the sustainability of the environment through mechanisms such as rahui.'[118]

Customary rights, law, and practices also applied to imported species and technologies. New species in Te Urewera included new crops, pig and deer hunting, harvesting of waxeyes, and, as we discuss later in the chapter, trout fishing. New or adapted technologies encompassed the use of guns, wire eeling spears, and hinaki made from chaff sacks and wire. Custom is not static, and new crops, food animals, birds, and fish were managed in the customary economy to serve Maori purposes. Jack Doherty described the taking of waxeyes (silver eyes) from a small shelter, where the fowler imitated the bird's distress call using a special flax, to attract them to sit on a hand-held manuka rod, and then struck them down with a similar rod held in the other hand.[119]

Stokes, Milroy, and Melbourne pointed out that potatoes and pigs 'have been an integral part of the forest economy since the 1840s', and horses have been a vital means of transport since the 1860s. Introduced animals, plants, and technology were 'absorbed into an ongoing social and economic organisation among the clans of Tuhoe'.[120] While potatoes and pork were the most important new food sources, there were also other useful crops. The traditional forest economy was modified by the introduction (notably by the missionary James Preece at Te Whaiti) of maize, fruit trees, and vegetables.[121] Nor was the adaptation of the customary economy confined to the nineteenth century. Deer were introduced to Te Urewera at the end of that century and were well established by the 1920s. For many decades, deer have been an important source of food for local Maori communities.[122]

It is clear, too, both that care was taken to assist pigs with foraging, and that pig and deer hunting was carried out in accordance with tikanga. By 1900 the people of Te Whaiti and Ruatahuna were cultivating productive grounds for pig-hunting, firing undergrowth to destroy patches of bush, so that pigs would be attracted in numbers to feed on the roots of the fern that grew after burn-offs. Among Tuhoe, this became a tradition.[123] In the period before hunting became a means of 'pest' control, and therefore a source of income, the sustainable hunting of pigs and deer was important to the conservation of the food source. Korotau Tamiana of Ruatahuna explained that:

> At that time, you would be told off if you had shot say four deer, or caught three pigs, you might think you were neat, but when you got home you would be told off. They would say how on earth are we supposed to eat all this, you should [have] let some go. That's how the families lived at Ohaua. Pakitu [Wharekiri] would have a mark, and each one would have

118. Counsel for Ngati Whare, closing submissions (doc N16), p 101
119. James Edward Doherty, summary of evidence, 11 May 2004 (doc D27), p 7
120. Stokes et al, *Te Urewera* (doc A111), p 28
121. Stokes et al, *Te Urewera* (doc A111), pp 26–27
122. Stokes et al, *Te Urewera* (doc A111), p 355
123. Tuawhenua Research Team, 'Ruatahuna', Part 2 (doc D2), p 232

> a mark. When it came to the time to let the pigs go, because they couldn't be eaten, they would be marked . . . When the pigs were caught later, sometimes a year later, you would see who had marked the pig.[124]

In his evidence to us, Mr Tamiana added that the limit for deer was 'roughly not more than two', and that pigs that were let go for catching later were first castrated: 'It was frowned upon if you caught more than you needed, or more than you could give away to other families.'[125]

Evidence was given also about the importance of observing ownership of whanau and hapu lands when paying clients were first accepted by whanau for hunting and fishing expeditions. Rongonui Tahi had been told stories by his grandfather and elders of such expeditions in the 1940s in the upper reaches of the Whakatane River – places like Pukareao, Hanamahihi, Waikarewhenua, and Ohaua, which could only be reached by trekking or by horse:

> Each family made contact with a client and a longterm rapport was established for up to 10 years in some cases. The client was taken to the family patch or territory and there he carries out his activities. Our elders were particular about boundaries of operation and kept strictly to Maori protocol on land issues. This was the basis of the establishment of these enterprises.[126]

We must also consider the question of the extent of hapu and tribal authority over rivers – and, beyond that, over other waterways. The importance of waterways to the peoples of Te Urewera can hardly be overstated. They were the arteries of life in the region, a source of food – both in the water and on the river flats – of plants, and drinking water, and the centre of eel cultures; they were where people lived, they were where transport and commerce between kainga took place. Waterways are associated with the rhythm of life, and controlled by rahui and by taniwha. They are also symbols of identity and unity.[127]

Claimants in our inquiry spoke of waterways in different ways. Kaumatua Charles Cotter of Ngai Tamaterangi stated: 'All of our rivers are taonga tuku iho.' One of the major rivers, the Waiau, 'is identified with the collective of Ngai Tamaterangi', though each whanau 'have their localised rivers'.[128] Ngai Tamaterangi, he said, 'exercised mana over our rivers and waterways within our rohe including but not limited to the Waiau, Waikaretaheke, Mangaaruhe, Ruakituri and Hangaroa Rivers'. In respect of the Waiau River:

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124. Tuawhenua Research Team, 'Ruatahuna', Part 2 (doc D2), p 389
125. Korotau Tamiana, brief of evidence, 10 May 2004 (doc D20), p 6
126. Rongonui Tahi, brief of evidence (English), 22 June 2004 (doc E27)
127. Suzanne Doig, 'Te Urewera Waterways and Freshwater Fisheries' report commissioned by the Crown Forestry Rental Trust, 2002 (doc A75), p 23
128. Charles Manahi Cotter, brief of evidence (doc I25), p 10

21.3.3

> My Uncle Rongo Hema was the tohunga for the river. He was the expert in relation to it. We could not only get eels including blind eels (peharau) but also kakahi . . ., panoko (small fish), white bait, fresh water flounders and the like. It would all depend upon the signs and the seasons and waiting until certain months in the year. This is where people such as my Uncle Rongo exhibited their expertise.[129]

Mr Cotter thus spoke in the same breath of rivers as taonga, the exercise of mana, and the specialised knowledge developed to take river resources sustainably.

Ngati Whare, naming the rivers and streams within their rohe, stated that:

> These rivers and waterways and the fisheries and other natural resources that they sustain are taonga and of extreme cultural significance to the iwi and hapu of Ngati Whare. There are a number of important awaawa mahinga kai (water resource) sites within Ngati Whare's rohe where kokopu (native trout), koura (freshwater crayfish), tuna (eel), whio (blue mountain duck) and parera (native duck) were caught.[130]

Te Okoro Joe Runga, who brought a Ngati Kahungunu claim about the southern rivers, spoke of mana awa in relation to the river system, including the whole of the waterways:

> Mana awa is the unrelinquished tino rangatiratanga over estates of the Kahungunu Iwi. In the Urewera the estate pivots from Te Pae o Huiarau . . . [which] sheds for us nga wai to sustain and imbue the intricate and extensive river system and Lake Waikaremoana . . .
>
> Thus the springs, aquifers, streams, tributaries, rivers, lakes, lagoons, watersheds and catchments of Te Pae o Huiarau are the dominion of Kahungunu that culminates in the significant rivers of the Waiau, the Waikaretaheke, the Ruakituri, the Waipaoa stream, the Mangaruhe and many others.[131]

He underlined his korero on the interconnectedness of the whole system of waters and waterways by reference to Tangaroa, 'as there is no division between moana, roto or awa in terms of his domain'.[132]

But customary rights in a large water system might not necessarily be exclusive to any particular group of closely related peoples. Ngati Ruapani, their counsel stated, 'had tino rangatiratanga of the waters and resources of Lake Waikaremoana, Lake Waikareiti and the river network within their rohe'. The 'cultural relationship of the Waikaremoana hapu with

129. Charles Manahi Cotter, brief of evidence (doc I25), pp 10–11

130. Counsel for Ngati Whare, closing submissions (doc N16), pp 119–120, citing Wiri, 'The Lands of Te Whaiti Nui-a-Toi' (doc A29), pp 131, 137–141

131. Te Okoro Joe Runga, amended brief of evidence, 30 November 2004 (doc I19), p 5. For clarification of the nature of Mr Runga's claim to southern waterways for and behalf of Ngati Kahungunu, see counsel for Te Okoro Joe Runga, opening submissions, 2 December 2004 (doc I46), p 2.

132. Te Okoro Joe Runga, amended brief of evidence, 30 November 2004 (doc I19), p 5

the rivers and waterways in the region is an integral part of their being [and] ought not to be in doubt'.[133] Yet Ruapani do not claim exclusive rights to the whole water system:

> the proprietary rights are both exclusive and non-exclusive in nature. Near kainga and marae the rights to take water and/or fish has an exclusionary component. However, the whole water system was vital to all Maori residents in Te Urewera. Interference with part of the water system at its source, for example at Lake Waikaremoana causes prejudice to all right holders.[134]

Rights to fish and the control of fishing were particularly important in demonstrating who had authority to care for, manage, and harvest in waterways. Mr Runga described mahinga kai as 'an undisturbed estate of Maori', which the people had continued to use despite assaults on, and denial of their mana over waterways. Mahinga kai, in other words, was an expression of tino rangatiratanga. And he also emphasised mana wai: 'We . . . always held dominion and control over water and its uses within our tribal areas.'[135]

Some speakers referred to particular waterways, tributaries, or streams, often emphasising their importance to the prized eel fisheries. James Doherty, in his evidence for the Tuawhenua claim, told us that the Okahu River, a major tributary of the Whirinaki, 'is responsible for providing smaller streams with eels and fish.'[136] Hakeke McGarvey stated that people used to have eel weirs at Patutahuna, where the Kawekawe Stream entered the Ohinemataroa River. 'They also used hinaki particularly in the tributaries.'[137]

Jack Ohlson said that Ngati Whare mahinga kai included areas to catch kokopu, of which there were different species; and there were also koura. That, he said, was why the eels 'would come up our rivers and streams, to eat the koura.'[138] Robert Wiri's list of Ngati Whare awaawa mahinga kai features a number of streams (Oruiwaka, Mangawiri, Tangitu, Waimurupuha, Mangakirikiri) and a well known lagoon, called Arohaki, abundant with kokopu and other fish, and ducks.[139] Noera Tamiana mentioned that as well as catching eels, they caught raumahehe, 'a native fish that lived in the bush creeks . . . about 8–9 inches long.'[140]

Dr Suzanne Doig also stressed the importance of 'smaller side streams' as a major source of food. Tunakapakapa (the name means writhing eels) was an 'ancient ditch' or channel near Minginui, which linked the Tunakapakapa stream to the Whirinaki River; the waters of the stream were diverted into the ditch during the main eeling season, then back into the

133. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 63
134. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 67
135. Te Okoro Joe Runga, amended brief of evidence, 30 November 2004 (doc I19), p 6
136. James Edward Doherty, brief of evidence, 11 May 2004 (doc D27), p 3
137. Hakeke Jack McGarvey, brief of evidence, 2005 (doc J33), p 3
138. Jack Tapui Ohlson, second brief of evidence, September 2004 (doc G36), para 27
139. Wiri, 'The Lands of Te Whaiti-Nui-a-Toi' (doc A29), pp 138–139
140. Noera Tamiana, brief of evidence, 10 May 2004 (doc D15), p 5

stream, leaving the eels stranded.[141] Wiri states that the name arose from an incident when Ngati Mahanga cut the channel from a bend in the stream to the river.[142]

Inanga were caught, in their two major annual migrations, in pools in the rivers and in side streams; kokopu, important to the Ruatahuna people, were mostly caught in side streams rather than in the main river channels. They were also a major food source in the Whirinaki River, and lower down in the Rangitaiki River and many of its side streams; as well as in tributaries of the Tauranga River and Waiiti Stream. And raumahehe (known as koaro elsewhere) – an important part of the traditional Tuhoe diet – was also taken mostly from small side streams, and in Waikareiti. Doig adds that it was a particular delicacy at Ruatahuna, where it was described as a 'special' fish.[143]

We add that there is evidence that whanau and hapu assumed that their authority over streams and rivers extended to introduced fish. Dr Doig, in her study of rivers and fisheries in the catchments of the Rangitaiki and Whakatane Rivers, and the western Wairoa River catchment, noted that new fish such as trout and morihana (carp) were often taken by traditional methods. Morihana, for instance, were caught by driving them down the Whakatane River into waiting nets, just as other small shoaling indigenous fish were caught.[144] And the 'traditional retireti board, designed especially to catch trout . . . [was] used for many years in Te Urewera', until it was banned (as not being in keeping with the spirit of sports fishing).[145] The retireti (board) is a customary fishing device made from timber, to which hooks or lures are attached; the board is cast into a river or stream by a line attached to it, and works its way against the current to the opposite side of the waterway, allowing people to fish both sides.[146] In Te Urewera, we were told, many people catch trout as food fish; 'very few Urewera Maori are interested in the sports aspect of trout fishing'.[147] Some Tuhoe, indeed, catch the trout as part of their traditional fisheries using preferred traditional methods. And there is a feeling that, since the trout have been in the rivers for so long, 'they have become a part of the Urewera fisheries resources and should be able to be caught freely'.[148]

Tuhoe for their part claimed 'customary ownership and rights to all rivers and waterways' within Te Urewera as 'an integral part of Tuhoe life and culture'.[149] And we note in particular how the Ruatoki claimants explained their hapu and iwi rights. They stated that: 'Nga Hapu o Ruatoki and Ngai Tuhoe had mana and tino rangatiratanga to all rivers and

141. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), pp 15–16
142. Wiri, 'The Lands of Te Whaiti-Nui-a-Toi' (doc A29), p 139
143. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), pp 17–19. Doig's informants about the raumahehe were Whare and Margaret Biddle, and Basil Tamiana.
144. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 20
145. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 147
146. Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: Legislation Direct, 1998), p 112
147. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 147. Doig's informants were Whare and Margaret Biddle, Ruatahuna, and representatives of the Ngati Whare runanga, Murupara (2001).
148. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), pp 147–148
149. Counsel for Wai 36 Tuhoe, first amended particularised statement of claim, 27 April 2004 (SOC 1.2.2(a)), p 198

waterways within their tribal territories.'[150] For the peoples of Ruatoki, 'rivers are steeped in tribal lore and history'. But, they added, their: 'Traditional waiata and oriori confirm that the resources of the waterways (water, fish, ducks and plants) were vital not only to their physical sustenance and survival, but also to their identity as a constituent people of a much wider collective.'[151] The major rivers also provided 'important access routes' well into the twentieth century;[152] control of the rivers for transport and communications was thus an important feature of tribal tino rangatiratanga.

The peoples of Te Urewera thus spoke of their waterways in terms of their ancestral relationships with them, their respect, and obligation to care for them, and their authority over them. They spoke of mana motuhake and of tino rangatiratanga over waterways within their rohe.

In summary, the peoples of Te Urewera relate to their land, their mountains, their rivers, their forests, through whakapapa. Ultimately their deep sense of whanaungatanga within the universe stems from the creation whakapapa, beginning with the coupling of Ranginui and Papatuanuku, and the creation by their offspring Tane of his world, with its trees, insects, and birds. The history of people's identity with their tribe, their land, their maunga and waterways through generations of their tupuna has been carefully preserved – and passed on to younger kin – in whakapapa, pepeha, whaikorero, waiata, place names; and that knowledge was essential to their identity as whanau, hapu, iwi. Their environment was rich in resources – birds, eels, fish, trees, plants. They had particularly important relationships with taonga species, notably kereru and tuna, highly prized foods which were conserved, caught, preserved, distributed, and consumed in accordance with tikanga.

Whanau, hapu, and iwi exercised authority over their whenua, their forests, and waterways. The obligations of kaitiakitanga of taonga and taonga species fell on tribal communities, and the responsibilities of exercising authority in accordance with those obligations fell to rangatira. It was their duty also to protect community rights to resources, to manage their sustainable harvesting, and thus to regulate the allocation of resources and their seasonal takes. This was the exercise of mana motuhake, of tino rangatiratanga.

All these things, in our view, were reserved to the peoples of Te Urewera when the Urewera District Native Reserve Act was passed in 1896, embodying the agreement negotiated between the Crown and Te Urewera leaders the year before. We turn next to discuss the claimants' allegations that the Crown breached the agreement and the Treaty of Waitangi when it intervened to control and transform parts of the Te Urewera environment in the first half of the twentieth century.

150. Counsel for Ruatoki claimants, amended consolidated particularised statement of claim (SOC 1.2.8(b)), p 119. See also page 123.

151. Counsel for Ruatoki claimants, amended consolidated particularised statement of claim (SOC 1.2.8(b)), pp 124–125

152. Counsel for Ruatoki claimants, amended consolidated particularised statement of claim (SOC 1.2.8(b)), p 125

21.4 Key Facts: Crown Interventions in the Environment of Te Urewera before 1954

21.4.1 The negotiation of the UDNR agreement

The facts in respect of the negotiation of the UDNR agreement are set out in chapter 9. Here, we provide a brief summary of the matters relevant to this chapter.

In 1894, the Liberal premier, Richard Seddon, toured Te Urewera with James Carroll, the Minister in Cabinet representing the 'Native race'. During this tour, Tuhoe and other iwi considered the Government's request that they place themselves and their lands under the Queen's protection, accept the Queen's law, and have their remaining lands surveyed and put through the Native Land Court. In response, Tuhoe asked the Crown to recognise their self-government in the form of a central committee for their rohe potae. Further negotiations were planned for 1895 but were at first prevented by clashes over the trig survey of Te Urewera and the Government's decision to push ahead with building roads. Seddon sent troops to force the survey and the roads, but he also sent Carroll, who negotiated a new agreement that Te Urewera leaders would allow the trig survey and roads to proceed, and would come to Wellington to arrange a more comprehensive agreement with the Premier. Most of the troops were then withdrawn.

A delegation of Te Urewera leaders had come to Wellington by early August 1895, although the exact time of their arrival is unknown. It consisted of important chiefs, and is known to have included Tuhoe, Ngati Whare, and Ngati Manawa leaders. The delegation held discussions with Carroll (attended by Maori parliamentarians Wi Pere and Hone Heke) from early August to September 1895, of which we have no record. Near the beginning of these discussions, a Bill was before the House to amend the Animals Protection Act 1880. While the House was in committee on this Bill, Liberal member R M Houston moved an amendment on 2 August 1895 to ban the taking or killing of native pigeons (kereru) in 1896, and every sixth year from then on. Seddon successfully moved the addition of a proviso:

> Provided that the Governor may, on the recommendation of the Colonial Secretary, by notification in the *New Zealand Gazette*, exclude the Urewera Country, and other Native districts in the North and South Islands, from the operation of this section.[153]

The Animals Protection Act Amendment Act 1895 became law on 30 August 1895. The six-yearly ban on hunting kereru, and Seddon's proviso for exempting Te Urewera, were contained in section 7 of the Act.

A week later, on 7 September 1895, the delegation met with Seddon for the first time. At that meeting, Carroll presented the premier with a series of proposals which had been worked out between himself and the delegation. In brief, the Te Urewera leaders proposed the setting aside of a self-governing Native Reserve, in which their forests, birds, and way

153. Seddon, 2 August 1895, NZPD, 1895, vol 88, p 407

of life would be protected; a proposal with which the premier agreed. Roads, tourism, economic development, and social assistance to the peoples of Te Urewera were all discussed. The full content of those of the delegation's proposals which are relevant to this chapter, and of Seddon's responses to them, is set out below in section 21.6.3.

On 23 September 1895, there was a further meeting between Seddon and the delegation, at which additional proposals were presented to the premier. The delegation also asked for a draft Bill or heads of agreement to take back to their people for consultation. Of relevance to this chapter, Wi Pere (speaking on behalf of the delegation) sought a Maori-controlled process of acclimatising English fish and birds in the proposed reserve. The discussion of this proposal, as recorded somewhat briefly in the press, will be set out in section 21.6.3.

On 25 September 1895, Seddon drafted a memorandum setting out what he understood to be each of the delegation's proposals, and his undertakings in respect of them. It was understood between the premier and Te Urewera leaders that they were in broad agreement. In brief, Seddon stated that the delegation had sought the introduction of exotic fish and birds for the dual purpose of promoting tourism and augmenting their food supplies, and that he would arrange for trout to be delivered to them for release, along with information as to how to manage the trout fishery. The contents of the memorandum will be discussed in more detail in section 21.6.3.

In 1896, the Urewera District Native Reserve Bill was introduced to Parliament, debated in both Houses, and became law on 12 October 1896. Seddon's 25 September 1895 memorandum was made a schedule of the Act. In section 24, the Governor was given power to make regulations to give effect to anything in the Act or to 'give full effect to this Act', and to give effect to Seddon's memorandum.

21.4.2 The Crown's restrictions on the customary management and harvesting of native birds in Te Urewera, especially kereru, after the UDNR agreement

The Crown's restrictions on the customary management and harvesting of native birds were legislative in form. The questions of whether, when, and to what extent the legislation was actually enforced were contested by the parties, and will be addressed in section 21.7.3(4). Here, we provide a brief timeline of the major legislative restrictions and their application to Te Urewera.

Animals Protection Act 1880: This Act was in force at the time the UDNR agreement was negotiated. Its long title was: 'An Act to consolidate the Law for the Protection of Animals and for the Encouragement of Acclimatisation Societies'. Key provisions included:

- No native game could be taken or killed in any district the governor notified under the Act, except during a season of up to four months in any year, which would be notified

by the governor from time to time (section 17), whereas the season for imported game was set for (up to) three months between 1 May and 31 July each year (section 3);

- No game or native game could be sold more than seven days after the expiry of the season (section 22); and
- No game could be taken or killed by traps or snares (the provision did not extend to native game at this point) (section 5)

Animals Protection Act 1880 Amendment Act 1886: This Amendment Act provided for the Governor to prohibit 'absolutely or for such time as he may think fit the destruction of any bird indigenous to the colony' (section 3).

Animals Protection Act Amendment Act 1895: This Amendment Act imposed a six-yearly closed season for kereru, with the proviso that the Governor, on the recommendation of the Colonial Secretary, could 'exclude the Urewera Country and other Native districts' from the operation of this section (section 7).

Animals Protection Acts Amendment Act 1900: This Act:

- provided that no native game (including kereru) could be 'held in possession' for more than seven days after the close of the season, whether frozen or chilled or not, which had the effect of making huahua illegal (section 3); and
- from 1901, imposed a closed season for kereru, kaka, and pukeko every third year, with the same proviso as section 7 of the 1895 Act (that is, that the governor could exempt Te Urewera and other 'native districts' from this closed season, on the recommendation of the colonial secretary) (section 4)

Animals Protection Amendment Act 1903: The only important amendment in 1903 for our purposes was the institution of a uniform open season nationwide for both native and imported game, running from 1 May to 31 July each year.

Animals Protection Act 1907: The 1907 Act repealed and replaced all the previous Animals Protection Acts. It:

- continued to impose a single open season for native and imported game throughout New Zealand, beginning on 1 May and closing on 31 July (section 3);
- extended the prohibition of traps and snares to include the catching of native as well as imported game, allowing only 'hunting or shooting' (section 6);
- empowered the governor to prohibit absolutely or for 'such time as he thinks fit' the taking of any native birds (section 20);
- declared 1910, and every third year after it, a closed season for imported and native game – with the proviso that the governor could, on the recommendation of the Minister of Internal Affairs, 'exclude the Urewera country and other Native districts' from the operation of this section (in respect of native game only) (section 26); and
- continued the prohibition on holding imported and native game, whether frozen, chilled, or otherwise, for more than seven days after the close of the season (section 30).

Animals Protection Act 1908: This Act was the product of a major project to consolidate New Zealand's statute law. In the case of the Animals Protection Acts, a major new Act had only just been passed the year before, so the 1908 Act only consolidated two pieces of legislation: the Animals Protection Act 1907 and the Homing-pigeons Protection Act 1898.

Animals Protection Amendment Act 1910: This Amendment Act made two relevant changes:

- it added a proviso that the ban on holding native game for more than seven days after the close of the season did not 'affect the right of Natives to hold preserved game known as *huahua*' (section 4(2)); and
- by section 10, it made it illegal to take any native birds or their eggs, with the proviso that the governor could suspend the operation of this section for any species for 'such period in any [one] year as he thinks fit', and with the added proviso that the power to exempt Te Urewera and native districts was now made subject to this section (that is, any exemption for Te Urewera would now have to be for named species in a specified period of a particular year, with a new exemption required every year) (section 10).

Animals Protection and Game Act 1921–22: This Act came into force on 1 April 1922. It repealed and replaced the previous Animals Protection Acts, and:

- absolutely prohibited the taking of kereru, kaka, tui, pukeko, and many other species of native birds (section 3); but
- provided that the governor could, by warrant, remove a species from the schedule of absolutely protected animals and either (a) declare it imported or native game, or (b) declare it no longer subject to the Act (sections 3, 5).

21.4.3 The acclimatisation of exotic species in Te Urewera

After the arrival of Pakeha, the peoples of Te Urewera chose to grow several new crops, particularly potatoes. By the late nineteenth century, the potato was the food on which they were most reliant. They also grew maize in significant quantities in some parts of the inquiry district, as well as various vegetables and fruit trees.[154] Pigs, originally liberated by James Cook at Cape Kidnappers in 1773, are likely to have colonised most of Te Urewera by the 1840s.[155] By the 1890s, the peoples of Te Urewera hunted pigs extensively, and they had become another very important food. By that time, the European rat had decimated the kiore population, and some indigenous birds had also fallen in numbers, or disappeared

154. Judith Binney, 'Encircled Lands, Part Two: A History of the Urewera 1878–1912'(commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A15), pp 275, 284, 287; Stokes et al, *Te Urewera* (doc A111), pp 26–28; Brian Murton, 'The Crown and the Peoples of Te Urewera: The Economic and Social Experience of Te Urewera Maori, 1860–2000, Part Two: The Erosion of the Economic Base: Conflict, Land Loss, Crisis and Response, circa 1860-circa 1910s-1920s'(commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc H12), pp 295–297, 306–307

155. Coombes, 'Cultural Ecologies 1' (doc A121), p 13

altogether from the area, as in the case of the titi (muttonbird). Kereru, however, were still an important food. From the 1860s, horses were an important means of transport in Te Urewera.[156]

By the 1890s, then, traditional indigenous foods were still important in Te Urewera, but the introduced flora and fauna had also significantly changed the diet and, to some extent, the lifestyle, of the peoples of Te Urewera. Until that point, however, the extent to which these changes occurred was primarily the result of decisions by the peoples of Te Urewera. Only in the 1890s did developments related to acclimatisation (that had affected most of New Zealand from the 1860s) begin to impact significantly on Maori communities in Te Urewera.

Dr Brad Coombes defined acclimatisation as 'the managed process of introducing, liberating, and maintaining populations of introduced plants and animals'.[157] Early introductions of exotic flora and fauna to New Zealand, such as that of the potato and the pig, were unregulated. The Duties of Customs Ordinance 1846 allowed animals and plants into New Zealand duty free and did not provide for any powers of refusal or inspection.[158] Introductions of exotic species to New Zealand up to 1867 were haphazard, undertaken without legislative backing in an uncoordinated manner by private individuals or provincial governments.[159]

During the 1860s, this situation began to change, as the Crown began to concern itself with issues related to acclimatisation. The Protection of Certain Animals Act 1861 began the provision of protection for some exotic species. Much legislation protecting exotic animals followed, including the Protection of Animals Act 1867.[160] This Act brought in measures to encourage and delegate authority to organisations known as 'acclimatisation societies' (the precursors of the Fish and Game Councils), a few of which had already been founded earlier in the decade. The legislation gave the societies quasi-property rights in introduced animals. This enabled them to profit from licensing the hunting of such animals. The societies gained wide powers to control species until they were well-established in New Zealand, and to redistribute introduced species around the country. Members of the acclimatisation societies were often influential colonists, including important politicians. A system for approving the introduction of exotic species by the Crown was only set up in 1895, but even then the societies retained sweeping statutory powers relating to exotic animals.[161]

156. Stokes et al, *Te Urewera* (doc A111), pp 27–28; Binney, 'Encircled Lands', pt 2 (doc A15), p 204; (doc H12), p 306; Elsdon Best, 'Maori Forest Lore: Being Some Account of Native Forest Lore and Woodcraft, as also of Many Myths, Rites, Customs, and Superstitions Connected with the Flora and Fauna of the Tuhoe or Urewera District – Part II', *Transactions and Proceedings of the New Zealand Institute*, vol 41 (1908), p 282

157. Coombes, 'Cultural Ecologies 1' (doc A121), p 11

158. Coombes, 'Cultural Ecologies 1' (doc A121), p 16

159. Coombes, 'Cultural Ecologies 1' (doc A121), p 17

160. Coombes, 'Cultural Ecologies 1' (doc A121), pp 17, 142

161. Coombes, 'Cultural Ecologies 1' (doc A121), pp 17–18; Cathy Marr, Robin Hodge, and Ben White, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna, 1840–1912* (Wellington: Waitangi Tribunal, 2001), pp 229–232

Te Urewera was included in the network of acclimatisation districts that emerged after the passage of the 1867 Act. The boundaries of these districts changed frequently. At different times from 1867, counties comprising parts of the inquiry district were variously within the Auckland, Hawke's Bay, Tauranga, Opotiki, and, from the early twentieth century, the Wairoa and Rotorua Acclimatisation Districts.[162] It seems, however, that the inclusion of the inquiry district within the acclimatisation districts was, until the late 1890s, essentially a theoretical matter: with one exception, releases of exotic species by the various societies apparently did not affect Te Urewera before then, and the societies did not attempt to enforce their authority within the district at that stage. The exception was the release of animals such as weasels by the Hawke's Bay Acclimatisation Society, in an effort to control the threat posed by a rapidly growing rabbit population to Hawke's Bay farmers. These animals apparently rapidly spread to Te Urewera. With this exception, it seems that acclimatisation societies impacted minimally on our inquiry district before 1896.[163]

By the late 1890s, the Crown took the view that Te Urewera had restricted potential for farming (a view which later changed in the 1910s and 1920s, as we explained in chapter 13). To Pakeha eyes, Te Urewera often appeared to be a large area lacking an economic use. Seddon and other Pakeha politicians and Crown officials began to see Te Urewera as a promising destination for tourists. Discussions in 1895–1896 focused on indigenous flora and fauna and on acclimatisation of game fish and birds for their tourist potential as well as for their value as food to the peoples of Te Urewera. The Department of Tourist and Health Resorts, set up in 1901, almost immediately took a particular interest in Te Urewera, especially the Waikaremoana area, seeing this as a promising tourist attraction in terms of its scenery and its potential as a venue for hunting and shooting, activities that contemporaries referred to as 'sport.'[164]

Successful acclimatisation of exotic animals in Te Urewera began in the late 1890s. Trout were first liberated successfully in 1896; deer in 1897; and opossums in 1898. Game reserves for imported game were created at Waikaremoana and Rangitaiki in 1898. The Wellington Acclimatisation Society, the Crown and private individuals were responsible for the initial releases.[165] From the early twentieth century, the Crown's role in acclimatisation of exotic species in Te Urewera for sporting, tourism, and economic purposes was unusually prominent. By 1909, the whole of Te Urewera had been incorporated into the Rotorua Acclimatisation District, which had been taken over and was administered directly by Department of Tourist and Health Resorts.[166] As we shall see, it then took well into the

162. Coombes, 'Cultural Ecologies 1' (doc A121), p 30
163. Coombes, 'Cultural Ecologies 1' (doc A121), pp 14, 23–29, 33, 34, 37–39
164. Coombes, 'Cultural Ecologies 1' (doc A121), pp 44, 48, 53–54, 92–98
165. Coombes, 'Cultural Ecologies 1' (doc A121), pp 36, 79–83, 86–87; Garth Cant, Robin Hodge, Vaughan Wood, and Leanne Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana and Lake Waikareiti, Te Urewera'(commissioned research report, Wellington: Waitangi Tribunal, 2004) (doc D1), pp 63–64
166. Coombes, 'Cultural Ecologies 1' (doc A121), pp 30, 96

twentieth century for the Crown to recognise and to try to control the adverse impacts of deer, opossums, weasels and related animals, and other exotic animals on the Te Urewera environment.

We turn next to consider the essence of the difference between the parties' positions on these matters.

21.5 Essence of the Difference between the Parties

21.5.1 Introduction

In this section, we provide a brief summary of the main points of difference between the parties with regard to:

- The meaning and effect of the UDNR agreement in respect of 'biological resources';
- the Crown's restrictions on the customary management and harvesting of native birds, more particularly the kereru; and
- the introduction (whether directly by the Crown or with its assistance) of deer, trout, opossums, and other exotic species to Te Urewera, and the management of those species after they were released.

We summarise the parties' submissions about the Whirinaki Forest and about rivers separately in later sections of this chapter.

21.5.2 The 'ecological logic' of the UDNR negotiations and agreement

The parties did not agree on the 'ecological logic' of the UDNR negotiations and agreement of 1895. We summarise the main points of difference here.

Relying on the evidence of Dr Brad Coombes, claimant counsel argued that the UDNR Act 1896 'included the recognition of tangata whenua rights to manage their forests and guarantees to continued access to forest resources, guarantees which were soon to be disregarded within a few years of the development of the compact between the respective parties'.[167] These guarantees, the claimants argue, specifically included their rights to cultural harvest of kereru and other birds.[168] This was evidenced by the Animals Protection Act Amendment Act 1895, which the claimants see as integrated with the UDNR negotiations of that year. In their view, the provision in the Act to exempt Te Urewera from restrictions on the taking of native birds was part and parcel of the UDNR agreement.[169] Further, the claimants submitted that there is evidence that, in the decade following the enactment of the

167. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 144
168. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 144–146; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 151–155; counsel for Tuawhenua, closing submissions (doc N9), p 285
169. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 152, 155

UDNR Act 1896, both Ministers and officials 'accepted that the Act provided certain wildlife rights to tangata whenua'.[170]

The Crown, however, denied that any aspects of the UDNR agreement amounted to a 'biological treaty' or 'ecological compact', which was how Cecilia Edwards had characterised Dr Coombes' position.[171] In the Crown's view, the peoples of Te Urewera were to be subject to mainstream legislation, including the Animals Protection Acts. The 1895 exemption was for other native districts as well as Te Urewera. It was introduced independently of the UDNR negotiations and was not part of the agreement.[172] While accepting that there was some discussion in 1895 of protecting forests and birds, and of introducing new species for tourism and food supplies, the Crown's view is that there was nothing sufficiently detailed to bind the Crown to any particular terms or forms of protection. Nor, in the Crown's view, did the agreement or the UDNR Act 1896 guarantee any Maori rights in respect of cultural harvesting or management of wildlife.[173] In Crown counsel's submission, the premier likely intended the general committee to take on a management role in implementing legislation like the Animals Protection Acts, but 'this was not developed further'.[174] The claimants argue that further discussions were anticipated in order to flesh out this part of the agreement, which the Crown denies.[175]

In respect of the introduction of exotic animals to the UDNR, the Crown accepts that Seddon made a specific statement that trout would be introduced (for tourism and as a food source), and argues that this was carried out as promised. Otherwise, while the UDNR Act 1896 allowed for regulations to give effect to Seddon's 1895 memorandum, 'arguably there was nothing to give effect to in respect of exotic species'.[176] Deer, opossums, and other animals do not appear to have been discussed, but Crown counsel submits: 'It is possible, though not certain, that the parties could have taken away a general understanding that species could be liberated that might serve as food sources or to attract tourism, however, there can be no certainty on this point.'[177]

There was some difference between the claimants on this issue. While the claimants agree that the UDNR negotiations and Act did not constitute permission for the Crown to introduce deer or opossums, they are not in agreement as to trout. Counsel for Wai 36 Tuhoe accepts that Tuhoe requested the introduction of exotic fish, and that there was specific

170. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 146
171. Crown counsel, closing submissions, June 2005 (doc N20), topic 29, p 8
172. Crown counsel, closing submissions (doc N20), topic 29, pp 3, 8, 10–11
173. Crown counsel, closing submissions (doc N20), topic 29, pp 3, 8–11
174. Crown counsel, closing submissions (doc N20), topic 29, p 10
175. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 151; Crown counsel, closing submissions (doc N20), topic 29, p 10
176. Crown counsel, closing submissions (doc N20), topic 29, p 10
177. Crown counsel, closing submissions (doc N20), topic 29, pp 9–10

agreement to introduce trout in 1895.[178] Counsel for Nga Rauru o Nga Potiki, however, note oral evidence to the contrary (recorded by researchers in this inquiry), and submit:

> Because the written and oral evidence conflicts, it is not possible to decide conclusively on whose decision it was to release trout, and therefore on whether the Crown's action was consistent with the property and Treaty rights of the owners.[179]

Nonetheless, the claimants agree that the Crown was committed to a promise in the UDNR agreement that Tuhoe would manage the introduction of trout and 'the subsequent fishery', and that this promise was not kept.[180]

In the claimants' view, the Crown also failed to honour its guarantees of their rights to manage and harvest native birds, their right to govern themselves and their reserve, and their right to manage all wildlife in their reserve according to their customary conservation ethic. Rather, the Crown's actions had the effect of outlawing their customary management of wildlife; an outcome so at variance with the UDNR agreement that some claimants felt they had been misled and deceived in the negotiations that led up to it.[181] The Crown, on the other hand, denies that there were in fact any specific or substantive agreements at all about 'biological resources' (Dr Coombes's term[182]) or environmental management in 1895; there was nothing for it to have breached. Also, the Crown argues that its introduction of exotic species and its restrictions on the cultural harvest of native birds were good faith actions, which balanced competing interests appropriately.[183]

We turn next to consider the gradual imposition of legislative restrictions on the hunting of native birds, and the differences between the Crown and claimants on that issue.

21.5.3 The Crown's restrictions on the customary management and harvesting of native birds, especially kereru

The parties in our inquiry agreed that the protection of native birds from their evident decline and possible extinction was of vital importance. This was especially so for kereru, which is a taonga species for the peoples of Te Urewera, and very highly valued more generally by both Pakeha and Maori. Parties also agree that it was appropriate for the Crown to impose legislative restrictions on sporting and commercial hunting of native birds as a protective measure. There was, however, one exception to these two points of agreement. The Crown did not protect all native birds; it categorised certain species, notably kawau

178. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 151–152
179. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 234
180. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 234; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 151–153
181. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 145–148
182. See, for example, Coombes, 'Cultural Ecologies 1' (doc A121), p 1
183. Crown counsel, closing submissions (doc N20), topic 29, pp 3, 8–11, 13–14, 18, 19

(black shags), as 'vermin' and actively culled them, as well as encouraging hunters to shoot them in the Waikaremoana sanctuary. The claimants do not agree with the Crown's view that it balanced competing interests appropriately when it decided that 'tourism and the opportunities for a trout fishery outweighed the significance of the[se] birds'.[184] The claimants question the Crown's 'conservation ethic' during the time that it was restricting the hunting of some native birds to preserve them while simultaneously 'funding the extermination of [this] indigenous species'.[185]

More generally, the claimants' view is that the ethic of mainstream conservationists has increasingly resulted in the limitation of human activities in the biodiversity-rich Te Urewera, through 'expropriation of resources and the legal restraint of traditional practice'.[186] Claimant counsel submit that 'the Tribunal should recognise the vastly different perceptions of conservation which are at play here'.[187] Maori methods of hunting were outlawed, then huahua was criminalised, and finally the peoples of Te Urewera were banned altogether from carrying out their traditional management and harvesting of kereru and other birds. The hardship that this would impose on the peoples of Te Urewera was fully known to the Crown at the time it made these decisions.[188]

In terms of specifics, claimant counsel submitted that:

- From 1896 to 1910, customary harvesting of kereru and other birds was increasingly restricted, without consultation with the peoples of Te Urewera and without adequate notification of provisions to exempt the peoples of Te Urewera from such restrictions;[189]
- After 1911 the Crown has refused to allow the customary harvest of kereru by the peoples of Te Urewera, without consultation with the peoples of Te Urewera and despite petitions from Te Urewera leaders and requests for pua manu reserves;[190]
- The Crown has failed to support the customary conservation strategies of the peoples of Te Urewera but instead has unfairly exaggerated their 'poaching' of indigenous game,

184. Crown counsel, closing submissions (doc N20), topic 29, p 49; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 172; counsel for Wai 945 Ngati Ruapani, closing submissions, 30 May 2005 (doc N13), p 58; counsel for Wai 36 Tuhoe, submissions by way of reply, 9 July 2005 (doc N31), p 43

185. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 154

186. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 142

187. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 167

188. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 146–148

189. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 155; counsel for Tuawhenua, closing submissions (doc N9), pp 284–285; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 146–147; counsel for Ngati Whare, closing submissions (doc N16), p 108; counsel for Wai 621 Ngati Kahungunu, addition to second amended statement of claim, pt M, 12 April 2004 (SOC 1.2.6(a)), pp 5–6; counsel for Ngai Tama Te Rangi, second amended statement of claim, 15 August 2003 (SOC 1.2.4), p 43; counsel for Wai 144 Ngati Ruapani, amended statement of claim, 5 October 2004 (SOC 1.2.15(b)), pp 102–105

190. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 153–156; counsel for Tuawhenua, closing submissions (doc N9), pp 285–288; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 147; counsel for Ngati Whare, closing submissions (doc N16), p 109; counsel for Wai 621 Ngati Kahungunu, addition to second amended statement of claim, pt M (SOC 1.2.6(a)), p 8; counsel for Ngai Tama Te Rangi, second amended statement of claim (SOC 1.2.4), pp 42–44; counsel for Wai 144 Ngati Ruapani, amended statement of claim (SOC 1.2.15(b)), pp 106–108

while sometimes failing adequately to publicise laws and policies, and while also failing to remedy the effects of competition and predation by introduced species, and of loss of the habitat of indigenous species;[191] and

- The Crown has not implemented any strategy to reinstate customary bird harvests by the peoples of Te Urewera.[192]

Crown counsel conceded that the peoples of Te Urewera 'could have received a greater management role'. Nonetheless, the Crown argued that its conservation measures were enacted in good faith to protect species in decline, 'while also giving some measure of recognition to the interests of Urewera Maori in those resources'.[193] Crown counsel submitted, for example, that for many years it was possible to obtain exemptions from the legislative restrictions on customary management and harvesting.[194] By means of these exemptions, 'the legislation provided for some continued exercise of kaitiakitanga, albeit necessarily limited'.[195] Although it appears that the only Te Urewera exemption occurred in 1911, this must partly be explained, counsel said, by the Crown's '[m]inimal enforcement' of the law: the first prosecutions did not take place until the 1930s.[196] Once prosecutions did begin, the Crown's view is that there is 'no evidence of unfair targeting or victimisation of Urewera Maori' regarding poaching of indigenous birds.[197]

The Crown also submits that the negative effects of commercial and recreational hunters could not be controlled by customary means, and so some form of legislative restriction was essential. Also, in its view, customary harvesting had contributed to the decline of kereru and thus had to be restricted as well.[198] In enacting such restrictions, the Crown was mindful of its kawanatanga responsibilities to balance the competing interests concerned, and 'govern to conserve natural resources'.[199] In its balancing of interests, the Crown argues that it was sufficiently informed by the Maori members of Parliament as to Maori interests in kereru. In the Crown's submission, therefore, specific consultation with the peoples of Te Urewera was unnecessary,[200] and the 'legislation restricting traditional management and harvesting of resources was a reasonable and responsible exercise of kawanatanga'.[201]

191. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 157–160; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 147–148; counsel for Ngati Whare, closing submissions (doc N16), pp 109–110; counsel for Wai 621 Ngati Kahungunu, addition to second amended statement of claim, pt M (SOC 1.2.6(a)), p 7; counsel for Ngai Tama Te Rangi, second amended statement of claim (SOC 1.2.4), pp 42, 44; counsel for Wai 144 Ngati Ruapani, amended statement of claim (SOC 1.2.15(b)), p 108

192. Counsel for Ngati Whare, closing submissions (doc N16), pp 105, 110

193. Crown counsel, closing submissions (doc N20), topic 29, p 13

194. Crown counsel, closing submissions (doc N20), topic 29, p 3

195. Crown counsel, closing submissions (doc N20), topic 29, pp 15–16

196. Crown counsel, closing submissions (doc N20), topic 29, pp 15–17

197. Crown counsel, closing submissions (doc N20), topic 29, p 17

198. Crown counsel, closing submissions (doc N20), topic 29, p 14

199. Crown counsel, closing submissions (doc N20), topic 29, p 18

200. Crown counsel, closing submissions (doc N20), topic 29, p 16

201. Crown counsel, closing submissions (doc N20), topic 29, p 3

In the claimants's submission, however, the Crown's failure to consult them about 'absolute prohibition as a conservation measure' denied them 'the opportunity to identify less "extreme" approaches to conservation that may have preserved both the natural resources of Te Urewera and Tuhoe's tino rangatiratanga'.[202] The claimants also deny that their cultural harvesting contributed to the decline of kereru and other birds. In counsel for Wai 36 Tuhoe's submission, the Crown provides no evidence that this harvesting caused the kereru population to fall. In their view, the 'evidence on the record is clearly to the contrary'.[203]

21.5.4 Acclimatisation, management, and control of exotic species

There were some points of agreement between the parties in respect of the acclimatisation of exotic species. No one disputed that introductions such as deer, opossums, weasels, and stoats have had serious harmful effects. The Crown also conceded that trout caused significant damage to indigenous fisheries. Further, the parties agreed that some kind of management role in respect of these species was or ought to have been possible for the peoples of Te Urewera.

There were, however, some significant points of disagreement.

In the claimants' submission:

- The Crown's acclimatisation policies failed to apply the precautionary principle[204] (which required the Crown to take action if serious harm or degradation to the environment was a risk, even if full scientific information was not yet conclusive as to the risk);
- The Crown's acclimatisation policies did not respect the values of the peoples of Te Urewera and, apart from the negotiations between the peoples of Te Urewera and Seddon in 1895, there is no recorded consultation regarding acclimatisation within Te Urewera;[205]
- In particular, contrary to Seddon's 1895 memorandum, Maori did not manage the introduction of trout and the resultant fishery, and the only involvement of Maori with trout fishery management was with the hatchery at Waimako Pa from 1926 to 1929, which was relocated over the issue of rent or free fishing licences for a Waikaremoana community;[206]

202. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 199

203. Crown counsel, closing submissions (doc N20), topic 29, p 14; counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 35

204. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 162; counsel for Nga Potiki o Nga Rauru, closing submissions (doc N14), pp 151–155

205. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 161–163; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 149–150, 152; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 75

206. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 234–235; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), appendix A, pp 85–86, 120

21.5.4

- The Crown's introduction of deer was solely for the purpose of benefiting tourism and not the peoples of Te Urewera, as evidenced by the denial of their hunting rights in the game reserves,[207] although the Tuawhenua claimants submit that deer did become a food source from the 1920s, and that the ability to hunt deer for food was an important right put at risk by the establishment of the national park;[208] and
- The Crown was unduly slow to act to control exotic species that had harmful effects on the flora, fauna and land of Te Urewera, and on the peoples of Te Urewera, and its belated actions were also ineffective.[209]

Crown counsel submits that while discussion relating to the release of deer, opossums, or other land animals is not recorded, it is 'possible, though not certain', that the parties involved in the UDNR negotiations 'could have taken away a general understanding that species could be liberated that might serve as food sources or to attract tourism'.[210] It is also the Crown's view that deer were introduced for the dual purpose of tourism and augmenting Maori food supplies, and not solely or primarily to benefit tourism interests.[211] In respect of the tourism game reserves, Crown counsel submits that, although it seems that the reserves set up in 1898 were established without specific consultation with the peoples of Te Urewera, they were established at a time when Seddon and Carroll were meeting with Te Urewera leaders. In the Crown's view, there was a considerable amount of interaction and thus opportunity for those leaders to object to the establishment of the reserves (and the game released there) if they wished to do so.[212]

In respect of the admitted harm that introduced species have caused, the Crown argues that the precautionary principle has only recently emerged from a growth of scientific knowledge. It should not be applied retrospectively to Crown actions which took place before it was even developed.[213] Crown counsel also submits that the Crown could not reasonably have foreseen significant detrimental effects from acclimatisation in Te Urewera. In so far as damage has occurred, the Crown's view is that it has acted in a timely way since the 1930s to ameliorate and control such damage.[214]

This question of timely action is the most contested issue in respect of exotic species. The Crown and claimants dispute the facts as to the degree of scientific knowledge available to the Crown on each of the species, and the time at which the Crown ought to have known

207. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 162, 164
208. Counsel for Tuawhenua, closing submissions (doc N9), p 295
209. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 161–163, 166; counsel for Tuawhenua, closing submissions (doc N9), p 288; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 152–154
210. Crown counsel, closing submissions (doc N20), topic 29, pp 9–10
211. Crown counsel, closing submissions (doc N20), topic 29, p 22
212. Crown counsel, closing submissions (doc N20), topic 29, p 27
213. Crown counsel, closing submissions (doc N20), topic 29, pp 23–24
214. Crown counsel, closing submissions (doc N20), topic 29, p 3, 29

to take firm action against each species.[215] In the Crown's submission, there needed to be time for the scientific community to reach agreement as to the effects of any particular species, followed by an inevitable 'lag' before this consensus could be expected to influence Government policy.[216] The claimants, on the other hand, argued that the Crown ought to have applied the precautionary principle and acted much earlier and more effectively than it did. Also, the claimants argue that Government departments were in fact aware of the need to act – against deer, for example, by 1922 – but failed to do so because the interests of sport and tourism were prioritised over the interests of Maori and the environment.[217]

We turn next to assess the claims that the UDNR agreement of 1895–1896 had an important ecological and resource management dimension, which the Crown agreed to at the time but has since failed to carry out.

21.6 To What Extent did the UDNR Agreement Recognise the Authority of Te Urewera Peoples over the Environment of Te Urewera and its Waterways?

Summary answer: *The UDNR agreement comprised the documentation and results of the 7 September 1895 meeting between a delegation of Te Urewera leaders and Premier Seddon in Wellington, the further meeting of 23 September, and Seddon's 25 September memorandum setting out what he understood to be the delegation's several proposals, and his undertakings in respect of them. This memorandum was appended as a schedule to the Urewera Native Reserve Act 1896. Section 24 of the Act empowered the Governor to make regulations to give effect not only to anything in the Act, but also to Seddon's memorandum. There was an 'ecological logic' to this agreement. The forests, birds, rivers, and fish of Te Urewera were to be protected from environmental degradation for the benefit of their owners, the peoples of Te Urewera, and for the enjoyment of visitors. Protection was to be achieved through the legislative establishment of a permanent inalienable Native Reserve in which Maori communities would be defined as owners, and would continue to live according to their customs. This included their right to 'kill game for food'. Self -government would be exercised via hapu committees and a General Committee. Issues between the Crown and the peoples of Te Urewera would be resolved by dialogue between the Government and the General Committee. Food supplies were to be augmented, and the people were not to be excluded from their traditional foods. They would in fact be exempted from the operation of aspects of mainstream law for ownership and management of indigenous and exotic species of birds and fish in Te Urewera, including restrictions on the hunting of native birds. This was what Seddon intended the 1895 arrangements and*

215. Crown counsel, closing submissions (doc N20), topic 29, pp 19–26; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 152–154; counsel for Tuawhenua, closing submissions (doc N9), p 288

216. Crown counsel, closing submissions (doc N20), topic 29, pp 23–24

217. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 162–164, 166, 168; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 152–154

the 1896 Urewera District Native Reserve Act to achieve. Rights and authority with respect to the introduction and management of exotic fauna were the least defined aspect of the arrangements. But the Urewera leaders' delegation requested exotic birds and fish, and Seddon accepted this and specifically undertook to supply trout for the people to release and manage. Deer may have been contemplated in 1895 (they would have met the dual purpose of tourism and food), but further discussion was needed as to how iwi would access this new source of food and how it would be managed. The release of opossums was not within the spirit of the agreement. Many of the details of the overall agreement in respect of environmental management and resource use had yet to be worked out but the Crown had made a commitment to a framework that respected mana motuhake and customary rights.

21.6.1 Introduction

We have already discussed the negotiation of the UDNR agreement in chapter 9 of our report. We found that the documentation and results of the 7 September 1895 meeting, the 23 September meeting, and Seddon's 25 September memorandum together comprised the UDNR agreement. The agreement cannot be confined to the contents of the premier's memorandum (as the Crown suggested) or the 7 September discussions (as the Tuawhenua claimants suggested).

From our analysis in chapter 9, we identified seven core principles of the agreement, of which five are relevant to the question of control and authority over the environment and its resources:

- The first principle was that an inalienable reserve was to be established to provide permanent protection for the Maori peoples of Te Urewera; their lands; their forests, birds, and taonga; and their customs and way of life.
- The fourth principle was that the peoples of Te Urewera would be self-governing by means of hapu committees to manage their lands and tribal affairs, and a General Committee that would have 'local government' powers.
- The fifth principle was that the peoples of Te Urewera acknowledged the Queen and the Government, and would obey the law.
- The sixth principle was that the Government would protect the people and promote their 'welfare' in all matters, and it would provide a 'package' of social and economic assistance. The details of the package had not been agreed and were to be worked out in the future by further negotiations, in which the people would be represented by the General Committee.
- The seventh principle was that development should take place in the reserve, although (as we understand it) in a manner in keeping with the primary nature of the reserve.

> This development included roads, tourism, gold mining (if gold was discovered), and some farming.

These core principles of the agreement were reflected in the parliamentary debates of 1896 as the Bill passed through both Houses, and in the contents of the Urewera District Native Reserve Act 1896. Seddon's 25 September 1895 memorandum was made part of the Act in the form of a schedule, and there was provision to give effect to it by regulation.

In chapter 9, however, we did not address the environmental aspects of the agreement, which were reserved for specific treatment in the present chapter of our report. We did note that the reservation of the forests and birds of Te Urewera for their Maori owners was a key element in the Act's creation of a native reserve; a reserve which was also for the people to continue their customs and way of life. Economic development, it was envisaged, would allow for farming in the reserve but might mainly consist of tourism and mining. The Maori owners of the reserve and the people of New Zealand were both supposed to benefit from these outcomes (see chapter 9).

In this chapter, we assess the claimants' argument that the 1895 agreement was part of an 'integrated package' which confirmed and guaranteed 'their customary rights to manage wildlife and other natural resources'.[218] In their view, the Crown later broke the agreement and 'failed to affirm and protect Tuhoe's authority over and interests in the natural environment of Te Urewera including its natural flora and fauna and cultural sites, and failed to grant Tuhoe authority over introduced bird and fish species'.[219] The Crown, as we have seen, did not accept this claim:

> The events of 1895 and the resulting Act of 1896, do not constitute a 'package' that guaranteed Urewera Maori certain rights and confirmed Treaty guarantees, especially in respect of the ecology and wildlife of Te Urewera. Neither can the 1895 discussions and 1896 Act be interpreted as a kind of biolog[ical] treaty, or ecological compact.[220]

We turn first to consider the evidence as to what was actually agreed between the Crown and the Te Urewera delegation in 1895, leading up to the enactment of the UDNR Act 1896.

21.6.2 The debate between the historians

(1) *The claimants' environmental historian*

In evidence for the claimants, Dr Brad Coombes argued: 'The debates which led to the Urewera District Native Reserve Act . . . included recognition of tangata whenua rights to manage their forests and guarantees to continued access to forest resources.'[221]

218. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 152–153
219. Counsel for Wai 36 Tuhoe, closing submissions, pt C (doc N8(b)), pp 6–7
220. Crown counsel, closing submissions (doc N20), topic 29, p 8
221. Brad Coombes, 'Resource and Wildlife Management in Te Urewera, 1895–1954: Summary of Evidence', not dated (doc H3), pp 1–2

21.6.2(1)

In Coombes' view, there were two relevant aspects to what he called the 'ecological logic' of the 1895 agreement. The first was a reciprocal recognition of rights:

> The failure of the Crown to implement the administrative logic of the UDNR represents an obvious source of grievance, but it also failed to implement fairly the *ecological* logic which was negotiated in these exchanges. Intertwined with the issues of governance, land and communications [roads] was another bargain: the Crown would be permitted to introduce exotic game for tourism, and Tuhoe would retain the right to harvest kereru: and both native and exotic game would be 'additional sources of food'. [Emphasis in original][222]

Coombes argued that this aspect of the agreement was part of an 'integrated package' with the Animals Protection Act Amendment Act 1895, in which Seddon had arranged for the peoples of Te Urewera to obtain exemption from national restrictions on the taking of kereru.[223]

The second relevant aspect of the agreement was the Crown's recognition of Maori authority in respect of environmental management. The premier recognised 'Tuhoe guardianship over forests and birds', which reflected (and was a part of) the promised self-government arrangements for the native reserve.[224] 'The [committee] provisions for self-administration', argued Dr Coombes, 'clearly extended to resource and wildlife management as well as hapu management'.[225] The Government guaranteed 'Tuhoe's rights to maintain traditional use of forest and bird resources'; these traditional use rights would be self-regulated, with Tuhoe exempt from national restrictions.[226] The Crown's right under the agreement to introduce acclimatised species and promote 'game management for tourism' would need to be balanced with Tuhoe's authority and 'traditional use of the same forest space'.[227] After all, the agreement envisaged Tuhoe management of exotic species in Te Urewera once they had been introduced by the Crown. From Dr Coombes' evidence, the vehicle for Tuhoe authority was expected to be the General Committee, which would raise issues and negotiate with the Government where rights and authority overlapped. The Crown was accustomed to devolving authority over species and the environment to acclimatisation societies,[228] although there was no specific intention to give the General Committee the powers of an acclimatisation society; this was rarely done for local government bodies.[229]

222. Coombes, 'Cultural Ecologies of Te Urewera I' (doc A121), p 72
223. Coombes, 'Cultural Ecologies I' (doc A121), pp 69–72
224. Coombes, 'Cultural Ecologies I' (doc A121), p 51
225. Coombes, summary of evidence (doc H3), p 5
226. Coombes, 'Cultural Ecologies I' (doc A121), p 1
227. Coombes, 'Cultural Ecologies I' (doc A121), p 1
228. Coombes, 'Cultural Ecologies I' (doc A121), p 16
229. Coombes, 'Cultural Ecologies I' (doc A121), p 56

(2) *The Crown's historian*

Cecilia Edwards, in her evidence for the Crown, denied that there was a 'biological treaty' or 'ecological compact', terms which she used to 'encapsulate the position advanced by Dr Brad Coombes that the 1895 agreement and 1896 Act provided a guarantee for Tuhoe to retain their "biological resources" in exchange for the Crown being allowed to survey in the Urewera, construct roads, and develop the area for European tourism'.[230] In Edwards' view, this argument 'attributes a certain degree of design and intention on the part of Seddon and Carroll' which simply was not present.[231] Also, tourism and the idea of protecting forests, birds, water courses, and fish 'played a relatively minor role in the discussions' at the 7 September meeting.[232] In Ms Edwards' opinion, we should confine our consideration to the premier's 'formal response' to the 'series of [Tuhoe] requests', as recorded in his 25 September memorandum. His specific commitments amounted to nothing more than a 'broad statement that forests and birds would be protected' and that an attempt would be made to stock Te Urewera waterways with trout (and the Government would 'pay in part for the services of an expert to show Urewera people how to manage the fish').[233]

In Ms Edwards' view, therefore, the evidence does not support a position that:

> the Crown acknowledged and affirmed 'the right of Tuhoe to biological resources and cultural harvests within their own forests' . . . In my view neither Seddon nor Carroll appear to have turned their minds greatly to the elements that might comprise a biological treaty or ecological compact. The 1895 discussions and the 1896 Act represented a milestone of a kind but the future directions were not spelt out in great detail.[234]

Ms Edwards also argued that, for the biological treaty argument to work, it would have been necessary for the Government to agree in 1895 to set Te Urewera aside from the mainstream operation of the law. She accepted that some special arrangements were deemed necessary because of what she called the 'difficulties' in 1893 and 1895 (see chapter 9 for an account of the 'small war' over surveys). Hence, special arrangements were in fact made to except Te Urewera from the 'mainstream' law in respect of matters like roading, survey requirements, and Native Land Court titles. Yet, in Ms Edwards' view, we should not accept the Animals Protection Act Amendment Act exemption in 1895 as a similar, exceptional arrangement and an 'integrated' part of the 1895 UDNR negotiations. The Te Urewera delegation was likely present in Wellington and had met with Carroll at the time the Animals Protection Bill was going through Parliament in early August 1895. Discussions had probably been held, and Carroll would have briefed Seddon. Nonetheless, the premier had not

230. Cecilia Edwards, summary of 'The Urewera District Native Reserve Act 1896, pt 1: Prior Agreements and the Legislation', 20 January 2005 (doc L2), pp 21, 23
231. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 21
232. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 22
233. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 23
234. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 23

met with the delegation or agreed anything with it at the time he moved the amendment to the Bill on 2 August 1895. His amendment was not part of the negotiations per se but likely arose from Seddon's awareness 'of the impact of such a restriction [to the hunting of kereru] in districts where subsistence economies were being practised'. Nonetheless, Ms Edwards accepted that discussions with the delegation may have influenced the insertion of the exemption clause. It may have been intended as a show of good faith 'and to acknowledge the mana of the Urewera people'. But it was not, she argued, a companion piece of legislation to the 1896 UDNR Act.[235]

Ms Edwards' argument had two caveats. She agreed with Dr Coombes up to a point: 'While I agree that Seddon appeared to suggest the introduction of some kind of an exceptions system (from mainstream legislation) for ownership and management of indigenous and exotic species of birds and fish in Te Urewera, this was not developed further, and certainly not outside the mainstream legislative mechanisms.' She also noted that, if the UDNR Act 1896 and prior discussions are *not* 'construed as a biological treaty', then she was unsure how to account for the Government's apparent belief that it could gazette a game sanctuary over part of the customary lands in the UDNR, and liberate species there, including deer.[236]

21.6.3 Our analysis of the documentation surrounding the UDNR agreement

As we found in chapter 9, our view of the UDNR agreement of 1895 is that it cannot be limited to any one set of discussions or document. Rather, it was the culmination of the discussions at the 7 September and 23 September meetings, and Seddon's memorandum in response to the delegation on 25 September. The documentation in relation to all three constitutes the record of the 1895 agreement. Here, we need to analyse that documentation in respect of the arguments advanced by the claimants, the Crown, and their respective historians as to a 'biological treaty', and we also need to consider whether a fourth component should be added to the record of the agreement: the documentation surrounding the enactment of section 7 of the Animals Protection Act Amendment Act in August 1895.

We begin with the minutes of the 7 September meeting, which Cathy Marr provided in her evidence for the Tribunal. As we discussed in chapter 9, Carroll negotiated with the delegation of Te Urewera leaders and then presented an agreed set of requests to the premier on 7 September 1895, to which Seddon responded verbally at the meeting. Cecilia Edwards stressed that only seven of 58 pages of recorded discussion are 'relevant to the idea of a "biological treaty"', arguing that tourism and the protection of forests and birds in a native reserve received scant attention.[237] In our view, however, there can be no strict

235. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), pp 24–25
236. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 26
237. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 22

correlation between the significance of an issue and the number of pages of recorded discussion about it.

Carroll, speaking on behalf of the delegation, told the premier:

> My wish was that the whole of the Tuhoe boundary should be reserved as a reserve for the Native people, a place wherein the Native people could develop itself and that its mountains and its forests be reserved as a resort for tourists in the future; the Native Birds of the Island would be preserved there as they are being driven out of other parts owing to the advance of civilization. That roads would be made through the country and thus enable tourists from other parts of the world to visit the place and see the Maoris in their natural state and their land and all that they placed on it. Because in my opinion I consider that the Tuhoe Country is a part of New Zealand where the natural curiosities of the Country exist in their natural beauty. . . . You are aware Sir that the Country is not suited for agriculture and farming operations or for settlement purposes but in the estimation of the native race it is a country very suitable to their requirements; they think a great deal of it.[238]

Carroll added that it would be for the Government to bring in legislation for the achievement of these objects, and to assist the peoples of Te Urewera with 'improved methods of cultivation'.[239] Although gold mining and improved cultivation were mentioned, Carroll noted on behalf of Te Urewera leaders:

> I should point out that this is the last tract of native country in its natural state left in New Zealand. And it would be a district in which the natives, the remnants of the name Maori, could gather themselves together. That is why I ask that this District be reserved, made sacred, to preserve this name of the Maori people, preserve the Maori and the forest and all connected with the people in this particular spot situated in the interior of this Island.[240]

Seddon responded that he fully appreciated the people's 'great anxiety as regards your lands and it is well that in dealing with this question that every care should be exercised so that you may not be deprived of that by which you must live'.[241] In response to their request for an inalienable reserve in which their forests, birds, and way of life would be protected, he told the delegation:

238. 'Urewera Deputation, Notes of Evidence', 7 September 1895, ACGS J1/584/ae, 1897/1389, Archives New Zealand, Wellington, pp 2–4 (Cathy Marr, comp, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922', vol 2 (doc A21(b)), pp 166–168)

239. 'Urewera Deputation, Notes of Evidence', p 5 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), p 169)

240. 'Urewera Deputation, Notes of Evidence', pp 5–6 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), pp 169–170)

241. Urewera Deputation, Notes of Evidence', p 15 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), p 179)

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> You then asked that once the boundary is defined that this land shall be kept intact, that your forests may continue to exist, that your wild birds which are very few now may flock there, so that you may live and shall be undisturbed. A people, only a remnant, it is true, of the native race. That is your request. You ask that your streams may be allowed to flow as at present, the waters to remain unpolluted so that the fishes may live; they are also to you a source of food. Both these requests are reasonable and they are in accordance with what I believe to be in your interest and in the interests of the Country. But you say that you desire roads may be made through this Country which will be for convenience of travel to yourselves and which will be utilised to a very large extent by tourists from all parts of the world who will come to see you and to see your Country.[242]

The premier later elaborated on the nature of the risks to the environment in Te Urewera, which might be defeated by protecting both land and people in a native reserve. First, he singled out exotic briars that were invading the 'ancient forest', and urged the people to eradicate them if possible.[243] Then he referred to habitat destruction elsewhere, making the obvious connection between that point and the destruction of native birds. He also pointed to the creation of an island sanctuary on Little Barrier Island, in which the land had to be obtained from Maori, with the payment of compensation, so as to exclude all people (and predators). Te Urewera, as Dr Coombes noted, was to be the antithesis of Little Barrier. Seddon envisaged the people continuing to live there and use the forests in the ways of their forefathers, with the whole country set to benefit from tourists visiting the district:

> I was forcibly struck with the request that your lands should be left as the last tract of native country that it should be a last resource for the native race, that there they may enjoy the freedom that their forefathers enjoyed for ages. That the birds might flock there as a last resort there to feel protected against the encroaches of Civilization [that is, habitat destruction] and their destruction. It was a fervent appeal to the heart. . . . Only a short time ago with the almost unanimous consent of the Legislature a large sum of money was expended in the purchase of the Barrier Island and the purpose of that purchase was to preserve the native birds, the fauna and the flora. Granting your request costs the State nothing the lands are yours, the forests are yours, and the birds that flock there they are yours. There is therefore a pleasure in granting – in acceding to your wishes and it is also a very great pleasure to me to know that you have not asked to conserve to yourselves wholly and solely these beauties; you have asked that roads may be made and that people from all parts of the world may visit you[,] go over your country, admire the grandeur of your scenery, your mountain

242. 'Urewera Deputation, Notes of Evidence', p 22 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), p 186)

243. 'Urewera Deputation, Notes of Evidence', pp 23–24 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), pp 187–188)

> scenery, your forests, your Rivers, and that they would see here the last remnants of the beautiful birds that originally inhabited this Island.[244]

Nothing was said about the acclimatisation of exotic fauna at this meeting. Discussion of the acknowledged need to augment Tuhoe's food supplies seems to have focused on assistance with cultivation and the protection of existing food resources, both birds and fish. It was not until the next recorded meeting, on 23 September, that exotic species were raised by the delegation through Wi Pere, their member of Parliament, who spoke on their behalf at that meeting. According to the newspaper account, Wi Pere 'suggested that round the shores of Lake Waikaremoana a fish breeding establishment might be erected, and the Natives taught how to manage it, and that breeding places for birds should be constructed, so that desirable imported game might be bred'.[245]

In response to the delegation's various representations through Wi Pere, Seddon said that the proposed General Committee would have

> extended powers, and in matters that arose between the Government and the Tuhoe the central committee would act as the medium of communication. In fact, the Government proposed to give the Tuhoe local government.[246]

The premier would 'lend them assistance in regard to the acclimatisation of fishes and birds in their country, and would write to Mr Rutherford [see below] on the matter'.[247] There was no mention at this meeting of having to work through or consult acclimatisation societies. In the memorandum which followed it, acclimatisation of exotic species was represented as a matter to be dealt with by the Government and Tuhoe directly.[248]

The 23 September meeting was followed by the premier's memorandum of 25 September, which later became the second schedule of the Urewera District Native Reserve Act 1896. Seddon characterised his memorandum to Tuhoe as 'an answer to the matters brought before me', so as to 'acquaint you with the decision of the Government thereon'. Two passages addressed matters relevant to the question of an 'ecological compact'.

First, the premier responded to what he characterised as a request for additional food supplies and additional tourist attractions: the acclimatisation of exotic fish and birds:

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244. 'Urewera Deputation, Notes of Evidence', pp 38–40 (Marr, supporting paperss to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), pp 202–204)

245. 'The Urewera Tribe', *New Zealand Times*, 24 September 1895 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), p 267)

246. 'The Urewera Tribe', *New Zealand Times*, 24 September 1895 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), p 268)

247. 'The Urewera Tribe', *New Zealand Times*, 24 September 1895 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), p 268)

248. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, second schedule

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> As you feel that it would be desirable to provide an additional attraction to European tourists, and at the same time provide you with additional sources of food, you have asked that arrangements may be made for the introduction of English birds, and by stocking the rivers with English fish. By such means you Maoris will be benefited, and the rest of the colony as well. I will place myself in communication with the Curator of the fish-ponds at Masterton [Mr Rutherford, referred to above], and ascertain whether there are any English trout that can be supplied to you this year; and I will also ask to be furnished with full directions to be furnished to you, so that you may know which are the most suitable places in which to place the fish in the rivers and lakes of your country, and how to look after them.[249]

The claimants emphasised Seddon's promise that Maori communities would release the trout and manage the fishery as a model for how species should be acclimatised under the 1895 agreement, and as Government acceptance of their authority and management in such matters.

The second relevant section of the memorandum was the premier's response on the matter of forests, birds, and rivers, which he connected with both the benefits of tourism and Tuhoe's agreement to honour and obey the Queen's laws:

> With regard to your request that your forests and birds should be suitably protected, it gives me much pleasure to assent to this request of yours. I am also very much pleased to learn from you that you have opened your land to tourists, who will now have an opportunity of seeing the wonders of your country, and the extent of your forests, with its lakes and its rivers. It is a cause of gratification to the Governor, and to me also, to hear that you acknowledge that the Queen's mana is over all, and that you will honour and obey her laws.[250]

The issue of what Seddon meant by 'suitably protected' was much debated in our inquiry. Dr Coombes posed the question:

> Did Seddon refer to the *level* and *scope* of protection, or to the *cultural appropriateness* of protection? If the former, then the Crown's subsequent adoption of policies which restricted cultural take of native avifauna might appear justified; if the latter, then the restrictions on indigenous harvest and management of native species would have been unfounded.[251]

According to the claimants, the promise of 'suitable protection' can only be understood in light of the Animals Protection Bill earlier in the year, and the premier's introduction of

249. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, second schedule

250. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, second schedule

251. Coombes, summary of evidence (doc H3), p 3

an exemption for Te Urewera from the operation of its restrictions on hunting kereru.[252] Counsel for Wai 36 Tuhoe submitted: 'In the context of Te Urewera in 1895 it is inconceivable that Tuhoe or Seddon would have contemplated any restriction on customary harvest as being suitable or appropriate.'[253] We agree.

The Animals Protection Act Amendment Bill was originally designed to introduce 'a minor, procedural amendment'.[254] During its passage through the House, however, Mr Houston (a Government member) moved an amendment to ban all hunting of kereru every sixth year, starting in 1896. This amendment was accepted without debate, but Seddon at once moved a proviso:

> Provided that the Governor may, on the recommendation of the Colonial Secretary, by notification in the Gazette, exclude the Urewera Country and other Native districts in the North and South Islands from the operation of this section.[255]

Ms Edwards accepted that the Te Urewera delegation was almost certainly in Wellington at the time of this amendment, and had likely begun discussions with Carroll and/or Pere. Carroll would have briefed Seddon.[256] In our view, it defies belief that the explicit mention of Te Urewera in the legislation was unrelated to the subsequent negotiations with Te Urewera leaders. But was it part of a 'package' to be read together with, and inform the undertakings made in respect of, the UDNR Act?

In our view, light is shed on this subject by the debate over the UDNR Bill in Parliament in 1896, and by statements from the Minister who had been most central to the negotiations, James Carroll.

The UDNR Bill 1896 was introduced by Carroll, who explained to the House that the district was being reserved because it was 'not fit . . . for settlement in any shape whatever':

> it is land full of natural beauties; it is land that will form a strong attraction for tourists; it is also a convenient abiding-place for the Native owners. They live there within their own conditions congenial to their habits and welfare. They have their cultivations, the produce of the rivers and creeks, and little bends here and there where the wash from the hills has formed a little soil serves them for special gardening. They have lived there for centuries and ages; and it is their earnest desire, seeing, of course, that it is fit for no other use than for benefiting themselves – seeing that it is not adapted for being cut up for settlement purposes – it is their ardent wish that this land should be preserved to them. Sir, in agreement with their views on this subject, the Government considered the matter, and the result of that consideration is the Bill now before the House. In order to carry into effect the

252. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 152, 155
253. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 152
254. Coombes, 'Cultural Ecologies 1' (doc A121), p 69
255. Animals Protection Act Amendment Act 1895, s 7; Coombes, 'Cultural Ecologies 1' (doc A121), pp 70–71
256. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 25

agreement between the Government and the Natives in a practical way, we have to seek legislation in this direction.[257]

Hone Heke, member for Northern Maori, explored the nature and extent of protection offered. Relying on Seddon's speech to the delegation on 7 September 1895, Heke said that the premier had been 'willing to grant to them [Tuhoe] the full rights conferred upon them by the Treaty of Waitangi'. In particular, 'he told them that the forests, birds, and everything else within the Urewera district belong to the Natives themselves, and then he quoted the Treaty of Waitangi as his authority'. Heke also stressed the premier's reference to Little Barrier Island and the Government's intention to achieve somewhat similar ends by very different means in Te Urewera, where Maori would remain the owners. Heke was concerned, however, at the way in which power to regulate was reserved for the governor in council, and he proposed that more should be done in the substance of the Bill itself to give effect to the agreement. He would move an amendment 'to substantiate the statements made by the Ministers before the Urewera people regarding their rights, as conferred upon them by the Treaty of Waitangi'.[258]

Wi Pere, who – as with Heke – had been present at all meetings between the delegation and the premier, told the House that the Bill was intended to carry out the wish of the Maori people and make their country a 'permanent reserve . . . where the Native race may live in their primitive state – where their customs and the native birds may be preserved'.[259] We agree with Dr Coombes that the only meaning Pere could have in coupling Maori customs and native birds in this way was, at the least, an expectation that customs in respect of birds and birding were to be protected as part of the legislation.[260]

Houston, who had moved the original amendment to restrict the taking of kereru in 1895, spoke against Heke's proposed amendment, which Heke had already tried to insert when the Bill was before the select committee. Birds and fisheries, said Houston, should not be reserved 'exclusively for the Natives'. In his view, it was dangerous to recognise the Maori owners as having exclusive rights, especially to fisheries. It would prevent tourists and travellers from fishing without permission.[261]

Ropata Te Ao, member for Western Maori, responded to Houston by pointing out that the Bill proposed not to alienate but to preserve 'the land for the Tuhoe people, and for the purpose of preserving their birds and their fisheries' – and permanently so.[262]

Seddon's response was similar: he reminded the House that the district was not fit for settlement nor in fact needed for settlement in any case. Instead, it would be reserved for

257. James Carroll, 24 September 1896, NZPD, 1896, vol 96, p 157
258. Hone Heke, 24 September 1896, NZPD, 1896, vol 96, p 163
259. Wi Pere, 24 September 1896, NZPD, 1896, vol 96, p 164
260. Coombes, 'Cultural Ecologies 1' (doc A121), p 59
261. R M Houston, 24 September 1896, NZPD, 1896, vol 96, p 165
262. Ropata Te Ao, 24 September 1896, NZPD, 1896, vol 96, p 166

the Tuhoe people, who would 'govern themselves in accordance with their own traditions'. In particular, he noted the dependence of this self-governing people on their forests and birds for sustenance and survival:

> But in the wilds of the Urewera Country the forests provide the feed for the birds; upon which the Native live, the lakes and rivers provide the fish necessary for their existence, and the little flatland they have is sufficient for them to cultivate the potatoes and other food they require, kumaras, and so on.[263]

Thus, birds and fish 'upon which the Natives live' and which were 'necessary for their existence', along with the forests, lakes, and rivers which sustained these food sources, were – in the Premier's view – what the Bill would reserve to the self-governing Maori communities of Te Urewera.

Thomas Mackenzie also linked the preservation of forests and birds with the preservation of the 'Natives in their own original mode of life'.[264] Reading the speeches together, it seems that the point was well understood. Preservation of an entire district, its forests, birds, waterways and fish, was for multiple purposes: for the sake of its natural beauties (given that the district was not suitable for close settlement, and native forests were fast disappearing from other parts of the colony); for the sake of the Maori people who lived there and would retain their way of life, their natural food sources, and the 'freedom of their forefathers' to govern themselves; and for the sake of the economic development of Maori and the colony in the form of tourism and mining.

But would Maori rights to their resources be exclusive? In committee, Heke moved to add the following words to the preamble:

> and for preserving to the Native owners the full enjoyment of their rights to the lands within the said district, and to the forests, fisheries, and other properties which they may collectively or individually possess, as provided by the second article of the Treaty of Waitangi.[265]

Heke's amendment was negatived without need for a vote. From Houston's earlier speech, we take it that Parliament was concerned not to explicitly recognise what they saw as Treaty rights to *exclusive* use of the forests, fisheries, and other Maori properties in Te Urewera. The claimants' view that 'tourists would be permitted entry [under the agreement] on a non-consumptive basis'[266] was not the view that prevailed in Parliament.

Dr Coombes concluded:

> To some extent, the UDNR was a nature reserve, but not one for the inviolable preservation of native species, but rather for the preservation of Maori rights to cultural harvesting

263. R Seddon, 24 September 1896, NZPD, 1896, vol 96, p166
264. Thomas Mackenzie, 24 September 1896, NZPD, 1896, vol 96, p171
265. Hone Heke, 24 September 1896, NZPD, 1896, vol 96, p178
266. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p152

and management of forest resources. Before Parliament, Seddon celebrated the fact that 'in the wilds of the Urewera Country the forests provide the feed for the birds; upon which the Natives live'. Given this celebration, there should be no suggestion that Seddon wanted to extinguish birding practices. Along with other members of Parliament, he assured that the UDNR would be the antithesis of Little Barrier Island, which had shortly before that time been established as an exclusionary nature preserve.[267]

In our view, one further piece of evidence is decisive. Coombes noted:

> James Carroll's understanding was that 'one of the conditions upon which the Urewera Reserves Act was passed was that we should augment their food supply and not exclude their rights to taking [*sic*] game for food'. Of all Crown agents, Carroll was probably best situated to articulate the intent of the UDNR, so this is an important affirmation of the resource rights which the Reserve was intended to bestow.[268]

We agree with Dr Coombes' conclusion here. Carroll's view was recorded in 1902, when his opinion was sought by officials of the Tourist Department as to whether Maori should be exempted from a ban on killing native birds in the Waikaremoana sanctuary. We referred to this issue briefly in chapter 20, and will discuss it in more detail when we explore the Crown's restrictions on birding later in this chapter. Here, we note that Carroll's response revealed his recollection of one of the core aspects of the UDNR agreement:

> I believe in protecting both imported and native game in the locality referred to but in doing so we must make an exception in favour of the Natives living in that country, because *one of the conditions upon which the Urewera Reserves Act was passed was that we should augment their food supply and not exclude it from them. They will claim their rights to kill game for food.* I can however regulate them under their own Act which will serve the purpose just the same [that is, the purpose of exempting them from the Order in Council banning all hunting of native birds in the sanctuary].[269] [emphasis added]

This was an internal memorandum, not a document crafted for public consumption. Its purpose was to remind Tourist Department officials and their Minister what had been agreed to by the Government – and it is all the more persuasive for it.

267. Coombes, summary of evidence (doc H3), p 5
268. Coombes, 'Cultural Ecologies 1' (doc A121), p 68
269. Native Minister, minute, 23 September 1902, on T E Donne, Superintendent, to Minister in Charge Tourist Department, 15 September 1902 (Walzl, 'Waikaremoana' (doc A73), p 102); 'Lake Waikaremoana: History of Surrounding Lands', p 22, not dated (Vincent O'Malley, comp, supporting papers to 'The Crown's Acquisition of the Waikaremoana Block, 1921–25', various dates (doc A50(c)), p 854)

21.6.4 Our conclusion about the 'ecological logic' of the UDNR agreement

The 1895 exemption for Te Urewera in the Animals Protection Act, the record of discussions at the 7 and 23 September 1895 meetings, the text of the premier's 25 September memorandum, the parliamentary debate over the UDNR Bill in 1896, and Carroll's recollection in 1902, together substantiate that there was an 'ecological logic' to the UDNR agreement. We summarise it as follows.

The forests, birds, rivers, and fish of Te Urewera were to be protected from environmental degradation for their owners, the peoples of Te Urewera, and for the enjoyment of (paying) visitors. Rivers were not to have their courses diverted or their waters polluted. The land was to be protected from deforestation to provide a secure habitat for native birds, and to protect the customary way of life and resource-use of the peoples of Te Urewera. The mode of protection was to be the legislative establishment of a permanent, inalienable native reserve in which Maori communities would be defined as owners and would continue to live according to their customs. This included their 'right to kill game for food', which was recognised. Self-government would be exercised via hapu committees and a General Committee. Issues between the Crown and the peoples of Te Urewera would be resolved by dialogue between the Government and the General Committee. Food supplies were to be augmented, and the people were not to be excluded from their traditional foods. Rather, the peoples of Te Urewera were to be exempt from the operations of aspects of the mainstream law, including restrictions on the hunting of native birds (whether the exemption was through legislation, as with section 7 of the 1895 Amendment Act, or by order in council, as Carroll planned for Waikaremoana in 1902).

This was the clear commitment of the Crown to the peoples of Te Urewera in 1895–6, to a framework that respected mana motuhake and customary rights. Rights and authority with respect to the introduction and management of exotic fauna were, perhaps, the least defined of this set of prospective arrangements.

We stress the prospective nature of the agreement; many of the details had yet to be worked out. Cecilia Edwards agreed with Dr Coombes that 'Seddon appeared to suggest the introduction of some kind of an exceptions system (from mainstream legislation) for ownership and management of indigenous and exotic species of birds and fish in Te Urewera.'[270] We agree. That is exactly what he did, and what the 1895 arrangements and 1896 Act were intended to achieve. One way of working out the details was to be by regulation under the 1896 Act. But, commented Ms Edwards, Seddon's intention was 'not developed further, and certainly not outside the mainstream legislative mechanisms.'[271]

Crown counsel argued that the broad statements about natural resources at the 1895 meetings did not constitute a formal agreement to a specific type of protection, let alone

270. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 26
271. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 26

to specific terms.[272] We do not agree. The intent of the UDNR agreement was to create a very specific form of protection: a self-governing and inalienable native reserve. We do agree, however, that much of the detail or specific terms in respect of environmental management and resource use were left out of the discussions and the Act that followed. The claimants agreed that there was insufficient detail about how the 'suitable protection' of forests and birds was to work in practice. Relying on the evidence of Cathy Marr and Cecilia Edwards, claimant counsel submitted that the detail was supposed to be fleshed out and agreed in future by further negotiations, which never happened. In particular, the General Committee was to have played a pivotal role.[273]

Crown counsel conceded that Seddon may have intended some role for the General Committee in implementing relevant environmental legislation. A key point for the Crown, however, was that the UDNR Act did not override 'mainstream' legislation on environmental matters, which it could have done if that had been intended; by contrast, its terms did specifically exclude the jurisdiction of the native land laws from the reserve. Thus, in the Crown's view, the 1896 Act did not intersect with the Animals Protection Acts to guarantee certain or specified rights over natural resources in the reserve. Nor was the application of future environmental policy or legislation in the reserve to be negotiated with the General Committee. Rather, the Crown's view was that Seddon 'saw this aspect of his engagements with Tuhoe as something for him to arrange, informing him[self] of their views'.[274]

As we found in chapter 9, Seddon made a very clear statement of his intentions at the 23 September 1895 meeting. He told Te Urewera leaders that 'in matters that arose between the Government and the Tuhoe the central committee would act as the medium of communication'.[275] We see no reason why this would not apply to the negotiation of future exemptions from mainstream environmental legislation, including any further restrictions that Parliament might impose on the harvest of native birds.

21.6.5 The issue of exotic fauna

The issue of exotic fauna requires further comment. According to Dr Coombes, the 1895 UDNR agreement included the following 'bargain': 'the Crown would be permitted to introduce exotic game for tourism, and Tuhoe would retain the right to harvest kereru; and both native and exotic game would be "additional sources of food"'.[276] Ms Edwards admitted that if such a bargain had not in fact been made, then it was difficult to account for 'the Government's later actions (in gazetting a game sanctuary over part of the customary

272. Crown counsel, closing submissions, topic 29 (doc N20), p 9
273. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 151–155
274. Crown counsel, closing submissions, topic 29 (doc N20), p 10
275. 'The Urewera Tribe', *New Zealand Times*, 24 September 1895 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), p 268)
276. Coombes, 'Cultural Ecologies 1' (doc A121), p 72

lands subject to the UDNRA, and liberating other species, including deer)'.[277] Given the Government's release of deer in Te Urewera in 1897, so soon after negotiating the UDNR agreement, Edwards suggested that 'the parties could have taken away a general understanding that no further consultation over the release of other species was required'. Alternatively, Carroll may have assumed that no further consultation was needed to release additional species, or he may have conducted informal (unrecorded) consultation with Te Urewera leaders. In Ms Edwards' view, there can be 'no certainty on this point'.[278]

From the records of the 1895 meetings and Seddon's memorandum, it is clear that augmenting the food supplies of the peoples of Te Urewera was an objective for both parties. It also appears that both parties were interested in tourism and its economic benefits. According to the newspaper account of the 23 September meeting, it was the Te Urewera delegation which asked for the introduction of exotic birds and fish to their district. But the delegation's request was not couched in passive terms. They wanted to control and carry out the work of acclimatisation themselves. As we noted above, Wi Pere, speaking on behalf of the delegation, 'suggested that round the shores of Lake Waikaremoana a fish breeding establishment might be erected, and the Natives taught how to manage it, and that breeding places for birds should be constructed, so that desirable imported game might be bred'.[279] In other words, the peoples of Te Urewera would breed, establish, and manage the exotic species, both fish and birds. The newspaper article did not suggest any particular motivation for this request, but it did record the premier's response that he would 'lend them assistance in regard to the acclimatisation of fishes and birds in their country'.[280]

Subsequently, in his memorandum of 25 September 1895, Seddon expanded on what he understood to be the reasons for the request, and how he would lend assistance. Tuhoe wanted more attractions for foreign tourists. Hunting and fishing for sport was a primary aspect of tourism at the time. Tuhoe leaders also wanted 'additional sources of food' for their communities. The premier believed that both Maori and the colony would benefit, and so he agreed to the request in the terms in which it was made; specifically, he promised to obtain trout and 'full directions' as to the best places to release them and how to manage the resource, so that they could do both themselves.[281] The Crown emphasised in our inquiry that Seddon's specific undertaking was limited to trout,[282] but we consider that a more general understanding had been reached, at least as regards future intentions about the introduction of new fish and bird species.

277. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 26
278. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 24
279. 'The Urewera Tribe', *New Zealand Times*, 24 September 1895 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), p 267)
280. 'The Urewera Tribe', *New Zealand Times*, 24 September 1895 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922' (doc A21(b)), p 268)
281. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, second schedule
282. Crown counsel, closing submissions, topic 29 (doc N20), p 10

21.6.5

There were, however, three complicating factors:

- The general agreement as to the introduction of exotic fish and birds was included in the 1896 Act by way of the second schedule, but no additional detail was provided and it remained for the Crown to give effect to the schedule by regulations;
- There was a question as to whether the agreement to acclimatise fish and birds represented a general licence for the Crown to introduce other kinds of animals, particularly deer, without further consultation and agreement; and
- Some claimant groups query whether the delegation did in fact request the introduction of trout to their lakes and rivers, based on oral traditions to the contrary.

We will deal with the first point later in the chapter, when we consider the extent to which the 1895 agreement was given effect after the passage of the UDNR Act in 1896. Here, we address the questions of whether the delegation really did ask for trout with which to stock their waterways, and whether an agreement to introduce birds and fish extended – implicitly or explicitly – to an agreement to introduce other forms of wildlife to the protected reserve.

Counsel for Wai 621 Ngati Kahungunu submitted that Ngati Kahungunu were not involved in the UDNR negotiations, and that trout were introduced into their waterways without consultation or agreement.[283] We confirmed in chapter 9 that Ngati Kahungunu and Ngai Tamaterangi were not a party to the 1895 negotiations. As far as we are aware, there was no consultation with Waikaremoana leaders about the introduction of trout (other than the request to Seddon during the 1895 negotiations).[284] Reay Paku, a Ngati Kahungunu kaumatua who was interviewed by Professor Garth Cant's research team, shared the tribe's view that the local people had not sought the introduction of trout:

> No, that was just a tale that originated just to suit the purpose of the day. The truth of it is that this person had brought trout across over to Waikaremoana for release into the waters of Waikaremoana and one specific area called Waitangi where possibly the purest steel-head trout of today are to be found. The Maoris did not ask for trout, they didn't even know what trout [were].[285]

Tama Nikora, interviewed by researcher Suzanne Doig, said that Tuhoe had not requested the introduction of trout either.[286] We received no oral evidence on this point from Mr Nikora or any other claimants at our hearings, though counsel for Wai 36 Tuhoe stated that 'Tuhoe requested exotic fish and birds which Seddon understood would form a supplementary food source'.[287]

283. Counsel for Wai 621 Ngati Kahungunu, closing submissions, 30 May 2005 (doc N1), pp 22, 162, 166
284. Walzl, 'Waikaremoana' (doc A73), pp 60–62
285. Reay Paku, interview, 11 November 2003 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana and Lake Waikareiti' (doc D1), p 70)
286. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 59
287. Counsel for Wai 36 Tuhoe, closing submissions (doc N8 (a)), p 151

Counsel for Nga Rauru o Nga Potiki submitted: 'Because the written and oral evidence conflicts, it is not possible to decide conclusively on whose decision it was to release trout, and therefore on whether the Crown's action was consistent with the property and Treaty rights of the owners.'[288] Counsel argued that the Tribunal should nonetheless accept that Seddon had promised trout as a tourist attraction and an extra food source for Tuhoe, and that Tuhoe were supposed to manage trout as part of their customary fisheries, but his promise was not kept.[289] Thus, while there is doubt as to whether Te Urewera leaders really did ask for trout, these claimants' position is that the premier – having decided to introduce it – was still accountable for his undertakings to provide additional food and to enable Tuhoe management of the natural resources in their reserve, including trout.

On the issue of mammals and marsupials – namely deer and opossums – we have already noted Ms Edwards' suggestion of three possibilities arising from the UDNR agreement in 1895:

- Both of the parties to the 1895 agreement 'could have taken away a general understanding . . . that no further consultation over the release of other species was required';
- The Crown may simply have assumed that no further consultation was needed before species other than birds and fish could be released into the reserve; or
- Carroll (later Native Minister) may in fact have consulted informally with Te Urewera leaders before the introduction of additional species.[290]

Dr Coombes considered that the Crown gained a general right to 'release exotic game animals within the inquiry district as a basis for its tourism projects at Waikaremoana', in return for recognising 'Tuhoe's right to maintain traditional use of forest and bird resources'.[291] In his view, the Crown's right would have covered the release of deer but not opossums, because opossums were not introduced for tourism purposes or as a source of food. Relying on Seddon's memorandum, he also suggested that the delegation's request for new species was 'tempered by the suggestion that tangata whenua would administer the new wildlife resources'.[292] In other words, if the agreement was to be understood as a reciprocal recognition of rights, then this was a qualification of the Crown's right: once released, new species were to be managed inside their reserve by the peoples of Te Urewera.

We will address the issue of post-1896 possibilities – that is, that Carroll may have consulted 'informally' before introducing animals that had not been discussed and agreed to – later in the chapter. We will discuss mustelids in a later section too. Here, we are concerned with the contention that either the Crown or both parties viewed the 1895 agreement as licence for the Crown to introduce mammals or marsupials (rather than birds or fish) into the reserve. Edwards suggested that the Crown may have acquired such a right and

288. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 234
289. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 234
290. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 24
291. Coombes, 'Cultural Ecologies 1' (doc A121), p 1; see also p 15.
292. Coombes, summary of evidence (doc H3), p 3

Coombes asserted that it did, although Coombes' argument was qualified by his suggestion that new species had to be for tourism and food supply purposes, and subject to the Maori administration of the reserve.

In our view, it is stretching matters too far to suggest the Te Urewera delegation had agreed that any animals whatsoever could be released in their reserve, even if understood to be useful for tourism or the increase of food supplies. They asked for birds and fish, and that is what Seddon agreed to. On the other hand, we accept that Tuhoe agreed in 1895 to development in the reserve for tourism. Discussion of the tourism aspects of the agreement mostly focused on roads, but we accept that the parties reached a general understanding that new species would be introduced for the purposes of tourism and food supplies. Much would depend on future dialogue between the Crown and the leaders of Te Urewera as to how these general commitments would be carried out in practice.

Although we have no record of any specific discussion of deer in 1895, we are not surprised that the Government considered it could go ahead with plans to develop deer stalking as an attraction (and as a source of food for the peoples of Te Urewera). Further discussion was necessary, however, as to how Tuhoe and other iwi would access this food supply, how it would be regulated, and who would manage it. We agree with Dr Coombes that the 1895 agreement could not be considered justification for introducing opossums for the quite different purpose of establishing a fur industry.

21.6.6 Our conclusion about the agreement as to exotic fauna

As we see it, the documentation surrounding the UDNR agreement makes it clear that the Te Urewera delegation requested the acclimatisation of exotic fish and birds on 23 September 1895, for the dual purpose of increasing their food supplies and attracting tourists. The delegation was in no doubt as to who would control and manage the process of acclimatisation. Their request was that the Crown would assist them with expertise, technology, and stock: it would provide the fish and birds, a hatchery and breeding structures (for birds), and instruction as to how the fauna should be released and managed. The premier seems to have agreed to this request in the spirit in which it was made. The first mention of trout came in his memorandum of 25 September. His specific undertaking was to obtain trout for the peoples of Te Urewera to release and manage, as well as the necessary instruction for them to be able to do so. We note the claimants' position that there is some doubt as to whether the delegation did ask specifically for trout, and that a conclusive answer is not possible. We accept that Ngati Kahungunu did not request trout, as they were not part of the Te Urewera delegation, and there does not appear to have been any consultation with local communities at Waikaremoana before trout were released in 1896. With regard to Tuhoe, however, we have one source (Tama Nikora interviewed by Suzanne Doig) but no

oral evidence was presented to the Tribunal on the question. We do not consider that there is a sufficient basis for questioning the documentation surrounding the 1895 agreement.

Seddon's memorandum, which accepted the delegation's general request with regard to exotic birds and fish and made the specific undertaking to supply trout for the people to release and manage, was given the force of law as a schedule to the UDNR Act. The governor in council was empowered to make regulations to give effect to the schedule. Thus, the question of how exactly this aspect of the agreement would be carried out was left for the future.

But we do not see how an agreement to acclimatise fish and birds in the reserve could be extended to include any and all 'mammalian or marsupial creatures',[293] even if they might augment Maori food supplies and attract tourists, without further consultation and agreement with the owners and kaitiaki of the reserve. Deer were likely in contemplation in 1895 and certainly met the dual purpose of tourism and food, but further discussion was needed as to how iwi would access this new source of food, and how it would be managed inside the reserve. The Crown's relationship with the peoples of Te Urewera was to be a continuing one, however, and Seddon's undertakings about the introduction of exotic birds and fish had laid the basis for further arrangements.

21.7 What Were the Crown's Major Interventions in the Environment of Te Urewera before the Establishment of the National Park in 1954? Were those Interventions Conducted with the Agreement of, or with Due Regard to the Interests of, the Peoples of Te Urewera?

Summary answer: *The Crown's three major interventions in the environment of Te Urewera before 1954 were:*

- *its assertion (and then assumption) of control of Te Urewera land-use (first, by the 1930s, by informally reserving Te Urewera forests, later by legislative controls for soil and water conservation);*
- *its assertion (and then assumption) of control of indigenous birds in Te Urewera, by gradual restrictions on the harvesting of birds; and*
- *the deliberate introduction of exotic species – trout, deer, opossums, and mustelids – either directly by the Crown, or facilitated by it after the UDNR agreement.*

By 1909 new Crown policies for control of land-use in Te Urewera were taking shape, as the 1895 agreement was 'forgotten'. Liberal government commitment to total protection of the UDNR for its people and their forests, birds and fish was replaced by its vision of acquiring more than a third of the reserve for close settlement (that is, small settler family farms)– a

293. Edwards, summary of 'Urewera District Native Reserve Act 1896, pt 1' (doc L2), p 26

proportion which soon grew to well over a half. During the 1910s the Crown's purchase programme accelerated; the General Committee was bypassed as great numbers of individual shares were purchased by predatory tactics. During the 1920s, officials began to scale down the proposed clearances for settlement, but it was not until the 1930s that water and soil conservation became the predominant government policy for Te Urewera. Whirinaki Valley was destined for milling, and was proclaimed a State forest, while the rest of the Crown's vast block awarded it in the consolidation scheme by virtue of its individual share purchases in many blocks of the reserve, was to be preserved in its 'natural' state, to prevent what was feared might be an environmental disaster in lower lying farmlands.

At the same time, the Crown restricted milling on Maori land, other than at Whirinaki and Te Whaiti and some parts of the rim blocks. In the early 1950s the Minister of Maori Affairs, E B Corbett, decided to reserve the Crown's land as a national park (thus affording it the highest possible protection), while responding to Tuhoe pleas for employment for their people with a land-use classification project to ensure controlled milling on Maori land, which would not pose environmental risks in terms of erosion. By 1954 the Crown had assumed complete control of the Te Urewera environment for soil and water conservation purposes.

A critical element of the Crown's assumption of control of the Te Urewera environment before 1954 was its intervention in the control and management of wildlife. In respect of native birds, this took the form of the gradual imposition of restrictions on hunting of kereru and other species until hunting was banned in 1922. All Maori communities in Te Urewera hunted kereru; it was a treasured part of their food supply in the nineteenth and early twentieth century, while the presentation of preserved birds to manuhiri upheld hapu and tribal mana. Kereru was a taonga species; and the Crown has acknowledged their spiritual importance to the peoples of Te Urewera. Despite the harvest of birds in Te Urewera being strictly controlled by customary law, and despite the Crown's recognition in the UDNR agreement that Maori there were living by their own 'customs and habits', a clash between customary law and statutory law loomed because the Crown had already established a system of control of native birds in 'native districts' elsewhere in the country. Animal protection legislation, which had long laid down rules for hunting native birds, reflected the preoccupation of Pakeha hunters with sport and recreation.

However, by the 1890s there was among Pakeha a new nationalistic pride in indigenous birds and bush, and a concern with their preservation and thus absolute protection. At first there was a specific exemption for Te Urewera from new nationwide restrictions imposed in 1900 on the hunting of kereru, pukeko and kaka, with closed seasons every third year, and prohibitions on preserved game – which made huahua illegal. In 1903 a single standard season for native game was introduced, despite strong objections from Maori members of parliament, who stressed that Maori had their own hunting seasons, but they were flexible to take account of seasonal variations in berry ripening across the country– and thus the timing of

birds reaching peak condition for eating and preserving. Nor did the members' attempts to defend Maori hunting techniques (including traps and snares) succeed; Pakeha parliamentarians wanted to make the taking of kereru more sporting. By 1910 there was a permanent ban on killing native birds, with provision for the peoples of Te Urewera and 'native districts' to apply, now, for an annual exemption. The only open season under the 1910 Act was however declared in 1911. From 1912 on, it was unlawful for Maori in Te Urewera to hunt restricted bird species, including kereru. No more exemptions would be granted, according to the Minister of Internal Affairs-despite the petitions he received from Te Urewera. In 1922 the government legislated accordingly: the Animals Protection and Game Act 1921–22 made kereru, kiwi, tui and kaka 'absolutely protected'. Yet Maori continued their customary take of birds in the years that followed, and there was no – or no effective interference from rangers. During the Urewera Consolidation Scheme Te Urewera leaders asked the commissioners to set aside pua manu (forested areas for the hunting of kereru and other birds), evidently still considering the people fully entitled to hunt as they always had done. Change did not come till 1931, when two people from Te Whaiti were prosecuted for poaching, and fined. There were immediate shock waves in Te Urewera, and petitions to Wellington seeking the reinstatement of customary rights, and Treaty rights. But despite Ngata's support for the petitioners at Cabinet level, there were no law or policy changes. By the end of the 1930s, hunting declined drastically as the reality of the cost of fines hit home hard –though kereru continued for some time to be taken for the old people, or served on important occasions where the mana of the hosts was at stake.

At the time there were alternatives proposed to the restriction and the prohibition of the customary harvest of native birds. These included making forest reserves, to tackle the issue of habitat destruction; or at least the strategic reservation of berry trees or stands of indigenous forest; reserving sufficient miro and hinau trees within state forests, active eradication of predators and pests, and continuing district- specific exemptions policy for Maori, depending on local circumstances But the Crown rejected all proposals that sustainable harvests were feasible in Te Urewera, and stuck with its law prohibiting the killing of birds. Nor did it consider carefully the people's circumstances, the hardship that resulted from banning the take of an important food, or the provision of an alternative food supply as compensation.

Some introduced fauna however did augment wild food supplies, as promised in the 1895 agreement. Trout, deer and opossums were the most significant acclimatisations that took place in Te Urewera in the late nineteenth and early twentieth centuries. Trout were introduced with marked success just before the UDNR Act 1896 was passed. Trout fry were released at Waikaremoana in 1896, and became well established over the next few years; and local Pakeha residents successfully released brown trout into the Rangitaiki and Whirinaki rivers. Te Urewera was incorporated by stages into the Rotorua Acclimatisation District, which was taken over by the Tourist and Health Resorts Department in 1908. The Department of Internal Affairs took over the administration of freshwater fisheries in 1914. The Te Urewera trout

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fishery was put under the same arrangements for licensing and regulations as the rest of New Zealand. This cannot have been what Te Urewera leaders expected when they asked in 1895 for English fish to augment their food supplies and attract tourists; nor should they have been subject to the Government's licensing regime. The Premier, in agreeing to their request, undertook to secure trout for them and information so they could manage the fishery. Trout did become a part of the customary economy; to some extent this was necessary because of the impact of exotic species in reducing the indigenous fish species. The Crown has accepted that trout did damage native fish populations. Its management of the trout fishery also involved attempts to reduce or eradicate native species which were believed to predate on trout. Tuna culling began in the 1950s, which falls outside the scope of this chapter. Kawau (black shags) were vilified because they ate trout, and campaigns against them at Waikaremoana lasted from the 1920s into the early 1950s, despite their importance to the peoples of Te Urewera. Native hawks were also targetted as pests because of their impact on Pakeha game fish and birds, and for sport. But there had been no agreement in 1895 that the Government could systematically cull any native species of bird; any such policies should have been negotiated. As with the prolonged involvement of government departments in stocking rivers and lakes with trout (for they proved expensive and difficult to establish), this was an example of Crown policies prioritising the interests of the tourist industry and angling over those of the peoples of Te Urewera.

Deer were introduced into Te Urewera from 1897, by a local settler who was a keen acclimatiser, with help from the Wellington Acclimatisation Society. Subsequently, up till 1922, almost all other releases in Te Urewera were undertaken by the Tourist and Health Resorts department. There is no record of consultation with Maori. It seems however, that Native Minister Sir James Carroll favoured the introduction of deer, at least in part as a food source for the peoples of Te Urewera. Carroll approved the creation of two large game reserves in the Waikaremoana and Rangitaiki areas in 1898 to protect newly released deer. But subsequently restrictions on hunting in the reserves were imposed, and elsewhere there was an expensive license fee for hunting imported game in the Rotorua acclimatisation district. Both would have served as a real barrier to Maori wishing to hunt legally. There does not appear to be evidence of consultation with Te Urewera leaders about these changes; it is not even clear whether Te Urewera communities knew about them. During the 1920s deer populations in Te Urewera grew rapidly. As early as 1913 forestry officials were reporting on the damage deer were inflicting on indigenous forest; by 1922, as the Crown acknowledged in our inquiry, the Forest Service was certain of their destructive effects. Faced with conflicting advice from the Department of Tourist and Health Resorts, however, the Government chose to do nothing –though the speed with which Internal Affairs, successor to the Department of Tourist and Health Resorts in 1930, accepted the necessity for culling, seems to point to recognition of a major problem by this time. The Crown failed to take any real action against deer before 1931, and in fact it was 1938 before it began in earnest. Operations were then scaled back because of the war, and began

again only afterwards. Moreover throughout this period it used its own hunters and trappers, and failed to take advantage of the opportunity to employ experienced local Maori hunters in the destruction of deer, which would have provided a much-needed boost to the local economy, and could also have provided Maori with regular access to a very useful food source, alongside pigs. Deer were already a welcome additional source of meat, especially as native birds were no longer taken regularly for food.

As well as deer there were other pests that wrought long-term damage on the forests and native bird populations. The first release of opossums in Te Urewera, in which the Wellington Acclimatisation Society and the Lands and Survey Department cooperated, was in 1898. Te Urewera leaders do not seem to have been consulted about this introduction, and as opossums were valued for their fur, not as food, it is difficult to see how the UDNR negotiations can be seen as relevant to – or construed as providing the permission of Te Urewera leaders for – opossum releases. Some eminent scientists maintained that opossums were not harmful to forests, though there was widespread opposition from other organisations, and the Government was slow to adopt a consistent approach to possum control, though Internal Affairs opposed further liberations as early as 1915. Open seasons on opossums were declared erratically during the 1920s and 30s, and protection for them was not removed completely until 1947.

The Crown honoured the environmental aspects of the 1895 agreement only to a very limited extent. It failed to protect native birds for the peoples of Te Urewera; rather it showed itself to be careless of or indifferent to Maori interests in their birds. Without consultation or agreement, it abolished a right that it had acknowledged and promised to protect in 1895–6, the right to take birds for food in accordance with their customary law. It did abandon plans envisaged in the mid 1910s to clear forest from over half the native reserve –but only for its own reasons. The Crown failed also to protect native birds by refusing to accept evidence that opossums and mustelids were a major threat to birds and their habitat, or to take timely action against them. In the case of mustelids, the threat they posed had been well canvassed even before the Crown decided to bring them to New Zealand in large numbers; but the interests of pastoralists were prioritised. Trout and deer were introduced with the dual purpose of sport/tourism and to augment Maori food supplies. Legal access to them was quite restricted, but they were extensively taken for food by Maori, and by the time of the Second World War had come to dominate forest hunting, alongside pigs (a much earlier arrival in which the Crown had played no part). To that extent they proved their worth as food sources especially in the period between the 1930s and 1950s when people had to adjust to the loss of birds as an important food, and before the impact of forestry employment and the welfare state would markedly improve their general standard of living.

The cultural harvesting of kereru today is prohibited under the Wildlife Act 1953. While cultural harvesting of plants and animals is permitted in Te Urewera National Park under the National Parks Act, there is no discretion to permit harvesting of kereru in the park (or

anywhere else). We cannot know whether the size of kereru populations warrants the maintaining of an absolute prohibition of cultural harvesting in Te Urewera, whether they are in decline, or whether they are sufficiently viable to sustain a controlled cultural take. The gathering of empirical data is an important first step to any re-assessment of the policy.

21.7.1 Introduction

In this section of our chapter, we analyse and assess the Crown's three major interventions in the Te Urewera environment before the establishment of the national park in 1954:

- The Crown's assertion (and then assumption) of control of Te Urewera land-use. In the 1910s and 1920s, the Crown pursued a policy of land purchase with the eventual aim of mass forest clearance and pastoral farming over much of the UDNR. By the 1930s, when the full effect of such a policy on lower lying farm lands was appreciated, the Crown decided that Te Urewera forests would instead be informally reserved to protect existing farmland and Lake Waikaremoana. By keeping its own lands in forest and by using legislative controls to prevent Maori from milling timber on their lands, the Crown assumed full control of the Te Urewera environment for the purpose of soil and water conservation. Because this issue has already been discussed earlier in the report, it will only be set out briefly in this chapter.
- The Crown's assertion (and then assumption) of control of indigenous birds in Te Urewera. From 1895 to 1922, the Crown gradually imposed legislative restrictions on the harvesting of native birds, culminating in a total ban on the hunting of kereru from 1912 (formalised in 1922). On the ground, however, Maori customary law continued to control the hunting of native birds in Te Urewera until 1930. After that, a direct clash occurred between Parliament's law and Maori law in the former territories of the UDNR, with the result that kereru ceased to be an available food for the peoples of Te Urewera.
- The introduction of exotic species (either directly by the Crown or facilitated by the Crown) in the wake of the UDNR agreement. From the late 1890s, trout, deer and opossums were introduced to Te Urewera (mustelids had already arrived there) with very destructive results for indigenous fish, birds, and plants. Some introductions had compensatory benefits, and the question of how such exotic species would be accessed and controlled – and for whose benefit – was both contested and controversial.

21.7.2 The Crown assumes control of the Te Urewera environment for the purposes of soil and water conservation

In 1895, the Crown and the peoples of Te Urewera forged an agreement that Te Urewera would become an inalienable native reserve, recognised and protected by Act of Parliament.

For the purposes of this chapter, the key aspect of the agreement was the protection of the native forests and birds of Te Urewera from the 'encroaches of Civilization'. The forests, rivers, birds, and fish would be protected by and for their Maori owners; it was partly a nature reserve in which the peoples of Te Urewera would continue to exercise their customary authority and way of life. The promise was enshrined in the Urewera District Native Reserve Act 1896 by way of the second schedule. The governor in council was empowered to make regulations for the purpose of giving effect to the schedule in which, as we discussed above, the premier agreed to the Te Urewera delegation's request that 'your forests and birds' would be 'suitably protected'. As we also discussed above, the mode of protection was to be an inalienable, self-governing reserve in which a General Committee would exercise 'local government' powers and provide the conduit for dialogue between the reserve's owners and the Government.

In section 21.6.3, we noted the various assurances and observations from Carroll, Seddon, and other parliamentarians that Te Urewera was not suitable for close settlement and should therefore be reserved for the preservation of its natural beauties, New Zealand's increasingly vanishing indigenous flora and fauna, and – of course – its Maori inhabitants. This remained Government policy for just over a decade after 1895. Economic development was not to be excluded altogether; Maori were to be assisted with farming their lands, and gold mining was a potential source of revenue which would have impacts on the environment.

Mining proved to be a mirage, as Te Urewera was not the hoped-for new source of gold for the colonial economy. But it was soon replaced by a new mirage. As we discussed in chapter 13, Seddon died in 1906, and by 1909 the Liberal Government was preparing to acquire more than a third of the reserve for close settlement (that is, small settler family farms). The UDNR Act was amended in that year to facilitate land alienation. Official talk of preserving forests, birds, and the Maori way of life had given way to talk of Pakeha settlement and forest clearance. From this time on, the Crown began to claim control of the Te Urewera district and its environment, the power to make unilateral decisions that would transform that environment, and the power to impose those decisions on the peoples of Te Urewera. The 1895 agreement was forgotten.

At first, the policy change was partially obscured by the desire of some Te Urewera leaders to lease land or make strategic sales, and the Liberals' attempt to work through an appointed General Committee (see chapter 13). But after the Reform Government took office in 1912, Government policy was to buy as many individual, undivided interests in the reserve as possible, so as to secure the bulk of the forests of Te Urewera for clearance and Pakeha farming. In 1915, the Lands Department advised that four of the UDNR blocks (Waikaremoana, Te Whaiti, Manuoha, and Paharakeke), amounting to some 182,000 acres, were not suitable for clearance and farming 'at present'. A further 100,000 acres of land was needed for its Maori owners or for scattered 'scenic and climatic' reserves. This left around

370,000 acres to be cleared and farmed by Pakeha settlers once the Crown had acquired the land. As we have seen in chapter 13, the power of Maori choice was taken away: the General Committee was bypassed and individual shares were purchased by predatory tactics, resulting in the 'bleeding' of shares in an uncontrolled and, indeed, uncontrollable fashion. This was all in service of the Crown's new vision for the transformation of Te Urewera: '350 or so struggling sheep farms' were to be established on 'eroding hillsides'.[294] Professor Richard Boast commented: 'No really comprehensive study of the feasibility of this had been done, however, and had this been proceeded with it would have been an environmental and ecological disaster.'[295] Officials of the time, however, 'seemed to take it for granted that the Crown could impose whatever land use policy it chose on the Urewera.'[296]

Even as the Crown pushed ahead with the Urewera Consolidation Scheme in the 1920s, doubts were cast on its proposed future for the Te Urewera environment. The 'main objective of the consolidation scheme was the clearing and settlement of most of Te Urewera for sheepfarming'.[297] But, as we saw in chapter 14, R J Knight examined the situation at the commencement of the UCS in 1921 and down-scaled the proposed land clearances by 100,000 acres to about 250,000 acres for pastoral farming. It was considered by then that a much larger area had to be reserved to prevent flooding in lowland districts and to preserve the utility of Lake Waikaremoana for hydroelectricity. In 1922, the Government further down-scaled its estimate to 120,000 acres of land that would be cleared and farmed after consolidation.[298] Then, in 1923, the commissioner of Crown lands and a public works engineer reported that only a maximum of 50,000 acres could be made available for settlement, due to 'the environmental consequences of denuding steep land of bush', as Cleaver put it.[299] Nonetheless, the Crown persisted with the UCS and its goal of transforming the environment of Te Urewera for pastoral farming.[300] Perhaps the price of expensive river protection works in the future seemed worth paying.[301] Klaus Neumann pointed out that, apart from the Waikaremoana block, 'issues of scenery preservation and soil conservation do not seem to have played a major role in the Crown's selection of land' during the UCS.[302] In particular, there was no effort to secure all of the steep land that was most likely to erode if it were

294. Richard Boast, 'The Crown and Te Urewera in the 20th Century: A Study of Government Policy' report commissioned by the Waitangi Tribunal, 2002 (doc A109), p 61
295. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p 100
296. Klaus Neumann, '"That No Timber Whatsoever Be Removed": The Crown and the Reservation of Maori-owned Indigenous Forests in the Urewera, 1889–2000'(commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A10), p 56
297. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p 100
298. Philip Cleaver, 'Urewera Roading'(commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A25), p 74
299. Cleaver, 'Urewera Roading' (doc A25), p 76
300. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p 100
301. Neumann, 'That No Timber Whatsoever Be Removed' (doc A10), p 57
302. Neumann, 'That No Timber Whatsoever Be Removed' (doc A10), p 49

milled.[303] Maori, in turn, were promised a prosperous future of timber milling and family farms if they cooperated in the process necessary to consolidate the Crown's award. We saw how this worked in practice in chapters 14 and 15.

It was not until the 1930s that Te Urewera's future was formally repurposed for water and soil conservation, and this new vision for Te Urewera became the predominant Government policy. As will be recalled from chapter 16, the Government had abandoned its prospective clearance and settlement project by the end of the 1920s without formally deciding whether the Crown's award would be placed under the Forest Service or would become some sort of reserve under the Lands Department. In 1934, the Lands Department decided that it was necessary to 'make a thorough exploration and survey of the whole of the Urewera to determine exactly what should be done with the country in the best interests of the State'.[304] This was based on the mistaken understanding that it 'has always been contemplated' to keep the majority of the district 'in its natural state'.[305] Galvin (Lands and Survey) and Dun (Forest Service) inspected Te Urewera in 1935. In brief, they recommended that the Whirinaki Valley could be milled but otherwise Te Urewera should be preserved for water and soil conservation, to prevent an environmental disaster in lower lying farmlands. A number of options arose from their report. These included:

- proclaiming the Crown's award as a State forest;
- setting up a special legislative regime to be managed by multiple departments, including the Native Department (in recognition of Maori interests in the district); or
- establishing a national park, a scenic and nature reserve, or an actively managed forest sanctuary.

Maori were not consulted about any of these options, despite the presence of Maori land and communities in the district with a vital stake in the future of their rohe. Crown counsel accepted that Maori were not consulted, but submitted that there was '[d]iscreet sounding' of their views,[306] quoting the Galvin and Dun report:

> Discreet sounding led to the conclusion that Maori were willing to cooperate in the preservation of their bush, provided that the action entailed would not be detrimental to native interests.[307]

The inter-departmental committee eventually recommended that the Whirinaki Valley be proclaimed a State forest, and that the rest of the Crown's award be administered by the

303. Neumann, 'That No Timber Whatsoever Be Removed' (doc A10), p 49
304. Under-secretary for Lands to Commissioner of Crown Lands, 14 March 1934 (S K L Campbell, 'Te Urewera National Park, 1952–75'(commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc A60), p 23)
305. Under-secretary for Lands to Commissioner of Crown Lands, 14 March 1934 (Campbell, 'Te Urewera National Park, 1952–75'(doc A60), p 23)
306. Crown counsel, closing submissions (doc N20), topic 29, p 40
307. Galvin and Dun, 'Report by Officers of the Lands & Survey Department and the State Forest Service, on the Urewera Forest', 29 April 1935 (Crown counsel, closing submissions (doc N20), topic 29, p 40)

21.7.2

Forest Service as a special scenic and historic reserve under its own legislation. Soil and water conservation was the primary motive, although tourism, scenery preservation, and the preservation of native plants and birds were also important (see chapter 16).

In order to secure successful forest protection, the committee recommended that the goodwill of local Maori communities was vital. Thus, Galvin from the Lands Department and G P Shepherd of the Native Department were sent to Te Urewera in 1936 to secure Maori support for forest preservation measures. We discussed their mission in chapter 16. In brief, Galvin and Shepherd recommended the preservation of Te Urewera in its natural state for soil and water conservation, alongside Government assistance to Maori farming in the Waimana Valley and at Maungapohatu.

No formal reservation of Crown land was made in the 1930s but the policy from then on was not to mill it, with the exception of the Whirinaki State Forest. At the same time, the Crown made halfhearted attempts to acquire Maori land so as to secure it against logging, and refused permission for timber milling on a number of blocks. As we discussed in chapters 16 and 18, there was growing pressure on the Crown in the 1940s, because milling of previously inaccessible land became more of a commercial prospect. The Government's policy remained to restrict milling on Maori land, and to negotiate for purchase or exchange of forested land. We explained how Minister E B Corbett had to change this policy in the early 1950s. Corbett developed a two-pronged approach: reservation of the Crown's land under the highest possible protection as a national park; and a land-use classification project to ensure that controlled milling on Maori land in Te Urewera would not pose environmental risks in terms of erosion.

Thus, by 1954, the Crown had assumed complete control of the Te Urewera environment for soil and water conservation purposes. As the owner of by far the largest part of the district, it could virtually control the environment simply by the uses to which it put its own land. Originally, the Crown's plan was to clear 370,000 acres for pastoral farming, but it was already clear before the UCS was complete that such an outcome would prove an environmental calamity for Te Urewera and for lower lying Pakeha farming districts. Milling was allowed at Te Whaiti, the Whirinaki lands, and in parts of the rim blocks, but the great bulk of the Crown's land was deliberately kept in its 'natural state' from 1927 onwards. By legislation, the Crown also controlled whether and how Maori would be allowed to mill timber on their remaining pieces of land. It had enforced a no-milling policy for as long as it could, but had been forced to relax it somewhat by the early 1950s. At the same time, the Crown's share of the district was about to become a national park, which would ensure its preservation for soil and water conservation, for tourism, and as a remarkable scenic treasure replete with precious native flora and fauna.

The issue of native birds had already received special attention from the Crown. Control of land-use was the main way in which the Crown controlled the environment in Te

Urewera from the 1920s to the 1950s. But it had also introduced a separate system of controls on the hunting of native birds, to which we now turn.

21.7.3 The Crown's control of indigenous species

> Ko Te Urewera hoki tōku ao, me tiki tonu ake, ko Te Urewera ko tōku ao, ko Te Urewera tōku maramataka. I runga i taku mātau ki tērā o ngā rā nei. Ko taku maramataka inaianei ko tāu i ako mai i au engari kāore ano kia hāngai ki tāku. He aha ai? He kōtahi tonu te whakaheke o tāu, ko tāku mā te ora hei kī mai mō ahea au haere ai ki te patu i te manu. Ka taea e tāu maramataka te kī mai "me kī", "me kī" kāore he "me kī" ki tāku ko taku hononga tērā. Ka tatari rawa ahau kia eke ki tāku, e eke ai ki tāku ma taku kōrero ki ngā kaupapa katoa, ki ngā kaupapa o te Rangi kia hāngai ki aku whakaaro.
>
> Te Urewera is my world. Te Urewera denotes the times of the year for me. And . . . the calendar that you taught me . . . does not fit in easily with my own calendar. Why is that? Because your calendar has one descent. My calendar is the environment that indicates to me when the time is right to catch birds. . . . Your calendar says to me, perhaps. There is no perhaps in my calendar. That is because that is my sustenance. I wait until the time is right for me.[308]

(1) *Introduction*

For the claim issues discussed in this chapter, the most important aspect of the Crown's assumption of control of the Te Urewera environment before 1954 was its intervention in the control and management of wildlife. This took two forms: the gradual imposition of restrictions on the hunting of native birds until all hunting of kereru and some other species was banned in 1922; and the introduction and management of exotic fish and animal species for sporting and tourism purposes. In this section, we examine the Crown's assumption of control of indigenous birds in Te Urewera.

(2) *Two systems of law*

As we discussed in section 21.3, the harvesting of birds in Te Urewera was strictly controlled by customary law. As we will show shortly, many aspects of that law were well known to the colonial law makers in Parliament. Maori members explained many times how hunting was governed by tohunga and rangatira, how the birds were utilised as a food source, how the timing and extent of access to forest and birds was controlled by rahui and tapu, and how the species were conserved for future generations. Much of the focus in the consideration of indigenous birds in this inquiry has been on kereru, which is a taonga species. All Maori

308. Transcript of simultaneous translation of evidence of Hohepa Kereopa, 26 November 2003, Te Waimana

communities in Te Urewera hunted kereru.[309] It was an essential part of their food supplies in the nineteenth and early twentieth century. As we discussed earlier in the report, these communities were living on a knife's edge by the 1890s, in the wake of the confiscation of their best arable land and the restriction of access to land in the rim blocks. The removal of any one of their key staples could literally mean starvation, as Professor Brian Murton's evidence has explained.[310]

In this inquiry, the Crown has acknowledged the spiritual importance of kereru and other birds to the peoples of Te Urewera, and also the importance of native birds in their diet. The Crown has also accepted that before Crown laws, policies, and programmes affected Te Urewera's flora and fauna, the peoples of Te Urewera exercised 'some measure of customary management, utilisation and protection' over resources such as birds.[311]

Despite the existence of this traditional system, however, the Crown moved increasingly towards a system of control of indigenous birds in 'native districts' that focused not on Maori custom but on control through legislation. The Crown's relationship with the peoples of Te Urewera was profoundly affected by this intersection of these two forms of law, customary and statutory. Before 1895, the Queen's laws did not operate inside the rohe potae of Tuhoe. As we discussed in chapters 8 and 9, this was a key motivation in the Crown's negotiation of the UDNR agreement in 1895. The outcome of the negotiation was a mutual recognition and partnership between the peoples of Te Urewera and the Crown. The Queen's law would henceforth apply in the specially recognised and protected Urewera District Native Reserve. But, as the Government's spokesperson explained in the legislative council, the Maori peoples of Te Urewera were still living under 'their own Native customs and habits', and the intent of the UDNR Act was to give 'legal sanction to those customs and habits by putting them into an Act of Parliament'.[312] The mode of protection, as we discussed above, was the power to make regulations to give effect to the second schedule, and the self-government powers of the General Committee and hapu/block committees.

(3) *The Crown's law imposes increasing restrictions on cultural harvesting*

Outside of Tuhoe's rohe potae, legislative restrictions relating to indigenous birds existed well before the UDNR Act. For example, the Wild Birds Protection Act 1864 laid down a fixed season for hunting kereru and native ducks, although only in areas proclaimed by the governor. The Protection of Certain Animals Act 1865 made illegal the killing by snares or

309. Jack Tapui Ohlson, mana whenua brief of evidence (doc G30), p 8; Tuawhenua Research Team, 'Ruatahuna' (doc B4(a)), pp 169–172; Coombes, 'Cultural Ecologies I' (doc A121), pp 137–138; Charles Te Arani Kapene, brief of evidence (doc I26), para 1.11; Gladys Colquhoun, brief of evidence (doc H55), p 4

310. Brian Murton, summary of evidence (doc J1), p 11; Brian Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 302–308

311. Crown counsel, closing submissions (doc N20), topic 29, p 6

312. W C Walker, 29 September 1896, NZPD, 1896, vol 96, p 262

traps of any protected birds, including kereru.[313] The Protection of Animals Act 1867 was the first legislation to define 'native game'. Kereru were among the species so defined, which were not to be shot or snared outside the official hunting season. Subsequent legislation confusingly sometimes included and sometimes excluded kereru from this controlled category. An 1889 amendment to the Animals Protection Act 1880 again threatened traditional harvesting methods by forbidding the killing of native game except with a shoulder-gun.[314]

The late nineteenth century was a period of quasi-control by the various acclimatisation societies. In 1887, the Hawke's Bay Acclimatisation Society established licence fees for shooting native game, applying to kereru and kaka. Technically, Maori communities in southern Te Urewera were obliged to pay these. Each individual hunter would, however, have had to travel to Wairoa to obtain a licence. Given the exclusion of the Crown's laws and officials (including rangers) from the rohe potae, it is unlikely that they did.[315]

Animals protection legislation up to this point was dominated by the Pakeha interest in 'sport'. This continued to be a strong influence on legislation affecting indigenous birds into the early years of the twentieth century. For example, in a back-handed development in 1903, a clause extending licences to native game was struck out partly because some Pakeha members did not think that there was sufficiently worthwhile 'sport' in shooting kereru to justify a £1 licence fee.[316] It was also sporting considerations that drove the aligning of open seasons between districts and between so-called imported game and native game, in order to protect from poaching imported game seen as particularly good 'sport'.[317]

This state of affairs represented a cultural misalignment: by the late nineteenth century, Pakeha mostly hunted birds for sport and recreation; Maori hunted birds for sustenance, survival, and because the presentation of preserved birds to their manuhiri upheld hapu and tribal mana and recognised the importance of reciprocal arrangements. In the late 1880s and on into the early twentieth century, the Maori members of Parliament fought to present their distinctly different cultural perspective, centring on seeing kereru as a food source. In terms of setting seasons, Maori wanted birds fat for eating, but Pakeha wanted the 'sporting' challenge of faster leaner birds. In terms of hunting methods, snares lacked challenge for Pakeha hunters but had worked as a method of catching food for generations of Maori including, as Heke pointed out in 1907, those in 'the Tuhoe district'.[318] Sporting values, however, routinely prevailed.

313. James W Feldman, *Treaty Rights and Pigeon Poaching: Alienation of Maori Access to Kereru, 1864–1960* (Wellington: Waitangi Tribunal, 2001), pp 3, 23. The ban on snares only lasted two years at this point.
314. Coombes, 'Cultural Ecologies 1' (doc A121), pp 142–145
315. Coombes, 'Cultural Ecologies 1' (doc A121), p 26
316. Coombes, 'Cultural Ecologies 1' (doc A121), pp 166–167
317. Coombes, 'Cultural Ecologies 1' (doc A121), pp 151–152, 169–170
318. Feldman, *Treaty Rights and Pigeon Poaching*, pp 10–12, 25; Hone Heke, 12 November 1907, NZPD, 1907, vol 142, pp 785–786

21.7.3(3)

During the late nineteenth century, and particularly in the 1890s, a very different type of Pakeha value also began to influence animals protection legislation. Unlike the first European settlers exploiting natural resources in the battle to make a home, many colonists born in New Zealand now wished to preserve indigenous birds and bush, which became a source of nationalistic pride. The kotuku (white heron) and the kamana (crested grebe) were listed as native game that could not be taken or killed anywhere in New Zealand in 1885. A growing desire to preserve scenery helped establish the Tongariro National Park in 1894, and a growing desire to preserve indigenous birds- supported by the Governor, Lord Onslow who submitted a memorandum to Government – led to Crown establishment of three island scenic reserves and bird sanctuaries in the 1890s.[319] It is important to note, however, that this early preservationist movement was limited, in terms of its successes, to areas or types of land not considered suitable for farming.

In 1895, the conservationist perspective helped to produce a significant new legislative erosion of Maori access to kereru, by instituting the first nationwide closed season on hunting kereru. We have already noted the proviso in this legislation for exempting Te Urewera and other 'native districts'. In subsequent years, pressure from those with conservationist values mounted in Parliament. Those who adopted such values sought absolute protection of birds, contrary to the Maori perspective of conservation through sustainable harvesting. Maori members continued their long-standing reminders to Pakeha members of the use of rahui to protect birds out of season, as well as pointing to what they saw as the true cause of declining bird numbers: the destructive effects of the widespread felling of forests, which destroyed bird habitats.[320] Sometimes Pakeha members conceded the useful role of rahui, albeit in the past, and the problems caused by habitat destruction.[321] Nevertheless, Maori values did not prevail. A 1900 amending Act introduced closed seasons every third year for kereru, pukeko, and kaka, as well as reducing flexibility over the timing of the seasons that remained. Section 3 of the Act also banned holding game (including native game) for more than seven days after the season closed. This effectively made huahua illegal, even though the real purpose of the provision was to stop commercial hunters from sending birds to the freezing works, so that they could be used or sold later.[322]

319. Feldman, *Treaty Rights and Pigeon Poaching*, pp 9–10; Walzl, 'Waikaremoana' (doc A73), p 69. Lord Onslow also took a special interest in the huia (his son, born in New Zealand in 1890, having been given the name Huia after Ngati Huia suggested it) and he secured legal protection for the species just before he left the country in 1892: Ross Galbreath, 'William Hillier Onslow', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, http://www.teara.govt.nz/en/biographies/2o6/onslow-william-hillier, last modified 11 December 2013.

320. Feldman, *Treaty Rights and Pigeon Poaching*, pp 11–13, 20–21, 28–29

321. See, for example, R Monk, 16 August 1900, NZPD, 1900, vol 113, p 26; R McNab, 16 August 1900, NZPD, 1900, vol 113, p 30; H Lysnar, 7 October 1921, NZPD, 1921, vol 191, p 371 (Coombes, 'Cultural Ecologies 1' (doc A121), p 186).

322. Coombes, 'Cultural Ecologies 1' (doc A121), pp 149–153; see also J Hutcheson, 16 August 1900, NZPD, 1900, vol 113, p 39; J A Millar, 16 August 1900, NZPD, 1900, vol 113, p 28

Sir James Carroll Acknowledges Maori Customary 'Game-laws', 1900

Mr Carroll: You cannot find more correct observers in natural history than the Maoris. . . . less harm comes from the Natives on the whole than what does from Europeans. They go out only once or twice in the season, but they never start in April, May, or June. It is only in July or August, when the birds are fat and fit for killing, that you find the Maoris going out to kill; and what they kill during these times would not amount in the aggregate to what is killed by the Europeans from the 1st April to the 31st July.

Capt Russell: The Europeans kill more on the first day of the season than the Maoris in the whole of the season.

Mr Carroll: Yes, and what is more, the Natives never kill birds out of the proper season; they never shoot a bird unless it is fat, and fit for the pot. They bag properly and do not wound birds by loose and reckless killing. They preserved all their bushes under their old laws, and no one was allowed to transgress. Their old game-laws were strict enough, I tell you, and until the particular day arrived for opening, and when the proper ceremony had been performed and the ban removed no one was allowed to go out into the bush and kill except at the risk of his life.

Source: James Carroll, 16 August 1900, NZPD, 1900, vol 113, p 36 (Coombes, 'Cultural Ecologies 1' (doc A121), p 153)

The 1895 provision for possible exemption of Te Urewera and other 'native districts' from the closed season was retained in section 4 of the 1900 Act. This section, which now provided for a three-yearly, nationwide closed season, was mainly intended to control Pakeha commercial hunters. The Minister who introduced it, Sir James Carroll, signified that Maori harvesting under their own laws was not the real target (see box this page).[323] But, as Dr Coombes noted, the effect was much the same if no exemptions were in fact granted.

In 1903, the imported game reserves at Waikaremoana and Rangitaiki were changed into absolute reserves for the protection of all game, both indigenous and exotic. This fundamental change was made by order in council rather than by legislation. The two reserves encompassed 16.6 per cent of the UDNR, without any consultation about their establishment in 1898 or their extension to include native species in 1903.[324] Dr Coombes commented that when the reserves were 'restricted to imported game, this would not have been a significant imposition, but the extension of protection to native game in 1903 would have severely impacted upon subsistence resources'.[325]

323. Coombes, 'Cultural Ecologies 1' (doc A121), pp 148–156
324. Coombes, 'Cultural Ecologies 1' (doc A121), pp 80–83
325. Coombes, 'Cultural Ecologies 1' (doc A121), p 81

21.7.3(3)

As we discussed in chapter 20, the Tourist and Health Resorts Department specifically debated whether the new restrictions at Waikaremoana should apply to Maori hunting for their traditional foods. That department's primary objective was to preserve native birds for the enjoyment of tourists, and, at the same time, to protect the birds *from* the influx of tourists with guns. The superintendent, Thomas Donne, anticipated that the new restrictions would 'probably cause discontent amongst the Urewera natives, as it would restrict their food supplies'.[326] He consulted the relevant Ministers, Sir Joseph Ward and Native Minister Carroll, as to whether local Maori communities should be exempt from the hunting ban. As noted above, Carroll pointed out that the proposal would breach the UDNR agreement 'because one of the conditions upon which the Urewera Reserves Act was passed was that we should augment their food supply and not exclude it from them'. The Maori owners of the reserve would 'claim their rights to kill game for food'. Carroll, however, was of the view that Maori could be exempted by regulations under the UDNR Act.[327]

Ward, however, agreed to exclude Maori from the order in council under the Animals Protection Act 1880, extending the Waikaremoana game reserve to include native game. He approved a draft proviso:

> Nothing however in this notification shall prohibit in any way the Urewera Natives or other Natives living in the immediate vicinity of the herein described area of land, from taking or killing, within the said area, native game and native birds, for food supplies, in accordance with native customs and usages.[328]

As we noted in chapter 20, Tourist and Health Resorts Department field officials objected to this proposed exemption. The department's senior inspector, Frederick Moorhouse, acknowledged that the 'natives of this district have the right to take and kill native birds for food supplies'. In his view, however, based on an unnamed source at Waikaremoana, Maori hunting could result in there being no birds left to protect.[329] Although this advice ran contrary to what had been said in Parliament by Maori and some of the Pakeha members, Donne accepted Moorhouse's report at face value and removed the exemption from the draft order in council, which was then published without it.[330] Carroll did not follow

326. Superintendent, Tourist and Health Resorts, to Minister, 25 September 1902 (Coombes, 'Cultural Ecologies I' (doc A121), p 160)

327. Native Minister, minute, 23 September 1902, on T E Donne, Superintendent, to Minister in Charge Tourist Department, 15 September 1902 (Brad Coombes, comp, 'Cultural Ecologies of Te Urewera I: Making 'scenes of nature and sport' – Resource and Wildlife Management in Te Urewera, 1895–1954', various dates (doc A121(a)), p 61); Walzl, 'Waikaremoana' (doc A73), p 102; 'Lake Waikaremoana: History of Surrounding Lands', not dated, p 22 (Vincent O'Malley, comp, supporting papers to 'The Crown's Acquisition of the Waikaremoana Block, 1921–25', various dates (doc A50(c)), p 854)

328. Draft proclamation, April 1903 (Coombes, 'Cultural Ecologies I' (doc A121), p 161)

329. F Moorhouse, inspector, to Superintendent of Tourist and Health Resorts, 25 April 1903 (Coombes, 'Cultural Ecologies I' (doc A121), p 162

330. Coombes, 'Cultural Ecologies I' (doc A121), p 162

through on his stated intention to regulate under the UDNR Act so as to protect Maori rights at Waikaremoana to their indigenous birds.

By 1903, then, Maori rights had already been significantly circumscribed by the Crown's law despite the UDNR agreement. In the case of the 1900 Act, the vital custom of preserving birds for winter food supplies, for gifts, and for honouring manuhiri at hakari had been made illegal, although that had not been Parliament's intention in passing section 3 of the Act. The hunting of kereru, kaka, and pukeko was also made illegal every third year. But a specific exemption for Te Urewera and other native districts was still provided for – the peoples of those districts could apply to the colonial secretary (later Minister of Internal Affairs), who had discretion to allow them an open season. In that respect, there was a mechanism for the Crown to protect Maori rights and interests. But in the Waikaremoana and Rangitaiki game reserves all hunting of native birds was made illegal in 1903, without the possibility of exemption. This meant that Maori rights were denied absolutely in those two parts of the UDNR, and potentially elsewhere as well every third year, unless a lawful exemption was granted by the Government.

In the same year (1903), the animals protection legislation was amended again to standardise all open seasons for native game (which would henceforth begin everywhere on 1 May). The Bill also had a clause requiring all persons to obtain a licence for taking native game. It would have had a major impact on Te Urewera by making it illegal for Maori to take birds on land that had not passed through the Native Land Court – which was precisely the status of the UDNR – without first buying a licence. This clause was eventually cut from the Bill, mainly because Pakeha members considered there was not enough sport in shooting kereru to justify a licence fee.[331] The single, standard season for native game remained in place. Hone Heke, member for Northern Maori, strongly objected to the enforcement of a national rule instead of a 'sliding-scale' for when the birds were ready in different localities, pointing out that Maori experience showed that a start date of 1 May for killing of native birds throughout the colony was 'entirely wrong'.[332] The Maori calendar, as Maori members of the House of Representatives pointed out, centred on taking birds when their condition was finest for food; they thus depended on the flowering time of berry trees, which could vary from season to season and district to district. And if a season started later than usual because the birds were 'very late in getting into condition',[333] a nationally enforced closing date that took no account of ecological circumstances would make no sense either. But such arguments were to no avail.

The animals protection laws were consolidated and amended in 1907. Two years earlier, the Tourist and Health Resorts Department urged the Government to bring in further

331. Coombes, 'Cultural Ecologies 1' (doc A121), pp 164–167
332. Hone Heke, 29 September 1903, NZPD, 1903, vol 126, p 72 (Coombes, 'Cultural Ecologies 1' (doc A121), p 165)
333. Hone Heke, Tame Parata, 9 October 1899, NZPD, 1899, vol 110, p 407 (Coombes, 'Cultural Ecologies 1' (doc A121), p 150)

restrictions on the hunting of native birds, especially to limit the number that could be taken by any one 'sportsman'. Again, commercial hunting was the primary target so exceptions were still made possible for Maori hunting for food. The triennial closed season remained in place, along with the standing proviso that Te Urewera and other Maori districts could be exempted by the Government. The prohibition on frozen, chilled, or otherwise preserved game also remained in place, which meant that huahua was still illegal.[334] The use of traps or snares was once again banned, which 'criminalised traditional practices and the application of traditional technology in kereru harvests'.[335] And the governor retained the power to 'prohibit absolutely, or for such time as he thinks fit, the taking or killing of any bird indigenous to New Zealand'.[336] This gave the Government discretion to impose closed seasons more often than every third year.

Hone Heke, member for Northern Maori, objected to the banning of traps and snares, arguing that it was an attempt to prevent Maori in 'the Tuhoe district' and other districts from capturing their traditional foods. For generations, he said, Maori had looked upon these birds as 'their food-supply', which was strictly governed by their own, customary 'preserve seasons'. But the banning of Maori hunting techniques was aimed at making the capture of birds more sporting, following the 'custom of the pakeha . . . that birds are only for the purposes of sport'.[337] This objection fell on deaf ears, as did Ngata's opposition to the uniform native game season. The Minister, Carroll, responded to Ngata that an earlier season for native game ran the risk of hunters shooting imported game at the same time, and so could not be allowed for that reason.[338]

There was some sympathy for Maori members' objections about protecting Maori rights to native game.[339] One Pakeha member accepted that the Treaty entitled Maori to fish and take birds 'without the restrictions we put upon them', so long as the right was confined to 'the fish [and birds] that were here when the treaty was made'.[340] Thomas Mackenzie, on the other hand, maintained that 'notwithstanding the Treaty of Waitangi, we have reached that stage in this country that if the Natives will not assist in protecting that which is so beautiful, then the laws of the country will have to do so'.[341] In other words, the Treaty would have to be abrogated. Heke responded that customary harvesting was being targeted whereas

334. Coombes, 'Cultural Ecologies 1' (doc A121), pp 167–169
335. Coombes, 'Cultural Ecologies 1' (doc A121), p 168
336. Animals Protection Act 1907, s 20
337. Hone Heke, 12 November 1907, NZPD, 1907, vol 142, p 786 (Coombes, 'Cultural Ecologies 1' (doc A121), pp 169–170)
338. Coombes, 'Cultural Ecologies 1' (doc A121), p 170
339. Coombes, 'Cultural Ecologies 1' (doc A121), p 171
340. T Wilford, 12 November 1907, NZPD, 1907, vol 142, p 789 (Coombes, 'Cultural Ecologies 1' (doc A121), p 171)
341. Thomas Mackenzie, 12 November 1907, NZPD, 1907, vol 142, p 790 (Coombes, 'Cultural Ecologies 1' (doc A121), p 172)

Maori traditionally did and do protect the birds, and deforestation was the real culprit in their decline;[342] a point to which we will return later in the chapter.

The situation from 1907 was that the Maori communities of Te Urewera were not lawfully permitted to catch birds using traditional methods, or preserve birds in their own fat in the traditional way, but could still shoot in the closed seasons if they obtained an exemption from the Government. Between 1907 and 1910, conservationists remained concerned about commercial hunting of kereru and the mass 'slaughter' it entailed. In 1908, they pushed for an absolute ban on all hunting of kereru.[343] It was unsporting, proclaimed Christchurch member Harry Ell, and there was no longer 'any part of New Zealand where the few remaining pigeons were required for food'.[344] Parliament did not agree and no changes were made. Pakeha members who had Maori populations in their electorates pointed out Maori did in fact rely on the birds for food.[345] Also, 'it would be interfering with the rights of the Natives' if an absolute ban was imposed.[346] A leading Opposition member, W H Herries, urged stronger controls on the sale of birds, but noted:

> It would be impossible to check pigeon-shooting altogether, because the Maoris must be allowed to shoot the pigeons for food. . . . It was, in his opinion, doubtful whether the Maoris could be prevented from shooting the pigeons for food, close season or not, as in the Treaty of Waitangi they were guaranteed that right.[347]

Ell was brought to accept that Maori still needed access to kereru for their food supplies, and 'there was conditional support for Maori harvesting rights', with 'some recognition that these rights were grounded in the Treaty of Waitangi'.[348] No change was made to the law. But deforestation was again identified as the real threat, and no action was taken on that issue either. We will explore the alternatives available to the Government at the time later in this section.

Legislation that would spell the end of lawful kereru harvests was introduced in 1910, 15 years after the UDNR agreement, and just as the Crown was preparing to purchase vast areas of the reserve and transform it from a habitat for birds to a habitat for sheep. Ironically, the Maori members had appeared to win a major victory in this Act (the Animals Protection Amendment Act 1910). Maori members made the (by now) usual arguments about the timing of seasons, Maori customary law and practices in managing sustainable harvests, the cultural disconnect between Pakeha hunting for sport and Maori hunting for food, and the

342. Coombes, 'Cultural Ecologies 1' (doc A121), p 172
343. Coombes, 'Cultural Ecologies 1' (doc A121), pp 172–173
344. Harry Ell, 11 September 1908, NZPD, 1908, vol 145, p 62 (Coombes, 'Cultural Ecologies 1' (doc A121), p 173)
345. Coombes, 'Cultural Ecologies 1' (doc A121), pp 173–174
346. A E Remingston, 11 September 1908, NZPD, 1908, vol 145, p 62 (Coombes, 'Cultural Ecologies 1' (doc A121), p 173)
347. W H Herries, 11 September 1908, NZPD, 1908, vol 145, p 66 (Coombes, 'Cultural Ecologies 1' (doc A121), p 173)
348. Coombes, 'Cultural Ecologies 1' (doc A121), p 174

pointlessness of attacking harvesting while allowing or even promoting deforestation.[349] Te Rangihiroa, who had replaced Heke as member for Northern Maori, led the attack on the banning of huahua. He maintained that the present Act (and the proposed amendments) took away one of the 'rights and privileges of the Native race': 'I strongly protest on behalf of the Maori people that anything should be done under this Bill to prevent the Maoris from preserving native game for food-supplies.' He named Te Urewera as one of the districts where 'food-supplies are not so plentiful and not so easy to obtain', and where 'the imposing of this law would inflict a distinct hardship on the people'.[350]

Henare Kaihau, the member for Western Maori, supported endingthe closed seasons and the prohibitions on huahua. The people of his district, he said, were 'under the impression that they still possess the right conferred by – and held by them since – the Treaty of Waitangi to kill and take, for the purpose of food, native game and fish throughout the Dominion'.[351] Wi Parata, member for Southern Maori, added that the Maori people had not been consulted about the Bill (or earlier animals protection legislation).[352]

In response, Harry Ell pointed out that the Bill did not change the provision for exempting Te Urewera and other Maori districts 'from the special provisions restricting Europeans from taking native birds'.[353] The law, he said, would not interfere with Maori in districts where the birds were both plentiful and still required for food. Also, the Minister of Internal Affairs agreed that the law should now make an exception for huahua.[354] A proviso was duly added to the Act, to the effect that its restriction on holding birds for longer than seven days after shooting did not apply to huahua.[355] As Dr Coombes noted, this triumph recognised 'the cultural and social dimensions of kereru harvests'.[356]

Yet this very Act in 1910 allowed 'the Crown to, in effect, end cultural harvests only two years later'.[357] When the Bill came back to the House from the legislative council, it had been amended to change the three-yearly closed seasons to a permanent ban on the killing of native birds. The amendment still allowed for the peoples of Te Urewera and 'native districts' to apply for an exemption, but now they would have to do so every year.[358] According to Dr Coombes, the council's amendments came late in the session and the Maori members

349. Coombes, 'Cultural Ecologies 1' (doc A121), pp 176–181
350. Te Rangihiroa, 2 September 1910, NZPD, 1910, vol 151, p 258 (Coombes, 'Cultural Ecologies 1' (doc A121), p 179)
351. Henare Kaihau, 2 September 1910, NZPD, 1910, vol 151, p 260 (Coombes, 'Cultural Ecologies 1' (doc A121), p 180)
352. Coombes, 'Cultural Ecologies 1' (doc A121), p 180
353. Harry Ell, 2 September 1910, NZPD, 1910, vol 151, pp 262–263 (Coombes, 'Cultural Ecologies 1' (doc A121), p 180)
354. Coombes, 'Cultural Ecologies 1' (doc A121), pp 180–181
355. Animals Protection Amendment Act 1910, s 4(2)
356. Coombes, 'Cultural Ecologies 1' (doc A121), p 181
357. Coombes, 'Cultural Ecologies 1' (doc A121), p 181
358. Coombes, 'Cultural Ecologies 1' (doc A121), pp 182–183

had already left.[359] The House welcomed the opportunity provided in the council's amendments for the Government to declare some native species open for hunting, as a means to target 'nuisances' to farming such as hawks.[360] The only comment on Maori interests came from the member for Patea, who 'complimented the Council' on making it 'possible to protect pigeons from the depredations of the Natives'.[361] The result, Dr Coombes told us, was a 'legal absurdity': 'henceforth, it would be legal to possess huahua but illegal to harvest its ingredients'.[362]

The only open season under the 1910 Act was declared in 1911. From 1912 onwards, it was unlawful for Maori in Te Urewera to hunt restricted native bird species, including kereru. By 1914, the Minister of Internal Affairs and his officials had made it clear that no more exemptions would be granted for Maori to hunt kereru.[363] G W Russell, former Minister of Internal Affairs, protested against this policy in 1914 during a further amendment of the Animals Protection Acts. He reminded the Government that it had the power to allow hunting in Te Urewera and other districts for vitally needed food. If it refused to exercise that power, then it was inflicting great hardship on the Maori people.[364]

Instead of changing its policy, the Government removed its power to exempt Te Urewera altogether in 1922. The Animals Protection and Game Act 1921–22 made kereru, kiwi, tui and kaka 'absolutely protected'. Open seasons could no longer be declared in Te Urewera or anywhere else, although Dr Coombes pointed out that, in reality, there had already been no open seasons for a decade.[365] There was provision in the new Act (section 3) for the governor 'by Warrant' to remove a species from the schedule of absolutely protected birds. The governor could also impose a partially protected status on animals that were not already protected; that is, they might by warrant be protected in specified parts of New Zealand, though such warrant might also be revoked (section 4). For birds such as kereru, the Act gave the governor discretion to do one of three things: to maintain absolute protection; to declare the species native game (that is, they might be killed during an open season declared by the Minister, but not by snaring or trapping, or exceeding daily set limits); or to declare the species no longer subject to the Act at all (section 5); certainly the option of exempting Te Urewera and other native districts had been repealed.[366]

Dr Coombes commented:

359. Coombes, summary of evidence (doc H3), p 8
360. Coombes, 'Cultural Ecologies 1' (doc A121), p 183
361. G Pearce, 27 October 1910, NZPD, 1910, vol 153, p 116 (Coombes, 'Cultural Ecologies 1' (doc A121), p 184)
362. Coombes, 'Cultural Ecologies 1' (doc A121), p 184
363. Coombes, 'Cultural Ecologies 1' (doc A121), pp 184–185
364. Coombes, 'Cultural Ecologies 1' (doc A121), pp 185–186
365. Coombes, 'Cultural Ecologies 1' (doc A121), p 186
366. Animals Protection and Game Act 1921–22, ss 3–5.The third schedule to the Act, which listed 'native game', was a short one, mostly comprising waterfowl or sea birds.

> all harvesting of kereru after 1911 was in effect criminalised, and there were no exceptions made for Te Urewera. In that year, the game reserves were opened for the shooting of deer: the Crown's benefit from the 1895 compact was fully realised in the same year that the wildlife advantages for Maori in that compact were fully and finally annulled.[367]

We will return to the question of deer and tourism later in the chapter. We turn next to examine which law, customary or statutory, was actually enforced and governed the taking of native birds in Te Urewera, before looking at whether restricting customary harvests was the only or best means available to the Crown for protecting native birds.

(4) *Enforcing which law?*

As we explained in section 21.3, the peoples of Te Urewera harvested birds and other forest resources under their own customary laws and practices. This system continued to operate unchanged in the 1890s and early 1900s. New methods of hunting, particularly the use of firearms, had been adopted alongside traditional snares and traps, but were used towards the same ends of killing for food when the birds were fattest, without waste or damage to the resource. The Animals Protection Act Amendment Act 1895 established the first closed season for the hunting of kereru in 1896. At this point, however, the Queen's law was still not accepted in Te Urewera, and the 1895 UDNR agreement was not given force until the UDNR Act became law on 12 October 1896. It is not surprising, therefore, that Te Urewera leaders did not apply for an exemption in 1896. The next closed season under the 1896 Act was not due until 1902, but the law was changed in 1900 to declare a closed season in 1901 and every third year after that. There was no consultation with Maori about this law change, as Wi Parata pointed out and condemned in Parliament.[368] Parata predicted that many Maori would never hear of it, and Dr Coombes suggested:

> It is likely that communities within Te Urewera only heard of the 1900 Act when it was implemented, if at all, and this contributes to an explanation for why they were again unable to obtain an exemption in 1901, the first closed year for kereru under the new provisions.[369]

The possibility of seeking an exemption from the triennial closed seasons was poorly notified (if at all) in Te Urewera, and there was neither an application nor an exemption in 1901, 1904, or 1907. We agree with Dr Coombes that dialogue between the Government and Te Urewera leaders on this matter, and the negotiation of exemptions, would have been facilitated 'if the General Committee of the UDNR had been formed'.[370] As we explained in chapter 13, the Crown has conceded its responsibility for the failure to give effect to the self-government arrangements of the UDNR agreement. In our view, the growing disjunction

367. Coombes, summary of evidence (doc H3), p 9
368. Coombes, 'Cultural Ecologies 1' (doc A121), p 155
369. Coombes, 'Cultural Ecologies 1' (doc A121), p 156
370. Coombes, 'Cultural Ecologies 1' (doc A121), p 157

between customary law as it operated in the reserve, and the statutory law imposing restrictions on hunting native birds, was one of the consequences of that failure.

By 1907, Te Urewera leaders were becoming aware of the disjunction. The first request for an exemption came from Ngati Whare in 1907.[371] Wharepapa Whatanui wrote on behalf of the tribe to the Minister for Public Works to ask that the people be allowed 'pigeon shooting for our maintenance, for we are very short of food . . . all our potatoes perished with the blight'.[372] We have no information as to why no exemption was granted in response to this request. Then, before the next closed season (1910), Te Urewera leaders appealed to the Native Department for an exemption, once again noting the terrible effects of potato blight. Ngata supported their application. The Government approved a formal exemption for Te Urewera in that year, so that kereru and kaka could be hunted for food, except in the game reserves (Rangitaiki and Waikaremoana).[373] Also, in the wake of the 1910 amendment, huahua was decriminalised and could once again be kept lawfully. Thus, the year 1910 seemed a promising improvement: the two systems were once again in alignment, with the peoples of Te Urewera and the Government both in agreement that kereru could be hunted and preserved for food in the traditional way. This apparent alignment continued in 1911, after the law had been changed to make every year a closed season. In this year, too, an exemption was granted for Te Urewera (although not for the game reserves). This was the final exemption until the law was changed in 1922.[374]

According to Dr Coombes, Te Urewera leaders sought further exemptions in the years immediately after 1911 but were refused by the Government. The years 1913–14 were 'a focal point for contestation of these prohibitions' nationally, with Te Urewera 'a principal source of petitions'.[375] In 1913, for example, the owners of Heruiwi 4 block, one of the Te Urewera rim blocks, wrote to the Native Minister from Ruatoki, stressing the connection between the berries of their trees coming into season, and the condition of the birds on which the people depended:

> We desire to inform you that the months in which the Maori birds, such as pigeons, kaka, and Tui, are fattest are March to April, May to June-July, and January to February. During those Months our birds feed on the Mako, Tawa, Miro, Hinau, Rimu, Kahika, Rata, and Maire. These fatten our Maori birds. We therefore ask you to authorise those Months as Months in which we can take these birds, because we understand these matters quite well. Let the law protect the birds only in their breeding seasons, and in very bad weather.[376]

371. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 786
372. W Whatanui to Minister for Public Works, no date (May 1907) (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 786)
373. Coombes, 'Cultural Ecologies 1' (doc A121), p 175
374. Coombes, 'Cultural Ecologies 1' (doc A121), p 184
375. Coombes, 'Cultural Ecologies 1' (doc A121), p 184
376. Te Waaka Paraone Teranui and others to Native Minister, 13 January 1913 (Paula Berghan, comp, supporting papers to 'Block Research Narratives of the Urewera', various dates (doc A86(m)), p 4351, see also p 4353)

21.7.3(4)

By the end of 1914, it was clear that the new Reform Government would not grant any exemptions under the 1910 Act. Coombes found two responses from the Internal Affairs Department to Te Urewera applicants in 1914, both declaring that exemptions for Te Urewera would no longer be considered by the Government.[377] A former Minister from the previous Liberal Government, G W Russell, queried the legality of this position:

> I notice that the Minister of Internal Affairs has stated that he intended to allow no pigeons to be shot in the country. I am not sure that there is power in the law for such a total prohibition as that to be brought about. There is power given in section 26 of the Act of 1908 for the Governor, on the recommendation of the Minister, to exclude the Urewera country and other Native districts in New Zealand from the operation of the section dealing with the close season – in other words, allowing the Maoris to shoot every year if the Government thought it desirable to allow that privilege. I may say that in some of the districts where pigeons are exceedingly numerous it is felt by the Natives to be a great hardship that even during the close season they should be prevented from securing what is the natural food. Of course, honourable members will know that during the shooting season the Maoris shoot a considerable number. They then put the birds that are cooked down in fat, and it provides a large portion of the food of the Maoris, many of whom are not able to purchase meat in the ordinary way for the purposes of sustenance. During the short period I was Minister of Internal Affairs a number of deputations waited upon me, particularly at Rotorua, on this point. . . . I do not think it would lead to the slightest injury of the bird-life of the country if a reasonable amount of shooting were permitted, provided the Minister exercised the power he undoubtedly has to limit the number of birds that might be shot by the one gun either in the day or, if necessary, for the season.[378]

It is notable, however, that when Russell became Minister again the following year, he did not in fact alter the policy during his tenure (1915–1918).[379] It thus remained Internal Affairs policy to refuse applications for open seasons until even the possibility was taken away by the new Animals Protection and Game Act 1921–22. Coombes commented that the Liberal Government had not intended the 1910 amendments to introduce a total ban 'but that is what the policy had become'.[380]

Did this actually stop the hunting of birds in Te Urewera at the customary times and in the customary ways? The evidence available to us suggests that it did not. In theory, a total ban was in place at Waikaremoana from 1903 onwards, but the evidence from that district – where a small amount of ranging activity had begun to penetrate Te Urewera by

377. Coombes, 'Cultural Ecologies 1' (doc A121), p 185

378. G W Russell, 7 October 1914, NZPD, 1914, vol 170, p 484 (Coombes, 'Cultural Ecologies 1' (doc A121), pp 185–186)

379. James W Feldman, *Treaty Rights and Pigeon Poaching: Alienation of Maori Access to Kereru, 1864–1960* (Wellington: Waitangi Tribunal, 2001), p 37

380. Coombes, 'Cultural Ecologies 1' (doc A121), p 186

1910 – was that local Maori communities hunted birds for food regardless. As we described in chapter 20, the Waikaremoana ranger, W A Neale, was incensed at local Maori, who, he said, 'recognise no Law, save that that nature gave them, viz, the stomach – and when that calls season or no season all is kai'.[381] Hence, he reported, Maori shot pigeons and ducks at Waikaremoana for food, regardless of the Queen's law. Neale, unlike some other Pakeha in the district, seems to have been totally unaware of how customary law governed the number of birds taken and the season in which hunting was allowed. In any case, his superiors would not allow any prosecutions in 1910. It was an important fact of law enforcement at the time that – regardless of the letter of the law – Government policy was not to prosecute Maori under the animals protection legislation unless the Native Minister approved.[382] At the beginning of the 1910s, the Government was anxious not to alienate the peoples of Te Urewera as it planned large-scale purchases in the UDNR. As Dr Coombes noted, cultural harvests continued until the Crown 'eventually decided to police its own rules'.[383] This did not occur in the 1910s, when the emphasis was on persuasion rather than enforcement.[384]

Nationwide, the acclimatisation societies' rangers were uncertain as to whether *they* could or should initiate prosecutions. They were baffled by Maori hunters who claimed that their right to take birds was guaranteed by the Treaty of Waitangi, and were unsure of whether they could win in court.[385] In 1917, the Crown Law Office provided the Department of Internal Affairs with a legal opinion, in response to a request from the Auckland Acclimatisation Society (see box for the full text of the opinion). Crown solicitor Ernest Redward advised that the provisions of the Animals Protection Acts were 'general in their terms and apply to all persons whatsoever'. In his view:

> There is no exception with respect to Maoris or half-castes and anything contained in the Treaty of Waitangi cannot affect this position. Whatever force or effect that the Treaty may have nothing therein can override the direct provisions of a statute.[386]

Redward relied on *Waipapakura v Hempton*[387] for authority that Maori had no claim to tidal fisheries because 'no legislation had given them that right'. Similarly, he argued, the animals protection legislation provided no exception for Maori but rather imposed restrictions on access to kereru by both Maori and Pakeha. Presumably, therefore, Redward discounted the particular, exceptional arrangements for Te Urewera and other 'native districts'. Redward did consider that the position was 'stronger against Maoris with regard to native game

381. Neale to Robieson, 9 June 1910 (Walzl, 'Waikaremoana' (doc A73), p 105)
382. Walzl, 'Waikaremoana' (doc A73), pp 105–107
383. Coombes, 'Cultural Ecologies 1' (doc A121), p 187
384. Coombes, 'Cultural Ecologies 1' (doc A121), pp 189–193
385. Feldman, *Treaty Rights and Pigeon Poaching*, p 37
386. Ernest Redward, 'Native Pigeons and the Treaty of Waitangi', 27 September 1917 (Feldman, *Treaty Rights and Pigeon Poaching*, p 38)
387. *Waipapakura v Hempton* [1914] 33 NZLR 1065 (SC)

than it is with regard to fish because "fisheries" are referred to in Article 2 of the Treaty of Waitangi while there is no reference to Native game or other food supplies in the Treaty'. But Redward concluded with the reservation that his opinion could not be binding and should not be distributed to the acclimatisation societies for use in court; 'in the present confused state of the Animals Protection law it is not advisable to say more than is absolutely necessary'.[388]

A Crown Law Office Opinion as to the Application of the Treaty, 1917

Native Pigeons and the Treaty of Waitangi

The provisions of the Animals Protection Act 1908 are general in their terms and apply to all persons whatsoever. If therefore any person fails to observe any of the provisions of the Act or commits any breach thereof he is liable to the penalty provided for such failure or breach. There is no exception with respect to Maoris or half-castes and anything contained in the Treaty of Waitangi cannot affect this position. Whatever force or effect that Treaty may have nothing therein can override the direct provisions of a statute. I am of opinion, therefore, that if a Maori or half-caste shoots Native pigeons during the close season for Native game he commits an offence against the provisions of the Act.

The Treaty of Waitangi has been discussed in a number of cases, the latest being *Waipapakura v Hempton* (33 NZLR 1065). In that case the appellant, who was fishing in the tidal waters of the Waitara River, claimed that she was using the nets in exercise of a Maori fishing-right. The Full Supreme Court held that the right of Maoris to fish in the sea or tidal waters is the same as the right of Europeans, and is governed by the Fisheries Act 1908, and the regulations made thereunder. In delivering the judgment of the Court Stout CJ said 'In the tidal waters – and the fishing in this case was in this area – all can fish unless a specially defined right has been given to some of the King's subjects which excludes others. It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right, and in the absence of such both *Wi Parata v The Bishop of Wellington* and *Nireaha Tamaki v Baker* are authorities for saying that until given by statute no such right can be enforced. An Act alone can confer such a right.' And again later 'Therefore, so far as sea-fisheries are concerned – and the question of fishing-rights on inland rivers adjoining Maori land is not before the Court – there must, in our opinion, be some legislative provision made before the Court can recognize the private rights, if any, of Maoris to fish in the sea or tidal waters'. The Court it will be

388. Ernest Redward, 'Native Pigeons and the Treaty of Waitangi', 27 September 1917 (James Feldman, comp, supporting papers to *Treaty Rights and Pigeon Poaching: Alienation of Maori Access to Kereru, 1864–1960* (Wellington: Waitangi Tribunal, 2001) (Wai 262 ROI, doc B8(a)), pp 43–45)

noticed did not deal with fishing in inland rivers, but the statement that there must be some legislative provision made before the Court can recognize private rights, if any, of Maori applies equally, in my opinion, to the taking or killing of game or native game. The position is stronger against Maoris with regard to Native game than it is with regard to fish because 'fisheries' are referred to in Article 2 of the Treaty of Waitangi, while there is no reference to Native game or other food supplies in the Treaty.

With reference to the letter of the 23rd August last from the Secretary to the Auckland Acclimatisation Society I do not think that any Society should be given a copy of a Law Officer's opinion either for themselves or for their Rangers to produce in Court. The opinion is given to the Department and the Society should only be informed of the general effect thereof. Such an opinion is not binding on the Court and in the present confused state of the Animals Protection law it is not advisable to say more than is absolutely necessary.

Source: E Redward, Crown Solicitor, Crown Law Office, 27 September 1917 (James Feldman, comp, supporting papers to Treaty Rights and Pigeon Poaching: Alienation of Maori Access to Kereru, 1864–1960 (Wellington: Waitangi Tribunal, 2001) (Wai 262 R01, doc B8(a)), pp 43–45

In any case, there were no prosecutions in Te Urewera. By 1921, there had not been an open season since 1911, and kereru, kaka, and pukeko had just been made absolutely protected species. Nonetheless, tangata whenua requested pua manu reserves in 1923, during the sittings of the Urewera Consolidation commissioners (see chapter 14). These reserves were forested areas which the people asked to be set aside for the hunting of pigeons and other birds. According to one Ruatahuna elder, Ngata had promised pigeon reserves in the Kohuru Tukuroa block (in 1921). Another request was also clearly for forested land to be preserved in their ownership specifically for pigeon hunting.[389] The consolidation commissioners referred three requests for pua manu (which they called 'forest reserves') to the Government for decision. As we discussed in chapter 14, the response was:

> These areas are now Crown lands and the Natives have been paid for them. As Crown lands they are unsuitable for settlement and will become Forest or Climatic Reservations. . . . A right could be given these Natives to hunt and shoot in areas 1, 2, 3 [the requested pua manu reserves]. No title to be given them but permission to hunt only.[390]

389. Tuawhenua Research Team, 'A History of the Mana of Ruatahuna from the Urewera District Native ReserveAct 1896 to the 1980s', vol 2 of 'Ruatahuna: Te Manawa o Te Ika' (research report, Rotorua: Tuawhenua Research Team, 2004) (doc D2), p 181

390. Handwritten annotations, evidently by J B Thompson, Under-Secretary for Lands, on Knight and Carr to Guthrie and Coates, 6 August 1923 (doc M31(a)), vol 2, p 1457)

21.7.3(4)

No hunting rights were in fact accorded, and the shooting of kereru was by then illegal without the possibility of exemptions. What this shows, however, is that Ruatahuna leaders clearly still hunted for kereru in 1923 as a matter of course, and considered themselves fully entitled to do so. Maori law still governed the taking and conservation of native birds in the former UDNR at that time, and the Crown had taken no steps to enforce its contrary view of the law. The peoples of Te Urewera emerged from the UCS with the understanding that they had reserved some of their lands specifically for pigeon shooting. In 1927, Waikaremoana leader Matamua Whakamoe wrote to the Government, requesting the right to take kereru, as they had retained certain lands in the UCS for that very purpose, 'to supply us the game which our ancestors partook.'[391] They had done this, seemingly unaware that the law had changed in 1922, that kereru was now absolutely protected, and that the Minister of Internal Affairs no longer had discretion to declare open seasons in Te Urewera. Matamua Whakamoe wrote to the Minister in 1927:

> This is an application to you . . . to open the season for shooting wild pigeons at Waikaremoana for the following reasons:
>
> The season for shooting wild pigeons at Waikaremoana District has been closed for the last ten years.
>
> Parts of this district have been sold to the Crown and parts we retained to supply us with the game which our ancestors partook.
>
> Season for shooting birds and wild game acclimatised by the Crown is opened every year.
>
> For that reason we ask that an open season for wild pigeons at Waikaremoana be granted as from the 1st June, 1927 to 31st July 1927.[392]

The Minister of Internal Affairs 'summarily declined the request.'[393] He informed Whakamoe and the Waikaremoana people that open seasons for kereru could no longer be declared under the 1921–22 Act. He also urged them to help the Government protect this 'rare and beautiful bird' for future generations: 'surely the Maoris do not desire that the Kereru should disappear from New Zealand.'[394] Thus, each side was aware of the position of the other going into the 1930s, when the Government tried to enforce its law in Te Urewera for the first time.

In the 1920s, customary harvests continued without any – or any effective – interference from rangers.[395] Dr Coombes commented that the Crown 'did not implement its policy or

391. M Whakamoe and others to R Bollard, undated, April or May 1927 (Coombes, 'Cultural Ecologies 1' (doc A121), p 194)

392. M Whakamoe and others to Mr RF Bollard, not dated, April or May 1927, ACGO 8333 IA1/1585 25/12, pt 1, Archives New Zealand, Wellington

393. Coombes, 'Cultural Ecologies 1' (doc A121), p 194

394. R Bollard, Minister of Internal Affairs, to Matamua Whakamoe, 18 May 1927, ACGO 8333 IA1/1585 25/12, pt 1, Archives New Zealand, Wellington

395. Coombes, 'Cultural Ecologies 1' (doc A121), pp 205–206

[land] ownership status for some time, but then it abruptly expected Tuhoe and other iwi to obey its law on biological resources'.[396] The new approach began in 1931 on the western borders of Te Urewera, where two local Maori from Te Whaiti were prosecuted for poaching. The two young men were fined £15 each. This caused surprise and consternation across the former territories of the UDNR, and resulted in two petitions to the Crown.[397]

In June 1932, Pera Te Horowai and 67 others from Te Whaiti and for the hapu 'e hono nei i roto i te rohe potae o Tuhoe' petitioned Parliament.[398] The official translation stated:

> We the undersigned petitioners representatives of the Tuhoe Tribe respectfully pray,
>
> (1) That your Honourable House would duly consider an unfortunate matter which has been brought against the young members of our tribe namely their shooting of pigeon on our own native areas.
>
> (2) That the Government has never provided work for your petitioners – all the available work going to the Europeans alone.
>
> (3) That the pigeon has always been one of the staple foods of our ancestors right down to us the present generation. Your petitioners would commit to your favourable consideration the question of lifting the ban off shooting pigeons in the Tuhoe District especially in view of the scarcity of work to provide food for your petitioners and their dependents.
>
> (4) That the magistrate imposed on the younger members of our tribe who were defendants the sum of £15 each. It would have been more humane if he imposed imprisonment as there is no money available for paying fines.
>
> (5) The law should be amended so as to correspond with the laws existing with respect to trout in our streams. The owners should be the only ones allowed to shoot pigeon without a license. With regard to others a license is necessary.
>
> (6) Your petitioners are of the opinion that the shooting of pigeons should be left open to them but the outside people Maoris and Pakehas should be fined if they break this law.
>
> (7) That the law as it now stands contravenes the section 4 [2] of the Treaty of Waitangi granting to the Natives right to the oysters, fish, eels, and birds obtainable on their lands.
>
> (8) If the prayer of your petitioners is not answered then trouble will always arise. It is the first time that this law has been enforced in our territory for 500 years. Your petitioners are aware of the season for the pigeons and would vouch that they will never disappear altogether.[399]

396. Coombes, 'Cultural Ecologies 1' (doc A121), p 223
397. Coombes, 'Cultural Ecologies 1' (doc A121), pp 223–226
398. Coombes, 'Cultural Ecologies 1' (doc A121), p 224
399. Pera Te Horowai and others, petition, 30 June 1932 (translation) (Coombes, 'Cultural Ecologies 1' (doc A121), pp 224–225)

21.7.3(4)

On 7 July 1932, a second petition was sent to the Native Minister, Apirana Ngata, from Dan Manihera and 56 others, including 25 from Ruatahuna and 20 from Murupara.[400] The official translation stated:

> Your humble petitioners respectfully pray
>
> (1) That the law relating to the preservation of pigeons be suspended and your petitioners allowed the privilege of securing same.
>
> (2) That such suspension operate only on the areas owned by your petitioners for a definite period – one season in every two years.
>
> (3) That the methods used for killing pigeons should be those employed by our ancestors that is by snaring. The use of the gun to be prohibited because of the waste of birds involved by this method.
>
> (4) That the Matatua Maori Council be vested with such powers as may be deemed necessary to carry out what is involved in this petition.[401]

Thus, the petitioners sought the Crown's agreement to amend the animals protection laws, to give effect to their claimed Treaty right to hunt pigeons for food on their own lands. The petitioners also sought Government sanction for traditional methods of hunting and management, which, they said, would conserve the kereru. One petition also offered to institute a closed season every second year. Also, now that the UDNR Act had been repealed, the petitioners hoped to govern these matters through the Matatua Maori Council.

Ngata's view was that the absolute prohibition in the 1921–22 Act was unnecessary. He saw Te Urewera as a district where Maori should be able to take native game 'for food in some years under strict regulations'.[402] If accepted, this would have meant a return to the pre-1922 exemptions regime. As Native Minister, Ngata recommended this to the Minister of Internal Affairs, who was responsible for administering the animals protection laws and would need to support any legislative change.

Internal Affairs officials advised their Minister not to agree with Ngata's position or allow any hunting of kereru. In respect of the Treaty, the Crown Law Office had 'previously advised that the provisions of the Animals Protection and Game Act are general in their terms and apply to all persons, there being no exception with respect to Maoris or half-castes and anything contained in the Treaty of Waitangi cannot affect this position'.[403] This had been Internal Affairs' position since 1908, when the department held that 'the Treaty of

400. Coombes, 'Cultural Ecologies 1' (doc A121), p 225

401. Dan Manihera and others to Sir Apirana Ngata, 1 July 1932 (Coombes, 'Cultural Ecologies 1' (doc A121), p 225)

402. Ngata to Minister of Internal Affairs, 27 July 1932, marginalised memorandum (Coombes, 'Cultural Ecologies 1' (doc A121), p 226)

403. Under-Secretary for Internal Affairs to Minister of Internal Affairs, 2 August 1932 (Coombes, 'Cultural Ecologies 1' (doc A121), p 226). This appears to be a reference to the 1917 legal opinion discussed above, even though the Under-Secretary cited the new 1921 legislation, and not the legislation in respect of which the opinion was given.

Waitangi has been modified by Acts passed by Parliament in which there are representatives of the Maoris', and that 'the Animals Protection Act 1907 makes no distinction between Europeans and Maoris'.[404] The irony of this position, of course, was that the Animals Protection Act in 1907 did explicitly provide for different and appropriate treatment of Maori, whose circumstances in Te Urewera and other 'native districts' differed from those of others, whether Maori or Pakeha.

In any case, the Minister of Internal Affairs, Adam Hamilton, accepted his officials' advice that the Treaty could not prevail over legislation and was of no effect in this case. He also accepted their advice that Ngata's recommendation about the petitions should be rejected. Hamilton responded formally to the Native Minister on 5 August 1932. He admitted that the question of 'allowing the taking of native pigeons by the natives of the Urewera and Taupo districts is an old one'. Hamilton noted that open seasons had been possible in legislation between 1907 and 1922 but had seldom been allowed during those years because 'full protection' was seen as the only way to save the kereru. The public interest in preserving native pigeons was high, and the necessity for it was 'generally accepted' – except by poachers. Since 1913 and 'on numerous occasions later', approaches from Te Urewera leaders had always been met with the response that 'the birds must be protected' and 'surely the natives do not wish the pigeon to disappear'. It would certainly be possible to now amend the Act to licence kereru hunters or allow shooting on private Maori land, with some closed seasons, or even to remove protections altogether. Such amendments, however, would arouse a 'storm' of public protest, and undo all the work and expense of past protection.[405]

In respect of the Treaty, Hamilton told Ngata:

> As far as the reference to the Treaty of Waitangi is concerned, the Crown Law Office has advised my Department that the provisions of the Animals Protection and Game Act are general in their terms and apply to all persons, there being no exception with respect to Maoris or half-castes and anything contained in the Treaty of Waitangi cannot affect this position.[406]

Finally, the Minister offered to have the question settled by Cabinet if Ngata still disagreed. The Native Minister persisted and so the matter was discussed in Cabinet, which rejected Ngata's position and resolved that there would be no law or policy changes.[407]

Ngata's sympathy with the petitioners' cause, however, may have become known in Te Urewera. There was a further prosecution in 1934, at which the defendant claimed 'the

404. H Pollen, Internal Affairs Department, marginal note, 11 May 1908 (Coombes, 'Cultural Ecologies 1' (doc A121), p 174)

405. A Hamilton, Minister of Internal Affairs, to Sir Apirana Ngata, 5 August 1932 (Coombes, 'Cultural Ecologies 1' (doc A121), p 227)

406. A Hamilton, Minister of Internal Affairs, to Sir Apirana Ngata, 5 August 1932 (Coombes, 'Cultural Ecologies 1' (doc A121), p 227)

407. Coombes, 'Cultural Ecologies 1' (doc A121), p 228

Native Minister had given authority to Natives in the Te Whaiti district to shoot pigeons over a certain area.'[408] The case was adjourned so that the magistrate could inquire as to whether Ngata had made any 'commitments to local Maori'. Ngata responded: 'They were given to understand and every one of them understood that until the prohibition was removed by Parliament it was against the law to shoot or kill pigeons.' Even so, counsel for the defendant argued in court that the hunting of kereru had been going on in Te Urewera for years 'and this was the first time any steps had been taken to stop it'. This was substantially correct, apart from the prosecutions in 1931. The magistrate accepted that local Maori might have misunderstood the position, and only fined the defendant £2.[409]

The early and mid-1930s were a time of want, 'periodic food shortages', and sometimes 'semi-starvation' in Te Urewera.[410] The people remained vulnerable to any disruption of their potato crops. In January 1935, an official from the Rotorua Employment Bureau noted that the new policy of prosecutions had had an impact. The people at Ruatahuna were trying to survive on wild pork and venison. 'I understand', he wrote, 'that up to quite recently, wild pigeons were their staple article of diet, but owing to a recent prosecution, they no longer hunt the pigeons, which are absolutely protected birds.'[411] At Maungapohatu, the community was struggling to survive on store-bought flour and sugar, with very few native birds taken (and other customary foods in short supply).[412] Regular inspections at Waikaremoana in 1935 found no trace of pigeon hunting.[413] Galvin and Dun, who inspected the former UDNR lands later in the year, reported that native birds (including kereru) were numerous. They urged active protection for 'these little feathered inhabitants of early New Zealand' and 'vigorous penalties for their wanton destruction'. But these officials also reported that 'the Natives have been forced by necessity to shoot pigeons regularly'. Pakeha visitors to the district, however, should be prosecuted – especially commercial hunters. Galvin and Dun also suggested that if Maori were to be restricted from using the bush on their own lands, then they deserved 'something in return'[414] – a point which Dr Coombes suggested also applied to the prohibition of hunting in their bush for an important food.[415]

408. 'Native pigeons shot – prosecution of Maori – Minister refutes statement', *New Zealand Herald*, 17 August 1934 (Coombes, 'Cultural Ecologies 1' (doc A121), p 228)

409. 'Native pigeons shot – prosecution of Maori – Minister refutes statement', *New Zealand Herald*, 17 August 1934 (Coombes, 'Cultural Ecologies 1' (doc A121), pp 228–229)

410. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 551–556, 1045–1060

411. Certifying Officer to Commissioner of Unemployment, 29 January 1935 (Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 275)

412. Judith Binney, 'Maungapohatu Revisited: Or, How the Government Underdeveloped a Maori Community', *Journal of the Polynesian Society*, 92(3), September 1983 (doc A128), p 375

413. Coombes, 'Cultural Ecologies 1' (doc A121), p 235

414. Galvin and Dun, 'Report by Officers of the Lands & Survey Department and the State Forest Service, on the Urewera Forest', 29 April 1935 (John Hutton and Klaus Neumann, comps, supporting papers to 'Ngati Whare and the Crown, 1880–1999' (doc A28(a)), pp 14–15, 22–23)

415. Coombes, 'Cultural Ecologies 1' (doc A121), p 232

The under-secretary for Internal Affairs, Joseph Heenan, was concerned at the implication that the Government should turn a blind eye to Maori hunting in Te Urewera and only prosecute Pakeha poachers. In response to Galvin and Dun's report, he told the head of the Lands and Survey Department:

> I note with some concern the statement that it is recognised that the natives have been shooting pigeons regularly. . . . My own view is that no indication should at any time be given to the natives that the Government is prepared to countenance their shooting of pigeons. It would be far better, if the present practice is necessitated by actual hardship, for the Government to make other provision for food supplied for the natives of the Urewera.[416]

These statements echoed themes explored during the negotiation of the UDNR agreement, when the Crown promised suitable protection for forest and birds but recognised the right of the peoples of Te Urewera to hunt birds for food, and promised to augment their food supplies. By the 1930s, hunting certain species for food had long been criminalised. The idea of specific redress to augment their food supplies was proposed by the under-secretary for Internal Affairs in 1936 but without much enthusiasm or any follow-through. Particular crises could result in food distributions, as at Waikaremoana in 1934,[417] but there was no systematic attempt to compensate for depriving the peoples of Te Urewera of a teasured food. This was particularly disappointing, given the situation of necessity reported by Galvin and Dun in 1935.

Evidence from the 1930s suggests that the hunting of kereru and other protected birds continued despite prosecutions in 1931 and 1934, because of 'necessity'. Towards the end of the decade, however, it appears that hunting had declined drastically, although kereru continued to be a culturally important food; that is, it was still vital for the peoples of Te Urewera to be able to provide kereru at major hui and tangi. This dramatic change had been brought about in less than a decade by the Crown's decision to enforce the law and the very real threat of further prosecutions, resulting in fines that Maori communities simply had no way of paying.

In 1938, in response to officials' recognition that cultural harvesting was still going on for important ceremonial events, the Minister of Internal Affairs held an interdepartmental conference at Rotorua to discuss the issue. The Forest and Bird Protection Society and acclimatisation societies participated alongside representatives from Maori Affairs, Internal Affairs, Lands and Survey, and the Forest Service, but no iwi representatives took part.[418] It was acknowledged that the Maori people of Te Urewera continued to believe that 'under the Treaty (evidently of Waitangi) they were allowed to shoot pigeons'. The 'older Maoris' lived

416. Under-Secretary for Internal Affairs to Under-Secretary for Lands, 28 April 1936 (Coombes, 'Cultural Ecologies 1' (doc A121), p 232)

417. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 553–554

418. Coombes, 'Cultural Ecologies 1' (doc A121), pp 229–230

by the 'principle of hospitality', which required tribal members to provide 'a quantity of pigeon preserved in oil' for feasts and hui. Magistrates would inflict 'a fairly good fine' if any such cases ended up in court. But Pakeha were also shooting pigeons without 'the excuse the Maoris had'. Two different options were considered. The first was to hand over management of kereru to Maori, who would be permitted to shoot for food as needed, while Pakeha would remain prohibited from hunting; 'in all probability they themselves would take steps to see that even for food and for ceremonial feasts the bird was killed only in such numbers as would not deplete too seriously the stock'. The second option, by contrast, was to establish a national park in Te Urewera and ensure the absolute protection of the birds.[419] The Minister's decision was that neither option would be adopted. Kereru would remain protected and the rangers should 'use their commonsense' in the special circumstances affecting Maori, rather than – as Coombes put it – 'to stridently enforce the law'.[420] There was official recognition, in other words, of the cultural importance of kereru to Maori, and of the fact that Maori would themselves restrict their taking of the birds; but there was still no political will to accommodate Maori within the law by allowing them to manage their own cultural harvest.

Shortly after this conference, there was something of a scandal when 'a vast concourse of natives from all over the North Island' gathered in Wairoa for the opening of the Sir James Carroll Memorial House. The manuhiri were served 'many scores of pigeons' brought out from Te Urewera.[421] Internal Affairs' response was swift, and took little note of the cultural imperatives that had been acknowledged at the Rotorua conference earlier in the month. Under-secretary Heenan recommended that the time had come to increase the number of rangers and crack down on customary harvesting:

> There is no doubt that the Urewera is providing the main source of supply of pigeon for Maori huis, and in view of the decision to declare a large tract of this country as a national reserve, it is evident that the position as regards the taking of native pigeons and other protected birds will have to be definitely faced.[422]

By this point, there was also a plan to cull deer so the two imperatives were combined: the number of rangers and their inspections of Te Urewera were increased, and deer hunters were used as rangers to combat Maori harvesting of native birds. A ranger was stationed at Ruatahuna. Although the 'raids' and other ranger activities must have had some effect as a deterrent, cultural harvesting continued for important ceremonial occasions; kereru were served at the opening of the District Nurse's house at Murupara. Nonetheless, increased

419. Minutes of Rotorua Conference, 8 June 1938 (Coombes, 'Cultural Ecologies 1' (doc A121), pp 230–231)
420. Coombes, 'Cultural Ecologies 1' (doc A121), p 231
421. 'Great Maori Hui at Wairoa', *Dominion*, 18 June 1938 (Coombes, 'Cultural Ecologies 1' (doc A121), p 229)
422. Under-Secretary to Minister of Internal Affairs, 22 June 1938 (Coombes, 'Cultural Ecologies 1' (doc A121), p 232)

monitoring in the early 1940s suggested that pigeon hunting was no longer common for the Maori communities of Te Urewera.[423]

At the same time, poaching by outsiders was on the rise near Minginui and the hydro works at Waikaremoana, as an influx of workers began shooting kereru in Te Urewera.[424] Also, increasing evidence was found that introduced predators were killing the birds.[425] In this context, Maori leaders, including Te Urewera leaders, made one final attempt to secure a change in Government policy. After the outbreak of the Second World War, they sought agreement to harvesting kereru for dispatch to the Maori Battalion overseas. The Prime Minister promised to consider the request, which, according to Internal Affairs, had produced a public 'clamour' of opposition.[426] The department advised:

> any question of removal of the present absolute protection on native pigeon should not only not be considered, but the Government should make public its firm determination to protect this beautiful native bird. At various times in the past, the latest being away back in 1932 [the Te Urewera petitions discussed above], Maoris have raised the question of removal of protection, but the Government has always been adamant.[427]

Officials also considered this request had been made 'with their tongues in the cheeks', because the Maori peoples of Te Urewera, Rotorua, and the East Coast were taking kereru anyway and serving it on important occasions, such as the opening of the centennial meeting houses at which the request to the Prime Minister was made.[428] The question of whether the Crown should change the law so that Maori could once again take kereru lawfully, perhaps limited to important cultural events, was not really considered. Officials believed that Maori communities in the 1940s had departed from 'the old days' when 'the Maori . . . was probably the world's best conservationist of his food supply'. Any official relaxation of restrictions so that kereru could be sent to the Maori Battalion would only be seen as Government complacency in 'their slaughtering of the pigeon'. Also, Internal Affairs officials thought that relaxing restrictions so that Maori could hunt kereru would result in increased hunting of other protected species, such as tui. For all these reasons, the department advised against granting the request.[429] The Minister agreed with this advice, and even announced that there would be increased ranging to prevent poaching. If the Maori Battalion needed greater food supplies, 'the remedy obviously would be in other direc-

423. Coombes, 'Cultural Ecologies 1' (doc A121), pp 234, 236–240
424. Coombes, 'Cultural Ecologies 1' (doc A121), p 240
425. Coombes, 'Cultural Ecologies 1' (doc A121), p 241
426. Coombes, 'Cultural Ecologies 1' (doc A121), p 243
427. Under-Secretary to Minister of Internal Affairs, 18 June 1943 (Coombes, 'Cultural Ecologies 1' (doc A121), p 243)
428. Under-Secretary to Minister of Internal Affairs, 18 June 1943 (Coombes, 'Cultural Ecologies 1' (doc A121), pp 243–244)
429. Under-Secretary to Minister of Internal Affairs, 18 June 1943 (Coombes, 'Cultural Ecologies 1' (doc A121), pp 244–245)

tions'.[430] There was, however, no corresponding gesture towards increasing the food supplies of the home communities, which had briefly been contemplated in the 1930s but not carried out.

This formal approach to the Crown in the 1940s was the final occasion on which the peoples of Te Urewera attempted to get Government agreement to a lawful taking of kereru before the establishment of the national park. By this time, as the Tuawhenua researchers explained, Maori had to rely on other foods to replace native birds as staples. Wild cattle, deer, pigs, pheasants, and quail began to supplement the Tuhoe diet in the early decades of the twentieth century; thus the focus of traditional hunting shifted from native birds to exotic birds and animals.[431] By the 1940s, eels, wild pork, venison, and berries supplemented food from gardening, but native birds were still eaten at times. Harvesting of these birds was still conducted under strict traditional controls.[432] Rahui continued to protect the birds out of season.[433] Jack Tapui Ohlson, who grew up at Te Whaiti in the 1930s and 1940s, explained that native birds, including the kereru, were still prized and hunted at that time. Guns had replaced traditional methods of trapping, but increasingly the birds were only taken for the old people or important ceremonial occasions.[434] Harata Williams recalled that her grandfather still hunted kereru at Ruatoki in the 1940s.[435] But cultural harvesting of kereru was becoming uncommon. At the same time, the influx of large working populations meant that more outsiders (Pakeha and Maori) had begun hunting in the 1940s without regard to traditional seasons or conservation of the resource.[436] This must have caused concern to local Maori leaders in Te Urewera, as these outsiders were not controlled by customary law.

By the 1950s, when the national park was established, Government restrictions meant that kereru were already no longer a 'source of food' for Maori communities in Te Urewera. This, at least, was the observation of the Maori welfare officer who visted Ruatahuna regularly in that decade, and who gave evidence in our inquiry.[437] Maria Waiwai, who grew up at Waikaremoana before the power station was built in the 1940s, recalled that all regular use of the kereru and kaka had ceased 'about 50 years ago'; that is, by the 1950s.[438] Other claimant evidence suggests that any customary harvesting which continued after that was still strictly governed by Maori law, and was mostly for exceptional, ceremonial occasions, or to give a taste to 'the old people'.[439] One of the 1932 petitions observed that 'the pigeon has

430. W Parry, Minister of Internal Affairs, 'Native pigeons. Protection not to be removed or modified', press release, not dated (Coombes, 'Cultural Ecologies 1' (doc A121), p 245)
431. Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 233, 388–390
432. Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 388–390
433. Klaus Neumann, 'Millable Timber and Natural Forest Values': summary of evidence and response to SOI, August 2004 (doc G2), p 19
434. Jack Tapui Ohlson, second brief of evidence (doc G36), paras 12–20
435. Harata Williams, brief of evidence, 10 January 2005 (doc J31), p 4
436. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 787
437. Anne Anituatua Delamere, brief of evidence, 21 June 2004 (doc E15), p 3
438. Maria Waiwai, brief of evidence, not dated (doc H18), p 16
439. Jack Tapui Ohlson, second brief of evidence (doc G36), paras 12–23

always been one of the staple foods of our ancestors right down to us the present generation', and criticised the law for contravening the Treaty of Waitangi.[440] That situation had been reversed in less than a decade, once the Crown began active enforcement of its law in Te Urewera.

(5) *What alternatives were available to the Crown?*

Was it inevitable that the protection of native birds would take the form of restricting and then prohibiting customary harvesting? Were there other alternatives available to the Crown, equally or even more likely to be effective, and less harmful to the peoples of Te Urewera? And was it within the bounds of possibility that the peoples of Te Urewera could have received some kind of redress or compensation for the Government depriving them of an important food?

(a) *Alternative ways of protecting native birds:* In 1917, the Minister of Internal Affairs suggested that the Crown's policy for the protection of native birds was essentially futile. In refusing to declare an open season under the 1910 Act, he told an acclimatisation society:

> Doubtless you are aware that the native pigeon is a bird endemic to New Zealand and it is well known that with the gradual destruction of the bush the native pigeon will eventually become extinct, and in view of this it must, I think, be admitted that it is most undesirable to in any way help to facilitate the extinction of this magnificent bird.[441]

At that time, Internal Affairs had recently advised the peoples of Te Urewera that no more open seasons would be declared in their district, despite provision for this in the law. And yet, in that very decade, the Crown was planning to destroy some 370,000 acres of indigenous forest in Te Urewera for pastoral farming, which would have repeated the consequences elsewhere of removing native birds' habitat. There was thus a vast gulf between two aspects of Crown policy: efforts to preserve native birds, which took the form of restricting hunting; and deliberate destruction of the birds' habitat with its inevitable results. Although the Minister of Internal Affairs was somewhat fatalistic about the outome, others were far from accepting it.

Dr Coombes summarised the debate as follows:

> the Maori members of Parliament steadfastly resisted the abrogations of cultural harvesting rights. They argued that the most significant threats to native avifauna were commercial hunters, those who killed for sport rather than subsistence, introduced predators and habitat destruction. Notably, most of the Pakeha politicians appeared to agree with them. Ironically,

440. Pera Te Horowai and others, petition, 30 June 1932 (translation) (Coombes, 'Cultural Ecologies 1' (doc A121), p 224)

441. G W Russell, Minister of Internal Affairs, to A F Lowe, 30 May 1917 (Feldman, *Treaty Rights and Pigeon Poaching*, pp 34–35)

21.7.3(5)(a)

> amendments to Animals Protection legislation in that first decade [of the twentieth century] singularly failed to regulate the real threats to native avifauna, while criminalising the one mechanism that most members of parliament agreed was a bulwark to further decline – that being, the forest conservation incentives which were inherent to cultural harvests. Even such notoriously conservative politicians as Captain Russell accepted that 'Europeans kill more [native birds] on the first day of the season than the Maoris in the whole of the season'. Such truisms were not incorporated into the logic of Crown policy, which punished Maori harvesters but retained the unfettered dominion of those who destroyed bird habitat.[442]

The 'unfettered dominion of those who destroyed bird habitat' seemed politically unbeatable in the first half of the twentieth century, despite the rise of conservationist sentiments in the electorate. It was only the logic that pastoral farming in the Bay of Plenty would be significantly harmed if forests were cleared in Te Urewera that saved it from mass deforestation in the 1930s. Within that political context, however, there were still alternatives to the milling of all the berry trees, miro and hinau, which were essential for kereru, or the prohibition of all cultural harvesting.

The following alternatives were proposed at the time:

- **Forest reserves:** the Maori members of Parliament frequently pointed to deforestation as the fundamental cause of kereru decline, a point which the Pakeha members sometimes acknowledged. But habitat destruction for the purposes of pastoral farming was the cornerstone of colonialism in the nineteenth century, and it remained the predominant policy in the early decades of the twentieth century.

  There was a fundamental disjunction between Maori pleas that habitat destruction be stopped, and the Crown's determination to see every farmable acre of New Zealand in pasture. By mid-century, also, it was held that if marginal forest land was not even remotely capable of being farmed, it should be milled and converted to exotic forests. What was feasible in those circumstances, however, was the strategic reservation of sufficient berry trees or stands of indigenous forest to enable the survival of native birds. Hence, the Maori members pushed for pua manu, or forest reserves for birds, to be set aside during the process of converting forest to farmland.[443] This objective was of great importance to the peoples of Te Urewera. As we have seen, the preservation of their forests and forest culture was a primary reason for negotiating the UDNR agreement in 1895. They also sought to establish pua manu during the UCS in the 1920s, and, as the petition of Waikaremoana peoples showed in 1927, believed that the law should accommodate them in the use of their retained lands for that essential purpose.

442. Coombes, summary of evidence (doc H3), p 8
443. Coombes, 'Cultural Ecologies 1' (doc A121), pp 180

An Exchange between T Mackenzie, Liberal Member for Waikouaiti, and Hone Heke, Member for Northern Maori, during the Debate on the Animals Protection Bill, 1907

Mr T Mackenzie: I appeal to the members of the Native race to give us all the support they can. . . . What is desired to enlist is the sympathy of the natives of this country . . .

Mr Heke:—What about the freeholders who want to get the land in order to knock the bush down?

Mr T Mackenzie: . . . I say that notwithstanding the Treaty of Waitangi, we have reached that stage in this country that if the Natives will not assist in protecting that which is so beautiful [native birds], then the laws of the country will have to do so.

Mr Heke:—The Natives are the only ones who do do it.

Mr T Mackenzie:—The Natives in some parts protect the birds, but in other parts they destroy them . . .

Mr Heke:—What is the area of bush country that has been knocked down by the settlers?

Mr T Mackenzie:—We will not discuss the area that has been knocked down.

Source: T Mackenzie, H Heke, 12 November 1907, NZPD, 1907, vol 142, p 790 (Coombes, 'Cultural Ecologies 1' (doc A121), p 172)

From the 1890s onwards, acclimatisation societies also called for the preservation of key native bush habitats, as well as the active creation of new habitat by planting trees that would provide food for kereru.[444]

- **Miro and hinau reserves within State forests:** a closely related possibility was the reservation of sufficient miro and hinau trees within State forests for native bird habitat. By the 1950s, Internal Affairs had begun pressing for this to be done. But, according to the evidence of John Hutton and Klaus Neumann, the Forest Service refused to exempt hinau and miro from logging. The Rotorua conservator's view was that 'growing stock strips were left' and thus 'sufficient provision is already being made in State Forest Management areas', including the Whirinaki State Forest. But, it was admitted, more could be done to exempt clumps of miro and hinau (in among non-millable species) from logging.[445] From the 1950s, the new Wildlife Branch tried but made little headway against the Forest Service. Although the berry-bearing trees had little economic value as timber, the service maintained that it was doing enough and that preserving more

444. New Zealand Conservation Authority, *Maori Customary Use of Native Birds, Plants, and Other Traditional Materials: Interim Report and Discussion Paper* (Wellington: New Zealand Conservation Authority, 1997), p 106
445. Hutton and Neumann, 'The Crown and Ngati Whare' (doc A28), pp 790–794

miro and hinau was neither efficient nor practical forestry. While the Wildlife Branch disagreed, it had little power within Government vis-à-vis the Forest Service.[446]

- **Active eradication of predators and pests:** Even if more strategic forest reserves had been created, if State forests had preserved more miro and hinau, and if all human hunting and consumption had been prevented, introduced predators and pests would still have damaged forests and destroyed adult birds, chicks, and eggs. As the twentieth century progressed and habitat destruction was eventually curtailed, the impact of browsing animals and predators continued. The question of how this came about, and whether the Crown did enough to combat a situation it had in part created, will be addressed in the next section. Here, we simply note that predator-eradication was called for in the early twentieth century at the same time that cultural harvests were being criminalised.
- **Continuing the district-specific exemptions policy for Maori, depending on local circumstances, including the viability of bird populations and sustainability of harvesting:** For a quarter of a century, from 1895 to 1922, the law allowed the Government to exempt the peoples of Te Urewera from restrictions against hunting native birds. In the 1930s and 1940s, Maori pushed for what they saw as their Treaty right to be restored (by way of the exemption). Both the Crown and Maori wanted to see the forests and birds of Te Urewera protected for future generations. The question was whether the national policy of no hunting could still allow for exemptions in districts such as Te Urewera. In evaluating this question, we have to look past the Crown's refusal to halt its active destruction of bird habitat to consider whether the surviving forests and bird populations of remote areas such as Te Urewera could permit of sustainable harvesting. As we have seen, the Government refused to grant exemptions after 1911, but we have little evidence that the particular circumstances of Te Urewera and its people received careful consideration. The Native Minister, Ngata, advocated for the exemptions policy to be restored in 1932, in response to petitions from Te Urewera, but Cabinet's decision went against him. The Rotorua conference also considered the possibility in 1938, but again the decision was to retain the absolute ban on hunting in all parts of New Zealand.

According to Dr Coombes, the influence of conservationists accounts for this blanket policy.[447] On the one hand, the Government would not agree to stop clearing land for farming – indeed, as we saw in chapter 18, the mid-twentieth century was a time when concerted efforts were made to bring more marginal lands into production throughout the country. But, on the other hand, the Government feared the 'storm' of public protest that would be aroused by permitting the killing of native birds, especially by the 1940s.[448]

446. Feldman, *Treaty Rights and Pigeon Poaching*, pp 55–57; Coombes, 'Cultural Ecologies 1' (doc A121), pp 265–269
447. Coombes, 'Cultural Ecologies 1' (doc A121), pp 208–211, 234, 236–239
448. Coombes, 'Cultural Ecologies 1' (doc A121), pp 234, 243–245

It is worth considering the contrary view, as put at the Rotorua conference in 1938, that the Government might in fact recognise and provide for cultural difference and might safely hand back the management of kereru to Maori for sustainable harvesting, while prohibiting Pakeha from shooting them:

> Mr Dickinson made the suggestion that probably if the pigeon and its preservation was more or less handed over to the Maori it might result in the Maori taking steps to see that it was preserved. For instance, the pigeon might be allowed as food for the Maori but absolutely prohibited to the pakeha by whom it would be a punishable offence if a pigeon were shot. If the Maoris were fully informed of the desirability of protecting and preserving their native pigeon, in all probability they themselves would take steps to see that even for food and for ceremonial feasts the bird was killed only in such numbers as would not deplete too seriously the stock.[449]

Ultimately, the Crown rejected all proposals that sustainable harvests were feasible in Te Urewera, even if limited to special events of great cultural significance (such as the request to be able to send preserved birds overseas for the Maori Battalion). The Maori communities of the time, as Jack Tapui Ohlson and others explained, believed that kereru and other birds could safely be harvested, subject to strict customary constraints. Against this view, which was supported by Ngata, Internal Affairs had no scientific studies of the bird populations of Te Urewera to offer. Rather, public opinion, along with a sincere belief on the part of Internal Affairs officials that no birds should be killed, was the decisive factor in the Crown's rejection of this option.

Thus, the focus of Crown management and control to 1954 was on directly preventing the killing of kereru. Dr Coombes argued strongly that much of the enforcement effort was focused on Maori.[450] Subsequently, D S Main, the field officer based at Murupara responsible for wildlife in Te Urewera in the late 1950s and early 1960s, expressed concern about what he saw as a definitely declining population of kereru and tui. While he was aware of predator damage and some illegal shooting, he regarded the milling of miro and hinau as 'one of the biggest factors'.[451] He considered 'the Maori to be an enemy of the pigeon, but not to the same degree as the Pakeha and his virtual destruction of the forest'.[452]

In the 1950s, Internal Affairs produced a pamphlet to advertise the plight of the kereru and the punishments for poaching. The pamphlet proclaimed

449. Minutes of Rotorua Conference, 8 June 1938 (Coombes, 'Cultural Ecologies 1' (doc A121), p 230)
450. Coombes, 'Cultural Ecologies 1' (doc A121), pp 189–193
451. D S Main to Conservator of Wildlife, 9 October 1958 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 791)
452. D S Main to Conservator of Wildlife, 19 January 1959 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 794)

21.7.3(5)(b)

> 'If he were dull to look at and tasted like boot leather, if he were hard to shoot, wary of people, and fathered ten youngsters a brood, absolute protection would hardly be necessary. But handsome, conspicuous, delicious to eat, easy to shoot, and tame as a chicken, rearing only a single chick each brood, and a great sower of tree seeds, he must be protected from those who can see no further than their stomachs.'[453]

But this was simply untrue. Internal Affairs documentation from the time shows that officials were aware of Maori conservation methods and sustainable harvesting, and that habitat destruction and introduced predators were primary causes of the decline of kereru. The question facing the Government was whether it would or could do anything about these other factors.

Dr Klaus Neumann described Main as 'simply ahead of his time'.[454] Nevertheless, the insights he expressed had been available since the time that the policy of increasingly stringent controls on customary harvesting of kereru began. We have already seen that Maori and some Pakeha parliamentarians understood the importance of habitat for indigenous birds in the early twentieth century. The Crown was also, as we shall see, largely responsible for the introduction of browsing animals and predators that adversely affected indigenous birds. Yet despite this, the Crown adopted a narrow approach to preserving kereru and other indigenous birds that ignored these problems.

(b) ***Compensating for the loss:*** Importantly, the idea of compensating the peoples of Te Urewera for criminalising one of their treasured foods was almost never considered. This seems remarkable to us, given the poverty and endemic food shortages in Te Urewera at the time, and the context of the Crown's promise in 1895 to respect their rights and augment their food supplies. As we have seen, the issue was raised in 1935, very soon after the Crown began to enforce its restrictions in Te Urewera. Galvin and Dun reported that Maori were still shooting birds out of 'necessity'. The Department of Internal Affairs' response was that, if it was true that there was 'actual hardship', it would be 'far better . . . for the Government to make other provision for food supplied for the natives of the Urewera'.[455] In our view, the department's suggestion in 1936 that the Government could match its restrictions on taking kereru with the specific provision of an alternative food supply was an obvious means of compensating for the loss. This never happened. Assistance in the form of eating and seed potatoes or of maize, for example, would have been feasible and the 'cheapest method

453. Department of Internal Affairs, 'This is Your Pigeon', not dated (James Feldman, comp, supporting papers to Treaty Rights and Pigeon Poaching (Wellington: Waitangi Tribunal, 2001) (Wai 262 R01, doc B8(a), pp 61–62)); Hutton and Neumann, 'The Crown and Ngati Whare' (doc A28), pp 790–794; Jim Feldman, Treaty Rights and Pigeon Poaching, pp 51–52, 55–57; Coombes, 'Cultural Ecologies 1' (doc A121), pp 139–140, 265–269

454. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 792

455. Under-Secretary for Internal Affairs to Under-Secretary for Lands, 28 April 1936 (Coombes, 'Cultural Ecologies 1' (doc A121), p 232)

of aiding these people'.[456] Regular assistance of this kind could have done much to combat what was known to be a situation of widespread malnutrition in Te Urewera.

Nonetheless, some introduced species did augment wild food supplies at the time, as initially promised in 1895. We turn next to consider the Crown's introduction and management of exotic species in Te Urewera.

21.7.4 The Crown's introduction and management of exotic species

(1) *Introduction*

In our inquiry, the Crown and claimants agreed that introduced species, such as deer and opossums, have had a very harmful effect on the environment. They also agreed that some kind of management role in respect of these species was or ought to have been possible for the peoples of Te Urewera. The parties disagreed, however, about:

- the degree of Crown responsibility for the introductions;
- whether the introductions were partly for the benefit of Maori or solely for the benefit of tourism, sport, and recreational hunting;
- whether the Crown could or should have been aware of the harmful effects sooner or even at the time of introduction;
- whether the Crown should have applied the 'precautionary principle'; and
- whether the Crown took timely action against introduced pests once their harmful effects were known (or proven).

We begin our analysis with a discussion of the precautionary principle. If this principle had been applied by the Crown, then it would have affected the introductions of all exotic species. We examine the significance principle, and whether it had any relevance before the late twentieth century. After that discussion, we assess the circumstances of each introduction of a new species (which took place at different times, for various reasons, and with variable effects).

(2) *The precautionary principle*

In his evidence for the claimants, Dr Coombes introduced the concept of a 'precautionary principle' in acclimatisation, although he did not define it.[457] As a concrete example, he cited the failure of the Forest Service to take action to control possums in Te Urewera State forests, because of scientific uncertainty as to the exact nature of the threat.[458] The principle was expanded upon by Crown witness Jonathan Coakley of the Ministry for the Environment. He explained that the precautionary principle 'in a true sense' was not adopted until the

456. A T Carroll, welfare officer, to Registrar, Native Land Court, 10 August 1934 (Murton, comp, supporting papers to 'The Peoples of Te Urewera and the Crown' (doc H12(a)(I)), pp 130–131)
457. Coombes, 'Cultural Ecologies 1' (doc A121), p 16
458. Coombes, 'Cultural Ecologies 1' (doc A121), pp 363–365

World Summit at Rio de Janeiro in 1992.[459] In his view, modern incidents such as the use of the poison DDT, which everyone had thought was safe, encouraged the development of a more precautionary approach.[460]

Mr Coakley gave evidence that the Ministry for the Environment defined the principle in 2002 in these terms:

> *Where there is a threat of serious or irreversible damage, lack of full scientific certainty should not be a reason for postponing cost-effective measures to prevent environmental degradation or potential adverse health effects.*
>
> Where decision-makers have limited information or understanding of the possible effects of an activity, and there are significant risks or uncertainties, a precautionary approach should be taken. [Emphasis in original.][461]

Under cross-examination by counsel for Nga Rauru o Nga Potiki, Dr Coombes stated that this modern principle should not be applied retrospectively: 'I would hate to . . . ascribe modern environmental values on the past'. Nonetheless, he suggested that a commonsense approach to acclimatisation should have prevailed anyway, since the Crown was fully aware that introducing exotic species had gone wrong in other parts of the world. A 'cautious' approach, therefore, would only have been sensible, regardless of the full state of scientific knowledge about any particular species or its likely effects at any one particular time.[462]

Crown counsel submitted that the precautionary principle is a 'concept that emerged only recently from the growth of scientific knowledge . . . and should not be imputed as appropriate for Crown actors in the early 20th century'. The Crown cautioned the Tribunal against a presentist approach, and proposed: 'We must examine the knowledge that was either held at the time or was reasonably available to the Crown, and also whether Maori communicated any concerns to the Crown'.[463] We agree with this approach and have adopted it accordingly.

But the Crown went further in its submission, and argued that it was not appropriate for the Crown to take action until scientific research had been validated and accepted by the scientific community as a whole, and even then that a 'time lag' was allowable before Government policy caught up with scientific knowledge.[464] In our view, this submission is more relevant to the period before 1895. For the twentieth century, it takes too little account

459. Jonathan Coakley, under cross-examination by counsel for Nga Rauru o Nga Potiki, Taneatua School, 15 April 2005 (transcript 4.16(a), p 545)

460. Jonathan Coakley, under cross-examination by counsel for Nga Rauru o Nga Potiki, Taneatua School, 15 April 2005 (transcript 4.16(a), pp 545–547)

461. Ministry for the Environment, *The New Zealand Waste Strategy: Towards Zero Waste and a Sustainable New Zealand* (Wellington: Ministry for the Environment, 2002), p 20 (Jonathan Coakley, comp, papers in support of brief of evidence (doc M8(a)), attachment 'M')

462. Brad Coombes, under cross-examination by counsel for Nga Rauru o Nga Potiki, Rangiahua Marae, 2 December 2004 (transcript 4.12, p 235)

463. Crown counsel, closing submissions (doc N20), topic 29, p 23

464. Crown counsel, closing submissions (doc N20), topic 29, pp 23–24

of the scientific debate *within* Government and the advice that was coming from official sources; in some cases, as we shall see, Government departments disputed each other's scientific findings in order to promote the sometimes conflicting interests they served, whether it be sport and tourism, forestry, or wildlife preservation. The Forest Service, for example, saw the harm that deer caused and wanted them out of its forests, whereas the Tourist and Health Resorts Department (and acclimatisation societies) queried whether deer were really so harmful, in order to protect tourism and recreational hunting. This adds quite a different dimension to the question of when or whether the Crown should have accepted scientific data as proven and as requiring Government action. Claimant counsel submitted that officials capitalised on scientific uncertainty to prioritise the interests of nationally important industries, such as tourism, over the interests of the peoples of Te Urewera.[465] In other words, it was not a question of scientific knowledge but of which interests would be prioritised. There is some truth to this assertion, as we shall see below.

In sum, the full precautionary principle, as developed in the 1990s, cannot be used retrospectively to assess Crown policy and actions. We agree with the Crown on that point. We also agree that the Tribunal must examine 'the knowledge that was either held at the time or was reasonably available to the Crown'.[466] In doing so, we focus mostly on the scientific debate and advice coming from within Government, which Ministers and officials had to respond to in some way, and the decisions which they made as a result of that knowledge and advice.

(3) *Acclimatisation before the UDNR Act 1896*

Before we turn to the successful introduction of various types of fauna that began in 1896 and the years immediately following, we note some of the activities of acclimatisation societies whose districts included part of Te Urewera before that point. Most of these activities were unsuccessful. Back in 1883, the Hawke's Bay Acclimatisation Society had unsuccessfully liberated brown trout at Waikaremoana.[467] During the 1880s, the Tauranga Acclimatisation Society had released trout ova in several rivers, including the Whakatane and the Waimana, but again this was apparently unsuccessful.[468] In the same decade, the Tauranga and Hawke's Bay Acclimatisation Societies had both liberated deer, as had private individuals, but it is unlikely that the resultant herds had colonised Te Urewera. In any event, the societies were utterly unable to police Te Urewera in the period leading up to the UDNR Act 1896, when even the Queen's writ did not run in the Tuhoe rohe potae.[469]

465. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 152–154
466. Crown counsel, closing submissions (doc N20), topic 29, p 23
467. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 63
468. Coombes, 'Cultural Ecologies 1' (doc A121), p 33
469. Coombes, 'Cultural Ecologies 1' (doc A121), pp 26, 34, 88

21.7.4(3)

The desire to introduce deer and trout into the area around Te Urewera in the years before the UDNR Act was essentially driven by factors related to sport and tourism. For instance, in 1886, the liberation of trout ova into the upper Whakatane River was described in the *Bay of Plenty Times* as heralding a day when 'we shall be able to add another inducement to outsiders to visit us, when we can offer them good fishing'.[470] Again, in 1895, the news that the efforts of the Hawke's Bay Acclimatisation Society to acclimatise deer had been sufficiently successful for the issue of deer stalking licences to be contemplated brought an excited comment in the *Daily Telegraph* that there was 'every indication that at no very distant date Hawke's Bay will become one of the best hunting grounds for the pursuit of deer stalking, the most fashionable of all sport'.[471]

The one acclimatisation that did have a significant long-term impact on Te Urewera before 1896 was not, however, linked to sport or tourism. Weasels and related species were not introduced directly into Te Urewera, but spread there from southern Hawke's Bay.[472] The introduction of these animals was a response to the spread of rabbits, another introduced animal that became a serious threat to the sustainability of livestock numbers in Hawke's Bay and some other areas of New Zealand during the 1870s. Consequently, some private individuals began importing stoats, weasels, and ferrets to try to protect pastoral farming. This was expensive, and there were therefore calls for the Crown to import the animals. During the 1880s, the pressure from farmers to solve the rabbit problem grew stronger, and the Crown eventually succumbed to it. Since these animals initially succeeded in some places in reducing rabbit numbers, some acclimatisation societies supported further liberations. In 1886, the Hawke's Bay Acclimatisation Society asked Parliament to import these animals for rabbit control, and the society subsequently distributed Government stock in its area. Within a few short years, weasels had arrived at the boundaries of Te Urewera.[473]

As early as 1876, however, legislation to prevent the importation of various animals including weasels, stoats, and polecats was introduced. Several members clearly warned Parliament that these animals would gravely threaten birds, including indigenous birds, and that their ability to control rabbits was questionable.[474] Nevertheless, pastoral interests prevented the legislation from passing. In 1876, the eminent ornithologist Walter Buller cited a prominent English zoologist who warned of the enormous danger to New Zealand birds posed by the polecat, noting that the ferret was a domestic polecat. Buller argued that such 'predaceous vermin' should not be introduced.[475] Despite this, and subsequent warnings

470. *Bay of Plenty Times*, 30 September 1886 (Coombes, 'Cultural Ecologies 1' (doc A121), p 38)
471. *Daily Telegraph*, 15 June 1895 (Coombes, 'Cultural Ecologies 1' (doc A121), pp 88–89)
472. Coombes, 'Cultural Ecologies 1' (doc A121), pp 26–29
473. Coombes, 'Cultural Ecologies 1' (doc A121), pp 26–29
474. G Grey, 12 October 1876, NZPD, 1876, **vol 23**, pp 273–274; Mantell, Whitmore, Nurse, Robinson, 25 October 1876, NZPD, 1876, **vol 23**, pp 609–614
475. W L Buller, 'On the Proposed Introduction of the Polecat into New Zealand', *Transactions and Proceedings of the New Zealand Institute*, vol 9 (1876), pp 634–635; Coombes, 'Cultural Ecologies 1' (doc A121), pp 26–27

from the scientific community in the mid-1880s, the Crown brought in thousands of stoats, weasels, and ferrets and actively supported their distribution. As we have noted, they soon moved from Hawke's Bay into Te Urewera.[476]

Crown counsel submitted:

> While some concern was expressed at the time regarding the effect of mustelids on native birds, it is clear that these views were not widely accepted or sufficiently persuasive at the time. Farmers saw them as a solution to the problem of rabbit plagues, at a time when powerful economic forces also drove the decision to introduce them.[477]

The Crown relied on scholar Carolyn King, who commented in 1984:

> Nowadays we know rather more about the ecology of animals than the early pioneers did and we may wonder at the naivety of those who saw the introduction of mustelids as the solution to the rabbit problem. But do not forget that in those days it was a simple matter of survival; there was an economic depression on, and those farmers were struggling for their lives.[478]

In our view, it was not a question of knowledge but of prioritising of interests. The likely effect of 'a shipload of known murderers to be let loose on your peaceful shores' was anticipated.[479] But in a contest between pastoral interests and other farming interests, and between pastoral interests and conservation interests, the pastoralists won.[480] By 1900, numerous members, Maori and Pakeha, were in a position to tell Parliament what enormous damage had been done to indigenous birds by weasels and stoats. Nonetheless, their protection under section 28 of the Rabbit Nuisance Act 1882 was left untouched.[481] Soon after, section 6 of the Animals Protection Amendment Act 1903 allowed the gazetting of areas within which weasels and stoats could be killed. Then, in 1910, section 7 of a new Animals Protection Amendment Act made their destruction legal everywhere, except within any areas in which the governor in council suspended its operation. From 1931, most acclimatisation societies paid bounties on the tails of these animals, but this development came far too late.[482] We consider that, given the warnings available before the widespread acclimatisation of weasels and stoats, the Crown acted unwisely in allowing this. And, despite the fact that the impact

476. Coombes, 'Cultural Ecologies 1' (doc A121), pp 27–29
477. Crown counsel, closing submissions (doc N20), topic 29, p 22
478. Carolyn King, *Immigrant Killers: Introduced Predators and the Conservation of Birds in New Zealand* (Auckland: Oxford University Press, 1984), p 90 (Crown counsel, closing submissions (doc N20), topic 29, p 22)
479. Professor J Newton, cited in Buller, 'On the Proposed Introduction of the Polecat into New Zealand', p 634 (Coombes, 'Cultural Ecologies 1' (doc A121), p 27); Coombes, 'Cultural Ecologies 1' (doc A121), pp 26–29)
480. Peter Holland, Kevin O'Connor, and Alexander Wearing, 'Remaking the Grasslands of the Open Country', in Eric Pawson and Tom Brooking (eds), *Environmental Histories of New Zealand* (Melbourne: Oxford University Press, 2002), p 80
481. NZPD, 1900, vol 113, pp 25–31, 33–34, 37–38, 41–42, 47
482. Coombes, 'Cultural Ecologies 1' (doc A121), p 155

of these animals was clearly recognised relatively early, Dr Coombes observed that they did not receive much attention from the Crown until the creation of the Department of Conservation in 1987.[483]

(4) *Trout*

Trout were only acclimatised in Te Urewera with marked success just before the passage of the UDNR Act 1896. Despite this, there was no specific consultation with local Maori communities about the first successful release of trout at Waikaremoana. As will be recalled from section 21.6, Seddon's undertaking – which was given the force of law by the 1896 Act – was to supply them with trout and information so that they could release and manage this species. In September 1896, F W Rutherford, brother of the chairman of the Wellington Acclimatisation Society, A J Rutherford, transported a small number of trout fry to the lake. With assistance from local Maori, Rutherford deposited fry in streams in the area. Maori involvement in this release appears to have been essentially fortuitous. Nevertheless, A J Rutherford subsequently informed the colonial secretary that these trout had been sent 'in part fulfilment of promises made by the Hon the Premier in his letter embodied in "The Urewera Native Reserve Act 1896"'.[484] A J Rutherford and Lake Ayson, curator at the Masterton Hatchery, were involved in a further trout release and construction of a hatchery near Waikaremoana.[485] The Wairoa Acclimatisation Society later bought trout fry from the hatchery. Trout were apparently well established in the lake by 1903. In addition, local (Pakeha) residents successfully released brown trout into the upper Rangitaiki and Whirinaki Rivers.[486]

Te Urewera was incorporated by stages into the Rotorua Acclimatisation District, which was taken over by the Tourist and Health Resorts Department in 1908. Initially, both freshwater fisheries and game were managed by the Tourist and Health Resorts Department, so from this time trout were particularly the responsibility of a Government department. This continued to be the case when the Department of Internal Affairs took over the administration of freshwater fisheries in 1914. Subsequently, the Crown was heavily involved in trout releases at Waikaremoana and Waikareiti, the main focus of such liberations in the inquiry district. There was, however, acclimatisation society involvement in releases over several

483. Brad Coombes, under questioning by presiding officer, Rangiahua Marae, Frasertown, 2 December 2004 (transcript 4.12, p 240)

484. AJ Rutherford to Colonial Secretary, 7 October 1896 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 63–64)

485. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 64

486. Coombes, 'Cultural Ecologies 1' (doc A121), p 33

decades into the Waikaretaheke, Hangaroa, Waiau, and Ruakituri Rivers, as well as various streams and Lake Kaitawa.[487]

Dr Doig has noted that Te Urewera was, in practical terms, beyond the Crown's control in the late nineteenth century when the Crown was passing a 'barrage of legislation' relating to waterways.[488] Nevertheless, once trout were established, Maori were legally bound by the Salmon and Trout Act 1867 and subsequent legislation and regulations. The 1867 Act had given introduced game fish precedence in New Zealand over indigenous fish, and protected trout through closed seasons. From 1892, angling licences were also used to protect trout.[489] As early as 1895, the Hawke's Bay Acclimatisation Society began to issue notices in te reo Maori warning about trout poaching penalties.[490]

The introduction of trout, according to Seddon's memorandum, was partly intended to supplement the food supplies of the peoples of Te Urewera, and he apparently anticipated them managing the trout. Nevertheless, the Te Urewera trout fishery was put under the same arrangements for licensing and regulations as the rest of New Zealand. As we discussed in chapter 20, local Waikaremoana leaders objected to Pakeha fishing at Waikaremoana without paying the lake's owners, and considered themselves entitled to fish for trout in the lake.[491] Possibly local Maori had not expected significant numbers of tourists to access the trout fishery, but they certainly were not prepared to give up control of their lake to the new Tourist and Health Resorts Department. In 1908, Rua Kenana complained that fishing licences were required within the UDNR. At this time, there were reports of Waikaremoana Maori communities catching trout throughout the year. From their perspective, it is likely that they were using the resource as promised by Seddon. To Pakeha, on the other hand, their fishing was considered both illegal and 'unsportsmanlike'.[492]

From 1926, a rebuilt trout hatchery was located on land at Waimako Pa, but in 1929, after the local people sought either rent or a number of free fishing licences for use of the site, the Tourist and Health Resorts Department moved it to government reserve land.[493] This seems to have been the sole and very short-lived example of significant Maori involvement in management of trout. The rangatira Mahaki had facilitated the establishment of

487. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 65–68; Bruce Stirling, 'Southern Te Urewera Waterways and Fisheries'(commissioned research report: counsel for Wai 687 claimants, 2004) (doc 19), pp 6–7

488. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 141

489. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 144; Wendy Pond, *The Land With All Woods and Waters*, Waitangi Tribunal Rangahaua Whanui Series (first release), June 1997, p 88

490. Coombes, 'Cultural Ecologies 1' (doc A121), p 24

491. Walzl, 'Waikaremoana' (doc A73), pp 93–98

492. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), pp 143–144, 148; Walzl, 'Waikaremoana' (doc A73), pp 87–90; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 70–71

493. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 76–79

the hatchery and helped look after and repair it.[494] This was not, however, the only request for free fishing licences. In 1932, Waikaremoana leader Waipatu Winitana requested 50 free trout fishing licences, because no compensation had been paid for the Crown's use of the lake (see chapter 20). Tony Walzl commented:

> Considering at this time, Waimako Maori could not afford £3 for a water tank, it is unlikely that trout fishing licences were affordable and therefore grants of licences were the only way that local Maori could access the fishery legally. To do so illegally would risk fines that also could ill be afforded. If this was the situation by 1930, then the conditional permission that Waikaremoana Maori had given 35 years earlier to allow trout to be introduced so that there might be an extra food source available had been breached. At a time when the food that trout could have provided was needed the most, Maori were restricted from gaining access.[495]

The question of whether trout did in fact augment Maori food supplies is a complicated one. There are three key considerations:

- first, legal access to the trout fishery was conditional upon payment of a fishing licence fee, and the extent to which Maori fished without such licences is virtually impossible to discover;
- secondly, trout had the invidious effect of reducing indigenous fish species, on which the local people depended; and,
- thirdly, the Crown's management of fisheries privileged trout over indigenous species, including policies for the deliberate reduction of tuna (eels) and certain native birds (especially kawau (shags).

We discuss each of these points in turn.

On the first point, we note that Te Urewera leaders are understood to have asked in 1895 for English fish to augment their food supplies and attract (presumably paying) tourists. The premier agreed to this request but only made one specific undertaking; to secure trout for them and information so that they could manage the fishery effectively. We consider it virtually impossible that the leaders could have taken from this that they would be asked to pay licence fees, or that the fishery would be administered by the Government from outside the Reserve. Nor was the undertaking in respect of trout an isolated one; there was a broader intention to augment food supplies, of which the introduction of trout was only one aspect. We note, however, that trout proved difficult and expensive to establish in Te Urewera, with constant releases of ova required over many years. Licence fees were necessary to help fund this continuous process of replenishing the fishery. Tourist fishing licences probably sustained this work. Maori could not afford licences and thus are unlikely to have contributed much to financing the fishery.

494. Walzl, 'Waikaremoana' (doc A73), pp 270–274
495. Walzl, 'Waikaremoana' (doc A73), p 274

Yet trout became a common food for those who exercised their customary rights to fish in their rivers and lakes, regardless of whether they paid a licence fee. Professor Murton suggested:

> Of course, it is difficult to gauge from the materials available to what extent they abided by it [the legislation]. In fact, the records tell very little about hunting and gathering by the peoples of Te Urewera, unless officials thought that regulations had been broken. There is little question that tangata whenua, surrounded by the bounty of their forests, including the new animals as well as trout, made use of this bounty in order to survive. The exact impact of the animal protection legislation, therefore, is difficult to assess in economic terms.[496]

We have already mentioned in section 21.3 above that trout became a part of the customary economy. Although we lack comprehensive evidence on the point, witnesses told us that trout fishing was important to them in the early decades of the twentieth century. In chapter 20, we cited the evidence of Lorna Taylor, Rangi Paku, and Kuini Te Iwa Beattie about the importance of trout in the diet of their whanau growing up at Waikaremoana. Indeed, Mrs Rangi Paku, who grew up at Tuai in the 1940s and early 1950s, said that her whanau ate 'trout by the galore'.[497] Elsewhere in the inquiry district, Te Rongonui Tahi, who grew up at Ohaua in the Ruatahuna district in the 1940s and early 1950s, told us of hunting and fishing there with his grandparents. Potatoes and vegetables from the garden were the staple foods, with trout and wild pork to 'complement the larder'.[498] Miriama Howden confirmed that trout became part of the Ruatahuna traditional economy, along with eels, communally worked gardens, and plants gathered from the bush.[499] Ngati Manawa also incorporated trout in the customary economy. Rano (Bert) Messent grew up near Murupara beside the Rangitaiki River in the late 1920s and 1930s. He explained that trout fishing was done with a retireti board, which we described above in section 21.3; 'a board which was illegal by Pakeha law'. Ngati Manawa 'could still live off the land' at that time, he told us, fishing for trout as well as eels, growing potatoes and vegetables, and hunting for wild pigs.[500] Sarah Hohua confirmed the role of trout in living 'off the land' for Ngati Manawa in the 1940s.[501] Also, Basil Tamiana informed researcher Suzanne Doig that trout have been in the rivers so long that they are considered part of the tribal fishery resources and 'poached' without licences throughout Te Urewera.[502] This was easier in some places than others – the 'popular Whirinaki River fishery' was well policed and the rules enforced.[503]

496. Brian Murton, summary of evidence (doc J1), p 24
497. Rangi Paku, brief of evidence, 18 October 2004 (doc H37), p 3
498. Rongonui Tahu, brief of evidence, 11 May 2004 (doc D23), pp 4–5
499. Miriama Howden, brief of evidence, 11 May 2004 (doc D26), pp 2–4
500. Rano (Bert) Messent, brief of evidence, 9 August 2004 (doc F12), pp 3–4
501. Sarah Hohua, brief of evidence, 11 August 2004 (doc F32), pp 3–4
502. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 147
503. Murton, 'The Peoples of Te Urewera and the Crown' (doc H12), p 911

21.7.4(4)

To some extent, fishing for trout was necessary because of the way in which this exotic species had reduced the supply of indigenous fish. Trout eat indigenous fish, as well as competing for their food supply and for the food supply of whio and other native ducks.[504] Claimant witnesses were very aware of the impact of trout on their ability to take traditional foods. Jack Tapui Ohlson of Ngati Whare told us:

> When European trout were introduced it ate the kokopu in our area. There are still some around now, but very few.[505]

Robin Hodge was cross-examined regarding how long it would have taken for trout to affect the populations of fish such as kokopu. She responded that:

> Ecological studies were really just starting overseas at about that time [1896] and so that there was no ecological studies about how long it would have taken but because trout are known to predate all sorts of other fish presumably it wouldn't have taken all that long, given the vast numbers of trout which are introduced year on year, for indigenous fish stocks to be greatly reduced.[506]

From the 1890s, the damaging impact of trout on indigenous fish entered public discussion.[507] By the early twentieth century, Parliament was hearing frequently about the negative impact of trout on indigenous fish. In its report *He Maunga Rongo*, the Central North Island Tribunal explained that the matter was discussed in Parliament during several fisheries debates. Maori Treaty rights were part of the discussion. Pakeha members acknowledged the destructive effects of trout on native fish species, and sometimes agreed with the Maori members that steps should be taken to reduce those destructive effects, or to legalise Maori fishing for free for introduced species and by customary methods.[508]

As well as petitions from Maori, the Stout–Ngata commission drew attention to the seriousness of the problem for Rotorua peoples. Free licences were at first secured for Te Arawa as a result of these representations from the commission, and later formed part of the negotiated Crown–Maori agreements over Lakes Taupo and Rotorua. Otherwise, after two or three decades of admissions and abortive proposals to do something, virtually nothing had actually been done to protect indigenous fisheries or to recognise and protect Maori fishing rights.[509] Instead, indigenous fish only really attracted attention from successive

504. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p146
505. Jack Tapui Ohlson, second brief of evidence (doc G36), para 27
506. Robin Hodge, under cross-examination by counsel for Nga Rauru o Nga Potiki, 20 October 2004, Waimako Marae (transcript 4.11, p138)
507. Pond, *The Land With All Woods and Waters*, pp124–125, 136–137
508. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One, revised ed*, 4 vols (Wellington: Legislation Direct, 2008), vol 4, pp1291–1295
509. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp1291–1330

governments because of the alleged tendency of tuna to eat trout which, as game fish, were the true focus of attention of those managing freshwater fisheries.

The Central North Island Tribunal concluded:

> We find that the Crown was fully aware of the Treaty rights of Taupo Maori with regard to their fisheries, that it knew of the destructive impact of trout on those fisheries, and that it was made aware of the prejudice suffered by Maori as a result. Proposals were made, especially by the Maori members of Parliament, for the Government to act on the Treaty guarantees, to do something to conserve native fish in the face of predation by introduced species, and to recognise Maori fishing rights by reserving them free fishing for all species in all waterways. . . . Governments chose to prioritise and protect trout and anglers over indigenous fish and Taupo Maori.[510]

We need not consider this matter in more detail here, as the Crown has conceded that the introduction of trout in Te Urewera, 'which the Crown facilitated, has damaged native fish populations'.[511] We note, however, that the Crown did more than simply *facilitate* the stocking of rivers and lakes with trout; in Te Urewera, much of this work was done by Government departments over many years. This is an example of sporting values and tourism being prioritised over Maori interests, although – as noted above – trout did become an important food source for the peoples of Te Urewera. It is not possible to know the extent to which the inclusion of trout in the local diet compensated for the accompanying reduction of traditional fishing. The cultural loss – no longer being able to take valued native fish species – would have been significant regardless. We noted earlier that the Government turned down requests from Waikaremoana leaders for free fishing licences in 1929 and 1932. These requests show that local Maori would have preferred to fish for trout lawfully, but they had little choice in the matter if they were to survive.

Since trout had been introduced at least in part to fulfil a Crown promise to augment Maori food supplies, we do not think it reasonable that the peoples of Te Urewera should have been subject to the Government's licensing regime. The long delayed establishment of the UDNR General Committee, and its shortlived existence, meant that it could not take on a role in managing the introduced fishery or negotiating with the Government about licensing arrangements. In the claimants' view, rather than a 'quasi property right' being bestowed on acclimatisation societies, which could then charge licence fees, 'it is arguable that Tuhoe were entitled to be granted a quasi property interest in the exotic species to be introduced by the Seddon Government and to have their customary harvesting rights affirmed by legislation'.[512] We agree, especially in respect of trout, which was the subject of

510. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1295
511. Crown counsel, closing submissions (doc N20), topic 30, p 2
512. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 163

specific negotiation in 1895 and of a specific indication that it would be managed by Maori as a food source and for tourism.

Finally, we note that the Crown's management of the trout fishery involved attempts to reduce or eradicate native species which were believed to predate on trout. Tuna are the most important indigenous fishery in Te Urewera, and formed a staple in the pre-contact diet (alongside fernroot and native birds). The Government's approach to the eel fishery ranged from a failure to protect the species to active culling of it for the stated purpose of protecting trout. From Dr Doig's evidence, it appears that culling in Te Urewera rivers began in the 1950s, and that the encouragement of commercial eeling (for the same purpose of reducing eels) occurred from the 1960s.[513] Thus, the Crown's active attempts to reduce the tuna population of Te Urewera fall largely outside the period considered in this section of our chapter.

While kereru and many other indigenous birds were absolutely protected from 1922, kawau were vilified and shot in the first half of the twentieth century. The Crown has admitted this, while also noting at our hearings that it has now come to understand how important kawau are to the peoples of Te Urewera.[514] Dr Coombes summarised the Crown's campaign against the kawau as follows:

> Soon after the inquiry district became part of the Rotorua Acclimatisation District [which came under the Tourist and Health Resorts Department], a widespread extermination campaign commenced. In the 1920s, the Department of Internal Affairs employed a culler to eliminate shags from Waikaremoana and its tributaries. These campaigns lasted until the early 1950s, despite the fact that the kawau was an important species for local hapu at the Lake. The line between protected and slaughtered native birds was both contradictory and arbitrary: shags were in far smaller populations than were kereru.[515]

The Crown facilitated the killing of kawau because they ate trout.[516] Native hawks were also targeted as 'pests' because of their impact on Pakeha 'game fish and birds' and for 'sport'.[517] Tuhoe revered some kawau colonies at Waikaremoana and Waikareiti because of their 'guardian-like activities', and the young birds of other colonies were sometimes a food source. Crown agencies ignored the customary significance of kawau because they valued the sport involved in trout fishing so highly. Consequently, at various times from 1906 through to the early 1950s, officials and even Ministers of the Crown, along with some private individuals, shot kawau in the Waikaremoana game reserve, later the game sanctuary. In 1922, the solicitor general considered the legality of shooting kawau in the reserve if it was a sanctuary.

513. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), pp 147, 159
514. Crown counsel, closing submissions (doc N20), topic 29, pp 5, 48–49
515. Coombes, summary of evidence (doc H3), p 24
516. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 75–76
517. Coombes, 'Cultural Ecologies 1' (doc A121), pp 25–26, 183, 215, 217

His argument that section 32 of the Animals Protection and Game Act 1921–22 justified such shooting hinged on interpreting trout as property.[518] Section 32 allowed the Minister to authorise an owner or occupier of land, or an acclimatisation society, to kill any animal damaging or likely to damage 'any land', even if the land was a sanctuary, and the solicior general's view was that 'land' in this case 'must . . . be held to include all property [including] fish in the Lake". There was no provision in the section for killing a species for doing damage to another species.

Were kawau really a threat to the valuable trout fishery, which would justify consultation with the peoples of Te Urewera as to whether they could be culled? Crown counsel noted that kawau were shot because they were 'perceived as a threat to introduced species'.[519] It was put this way because the belief that kawau 'preyed extensively on trout' was simply not true.[520] The Crown did not consult Waikaremoana peoples before (or during) campaigns to exterminate the shag. Nor, however, is there any evidence of protest or disagreement from local Maori communities.[521] Dr Coombes found protests from the Forest and Bird Protection Society on file but none from Maori.[522]

As we have explained, the Crown and Maori agreed from 1895 that the native birds of Te Urewera should be protected. Maori members of Parliament always supported protection of birds during the debates on the animal protection laws, but differed from the Government as to the mode of protection and the role of Maori in it. There was certainly no agreement that any species could be hunted to extinction. The peoples of Te Urewera valued their indigenous birds enormously but believed that sustainable harvests, controlled by customary law, were both feasible and appropriate. That is a far cry from the Crown's decision that shags and hawks were 'vermin' and should be exterminated. In our view, this departure from the generally agreed position between the peoples of Te Urewera and the Crown since 1895, that native birds should be protected, required specific negotiation and agreement before it could be carried out in our inquiry district.

In the Crown's submission, it balanced the interest in preserving native bird species against the interest in preserving the trout fishery, and did so appropriately. In this instance, 'tourism and the opportunities for a trout fishery outweighed the significance of the [native] birds', especially because (the Crown says) it was not aware of the importance of the kawau to Maori at Waikaremoana.[523] As we see it, this was in fact just one example of a marked

518. Coombes, 'Cultural Ecologies 1' (doc A121), pp 215–218; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 75–76; Robin Hodge, in response to questions from the Tribunal, 20 October 2004, Waimako Marae (transcript 4.11, p 137)
519. Crown counsel, closing submissions, topic 29 (doc N20), p 5
520. Coombes, 'Cultural Ecologies 1' (doc A121), p 215
521. Crown counsel, closing submissions, topic 29 (doc N20), p 49
522. Coombes, 'Cultural Ecologies 1' (doc A121), p 217
523. Crown counsel, closing submissions (doc N20), topic 29, p 49

pattern of the Crown prioritising the interests of the tourism industry and angling in its Te Urewera policies.

We turn next to consider the introduction of deer into the inquiry district, and evaluate the Crown's balancing of interests in that case.

(5) *Deer*

The introduction of deer to Te Urewera was significant in terms of provision of both a large new potential food source for Maori communities and an attraction for New Zealand sportsmen and foreign tourists. It thus met two of the objects of the 1895 agreement.

We have no direct evidence that Maori food supplies were in fact considered by Ministers or officials when the decision was made to release deer in Te Urewera. It was certainly the case that some officials were later staunchly opposed to Maori hunting for deer (in the game reserves). In 1910, W A Neale, who had been appointed a ranger, warned his superior officers: 'I cannot prove as yet that they have taken on venison, but when once the taste is acquired, if it is not already, they will have a splendid larder to operate on.'[524] But it was Carroll who was the key figure in Government policy, as far as the 1895 commitments were concerned. The head of the Tourist and Health Resorts Department later commented: 'Sir James Carroll, as representative of the Maori race, strongly favoured the introduction of game animals to his native land.'[525] Carroll also supported the ban on hunting introduced animals in the game reserves, which was necessary for the deer population to become properly established.[526]

This can be contrasted with his approach to the introduction of goats, which were not intended for sport or tourism but 'in the hope that they might become a fibre and food source' for Tuhoe.[527] T E Donne and historian James Cowan both recorded how Carroll, as Native Minister, personally delivered a herd of goats to Tuhoe in 1904, a year of 'intense famine' in Te Urewera.[528] Carroll presented the goats 'on behalf of the Government to the tribesfolk of the Urewera'.[529] Tuhoe leaders were gathered for a tangi and formally welcomed the Minister (and his goats), imposing a rahui so that the goats would not be killed until they had a chance to get established.[530]

On balance, we think it likely that Carroll gave his support as Native Minister to the introduction of deer, at least in part as a food source for the peoples of Te Urewera. In any case, it is necessary to keep in mind the dual significance of deer (as a food source as well

524. W A Neale to C Robieson, THR, 9 June 1910 (Coombes, 'Cultural Ecologies 1' (doc A121), p 191)
525. T E Donne, *The Game Animals of New Zealand* (London: John Murray, 1924) (Coombes, 'Cultural Ecologies 1' (doc A121), p 76)
526. Walzl, 'Waikaremoana' (doc A73), pp 64–65
527. Coombes, 'Cultural Ecologies 1' (doc A121), p 76
528. Coombes, 'Cultural Ecologies 1' (doc A121), p 76
529. J Cowan, 'The Illustrious Goats of Ruatoki: A Story of the Urewera Tribe', in *Tales of the Maori Bush* (Dunedin: Reed, 1934), p 76 (Coombes, 'Cultural Ecologies 1' (doc A121), p 77)
530. Coombes, 'Cultural Ecologies 1' (doc A121), pp 76–77

as for tourism and recreation) when considering the recategorisation of deer as 'pests' from the 1930s.

The first deer liberation in Te Urewera occurred at Galatea in 1897. It was apparently the result of action by James Grant, manager of Galatea Station, a keen acclimatiser; the Wellington Acclimatisation Society, which provided the deer; and either the Department of Lands and Survey or the Tauranga Acclimatisation Society. Dr Coombes argued that, given the inactive state of the Tauranga society at that time, it is likely that it was the Government department that transported the deer.[531] For the first liberation at Waikaremoana in 1899, the Wellington society provided the animals, Lands and Survey arranged transport, and roading gangs released the deer at Waikaremoana.[532] As with trout, however, the extent of Crown involvement increased significantly thereafter. Dr Coombes' research indicates that in the period up to 1922 inclusive, almost all the other releases of deer within Te Urewera, or in adjacent forests from which animals colonised Te Urewera, were undertaken by the Tourist and Health Resorts Department.[533] No records of consultation with Maori in relation to any of these releases have been located.

Furthermore, significant restrictions were imposed on Maori land in the Waikaremoana and Rangitaiki areas in conjunction with the release of deer at Waikaremoana and, slightly earlier, at Galatea. Forest reserves had been established in 1891 and 1895 on land acquired earlier by the Crown on the eastern and southern shores of Waikaremoana.[534] Game reserves were created in 1898 to protect newly released deer and facilitate control of fish and game; these were approved by James Carroll. The game reserves not only incorporated almost all of the forest reserves, but also large areas within the UDNR. Much of the land in these reserves, therefore, was Maori land. The Waikaremoana reserve had a total area of 37,498 hectares. Of this, 23,088 hectares was Maori land within the UDNR, 127 hectares was the Whareama reserve, and 4989 hectares was the Waikaremoana lakebed. In all, then, 75.2 per cent of this reserve was Maori land, while the balance was Crown forest reserve or other Crown land. At Rangitaiki, 39.5 per cent of the 40,301-hectare reserve was Maori land within the UDNR, while the remainder was non-Maori land outside the UDNR. Dr Coombes was unable to locate any records of communication with tangata whenua about this reservation.[535]

The Crown conceded that the game reserves were apparently 'established without specific consultation with Urewera Maori about their creation, rules, boundaries or administration', but suggested that it is 'likely that Urewera Maori supported this type of reserve'.[536] Yet the *Gazette* notice notified that 'imported game shall not be taken or killed' within this

531. Coombes, 'Cultural Ecologies 1' (doc A121), p 36
532. Coombes, 'Cultural Ecologies 1' (doc A121), p 89
533. Coombes, 'Cultural Ecologies 1' (doc A121), p 91
534. Coombes, 'Cultural Ecologies 1' (doc A121), pp 78–79
535. Coombes, 'Cultural Ecologies 1' (doc A121), pp 80–83
536. Crown counsel, closing submissions (doc N20), topic 29, p 27

reserve.[537] Consequently, the creation of these reserves made it impossible for local Maori communities to benefit legally from any additional food source in the form of introduced game. Furthermore, in 1909, regulations under the Tourist and Health Resorts Control Act 1908 forbade anyone from carrying or using a firearm, or using a dog to catch 'any bird or animal' within the forest reserves without the written permission of the Minister or the general manager of the Tourist and Health Resorts Department.[538] Dr Coombes has not located evidence of consultation with Maori about the transfer of both the forest reserves and the administration of the Rotorua Acclimatisation District to that department. The required permission made it very difficult to hunt legally in these reserves, once deer were no longer absolutely protected.

The licence fee for hunting imported game elsewhere in the acclimatisation district would have been prohibitively expensive for many local Maori.[539] The law did allow an occupier, an occupier's child, or another designated person to hunt without a licence in season on their own land[540] – always provided a reserve or sanctuary designation did not affect this. Given the low incomes and marked subsistence needs of many Te Urewera Maori communities in the early twentieth century, the cost of licence fees may have been a real deterrent to those who wished to hunt legally in Te Urewera in places where a licence was required.

Yet the justification for introducing deer into the Urewera District Native Reserve, without further consultation with Te Urewera leaders, presumably lay in its provision of an additional food supply at least as much as in its provision of sport for tourists. Despite this, a campaign against 'poaching' deer began in 1910 and intensified in the 1920s. From 1912, increasingly wide areas were opened for deer shooting, including most of the inquiry district. The regulations focused on sport, rather than an additional Maori food source. Licence fees for short seasons with restricted 'bags' were set at sums such as £2 or £3. In 1903, David Buddo, the member for Kaiapoi, told the House that a £1 fee for a fishing licence 'would make fishing for trout . . . a close monopoly only to be enjoyed by those of leisure and means'. The significantly higher fees charged for licences to shoot deer were almost certainly beyond the means of most Maori communities in Te Urewera.[541] The local people may, however, have been unaware of these matters. The forest reserve regulations gazetted in 1909 were only comprehensively notified in Te Urewera in 1919, and the Tourist and Health Resorts Department's first publicity about the rules of the game reserves also occurred in

537. 'Animals Protection Act – Declaring Reserves for Imported Game, Waikaremoana and Rangitaiki', 17 June 1898, *New Zealand Gazette*, 1898, no 46, p 1016

538. 'Regulations under "The Tourist and Health Resorts Control Act 1908"', 23 August 1909, *New Zealand Gazette*, 1909, no 72, pp 2242–2245

539. Coombes, 'Cultural Ecologies 1' (doc A121), pp 110–112

540. Animals Protection Act 1880, s 7; Animals Protection Act 1908, s 23; Animals Protection and Game Act 1921–1922, s 14(3)

541. D Buddo, 26 October 1903, NZPD, 1903, vol 127, p 5; Coombes, 'Cultural Ecologies 1' (doc A121), pp 134, 137, 187–189

1919.[542] The Waikaremoana people did not believe that the restrictions applied to them as late as 1950, when they protested against rangers' attempts to stop them from shooting pigs and deer for food on their own land (the UCS reserves).[543] It was not until June 1950 that Turi Carroll found out he 'could not hunt on the Timi Taihoa Reserve, which he owned, without a special license, which he would have to enter a ballot to try and obtain'.[544]

In a review following the 1921–22 Act, the Rangitaiki game reserve was revoked, but the Waikaremoana reserve was given a formal sanctuary designation in 1925. Its new, smaller boundaries facilitated deer and opossum hunting outside the sanctuary but, in effect, given section 32 of the 1921–22 Act, permitted only hunting of animals proved to be causing damage to land within the sanctuary. This made any further hunting for subsistence purposes in the sanctuary illegal. Despite the Crown's submission that informal consultation with Maori may have occurred, we have not received any evidence of consultation with Te Urewera leaders or communities about these changes.[545]

Dr Coombes pointed to an 1893 article in the widely circulated *Transactions and Proceedings of the New Zealand Institute* arguing for the destructive effect of deer on forests as indicating that it was likely that Crown agents knew how deer affected forests before their release in Te Urewera.[546] Deer populations in the inquiry district grew very rapidly in the 1920s.[547] In 1914, however, the inspector of scenic reserves had reported on a need for 'sufficient shooting' of deer at Waikaremoana. The inspector quoted a recent Royal Commission on Forestry as having demonstrated the 'extremely detrimental' way in which deer affected indigenous forest.[548] Dr Neumann put great stress on this 1913 royal commission's report, which, he argued, predated the Crown's main initiative to establish deer in Te Urewera (which he said took place from 1913 to 1921).[549]

Crown counsel asked Dr Neumann: 'Did Government understand the effect of the deer at the time they were introduced?'[550] In response, Neumann quoted the 1913 Forestry Commission:

> Should it be a fact that the presence of deer in great numbers is detrimental to the undergrowth of the forest, then it is clear that steps should be taken to either do away with them altogether or to restrict them to defined areas where they can do the minimum amount of

542. Coombes, 'Cultural Ecologies 1' (doc A121), pp 197–200
543. Campbell, 'Te Urewera National Park, 1952–75' (doc A60), p 149
544. Secretary for Maori Affairs to Turi Carroll, 22 June 1950 (Campbell, 'Te Urewera National Park, 1952–75' (doc A60), p 149)
545. Coombes, 'Cultural Ecologies 1' (doc A121), pp 83, 200–203; Crown counsel, closing submissions (doc N20), topic 29, p 48
546. Coombes, 'Cultural Ecologies 1' (doc A121), p 89
547. Coombes, 'Cultural Ecologies 1' (doc A121), pp 117, 188–189
548. 'Report of the Inspector of Scenic Reserves', AJHR, 1914, C-6, p 7 (Coombes, 'Cultural Ecologies 1' (doc A121), p 294)
549. Klaus Neumann, written answers to Crown questions of clarification, September 2004 (doc G20), p [4]
550. Neumann, written answers to Crown questions of clarification (doc G20), p [2]

> damage. In order to ascertain what part the deer played in the economy of the upland forests, on the one hand, we examined such witnesses in every centre as seemed likely to afford information of moment. Especially did we seek to get a clear expression of opinion from the side of the sportsman, and, with this end in view, took evidence from the chairman and secretary of various acclimatisation societies; and, taking that evidence alone, we fail to see that deer are not harmful in a forest, or that the monetary gain to the country can in any way counterbalance the damage they must eventually do to the climatic reserves. Taking the evidence of the non-sportsman, and considering the damage done by deer not only to the forests . . . but also to the plantations, orchards, and crops, our opinion as to their harmfulness is much strengthened. We therefore advise that measures be taken to restrict deer to limited areas, sufficient for sport, which may be proclaimed deer parks, where they can do the smallest possible damage.[551]

Nevertheless, alongside predictable opposition to deer from the Forest and Bird Protection Society and support for them from acclimatisation societies, considerable debate between Government departments as to whether deer did indeed damage indigenous forests continued through the 1920s until at least 1931.[552]

Putting aside the 1913 recommendations of the royal commission and the 1914 recommendation of the scenic reserves inspector, the Crown acknowledged in our inquiry that the Forest Service was certain about the destructive effects of deer by 1922.[553] Crown counsel referred to an official Forest Service report of that year, which 'concluded that large deer populations could cause significant damage'.[554] Against this conclusion, the Crown noted two points: the first was that the report did not specifically 'refer to any damage that may have been done in Te Urewera'; and the second was that the Tourist and Health Resorts Department continued to express 'varying views . . . regarding whether or not deer caused damage to native flora and fauna'.[555] In 1923, a ranger of that department denied that deer were causing any damage to the Waikaremoana forests.[556]

Essentially, though, the Tourist and Health Resorts Department (which controlled the release and hunting of deer) prioritised tourism. T E Donne, head of department at the time, 'admitted that deer had a negative effect on native flora', but held the view that this was 'acceptable because of the purported benefits of game tourism'.[557] Dr Coombes quoted Donne, writing in 1924:

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551. 'Report of the Royal Commission on Forestry', AJHR, 1913, C-12, p xv (Neumann, written answers to Crown questions of clarification (doc G20), p [4])
552. Coombes, 'Cultural Ecologies 1' (doc A121), pp 89, 188–189, 294–299, 311–317
553. Crown counsel, closing submissions (doc N20), topic 29, p 24
554. 'Deer in New Zealand: Report on the Damage Done by Deer in the Forests and Plantations in New Zealand', AJHR, 1922, C-3a, pp 4–5 (Crown counsel, closing submissions (doc N20), topic 29, p 24)
555. Crown counsel, closing submissions (doc N20), topic 29, p 24
556. Coombes, 'Cultural Ecologies 1' (doc A121), pp 296–297
557. Coombes, 'Cultural Ecologies 1' (doc A121), p 297

> It is, of course, known that deer browse on shrubs and plants, but their destructiveness to forests is infinitesimal in comparison with that caused by fire . . . It might be pointedly asked, how many travellers visit New Zealand to view shrubs and plants as against those who are attracted there by sport? In any case there are more trees, shrubs and plants than a man could look at in a hundred years.[558]

As the claimants have argued, when decisions were made, it was only partly a matter of scientific knowledge; the underlying question was which interests would be prioritised.[559] Dr Coombes suggested: 'Probably because of the inter-departmental competition, agency views of these browsing animals became polarised around particular political objectives.'[560] The Forest Service was supported by the Forest and Bird Protection Society, while the Tourist and Health Resorts Department was supported by Internal Affairs and the acclimatisation societies. The departments were, as Coombes put it, 'politically motivated to deny the impact of deer on native forests.'[561]

At this time, the Tourist and Health Resorts Department held the whip-hand over the Forest Service because it had statutory control of deer. Ministerial intervention was required for the Forest Service's view to prevail, and it was not forthcoming. In 1929, the Minister of Forests threatened to take control of deer by amending the Forests Act 1921–22 but nothing came of this.[562] Instead, the Tourist and Health Resorts Department and the Forest Service continued to battle each other in the 1920s, each relying on the observations of its field staff or acclimatisation societies or Pakeha visitors to the district. Maori were not consulted. In 1925, for example, Forest Service staff reported that pigs and deer had caused serious 'although as yet not extensive' damage to Waikaremoana forests, and that action should be taken before large areas of forest were affected. A departmental ranger visited the area in response and denied the reports of damage, recommending against increased shooting of deer.[563] From 1923, the Government did agree that the absolute protection of deer should be lifted, but the departments were to work with each acclimatisation society to determine the districts where protection should be lifted.[564] For Te Urewera, of course, the acclimatisation society was in fact the Tourist and Health Resorts Department until 1930, when this responsibility was transferred to Internal Affairs. Within a year, according to Dr Coombes, Internal Affairs had accepted the necessity of culling deer to reduce their number.[565]

558. Donne, *The Game Animals of New Zealand*, p 284 (Coombes, 'Cultural Ecologies 1' (doc A121), p 297)
559. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 150–153
560. Coombes, 'Cultural Ecologies 1' (doc A121), p 295
561. Coombes, 'Cultural Ecologies 1' (doc A121), p 295
562. Coombes, 'Cultural Ecologies 1' (doc A121), pp 211, 311–312
563. Acting Officer in Charge, 'Destruction of Pigs and Deer – Waikaremoana – H Tapper', 6 June 1925 (Coombes, 'Cultural Ecologies 1' (doc A121), p 298)
564. Coombes, 'Cultural Ecologies 1' (doc A121), pp 298–299
565. Coombes, 'Cultural Ecologies 1' (doc A121), pp 313, 315–317

21.7.4(5)

As a result, the Government took no action to control deer in Te Urewera until 1931, some 10 years after the State Forest Service was convinced of the need to do so. It is true that the reports it received up to that point were contradictory, but we find it difficult to believe that the Government did not hear the alarm bells ringing through the conflicting positions taken by the Tourist and Health Resorts Department and the Forest Service. The Minister of Forests might have acted in 1929, as he threatened, but evidently failed to follow through. The speed with which Internal Affairs, the successor to the Tourist and Health Resorts Department in 1930, accepted the necessity for culling seems to point to recognition of a major problem by this time.

The question then becomes, as Crown counsel noted, 'whether the Crown acted promptly once it became aware of the detrimental impacts, and whether the actions it took were effective'.[566] The Crown says that account must be taken of competing environmental priorities nationally (although it provided no details), resource constraints, and the inexact scientific knowledge at various times. The Crown's submission is that its agents acted reasonably in the circumstances.[567] Even so, the Crown conceded that deer control did not begin 'in earnest' in Te Urewera until 1938,[568] which was 16 years after the Forest Service was certain of the need for action.

One way to reduce the deer population was to use private hunters. We have already seen that factors such as the need to pay high licence fees sometimes hampered Maori from hunting legally when and where this was permitted. Encouragement of private hunters for deer control purposes only occurred occasionally before the 1950s. During the 1930s, there was a limited ammunition subsidy for hunters who were landowners.[569] From 1939, safety reasons served as a reason to refuse shooting permits to both Maori and Pakeha hunters when Internal Affairs deer control officers were working, other than for some 'sporting' hunting. The peoples of Te Urewera were not consulted about this, despite overlap between deer control areas and traditional hunting grounds. During the Second World War, because of Crown labour shortages, private hunting of deer, pigs, and wild cattle was permitted. In the early post-war years, almost all such hunting was banned. The few exceptions were not necessarily for the local hunters.[570] This was despite a 1937 Native Department report urging the Government to employ Tuhoe to hunt deer, to provide them with an economic opportunity and to take advantage of their significant hunting skills and knowledge of Te Urewera.[571]

Instead, the Crown's preferred way of controlling damaging exotic species was to use its own hunters and trappers. A small-scale pilot deer control scheme began in the early 1930s

566. Crown counsel, closing submissions (doc N20), topic 29, p 24
567. Crown counsel, closing submissions (doc N20), topic 29, p 24
568. Crown counsel, closing submissions (doc N20), topic 29, pp 25–26
569. Coombes, 'Cultural Ecologies 1' (doc A121), p 320
570. Coombes, 'Cultural Ecologies 1' (doc A121), pp 222–223, 246–247, 326
571. Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 292–293

using Government deer destruction teams, but soon ceased because of financial constraints and labour shortages. Internal Affairs finally began permanent operations in the area in 1938, but these were soon scaled down because of the Second World War. Government culling gained impetus only slowly after the war ended. Dr Coombes argued that even during the 1950s, Government culling operations in the Te Urewera highlands were insufficiently intensive to reduce the deer population appropriately.[572]

Thus, in the period covered by this section of our chapter, the Crown failed to take advantage of an acknowledged opportunity to employ experienced local Maori hunters in the destruction of deer. This could have provided a much-needed boost to the Te Urewera economy from the 1930s to the 1950s, once deer were finally acknowledged as a threat to the forest. It could have provided Maori with both income, and regular access to a very useful food source. It would also have boosted attempts to control and reduce deer, which we can only describe as dilatory and ineffective during this period. By the Crown's own admission, a serious attempt to control deer in Te Urewera did not begin until 1938. This attempt was short-lived. While we accept that there was a labour shortage during the war, local Maori could have been encouraged to cull deer by paid hunting on at least a part-time basis. Deer had returned to their 1938 levels by the end of the war.[573] What this meant was that the Crown did not really begin serious and sustained action against deer in Te Urewera until long after the Forest Service was certain of the serious nature of the threat.

Nonetheless, we must ask the question whether – in a practical sense – the establishment of a large deer population met the spirit of the 1895 agreement by successfully augmenting local Maori food supplies. Officially, of course, it did not because, for much of the period under review, hunting deer for food was either banned (at places and times) or illegal without a licence except for landowners, Maori and Pakeha, on their own land. As Professor Murton pointed out, detailed information is difficult to obtain from archival or published sources for precisely that reason. Because the hunting practices 'were criminalised, the practitioners kept silent about them'.[574] If Carroll did indeed give his support years earlier for the introduction of deer, we doubt this was what he had had in mind.

Kaumatua and kuia told us that venison was an important part of their diet during the period from 1930 to 1954 (and beyond). The Tuawhenua researchers reported that wild game, including deer, which were 'released or gained entry into the Urewera supplanted, to some extent, the traditional dependence on native birds'.[575] In the 1930s, when prosecutions for taking kereru caused a significant change in Maori subsistence hunting, the supply of 'wild pigs and deer' began to be depleted, 'making the meat much harder to obtain'.[576] Maori

572. Coombes, 'Cultural Ecologies 1' (doc A121), pp 293, 305, 314–319, 324–328
573. Coombes, 'Cultural Ecologies 1' (doc A121), p 293
574. Brian Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1708
575. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 233
576. Certifying officer to commissioner of unemployment, 29 January 1935 (Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 275)

communities struggled to survive, even with the addition of venison to the food supplies.[577] Wild pigs and deer were hunted and conserved as part of the people's resources and according to customary controls.[578] For Rua Kenana's community at Maungapohatu, wild cattle and deer were the principal sources of meat.[579]

In respect of the Ruatahuna district in the 1940s, Korotau Tamiana explained to the Tuawhenua researchers that the 'main foods' were 'preserved meat, dried eels, wild pork and venison. Our mother would preserve the venison.'[580] Instead of preserving kereru in its own fat in carved taha, Maori communities were now preserving venison cooked in pork fat in old tins. Survival at Murupara in the 1940s depended on wild venison and pork, fishing for eels and trout, and communal gardening.[581]

By the 1950s, the staples at Ruatahuna were potatoes, venison, and mutton (from the development scheme), supplemented by poultry and 'some kereru'.[582] In the Whirinaki district, too, Ngati Whare were 'dependent on pigs and deer for food'.[583] By the beginning of the 1960s, the Maungapohatu, Ruatahuna, and Waimana communities were described to the commissioner of Crown lands as having 'come to depend on pork and venison'.[584]

Mrs Rangi Paku told us that venison was also a part of the diet at Tuai in the 1940s and 1950s, along with trout, pikopiko, wild pork, puha, eels, and kanga pirau (rotten corn).[585] Des Renata explained that food was 'the main topic of conversation in the community', and the ability to 'grow, catch, and preserve food was the most important subject that was impressed upon me'. Growing up at Waikaremoana in the 1940s, hunting for pigs and deer was 'our livelihood'.[586]

It seems clear, therefore, that the introduction of deer did augment the food supplies of the peoples of Te Urewera in a very significant way, despite the Crown's restrictions on hunting. Under the heading 'survival', Noera Tamiana explained that development scheme farming at Ruatahuna in the 1940s and 1950s had to be supplemented by hunting: his father would go twice a week for pigs and deer, and his mother would fish the river for eels, without which the whanau could not survive.[587] Thus, when outsiders began culling deer in the inquiry district, it seemed that a new threat to the food supply had materialised.[588]

577. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 275
578. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 389
579. Binney, 'Maungapohatu Revisited' (doc A128), p 363
580. Korotau Tamiana, 18 February 2002 (Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 388–389)
581. Sarah Hohua, brief of evidence (doc F32), p 4
582. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 385
583. Douglas Rewi, brief of evidence, September 2004 (doc G37), p 5
584. M C Bollinger to Commissioner of Crown Lands, Hamilton, 11 January 1962 (Campbell, 'Te Urewera National Park, 1952–75' (doc A60), pp 140–141)
585. Rangi Paku, brief of evidence (doc H37), pp 3, 10
586. Desmond Renata, brief of evidence, 22 November 2004 (doc I24), p 6
587. Noera Tamiana, brief of evidence (doc D15), p 5
588. Douglas Rewi, brief of evidence, September 2004 (doc G37), p 5; Gladys Colquhoun, brief of evidence (doc H55), pp 3–4; Campbell, 'Te Urewera National Park 1952–75' (doc A60), p 140

Report of M C Bollinger to the Commissioner of Crown Lands, 1962

In a report to the Hamilton Commissioner of Crown Lands, M C Bollinger described how the Maori communities of Te Urewera had come to depend on venison by the 1950s, and how the move to serious culling of deer as pests was thus seen as a threat to their interests:

> I have drawn the attention of the Forestry Service to the need for better public relations with the Maori residents regarding the deer extermination campaign, and I would like to put the same point to you.
>
> The three families at Maungapohatu, many of the people at Ruatahuna, and the people in the Waimana Valley have come to depend on pork and venison, and the sale of deer skins as part of their livelihood. They see the building of huts [to accommodate professional cullers] as the beginning of a campaign to deprive them of these things, and resent it fiercely. . . . I feel you cannot just ignore the Maori people in this, and while I agree wholeheartedly with the extermination policy regarding deer, I would urge that you make allies of the local folk as far as possible before doing anything to alienate their good will.

Source: M C Bollinger to Commissioner of Crown Lands, Hamilton, 11 January 1962 (S K L Campbell, comp, supporting papers to 'Te Urewera National Park, 1952–75', various dates (doc A60(b)), p 265)

Hutton and Neumann, however, add a note of caution, arguing that the addition of deer to the food supply was of 'dubious value' because, 'while providing an additional source of protein, [it] had devastating effects on the forest ecosystem.'[589] In their view:

> once Maori harvesting rights were curtailed, Maori such as [those of] Te Urewera, who had depended on kereru as a food source, suffered the consequences. The Crown made no attempt to provide an alternative food source specifically to replace kereru (the liberation of deer can hardly be construed as a compensatory measure!)[590]

As we saw in chapter 16, deer certainly became a major threat to the environment of Te Urewera in the second half of the twentieth century. Yet, as Stokes, Milroy, and Melbourne observed, deer were a 'welcome additional source of meat.'[591] Along with horses, pigs, and dogs, deer were 'incorporated into the culture and life style of Te Urewera people' to such an extent that, 'by virtue of time [they] can be included as "traditional" elements of modern

589. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 31
590. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 804
591. Stokes et al, *Te Urewera* (doc A111), p 355

Te Urewera culture'.[592] As we discussed in section 21.3, rules were soon developed for the communities' conservation and use of these wild resources. At Murupara in the 1940s, the produce from deer stalking and pig hunting was shared around the community, which also took a communal approach to the planting and use of gardens.[593] At Ruatahuna in the 1940s and 1950s:

> We did these things to be able to survive. But we were all conservationists. You were still only allowed to shoot what you were able to use, that was roughly not more than 2 deer. With wild pigs, we had a policy that if you caught more than you needed you could mark them, castrate them and let them go to catch next time. We had no storage like a refrigerator anyway. It was frowned upon if you caught more than you needed, or more than you could give away to other families. The old lady was an expert at preserving meat, miti tahu, which we kept in tins for leaner times. All the other families at Ohaua did these things too to survive.[594]

One advantage of deer in this respect was that they were not customarily restricted to particular seasons but could be hunted all year round.[595]

Maori and the Crown faced a dilemma by the 1940s. Recently deprived of all regular use of the native birds which had formed such a staple food, the peoples of Te Urewera came to depend on introduced animals – which then turned out to be very harmful to the forest (and thus even more intolerable in the new national park after 1954). The Crown could have made this dilemma less painful by entrusting the culling of deer to the local peoples, so that at least they obtained some benefit from the systematic reduction of their newest food supply. This places significant importance on the Crown's decision, for much of the period from the 1930s to the 1950s, to pay outsiders to cull deer. Given that the Native Department had urged the employment of Tuhoe for this work, and given that a new centre for deer control was established at Ruatahuna by the end of 1938 (which the Department evidently had difficulty staffing) we have to ask why the government did not act on this advice, and why there is no evidence that any attempt was made to consult with tangata whenua.[596] Witnesses agree that the Crown made little headway in reducing the deer population before 1954, so that we might conclude that the impact of the dilemma was therefore fairly muted before the establishment of the national park. But Tuhoe hunters might well have made a significant difference to the success of the culling programme earlier. We have already dealt with the post-1954 consequences of introducing (and then seeking to eradicate) deer in chapter 16, and the economic opportunity that hunting deer for that purpose provided

592. Stokes et al, *Te Urewera* (doc A111), p 350
593. Sarah Hohua, brief of evidence (doc F32), p 4
594. Korotau Tamiana, brief of evidence (doc D20), p 6
595. James Edward Doherty, brief of evidence (doc D27), p 7
596. Coombes, 'Cultural Ecologies 1' (doc A121), pp 325–326

Maori during the national park era. Tuhoe began to see deer as harmful pests more than as a food source,[597] although venison is still an important part of the diet for some whanau.

(6) *Opossums*

The first confirmed release of opossums in Te Urewera occurred in 1898. The Wellington Acclimatisation Society supplied the animals, Lands and Survey organised their storage, transit, and release, and roadworkers undertook the actual liberation of the animals. James Carroll was involved in making arrangements for this liberation. It is possible that Carroll was motivated by a desire to provide a fur industry to assist the peoples of Te Urewera, but Dr Coombes has not found evidence of consultation with Te Urewera leaders over the introduction.[598] As Sonny Biddle told us, Tuhoe see opossums as 'uninvited pests'.[599] Subsequent confirmed opossum liberations in or near Te Urewera were predominantly the work of the Tourist and Health Resorts Department.[600] As opossums were valued for their fur, not as food, it is difficult to see any way in which the UDNR negotiations could be seen as relevant to – or permission for – these releases.

The colonial secretary had had inquiries made about opossums in Australia a few years before their introduction to Te Urewera, following complaints of opossum damage to orchards. The replies did not indicate a need for serious concern, although the New Zealand situation lacked comparable predators. There was 'no vociferous opposition' to liberating opossums in nineteenth- and early twentieth-century New Zealand.[601] The opposition of orchardists, however, continued. From 1912, protection of opossums was inconsistently removed and reimposed. Internal Affairs officially opposed further liberations from 1915. Subsequently, the Forest and Bird Protection Society, the New Zealand Fruitgrowers' Federation, the Auckland Institute and Museum, the New Zealand Horticultural Society, the New Zealand Forestry League, and the Royal Society of New Zealand criticised opossums as environmentally harmful. Some acclimatisation societies, however, wanted them protected. They were seen as a source of fur and employment for trappers.[602]

The Government departments involved were slow to adopt a whole-hearted and consistent opposition to the opossum. The Forest Service long concurred with the view of Dr Leonard Cockayne, a key departmental scientist, that opossums did negligible damage to forests. After the Internal Affairs Department called for research, Professor H B Kirk undertook it through the New Zealand Institute. His results were generally favourable towards

597. Korotau Basil Tamiana, brief of evidence, 21 June 2004 (doc E11), p 3; Jack Te Piki Hemi Kanuehi Te Waara, brief of evidence, 21 June 2004 (doc E23(a)), pp 2, 4
598. Coombes, 'Cultural Ecologies 1' (doc A121), pp 86–88
599. Te Kiato Sonny Biddle, brief of evidence, 10 December 2003 (doc B25), p 2
600. Coombes, 'Cultural Ecologies 1' (doc A121), pp 86–88
601. Coombes, 'Cultural Ecologies 1' (doc A121), pp 85–86; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 796
602. Coombes, 'Cultural Ecologies 1' (doc A121), pp 124–128, 299–300, 302

the opossum. This seems to have made more impression on Internal Affairs than his one reservation, which related to the effect of the opossum as a competitor with some indigenous birds. He therefore recommended that opossums be exterminated from bird sanctuaries. The department relied on his studies as support for its opposition to further opossum importations, but did not see them as justifying a policy of reducing opossum numbers.[603] Kirk's recommendation, if applied to the Waikaremoana sanctuary, might have produced useful reductions in the opossum population in Te Urewera. Nevertheless, given the positions of Kirk and Cockayne, it is understandable, if highly regrettable in hindsight, that the Crown did not take large-scale decisive action earlier against the opossum.

Instead, open seasons on opossums under the Animals Protection and Game Act 1921–22 were declared only erratically in the 1920s and 1930s, although more consistently after 1933. It was only in the 1940s that a full interdepartmental consensus appeared on the need for firm action against opossums, over and above fostering the fur industry that had led to the trapping of some opossums in the area. Government deer destruction teams gave some attention to opossum control from 1940, but on a very small scale. Protection for opossums was not completely removed until 1947.[604] During the 1950s, an opossum bounty scheme operated. It was more successful in remote areas because skins did not have to be recovered, but Maori participation was hampered by a lack of publicity and the preference given to full-time trappers. The scheme ceased in 1961, partly for financial reasons, but also because Internal Affairs and Forest Service scientists considered that the primary way to control opossums was to control the deer population. This turned out to be fallacious, and demonstrates how insufficient attention to research related to management and control of introduced fauna has caused significant problems in Te Urewera.[605]

(7) *Other introduced food sources*

Trout, deer, and opossums were the most significant acclimatisations that took place in Te Urewera in the late nineteenth and early twentieth centuries. There were, however, some others. Seddon's memorandum also mentioned the possible introduction of 'English birds'. Birds, however, were only introduced on a minor scale, and we lack evidence that they supplemented Maori food supplies to any appreciable degree.[606] James Cowan stated that Maori initially welcomed the arrival of the flock of goats delivered by Carroll around 1905 as a source of fibre and food, but were later suspicious about these.[607] Goats, a less significant

603. Coombes, 'Cultural Ecologies 1' (doc A121), pp 300–302
604. Coombes, 'Cultural Ecologies 1' (doc A121), pp 302–310
605. Coombes, 'Cultural Ecologies 1' (doc A121), pp 331–336; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 798
606. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 66; Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 144
607. J Cowan, 'The Illustrious Goats of Ruatoki: A Story of the Urewera Tribe', pp 74, 76, 80 (Coombes, 'Cultural Ecologies 1' (doc A121), pp 76–77)

introduction, had 'staunch supporters and staunch opponents' in Te Urewera.[608] There is a good deal of evidence about Maori food supplies in the crucial period when consumption of kereru declined (the 1930s onwards), some of it from kaumatua and kuia who gave evidence in our inquiry. None of the evidence refers to goat meat as part of the food supply. It is, therefore, unlikely that either introduced birds or wild goats supplemented Maori food supplies in a significant way.

(8) ***What was the impact of introduced species?***

One type of impact that Crown control and management of exotic species has had on the peoples of Te Urewera is indirect, although very significant. This is the damage that has been inflicted on forests and on fauna in the forests and waterways by the various introduced animals. Introduced mammals have reduced the forest biomass and forest biodiversity. Deer are more markedly present in the upland parts of the inquiry district, while opossums are spread more widely in the forests of Te Urewera. Both deer and opossums, however, have affected a large number of species through their browsing, while deer have done further damage by antler rubbing and bark-chewing. Deer also spread ragwort seeds. Some plant species have been affected more than others, and this has changed the pattern of prevalence of species. Other introduced species that have done some damage to Te Urewera forests are goats, pigs, and cattle.[609]

The activities of all these animals have adversely affected the habitat and food sources of indigenous birds. Furthermore, opossums sometimes eat eggs, nestlings, and adults from a range of bird species, including kiwi, fantail, kokako, and kahu.[610] Cats and (European) rats eat indigenous birds. Stoats, weasels, and ferrets also eat indigenous birds, chicks in nests, and eggs.[611] Trout have caused great damage to indigenous fisheries, as the Crown has conceded (see above).[612]

The need to keep forest cover to prevent erosion and flooding downstream has been presented to Te Urewera communities for many years as an important reason to curtail their rights to remove headwater forest (see chapter 18). While there is some debate as to the extent to which habitat changes caused by introduced browsing mammals have contributed to the development of severe erosion, there is much less debate that the activities of browsing animals accelerate erosion, and prolong it by delaying the recovery of the forest cover.[613]

608. Brad Coombes, under cross-examination by counsel for Nga Rauru o Nga Potiki, 2 December 2004, Rangiahua Marae (transcript 4.12, pp 235–236)
609. Walzl, 'Waikaremoana' (doc A73), p 279; Coombes, 'Cultural Ecologies 1' (doc A121), pp 11, 284–289, 296, 312, 315–316, 328
610. Coombes, 'Cultural Ecologies 1' (doc A121), p 285
611. Coombes, 'Cultural Ecologies 1' (doc A121), pp 11, 235, 265, 292
612. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 146
613. Coombes, 'Cultural Ecologies 1' (doc A121), pp 285–289

21.7.5

This range of effects of introduced animals over many decades has effectively reduced the population of various indigenous birds and fish, making it more difficult for the peoples of Te Urewera to access them. The introduction of legislation designed to foster the interests of Pakeha sportspeople, tourists, and those committed to conservation in the form of absolute preservation has created further difficulties for the peoples of Te Urewera. Not only have they been deprived of significant sources of food and materials for arts such as weaving, they have also lost access to species needed to provide prized foods to honour manuhiri in the traditional way, and to the knowledge that goes with customary harvesting.

21.7.5 Did the Crown honour the 1895 agreement?

(1) *Did the Crown give effect to the 'ecological logic' of the 1895 agreement?*

Having assessed the evidence and issues in respect of native and introduced species, we are now in a position to determine whether the Crown honoured the 1895 agreement.

As Dr Coombes set out in his evidence, there was an 'ecological logic' to the 1895 agreement. The Crown promised that the forests and birds of Te Urewera peoples would be'suitably protected'[614], and recognised 'their rights to taking game [native birds] for food.'[615] The form of protection was to be a self-governing Maori reserve, set aside and protected by an Act of Parliament. Powers of local self-government were to be exercised by hapu committees, with a General Committee to determine matters for the Reserve at a central level, and to act as an organ for dialogue with the Government. At the same time, the Crown undertook to augment the food supplies of the peoples of Te Urewera. As part of this general undertaking, it was understood that English birds and fish would be introduced to the Reserve, but the only specific undertaking was to provide trout for the peoples of Te Urewera to release and manage.

In respect of the forests and the birds, the Crown acknowledged Maori possession of both, and promised to protect both. That, in our view, was appropriate. To the peoples of Te Urewera, the forest was a living forest, the world that Tane Mahuta created, with its trees, insects, birds, and animals, each with its own mauri. Their old people were responsible for protecting the forest, for managing it in accordance with tikanga, based on the kaitiakitanga relationship. Just as rivers sustained their fisheries, so the forests sustained their birds. The Crown's undertaking to protect the customary laws and practices of the Reserve's peoples in relation to the forest and its birds was also appropriate. It included the right to continue taking birds for food. Nationally, the Crown became determined to carry out two mutually exclusive policies: the clearance of as much land as possible for farming, no matter how

614. See Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, second schedule.

615. J Carroll, margin comments on T Donne to Minister, Tourist Department, 15 September 1902 (Coombes, 'Cultural Ecologies 1' (doc A121), p 68)

marginal; and the preservation of (almost) all native bird species. Unwilling or unable to stop deforestation, the Crown's chosen policy was to restrict and finally ban the hunting of native birds instead. Nonetheless, for a quarter of a century (from 1895 to 1921), the law gave the Government discretion to allow Maori to hunt kereru in Te Urewera and other 'native districts'. Although this discretion was available in theory, it was seldom exercised (and never after 1911).

It is simply impossible for us to judge retrospectively whether or how seriously the native bird populations were declining in Te Urewera before 1954, or whether Maori hunting for food was a factor in any decline. We noted that the Government had other alternatives available to it for the preservation of native birds:

- strategic forest reserves to preserve a minimum of the habitat necessary for native birds;
- reservation of more berry-bearing trees in State forests, which the Wildlife Branch believed was feasible; and
- continuing to ban Pakeha sport but allowing Maori harvests in districts where it was shown to be sustainable (which was officially the policy until 1922).

It is difficult for us to sympathise today with the Crown's choice to ban all hunting, when the governments of the day clearly knew that destruction of habitat was the primary cause of the decline of native birds. We noted earlier the fatalistic position of the Internal Affairs Minister in 1917, that birds should be preserved in the meantime until all their forest habitat was gone. Not only did the Crown not halt deforestation, it actively promoted it, even where land was marginal for farming at best. Only the prospect of catastrophic erosion and flooding saved the Te Urewera forests from clearance. Further, the Crown's criminalising of such a culturally important product as huahua (from 1903 to 1910) and of customary trapping methods shows how little real influence Maori were able to wield in Parliament. Neither of these things had really been the target of the legislation concerned, yet Maori were unable to reverse the prohibition on huahua until 1910, ironically the year before the final legal harvest of kereru was permitted in Te Urewera. The Crown was careless of or indifferent to Maori interests in their native birds and traditional foods, even when its intention had been to retain the discretion to allow cultural harvests in Te Urewera.

In one sense, it could be argued that the Crown's restriction and then absolute prohibition of hunting was a response to Te Urewera leaders' request that their birds be 'suitably protected', if it saved the birds from extinction. Similarly, the decision in the 1930s to preserve Te Urewera forests for soil and water conservation, even though it was mainly to protect lower lying farmland, offered a form of protection. There is some truth to this perspective. As we have said, there is no way for us to judge the sustainability of harvesting in Te Urewera at the time.

Banning Pakeha hunting of native birds was certainly consistent with the 1895 agreement, since it did not seriously interfere with the promised tourism. But the peoples of Te Urewera,

with their intimate knowledge of the district and its bird life, did not believe that their own hunting – strictly controlled by customary law – was a threat to kereru or other species. Customary law, moreover, provided for rapid local response to changing situations, such as a bad season. They sought exemptions, as allowed by the law, but were denied them after 1911 because the Department of Internal Affairs adopted a blanket approach of refusing all exemptions. From 1922, the whole system of exemptions was abolished and all harvesting of kereru, kaka, and pukeko was criminalised. All of the changes to the law – banning the making and storage of huahua, banning traditional trapping methods, and finally banning hunting altogether – were enacted without consultation with Maori generally, let alone with Te Urewera leaders. This was especially important when the specific Te Urewera exemption was removed from the Animals Protection Acts in 1922, without either the consultation of or the agreement of the peoples of Te Urewera.

Thus, without consultation or agreement, the Crown abolished a right that it had acknowledged and promised to protect in 1895–1896; the right of the peoples of Te Urewera to take native birds for food, in accordance with their customary law and within their protected Native Reserve. Carroll had reminded his colleagues of this acknowledged right and the need to respect it in 1902 (though without actually taking effective action to do so in the Waikaremoana game reserve). By 1922, however, Carroll was no longer in office, the UDNR had been destroyed by Crown purchasing of individual interests, and the Government was planning a mass clearance of forest (and birds) in Te Urewera for pastoral farming. The year 1922, with its repeal of the UDNR Act, represented a nadir in Crown–Maori relations in the former Native Reserve.

In 1902, Carroll had couched his objection to restricting Maori hunting rights in the following terms:

> one of the conditions upon which the Urewera Reserves Act was passed was that we should augment their food supply and not exclude it from them. They will claim their rights to kill game for food.[616]

A key issue, therefore, is whether the Crown kept this 'condition' of the 1895 agreement. The condition as stated by Carroll had two parts. Clearly, as we have just shown, the Crown failed to keep the second part; that the Government would 'not exclude it [their food supply] from them'. Arguably, the Crown's justification for this by the 1920s – the preservation of native birds from extinction – would have carried more weight if the Crown had also done more to reserve strategic forest habitats (and miro trees within forests) from destruction. As we have seen, it did not do so in the State forests which dominated some of the Te Urewera rim blocks before 1954. But it did abandon plans to clear 370,000 acres of UDNR forest, which would have had an incredibly destructive effect on the native birds

616. Native Minister, minute on memorandum of 15 September 1902 to Minister of Tourist and Health Resorts (Walzl, 'Waikaremoana' (doc A73), p 102)

of the district. At the same time, as we discussed in chapter 18, the Crown tried very hard before 1954 to prevent the peoples of Te Urewera from clearing their own, scattered pieces of land for farming or exotic forestry, so as to protect Lake Waikaremoana and Bay of Plenty farmlands.

Thus, the peoples of Te Urewera continued to live in a forest environment, despite the purchase of so much land by the Crown. As Rose Pere observed, this was very important to them:

> A conservationist at heart, I am very grateful that the Urewera bush, the ancestral home of the Tuhoe people, is still intact. The bush clad ranges, the mist, the smell of the undergrowth, the company of birds and insects, Panekire – the majestic bluff that stands sentinel over the tranquil or sometimes turbulent waters of Waikaremoana – all give me a strong sense of identity and purpose to life.[617]

The next question is whether the Crown acted as promised to keep the first part of the condition as stated by Carroll above. Did it augment the food supply of the peoples of Te Urewera, and provide them with new or increased sources of food in their forests? This would have been expected under the agreement, even if the Crown had not acted to criminalise the use of an important food (native birds) and thus actively *decreased* the food supply.

As we have seen, goats were the only animals introduced by the Crown solely for the purpose of augmenting Maori food supplies. From the evidence available to us, which included the oral evidence of kaumatua and kuia who grew up in Te Urewera from the 1920s to the 1950s, goats did not figure as a food source. Trout and deer were introduced with the dual purpose of sport/tourism and to augment the food supply. As we have seen, *legal* access to these species was quite restricted but they were extensively taken for food regardless. Deer was probably the most important in terms of staples (as well as pigs, which were established in Te Urewera many decades earlier), but there is evidence to show that trout was a significant source of food as well. Both of these new food species came with drawbacks. As discussed, trout had the most negative effect on Maori food supplies. These exotic fish reduced the supply of native fish. Even tuna, the most vital indigenous fish for consumption and for feeding manuhiri, were affected once the Crown began culling them in the 1950s to protect trout.

Nonetheless, the Crown's introduction of deer and trout did provide new food sources, as promised. Without 'liv[ing] off the land' in the 1940s, Sarah Hohua told us, namely without access to wild pork, venison, tuna, and trout, 'we would starve'.[618] By the time of the Second World War, when native birds could no longer be utilised as an important food source,

617. Rangimarie Rose Pere, 'Taku Taha Maori: My Maoriness', in *He Matapuna – A Source: Some Maori Perspectives* (Wellington: New Zealand Planning Council, 1979), pp 23–25 (Ngahuia Te Awekotuku and Linda Waimarie Nikora, 'Nga Taonga o Te Urewera', August 2003 (doc B6), p 24)

618. Sarah Hohua, brief of evidence (doc F32), p 4

introduced species had come to dominate forest hunting. Plant foods were still gathered, and maara kai (gardens) provided the other staple food, the potato.[619]

The only other direct Government assistance in respect of food supplies was the farm development schemes, which we described in chapter 18. These did not really get underway until the 1930s, long after the 1895 agreement. They provided much-needed income for communities during their establishment phase before the Second World War, and for unit occupiers after that. Development scheme loans had to be repaid, of course, and the income was not enough for unit occupiers to farm fulltime (see chapter 18). Korotau Tamiana farmed with his father at Ohaua, near Ruatahuna, during the 1940s and 1950s. He explained:

> Living at Ohaua was hard but we never starved. Mum and Dad were good providers, they taught you the basics of survival as soon as you could walk. Food was the basis of survival. We had to hunt to survive. We would go eeling and hunt pigs and deer. We also had the berries of the bush and kotukutuku (cherry laurel) trees growing there, and our fruit trees. We also raised pigs for our own use, as did others at Ohaua.[620]

The farm schemes did occasionally provide mutton and beef for consumption but this source of meat was never anywhere near as important as wild pork and venison. When there was income from part-time farming, seasonal work outside the rohe, and early forestry work, it was spent on tea, flour, and other provisions. Flour became a staple (when it could be obtained) and was used for making bread and damper. It was not until the second half of the twentieth century, however, that store-bought food became the main component of the diet of Maori communities in Te Urewera.

As we discussed earlier, the value of the introduced food species has been seen as 'dubious' because of their environmental impacts on the forests and waterways of Te Urewera. Also, it is impossible to determine the extent to which a species like trout increased food supplies overall, given its reduction of native fisheries. The importance of adding deer as a food source, however, is beyond dispute. If deer had been introduced without banning access to native birds, it would certainly have augmented the food supply overall. As it was, the timing was fortuitous. Deer populations increased in the 1920s to the point where venison could help fill the gap once hunting of native birds was greatly reduced in practice from the 1930s. Quantification is impossible, of course, but there was still hunger and poverty in Te Urewera by 1950. It is not clear whether the addition of venison and trout, with the subtraction of native birds and of some indigenous fish, increased the food supply overall. It is impossible to be certain. One worrying aspect was that Maori at Maungapohatu, Ruatahuna and in the Waimana Valley had 'come to depend on pork and venison' and the sale of deer skins, by the early 1960s, as a report to the Commissioner of Crown Lands at

619. Sarah Hohua, brief of evidence (doc F32), p 4
620. Korotau Tamiana, brief of evidence (doc D20), p 6

Hamilton stated,[621] and these very food sources were themselves about to come under serious attack after the establishment of the national park.

This brings us to an important, related issue: how these species were managed, and who made the decisions about them.

As we found in chapter 13, the Crown failed to give effect to its promise of tribal self-government in the UDNR. In respect of the 'mainstream' laws that governed wildlife, the Crown conceded in our inquiry that Seddon may have intended the General Committee to have 'some role within the Reserve in terms of implementing mainstream legislation, but this was not developed further'.[622] The failure to establish the General Committee in a timely or effective fashion dealt a serious blow to the ability of the peoples of Te Urewera to establish formal licensing arrangements for indigenous or introduced species, or to negotiate with the Government about birding restrictions and other vital matters. As a result, there was no institutional structure to bridge the two systems of law that now operated in the Reserve. The two systems continued side by side, occasionally intersecting – usually in the prosecution of 'poachers' in the courts, which began in the 1930s.

As we have seen, the Crown criminalised all hunting of kereru from 1912 onwards but did not really attempt to enforce its law in Te Urewera until 1931. Up until that time, the customary system of hunting seems to have continued, relying on its traditional mechanisms to conserve the bird resource. In 1932, Te Urewera leaders protested the Crown's law by way of petitions, without success. The option of handing over the management of kereru to Te Urewera leaders for sustainable harvest was raised again after 1922 but not seriously considered by the Crown.

Introduced species were incorporated in the customary economy, and the peoples of Te Urewera managed their own use of these species according to traditional conservation methods, adapted to the new circumstances. Before the establishment of the national park, the Crown did not regulate the hunting of wild pigs. Others' use of deer and trout was managed by the Crown's rules for sport and tourism, involving payment for hunting and fishing licences. Legally, these same rules applied to the peoples of Te Urewera, but the law seems to have been irregularly enforced before the establishment of the national park. Outside of the game reserves, once deer were no longer protected Maori communities could hunt deer on their own lands without a licence. In essence, the peoples of Te Urewera managed their own use of the introduced species with infrequent interference from the Crown, but this system came under serious threat once the national park was established in 1954.

621. MC Bollinger to Commissioner of Crown Lands, Hamilton, 11 January 1962 (Campbell, 'Te Urewera National Park 1952–75' (doc A60), p140)
622. Crown counsel, closing submissions (doc N20), topic 29, p10

21.7.5(2)

(2) *What was the impact of the Crown's failure to honour the 1895 agreement?*

In his evidence for the claimants, Professor Murton introduced the concept of 'biological poverty', which relates to 'the nutritional requirements of survival and work efficiency, and which involves absolute deprivation, starvation, hunger and related diseases'.[623] The most direct cause of this form of poverty was the denial of access to biological resources, which was one effect of 'legislatively curtailing Tuhoe access to indigenous birds'. Hunting was a matter of survival at the time, and birds were a significant food.[624]

In chapter 23, we will explore the socio-economic conditions of the peoples of Te Urewera in this period, and examine the causes and effects of their poverty. Here, we note that the Crown directly deprived the peoples of Te Urewera of a prized and important food in the national interest, and without agreement or compensation. The full effects were delayed until after 1930, when the Crown began to enforce the Animals Protection and Game Act 1921–22. This had the effect of drastically reducing the role that native birds played in Maori communities' food supplies. While some birds continued to be taken for important cultural events, this was relatively small in scale.

The introduction of trout did not help matters much because it reduced supplies of native fish species. Fortunately, deer were present in sufficient numbers to become a new staple in the 1930s to 1950s, alongside wild pork, tuna, and potatoes. But survival, we were told, and the staving off of starvation, now depended on species which harmed the biodiversity of Te Urewera. These very species were about to come under serious attack as pests after the establishment of the national park in 1954. This was an invidious situation for the peoples of Te Urewera.

The Crown's actions had mixed effects on the conservation of native birds, which both parties agreed was a vital object. Legislation brought an end to commercial hunting and the shooting of birds by outsiders (to the extent that outside poachers did not defy the law). In our view, this ban on hunting must have helped preserve these highly valuable indigenous species although, as we have said, we lack specific evidence as to whether cultural harvesting was sustainable in Te Urewera in the period under review. We note, however, that it continued until the 1930s without obvious ill effects. In 1935, for example, Galvin and Dun had reported that kereru were still 'numerous' in Te Urewera.[625] Other evidence supports their observations.

Where the Crown failed most, perhaps, in respect of native birds, was its refusal to accept evidence that opossums, stoats, and other introduced animals were a significant threat to native birds and their habitat, or take timely action against them. We came to the conclusion that, though very regrettable, there was sufficient doubt among the experts to explain

623. Murton, summary of evidence (doc J1), p 2

624. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 866–873

625. Galvin and Dun, 'Report by Officers of the Lands & Survey Department and the State Forest Service, on the Urewera Forest', 29 April 1935 (Hutton and Neumann, comps, supporting papers to 'Ngati Whare and the Crown, 1880–1999' (doc A28(a)), p 15)

some of the delays that occurred. In the case of stoats and deer, this is harder to accept. There was plenty of settler opposition before the fact to the introduction of mustelids to New Zealand, on the grounds of the damage they would inflict on native birds. There were plenty of settler complaints in the years immediately following their release, about the damage that had been inflicted. And there was enough evidence in the case of deer- even if it was not unanimously accepted by departments- that the Government should have been considerably more active in embarking on pre-emptive measures to limit their population spread. Dr Coombes conceded that opossums and possibly deer would have colonised Te Urewera if the Crown had not introduced them (or facilitated their introduction). But, he said, it would have been significantly later and with 'effects which may have been more manageable'.[626]

Overall, the effect of the Crown's actions was to deprive the peoples of Te Urewera of a significant food at a time when Maori communities throughout the district were struggling to survive. Poverty and hunger were exacerbated, and cultural survival (in terms of customary practices and knowledge) put at risk. The new food sources supplied by the Crown were of doubtful utility, certainly from a long-term perspective. Trout reduced indigenous fish supplies. Deer became a new and much-needed staple but did great damage to the forest.

We need to consider the post-1954 situation briefly in order to assess the degree of prejudice. By the time the national park was established in 1954, Maori communities were known to have become dependent on introduced 'pests' for food, especially deer and wild pigs. The reoriented customary economy thus came under a new and significant threat while the people were still adjusting to the prohibition on hunting of native birds.

We addressed the post-1954 situation in the national park in chapter 16, and we consider the socio-economic position further in chapter 23. We note here that, from the evidence of Professor Murton, the 'food crises' of the 'late nineteenth century and first half of the twentieth century', in which 'many people suffered from under-nutrition and malnutrition, at times even starvation', were not repeated in the second half of the twentieth century. Forestry employment, the welfare state and other factors meant that less food needed to be grown, hunted, or gathered. According to Professor Murton, the dependence on wild foods was replaced to a significant extent by store-bought food.[627] This is important context for our findings below. The Crown's introduction of deer thus proved a well-timed buffer for food supplies in the crucial decades of the 1930s to the 1950s, before the serious culling of deer commenced and the Maori dependence on wild foods coincidentally declined. We cannot, however, avoid the conclusion that, purely from a point of view of survival, the peoples of Te Urewera would have fared better in those decades if they had had venison *as well as*, not *instead of*, kereru and other birds to rely on.

626. Brad Coombes, responses to questions in writing from Crown counsel, not dated (doc 136), p 2
627. Murton, summary of evidence (doc J1), p 46

21.7.6 Post-script: should cultural harvesting of kereru be decriminalised?

(1) *Introduction*

In chapter 16, we addressed matters particular to Te Urewera National Park, as governed by the National Parks Act. At the time of writing, cultural harvesting was permitted in Te Urewera National Park under that legislation, at the Crown's discretion, provided that the plants or animals were not protected under other legislation and the demands were not 'excessive'. We did not consider the cultural harvesting of kereru, which is prohibited under a different Act altogether, the Wildlife Act 1953. There was no discretion to permit cultural harvesting in the national park (or anywhere else). In their submissions to us, the claimants pointed to the alternative arrangements adopted in the South Island for titi, and argued that the time had come to re-examine the necessity of the absolute prohibition on the hunting of kereru in Te Urewera. The Crown, however, argued that current kereru populations were not strong enough to permit the resumption of harvesting at this stage.

(2) *The claimants' position*

In the claimants' view, 'the Crown's failure to recognise Tuhoe's right to cultural harvests is inconsistent with the Treaty guarantees contained [in] Article 2.'[628] Counsel for Wai 36 Tuhoe submitted that the Crown's sovereignty is not absolute but is qualified by the requirement for it to protect the rights guaranteed in Article 2. The Crown may only breach those rights where:

- the action is 'taken in exceptional circumstances and as a last resort in the National interest';
- the Crown has first consulted Tuhoe to ensure that their interests are not harmed more than is absolutely necessary to protect the resource.[629]

In the claimants' view, this test cannot be met simply because a proposed Crown action is in the public interest, or is justified by 'reasons of convenience or economy'.[630]

The Crown, they said, has provided no evidence that the prohibition on the harvesting of kereru meets this Treaty test. Rather, the DOC witnesses conceded that the Crown 'has no current data on kereru numbers within Te Urewera', but, on the basis of DOC's observations, a harvest of one bird per year could be sustained 'without adverse effect'.[631] In claimant counsel's submissions, this means that the Crown itself accepts that an absolute prohibition is no longer required in principle, even if (in the absence of research data) DOC believes that the size of the harvest would be very small. In addition, there has been no consultation with Tuhoe on this matter.

628. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 198
629. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 198–199
630. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 199
631. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 199

Counsel concluded that the Crown now needs to re-evaluate both its current position and its past behaviour:

> The Crown has not presented any biological evidence that justifies the continuation of any interference with Tuhoe's cultural harvests within Te Urewera. The Crown's failure to consult Tuhoe in respect of absolute prohibition as a conservation measure is a continuing one; Tuhoe continue to be denied the opportunity to identify less 'extreme' approaches to conservation that may have preserved both the natural resources of Te Urewera and Tuhoe's tino rangatiratanga.[632]

(3) *The Crown's position*

The Crown interpreted the evidence of the DOC witnesses quite differently. In the Crown's view, the absolute prohibition on harvesting was still appropriate for Te Urewera. Crown counsel pointed to three pieces of evidence in support of this proposition:

- The New Zealand Conservation Authority's review of the issue in the mid-1990s, which concluded that kereru populations were not strong enough to allow for cultural harvesting;
- Mr Williamson's confirmation of this point under cross-examination; and
- Dr Coombes' research, which showed that Maori spokespeople interviewed by him 'recognised this [point] to some extent'.[633]

The Crown concluded that it would be in breach of its obligation to 'conserve natural resources in the interests of all New Zealanders', and of its duty to actively protect the natural resources important to the peoples of Te Urewera, if it allowed cultural harvesting to resume. In respect of consultation, the Crown submitted: 'If matters change, Urewera Maori will clearly be amongst those consulted', as having a greater interest than that of the general public.[634]

In respect of *how* matters might change, Crown counsel submitted:

> The Crown is required to manage natural resources in the national interest, and must achieve a balance between use and preservation. If information and evidence indicates that sustainable use of specific resources is justifiable, the Crown may review its current policies. Kereru and other birds remain endangered, and no change is envisaged in the short term.[635]

632. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 199
633. Crown counsel, closing submissions (doc N20), topic 29, p 17
634. Crown counsel, closing submissions (doc N20), topic 29, p 17
635. Crown counsel, closing submissions (doc N20), topic 40, p 13

21.7.6(4)

(4) *The claimants' reply to the Crown*

In reply submissions, counsel for Wai 36 Tuhoe disagreed with the Crown's evidence that the kereru population in Te Urewera was not strong enough to allow cultural harvesting. In respect of the New Zealand Conservation Authority's 1997 report, counsel submits that:

- The report is not on the Record of Inquiry and so the Tribunal should attach little weight to it, as there has been no opportunity to cross-examine the authors of 'the major evidential plank in the Crown's argument for the current prohibitions';
- The review is an interim report and discussion paper, not a final report or a 'statement of any fixed or final position of the NZCA on this issue';
- The review is based on a starting assumption that there is a continuing decline of indigenous birds, but no empirical evidence is provided, nor is this assumption tested;
- No empirical evidence is actually provided in support of the conclusion that there is no prospect of sustainable use for the foreseeable future;
- The review 'is essentially a discussion of contemporary views in respect of customary harvests and is not evidence of kereru populations in Te Urewera or elsewhere.'[636]

Further, DOC witnesses conceded they had no current data on kereru populations within Te Urewera, and that there was no specific programme in place for the protection of kereru. From that evidence, counsel suggested that this 'lack of specific focus on kereru is strong evidence that populations (within Te Urewera) are no longer in decline.'[637]

(5) *Our view of the matter*

As we see it, neither party had empirical evidence at the time of our hearings as to whether a cultural harvest of kereru was sustainable in Te Urewera. Nonetheless, the parties were not actually far apart at all in theory, regardless of how great the gulf may have been in practice.

The Crown conceded that the absolute prohibition on cultural harvests was not an end in itself; rather, it was the approach necessary at the time to balance use and preservation of the taonga. But the Crown also conceded that: 'If information and evidence indicates that sustainable use of specific resources is justifiable, the Crown may review its current policies.' The claimants did not have such 'information and evidence' to hand in 2005, and neither did the Crown. We accept the claimants' submissions that the Crown lacked empirical data about the size of kereru populations in Te Urewera, whether those populations were in decline, and whether the populations were viable enough to sustain a cultural harvest (either small or large). DOC did not have that information, and nor did the Conservation Authority when it reviewed the issue in the mid-1990s. In the absence of such information, neither the claimants nor the Crown could be sure whether any kind or degree of cultural harvesting was sustainable.

636. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 36–37
637. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 37

It seems to us that obtaining the 'information and evidence' required by the Crown before it could review its policies was the obvious first step to making an informed decision. Without taking that step, in consultation with the peoples of Te Urewera, the Crown cannot be said to have made an informed decision to maintain its absolute prohibition of cultural harvesting in Te Urewera.

21.8 Treaty Analysis, Findings, and Recommendation

21.8.1 The UDNR agreement

The 1895–96 UDNR agreement was no ordinary agreement. As we found in chapter 9, the negotiation of this agreement marked the true beginning of the Treaty relationship between the Crown and the peoples of Te Urewera, and was the point from which *each* partner owed Treaty duties to the other. Previously, the Treaty had taken effect from 1840 as a unilateral set of promises, binding on the Crown.

In 1895, the Crown and Maori agreed that the forests and birds of Te Urewera would be 'suitably protected'. But the form of protection agreed upon – a Maori-controlled reserve – was undermined and then destroyed by the Crown, which ultimately replaced it with a Pakeha-controlled park. This outcome was not consistent with any of the principles of the Treaty of Waitangi.

In particular, the promise of Maori self-government within the Reserve was broken. The ability of the peoples of Te Urewera to protect their lands, waterways, and resources was drastically undermined. The right to take game for food (especially kereru), which was recognised in the 1895 agreement, was outlawed. The undertaking to augment Maori food supplies was only partly fulfilled. The understanding that Maori would have access to and manage new food species, beginning with exotic fish and birds, was neither fleshed out nor given proper effect. More generally, Maori law and authority in the governance of natural resources in the Reserve, and of its forest environment, was suppressed by that of the Crown. This was a bitter sequel to the promises of 1895.

We turn next to our more specific findings.

21.8.2 Cultural harvest of kereru

(1) *Was there a Treaty right?*

As we have seen, Maori generally (including Te Urewera leaders) asserted their Treaty right to hunt kereru for food and to meet cultural obligations. The Crown gradually imposed legislative restrictions on this right from 1895 to 1922, when the right was outlawed altogether. Concerned that a Treaty defence might succeed in court, acclimatisation societies and the

21.8.2(1)

Internal Affairs Department sought a legal opinion from the Crown Law Office in 1917 as to the applicability of the Treaty of Waitangi. As discussed earlier, the Crown's lawyer argued that:

- the Animals Protection Act prevailed over the Treaty;
- a Treaty right had no force unless it was embodied in statute;
- the Animals Protection Act did not differentiate between Maori and Pakeha (and all were bound by it); and,
- in any case, the Treaty did not mention birds or hunting (unlike fisheries).

To this advice, Internal Affairs added its own interpretation that the 'Treaty of Waitangi has been modified by acts passed by Parliament in which there are representatives of the Maoris', and that 'the Animals Protection Act 1907 makes no distinction between Europeans and Maoris'.[638] Governments relied explicitly on this position (and the legal opinion) to justify their ban on the cultural harvesting of kereru from the 1910s through to at least the 1930s.

We find the Crown Law Office's opinion in 1917 problematic for a number of reasons.

First, the animals protection laws acknowledged Maori and non-Maori as having different needs and interests until 1922, which meant that Maori rights could be protected and given effect under the exemption for Te Urewera and other 'native districts'. We do not think it is correct, therefore, to argue that all were treated equally and fairly once the exemption was removed and the law made no more distinctions between Pakeha and Maori. Nor was it fair to suggest that no Treaty breach could arise given this apparently equal treatment of both peoples.

Secondly, a Treaty right is binding on the honour of the Crown, regardless of whether it is embodied in statute. To rely on the fact that the Crown had not legislated to protect the right, as a reason for disregarding that very right, was hardly consistent with the honour of the Crown.

On the question of whether a Treaty right did in fact exist, the Crown in 1917 relied solely on the English text of article 2, and considered that bird hunting was not included in the 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties'. We cannot agree. Hunting for birds in their forests was a Maori customary right, akin to a property right, and its centrality to the Maori way of life was well known at the time the Treaty was made. Hunting was controlled by hapu as exclusively as rights to fishing or other resources in a tribal territory, and was a vital component of the forest resource that Maori possessed in 1840. The Treaty guarantee of possession of their forests must have included all those creatures within it – unless the forests were to fall silent, deprived of their communities of birds and insects whose habitat they provided. It must have included

638. H Pollen, Internal Affairs Department, memorandum, 13 June 1908, attached to Hapareta Rore Pukekohatu to James Carroll, Native Minister, 16 May 1908 (James W Feldman, comp, supporting papers to 'Treaty Rights and Pigeon Poaching: Alienation of Maori Access to Kereru, 1864–1960', various dates (Wai 262 R01, doc B8(a)), p 28

the authority that Maori customarily exercised over their forest. And the Maori text of the Treaty, which promised that the Crown would recognise and respect te tino rangatiratanga o o ratou taonga katoa must, in our view, have included a taonga of such importance as kereru, and Maori authority over how that taonga was to be managed and used.

We agree with the Chatham Islands Tribunal, which found:

> Customary hunting practices are cognisable as rights in law. They are also cognisable under Treaty principles. The Maori Treaty text acknowledged that Maori had authority over all their prized possessions, unless that authority was freely relinquished. Moreover, the Treaty does not restrict users to traditional implements and craft. As with all people, there is a developmental right.[639]

Because, historically, the Treaty right to take birds had been so important to both physical and cultural survival and well-being, any restrictions were naturally of great concern in Treaty terms.[640] Nonetheless, the Tribunal added: 'We acknowledge a Treaty right to take, but equally we acknowledge that the Crown has a Treaty duty to preserve.'[641]

We turn next to the question of how the Treaty right to take kereru in Te Urewera was balanced against the Crown's Treaty duty to conserve endangered species.

(2) *Has the Treaty right been breached?*

In our inquiry, the Crown argued that its actions in restricting and then banning the hunting of kereru were undertaken in good faith, for the purpose of conserving the resource.[642] Crown counsel submitted:

> Crown policies relating to the taking of indigenous species within Te Urewera were and are not in breach of Treaty principles . . . They are a reasonable exercise of the Crown's authority under Article 1 to balance competing interests, and govern to conserve natural resources.[643]

The Crown also emphasised that exemptions were possible for many years, and argued that 'the Crown acted in good faith in the context of species that were in decline, while also giving some measure of recognition to the interests of Urewera Maori in those resources.'[644]

Relying on the Tribunal's *Radio Frequencies Report* and *Ngawha Report*, the Crown suggested that the Tribunal has identified a:

639. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 264
640. Waitangi Tribunal, *Rekohu*, pp 264–273
641. Waitangi Tribunal, *Rekohu*, p 10
642. Crown counsel, closing submissions (doc N20), topic 29, pp 3, 13, 14
643. Crown counsel, closing submissions (doc N20), topic 29, p 18
644. Crown counsel, closing submissions (doc N20), topic 29, p 13

hierarchy of interests in respect of natural resources based on kawanatanga and tino rangatiratanga. The first interest is the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Then comes the tribal interest in the resource, ahead of the rest of the public.[645]

Further, in the *Mohaka ki Ahuriri Report*, the Tribunal found that the kawanatanga duty and 'the duty to protect the rights of Maori to exercise rangatiratanga could sometimes be in conflict – and an example given by the Tribunal is where native species had become endangered'.[646] In Crown counsel's submission, the Mohaka ki Ahuriri Tribunal noted that, above all, 'consultation is needed between Treaty partners "even though the responsible exercise of kawanatanga might ultimately require the Crown to make the final decision"'.[647] On the issue of consultation, Crown counsel submitted that modern standards for consultation were not applicable at the time of the animals protection legislation in the 1910s and 1920s, and that the Crown was in any case well informed of Maori views and interests due to the Maori members' contributions in Parliament. Separate consultation with Tuhoe, it was argued, was unnecessary, and the Crown had balanced interests fairly and consistently with its Treaty obligations.[648]

The claimants, on the other hand, saw what the Crown called the 'hierarchy of interests' rather differently. They argued that the role the Crown has assumed in Te Urewera is 'all encompassing', entailing its absolute control of all resources. The effect of the Crown's 'exclusive environmental management within Te Urewera is that the tino rangatiratanga of Tuhoe is disregarded'.[649] The claimants accepted that 'the Crown does have a power and a duty to manage natural resources in the interests of conservation but that these rights are qualified by the tribe's te tino rangatiratanga'.[650] The claimants emphasised that, in the Crown's admitted right to enact laws for conservation, there is a standing qualification on the Crown's right to govern; the Crown must recognise, protect, and give effect to their tino rangatiratanga over their taonga.[651] In the claimants' view, the Crown failed in this duty when it banned customary harvests after 1911, despite 'numerous petitions by Tuhoe and despite the decline in kereru being attributed to sports people and harvesting for commercial purposes, not to traditional harvesting'.[652]

The claimants do agree with the Crown that it was well informed when it made its decision to prohibit harvesting, to the extent that Maori members (and others) made Parliament

645. Crown counsel, closing submissions (doc N20), topic 29, p 12
646. Crown counsel, closing submissions (doc N20), topic 29, p 13
647. Crown counsel, closing submissions (doc N20), topic 29, p 13
648. Crown counsel, closing submissions (doc N20), topic 29, pp 14–16
649. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 153
650. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 153
651. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 198–199; counsel for Ngati Whare, closing submissions (doc N16), p 17; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), pp 8–9; counsel for Ngai Tamaterangi, closing submissions (doc N2), pp 69–71
652. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 153–154

very aware of the hardship that would be inflicted on Tuhoe.[653] Yet, in the claimants' view, this awareness did not result in any kind of appropriate balancing of interests: sporting interests were preferred at first, resulting in the inappropriate ban of Maori hunting methods; and, then, Maori cultural harvesting was wrongly banned altogether when other factors were responsible for the admitted decline in bird numbers.[654]

Both the claimants and the Crown are correct: the Crown has a duty to govern in the interests of all New Zealanders, and to conserve resources for future generations. In particular, the Crown has a Treaty duty to protect taonga. But the extent and form of protection necessary is something that a Treaty-compliant Crown must decide in partnership with Maori, especially where a taonga is concerned. The Crown's right to govern is qualified by the need to respect and protect te tino rangatiratanga of the peoples of Te Urewera.

The Crown was certainly informed of the Maori interests that were at issue, the nature of those interests – physical and cultural survival and well being for the peoples of Te Urewera in the circumstances of that time – and the hardship that would surely follow if it criminalised one of their most culturally important foods. In our view, this awareness highlighted the need for consultation, rather than, as the Crown argued, making it unnecessary. Also, we agree with counsel for Wai 36 Tuhoe, who identified that a range of factors had contributed to the decline of kereru, and submitted that the Crown's failure to consult Tuhoe about 'absolute prohibition as a conservation measure' denied them 'the opportunity to identify less "extreme" approaches to conservation that may have preserved both the natural resources of Te Urewera and Tuhoe's tino rangatiratanga.'[655] Some local harvesting, perhaps limited to important cultural events, could perhaps have been permitted. It is impossible to be certain on this point. Ngata certainly thought that harvesting could and should be permitted in the 1930s, in response to Tuhoe's petitions about it, but the Government was not even willing to consider the matter because public opinion was believed to be against it. In our view, that was not an appropriate balancing of interests.

We agree with the Crown that it provided for Maori interests – at least on paper – until 1922, because of the lawful exemptions that could be granted to Te Urewera before that year. We also agree with the claimants, however, that all customary harvesting was in fact banned from 1912. This situation was formalised by the 1922 Act, which criminalised not just a key food source but also a Treaty right, without consultation, consent, or compensation. This right had previously been acknowledged and affirmed in the UDNR agreement of 1895, as Native Minister James Carroll confirmed. Maori rights to govern themselves and to continue their own internal laws and way of life, including their 'rights to kill game for food',[656]

653. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 154
654. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 153–159; counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 35
655. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 199
656. Native Minister, minute on memorandum of 15 September 1902 to Minister of Tourist and Health Resorts (Walzl, 'Waikaremoana' (doc A73), p 102)

were supposed to have been guaranteed and protected by the agreement and the Urewera District Native Reserve Act 1896 which followed it. By 1922, that Act had just been repealed, Maori self-government had been defeated, the inalienable reserve for Maori had been dismantled, the promise to protect their forests and birds had been broken and – as a final blow – their right to take birds on which they were dependent for food was now also being taken away. Further, the Crown's action in 1922 criminalised a system of law and authority which had managed and regulated access to kereru for centuries, and which continued to operate until forcibly suppressed by criminal trials in the 1930s. Even then, Maori law and authority continued to govern access to kereru for important cultural events, but on a greatly reduced scale (hidden as far as possible from the Crown).

Relying on previous Tribunal reports, the claimants have submitted that 'if the Crown is ever to be justified in exercising its right to govern in a manner that overrides tino rangatiratanga, then it should only be in exceptional circumstances and as a last resort in the national interest'.[657] Counsel for Wai 36 Tuhoe also submitted that the Crown must first have consulted its Treaty partner to ensure that their interests are not harmed more than is absolutely necessary to protect the resource. Public interest, convenience, or reasons of economy are not justifications that can meet these tests.[658] Counsel for Wai 144 Ngati Ruapani submitted that if infringement of Treaty rights is necessary, then that necessity 'must be justified on nominate grounds and must be undertaken in a manner that has the least impact on the mana and rangatiratanga of Ruapani'.[659]

In our view, the Treaty right to take birds in Te Urewera was so central to the physical and cultural survival and well-being of the peoples of Te Urewera that the Crown could not be justified in outlawing that right – except in the most extreme circumstances – without first obtaining their consent, and never without payment of compensation or ensuring they had access to an alternative food source.

Also, to determine if it was in fact necessary to completely abrogate the right rather than restricting it (as had been the case for the previous 25 years), the Crown had to at least consult the peoples of Te Urewera and satisfy itself that a total ban was truly unavoidable in their district.

We accept that the conservation of kereru, a taonga species, was essential in the national interest. It is difficult, however, not to hold the Crown guilty of some hypocrisy, given its promotion of deforestation and habitat destruction at the same time as it was banning Maori hunting. We are reminded of the Minister's words in 1917, when he said that it was 'well known that with the gradual destruction of the bush the native pigeon will eventually become extinct'; his Government's ban on hunting was supposed to do no more than delay

657. Counsel for Ngati Whare, closing submissions (doc N16), pp 17–18; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 198
658. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 199
659. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 9

the inevitable 'extinction of this magnificent bird', an extinction that the Crown knew could be halted if less native forest was converted to pasture or exotic forest.[660] Also, suggestions by Ngata in 1932 and by the Rotorua conference of officials and agencies in 1938, that Maori in Te Urewera should be allowed to manage and conserve kereru while permitting a limited take, were not really investigated. Alternatives available at the time were not properly considered, which was not consistent with the fair and scrupulous treatment to which the peoples of Te Urewera were entitled under the Treaty.

From the evidence available to us, we do not know whether banning all cultural harvests of kereru in Te Urewera was a necessary or unavoidable step in 1912 (when the ban became absolute) or 1922 (when the absolute ban was reflected in legislation). As we have shown, other alternatives did exist, including banning hunting for commercial and sporting purposes alongside reserving more forest, especially berry-bearing trees. Nonetheless, we cannot say for certain that cultural harvests could have continued in Te Urewera after the 1930s – when such harvests became greatly reduced – without harming the taonga. That in itself is a measure of the Crown's failure to demonstrate that its ban was justified.

In Treaty terms, consent and compensation were both necessary. Even if, as a final resort, consent had to be overridden, compensation was still essential.

In the 1930s and 1940s, after the Crown began to enforce its animals protection law in Te Urewera, Maori leaders protested by way of petition, without success. They pointed out that kereru was an important food, that their rights to kereru were protected by the Treaty, and that they could manage the take of kereru in a way that would protect and conserve the resource; all to no avail. They were not given a fair hearing, and their interests were not adequately considered or protected. A Government report of the time, that Maori were taking kereru still because of absolute need, was met with this response: if 'the present practice' was 'necessitated by actual hardship', the Government should 'make other provision for food supplied for the natives of the Urewera.'[661] Yet even this way of compensating for the loss was never carried out.

In conclusion, we find the Crown in breach of the Treaty principles of partnership and active protection, and of the plain meaning of article 2, for prohibiting the exercise of the Treaty right to take kereru, without:

- Consulting the peoples of Te Urewera and seeking their consent;
- determining whether the prohibition was truly necessary;
- providing compensation;
- regularly reviewing the need for the prohibition, and investigating or responding adequately to complaints; and

660. G W Russell, Minister of Internal Affairs, to A F Lowe, 30 May 1917 (Feldman, *Treaty Rights and Pigeon Poaching*, p 35)

661. Under-Secretary for Internal Affairs to Under-Secretary for Lands, 28 April 1936 (Coombes, 'Cultural Ecologies 1' (doc A121), p 232)

21.8.2(2)

- being prepared to investigate or adopt alternative means of meeting the shared goal of ensuring the kereru population is protected.

The right had been guaranteed as recently as 1895. Its abrogation did significant harm to the peoples of Te Urewera.

Before 1930, the Crown's restrictions, including the ban on hunting methods and huahua, had not been enforced in Te Urewera. After 1930, the restrictions were enforced and the food supply of the peoples of Te Urewera was reduced at a time of critical need. In the period covered by this part of our chapter, it was known that the Maori communities of Te Urewera *could not survive* without adequate access to wild foods. The loss of a crucial food source was a very serious matter for them. We referred earlier to a state of 'biological poverty', in which Te Urewera communities were malnourished and lived precariously, pushed into serious deprivation if any one food resource failed in any particular year. The permanent removal of an entire food source – a range of bird species – had significant consequences, and contributed directly to the state of biological poverty in the first half of the twentieth century.

Further, the ability of Te Urewera communities to meet their cultural obligations, by providing manuhiri with a food for which they were renowned, exchanging kereru for the prized foods of other iwi, or taking huahua to important cultural events outside their rohe, was impaired. Their mana was infringed as a result. The ability to transmit tikanga and matauranga relating to fowling to succeeding generations was reduced when customary practices in respect of kereru could no longer be carried out and passed on to mokopuna. These prejudicial effects were of a serious nature. From the 1960s, the sheer physical survival of the peoples of Te Urewera no longer depended on their wild food supplies, but the cultural losses were cumulative with each generation.

On the positive side, the Crown's introduction of deer to our inquiry district, and the growth of a large deer population in the 1920s, provided a new food source at the time it was most needed (the 1930s to the 1950s). Deer was not an unalloyed success, of course, because of its environmental impacts, but venison did go some way to filling the gap created by the removal of kereru from the diet. As we have said, however, the introduction of trout did not boost food supplies overall, given its swift reduction of native fish stocks.

We accept that the prejudicial effects were beginning to diminish by the end of the 1950s. Malnutrition was still being reported at Ruatahuna in 1950,[662] but by the early 1960s this problem was less evident.[663] Dependence on wild foods for *survival* declined in the second half of the twentieth century, when store-bought food became a principal source of supply.

Nonetheless, the Crown did not keep its 1895 promise to Te Urewera leaders that food sources would be augmented; the introduction of venison barely made up for the loss of kereru and other birds' species in the crucial decades. Deer could not, of course, redress the

662. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 384
663. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1716–1718

cultural loss. We find the Crown's failure to honour the 1895 agreement a breach of the principles of partnership and active protection.

(3) *Was the Crown still in breach of this Treaty right at the time of our hearings?*

At the time of our hearings, the prohibition on the hunting of kereru was likely justified in the national interest, but no one had any certain information on the point. We agree that the Crown should apply the precautionary principle. If cultural harvesting in Te Urewera would risk the conservation of the kereru there, then the Crown must continue to prohibit it. That is its duty under the Treaty. We also agree with the Wai 262 Tribunal that: 'Protecting the kaitiaki interest and conserving indigenous flora and fauna are two sides of the same coin.'[664] The claimants made it clear to us that they wish to conserve kereru, a taonga species, for future generations. But there had been no dialogue with the Crown on this issue; in other words, there was no partnership.

The Crown relied on the terms of the Wildlife Act 1953, under which the kereru has been an absolutely protected species for more than half a century, and had not conducted any research or scientific investigation of kereru populations in Te Urewera, or the sustainability of a very limited cultural take of even one bird per annum. We agree with the claimants that the 1997 Conservation Authority paper, which the Crown used as its authority that cultural harvest could not be sustained, provided no scientific data and was not intended for that purpose. It may be that the DOC witnesses were correct in their impression that a harvest was not sustainable. But Crown counsel accepted in closing that, if this were not the case, then it would need to consult the claimants on the matter and consider changing its policy.

We were concerned, as were the claimants, that the Crown appeared to have no programmes at all in respect of kereru in Te Urewera – no monitoring of kereru and no measures for predator reduction or habitat enhancement other than those underway for other species (from which, we were told, kereru also benefit).

In our view, the Crown remained in breach of Treaty principles at the time of our hearings because it had failed to enter into a dialogue with the claimants or to monitor the situation and ensure that its denial of a Treaty right was still necessary in the national interest.

We note, however, the extraordinarily difficult circumstances under which DOC was working at that time. The Wai 262 Tribunal, considering the position in 2005 from more extensive evidence than we were able to receive, found:

> Much of DOC's work is designed to protect, and support the recovery of, endangered species. The department told us that it was undertaking specific management of 176 species, which is only a fraction of the 2,400 species assessed as threatened in some way. Put another way, DOC's budget allowed it in 2005 to provide intensive management over only 2.7 per cent of its total holdings. An additional 32 per cent of the land received limited management,

664. Waitangi Tribunal, *Ko Aotearoa Tenei*, *Te Taumata Tuarua*, vol 1, p 197

and 'about 55% of the lands administered by DOC where management would also be beneficial received only limited or no management'.[665]

In this circumstance, Te Urewera benefited from its status as a national park and the efforts to control pests in the park: kereru numbers 'can improve significantly simply as a result of controlling possums and rats which eat both the young in their nests and the flowers and fruit the birds depend on for food'.[666]

While the Crown must rationalise and prioritise the resources at its disposal, the claimants' evidence was that the kereru was and is extremely important to them; it is a taonga. In our view, the Treaty required a specific dialogue between the parties on:

- the question of how kaitiakitanga of the kereru would be respected and given effect to;
- the viability of the present kereru population in Te Urewera;
- strategies for the protection and enhancement of that population; and
- the question of whether a limited customary take was sustainable.

In the absence of that dialogue, the Crown was at the time of our hearings in breach of the partnership principle, and its duty actively to protect the taonga and the Treaty right to take (and to manage the conserving and taking of) kereru where such harvesting is sustainable.

(4) *Recommendation*

We acknowledge that we have no jurisdiction to make recommendations in respect of historical Treaty claims already settled by legislation. We therefore confine our recommendation to refer only to claimants before us who have not settled.

Recognising that the Crown and the appropriate claimants regard conservation of the kereru as paramount, we recommend that they design and implement strategies, in partnership, for the protection and enhancement of the kereru population.

We recommend that the Crown and appropriate claimants assess the present kereru population in Te Urewera, and monitor it over a period of time to establish its viability.

If the viability of the kereru population is established we recommend that the Crown enter into dialogue with the appropriate claimants with a view to their deciding together whether a culturally appropriate and limited take might be sustainable.

21.8.3 Treaty analysis: Introduced species

In our analysis earlier, we concluded that the Crown was not acting unwisely when it introduced deer and opossums to Te Urewera given the state of the information available to it at the time.

665. Waitangi Tribunal, *Ko Aotearoa Tenei*, *Te Taumata Tuarua*, vol 1, p 309

666. Doris Johnston, brief of evidence on behalf of Department of Conservation, 21 November 2006 (doc R8), p 29 (Waitangi Tribunal, *Ko Aotearoa Tenei*, *Te Taumata Tuarua*, vol 1, p 310)

We find, however, that Governments were relatively slow to take any effective action once these two species were known to be harmful to the environment. In the case of opossums, it took many years before the Crown was convinced that they were a serious threat. It was strongly influenced however by the views of two eminent scientists, Dr Leonard Cockayne and Professor H B Kirk, who were not convinced that opossums were a threat to native forests – though Kirk recommended that they be exterminated from native bird sanctuaries. The Department of Internal Affairs evidently did not proceed even with this limited action. The Crown acted unwisely in delaying a response, and its actions had long-term detrimental effects on the forest environment and the birdlife of Te Urewera, but failure to act wisely is not indicative of a lack of good faith, nor is it a Treaty breach.

In the case of deer, the Forest Service was convinced of the need to act from at least 1922, but other departments were not similarly persuaded until 1931. In part, the delay was attributable to rivalry between departments, which meant that contradictory reports about the impacts of deer were produced. But the delay was most clearly an outcome of the prioritisation of sport and tourism over forest interests. The Crown failed to act until agreement was finally reached between the Forest Service and Internal Affairs in 1931, soon after the Tourist and Health Resorts Department ceased to be the acclimatisation society in Te Urewera and Internal Affairs took over the responsibility. Unfortunately, no effective deer control measures were introduced until 1938, and even then the effects were negated when hunting capacity was reduced during the Second World War. But the alarms sounded by the Forest Service and its certainty about the destructive effects of deer by 1922 should have led the Crown to reassess its policy before 1931. The price of delay is evident, given that insufficient funding during the Depression (especially in the North Island), and then the war resulted in an effective reprieve for deer over a number of years – with a brief exception from 1938. Thus, by the late 1940s, the deer population in Te Urewera had recovered to its 1938 level. By then it was some 25 years since the Forest Service warnings. We consider that the Crown's failure to act once it was clear how destructive deer were of forests was in breach of the principle of active protection. This omission caused catastrophic damage to forests guaranteed to Maori by Article two of the Treaty and by Premier Seddon in the 1895 agreement. His promise to Te Urewera leaders was that their 'forests and birds should be suitably protected'. The Crown's duty was to deliver on that promise when there was sufficient evidence before it that deer were endangering the forests.

The Crown was also at fault in Treaty terms when it rejected the Native Department's suggestion in the late 1930s that local Maori be employed to cull deer. This recommendation, if followed, would have mitigated the impact of the culling of an animal which had become an important food, together with pigs, for Te Urewera communities. It would have provided both a regular food supply and a welcome source of income. Further, we note that though one reason why deer were introduced was to augment Maori food supplies the Crown soon

lost sight of that purpose. The peoples of Te Urewera should not have had to pay for hunting licences, and should have had a greater say in the management of 'their' food resource. The Crown admits that Maori should have had a management role. Its omission to provide for these matters was inconsistent with the Treaty partnership and the principle of active protection.

As with deer, the introduction of trout was for the dual purpose of feeding Maori and attracting tourists. The peoples of Te Urewera should not have had to pay for fishing licences either, which they simply could not afford. It was a specific part of the 1895 agreement, as understood by the Crown, that trout would be an important and, necessarily, an *accessible* new food source for Maori, and also that trout would be managed by Maori inside the UDNR. The Crown provided for neither of these things, in breach of its partnership obligations and the principle of active protection. Prejudice is difficult to determine, as Maori appear to have fished for trout regardless; trout came to form an important component of Te Urewera food supplies.

Once trout were established and proven to be a serious threat to indigenous fish species, the Crown took no action to manage the fishery in such a way as to maintain a balance between exotic and indigenous fish. This was in breach of the principle of active protection. The Crown even went so far as to cull tuna in the 1950s, though it was a taonga species,thus also reducing another staple and culturally important food source, and it culled kawau at Waikaremoana with the intention of exterminating them. Kawau were a taonga for the Waikaremoana peoples, and the Crown's action against this important native species was entirely unsanctioned by the peoples of Te Urewera. This was not consistent with the Crown's Treaty obligations of partnership and active protection of taonga. It was also in violation of the 1895 agreement that native birds would be protected.

In our view, the culling of kawau was symptomatic of the way the Crown prioritised sport fishing above Maori interests, including its failure to provide for a better balance between exotic and indigenous species in its fisheries management. The harm to indigenous fisheries caused by trout, which the Crown admitted in our inquiry, was a prejudicial effect of the Crown's Treaty breach.

Ultimately, as we have seen earlier in the report, the Crown failed to keep almost all of its 1895 undertakings. Here, we find that Maori leaders were not given the authority to manage their new, exotic food species – birds, fish, or, by logical extension, deer – either autonomously through their General Committee or in partnership with Government agencies. This was inconsistent with Treaty principles, and prejudiced the peoples of Te Urewera because they were unable to ensure that the new species were sufficiently accessible and affordable for their use as food, or managed for the conservation of resources and the environment. Maori communities in Te Urewera, as we have shown, managed their own harvesting of wild foods in accordance with tikanga, so as to conserve the resource and ensure it

was shared communally, but they could not control the hunting of outsiders or the numbers of trout released continually into their waters.

As we found earlier, the introduction of opossums was not within the spirit of the 1895 agreement, since possums were not intended either for food or for attracting tourists. We hesitate to find this a Treaty breach, however, since the negative effect of opossums on a forest environment was not anticipated, and the Crown hoped that Maori (as well as other trappers) would benefit from a fur industry.

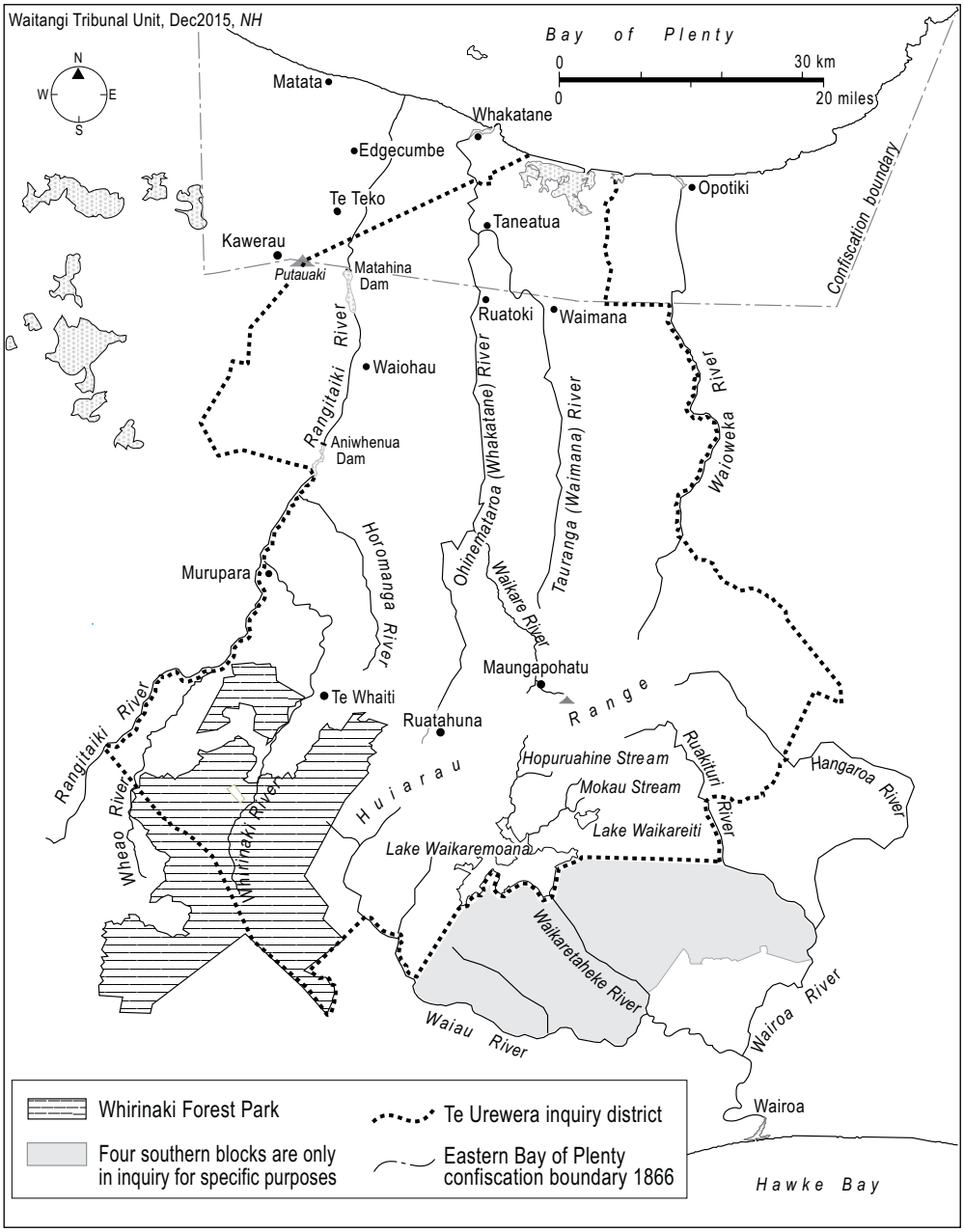
Mustelids, of course, had been introduced into New Zealand before the 1895 agreement; they may already have reached Te Urewera by then. They were not introduced into the district by the Crown, but were imported from overseas in large numbers by the Crown, released in Hawke's Bay, and from there found their way quickly inland. Their arrival in Te Urewera was a by-product of the Government's determination to meet the concerns of pastoralists across the country to deal with the rabbit menace. The disastrous impact of mustelids on native birds everywhere was predicted, both in and outside parliament. But it does not seem that the importance of birds to Maori was considered at all at the time. Warnings about the impact of mustelids on birds were rapidly shown to have been justified – so much so that the first measures to provide for the destruction of stoats and weasels throughout the country were quickly introduced. But they were not introduced on a national scale until 1936. Predators on the ground had a head start of several decades on any systematic attempt to eradicate them. Mustelids remain today 'one of the principal threats' to native birds in the inquiry district.[667]

We find the Crown in breach of the principle of active protection for failing to consider the importance of native birds to Maori when mustelids were introduced into New Zealand, and for failing to act quickly and decisively to eradicate them when it became clear very quickly that their impact on birds was as damaging as had been predicted.

In sum, we consider that a number of the Crown's actions in relation to exotic species were in breach of the Treaty. The failure to provide for free Maori access to and management of new food species was in violation of the 1895 agreement, and was a Treaty breach with prejudicial effects. The Crown was slow to act against harmful species. Its delay in proceeding with deer culling once the Forest Service was convinced of the need to do so, and its failure to maintain a sustained programme even when it did start – allowing deer populations to flourish – was also in breach of Treaty principles. Opossums which were introduced directly into Te Urewera, and mustelids, which were not, became pests which have wreaked havoc on the Te Urewera forest environment. The damage caused by opossums however was not attributable to Treaty breaches in the period under review here (before the establishment of the national Park). But the Crown's introduction of stoats, weasels and ferrets to New Zealand in large numbers, known to be a grave threat to native birds, and

667. Coombes, Cultural Ecologies 1 (doc A121), p 27

21.8.3(4)



Map 21.1: Whirinaki Forest Park

without consideration of the importance of birds to Maori, was. A further breach was its failure to move more quickly to eradicate them at a national level.

We turn next to consider the Crown's management of the environment in the Whirinaki Forest, about which the claimants have alleged several Treaty breaches.

21.9 Key Facts: Whirinaki Forest

The Whirinaki valley is the ancestral heartland of Ngati Whare. The area is also of great significance to Ngati Manawa and to Tuhoe. For the close relationships between these groups, and the tribal histories the people presented in the hearings, embodying their own understandings of their past, we refer the reader to chapter 2. There are wahi tapu, pa, other archaeological sites, and mahinga kai (food gathering places) throughout the valley.[668] Before logging began in the early twentieth century, most of the valley was covered with native forest, which was an important source of food, medicine, and other resources for local hapu and iwi.[669] Jack Ohlson told us about his tipuna's traditional kaitiakitanga, or resource conservation practices, such as tohunga placing prohibitions on hunting areas so that the birds could recover.[670]

The forest's trees, including totara, miro, rimu, kahikatea, and tawa, were highly prized for their timber, both by Maori and by Europeans. From the late 1920s, the valley became the centre of the Te Urewera timber industry. Logging and sawmilling was initially carried out by private companies on Maori land, with a few small operations active in the early 1920s and a larger sawmill opening at Te Whaiti in 1928.[671] More mills opened at Te Whaiti and Minginui in the 1930s, one of which was said to be the fourth-largest sawmill in New Zealand at the time.[672] The mill operators were criticised at the time by the State Forest Service, Native Minister Apirana Ngata, and others, for wasting good timber and paying the Maori land owners low prices.[673]

Although the Crown had purchased land in the Whirinaki Valley with the intention that it would be developed for farming, it eventually decided that the area was best used for forestry. The Crown had become a major owner of totara and rimu-matai-hardwoods forest in various blocks in the Whirinaki Valley, as a result of policies and practices which we have found to be in breach of the Treaty. In all of them, the Crown bought up individual interests: in the rim blocks Whirinaki 1 and 2, which had been made inalienable, it did so in defiance of the legal restrictions; even in Heruiwi 4, where much of the land was sold on the basis of group decisions, the Crown subsequently secured more through purchase of individual interests; and in the Te Whaiti blocks, as with other UDNR blocks, its purchase of individual interests before 1916 was likewise illegal until legalised retrospectively, and the timber on Te Whaiti was very substantially undervalued by the Crown. Later, through the

668. See 'Ngati Whare Map Book for Treaty of Waitangi Claim Wai 66' (doc G33), maps 5B and 5C; Merata Kawharu and Dr Rapata Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), pp 41–42; Brad Coombes, 'Cultural Ecologies II: Preserving 'a great national playing area' – Conservation Conflicts and Contradictions in Te Urewera'(commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A133), p 151.

669. Meriana Taputu, brief of evidence, September 2004 (doc G28), pp 3–4; Edward Charles Rewi, brief of evidence, September 2004 (doc G35), p 3

670. Jack Tapui Ohlson, mana whenua brief of evidence (doc G30), pp 7–8

671. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 307

672. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 311, 325–326

673. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 313, 327

Urewera Consolidation Scheme, it secured the valuable land it wanted within the enormous Urewera A block that was its award (see chapters 13–14).[674] The Crown's subsequent acts and omissions in respect of the forest have to be seen against that backdrop.[675] In 1932, land from the Crown-owned parts of the Te Whaiti, Whirinaki, and Heruiwi blocks was gazetted as State Forest 58, and milling began in 1938.[676] At this stage, the Forest Service's long term plan was to replant milled areas with plantation timber, such as pine. Once the plantation trees were ready, the plan went, the Whirinaki timber industry could switch from native to non-native milling.[677] As we discuss in detail in chapter 23, the Crown's involvement in the timber industry – both its own operations and its support for private milling – meant that in the middle of the century Maori in the Whirinaki Valley enjoyed full employment, and a much higher standard of living than in previous decades. The Forest Service also provided housing for its workers and took a close interest in the welfare of the timber towns and their residents, especially Minginui.

From around the mid-1960s, increasing numbers of New Zealanders became more aware, and more critical, of the ecological costs of development. Reducing or ending native logging soon became one of the major aims of New Zealand environmentalists. In response to a Government plan to mill South Island lowland beech forests, the Beech Forest Action Committee was formed, later becoming the Native Forests Action Council. The council put together the 1975 'Maruia Declaration': six principles which would guide activism on native forest preservation.[678] These included the need for native forests 'wherever they remain' to have legal protection, that 'the logging of virgin forests (with certain exceptions) should be phased out by 1978', and that 'our remaining publicly owned native forests should be placed in the hands of an organisation that has a clear and undivided responsibility to protect them'.[679] The declaration was later circulated as a petition, and gained more than 340,000 signatures.[680]

674. See section 15.3.7(1); 'Te Urewera Inquiry District Overview Map Book Part Three', map book commissioned by the Crown Forestry Rental Trust, 2003 (doc A132), pl 27; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 11, 201; Campbell, 'Te Urewera National Park, 1952–75' (doc A60), map 2. See also Tulloch, 'Heruiwi 1–4' (doc A1), pp 9, 77–79, 84–85; Tulloch, 'Whirinaki' (doc A9), pp 37–41, 48–53

675. See section 10.7.3(1)(a).

676. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p 203; Tulloch, 'Whirinaki' (doc A9), p 123; Renee Rewi and John Hutton, 'Ngati Whare Site Visit', 12 September 2004 (doc G32), p 13; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 344; 'Annual Report: State Forest Service', 1 July 1939, AJHR, 1939, C-3, p 14

677. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 503

678. Simon Nathan, 'Conservation – A History – Environmental Activism, 1966–1987', *Te Ara – the Encyclopedia of New Zealand*, updated 5 May 2015, http://www.TeAra.govt.nz/en/conservation-a-history/page-8; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 644–645

679. 'Maruia Declaration', in Simon Nathan, 'Conservation – A History – Environmental Activism, 1966–1987', *Te Ara – the Encyclopedia of New Zealand*, updated 8 July 2013, http://www.TeAra.govt.nz/en/document/13938/the-maruia-declaration-petition; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 644–645

680. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 645

In response to growing public antagonism towards native logging, clear felling in Whirinaki was replaced by selective logging, which focused on felling trees near the end of their natural lives, and replacing them with native saplings.[681] This did not reduce the quantity of native timber being milled, and so in the late 1970s environmentalists and the Te Urewera National Park Board began lobbying for the Whirinaki State Forest to be incorporated into the national park. This idea was strongly opposed by the Forest Service and Whirinaki residents, and was rejected by Cabinet in 1979.[682] However, the amount of native timber to be taken from the forest was heavily reduced; from 30,000 cubic metres in 1978 to just 5,000 cubic metres in 1981.[683] In 1982, native logging in Whirinaki was limited to salvaging wind-thrown trees.[684] Finally, following the election of the fourth Labour Government in 1984, the taking of native timber from Whirinaki was halted completely, except for dead standing totara 'for specific Maori cultural purposes'.[685]

In March 1984, the Whirinaki State Forest was gazetted as Whirinaki State Forest Park under section 63B of the Forests Act 1949, which made greater allowance for recreational use of the forest in conjunction with continued forestry operations.[686] Under section 63F of the Act, an advisory committee was created, with members chosen by the Minister of Forests.[687] Sarah Harris and Winiata Herewini were the only two Maori members of the 10-person committee.[688]

As part of a wider restructuring of the public sector, the Forest Service was disestablished in 1987, with the commercial elements now being run by a new Forestry Corporation, and the conservation side being run by a new Department of Conservation (DOC).[689] The native forest in Whirinaki Forest Park was transferred to DOC, while the exotic plantation forest was transferred to the Forestry Corporation, which also took over the Crown forestry leases on Maori land.[690] The Whirinaki Forest Park, along with Te Urewera National Park, was in DOC's Eastern Region, which was run from Rotorua and included large areas outside of Te

681. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 635–639; Coombes, 'Cultural Ecologies II' (doc A133), p 303

682. Coombes, 'Cultural Ecologies II' (doc A133), pp 319–330

683. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 501; Coombes, 'Cultural Ecologies II'(doc A133), p 334

684. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 698

685. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 698

686. 'State Forest Land Set Apart as a State Forest Park to be Known as Whirinaki State Forest Park – Rotorua Conservancy', 28 February 1984, *New Zealand Gazette*, 1984, no 35, p 643. The park is sometimes referred to as the Whirinaki Conservation Park, but it appears from the *Gazette* notice that its official name was always Whirinaki State Forest Park. Since 2012, following the Ngati Whare settlement, the park has been officially called Whirinaki Te Pua-a-Tāne Conservation Park.

687. Coombes, 'Cultural Ecologies II' (doc A133), p 332

688. Coombes, 'Cultural Ecologies II' (doc A133), pp 332–333

689. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 710

690. Ngati Whare and the Crown, *Deed of Settlement of Historical Claims* (Wellington: Office of Treaty Settlements, 2009), p 14

Urewera.[691] Another administrative change came in 1990, when the Government established conservation boards, each overseeing a particular area. The conservation boards replaced local advisory committees, including the Whirinaki Forest Park advisory committee, which was abolished. The following year, Whirinaki became part of DOC's Bay of Plenty conservancy while Te Urewera National Park was in the East Coast conservancy. The two parks remained in separate areas until at least 2003, despite another reorganisation in 1998.[692]

21.10 Essence of the Difference between the Parties

Much of the disagreement between the claimants and the Crown over the Whirinaki Forest involves the extent to which tangata whenua were consulted or involved in the management of the forest and its resources. The claimants said that the Crown had repeatedly failed to consult them over changes to native timber milling and to park management, did not allow them adequate involvement in the management of the forest, its resources, and wahi tapu within the forest, and had allowed wahi tapu and forest ecosystems to be damaged by forestry operations. We focus below on three questions:

- Did the Crown's management of Whirinaki Forest, before and after the creation of the Department of Conservation, involve partnership and consultation with tangata whenua of the area?
- Why did the Crown restrict and then stop native logging in Whirinaki Forest? Did it consult with tangata whenua, or manage the cessation of logging in such a way as to minimise detrimental effects on tangata whenua?
- What has the Crown done to protect wahi tapu in Whirinaki?

The only claimants to make substantial formal submissions specific to Whirinaki on these issues were Ngati Whare; this means that the essence of difference below is, in effect, a conversation between Ngati Whare and the Crown. As the Ngati Whare claimants point out, the Whirinaki Forest Park occupies 'a very large area within the heart of their rohe.'[693] However we note that other iwi, particularly Ngati Manawa and Tuhoe, also have interests in Whirinaki and in the issues we discuss here, and that their witnesses discussed those topics during our hearings.

691. Coombes, 'Cultural Ecologies II' (doc A133), p 225
692. Coombes, 'Cultural Ecologies II' (doc A133), p 210; Douglas Rewi, brief of evidence, September 2004 (doc G37), pp 15–16
693. Counsel for Ngati Whare, closing submissions, 9 June 2005 (doc N16), p 113

21.10.1 Did the Crown's management of Whirinaki Forest, before and after the creation of the Department of Conservation, involve partnership and consultation with tangata whenua of the area?

Counsel for Ngati Whare submitted that:

> At the heart of Ngati Whare's grievances in relation to their environment is the fact that the Crown has assumed the exclusive role of management of the environment within Ngati Whare's rohe contrary to Ngati Whare's customary rights and interests and without the consent of Ngati Whare.[694]

The Ngati Whare claimants said that the Crown established Whirinaki Forest Park without consulting adequately with them, or recognising fully their interests and rights in the land and resources within the park.[695] Once the park was established, the Crown 'failed to make any or any adequate provision for Ngati Whare's active involvement and representation in the operation and management' of the park.[696] It also failed to 'adequately recognise and provide for Ngati Whare's role as kaitiaki in respect of land and resources in the Park'.[697] In general, the claimants said, the Crown has failed to 'adopt any partnership approach' with them in relation to the forest park, not only in terms of management but also employment within the park.[698] They said that the Crown has failed to recognise or allow for their traditional reliance on the Whirinaki forest and its resources for food, medicine, and other purposes.[699] The Ngati Whare claimants also said that the Crown 'has failed to ensure that Ngati Whare are able to exercise their customary use rights within the Whirinaki State Forest Park in relation to the harvest of particular resources in accordance with their tikanga'.[700] The Crown has also 'damaged, depleted and polluted the lands and resources' through practices including milling indigenous forests, planting exotic forests, and general mismanagement.[701]

The Crown responded that there was 'insufficient evidence that nga hapu o te Urewera are currently excluded' from management of and employment in the Whirinaki Forest Park. It noted that there were two tangata whenua representatives on the Whirinaki State Forest Advisory Committee.[702] It also said that DOC appointments were made on an equal opportunities basis, with involvement from kaumatua. It also has a training programme 'to raise awareness of tikanga Maori and to ensure Treaty obligations are understood by all staff'.[703] The Crown acknowledged that Whirinaki tangata whenua traditionally used and managed

694. Counsel for Ngati Whare, closing submissions (doc N16), p 103
695. Counsel for Ngati Whare, fourth amended statement of claim, 22 April 2004 (claim 1.8(d)), p 129
696. Counsel for Ngati Whare, closing submissions (doc N16), p 105
697. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), p 130
698. Counsel for Ngati Whare, closing submissions (doc N16), p 112
699. Counsel for Ngati Whare, closing submissions (doc N16), pp 101–103, 106
700. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), p 130
701. Counsel for Ngati Whare, closing submissions (doc N16), p 106
702. Crown counsel, closing submissions (doc N20), topic 40, p 4
703. Crown counsel, closing submissions (doc N20), topic 40, p 4

natural resources, and that there was a 'spiritual aspect' to these taonga.[704] Its submissions on traditional use of natural resources focused almost entirely on native birds, which we deal with elsewhere in this chapter.

21.10.2 Why did the Crown restrict and then stop native logging in Whirinaki Forest? Did it consult with tangata whenua, or manage the cessation of logging in such a way as to minimise detrimental effects on tangata whenua?

The Ngati Whare claimants submitted that the Crown failed to consult with them over restricting native logging in the Whirinaki Valley, or before halting native logging altogether. They argued that this was part of a wider pattern of arrogant behaviour in relation to native forests on the part of the Forest Service and the Crown more generally. In relation to the management of the Whirinaki State Forest, the Ngati Whare claimants said that the Forest Service exploited 'the last substantial native timber reserves in the North Island' without seeking a full understanding of the forest and whether it could be regenerated. They said that this 'left little room for the trial of alternative management practices which may have allowed for the harvesting of native timber in perpetuity'.[705] There is no evidence that the Forest Service consulted with Ngati Whare or other tangata whenua groups on forest management. As a result, the claimants said, the Crown alone 'is to blame for the mismanagement of native forests that lead ultimately to cessation of indigenous logging from 1982.'[706]

Nor did the Crown adequately consult with Ngati Whare or other Maori on any of the changes to indigenous logging practices.[707] The Ngati Whare claimants acknowledged that the Crown, particularly the Forest Service, sometimes referred to Ngati Whare socio-economic interests, but said this was generally only when they could be used in support of the Forest Service.[708] They said that the Forest Service's 'understanding of the interests of Maori, including Ngati Whare, in local forests was patronising and insensitive', and not all of the service's staff wholeheartedly supported 'the interests of Ngati Whare and other Urewera Maori'.[709] Other Crown departments and bodies opposed native logging at Whirinaki without regard to or understanding of the support Ngati Whare and other Maori had for logging.[710] When native logging was stopped, the Crown failed to manage the process in

704. Crown counsel, closing submissions (doc N20), topic 29, p 6
705. Counsel for Ngati Whare, supplementary closing submissions on corporatisation and Minginui, 3 June 2005 (doc N16(a)), p 31
706. Counsel for Ngati Whare, supplementary closing submissions on corporatisation and Minginui (doc N16(a)), p 31
707. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), pp 105, 107, 131
708. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), p 131
709. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), p 131
710. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), pp 131–132

a way which minimised the detrimental impact on Ngati Whare and the Minginui Maori community.[711]

The Crown conceded that it did not always consult with Ngati Whare over changes to native logging activities, but did say that it consulted the Whirinaki Forest Park Advisory Committee over the formulation of the 1979 forest management plan.[712] It denied that the Forest Service was patronising and insensitive, and that the Forest Service only promoted Maori interests in support of its own arguments.[713] The Crown acknowledged 'the impact of the cessation of [native] logging on those communities who derived their primary income from this activity'.[714] Crown counsel also stated, however, that Government policy attempted to balance conservation with 'production needs for the national good'.[715]

21.10.3 What has the Crown done to protect wahi tapu in Whirinaki?

The Ngati Whare claimants said that the Crown has failed to prevent or adequately remedy the disturbance and destruction of archaeological sites by the Forest Service, or prevent disturbance of sites by users of the Forest Park.[716] They stated that 'many of Ngati Whare's sites of significance' have been damaged for forestry activity, including some which were planted over in pine and eucalyptus.[717] Since the indigenous parts of the forest came under DOC control, the claimants said that DOC has a responsibility to protect and manage wahi tapu on land it controls, but has failed to adequately do so.[718] They also said that the Crown has failed to protect details of wahi tapu and other sites of significance in the Whirinaki Forest Park from 'inappropriate publication'.[719]

The Crown accepted that the Forest Service damaged or destroyed archaeological sites in the Whirinaki Forest during logging activities, and that Te Tapiri was damaged by forestry contractors in 1988 and 1992. Crown counsel stated that the Crown viewed this 'with concern'.[720] They also stated that the Forest Service and other Crown bodies subsequently improved their practices, for example, to exclude pa sites and other wahi tapu from active forestry zones.[721]

The Crown submitted that, at the time of our hearings, policy and practice provided adequate legislative protection for wahi tapu, and that tangata whenua were actively involved

711. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), p 105
712. Crown counsel, closing submissions (doc N20), topic 31, p 21
713. Crown counsel, closing submissions (doc N20), topic 31, p 21
714. Crown counsel, closing submissions (doc N20), topic 31, p 21
715. Crown counsel, closing submissions (doc N20), topic 31, p 22
716. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), pp 147, 149–150
717. Counsel for Ngati Whare, closing submissions (doc N16), p 112
718. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), p 147
719. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), p 149
720. Crown counsel, closing submissions (doc N20), topic 40, p 14
721. Crown counsel, closing submissions (doc N20), topic 40, p 14

in the management of wahi tapu.[722] It cited the Historic Places Act 1993, in particular its processes for registering wahi tapu, and sections of the Act which made it unlawful to damage, destroy, or modify an archaeological site (registered or otherwise) without the permission of the Historic Places Trust.[723] The Crown also stated that DOC has a duty to protect wahi tapu, and that:

> DOC's vision for protection and management of wahi tapu includes tangata whenua participation and control in the protection and management of wahi tapu in areas administered by the Department. One of the goals is to provide for the exercise of kaitiakitanga by tangata whenua by 'providing for control by tangata whenua of discrete wahi tapu sites where appropriate.'[724]

In the Crown's submission, DOC works with tangata whenua to make sure that new developments and activities do not impact on wahi tapu.[725] Crown counsel also stated, however, that there was no evidence that the Crown had specifically undertaken to protect wahi tapu such as Te Tapiri Pa.[726] Nonetheless, Crown counsel suggested that its systems did not and could not guarantee that wahi tapu were protected in practice. This was because some of the necessary factors were outside the Crown's control, although the Crown also conceded that its systems were inadequately funded:

> Again, the Crown does not claim that this system guarantees practical protection, and it cannot reasonably be expected to provide that. For example, adequate funding is required for effective monitoring and prosecuting in respect of sites, and community participation is needed to identify sites of significance to Maori through district plans and the Historic Places Register. These are difficulties that governance in many areas encounters.[727]

The Crown denied that its agencies had inappropriately published details of wahi tapu, although it admitted that some sites had been shown in early maps of the National Park. It submitted that 'endeavours are now made to no longer publish such information.'[728] Counsel conceded that, at the time of our hearings, DOC maps still identified some wahi tapu sites, but said that DOC would ensure that they were removed when the maps were reprinted.[729]

722. Crown counsel, closing submissions (doc N20), topic 40, p 11
723. Crown counsel, closing submissions (doc N20), topic 40, pp 9–10
724. Crown counsel, closing submissions (doc N20), topic 40, p 10
725. Crown counsel, closing submissions (doc N20), topic 40, pp 10–11
726. Crown counsel, closing submissions (doc N20), topic 40, p 14
727. Crown counsel, closing submissions (doc N20), topic 40, p 11
728. Crown counsel, closing submissions (doc N20), topic 40, pp 8–9
729. Crown counsel, closing submissions (doc N20), topic 40, p 11

21.11 What Influence and Authority Have Maori Had in the Management of Whirinaki Forest?

Summary answer: *At the start of the twentieth century, most of the Whirinaki valley was covered in totara, miro, rimu, matai, kahikatea, and tawa. The Crown gazetted its land in the valley as a State forest in 1932, and later in the decade its Forest Service began milling. In the mid-twentieth century, its long term plan for the valley was to mill most of the native timber and replace it with plantations of faster-growing exotic trees such as pine. At this point there was no opportunity for tangata whenuato be involved in the management of the forest. Scientists were regarded as the sole experts on the forest; Maori were marginalised and their knowledge went unrecognised. One of the results was that tangata whenua were unable to protect wahi tapu from damage caused by forestry operations. Nor, in the absence of consultation, were they able to protect native birds from wholesale destruction of their habitat.*

From the 1960s, the general public became increasingly opposed to native timber milling, particularly clear felling. In response, in the mid-1970s the Forest Service switched from clear felling to selective logging in Whirinaki. Any reduction in the timber industry was strongly opposed by Whirinaki residents, particularly the people of Minginui, but they supported the change to selective, sustainable logging. Despite this, native logging was stopped altogether in 1982, and the removal of dead trees (except for totara for cultural purposes) was stopped in 1984–85. Although the new techniques had shown promise, it was by no means certain that the Forest Service had developed a means of sustainably logging a New Zealand native forest of such high environmental and cultural value to local Maori peoples and the nation. In 1984, this value was to some extent recognised when the Whirinaki State Forest was designated a forest park, with an advisory committee with some Maori representation. The end to all native logging was opposed by tangata whenua, but – on its own – the impacts would have been relatively small if the Crown had kept its undertaking that exotic forestry would become a viable alternative. We explore the timber industry crisis and the corporatisation of State forestry further in chapter 23.

In 1987, the Forest Service was disestablished, with the indigenous parts of Whirinaki State Forest becoming the responsibility of the newly created Department of Conservation (DOC). After this change, the park's specific advisory committee was replaced by a more distant conservation board with – inevitably – less local representation. Nonetheless, DOC has attempted to consult and work with tangata whenua. Some claimants saw this engagement as token and insincere. The plantation parts of the forest have mostly been milled by contractors, who at times have inadvertently damaged wahi tapu.

21.11.1

21.11.1 Introduction

In the second half of the twentieth century, there was a fundamental conflict over the Whirinaki Forest, between economic imperatives on the one hand, and environmental, cultural, and spiritual values on the other. We have already referred to that conflict more generally in chapter 18, where we discussed the Government's decision to halt all logging of native trees on Maori land. Here, we discuss it more specifically in respect of the Whirinaki State Forest, which was transformed into the Whirinaki Forest Park in 1984, followed by a ban on all felling of indigenous timber. To put it simply, the Whirinaki peoples were financially dependent on the timber industry, and therefore supported it despite the damage it was doing to their forest. Several claimants acknowledged this tension. Jack Ohlson told us that the timber industry 'created work for our people, but it also created disharmony for the bird life, which was our kai resource'.[730] Meriana Taputu had a ready answer for those who questioned how her people could have respected the forest so much and yet helped to cut it down:

> Easy . . . it's called the dollar note! Times were evolving and changing economic circumstances were impacting on my people, so it was easier to buy basic and luxury items with money you earned than from a few leaves or bark that was being gathered to supplement the daily meal.[731]

The Maori communities of Whirinaki were effectively faced with the choice between poverty and participating in the degradation of their whenua.

It was clear to us that the claimants and their whanau wanted a balance between the two sides: to make a living from their lands and forests in a sustainable way, to preserve the forests, birds, and wahi tapu while also preserving their own ability to live in the valley and maintain a reasonable standard of living. Many felt that this could only be achieved if the local people regained some degree of control over their forest.

In this section we analyse the extent to which the Crown has allowed the tangata whenua of Whirinaki to have influence or control over the forest, its resources, and its wahi tapu. We look first at the overall management of the forest, under the Forest Service and then under DOC. We then analyse the end of the native timber industry, and whether the Crown sought or acted on the views of Whirinaki tangata whenua when it restricted and then ended native logging. Finally, we ask what the Crown has done to protect wahi tapu in the Whirinaki Forest, and to what extent tangata whenua were involved.

730. Jack Ohlson, second brief of evidence (doc G36), para 35
731. Meriana Taputu, brief of evidence, September 2004 (doc G28), p 4

21.11.2 Did the Crown's management of Whirinaki Forest, before and after the creation of the Department of Conservation, involve partnership and consultation with tangata whenua of the area?

The management of the Whirinaki Forest can be divided into two eras, with the turning point coming in 1987, with the creation of the Department of Conservation (DOC). Prior to this, the forest was managed by the Forest Service, with an advisory committee from 1984. Tangata whenua seem to have been more involved in the forest and its management from 1987, although claimants continued to feel that the Crown did not allow them to fully participate in the management of the forest.

We did not receive much evidence on Maori involvement in forest management before the creation of the Whirinaki Forest Park in 1984, and it seems clear to us that this was because Maori were not involved. As we discuss below, in our discussion of native logging, Maori were rarely consulted on changes to the management of the forest. As kaitiaki of the forest, Ngati Whare and other tangata whenua should have had at least an advisory role. However, Klaus Neumann said during cross examination, the Forest Service paid little regard to Maori knowledge of the forest, with Forest Service scientists regarding themselves – and being regarded by forest management – as the 'sole experts' on the forest.[732] This attitude not only marginalised Maori but also cut the Forest Service off from valuable information which could have assisted its work. Had the Forest Service recognised this knowledge, it might have avoided some of the problems with native timber and with wahi tapu which we discuss below.

A partnership with local Maori may also have reduced the harm done to native birds in the forests.[733] As we discussed earlier (section 21.7.3), Maori had maintained since the early twentieth century that it was wrong of the Crown to restrict or ban the hunting and trapping of kereru, while at the same time allowing the forests on which the kereru depended to be destroyed.[734] In 1958, Te Urewera wildlife officer D S Main told the Conservator of Wildlife that milling of miro and hinau was 'one of the biggest factors' behind the decline of the kereru and tui populations, with illegal hunting being a relatively minor factor.[735] Despite this, the Forest Service paid little attention to habitat preservation, arguing that the remaining stands of bush were enough to sustain native bird life.[736] It did not carry out any research on the impact of logging on native bird populations until the late 1970s.[737] The Maori view that miro and hinau should be planted to increase kereru habitat was articulated by Stokes,

732. Klaus Neumann, under questioning by the Tribunal, Murumurunga Marae, Te Whaiti, 15 September 2004 (transcript 4.10, pp 63–64)

733. Jack Tapui Ohlson, second brief of evidence (doc G36), para 18; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 793

734. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 791 n

735. D S Main to Conservator of Wildlife, 9 October 1958 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 791)

736. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 791–792

737. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 699, 792

Milroy, and Melbourne in their survey of Te Urewera in the 1980s, and could have been acted upon earlier by the Forest Service if it had consulted Maori about its management of Whirinaki Forest.[738]

One instance in which the Crown did pay attention to the views of Whirinaki Maori was in response to a late 1970s proposal to incorporate the State forest into Te Urewera National Park. As a part of their wider efforts to end native logging in Whirinaki, conservationists were campaigning for the conversion of Whirinaki from a State forest to a part of the national park. This plan was also supported by Te Urewera National Park Board, but strongly opposed by both the Forest Service and local Maori.[739] Forest Service staff and Minginui residents worked together to oppose the national park plan, and generally present a united front against the conservationists who were trying to end native logging in Whirinaki.[740] Residents including Ngati Whare kuia Ngaki Kingi and Pakeha shopkeeper George MacMillan gave media interviews, explaining that the traditional harvest of rakau from the Whirinaki Forest would end if it became part of the national park, and accusing conservationists of 'attempting to exterminate our lifestyle and our very existence within this forest'.[741] In the end, Cabinet decided in 1979 that although Whirinaki met the criteria for a national park, it should remain as it was, because transferring it to Te Urewera National Park would have adverse social and economic effects on the Minginui community, and because the management proposals for the forest already provided for an acceptable degree of preservation.[742] The joint opposition of the Forest Service and Whirinaki locals to native logging restrictions will be discussed in more detail in the next section.

Early in 1984, the National Government announced that Whirinaki State Forest would become a forest park. Under section 63B of the Forests Amendment Act 1976, forest parks were intended for 'the purpose of facilitating public recreation and the enjoyment by the public of any area of State forest land in conjunction with the other purposes for which it is managed'. This was not a major alteration to the forest's purpose, since State forests had always been managed under multi-use principles, and locals were able to gather plants and hunt in the State forest well before it became a forest park.[743] Environmental management researcher Brad Coombes described the redesignation as 'a token gesture', presumably to placate conservationists by emphasising the recreational aspects of the forest.[744] It may have been an attempt by the National Government to please both forestry workers and

738. Stokes et al, *Te Urewera* (doc A111), p 352
739. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 649
740. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 662
741. Coombes, 'Cultural Ecologies II' (doc A133), p 457; Stokes et al, *Te Urewera* (doc A111), p 239
742. Coombes, 'Cultural Ecologies II' (doc A133), p 330
743. Coombes, 'Cultural Ecologies II' (doc A133), p 483; Douglas Rewi, brief of evidence, September 2004 (doc G37), p 5
744. Coombes, 'Cultural Ecologies II' (doc A133), p 331

environmentalists, in contrast to Labour Party policy which tended to be on the side of the environmentalists. A contemporary news report stated:

> Announcing the decision, Forests Minister Jonathan Elworthy said the change in status would not affect the way the forest was run. However, as a state forest the only opportunity for public involvement in its management was through reviews of the management plan every 10 years. As a state forest park it would have an advisory committee, ensuring constant public participation.[745]

The advisory committee was not required to include tangata whenua, or any Maori representation. Members could be nominated by anyone, but seem to have been chosen by the Minister of Forests.[746] Nominees included Makarini Temara, the deputy chair of the Tuhoe-Waikaremoana Maori Trust Board (TWMTB) and a former member of this Tribunal; Tony Winiata Herewini, a TWMTB member; RS Paku, a Ngati Kahungunu representative on the East Coast National Parks and Reserves Board; and Hera (Sarah) Harris of Ngati Whare, a leading advocate for Minginui and its native timber industry. Only Harris and Herewini were chosen, for a committee with a total membership of 10.[747] The Crown claimed in this inquiry that it consulted with the advisory committee over the formulation of the 1979 forest management plan.[748] As we can see, Crown counsel was in error, since the committee was not formed until the park was created in 1984. Nonetheless, the Forest Service did consult and obtain local Maori approval for its 1979 management plan as part of their joint campaign against transfer to the national park.

Meanwhile, senior Forest Service officials were concerned that forest management did not know enough about what the people of Minginui wanted, and stressed that management 'must be careful not to overlook the locals in developing resources for our visitors'.[749] However, there was also significant external pressure from the Whirinaki Promotion Trust, a conservation group with a largely Auckland-based membership. Coombes stated that the trust had 'some success at the expense of local Maori', such as minimising the amount of totara taken from the park for cultural purposes.[750] We received little information on how the forest park was managed between its creation and the overhaul of conservation law and practice in 1987, or how much influence the Advisory Committee had.

A major change in the administration of the forest park came in 1987, with the disestablishment of the Forest Service. One of the main conservationist criticisms of the service

745. 'New Status for Forest', *Waikato Times*, 24 December 1983 (Coombes, 'Cultural Ecologies II' (doc A133), p 332)
746. Coombes, 'Cultural Ecologies II' (doc A133), p 332
747. Coombes, 'Cultural Ecologies II' (doc A133), pp 332–333
748. Crown counsel, closing submissions (doc N20), topic 31, p 21
749. K Marwick, for Conservator of Forests, to A Griffiths, 'ROPS Meeting Whirinaki Forest Park', 24 May 1985 (Coombes, 'Cultural Ecologies II' (doc A133), p 333)
750. Coombes, 'Cultural Ecologies II' (doc A133), pp 333–334

was that no organisation could be both a protector of forest ecosystems and a commercial timber miller.[751] In response, Cabinet had voted in September 1985 to split the service in two, with the commercial side being run by a new forestry corporation, and the conservation side being run by a new Department of Conservation (DOC).[752] When this took effect, the native forest in Whirinaki Forest Park was transferred to DOC, while the exotic plantation forest was transferred to the forestry corporation, which also took over the Crown forestry leases on Maori land.[753] As we discuss in detail in chapter 23, the forestry corporation dramatically reduced employee numbers in Whirinaki and elsewhere. Some jobs were created by DOC, but these were few in number, and generally did not involve skills transferable from forestry.[754]

In chapter 16, on the national park, we found that since 1987 the tangata whenua of Te Urewera have been recognised as kaitiaki of the taonga of the area and were included in park planning processes and the administration of certain initiatives. There was a shift in the wording of policy and planning documents – both at national level and for Te Urewera National Park – to recognise the relationship of Maori with Te Urewera National Park, and there was more, and better quality, consultation about certain park management issues. However, we also found that the changes had been essentially procedural, rather than substantive, as the National Parks Act did not mention tangata whenua interests. Our finding was similar to that of the Wai 262 Tribunal, which found that the Conservation Act 1987 imposed extremely strong Treaty obligations on DOC, which made significant efforts to involve tangata whenua in its work. It also found that DOC must go further than this, and 'incorporate the principle of partnership into all of its work'.[755] The Wairarapa ki Tararua Tribunal found that:

> DOC has sought to address past problems in its relationships with iwi by improving Māori participation in its work, better providing for Māori interests in its plans and policies, and consulting Māori on significant management decisions affecting protected areas or species. However, at the end of the day, DOC is the decision-maker, and the Crown owns and manages conservation lands and protected species.[756]

It appears that this was also true in regard to the Whirinaki Forest Park by the time of our hearings.

751. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 709–710
752. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 710
753. Ngati Whare and the Crown, *Deed of Settlement of Historical Claims* (Wellington: Office of Treaty Settlements, 2009), p 14
754. Douglas Rewi, brief of evidence, 9 August 2004 (doc G37), p 13
755. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, pp 324, 343, 346
756. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 3, p 931

In 1990, the Conservation Act was amended to create conservation boards, each of which oversaw one of the country's conservancies (conservation board districts); by 2006 there were 13 of these.[757] As part of this amendment, forest park advisory committees were abolished. As with the abolition of the local Te Urewera national park board, discussed in chapter 16, the result was a shift in policy-making and the advisory role to more distant entities with responsibility for multiple parks and conservation lands. Each conservation board has up to 12 members, appointed by the Minister of Conservation after a public nomination process. In appointing members, the Minister was required to have regard to 'the local community including the tangata whenua of the area', but there was no general requirement that any of the members be Maori or represent tangata whenua.[758] Replacing a body of 10 locals – including two tangata whenua members – with this very different kind of board would inevitably have reduced the usefulness of this mechanism for claimant communities' input to the management of Whirinaki Forest Park. Douglas Rewi told us that trying to stay engaged with the different DOC conservancies, as well as the entities managing leased forestry land and other private land, was a major challenge for Te Runanga o Ngati Whare Iwi Trust, particularly given their lack of resources.[759]

We did not receive detailed evidence on how DOC's management of the Whirinaki Forest Park worked in practice, but Hutton and Neumann found that from the 1990s, DOC regularly consulted with Ngati Whare over its management of the park. The evidence shows that DOC representatives 'have talked to Ngati Whare kaumatua, outlined their plans for public scrutiny at hui in Te Whaiti, and, more recently, held discussions with the Ngati Whare runanga'.[760] This was an improvement on earlier decades, but Whirinaki tangata whenua said that they needed a more meaningful relationship with DOC. Meriana Taputu, for example, stated that DOC paid only lip service to consultation with Ngati Whare, which in reality consisted of telling the iwi about decisions which had already been made. She told us that this seemed to be merely 'a box ticking exercise, not a genuine attempt to involved Ngati Whare in the development or ongoing management of policies in the Whirinaki'.[761] She concluded:

> I would like to see DoC and Ngati Whare enter into a conscious, meaningful engagement based on both Kaitiakitanga (guardianship) and continued sustainability of the Whirinaki. I know that this relationship would in fact add value to DoC as an organisation rather than be detrimental to it.[762]

757. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 326; Conservation Law Reform Act 1990, part 2A

758. Conservation Law Reform Act 1990, s 6P(2). As of November 2015 the Conservation Act had been amended several more times, but there was still no requirement for Maori or tangata whenua membership of the boards.

759. Douglas Rewi, brief of evidence, September 2004 (doc G37), pp 15–16

760. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 781

761. Meriana Taputu, brief of evidence, September 2004 (doc G28), p 6

762. Meriana Taputu, brief of evidence, September 2004 (doc G28), p 9

21.11.3

Hutton and Neumann meanwhile reported that DOC's attitude in relationship to opossum control was seen by Ngati Whare as 'still marked by the arrogance of those who always [think that they] know best'.[763]

We received even less information on the management of the plantation timber parts of Whirinaki forest after the disestablishment of the Forest Service, apart from that relating to the corporatisation programme of the 1980s. As we discuss below, wahi tapu on forestry land were not always protected, and it appears that there were also ecological problems. Coombes stated that the Crown did not actively manage habitats on its non-conservation lands until the passage of the Resource Management Act in 1991, and attributed the continued decline of endangered species to this neglect.[764]

Overall, Dr Neumann observed:

> In the cases of the Te Urewera National Park and the Whirinaki Forest Park, the Crown recognised Maori custodianship by according some Maori representatives an advisory role. The Crown did not recognise that custodianship in the case of the State forests: at no stage were the previous Maori owners consulted over the management of State forests in the Urewera.[765]

This was certainly true, even in the case of the 1979 management plan, to which Maori had no input outside of the general public submissions process. This was despite the congruence of interests between the Forest Service and local Maori at that time, as they sought to prevent a total ban on the logging of indigenous timber. We turn to consider that issue in detail next.

21.11.3 Why did the Crown restrict and then stop native logging in Whirinaki Forest? Did it consult with tangata whenua, or manage the cessation of logging in such a way as to minimise detrimental effects on tangata whenua?

The Crown's policy and practice on native logging changed dramatically over the 1970s and 1980s, in response to increasing public opposition to the destruction of native forests. Clear felling was replaced with selective logging in the mid-1970s. In the early 1980s, the amount of native timber taken from the forest was reduced, and then native logging in Whirinaki was halted completely and permanently in the mid-1980s. The Forest Service often worked with Maori and non-Maori residents of the Whirinaki timber towns to counter environmentalist lobbying. However, we saw no evidence that the Forest Service or any other Crown entity undertook serious consultation with tangata whenua, or made any real effort to minimise negative effects of the native logging ban.

763. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 804
764. Coombes, 'Cultural Ecologies II' (doc A133), p 234
765. Neumann, summary of evidence (doc G1), p 25

The Crown began logging in Whirinaki in 1938, but did not develop a working plan for the forest until 1951.[766] In the first decade of milling the amount of timber taken was 'far higher than had [originally] been intended'.[767] The first working plan was an attempt to manage milling so that there would still be some native timber left in the future, the existing operations would be long term, and 'sawmill communities will be permanent rather than transitory'.[768] In the 1940s, Ngati Whare were assured that there would be forestry jobs in the valley for at least 40 years.[769]

It is clear that in the mid-twentieth century the Forest Service wanted its Whirinaki forestry operations to be long term and, ideally, sustainable, in terms of the communities as well as the trees. At this point it was not interested in simply removing all the good timber and then leaving. However, the Forest Service consistently regarded native forest regeneration as too slow and difficult to be commercially viable.[770] This conclusion seems to have been based partly on some experimental planting, but mostly on knowledge of the slow growth rates of the native trees used for timber.[771] The apparent non-viability of commercial native forest regeneration meant that forestry in Whirinaki and elsewhere could ultimately be sustained only by clear-felling much of the native forest and replacing it with exotic (non-native) plantation trees such as pine. The Forest Service estimated in 1951 that, by 1990, about 60 per cent of the remaining accessible native forest (about 97 million cubic feet) would have been felled and replaced with exotic plantation forest.[772]

It was inevitable that growing public antagonism towards native logging would affect the Whirinaki forest industry. Initially, the changes were positive for both the environment and for forestry workers. From 1975, clear felling was replaced with selective logging, which focused on felling trees near the end of their natural lives, and replacing them with native saplings.[773] The claimants, as kaitiaki of the forest, agreed that this change was necessary and strongly supported the move to sustainable forestry.[774] Selective logging required a much higher level of skill and care than clear-felling, and inexperienced workers initially damaged the trees left standing.[775] However, they gained mastery of the difficult techniques, which was a source of great pride to their whanau.[776] Sarah Harris told us:

766. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 344, 503
767. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 500
768. New Zealand Forest Service, 'Working Plan for Whirinaki Production Working Cycle Rotorua Conservancy', 1951, p 1 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 503)
769. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 505
770. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 346–347, 353, 503–506, 640
771. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 504–505, 640
772. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 503
773. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 635–639; Coombes, 'Cultural Ecologies II' (doc A133), p 303
774. Sarah Harris, brief of evidence (doc G39), p 7
775. Hutton and Neumann, 'Ngati Whare and the Crown', (doc A28), p 642
776. Sarah Harris, brief of evidence (doc G39), p 8

21.11.3

> I remember seeing Tihema Ruri take out three trees in an area where there were many other trees nearby. Looking at it even I couldn't believe that those trees could be cut down without hitting and damaging the surrounding trees. However, after sizing up the job, Tihema cut down the three trees with perfect precision and ensured that they fell exactly between the other trees in the forest. The precision of his work was amazing and these were the skills that were held by men throughout the forest at Minginui.[777]

Selective felling was also more labour intensive than clear-felling, which meant that there was more work available.[778] The native planting programme was a source of new jobs for women, who had not previously worked in the forest except during the Second World War, when men were absent.[779]

It is important to note, however, that the long-term viability of sustainable logging in New Zealand's native forests was untested. It is by no means certain that the methods and strategies developed by the Forest Service would succeed in preserving the indigenous parts of the Whirinaki State Forest. By the late 1970s, in the view of Hutton and Neumann, 'Forest Service staff were not so much refining a proven practice as still trying to identify appropriate methods of logging and regeneration in the first place'.[780] The shift to selective felling did not reduce the overall amount of native timber taken from Whirinaki. In 1978, the Forest Service was still committed to supplying 30,000 cubic metres of native timber a year to the Minginui sawmills; Hutton and Neumann estimated that this was at least as much as was annually extracted from the State forest before the shift to selective logging.[781] Also, the lowland part of the forest, where logging operations were concentrated, was described as 'extremely rare, impressively beautiful, and scientifically little-understood', whereas the higher altitude forest was not merchantable in any case.[782] Conservationists continued to lobby for an end to native logging in Whirinaki, which led to conflicts between environmentalists and residents of Minginui. In June 1978, a group of visiting environmentalists trying to visit the forest were blockaded by nearly the entire population of Minginui, who made it clear that they wanted native logging to continue.[783]

As we noted earlier, the Forest Service and its staff often worked with local residents, including tangata whenua, to oppose attempts to end native logging. At times, the Forest Service highlighted the potential effects of a native logging ban on local Maori, or encouraged residents to lobby the Government. Pro-logging activism was frequently led or

777. Sarah Harris, brief of evidence (doc G39), p 8

778. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 641–642; Coombes, 'Cultural Ecologies II' (doc A133), p 335

779. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 642

780. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 667

781. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 501

782. J Ogden, letter to the editor, 'Whirinaki Forest', *Daily Post*, 7 June 1984 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 667)

783. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 649–656

directed by Bob Collins, the Forest Service's district ranger. Researchers John Hutton and Klaus Neumann wrote that this was evidence of the fact that:

> for forty years the Forest Service had not consulted the tangata whenua about the management of the Whirinaki forest. But it had also provided for them – at least for those Ngati Whare who lived in Minginui. . . .
>
> For forty years, senior Forest Service staff had presumed to know best what to do with the forest and how to run the village [Minginui] – now that the very existence of Minginui was threatened, it made little sense to question a long-established authority.[784]

According to Brad Coombes, the Forest Service's advocacy for the Minginui community was 'both strategic and cynically applied'.[785] He noted that a social scientist from Otago University proposed a study on the social impacts on Maori of any cessation of logging, but this was turned down by the Forest Service because it was 'rather irrelevant to [the] major decision'.[786] The service was more open to research by 1983, undertaking with the Department of Lands and Survey a joint land-use survey of Whirinaki and all other Crown forests in the eastern Bay of Plenty.[787] One of the products of this survey was a report on the people and communities of Te Urewera by Evelyn Stokes, Wharehuia Milroy, and Hirini Melbourne which has proved immensely useful to us and to researchers in this inquiry. Despite the high quality of the report, it was largely rejected by senior Crown officials, particularly its criticisms of the national park, as we discussed more fully in chapter 16.[788] According to Dr Coombes, other parts of the survey were subject to political interference:

> For instance, a conservation biologist was commissioned to determine the habitat significance of indigenous forest throughout the Raukumara-Urewera-Whirinaki forest tract. When he concluded that 97% of those forests were 'significant,' NZFS [Forest Service] staff attempted to have his conclusions deleted or altered, presumably because of their potential impact on public perceptions of indigenous timber milling and on potential transfer of Whirinaki forests to Te UNP.[789]

Only the Stokes, Milroy, and Melbourne report involved any systematic engagement with tangata whenua.[790]

In response to public pressure, native logging was reduced in the early 1980s, and then stopped completely following the election of the fourth Labour Government in 1984. The

784. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 663
785. Coombes, 'Cultural Ecologies II' (doc A133), p 314
786. Margin comment on memorandum to conservator of forests, 'Suggested Minginui Social Study', 4 October 1979 (Coombes, 'Cultural Ecologies II' (doc A133), p 314)
787. Coombes, 'Cultural Ecologies II' (doc A133), p 335
788. Coombes, 'Cultural Ecologies II' (doc A133), pp 335, 345–357
789. Coombes, 'Cultural Ecologies II' (doc A133), p 336
790. Coombes, 'Cultural Ecologies II' (doc A133), p 341

21.11.3

Labour Party's environment policy leading up to the 1984 general election included a pledge that native logging in Whirinaki would cease, except for small quantities of totara felled 'for traditional Maori cultural purposes'. The party also pledged that '[s]awmill employment at Minginui will be safeguarded using the State's available exotic timber resources, and Labour will guarantee the future of the forest work force'.[791] Salvage operations were halted in December 1984, following Labour's electoral victory in July that year, although Cabinet did not actually confirm the logging ban until the following year.[792] As expected, the new Labour Cabinet decided in 1985 that:

> no native trees were to be felled except dead standing totara for specific Maori cultural purposes, that no further roading was to be carried out in the predominantly indigenous parts of the park, and that all virgin high density podocarp forest areas were to be put into ecological reserves.[793]

The decision was made despite a petition from Minginui residents, who praised the Forest Service's 'wise' management of the native forest and its provision of employment.[794] The conservator of forests had also argued for continued selective logging, on the grounds that its 'environmental impact is minimal'.[795]

Even so, the Forest Service had already limited itself in 1982 to the salvage of 'windthrown podocarps' in the Whirinaki Forest.[796] This meant that active logging had already ceased. The main impact of Labour's new policy, therefore, was to further restrict the harvesting of dead trees, which had cultural ramifications for Ngati Whare and Ngati Manawa, and to confirm that a resumption of sustainable logging would not be permitted. As we noted earlier, it was by no means certain that the indigenous parts of the Whirinaki Forest *could* be logged sustainably. The Maori view at the time was that the experiment should be tried; ultimately, the Crown decided that it should not.

In any case, as Ms Harris pointed out to us, when native logging ended 'it was not felt that all was lost, as there were by that time major exotic forests established in the area and work should have continued'.[797] This was what Labour had specifically promised in the lead up to the 1984 election, and, even before native logging became controversial, it had always been planned that native forestry would eventually be replaced by exotic plantation forestry. The problem was that, by the 1980s, the entire timber industry was in serious economic difficulty. Wakeley Matekuare told us that in the early 1980s many timber workers began to

791. New Zealand Labour Party, 'Environment Policy: Basic Principles / Native Forests / National Parks', not dated (1984) (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 695)
792. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 698
793. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 698
794. Stokes et al, *Te Urewera* (doc A111), p 257
795. DA Elliott, conservator of forests, Rotorua, to Michael Cullen, 17 May 1984 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 699)
796. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 698
797. Sarah Harris, brief of evidence (doc G39), p 8

realise that their future was uncertain. Management 'started telling us that production was too low, and we had to work longer hours for no extra money. . . . some people decided to leave . . . because they could see that the industry was going to stop.'[798]

The end of native logging would not have strongly affected the timber towns if the Crown had stuck to its original plan of replacing native timber milling with exotic timber milling. Part of the reason it failed to do this may have been that native milling was phased out far more quickly than had been planned, and in later years the extracted native trees were replaced with new native planting rather than exotics. The end of native logging was ultimately just a small part of the Forest Service's problems, however. By the mid-1980s, the service was making huge financial losses, and was thus an obvious target for the reforming and cost-cutting zeal of the fourth Labour Government. We discuss the subsequent corporatisation of the Forest Service in detail in chapter 23, where we show that it led to widespread redundancies in and around Whirinaki, with devastating economic and social effects for the Maori communities of western Te Urewera. Here, we note that native logging in Whirinaki was ended against the wishes of local Maori communities, but that this decision on its own would have done them relatively little harm, while ensuring the preservation of their forest taonga for future generations. Pondering on this history, Meriana Taputu said to us: 'In hindsight, I am glad that Whirinaki is protected, but what of the future of my people?'[799]

21.11.4 What has the Crown done to protect wahi tapu in Whirinaki?

There are numerous wahi tapu, including pa sites and urupa, throughout the Whirinaki Forest. We heard that forestry work resulted in damage to such wahi tapu under both the Forest Service and its successors. In recent decades there have been better attempts to protect sacred places in the forest, but damage has still occurred due to a lack of knowledge and a degree of carelessness.

During the Forest Service era, damage to wahi tapu occurred on Maori land under forestry leases and on Crown land. For example, former forest worker Jack Tapui Ohlson told us that two Ngati Whare wahi tapu on Te Whaiti-nui-a-Toi Trust land were planted over. He said that the Forest Service:

> were supposed to leave the waahi tapu sites of Ngati Whare alone, but they didn't, they planted right over them, and destroyed them in the process. Ngati Whare was supposed to have advisory power, but they weren't bound to listen to us and didn't.[800]

798. Wakeley Matekuare, brief of evidence, September 2004 (doc G40), p 3
799. Meriana Taputu, brief of evidence (doc G28), p 4
800. Jack Tapui Ohlson, second brief of evidence, September 2004 (doc G36), paras 32–33

21.11.4

Rangi Anderson also told us that the Forest Service planted over wahi tapu in various places.[801] He described the Forest Service as a 'non-cultural organisation' which made no attempt to recognise Maori culture, saying that there was 'a regime of pure ignorance while I was in the Forest Service towards the importance and significance of wahi tapu in general'.[802]

Mr Ohlson and another forestry worker, Maurice Toetoe, told us that some Maori forestry workers refused to work on wahi tapu, but said that this only meant the work was done by other crews.[803] In response to questions from the Tribunal, Mr Toetoe said that it would have been difficult to raise such issues, and so Maori workers tended to simply stay at home when they were assigned to an area which they knew to be wahi tapu. He told us that many 'were subsequently labelled as lazy by forestry companies who assumed they were not willing to work'.[804]

From the early 1970s, the Forest Service made some effort to protect identified pa sites and other wahi tapu.[805] However, this did not always translate to actual protection. For example, gum trees were sometimes planted on wahi tapu, supposedly to protect them after the bush around them was milled, but also to test the growth rate of the trees.[806] By 1979, archaeological surveys had been carried out in the valley, but not in the areas which were being logged at that time.[807] Probably because of the Crown's poor record of protection, tangata whenua seem to have been reluctant to provide information about wahi tapu locations.[808] In the early 1980s they did allow a register of archaeological sites to be compiled, but would not allow a map to be made in case this led to 'fossicking and other abuses'.[809]

From 1980, the Historic Places Act provided legal protections for archaeologically significant sites, although, like earlier protections, it was not always effective.[810] We received little information on damage to wahi tapu after the Forest Service was disestablished, but we did hear that one of the pa sites damaged by the Forest Service has been cleared of pines and the site protected.[811] However, we also heard that Te Tapiri, a nineteenth-century pa site and a wahi tapu of Ngati Manawa and Ngati Whare on the western side of the forest park, was

801. Rangi Anderson, brief of evidence, 18 August 2004 (doc F29), p 6

802. Rangi Anderson, brief of evidence, 18 August 2004 (doc F29), p 6

803. Jack Tapui Ohlson, second brief of evidence, September 2004 (doc G36), para 34; Maurice Toetoe, brief of evidence, 9 August 2004 (doc F11), p 3. Mr Toetoe's evidence seems to relate to the Kaingaroa Logging Company; it is not clear whether Mr Ohlson's evidence relates to the Forest Service or a private company.

804. Maurice Toetoe, brief of evidence, 9 August 2004 (doc F11), p 3; Maurice Toetoe, under questioning by the Tribunal, Rangitahi Marae, Murupara, 18 August 2004 (transcript 4.9, p 68)

805. Coombes, 'Cultural Ecologies II' (doc A133), pp 150–151

806. Coombes, 'Cultural Ecologies II' (doc A133), p 150

807. Coombes, 'Cultural Ecologies II' (doc A133), p 317

808. Coombes, 'Cultural Ecologies II' (doc A133), p 147

809. Coombes, 'Cultural Ecologies II' (doc A133), p 147

810. Damage caused by unauthorised works to archaeological sites could, for example, result in fines of $25,000 or $500 per day while unrectified: Stokes et al, *Te Urewera* (doc A111), pp 330–332, 336–338. Later, the Historic Places Act 1993 (s 97) set the fine for damage as up to $100,000, if convicted; the 1993 Act was repealed by the Heritage New Zealand Pouhere Taonga Act 2014, which did not stipulate the amount of fines.

811. Renee Rewi and John Hutton, Ngati Whare site visit booklet, 12 September 2004 (doc G32), p 11

damaged by contractors on two separate occasions.[812] In 1988, a burn-off near the pa got out of control, and a temporary fire break was made across the pa site, doing some damage. Four years later, following miscommunication with his supervisor, another contractor inadvertently bulldozed a track through the site. Douglas Rewi told us that in both cases:

> There were no physical checks of Te Tapiri Pa site prior to the operations commencing nor was there any consultation with Ngati Manawa or Ngati Whare nor any attempt to discover if there were any waahi tapu which might be damaged or destroyed. This was typical of the approach throughout the whole of the Ngati Manawa rohe.[813]

Although it was part of official procedure that all contractors be provided with maps, this was not done in either of the instances in which damage occurred.[814]

Mr Rewi and Mr Toetoe both told us that 'strange' or 'unexplainable' events sometimes occurred when forestry crews were working on and around wahi tapu. Mr Rewi said that these events included continual equipment breakdowns, 'people experienced the chills, workers becoming sick and behaving in an abnormal or unusual way'.[815] Mr Toetoe explained:

> We had an incident in my own crew, up the Whirinaki Block, where – how can I put it – strange things were happening . . . Where we had to get kaumatua in to bless the place. I had lost men, through these funny things happening. . . . Other places where we've logged around waahi tapu there've been horrific accidents where people from out of the rohe have come and asked our kaumatua to bless these places. As I say, I've seen some accidents happening in places of significance to Ngati Manawa, and things that happened in my crew were happening to people not from here. They were happening to people from out of the area.[816]

He said that he believed that these incidents happened 'because of the desecration and ignorance' affecting wahi tapu.[817]

In sum, there was no formal protection of wahi tapu in the Whirinaki Forest until the 1970s. Local Maori, including some forest workers, were well aware of the locations of sacred places in the forest, but generally felt unable to raise the matter with management. Because there was no formal way of alerting the Forest Service or timber companies to the location of wahi tapu, tangata whenua had little choice other than to stand by as pa sites and

812. Renee Rewi and John Hutton, Ngati Whare site visit booklet, 12 September 2004 (doc G32), p 10. For a history of Te Tapiri, see chapters four and five.

813. Douglas Rewi, brief of evidence, 9 August 2004 (doc F18), p 15

814. Douglas Rewi, brief of evidence (doc F18), p 15

815. Douglas Rewi, brief of evidence (doc F18), pp 15–16

816. Maurice Toetoe, under questioning by the Tribunal, Rangatahi Marae, Murupara, 18 August 2004 (transcript 4.9, p 69)

817. Maurice Toetoe, under questioning by Tribunal, Rangatahi Marae, Murupara, 18 August 2004 (transcript 4.9, p 69)

other wahi tapu were bulldozed or planted over. Some chose to absent themselves, and were then stigmatised as lazy by managers who did not understand why they were not at work.

From the 1970s, the Forest Service made some efforts to protect identified pa sites and other wahi tapu. Nonetheless, sites continued to be damaged – for example, by the planting of exotic trees on them. The Historic Places Act 1980 provided some legislative protection, but in practice this was not always effective, particularly in areas which were still being logged. We have seen that Te Tapiri was seriously damaged twice in the 1980s and 1990s. Both of these incidents were accidental, but in both cases there was a failure to supply contractors with maps which would have allowed them to avoid the pa site. This carelessness was, again, the Crown's responsibility.

The Crown has argued that it cannot guarantee 'practical' protection of wahi tapu, saying such protection is contingent on factors such as adequate funding for site monitoring, Maori identifying their sites, and decision-making by government. We acknowledge that there are financial constraints in ensuring protection of wahi tapu, and that direction from tangata whenua is vital, but we do think that the Crown has an obligation to do what it reasonably can to protect wahi tapu. In particular, it needs to follow its own procedures and ensure that forest workers are given enough information to allow them to avoid wahi tapu.

21.12 Treaty Analysis and Findings (Whirinaki Forest)

The Wai 262 ('Flora and Fauna') Tribunal dealt extensively with the Treaty's requirements of a management system for the natural environment. We endorse its conclusion that the Treaty guarantee of tino rangatiratanga obliges the Crown to 'actively protect the continuing obligations of kaitiaki towards the environment, as one of the key components of te ao Maori.'[818] As the Tribunal explained, kaitiakitanga is 'the obligation side of rangatiratanga' and it does not require ownership. While the English text of the Treaty guarantees rights in the nature of ownership, 'the Maori text uses the language of control – tino rangatiratanga.' Thus 'the kaitiakitanga debate is not about who owns the taonga, but who exercises control over it.'[819] The kaitiaki relationship with the environment is 'founded in whanaungatanga'; it 'is permanent and mandatory, binding both individuals and communities over generations and enduring as long as the community endures.'[820] The community leaders who are entrusted with the responsibilities of kaitiaki will be expert in matauranga Maori because 'kaitiaki must act unselfishly, and with right mind and heart, using correct procedure.'[821]

818. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 269
819. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 270
820. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, pp 267, 269
821. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 116

And that is so even if they have other interests in the resource in question: 'they may run businesses, or have recreational interests', for example.[822]

Of course there are interests in the environment other than those of kaitiaki: the interests of other people, and of the environment itself, must also be weighed in an environmental management system. Sometimes all the various interests will be reasonably aligned, sometimes there will be significant divergences. The particular circumstances should determine exactly how kaitiaki and other interests are to be balanced: the kaitiaki interest 'is not a trump card'.[823] And not all environmental taonga warrant the same degree of protection by their kaitiaki:

> some may be more important to iwi or hapu identity than others, as evidenced by the body of matauranga associated with them, and some may be more deserving of protection than others because they are in more fragile health.[824]

The Whirinaki Forest – its trees, plants, and birds – has long provided food and other material resources to its customary owners. For some 50 years from the 1920s, it was the main source of employment to the local peoples – including in State Forest 58, where logging began in 1938. By then, the Crown was the legal owner of the forest land. But such ownership did not negate the continuing obligations of kaitiaki towards the environment. As Ngati Whare put it:

> The Crown failed to recognise Urewera Maori's status as previous owners of the Urewera forests in cases in which the Crown acquired these forests. In the case of Ngati Whare the issue is not limited to the Crown's responsibility to consult with Ngati Whare over the management of the Whirinaki Forest Park or of the Te Urewera National Park, but extends to the Crown's historical responsibility to consult with Ngati Whare over the management of State Forest 58.

The question is how, in the circumstances, kaitiaki interests should be accommodated. The Wai 262 Tribunal provided this description of the relative weight that a Treaty-consistent environmental management system would accord the kaitiaki interest in particular taonga:

> Where, in the balancing process, it is found that kaitiaki should be entitled to priority, the system ought to deliver kaitiaki *control* over the taonga in question. Where that process finds kaitiaki should have a say in decision-making but more than one voice should be heard, it should deliver *partnership* for the control of the taonga, whether with the Crown or with wider community interests. In all areas of environmental management, the system must provide for kaitiaki to effectively *influence* decisions that are made by others, and for

822. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 272
823. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 272
824. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 272

21.12

> the kaitiaki interest to be afforded an appropriate level of priority. And the system must be transparent and fully accountable to kaitiaki and the wider community in delivering these outcomes.[825] [Emphasis in original.]

In terms of the Wai 262 Tribunal's Treaty analysis, the kaitiaki interest in the forest warrants a partnership role in decisions affecting it or, at the very least, an influential role in that decision-making. The evidence shows, however, that until 1984 the Crown provided no opportunities for kaitiaki involvement in management decisions affecting the forest. One consequence was that for the entire period that logging was conducted, no effective system was established to identify and protect the many wahi tapu in the forest. Nor did the Forest Service take any steps to preserve the habitat of native birds, though the destruction of miro and hinau had been identified as a major factor in the decline of kereru and tui populations – food greatly prized by local Maori – as early as 1958. A further consequence was the minimal protective impetus to key decisions about the extent of logging to be conducted and the effort to be invested in developing sustainable or less extensive logging practices. Instead, the community leaders were not accorded any formal role in the decisions made by Crown officers, first, to clear-fell then selectively log the forest and, finally, to cease logging altogether.

We are clear that the strong tangata whenua support for forestry, including for continued logging of native timber in Whirinaki after 1970, was not evidence of kaitiaki involvement and influence in forest policy. Rather, it was a pragmatic response from the local communities, driven by the need to retain their major source of employment in the rohe. Tangata whenua had become economically dependent on forestry because there were so few other options in their rohe, and at a time when the industry's long term effects on native forests were not fully appreciated. The timber towns of Te Urewera, most notably Minginui, were thus built – quite literally – on the back of forestry policy which was fatal for native forests but which, for as long as it lasted, provided economic security for tangata whenua. Once it was apparent that experimental regeneration efforts had been unsuccessful, the forest's kaitiaki had to choose, in effect, between its further destruction or the destruction of their people's livelihood and communities. At that time, tangata whenua calls for further efforts to develop sustainable logging went unheeded. And the comfort they drew from the policy of selective logging – which seemed more consistent with kaitiaki interests than clear felling – was short-lived. In terms of the Treaty's requirements, we are certain that the Crown's failure to recognise that kaitiaki interests in Whirinaki Forest must be influential, at the very least, in management decisions, is in breach of the principles of active protection of tino rangatiratanga and of partnership.

The advent of the Whirinaki Forest Park advisory committee in 1984 represented a very limited opportunity for tangata whenua involvement in the new forest park's management:

825. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 272

there was no provision for Maori membership, the committee's role was merely advisory, and it was replaced in 1990 by a conservation board with responsibilities for an entire region. Meantime, the Conservation Act 1987, with its reference to the Treaty of Waitangi, set the agenda for the forest park's management. It was too late to protect the forest and the wahi tapu that had already been destroyed but the limited evidence we have for the years to 2005 reveals that some positive changes occurred in that period. For example, DOC staff and management adopted a more inclusive, consultative, relationship with the forest's kaitiaki, perhaps paving the way for their far more extensive, Treaty consistent, involvement in the setting and implementation of policy.

To summarise our Treaty analysis to this point, we find the Crown to be in breach of its Treaty duty actively to protect tino rangatiratanga by excluding the forest's kaitiaki from any formal role in the management of the Whirinaki Forest through to the mid 1980s. The resulting prejudice includes the destruction of wahi tapu and, we consider, the excessive destruction of the forest, including its native bird population.

The Government's decision to cease logging in Whirinaki Forest had severe effects on the local peoples. But that decision was made in the context of a substantial reorganisation of State assets and their administration. In chapter 23 we examine that larger policy context and analyse its effects on the peoples of Te Urewera. For present purposes, our conclusion on the issue of the Crown's management of its decision to cease logging native timber in Whirinaki is that the Crown's conduct failed to minimise the effects on tangata whenua, but by far the more serious socio-economic impacts were caused by the corporatisation of State assets. As we have noted, the original Crown plan was to replace the logging of native trees with plantation forestry and, had that plan been implemented, forestry would have continued to sustain the local communities. But the Government's decision to withdraw from unprofitable State enterprises, including the subsidised plantation forest industry, put an end to that plan and was primarily responsible for the devastating effects on the timber towns in Te Urewera. Our conclusions about the consistency with Treaty principle of the corporatisation policy and the manner in which it was implemented in Te Urewera are presented in chapter 23.

21.13 Rivers: Introduction

The claims of the peoples of Te Urewera in relation to their rivers, their streams, and their customary fisheries were a major issue in our inquiry. At each of our hearings, kaumatua and kuia spoke of their ancestral relationships with their own rivers, their taonga, and the mauri of each of their waterways. They told us of their awaawa mahinga kai (water resource) sites where they took kokopu and koura, kakahi, inanga, ducks – and above all tuna, a

taonga species and a prized food in Te Urewera. Hapu and whanau had for generations exercised authority over their waters and waterways, and controlled fishing rights. And they exercised that authority in accordance with tikanga and with the values of kaitiakitanga, to respect and conserve their waterways and all the beings within them.

At the heart of the waterways and customary fisheries claims before the Tribunal was the disquiet of the claimants that they should have been dispossessed of their rivers by a principle of English common law (the *ad medium filum* presumption) of which they were not aware. They did not knowingly or willingly alienate their rivers to the Crown when their land, or undivided interests in their land, was purchased. New Zealand legislation had also expropriated their ownership and management rights in their rivers. The Coal-mines Act Amendment Act 1903 had confiscated their navigable rivers, the claimants say, yet they are still not sure which rivers or stretches of rivers the Crown believes it took under the legislation. And by later legislation the Crown has assumed exclusive control over rivers, disregarding their tino rangatiratanga, and then has managed them badly. Their indigenous fisheries, including tuna, were sacrificed to introduced trout, and to hydroelectric development. The Resource Management regime introduced in 1991, according to the claimants, has yet to deliver effective recognition of hapu and iwi as owners and kaitiaki of their rivers.

Claims relating to the mana and tino rangatiratanga of the hapu of Te Ika Whenua (Te Runanganui o Te Ika Whenua) over the Rangitaiki, Wheao, and Whirinaki Rivers and their tributaries, in the western part of our present inquiry district, have already been investigated and reported on by the Tribunal in 1998. Ngati Manawa, Ngati Whare, and Ngati Haka Patuheuheu (all represented by Te Ika Whenua in that inquiry) asked us to adopt the Tribunal's findings in respect of those rivers. We do so in large part, and discuss our position more fully, in s 21.16.2, when we consider the Crown's acquisition of western rim blocks between the 1870s and 1920s. We also consider the application of those findings to other claimants in this inquiry.

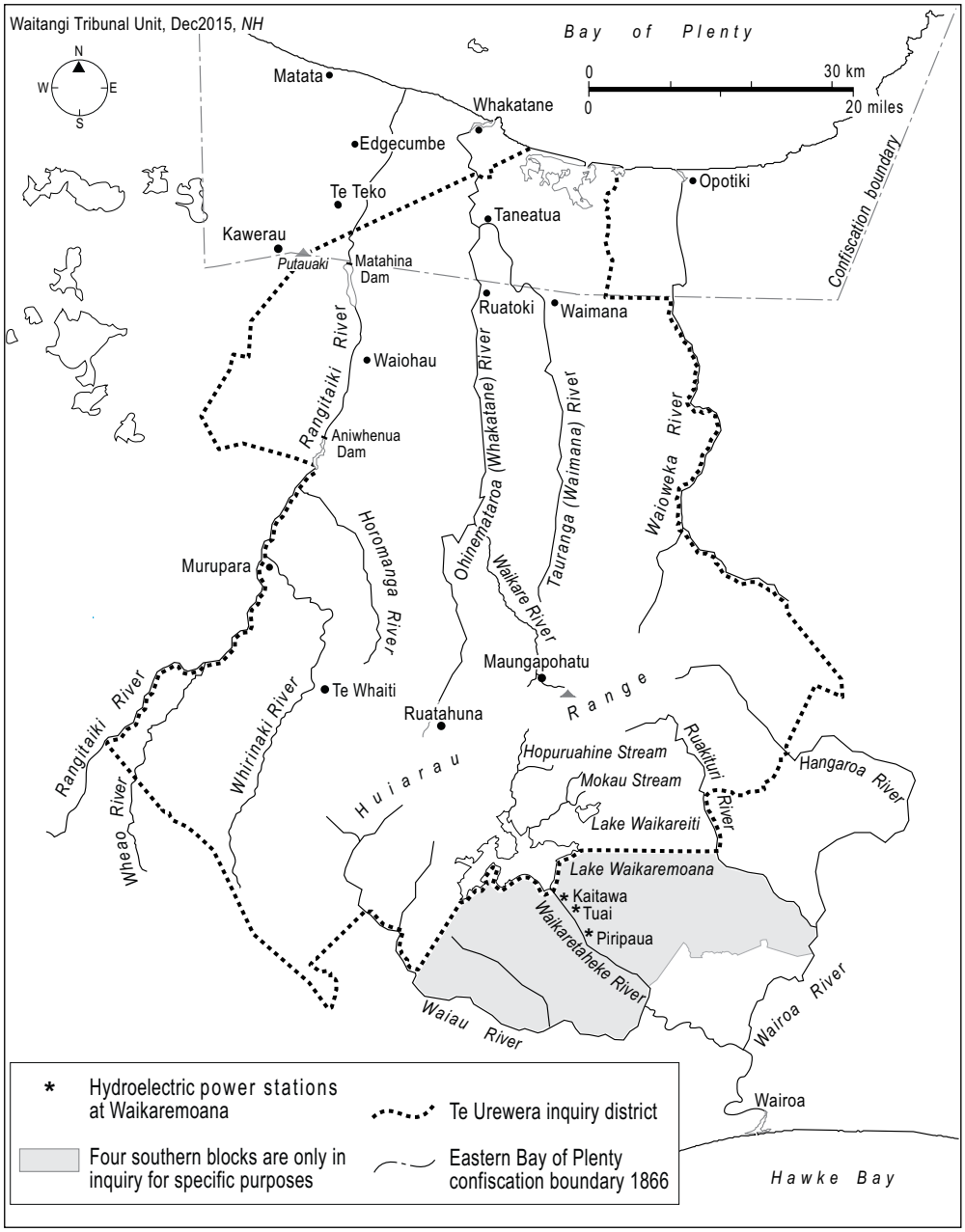
Our chapter considers the evidence brought about all these claims, and concludes with findings and a recommendation to the Crown.

21.14 Rivers: Key Facts

21.14.1 The rivers of the Te Urewera inquiry district

The rivers and streams of Te Urewera fall into three major catchments (see map 21.2)

The Ohinemataroa (Whakatane) River catchment drains the northern slopes of the Huiarau Range, and is joined on its way to Whakatane in the Bay of Plenty by the Waikare and Tauranga (Waimana) Rivers.



Map 21.2: Te Urewera inquiry district and waterways

The Rangitaiki River catchment drains the Ikawhenua Range to the east, and the Kaingaroa Plains to the west, and also flows into the Bay of Plenty. It is joined on its way north by the Wheao, Whirinaki, and Horomanga Rivers.

21.14.2

The Wairoa River catchment flows south from the Huiarau Range, into Hawke's Bay. The Wairoa River is fed by the Waiau, Waikaretaheke, Ruakituri, and Hangaroa Rivers.

Te Urewera also contains two significant lakes: Lake Waikaremoana (drained by the Waikaretaheke River), which is dealt with in chapter 20; and Lake Waikareiti, which is located in the Waipaoa block and is discussed in chapter 10. The Hopuruahine River, the Mokau Stream, and other streams empty into the northern shore of Lake Waikaremoana.

The inquiry district contains many other streams and smaller waterways. Nga Rauru o Nga Potiki, for example, produced a map of 40 named tributaries of the Ohinemataroa (Whakatane) and Tauranga (Waimana) Rivers.[826] Most of the land is broken and mountainous, and so river flats were principal sites of occupation for the peoples of Te Urewera, and they were heavily dependent on the foods available in the waterways and forests. It would be difficult to over-emphasise the importance of rivers to the claimants. We have already described their customary relationships with and uses of their waterways in section 21.3 above.

21.14.2 The law

The claim issues in respect of rivers are dominated by questions of law and its interpretation. In this section, we give a brief factual introduction to the legal terms, statutes, and cases that are discussed more fully in later sections.

(1) *Usque ad medium filum aquae*

The common law rule *usque ad medium filum aquae*, 'up to the middle line of the water', is a presumption of conveyancing law. The holder of a Crown grant is presumed to own the bed of a boundary river or stream, up to an imaginary line running along the centre of the bed. The presumption can be rebutted by the terms of the grant or by surrounding circumstances. The presumption does not apply if the survey plan has a fixed point or 'right line' boundary marked on it, rather than having the river or stream as the boundary. If a block is bounded by a river or stream, the boundary moves with the river if the change to its course is slow and gradual.

With regard to the claim issues before us, the leading historical cases about the *ad medium filum* rule are *Mueller* (1900) and *Wanganui River* (1962). The leading modern case is *Paki no 2* (2014).

- *Mueller*: *Mueller v Taupiri Coal-Mines Ltd* raised an issue of such importance that the case was moved from the High Court to the Court of Appeal.[827] It concerned the mining of coal under the bed of the Waikato River. The river was confiscated from Maori

826. 'Nga Rauru o Nga Potiki Te Urewera Inquiry District Map Book', December 2003 (doc B24(a)), map 16: Te Miina a Papatuanuku

827. *Mueller v Taupiri Coal-Mines Ltd* [1900] 20 NZLR 89 (CA)

by the Crown in the 1860s. The question before the court was whether, when riparian land was granted to settlers by the Crown, it carried with it ownership of the riverbed to the mid-point. All five judges of the Court of Appeal agreed that the *ad medium filum* rule applied unless rebutted. Four judges held that the presumption was rebutted by the circumstances of the grant. The Chief Justice held that it was not. The case was also significant because it influenced the statutory vesting, in 1903, of the beds of navigable rivers in the Crown. It is discussed further in later sections of this chapter.

- *Wanganui River*: The 1962 Court of Appeal decision in *Re the Bed of the Wanganui River* marked the end of litigation in the general courts which began in 1950.[828] It was preceded by litigation in the Maori Land Court, in which the Whanganui tribe sought to obtain freehold orders for the bed of the river. The issue in the general courts was whether compensation was due to Maori because they had owned the bed of the river before the beds of all navigable rivers were vested in the Crown by statute in 1903. In brief, the final outcome was that the Court of Appeal held that Maori had already lost ownership before 1903. This was because the court held there was no separate tribal title to the river in custom and the bed of the river had belonged *ad medium filum* to those individuals who received awards of riparian land from the Native Land Court before 1903, and to the purchasers of these riparian lands.
- *Paki No 2*: The *Paki* case concerned the bed of the Waikato River adjacent to the Pouakani lands. The former Maori owners of those lands brought a case in which the parties agreed that, if the river was not navigable, the Crown obtained the bed *ad medium filum* by purchase from the riparian owners. But the Maori owners maintained that they had not known of the mid-point rule, had not knowingly or willingly alienated the riverbed, and that the Crown therefore owned it under a constructive trust for them. In terms of the application of the *ad medium filum* rule, the key decision is the Supreme Court's 2014 judgment (*Paki v Attorney-General* (*No 2*)[829]). In brief, all four judges held that the parties' agreement that the riverbed had transferred *ad medium filum* could not be accepted without inquiry as to the facts. The 1962 *Wanganui River* decision was held to be 'questionable', and an inquiry as to specific Maori custom in respect of the Waikato River was essential before it could be certain that the *ad medium filum* presumption applied. The judges' reasoning is set out in more detail in section 21.16.1.

(2) *The doctrine of aboriginal title*

The doctrine of aboriginal or native or customary title is a common law doctrine. Under this doctrine, the Crown obtained 'imperium' (territorial authority) when it obtained sovereignty over New Zealand in 1840. This carried with it a 'radical' or 'root' title to all lands

828. *In re the Bed of the Wanganui River* [1962] NZLR 600 (CA)
829. *Paki v Attorney-General* (*No 2*) [2014] NZSC 118; *Paki v Attorney-General* (*No 2*) [2015] 1 NZLR 67 (SC)

and waters. It did not include 'dominium' or ownership. The Crown's radical title is 'burdened' by pre-existing Maori customary rights. Those rights endure until or unless they are extinguished, which can only happen by consent and in accordance with New Zealand law (although it is held that statutes, if sufficiently explicit in their language, can extinguish customary title without consent). Aboriginal or native title does not depend on, and should not be characterised by, the incidents of English law. Aboriginal title must be conceptualised in its own terms.[830]

(3) *Navigable rivers and the coal mines legislation*

Section 14 of the Coal-mines Act Amendment Act 1903 vested the beds of all navigable rivers in the Crown. This vesting was perpetuated in each succeeding Coal Mines Act until 1991, when the relevant section was repealed (by the Crown Minerals Act), but its effect was saved by section 354 of the Resource Management Act 1991, as if it had not been repealed.

The origins of section 14 of the Coal-mines Act Amendment Act 1903 are set out in some detail in section 21.16.3. Section 14 began with a saving clause – 'save where the bed of a river is or has been granted by the Crown'. After this, the section stated that the beds of navigable rivers 'shall remain and shall be deemed to have always been vested in the Crown'. A navigable river was defined as a river 'continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts, or rafts'. In section 206 of the Coal-mines Act 1925, this definition was changed to: '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'.

The meaning and scope of the saving clause, the definition of navigability, and the question of whether this statutory language was sufficiently explicit to extinguish Maori customary title, are all questions that have been debated in the courts. Here, we provide a brief introduction to cases that are dealt with later in the chapter:

- *Leighton* (1955): In *Attorney-General, ex rel Hutt River Board v Leighton*, Mrs Leighton sought to alter her title to include what she claimed was an accretion adjacent to the Waiwhetu Stream, which she argued that she owned *ad medium filum*.[831] The Hutt River Board sought to establish that the 'accretion' was the product of work carried out by the board and belonged to it. The Attorney-General sought a declaration that the Waiwhetu Stream was a navigable river, and its bed was vested in the Crown. The High Court found in favour of Mrs Leighton. On appeal, the Court of Appeal declined to make the declaration sought by the Attorney-General, after significant discussion and obiter dicta (non-binding judicial comments) about the application of the coal mines legislation and the definition of navigability, on which the judges disagreed.

830. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 45–46
831. *Attorney-General, Ex Relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA)

- *Tait-Jamieson* (1983): In *Tait-Jamieson v G C Smith Metal Contractors Ltd*, the defendant company had been removing shingle from the bed of the Manawatu River, and dairy farmers with riparian lands accused it of trespass.[832] The company claimed the river was navigable and the bed belonged to the Crown. The High Court (agreeing with Justice Adams in *Leighton*), found that section 261 of the Coal Mines Act 1979 was not a statutory rebuttal of the *ad medium filum* presumption, and that the river was likely not navigable either. For both reasons, the bed vested *ad medium filum* in the dairy farmers. The decision was not appealed.
- *Paki* (No 1): The circumstances of the *Paki* case have been set out above. In its first decision (2012), the Supreme Court found that the riverbed was not vested in the Crown because that particular stretch had not been navigable in 1903 when the Act was passed.[833] It overturned the decision of the High Court and Court of Appeal, which had found that the whole of a substantially navigable river vested in the Crown. Having decided this part of the appeal, the Supreme Court then held further hearings to determine the remaining issues (which resulted in the *Paki No 2* judgment in 2014).

(4) *Legislation for the management of rivers*

The Crown's assumption of control over the rivers of Te Urewera began in the 1940s (apart from the specific issue of hydroelectric development), after the consolidation scheme and the Crown's decision to redesignate most of Te Urewera for water and soil conservation. Legislation by which rights to control and manage rivers and waterways were transferred to the Crown included the Soil Conservation and Rivers Control Act 1941, the Water and Soil Conservation Act 1967, and the Resource Management Act 1991. A brief introduction to key provisions of these Acts follows.

(a) *Soil Conservation and Rivers Control Act 1941:* The Act empowered the Crown to control and manage rivers so as to minimise and prevent erosion and protect property from flooding. It provided for:

- the establishment of a Soil Conservation and Rivers Control Council, consisting of senior officials of the Public Works and Lands Departments, representatives of local authorities, and one representative of agricultural and pastoral interests (section 3), with a range of functions to carry out the purposes of the Act;
- the establishment of catchment boards under the supervision and control of the council (section 11(1)(j)–(k)); every board was required to submit to the Minister of Public Works and the council a general plan for preventing and minimising damage within its district by floods and erosion (section 128); and

832. *Tait-Jamieson v G C Smith Metal Contractors Ltd* [1984] 2 NZLR 513
833. *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 (SC)

- all or some rivers, streams, and channels within a district, by direction of the governor-general in council, to come under the control and management of the board, which could also be charged with repairing, improving, or reconstructing them, with funding assistance from local authorities, drainage boards, and river boards as the governor-general directed (section 130).

(b) ***Water and Soil Conservation Act 1967:*** This Act vested all rights to natural water in the Crown and modified the common law regime of riparian rights. Its purpose, as set out in its preamble, was to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use, and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, water supplies of local authorities, fisheries, wildlife habitats, and all recreational uses of water.

The Act:

- created a National Water and Soil Conservation Authority, chaired by the Minister of Works, with six other appointed members: one appointed on the advice of the Minister, one each representing the Soil Conservation and Rivers Control Council, the Pollution Advisory Council, and the Water Allocation Council, one appointed after consultation with the Executive Committee of the Municipal Association of New Zealand Incorporated, and one appointed after consultation with the Executive Committee of the New Zealand Counties Association Incorporated (section 5(1))
- created a Water Allocation Council, consisting of 11 members appointed on advice of the Minister, chaired by a member who was not in Government service, and comprising one officer each of the Department of Agriculture, the Department of Internal Affairs, the New Zealand Electricity Department, the Ministry of Works, and the Department of Health, plus three members to represent local authorities, plus one appointed after consultation with Federated Farmers of New Zealand Incorporated 'to represent the interests of primary industry in natural water', and one appointed after consultation with the New Zealand Manufacturers' Federation 'to represent manufacturing interests in natural water' (section 8(1))
- For the purposes of the Act, deemed catchment boards and catchment commissions constituted under the Soil Conservation and Rivers Control Act 1941 to be regional water boards (section 19(1))
- provided that the new National Water and Soil Conservation Authority should (among many other powers) control the system of allocating natural water rights, and the damming, diversion, taking, and use of water, and discharges into natural water (section 14(3)(a) and (g))

- provided that the authority should delegate certain powers to the three councils which, with itself, comprised the National Water and Soil Conservation Organisation as follows: matters of water and soil conservation to the Soil Conservation and Rivers Control Council; matters of pollution and quality of natural water and other water to the Pollution Advisory Council; and 'matters of allocation of natural water, and matters of co-operation with and between local authorities and suppliers of natural water in solving problems of distribution and economy of use of natural water and other water' to the Water Allocation Council; while the authority retained control of national policy, and general supervision of the administration of natural water (section 15)
- subject to any contrary legislative provision, vested 'the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water' in the Crown, except that it was lawful for persons to take or use natural water for domestic needs, and for their animals or for firefighting needs (section 21)
- provided that all other uses of water would henceforth require consent from a regional water board (sections 21, 22, 24).

(c) ***Resource Management Act 1991:*** A new regime, the culmination of many years of policy development, was introduced in 1991 to 'restate and reform the law relating to the use of land, air, and water'.

The Part II provisions of the Resource Management Act are most relevant to this issues before us.

Section 5 sets out the Act's purpose as follows:

'to promote the sustainable management of natural and physical resources'. Sustainable management is defined as the use, development, and protection of resources in such a way as to enable people and their communities to provide for their social, economic, and cultural well-being).

In giving effect to the Act's purpose, all people who exercise powers and functions under it (mainly local authorities) have to consider the matters set out in sections 6, 7, and 8 (section 5).

- Particularly important are the seven 'matters of national importance' listed in section 6 which decision makers have to recognise and provide for. These include 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga', and 'the protection of protected customary rights (section 6(g)). Section 6 was amended in 2003 to add the protection of 'historic heritage' as a matter of national importance; this includes 'sites of significance to Maori, including wahi tapu'.

- Under section 7 decision makers exercising powers under the RMA must also have 'particular regard' to a number of other listed matters, including 'kaitiakitanga' and the ethic of stewardship.
- Under section 8 decision makers exercising powers under the Act, in relation to managing the use, development, and protection of natural and physical resources, shall 'take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)'.

Regional councils are to give effect to the Act in their region. They control water and water bodies, and the principal management documents for rivers (and the other matters for which regional councils are responsible) are 'regional policy statements and plans', which the councils prepare (sections 30, 59). When preparing or changing these management documents, councils must 'consult tangata whenua' of the area who may be affected (sections 60(1), 73(1), first schedule, part 1, clause 3(1)(d)) and must 'have regard to' any relevant planning document recognised by an iwi authority (sections 62(2A)(a)(ii)).

The Act also regulates the taking of gravel from any river; this is controlled by local authorities. Section 13(1)(b) provides that no person may excavate or disturb the bed of a lake or river unless expressly permitted by a rule in a national environmental standard, regional plan, proposed regional plan, or a resource consent. Local authorities are required to consider tangata whenua values when making decisions about gravel extraction.

Under section 33(1) a local authority may transfer one or more of its functions, powers, and duties under the Act to another public authority; section 33(2) specifies that a public authority includes 'an iwi authority'. Section 2 defines iwi authority to mean 'the authority which represents an iwi and which is recognised by that iwi as having authority to do so'. Since 2003, when the original section 33(1) was repealed and replaced, the power of transfer has included the power to approve a policy statement or plan.

21.14.3 Land alienation in the inquiry district

Because of the connection in New Zealand law between land ownership and riverbeds, it is necessary to provide a brief recapitulation of the ways in which Maori customary tenure has been converted to Crown-derived titles, and the manner in which land has been transferred out of Maori ownership.

(1) *The Native Land Court and the rim blocks*

As we discussed in chapters 7, 8 and 10, blocks of land encircling the future Urewera District Native Reserve were passed through the Native Land Court from the mid-1870s to the 1890s. The court's orders converted Maori customary tenure into a form of Crown-derived title known as Maori freehold land. The tenure conversion process and the new titles comprised

a separate Maori title system, governed by the native land laws and administered by the Native Land Court.

In our inquiry district, the process began in the early 1870s with the four southern blocks, located south-east of Lake Waikaremoana. As set out in chapter 7, the Crown's purchase of the four southern blocks from Tuhoe, Ngati Ruapani, and Ngati Kahungunu in 1875 was conducted in a coercive, unfair manner that breached Treaty principles.

On the western side of the inquiry district, the rim blocks were: Matahina; Waiohau; Kuhawaea; Heruiwi 1–3; and Heruiwi 4. These blocks were mostly sold to the Crown through a purchase system in which the Crown imposed monopolies and subverted community control by picking off individual interests, partitioning and acquiring more land for survey costs, and then resuming purchase of the interests of non-sellers. There is a full account of these matters in chapter 10.

On the eastern side of the inquiry district, the Waipaoa block to the south and the huge Tahora 2 block in the north were passed through the court in the late 1880s and early 1890s. Part of Tahora 2 was acquired for survey costs but much of the block ended up in the East Coast trust (see chapter 12). The Waipaoa block was the subject of a particularly coercive and ruthless Crown purchasing campaign, as we explained in chapter 10.

The northern rim blocks were the Tuararangaia, Ruatoki, and Waimana blocks. The history of these three blocks was rather different. Tuhoe interests in Tuararangaia were gifted to the Crown in the twentieth century. Ruatoki passed through the court, was then placed in the Urewera District Native Reserve, and was mostly retained in Maori ownership following a consolidation scheme in the 1930s. Waimana was not the subject of Crown purchasing. Private purchasing and a process of serial partitioning resulted in the alienation of significant parts of the block, creating a patchwork of small, often uneconomic Maori blocks.

(2) *The Urewera District Native Reserve and Urewera Consolidation Scheme*

As we discussed earlier in the chapter, Premier Seddon and Te Urewera leaders negotiated an agreement in 1895. The result was the creation of the inalienable Urewera District Native Reserve. Title to the lands in the reserve was to be determined through a unique form of tenure conversion, in which a commission (with two Pakeha and and five Tuhoe commissioners) would list the individual owners of hapu blocks. Although the UDNR Act 1896 was a promising resolution of decades of struggle between the peoples of Te Urewera and the Crown, it, like the rim blocks, was subverted by the Crown's purchase of individual interests in the 1910s and early 1920s. By then, the Crown had acquired about half of the reserve, but no one knew where its interests were actually located (see chapter 13). Ultimately, rather than partition each of the UDNR blocks between Maori and the Crown, creating a patchwork of interests, both parties preferred a consolidation scheme involving their respective

interests within the entire Reserve by the time the Crown was willing to stop its purchasing (at least for the meantime).

The Urewera Consolidation Scheme was a complex and unique set of arrangements. The principles and outline of the scheme, as well as much of the disposition of the land, was negotiated between the Crown and Maori owners at the Tauarau hui in August 1921. The scheme was then given legislative force by the Urewera Lands Act 1921–22. Government officials representing the Lands and Survey Department and the Native Department were appointed as consolidation commissioners to implement the scheme. Their task was to set boundaries and awards on the ground, and to issue title orders for those awards. This process took several years, and the scheme was finally completed in 1927 (see chapter 14). As part of the scheme, the Crown acquired the Waikaremoana block, despite the fact that it had not actually purchased any interests there. Given the Government's determination to secure the block, evident in its plan to obtain it by a mix of compulsory public works takings and individual purchasing, Tuhoe insisted on relocating their interests from the Waikaremoana block into northern blocks in which they already had substantial interests, as part of the consolidation scheme. The Crown then purchased the remainder of the block from Ngati Ruapani and Ngati Kahungunu, based on agreements negotiated via local member of the House of Representatives Apirana Ngata in 1921.

Having briefly outlined the main forms of tenure conversion and land alienation, we turn next to examine the difference between the parties' positions on river issues.

21.15 Essence of the Difference between the Parties in Respect of Rivers

21.15.1 The *ad medium filum* presumption and the issue of knowing, willing sales of rivers

In the Crown's view, no riverbeds were acquired in Te Urewera in circumstances that breached the Treaty, except in the cases of raupatu and consolidation.[834] Crown counsel submitted:

> Neither the *ad medium filum aquae* presumption itself nor its application was in breach of Treaty principles. The presumption was not a principle designed to disentitle anyone of property rights. It was merely a principle of interpretation, a method of resolving any ambiguity as to boundaries when a sale of land bordered a river.[835]

This argument was based on the Crown's view that the *ad medium filum* presumption equated to Maori custom. According to Crown counsel, customary ownership of rivers went with ownership of adjoining lands. Transfer of the land would automatically include transfer of the river. Unless a Native Land Court investigation or a sale specifically excluded

834. Crown counsel, closing submissions (doc N20), topic 30, p 12
835. Crown counsel, closing submissions (doc N20), topic 30, p 2

a river, Maori custom and the English common law would both presume that the riverbed was included to the centre line.[836]

On that reasoning, there was no need for Native Land Court judges or Crown purchase agents to mention or explain the *ad medium filum* presumption, or to explicitly include a river in title investigations or land sales. Maori and the Crown would both know that rivers went with the land, unless the presumption was rebutted by a specific arrangement at the time of sale. In the Crown's view, this must be assumed to be the case for all land sales in Te Urewera.[837] The Tribunal, we were told, could only depart from this assumption by examining the 'understandings of each vendor and purchaser in each sale transaction . . . on a case-by-case basis' before it could 'arrive at any conclusion that Urewera Maori had a different understanding as to what was being sold'.[838] There is no evidence, Crown counsel added, that Maori sought to specifically exclude rivers from a sale, or protested trespass on riverbeds as if they had not intended to sell their rivers.[839]

The claimants' view of the *ad medium filum* presumption was very different. It is *not* their custom, they told us.[840] Rather, the presumption has been used to deny hapu 'the rewards of river ownership' and any say in the management of their rivers. Relying on Dr Doig's evidence, the claimants argued that the presumption was never explained to the peoples of Te Urewera: not in the proceedings of the Native Land Court or the two Urewera commissions; and not by purchase agents in land sales. Thus, a principle of English law, of which they had no knowledge, was used to dispossess them of their rivers. Further, Crown agents never offered to purchase rivers or said that rivers were included in a sale. Tuhoe, we were told, 'had no grounds to believe that their rangatiratanga over the waterways was diminished' by land sales. Since the Crown did not actively assert ownership till much later, in the second half of the twentieth century, it is not surprising that there were no protests about the loss of river ownership for a long time after the sales.[841]

Counsel for Ngati Kahungunu claimants used the four southern blocks as a prime example of how the *ad medium filum* presumption 'worked covertly' to alienate property rights, and diminished the mana and rangatiratanga guaranteed by the Treaty in respect of very significant taonga.[842] In the claimants' submission, English common law rules about the ownership of riparian land, and the effect of this on ownership of adjoining rivers, were not known or apparent to Maori at the time of sale in 1875. Under the doctrine of aboriginal title, Maori custom needed to be lawfully extinguished before English title rules could apply.

836. Crown counsel, closing submissions (doc N20), topic 30, pp 9–11
837. Crown counsel, closing submissions (doc N20), topic 30, pp 9–11
838. Crown counsel, closing submissions (doc N20), topic 30, p 11
839. Crown counsel, closing submissions (doc N20), topic 30, p 11
840. Counsel for Te Okoro Joe Runga, submissions by way of reply, 13 July 2005 (doc N32), p 6
841. Counsel for Tuawhenua, closing submissions, appendix (doc N9(a)), pp 110–114, 116–117
842. Counsel for Te Okoro Joe Runga, generic closing submissions on rivers, 30 May 2005 (doc N4), p 8. See also counsel for Te Okoro Joe Runga, submissions by way of reply (doc N32), p 6.

21.15.2

In claimant counsel's submission, this did not happen with the rivers of the four southern blocks. The tribal groups did not knowingly or willingly sell these rivers. The rivers were not mentioned in the negotiations or the deeds, and the contra proferentem rule holds that ambiguities in deeds should be construed against the drafter. Further, the *ad medium filum* presumption should (within its own terms as part of English law) be considered as rebutted. This is because the transaction did not specifically include any waterways and Maori continued to use the rivers in the customary way after the sales. In those circumstances, and since there is no evidence that Maori understood the *ad medium filum* rule, the presumption should be considered to have been rebutted.[843] Further, the claimants argued that the Crown had a positive obligation under the Treaty to ensure that Maori properly understood land transactions, including any implications for river ownership.[844]

Instead of Maori losing title by a presumption of English common law, the Crown's title system should have 'conferred on them in 1840 a proprietary interest in the rivers that could be practically encapsulated within the legal notion of the ownership of the waters.'[845] This, the claimants pointed out, was the Tribunal's finding in the *Te Ika Whenua Rivers Report*.[846]

21.15.2 The coal mines legislation and navigable rivers

The claimants argued that no justifications of 'good governance' were available for the 'confiscation' of their navigable rivers by statute in 1903. In the claimants' submission, there was simply no need for this degree of interference with their property rights and their tino rangatiratanga over rivers. The 1903 Act expropriated the beds of navigable rivers, even though the evidence shows that the Act was only supposed to deal with the ownership of coal in response to the *Mueller* case. In its final form, the 1903 Act had 'far wider ramifications' and breached Treaty guarantees. Further, the claimants' view is that the statute was enacted without due care for Maori interests, given the uncertainty that has persisted in the meaning of 'navigability', and of what was being saved in the word 'granted' (discussed further below).[847]

In the claimants' submission, the evidence also highlights that 'the Crown passed this expropriatory legislation without any consultation or agreement by Maori; or monetary compensation.'[848] The Crown failed to live up to its own common law standards when it paid no compensation: 'At common law, it is always presumed that extinction of private

843. Counsel for Te Okoro Joe Runga, generic closing submissions on rivers (doc N4), pp 6–8, 16, 19–25
844. Counsel for Te Okoro Joe Runga, submissions by way of reply (doc N32), pp 3–4
845. Counsel for Tuawhenua, closing submissions, appendix (doc N9(a)), p 111
846. Counsel for Tuawhenua, closing submissions, appendix (doc N9(a)), p 111
847. Counsel for Te Okoro Joe Runga, generic closing submissions on rivers (doc N4), p 9
848. Counsel for Te Okoro Joe Runga, generic closing submissions on rivers (doc N4), p 9

property rights by statute entails an obligation to pay compensation, and this applies to aboriginal title rights.'[849]

In the claimants' view, no Treaty justification was (or can) be made for expropriating the beds of navigable rivers in the inquiry district in this way, or for treating the Treaty-guaranteed possession of navigable and non-navigable rivers differently. The claimants also noted the Court of Appeal's view in the 1994 *Te Ika Whenua* case that the 1903 legislation may not have been 'sufficiently explicit to override or dispose of the concept of a river as a taonga,'[850] but this issue, they pointed out, has not been decided authoritatively. In the meantime, there is no evidence that any rivers in the inquiry district have been alienated from Maori to the Crown in a manner consistent with the Treaty.[851]

The Crown's response to these arguments was that the peoples of Te Urewera had never expressed any dissatisfaction with the vesting of the beds of navigable rivers in the Crown before the present claims. First, there was no evidence to show that they had not been consulted about the coal mines legislation before it was passed. Secondly, there was no evidence that the peoples of Te Urewera had ever protested against the legislation or its effects. Thirdly, there was no evidence that they had ever 'sought compensation for any lost rights' following the enactment of the legislation. In those circumstances, the Crown concluded, 'there is no evidence adduced of any particular Crown acquisition of any riverbed in the inquiry district that is contrary to the principles of the Treaty.'[852]

The claimants responded that one of their concerns was the uncertainty about how the coal mines legislation actually applied in Te Urewera (which we discuss further below).[853] They also reaffirmed their position that 'the Coal-mines Amendment Act 1903 was clearly confiscatory and a breach of the principles of the Treaty.'[854] Counsel for Ngati Manawa added that it was 'fantastic to imagine . . . that there was any kind of consultation with Urewera Maori, Maori elsewhere, or indeed anyone, regarding the enactment of an obscure amendment to the Coal Mines Act in 1903.'[855] The Crown, in the claimants' view, had 'chided' them for not protesting or seeking compensation, whereas the legislation and its implications were not explained by the Crown, and did not become clear in the inquiry district until much later. Indeed, one of the claimants' main concerns is that they are still not really sure which rivers or stretches of river the Crown has confiscated under the legislation.[856]

849. Counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), p 63
850. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA), p 26 (counsel for Te Okoro Joe Runga, generic closing submissions on rivers (doc N4), p 9); counsel for Ngati Manawa, closing submissions (doc N12), pp 61–62
851. Counsel for Te Okoro Joe Runga, generic closing submissions on rivers (doc N4), p 10
852. Crown counsel, closing submissions (doc N20), topic 30, pp 11–12
853. Counsel for Ngati Manawa, submissions by way of reply, 8 July 2005 (doc N26), pp 6–7
854. Counsel for Ngati Manawa, submissions by way of reply (doc N26), p 7
855. Counsel for Ngati Manawa, submissions by way of reply (doc N26), p 7
856. Counsel for Ngati Manawa, submissions by way of reply (doc N26), pp 7–8

21.15.3 The special circumstances of the Urewera Consolidation Scheme

The claimants argued that the Crown had 'wrongly acquired' their rivers as part of the Urewera consolidation scheme, even though the peoples of Te Urewera never knowingly or willingly sold their rivers to the Crown.[857] Purchase agents only acquired undefined, unlocated shares in land, and the UDNR deeds made no mention of rivers. Thus, the Crown never paid for any riverbeds that it ended up acquiring through the Urewera consolidation scheme. Nor did it obtain any riverbeds by consent as part of that scheme. At no stage, in the claimants' submission, did the consolidation commissioners ever explain the *ad medium filum* rule or that the Crown would end up the owner of riverbeds adjoining the riparian land that it was awarded. Indeed, it is not clear that the commissioners themselves expected the presumption to apply to their awards. They very occasionally awarded interests in the actual beds of rivers to Maori, though never to the Crown.[858]

Tuhoe protested by petition in 1922, fearing that the Crown was gaining ownership of their rivers through the scheme, which was something they had never agreed to:

> It is clear that Tuhoe were unwilling to alienate their rivers under the UCS, which was unsurprising given that the issue hadn't been negotiated with them.[859]

In the claimants' submission, the Crown's response in 1924 that the rivers were not part of its award should have been the end of the matter, but it was actually ambiguous because it did not rule out the application of the *ad medium filum* rule to the Crown's award. Since then, the Crown has claimed ownership of adjoining riverbeds under this common law doctrine, which the claimants believe is a Treaty breach.[860] Also, the Crown has obtained riverbed ownership through creating riverbank reserves or marginal strips, the 'deemed effects' of which include title to the river bed *ad medium filum aquae*.[861]

The Crown took a very different view of the effects of the UDNR purchases and the consolidation scheme.

First, the Crown argued that its creation of marginal strips or riverbank reserves as part of the consolidation scheme had been well intentioned. Based on Dr Doig's evidence, Crown counsel argued that there had been no deliberate attempt to deprive hapu of riverbed ownership.[862]

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857. Counsel for Wai 36 Tuhoe, closing submissions, pt C (doc N8(b)), p 15; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a), pp 173–175

858. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 173–175

859. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 174

860. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 174–175; counsel for Tuawhenua, closing submissions, appendix (doc N9(a)), pp 115–116

861. Counsel for Ngati Manawa, closing submissions (doc N12), p 58

862. Crown counsel, closing submissions (doc N20), topic 30, p 12. See also Doig, summary of 'Te Urewera Waterways' (doc F6), pp 4–5.

Secondly, the Crown noted that in cross-examination, Dr Doig had accepted that rivers running inside blocks (rather than bounding them) would have been understood as alienated with the land.[863]

Thirdly, the Crown argued that UDNR purchases were the same as all others, in the sense that where boundaries were rivers, those rivers would automatically transfer with the land – and Maori would have understood that to have been the case. Again, proof to the contrary would be needed in every case before the Tribunal could find that Maori had not understood themselves to be selling their rivers along with their land.[864]

Fourthly, the Crown argued that, because rivers went with the land, no extra payment was required for rivers. Dr Doig had maintained that the Maori owners who sold land and those who were relocated as part of the consolidation scheme received no compensation for rivers over and above the price paid by the Crown for the value of their *land*. Crown counsel submitted: 'This point assumes that compensation for rivers would necessarily be a separate part of any negotiation of price.' The Crown's view is that rivers were included as part of the sale of land, and so the purchase price 'necessarily' included payment for those rivers.[865] Crown counsel did add: 'In the case of consolidation, the purchase of shares provided a different context.'[866] No explanation was offered, however, as to how the context differed or what significance the difference had for the Crown's argument about the UDNR purchases.

Also, Crown counsel submitted, as noted above, that 'there is no evidence adduced of any particular Crown acquisition of any riverbed in the inquiry district that is contrary to the principles of the Treaty'. But this submission was 'subject to two important qualifications', one of which was raupatu, and the other of which was the Urewera consolidation scheme.[867] Yet the Crown made no other submission about how or why the consolidation scheme was an exception in respect of its acquisition of rivers.[868]

21.15.4 What riverbeds does the Crown claim to own, and is the law in respect of ownership unclear?

The Wai 36 Tuhoe claimants argued that the Crown has 'wrongly acquired by legislation or by operation of the UDNRA and UCS title to Tuhoe's rivers within Te Urewera, *or has left the state of ownership of rivers in confusion* [emphasis added]'.[869] This was because

863. Crown counsel, closing submissions (doc N20), topic 30, p 10
864. Crown counsel, closing submissions (doc N20), topic 30, pp 9–11
865. Crown counsel, closing submissions (doc N20), topic 30, p 10
866. Crown counsel, closing submissions (doc N20), topic 30, p 11
867. Crown counsel, closing submissions (doc N20), topic 30, pp 11–12
868. See Crown counsel, closing submissions (doc N20), topics 18–26.
869. Counsel for Wai 36 Tuhoe, closing submissions, pt C (doc N8(b)), p 15

21.15.4

> the UCS did not expressly address the question of rivers. As a result the question of title to rivers remains in substantial doubt. We argue that the rivers have not been willingly ceded by Tuhoe to the Crown and the presumption remains that they belong in Tuhoe ownership. However, this is the matter that the Crown must clarify for the future. So also, Tuhoe title to its rivers, where navigable, needs to be confirmed as they too have never been acquired from Tuhoe.[870]

Counsel for Ngati Manawa submitted: 'The real problem with the issue of title to river beds seems to be that neither the Crown nor anyone else has any clear idea as to which river beds belong to the Crown and which do not.'[871]

For Ngati Manawa, the main problem was the poor drafting of the coal mines legislation, with its circular definition of a navigable river as a river that can be used for navigation, and the Crown's long-standing refusal to correct the ambiguities because they favoured the Crown's interests. In the claimants' view, the Crown has been enabled to assert ownership of riverbeds on flimsy grounds, including that of rivers which were navigable by jet boats, though these were not invented in 1903. Then, the Crown has not necessarily pressed its claims to rivers after acquiring what it wanted (usually valuable gravel). Another flaw in the 1903 Act, we were told, was that it included no mechanism to formally declare a river navigable, nor any due process or means of appealing such a decision. Given the confiscatory nature of the legislation, the claimants' view was that there needed to be a careful, formal appraisal of navigability and an explicit Crown claim of ownership, which could then be contested as necessary. Instead, the law is unclear and Government departments have claimed rivers from time to time with significant inconsistency.[872] Because the Crown has sometimes asserted ownership of the Rangitaiki as navigable, and at other times not, the claimants today still do not know which stretches of the Rangitaiki are claimed by the Crown.[873]

The Crown responded: 'Riverbed ownership depends not on Crown recognition but on the legal system's recognition of rights and interests.' The 'question of who holds title to riverbeds within the inquiry district today is a question of law that could be determined by the Maori Land Court and High Court'.[874] Crown counsel submitted that it was 'likely' that title to the beds of navigable rivers in Te Urewera 'will be held . . . by the Crown'. For non-navigable rivers, it was 'likely' that the adjoining landowner would own half of the riverbed, in accordance with the *ad medium filum* presumption.[875] Tangata whenua, Crown counsel submitted, were 'likely to hold title to some riverbeds' under this presumption, but the pre-

870. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 60
871. Counsel for Ngati Manawa, submissions by way of reply (doc N26), p 6
872. Counsel for Ngati Manawa, closing submissions (doc N12), pp 59–60, 63
873. Counsel for Ngati Manawa, closing submissions (doc N12), p 60; Counsel for Ngati Manawa, submissions by way of reply, (doc N26), p 7
874. Crown counsel, closing submissions (doc N20), topic 30, p 8
875. Crown counsel, closing submissions (doc N20), topic 30, p 8

sumption was rebuttable. They 'may still and, in places, are quite likely to, hold title to beds of non-navigable rivers' where they owned adjacent or surrounding land. The Crown noted that surviving pockets of Maori land in the national park were mostly on rivers; it would be quite wrong, therefore, to assume that tangata whenua have lost ownership of all riverbeds. Block-by-block evidence was needed: 'It is not an issue that admits of easy, generic answers in the abstract.'[876]

Thus, the Crown argued that the owners of riparian Maori land may still own riverbeds to the mid-point unless that presumption has been rebutted. But Crown counsel made no submissions about the meaning or effects of the coal mines legislation, other than to note that Government departments had extracted gravel from time to time in the bona fide belief that the riverbeds concerned were Crown-owned. This could include a 'belief that the river was navigable.'[877] Crown counsel gave no explanation as to why it was only 'likely' that the Crown had title to the beds of navigable rivers in Te Urewera.

In reply to the Crown's submissions, counsel for Wai 36 Tuhoe submitted: 'It is particularly disappointing that the Crown has not addressed the uncertainty of rights of ownership and management of rivers arising from the legal regime applying to rivers.'[878]

Counsel for Ngati Manawa agreed, arguing that the Crown was correct that there were no 'easy, generic answers in the abstract', and that Maori may still own some riverbeds or stretches of riverbeds.[879] The problem, in the claimants' view, is that no one knows for sure – even in respect of such a major river as the Rangitaiki:

> one would expect that in the case of major waterways such as the Rangitaiki river (a river of great significance to Ngati Manawa) the Crown would have some idea as to what stretches of the river it actually lays claim to and on what basis. Without knowing the basis for Crown claims to ownership in any given case it is hard to know whether any such claim is well-founded or not – even in the ordinary law, quite apart from any consideration of Treaty breach. Until the Crown deigns to inform the claimants as to what waterways it believes it owns and why the matter is indeed 'in the abstract'.[880]
>
> . . . . .
>
> It is submitted that the Crown cannot tell us what stretches of the Rangitaiki river it owns (and the Wheao and Whirinaki for that matter) because it – or rather, its officials – do not themselves have any idea, and indeed cannot do so given that the law relating to riverbed ownership is in such a state of hopeless ambiguity, uncertainty and confusion.[881]

876. Crown counsel, closing submissions (doc N20), topic 30, pp 8–9
877. Crown counsel, closing submissions (doc N20), topic 30, p 17
878. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 44
879. Counsel for Ngati Manawa, submissions by way of reply (doc N26), p 6
880. Counsel for Ngati Manawa, submissions by way of reply (doc N26), p 6
881. Counsel for Ngati Manawa, submissions by way of reply (doc N26), p 7

21.15.5

Thus, the parties agreed that there were no 'easy, generic answers in the abstract' about the ownership of particular rivers, or stretches of them, but disagreed as to whether that meant the law governing ownership was unclear. The claimants argued that the law itself was uncertain in its application to every major river in Te Urewera.

21.15.5 How has the Crown asserted authority and control over rivers and customary fisheries, and with what effects?

The claimants asserted that the Crown has assumed 'exclusive environmental management' within Te Urewera. Counsel for Tuhoe submitted that the effect of this was that the tino rangatiratanga of Tuhoe 'is disregarded'.[882] The Crown denied that it had assumed exclusive management – which would assume that it had ignored its Treaty partner completely, 'in a relationship where neither party can have monopoly rights over a resource'. It denied also the suggestion that it had 'somehow excluded Maori from the broader group that it governs'.[883] Counsel pointed to Tribunal reports referring to a hierarchy of interests in respect of natural resources based on kawanatanga and tino rangatiratanga, and noted that the first interest is the Crown's obligation to control and manage those resources 'in the interests of conservation and in the wider public interest'; then comes 'the tribal interest in the resource, ahead of the rest of the public'.[884] The management of natural resources 'is an exercise of reasonable and good governance'.[885]

Claimants and the Crown dispute the degree of authority the Crown has assumed in respect of rivers. The claimants' key concern has been the Crown's assumption of exclusive control by statute, disregarding both their tino rangatiratanga and their obligations as kaitiaki; and its subsequent bad management of rivers. The result has been erosion, pollution, and habitat destruction – with serious damage to customary fisheries.

The Crown made two concessions in response: it had until 'relatively recently' conducted 'limited consultation' in respect of river management issues on gravel extraction and flood control';[886] and it had 'facilitated' the introduction of trout, which had damaged indigenous fisheries.[887] Otherwise, counsel pointed to the Resource Management Act 1991, submitting that tangata whenua interests are 'taken into account' through the Act in terms of how the natural environment is managed, and through the fisheries regime. The Crown stated that there was 'insufficient evidence' before the Tribunal to make any finding of Treaty breach.[888]

882. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a), p 153)
883. Crown counsel, closing submissions (doc N20), topic 29, p 12
884. Crown counsel, closing submissions (doc N20), topic 29, p 12
885. Crown counsel, closing submissions (doc N20), topic 29, p 45
886. Crown counsel, closing submissions (doc N20), topic 37, p 3
887. Crown counsel, closing submissions (doc N20), topic 30, p 2
888. Crown counsel, closing submissions (doc N20), topic 30, p 14

As we have seen, the claimants expressed concern that the Crown has appropriated the profits of gravel extraction by claiming ownership of their rivers. In their view, gravel extraction has been poorly administered and monitored; the result has been erosion and degradation of rivers and riparian lands in Te Urewera. The Crown conceded that consultation before 1991 was limited. But the RMA currently regulates the taking of gravel from any river, and local authorities are required to consider tangata whenua values when making decisions about gravel extraction.[889]

The management and control of customary fisheries is an important issue for the claimants. Claimants and the Crown were not in agreement about the impact of the post-1991 regime for managing customary fishing, and the management of indigenous fish species and their habitats. The claimants argued that the modern fisheries management regime was 'insufficient' to ensure that fish stocks –especially tuna – remained at a level suitable for customary harvest.[890] The Crown, as we have noted, submitted that tangata whenua interests 'are taken into account . . . through the fisheries regime'.[891] In our analysis we consider the Crown's position that tangata whenua played an important role in regulating customary fishing in rivers, in accordance with the Fisheries (Kaimoana Customary Fishing) Regulations 1998 negotiated under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[892]

The claimants made no submissions about the suitability of fishing regulations. Their principal concern was the decline of their eel fishery, and the impact on it of hydro dams, commercial fishing, and habitat degradation.[893] The claimants submitted, in respect of the Waikaremoana power scheme, that they had not been consulted about the scheme, and that it had had significant detrimental effects on them, their rivers, and their fisheries.[894] The Crown acknowledged the impacts of the hydro scheme on customary fishing activities, and on eel migration, but stated that resource consents for the scheme are now required by law and that there has been considerable consultation between ECNZ and local Maori groups.[895]

Crown counsel, while conceding the damage to native fish populations in Te Urewera rivers caused by the introduction of brown and rainbow trout, pointed to Mr Lynch's evidence that little or no commercial fishing was now taking place in Te Urewera as a 'circumstance' that should be considered in this context.[896] But the claimants did not consider that the Crown's remedial measures (including a moratorium on new commercial licences, and

889. Crown counsel, closing submissions (doc N20), topic 30, p 17
890. Counsel for Te Okoro Joe Runga, submissions by way of reply (doc N32), p 4
891. Crown counsel, closing submissions (doc N20), topic 30, p 14
892. Crown counsel, closing submissions (doc N20), topic 30, p 13
893. Claimants set out this concern in a number of briefs of evidence and submissions. See, for instance, counsel for Te Okoro Joe Runga, submissions by way of reply (doc N32), p 4.
894. See, for instance, the evidence of Maria Waiwai, brief of evidence (doc H18), pp 4–6; James Anthony Waiwai, brief of evidence (doc H14), pp 23–24; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 65.
895. Crown counsel, closing submissions (doc N20), topic 28, pp 16–17
896. Crown counsel, closing submissions (doc N20), topic 30, p 16

allocation of quota to tangata whenua) were adequate to ensure the health of the customary eel fishery. Tuna stocks were low because of previous over-fishing and hydro development, and the commercial fishermen themselves had chosen to stay away.[897]

In respect of post-1991 river management, the claimants accepted that the Resource Management Act was an improvement on the previous resource management regime. Counsel for Tuawhenua, for instance, had expressed concern about the Water and Soil Conservation Act 1967, under which the Crown's powers in respect of rivers were further entrenched; since then, she said, 'anyone wishing to use [natural] water has been required to obtain the Crown's consent.'[898] Counsel for Nga Rauru o Nga Potiki considered the RMA was 'well intentioned'.[899] Claimant submissions generally were brief, and were critical of various aspects of the Act, or of the Crown's river management regimes. Counsel for 144 Ngati Ruapani submitted that the Crown's environment protection regimes 'have not recognised or provided for the traditional fisheries and other activities of Maori with regard to their rivers, and have failed to give Maori the consultative and management role they are entitled to by the Treaty'. Counsel were critical of post-1991 river management because tangata whenua, in her view, were seldom consulted over management; if they were. Nor had the delegation of management functions from centralised Crown agencies to local government been satisfactory.[900] Counsel for Wai 36 Tuhoe agreed that the Act fell short of what was required by the Treaty because it vested river management in regional councils, and 'Tuhoe have no recognised legal role' to manage their rivers.[901]

The Crown's response to post-1991 claimant concerns about river management and consultation was consistently couched in terms of the Resource Management Act; issues such as gravel extraction, pollution, hydro dams, flood control, and the permissibility of certain river activities are now managed appropriately through the Act.[902]

21.16 How Has the Crown Exercised Authority and Control over Te Urewera Rivers, and Has it Taken Due Account of the Rights and Interests of the Peoples of Te Urewera?

Summary answer: *New Zealand law about rivers – both common law and legislation – is complex and confusing. The application of both in Te Urewera has created great uncertainty about the legal ownership and management of its rivers.*

897. Counsel for Te Okoro Joe Runga, submissions by way of reply (doc N32), p 4
898. Counsel for Tuawhenua, closing submissions, appendix (doc N9(a)), pp 117–118
899. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 268
900. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), appendix A, pp 114, 117
901. Counsel for Wai 36 Tuhoe, thematic submissions for Ruatoki hearing, 17 January 2005 (doc J43), p 4
902. Crown counsel, closing submissions (doc N20), topic 30, pp 2–3, 13–18

The common law

Under the English common law, rivers are conceptualised as land – the riverbed – (which can be owned) and water (which cannot). For tidal rivers, the bed of the tidal reaches is vested in the Crown. The beds of non-tidal rivers can be privately owned. There is no public right of navigation or fishing in these privately owned rivers. Where access to the river can be controlled or prevented, there is little practical difference between ownership of a riverbed and ownership of a whole river, including its water and other resources. Legally, however, the water cannot be owned until abstracted and captured. Ownership of the bed of a non-tidal river is presumed to lie with the owner of the land adjoining it, to the centre line of the stream (ad medium filum aquae), though the presumption might be rebutted by the terms of the land owner's grant. The English common law was imported to New Zealand in 1840. The English Laws Act 1858 however added an important qualification: the laws of England were deemed to be in force 'so far as applicable to the circumstances of . . . New Zealand'. Relevant circumstances in New Zealand include Maori customary law and the rights recognised and guaranteed by the Treaty of Waitangi. The common law in New Zealand also incorporates the doctrine of aboriginal title or customary title, which states that the Crown's radical or underlying title, acquired with sovereignty, is subject to pre-existing Maori customary rights. Those rights can only be extinguished with the free consent of Maori or by clear statutory wording.

The Native Land Court was statutorily charged with ascertaining ownership according to Maori custom; but in the general courts, from 1877 on, Maori customary property rights were found to be unenforceable. In the leading case at the time of our hearings, the 1962 Court of Appeal decision In re the Bed of the Wanganui River, the court held that there was no separate tribal title to the river bed, and that investigation and granting of title to blocks of land by the land court extinguished the customary title ad medium filum aquae. But the idea that separation of river beds from their waters and the mid-point presumption equate with Maori custom has faced serious criticism since at least the 1990s, notably by the Waitangi Tribunal, which has found that such rules are not relevant to the way Maori understood, and understand, rivers, or what Maori agreed to sell as part of a land transaction. The leading modern case is Paki No 2 (2014). All four Supreme Court judges considered that the Wanganui River decision about the applicability of the ad medium filum presumption was at best of doubtful authority; that an investigation of local Maori custom was required, and that if local Maori custom involved separate ownership of a river from the adjoining land, then the ad medium filum presumption would not apply to a Native Land Court title or its subsequent conveyance.

The Crown first asserted its control and authority over Te Urewera rivers in the Eastern Bay of Plenty confiscation, under the New Zealand Settlements Act 1863. The confiscation included the beds of rivers. Later assumptions of Crown authority over rivers arise from Crown purchases of the four Southern blocks (1875); its purchases of the 'rim' blocks defined by the Native Land Court, which encircle the Tuhoe rohe potae, from the mid-1870s on; and from the

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statutory conversion of the titles of UDNR blocks (originally decided by the Urewera commissioners, not the Native Land Court, so that legally the UDNR land remained in customary title) to orders of the Native Land Court in 1909.

The evidence of tangata whenua before us in this inquiry did not support a view that mana over land and adjacent rivers is identical, or that rivers were customarily considered part and parcel of an adjoining piece of land; rather, rivers have a separate identity from the surrounding lands as awa tupuna, with their own mauri. In considering the effect of land alienations on rivers, we note the key difference between the position of the Crown and that of Chief Justice Elias in Paki No 2. The Crown submitted to us that the peoples of Te Urewera sold their rights to the rivers when they sold their lands, unless the rivers were specifically excluded. That is, the Crown wants the matter to be viewed in the context of English custom (common law). The Supreme Court in Paki has said that the matter is to be viewed objectively in the context of Maori custom and usage in relation to the river in question.

In the case of the four southern blocks, there is no evidence that rivers formed part of the negotiation for the blocks, and the sketch maps accompanying the deeds of sale show the shaded boundaries as running alongside the rivers but not including them. The claimants moreover gave evidence of their communities' continued, widespread use of water resources south of the lake until at least the 1940s. It cannot be shown that the Maori vendors knowingly and willingly alienated their rivers in (and bounding) the four blocks; and their continued exercise of customary rights in the rivers shows that they considered ownership remained with them. For the western rim blocks we adopt the relevant findings of the Te Ika Whenua Rivers Tribunal, namely that there was no evidence that the Rangitaiki, Whirinaki or Wheao Rivers were included as part of the sale of riparian land. The Tribunal did accept that smaller tributaries and streams, where located inside the boundaries of a sold block, were not necessarily taonga, and that tino rangatiratanga over these waterways may not have been retained. But it considered that the onus rested with the Crown to prove that Maori willingly gave up the wish to retain their rivers. Title may have passed to the Crown by virtue of the ad medium filum rule, but this was hardly a voluntary relinquishment of tino rangatiratanga. The Treaty promised Maori full, exclusive and undisturbed possession of their taonga, and this included water; the ownership rights of hapu equated to full rights of use and control of the waters within their rohe. In respect of the eastern rim blocks, Tahora 2 and Waipaoa, there is no evidence available to us from which to draw conclusions about whether rivers were alienated knowingly and willingly in land transactions. There are no records indicating that the Crown would acquire the riverbed of the Ruakituri River, the eastern boundary of the Waipaoa block, when it acquired land with frontage to the river for survey costs. The Crown obtained the whole of the riparian land abutting the Waipaoa Stream and most of the riparian land adjoining the Ruakituri River, but there is no evidence that the owners knowingly or willingly sold either waterway, and significant evidence to the contrary. In the northern rim blocks, the Ruatoki

owners secured legal ownership of their small riparian sections by the Ohinemataroa River as a result of the Ruatoki–Waiohau consolidation scheme. The wider community, however, continued to exercise customary rights over the river, maintaining their customary relationship with it. The Crown emerged from this consolidation scheme as the owner of a significant stretch of the Rangitaiki River – but it had purchased no land there; it acquired the land as a result of purchases at Ruatoki. Thus there is no evidence that the Waiohau owners willingly agreed to transfer this stretch of the river to the Crown. At Waimana, the position is highly confused because surveyors sometimes used fixed (right line) boundaries, some by the banks and others in the middle of the riverbed, especially when many small partitions of the block were created. This was probably because of the constantly changing course of the river. The ad medium filum presumption did not apply to these boundaries.

Legislation

The importance of the Coal-mines Act Amendment Act 1903 has been far-reaching. Section 14 of the Act vested the beds of navigable rivers in the Crown, and deemed them always to have been vested in the Crown (except in case of a Crown grant). The Government's aim in inserting the clause initially was to obtain more certain ownership of the coal under the beds of New Zealand's larger rivers. But concerns were raised about interference with the rights of private property owners. At the third reading, the clause about navigability was inserted to circumvent this difficulty, vesting not just coal in the Crown, but riverbeds and all minerals in them. It is clear that Maori rights were given no consideration, nor were the special circumstances of Te Urewera (as a native reserve with its own unique titles system). And the peoples of Te Urewera could not have been consulted in the few days before the new clause was inserted at the third reading of the Bill. In the general courts, the question has been debated whether the effect of the Act was to expropriate (confiscate) Maori rights or merely to declare the prior legal position. In the Te Ika Whenua case (1994), the Court of Appeal suggested that the language of section 14 might not be sufficiently clear to expropriate a river that is a taonga –a 'whole and indivisible entity, not separated into bed, banks and waters'. The question has not yet been tested and decided by the courts. In the meantime we consider that the Crown's claim of riverbeds in our inquiry district on the basis of the Act was expropriatory. Either the Crown is acting unlawfully or the Act is expropriatory.

There are particular difficulties with the statutory definition of navigability, which has no root in Maori custom; Maori were not concerned with the ownership of riverbeds. The higher courts have been uncertain how to interpret navigability. Judges have disagreed for instance about whether the Act should be interpreted as vesting in the Crown the whole bed of a river that is navigable 'in substantial part', or whether navigation has to be for a commercial purpose. There have been official initiatives since the mid-1960s to consider how to clarify the law, or whether to set up a mechanism to decide which rivers are navigable, and to what

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point, operated by the Lands and Survey Department. There was a proposal in 1985 to state a case to the Court of Appeal to clarify the meaning of the relevant section (section 261 of the Coal Mines Act 1979, the effect of which has been preserved by section 354 of the Resource Management Act 1991); the Minister approved it, but it was not carried out. The law relating to ownership of the beds of navigable rivers seems not to have been reconsidered by the time of our hearings in 2005.

The special circumstances of the Urewera District Native Reserve and the Urewera Consolidation Scheme

The ordinary native land laws did not apply to the UDNR in 1903 when the Coal-mines Act Amendment Act was passed. The Premier and the Native Minister had both acknowledged that the rivers in the reserve belonged to Maori. In the hearings of the Urewera Commission, set up to divide the district into hapu blocks, investigate their ownership and make block orders, the ownership of rivers was almost never discussed, nor is it clear how Tuhoe saw their land titles as affecting their rivers. The work of the Urewera Commission had not changed the fact that the UDNR was still in customary title, but section 3 of the UDNR Amendment Act stated that all orders made under the 1896 Act should be deemed to have had the same operation as a freehold order made by the Native Land Court (the Government hoped it would assist the purchase of reserve land for settlement). It is our view however that it was highly unlikely that rivers were included ad medium filum in the orders of the Urewera commissioners, and therefore it was equally unlikely that when the orders were deemed to have had the 'same operation' as Native Land Court orders, this vested riverbeds in riparian owners ad medium filum. The Crown's purchases were later treated as if both had happened. But the Crown bought only undefined interests in UDNR blocks; it never managed to buy the whole of any block. So many kainga and cultivations were near rivers, it seems these would be the last places given up once interests were finally located on the ground. The deeds and transfer documents for the UDNR purchases do not mention rivers at all. It cannot be shown in fact that Tuhoe, Ngati Manawa or Ngati Whare knowingly or willingly sold any of their rivers to the Crown in these transactions, and there is significant evidence that they did not. In the case of the Waikaremoana block, the Crown purchased no interests at all, so Tuhoe, Ngati Ruapani and Ngati Kahungunu did not knowingly or willingly alienate any rivers or waterways in that block.

The Urewera Consolidation Scheme followed the intense years of Crown purchasing in the UDNR blocks. Maori owners would negotiate the location of their awards on the ground with Crown officials. Consolidation commissioners would subsequently finalise awards on the ground, and settle boundaries. Maori were not represented on the commission and, because rivers and streams were used extensively as boundaries, the decision as to how much riverbank land the Crown and Maori would get was solely a matter for the Crown. From notes of the consolidation hui we know that the commissioners did not discuss the potential implications

of the consolidation scheme and reorganisation of the titles for legal ownership of the rivers or riverbeds at any point during the proceedings. The Crown assumed later that it was self evident that control and use of waterways was dependent on the ad medium filum presumption (so that this required no explanation at all). On the other hand it also acquired riparian strips or reserves, generally one chain (20 metres) wide, adding to the uncertainty as to what rights it had acquired over riverbeds. It thus took ownership of the banks of almost the entire Tauranga River and some of its major tributaries, though the land in question was not Crown land. It is not entirely clear why some of these reserves were made under the authority of the Land Acts. Other reserve strips were located along streams in both the Whakatane and Waimana catchments. It is not clear whether these marginal strips made the Crown owner of these waterways ad medium filum. What is clear is that when the Crown began to lay off riverbank reserves, a large Tuhoe petition was sent to Parliament in 1922; the petitioners stated their strong objection to the Crown 'taking our rivers'. The commissioners, to whom the petition was referred, responded in 1924 that: 'The rivers are not included in any of the Crown awards'. Thus the peoples of Te Urewera were entitled to assume that their authority and control over rivers continued as before – and as it had during the time of the UDNR. The question also arises whether, if the Crown did acquire any property rights in rivers through the acquisition of riparian land during the UCS, it did so without the payment of any compensation to Maori sellers or non-sellers. The land had not been partitioned, with a defined purchase of riparian land. Instead, the Crown's consolidated award equalled the monetary value of what it had paid in its purchases for undefined shares. It must be the case therefore that the Crown never paid for the land under the rivers. It is not clear how much riparian land the Crown obtained through separate roading and survey deductions, though it would be surprising if no river and stream frontages at all were included in the 71,500 acres awarded to the Crown for this purpose. In respect of the Waikaremoana block, we note that there was no explicit offer by the Crown to Ngati Ruapani and Ngati Kahungunu to buy rivers, or agreement to sell them; it seems also that the Crown sought to separate Maori from any ownership of riverbanks in the block by inserting foreshore reserves between Ngati Ruapani reserves and the Hopuruahine River – perhaps because of its preoccupation with watershed protection. By the end of this period it appeared that the Crown had ownership of virtually all the waterways south-east of the Huiarau Range. Maori, on the other hand, were still largely unaware that the Crown might claim ownership of their rivers. It may be added that Tuhoe and Ngati Whare processes of amalgamating many of the UCS titles and vesting them in new tribal trusts in the late 1960s and early 1970s further complicated the situation. But there is no evidence that these processes had any effect on tribal ownership of the Ohinemataroa (Whakatane) River, regardless of who owned the riparian lands. It was the intrusion of the Crown's claims as a new owner of massive amounts of riparian land that was the most important change in respect of rivers.

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Crown claims of ownership of Te Urewera riverbeds

The Crown has asserted its ownership of riverbeds in a variety of ways. The most far-reaching assertion came in the 1950s, when long stretches of riverbed were made part of the national park, mostly made up of the Crown's Urewera A block which it had obtained through the UCS. It maximised its claim to riverbeds in the park by also including many of the riverbank reserves created during the consolidation scheme. All beds and waters in the Urewera A block had been included in the national park by the end of 1957. Outside the national park, assertions of riverbed ownership were mostly made in relation to gravel extraction, because the Crown could charge extractors royalties for Crown-owned rivers. It also arose when the Government had to decide whether or not to claim dry riverbed when a water course had changed. But the basis on which the Crown claimed to own particular stretches of riverbed was often unclear. It has claimed various beds or parts of beds from time to time, through different agencies – sometimes by licensing local bodies – and has also apparently abandoned claims or changed the basis of the claim from navigability to the ad medium filum presumption. The Rangitaiki, Whirinaki, Ohinemataroa (Whakatane) and Tauranga (Waimana) Rivers were all declared navigable in 1977 for the purpose of gravel extraction, but it is not at all clear on what basis. Lands and Survey, for instance, could find no evidence in 1994 of the Crown ever claiming to own the Rangitaiki.

There remain many points of doubt as to who owns the riverbeds of Te Urewera. It is uncertain whether Maori customary title has survived the various points at which it might have been extinguished by law. It is uncertain whether any rivers or parts of rivers are 'navigable' within the meaning of the coal mines legislation, and which rivers or parts of rivers are claimed by the Crown. Yet it is over 100 years since the 1903 Act was passed. A third major area of uncertainty is whether the ad medium filum presumption may be rebutted at the time of sale (of riparian lands) to the Crown. Riverbed ownership, once the national park was established, seems to have been of little interest to the Crown – perhaps because so many powers of control over rivers were vested in it by statute in the second half of the twentieth century.

Crown assertions of authority and control over rivers and customary fisheries

The Crown introduced laws to control aspects of river management, especially those related to assisting Pakeha settlement, from the earliest colonial period. Tribal authority and ownership of waterways was barely considered in the enactment of these statutes. In Te Urewera Pakeha settlement was limited to the fringes of the inquiry district, and most of the area was kept for catchment preservation of forestry. As a result many of the nineteenth century statutes were not of relevance in Te Urewera. Crown assumption of control over the rivers of Te Urewera began in the 1940s (with the exception of its use of the Water-power Act 1903 and its successors for hydro development at Lake Waikaremoana and the southern waterways). Foremost among statutes by which control has been asserted was the Water and Soil Conservation Act

1967, which established a Water and Soil Conservation Authority to oversee a national system of allocating water rights. Maori rights and interests were neither considered nor provided for in the Act. An amendment in 1981 did not improve matters. Historically, Crown management issues which directly affected Maori owners included gravel extraction, flood protection, and pollution. The Crown conceded that its consultation on gravel extraction and flood control had been limited 'until relatively recently'. It appears that there was poor monitoring of gravel extraction, and that this contributed to erosion before the RMA. *Local bodies took little or no interest in flood protection for Te Urewera Maori communities before the 1960s because until 1964 there was a general rating exemption for former UDNR lands. The land Maori owners retained was generally not very productive or was too small in individual parcel size to allow their effective participation in decision-making around funding for erosion protection. They could not bring financial pressure to bear on catchment boards and regional councils. Maori riparian land was particularly vulnerable to erosion and flooding. Most was still left out of the major works constructed in the 1960s and 1970s, though Ruatoki, Waimana and other areas did get some benefit. There is little evidence about pollution of particular rivers before the* RMA, *though it is clear that it occurred due to fertiliser run off, pest control poisons, farm effluent, and leaching from riverside dumps around townships. Hydro development also impacted on rivers in the inquiry area. We accept the findings of the Te Ika Whenua Rivers Report in respect of the Matahina, Aniwhenua and Wheao power schemes. The Waikaremoana scheme, which had major effects on the river system to the south-east of the lake, resulted in loss of habitat and mahinga kai, and it was the late 1990s before a programme was instituted to try to reverse the harm to the migration cycle of eels. The claimants were not compensated for the use of their taonga, their water bodies, to generate electricity for the national benefit, nor for the harm to their waterways and fisheries.*

A further area of Crown river management concerns customary fisheries. The importance of customary fisheries to Maori had often been acknowledged since the early decades of the twentieth century, but the Government had taken little action to protect them. The biggest single threat to the customary fisheries of Te Urewera has been the introduction of trout, which predate on native fish and compete with them for food supplies. Trout have devastated the indigenous fisheries of Te Urewera, with the exception of tuna. In the first half of the twentieth century, the Government managed the fisheries for the benefit of Pakeha sports people, and were indifferent to most indigenous species except eels, which were seen as a threat to trout. The first attempt to protect indigenous fish for Maori is found in 1951 regulations; but it was 1977 before some protection was extended to eels. The lack of provision for tangata whenua input into decision-making over customary fisheries has made the taonga of the tuna fishery vulnerable to damage by competing interests, within the Crown-controlled and regulated regime. The fishery has been damaged by habitat depletion, hydroelectricity production, and barriers to migration and, from the late 1960s, a great expansion of commercial fishing which

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spiked in the early 1980s and then remained stable. In the RMA era, post-1991, the Crown has undertaken some remedial measures, but at the time of our hearings tuna stocks were still low, and there was still no provision at any of the hydroelectricity projects for eel migration in both directions. Maori customary fishing rights have received some recognition in DOC's management of Te Urewera National Park, including recognition of tuna fishing as a permitted activity. But Maori were still shut out of any management role for their customary fisheries in the park before the 2003 management plan, which at least provided for negotiation of joint management for customary tuna fishing. Outside the park, customary fishing was still controlled by amateur fishing regulations at the time of our hearings, which gave Maori comparatively little control over their own customary fishing.

With the advent of the RMA regime in 1991, the stated purpose of which is provision for sustainable management of natural and physical resources, there is recognition of the relationship of Maori and their culture and traditions with their ancestral lands and water, for protection of recognised customary activities; and Treaty principles are to be taken into account. Regional councils are to prepare regional policy statements and plans, and consult with tangata whenua. At the time of our hearings it was not clear how the tribal relationship with Environment Bay of Plenty worked in practice, or whether river issues such as gravel extraction, pollution, hydro dams, and flood control are managed appropriately through the RMA. The Act is a significant improvement on the pre-1991 regime for management of rivers. But no management powers in respect of any rivers in Te Urewera had been transferred to Tuhoe or other iwi at the time of our hearings, though there is provision in the RMA for powers exercised by local authorities to be transferred to iwi authorities.

Crown recognition of the rights and interests of the peoples of Te Urewera in their rivers has, historically, been minimal, and been overridden by preoccupation with the demands of settlement, sports fishing, and hydro development,. The Crown's failure to recognise Maori authority, the importance of their relationships with rivers, and tuna, their taonga, and Maori reliance on clean rivers and river foods, has led to environmental damage and damage to the tuna fishery throughout Te Urewera.

21.16.1 The common law

Under the English common law, rivers were divided into land (which could be owned) and water (which could not). For tidal rivers, the bed of the tidal reaches was vested in the Crown. The beds of non-tidal rivers could be privately owned. Such ownership carried with it exclusive rights to control and use the fisheries and the water in the river, as long as the rights of downstream owners were not infringed. There was no public right of navigation or fishing in these privately owned rivers; such rights, where they could be invoked, 'depended

upon immemorial user or dedication by a riparian landowner'.[903] Thus, where access to the river could be controlled or prevented, there was little practical difference between ownership of a riverbed and ownership of a whole river, including its water and other resources.[904] Legally, however, the water could not be owned until abstracted and captured. And the abstraction or use of water for agriculture, industry, and other purposes could not infringe the rights of other owners to 'receive the unimpeded flow of stream water unaltered in volume or quality'.[905]

Ownership of the beds of non-tidal rivers was presumed to lie with the owner of the land adjoining the river. This was a presumption of conveyancing law, expressed in the maxim *ad medium filum aquae* (to the middle point of the water). Where land is bounded by a non-tidal river, 'the presumption is that the boundary is the centre line of the stream; but this presumption may be rebutted by the terms of the grant or by the surrounding circumstances'.[906]

The English common law was imported to New Zealand in 1840. The English Laws Act 1858 states in section 1:

> The laws of England as existing on the 14th day of January 1840, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of Justice accordingly.

The key phrase in this section was 'so far as applicable to the circumstances of the said Colony of New Zealand'. Relevant circumstances in New Zealand included Maori customary law and the rights recognised and guaranteed by the Treaty of Waitangi. This was especially relevant in respect of rights to, and concepts of, 'property'. The common law in New Zealand and other colonies incorporates what is called the doctrine of aboriginal title or customary title, which we described briefly in the Key Facts section above. As the Tribunal in the Te Kahui Maunga Report explained, the doctrine of customary title:

> identifies Maori as the original inhabitants of the country and acknowledges that they 'held all land in New Zealand according to their customs and usages' . . . The doctrine seeks to protect these rights by recognising that although the Crown acquired radical title upon its

903. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), pp 16–17
904. Waitangi Tribunal, *The Whanganui River Report*, p xv
905. G W Hinde, D W McMorland, and P B A Sim, *Introduction to Land Law*, 2nd ed (Wellington: Butterworths, 1986), sec 12.011 (*Waitangi* Tribunal, *Te Ika Whenua Rivers Report*, p 83)
906. Hinde, McMorland, and Sim, *Introduction to Land Law*, sec 2.201 (Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 83). After 1903, the presumption no longer applied in New Zealand law to non-tidal but navigable rivers.

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assumption of sovereignty, this is held 'subject to Maori customary usages or native title until the Maori customary interest had been extinguished'.[907]

The nature and importance of customary title has been set out in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*:

> Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession, or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective. It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes.[908]

In the early period of New Zealand's colonial history, this position was acknowledged by both the British Government and the New Zealand courts. The Tribunal has noted a number of instances over the years. The best known is the 1847 case *R v Symonds*, in which Justice Chapman stated:

> Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.[909]

The need to conceptualise native title in its own terms was also known, although not always respected. From 1840 the British Government assumed that Maori territorial rights were circumscribed, and did not extend over the whole country. From 1844, there was a move afoot (finally abandoned by 1847) to seize all Maori land that was not directly occupied

907. Waitangi Tribunal, *Te Kahui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2013), vol 3, p 998

908. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA), 23–24

909. *R v Symonds* (1847) NZPCC 387, 390 (Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 998)

by way of houses or cultivations as 'unowned' by Maori and therefore the property of the Crown.[910] Lord Stanley, secretary of state for the colonies until the end of 1845, opposed this move, explaining that what Maori owned depended on Maori law and custom, not English law. He told the British Parliament, in a speech that was received with acclamation:

> With respect to the greater portion of New Zealand, I assert that the limits and rights of tribes are known and decided upon by native laws. I am not prepared to say what number of acres in New Zealand are so possessed; but that portion which is not so claimed and possessed by the natives, is, by the act of sovereignty, vested in the Crown. But that is a question on which native law and custom have to be consulted. That law and that custom are well understood among the natives of the islands. By them we have agreed to be bound, and by them we must abide. These laws, these customs, and the right arising from them, on the part of the Crown, we have guaranteed when we accepted the sovereignty of the islands; and be the amount at stake, smaller or larger, so far as native title is proved, – be the land waste or occupied, barren or enjoyed, – these rights and titles the Crown of England is bound in honour to maintain, and the interpretation of the treaty of Waitangi, with regard to these rights is, that except in the case of the intelligent consent of the natives, the Crown has no right to take possession of land, and having no right to take possession of land itself, it has no right – and so long as I am a minister of the Crown, I shall not advise it to exercise the power – of making over to another party [ie, by Crown grant] that which it does not possess itself.[911]

Later, in the 1871 case *Re the Lundon and Whitaker Claims Act*, the New Zealand Court of Appeal found:

> The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. *Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it*. [Emphasis added.][912]

In the general courts, this line of reasoning was later displaced by what Chief Justice Elias refers to as the '"political trust" notion', which made Maori customary property rights unenforceable in the courts. This began to dominate legal proceedings after the *Wi Parata* decision in 1877.[913] The Native Land Court, by contrast, remained statutorily charged with ascertaining ownership according to Maori custom. As we saw in chapter 20, the Native

910. Peter Adams, *Fatal Necessity: British Intervention in New Zealand 1830–1847* (Auckland: Auckland University Press, 1977), pp 179–187; Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 257–261

911. *New Zealander*, 13 December 1845 (Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, pp 295–296)

912. *Re the Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41 (CA), 49 (*Paki v Attorney-General* (*No 2*) [2015] 1 NZLR 67 (SC), 124)

913. *Paki v Attorney-General* (*No 2*) [2015] 1 NZLR 67 (SC), 93, 124–127

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Appellate Court found in respect of Lake Waikaremoana that any consideration of the *ad medium filum* rule, and its application to the Crown's acquisition of lands adjoining the lake, was irrelevant: 'There is abundance of authority that in New Zealand the rights of natives are safe-guarded without reference whatsoever to the incidents of English law.' Maori held Lake Waikaremoana 'in accordance with their ancient customs and usages'. Those 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', which would include the Crown's assertion in court that it had acquired rights to the lakebed when it became the owner of riparian lands.[914]

For rivers, the leading case at the time of our hearings was the 1962 Court of Appeal decision *In re the Bed of the Wanganui River*.[915] The court held that there was no separate tribal title to the river bed, and that investigation and granting of titles to blocks of land by the Native Land Court 'extinguished the customary title *ad medium filum aquae*'.[916] In coming to this decision, the Court of Appeal relied mainly on the advice of the Native Appellate Court. The president of the Court of Appeal, Justice Gresson, found:

> 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 medium filum rule. In regard to both matters there may well have been an express or tacit permission, and in any case it is reasonable to suppose that there would have existed some degree of 'give and take' between hapus in this regard. That riparian owners without let or hindrance may have permitted a right of passage or may have allowed the construction of fishing devices by others than those holding title to the riparian land does not, in my opinion, exclude the principle that the bed of the river up to the middle line was included when the banks were parcelled out among groups or hapus and common ownership was transmuted [by the Native Land Court] to ownership in severalty.
>
> For the reasons earlier expressed, I am of 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 other Members of the Court concurring in this view, there will be a declaration accordingly that the titles issued in respect of the riparian blocks included in each case a title *ad medium filum aquae*.[917]

914. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), pp 153–154
915. *In re the Bed of the Wanganui River* [1962] NZLR 600 (CA)
916. Counsel for Ngati Manawa, closing submissions (doc N12), p 61
917. *In re the Bed of the Wanganui River* [1962] NZLR 600 (CA), 609–610

Relying in part on this case, the Crown argued in our inquiry that the *ad medium filum* presumption applied to Maori riparian lands because it was, in effect, Maori custom. As Crown counsel put it, the 'possession of mana over land surrounding or adjacent to rivers or streams carried with it the possession of mana over those streams or rivers (or parts of them where different hapu/iwi occupied opposite banks)'. On that understanding of custom, the Crown argued that the 'relinquishment of mana over the surrounding or adjacent land carried with it the relinquishment of mana over the rivers or streams, unless rights in relation to rivers or streams were specifically reserved'.[918] In making this argument, the Crown repeated its position from the Te Ika Whenua Rivers inquiry in the 1990s.[919] There, it was added that Maori custom was so similar to the 'philosophy underlying the common law principles as to riparian rights', as encapsulated in the *ad medium filum* rule, that the rule was a reliable indicator of what Maori agreed to part with – whether in post-Treaty land sales or the abandonment of territory in pre-Treaty times.[920]

In his evidence for the Tribunal, Professor Boast explained the significance of the the 1962 *Wanganui River* decision for our inquiry. The decision was primarily concerned with the effect on a riverbed when the Native Land Court investigated and awarded title to riparian blocks, and its application has not been limited to Whanganui:

> The Court of Appeal found that the Native Lands Act processes of investigation of title and subsequent Crown grant had the effect of vesting title to the bed of the Wanganui *ad medium filum* in the grantees, thus extinguishing any notional customary tribal title to the river bed. The case tends to indicate, then, that Crown grants to Maori under the Native Lands Act in fact do extinguish customary title to the river bed. The 1962 decision is, however, questionable in view of the recent development of the law relating to aboriginal title in Australia, Canada and New Zealand.[921]

In effect, the 1962 Court of Appeal decision has been treated as expressing 'universal Maori custom', most recently by the High Court in the *Paki* case.[922] But the idea that separation of river beds from their waters, and the mid-point presumption equate with Maori custom has faced serious criticism since at least the 1990s. The Waitangi Tribunal's *Mohaka River Report* found that English common law rules had little or no relevance in explaining how Maori customarily understood (and continued to understand) rivers, or what Maori had

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918. Crown counsel, closing submissions (doc N20), topic 30, p 9

919. Crown counsel, closing submissions (doc N20), topic 30, p 9. Crown counsel referred us to fuller discussion of the Crown's position in Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 93 (see also pp 93–97).

920. Crown counsel, closing submissions, 10 October 1994 (Wai 212 ROI, doc D5), p 12 (Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 93); see also pp 93–97.

921. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p 271 n

922. This characterisation of the High Court's decision was made in *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 85.

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agreed to sell as part of a land transaction.[923] Relying on that report, and the *Te Ika Whenua – Energy Assets Report 1993*, the Court of Appeal in *Te Ika Whenua* suggested in 1994:

> the Waitangi Tribunal have adopted the concept of a river as being taonga. One expression of the concept is 'a whole and indivisible entity, not separated into bed, banks and waters'. . . . [A]s the Waitangi Tribunal bring out in their Mohaka River Report at pp 34–38, the ad medium filum aquae rule applied in the 1962 case is inconsistent with the concept and may well be unreliable in determining what Maori have agreed to part with.[924]

This decision was followed by the Tribunal's *Te Ika Whenua Rivers Report* in 1998 and *Whanganui River Report* in 1999. Both reports rejected the notion that the mid-point presumption had anything to do with Maori custom. The *Whanganui River Report* was stringent in its criticism of the advice given by the Maori Appellate Court to the Court of Appeal, and the Court of Appeal's 1962 *Wanganui River* decision.[925] The Tribunal noted, however, that the comments of President (later Lord) Cooke in the 1994 Court of Appeal decision in *Te Ika Whenua* were not binding. What was needed, the Tribunal explained, was a test case:

> Whether as a matter of law the rights to rivers and waters may exist as a matter of aboriginal title or customary law and may not be overridden by . . . the *ad medium filum aquae* rule, will not be known until such time, if ever, as the issues are further tested in the High Court and Court of Appeal.[926]

Since our hearings, the reliability and applicability of *In re the Bed of the Wanganui River* was tested in the *Paki* case. Although we do not have the benefit of submissions from the parties, we cannot avoid some discussion of that case's implications for the claims before us.

As noted above, the High Court in *Paki* considered that the 1962 *Wanganui River* decision expressed a universal rule of Maori custom, that there was no separate ownership of riverbeds and adjoining land. Even if there had been, the High Court's view was that the rights were extinguished by the title orders of the Native Land Court, before any subsequent acquisition of riparian blocks by the Crown.[927]

In the Supreme Court in *Paki*, the judges delivered separate judgments. We summarise here only the points relevant to the *ad medium filum* rule.

The Chief Justice, Dame Sian Elias, found that the outcome of the appeal was not determined by applying the 1962 *Wanganui River* decision. The reason the appellants had put their case that way (that the Crown gained ownership *ad medium filum* by its acquisition of their riparian lands) was that they had feared the Maori Land Court, relying on the 1962

923. Waitangi Tribunal, *The Mohaka River Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp 30–38, 49–50, 78
924. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA), 26–27
925. Waitangi Tribunal, *Whanganui River Report*, pp 224–232, 265–266
926. Waitangi Tribunal, *Whanganui River Report*, p 306
927. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 82, 85, 96

Court of Appeal decision, would reject a claim that they still owned the riverbed.[928] The Chief Justice, by contrast, considered that the 'effect and the application' of the *ad medium filum* presumption when the Native Land Court investigated and granted title was in fact a matter of 'significant controversy'.[929] While the High Court in the *Paki* case had treated *Wanganui River* as 'expressing universal Maori custom', her view was that such a conclusion could not reasonably be drawn from the Whanganui River proceedings. Local custom was ascertainable as a matter of fact and may differ from that applying to the Whanganui River. Relying on the Privy Council decision in *Amodu Tijani*, which we discussed in the previous chapter, the Chief Justice considered that 'the study of the history of the particular community and its usages in each case' was needed. The High Court was wrong to apply *Wanganui River* without further inquiry as to the custom and usage of the Pouakani people.[930]

The Chief Justice then turned to the doctrine of aboriginal title. The High Court had found, and the Court of Appeal had appeared to agree, that, 'irrespective of whether it accorded with custom', the *ad medium filum* presumption arose 'as a matter of New Zealand law' when titles to riparian lands were granted by the Native Land Court. The Chief Justice disagreed: 'no such presumption of ownership arose as a matter of New Zealand law on investigation of titles and . . . such a presumption of law would be inconsistent with New Zealand law and traditions, for reasons explained in *Ngati Apa*'.[931] That is, Maori customary title was a burden on the Crown's radical title, was not displaced by English common law rules affecting property (such as Crown ownership of tidal lands), and could not be extinguished without consent unless overridden by statute. The onus of proof of extinguishment is on the Crown.[932]

Thus, a conveyancing presumption about the riverbed could only apply if the riparian owners 'had the bed to convey'. The presumption was not available unless the 'riverbed land had been investigated and any customary interest extinguished' either by sale to the Crown or 'conversion to Maori freehold land' after title investigation by the Native Land Court. A specific investigation and grant of title to a riverbed was necessary before the *ad medium filum* presumption could apply to new, Crown-derived titles. The Chief Justice noted that, in the case of small watercourses, the inference of a separate customary title might not apply, but the inference could not be excluded for significant water bodies.[933]

It was also possible for the presumption – if title to the riverbed had been gained – to be rebutted. Normally, sellers of riparian land would have no interest in retaining a 'strip

928. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 83–84, 94–95
929. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 84
930. *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC), 404 (*Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 84–85)
931. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 86, referring to the Court of Appeal decision in *Ngati Apa v Attorney-General* [2003] 3NZLR 643 (the Marlborough Sounds Foreshore and Seabed case)
932. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 100–101
933. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 86–87, 122

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of riverbed' but, in the case of Maori vendors, the presumption can be rebutted by a 'continuing interest by Maori riparian owners in fisheries or other resources or attributes' of the river. Before considering whether the riparian owners could rebut the presumption, however, the earlier question had to be decided as to whether they had ever owned it *ad medium filum* in the first place.[934]

The Chief Justice then summarised her views on the 1962 *Wanganui River* decision. Because of its significance for our inquiry, we quote this passage in full:

> For the reasons explained below, I do not consider that the 1962 decision in *Re the Bed of the Wanganui River* is authority for the proposition that a legal presumption of ownership to the middle of the flow attached to all Maori freehold riparian land for which title was issued on investigation in the Native Land Court, ousting any separate customary interest in the bed if the riparian land has been investigated. If ownership to the middle of the flow does not accord with the custom and usage of the Pouakani riparian owners, I consider that no presumption that the riverbed was conveyed with the riparian lands applies as a matter of New Zealand law. On that basis, the status of the riverbed is undetermined and may be investigated by the Maori Land Court to establish whether it continues as unextinguished customary land.
>
> If, contrary to the view I take, the 1962 decision in *Re the Bed of the Wanganui River* does purport to express a rule of law of general application as to ownership of riverbed land adjoining riparian Maori freehold land, I would not follow it, for reasons explained at paragraphs (142) to (145). They include the nature of land ownership in New Zealand and the institutional protections for Maori property which have always been a feature of New Zealand law. They also include the inapplicability of the justifications given by the authorities for what is a limited rule of English conveyancing practice, predicated on undoubted ownership of riverbed by riparian owners, which justifications are unconvincing in the circumstances of conversion of Maori customary land into Maori freehold land.
>
> The 1962 decision, as is explained in paragraph (141), is difficult to reconcile with earlier decisions, such as the 1912 decision of the Court of Appeal concerning the bed of Lake Rotorua in *Tamihana Korokai v Solicitor-General* [discussed in chapter 20], and with decisions of the Native Land Court vesting the beds of lakes, such as Lake Omapere [discussed in chapter 20]. The decision has been much criticised (including by the Waitangi Tribunal in 1999 in its report on the Whanganui River) and rests in part on reasoning which was not followed by the Court of Appeal in 2003 in *Ngati Apa v Attorney-General*. I consider that the continued authority of the 1962 Court of Appeal decision in *Re the Bed of the Wanganui River* is inconsistent with the decision of the Court in *Ngati Apa* . . .[935]

934. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 87, 100
935. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 87–88; see also 120–122

Then, in a paragraph with which Justice Glazebrook concurred, the Chief Justice stated that the assumption relied on by the parties in *Paki*, that the Crown had obtained the riverbed with its purchase of riparian lands, was 'highly contentious'. The 'single authority relied on for it [*Wanganui River*] was 'questionable'. Thus, it would not be responsible for the Supreme Court to accept the parties' agreed position that the riverbed had transferred to the Crown *ad medium filum*.[936] In the Chief Justice's view, it was still open for the Maori Land Court to investigate title to the riverbed. She stated that she declined to accept the Crown's 'assertion of ownership'.[937]

Justice McGrath found that the appellants' case was flawed because the question of whether the 1962 *Wanganui River* decision 'provides a sound basis for acceptance of the parties' common reliance on the application of the mid-point presumption in this case is a matter on which there is scope for argument'. One view is that *Wanganui River* established a generally applicable rule of law, based on a finding of universal Maori custom, that the investigation of riparian land by the Native Land Court included the riverbed to the middle point, constituting an 'effective barrier' to other claims of customary title to the bed of a river. But another view is that the outcome in *Wanganui River* was determined not by the existence of any general rule of law or finding of universal custom, but rather by the particular facts, which the Court of Appeal saw as establishing that the application of the mid-point presumption was consistent with local Maori custom. On this approach, the mid-point presumption may not apply if its operation is inconsistent with Maori custom and usage in relation to the particular river concerned. Neither approach can be assured; there needed to be a contest as to the facts and the law.[938]

Justice William Young considered that 'it is at least uncertain whether the mid-point presumption generally applied to the titles created by the Native Land Court and, if so, whether it applied in relation to the Pouakani blocks and was not displaced'.[939] Justice Young expressed 'reservations' that the *ad medium filum* presumption did apply to these particular blocks, and therefore it was not clear to him that customary title to the riverbed had been lost. Given the absence of a contest, the Supreme Court could not determine whether the *ad medium filum* presumption did in fact apply, but the 'lack of clarity' as to whether it did or was displaced added uncertainty to the factual position.[940] On the facts available as to the Native Land Court's investigation of the Pouakani blocks, Justice Young thought there was a 'reasonable case to be made' that the riverbed was not investigated or included in the Pouakani titles.[941] On the other hand, there was also a reasonable case to be made that, as a matter of law and on the limited facts, the mid-point presumption *did* apply to the

936. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 88, 167
937. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 88–89
938. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 131
939. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 139
940. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 140
941. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 147–148

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Pouakani titles issued by the Native Land Court.[942] But because the appeal was based on the assumption that the *ad medium filum* rule applied, and this assumption was 'at least doubtful', the appeal had to be dismissed.[943]

As noted, Justice Glazebrook agreed with the Chief Justice that the assumption relied on by the parties – the Crown had obtained the riverbed with its purchase of riparian lands – was 'highly contentious', and the authority relied on for it (*Wanganui River*) was 'questionable'.[944] Thus, it would not be responsible for the Supreme Court to accept the parties' agreed position that the riverbed had transferred to the Crown *ad medium filum*, and the appeal had to be dismissed. Justice Glazebrook was also 'inclined to agree with the Chief Justice that *Re the Bed of the Wanganui River* is not authority for the proposition that the mid-point presumption reflects universal Maori custom'. Even if it were, the Supreme Court could depart from it, given that it 'is not a decision of this Court'. She noted that a lot of research had been done since 1962 on land transactions and Maori custom, and the United Nations Declaration on the Rights of Indigenous Peoples might also be relevant. In any case, Justice Glazebrook stated that she agreed with the Chief Justice that the question depended on local Maori custom, which could displace the *ad medium filum* presumption. Further, whatever the local custom was, there were 'real doubts' that in the Pouakani case the Native Land Court process to award title 'ever engaged with the riverbed at all'.[945]

But, in her view, it was not necessary to decide whether the *ad medium filum* presumption applied. If it *did* apply, then that was because it was Maori custom, and the Maori owners must have known their own custom (and therefore knew that the riverbed transferred with sale of the land). If it did *not* apply, then the riverbed never belonged to the riparian owners by virtue of their Native Land Court titles, and so they could not sell it to the Crown. Either way, the appeal could not be sustained.[946]

The issue of knowingly selling a riverbed *ad medium filum* was dealt with differently by the judges. As noted, Justice Glazebrook observed that *if* riparian landowners had title to the riverbed *ad medium filum*, it could only be because that was Maori custom. Knowing their own custom, they must have known that they were selling the bed with the adjoining land.[947] Justice William Young, in a section entitled 'What were they thinking?', concluded that 'there can be no certainty' as to what the Crown, the Native Land Court, or Maori vendors thought in the late nineteenth century as to whether title to the riverbed went with the adjoining land.[948]

942. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 147
943. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 150
944. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 88, 167
945. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 167
946. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 167–168
947. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 167–168
948. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 149–150

The Chief Justice relied on *Mueller* to emphasise the importance of surrounding circumstances rather than direct evidence of the vendors' intentions. She stated:

> Since it has been important in the reasoning of the Courts below that the intentions of the individual vendors is [*sic*] now unknowable, it should be noted that application and rebuttal of the presumption does not turn in all cases on close inquiry as to the thinking of the individuals concerned at the time. In *Mueller* no close inquiry was made of what the agents of the Crown had in mind when the land grants there in issue were made. Instead, the presumption was rebutted on objective assessment by the Court of the externalities of the grant: the importance of the Waikato River for communication, the Crown's purpose in opening up the settlements, and so on. Similar assessment may be available in relation to the vendors of the Pouakani blocks and in relation to those who agreed to the partitions arrived at, depending on custom in relation to the river and its continued importance to the vendors. They remained on land in the District and may well have had no thought that their connection with the river would be affected. . . .[949]
>
> In their statement of claim, the plaintiffs plead that at the time of the transfers of the land to the Crown the Pouakani people had 'no knowledge of the principle of common law that the land adjoining a non-navigable river took the ownership of and rights up to the middle of the river known as the "ad medium filum" principle' but that the Crown 'was aware of the operation of the ad medium filum principle'. In its statement of defence the Crown said, in response, that while it had insufficient knowledge of the understanding of the Pouakani owners (and therefore put the plaintiffs to proof of their understanding), 'the Crown was aware that the *ad medium filum* presumption was a principle of New Zealand law that applied at the relevant times'. This admission answers any doubt that the Crown may not itself have understood the consequences, an element in the claim of unconscionable or unfair dealing. In relation to the understanding of the Pouakani riparian owners, it is not clear that an inference would not be objectively available on inquiry into the circumstances, in particular the custom and usage in relation to the River. As indicated at paragraph (23), that was the approach taken in *Mueller*, which did not rely on evidence of subjective intention.[950]

In the Chief Justice's view, the continued use by Maori of their river and its fisheries was itself sufficient to rebut the presumption that the riverbed had transferred *ad medium filum* with a land sale.[951] Her reasoning is clearly applicable in our inquiry, where similar arguments were traversed by Crown and claimants.

Thus, all four Supreme Court judges considered that the *Wanganui River* decision was at best of doubtful authority; that an investigation of local Maori custom was required; and

949. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 100
950. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 123
951. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 100, 122, 123

that if local Maori custom involved separate ownership of a river from the adjoining land, then the *ad medium filum* presumption would not apply to a Native Land Court title or the subsequent conveyance of that title. The Chief Justice also considered that, if the riparian owners did obtain title because that was consistent with local custom, post-sale use of an important tribal waterway would rebut the presumption that title had passed *ad medium filum* with the sale of riparian land.

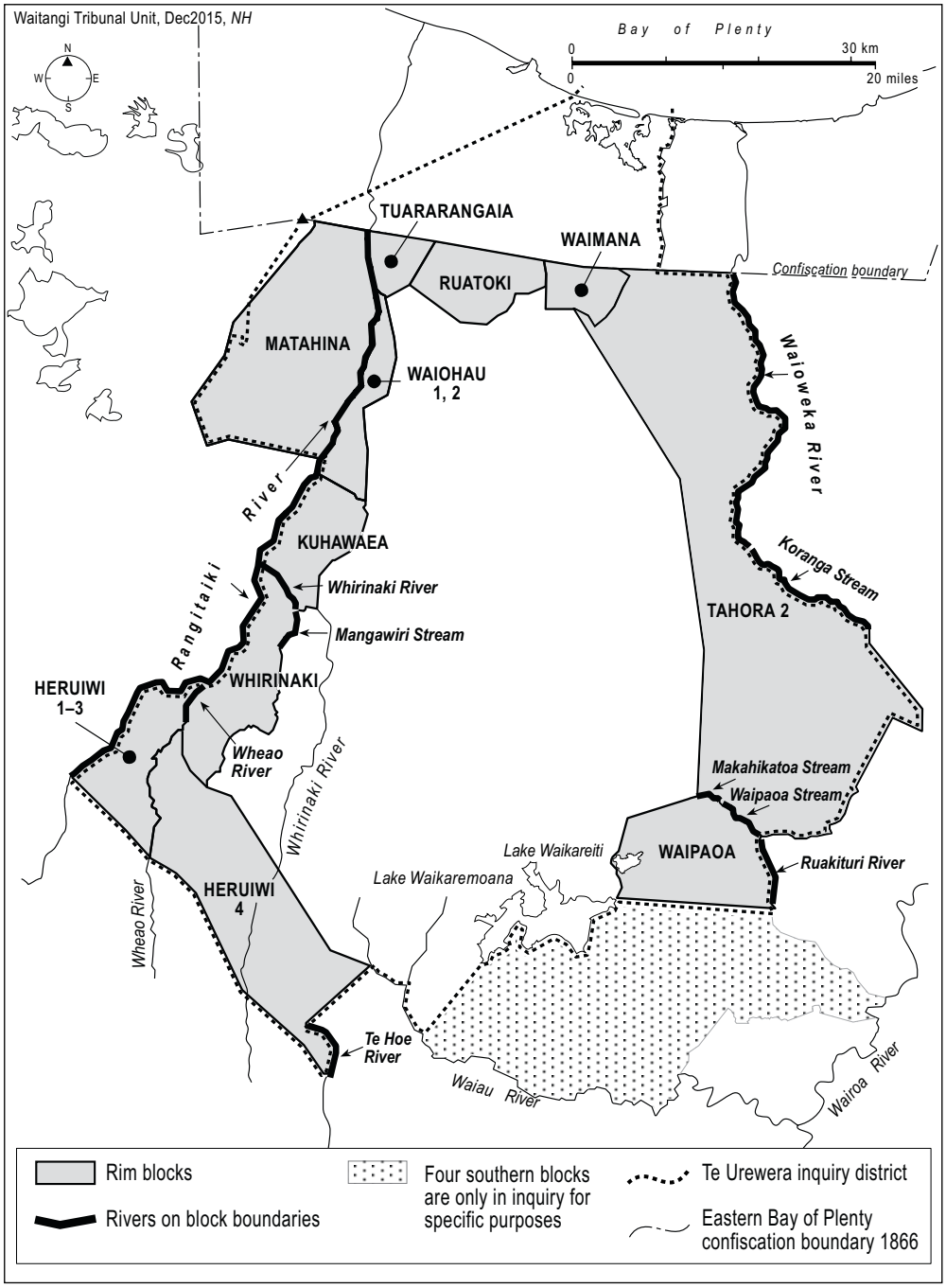
We turn next to consider the application of the *ad medium filum* presumption in our inquiry district, prior to the passage of legislation in 1903 that vested the beds of all navigable rivers in the Crown.

21.16.2 The application of the *ad medium filum aquae* presumption in the Te Urewera rim blocks

(1) *Introduction*

The Coal-mines Act Amendment Act 1903 vested the beds of navigable rivers in the Crown. Before 1903, the Crown could not have claimed to own the riverbeds of Te Urewera except by an explicit purchase or by the operation of the *ad medium filum aquae* presumption. The exception was the riverbeds in the lands north of the confiscation line. As we discussed in chapter 3, the Crown confiscated the entire Eastern Bay of Plenty district north of the line under the New Zealand Settlements Act 1863. The confiscation, which Tuhoe and other iwi would protest against as unjust, included the beds of the rivers. As we found earlier in the report, the confiscation was in breach of Treaty principles. That includes the confiscation of the rivers.

South of the confiscation line, the Tuhoe rohe potae was gradually encircled by a series of Native Land Court-defined blocks, all of which were created under the nineteenth century native land laws (see Part 2). For these encircling blocks, which we refer to as the 'rim blocks', the *ad medium filum* presumption could potentially have applied at three points in time. First, in land blocks with rivers as boundaries, the Native Land Court's investigation and award of titles could have extinguished customary title to those riverbeds to the centre line, unless this presumption was rebutted. Secondly, when the blocks were sold, the sale of the land could have included the riverbed to the middle line – again, unless the presumption was rebutted. Thirdly, the beds of rivers and streams running inside a block were considered the property of the block's owners and, similarly, were held to transfer when a block was sold. These were not necessarily small waterways. The Ohinemataroa (Whakatane) River flowed through the Ruatoki 1 block, and the Tauranga (Waimana) river across the Waimana block. When these blocks were partitioned, these rivers became partition boundaries – the *ad medium filum* presumption was held to apply to them at that point.



Map 21.3: The "rim blocks" and boundary rivers

For the land encircled by the rim blocks, however, another statutory regime was in place from 1896 to 1922. The Urewera District Native Reserve Act 1896 created the Urewera

Commission(s) to decide titles, which were not Native Land Court titles. The commission's original purpose was to establish electoral rolls by which hapu block committees and the General Committee could be elected. The committees' role was to control and administer lands and resources inside the reserve. Only the General Committee could alienate land, whether by lease or sale (see chapters 9 and 13 for details about the UDNR Act). As at 1903, when the coal mines legislation was amended, and took the beds of navigable rivers, the UDNR blocks were covered by orders of the commissioners and no land had been alienated. The legal view was that all land (and rivers) inside the reserve was still in customary title at that time. From 1909, however, Parliament deemed the commissioners' orders to have had the same effects as orders of the Native Land Court, backdated to the point at which the orders were made. The *ad medium filum* presumption was sometimes held to have applied to boundary riverbeds after that. We discuss the special circumstances of the UDNR further below in section 21.16.4.

In this section, we are concerned with whether (or how) the *ad medium filum aquae* presumption might have applied in the rim blocks. We say *might have applied* because there is a great deal of uncertainty. Even the Crown submitted that it was only 'likely' that the rule applies to the beds of non-navigable rivers in the inquiry district.[952]

(2) *Did the presumption equate to Maori custom within Te Urewera, such that mana over adjoining land carried with it mana over a river to the middle line?*

One of the Crown's primary arguments is that the *ad medium filum aquae* presumption did not dispossess anyone of their property, because Maori who held mana over adjoining lands also held mana over the rivers; the two were so bound up that the relinquishment of mana over land carried with it the relinquishment of mana over the adjoining river. Crown counsel did not point us to any evidence in support of this assertion. A related point for the Crown was that the *ad medium filum aquae* presumption did not have to be explained to Maori, either by the Native Land Court or Crown purchase agents, because it was actually the same as Maori custom. For every land transaction, therefore, it can be inferred that Maori understood they were selling the river bed to the centre line unless there is explicit evidence to the contrary.[953]

Crown counsel explained:

> The *ad medium filum aquae* presumption can be said to have operated in the following way:
>
> (a) The possession of mana over land surrounding or adjacent to rivers or streams carried with it the possession of mana over those streams or rivers (or parts of them where different hapu/iwi occupied opposite banks).

952. Crown counsel, closing submissions (doc N20), topic 30, pp 8–9
953. Crown counsel, closing submissions (doc N20), topic 30, pp 9, 11

(b) The relinquishment of mana over the surrounding or adjacent land carried with it the relinquishment of mana over the rivers or streams, unless rights in relation to rivers or streams were specifically reserved.[954]

But was this submission correct for the claimant groups in our inquiry district?

As we discuss more fully later, we are relying on the findings of the Te Ika Whenua Rivers Tribunal for the claims of Ngati Manawa, Ngati Whare, and Ngati Haka Patuheuheu. In the *Te Ika Whenua Rivers Report*, the Tribunal accepted the evidence of those groups that the *ad medium filum* presumption was not their custom, despite Crown assertions to the contrary.[955]

For Tuhoe and Ngati Ruapani, the evidence in our inquiry suggests that there was a balance between the particular rights of hapu who lived closest to a water resource and the tribal rights and relationship with that resource. In chapter 20, we saw how the striking of that balance was strenuously debated within and between iwi when ownership of a major waterway, Lake Waikaremoana, had to be decided for the purpose of leasing it to the Crown. We cited the evidence of Professor Pou Temara, who condemned the Native Land Court's approach of vesting the lake in the occupants of its immediate environs. Professor Temara welcomed the inclusion in 1971 of the whole tribe in the ownership of their tribal taonga.[956] Without that ownership, he said,

> your tribal saying by which you identify yourself and which says that Waikare is the lake and Tuhoe is the tribe, or Waikare is the lake and Ruapani is the tribe, would seem hollow and meaningless. . . . I therefore say that despite being a personal disadvantage to me, I favour overwhelmingly a tikanga, a Maori custom that allows everyone to be part of Waikaremoana.[957]

This debate was clearly relevant to other major waterways, including rivers. We received a great deal of evidence about customary rights, relationships, and obligations in respect of rivers (see also section 21.3 above). For Tuhoe, Ngati Kahungunu, Ngati Ruapani, and Ngai Tamaterangi, the claimants' evidence and submissions did not support a view that mana over land and adjacent rivers was identical, or that rivers were customarily considered part and parcel of an adjoining piece of land. This is not to say, as we have noted, that hapu living in the immediate vicinity of a stretch of river did not have some special rights and responsibilities, sometimes of an exclusive nature. But the evidence is that rivers were not in the sole possession and control of those who inhabited kainga or had cultivations close to the banks. The narrower the riparian block, the less likely it would be.

954. Crown counsel, closing submissions (doc N20), topic 30, p 9
955. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 93–97
956. William Rangiua (Pou) Temara, brief of evidence, 2004 (doc H61), paras 15–20
957. William Rangiua (Pou) Temara, brief of evidence (doc H61), paras 18, 20

21.16.2(2)

Above all, rivers have a separate identity from the surrounding land as awa tupuna (ancestral rivers), and have their own mauri distinct from the land – even though there might still be a connection with the surrounding land. Huka Williams explained it in the following whakatauki, when speaking of the Ohinemataroa River:

> Ko te wai te toto o te whenua
> Ko te whenua te toto o te tangata.
> The water is the blood of the land, the land is the blood of the people.[958]

Maori do not conceptualise a river as separate components, land and water, in which the land under the water is identical to the land beside the banks, and only the land can be possessed. The river belongs to the people, and the people belong to the river. Customarily, those who occupied kainga immediately next to a river would be a subgroup of the people with rights to and authority over that river, as indeed would likely be the case with all taonga in the territories of hapu and iwi.

As we explained in section 21.3, Hakeke McGarvey put the position in respect of the Ohinemataroa (Whakatane) River as follows:

> The river is Ohine-mataroa. It was later called the Whakatane river. All of us of Tuhoe are descendants of Hine-mata-roa of Nga Potiki. Our ancestral claim is from this source to ourselves, and to our continuing occupation and trusteeship [kaitiakitanga].[959]

Mr McGarvey gave the whakapapa for the ancestress Hine-mata-roa, and also named the three taniwha in the river, which are also ancestors. He then explained that:

> Ohinemataroa has always belonged to Tuhoe mai ra ano, and the people belong to the river. In terms of ownership the river doesn't belong to any one individual but to us all. All of Tuhoe can whakapapa to our tupuna, Hinemataroa and the river belongs to all of Tuhoe.
>
> Tuhoe have always enjoyed the river as a site for everyday activities such as swimming and playing, and as a source of eel and other foods.[960]

Mr McGarvey gave an account of the different methods used by Tuhoe to catch the eels, including the construction of eel weirs on the river and its tributaries, and said that eel fishing continues today – albeit reduced because eel numbers have been reduced. He added that the river was also used as a source for particular types of wood for various purposes, including construction.[961]

In addition to these everyday, economic uses, some of which continue, Mr McGarvey emphasised that:

958. Huka Williams, brief of evidence, 10 January 2005 (doc J13), p 2
959. Hakeke Jack McGarvey, brief of evidence, 2005 (doc J33), p 1
960. Hakeke Jack McGarvey, brief of evidence (doc J33), pp 1–2
961. Hakeke Jack McGarvey, brief of evidence (doc J33), p 3

> The river also has important spiritual significance for Tuhoe. People continue to be baptised in its waters, and traditional healing and cleansing takes place at the river. . . . The use of the river in this way reaffirms our connections to our tupuna, Hinemataroa, and provides a continuity with all our tupuna. Because all Tuhoe share that whakapapa, the river is a taonga that connects us all to each other.[962]

Kaitiakitanga is still exercised over the river, to the extent that New Zealand law allows. At the time of our hearings, a river committee had been established, had laid out a 10-year restoration plan, and was working in partnership with Ruatoki School where a native plant nursery had been set up. The people had planted out 20,000 native plants, cleared sections of the riverbank of woody weeds, and were committed to restoring and protecting the river.[963]

Mr McGarvey emphasised the importance of the whole length of the river in tribal identity and unity, and in creating and reaffirming connections between all of Tuhoe. Hapu also had particular rights in particular stretches of this river. In the Ruatahuna district, we were told that hapu access to and use of the river was still controlled in the traditional way by rangatira up to the early 1960s. Rights were specific to hapu, and hapu without rights would be ordered off. Rongonui Tahi gave evidence that Pakitu Wharekiri was the last rangatira to exercise such strict, tight control on behalf of all the hapu with rights in that part of the Whakatane River.[964]

We heard similar evidence from Ngati Kahungunu in respect of the rivers that run through or bound the four southern blocks and the eastern rim blocks (Waipaoa and Tahora 2). Te Okoro Joe Runga told us that rivers are a source of tribal identity, and 'each hapu has its river or group of rivers'. The relationship with a tribal river begins in youth, usually by being taught the traditional fishing practices and rituals by an elder. The relationship is reinforced by the continued gathering of food later in life.[965]

Mr Runga explained that 'mana awa' (mana over tribal rivers) has never been and can never be given up.[966] The water comes from the Huiarau range, shed to 'sustain and imbue' the extensive, intricate southern river system, culminating in the 'significant rivers of the Waiau, the Waikaretaheke, the Ruakituri, the Waipaoa Stream, the Mangaruhe, and many others'. Papatuanuku, he told us, has two domains: land (the domain of Tane) and waters (the domain of Tangaroa). Each waterway contains and is a conduit of its own mauri, and any practical use of a waterway was guided by the elders' understanding of the mauri 'within it and flowing through it'. Practical use of the southern waterways focused on mahinga kai

962. Hakeke Jack McGarvey, brief of evidence (doc J33), p 3
963. Hakeke Jack McGarvey, brief of evidence (doc J33), pp 3–7
964. Rongonui Tahi, notes in English of evidence, 22 June 2004 (doc E26), pp 2–3
965. Te Okoro Joe Runga, brief of evidence (doc I19), pp 6, 8
966. Te Okoro Joe Runga, brief of evidence (doc I19), pp 5–8

(food producing places), which were an 'undisturbed estate' at one time and continue to be used – 'albeit in a more restricted fashion'.[967]

The centrality of the rivers to the life and livelihood of the people was illustrated, in Mr Runga's evidence, by the fact that most pa, kainga, and marae were 'situated on or nearby waterways', and 21 of the 24 Kahungunu reserves created out of the four southern blocks were 'located on rivers and waterways'.[968] These rivers, Mr Runga maintained, could not be divided into beds and water for separate ownership: 'We . . . always held dominion and control over water and its uses within our tribal areas.' He added: 'If there was truth in the Crown's premise that water is not owned then the owners of [Lake] Waikaremoana have merely a hole in the ground. This is an absurdity.'[969]

Ngati Ruapani held the view that customary use of waterways as a food source became even more vital to the peoples of Te Urewera, especially after the confiscation of arable land in the 1860s.[970] The whole Waikaremoana water system, in their submission, was an inter-connected taonga. Hapu had rights in particular rivers but shared a common right in the whole water system with their relatives.[971] The connected river system was also vital for travel and transport. The 'spiritual connections between the people and the rivers were close, demonstrated by the many wahi tapu, tipua, taniwha, and tuoro in the waterways'.[972]

Ruapani's evidence illustrated with great effect that a river is a taonga and an indivisible water resource; without the water a river is 'meaningless', as the Whanganui River Tribunal pointed out. It becomes just a piece of dry land, of no great value. That may seem obvious, yet it is not obvious to the common law, which gives ownership of a river bed but not water or a river. Even reducing the flow can make a river less than it was, harming its mauri and reducing its vibrancy and value.

Maria Waiwai told us:

> The waterways that flow through our whenua are important to the whanau here spiritually, economically and emotionally. When I was younger, the waterways were full and vibrant. Now that the power stations have taken hold, our rivers and streams are less vibrant. The waters have been diverted to meet the needs of the whole of New Zealand.
>
> Kahui Tangaroa is our river. The name comes from the legend of Haumapuhia, who found the outlet and was caught there when dawn broke. We believe the taniwha that formed Lake Waikaremoana was Haumapuhia. She was unsuccessful in reaching the sea before dawn, so she made herself comfortable in Waikaretaheke River, an outlet from Te Wharawhara Waikaremoana. As time went by, her grandfather Mahu felt sorry for Haumapuhia, so he

967. Te Okoro Joe Runga, brief of evidence (doc 119), pp 5–6
968. Te Okoro Joe Runga, brief of evidence (doc 119), p 8
969. Te Okoro Joe Runga, brief of evidence (doc 119), p 6
970. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), appendix A, issues 18 and 19, p [397]
971. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), pp 67–68
972. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), appendix A, issue 6, p 127

prayed to Tangaroa the sea god to send some kai for her. Eels, crayfish, shellfish and other creatures came up the waterways for Haumapuhia's survival.

Today Kahui Tangaroa is just a dry river bed. When Whakamarino flat was flooded and the water reserved for Piripaua Power Station, Kahui Tangaroa and another food source disappeared.

Waikaretaheke is the only flowing outlet from Lake Waikaremoana. It used to flow down the valley separating Whakamarino from the rest of the Kopani land block.

During heavy falls of rain, we would eel at Waikaretaheke during the day. We would thread worms with fibre from the flax, and then loop several strings of worms together to make a bob. The bob was tied securely to the end of the rod, a supple manuka stick about two metres long. It was exciting to see the eels coming to tug at the worm bob at the end of the rod. Once the eels caught the bob, we would flick it up quickly and toss it on to the bank. The eels were shared with the whanau who lived around the pa. The kuia and koro took part in this activity as they believed in showing the rangatahi the proper way to clean, dry and preserve the large eels to keep for when food was not plentiful.

Today, you can't eel at Waikaretaheke as the flow of water is restricted and Waikaretaheke is no longer what it used to be.

Kerehene is another river which flows downhill towards Waikaretaheke from Te Kuha. It was once like Waikaretaheke, but today it is useless and runs dry.[973]

The Nga Rauru o Nga Potiki claimants pointed out that Maori views of 'ownership' were not the same as western-style ownership.[974] Manaakitanga, mana motuhake, kaitiakitanga, and other concepts discussed earlier in this report are critical.[975] Most critical of all is the concept of taonga. Although Maori were forced, for example, to couch the Whanganui River claim in the courts as a claim to ownership of the bed, that was a distortion of custom.[976] The claimants in our inquiry summarised their position about what they 'owned' by referring us to the following passage in the *Whanganui River Report*:

> From our own knowledge and research of the Maori comprehension of rivers, we see the river, like other taonga, as a manifestation of the Maori physical and spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, tribal cohesion, social stability, empathy with ancestors, and emotional and spiritual strength.
>
> Thus, while previous judicial findings that Atihaunui owned the [river]bed at 1840 are supported by clear fact and law, they are still partial findings, for Atihaunui owned more than a bed and more even than a river. They owned a taonga.[977]

973. Maria Waiwai, brief of evidence (doc H18), pp 4–6
974. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 136
975. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 136–139
976. Waitangi Tribunal, *Whanganui River Report*, pp 280–281
977. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 135

21.16.2(3)

The question then becomes: did Maori knowingly and willingly give up their taonga, the rivers, when they sold land in our inquiry district?

(3) *Our approach*

In our inquiry, the Crown submitted that the peoples of Te Urewera sold their rights to the rivers when they sold their lands, unless it can be shown that rivers were specifically excluded from the sale.[978] This included boundary rivers, of which there were many, and which transferred by application of the *ad medium filum aquae* presumption. The Crown's argument is that everyone, including the Maori vendors, knew that the rivers would transfer with land in this way, because that was Maori custom as well as English law. Thus, 'it is wrong to assume that because neither Native Land Court judges nor the Crown explained the legal doctrine of the *ad medium filum aquae* presumption, that Maori were unaware that a riverbed was included in a sale of land'.[979] In the Crown's view, any rejection of the thesis that Maori sold their riverbeds would need to be proven for each and every transaction. The 'understandings of each vendor and purchaser in each sale transaction would need to be considered on a case-by-case basis' before the Tribunal could 'arrive at any conclusion that Urewera Maori had a different understanding as to what was being sold'.[980]

This is contrary to the approach suggested by Chief Justice Elias in *Paki No 2*. As discussed above, the Chief Justice pointed out that the judges in *Mueller* knew nothing about what was in the minds of Crown officials (their 'subjective intention') when they granted riparian lands, as to whether the bed of the Waikato River was included in the grants. Four of the five judges in *Mueller* had held that the *ad medium filum* presumption was rebutted by the surrounding circumstances. Chief Justice Elias stressed that '[i]n relation to the understanding of the Pouakani riparian owners' when they sold their land in the nineteenth century, what was needed was not evidence of their 'subjective intention' but an objective inquiry 'into the circumstances, in particular the custom and usage in relation to the River'.[981]

It seems to us that the essence of the difference is that the Crown wants the matter to be viewed in the context of the English custom or common law – the *ad medium filum* presumption. The Supreme Court in *Paki* has said that the matter is to be viewed objectively in the context of Maori custom and usage in relation to the river in question. The Crown, the parties, and the Tribunal are bound by this decision. We turn now to consider the evidence before us relating to the four southern blocks and the rim blocks, and later to the UDNR, to determine whether there is any evidence that would show a knowing and willing Maori cession of their rivers.

978. Crown counsel, closing submissions (doc N20), topic 30, p 11
979. Crown counsel, closing submissions (doc N20), topic 30, p 11
980. Crown counsel, closing submissions (doc N20), topic 30, p 11
981. *Paki v Attorney-General* (*No 2*) [2015] 1 NZLR 67 (SC), 123

(4) *The four southern blocks*

In respect of the southern waterways, Te Okoro Joe Runga told us:

> Mana awa is the unrelinquished tino rangatiratanga over estates of the Kahungunu Iwi. . . . Our interests in waterways is an unrelinquished equity. The law tries to say that that interest no longer exists and we counter that by saying we never gave it up. It is my firm belief that any law that contravenes tino rangatiratanga, customary ownership and rights, and customary mahinga kai contravenes article two of the Treaty of Waitangi.[982]

Historian Bruce Stirling reviewed the documentary evidence in respect of the Crown's acquisition of the four southern blocks. He found no evidence that the rivers formed part of the negotiations for these blocks, except in their 'use as boundary lines between each of the four blocks'.[983] There was nothing in the boundary descriptions 'that seems to have made it explicit to the Maori vendors that the rivers were being alienated with the land'.[984] Suzanne Doig concurred that the rivers received little (or no) attention during the transactions, except as boundaries. She concluded that the Crown assumed it was acquiring ownership to the centre line.[985] Stirling commented:

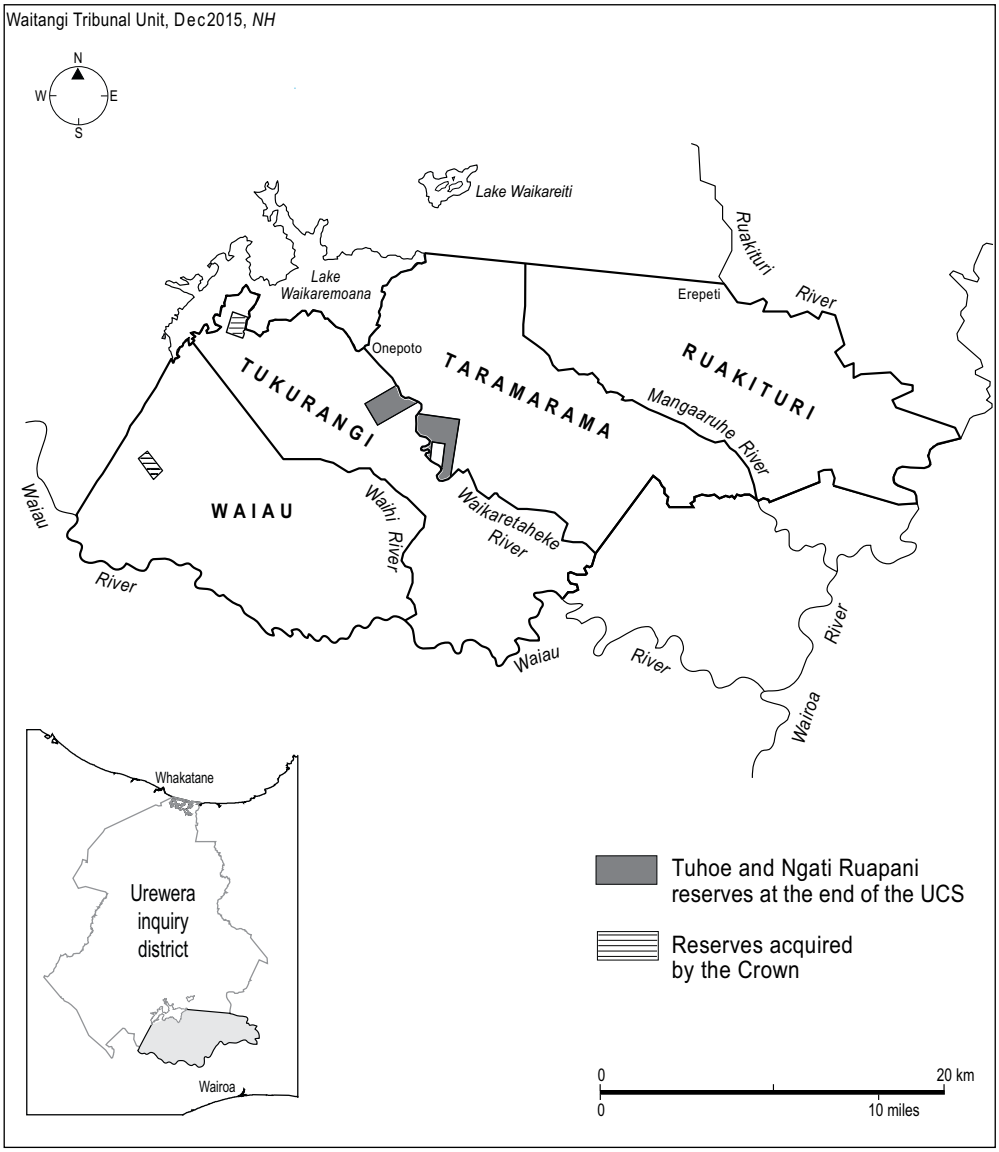
> there is nothing in its [the Crown's] negotiations with the Maori vendors of the *land* that communicates this assumption or the arcane (to Maori) legal basis for that assumption. Indeed, what Maori understood was that the transactions involved 'to matau whenua katoa', or 'all their *land*', rather than all their rivers. The rivers are simply referred to as boundaries without reference to which bank of the river was the boundary or if the middle of the river was the operative boundary.[986]

Claimant counsel also noted that the sketch maps accompanying the deeds of sale showed the shaded boundaries as running alongside the rivers but not including the rivers. Legally speaking, claimant counsel submitted, this may not rebut the *ad medium filum* presumption but it is surely significant historical evidence as to what Maori understood themselves to be selling.[987]

In setting the boundaries of our inquiry district, we consulted the parties and decided not to inquire into Crown actions concerning the four southern blocks after their sale in 1875, except so far as they related to the reserves set aside for Tuhoe and Ruapani. We can

982. Te Okoro Joe Runga, brief of evidence (doc 119), pp 5, 6
983. Stirling, 'Southern Te Urewera Waterways and Fisheries' (doc 19), p 4
984. Stirling, 'Southern Te Urewera Waterways and Fisheries' (doc 19), p 5
985. Doig, 'Te Urewera Waterways' (doc A75), p 46
986. Stirling, 'Southern Te Urewera Waterways and Fisheries' (doc 19), p 5
987. Counsel for Te Okoro Joe Runga, generic closing submissions in respect of rivers (doc N4), p 10. For copies of the deeds and sketch maps, see Cathy Marr, comp, supporting papers to 'Crown Impacts on Customary Interests in Land in the Waikaremoana region in the nineteenth and early twentieth century' (doc A52(a)), pp 20–37.

21.16.2(4)



Map 21.4: The Four Southern Blocks and boundary rivers

still, however, consider claimant evidence about the post-1875 customary uses of the rivers, as relevant to the question whether they knowingly and willingly sold their rivers in 1875, and/or whether the *ad medium filum* presumption may have been rebutted in relation to the 1875 transactions.

The placing of reserves on the rivers facilitated Maori 'links to and use of' the rivers after the sale.[988] Doig could find no documentary evidence 'that any of the vendors believed that

988. Stirling, 'Southern Te Urewera Waterways and Fisheries' (doc 19), p 5

they retained ownership of the rivers running through the land they unwillingly sold'.[989] In our inquiry, however, Maria Waiwai and others explained their communities' continued wide-ranging use of water resources south of the lake until at least the 1940s.[990] The Crown's hydro scheme altered the course and nature of some of the waterways and interfered with their use. For the 50-year period between the sale and the beginning of the hydro scheme, rivers were essentially treated as unsold by many Maori who, for instance when eeling, ranged far afield from their small, riverside reserves. This exercise of customary rights continued during the 1920s and 1930s, while the scheme was underway, after which some rivers could no longer be used for fishing or other resource gathering.[991]

Lorna Taylor, whose whanau was based at the Waimako reserve, told us that her brothers 'knew how to eel in Whakamarino [an eel-rich wetland before it became an artificial lake[992]], Waikaretaheke, Waihi, Patunamu, Waiau, Miromiro, Potaka, the Mangaruhe stream, Tapui, Kuha, at the mouth of the Mangapapa where it joins the Waikaretaheke, and at Waikaremoana'.[993] Her grandfather's fishing trips could last for days, during which he lived off fruit growing on the river banks.[994]

Des Renata referred to a stream near the Piripaua power station that was used regularly by Ruapani for its large number of freshwater crayfish, until it was bulldozed after the establishment of the power scheme.[995] Following on from the hydro works, water resources were still used,[996] and some southern rivers were unaffected. As Charles Te Arani Kapene pointed out, in the absence of roads, Ngai Tamaterangi continued to use the Waiau River for transport and trade by waka well into the twentieth century.[997] Maori use of this river is still controlled by rahui.[998] James Waiwai described continuing exercise of customary rights in the four southern blocks' waterways across the generations, from the times before he was born (when eels were still the main source of protein) through to his niece's work for the elver recovery programme.[999]

Added to the weight of continued use is the consideration that Tuhoe and Ruapani could hardly be described as willing sellers, even of the land (see chapter 7). We note, too, that the Crown claimed Maori had sold Lake Waikaremoana to the centre point because it was used as a northern boundary for the four southern blocks. The Native Appellate Court dismissed this claim in 1944 (see chapter 20). We see no reason why Maori would have understood

989. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 46
990. Maria Waiwai, brief of evidence (doc H18); Lorna Taylor, brief of evidence, 18 October 2004 (doc H17); Des Renata, brief of evidence (doc 124)
991. Maria Waiwai, brief of evidence (doc H18), pp 4–6
992. James Anthony Waiwai, brief of evidence (doc H14), p 24
993. Lorna Taylor, brief of evidence (doc H17), p 7
994. Lorna Taylor, brief of evidence (doc H17), p 4
995. Desmond Renata, brief of evidence (doc 124), p 20
996. James Anthony Waiwai, brief of evidence (doc H14), p 24
997. Charles Te Arani Kapene, brief of evidence (doc 126), paras 5.1–5.2
998. Heiariki Hazel Governor, brief of evidence, 29 November 2004 (doc 128), para 3
999. James Anthony Waiwai, brief of evidence (doc H14), pp 23–25

themselves to be selling their rivers any more than their lake, simply because the rivers, like the lake, were the boundaries of the purchase.

Our conclusion, therefore, is that it cannot be shown that the Maori vendors knowingly and willingly alienated their rivers in (and bounding) the four southern blocks. On the contrary, there is evidence that Maori – in continuing to exercise their customary rights in the rivers – considered that ownership remained with them.

(5) *The western rim blocks*

The passage of the western rim blocks through the Native Land Court, and the alienation of interests in those blocks to the Crown and private purchasers, has already been fully discussed in chapter 10. The blocks concerned were: Matahina, Waiohau, Kuhawaea, Heruiwi 1–3, and Heruiwi 4.

Due to the Ngati Awa Claims Settlement Act 2005 and the non-participation of certain groups in our inquiry, the Tribunal does not have jurisdiction to consider some partitions of the western blocks: Matahina A1-A6, Matahina B, and Waihou 2 (see section 10.7.3 for an explanation).

The situation of the rivers in the western rim blocks has already been investigated and reported on by the Waitangi Tribunal in its *Te Ika Whenua Rivers Report*. In our inquiry, Ngati Manawa, Ngati Whare, and Ngati Haka Patuheuheu asked us to adopt that Tribunal's findings in respect of the Rangitaiki, Whirinaki, and Wheao Rivers.[1000] We do so with four reservations, which we discuss later:

- the parties agreed in 1994 that the rivers were not navigable and only the *ad medium filum* rule applied, but subsequent research has cast some doubt upon this position;
- the Tribunal's findings did apply to UDNR blocks but the special circumstances of the UDNR and the Urewera Consolidation Scheme were not fully considered by that Tribunal;
- the Tribunal commented on but was not in a position to make conclusive findings about the status of rivers flowing through (rather than bounding) the western rim blocks; and
- the Waiohau fraud was a relevant matter that was not under consideration by the Te Ika Whenua Rivers Tribunal, and we comment on it at the end of this section.

With those reservations, we adopt the relevant findings of the Te Ika Whenua Rivers Tribunal in respect of the western rim blocks, which we consider apply also to Tuhoe, Ngati Rangitihi, and Ngati Hineuru where those iwi had interests in the western rim blocks. We summarise those findings as follows.

Maori land transactions in the western rim blocks took place between the 1870s and the 1920s. The land sales had many questionable features in Treaty terms, but that was not the concern of the Rivers Tribunal. Even if Maori had willingly and knowingly sold

1000. Counsel for Ngati Manawa, closing submissions (doc N12), p 65; counsel for Ngati Whare, closing submissions (doc N16), pp 119–120, 147–152; counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 142–144

their lands in those transactions, there was no evidence that the Rangitaiki, Whirinaki, or Wheao Rivers were included as part of the sale of riparian land. The Tribunal did, however, accept that smaller tributaries and streams – where located inside the boundaries of a sold block – were not necessarily taonga, and that tino rangatiratanga over these waterways may not have been retained when access to (and authority over them) was lost after a sale. The Tribunal considered that this was ultimately an issue for the Tribunal appointed to investigate the land alienations, not the Rivers Tribunal.[1001]

Crown counsel took the view that more evidence was required about the land transactions, in respect of boundary rivers, but argued there was *some* evidence that such rivers were relinquished as part of the sales. The Tribunal disagreed. In its view, the evidence showed that the Crown acquired those riverbeds by a common law presumption only, and that there was no instance where the plans attached to sale documents showed the external boundaries 'extending into a river, let alone to the middle line'. Notwithstanding the Crown's argument, the Tribunal found that there was in fact 'no firm evidence that mana over rivers was ever voluntarily relinquished when riparian lands were alienated'. There was, on the other hand, firm evidence that Maori 'continued to use, occupy, and control their rivers' after land sales 'in much the same way as before', although sometimes sharing with settlers, until forestry activities restricted their exercise of customary and Treaty rights in the second half of the twentieth century. The Crown's case relied essentially on inferences drawn from the mere fact that a land sale had taken place, and this was unsustainable in the Tribunal's view.[1002]

There being no evidence that rivers were alienated in the deeds or transactions in any way other than by the *ad medium filum* presumption, it therefore remained for the Tribunal to test the Crown's argument that the presumption equated with Maori custom, so that Maori would have known that by selling land they were selling boundary rivers to the middle point. In examining this argument, the Tribunal accepted that occupiers of riparian lands could hold special rights to sections of a river, but that others would also have various use rights, and all such rights were controlled by the hapu.[1003] The Tribunal also found that, at the time of the land sales in the late nineteenth and early twentieth centuries, alienation of interests by individuals – unrestrained by hapu authority – was 'novel'. The absolute alienation of a river in this way, given the wider rights of the hapu, was 'generally inconceivable'.[1004] The Crown had relied on evidence in Native Land Court hearings, that eel fisheries and customary use of rivers were sometimes used as evidence to support a claim to the adjoining land. In the Tribunal's view, it was understandable that the use of rivers and streams would

1001. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 91–92
1002. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 92
1003. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 123–124
1004. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 93–94, 99–100

21.16.2(5)

be referred to as evidence of occupation and use of nearby land. But that did not affect the custom that rivers were and are regarded differently from land:

> They have separate physical characteristics, provide distinctive resources and benefits, and possess their own mauri (life force) and spiritual being. They constitute whole and indivisible entities, not being separated into bed, banks, and waters.[1005]

The territory of a hapu would include land, rivers, mountains, and forests, all under the tino rangatiratanga of the hapu. But sales of land did not, as the Crown contended, 'automatically' include rivers to the middle line. Nor, because there were customary links between lands and rivers, did this mean that Maori understood or accepted the *ad medium filum* presumption. The Crown's arguments were not supported by the evidence, and, it was noted, had also been rejected by the Mohaka River Tribunal.[1006]

Another of the Crown's arguments to the Te Ika Whenua Rivers Tribunal was that more evidence about the land sales was needed, and that – in the meantime – it was impossible for the Tribunal to be *sure* that the owners of riparian lands did *not* intend to relinquish their boundary rivers when selling lands.[1007] The Tribunal (as the National Park Tribunal was later to do) found rather that the onus rested with the Crown to prove that Maori have 'willingly given up the wish and desire to retain' their Treaty-guaranteed properties, the rivers.[1008] There were two planks to the Tribunal's position on this matter:

- Maori did not voluntarily relinquish possession of their rivers, and the Crown would have to prove that they had done so; but
- title to the beds of rivers passed to the Crown anyway by virtue of the operation of the *ad medium filum* rule, in breach of the Treaty.

Thus, the Tribunal did consider that title had passed to purchasers (mainly the Crown):

> At least with the majority of the Te Ika Whenua land sales, the vendors would have had no idea of this law [the *ad medium filum* rule]. Although the riverbeds passed on the sale of riparian lands [accepting the position in *In re the Bed of the Wanganui River*], this could hardly be said to be a voluntary sale or relinquishment of tino rangatiratanga.[1009]

Without the operation of this common law rule, titles to adjoining river beds would neither have been created by the Native Land Court block titles, nor passed to purchasers of those blocks. Rivers would have remained boundaries showing the limits of a transaction but not included within it, and their ownership would have stayed in Maori customary title.[1010]

1005. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 94
1006. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 94–95
1007. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 99
1008. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 100
1009. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 100
1010. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 101

Having made these findings, the Tribunal also set out what should have happened, instead, under Treaty-compliant arrangements. As part of the doctrine of aboriginal title, native title must be rendered conceptually in its own terms, not terms appropriate only to English law. In light of the Treaty of Waitangi and the English Laws Act 1858, consideration should have been given – in developing a title system for the colony – not just to English and Australian law (the Torrens system) but also to a system that recognised and protected Maori customary rights. In the case of rivers, that would have required a 'composite title' for rivers – including the bed, banks, and water – instead of the English law system of separate components, no ownership of water, and the *ad medium filum* rule. The Crown's failure to institute a more appropriate New Zealand title system enabled it, through the application of English law, to appropriate 'lands [river beds], properties, and fisheries that belonged to Maori.'[1011]

In respect of water, the Tribunal specifically found that Maori were promised full, exclusive, and undisturbed possession of their taonga. As at 1840, when creating a title system for the colony, 'Te Ika Whenua [hapu] were entitled . . . to have conferred on them a proprietary interest in the rivers that could be practically encapsulated within the legal notion of ownership of the waters thereof'. In tikanga Maori, the rights of downstream users would be protected by the preservation of the resource. But use and control of the water rested with the hapu, and their ownership rights equated to the 'right of full and unrestricted use and control of the waters' while the waters were within their rohe.[1012]

These findings of the Te Ika Whenua Rivers Tribunal do not cover the specific issue of Waiohau 1B. As we discussed in chapter 11, Ngati Haka Patuheuheu lost ownership of this land as a result of fraud, followed by inaction on the part of the Crown to provide an effective remedy. There was certainly no willing or knowing alienation of the stretch of the Rangitaiki River that forms the western boundary of Waiohau 1B.

(6) *The eastern rim blocks*

The eastern rim blocks consist of the Waipaoa block in the south (adjacent to the four southern blocks) and the massive Tahora 2 block north of Waipaoa.

The Tahora 2 block never existed in a single title, but rather was partitioned upon award of title in 1889. In terms of major rivers, the Ruakituri River formed part of the eastern boundary of the Waipaoa block, and then flowed through the Tahora 2F block. The Waipaoa Stream formed part of the boundary between Tahora 2 and the Waipaoa block. The Hangaroa River flowed through the middle of the Tahora 2C block. The Kahunui Stream

1011. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 103–104
1012. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 124

flowed through Tahora 2C3 section 1, and in doing so formed the boundary between 2C3(1) and Tahora 2G. The Koranga River formed part of the boundaries of 2C3(1) and 2C3(2).[1013]

Unfortunately, the evidence available to us does not permit any conclusions about whether rivers bounding or flowing across the Tahora 2 block were alienated knowingly or willingly in land transactions. This matter was not considered by the witnesses who covered this block in their evidence.[1014] Dr Doig's evidence in respect of Tahora 2 was concerned only with Tuhoe, and is as follows:

> To the east, the massive Tahora 2 block was brought to the Native Land Court in 1889 following an unauthorised survey. The Tahora 2 case saw Tuhoe lose ownership of the land adjoining most of the upper Ruakituri River and upper Hangaroa River by 1896 – some to the Crown through purchase and survey lien, and some to rival claimants, although these other hapu also included Tuhoe people with legitimate interests in their lists. Tuhoe hapu did retain ownership of a small portion of the block near Waimana, over which the Waimana River flowed, although sections of the block away from the river were lost to liens. In 1896, the Crown took well over 4000 acres from Tuhoe's various riparian blocks within Tahora 2 in survey liens, to pay for an expensive survey which Tuhoe had opposed throughout.[1015]

We discussed the contentious Tahora 2 survey, and the Crown's acquisition of land as a result of it, in chapter 10. We accept here that the Crown's taking of land for survey costs in Tahora 2 could not, in any sense, represent a willing or knowing alienation of any rivers within or bounding that land. We also accept that it is likely, as submitted by claimant counsel, that the Crown wrongfully acquired riverbeds by application of the *ad medium filum aquae* rule. But we have no specific evidence for Tahora 2, other than the brief analysis supplied by Doig above. The extent to which the Crown has acquired or claimed the riverbeds in the Tahora 2 blocks is unknown.

In respect of Waipaoa, the claimants' principal concern was the way in which the Crown acquired Lake Waikareiti, one-third of which was taken for survey costs and the remaining two-thirds by way of purchasing individual interests in an unfair, coercive manner. We have addressed that issue in chapter 10.

With regard to the rivers, the eastern boundary of the Waipaoa block was formed by the Ruakituri River, a river of great significance to Ngati Kahungunu. The north-eastern boundary was the Waipaoa Stream. The Crown acquired land adjoining the Ruakituri River

1013. Moira Jackson and Anita Jo Foley, 'Te Urewera Overview Maps, Part 2', map book commissioned by the Crown Forestry Rental Trust, 2002 (doc A16), map 7

1014. Peter Boston and Steven Oliver, 'Tahora'(commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A22); Michael Macky, 'Report in respect of Tahora 2 and the East Coast Trust'(commissioned research report, Wellington: Crown Law Office, 2005) (doc L8); James Brent Parker, 'Tahora no 2 Block'(commissioned research report, Wellington: Crown Law Office, 2005) (doc L7)

1015. Doig, 'Te Urewera Waterways' (doc A75), p 52

in the east of the block (Waipaoa 1) for survey costs. In the original survey agreement, Ngati Kahungunu leaders had agreed that the Crown should acquire land with 'frontage to the Ruakituri River' to pay for the survey. But there was nothing in the agreement which could serve as an acknowledgement that the Crown would thereby obtain the adjoining riverbed to the centre line. The sketch attached to the agreement showed the shaded block as stopping at the western bank of the river.[1016] As Cathy Marr has noted, the Crown intended the *ad medium filum* presumption to apply to this acquisition, but the Crown's main focus was to obtain Lake Waikareiti.[1017]

By the process of buying individual interests, which were not located on the ground (early partitions were later simply ignored), the Crown obtained further shares that were mainly located so as to secure the west of the block, including ownership of the lake (see chapter 10). Part of the land adjoining the Ruakituri River was also secured (as the boundary of Waipaoa 3). As far as we know from the evidence before us, ownership of the Ruakituri River itself had not been investigated in the Native Land Court hearings, the *ad medium filum* presumption was never mentioned or explained, and the river itself was not the subject of specific Crown purchase.[1018] Unfortunately, we were not supplied with copies of the two purchase deeds by which the Crown obtained Waipaoa 3.

Maori still retained most of the land abutting the river after the Crown's interests were partitioned.[1019] As we explained in chapter 10, however, their land (Waipaoa 5) was taken compulsorily by the Native Minister in 1906 and vested in the Tairawhiti Maori Land Board for leasing. The owners had no legal right to be consulted, and their agreement was not required. The board was unable to lease any of the land, and eventually it offered the whole block to the Crown for purchase. An assembled meeting of owners agreed to sell in 1910, although the number present was well short of a majority (16 per cent of owners). There

1016. Agreement to pay in land for the survey of the Waipaoa and Matakuhia Blocks, 21 November 1882 (Emma Stevens, 'Report on the History of the Waipaoa Block, 1882–1913'(commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A51), pp 10–12). A copy of the agreement with the sketch plan is entitled Map 4, located between pp 24–25.

1017. Cathy Marr, 'Crown Impacts on Customary Interests in Land in the Waikaremoana region in the nineteenth and early twentieth century'(commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A52), pp 263–265

1018. See Stevens, 'Report on the History of the Waipaoa Block' (doc A51); Paula Berghan, 'Block Research Narratives of the Urewera, 1870–1930'(commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A86), pp 715–732; Paula Berghan, comp, supporting papers to 'Block Research Narratives of the Urewera', various dates (doc A86(r)); Richard Niania, brief of evidence, 22 November 2004 (doc 138); Michael Belgrave, Anna Deason, and Grant Young, 'The Urewera Inquiry District and Ngati Kahungunu: An Overview Report of Issues Relating to Ngati Kahungunu'(commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A122); Grant Young and Michael Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands'(commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A129): This report contains a summary of what was said at the Native Land Court hearings for the Waipaoa block.

1019. Stevens, 'Report on the History of the Waipaoa Block' (doc A51), map 14, between pp 51–52

was only a very limited opportunity for dissentients to have their land reserved (see chapter 10 for a full discussion of these events).

Thus the great majority of the Waipaoa 5 block was sold, carrying with it some of the frontage to the Waipaoa Stream (and the bed of the stream if the *ad medium filum* presumption applied). Again, there is no record that ownership of the river was mentioned or that the owners intended to sell the river to the Crown.[1020] A second meeting of owners had to be called in 1913 because the Crown significantly reduced its price, but the owners were desperate and still agreed to the sale (see chapter 10). We concluded in chapter 10 that the whole process by which the Crown obtained Waipaoa 5B could not be described as a willing alienation by the owners. Nor, in our view, could it be described as a knowing or willing alienation of the Waipaoa Stream where that waterway adjoined Waipaoa 5B.

After this sale, as we found in chapter 10, the Crown behaved in a reprehensible manner by preventing the non-selling owners from leasing or farming their remaining lands, which adjoined significant stretches of the Ruakituri River. The land purchase department, knowing that the owners would refuse to sell at a duly called meeting of assembled owners, picked off individual interests over a number of years. It then sought a partition, obtaining Waipaoa 5A, which abutted the last outstanding stretch of the Waipaoa Stream and part of the Ruakituri River. The Crown remained part-owner in the surviving Maori sections (5A2 and 5C), making it part-owner of the banks of the Ruakituri River in those sections (see map 7 in Part 2 of our report).

Again, the riparian lands obtained by these means were not acquired from willing sellers. These stretches of the Waipaoa Stream and Ruakituri River were not knowingly or willingly sold to the Crown.

Thus, as a result of its dishonourable treatment of the owners of the Waipaoa block, the Crown obtained the whole of the riparian land abutting the Waipaoa Stream and most of the riparian land adjoining the Ruakituri River. Because its purchase of individual interests in Waipaoa 5A2 and 5C remain unpartitioned (as far as we know), the Crown also became part-owner of the rest of the land abutting the Ruakituri River.

There is no evidence that the Waipaoa owners ever knowingly or willingly sold the Ruakituri River or the Waipaoa Stream to the Crown, and significant evidence to the contrary.

(7) *The northern rim blocks*

The northern rim blocks, which separated the UDNR from the confiscation line, were Waimana in the east, Ruatoki in the middle, and Tuararangaia in the west. Because their histories are all very different, we deal with each block in turn.

1020. See Stevens, 'Report on the History of the Waipaoa Block' (doc A51); Richard Niania, brief of evidence (doc 138); Berghan, 'Block Research Narratives' (doc A86); Berghan, supporting papers to 'Block Research Narratives' (doc A86(r)).

(a) ***Ruatoki:*** We have already discussed the Ruatoki block extensively in earlier chapters of our report. The Ruatoki lands were investigated by the Native Land Court in 1894 but were then included in the Urewera District Native Reserve in 1896. The Native Appellate Court heard appeals in 1897 but its decisions were annulled in 1900, and Ruatoki was reinvestigated by the two Urewera commissions. The commissioners did not change the partitions created by the Native Land Court, which meant that the Ohinemataroa (Whakatane) River ran through Ruatoki 1 rather than forming a block boundary. Thus, if it were held that ownership of a riverbed enclosed in a block goes with the land, then the Urewera commissioners' orders for Ruatoki 1 would be held to have included the river. Ruatoki 1 survived the Crown's purchasing of individual interests in the UDNR because it was one of the few UDNR blocks in which partitioning had been permitted. As we explained in chapter 13, the process of partitioning created some very small sections at Ruatoki and proved an effective barrier to Crown purchasing. Crown purchase agent Bowler was unable or unwilling to buy individual interests in Ruatoki because it was not economic for the Crown.

By the time the Crown was ready to proceed with a consolidation scheme to concentrate its interests in the former Reserve, Ruatoki lands were too valuable to include, as they would have distorted the relative shares in the scheme. Instead, as we discussed fully in chapter 19, the Ruatoki and Waiohau blocks underwent a separate consolidation scheme, designed to provide more concentrated, economically viable sections for the Maori owners. The result was that the Ohinemataroa River became a boundary for the many small sections that were created at right angles to the river on each side of it. If it were held that ownership of that stretch of the river was properly investigated and intentionally awarded as part of Ruatoki 1, then the particular individual owners of these small riparian sections became owners of the riverbed unless the *ad medium filum* presumption was rebutted. There is certainly evidence that the wider community continued to exercise customary rights over their taonga, the river, after the consolidation scheme. Hakeke Jack McGarvey, Tamaroa Nikora, and others told us that the river belongs to Tuhoe. Mr McGarvey explained how customary relationship with and rights in the river have been maintained.[1021] We note that the Crown's interests were awarded some distance away from the river, on the western side of the Ruatoki block, and thus the Crown had no claim to own this stretch of riverbed *ad medium filum* (see map 19.1 in part 4 of our report). We discuss later in the chapter the Crown's claim that this part of the river was navigable.

In terms of the Waiohau part of this consolidation scheme, the Crown did emerge as the owner of a significant stretch of riparian land abutting the eastern bank of the Rangitaiki River, Waiohau B9.[1022] We found in chapter 19 that the Crown treated the Waiohau owners differently from the Ruatoki owners in a number of ways, and that the amount of land

1021. See Hakeke Jack McGarvey, brief of evidence (doc J33); Tamaroa Nikora, brief of evidence, 12 January 2005 (doc J40), p 6

1022. Doig, 'Te Urewera Waterways' (doc A75), p 90

it obtained at Waiohau (one-third of the block) was unfairly acquired. The Crown never purchased any land at Waiohau – it obtained its interests there as a result of purchases at Ruatoki. There is no evidence that the Waiohau owners knowingly and willingly agreed to transfer this stretch of the Rangitaiki River to the Crown along with the riparian land. Indeed, they had not transferred anything at all to the Crown. As occurred in the Urewera consolidation scheme (which we discuss below), if the Crown *did* successfully acquire the riverbed to the mid-point adjacent to Waiohau B9, then it did so without paying for it.

In terms of whether the presumption may be rebutted by continued tribal use of the river, Ani Hare told us that the Rangitaiki River opposite Waiohau was an abundant source of eels, koura, and kokopu in the 1930s, when the consolidation scheme took place. Her whanau lived on a development scheme farm, and sometimes eels from the Rangitaiki 'would be our food source for weeks on end'. The river remained a vital food source for Ngati Haka Patuheuheu, who continued to fish in the traditional ways, until the supply of eels began to decline after the building of the hydro schemes.[1023]

As noted above, we adopt the findings of the Te Ika Whenua Rivers Tribunal in respect of Waiohau and the other western rim blocks, but we add our reflections here in respect of the very specific issue – raised in our inquiry – of the riparian land obtained by the Crown as a result of the Ruatoki–Waiohau consolidation scheme.

(b) *Tuararangaia:* Tuararangaia 1 was awarded to Tuhoe in 1891. Ownership of Tuararangaia 2 was obtained by Ngati Pukeko, while Tuararangaia 3 was granted to Ngati Hamua and Warahoe. The principal river at issue is the Rangitaiki River, which formed the western boundary of the Tuararangaia block until the opening of the Matahina dam in the 1960s. After that, the Rangitaiki Gorge was flooded and Lake Matahina became the western boundary.[1024] This stretch of the Rangitaiki was used for eeling in the nineteenth century, as were smaller streams in the block.[1025] From the point at which the Native Land Court awarded title, however, Tuhoe owned the eastern side of the block. It was the western partitions, Tuararangaia 2 and 3, which were bounded by the river (and later by Lake Matahina).[1026] As noted above, Tuararangaia 2 and 3 are not part of our inquiry, so we can make no findings in respect of the Rangitaiki River and the Tuararangaia block.

(c) *Waimana:* The Waimana block features as a case study in Dr Doig's report, and demonstrates the complexity involved in ascertaining the legal ownership of riverbeds in Te Urewera. The key issue for Waimana is that the use of the Tauranga (Waimana) River as a boundary for partitions was sometimes interpreted by surveyors to require a fixed (also

1023. Anitewhatanga Hare, brief of evidence (doc C17(a)), pp 23–24
1024. Peter Clayworth, 'A History of the Tuararangaia Blocks'(commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A3), p 16
1025. Clayworth, 'Tuararangaia' (doc A3), p 20
1026. See map in Clayworth, 'Tuararangaia' (doc A3), p 74

called right-line) boundary. With this type of boundary, river edges were 'surveyed as a succession of marked straight lines, rather than following the natural line of the river'. Sometimes the boundary points for these lines were placed in the middle of the river (as it was at the time). This took the treatment of rivers as land to a new level, displacing the *ad medium filum* presumption in favour of fixed, surveyed lines. Presumably, the river was considered too migratory for use as the actual boundary when some of the Waimana partitions were surveyed.

As we set out in chapter 10, Waimana was the first Te Urewera block to pass through the Native Land Court. An application by two Te Upokorehe individuals forced Tuhoe into court in 1878 to defend their claim. Although Tuhoe hapu won ownership of the block, the private lessee began buying up individual interests. After a rehearing in 1880, the list of owners was expanded and the piecemeal private sales continued. The court had not completed its task of defining relative shares, so tribal leaders applied for a partition shortly after the rehearing. According to anthropologist Jeffrey Sissons, this had a dual purpose to define shares and to stop the sale of individual interests. After long delays, because the people were not agreed as to partitioning, the block was eventually partitioned in 1885. Tuhoe leaders wanted a partition that would give them the land on the east bank of the Tauranga River, which flowed through the block. Private purchasers would have the land on the west bank, along with a reserve for the sellers abutting on that bank. Tamaikoha's reference to the river was that it should be the boundary between the non-sellers and the new private owners.[1027] From the evidence of Jeffrey Sissons and Suzanne Doig, there is no indication that ownership of the river itself was discussed or seen as part of these arrangements, or any suggestion that the private purchasers would thereby gain title to the middle line.[1028]

Dr Doig confirmed that title to the river was also not investigated by the Native Land Court in 1878 and 1880:

> These investigations contain very few references to the Waimana River; there were passing references to fisheries, the location of kainga on the banks of the river, and boundary markers [between hapu] on and in the river.[1029]

In the event, the court did not agree to Tuhoe's request to hold all land on the east bank of the river. The river had not been surveyed, and Waimana was partitioned into blocks containing land on both sides, except for the sellers' reserve which was bounded by the river on the west bank.[1030] This reserve was surveyed with right lined boundaries.

In order to cut land out for leasing or sale to meet survey costs or for farming, a process of further partitioning began which, over the next few decades, saw the creation of multiple

1027. Jeffrey Sissons, 'Waimana Kaaku' (doc A24), pp 46–57
1028. Sissons, 'Waimana Kaaku' (doc A24), pp 51–56; Doig, 'Te Urewera Waterways' (doc A75), pp 107–110
1029. Doig, 'Te Urewera Waterways' (doc A75), pp 107–108
1030. Doig, 'Te Urewera Waterways' (doc A75), pp 108–109

small, narrow, strips of land running at right angles to the river.[1031] In this partitioning process, the river became a boundary between multiple blocks with small river frontages. Many of these blocks had right lined boundaries, some by the banks and others in the middle of the riverbed. Some even included the whole riverbed inside the fixed boundaries.[1032] It seems likely that the early twentieth century surveyors took this approach because, as one put it, '[t]his river changes its course every year'.[1033] The *ad medium filum* presumption did not apply to these right lined boundaries.[1034]

The issue of the ownership of the riverbed was raised in the 1970s because the Bay of Plenty Catchment Commission had been carrying out flood protection works. The commission wanted to establish the ownership so that it could take control of the land on which its works had been constructed. It was found that the Crown had claimed ownership of exposed riverbed in the Waimana block since about 1950, leasing it to neighbouring farmers. The basis of the Crown's claim to own the riverbed was never explained. Suzanne Doig theorised that it might have been based on the idea that the Tauranga was navigable, and thus its dry riverbed belonged to the Crown. By 1969, however, the Government was considering abandoning the leases due to flooding. The catchment commission's work to stabilise the river saved the leases. In the early 1980s, the Crown decided to sell the newly stabilised land to the lessees. At that point, Lands and Survey investigated the basis of the Crown's title and concluded that it was not Crown land at all. In part, this was because officials took the view that the river was not in fact navigable in the Waimana block.[1035]

As a result, the Crown had to cancel its leases in 1983, advising lessees that the land was actually 'no man's land' but could be claimed by riparian owners as accretion. This was correct where there were no right lined boundaries, so long as the change to the river had been slow and gradual. Some owners did obtain Land Transfer titles to parts of dry riverbed at that point. Other Waimana blocks, with right lined boundaries, were held to be 'virtually "no man's land" as no adjoining owner has any rights to claim ownership of it'. The department thought that the exposed riverbed for right lined blocks might still belong to the 'owners of the prior subdivided blocks', or could 'likely' still be in Maori customary title.[1036]

The Bay of Plenty Catchment Commission's chief engineer responded:

1031. Sissons, 'Waimana Kaaku' (doc A24), pp 66–94
1032. Doig, 'Te Urewera Waterways' (doc A75), pp 110–112
1033. Note on survey plan ML12082, October 1920 (Doig, 'Te Urewera Waterways' (doc A75), p 112)
1034. Doig, 'Te Urewera Waterways' (doc A75), p 112
1035. Doig, 'Te Urewera Waterways' (doc A75), pp 112–113
1036. Commissioner of Crown Lands, Hamilton, to District Field Officer, Rotorua, 10 August 1983 (Doig, 'Te Urewera Waterways' (doc A75), pp 113–114)

> I think it is ridiculous that the Crown should now decide that land that had previously been declared Crown land and for which the Crown has been collecting grazing tenancy for some years is now 'no man's land' whatever that is.[1037]

Remarkably, the Crown's response was to start leasing the land again, in a role as 'caretaker'.[1038] Unfortunately, Dr Doig's research could not uncover how this situation was finally resolved, or who eventually obtained legal title, if anyone. At the very least, Dr Doig concluded,

> The history of the riverbed in these parts of the Waimana block highlights the legal confusion which surrounds riverbed ownership in New Zealand.[1039]

The Crown did not make any submission on the use of right line boundaries or the situation at Waimana, other than to state that the *ad medium filum* presumption did not apply to fixed boundaries.[1040]

21.16.3 The Coal-mines Act Amendment Act 1903 vests the beds of navigable rivers in the Crown

In 1903, the beds of navigable rivers were vested in the Crown by an amendment to the coal mines legislation which was mainly concerned with pay and compensation for coal miners, the establishment of a medical fund for miners, the transfer of coal-mining leases, and the issue of leases over education endowments. This was a significant grievance for the claimants in our inquiry. In their view, the Act expropriated the beds of their navigable rivers without consultation, consent, or compensation. The Crown's view was that there was no evidence to show that the peoples of Te Urewera were not consulted about the passage of the 1903 Act. Crown counsel also submitted there was no evidence that the peoples of Te Urewera had ever protested against its enactment or effects, nor any evidence that they had ever 'sought compensation for any lost rights' following its enactment. The claimants' response to this argument rested on the uncertainty surrounding definitions of navigability in the Act, the uncertainty as to which rivers or stretches of river the Crown actually claims to own as a result of the Act, and the relative lateness of claims of Crown ownership in Te Urewera (many decades after the passage of the Act).

(1) *The words of the Act in 1903 and the amendment of 1925*

Section 14 of the Coal-mines Act Amendment Act 1903 stated:

1037. Chief Engineer, Bay of Plenty Catchment Commission, to Hamerton and Chappell, Barristers and Solicitors, Whakatane, 29 November 1983 (Doig, 'Te Urewera Waterways' (doc A75), pp 114–115)

1038. M Littlejohn for Commissioner of Crown Lands, to Hamerton and Chappell, 1 March 1984 (Doig, 'Te Urewera Waterways' (doc A75), p 115)

1039. Doig, 'Te Urewera Waterways' (doc A75), p 115

1040. Crown counsel, closing submissions (doc N20), topic 30, p 8

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14. Bed of river deemed vested in Crown—(1) 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 in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.

(2) For the purpose of this section—

'Bed' means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:

'Navigable river' means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts or rafts; but nothing herein shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

In 1925, the definition of navigability was changed to what claimant counsel considered a 'slightly simplified wording': 'a river of sufficient width and depth (whether at all times or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.'[1041] This definition has been retained ever since, most recently by the effect of section 354 of the Resource Management Act 1991.

We will deal with the claimants' concerns about the definition of navigability shortly. First, we consider the question of how and why the Seddon Government introduced this section into the Coal-mines Act Amendment Bill in 1903, proposing the vesting of the beds of all navigable rivers in the Crown, and whether there is sufficient evidence to be sure that the peoples of Te Urewera were not consulted about it.

(2) *The significance of section 14's origin*

Professor Boast gave evidence that the 1903 amendment was a response to the Court of Appeal's 1902 decision in *Mueller v Taupiri Coal-mines Ltd*.[1042] This view is consistent with the view of the Supreme Court in the *Paki* case.[1043] We have already referred briefly to *Mueller*. In essence, the Crown won that case – and therefore the ownership of the coal under that stretch of the Waikato River bed – because four of the five judges considered the *ad medium filum* presumption to have been rebutted by the circumstances surrounding the Crown grants. The fifth judge, the Chief Justice, disagreed that the presumption had in fact been rebutted. The Crown's goal in 1903, therefore, was to obtain a more certain ownership of the coal under the beds of New Zealand's larger rivers. The issue of Crown use of rivers

1041. Coal Mines Act 1925, s 206
1042. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p 271
1043. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 301

for hydroelectricity was addressed separately the same year in specific legislation for that purpose; the Water-power Act 1903.

The amendment to the Coal-mines Act to secure ownership of coal in river beds seems to have been an after-thought. A clause was not introduced into the Bill until the House was already in committee, debating and passing the Amendment Bill section by section. On 12 November 1903, the Minister moved the addition of a clause: 'It is hereby declared that all coal and lignite under any river exceeding thirty-three feet in width is vested in His Majesty.'[1044] Although this clause initially passed the House, there were objections on the basis that it would interfere with private property rights. This seems to have resulted in a re-wording, which introduced a justification that the rivers were public highways:

> The Premier then moved to amend the clause so as to make it read that all such rivers navigable by small boats or steamers are declared to be highways, and the coal or lignite under such rivers are vested in His Majesty.[1045]

This also received objections, so the specification of a 33-feet width was reinserted:

> the Premier substituted for it another amendment to provide that in respect to all rivers exceeding 33 ft in width that can be navigated by small boats or steamers, all coal or lignite under such rivers is vested in His Majesty.[1046]

At that point, the Leader of the Opposition succeeded in inserting a 'saving' clause, that the effects of the draft provision would be 'subject to existing rights'. An alternative wording, making it clear that the rights of riparian landowners *ad medium filum* were the rights to be saved in this way, was not adopted. After further debate, it was agreed to omit the provision altogether and the Bill passed the House without it.[1047]

A few days later, on 17 November 1903, the amendment Bill received its third reading. In the meantime, the Government had come up with a replacement clause, the text of which became section 14 (as set out above). The new clause thus, for the first time, proposed to vest the riverbeds themselves in the Crown, and declared that not simply coal and lignite but all minerals under the beds were the 'absolute property' of the Crown.

Seddon advised the House that the new clause was intended to meet the Opposition's wish to 'conserve existing rights'. The Government, he said,

> did not wish in the slightest degree to disturb existing rights, but there was a difficulty as to how they should avoid that. A new clause had been drafted which he thought would meet the difficulty.[1048]

1044. James McGowan, 12 November 1903, NZPD, 1903, vol 127, pp 511–512
1045. *Evening Post*, 13 November 1903 (*Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277, 327)
1046. *Evening Post*, 13 November 1903 (*Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277, 327)
1047. *Otago Witness*, 2 December 1903 (*Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277, 328)
1048. Seddon, 17 November 1903, NZPD, 1903, vol 127, p 681

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The leader of the Opposition agreed that 'the clause now proposed would remove the difficulty, and, he was sure, would be supported by the House'. Without much debate, therefore, the House inserted section 14 into the Coal-mines Act Amendment Act.[1049]

This brief account, which is based on *Hansard* (and the newspapers cited in *Paki*) highlights the following points. First, as concluded by the Supreme Court in *Paki*, the compromise clause was intended to strike a balance between private and public rights.[1050] Secondly, Maori interests and customary rights were given no consideration. At best, such rights must have been considered identical to the *ad medium filum* rights of riparian owners (that is, land obtained from the Crown by way of a Crown grant). Thirdly, no consideration was given to the special circumstances of Te Urewera, which had its own unique status at the time as a special Maori reserve, and its own unique titles system. Fourthly, it is simply impossible that the peoples of Te Urewera could have been consulted about this section of the 1903 Act. There were at most four days between the drafting of a clause taking the beds of all navigable rivers and its adoption by the House of Representatives. We agree with claimant counsel:

> The Crown suggests that there is nothing to show that the people of Te Urewera 'were not consulted over the enactment of the Coal-mines Amendment Act 1903'. I would submit that it is fantastic to imagine that they were. Who can believe that there was any kind of consultation with Urewera Maori, Maori elsewhere, or indeed anyone, regarding the enactment of an obscure amendment to the Coal Mines Act in 1903?[1051]

Tuhoe were clearly unaware of the effects of the Act five years later, when they debated the leasing of rivers for mining purposes.[1052]

(3) *Was the Act expropriatory or declaratory?*

Over the 100 years since the Act's passage, the question of whether its effect was to expropriate (confiscate) Maori rights or merely to declare the prior legal position has been debated from time to time. The debate has focused on three questions:

- whether Maori had had title to navigable rivers at the time of the Treaty in 1840 (and therefore anything to lose if the beds of navigable rivers were vested in the Crown);
- whether the Act was expropriatory of riverbeds owned under the *ad medium filum* presumption; and
- whether the Act's expropriation of one component of a river – the bed – was sufficient to expropriate a taonga, an indivisible water regime possessed by Maori under their unique form of customary title.

1049. W Massey, 17 November 1903, NZPD, 1903, vol 127, p 681
1050. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 301–306
1051. Counsel for Ngati Manawa, submissions by way of reply (doc N26), p 7
1052. Edwards, 'The UDNR Act – Part 3' (doc D7(b)), p 59; Binney, 'Encircled Lands, Part 2' (doc A15), p 392; Doig, 'Te Urewera Waterways' (doc A75), p 60

We begin with the first of these questions: whether Maori had title to navigable rivers in 1840, at the time of the signing of the Treaty. From the 1910s to the 1950s, Solicitors-General tried to persuade the courts that large, navigable, inland waterways, including rivers, had been owned by the Crown since 1840 under the New Zealand common law. As will be recalled from chapter 20, John Salmond developed the argument that:

- 'small unnavigable streams, lagoons, and other waters were undoubtedly merely appurtenant to the adjoining land and subject to customary title', and could be included in the freehold orders of the Native land Court;
- *Mueller* was authority for the implied reservation of navigable rivers when riparian lands were granted by the Crown;
- There was no qualitative difference between that implied reservation in a Crown grant, and the implied reservation of navigable rivers in the 'statutory grant' that took place when the Crown entered into the Treaty of Waitangi, and gave the Treaty legislative force in respect of native title through the native land laws;
- The question for courts to decide, in respect of both lakes and rivers, was whether an inland waterway was sufficiently large and significant that it had been reserved for public navigation and fishing under the Treaty and the native land laws; or,
- Alternatively, whether Maori had no greater rights than fishing rights because Maori custom did not recognise the ownership of land under water.[1053] (For a full explanation of these arguments, see chapter 20.)

This argument was refined by Crown lawyers and tested in a number of lake cases, in which it was invariably rejected by the courts (including in the Lake Waikaremona case). For navigable rivers, its principal test came in the Whanganui River case, where it was rejected by the Native Land Court in 1939, the Native Appellate Court in 1944, the Whanganui River royal commission (former High Court judge Sir Harold Johnston) in 1950, and the Court of Appeal in 1955.[1054] In the series of Whanganui River decisions, Justice Hay, in *The King v Morison* (1950), considered that the 1903 legislation was not confiscatory.[1055] The Whanganui River commission, on the other hand, considered that the Act *was* expropriatory and that the Maori owners of the Whanganui River were entitled to compensation 'in equity and good conscience'.[1056] Ultimately, the Court of Appeal found in 1962 that Maori customary title to the Whanganui River had already been extinguished by the award of Native Land Court titles before the passage of the Act.[1057]

1053. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Tony Walzl, comp, supporting papers to 'Waikaremoana: Tourism, Conservation & Hydro-Electricity (1870–1970)', various dates (doc A73(a)), pp 229–234)

1054. 'Report of the Royal Commission Appointed to Inquire into and Report on Claims Made by Certain Maoris in respect of the Wanganui River', AJHR, 1950, G-2; *In re the Bed of the Wanganui River* [1955], NZLR 419 (CA).

1055. *The King v Morison and Another* [1950], NZLR 247 (SC), 266–268

1056. 'Report of the Royal Commission Appointed to Inquire into and Report on Claims Made by Certain Maoris in respect of the Wanganui River', AJHR, 1950, G-2, pp 12–14

1057. See *In re the Bed of Wanganui River* [1962] NZLR 600 (CA).

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Turning to the second question, whether the Act was expropriatory of rights *ad medium filum*, the Court of Appeal judges in the 1955 *Leighton* case were far from united. Justice Stanton expressed no view on the matter. Justice Fair considered the Act was confiscatory.[1058] Justice Adams thought it may have been declaratory because, in his view, the saving clause in the 1903 and 1925 Acts included all Crown grants to which the *ad medium filum* presumption applied. In other words, a river had to have been expressly excluded from a grant before it could be considered to be vested in the Crown. But Justice Adams also thought it could be confiscatory in some respects, including of Maori customary rights.[1059] Justice Fair disagreed with Justice Adams that all Crown grants were included in the saving clause, because that practically nullified the section.[1060]

There was debate in the 1980s as to whether a case should be taken to the Court of Appeal to determine whether the Act was confiscatory or declaratory. The Minister of Justice, Geoffrey Palmer, intended that a case would be stated under section 222 of the Land Transfer Act.[1061] The Minister noted that there was a

> difficulty in deciding whether s 261 of the Coal Mines Act 1979 dealing with Crown ownership of the bed is confiscatory or declaratory. This is a central question upon which the court will be requested to rule.[1062]

In the event, no case was stated.

In *Paki* in 2012, the Supreme Court found that the 1903 amendment Act was intended by Parliament to be declaratory, not expropriatory. It was intended to balance public rights with those of the riparian owner. One example of this balance was that stretches of an otherwise navigable river that were not navigable *in fact* would not vest in the Crown. In the Supreme Court's view, section 14 was influenced by the *Mueller* case, which had noted the North American common law in respect of navigable rivers. The position in Canada and the United States, due to the circumstances particular to those colonies, was that large, navigable rivers were public highways, owned by the State.[1063]

The majority in *Paki* concluded:

> It [the 1903 amendment Act] allowed rivers which were potential highways (as the roads marked out on survey maps were potential highways only, until formed) to vest in the Crown,

1058. *Attorney-General, Ex Relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA), 768, 769

1059. *Attorney-General, Ex Relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA), 789–793

1060. *Attorney-General, Ex Relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA), 772

1061. G Palmer, Minister of Justice, press statement, 27 February 1985 (David Alexander, comp, supporting papers to 'Native Land Court Orders and Crown Purchases', various dates (doc A92(a), vol 3), p v125)

1062. Minister of Justice to Planning Officer, South Canterbury Catchment Board, 19 May 1986 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v127)

1063. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 301–307

> leaving intact private property in relation to non-navigable rivers which were not capable of becoming highways. There was sufficient justification in North American case law concerning the beds of navigable rivers to counter charges of expropriation of private property. Such course was of public benefit without being destructive of private property which, in relation to the beds of navigable rivers could only be regarded as precarious following *Mueller*. The Parliamentary debates which preceded enactment of the 1903 Amendment Act indicate that the purpose of the legislation was to strike an appropriate balance between private and public property, based on the concept of navigability.[1064]
>
> . . . . .
>
> While the Coal-mines Act Amendment Act 1903 was also undoubtedly concerned with ownership of minerals in river beds, the legislative history . . . indicates concern to strike a fair balance between the rights of riparian owners and the public interest. Against the background of the common law approaches in North America, referred to in the judgments in *Mueller*, such balance was found in the concept of rivers as highways with Crown ownership of the soil beneath. The existing common law and its development in North America (in circumstances comparable to those in New Zealand) were treated as providing sufficient justification to enable the claim to be made that the effect was not expropriatory. The speeches in Parliament and the acknowledged difficulties of achieving a fair balance suggest that a principled basis for Crown ownership was where rivers were navigable in fact.[1065]

A circumstance particular to New Zealand common law, however, was the unique Maori law and custom in respect of rivers. This brings us to the third question noted above: whether the expropriation by the Coal-mines Act Amendment Act 1903 of one element of a river – its bed – was sufficient to expropriate the taonga that is the river possessed by Maori. In 1994, the Court of Appeal in *Te Ika Whenua* suggested that the language of section 14 might not be sufficiently explicit to extinguish the Maori customary title to rivers. The president of the Court, delivering the court's judgment, commented:

> The Maori Affairs Act 1953, s 155, enacts that except so far as may be otherwise 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 manner against the Crown. The provision goes back to 1909 and the draftsmanship of Sir John Salmond. It is not clear that the provision extends to water; and in their Te Ika Whenua – Energy Assets Report in 1993 and Mohaka River Report in 1992 the Waitangi Tribunal have adopted the concept of a river as being taonga. One expression of the concept is 'a whole and indivisible entity, not separated into bed, banks and waters'. *The vesting of the beds of navigable rivers in the Crown provided for*

1064. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 301–302
1065. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 306

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> *by the Coal-mines Amendment Act 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept* [emphasis added].[1066]

In 2003, the Court of Appeal in *Ngati Apa* had to decide whether the statutory language of the Territorial Sea and Fishing Zone Act 1965 and Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 was sufficiently explicit to extinguish Maori customary title. Justices Keith and Anderson concluded that it was not. One of their reasons relied on a comparison with the statutory language of the coal mines legislation, which declared the minerals in the beds of navigable rivers to be the 'absolute property' of the Crown. The phrase 'absolute property', in the court's decision, involved both the Crown's radical title and the beneficial title; through this statutory language, the Crown had both.[1067] In our inquiry, counsel for Ngati Manawa pointed out that the phrase 'absolute property' only applied to the minerals; by contrast the river beds themselves were 'vested' in the Crown.[1068] The Tauranga Moana and Central North Island Tribunals agreed that the question of whether the coal mines legislation was sufficiently explicit to extinguish Maori customary title was still undecided after *Ngati Apa*.[1069]

In *Paki*, the Supreme Court did not need to address the question of the Act's effect. Its view that the Act was not intended to be expropriatory, therefore, should not be taken as applying to its effects on Maori customary or even Maori freehold titles. The majority stated:

> Because it is not claimed that the bed of the [Waikato] river is Maori customary land or Maori freehold land, it is not necessary to consider in the present appeal whether the terms of s 14 would apply to such land (an application doubted in relation to customary land by Cooke P in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*).[1070]

The court did, however, speculate whether the reason why words used in a 1926 Act, which vested the beds of Lake Taupo and its tributary rivers in the Crown,[1071] were more specific than the 1903 Act was because of doubts about the efficacy of section 14. The majority commented that the 1926 legislation:

> dealt with use of the waters of the river and cleared the land [beds] of any Maori customary title or Maori freehold title. The specific declaration of Crown ownership may have been necessary to effect an expropriation of Maori customary or Maori freehold title (if the land

1066. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA), 26–27. We note that the provision referred to by the Court of Appeal, section 155 of the Maori Affairs Act 1953, was not re-enacted in Te Ture Whenua Maori Maori Land Act 1993

1067. *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), 687–688

1068. Counsel for Ngati Manawa, closing submissions (doc N12), p 62

1069. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, p 610; Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1265

1070. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 288

1071. This legislation, the Native Land Amendment and Native Land Claims Adjustment Act 1926, is discussed in depth in Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1317–1334.

> was in such ownership). Certainly, in *Te Ika Whenua* Cooke P expressed the view that the terms of s 14 of the Coal-mines Act Amendment Act were not sufficiently explicit to achieve an expropriation of Maori customary land (a view perhaps turning on use of the word 'remain' and the reservation in relation to Crown grants, which could be taken to indicate that s 14 is effective only in respect of land obtained in ownership and subsequently granted by the Crown).[1072]

Otherwise, the court did not comment further on the question as posed by President Cooke in *Te Ika Whenua*.

In *Paki No 2*, the Supreme Court reiterated that, in respect of section 14, 'whether this vesting [of the beds of navigable rivers in the Crown] applied to Maori customary land was doubted by Cooke P in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* but is not in issue in this appeal'.[1073]

In the Whanganui River inquiry, the Waitangi Tribunal noted both the significance of the Court of Appeal's 1994 *Te Ika Whenua* case and that the meaning of the law would not be certain until tested and decided by the courts. In the meantime, the Crown had acted on the basis that it owned the bed of the Whanganui River as a result of the 1903 Act, and the Tribunal found that the Act expropriated Maori property rights, without consent or compensation, in serious breach of Treaty principles.[1074] We, too, consider that, so far as the Crown has claimed riverbeds in our inquiry district on the basis of the Act, it was expropriatory. Given the position in *Paki*, the legal question of whether its language was sufficiently explicit to extinguish customary title is still unresolved; uncertainty as to the law remains. Either the Crown is acting unlawfully or the Act is expropriatory.

(4) *Problems with the definition of navigability*

In our inquiry, the claimants were particularly critical of the statute's definition of navigability. They say that it has created doubt and uncertainty as to who actually owns the river beds of Te Urewera. Part of the problem relates to how various Crown or local authorities have applied the 1903 Act (and its successors) on the ground, a question which we will address in section 21.16.7. Here, we are concerned with the words of the Act, any moves by the Crown to reform it, and how the courts have interpreted it. In doing so, the critical period for Te Urewera is the second half of the twentieth century, as the Crown appears to have made no active claims to river bed ownership in the inquiry district before the 1950s.

According to claimant counsel, the wording of section 14 in 1903 has 'proved problematic and the law remains unclear'.[1075] While a 'slightly simplified wording' was adopted in section 206 of the Coal-Mines Act 1925 (and retained ever since), the 'poor drafting and circularity

1072. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 297
1073. *Paki v Attorney-General* (*No 2*) [2014] NZSC 118, [2015] 1 NZLR 67, 81
1074. Waitangi Tribunal, *Whanganui River Report*, pp 306–307, 336, 339–340
1075. Counsel for Ngati Manawa, closing submissions (doc N12), p 59 n

of this wording is obvious: essentially a navigable river is one that can be used for the purpose of navigation.'[1076] The definition reads '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'. Counsel pondered:

> Did, for example, the invention of the jet-boat convert the upper Rangitaiki river into a 'navigable' river and vest it in the Crown? But there has been no move to clarify the law since 1903, presumably because the vagueness and imprecision of the law is useful to governments.[1077]

In the claimants' view, one of the key deficiencies in the Act was the absence of a mechanism to apply the criteria of navigability to particular rivers and formally declare them to be navigable.[1078] They relied for this point on Dr Doig, who argued:

> The legislation, however, never specified a process (such as gazetting or proclamation) for declaring any particular river to be navigable, nor did it define which departments or officials had the authority to decide which rivers were navigable. Opinion was also divided on whether a river could be considered navigable in some parts but not others. These deficiencies in the process make it difficult to discover whether the Crown has ever claimed or enforced its rights—the evidence must often be sought in relatively obscure documents dealing with the administration of rivers at a local level.[1079]

We begin by noting that the test of 'navigability' applied to river bed ownership is a statutory one, not a common law test. It also has no root in Maori custom; Maori were not concerned with the ownership of river beds. Rather, as we have seen, relationships with rivers through whakapapa were at whanau, hapu, and iwi level; hence the origin of rights of various kinds and the responsibilities of kaitiakitanga. The *Paki* case has demonstrated that, even until recent times, its interpretation of the statutory test of navigability has given rise to many uncertainties. The High Court found in 2009 that the law should be interpreted as vesting in the Crown the whole bed of a river that is 'navigable in substantial part'.[1080] The three judges of the Court of Appeal agreed with the High Court. In their view, the original words 'continuously or periodically' referred to stretches of the river, not the state of the river over time.[1081] The Supreme Court, however, found that the words 'continuously or periodically' referred to the 'condition of the river over time', and that the 1925 amendment clarified this but did not change the original meaning.[1082] Thus, the Supreme Court reversed the decision

1076. Counsel for Ngati Manawa, closing submissions (doc N12), p 59
1077. Counsel for Ngati Manawa, closing submissions (doc N12), pp 59–60
1078. Counsel for Ngati Manawa, closing submissions (doc N12), p 60
1079. Doig, 'Te Urewera Waterways' (doc A75), p 121
1080. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 285, 298–299
1081. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 285, 295–296, 299–300
1082. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 294–297

of the lower courts, holding that only the parts of a river that were navigable *in fact* were vested in the Crown.[1083]

While united on this point, the Supreme Court judges disagreed as to what constituted navigability. The majority took the view that the mere ability to float a boat, barge, punt, or raft does not make a river navigable. The judges emphasised that the 'purposes of navigation' are the purposes of highway, which are concerned with connections for transport and trade. Therefore, slight or intermittent use may not be sufficient to render the river navigable. As for recreational use of a river, the majority of the judges found that it could be evidence of the capacity of the river to support navigation for the purposes of transport and trade.[1084] A dissenting opinion held that regular crossing from side to side, as well as use (or potential use) for recreational boating, could make a stretch of river navigable as at 1903.[1085] The National Park Tribunal considered that the Supreme Court's majority decision followed existing case law: 'what was envisaged was "something of the character of usage for commercial purposes"'.[1086]

The Supreme Court also found in *Paki* that the actual or potential use of the river for navigation depended on the character of the river as it existed in 1903, at the time of the passing of the Act, not taking into account later changes to the river.[1087] This had also been uncertain before the *Paki* decision.

David Alexander's research for the 1994 Te Ika Whenua Rivers Tribunal hearings found that there were efforts to reform the law relating to navigable rivers in the 1960s, and again in the 1970s-80s.[1088]

In the mid-1960s, an interdepartmental officials' committee was established to report on administration and law in respect of water. Its report fed into the legislative reform which produced the new Water and Soil Conservation Act 1967 (which is discussed below in section 21.16.7(2)). The committee found that the definition of navigability had probably been satisfactory for dealing with the 'limited range of problems' in respect of coal mining back in 1903. However, its subsequent application 'to different circumstances have revealed considerable weaknesses'. Within Government, for example, the belief had developed that each repetition in successive Acts of the phrase 'shall remain and be deemed always to have been vested in the Crown' meant that rivers that became navigable between 1903 and the latest

1083. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 302–309
1084. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 307–309, 317
1085. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 329–339
1086. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 1002
1087. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 300–301, but see also the contrasting view of Justice William Young at 339.
1088. David Alexander, 'Native Land Court Orders and Crown Purchases'(commissioned research report, Wellington: Crown Law Office, 1994) (doc A92), pp 14–21

21.16.3(4)

Act in 1925 were vested in the Crown. The position 'since the last re-enactment (in 1925)', however, was considered 'doubtful'.[1089]

Further, the definition of what constituted navigability was 'now extremely doubtful'. The courts had questioned it, and the most recent case at the time (the 1955 *Leighton* case) had left the Government uncertain. Officials commented that the judges had been divided on whether navigation had to be for a commercial purpose or not. Officials were also unsure as to how the law affected a river that was only navigable 'in parts'. Artificial changes (many of them made by the Government itself) to the course of a river was another point of uncertainty. Officials were not sure whether such changes could alter a river's classification and make it navigable or non-navigable and thus change its ownership. They were also unsure as to whether recent technological developments (the invention of jet boats and hover craft) could make a river navigable within the meaning of the Act by the 'fresh possibility of river use as a highway'. The *Leighton* case in particular had left Government departments in doubt as to how to apply the law.[1090]

Definitions of Navigability in the *Leighton* Case

In the *Leighton* case, the four judges involved (one High Court and three Court of Appeal) all disagreed as to the meaning of section 206 of the Coal-Mines Act 1925, and the definition of navigability in that section.

In the High Court, Justice Hutchison held that navigability required purposeful use of a river (in this case, the Waiwhetu Stream) for transport of goods and trade. Casual or recreational use of a river was insufficient to meet this standard. The judge considered whether the Waiwhetu Stream could be used for navigation, given its width and depth, both in its original state and after its modification by the Hutt River Board.[1]

In the Court of Appeal, none of the three judges considered they had to determine whether the Waiwhetu Stream was navigable, but they all made observations about the meaning of section 206.

Justice Fair decided that it was unnecessary and 'undesirable' to give an 'exhaustive definition' of navigability. He considered that slight, intermittent, restricted use of a river was not enough, and that a river had to be shown to be navigable as at 1903, when the legislation was first enacted. With regard

1089. Interdepartmental Committee on Water, 'NZ Law and Administration in Respect of Water: confidential report to Cabinet by the Interdepartmental Committee on Water' (extracts), March 1965, p 23 (David Alexander, comp, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v77)

1090. Interdepartmental Committee on Water, 'NZ Law and Administration in Respect of Water', pp 23–25 (Alexander, supporting papers to 'Native Land Court Orders' (doc A92(a), vol 3), pp v77-v99)

to the High Court's decision, he thought that navigation 'may' be restricted in the way that Justice Hutchison found, and that it surely did not include recreational boating or the mere transport of residents for a distance. Rather, section 206 applied to rivers 'likely' to be of 'real use for commercial, or economic, or general purposes of transport'. Further, he disagreed with his Court of Appeal colleague, Justice Adams, that the saving clause applied to all Crown grants; it must be read as applying only to express grants of river beds.[2]

Justice Stanton decided it was not necessary to determine whether the river was navigable for the purpose of determining the appeal. But he expressed doubt about the High Court's definition of navigability as 'use for economic purposes'. In his view, the question was whether a river had the requisite width and depth to allow the vessels mentioned in the Act to 'pass over a sufficiently continuous length of water as to justify one in saying that the stream, or a substantial and continuous portion of it, was available for the passage of any of the craft mentioned'.[3]

Justice Adams also disagreed with the High Court that navigation for commercial purposes such as the transport of goods was required. Use of a river by the vessels specified in the 1925 Act was all that was necessary. The capacity to use a rowing boat, for example, would suffice. But Justice Adams also held that he was not required to determine the meaning of navigability because, in his view (dissenting from the other judges) the saving clause applied to all Crown grants to which the *ad medium filum* presumption applied, a position also later taken in *Tait-Jamieson v GC Metal Contractors Ltd*.[4]

It is not surprising, therefore, that the interdepartmental committee and the Government departments which had to apply the Act were left uncertain as to what made a river navigable, or at what point in time the test had to be applied.

1. *Attorney-General, Ex Relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA), 755
2. *Attorney-General, Ex Relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA), 769–770, 772
3. *Attorney-General, Ex Relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA), 778
4. *Attorney-General, Ex Relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA), 789–793

The interdepartmental committee considered the possibility, suggested by the Ministry of Works, that the Crown should simply take ownership by statute of all river and stream beds. This was rejected, but an improvement in the definition of navigability was suggested to deal with the uncertainties:

> If vesting in the Crown is to rest upon navigability mainly plus status as a boundary between sections [that is, *ad medium filum* for non-navigable waterways], the definition of 'navigable stream' should be improved. It should include every stream that in the past,

> present or future, was is or becomes capable of permitting, without trespass on adjoining lands, the passage of any kind of vessel that will float upon it with one occupant. 'Vessel' should be defined to include any jet craft, canoe, raft, or hovercraft. It should be made clear that a navigable stream will not cease to have that status even if the waters cease to flow. The bed so vested should include the flood channel, all islands, and all parts of the stream bed downstream of the uppermost water that is navigable, whether those parts are navigable or not.[1091]

In the event, the 1967 Soil and Water Conservation Act did not address ownership issues, so these far-reaching 'improvements' to the definition of navigability were not implemented.

As an aside, we note that the committee also recommended the codification in a new statute of common law rights to rivers as at 1840. It noted the tension between the English law characterisation of these rights and the guarantees to Maori in the Treaty of Waitangi:

> The English Laws Act, 1858, (NZ) applies to New Zealand, the laws of England as they existed on 14 January 1840 and those laws included the Common Law of England 'so far as applicable to the circumstances of New Zealand'. . . . Bearing in mind the origins of the English systems of ownership of land and water on the one hand, and on the other the Treaty of Waitangi guarantee to the Maoris of the 'full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties', it seems difficult to be sure exactly how far the Common Law doctrines as to riverbank boundaries, lakeside boundaries, ownership of highways and rights of passage over water are 'applicable to the circumstances of New Zealand.'[1092]

Since the question of what was really applicable to the circumstances of New Zealand (the wording of the English Laws Act) was thus unclear, the committee recommended that the uncertainties be resolved by statute.[1093] This recommendation, too, was not adopted.

In respect of the issue identified by Dr Doig – the lack of a mechanism to decide which rivers are navigable – the 1965 committee debated a proposal to set up such a mechanism. The proposal was for the Lands and Survey Department to resolve conflicts between local authorities and riparian owners by fixing the point to which a river was navigable. Any 'interested person' would then have a right of objection, which would be heard and

1091. Interdepartmental Committee on Water, 'NZ Law and Administration in Respect of Water', p 25 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v79)

1092. Interdepartmental Committee on Water, 'NZ Law and Administration in Respect of Water', p 22 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v76)

1093. Interdepartmental Committee on Water, 'NZ Law and Administration in Respect of Water', pp 22–23, 54 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), pp v76-V77, v89)

determined by the Land Valuation Court. This kind of mechanism was not considered seriously by the committee, which considered it flawed on 'technical and practical grounds'.[1094]

Thus, the 1965 interdepartmental committee identified what it considered to be significant problems with the definition of navigability, and many points of uncertainty in the law. Nonetheless, no action was taken. If followed, the committee's recommendations could have seen a very significant expansion in the Crown's ownership of riverbeds. The committee itself believed that many rivers had become navigable since 1903 and were therefore vested in the Crown anyway, but it was unsure.

The issues were revisted in the 1970s, when the Catchment Authorities Association asked the Government in 1976 for 'clarification of the law of ownership of riverbeds'.[1095] In particular, the association was concerned about the definition of navigability. The Government agreed the time was ripe to reconsider this matter.[1096] In 1978, the Minister of Justice referred the issue to the Property Law and Equity Reform Committee (the Law Commission's predecessor). Before the committee could report, however, the Coal Mines Act 1979 was passed, and the 1925 definition was retained unchanged.[1097] The continued use of the definition was criticised by the committee's background report, which considered it 'entirely unsatisfactory' and identified 15 areas of significant uncertainty as to its meaning.[1098] The committee then made a preliminary report to the Government in 1983, recommending that 'express or necessarily implied grants of proprietary rights by the Crown, whether by statute or otherwise and including traditional and customary Maori rights, should be left intact and unaffected by any general statutory reform in this area'. Otherwise, riparian rights arising 'merely from the application of the ad medium filum presumption' should be set aside, and all river beds wider than a specified number of metres should be vested in the Crown by statute.[1099]

The committee's view was that width should become the sole criterion for Crown ownership, and navigability should be set aside (thus returning to the original proposition in 1903). The Lands and Survey Department suggested a width of 20 metres, but the committee considered that something much narrower (maybe only three metres) might be appropriate.[1100] The committee considered that its proposal was not confiscatory because the Crown had probably become the owner of most of New Zealand's river beds already, simply by the

1094. Interdepartmental Committee on Water, 'NZ Law and Administration in Respect of Water', pp 24–25 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), pp v78-V79)

1095. Alexander, 'Native Land Court Orders and Crown Purchases' (doc A92), p 17

1096. Surveyor-General to all Chief Surveyors, 7 July 1977 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v94)

1097. Coal Mines Act 1979, s 261

1098. Property Law and Equity Reform Committee, 'Background Paper on Ownership of Riverbeds', 10 September 1981, pp 6–8 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), pp v107-V108)

1099. Alexander, 'Native Land Court Orders and Crown Purchases' (doc A92), pp 18–19

1100. Property Law and Equity Reform Committee, 'Interim Report on Law Relating to Water Courses', 26 April 1983, p 5 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v99)

invention of modern forms of water transport, especially the jet boat.[1101] But this – and other uncertainties surrounding navigability – required clarification by a law change.

The committee also recommended a transparent process to declare that a riverbed was the property of the Crown. It would involve:

> public notification of intention; public rights of objection; an independent investigation and either a recommendation or a determination by a court, local authority, or tribunal; and compensation being fixed by that body, if appropriate.[1102]

The committee's proposals were put out for public discussion but the committee itself queried its recommendations, in part because of the High Court's decision in *Tait-Jamieson v GC Smith Metal Contractors Ltd*.[1103] There, the High Court found that the 1903 Act and its successors only vested a riverbed in the Crown if the original Crown grant had specifically excluded the bed from the grant. This was in accord with Justice Adams' view in *Leighton*, but not with the view of Justice Fair in the same case and Justice Hay in the 1950 High Court decision *The King v Morison*. The latter two judges had held that only a Crown grant that expressly included a riverbed was covered by the saving clause. As the Law Commission pointed out in 1989, the High Court's interpretation in *Tait-Jamieson* meant that the 1903 Act had virtually no application at all.[1104] In *Paki*, the Supreme Court disagreed with the *Tait-Jamieson* interpretation.[1105]

In the meantime, however, the Government advised the Property Law and Equity Reform Committee not to complete its work on navigability and the ownership of river beds.[1106] The committee's view was that a critical issue was public access, which might not be satisfactorily resolved by Crown ownership of the beds in any case.[1107] Its president advised the Government that an authoritative Court of Appeal decision was likely required in response to *Tait-Jamieson*. The Lands and Survey Department agreed, given its difficulties in interpreting the law about ownership of the beds of navigable rivers. The Justice Department, therefore, recommended in 1985 that a case be stated to the Court of Appeal to clarify the

1101. Property Law and Equity Reform Committee, 'Interim Report on Law Relating to Water Courses', 26 April 1983, p 9 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v101)

1102. Property Law and Equity Reform Committee, 'Interim Report on Law Relating to Water Courses', 26 April 1983, p 8 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v101)

1103. *Tait-Jamieson v GC Smith Metal Contractors Ltd* [1984] 2 NZLR 513 (HC); Property Law and Equity Reform Committee, minutes of meeting, 3 December 1984, pp 4–7 (Alexander, comp, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), pp v116-V119)

1104. Waitangi Tribunal, *Whanganui River Report*, pp 211–212

1105. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 301

1106. Alexander, 'Native Land Court Orders and Crown Purchases' (doc A92), p 19

1107. Property Law and Equity Reform Committee, minutes of meeting, 3 December 1984, pp 4–7 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), pp v116-V119)

meaning of the relevant section (section 261) of the Coal Mines Act 1979.[1108] Although the Minister approved this recommendation, it does not appear to have been carried out. David Alexander suggested that the registrar general, who had responsibility for this matter, had workload problems. As a result, the special case was lost sight of and eventually abandoned.[1109]

No changes were made to the law. When the Crown Minerals Act was passed in 1991, it repealed section 261 of the Coal Mines Act 1979. Section 354 of the Resource Management Act 1991, however, preserved the effect of the navigability clause as it had been defined in the Coal Mines Act. Section 354 stated that the repeal of various laws, including section 261 of the Coal Mines Act 1979,

> shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act [the Resource Management Act] comes into force, and every such right, interest, and title shall continue after that date as if those enactments [including section 261 of the Coal Mines Act 1979] had not been repealed.

As far as we are aware from the evidence available to us, the law relating to ownership of the beds of navigable rivers had not been reconsidered by the time of our hearings in 2005.

Before proceeding, however, to assess which rivers the Crown has actually claimed to own in Te Urewera under the 1903 Act, we must first consider the special circumstances of the Urewera District Native Reserve, and also the effects of the Urewera Consolidation Scheme on the ownership of rivers.

21.16.4 The special circumstances of the Urewera District Native Reserve and the Urewera Consolidation Scheme

(1) *The Urewera District Native Reserve*

(a) ***Rivers in the Urewera District Native Reserve negotiations:*** For much of our inquiry district, the ordinary native land laws did not apply in 1903 when the Coal-mines Act Amendment Act was passed. As we set out in chapter 9, Tuhoe, Ngati Whare, and Ngati Manawa leaders negotiated with the Crown in 1895 to keep the Native Land Court out of their remaining lands. We have highlighted the parts of those negotiations that dealt with natural resources in section 21.6 above. During the negotiations and the debate on the UDNR Bill, rivers were mainly mentioned in passing. Both Seddon and Carroll acknowledged that the rivers in the reserve belonged to Maori. They referred to 'your rivers' or 'their rivers' in contexts that

1108. Secretary for Justice to Minister of Justice, 7 November 1985 Property Law and Equity Reform Committee, minutes of meeting, 3 December 1984, pp 2–4 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), pp V122-V124)

1109. Alexander, 'Native Land Court Orders' (doc A92), pp 19–21

made that clear (see section 21.6.3). But how the new reserve's title or tenure system would work in respect of rivers was not discussed.[1110]

At that time, the peoples of Te Urewera were clearly aware that rivers elsewhere in the country had become polluted or had had their courses altered to suit settlers' needs. In response to their concerns, the premier promised that – in return for their agreement to allow and encourage tourism – 'your streams may be allowed to flow as at present, the waters to remain unpolluted so that the fishes may live; they are also to you a source of food'. This was a 'reasonable' request, he said, and 'in accordance with what I believe to be in your interest and in the interests of the Country'.[1111] Also, as we discussed earlier, the premier envisaged that Tuhoe would control the stocking of rivers and the trout fishery, although this intention was never given practical effect. On the other hand, the Government opposed Hone Heke's amendment to insert a Treaty guarantee about fisheries (among other properties) into the UDNR Bill. Some parliamentarians were not prepared to accept that Maori would have exclusive control over fisheries in the reserve (see above, section 21.6.3).

(b) ***Rivers in the hearings and title orders of the Urewera commissions:*** The 1895 negotiations resulted in the creation of the Urewera District Native Reserve the following year, governed by its own Act of Parliament. Under the UDNR Act 1896, the native land laws were excluded from operation in the reserve (although later the governor was empowered to confer jurisdiction on the Native Land Court for specific purposes). An Urewera commission was to be appointed to divide the district into hapu blocks, using sketch maps instead of full surveys, and investigate the ownership of each block 'with due regard to Native customs and usages'. The commission would then make an order for each block, listing the relative shares of every family and individual. The listed owners would elect committees to manage and control the hapu blocks. In turn, the block committees would elect a General Committee for the whole reserve. Only the General Committee could make the decision to alienate land, whether by sale or lease (see chapter 9).

Dr Doig's evidence has carefully considered the place of rivers in this scheme.[1112] She noted that, to keep survey costs as low as possible, convenient natural boundaries were used as far as possible to delineate block boundaries. This included the frequent use of rivers, even though these were seldom customary boundaries between the hapu concerned.[1113] As we discussed in chapter 13, it was virtually impossible for the Urewera commission to create completely separate hapu blocks, and so hapu interests had to be intermingled (as they were in custom).

1110. Doig, 'Te Urewera Waterways' (doc A75), p 60
1111. 'Urewera Deputation, Notes of Evidence', p 22 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896' (doc A21(b)), p 186)
1112. Doig, 'Te Urewera Waterways' (doc A75), pp 55–69
1113. Doig, 'Te Urewera Waterways' (doc A75), pp 67–68

According to the minutes of the commission hearings, the ownership of rivers was almost never discussed. Rather, as in the Native Land Court, the focus was on the ownership of blocks of land, and the ancestors for that land. Hence, discussion of customary relationships with or uses of rivers featured mainly as evidence of who occupied a block. In particular, fishing or the regular use of fishing kainga near rivers was a sign (tohu) of occupation.[1114] As with hapu interests more generally, the evidence also showed that hapu had fishing rights and the use of rivers that were widely separated from their land interests and so not immediately adjacent to their kainga and cultivations.[1115] At other times, the same ancestor was the source of rights in both land and a waterway, and people who had rights in adjacent land clearly also had rights in the rivers. But there is little evidence to suggest that either the commission or the people considered that title to rivers was being investigated or awarded.[1116] Fisheries were often 'overlooked' in evidence, despite their value to hapu, 'perhaps because of the inherent land-based bias of a land title investigation, with its emphasis on permanent kainga and cultivations'.[1117]

Dr Doig thought it possible that Tuhoe considered title to their major rivers to be part of their new land block titles.[1118] She seems to have based this mainly on the fact that the people still considered that they owned their rivers during and after the commissions' award of titles.[1119] Dr Doig did not, however, consider the possibility that rivers simply remained uninvestigated and in customary title. The Urewera commissions were not empowered to investigate or issue titles for rivers. In our view, which accords with that of the Te Ika Whenua Rivers Tribunal,[1120] what was needed was a separate, 'composite title' for rivers, encompassing the banks, beds, and water. It was outside the powers of the Urewera commissions to award such a title. They could only deal with hapu land blocks.[1121] We do not believe that title to such taonga as the Ohinemataroa (Whakatane) River, the Tauranga (Waimana) River, or the Whirinaki River could have been awarded as part of titles to land blocks without any specific investigation into or discussion of their customary ownership.

Evidence is scarce as to how Tuhoe saw their new land titles as affecting their rivers. The issue was not discussed by either the commissioners or the people during the Urewera commissions' hearings.[1122] The only piece of evidence we have, apart from the commission's minutes, is the approach taken by Te Urewera leaders at a major hui in 1908. As we discussed in chapter 13, the purpose of this hui was to elect the General Committee and to make decisions about opening the reserve for mining (see section 13.6.4). At the hui, the committee

1114. Doig, 'Te Urewera Waterways' (doc A75), pp 63–67
1115. Doig, 'Te Urewera Waterways' (doc A75), pp 66–67
1116. Doig, 'Te Urewera Waterways' (doc A75), pp 63–69
1117. Doig, 'Te Urewera Waterways' (doc A75), p 64
1118. Doig, 'Te Urewera Waterways' (doc A75), pp 68–69
1119. Doig, 'Te Urewera Waterways' (doc A75), pp 60, 63–69
1120. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 104
1121. Urewera District Native Reserve Act 1896, ss 6–8
1122. Doig, 'Te Urewera Waterways' (doc A75), p 63

and the people agreed that any rivers required for mining purposes would be 'leased by the owners'.[1123] The translation was not specific as to who was meant by 'the owners'. Cecilia Edwards did not comment on this point.[1124] Both Professor Binney and Dr Doig understood it to mean that the leasing of rivers would be done by the General Committee, elected to represent all the owners of the reserve.[1125] We note that in the original report of the hui to the Minister the point read: 'Ko nga[awa] Wai whai tikanga me riihi ki nga tangata whaitake ki te whenua meaua awa wai.' (The rules and regulations in relation to the waterways are that they be leased by the owners of those lands and waterways.)[1126]

In any case, the titles awarded under the UDNR Act were transformed the following year, as we discuss next.

(c) ***Transformation of customary title into Maori freehold title in 1909:*** As discussed in chapter 13, the Government's main purpose in transforming customary titles in the reserve into Maori freehold titles was to facilitate the purchase of land for settlement. The Crown Law Office had advised the Government that the UDNR was still in Maori customary title, a situation that the Urewera commissioners' orders had not changed.[1127] Section 3 of the UDNR Act Amendment Act 1909 stated that all orders made under the 1896 Act 'shall be deemed to have had as from the date of the making thereof, the same operation as a freehold order made by the Native Land Court under the Native Land Act, 1909'. The Attorney-General told the Legislative Council:

> The general purpose of the Bill is to enable the work of European settlement of large areas in the Urewera country to be proceeded with. I am not absolutely certain of the figures, but I believe I am right in saying that it is estimated that probably 100,000 acres of land will be obtained in this district for the purpose of closer settlement, and the chief service this Bill performs is to make it possible by the conversion of the existing orders [of the Urewera commission] into freehold orders, to carry out that general purpose.[1128]

According to historian Cecilia Edwards, the 'change in tenure from customary land to (Native or Maori) freehold land was symbolically important'.[1129] If, however, the law as stated in *Wanganui River* were followed, then this amendment had more than symbolic effects. It could have had the effect of extinguishing Maori customary title to their rivers, and establishing ownership of the rivers *ad medium filum* in the owners of riparian blocks. Dr Doig

1123. Numia Kereru and 13 others to the Native Minister, 'Report', 26 March 1908 (Cecilia Edwards, supporting papers to 'The UDNRA 1896 – Part 3' (doc D7(b)(i), vol 2), pp 1227–1228)
1124. Edwards, 'The UDNRA 1896 – Part 3' (doc D7(b)), p 59
1125. Binney, 'Encircled Lands' (doc A15), p 392; Doig, 'Te Urewera Waterways' (doc A75), p 60
1126. Numia Kereru, tiamana Heheo te Komiti nui o Tuhoe, Ripoata . . . ki te minita maori, 26 Maehe 1908 (Binney, comp, supporting papers to 'Encircled Lands' (doc A15(a)), p 67)
1127. Doig, 'Te Urewera Waterways' (doc A75), pp 69–70
1128. Findlay, 22 December 1909, NZPD, 1909, vol 148, p 1411
1129. Edwards, 'The UDNR Act – Part 3' (doc D7(b)), p 98

noted this possibility in her report,[1130] observing that if 'customary title to the rivers *was* extinguished when the adjoining land became Maori freehold land, then the presumption that *ad medium filum* applied to the rivers in the area from that time [1909] becomes much stronger'.[1131] If so, this had certainly occurred by a sidewind:

> There was no mention of the waterways of Te Urewera in the parliamentary debate on the [1909 Amendment] Bill or in the Act itself, and there appears to be little evidence that the implications of the conversion to freehold title for the ownership of the rivers within Te Urewera was considered at all by the Crown or explained to Tuhoe.[1132]

The Supreme Court's decision in *Paki* has cast serious doubt on whether *Wanganui River* applies. In our view, it was highly unlikely that the rivers were included *ad medium filum* in the orders of the Urewera commissioners. It was equally unlikely, therefore, that, when those orders were deemed to have had the 'same operation' as Native Land Court orders from the time of their making, this vested riverbeds in riparian owners *ad medium filum*. But the Crown's purchases were later treated as though both had happened. We turn to consider these purchases next.

(d) ***Rivers in the Crown's purchase of individual interests in UDNR land blocks:*** As we set out in chapter 13, the law change in 1909 was one of a number of measures designed to enable the Crown to purchase large parts of the supposedly inalienable Urewera District Native Reserve. The next question we need to consider is whether, in purchasing undivided, unlocated individual shares in the UDNR land blocks, the Crown purchased interests in Te Urewera rivers.

According to Crown counsel, rivers were included in its UDNR purchases, whether the river was a boundary or inside a block. Again, the Crown relied on its view that, under Maori custom, rivers were simply included as part of any sale of adjacent land, and no special explanation or recording of this was necessary. Nor, Crown counsel submitted, was any extra payment needed for the acquisition of rivers *ad medium filum* along with the land.[1133] The claimants, on the other hand, denied that any rivers were 'willingly ceded by Tuhoe to the Crown'.[1134] They relied on Suzanne Doig's evidence to support their position.[1135]

In the 1920s, during the consolidation scheme that followed the Crown's purchases, the evidence is clear that Tuhoe did not consider they had sold any of their rivers to the Crown. Dr Doig explained: 'The Crown had only bought up undefined interests in blocks of land

1130. Doig, 'Te Urewera Waterways' (doc A75), p 80
1131. Doig, 'Te Urewera Waterways' (doc A75), p 70 (Emphasis in original.)
1132. Doig, 'Te Urewera Waterways' (doc A75), p 80
1133. Crown counsel, closing submissions (doc N20), topic 30, pp 9–10
1134. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 60
1135. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 175; counsel for Tuawhenua, closing submissions, appendix (doc N9(a)), p 110

when it bought shares from the owners of Urewera District Native Reserve blocks; the deeds of sale do not mention any alienation of rivers."[1136] Because the 'individual shares were not parcelled out on the ground', it was not even certain that the Crown was 'being sold riparian interests by the Tuhoe owners, let alone interests in the rivers'.[1137] The Crown did not manage to buy the whole of any UDNR blocks. Thus, not even Crown purchase agents could know whether they had bought any particular land in a block to which the *ad medium filum* presumption could apply. Because so many kainga and cultivations were near rivers, it seems that these would be the last places given up once interests were finally located on the ground. Since the locations of the sellers' interests were never identified (which would have happened at the time of partition by the Native Land Court), this question will never be answered. What we do know is that Tuhoe entered the Urewera consolidation scheme on the basis that no rivers would transfer to the Crown, as we discuss more in the next section.

As noted, Dr Doig examined the deeds and 'transfer documents' for the UDNR purchases and confirmed that they 'do not mention rivers at all'.[1138] Further, her evidence is that 'the Crown never offered or asked to buy the rivers of Te Urewera, even though it purchased or otherwise acquired much of the land'.[1139] As we discussed in chapter 13, the Crown deliberately circumvented the General Committee, which had been prepared to agree to the leasing of rivers for specific uses. Having removed the protection of community control, the Crown's agents, especially W H Bowler, picked off individual interests in a manner which we described in chapter 13 as unfair and coercive. In the several historical reports prepared for our inquiry, including Cecilia Edwards' lengthy report for the Crown, there is no mention of Bowler or any other agent discussing rivers or explaining the *ad medium filum aquae* rule.[1140] We agree with the National Park Tribunal that it is 'highly questionable' that such explanations were ever given in the circumstances in which purchasing of individual interests took place.[1141]

Crown counsel cross-examined Suzanne Doig as to whether rivers located *within* blocks, rather than used as block boundaries, would transfer to the Crown as part of land sales. In that circumstance, Dr Doig considered it would depend on the context, case by case, but

1136. Doig, 'Te Urewera Waterways' (doc A75), p 96
1137. Doig, 'Te Urewera Waterways' (doc A75), p 71
1138. Doig, 'Te Urewera Waterways' (doc A75), p 71
1139. Suzanne Doig, summary of 'Te Urewera Waterways and Freshwater Fisheries' (doc F6), no date (2004), p 2
1140. See Edwards, 'The Urewera District Native Reserve Act 1896, Part 3: Local Government and Land Alienation under the Act' (doc D7(b); Anita Miles, *Te Urewera*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1999) (doc A11); S K L Campbell, 'Land Alienation, Consolidation, and Development in the Urewera, 1912–1950'(commissioned research report, Wellington: Crown Forestry Rental Trust, 1997) (doc A55); Heather Bassett and Richard Kay, 'Ruatahuna: Land Ownership and Administration c 1896–1990'(commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A20); Tuawhenua Research Team, 'Ruatahuna, pt 2' (doc D2).
1141. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 1013

– 'unless there is any evidence of Maori continuing to act as though they had not transferred those interests in the river along with the land' – then 'I would say that's the case. Yes.'[1142]

We note that no river titles were created by the Urewera commissioners, no land blocks were sold in their entirety, neither the sold nor unsold interests were located on the ground, no request or offer to purchase rivers was made, and no deed or transfer documents included the sale of a river. Also, as we shall see, Tuhoe did not act as if they had transferred any rivers along with the land, either during the consolidation scheme (which followed the purchases), nor for many decades afterwards.

In our view, therefore, it cannot be shown that Tuhoe, Ngati Manawa, or Ngati Whare knowingly or willingly sold any of their rivers to the Crown when it purchased individual interests in UDNR blocks, and there is significant evidence that they did not.

For Tuhoe, Ngati Ruapani, and Ngati Kahungunu, the Crown had not purchased any interests in the Waikaremoana block, so no rivers or waterways in that block were knowingly or willingly alienated to the Crown as part of the UDNR purchases.

We turn next to consider the Urewera consolidation scheme, and the question of how it affected the ownership of rivers in the former UDNR.

(2) *The Urewera Consolidation Scheme*

(a) ***The Ruatoki agreements, May and August 1921:*** The Urewera consolidation scheme was negotiated between Te Urewera leaders and the Crown at two crucial hui at Ruatoki in May and August of 1921. At the first hui in May 1921, the Native Minister and Minister of Lands obtained agreement to a scheme, which Tuhoe welcomed as the only way to stop the Crown's purchase of individual interests, obtain useable blocks, and start developing their lands for farming. At the second hui, which took place over three weeks in August 1921, Maori leaders organised their people into groups of non-sellers and negotiated the location of their awards with Crown officials. Apirana Ngata was their sole representative in these negotiations. Chapter 14 contains our detailed analysis of these hui and the consolidation scheme that resulted from them.

By 1921, the Crown had failed to buy all of the interests in any of the 44 UDNR blocks across which it had been purchasing, although it had bought the equivalent of half of the land in the reserve. Officials refused to contemplate an outcome in which the Crown's interests would be partitioned out of each block, scattered among Maori lands as if shaken from a pepper pot. They feared that the Crown might not obtain enough concentrated, useable land for a European settlement scheme, or the forested lands needed for watershed conservation. The Native Land Court's jurisdiction to partition land was therefore revoked, and a district-wide consolidation scheme proposed instead. As noted, Te Urewera leaders had their own reasons for agreeing to a scheme. There was no assurance that they could obtain

1142. Crown counsel, closing submissions (doc N20), topic 30, p 10; Suzanne Doig, under cross-examination by Crown counsel, Rangitahi Marae, Murupara, 19 August 2004 (transcript 4.9, pp 145–146)

21.16.4(2)(a)

Tuhoe Petition about the Consolidation Scheme (1922), and the Commissioners' Response (1924)

To the Honourable Mr Speaker and Honourable Members Assembled in the House of Parliament of the Dominion of New Zealand—

Greeting.

We your humble petitioners are aboriginal Natives and residents of that part of Aotearoa known as Tuhoe in the district of Te Urewera.

We pray to your Honourable House to investigate the injustices imposed on our lands by the Commissioners. We object to the Order made on the 31st day of October, 1921, as it did not coincide with the arrangement made at the meeting held at Ruatoki on the 1st day of August 1920. [sic, 1921]

Grievances

1. The Crown claims to have its interests allocated in the Whakatane and Waimana rivers; *We strongly object to the Crown taking our rivers.* . . . [Emphasis added.]

Source: Petition 341/22 of Tikareti Te Iriwhiro and 175 others, 1922 (S K L Campbell, comp, supporting papers to 'Land Alienation, Consolidation and Development in the Urewera, 1912–1950', various dates (doc A55(b)), p 219)

The commissioners' official response in 1924 to each of the itemised grievances of Tuhoe stated:

1. The Crown owned by purchase approximately ⅔ of the Urewera Block and portions only of its area are in the Whakatane and Waimana basins. *The rivers are not included in any of the Crown awards*. [Emphasis added.]

Source: Commissioners Carr and Knight to Under-Secretary, Native Department, 10 September 1924 (Campbell, supporting papers to 'Land Alienation, Consolidation and Development' (doc A55(b)), p 220)

all their kainga, cultivations, mahinga kai, and wahi tapu if the Native Land Court partitioned the 44 blocks. In any case, they were not allowed to go to the court for partitions. The scheme offered them instead the opportunity to organise whanau, group their interests together, and negotiate the selection of the land which – limited by the value of their surviving shares – they wished to retain. This limitation as to value was crucial, of course, because the Crown maximised its award by insisting on out-of-date, seriously flawed 'valuations',

which had the effect of decreasing the amount of land the Maori owners were entitled to retain (see chapter 14).

Te Urewera leaders agreed in principle to a scheme at the Ruatoki hui in May 1921. They were assured that the Crown would look after their interests and see that justice was done, so that both Maori and Pakeha would benefit from the scheme. Roads, valuations, concentration of lands for farming, retention of kainga and land around Maori 'settlements', a reserve for landless sellers, and other matters were canvassed. All that was agreed, however, was that there should be a scheme, the details of which were yet to be negotiated. From the documentary accounts of the hui, as recorded by Crown officials, the question of river ownership and the effects that a consolidation scheme might have on that ownership were not discussed.[1143]

The following August, a three-week hui was held at Tauarau Marae, Ruatoki, to settle the details of the scheme. We discussed this hui in chapter 14. We noted that Maori leaders had significant control over the areas in which their interests would be located. Four-fifths of the division of land between the Crown and Maori was effectively settled at the Tauarau hui; the remaining one-fifth was altered later during the course of the Consolidation commissioners' work to finalise awards on the ground. In respect of boundaries, officials told Maori that when the blocks were surveyed, fencing lines and 'boundaries more in accord with settlement conditions [that is, with establishing farms]' would be used.[1144] Thus, the proposed boundaries between Crown and Maori awards were not finalised as part of the agreements reached during the Tauarau hui.

This was important for two reasons. The first is that the Maori owners were able to negotiate at Tauarau, even if they only had one adviser/representative, Apirana Ngata. The future task of deciding boundaries, however, was assigned by statute to the Consolidation commissioners alone.[1145] Maori were not represented on the commission and could not appeal its decisions. Hence, as we said in chapter 14, this crucial aspect of dividing the land was profoundly unfair to the Maori owners.

The second point is that rivers and streams were used extensively as block boundaries because they were natural boundaries and their use would reduce survey costs.[1146] This meant that the decision as to how much riverbank land would be allotted to the Crown and Maori was solely in the authority of the Crown to decide. If the *ad medium filum aquae*

1143. 'Meeting of the Representatives of the Urewera Natives with the Honourable D H Guthrie, Minister of Lands, and the Honourable J G Coates, Native Ministers, at Ruatoki on the 22 May, 1921'; Native Minister to Minister of Lands, telegram, Ruatoki, 23 May 1921 (Campbell, comp, supporting papers to 'Land Alienation, Consolidation and Development' (doc A55(b)), pp 123–138)

1144. Balneavis to Coates, 27 August 1921 (Campbell, 'Land Alienation, Consolidation and Development' (doc A55), p 52)

1145. Urewera Lands Act 1921–1922, s 5

1146. Doig, 'Te Urewera Waterways' (doc A75), p 79

presumption applied to the new titles, then the Crown had given itself sole power to decide who would own the riverbeds of Te Urewera.

This outcome was not explained or anticipated (at least, by Maori) at the Tauarau hui. The documentary accounts of the hui contain no mention of river ownership or how the consolidation scheme might affect rivers. Fishing was not recorded as a subject of discussion or agreements. Watershed conservation was a primary goal for the Crown but it seems to have been couched in terms of preserving the bush, especially in the Waikaremoana block. A draft Lands and Survey report did note Maori agreement that 'the Crown will take as part of its award any steep bush clad land on the banks of rivers or streams which it may be necessary to preserve for their protection.'[1147] This point of agreement was not recorded in any of the other documentation about the hui, including the official report of the scheme. Steven Webster characterised it as a Crown proposal rather an agreement.[1148] We also note that no explanation of the *ad medium filum* presumption was made, and no discussion took place as to whether it would apply to the new land titles, or to any takings of land on river banks for water conservation.[1149] If, as we suggested in chapter 14, the Maori owners had been properly advised by legal counsel and appropriate experts, the position of rivers in the scheme would surely have been raised and clarified.

There is no evidence, therefore, that Tuhoe emerged from the Tauarau hui in August 1921 with any reason to believe their ownership of rivers would be affected by the scheme. Further, a petition the following year shows they had in fact understood that ownership of their rivers would *not* be affected.[1150] After the Consolidation commission had begun its hearings, a substantial body of Tuhoe feared that the Crown was now trying to obtain ownership of rivers, contrary to what had been agreed to at Tauarau; 'we strongly object to the Crown taking our rivers.'[1151] We discuss the petition and the Crown's response to it in more detail later.

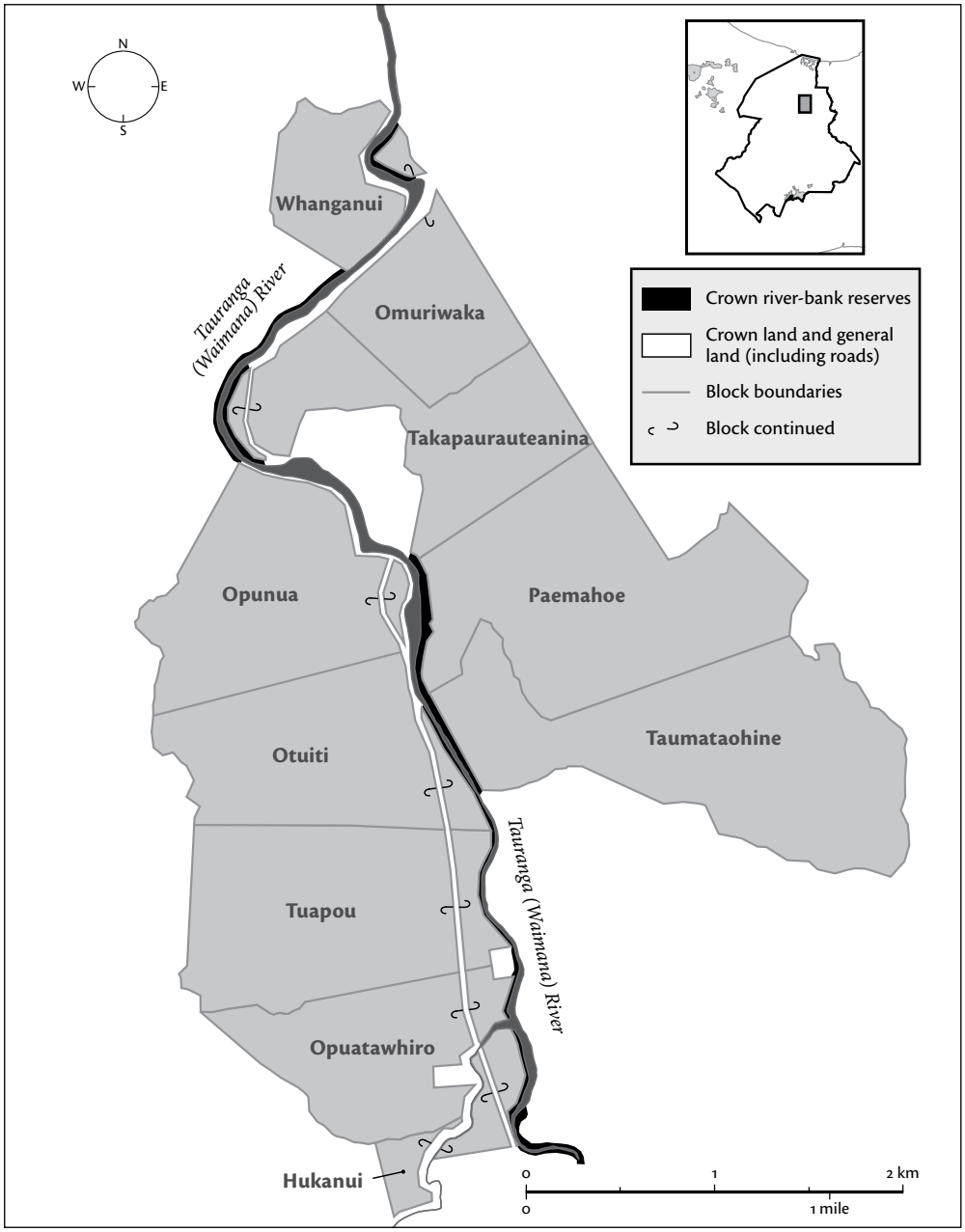
1147. Department of Lands and Surveys, District Office, draft report to Minister of Lands and Native Minister, 3 October 1921, p 2 (Campbell, supporting papers to 'Land Alienation, Consolidation and Development' (doc A55(b)), p 161)

1148. Steven Webster, 'The Urewera Consolidation Scheme: Confrontations between Tuhoe and the Crown, 1915–1925', report commissioned by the Waitangi Tribunal, May 2004 (doc D8), pp 253, 263

1149. The published account of the hui is Knight, Carr, and Balneavis, 'Urewera Consolidation Scheme', 31 October 1921, AJHR, 1921, G-7 (including A T Ngata, memorandum). Unpublished accounts include: Balneavis to Coates, 27 August 1921, pp 1–10; Department of Lands and Surveys, District Office, draft report to Minister of Lands and Native Minister, 3 October 1921, pp 1–12; Balneavis to Coates, telegrams, August 1921; Carr to Coates, 20 September 1921, pp 1–5 (Campbell, supporting papers to 'Land Alienation, Consolidation and Development' (doc A55(b)), pp 150–199).

1150. Miles, *Te Urewera* (doc A11), pp 471–473

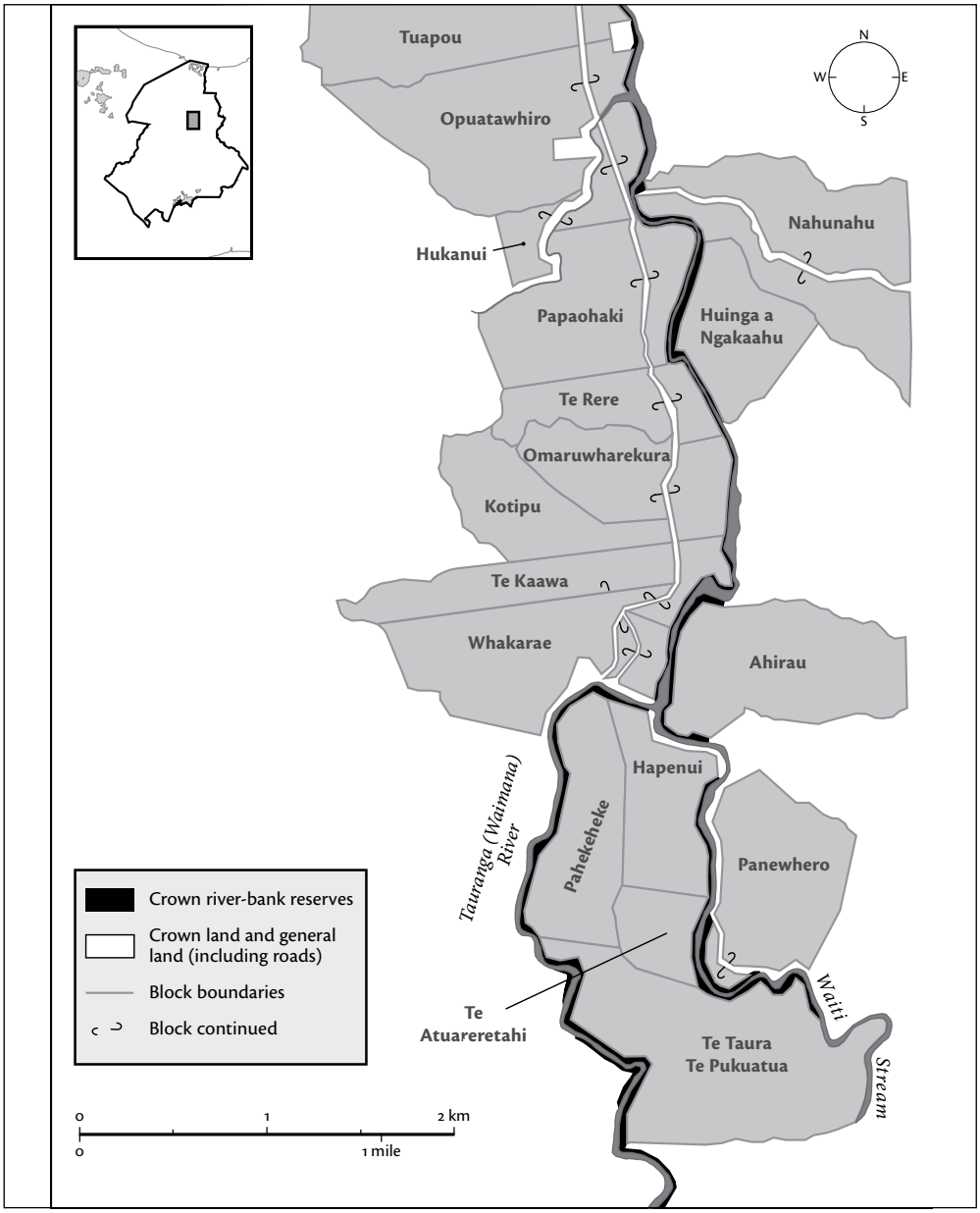
1151. Tikareti Te Iriwhiro and 175 others, petition 341/1922, circa September 1922 (Campbell, supporting papers to 'Land Alienation, Consolidation and Development' (doc A55(b)), p 219)



Map 21.5: Crown river-bank reserves along the Tauranga (Waimana) River

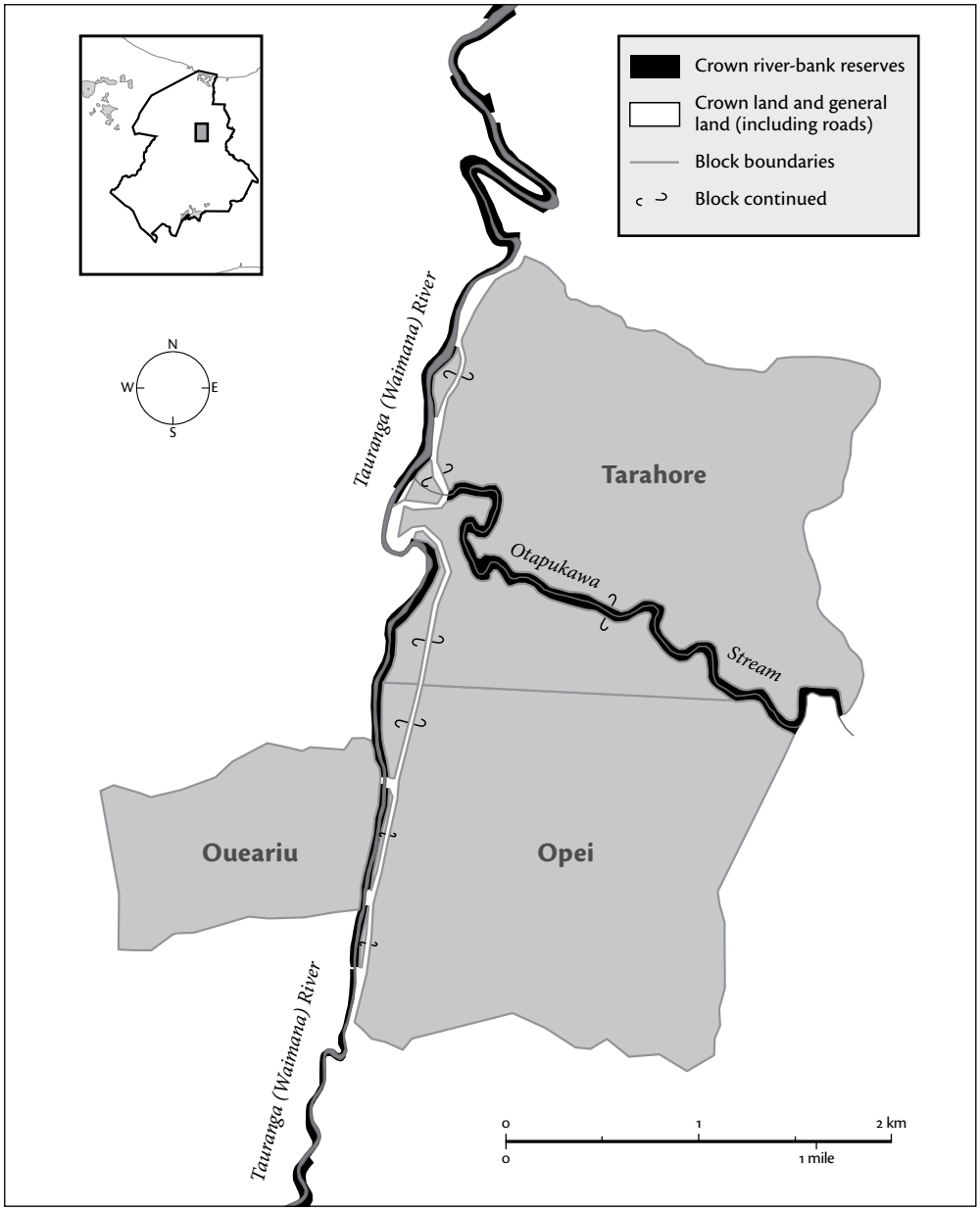
(b) ***The hearings and title orders of the Consolidation commissioners:*** Parliament legislated for the Urewera consolidation scheme in the Urewera Lands Act 1921–22. A Consolidation commission was established to carry out the scheme as agreed at Ruatoki in August 1921, and to finalise the location and boundaries of awards on the ground. As we discussed in

21.16.4(2)(b)



Map 21.6: Crown river-bank reserves along the Tauranga (Waimana) River and Waiti Stream

chapter 14, this was not an independent commission but rather a pair of departmental officers acting under the instructions of Ministers. Tuhoe were not represented on the commission, nor could they appeal its decisions. The commissioners' awards to Maori owners would have the status of Maori freehold land, subject to the jurisdiction of the Native Land Court. Once surveyed, it was intended that the new titles would be registered under the

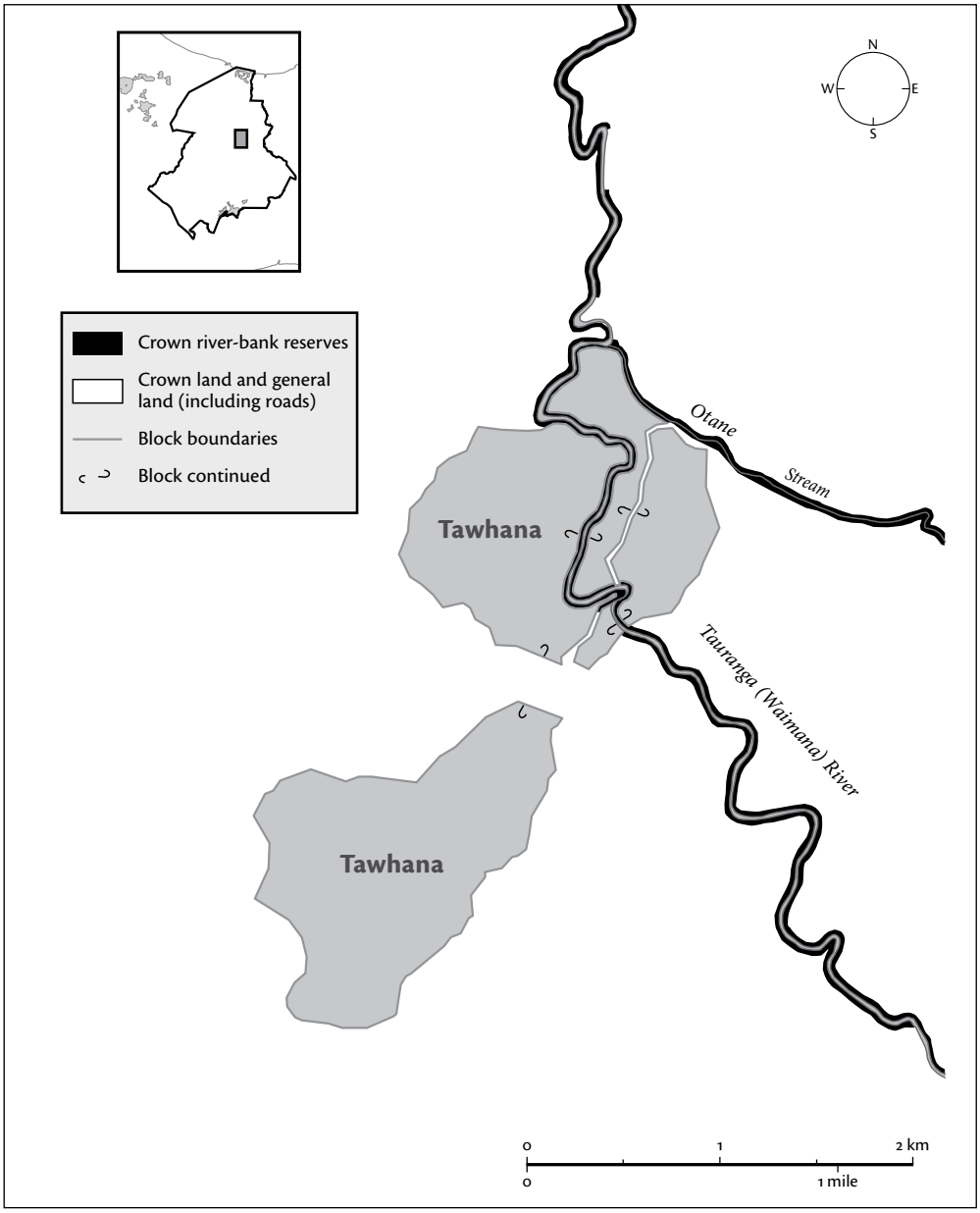


Map 21.7: Crown river-bank reserves along the Tauranga (Waimana) River and Otapukawa Stream

Land Transfer Act. Both Ministers and officials encouraged the peoples of Te Urewera to consider these new titles as a departure from the past, no longer based on ancestral rights but on the needs of a modern, farming community.

Rivers were not specifically mentioned in the Urewera Lands Act 1921–22. The provisions of that Act 'referred only to land and the mechanics of land title reorganisation'. Again, the

21.16.4(2)(b)



Map 21.8: Crown river-bank reserves along the Tauranga (Waimana) River and Otane Stream

question of statutory language and its effect on customary title is an issue. Dr Doig thought it 'uncertain whether the operation of the Act was sufficient to affect customary Maori title to the rivers running across or adjacent to that land.'[1152] We received no submissions on this point, but our view is that the Act could only have affected customary title to rivers if such

1152. Doig, 'Te Urewera Waterways' (doc A75), pp 73–74

title had been part and parcel of adjoining land and thus awarded *ad medium filum* by the Urewera commissioners. We have already noted, in our discussion of the claimants' evidence about the Ohinemataroa (Whakatane) River, that this does not appear to have been the custom in Te Urewera, and that the Urewera commissioners' block orders were unlikely to have extinguished customary title to rivers.

Nonetheless, consolidation had a significant effect on land control and use for the peoples of Te Urewera. So, too, given the considerable and extensive Crown acquisitions of riparian land, did consolidation dramatically affect control, use, and access to waterways – at least potentially. Dr Doig noted that the Crown obtained almost the entire west bank of the Tauranga River and the entire Waikaremoana/Waikaretaheke catchment.[1153] With land already obtained through acquisition of the four southern blocks and Waipaoa block, this meant the land on the banks of virtually all Te Urewera rivers to the southeast of the Huiarau Range was in Crown or private ownership. The waterways the Crown gained control over in this area included the banks of most of the upper Waiau River, all of the Hopuruahine River and other streams emptying into the northern shore of Lake Waikaremoana, and the upper Ruakituri catchment.[1154] The key question, as yet unanswered in the 1920s, was whether the *ad medium filum* rule gave ownership of these riverbeds to the Crown as riparian owner.

Where land ownership was confirmed with the peoples of Te Urewera, the inclusion of short stretches of riverbed into many smaller, individualised blocks of land 'reflected the commissioners' apparent assumption that rights to the riverbed now went with ownership of the riverbank on individual blocks, not to hapu or iwi as a whole.'[1155] The commissioners were not required to take traditional interests into account when determining the new interests of Maori owners.[1156] The Crown later assumed that the control and use of waterways was conditional on the operation of the official land tenure system in conjunction with the *ad medium filum* presumption, and that this was so self-evident and right as to require no explicit statement, explanation, or qualification when applying it. The consolidation scheme, therefore, did have 'a profound effect on the way the Crown perceived subsequent waterway ownership in the area.'[1157]

The position of the rivers in the scheme had not been raised or settled at the Tauarau hui, and the commissioners did not clarify matters during their hearings. Suzanne Doig stated: 'The commissioners did not discuss the potential implications of the consolidation scheme and reorganisation of the titles for legal ownership of the rivers or riverbeds at any time during the proceedings.'[1158]

1153. Doig, 'Te Urewera Waterways' (doc A75), p 76
1154. Doig, 'Te Urewera Waterways' (doc A75), p 77
1155. Doig, summary of 'Te Urewera Waterways' (doc F6), p 5
1156. Doig, 'Te Urewera Waterways' (doc A75), p 74, citing Te Urewera Lands Act 1921–22, ss 4–7, 14–15
1157. Doig, 'Te Urewera Waterways' (doc A75), p 74
1158. Doig, 'Te Urewera Waterways' (doc A75), p 78

21.16.4(2)(b)

We note here our discussion in chapter 14 of the standards by which the consolidation scheme should be judged. In that discussion we found ourselves in substantial agreement with the views of Tuhoe claimant Tamaroa Nikora. Mr Nikora maintained that the route to the benefits of a consolidation scheme was a careful, transparent process to which the co-owners consented – on the basis of sufficient information – at every step of the way.[1159] No such process occurred in relation to waterways.

This did not mean rivers and other waterways were never discussed. As we noted above, the boundaries of the new consolidated blocks were frequently defined by rivers and streams, for reasons of surveying convenience and to make the blocks easily identifiable on the ground. One of the main purposes of consolidation was 'to provide blocks that were suitable for farming, and so many of the new subdivisions were defined by convenient farm boundaries – rivers, streams, old trees, existing fences, "good fencing lines", spurs and ridges'.[1160] Doig highlighted a small number of cases where waterways were considered in relation to access. This appears to have been the main issue of relevance discussed in commission hearings: legal access across land to rivers, streams, and also to the new road lines.[1161]

For a waterway running *inside* a boundary, the commissioners 'appear to have assumed that the owners of a consolidated block would also own the waterways included within those block boundaries'.[1162] It is only an assumption because, as the Crown noted, rivers were 'not much discussed during the consolidation proceedings'.[1163] The limited discussion that Dr Doig was able to locate confirms that, in as far as any broader guiding assumptions on waterways were operative in the minds of the commissioners, the common law presumption of *ad medium filum* appears to have been taken as read and only some limited, particular cases involving access called for further consideration and decision.[1164]

The Crown's acquisition of riparian strips or reserves adds an extra layer of uncertainty as to what rights the Crown might have obtained over river beds. In addition to the larger blocks of land on the Tauranga River which passed to the Crown as part of its consolidated interests, the Crown also took ownership of the banks of almost the entire river and some of its major tributaries. This was achieved, Dr Doig explained, by 'laying out "marginal strips" or "Crown river-bank reserves", usually one chain (20 metres) wide, along the river bank, although some were only half a chain wide'.[1165] These marginal strips were marked on survey plans as Crown land reserved from sale under section 122 of the Land Act 1908 or section 129 of the Land Act 1924. As Dr Doig noted, these were the provisions used to 'cut off marginal strips (otherwise known as the Queen's chain) when Crown land is sold or otherwise

1159. See Tamaroa Nikora, brief of evidence, 18 June 2004 (doc E8)
1160. Doig, 'Te Urewera Waterways' (doc A75), p 79
1161. Doig, 'Te Urewera Waterways' (doc A75), pp 78–86
1162. Doig, 'Te Urewera Waterways' (doc A75), p 83
1163. Crown counsel, closing submissions (doc N20), topic 30, p 6
1164. Doig, 'Te Urewera Waterways' (doc A75), pp 78–83
1165. Doig, 'Te Urewera Waterways' (doc A75), p 84

disposed of'.[1166] Given that the land in question was not Crown land, it is not clear why or how this legislative provision was applied to separate remaining blocks of Maori freehold land from the rivers. Tama Nikora commented:

> The Crown appears to have been applying a survey policy as if the land was Crown land, which it was not. As a result of this sleight of hand the Crown has acquired for itself Tuhoe's rivers.[1167]

Furthermore, as Doig pointed out:

> Some of the river reserves, such as those running along the Tauranga River at Omaruwharekura and nearby blocks, appear on the survey plans without any indication of what legislation they were reserved under. It would thus appear that they simply formed part of the Crown's allotted interests under the Urewera Consolidation Scheme.[1168]

The Urewera Lands Act 1921–22 did not give the commissioners any authority to create reserves. If reserves were to be set aside, the commissioners had to recommend it to Ministers for separate action. As noted, some of the riparian strips were marked as created under the authority of the Land Acts. As we have said, it is not clear to us why this legislative authority applied to the making of title orders for Maori freehold land under the Urewera Lands Act 1921–22. Other marginal strips or riverbank reserves seem simply to be a strip of Crown land created as part of the Crown's award, and presumably deducted from its overall acreage (although we cannot be sure of that).[1169] At the Tauarau hui, the Crown had advised the people of its intention to reserve steep, forested land on river banks where it seemed necessary for water conservation. We do not know if the Maori owners agreed to this proposition at the hui (see the preceding section). The commissioners' minutes provide almost no explanation for their insertion of marginal strips between Maori land and rivers, but on one occasion the purpose was mentioned as 'for the better protection from erosion'.[1170] Dr Doig noted: 'It is possible that all the Tauranga River reserves were laid out as an erosion buffer zone, but this is not stated at any point in the minute books consulted.'[1171] Thus, the commissioners may have sought to protect Maori owners from loss of riparian land to erosion, as well as the Crown's interest in watershed preservation.

The Crown's reserves extended into the riverbed in some places, although specific mention of riverbeds was extremely rare in the commission's minutes: 'in the region of the

1166. Doig, 'Te Urewera Waterways' (doc A75), p 85
1167. Tamaroa Nikora, 'The Urewera Consolidation Scheme (1921–26)' (doc E7), p 29
1168. Doig, 'Te Urewera Waterways' (doc A75), p 85
1169. Doig, 'Te Urewera Waterways' (doc A75), pp 84–85
1170. Urewera Commissioners Minute Book 1, 9 April 1922, fol 92 (Doig, 'Te Urewera Waterways' (doc A75), p 85)
1171. Doig, 'Te Urewera Waterways' (doc A75), p 85

Opunua and Otuiti blocks, the Crown river reserve included both a one-chain strip on the river bank and an expanse of shingle in the riverbed'.[1172]

In the northern series of blocks, reserve strips were located along waterways as follows:

> As well as extending along all banks of the Tauranga or Waimana River which had not already been taken as part of the Crown's share, marginal strips were laid out along both sides of the Otaneuri Stream, Otapukawa Stream and parts of the Ureroa Stream, and the north side of the Ohora Stream and east side of the Waiiti Stream (these streams are in both the Whakatane and Waimana catchments). In many places, these marginal strips separated remaining blocks of Maori-owned land from the rivers and streams.[1173]

The waterway rights attached to the acquisition of these strips is unclear. As Ben White has noted in his work on inland waterways (with regard to lakes), the issue is

> whether title to such marginal strips carries with it title to lake beds *ad medium filum*. If they do, the Crown would be the owner of all lakes which are subject to a marginal strip. To the present author's knowledge the principle that marginal strips include title to abutting lakes has not been recognised by statute, nor is it supported by any domestic case law.[1174]

In our inquiry, Dr Doig was unable to trace any statute or case law that could confirm whether marginal strips alongside rivers or streams made the Crown owner of those waterways *ad medium filum aquae*. The Crown has not sought in its submissions to clarify this matter, which suggests there is no authoritative legal view here. In practice, the Crown or local bodies have acted as if the *ad medium filum* presumption applied, thus giving control and use rights to the Crown over waterways running alongside marginal strips.

Dr Doig observed that:

> In the final allocations, a majority of blocks either had a frontage on to a river or major tributary, or were separated from that waterway by a narrow road line or river bank reserve.[1175]

What this meant in practice is that the Consolidation commissioners did try to ensure that the owners of the new, consolidated blocks would have physical access to a river or stream, even if they had to cross a Crown reserve or a road. A road line or riverbank reserve would not prevent access for fishing or other customary uses, whereas that might not be the case should the land be able to be transferred into private ownership. Yet the creation of road lines as well as marginal strips/reserves may have changed the legal entitlements of the Maori owners of riparian blocks, because ownership of roads was vested by statute in

1172. Doig, 'Te Urewera Waterways' (doc A75), p 84
1173. Doig, 'Te Urewera Waterways' (doc A75), p 85
1174. Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1998) (doc A113), p 8
1175. Doig, 'Te Urewera Waterways' (doc A75), p 82

the Crown.[1176] This made little practical difference because so few roads were actually built, but legally this was another device which gave ownership of riverbanks to the Crown, and therefore possibly of the riverbeds as well.

Alongside the ambiguity raised by the application of the *ad medium filum* presumption to river strip reserve land and roads, there is serious doubt as to whether any riverbeds were acquired by the Crown at all through the consolidation process. Soon after the commission began its work in the northern series of blocks in early 1922, which included laying off riverbank reserves between Maori land and the Tauranga River, Tikareti Te Iriwhero and 175 others petitioned Parliament on behalf of all Tuhoe. Dr Doig speculated that 'the laying out of these riverbank reserves by the Crown's surveyors may well have seemed like a taking of the rivers to the local people'.[1177] The petitioners identified seven instances in which they believed that the Crown was departing from what had been agreed at the Tauarau hui in August 1921. The first of those instances was:

> The Crown claims to have its interests allocated in the Whakatane and Waimana rivers; we strongly object to the Crown taking our rivers.[1178]

At first, the Government's response was simply that the Crown's award was as recorded in the Urewera Lands Act 1921–22, and the commissioners were to 'follow [it] as closely as practicable', amending it where necessary to 'give effect to the true intent of the scheme'. In response to the objection about the Crown obtaining rivers, the Native Department stated that the 'portion to be awarded to the Crown is shown on page 8 of [AJHR] paper G7, paragraph 10'.[1179] The petition was considered again in 1924, when it was referred to the Consolidation commissioners for a response. Knight and Carr advised that:

> The Crown owned by purchase approximately 2/3 of the Urewera Block and portions only of its area are in the Whakatane and Waimana basins. The rivers are not included in any of the Crown awards.[1180]

This is significant, given that the commissioners were made sole judges of the boundaries of the Crown award by section 5(2) of the Urewera Lands Act 1921–22.

As Doig pointed out: 'Taken wholly at face value, this would seem to be an acknowledgement that all of the rivers within the consolidation scheme remained in Tuhoe

1176. For the effects of the Public Works Act 1876 in this respect, see *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 (SC), 289, 291, 301, 326.

1177. Doig, 'Te Urewera Waterways' (doc A75), p 87

1178. Tikareti Te Iriwhiro and 175 others, petition 341/1922, circa September 1922 (Campbell, supporting papers to 'Land Alienation, Consolidation and Development' (doc A55(b)), p 219)

1179. RN Jones, under secretary, Native Department, to the clerk, Native Affairs Committee, House of Representatives, 4 October 1922 (Suzanne Doig, comp, supporting papers to 'Te Urewera Waterways and Freshwater Fisheries', various dates (doc A75(a)), p 145)

1180. Carr and Knight to under secretary, Native Department, 10 September 1024 (Campbell, supporting papers to 'Land Alienation, Consolidation and Development' (doc A55(b)), p 220)

ownership, even where the land on both banks passed to the Crown.'[1181] Dr Doig carefully considered what the commissioners' reply might have meant, including that riverbeds were not expressly included in their orders because of survey conventions, or that they thought the *ad medium filum* presumption did not apply to rivers at all in the consolidation scheme. After weighing a range of options, Doig was unable to draw any definite conclusion.[1182] One thing she was certain of:

> The commissioners' statement can only have led Tuhoe to believe that they continued to own all the rivers within the compass of the Urewera Consolidation Scheme. Subsequent dealings with titles set up [under] that scheme, however, indicate that the *ad medium filum* presumption was applied to both Maori- and Crown-owned blocks within the area, regardless of the intentions at the time.[1183]

We received detailed claimant submissions about the petition and the commissioners' response to it. The claimants emphasised that the commissioners' response may be considered a rebuttal of the *ad medium filum* rule for riparian blocks in the consolidation scheme, but admitted that there are doubts.

In respect of the petition, counsel for Wai 36 Tuhoe submitted: 'It is clear that Tuhoe were unwilling to alienate their rivers under the UCS, which was unsurprising given that the issue hadn't been negotiated with them.' The commissioners' response – that the 'rivers are not included in any of the Crown awards' – may be considered 'a rebuttal of the ad medium presumption within the UCS'. Counsel conceded, however, that the evidence was not certain on this point. The commissioners 'might simply have meant that the riverbeds were not expressly included in the orders they made', which was factually correct. Claimant counsel noted that the survey plans of the Crown's award 'show the boundaries of its block running along the riverbanks, not across them, even when it owned the land on both sides of the river'.[1184] Also, Dr Doig suggested that the commissioners may simply have not understood the ad medium filum presumption of 'ownership of the adjoining riverbeds when they made their orders for riparian blocks'.[1185] Hence, claimant counsel submitted, the commissioners may have considered the ownership of the beds to remain with Maori and not the Crown.[1186] These points all indicate confusion on the Crown's side, but understandable certainty on the part of Tuhoe in light of the commissioners' response to their petition.

Given that the common law on waterways had never been discussed with the peoples of Te Urewera, we agree with the claimants that it cannot be assumed that they simply took it for granted that their authority and rights to waterways following consolidation

1181. Doig, 'Te Urewera Waterways' (doc A75), pp 87–88
1182. Doig, 'Te Urewera Waterways' (doc A75), pp 88–89
1183. Doig, 'Te Urewera Waterways' (doc A75), p 89
1184. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 174
1185. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 175
1186. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 174–175

were significantly reduced. Furthermore, whatever they might have been inclined to think, the peoples of Te Urewera had major official support in 1924 for the belief that their authority and control over rivers continued as before. They had lodged a protest objecting to the Crown taking their rivers and had received official assurance that the Crown had not been awarded them. If the people believed that their authority continued as before, it was because the Crown had made no mentionof any radical change to their rights in respect of rivers. They had no cause to believe that the Crown had assumed authority over their waterways. Crucially, the commissioners had ensured that they still had access to the rivers, for the most part, and so would be able to continue exercising their customary rights even if large stretches of riverbank had passed into Crown ownership.

In the claimants' view, if the Crown *did* succeed in acquiring the beds of rivers *ad medium filum* as part of its award, it did so by 'sleight of hand'.[1187] The key question for the claimants is not what the common law said but whether the Crown ever purchased or paid for these riverbeds.

As counsel for Wai 36 Tuhoe noted, the Crown only ever purchased 'undefined interests in blocks of land when it bought shares off Tuhoe owners'. Relying on Dr Doig's evidence, the claimants noted that 'the [UDNR purchase] deeds do not mention alienation of rivers'.[1188] In the consolidation scheme which followed the purchases, the non-sellers' shares were calculated on the basis of 'a set valuation for their *land* interests, without allowing anything for their river interests':

> As a result, if the Crown *did* acquire property rights in rivers through the acquisition of riparian land under the consolidation scheme, it acquired them without compensation either to the sellers or the relocated non-sellers.[1189]

The Crown dismissed the matter of possible compensation for the loss of waterways as a misunderstanding of how the *ad medium filum* presumption works. The Crown critiqued Dr Doig's evidence on the matter of compensation:

Doig states that: 'Those who had sold or were relocated under the consolidation scheme of the 1920s did not receive any compensation for the loss of their river rights, on top of the price paid by the Crown for the value of their land.'

This point assumes that compensation for rivers would necessarily be a separate part of any negotiation of price. The negotiations leading to the implementation of the consolidation scheme provide the factual backdrop for this issue. Application of the *ad medium filum aquae* presumption was not a case of land being surveyed specifically to exclude an adjoining riverbed with that riverbed being taken nevertheless. It was a case of a river forming a boundary of land that was sold, with there being a presumption, in the absence of any

1187. Tamaroa Nikora, 'The Urewera Consolidation Scheme' (doc E7), p 29
1188. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 175
1189. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 175

express statement to the contrary, that half of the adjoining riverbed was included in the sale. The purchase price therefore necessarily included consideration for the sale of the riverbed. In the case of consolidation, the purchase of shares provided a different context.[1190]

The key problem with the Crown's argument on this point is that it did not explain how the consolidation of shares provided a 'different context'. Instead, the Crown argument is constructed as if partitions, not a consolidation scheme, had taken place. In other words, the Crown's reasoning assumes that a defined purchase of riparian land took place, after which title to that riparian land was awarded to the Crown. Then, applying the *ad medium filum* presumption, ownership of the riverbed to the mid-point came to the Crown as part of acquiring the land. That puts to one side the question of whether a waterway was economically valuable for fishing, transport, or other reasons, and thus might have increased the price in a knowing and willing sale of a river as part of a purchase of riparian land.

In the Urewera consolidation scheme, neither the Crown's nor the claimants' interests (for the most part) were located in the beds of rivers. It appears, therefore, that the acreages of the river beds were not included in the Crown's award as land that it had paid for during its UDNR purchases, or in the Maori awards as land that they had retained. Suzanne Doig's research confirms this point (with the exception of some Crown riverbank reserves, which were surveyed as extending into a river).[1191] The plan for Urewera A showed the Crown's award stopping on each side of a river rather than crossing the river, even where it owned the land on both sides.[1192] It was later assumed that the Crown owned the riverbeds adjacent to its newly awarded lands *ad medium filum*.

As we found above, Tuhoe had never sold their rivers in the UDNR land sales. Further, the Crown's purchases were not partitioned out but rather became part of a total reorganisation of land titles, in which the Crown and Maori could receive land totally unrelated to what had been purchased on the one hand, and what had been sold on the other. The key point, however, was that the Crown's award of land would equal the monetary value of what it had paid in its purchases. What this means is that the Crown never paid for the land under the rivers, which was not calculated as part of its award; it simply claimed to own whichever riverbeds ended up adjacent to its new award, by application of the *ad medium filum aquae* presumption. Dr Doig was correct, therefore, when she stated that sellers and non-sellers alike were never paid for any riverbeds that the Crown claimed to have acquired in the Urewera consolidation scheme by application of this common law rule to its new land titles.[1193]

1190. Crown counsel, closing submissions (doc N20), topic 30, pp 10–11
1191. Doig, 'Te Urewera Waterways' (doc A75), p 84
1192. Doig, 'Te Urewera Waterways' (doc A75), p 88
1193. Doig, 'Te Urewera Waterways' (doc A75), pp 96–97

(c) ***The contribution of land to pay for surveys and roads:*** At the Tauarau hui, the Crown obtained broad agreement that Tuhoe would contribute land to pay for survey costs and as a contribution towards the building of roads. We discussed these matters in detail in chapter 14.

The Maori owners' representatives agreed to the Crown's proposal in respect of survey costs because they wanted the security of land transfer titles (which were promised but not delivered). The costs were not disclosed at Tauarau, however, and the implementation phase soon saw protests about the amount of land that was being deducted from Maori awards. Further, the circumstances which made the scheme necessary – massive and illegal Crown purchasing of individual interests in a coercive manner – meant that any further costs to the Maori owners should have been as minimal as possible.

In respect of roads, we found that the Maori owners gave up a quarter of their remaining lands for the promise of arterial roads that were never built. Further, they were misled by Ministers at the May 1921 hui – there was in fact no requirement that they should help pay for these roads, which in all other districts were paid for by the Crown.

Overall, 40,000 acres of land were acquired by the Crown for roads, and 31,500 acres for surveys.

When Te Urewera leaders agreed to donate land for surveys and roads, there is no indication that they intended to give up ownership of the rivers bounding or within any land awarded to the Crown for those purposes; quite the reverse. The 1922 petition shows that Tuhoe came out of the Tauarau hui believing that ownership of their rivers would not be affected. It was inconceivable to them that the Crown might seek to take their rivers as part of the consolidation scheme, and they protested strongly in 1922 when it emerged as a possibility. The Consolidation commissioners' response, as we have seen, was that no rivers had been awarded to the Crown.

Exactly how much riparian land the Crown obtained through roading and survey deductions is not known. We received no evidence or submissions on this point. We would be very surprised if there were no river or stream frontages at all in the 71,500 acres awarded to the Crown. But any claim on the part of the Crown to own the riverbeds adjacent to that land, by application of the *ad medium filum* presumption, does not arise from a knowing or willing cession of riverbeds to the Crown.

We note, too, that this point adds an extra dimension to the Crown's refusal to return the land acquired for roading in its 1958 settlement with Tuhoe (see chapter 14). The payment of monetary compensation would not have removed, and did not compensate for, any loss of ownership of riverbeds by the application of the *ad medium filum* rule to the lands acquired for roading by the Crown.

21.16.4(2)(d)

(d) *Waikaremoana:* Technically, the Waikaremoana block was only part of the consolidation scheme in respect of Tuhoe interests. The interests of Ngati Ruapani and Ngati Kahungunu in the block were purchased by the Crown in 1921 as a result of separate negotiations.

We discussed the Waikaremoana arrangements in section 14.7 of our report. In brief, the Crown advised Tuhoe that the Waikaremoana lands would not be part of the scheme, as the Crown had not purchased any interests in that block. The Crown's imperative was to acquire this land for watershed conservation, in particular to protect the water levels of Lake Waikaremoana for hydroelectricity. The plan was to take parts of the block under the public works legislation, and purchase individual interests in the rest. Tuhoe were extremely opposed to this plan, and the disagreement nearly overturned the Urewera consolidation scheme. Faced with the scenario put by Ministers and officials, Tuhoe preferred to transfer their interests out of the block for a greater share of land in other parts of the Reserve. Ministers were willing to agree to this compromise if it won them the Waikaremoana block. Although there were later disputes about valuation, and some opposition to giving up the Waikaremoana lands in this way, Tuhoe do seem to have seen the agreement as a cession of all their lands on the northern shores of the lake.

Did they also see it as a cession of all claims to rivers? We have virtually no information on this point. Because they retained no reserves in the block, Tuhoe essentially evacuated it. We did not receive evidence about continued use of the Hopuruahine River, or the other streams flowing into the lake, as we did for rivers in other alienated lands.

For Ngati Ruapani, there was very little that was truly voluntary in their agreement to sell their interests in the Waikaremoana lands. Tuhoe and the Crown agreed at the Tauarau hui that Ngati Ruapani were not fully represented and had to be dealt with separately. Like Tuhoe, Ruapani wanted and needed land and did not want small individual payments that would be used for immediate needs, not for development or to provide for their future. Their leaders were willing to consider giving up the forested lands in the block so long as they could retain their clearings and cultivations and ancestral sites, and on condition that the Crown provided them with development capital and desperately needed farmland south of the lake.

As we found in chapter 14, Ngati Ruapani got the worst of the deal. The Crown dictated the price and underpaid them for their lands north of the lake. Their sustainable income for the future took the form of debentures – which were poorly administered and did little to provide for their future needs. A small piece of Pakeha farmland for exchange south of the lake, however, was going to swallow almost all of the Crown's payment for their thousands of acres to the north. When that part of the deal was rejected, and Ngati Ruapani received debentures instead, they desperately tried to secure sufficient reserves on the northern shores. The end result, however, was their restriction to barely 600 acres of small, scattered pieces on the shores of the lake. A minority of owners, desperate for cash, even

sold their individual interests for less than half what the Crown was paying their relatives in debentures. The whole deal was disastrous for Ngati Ruapani, but not for the Crown, which secured its forested watershed at little cost or inconvenience to itself.

Ngati Kahungunu also sold their interests in the Waikaremoana block to the Crown in exchange for a mix of cash and debentures, and (in one case) an exchange of land. We lacked evidence to determine how willing the Kahungunu owners were to enter into these arrangements, but we noted that they, too, were underpaid for their share of the Waikaremoana block. Given that the Crown had raised the possibility of compulsory acquisition, and other owners had already agreed to vacate the block, the Ngati Kahungunu owners would have had little choice but to accept the Crown's offer at its price.

Did Ngati Ruapani and Ngati Kahungunu knowingly and willingly sell their rivers in these transactions? We have little evidence on this point. The documentary information shows that, as has frequently been the case, there was no explicit offer to buy rivers or agreement to sell them. At least, in this instance, the deal was negotiated with tribal leaders and was not forced on the communities by way of picking off individual interests. Even so, Commissioner Knight purchased some individual interests when he was able to.

The crunch came when the Consolidation commissioners settled the boundaries of the Ruapani reserves on the ground. Ngati Ruapani only obtained two reserves on a river, Hopuruahine West and Hopuruahine East. Here, as in the north, the commissioners inserted marginal strips between Maori land and the river. Both of these reserves were separated from the Hopuruahine River by what was marked as 'foreshore reserves' on the plan accompanying the commissioners' title orders.[1194] As we noted in chapter 14, Ngati Ruapani protested at the very small amount of land reserved for them at Waikaremoana. While all of their tiny reserves had lake frontages, they also wanted much more land reserved, including a larger, 300-acre fishing reserve on the Mokau Stream. The commissioners refused to allow this.[1195] Given that fact, and the insertion of 'foreshore reserves' between Maori land and the Hopuruahine River, it does seem that the commissioners sought to separate Maori from any ownership of riverbanks in the Waikaremoana block, presumably because the Crown's overriding goal for this region was watershed protection. We cannot be certain because no explanation was provided in the minutes.

Ngati Ruapani emerged from the Consolidation commission process the poorer, in respect of legal access to rivers and riverine fisheries. The commissioners flatly refused to vary the original agreement in respect of the number and size of reserves, even though other aspects – such as the purchase of farmland to the south – had been altered (see chapter 14).

1194. Order conferring title, Hopuruahine West Reserve, 21 February 1925; order conferring title, Hopuruahine East Reserve, 21 February 1925, and attached plans (Craig Innes, comp, supporting papers to 'Report on the Tenure Changes affecting Waikaremoana "Purchase Reserves" in the Urewera Inquiry' (doc A117(a)), pp [60], [63], [67], [68])

1195. Doig, 'Te Urewera Waterways' (doc A75), pp 80–81

21.16.4(2)(e)

The evidence in respect of the Mokau Stream fishery is especially telling. Waipatu Winitana described the requested 300-acre reserve to the commissioners:

> I pointed out the boundaries for this, from Waihirere Stream up to the road for about 20 chains [400 metres], then to the Mokau Stream about 20 chains then to the Lake, these boundaries include bush which we would leave standing, without the bush the block would not be of any use to us, there are many owners in the block. The bush contains pua manu's [birding reserves], a source of food supply, 30 head of cattle are grazing there. We asked Mr Ngata to reserve this Mokau Stream for a fish supply.[1196]

As far as we are aware, this is the only instance in which reservation of a waterway itself was requested, as though in acknowledgement that waterways at Waikaremoana had otherwise been sold. The commissioners refused to grant the request, although they had occasionally included a stream inside the boundaries of other Maori-owned blocks.[1197]

Ngati Ruapani had to leave the lake's northern shores soon after the sale because their reserves could not sustain them. Although they continued to visit their reserves regularly, various obstacles were placed in the way of their either living on or making economic use of these lands. While Waikaremoana was a sanctuary, they were not allowed to bring guns or dogs to hunt on their lands. Year after year, orders in council were gazetted, forbidding them from cutting down or selling cutting rights to their timber, or leasing their lands for an income (see chapter 16). We have no evidence, however, as to whether Ngati Ruapani continued to make ritual or economic use of the rivers running through the alienated Waikaremoana lands when they visited their reserves. Ngati Ruapani and Ngati Kahungunu witnesses did not speak of the Hopuruahine River and the other streams running into Lake Waikaremoana as they did of the lake itself or the waterways of the four southern blocks. It is not clear whether they continued to use or exercise rights over the rivers to the north of the lake. It appears that Ngati Ruapani may have considered the rivers as lost to them when they withdrew to Waimako and Te Kuha, although we cannot say for sure.

(e) ***No immediate interruption to the exercise of Maori customary rights:*** As Dr Doig concluded, the Crown's acquisition of the Waikaremoana block and the four southern blocks appeared to put virtually all the waterways south-east of the Huiarau Range into Crown ownership. By purchases and survey takings in the rim blocks, the operation of the 1903 coal mines legislation, and acquisition of river banks in the Urewera consolidation scheme, it seems that the Crown also owned most of the river beds of northern Te Urewera by 1927 when the scheme was wound up. If the *ad medium filum* presumption applied and a river was not navigable, then Maori still owned stretches of river bed adjoining their surviving

1196. Urewera Commissioners Minute Book 2A, 21 February 1925, fol 220 (Doig, 'Te Urewera Waterways' (doc A75), p 80)

1197. Doig, 'Te Urewera Waterways' (doc A75), pp 79–83

riparian lands. At the time, riverbed ownership meant more than it does today because the Crown had not yet vested in itself sole rights to use the water (saving some minor domestic extractions) – this was to come later in 1967.

Maori, on the other hand, were still largely unaware that the Crown might claim ownership of their rivers. We have already commented on the 1922 petition, and how the petitioners would likely have understood the Crown's response to mean that it did not claim their rivers. Lack of settlement in the area meant that

> there is no record of any early disputes over river use which might have led to a clarification of the legal position. Likewise, until recently there were few rival Pakeha uses of the river[s] which might have led Tuhoe to inquire into the legal status of their rivers.[1198]

Pakeha trout fishing does not seem to have generated the same disputes over rivers as it did over Lake Waikaremoana in the early part of the twentieth century, leading the iwi to claim ownership of their lake in the Native Land Court (see chapter 20).

Dr Doig noted:

> There has been a long time lag between the time at which riverbed ownership is supposed to have changed (through land title investigation or the passage of the navigable rivers legislation) and the time at which the Crown first claimed ownership of riverbeds within Te Urewera. These claims were not generally made until the second half of the twentieth century, when the demand for access to river resources such as hydroelectric generation and gravel increased. As a result, iwi often did not become aware of the effects of Crown actions until long afterwards. They were not advised of or consulted on matters affecting their rights in waterways, and not able to lodge any protest until well after the fact.[1199]

In particular, within the Urewera consolidation scheme lands, Tuhoe continued to use the river resources as they had always done 'within the unoccupied portions acquired by the Crown' from the 1920s until the first point of interruption in the 1950s, the establishment of Te Urewera National Park on the lands awarded to the Crown.[1200] Even after the park was set up, the peoples of Te Urewera have continued to exercise their customary rights in respect of rivers, sometimes regardless of official restrictions.[1201]

(3) *Recollectivising: further tenure transformation*

Before turning to the question of which rivers the Crown actually laid claim to after the consolidation scheme, we pause to mention an additional complication: in the second half of the twentieth century, the application of the *ad medium filum* presumption has been

1198. Doig, 'Te Urewera Waterways' (doc A75), p 93
1199. Doig, summary of 'Te Urewera Waterways' (doc F6), p 17
1200. Doig, 'Te Urewera Waterways' (doc A75), p 97
1201. Stokes et al, *Te Urewera* (doc A111), pp 353–354

further complicated by the amalgamation of Maori-owned riparian lands and their revesting in tribal trusts. We discussed this process in chapter 19 of our report.

In the late 1960s and early 1970s, Tuhoe and Ngati Whare leaders embarked on a process of amalgamating many of the Urewera consolidation scheme titles and vesting the new blocks in tribal trusts.[1202] For Ngati Whare, the Te Whaiti titles were amalgamated into the Te Whaiti-nui-a-Toi block in 1974. Tuhoe owners amalgamated more than 100 blocks of forest lands into Te Manawa a Tuhoe, Te Pae o Tuhoe, and Tuhoe Kaaku in the 1970s. These three new blocks were vested in the Tuhoe Waikaremoana Maori Trust Board as responsible trustee (see chapter 19).

As we set out in detail in chapter 19, the amalgamation of over 40 Ruatahuna blocks in the Tuhoe Tuawhenua block was ultimately rejected by the owners, who preferred to keep their original titles. They also rejected aggregation in the 1980s, which would have preserved the original block identities (including their discrete river frontages) but would have given each owner a share in all of the blocks. Eventually, a composite trust was created for some of these blocks, in which both the original block and its ownership were retained but the blocks were administered together in a single trust.

In 1995, the original 21 blocks amalgamated as Tuhoe Kaaku were restored and then aggregated into three ownership groups, with the Tuhoe Waikaremoana Maori Trust Board as custodial trustee, and owner representatives as the responsible trustees (see chapter 19).

Thus, many of the titles created in the Urewera consolidation scheme have undergone tenure transformation a third time, in order to restore tribal control as much as possible through the title options provided by the Maori land laws in the final three decades of the twentieth century. Hapu trusts, such as the Ngati Rongo trust, have also been created to aggregate various Ruatoki farming blocks.[1203]

As Suzanne Doig commented, the amalgamated (and later aggregated) blocks contained 'much riparian land, especially along the Whakatane River and in enclaves within Te Urewera National Park.'[1204] We received no specific evidence or submissions about the effects of either amalgamation or aggregation on riparian ownership. It seems that customary rights were still maintained – that is, that rivers and their resources continued to be used and cared for in the customary way – so long as there was access from Maori land or unoccupied Crown land in the vicinity of a river. There is no suggestion in the evidence of Tama Nikora, for example, a witness who discussed amalgamation and aggregation at length, that these processes had any effect on tribal ownership of the Ohinemataroa (Whakatane) River. Tuhoe ownership, he believed, had survived all of the tenurial revolutions set out above.[1205] Nor does the evidence of Hakeke McGarvey and other claimants suggest that the tribal rela-

1202. Titles from the Ruatoki–Waiohau consolidation scheme were included as well.
1203. Tama Nikora, 'Te Urewera Lands and Title Improvement Schemes', August 2004 (doc G19), pp 62–63
1204. Doig, 'Te Urewera Waterways' (doc A75), p 92
1205. See Tama Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19); Tama Nikora, brief of evidence (doc J40).

tionship with and rights over this river changed, regardless of who owned the riparian lands. In part, this represents a benefit from the consolidation scheme, and the care the commissioners took to ensure that most Maori-owned blocks had physical access to rivers, even where legally separated by a marginal strip.

Perhaps the most important change in respect of rivers, therefore, was not the particular nature of the title by which Maori held riparian lands, but the intrusion of the Crown's claims as a new owner of massive amounts of riparian land in Te Urewera.

We turn next to consider the extent to which the Crown has actually claimed ownership of riverbeds in Te Urewera in the second half of the twentieth century, and with what results.

21.16.5 To what extent has the Crown claimed ownership of Te Urewera riverbeds as a result of applying the *ad medium filum* presumption or the coal mines legislation?

(1) *Introduction*

In her evidence for the Tribunal, Suzanne Doig commented:

> Since 1840, when Tuhoe and its constituent hapu (and the other hapu living within Te Urewera) had undoubted mana and rangatiratanga over the land and waterways within their rohe, much of the ownership and control of the rivers of Te Urewera appears to have passed out of Maori hands. The extent of this transfer, and the means by which it may have taken place, is by no means clear.[1206]

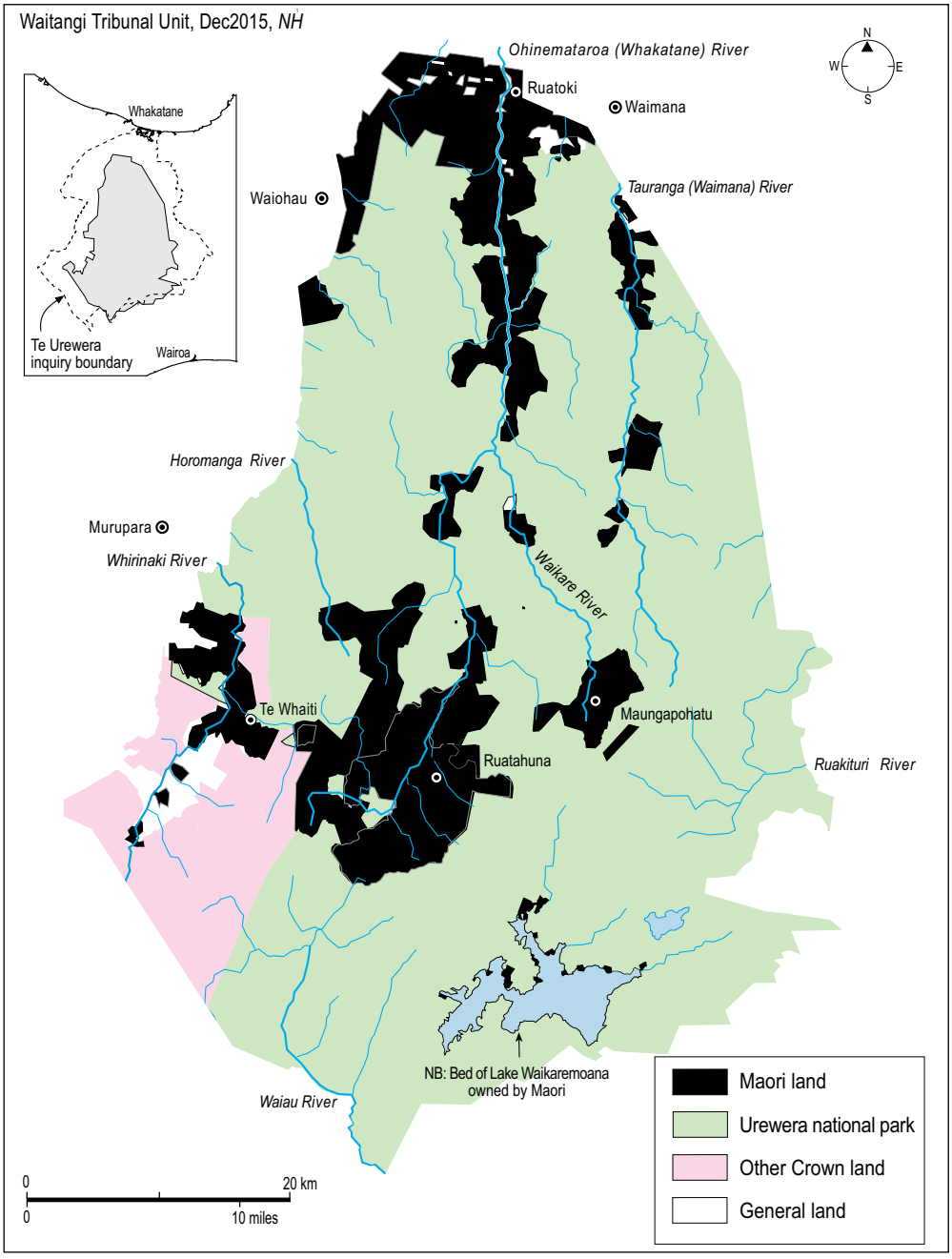
The Rangitaiki River serves as a good introduction to our analysis of this issue. Counsel for Ngati Manawa stressed the 'vagueness and imprecision of the law' in respect of navigable rivers, which has been interpreted variously by the courts, and which the claimants believe Governments have left untouched because it favours the Crown. We discussed some of the difficulties of interpreting the coal mines legislation above in section 21.15.2. According to the claimants, the effect of this legislation on the Rangitaiki River was and is uncertain, and 'the Crown itself does not seem to know for certain whether it has title to the Rangitaiki or not, or if so on what basis.'[1207]

Counsel for Ngati Manawa noted that, during the Te Ika Whenua Rivers hearings in 1994, the Crown at first claimed that the Rangitaiki (or stretches of it) was navigable. It then conceded that navigability could not be 'conclusively established', and the inquiry proceeded on the basis that the Crown did not claim ownership of the river under the coal mines legislation.[1208]

The Te Ika Whenua Rivers Tribunal had inspected the rivers and thought that it would be difficult to classify any of them as 'navigable in accordance with the provisions of English

1206. Doig, 'Te Urewera Waterways' (doc A75), p 39
1207. Counsel for Ngati Manawa, closing submissions (doc N12), pp 59–60
1208. Counsel for Ngati Manawa, closing submissions (doc N12), p 60

21.16.5(1)



Map 21.9: Land ownership and rivers in central Te Urewera

common law'.[1209] The Tribunal therefore sought information from the Hamilton branch of the Department of Lands and Survey, whose district manager responded:

1209. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 82

> In the case of the Rangitaiki River bed, I am unable to find relevant file evidence to support any assertion that it was navigable (in 1903). Neither can I find relevant file evidence to the contrary. Examination of the earliest available aerial photographs and relevant plans does not assist.
>
> In the absence of persuasive evidence either way, I am bound to recommend in favour of applying the presumption of *ad medium filum aquae*.
>
> It would be wrong of the Crown to assert ownership without convincing evidence of navigability – evidence that would stand up in a Court of law.
>
> Further, I cannot identify a compelling reason for carrying out the possibly protracted and complicated research required to prove such navigability.
>
> In the absence of instruction and funding to determine navigability I stand by my recommendation to apply the principle of presumptive ownership by adjoining owners (some of whom will be the Crown) to the middle line of the river bed.[1210]

When the department's views were put to Crown and claimant counsel in the Te Ika Whenua Rivers inquiry,

> counsel for the Crown conceded that it had not made any claim to the bed of these rivers under the Coal Mines Act 1979 or prior legislation and regarded the rivers as non-navigable with the *ad medium filum* rule applying. Counsel for the claimants accepted this proposition, and the Tribunal proceeded on the premise that it was dealing with non-navigable waterways to which the *ad medium filum* rule applied.[1211]

But Dr Doig's evidence in our inquiry showed that the Crown has in the past claimed to own 'all or part of the Rangitaiki' on the basis of navigability.[1212] In the claimants' submission, this was not a theoretical claim, as it had enabled the Crown to obtain royalties for gravel extraction from the river. The end result was that the 'claimants today still do not know which stretches of the Rangitaiki are claimed by the Crown'. Citing Dr Doig, claimant counsel added that the lack of a formal process to declare navigability was a problem, and inconsistencies in the Crown's position as to whether or not it claimsownership of the Rangitaiki 'raise the question of how explicit the Crown must be in making claims to navigability, given the potentially confiscatory effects of applying the Act'.[1213]

The Crown's response to this argument, in essence, is that it does not matter what the Crown claims to own because the answer is a matter of law: 'Riverbed ownership depends

1210. District manager and chief surveyor, Department of Survey and Land Information, Hamilton, to Judge Carter, 16 March 1994 (Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 82)

1211. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 82

1212. Doig, 'Te Urewera Waterways' (doc A75), p 131 (counsel for Ngati Manawa, closing submissions (doc N12), p 60)

1213. Doig, 'Te Urewera Waterways' (doc A75), p 131 (counsel for Ngati Manawa, closing submissions (doc N12), p 60); Counsel for Ngati Manawa, Submissions by way of reply (doc N26), p 7

not on Crown recognition but on the legal system's recognition of rights and interests.'[1214] The implication of this argument was that the Crown does not need to define what rivers or stretches of rivers that it owns – if there is a dispute or uncertainty as to how the law applies in any particular case, then it can be resolved by the courts. In the Crown's view, the 'question of who holds title to riverbeds within the inquiry district today is a question of law that could be determined by the Maori Land Court and High Court'.[1215] In Crown counsel's submission, it is 'likely' that title to riverbeds of navigable rivers will be held by the Crown under section 354(1)(c) of the RMA, which 'saves the Crown's title that ultimately stems from the Coal-mines Act Amendment Act 1903'. For non-navigable rivers, it is 'likely' that the adjoining landowner will own half of the riverbed, in accordance with the *ad medium filum* presumption. 'Tangata whenua' are 'likely to hold title to some riverbeds' under this presumption. But these presumptions are rebuttable.[1216]

Nonetheless, despite the use of the word 'likely', Crown counsel also submitted that the Crown has 'acquired title to riverbeds' in Te Urewera by means of both the coal mines legislation and the application of the *ad medium filum* presumption.[1217] The Crown did not address any of the allegations that it has left the definition of navigability imprecise, and the authority to declare rivers navigable unclear, to advance its own interests at the expense of Maori. Nor did the Crown address the issue of whether the *ad medium filum* presumption should apply to its marginal strips or riverbank reserves.

The question remains, therefore, as to what extent the Crown has actually claimed or asserted ownership of riverbeds in Te Urewera, and by what right. A related question is whether the Crown has created a title system that gives certainty as to the ownership of rivers, or whether – as the claimants argue – no one really knows who owns the riverbeds of the inquiry district. We address the first question in this section of our chapter, and the second question in the next section.

(2) *Crown assertions of ownership before the 1950s*

As Suzanne Doig has argued, the Crown did not actively assert ownership of riverbeds in the inquiry district until the second half of the twentieth century. Due to the district's relative isolation, the lack of Pakeha settlement, and the relatively small amount of production forestry before the 1950s, the Crown and settlers had little use for the rivers or riverbeds of Te Urewera. There were two main exceptions.

The first was the widespread introduction of trout into the rivers of Te Urewera for sport fishing from the 1890s, but the Crown did not assert ownership of the beds in order to establish or manage the trout fishery.[1218]

1214. Crown counsel, closing submissions (doc N20), topic 30, p 8
1215. Crown counsel, closing submissions (doc N20), topic 30, p 8
1216. Crown counsel, closing submissions (doc N20), topic 30, p 8
1217. Crown counsel, closing submissions (doc N20), topic 30, p 11
1218. Doig, 'Te Urewera Waterways' (doc A75), pp 94–95, 141–145, 150–151

The other main exception was the use and serious modification of waterways in the four southern blocks for the Waikaremoana power scheme, which took place from the 1920s to the 1940s.[1219] As we noted earlier, we have no jurisdiction to consider post-1875 actions of the Crown in respect of the rivers in these blocks. We did note some exceptions, including Crown actions in relation to the reserves set aside for Tuhoe and Ngati Ruapani, and the 'Crown's actions in relation to all the hydro-electric structures and works in Lake Waikaremoana or near the Lake involving waters taken from it, . . . irrespective of the date of the alleged breaches'.[1220] We consider the environmental, social and cultural impacts of the Crown's modification of the Waikaretaheke River later in the chapter. Here, we simply note that the Crown's construction of works along the river was in part an assertion of ownership of the bed, except where riverbed adjacent to Maori reserves was required. We deal with the specific claims about the hydro works in respect of those reserves in chapter 22.

(3) *The creation of Te Urewera National Park*

The Crown accepted in closing submissions that

> Urewera Maori are likely to have continued their customary access to the lands and resources (held as Crown land since 1927), until the national park was created in 1954 when Urewera Maori began to experience restrictions on the use of these lands and resources.[1221]

This accorded with Dr Doig's evidence[1222] and much of the tangata whenua evidence in our inquiry.

The Crown's most extensive and sweeping assertion of riverbed ownership in Te Urewera did in fact come in the 1950s with the creation of the national park. The nucleus of the park was established by an order in council of 28 July 1954. It involved an area of just over 121,000 acres in the Waikaremoana district (see chapter 16). The park's boundaries were principally lines on a map, but they did include stretches of rivers (specifying the Waiau River 'to the middle'). The order in council also specified that 'the beds and waters of all smaller lakes, rivers, and streams' were included in the park.[1223] Although Lake Waikaremoana was enclosed by the park's boundaries, it was not technically part of the park until it was leased to the Crown in 1971.

As will be recalled from chapter 16, the park was greatly expanded in 1957 with the addition of 330,000 acres, mostly made up of the Crown's Urewera A block, which it had obtained through the Urewera consolidation scheme. After its expansion, the park's

1219. Garth Cant and Robin Hodge, summary of 'The Impact of Environmental Changes on Lake Waikaremoana' (doc H11), pp 15–18

1220. Waitangi Tribunal, memorandum-directions, 12 April 2002 (paper 2.32), p 9

1221. Crown counsel, closing submissions (doc N20), topic 33, p 14

1222. Doig, 'Te Urewera Waterways' (doc A75), pp 77, 97

1223. 'Lands in South Auckland and Gisborne Land Districts Declared to be a National Park', 28 July 1954, *New Zealand Gazette*, 1954, no 46, p 1212 (Campbell, supporting papers to 'Te Urewera National Park' (doc A60(a)), p 21)

boundaries abutted rivers and streams in 15 areas, to all of which the *ad medium filum* presumption potentially applied.[1224] Several of these places adjoined Maori-owned blocks, which were later called 'enclaves' by park authorities, much to the irritation of the claimants. The 1957 order in council stated that the park included 'the beds and waters of all lakes, rivers, and streams'.[1225] It differed from a later order in council adding the Manuoha and Paharakeke blocks to the park in 1962, which included 'the beds and waters of all *internal* streams, rivers, lakes, lagoons, and pools' (emphasis added).[1226] Given this particular wording, it may be that the 1954 and 1957 orders in council were intended to include the whole of the beds of the 15 stretches of waterway that bounded the park, and not just half (to the centre line). If so, that was confiscatory of Maori rights. The point is unclear, however, from the documentation surrounding the park and its boundaries.

The rivers which flowed through the park for part of their length are the Whakatane River, the Tauranga (Waimana) River, the Waikare River, the Horomanga River, the Whirinaki River (for a short distance), and the headwaters of the Ruakituri River.[1227]

The Crown maximised its claim to ownership of riverbeds in the park by also including many of the riverbank reserves created during the consolidation scheme. This meant that some marginal strips separating Maori land from the Tauranga River and its tributaries were specifically included in the park, thereby including whole stretches of riverbed by application of the *ad medium filum* presumption to the strips. This created what we might call national park 'enclaves' in Maori-owned blocks.

Corbett, the Minister of Maori Affairs, had assured Parliament in 1954 that no Maori land would be included in the new national park.[1228] The Lands and Survey Department wanted to preserve this position in 1957, recommending that the additions to the park should be defined as 'excluding all Maori land but including the beds of all Rivers, Streams etc'.[1229] One way in which this was achieved was to include the 'riverbank reserves adjoining Whanganui, Opunua, Otuiti, Tuapau, Opuatawhiro, Hukanui, Papaohaki, Te Rere, Omaruwharekura, Te Kaawa, Whakarae, Ahirau, Te Huingaangakaahu, Nahunahu, Taumataohine, Paemahoe, Takapaurauteanina, and Omuriwaka Blocks' (see maps 21.5 to 21.8).[1230] We note that the inclusion of Hukanui seems to have been an error, as there were no marginal strips in that

1224. The waterways which formed part of the park's boundaries in 15 separate places were: Tauranga (Waimana) River; Ruakituri River; Waiau River; Ohinemataroa (Whakatane) River; Mahakirua River; Whirinaki River; Mangamako Stream; Owaka Stream; Kanihi Stream; Ohora Stream; Otaneuri Stream; Otapuwaka Stream; Waiti Stream; Otane Stream.

1225. 'Adding land to the Urewera National Park', 25 November 1957, *New Zealand Gazette*, 1957, no 89, p 2217

1226. 'Adding land to the Urewera National Park', 3 October 1962, *New Zealand Gazette*, 1962, no 61, p 1614 (Campbell, comp, supporting papers to 'Te Urewera National Park' (doc A60(a)), p 22)

1227. 'Te Urewera Inquiry District Overview Map Book, Part Three' (doc A132), pl 23

1228. Walzl, 'Waikaremoana' (doc A73), pp 373–374

1229. Chief Draughtsman, Lands and Survey, Gisborne, minute, 7 October 1957, on National Parks Authority, 'Additions to Urewera National Park', minutes of meeting, 10 September 1957 (Campbell, comp, supporting papers to 'Te Urewera National Park' (doc A60(a)), p 154)

1230. 'Adding Land to the Urewera National Park', 25 November 1957, *New Zealand Gazette*, 1957, no 89, p 2217

block. Possibly, the Hapenui block was meant. This list of blocks did leave out some riverbank reserves adjoining Maori land along parts of the Tauranga River and the Otapuwaka and Otane Streams. We note, however, that the Survey Office plan referred to in the order had 'river bank reserves included' marked next to some of them, so this may have been an oversight.[1231]

Thus, by the end of 1957, the Crown had asserted ownership of all the river 'beds and waters' in the Urewera A block by including them in the national park, from which Maori-owned land was specifically excluded. The Crown had also maximised the extent of its explicit claim to river ownership by including many of the riverbank reserves in the park, even where this inserted a strip of national park between Maori-owned blocks (consisting of up to a chain on each side of a river and thus the whole riverbed as well). This was doubly significant for Maori because the park's administration of rivers and customary fisheries would apply to these parts of the rivers, even though they appeared to be some distance from the park. Also, a large part of the upper Ruakituri catchment was added to the park in 1962 when the Crown purchased the Paharakeke and Manuoha blocks.[1232]

It is very unlikely that Maori were aware of these developments at the time the orders in council were gazetted. The inclusion of river 'beds and waters' in the park was not mentioned in closing submissions by either the claimants or the Crown. This is presumably because the focus was on the Crown's claim to own these riverbeds anyway, even if they had not been included in the park, by application of the *ad medium filum* presumption.

(4) *Assertions of Crown ownership outside the national park*

For the most part, assertions of Crown ownership of riverbeds outside the national park were made in relation to gravel extraction, usually to obtain a royalty for the Crown as owner. But the nature of these assertions was often vague and contradictory, both over time and as between Government departments. The basis on which the Crown claimed to own particular stretches of riverbed was often unclear.

Crown counsel told us that 'gravel was taken from riverbeds to which the Crown believed it had ownership', and that, 'generally, if the Crown believed it had ownership to such riverbeds, it would not have given compensation to Maori'.[1233] The Crown accepted, too, that it may have taken gravel from riverbeds that it did not own – but, equally, it *may* have owned them:

> One can only assume, in the absence of evidence to the contrary, that government agencies would not have taken gravel without their *bona fide* belief that the Crown had the right to do so, eg a belief that the river was navigable.[1234]

1231. SO 38956; 'Additions to Urewera National Park', *Historical Review* (1963) vol 11, no 1, p 47
1232. Doig, 'Te Urewera Waterways' (doc A75), pp 91–92
1233. Crown counsel, closing submissions (doc N20), topic 30, p 16
1234. Crown counsel, closing submissions (doc N20), topic 30, p 17

21.16.5(4)

These submissions did not inspire us with confidence that the Crown's past assertions of riverbed ownership rested on secure foundations.

Dr Doig summarised her evidence on this issue as follows:

> In summary, it appears that the Crown has claimed ownership of at least the lower stretches of the Whakatane River on the basis that they are navigable. These claims of ownership were made in connection with the extraction of gravel from the riverbed, and so they concerned rights of control of resources as well as ownership. The extent of the Crown's claimed interests in the Whakatane River are not clear, however, because no geographical limit was discussed in the documentation. It is possible that the Ministry of Transport regarded the river as navigable as far upstream as jet-boats could reach.
>
> The various departmental files also suggest that the Crown may have claimed ownership to much more extensive parts of the rivers of Te Urewera, including all or part of the Rangitaiki, Whirinaki, and Waimana Rivers. In each of these cases, however, claims of navigability from one department are countered by statements from other government departments which state that those rivers are not (or probably are not) navigable. The 1903 Act gives no mechanism to mediate between these conflicting interpretations; but the inconsistencies do raise the question of how explicit the Crown must be in making claims to navigability, given the potentially confiscatory effects of applying the Act.
>
> As with the earlier discussions on the applicability of *ad medium filum* to the rivers of Te Urewera, these matters were discussed solely amongst Crown and local government officials. There is no indication that Maori in Te Urewera were ever consulted on any of these matters, even where decisions to treat certain rivers as navigable would appear to have had extensive consequences for their interests in the rivers of Te Urewera.[1235]

Dr Doig's conclusions were supported by fragments of evidence relating to particular rivers, or particular assertions of ownership from the 1960s through to the 1980s. One of the main examples was an action of the Lands and Survey Department in 1963. The department issued the Bay of Plenty Catchment Commission with a general licence to take shingle and sand from the beds of the Whakatane, Waimana, Rangitaiki, and Whirinaki Rivers, and their tributaries, 'where the beds of the rivers are in Crown ownership either because they are considered to be navigable or because there are reserves on one or both sides of the Rivers'.[1236] Thus, navigability and the existence of marginal strips (by operation of the *ad medium filum* presumption) were the criteria for Crown ownership, which were left to the catchment commission to interpret. The marginal strips criterion would have included those riverbank reserves on the Tauranga River and its tributaries that had been left out of the national park.

1235. Doig, 'Te Urewera Waterways' (doc A75), p 131

1236. Head Office Committee: Land Settlement Board, General Licence to Remove Shingle, case no 62/959, 27 February 1963 (Doig, 'Te Urewera Waterways' (doc A75), p 105)

We will return to the issue of navigability below. Here, we note that this general licence was based in part on the belief that riverbeds next to Crown land in Te Urewera were vested in the Crown *ad medium filum aquae*. Dr Doig found other examples of the presumption being applied by Lands and Survey to riverbank reserves along the Whirinaki River in 1959 and 1983.[1237] David Alexander also identified examples of the Crown's claims to own riverbeds through application of the *ad medium filum* presumption. These included the Horomanga River in the Kuhawaea block in the 1950s, and the Whirinaki River in the 1980s. Crown claims to own the Rangitaiki riverbed adjacent to the Kuhawaea block, by operation of the *ad medium filum* presumption, were also made in the 1930s and 1960s.[1238]

If we were to accept the premise that the *ad medium filum* presumption did in fact apply to riverbeds adjacent to former Maori land, then its application was relatively straightforward – so long as Government agencies and local bodies respected that the presumption would also apply to Maori land along the riverbanks, which, in Dr Doig's evidence, they often failed to do. Maori have sometimes complained about gravel extraction, especially in more recent decades, but they also assumed on occasion that Government agencies would not be taking the gravel without a legal right to do so. Ngati Whare, for example, took this approach to extractions from the Minginui Stream.[1239] For the most part, the possibility of private (including Maori) ownership of riverbeds was basically ignored.[1240]

Turning to navigability, we note that the two departments most concerned before the creation of DOC in 1987 were Lands and Survey and the Marine Department (later the Ministry of Transport). In practice, however, local authorities have often been left with the task of deciding whether a riverbed is in Crown ownership because of their role in administering gravel extraction licences. In the northern catchments of Te Urewera, the Bay of Plenty Catchment Commission assumed that most of the larger rivers were navigable and therefore in Crown ownership. The commission had authority to levy a royalty on gravel taken from Crown-owned riverbeds on behalf of either Lands and Survey or the Ministry of Transport. These Government departments did not deny the claims of extensive Crown ownership made on their behalf.[1241]

In the mid-1970s, for example, problems with the definition of navigability in the Coal Mines Act 1925 became acute. As we discussed in section 21.16.3(4) above, the association of catchment commissions asked the Government in 1976 for an authoritative ruling as to its meaning.[1242] In the 1960s, operating under a general licence, the Bay of Plenty Catchment Commission had taken the position that 'river beds are generally held in Crown ownership',

1237. Doig, 'Te Urewera Waterways' (doc A75), pp 106, 130–131, 234
1238. Alexander, 'Native Land Court Orders and Crown Purchases' (doc A92), pp 24–27
1239. Doig, 'Te Urewera Waterways' (doc A75), p 128
1240. Doig, 'Te Urewera Waterways' (doc A75), pp 128, 132–134
1241. Doig, 'Te Urewera Waterways' (doc A75), pp 132–135
1242. Alexander, 'Native Land Court Orders and Crown Purchases' (doc A92), p 17

either as navigable or by application of the *ad medium filum* presumption.[1243] An interdepartmental committee reviewed the arrangements for water in 1965 and found many problems with how the definition of navigability was or should be applied. As noted above, the committee wanted the law changed to define navigation to include

> every stream that in the past, present or future, was is or becomes capable of permitting, without trespass on adjoining lands, the passage of any kind of vessel that will float upon it with one occupant. 'Vessel' should be defined to include any jet craft, canoe, raft, or hovercraft. It should be made clear that a navigable stream will not cease to have that status even if the waters cease to flow. The bed so vested should include the flood channel, all islands, and all parts of the stream bed downstream of the uppermost water that is navigable, whether those parts are navigable or not.[1244]

Even so, the committee believed that most rivers had become 'navigable' within the meaning of the Act because of changes that had taken place to the rivers and their use by the 1960s. A fairly relaxed approach was taken in that decade, with navigability assumed and the Act interpreted very widely.

In 1977, there was a legal challenge (outside of Te Urewera) to the gravel licensing system. It led the Director of Water and Soil Conservation to comment that compliance with the law was weak, and, '[u]nfortunately the term navigable is not well defined and is subject to interpretation.'[1245] Based on a Crown Law Office opinion obtained by the Ministry of Transport, all catchment commissions had to prepare and submit lists of rivers 'where there is an existing or potential use by boats for commercial purposes or recreational pursuits.'[1246] The commissions would then have to apply for approval for specific gravel licences from the ministry based on their lists of navigable rivers.[1247]

Although the ministry was acting under the Harbours Act, not the Coal Mines Act, the same licences would enable the commissions to levy a royalty for the Crown on Crown-owned riverbeds (under the Coal Mines Act).[1248] The use of 'recreational pursuits' in the ministry's criteria for navigability, including 'potential' use for recreation in the future, gave the catchment commissions a very wide brief. As Dr Doig noted, the Bay of Plenty Catchment Commission's list of rivers, for which it then sought licences in 1977, included

1243. Secretary, Bay of Plenty Catchment Commission, to County Clerk, Whakatane County Council, 3 October 1968 (Doig, 'Te Urewera Waterways' (doc A75), p 133)

1244. Interdepartmental Committee on Water, 'NZ Law and Administration in Respect of Water: Confidential Report to Cabinet by the Interdepartmental Committee on Water', March 1965, p 25 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v79)

1245. Director of Water and Soil Conservation to all Catchment Authorities, 23 September 1977 (Doig, supporting papers to 'Te Urewera Waterways' (doc A75(a)), p 260)

1246. Director of Water and Soil Conservation to all Catchment Authorities, 23 September 1977 (Doig, supporting papers to 'Te Urewera Waterways' (doc A75(a)), p 260)

1247. Doig, 'Te Urewera Waterways' (doc A75), p 127

1248. Doig, 'Te Urewera Waterways' (doc A75), pp 127–135

the Rangitaiki, Whirinaki, Whakatane, and Waimana Rivers as navigable.[1249] This list must have been approved by the ministry, because the commission 'did levy royalties on the gravel taken from the beds of these rivers on the basis of that Crown ownership, and it also issued licences to take gravel on that basis'.[1250]

Thus, in the 1960s and 1970s, the Rangitaiki, Whirinaki, Whakatane, and Waimana Rivers were all treated as navigable by local and central government, and therefore in Crown ownership, for the purposes of extracting gravel and charging a royalty for the gravel taken.

Dr Doig was critical of this state of affairs, noting that Maori were not consulted or informed about these decisions, there was no formal process for investigating or declaring that a river was navigable, and Maori had no right of appeal. Their only recourse was the expensive one of judicial review in the courts. She also noted that the requirements for a navigable river were interpreted differently over time, and between departments.[1251]

The Tauranga River, for example, was included as a navigable river by the catchment commission in 1977 because there was 'an existing or potential use by boats for commercial purposes or recreational pursuits'.[1252] In 1983, however, the Lands and Survey Department applied the tighter definition adopted by the High Court and one of the Court of Appeal judges in *Leighton* (see section 21.16.3(4) above).[1253] The district draughting officer gave his opinion that the river was not navigable in the Waimana block, where the ownership of dried-up riverbed was under consideration. He wrote:

> A 'navigable' waterway is a waterway that in 1903 (the date of the first Coal Mine Act where the bed of a navigable river was deemed to be Lands of the Crown) was navigable generally speaking on a commercial basis all year around, i.e. used by barges, shallow draught boats for the carriage of goods. We think of Waikato, Waipa, Waihou Rivers as navigable.[1254]

As will be recalled from section 21.16.2(7)(c) above, the Crown had claimed exposed riverbed in the Waimana block as Crown land since the 1950s – on what basis is unknown. It had leased parts of the dry riverbed to farmers for three decades (from 1950 to 1983). It was only because the Crown had decided to sell the exposed riverbed that the Lands and Survey Department investigated the basis of the Crown's title and decided that it had none. The river was not navigable and the land presumably belonged to riparian owners *ad medium filum*, or – in the case of right line boundaries – was 'no man's land'. Until the issue of the

1249. Doig, 'Te Urewera Waterways' (doc A75), p 127
1250. Doig, 'Te Urewera Waterways' (doc A75), p 134
1251. Doig, 'Te Urewera Waterways' (doc A75), pp 127–135
1252. Chief Engineer, Bay of Plenty Catchment Commission, to Regional Marine Officer, Ministry of Transport, Auckland, 5 October 1977 (Doig, 'Te Urewera Waterways' (doc A75), p 129)
1253. Doig, 'Te Urewera Waterways' (doc A75), p 125
1254. R J Schwass, minute, 9 August 1983, on A F Harding, memorandum, 4 August 1983 (Doig, supporting papers to 'Te Urewera Waterways' (doc A75(a)), p 222)

'no man's land' could be resolved, the Crown continued to lease the riverbed to farmers as a 'caretaker', by what authority is not clear.[1255]

The Ohinemataroa (Whakatane) River is an example of a river that has been claimed as Crown-owned because of the invention of the jet boat. As we have seen, it was included in the 1977 list of navigable rivers for gravel extraction purposes. Although recreational boating does not meet the test of purposeful navigation for transport or trade, 'some government departments seem to have regarded at least parts of the Whakatane River as navigable because they could be travelled by jet-boat'.[1256] In 1968, for example, the Secretary for Marine pointed out that his department issued licences for removal of shingle from this river under section 146A of the Harbours Act 1950. This was because the river was navigable and therefore a 'Crown owned river bed'.[1257] The Whakatane was navigable, in the department's view, because it had waters deep enough to 'float a jet boat at speed'. Crown ownership of the bed, however, would be limited to the 'navigable length' of the river.[1258] As Dr Doig noted, the coal mines legislation was not mentioned specifically, but it was nonetheless being invoked because the Crown could only own navigable riverbeds under that legislation.[1259]

Back in the 1950s, however, the Ohinemataroa River at Ruatoki had not been treated as navigable. The Whakatane County Council considered that the *ad medium filum* presumption applied.[1260] Later, in the 1980s, the Ministry of Works was granted a licence to take gravel from the upper Whakatane River near Umuroa Marae at Ruatahuna, because the bed was 'considered to be Crown owned'.[1261] In this case, however, it was not stated whether the Crown claimed ownership under the *ad medium filum* presumption or because the river was navigable. Because the ministry had to negotiate access to the river across the Ruatahuna Farm, we presume that the basis of the Crown's claim was navigability. Then, in 1988, Maori owners of several blocks in the Waikirikiri area complained that gravel was being extracted from the Whakatane River without their consent. Again, the response was that the riverbed was Crown-owned – presumably because it was considered to be navigable, given the context of Maori-owned blocks abutting this particular stretch of the river.[1262]

The issue of the navigability of this river was debated in our inquiry. Tama Nikora, an experienced surveyor, told us:

> there is also great uncertainty about ownership of Ohinemataroa because of the operation of the Coal Mines Act which provided that if the river is navigable, then the river belongs to

1255. Doig, 'Te Urewera Waterways' (doc A75), pp 107–116
1256. Doig, 'Te Urewera Waterways' (doc A75), p 126
1257. Secretary for Marine to Engineer, Bay of Plenty Catchment Commission, 24 May 1968 (Doig, supporting papers to 'Te Urewera Waterways' (doc A75(a)), pp 237–238)
1258. Secretary for Marine to Engineer, Bay of Plenty Catchment Commission, 24 May 1968 (Doig, supporting papers to 'Te Urewera Waterways' (doc A75(a)), p 238)
1259. Doig, 'Te Urewera Waterways' (doc A75), p 126
1260. Doig, 'Te Urewera Waterways' (doc A75), pp 126, 229–231
1261. Doig, 'Te Urewera Waterways' (doc A75), p 232
1262. Doig, 'Te Urewera Waterways' (doc A75), p 235

> the Crown. If that provision does apply to the Ohinemataroa, then I believe it is contrary to Tuhoe's rights under the Treaty. However, I do not believe the river is navigable. The whole issue of whether the river is navigable or not is a minefield. There is no one Crown agency which has determined that issue in relation to the Ohinemataroa, or in relation to any other rivers. The position remains that in legal terms the ownership of the Ohinemataroa remains in doubt, when it should not. It belongs to Tuhoe.[1263]

Crown counsel did not make any submissions about the issue of how navigability is defined, nor did it make any specific claims in our inquiry to ownership of particular rivers. Rather, the Crown's position was that it was 'likely' that navigable riverbeds in the inquiry district were vested in the Crown, and that ownership did not depend on Crown recognition but rather was a matter of law which could be decided by the courts.[1264]

Claimant counsel submitted:

> The Crown has not argued in this Inquiry that the bed of the Ohinemataroa river is Crown land, whether by application of the Coal Mines Act or otherwise, nor has it denied Tuhoe's kaitiaki status in respect of the river.[1265]

After our hearings concluded in 2005, the issue of the navigability of this river at Ruatoki came before the Maori Land Court. As we saw earlier, the river was used as a boundary between many of the sections originally created in the Ruatoki–Waiohau consolidation scheme. In 2009, claimant counsel filed submissions with the Tribunal, noting that the Crown did not claim to own the riverbed in these Maori Land Court proceedings.[1266] The Crown had argued before the Maori Land Court that the river was in fact navigable, but that the Urewera commissioners' orders for the Ruatoki block predated the Coal-mines Act Amendment Act 1903. Those orders having been given the effect of Native Land Court orders by the 1909 Act, the Crown's view was that the stretch of river that ran through the middle of the Ruatoki block in 1903 had been expressly granted by the Crown and was thus exempt under the saving clause.[1267]

The situation has been no less complicated for the Rangitaiki River. As we have seen, the Crown claimed to own the bed adjacent to the Kuhawaea block in the 1960s on the basis of the *ad medium filum* presumption. The blanket gravel licence issued by Lands and Survey in 1963 included the river, either because it was navigable or because there were riverbank reserves – the exact details were not specified. In 1971, the issue of ownership arose

1263. Tamaroa Nikora, brief of evidence (doc J40), p 7
1264. Crown counsel, closing submissions (doc N20), topic 30, p 8
1265. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 203
1266. Counsel for Nga Rauru o Nga Potiki, memorandum, 20 October 2009 (paper 2.883)
1267. Counsel for Nga Rauru o Nga Potiki, memorandum, 20 October 2009, Appendix A: Crown counsel, 'Memorandum of the Crown seeking to withdraw from the proceedings', 6 May 2009 (paper 2.883); Crown counsel, memorandum, 2 November 2009 (paper 2.884)

because of a dispute in the Waiohau A1B block, where the course of the river had changed.[1268] Somewhat casually, the commissioner of Crown lands suggested that 'the bed is probably Crown land – I assume the Rangitaiki River hereabout is or has been used for navigation.'[1269] The Rotorua field officer replied:

> There is nothing to suggest, and I doubt that there ever has been, any navigational use made of the Rangitaiki River in this locality. Between here and the river mouth, there are some narrow gorges, that before the Matahina Dam was built would have been impassable to [a barge or raft].[1270]

In this instance, the commissioner of Crown lands agreed that the dry riverbed was Maori land, and also that the licence to extract gravel had to be cancelled immediately.[1271]

As we have seen, the Rangitaiki River was later classified as navigable by the catchment commission in 1977, presumably with the approval of the Ministry of Transport, so that gravel could be extracted and royalties charged. How long it was classified that way, we have no information.

In 1994, as we discussed above, the Lands and Survey Department advised the Te Ika Whenua Rivers Tribunal that it could not find 'relevant file evidence' to support either an assertion having been made as to navigability or any 'evidence to the contrary'. 'It would be wrong of the Crown,' officials advised, 'to assert ownership without convincing evidence of navigability – evidence that would stand up in a Court of law'. Further, the department could not see a 'compelling reason for carrying out the possibly protracted and complicated research required to prove such navigability'. In the absence of an instruction or funding to do the work necessary to determine navigability, the department considered that the 'principle of presumptive ownership by adjoining owners (some of whom will be the Crown)' should apply.[1272]

On the evidence available to us, this seems to be a rare example of the Government contemplating that the issue warranted complicated research to prove navigability to a level that would 'stand up in a Court of law'. We saw one other example – the case of the Whirinaki River in 1984. In that instance, a Lands and Surveys official advised the local council that it might not be worth the cost and difficulty of trying to prove navigability, in order to secure ownership of a piece of exposed riverbed next to Whirinaki 2(1E2):

1268. Doig, 'Te Urewera Waterways' (doc A75), pp 127–130

1269. Commissioner of Crown Lands, Hamilton, to District Field Officer, Rotorua, 29 April 1971 (Doig, 'Te Urewera Waterways' (doc A75), p 130)

1270. Field officer, Rotorua, to Commissioner of Crown Lands, 26 May 1971 (Doig, 'Te Urewera Waterways' (doc A75), p 130)

1271. Commissioner of Crown Lands, Hamilton, to Engineer, Bay of Plenty Catchment Commission, 2 July 1971 (Doig, supporting papers to 'Te Urewera Waterways' (doc A75(a)), p 193)

1272. District manager and chief surveyor, Department of Survey and Land Information, Hamilton, to Judge Carter, 16 March 1994 (Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 82)

> The current situation is that it is – with other land – considered to be old river bed. The Crown can only claim such to be Crown Land if the Whirinaki River were proven to be navigable. The local knowledge of your council may provide some idea as to the likelihood of its being navigable but the nature of its meandering course suggests to me that navigability would be difficult to prove. There is also the question of whether the Crown would wish to initiate such an expensive and involved procedure in order to substantiate a claim for all the old river bed.[1273]

Suzanne Doig commented:

> This statement is one of the very few indications that the Crown might have to prove that a river was navigable before claiming ownership of the bed, rather than relying on an assumption of navigability, but as it comes from a relatively minor Crown official the statement may not carry much weight.
>
> Nevertheless, the comments do reflect that officials within the Department of Lands and Survey generally showed more circumspection in claiming Crown ownership of riverbeds on the basis of navigability within Te Urewera, compared to other agencies such as the Ministry of Transport.[1274]

The examples discussed above exemplify many of the problems with 'navigability' that have been identified by the courts, the interdepartmental committee in the 1960s, and the Property Law and Equity Reform Committee in the 1980s. There were doubts as to what constituted navigability: whether commercial or recreational; whether use of the water or simply the width and depth of the water; by what kind of vessel and at what time (in relation to when the first Act was passed). There were uncertainties as to whether technology unthought of in 1903 could render a river navigable, turning in part on the use of the word 'potential' in the statute. Sometimes the whole of a river was treated as navigable, at other times only a particular stretch of river was considered.

And in all of this there was often a remarkably casual approach to declaring rivers the property of the Crown for the purposes of gravel extraction. Whole rivers could be declared Crown-owned in the vague belief that they must either be navigable or the Crown's by application of the *ad medium filum* presumption to marginal strips, as under the 1963 'blanket' licence. The Rangitaiki, Whirinaki, Ohinemataroa (Whakatane) and Tauranga (Waimana) Rivers were all declared navigable in 1977 for the purposes of gravel extraction and Crown royalties, on what factual basis can only be imagined. And yet in 1994 Lands and Survey could find no evidence as to whether the Crown had ever claimed to own the Rangitaiki, whether as a navigable river or otherwise. The department advised that a protracted and

1273. J E Greedy for Chief Surveyor to General Manager, Whakatane District Council, 2 November 1984 (Doig, supporting papers to 'Te Urewera Waterways' (doc A75(a)), p 213)

1274. Doig, 'Te Urewera Waterways' (doc A75), p 131

expensive process would be required to prove whether a riverbed is navigable and therefore owned by the Crown.

There is no suggestion that such a process has ever been conducted in the past for the rivers in our inquiry district. Government departments do seem to have been more cautious in asserting navigability since the 1980s. Crown counsel's submission in our inquiry was that the Crown 'likely' owned navigable riverbeds (whatever navigable might be taken to mean), and that what really mattered is that agencies extracting gravel acted in the bona fide belief that the Crown owned the river concerned – which, after all, 'may have been the case'.[1275]

There is also the question of what might happen in the future, if further new technologies make rivers 'navigable' within the meaning of the now defunct coal mines legislation. Suzanne Doig commented:

> The owners also face the prospect that changing technological or social circumstances, which might cause an upsurge in river use or make rivers more accessible, may at some point in the future lead to a loss of ownership rights in the rivers if the Crown chooses to deem the rivers navigable. This uncertainty, and the uncertainties posed by the inconsistent application of the law, make it difficult for the people of Te Urewera to manage their interests in the rivers with any confidence.[1276]

In sum, the Crown has asserted its ownership of the riverbeds of the inquiry district in a variety of ways. The most far-reaching assertion came in the 1950s, when long stretches of riverbed were made part of the national park, including by way of making the consolidation scheme riverbank reserves a part of the park. Outside of the national park, the issue seems to have arisen largely in respect of gravel extraction, because extractors could be charged royalties for Crown-owned rivers. To a lesser extent, it also arose when the Government had to decide whether or not to claim dry riverbed land after a water course had changed. In those instances, the Crown has claimed various beds or parts of beds from time to time, through different agencies – sometimes by licensing local bodies – and has also apparently abandoned claims or changed the basis of the claim from navigability to the *ad medium filum* presumption. Finally, the Crown has asserted ownership where pieces of riverbed have been needed for the Aniwhenua and Wheao hydro schemes, although that issue was dealt with by the Te Ika Whenua Rivers Tribunal and we say no more about it.

Given the transitory nature of Crown claims to ownership, we have the impression that riverbed ownership was really of little interest to the Crown after the establishment of the national park. This may well be because so many powers of control over rivers became vested in it by statute – quite independently of who owned the beds – in the second half of the twentieth century. We consider that issue later. Next, we turn to the crux of the claimants'

1275. Crown counsel, closing submissions (doc N20), topic 30, pp 8, 16–17
1276. Doig, 'Te Urewera Waterways' (doc A75), p 135

argument, which is that the law in respect of ownership of riverbeds is so uncertain that their property rights are hopelessly unclear and often violated, to their serious detriment.

21.16.6 Is the law of riverbed ownership uncertain?

In previous sections, we have discussed many complex questions, including whether the *ad medium filum* presumption applied (or should have applied) in our inquiry district, whether the peoples of Te Urewera knowingly and willingly sold their rivers, whether they lost ownership of river beds within or that bounded consolidation scheme lands, and the extent to which the Crown has actually asserted ownership of the inquiry district's riverbeds.

Counsel for Wai 36 Tuhoe asked us to make a finding that 'the Crown has wrongfully acquired by legislation or by operation of the UDNRA and UCS title to Tuhoe's rivers within Te Urewera, or has left the state of ownership of rivers in confusion.'[1277]

Counsel for Ngati Manawa summarised the central issue in his reply to the Crown's closing submissions:

> The real problem with the issue of title to river beds seems to be that neither the Crown nor anyone else has any clear idea as to which river beds belong to the Crown and which do not. The Crown says that 'it would be quite wrong to assume that tangata whenua have lost ownership to all riverbeds in the inquiry district in the absence of direct block-by-block evidence' and that this question 'is not an issue that admits of easy, generic answers in the abstract'.
>
> In a sense this is a fair observation. However one would expect that in the case of major waterways such as the Rangitaiki River (a river of great significance to Ngati Manawa) the Crown would have some idea as to what stretches of the river it actually lays claim to and on what basis. Without knowing the basis for Crown claims to ownership in any given case it is hard to know whether any such claim is well-founded or not – even in the ordinary law, quite apart from any consideration of Treaty breach. Until the Crown deigns to inform the claimants as to what waterways it believes it owns and why, the matter is indeed 'in the abstract'.
>
> Ms Doig makes this all very clear at p 137 of her excellent report:
>
> 'Any attempt to state for certain which riverbeds within Te Urewera are owned by the Crown and which remain owned by Maori is riven with difficulties. Foremost amongst these difficulties is the uncertainty of the law in New Zealand with respect to ownership of riverbeds. Many commentators now doubt whether the application of common law rules such as the presumption of *ad medium filum* can override Maori customary title to rivers, but it can be difficult to distinguish if or when customary title to rivers has been extinguished.

1277. Counsel for Wai 36 Tuhoe, closing submissions, pt C (doc N8(b)), p 15

21.16.6

> This lack of certainty is a matter of great frustration for claimants, who believe that they are entitled to a clear and certain understanding of the extent of their ownership rights. As it stands, the Crown does not appear able to provide this without recourse to complicated and expensive legal proceedings.'
>
> It is submitted that the Crown cannot tell us what stretches of the Rangitaiki River it owns (and the Wheao and Whirinaki for that matter) because it – or rather, its officials – do not themselves have any idea, and indeed cannot do so given that the law relating to riverbed ownership is in such a state of hopeless ambiguity, uncertainty and confusion.[1278]

Counsel for Wai 36 Tuhoe agreed, stating: 'It is particularly disappointing that the Crown has not addressed the uncertainty of rights of ownership and management of rivers arising from the legal regime applying to rivers.'[1279]

The Crown's submissions must be taken as agreeing that there is at least an element of doubt, since Crown counsel was only prepared to use the word 'likely' for its ownership of riverbeds of navigable rivers in Te Urewera, although it does claim ownership of at least some (unspecified).[1280]

Guidance on some points of uncertainty has been provided by the recent Supreme Court *Paki* decisions, although this guidance has come comparatively late, given how long the law has been in force. It is also notable that the High Court, the Court of Appeal, and one Supreme Court justice took a very different view about the meaning of a 'navigable river' from that of the majority in the Supreme Court. This underlines further the uncertainties that had existed until 2012 and were highlighted in cases such as *Leighton*. Be that as it may, the Supreme Court confirmed in 2012 that navigability requires purposeful use for transport or trade, and must be determined for each part of a substantially navigable waterway. The saving clause in the coal mines legislation only applied to express grants of a riverbed, not all Crown grants. The legislation was held to be declaratory, not expropriatory (although the question of its effects on Maori customary rights was specifically not addressed). Navigability depends on the state of a river as at 1903, not after later modifications to the water course.[1281] To take one of the examples discussed earlier, recreational use of the Ohinemataroa River by jet boat would not now, in light of the Supreme Court decision in *Paki*, be sufficient of itself to make a river navigable.

In light of the discussion in preceding sections, however, we have found the following areas of significant uncertainty in the law of riverbed ownership in our inquiry district:

- Whether *In re the Bed of the Wanganui River* will continue to be interpreted by the courts as authority for a universal rule of Maori custom, and as authority on the effects of tenure conversion on that custom.

1278. Counsel for Ngati Manawa, submissions by way of reply (doc N26), pp 6–7
1279. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 43–44
1280. Crown counsel, closing submissions (doc N20), topic 30, pp 8, 11
1281. See *Paki v Attorney-General* [2012] 3 NZLR 277 (SC).

This was already in doubt at the time of our hearings, but the High Court and Court of Appeal followed *Wanganui River* in *Paki* in 2009–2010, after which the Supreme Court pronounced *Wanganui River* 'questionable'.

Our view is that the *ad medium filum* presumption was not Maori custom in Te Urewera.

- Whether the various tenure conversion processes in Te Urewera (the Native Land Court, the Urewera commissions, and the 1909 Act) had the effect of extinguishing Maori customary title to rivers, after which the *ad medium filum* presumption applied to the new land titles.

  Our view is that Maori customary title to rivers was not extinguished by tenure conversion in Te Urewera. From the evidence available to us, the Native Land Court and the Urewera commissions neither investigated nor awarded river titles.
- Whether the statutory language of the Coal-mines Act Amendment Act 1903 and its successors was sufficiently explicit to extinguish Maori customary title to rivers. The superior courts have not yet pronounced authoritatively on this point of doubt, first raised by the Court of Appeal back in 1994.

  It seems to us that if the 1903 Act did succeed in extinguishing Maori customary title in Te Urewera, then it was done without consent or compensation and was expropriatory of Maori property rights.
- Whether the Crown acquired Te Urewera riverbeds by operation of the *ad medium filum* presumption when it acquired Maori freehold land by purchase or award for survey costs.

  Our view is that it may have done so at law, if the courts were to follow *Wanganui River*. Nonetheless, it cannot be shown that any rivers in Te Urewera were knowingly or willingly sold to the Crown, and there is significant evidence to the contrary.
- Whether the Crown acquired Te Urewera riverbeds by operation of the *ad medium filum* presumption when it was awarded riparian lands by the Consolidation commissioners.

  It seems to us that it may have done so at law, if the courts were to follow *Wanganui River*. But Te Urewera leaders came out of the 1921 hui with the understanding that the consolidation scheme would not affect the ownership of rivers, which they believed they retained. When it seemed as if the Crown might be obtaining the Ohinemataroa (Whakatane) and Tauranga (Waimana) Rivers as part of its award, Tuhoe protested and the Government responded that no rivers had been awarded to the Crown. Whatever the ambiguities of the wording of that response, Tuhoe clearly did not intend to transfer ownership, and there was no knowing or willing transfer of ownership of any rivers as part of the Urewera consolidation scheme.

21.16.6

- Whether the *ad medium filum* presumption may be rebutted in Te Urewera by the surrounding circumstances, namely the continued exercise of Maori customary rights and responsibilities to their taonga, the rivers, long after land purchases by the Crown.

  It seems to us that there is considerable evidence in support of such a rebuttal, if it were indeed held that the presumption had applied to Maori freehold land at the time of its transfer to the Crown.
- By what authority marginal strips or riverbank reserves were inserted between Maori land and rivers by the Consolidation commissioners, and whether these strips conveyed ownership of riverbeds to the Crown by operation of the *ad medium filum* presumption.
- Whether the inclusion of riverbeds in the national park by statute was sufficient to extinguish Maori customary title to those rivers, if that title had survived the coal mines legislation, the orders of the Urewera commissioners, and the orders of the Consolidation commissioners. The new Te Urewera Act 2014 may have a bearing on that question, but that is not a matter for us – the Tribunal has no jurisdiction in respect of that Act.
- The remaining uncertainties about the meaning of navigability after the *Paki* decision, and whether it can reasonably be said that any of the rivers of our inquiry district are navigable within the meaning of that legislation, or that any significant stretches of them are navigable.
- The uncertainties created by the lack of a mechanism to formally declare a river navigable, the same rivers having sometimes been treated as Crown-owned and at other times not, ultimately leaving their ownership unclear without recourse to expensive and possibly protracted legal proceedings.

Essentially, there are many points of doubt as to who owns the riverbeds of Te Urewera. The biggest uncertainty is whether Maori customary title to rivers has survived the various points at which it might have been extinguished at law. It is also very uncertain whether any rivers or parts of rivers are 'navigable' within the meaning of the coal mines legislation, and which rivers or parts of rivers are claimed as such by the Crown. We found it hard to believe that this was still completely unknown in 2005, some 100 years after the passage of the 1903 Act. A third major area of uncertainty is whether the *ad medium filum* presumption may be rebutted at the time of sale (of riparian lands) to the Crown. We have discussed that possibility at length in preceding sections.

The claimants assert that they still own the rivers, and the Crown does not; and there is evidence to support their position. The Crown's most permanent assertion of ownership was the inclusion of riverbeds in the national park (although, as noted, the situation of those rivers may now depend on the Te Urewera Act 2014). Outside the park, the Crown has asserted ownership where convenient but has never sustained a long-term claim to any

riverbeds, except where it has built and maintained hydroelectric structures. In the Crown's submission, the question of who owns riverbeds it is a 'question of law that could be determined by the Maori Land Court or the High Court'.[1282] On the one hand, this position preserves the rights of Maori (and anyone else) to have their property defined by the courts according to law. On the other hand, it appears that it could entail expensive and protracted litigation for every individual stretch of riverbed, as in the *Paki* case, before ownership is certain. We think it highly unlikely that such litigation would stop at the Maori Land Court or the High Court. The Crown also relied on the *ad medium filum* presumption as a rule of law that is intended to resolve 'any ambiguity as to the boundaries when a sale of land bordered a river'.[1283] Clearly, it has not had that effect in Te Urewera; quite the opposite.

As we found in chapters 10 and 14, the Crown introduced the Native Land Court and later the Urewera consolidation scheme with promises of certainty of title. It has failed to deliver on these promises in respect of rivers.

Ultimately, ours is a Treaty jurisdiction and we will consider later whether the Crown's title system, laws, and actions have been consistent with Treaty principles. Next, we turn to consider the question of control of rivers, which has become divorced from ownership in Te Urewera by the passage of various statutes in the twentieth century. This was of major concern to the claimants in our inquiry, who argued that these statutes virtually nullified their kaitiakitanga and their tino rangatiratanga in respect of the rivers.

21.16.7 How has the Crown asserted authority and control over rivers and customary fisheries, and with what effects?

(1) *Introduction*

As we discussed earlier in the chapter, the claimants believe that the Crown has assumed an 'all-encompassing' control of the environment in Te Urewera, including an absolute control of all resources. The effect of the Crown's 'exclusive environmental management within Te Urewera is that the tino rangatiratanga of Tuhoe is disregarded'.[1284] One aspect of this control was the Crown's ban on all hunting of native birds, which we have already discussed. We also explained earlier how the Crown took general control of the environment in Te Urewera from the 1930s onwards. It imposed a regime of forest protection in order to preserve the supply of water to Lake Waikaremoana for hydroelectricity and to prevent erosion and flooding in lower-lying farm districts. The claimants accepted that 'the Crown does have a power and a duty to manage natural resources in the interests of conservation but that these rights are qualified by the tribe's te tino rangatiratanga'.[1285] The Crown's view was

1282. Crown counsel, closing submissions (doc N20), topic 30, p 8
1283. Crown counsel, closing submissions (doc N20), topic 30, p 9
1284. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 153
1285. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 153

that its control was not as absolute as the claimants argued, and was justified by its responsibilities under article 1 of the Treaty. Crown counsel submitted that, while obliged to control and manage natural resources in the interests of conservation and the national interest, it has not assumed such an exclusive role, nor has it ignored or excluded the peoples of Te Urewera.[1286]

One of the disputed aspects of control over the environment has been the degree of authority the Crown has given itself in respect of rivers. The claimants' principal concern was that the Crown has assumed exclusive control by statute, disregarding their tino rangatiratanga and their obligations as kaitiaki, and has then managed the rivers badly, resulting in erosion, pollution, and habitat destruction, which could all have been avoided. In particular, the Crown has modified and used rivers for hydroelectricity, without consent or compensation, and its actions have caused serious damage to customary fisheries. The Crown made two concessions in response: it had only conducted 'limited consultation' in respect of river management until 'relatively recently';[1287] and it had 'facilitated' the introduction of trout, which had had damaged indigenous fisheries.[1288] Otherwise, the Crown's view was that rivers are now managed with an appropriate degree of Maori input through Resource Management Act (RMA) processes.[1289]

We begin our analysis with a brief outline of the legislation for the control and management of rivers, before proceeding to outline the opportunities for Maori participation in the care and management of these taonga, and the effects of Crown management on rivers and fisheries.

(2) *The historical legislation for the control and management of rivers*

From the earliest decades of the colony, the Crown has introduced laws to control aspects of river management, especially those related to the needs of Pakeha settlement: town water supplies, drainage, flood protection, and water rights for various agricultural or industrial uses. The latter included water rights for mining, irrigation, and hydroelectricity, each provided for in a separate statute (such as the Gold Fields Act 1862, Mines Act 1877, Public Works Act 1882, Water-supply Act 1891, and Water-power Act 1903). These, and other statutes, 'consolidated the Government's control over water, regulated potential conflict between farming, mining, and industrial interests, prevented monopolies, and assured public access or private usages'.[1290] Tribal authority and ownership of waterways was barely considered in the enactment of these statutes, and various pieces of legislation contained

1286. Crown counsel, closing submissions (doc N20), topic 29, p 12
1287. Crown counsel, closing submissions (doc N20), topic 37, p 3
1288. Crown counsel, closing submissions (doc N20), topic 30, p 2
1289. Crown counsel, closing submissions (doc N20), topic 30, pp 13–18
1290. Waitangi Tribunal, *Whanganui River Report*, p 21; see also Michael Roche, *Land and Water: Water and Soil Conservation and Central Government in New Zealand, 1941–88* (Wellington: Department of Internal Affairs, 1994), chapter 1.

provisions that overrode Maori customary rights. For example, Acts dealing with the floating of timber down rivers and streams, treated eel weirs as obstructions to the colonists' use of rivers.[1291] As the Whanganui River Tribunal found, the Crown's recognition that Maori had rights was largely restricted to lakes:

> While the Government made laws for the protection, reform, and acquisition of Maori customary land, specific statutory recognition of Maori interests in lands covered by water was given only in respect of lakes.[1292]

In Te Urewera, Pakeha settlement was mostly limited to the fringes of the inquiry district, and the great bulk of the area was kept for catchment preservation or forestry, with some allowances for Maori farming. Towns sprang up later in the twentieth century to service the timber industry, again on the outskirts of our inquiry district. As a result the nineteenth-century statutes by which the Crown assumed control of rivers were largely inoperative in Te Urewera. As Suzanne Doig put it, 'many of these [statutes] have not been of relevance in Te Urewera, because of the Crown's limited presence in the area until relatively recently'.[1293] The most relevant of the early statutes was the Water-power Act 1903 and its successors, under which the Crown modified Lake Waikaremoana and the waterways of the four southern blocks from the 1920s to the 1940s (see chapter 20). Hydro development was not an issue again until the 1970s, when the Crown granted water rights for the Aniwhenua and Wheao power schemes.[1294]

Apart from the specific issue of hydroelectric development, the Crown's assumption of control over the rivers of Te Urewera began in the 1940s, after the consolidation scheme and the Crown's decision to repurpose most of Te Urewera for water and soil conservation. Dr Doig summarised the main developments as follows:

> Since the title reorganisation under the Urewera Consolidation Scheme, there has been little further alienation of riparian land within Te Urewera. Nevertheless, the rights of Urewera Maori have been eroded further in that time by the transfer of almost all rights of control and management in rivers and waterways to the Crown, through legislation such as the Soil Conservation and Rivers Control Act 1941, Water and Soil Conservation Act 1967, Conservation Act 1987, and Resource Management Act 1991. In many ways, the provisions of these Acts have made the question of riverbed ownership almost irrelevant, because they have allowed the Crown to assume extensive management rights over rivers regardless of underlying ownership.[1295]

1291. See Waitangi Tribunal, *The Hauraki Report*, vol 3, pp 1112–1120, 1154–1159.
1292. Waitangi Tribunal, *Whanganui River Report*, p 20
1293. Doig, 'Te Urewera Waterways' (doc A75), p 168
1294. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 47–49
1295. Doig, 'Te Urewera Waterways' (doc A75), p 3

21.16.7(2)

The Soil Conservation and Rivers Control Act 1941 was introduced to address some of the erosion and river control problems which were becoming more apparent in New Zealand by that time. The worsening environmental effects of 'over-extensive forest clearance in vulnerable catchments' could no longer be denied.[1296] We discussed this Act in chapter 18, where Government restrictions on timber milling in Te Urewera were the primary issue. In respect of rivers, the 1941 Act gave the Crown 'extensive and exclusive powers to control and manage all rivers and waterways regardless of who had riparian rights or riverbed ownership'.[1297] In particular, the Act was aimed at empowering the Crown to control and manage rivers for the prevention of flooding and erosion. The Crown established catchment boards or commissions as the means to exercise this newly acquired authority. Control of each river had to be formally vested in a board or commission by notice in the Gazette.[1298]

According to Suzanne Doig's research, however, control of the rivers draining northwards to the Bay of Plenty was not formally vested in a catchment commission, although the Bay of Plenty commission still undertook a 'range of river control activities' – apparently without lawful authority.[1299] This reflected two issues: in Te Urewera, forest cover remained in place in many areas, and so flooding and erosion problems were comparatively minor; and the problems mainly affected Maori communities, which were in part dealt with under the development schemes, and in part ignored by county councils (who could not collect rates from Maori until the 1960s).[1300]

The historical statute of most concern to the claimants in respect of rivers, however, was the Water and Soil Conservation Act 1967, under which the Crown's powers were further entrenched.[1301] This Act preserved the ability of riparian owners to take reasonable quantities of water for domestic and fire fighting purposes and to provide for the needs of animals. Otherwise, landowners' common law rights of exclusive access and use were taken away. All uses of water, other than the domestic and pastoral uses specified above, would henceforth require consent from a regional water board. Authority was delegated to these boards by the Crown, in which was vested 'the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water'.[1302] The system of allocating water rights was placed under the ultimate control of the Water and Soil Conservation Authority. The Tribunal commented in its *Te Kahui Maunga* report: 'It soon became apparent that the Crown had effectively nationalised rights to water.'[1303]

1296. Doig, 'Te Urewera Waterways' (doc A75), p 197
1297. Doig, 'Te Urewera Waterways' (doc A75), p 197
1298. Doig, 'Te Urewera Waterways' (doc A75), pp 197–198
1299. Doig, 'Te Urewera Waterways' (doc A75), pp 197–198
1300. Doig, 'Te Urewera Waterways' (doc A75), pp 197–199, 202–204
1301. Counsel for Tuawhenua, closing submissions, appendix (doc N9(a)), pp 117–118
1302. Water and Soil Conservation Act 1967, s 21
1303. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 1009

The Crown's view of the 1967 Act is that it was an 'exercise of reasonable and good governance' in the management of natural resources according to a 'hierarchy of interests'.[1304] We have already referred to this 'hierarchy of interests' above, as it was an argument on which the Crown also relied in respect of its management of kereru. Relying on previous Tribunal reports, the Crown submitted that there is a

> hierarchy of interests in respect of natural resources based on kawanatanga and tino rangatiratanga. The first interest is the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Then comes the tribal interest in the resource, ahead of the rest of the public.[1305]

In our view, Maori rights and interests were neither considered nor provided for in the Water and Soil Conservation Act 1967, certainly not ahead of the rest of the public. The Treaty was discussed briefly by the interdepartmental committee that reviewed arrangements for water in 1965, as we outlined above. But Maori values and interests were conspicuous by their absence from the Act's long title, which enumerated the interests to be balanced and protected:

> An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, water supplies of local authorities, fisheries, wildlife habitats, and all recreational uses of natural water.

An amendment in 1981 replaced the words 'water supplies of local authorities, fisheries, wildlife habitats, and all recreational uses of natural water' with 'community water supplies, all forms of water-based recreation, fisheries, and wildlife habitats, and of the preservation and protection of the wild, scenic and other natural characteristics of rivers, streams, and lakes'.[1306] The Treaty and Maori rights and interests were still not mentioned. This was despite the inclusion four years earlier, in the Town and Country Planning Act 1977, of the Maori relationship with their ancestral lands and waters (as a matter to be recognised and provided for).[1307] It was not until 1987, after the High Court's decision in *Huakina Development Trust v Waikato Valley Authority*,[1308] that 'consideration of Maori matters became a requirement under the Act'.[1309] As is well known, the 1967 Act itself was replaced soon after by the Resource Management Act in 1991.

1304. Crown counsel, closing submissions (doc N20), topic 29, p 45
1305. Crown counsel, closing submissions (doc N20), topic 29, p 12
1306. Water and Soil Conservation Amendment Act 1981
1307. Waitangi Tribunal, *Te Tau Ihu*, vol 3, p 1119
1308. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188
1309. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 62

21.16.7(2)

The *Huakina* decision applied to water use rights. For water conservation orders, however, the Planning Tribunal held that the Treaty and Maori values could not be taken into account under the Water and Soil Conservation Amendment Act 1981.[1310] National water conservation orders were a new development in 1981, created by this Amendment Act. Their purpose was to protect or preserve outstanding rivers, lakes, and streams. The criteria to be taken into account when granting water conservation orders were:

- all forms of 'water-based recreation, fisheries, and wildlife habitats';
- the 'wild, scenic, or other characteristics' of the waterway;
- the 'needs of primary and secondary industry, and of the community'; and
- any relevant local government planning schemes.[1311]

The legislative scheme was 'geared towards Pakeha needs and did not give any protection to Maori interests in the rivers of Te Urewera'.[1312] No Te Urewera waterways were granted conservation orders. Dr Doig commented:

> The whole process was an indication of some of the problems faced by Maori who wished to be involved in rivers management and protection. While a protection mechanism existed, its operation was governed almost entirely by Pakeha values and interests in the rivers. Matters of particular importance to Maori were not taken into account, and there was no consultation whatsoever with tangata whenua over the assessment of waters and the implementation of protection mechanisms.[1313]

In 1984, the Tribunal's *Report on the Kaituna River Claim* recommended that the Water and Soil Conservation Act be amended to enable proper account to be taken of Maori spiritual and cultural values.[1314] In 1985, the Tribunal's *Report on the Manukau Claim* agreed that the Act was 'monocultural legislation', and that Maori interests were treated as if they were no greater than those of the general public. The Tribunal recommended special recognition and an appropriate measure of priority for Maori Treaty fishing rights.[1315] The Mohaka River Tribunal also found the Act in breach of Treaty principles in 1992,[1316] but by that time the 1967 legislation had been replaced by the RMA 1991.

We do not accept the Crown's submission that the 1967 Act put the Crown's interest in conservation of the resource first, the tribal interest second, and the general public third. We consider the Treaty implications later in section 21.17.

1310. Doig, 'Te Urewera Waterways' (doc A75), p 185; Waitangi Tribunal, *The Mohaka River Report*, pp 59–60
1311. Waitangi Tribunal, *Mohaka River Report*, p 59
1312. Doig, summary of 'Te Urewera Waterways' (doc F6), p 11
1313. Doig, 'Te Urewera Waterways' (doc A75), p 188
1314. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wellington: Waitangi Tribunal, 1984), p 33
1315. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Government Printer, 1985), p 86
1316. Waitangi Tribunal, *Mohaka River Report*, p 66

(3) *The historical control and management of rivers in Te Urewera*

(a) *Gravel extraction, erosion, flood protection, and pollution:* As we noted earlier, the Crown has made a concession in respect of its historical management of rivers. Crown counsel accepted that:

> The evidence shows that until relatively recently, the Crown conducted limited consultation in respect of river management issues on gravel extraction and flood control.[1317]

Gravel extraction had two dimensions: the first was the issue of riverbed ownership, which we have already discussed. As we have seen, the Crown licensed gravel extraction and the levying of a royalty on the basis that rivers were navigable, had marginal strips along their banks, or belonged to the Crown *ad medium filum*. Crown counsel argued that Government agencies acted in the bona fide belief that the riverbeds were Crown-owned, although it was accepted that there were occasions on which this 'may not have been the case'. No compensation was paid to Maori riparian owners when a Government agency acted on the 'bona fide' belief of Crown ownership.[1318] But, as we have explained, the question of riverbed ownership is riven with uncertainties, a point which was debated by the interdepartmental committee in the 1960s and by the law reform committee and Government departments in the 1980s. In particular, the Crown (and local government bodies acting on its behalf) have denied royalties to Maori riparian owners on the basis of very casual and apparently incorrect assessments of navigability. The view put forward in the 1970s that the Ohinemataroa River, for example, was navigable because of recreational use by jet boats was controversial at the time. The Supreme Court's recent decision in Paki holds that recreational use provides only supporting evidence, not proof, that a river might be navigable.

The claimants were concerned that the Crown has appropriated the profits of gravel extraction by claiming ownership of their rivers, even where Maori landowners might have had riparian rights (let alone customary rights). Gravel extraction was very limited in the national park. Outside the park, Dr Doig's evidence showed that large quantities of gravel have been removed from Te Urewera rivers since the 1960s, mainly by local government bodies and the Ministry of Works. Considerable royalties paid to the Crown have sometimes used to help finance river works; and at other times the Crown has waived its royalty. A 1963 investigation showed a lack of precision in authorising and monitoring gravel extraction at Ruatoki. From the evidence available to us, this situation persisted until the passage of the RMA in 1991. From one perspective, this means that there was a casual attitude to which rivers or parts of rivers were privately owned, which parts of a river were authorised for extraction, and whether royalties were owed to anyone other than the Crown. From

1317. Crown counsel, closing submissions (doc N20), topic 37, p 3
1318. Crown counsel, closing submissions (doc N20), topic 30, p 17

another perspective, it also meant that the environmental impacts of gravel extraction were also treated somewhat casually.[1319]

In the claimants' view, gravel extraction has been poorly administered and monitored, resulting in erosion and degradation to rivers and riparian lands in Te Urewera. As we noted above, the Crown has conceded that consultation before 1991 was inadequate for river management, including gravel extraction and flood protection. As the owners of many riparian blocks, Maori in Te Urewera have been particularly vulnerable to river changes, with a corresponding need to have a significant degree of control over decisions about river management.

In 1977, the National Water and Soil Conservation Organisation wrote a damning paper about the 'fragmented' administration of gravel extraction, which had resulted in uncontrolled takings and in 'many cases' had caused erosion and flooding.[1320] Whether or not the system was improved nationwide, Environment Bay of Plenty commented in 2001 that, prior to the RMA in 1991, both 'the licensing and control of gravel excavation was carried out on a somewhat ad-hoc basis' in this area.[1321] There was 'very little monitoring of the amount of gravel taken, the places it was taken from, and the effects on the rivers'. As Dr Doig observed, in 1980:

> The Bay of Plenty Catchment Commission could not quantify the amount of gravel taken from rivers in the area because it did not know how much was being taken under authorities issued by other government departments. Nor could it give any indication of the size of the natural resource, or provide any information on natural shingle movements in rivers.[1322]

It seems clear that poor monitoring of gravel extraction contributed to erosion before the RMA, but we can only make that finding at a general level. The claimants, for example, showed us a section of the Ohinemataroa River which, they believed, had been substantially altered in its course by gravel extraction. But we do not have detailed evidence about the impacts of the extractions on particular rivers or Maori riparian land.

Erosion, flooding, and the lack of flood protection were issues long before gravel extraction began in earnest in the early 1960s. Dr Doig's evidence focused on the former territories of the UDNR, where the rating exemption meant that local bodies took little or no interest in flood protection for Maori communities before the 1960s. Maori riparian owners, often with small, uneconomic sections, could not afford the construction of flood protection works without assistance. Nor could they move their cultivations and settlements, as they would have done before tenure conversion and massive land loss took away this customary

1319. Doig, 'Te Urewera Waterways' (doc A75), pp 220–236
1320. National Water and Soil Conservation Organisation, 'Control of Sand and Gravel Extraction: Background Paper' (Doig, supporting papers to 'Te Urewera Waterways' (doc A75(a)), pp 264, 266–267)
1321. Environment Bay of Plenty, *Operative Regional River Gravel Management Plan* (Whakatane: Environment Bay of Plenty, 2001), sec 3.3 (Doig, 'Te Urewera Waterways' (doc A75), p 226)
1322. Doig, 'Te Urewera Waterways' (doc A75), pp 226–227

flexibility. It was a dilemma: river access was important to cultural and economic survival, but the rivers of Te Urewera were prone to erosion. Farming, commercial forestry, and the introduction of new, browsing species such as deer and opossums exacerbated the problem in parts of the inquiry district.[1323]

The claimants blamed the Crown for some of these causative factors, including the effects of introduced species and State forestry on rivers but the key issue here is not so much the Crown's degree of responsibility for erosion and flooding.[1324] Rather it is:

- the way in which it managed the problem (having given itself exclusive powers and responsibility to do so under the 1941 and 1967 Acts); and
- the assistance it provided in the form of flood protection works.

For Maori riparian owners in Te Urewera, the only help forthcoming before the 1960s was on the development schemes. According to Dr Doig's evidence, flood protection was not a priority for the Native Department administering the schemes. The works that were done became a financial burden on the owners and unit occupiers, and they do not appear to have been very successful.[1325]

Despite protests to the department and requests for specialist assistance in designing protection works, no action was taken, and protection against bank erosion remained a very low priority for scheme managers, 'even though large parts of some dairy units were being washed away'.[1326] There was confusion over responsibility as the Native Department believed it was the job of the Department of Public Works to build protection works.[1327] Damage was 'allowed to accumulate until it became virtually uneconomic to address the problem':

> When the Bay of Plenty Catchment Commission took over management, 730 acres of river flats in the upper Whakatane had become unproductive, and 460 acres on the Waimana River had been subject to erosion.[1328]

For Maori land, the Whakatane County Council did not take responsibility for bank protection works and other river management functions until about 1964. By then, as we discuss in more detail in chapter 23, the rates exemption was ended. This made the 'more developed riparian blocks' rateable. Overall responsibility for rivers in the district, however, was assumed by the Bay of Plenty Catchment Commission. It found that the large amount of Maori land on the banks of the Ohinemataroa (Whakatane) and Tauranga (Waimana) Rivers was a significant factor in the problems that had developed with erosion. Much of the

1323. Doig, 'Te Urewera Waterways' (doc A75), pp 192–213; Doig, summary of 'Te Urewera Waterways' (doc F6), pp 11–12
1324. Tama Nikora, brief of evidence (doc J40), p 7; Hakeke Jack McGarvey, brief of evidence (doc J33), p 6; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 196
1325. Doig, 'Te Urewera Waterways' (doc A75), pp 202–204
1326. Doig, 'Te Urewera Waterways' (doc A75), p 203
1327. Doig, 'Te Urewera Waterways' (doc A75), p 203
1328. Doig, 'Te Urewera Waterways' (doc A75), p 203

erosion on these waterways was on Maori-owned land on the upper rivers (above Ruatoki), according to the commission's engineer.[1329] The quantity of Maori land 'posed a problem in considering a flood protection scheme for these rivers, because the small block sizes and fragmented titles made it difficult to raise rates on the land – many blocks were unproductive and uneconomic, or had been overexploited by lessees'.[1330] One of the ongoing problems of using bank protection works was that 'they were expensive for riparian landowners and needed to be maintained and repaired over time, often at great cost'.[1331] A capacity to contribute effectively in the struggle against erosion was dependent on having commercially viable property from which costs could be deducted to combat environmental degradation.

The land retained by Maori owners was not generally so productive or was too small in individual parcel size to allow their effective participation in decision-making around funding for erosion protection. Basically, the peoples of Te Urewera were not able to bring financial pressure to bear on the catchment boards and regional councils because their landholdings were not significant enough to have implications for funding decisions. As Dr Doig commented in relation to the process that led to this result:

> the ongoing process of individualisation of title, either through the consolidation schemes or ordinary Native Land Court processes, made it increasingly hard for hapu or iwi to maintain their customary or Treaty rights to waterways.[1332]

We have no information as to whether the process of re-collectivising in the 1970s, and the creation of tribal trusts for amalgamated or aggregated lands, made a difference in this respect. As we noted earlier, the trustee arrangements for Tuhoe Kaaku were not finalised until the 1990s, and arrangements for Ruatahuna blocks were also long-delayed and still not complete by the end of that decade.

We have general evidence, therefore, that Maori riparian land in the inquiry district was particularly vulnerable to erosion and flooding, but received limited assistance from the agencies in which the Crown had vested absolute control of river management and flood protection works. Maori were seldom consulted and had little or no power to influence decision-making. According to Dr Doig, any consultation that did occur was limited to riparian landowners, not Maori communities or tribal authorities more generally. But we do not have detailed evidence as to flood protection (or the lack of it) for particular rivers or Maori communities in Te Urewera. Dr Doig's evidence suggests that coastal farmland was the priority area for the Bay of Plenty Catchment Commission's protection works. Most Maori riparian land in Te Urewera was left out of the major protection works constructed in the 1960s and 1970s, although Ruatoki, Waimana, and other areas did obtain some benefit.

1329. Doig, 'Te Urewera Waterways' (doc A75), p 204
1330. Doig, 'Te Urewera Waterways' (doc A75), p 204
1331. Doig, 'Te Urewera Waterways' (doc A75), p 209
1332. Doig, summary of 'Te Urewera Waterways' (doc F6), p 5

For Ruatoki, she reported that protection works were not being maintained by the 1990s because the Maori riparian owners simply could not afford it.[1333]

Waikirikiri kaumatua Hori Thrupp spoke of the toll that erosion had taken on Maori riparian land at Ruatoki. He told us:

> Our lands that have been carried away by the river or covered in shingle are as follows –
> Ruatoki A63 Pita Pouwhare whanau
> Ruatoki A64 Noho TeWharau whanau
> Ruatoki A65 Kewene Reha whanau
> Te Awatapu
> Matai
> Ngautoka
> Poutere
> Hauruia
> Waitapu
> Toketehua
> Onuitera
> Otauirangi
> Ohinenaenae
> Te Rautao
> Te Tapapatanga
> Tapuiwahine
> Hokowhitu a Tu
>
> Ruatoki A64 (13 acres) and A65 (41 acres) has been completely devastated by the river. My daughter has to continue paying rates on the whole of those blocks notwithstanding that most of the land has been carried away by the river. Despite all that, we still consider the river belongs to us and that we still own the land that has been overtaken by the river and the shingle.[1334]

We see a bitter irony in the fact that, as Brenda Tahi put it, the claimants faced forestry restrictions that required them to 'sacrifice development of the Urewera for the public good', so as to prevent erosion and flooding of low lying Pakeha farmland.[1335] The water and soil conservation laws were used against them to achieve that end (see chapter 18), yet they received little benefit from those laws or from flood protection measures for their own riparian lands.

1333. Doig, 'Te Urewera Waterways' (doc A75), pp 201–209; Doig, summary of 'Te Urewera Waterways' (doc F6), pp 9, 12

1334. Hori Thrupp, brief of evidence, 13 January 2005 (doc J41(a)), p 4

1335. Brenda Tahi, summary of evidence on behalf of the Tuawhenua Research Team, 10 May 2004 (doc D19), pp 8–9

21.16.7(3)(b)

Another matter, on which we have even less evidence in respect of particular rivers, is the issue of pollution. According to Dr Doig, river pollution has certainly occurred in Te Urewera due to 'run-off from sprays and fertilisers, pest-control poisons, human waste, farm effluent, storm-water pollution and leaching from riverside dumps around the townships, and unwanted plant invasions'.[1336] The dominance of the national park and forestry in the inquiry district means that pollution from towns and farms has mostly been limited to the fringes of the district. Inside the park, the claimants were particularly concerned about pollution of waterways by human waste and pest-control poisons, but their evidence was focused more on Lake Waikaremoana than the rivers running through the park. Dr Doig's research on this issue concentrated on the period since 1991. We are unable to draw any conclusions about river pollution before the RMA, except to say that some pollution occurred, and Maori had – as with other aspects of river management – little or no say in how it was managed or rectified.[1337]

(b) ***The impacts of the Crown's hydro schemes:*** The impacts of hydro development were felt in two parts of our inquiry district.

The Matahina, Aniwhenua, and Wheao power schemes have already been dealt with by the Tribunal in its *Te Ika Whenua River Report*. We received no new evidence that would cause us to reconsider the findings of that Tribunal in respect of the hydro schemes and their impacts.[1338]

The other relevant power scheme was the Waikaremoana scheme, which we described in chapter 20. The Tuai phase of the scheme was constructed in the 1920s. It used the fall of water between Lake Kaitawa, which is located about a kilometre from Lake Waikaremoana, and the Whakamarino Flat, a swampy, eel-rich area which was converted into an artificial lake. From 1938 to 1943, the lower (Piripaua) phase was constructed, running from the newly created Lake Whakamarino down to the lower courses of the Waikaretaheke River. This was followed by the upper (Kaitawa) phase, on which work began in 1943. Previously, water from Lake Waikaremoana had been the source of power but had not been actively controlled at the lake itself. In the 1940s, as we described in chapter 20, a tunnel was constructed to lower the lake and divert its waters from the natural outlet (the Waikaretaheke River) through a kilometre of tunnels and penstocks, directly to Lake Kaitawa. That stretch of the Waikaretaheke River is now usually dry, especially after the sealing blanket was constructed to stop the leaks. The siphons are used to spill water into the dry bed if the lake levels become too high. Previously, water had spilled over the lake's natural barrier into the river about half of the time, and it had also seeped through the cracks into the river, so

1336. Doig, 'Te Urewera Waterways' (doc A75), pp 161–162

1337. Doig, 'Te Urewera Waterways' (doc A75), pp 161–167; Doig, supporting papers to 'Te Urewera Waterways' (doc F6), pp 9, 15

1338. See Waitangi Tribunal, *Te Ika Whenua Rivers Report*, chapters 5–6, 9–11.

water flows varied considerably. After the hydro works in the 1940s, water re-entered the Waikaretahake River 'at the point of the river's diversion into Lake Kaitawa' (see map 21.2). Lake Kaitawa, originally about a hectare in size, became six hectares after its enlargement for hydroelectricity.[1339]

The effects on the river were also considerable south of Lake Kaitawa as far as the Piripaua power station. The stretch of the river between Lake Whakamarino and Piripaua 'alternated between being dry and being used as a short term discharge channel'.[1340] The Kahui Tangaroa (also known as Kahutangaroa) River has had its waters diverted and is now partly dry. The diversion of the Mangaone Stream made this stream bed dry as well, but it was cancelled in 1998 after resource consents were refused. We have no information as to whether negotiations to resume the Mangaone Diversion (underway at the time of our hearings) have been resolved.[1341]

As noted earlier, our jurisdiction is limited, in respect of the four southern blocks, to the 'Crown's actions in relation to all the hydro-electric structures and works in Lake Waikaremoana or near the Lake involving waters taken from it, . . . irrespective of the date of the alleged breaches'.[1342] This encompasses the hydro scheme from the lake's edge to Piripaua, but not south of that power station.

Garth Cant and Robin Hodge explained that the resources of the upper Waikaretaheke Valley were crucially important to its local Maori communities, especially once Ngati Ruapani had to live there permanently after evacuating their northern Waikaremoana lands in the wake of the Urewera consolidation scheme. Significant numbers of Ruapani, Tuhoe, and Ngati Kahungunu whanau were living on small, riverside reserves at the time of the hydro scheme. The valley's rivers, streams, and wetlands were more productive than Lake Waikaremoana or Lake Waikareiti in terms of mahinga kai (food gathering places), and the people were dependent on those resources for the subsistence component of their economy. The employment provided by the hydro works proved useful but transitory.[1343] As we noted earlier, there is considerable evidence that the peoples of this valley continued to use the rivers and fisheries as they had before the sale of the four southern blocks, until the hydro scheme interrupted a significant part of their customary resource-use and way of life. When the hydro works were completed and the employment dried up, Maori communities 'were

1339. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 17–18, 147–160

1340. Garth Cant and Robin Hodge, summary of 'The Impact of Environmental Changes on Lake Waikaremoana and Lake Waikareiti, Te Urewera', undated (2004) (doc H11), p 17

1341. Cant and Hodge, summary of 'The Impact of Environmental Changes on Lake Waikaremoana', (doc H11), pp 15–18; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 240

1342. Waitangi Tribunal, memorandum-directions, 12 April 2002 (paper 2.32), p 9

1343. Cant and Hodge, summary of 'The Impact of Environmental Changes on Lake Waikaremoana' (doc H11), p 15

faced with the choice of moving elsewhere for employment or remaining in the valley with a *greatly reduced subsistence base* [emphasis added]'.[1344]

The Waikaretaheke and its tributaries were also of crucial ecological importance because this river system was the connection between Lake Waikaremoana and the sea. For the indigenous fish species that 'migrate to and from the sea', especially eels, this was their pathway.[1345] Garth Cant and Robin Hodge argued that the

> negative impacts were greatest in the case of the upper Waikaretaheke River. The bed became dry for most of each year, habitat was lost and the migration path for eels and other species was interrupted.[1346]

Overall, there was a significant loss of habitat and mahinga kai, as a result of the drying up or significant reduction of water in rivers and streams, and through the stopping of fish migration. Cant and Hodge commented that the quantity and quality of flora as well as fauna diminished, both in the waterways and on their banks.[1347] The new lakes, however, probably continued to be fished as intensively as the wetlands they replaced, although they were now 'land locked' and with fewer species – Lake Whakamarino, for example, was fished by Ngati Ruapani. Maori continued to exercise their customary fishing rights wherever and whenever the new, diverted waterways allowed.[1348]

The claimants told us that there were significant spiritual and cultural consequences to the hydro works. As we discussed in chapter 20, the claimants were very concerned about Haumapuhia, the taniwha who had been turned to stone and who resided in the upper part of the Waikaretaheke River. Haumapuhia was buried in a landslide at the time of the construction works (see chapter 20). Her lament is no longer heard.[1349] Maria Waiwai and others spoke in our hearings of the cultural loss when a taonga is destroyed; when their rivers and streams ran dry, it was a spiritual blow to the kaitiaki of those taonga and damaging to their tribal community. The loss of a renowned food source was also a blow to the survival of the community, culturally and economically.[1350]

James Waiwai explained:

> One of the most obvious ways that the Hydro Power Dams have impacted upon our people is that they have changed the natural flow of the rivers, and thus changed the natural

1344. Cant and Hodge, summary of 'The Impact of Environmental Changes on Lake Waikaremoana' (doc H11), p 15
1345. Cant and Hodge, summary of 'The Impact of Environmental Changes on Lake Waikaremoana' (doc H11), p 15
1346. Cant and Hodge, summary of 'The Impact of Environmental Changes on Lake Waikaremoana' (doc H11), p 16
1347. Cant and Hodge, summary of 'The Impact of Environmental Changes on Lake Waikaremoana', (doc H11), pp 16–18
1348. James Anthony Waiwai, brief of evidence (doc H14), pp 23–25
1349. Lorna Taylor, brief of evidence, 18 October 2004 (doc H17), p 13
1350. Maria Waiwai, brief of evidence (doc H18), pp 4–6

> cycles of our food sources that depend on those rivers. There are strong reasons why our people live near water – we live here for our spiritual and physical sustenance. We are all connected, we all rely on each other. When you change one part of us, it flows through to all our other parts.[1351]

Eels were the main source of protein for the communities living at Waimako and Te Kuha, according to the evidence of James Waiwai.[1352] In the late 1990s, a programme was finally instituted to try to reverse the harm to the migration cycle of the eels. Cant and Hodge explained at a hearing in 2004:

> By 1996 . . . no eels were present beyond the diversion dam at Kaitawa. The results of a capture and release programme, organised jointly by iwi and power generating authority have yet to be evaluated. An eel management plan is still in preparation. Only within the last decade have steps been taken to restore this much- depleted habitat.[1353]

We have no information as to whether the eel management plan is succeeding in restoring the migration of eels between Lake Waikaremoana and the sea.

Counsel for Wai 144 Ngati Ruapani submitted:

> Without title to the Lake and associated river systems the Crown authorised and constructed the Tuai Power Scheme without consulting the hapu of Waikaremoana.[1354]

The evidence supports the claimants' view that the hydro scheme was conceived and executed without consulting the peoples of Te Urewera – indeed, the Kaitawa phase was constructed almost in defiance of them, because the tunnelling was underway even as the Native Appellate Court sat in 1944 to decide who owned the lakebed (see chapter 20). We also agree with the claimants that the scheme had significant detrimental effects on them and their taonga, the rivers and fisheries, which is demonstrated in the evidence of Cant and Hodge, Maria Waiwai, James Waiwai, Des Renata, and several others.

The Crown accepted that hydro works on the Waikaretaheke River had 'affected the ability of tangata whenua to conduct traditional fishing activities', and had restricted eel migration.[1355] Crown counsel noted, however, evidence that reduced flows *below* the Piripaua power house have aided the migration of some species, such as inanga, up the Waikaretaheke River. The point was also made that the removal of forest cover has had effects on indigenous fish as well, independently of the power scheme. Further, Crown counsel emphasised the RMA consents process in the mid-1990s, which produced the eel

1351. James Anthony Waiwai, brief of evidence (doc H14), pp 23–24
1352. James Anthony Waiwai, brief of evidence (doc H14), p 24
1353. Cant and Hodge, summary of 'The Impact of Environmental Changes on Lake Waikaremoana', (doc H11), p 18
1354. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 65
1355. Crown counsel, closing submissions (doc N20), topic 30, p 16; topic 28, p 15

management plan and discussions between Electricorp and Maori groups about river flows (among other things), before the consents were granted. Since the RMA process, Electricorp and its successor Genesis have worked with iwi to help restore the eel fishery.[1356] The claimants made no submissions about the RMA process in the 1990s, but they did accept that there was now at least a plan in place to try to restore the eel fishery.[1357] Its success was uncertain at the time of our hearings in 2005, with the claimants pointing to technical evidence that 'the measures may be "insufficient to repair the damage" caused to the fisheries by the dams over the years.'[1358]

The Crown's overall submission was that modern effects can be appropriately managed through RMA processes. For historical effects:

> Historically, whatever negative impacts the Waikaremoana power scheme had on the local environment must be assessed against the significant benefits its generation of electricity has provided to the country.[1359]

We think that the Crown rightly acknowledged the impact on customary fisheries, but cannot escape its Treaty obligations to the peoples of Te Urewera by invoking the national interest in electricity. We return to that point when we make our Treaty findings.

Here, we note the claimants' submissions that they received no benefit from the use of their taonga, the rivers, to generate hydroelectricity in the national interest. Ngati Ruapani urged us to apply the findings of the Te Ika Whenua Rivers Tribunal, that the Maori owners of the Waikaremoana river system were 'entitled to have had conferred on them in 1840 a proprietary interest in the rivers that could be practically encapsulated within the legal notion of the ownership of the waters.'[1360] We have already noted our agreement with this finding above, in respect of the western rim blocks and the Rangitaiki, Whirinaki, and Wheao Rivers. We agree with the Ngati Ruapani claimants that the same finding should be made for the Waikaremoana river system.[1361] It should indeed be made for all the rivers of our inquiry district. This accords with our findings in respect of the use of Lake Waikaremoana for hydroelectricity without permission or compensation (see chapter 20). The Crown argued that 'rivers, as opposed to the water within rivers, are the focus of cultural importance.'[1362] Without the water, however, the river is simply a dry bed, as Maria Waiwai's evidence so poignantly reminded us.[1363] We agree that the claimants' taonga were indivisible water bodies. The use of those water bodies to generate electricity for the national benefit

1356. Crown counsel, closing submissions (doc N20), topic 28, pp 15, 16–17
1357. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), appendix A, p 81
1358. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), appendix A, p 123
1359. Crown counsel, closing submissions (doc N20), topic 28, p 17
1360. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 68
1361. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), pp 63–68; appendix A, pp 110–112
1362. Crown counsel, closing submissions (doc N20), topic 30, p 23
1363. Maria Waiwai, brief of evidence (doc H18), pp 4–6

should have been compensated. That is quite apart from any compensation due, morally if not legally, for the harm done to their waterways and fisheries by the scheme.

We turn next to consider the control and management of customary fisheries in more detail.

(c) ***Managing customary fisheries:*** Customary fisheries are a taonga, the importance of which cannot be overstated. The claimants referred us to the findings of the Muriwhenua Fishing Tribunal, which they felt had a wider significance in explaining the relationship of the peoples of Te Urewera with all the natural gifts of the environment, including fisheries.[1364] The Tribunal found:

> In the Maori idiom 'taonga' in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift-exchange, and is a part of the complex relationship between Maori and their ancestral lands and waters. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.
>
> This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.
>
> The Maori 'taonga' in terms of fisheries has a depth and breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future which colours their thinking, attitude and behaviour towards their fisheries.
>
> The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or 'belonging', but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a 'hurt' to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.
>
> The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.

1364. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 135–138

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> This vision provided the mauri (life-force) which ensured the continued survival of the iwi Maori. Maori fisheries include, but are not limited to a narrow physical view of fisheries, fish, fishing grounds, fishing methods and the sale of those resources, for monetary gain; but they also embrace much deeper dimensions in the Maori mind . . .[1365]

For all tangata whenua, as this excerpt makes clear, indigenous fish are much more than particular classifiable species that may be used as a food resource. Claimants in our district have noted, for example:

> One of the Ngai Tamaterangi tohunga was Rongo Hema. He was the tohunga for the Waiau River. Rongo ensured that the Waiau River and its users were protected. All fishing was undertaken depending on the signs and seasons and fishing of particular species could only be undertaken in certain months of the year. Karakia were an integral part of fishing and the first fish was always returned.[1366]

As we explained earlier in the chapter, the single biggest threat to the customary fisheries of Te Urewera has been the introduction of trout. Predation by trout, or competition by trout for food supplies, had a destructive effect on many of the indigenous fish species of our inquiry district. In the first half of the twentieth century, the evidence is clear that the management of fisheries by Government departments exacerbated this problem, because it was essentially management to protect a Pakeha sport fishery. This mostly consisted of constant introductions of trout ova into the rivers of Te Urewera over many decades, licensing of anglers, and efforts to eradicate or reduce species that were perceived as a threat to the trout fishery. We have already seen that this resulted in a campaign to wipe out shags at Waikaremoana, and efforts to cull eels in Te Urewera rivers in the 1950s. Commercial eeling served a similar purpose and was encouraged in the 1960s by the grant of free licences.[1367]

Alongside the management of what was essentially a trout fishery for anglers, the official attitude to most indigenous species was indifferent (except, as noted, where eels were seen as a threat to trout). In Parliament, the importance of customary fisheries to Maori had been acknowledged many times since the early decades of the twentieth century, but little or no Government action had been taken to protect or conserve those fisheries. Section 83 of the Fisheries Act 1908 had provided for the making of regulations relating to freshwater fish, and in the Fisheries Amendment Act 1948, regulations could be made:

> Prohibiting or imposing restrictions and conditions on fishing in any waters or in any specified part or parts thereof, or the taking of any species of fish therein, and, in the case of

1365. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: Waitangi Tribunal, 1988), pp 180–181

1366. Counsel for Ngai Tamaterangi ki Ngati Kahungunu, third amended statement of claim, 16 April 2004 (claim 1.2.4(a)), p 68

1367. Doig, 'Te Urewera Waterways' (doc A75), pp 147, 159–161

> indigenous fish, exempting Maoris either wholly, partially, or conditionally, or in respect of any specified waters, from the operation of any such prohibition, condition, or restriction.[1368]

In the Legislative Council, the Government explained that the intention of this subsection was to allow the imposition of restrictions on (Pakeha) fishing

> while specifically recognising the existing rights of the Maori in relation to indigenous fish. That is a most important provision, as for many years the Maori people have had certain rights in regard to the fisheries in our lakes and rivers . . . which will be preserved under that paragraph.[1369]

In line with the intentions of the 1948 amendment, in 1951, new Rotorua Trout Fishing Regulations were made for roughly the area covering the Rotorua Acclimatisation District, excluding Taupo. The regulations therefore covered Te Urewera. The section relating to indigenous fish in these regulations was much the same as that in the Freshwater Fisheries Regulations 1951, which covered most of the rest of New Zealand. These general regulations provided for protection of upokororo, probably by that time already extinct, and forbade the intentional killing of small indigenous fish other than elvers in the water, while allowing the taking of whitebait and other small indigenous fish for human consumption and scientific purposes. The Rotorua regulations, however, made an additional provision:

> No person (not being a Maori) shall take from any lake or from any tributary of any lake in the district any small indigenous fish in such quantity that he shall have in his possession more than fifty of such fish at any one time.[1370]

It therefore appears that these regulations meant that only Maori could take an unlimited number of small indigenous fish from lakes and their tributaries in Te Urewera. This shows that, while the 'conservation of all indigenous freshwater fish species and their habitats' only finally appears in a statute in 1983 (section 71(1) of the Fisheries Act 1983), there was an attempt, albeit limited, to protect indigenous fish other than tuna for Maori in Te Urewera from the mid-twentieth century. The exception allowing the culling of elvers, however, was only removed from the regulations in 1977.[1371] Consequently, until that point the fish most important to the peoples of Te Urewera received the least statutory protection from the Crown. As we discussed earlier in sections relating to the introduction of exotic species, tuna (eels) were the most important customary fishery for the peoples of Te Urewera.

1368. Geoff Park, *Effective Exclusion?: An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912–1983* (Wellington: Waitangi Tribunal, 2001) (Wai 262 R01, doc K4), p 211

1369. D Wilson, 19 August 1948, NZPD, 1948, vol 282, p 1602

1370. Freshwater Fisheries Regulations 1951, part XV; Rotorua Trout Fishing Regulations 1951, cl 70; sch 1

1371. Regulations 13 to 16 of the 1977 regulations (1977/268) amended regulations 99 to 102 of the Freshwater Fisheries Regulations 1951.

21.16.7(3)(c)

For much of our inquiry district, however, the national parks legislation was in force from the late 1950s onwards. This brought a preservationist approach to significant stretches of rivers and their indigenous fisheries. As will be recalled from chapter 16, park lands and waterways were to be preserved as far as possible in their natural state, including the native flora and fauna, while exotic flora and fauna were 'as far as possible' to be exterminated.[1372] In theory, this set the prior Government policy – to protect the trout fishery at the expense of indigenous fisheries – at complete loggerheads with the national park ethos. The National Parks Act 1952, however, allowed the National Parks Authority to make exceptions.[1373] Such an exception was made for trout in Te Urewera National Park, and the park authorities have celebrated trout fisheries as a key part of its 'wilderness fishing experience' and 'internationally renowned angling opportunities'. Trout have been classed as a recreational fishery in the national park, and angling was permitted so long as the angler held a licence.[1374] On the other hand, the impact of trout on indigenous species has also been acknowledged.

The imposition of the national park on the peoples of Te Urewera could have had a very significant impact on their ability to continue exercising their customary fishing rights. The people had continued to exercise customary rights over the natural resources of Te Urewera between the consolidation scheme in the 1920s and the creation of the park; the 'alienation of land, was of the land only'. It was 'after the National Park was established in the 1950s that conflicts emerged'.[1375] The practical impact on rivers and customary fishing was investigated by Evelyn Stokes, Wharehuia Milroy, and Hirini Melbourne in the mid-1980s. They reported:

> Eel fishing is a traditional food collecting activity in most rivers, which is still carried on in traditional ways – spear, eel bob, hinaki and building of weirs. Conflicts with national parks and reserves policy include use of kiekie to make eel bobs, digging up riverbank areas to find worms for bait, and construction of dams or weirs in rivers. As far as local people are concerned, eeling is something they have always done, and they will go on doing it. No permits are required and there is little commercial involvement. The issue is whether any permanent damage is inflicted on the forest resource. It would appear that there is occasional minor disturbance but eel fishing creates few real problems.
>
> Native fish species were never very abundant in the rivers of the higher ranges of Te Urewera and have been largely replaced by exotic trout species introduced in the 1890s. Local people do go fishing [for trout] and it is suspected many do not obtain permits [licences]. For obvious reasons it is not possible to assess the extent of fishing by local people, but it is certainly a significant element in local food-gathering activities. Pressures may increase in river areas flanked by Maori blocks in the Whakatane and Waimana valleys if there is an

1372. National Parks Act 1952, s 3
1373. National Parks Act 1952, s 3
1374. Department of Conservation, *Te Urewera National Park Management Plan 2003*, pp 17, 29, 74, 85–86
1375. Stokes et al, *Te Urewera* (doc A111), p 350

> increase in numbers of fishermen from outside. Although local people are aware that they cannot prevent public use of rivers, there is still a strong feeling that these areas are Maori and local people should have priority.[1376]

For eeling and trout fishing, therefore, the national park's establishment had little practical effect on how the peoples of Te Urewera exercised their customary rights in rivers, except that it brought more sports anglers to the district. We use the word 'customary' deliberately in respect of trout. As we have discussed earlier in the chapter, trout had been fully integrated into the customary economy before the 1950s; indeed, the survival of Maori communities had been partly dependent on it during the difficult decades after birding restrictions were enforced. The 1895 UDNR agreement had anticipated that the peoples of Te Urewera would manage the trout fishery (as well as their own, indigenous fisheries), but no mechanism was put in place to give effect to that part of the agreement.

As we see it, if Maori had had the management of fisheries in their Reserve, some rivers would likely have been reserved for indigenous species, the constant releases of trout ova would have been balanced more carefully against the interests of indigenous species, and tuna would have been protected, rather than being the subject of eradication attempts. As it was, the peoples of Te Urewera continued to exercise their fishing rights, controlling the customary take by means of rahui and community sanctions, but without the ability to control or influence the fishing of others. In these respects, the national park made little practical difference to customary fishing. The claimants' evidence focused mainly on grievances in respect of plant-gathering and hunting restrictions in the park, although the ability to access the rivers without horses was an issue.[1377]

The customary tuna fishery was formally recognised in the national park's 1989 management plan. The Department of Conservation said that it would have 'full regard to the Treaty of Waitangi and the traditional rights of the tangata whenua', and that the 'traditional fishing of eels by the tangata whenua for food and other cultural purposes will be permitted provided the demands are not excessive'.[1378]

Suzanne Doig's evidence is that, for species other than eel, trout have devastated the indigenous fisheries of Te Urewera. The Crown has accepted this point in closing submissions. We have already discussed this issue earlier in the chapter. The main issue remaining for discussion here is the significant decline of the eel fishery itself, the most vital of the Te Urewera customary fisheries, and the degree of the Crown's responsibility for that decline.

1376. Stokes et al, *Te Urewera* (doc A111), pp 353–354

1377. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 189, 194, 197–199; counsel for Tuawhenua, closing submissions, appendix (doc N9(a)), pp 181–182; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 57, appendix A, pp 99–100, 138; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 120

1378. Department of Conservation, *Te Urewera National Park Management Plan 1989–1999* (Rotorua: Department of Conservation, 1989) (Campbell, 'Te Urewera National Park, 1952–75' (doc A60), pp 177, 179

21.16.7(3)(c)

Global climate change is one factor that is considered significant in different parts of the world, because it has reduced the number of elvers coming into a catchment area from the sea. Three other factors recognised internationally as affecting the number and passage of elvers may all have contributed substantially to a lower eel population in Te Urewera. All of these factors have been largely under the control of the Crown: commercial overfishing; habitat loss; and barriers to migration.[1379] A further factor, the attempted culling of tuna on the grounds that they adversely affected the trout population, was also under the control of the Crown but was mostly limited to the 1950s.[1380]

In respect of barriers to migration, these have already been discussed in the previous section dealing with the hydro works. According to Dr Doig, indigenous fish and traditional fisheries were almost never considered when hydroelectric construction was planned, except that on occasion the long-standing official view that tuna threatened trout was repeated. This militated against providing eel passes in dam designs.[1381] The failure to consult with Maori about the schemes was crucial here:

> the expertise of Maori in river management was not acknowledged or taken into account – any consultation with Maori over the likely environmental impacts of the dams would have raised the issue of the effects of migratory barriers such as dams on the eel population.[1382]

Since the late 1990s, serious efforts have been made to provide for eel migration in the Waikaremoana scheme. As noted, the Crown accepts that 'the building of dams on the main stems of the Rangitaiki and Waikaretaheke Rivers in particular would have affected the ability of tangata whenua to conduct traditional fishing activities'.[1383]

The Crown also acknowledged that commercial fishing has had a similar impact.[1384] Crown counsel relied on Ministry of Fisheries expert Terry Lynch, whose evidence was:

> From the late 1960s commercial fishing for tuna greatly expanded, including within the inquiry area. While the building of dams on the main stems of the Rangitaiki and Waikaretaheke Rivers in particular had a drastic effect on recruitment to the majority of the inquiry area, increased commercial fishing depleted the resident stocks of tuna. In combination these actions did affect the ability of tangata whenua to conduct their traditional fishing activities.[1385]

1379. Electricity Corporation of New Zealand, 'Waikaremoana Power Scheme Volume 2: Assessment of Effects on the Environment', April 1998, p 125

1380. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 147; Stirling, 'Southern Te Urewera Waterways and Fisheries' (doc I9), pp 9–11

1381. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), pp 151–152, 173–174

1382. Doig, 'Te Urewera Waterways and Freshwater Fisheries' (doc A75), p 174

1383. Crown counsel, closing submissions (doc N20), topic 30, p 16

1384. Crown counsel, closing submissions (doc N20), topic 30, p 16

1385. Terry Lynch, brief of evidence (doc M14), p 26

The Crown's submission was more limited, noting Mr Lynch's conclusion that dam construction and commercial fishing had 'affected the ability of tangata whenua to conduct traditional fishing activities', as we discussed above. What Mr Lynch more precisely said was that dam construction 'had a drastic effect on recruitment [of tuna] to the majority of the inquiry area', and that commercial fishing had 'depleted the resident stocks of tuna'.[1386] In other words, commercial fishing depleted existing stock and dam construction seriously hindered recovery of the stock. Many claimant witnesses pointed out the decline in their tuna fishery, and the effect that this has had on their mana, their ability to manaaki their manuhiri, and their ability to transmit traditional knowledge and the taonga itself to future generations.[1387] The interests of those wanting dam construction and expanded commercial fisheries were advanced to the detriment of the interests of tangata whenua in their customary fisheries. Neither for dam construction nor for commercial fishing did those involved have to consider the customary fisheries of the peoples of Te Urewera, whether to mitigate any damage caused, or to vary what they did to allow for customary fisheries to operate effectively, or to compensate for any damage caused to customary fisheries. The effect of exclusion of the peoples of Te Urewera from management decision-making, of not being able to exercise authority and control over their fisheries taonga, was to make that taonga more vulnerable to damage from competing interests, within the existing Crown-controlled and regulated regime.

Commercial eeling 'spiked in the early 1980s, and has remained stable since that point'. More recently, a moratorium on new commercial fishing permits has been imposed, and tangata whenua have been allocated quota in our inquiry district.[1388] While we consider modern developments in the next section, we note Mr Lynch's observation about the past fisheries regime:

> The claimants have claimed that the rivers are managed for commercial purposes to the exclusion of customary interests. *While in the past this could be claimed to be a reasonable observation*, the steps [now] taken to discharge the Crown's duties to iwi in respect of fisheries are intended to sustainably manage the fishery and properly recognise the customary and commercial interest of tangata whenua in the tuna fishery [emphasis added].[1389]

Habitat depletion is a matter on which we have less systematic evidence. Clearly, in the areas where State and private forestry has occurred, it has had an impact on rivers and their fisheries,[1390] although to what extent is unknown. Similarly, flood protection works

1386. Terry Lynch, brief of evidence (doc M14), p 26
1387. See, for example, Hapimana Higgins, brief of evidence (doc F31), pp 2–3, 9; Neuton Lambert, brief of evidence (doc H57), pp 5–7.
1388. Terry Lynch, brief of evidence (doc M14), pp 26–31
1389. Terry Lynch, brief of evidence (doc M14), p 30
1390. Jack Tapui Ohlson, brief of evidence (doc G36), paras 24–29; Doig, 'Te Urewera Waterways' (doc A75), pp 218–220

have changed the course and character of rivers, and farming has also had impacts on the fringes of our inquiry district. In the national park, however, habitat has been preserved as far as possible in its natural state, and this has no doubt benefited indigenous fisheries. Small numbers of a variety of indigenous fish still survive in national park waterways.[1391]

The lack of provision for tangata whenua to have input into management decision-making over customary fisheries has led to serious damage and depletion of that taonga. We consider that the Crown has failed until very recently to take appropriate account of the importance of indigenous fish, particularly tuna, to the peoples of Te Urewera. The Crown's failure to manage indigenous fish, other than in ways that have actively encouraged a reduction in tuna populations, appears to have favoured the interests of Pakeha sports fishing above the needs of tangata whenua. Activities associated with agriculture, commercial fishing, and hydroelectricity production have had further significant impacts, almost invariably damaging, on the fisheries taonga.

We note that the Tribunal does not have jurisdiction to consider grievances relating to commercial fishing. It is necessary to weigh the effects of commercial fishing in relation to other factors, as above, but we will make no findings specific to commercial fishing in our Treaty analysis and findings section.

(4) *Modern river and fisheries management: the RMA era*

(a) ***Post-1991 fisheries management:*** The Crown's position in respect of traditional fisheries and their management was that 'tangata whenua interests are taken into account . . . through the fisheries regime.'[1392] The claimants, on the other hand, argued that the modern fisheries management regime was 'insufficient' to ensure that fish stocks – especially tuna – remained at a level suitable for customary harvest.[1393] Two key, overlapping issues arise: the management of customary fishing; and the management of indigenous fish species and their habitats.

Before the Sealords Deal in 1992, Maori customary fishing was treated by the Crown as part of recreational fishing, and managed under the amateur fishing regulations. As part of the fisheries Treaty settlement of 1992, the Crown undertook to negotiate a separate set of regulations with Maori to govern customary fishing. These negotiations took several years, resulting in the Fisheries (Kaimoana Customary Fishing) Regulations 1998. At the time of our hearings in 2004–2005, however, these regulations only applied to coastal fishing. Freshwater fishing was still administered under the latest version of the amateur fishing regulations, which had been developed in 1986. Thus, the 1998 regulations' provisions for Maori management of customary fishing, and for Maori–Crown decision-making about policy, were not available to the peoples of Te Urewera. From Terry Lynch's description of

1391. Department of Conservation, *Te Urewera National Park Management Plan 2003*, p 17
1392. Crown counsel, closing submissions (doc N20), topic 30, p 14
1393. Counsel for Te Okoro Joe Runga, submissions by way of reply (doc N32), p 4

the two regimes, the one operating in Te Urewera was clearly inferior in recognising Maori rights and authority, a point to which we return below.[1394]

The Crown's submission that 'tangata whenua interests are taken into account . . . through the fisheries regime' was based on Mr Lynch's evidence, which the Crown understood to be: 'currently tangata whenua play an important role in regulating customary fishing *in rivers* in accordance with the Fisheries (Kaimoana Customary Fishing) Regulations 1998' (emphasis added).[1395] This was a misreading of his evidence. Mr Lynch explained:

> In the North Island, Regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986 provides the only mechanism for tangata whenua to take freshwater species for customary use. The provisions of the [Treaty of Waitangi (Fisheries Settlement) Act 1992] have not been applied as yet to freshwater species because of recent legal challenges by some iwi to the application of the 1992 Fisheries Deed of Settlement (the Deed) to freshwater fisheries. The Courts have found the Deed to apply to all species including freshwater species managed under the Fisheries Act 1996. The Ministry is making regulations to cover freshwater fisheries in the Rotorua Lakes, and intend to consult iwi in the North Island on the desirability of extending the application of the Kaimoana Regulations to freshwater fisheries.
>
> In the interim, Regulation 27 provides that fishers may take tuna for hui or tangihanga if they hold a permit signed by an authorised representative of a marae committee, Maori committee, runanga or trust board that represents the hapu or iwi that hold manawhenua in the area where fishing will take place. Fishers must mark their gear with their telephone number to enable Fisheries Officers to determine who is fishing and whether they are recreational fishers or authorised customary fishers. They must also report their catch to the person who authorised the customary harvest. The authorised representative must provide quarterly reports to the Ministry to enable the level of customary harvest to be properly taken into account when setting allowances for customary use.[1396]

The claimants did not make any submissions about this situation, either the suitability of the amateur fishing regulations or the desirability of applying the 1998 customary fishing regulations in Te Urewera. Their principal concern at the time of our hearings was the decline of their eel fishery, which had been significantly reduced by the factors described in the previous section, including hydro dams, commercial fishing, and habitat degradation.[1397]

Commercial over-fishing and hydro dam barriers were two areas which the Crown could address directly to help restore the customary eel fishery. (Habitat degradation was a more difficult problem, less immediately subject to Crown remedial action.)

1394. Lynch, brief of evidence (doc M14), pp 4–18, 26–27

1395. Crown counsel, closing submissions (doc N20), topic 30, pp 13–14. The Crown relied on paragraphs 15–29 of Lynch, brief of evidence (doc M14).

1396. Lynch, brief of evidence (doc M14), pp 26–27

1397. This principal concern is set out in a number of briefs of evidence and submissions. See, for example, counsel for Te Okoro Joe Runga, submissions by way of reply (doc N32), p 4.

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On the first of these two areas, Mr Lynch told us that a moratorium on new commercial licences, the allocation of significant quota to tangata whenua, and low tuna stocks had all served to reduce commercial fishing in Te Urewera. Little or no commercial fishing was taking place.[1398] Crown counsel 'point[ed] to' this evidence as one of the 'circumstances' to be considered in evaluating the impact of trout and other causes of damage to native fish populations.[1399]

The claimants' view, however, was that the Crown's remedial measures were inadequate to ensure a healthy customary eel fishery:

> Indeed it is the commercial fishermen themselves who make the decision to fish within the Urewera area, and who have chosen not to because previous over fishing combined with hydro development has depleted the stock to a level where it is not worth their while. However, under the current regime, which purports to have as its focus sustainable management, permits for commercial eel fishing within a certain quota management area do not limit eel fishers from fishing where stocks are depleted and therefore in Counsel's submission leaves a wide scope for unsustainable fishing in particular areas.[1400]

As earlier, we note these points to acknowledge that commercial fishing was one factor which affected customary fishing, and which must be described so that undue weight is not given to other factors, but we make no findings in respect of it.

In respect of the second area capable of immediate and direct Crown action, Terry Lynch acknowledged that the Crown's construction of dams had had a drastic effect on the customary eel fishery. Nonetheless, he provided no evidence of any Crown remedies.[1401] Suzanne Doig pointed out that no action had been taken to build bypass channels at the Matahina and Aniwhenua dams for 'eel migration in both directions'.[1402] This had been a recommendation of the Te Ika Whenua Rivers Tribunal in 1998,[1403] which had not been carried out by the time of our hearings. A bypass was built for elvers at the Matahina dam in 1991–1992, and improved in 1996–1997, and hand transfers of elvers have taken place since the 1980s. DOC and Ngati Whare appear to have agreed that these steps were inadequate, and that the Whirinaki River eel fishery, for example, was still in decline.[1404]

As we noted in chapter 20, Electricorp worked with DOC and Maori to develop an eel passage management plan for the Waikaretaheke River and its tributaries as part of the RMA consents process in the late 1990s. The Maori trust boards and the Haumapuhia Waikaremoana Authority were involved in implementing the plan, which was described

1398. Lynch, brief of evidence (doc M14), pp 26–31
1399. Crown counsel, closing submissions (doc N20), topic 30, p 16
1400. Counsel for Te Okoro Joe Runga, submissions by way of reply (doc N32), p 4
1401. Lynch, brief of evidence (doc M14)
1402. Doig, 'Te Urewera Waterways' (doc A75), p 178
1403. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 145; Doig, 'Te Urewera Waterways' (doc A75), p 178
1404. Doig, 'Te Urewera Waterways' (doc A75), pp 176–179

by Genesis as a 'co-management' arrangement. Ministry of Fisheries authorisation was required for elver transfers, and the plan was to be monitored by DOC. Hand transfers of elvers was the primary method but this only provided for one part of the eels' life cycle. The plan required development of a mechanism for safe downstream passage within 10 years. This had not occurred by the time of our hearings in 2005, and the claimants were concerned about that fact. It was too early to tell at that point whether the plan was succeeding in restoring the customary eel fishery south of the lake, although there were promising signs (see chapter 20).[1405]

The question of whether the Crown had done everything in its power to help the eel fishery recover was thus a work-in-progress at the time of our hearings.

More generally, DOC and regional councils have taken steps to protect indigenous fish species. Inside the national park, the achievements had not been stellar by the time of our hearings. As will be recalled from earlier in the chapter, trout predation or competition was a key factor in the serious decline of indigenous fish species (other than eels). A policy was introduced to prevent the further spread of trout to unaffected waterways.[1406] Otherwise, the sport fishery was encouraged in the park, and the department did not prohibit restocking of waterways in which trout had declined or disappeared.[1407] DOC's activities in respect of native fish mostly focused on monitoring.[1408] Professor Murton commented:

> The threat posed to indigenous fish by trout and barriers to access (such as culverts and dams) has been given more recognition under Department of Conservation management, although most action involves monitoring their distribution and abundance, and maintaining an inventory of obstacles to fish passage.[1409]

Outside the national park, Environment Bay of Plenty acted under the RMA to

> put in place policies to encourage the protection and restoration of river habitats for both indigenous fish and trout. Spawning sites have been given extra protection, and through the creation of a calendar of fish migrations, seasonal restrictions have been placed on

1405. In addition to the discussion in chapter 20, see Tracey Hickman, brief of evidence, 7 February 2005 (doc L11), p 19; James Anthony Waiwai, brief of evidence (doc H14), p 25; 'Waikaremoana Power Scheme Resource Consents Monitoring Programmes', schedule 8: 'Eel Passage Management Plan' (Tracey Hickman, papers in support of brief of evidence (doc L11(a)), pp [55]–[60]).

1406. Department of Conservation, *Te Urewera National Park Management Plan 2003*, p 85; East Coast Conservancy, *Conservation Management Strategy 1998–2008*, p 42 (Peter John Williamson, papers in support of brief of evidence (doc L10(a)), attachment F)

1407. Department of Conservation, 'Te Urewera National Park Management Plan: summary of submissions by chapter', submissions on chapter 2, pp 5, 13–14 (Peter John Williamson, papers in support of brief of evidence (doc L10(a)), attachment J)

1408. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 912–913

1409. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 912

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disturbances in rivers during key times, such as whitebait runs, inanga spawning, elver migrations, downstream eel migrations, and trout spawning.[1410]

We have no evidence as to how successful these efforts to protect and enhance indigenous fish stocks have been.

In respect of the management of customary fishing, Mr Lynch's evidence shows that the 1998 customary fishing regulations provided enhanced recognition of Maori fishing rights and greater autonomy in fisheries management than the regime operative in Te Urewera (Regulation 27 of the amateur fishing regulations).[1411] We have no evidence as to whether the peoples of Te Urewera were involved in developing either the 1986 regulations or the 1998 customary fishing regulations, or whether the new regulations have been adopted in Te Urewera since the close of our hearings in 2005.

At the time of our hearings, a significant part of the claimants' customary fishing was managed under the arrangements for Te Urewera National Park, which had its own, distinct statutory framework. As we discussed earlier, customary fishing persisted in the park from the time of its creation in the 1950s, no matter what legal or administrative framework governed it. In their research and assessment of this matter in the 1980s, Stokes, Milroy, and Melbourne pointed out that customary fishing practices were not always strictly lawful in the park. In reality, however, those practices barely modified the environment and so did not conflict with national park values.[1412]

In the consultation which took place over the draft management plan in the late 1980s, some Tuhoe held that the tuna and trout fisheries (among other resources) were Tuhoe resources and should be under the tribe's control; 'the Crown administers the land [of the national park] only'.[1413] The Tuhoe Waikaremoana Maori Trust Board also objected to any restrictions on customary tuna fishing.[1414] According to Dr Coombes, 'the nature of the protest was not only about access to biological resources within the Park; it also highlighted tangata whenua desires to be involved in (and to direct) management'.[1415] At the same time, no doubt recognising that eel fishing was not restricted in practice, park authorities were reminded that there were 'other things besides the taking of tuna that are traditional rights for Tuhoe people'.[1416]

The resultant management plan of 1989 reserved control to DOC, stating that the 'traditional fishing of eels by the tangata whenua for food and other cultural purposes will be

1410. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 913

1411. Lynch, brief of evidence (doc M14), pp 7–16

1412. Stokes et al, *Te Urewera* (doc A111), pp 353–354

1413. 'Tuhoe hunting and access rights. Notes on the deliberations of the tangata whenua of Ruatahuna, undated (1987), pp 5–6 (Coombes, supporting papers to 'Cultural Ecologies I and II' (doc A121(a)), pp 236–237)

1414. Tuhoe Waikaremoana Maori Trust Board, submission to East Coast National Parks and Reserves Board, 5 July 1987, pp 6–7 (Coombes, supporting papers to 'Cultural Ecologies I and II' (doc A121(a)), pp 248–249)

1415. Coombes, 'Cultural Ecologies II' (doc A133), p 378

1416. Peter Owens, minutes of East Coast National Parks and Reserves Board, 15–17 July 1987 (Coombes, 'Cultural Ecologies II' (doc A133), p 391)

permitted provided the demands are not excessive', a judgement which DOC would make.[1417] When DOC defended itself before a special ministerial inquiry a decade later (see chapter 20),[1418] it argued that the management plan's permission for the 'traditional fishing of eels by Tangata Whenua' was one of the matters which made it 'unique in its recognition of the relationship of the Tangata Whenua to this land'.[1419]

The 1998 ministerial inquiry 'suggested the need for "more dialogue"' between DOC and Maori in respect of customary harvesting (including fishing). Nonetheless, this was one of the few matters in which the ministerial inquiry

> did not suggest a process for resolution. It accepted DoC submissions that the management plan included appropriate provisions for tangata whenua use without considering either those provisions or broader debates about customary rights.[1420]

The issue of fishing (as of right) and control of fishing remained important to Tuhoe. When the national park management plan was again up for consultation in 1999, there were submissions from Tuhoe that their right to take customary fish species should be absolute, and also that they should have authority in respect of others' taking of 'all indigenous flora and fauna' (which would have included fishing).[1421]

The 2003 management plan did provide for DOC to negotiate a joint departmental–iwi management arrangement for customary tuna fishing, so long as

- traditional harvesting methods were used;
- the demand did not 'significantly impact on the population of the species or other natural values'; and
- the agreed joint management process could be reviewed periodically to check for adverse effects.[1422]

We did not receive submissions from parties about this apparent DOC concession to the claimants' wishes. Presumably, given that neither the Crown nor the claimants mentioned it, no such joint management regime had been negotiated by the time our hearings closed in 2005. The Te Urewera National Park Management Plan still reserved for DOC the control of non-Maori fishing of tuna in the park's rivers.

1417. Department of Conservation, *Te Urewera National Park Management Plan 1989–1999* (Rotorua: Department of Conservation, 1989), p 62 (Campbell, 'Te Urewera National Park, 1952–75' (doc A60), p 179)

1418. In 1998, in response to Nga Tamariki o Te Kohu's lakeside occupation at Waikaremoana, the Ministers of Conservation and Maori Affairs appointed the Maori Trustee, John Paki, and a solicitor, J K Guthrie, to hold a ministerial inquiry. The purpose was to inquire into a series of allegations about DOC's handling of the lease of Lake Waikaremoana. This inquiry, its origins and outcome, is described in chapter 20.

1419. DOC, '[Draft] response to allegations', 1998 (Coombes, 'Cultural Ecologies II' (doc A133), p 439

1420. Coombes, 'Cultural Ecologies II' (doc A133), p 440

1421. Te Waimana Kaaku, 'Submission, Te Urewera Draft Management Plan', 7 September 2001 (Coombes, 'Cultural Ecologies II' (doc A133), pp 470–471)

1422. Coombes, 'Cultural Ecologies II' (doc A133), pp 472–473

21.16.7(4)(b)

In sum, Maori customary fishing rights received a degree of recognition in DOC's management of Te Urewera National Park. In particular, traditional fishing of tuna was a permitted activity and, by 2003, one which was recognised as requiring departmental–iwi co-management. Other customary fishing in the park continued, not necessarily with the requisite licences, including fishing of trout. What is remarkable for this modern period is that Maori were shut out of any management role for their customary fisheries in the park before the 2003 management plan. Further, their control from 2003 was to be restricted to co-management of their own activities in respect of tuna, not those of other fishers (of tuna) or for other taonga species.

Outside the national park, customary fishing was controlled by amateur fishing regulations up to the time of our hearings. These regulations, as the Crown's fisheries witness showed, gave Maori comparatively little control over their own customary fishing and were clearly inadequate to provide for Maori fishing rights.

In addition, key claimant concerns about the serious decline of the eel fishery were not able to be satisfactorily answered at our hearings. Although the Crown had taken some steps to halt the decline, their effectiveness was at that time unknown. As noted earlier, the decline in the eel fishery was substantially attributable to acts or omissions of the Crown (in particular, its prioritisation of sport fisheries and its introduction of barriers to recruitment of elvers and passage to the sea).

We turn next to the management of rivers in the RMA era.

(b) ***Post-1991 river management:*** In their closing submissions, the claimants made few submissions about the Resource Management Act 1991, and almost none about the Act in respect of its regime for river management. Nga Rauru o Nga Potiki's submissions about the RMA, for example, were focused on how the Act applied to Ohiwa Harbour.

Counsel for Wai 144 Ngati Ruapani made a general statement about all river management regimes over the past few decades, including the RMA:

> The environmental protection regimes put in place by the Crown have not recognised or provided for the traditional fisheries and other activities of Maori with regard to their rivers, and have failed to give Maori the consultative and management role they are entitled to by the Treaty.[1423]

Counsel's submission in respect of post-1991 river management was:

> Problems continue to this day with consultation. Tangata whenua are seldom consulted over the range of waterways management matters, and where [it] does occur, it is in the role of land owner, rather than in recognition of Tuhoe's tangata whenua status. The transfer of management functions from centralised Crown agencies to local governments has been

1423. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), appendix A, p117

difficult, with local authorities arguing they are only required to recognise Treaty rights in terms of the prescriptions of the Resource Management Act 1991.[1424]

Counsel for Wai 36 Tuhoe added that the 1991 Act fell short of what was required under the Treaty because it vested river management in regional councils, and 'Tuhoe have no recognised legal role' to manage their rivers.[1425]

The claimants accepted, however, that the RMA was an improvement on the previous resource management regime. Nga Rauru o Nga Potiki considered that the Act generally was 'well intentioned' but 'has been found on occasion to diminish the status of tangata whenua and in some cases, a full recognition of tangata whenua rights is not assured under its strictures'.[1426] Counsel for Wai 621 Ngati Kahungunu observed that the Crown has vested power over rivers in regional councils, and it is up to those local authorities to decide whether power should be transferred on to iwi authorities (under section 33 of the Act).[1427]

The RMA's purpose is to promote the sustainable management of natural and physical resources. Sustainable management is defined as the *use, development, and protection* of resources in such a way as to enable people and their communities to provide for their social, economic, and cultural well-being (and their health and safety). The Act specifies that 'use' and 'development' must be carried out in a way or at a rate that:

- sustains the resources for future generations;
- safeguards the life-supporting ability of the environment; and
- avoids, remedies, or mitigates any harmful effects.[1428]

The Act, however, does not provide for remedying historical damage, which claimant Douglas Rewi called healing 'the environmental scars of the past'.[1429]

In giving effect to the Act's purpose, all people who exercise powers and functions under it (mainly local authorities) have to consider the matters set out in sections 6 to 8.

The wording of section 6 makes the considerations specified in that section the most important. Decision makers have to 'recognise and provide for' seven 'matters of national importance'. These include 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga'. The protection of 'recognised customary activities' is also a matter of national importance under section 6.[1430] In 2003, section 6 was amended to add the protection of 'historic heritage' as a matter of national importance, which includes waahi tapu and other 'sites of significance to Maori'.[1431]

1424. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), appendix A, p 114; counsel for Tuawhenua, closing submissions, appendix (doc N9(a)), p 114
1425. Counsel for Wai 36 Tuhoe, thematic submissions for Ruatoki hearing, 17 January 2005 (doc J43), p 4
1426. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 268
1427. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 149
1428. Waitangi Tribunal, *Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), pp 54–55
1429. Douglas Te Rangi Kotuku Rewi, brief of evidence, 9 August 2004 (doc F18), p 16
1430. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 55
1431. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maori*, vol 3, p 1166

21.16.7(4)(b)

Section 7 sets out 11 matters to which decision makers under the Act must have 'particular regard', which is a lesser requirement than to 'recognise and provide for' the matters listed in section 6. One section 7 matter is 'kaitiakitanga', defined as 'the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship'. Section 7 also states that 'particular regard' should be given to protecting the habitat of trout and salmon.[1432]

Finally, and with the least weight among these various factors, those who exercise powers and functions under the Act have to 'take into account' Treaty principles.[1433] As counsel for Ngati Haka Patuheuheu observed, the RMA does not '*require* persons exercising functions and powers under the Act to *act in conformity with* the principles of the Treaty of Waitangi' [emphasis added].[1434]

Under the RMA, the 'principal management documents' for rivers are 'regional policy statements and plans', which are prepared by regional councils. When preparing or changing these management documents, councils must 'consult with the tangata whenua' and 'have regard to' any relevant iwi management plans.[1435] We received little evidence, however, as to how the tribal relationship with the council worked in practice, what efforts the council had made to consult iwi and hapu, what input the tribes had had into RMA plans, or how far the people had taken up the opportunities the RMA provides for input and influence (or what resourcing capacity they had to do so). In particular, iwi management plans could have been influential,[1436] but we are not aware whether any such plans were prepared (or whether the peoples of Te Urewera had access to the financial and technical resources to create such plans). Neither the claimants nor the Crown provided evidence on such matters.

Dr Doig referred to the claimants' belief that they are still not fully or adequately consulted under the RMA, although she provided no specific or detailed examples in respect of a river or a river-related matter. She did give an example of positive engagement between the Western Tuhoe Maori Executive and Environment Bay of Plenty on river management at Ruatoki from the late 1990s. Dr Doig also outlined some of the opportunities for input available under RMA processes. But the evidence is short on specifics.[1437]

At the time Dr Doig prepared her report (2002), the process of preparing regional management documents was still ongoing.[1438] There was recognition of the need to consult

1432. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, pp 54–55

1433. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 55

1434. Counsel for Ngati Haka Patuheuheu, submissions by way of reply, 8 July 2005 (doc N25), p 36. Although this submission was made in respect of the Waikokopu Hot Springs, it is also relevant here.

1435. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p 276

1436. When the RMA was enacted in 1991, regional councils were required to 'have regard to' iwi management plans under sections 61 and 66. This was changed by the Resource Management Amendment Act 2003 to a requirement to 'take into account' any iwi management plans.

1437. Doig, 'Te Urewera Waterways' (doc A75), pp 155–158, 163–164, 165–166, 180, 199–200, 236–241, 253–258; Suzanne Doig, responses to questions of clarification, not dated (July 2004) (doc F24), p 5

1438. Doig, 'Te Urewera Waterways' (doc A75), p 199

Maori and to accommodate their values alongside more 'traditional' management issues. Doig considered it unclear, however, 'how well these policies and objectives in planning documents will be transformed into actual practice on the ground, and whether meaningful joint management and extensive consultation will eventuate'.[1439]

According to Dr Doig, Environment Bay of Plenty itself noted in 2000 that

> many local Maori communities have challenged the council's legislative management right over resources not owned by the Crown, and have found it inconsistent with their rangatiratanga and kaitiakitanga. The 'gap in understanding' is particularly large in the case of water resources, given that sole rights of apportioning water usage have been vested in regional councils and mere lip-service [it was believed] is given to the role of tangata whenua as kaitiaki.[1440]

Dr Doig's research revealed a general and persistent distrust of Environment Bay of Plenty, even though the new statutory regime provided 'a major departure from the management structures of the past'.[1441]

The Crown's closing submissions made frequent reference to the RMA in respect of river management. In its view, 'tangata whenua interests are taken into account through the RMA in terms of how the natural environment is managed'.[1442] In all the issues of concern to the claimants, including gravel extraction, pollution, hydro dams, and flood control, the Crown's response was that these matters are now managed appropriately through the RMA. Tangata whenua are consulted and their values are taken into account.[1443] Crown counsel did note Dr Doig's evidence that 'in practice claimants consider this consultation and recognition has been limited'.[1444] But the Crown also observed that 'Doig has not made an assessment of the validity or otherwise of the claimants' concern that this consultation and recognition has been limited'. In the Crown's submission, therefore, there is 'insufficient evidence before the Tribunal to draw any finding of Treaty breach'.[1445]

The Crown offered no evidence of its own in support of its contention that all matters are now managed appropriately through the RMA. In closing submissions, Crown counsel referred us to two specific examples of RMA processes in respect of rivers: the 1998 Electricorp consents process for the Waikaremoana power scheme; and gravel extraction at Ruatoki.[1446]

1439. Doig, 'Te Urewera Waterways' (doc A75), p 200
1440. Doig, 'Te Urewera Waterways' (doc A75), p 199. Doig was relying here on Environment Bay of Plenty, *Draft Regional Water and Land Plan Version 2.0* (Whakatane: Environment Bay of Plenty, 2000), sec 3.1.
1441. Doig, 'Te Urewera Waterways' (doc A75), p 200
1442. Crown counsel, closing submissions (doc N20), topic 30, p 14
1443. Crown counsel, closing submissions (doc N20), topic 30, pp 2–3, 13–18
1444. Crown counsel, closing submissions (doc N20), topic 30, p 13
1445. Crown counsel, closing submissions (doc N20), topic 30, p 14
1446. Crown counsel, closing submissions (doc N20), topic 30, p 17; topic 28, pp 16–17

21.16.7(4)(b)

We have already discussed the Waikaremoana consents process in chapter 20 (see section 20.10.3(4)). Here, we consider the case of the Ohinemataroa River at Ruatoki.

Environment Bay of Plenty had acknowledged in 2001 that 'ownership of river beds and implicitly also gravel' was 'uncertain', and was then 'before the Crown and the courts'.[1447] In the meantime, the council continued to authorise the extraction and sale of metal by contractors.[1448] Steven Oliver described the new regime for this gravel extraction under the RMA as follows:

> Gravel extraction from the Whakatane River is now administered by the Operations and Rural Development Section of Environment Bay of Plenty. Before consents are granted to the removal of gravel from the river affected parties are consulted and independent commissioners are appointed to hear submissions. Site meetings are held before extraction occurs and issues such as access to the sites are discussed. The discussions involve contact individuals and the Western Tuhoe Executive. Appeals can be made and when a consent is granted, the contractors are monitored to ensure the correct amount of gravel is removed.[1449]

Issues at Ruatoki concerned the balance between extraction for profit (selling the shingle) and stabilising the river; flood protection works; access across Maori land; and Tuhoe claims to ownership of the river and its gravel. Mr Oliver's brief account of these issues indicates that there was consultation about extraction in 1991, including with Joe Te Maipi of the Ruatoki River Committee, and that there were later opportunities for landowners and others to have input during the consents processes. But tensions persisted. Tuhoe wanted control rather than consultation. Ownership (and entitlements to royalties) remained a vexed issue, and contractors' machinery was vandalised in protest. Mr Oliver did not provide details or examples of the consents process or how the RMA operated in practice.[1450]

The pre-1991 management regime, in which Maori were not consulted (as the Crown admitted) but rather excluded from all decision-making, had left a legacy of distrust and suspicion. Claimants interviewed by Dr Doig believed that 'the regional council will do nothing even if their concerns are expressed to it'.[1451] Kaumatua Hori Thrupp told us:

> As far as I can see, Environment BOP isn't making any serious attempt to improve the river; instead it is just selling the gravel. You should take a look at Otauirangi; there is a real threat that the houses there may be carried away by the flooding.[1452]

1447. Steven Oliver, 'Ruatoki Block Report', report commissioned by the Waitangi Tribunal, 2002 (doc A6), pp 216–217
1448. Oliver, 'Ruatoki' (doc A6), pp 216–219
1449. Oliver, 'Ruatoki' (doc A6), p 218
1450. Oliver, 'Ruatoki' (doc A6), pp 216–219
1451. Doig, 'Te Urewera Waterways' (doc A75), p 200
1452. Hori Thrupp, brief of evidence, 13 January 2005 (doc J41(a)), p 4

Tama Nikora and Hakeke McGarvey also expressed the Ruatoki community's feeling of exclusion from decision-making about the Ohinemataroa River, regardless of the enactment of the RMA.[1453] In the claimants' view, the RMA did not go far enough in any case because it did not accord them a 'recognised legal role in the management of the river'. Until 'ownership and management of the river' is restored to iwi, it will continue to be managed by the regional council alone, and – in the claimants' view – gravel extraction will continue without proper flood protection works.[1454] On the other hand, Tame Iti told us that jet boat racing on the river had been successfully contested by local hapu in 1990–1991, and 'all river [boat racing] activities must now gain hapu consent'.[1455]

Ultimately, Crown counsel relied on the provisions of the RMA itself as a complete answer to the claimants on all river management issues:

> Since 1991 decisions concerning water uses have been made by regional councils under. the RMA. Such decisions must take Treaty principles into account and particular regard to kaitiakitanga must be had, but in practice claimants consider this consultation and recognition has been limited. . . .
>
> The Crown submits that tangata whenua interests are taken into account through the RMA in terms of how the natural environment is managed, and through the fisheries regime. . . .
>
> The RMA currently regulates the taking of any gravel from any river. Section 13(l)(b) provides that no person may, in relation to the bed of any lake or river, excavate, drill, tunnel, or otherwise disturb the bed, unless expressly allowed by a rule in a regional plan, proposed regional plan or a resource consent. The removal of any gravel is controlled by local authorities. Local authorities are required to consider tangata whenua values when making decisions about gravel extraction. . . .
>
> Section 13(1)(d) of the RMA provides that no person may, in relation to the bed of any lake or river, deposit any substance in, on, or under the bed, unless expressly allowed by a rule in a regional plan, proposed regional plan or a resource consent. Any discharges that are allowed are therefore regulated by local authorities, which must consider tangata whenua values. . . .
>
> The RMA gives local authorities the responsibility for regulating activities in rivers, especially those within the ambit of s13. The RMA requires that tangata whenua interests be taken into account in making decisions concerning the permissibility of certain river activities.[1456]

We agree with Crown counsel that there is not much evidence before us that would show how the RMA worked in practice in respect of Te Urewera communities and their

1453. Hakeke Jack McGarvey, brief of evidence (doc J33), pp 3–7; Tamaroa Nikora, brief of evidence (doc J40), pp 6–8
1454. Counsel for Wai 36 Tuhoe, thematic submissions for Ruatoki hearing, 17 January 2005 (doc J43), pp 4–5
1455. Wairere Tame Iti, brief of evidence (English), 10 January 2005 (doc J22), pp 13–14
1456. Crown counsel, closing submissions (doc N20), topic 30, pp 13, 14, 17, 18

21.16.7(4)(b)

rivers. We are left largely with the Crown's reliance on its submission that the Act itself is Treaty-consistent.

There is no doubting that the RMA is a significant improvement on the pre-1991 regime for management of rivers.[1457] The claimants emphasised, however, that the Act accorded them no legal management role over their rivers. The key here is section 33 of the Act. Professor Boast and Dr Doig both noted that this section allowed for the transfer of powers from local to iwi authorities.[1458] 'Under this provision', said Boast, 'councils could, in theory, transfer the management of particular water bodies to iwi authorities'. The essential problem was that no regional councils had 'shown any willingness to do so to date [2002]'.[1459] No management powers in respect of any rivers in Te Urewera had been transferred to Tuhoe or other iwi by the time of our hearings, despite the Act having been in effect by then for 14 years.

At Ruatoki, for example, Paki Nikora and Hakeke McGarvey established the Ohinemataroa River Management Committee in 2001, with the agreement of the Tuhoe Western Maori Executive Committee and the support of the Ruatoki people. The river committee was established 'to try to take control of the management of the river'.[1460] It has had 'some small success with restoration of the river', establishing a 10-year plan to 'rejuvenate the river and wetlands' and restore indigenous fish populations.[1461] Environment Bay of Plenty assisted with some funding, and the committee also obtained assistance from DOC's Nga Whenua Rahui biodiversity fund. The committee set up a native plant nursery in partnership with Ruatoki School, and – at the time of our hearings – had planted 20,000 native plants along the river banks. The committee also carried out fencing and had cleared willows and poplars with community support. Restoring natural cover, it was hoped, would help native fish stocks recover. The committee consulted marine and environmental scientists for help to restore customary fisheries.[1462]

But, Mr McGarvey told us,

> The biggest obstacle to the Committee's work is its lack of legal standing. According to the law, the River Committee has no status. Only Environment BOP has the legal status. We say this is wrong, as the river is Tuhoe's river, and should be controlled by Tuhoe.
>
> We do not have the legal standing to ensure that our views as the owners and kaitiaki of the river are respected. We are developing a working relationship with Environment BOP; however, because we do not have legal standing our ability to influence policy is dependent on what we can negotiate rather than having a recognised management role as of right.[1463]

1457. Doig, 'Te Urewera Waterways' (doc A75), p 200
1458. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p 276; Doig, 'Te Urewera Waterways' (doc A75), p 199
1459. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p 276
1460. Hakeke Jack McGarvey, brief of evidence (doc J33), p 3
1461. Hakeke Jack McGarvey, brief of evidence (doc J33), pp 3–4, 6–7
1462. Hakeke Jack McGarvey, brief of evidence (doc J33), pp 4–7
1463. Hakeke Jack McGarvey, brief of evidence (doc J33), pp 4–5

Section 33 of the RMA (as amended in 2003)

Section 33(1) states that '[a] local authority may transfer any 1 or more of its functions, powers, or duties under this Act, except this power of transfer, to another public authority in accordance with this section'. Prior to 2003, the power of transfer had not included the power to approve a policy statement or plan (or changes to the statement or plan), or the exercise of powers under Part 8 of the Act, which relate to designations and heritage orders.

Section 33(2) specifies that a 'public authority' includes 'an iwi authority'. Section 33(3) states that the delegating authority would retain ultimate responsibility but this was repealed in 2003. Section 33(4) requires a local authority, before transferring any of its functions, powers, or duties, to (i) hold a public consultation process about the transfer; (ii) notify the Minister; and (iii) agree with the 'public authority' that transfer is 'desirable' on the grounds of representation (the new authority 'represents the appropriate community of interest'), efficiency, and 'technical or special capability or expertise'. Under section 33(8), the local authority retains power to 'change or revoke the transfer at any time'.

The committee, for example, was in the process of negotiations with the regional council at the time of our hearings, trying to obtain a 'general authority to grant permission for people to extract volumes of up to 5000 cubic metres of metal from the river'.[1464] The committee planned to authorise the taking of smaller amounts, 'granting or withholding authorities as we felt was appropriate'. With the council's 'expertise available to us' to assist, the committee hoped to get exclusive control of at least local Ruatoki gravel extractions.[1465]

We have no evidence as to the outcome of this negotiation. We have noted that section 33 of the Act which permits transfer to iwi authorities of one or more powers exercised by local authorities had not been used in Te Urewera by 2002. In the absence of any section 33 delegations, the claimants' argument that they had had no legal management powers or role since 1991 was correct. As a consequence, they continued to feel disempowered in respect of river management after 1991, even if they were consulted from time to time.[1466]

Under the RMA, the Crown vested management and control of rivers in local authorities, and left it to those authorities to decide whether to utilise section 33 and transfer management powers to iwi. We assess the Treaty-compliance of these arrangements in the following section of our chapter, in which we make our Treaty findings in respect of rivers.

1464. Hakeke Jack McGarvey, brief of evidence (doc J33), p 5
1465. Hakeke Jack McGarvey, brief of evidence (doc J33), p 5
1466. See, for example, Hakeke Jack McGarvey, brief of evidence (doc J33), pp 3–7; Doig, 'Te Urewera Waterways' (doc A75), pp 199–200.

21.17

21.17 Treaty Analysis, Findings and Recommendation: Rivers

21.17.1 Findings on river ownership

The rivers and streams of Te Urewera were and are taonga to those hapu and iwi who have ancestral relationships with them. Each river has it own mauri and each is guarded by taniwha that inhabit it. Rivers were the arteries of life in the region, a source of fish and birds, of plants, and drinking water, and the centre of eel cultures. Waterways are associated with the rhythm of life; they were where people made their settlements, where transport and commerce between kainga took place. Whanau, hapu and iwi exercised mana and tino rangatiratanga over the rivers and waterways within their rohe; had deeply felt obligations of kaitiakitanga to them.

Under article 2 of the Treaty of Waitangi, the peoples of Te Urewera are entitled to tino rangatiratanga over their forests, fisheries, and other taonga, which clearly includes rivers. At no point has the Crown come close to giving effect to this guarantee.

The one clear concession the Crown made about its conduct affecting rivers in Te Urewera was that the 1866 raupatu of Eastern Bay of Plenty lands, including the beds of rivers within the confiscation boundary, was in breach of Treaty principles. That is certainly true, as our examination in chapter 4 of this report explains. The Crown also conceded, without further explanation, that the Urewera Consolidation Scheme involved Treaty breaches. Our conclusions about the UCS are presented shortly. Apart from those two concessions, the essence of the Crown's submission was that its ownership of riverbeds in Te Urewera is authorised by New Zealand law and that the relevant laws are not in breach of Treaty principles.

Previous Waitangi tribunal inquiries have investigated and reported on issues very similar to those before us. Consistently, the earlier tribunals have upheld the claimants' essential submission that a river is an entity distinct from the adjacent lands, that each has its own mauri and some are taonga, so vital are they to their peoples' existence. Consistently too, earlier tribunals have observed that the Maori conception of a river is a world apart from the English common law notion that it is land covered with water and that only the riverbed, which is an extension of the dry land adjacent to it, can be owned. Yet in this inquiry the Crown repeated its submission that Maori customarily regard rivers in much the same way as does the English common law. The Crown contended, in effect, that Maori conceive of rivers as being land so connected to the adjoining dry land that when that dry land is sold, so too is the riverbed, or half of it (to mid-river: *ad medium filum aquae*) where the river is the boundary between two land blocks. This line of argument enabled the Crown to defend its acquisition in the nineteenth and early twentieth centuries of the beds of many rivers as being not only lawful but also consistent with Treaty principle. Our inquiry has included close examination of the various means by which Maori land was alienated in Te Urewera, whether by purchase of individual interests in land blocks in the period from 1870 to the 1920s, or during the UCS – by which Maori owners' interests were consolidated into

210 blocks and the Crown was awarded the massive Urewera A block – or by the Crown's taking of marginal strips along the Tauranga River and its tributaries. We are satisfied that the *ad medium filum* presumption was not known to Maori land sellers in Te Urewera, let alone to those whose land was taken without their consent. As a result, we can endorse the earlier Tribunals' rejection of the Crown's submission that Maori custom and the common law have a shared view on the effect of the sale of land adjacent to a river. We note too that in the 2014 case of *Paki v Attorney-General*, the chief justice of New Zealand (with some support from the other three Supreme Court judges in that case) has rejected the lawfulness of applying the *ad medium filum* presumption to Maori land sales.

Before 1903, the English common law rules governed the ownership of the beds of New Zealand rivers whether or not the rivers were 'navigable'. With the 1903 statutory taking by the Crown of the beds of navigable rivers – without the knowledge or consent of Maori in Te Urewera – the common law's operation was reduced to rivers that are not 'navigable'. But the meaning of 'navigable' in the Coal mines Act Amendment Act and its successors has been beset with confusion for the entire time it has been part of New Zealand's law. And there is no readily accessible forum to solve the definition problems either generally or in particular cases. The 2012 Supreme Court decision in the *Paki* case is helpful but does not provide definite answers to all the questions that have arisen about the meaning of 'navigability'. The result is that for over 100 years now there has been considerable doubt as to which New Zealand riverbeds, or stretches of them, are Crown-owned on the grounds that they are 'navigable'. In addition, there has been doubt (since at least the time of the Court of Appeal's *Ika Whenua* decision) that the 1903 Act and its successors used sufficiently explicit language to extinguish Maori customary rights to their navigable rivers. This, too, adds to the confusion as to who owns the beds of navigable rivers in New Zealand.

The lack of clarity surrounding the common law and statutory rules about riverbed ownership was further complicated in the case of Te Urewera National Park, which was created in 1954, greatly expanded in 1957 and further expanded in 1962. The fact that different legislative words were used in 1962 (as compared with 1954 and 1957) to describe the Park's inclusion of waterways might have provided the Crown with an argument that it owned the full width of waterways on the park's boundaries. Aside from that, the many rivers and streams that adjoined the extended park's boundaries – including the Tauranga (Waimana) River, Ruakituri River, Waiau River, Ohinemataroa River and the Whirinaki River – could be claimed by the Crown *ad medium filum*, and some of the rivers within and adjoining the park could be claimed on the basis of their 'navigability'.

The situation just described, where the law governing the ownership of riverbeds in Te Urewera is both antithetical to Maori customary law and hopelessly confused, is a grave and ongoing breach of Treaty principle of which the Crown has long been apprised. It is far from consistent with the Crown's Treaty's promise actively to protect 'tino rangatiratanga o

21.17.1

o ratou wenua o ratou kainga me o ratou taonga katoa' ('the full exclusive and undisturbed possession of the Lands and Estates Forests Fisheries and other properties') for an English legal presumption about rivers, of which Maori had no knowledge and which runs counter to their own understandings, to have stripped them of their customary ownership of rivers when adjoining lands were acquired. It is far from consistent with that same Treaty promise for a statutory provision, about which Maori had no knowledge at the time or for years afterwards, to have expropriated, without compensation, the beds of their 'navigable' rivers. And that breach is compounded by the Crown's failure to remove the confusion and resulting unfairness that has long been recognised as surrounding the statutory provision. As we have seen, while the status quo serves the Crown's interests, it continues to prejudice those with legitimate Treaty claims to New Zealand rivers. And recent statements from our highest court suggest that a substantial part of the status quo may not even be lawful: the presumption *ad medium filum aquae* may not have been good law for land purchases from Maori,[1467] and the meaning of a 'navigable' river is more limited than the Crown and its delegates have sometimes relied on.[1468]

Returning to the Urewera Consolidation Scheme, clearly it differed from Crown purchase situations in which the Crown might assume the common law on riverbed ownership to apply, including the *ad medium filum* presumption. The Commissioners were charged with resolving the chaotic situation that had resulted from a period of predatory Crown purchase of thousands of individual interests scattered over 51 blocks. Also, no UDNR purchase deed conveyed (or compensated for) the beds of any rivers. What all this meant in practice was that the Crown could not claim to have purchased any particular rivers or riparian stretches of land, a situation which could only have been clarified upon partition by the Native Land Court. Instead, a consolidation scheme was used to locate the interests of whanau on the ground (in 183 new blocks) and then consolidate all the Crown interests in the Urewera A block. The *ad medium filum* rule was later applied to the lands that the Crown obtained through consolidation, not the unlocated, individual interests that it had purchased. This meant that Maori never consented to any alienation of the stretches of river that the Crown later claimed to own. Some of the Crown's riparian land was also acquired during the scheme as a result of the survey and roading contributions, again without any willing or knowing alienation of rivers. When the consolidation scheme was planned and agreed to in 1921, there was no mention of rivers or the *ad medium filum* presumption. Then, when the commissioners were giving effect to the scheme on the ground, they too did not explain or even refer to the *ad medium filum* presumption in their dealings with the Maori landowners. In 1924, the commissioners responded to a Tuhoe petition about the Whakatane and Waimana rivers by stating that the rivers were not included in the Crown's

1467. *Paki v Attorney-General (No 2)* [2014] NZSC 118
1468. *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 (SC)

awards. Tuhoe, therefore, emerged from the scheme with the understanding that they still owned their rivers.

Further, and quite apart from the dubious relevance of the *ad medium filum aquae* presumption to the unique circumstances of the UCS, we are satisfied there was no lawful authority for the Crown's acquisition of reserves or marginal strips along riverbanks. Crown ownership of those strips could not, therefore, support a lawful, let alone a Treaty-consistent, claim to half of the adjacent riverbed.

In all these respects, we find the Crown's reliance on the UCS as the source of authority for its riverbed ownership to be inconsistent with Treaty principles.

Overall, it is our finding that the Crown's actions, policies and laws discussed to this point have had the effect of expropriating the rivers of Te Urewera from their customary owners without their knowledge or consent, in breach of the Crown's Treaty obligations to protect Maori taonga and properties.

In many respects our findings echo those of earlier tribunals, including those of the Te Ika Whenua tribunal whose inquiry was focused on the taonga Rangitaiki, Wheao and Whirinaki Rivers and their tributaries, and so overlaps the Te Urewera inquiry district. That Tribunal found that Maori retained residual proprietary interests in the rivers that they had not relinquished voluntarily, but which had been claimed by the Crown through the *ad medium filum* presumption. Where we differ is to note that the Crown may not have actually succeeded in expropriating the ownership of riverbeds at law, although it has acted as if it has done so. The confusion in the law as to who actually owns the river beds of Te Urewera is inimical to Maori property rights, and is fundamentally inconsistent with the Crown's guarantee of those rights in articles 2 and 3 of the Treaty.

As has been noted, we endorse most of the findings of the Te Ika Whenua Rivers tribunal but since it did not inquire into land transactions, and we have conducted that inquiry for many of the lands adjoining the Te Ika Whenua rivers, we can bolster its findings in certain respects. For example, the Te Ika Whenua tribunal was of the view that even if there was evidence that the customary owners of the three taonga rivers were willing sellers of adjacent land, that would not establish their willingness to relinquish tino rangatiratanga over the rivers. Having investigated many of the relevant land transactions, we can confirm that when a river is a taonga, that is the most important fact to be weighed in any assessment of the effect of its customary owners' sale of adjoining land – not the fact that it runs beside or through a (more recently defined) block of land. Nor did we receive any evidence of a knowing and willing sale of a river; quite the reverse, as demonstrated by ongoing customary use of rivers and fisheries after land sales unless forcibly interrupted.

The Crown and claimants disputed whether the Crown paid for the beds of the rivers and streams that it acquired throughout Te Urewera on the basis of the common law rules, including the *ad medium filum* presumption. Our finding, that the customary owners were

unaware of those English legal devices, supports the claimants' submission that the Crown did not pay for the beds of the waterways it claims to own by virtue of those devices. The resulting financial prejudice to the customary owners would be additional to any other loss they may have sustained in particular cases (such as the loss of use of a waterway) from the Crown's assumed ownership of the beds of their waterways. Further on the matter of payment, it is plain that the Crown did not compensate anyone in 1903 when it claimed ownership of the beds of all 'navigable' New Zealand rivers – whichever they may be.

As a tribunal whose findings reiterate those of earlier tribunals that have dealt with fresh water issues, we are extremely concerned at the complete lack of clarity in the New Zealand law of waterway ownership and the ongoing confusion and injustice that is perpetuated by that situation. Reform is urgently needed, we consider, to produce clear law about who has proprietary rights in relation to rivers and a clear process for applying, and testing, that law in the case of particular rivers or stretches of them. To date, the task of undertaking that reform has been left to languish in the Crown's too hard basket and it seems the Treaty settlement process is being used instead, as a piecemeal substitute for a nationwide legal regime for river ownership and management that is consistent with Treaty principles. It is our view that the piecemeal approach is bound to prejudice some Maori groups as against others. Also, if the quantum of a Treaty settlement does not reflect the Crown's wrongful taking of the beds of rivers and the resulting harm to their customary owners, then the Crown is obtaining a further benefit from that approach.

21.17.2 Recommendation in respect of river ownership

For all those reasons, we are driven to make a recommendation to the Crown, as we are empowered to do by section 6(3) of the Treaty of Waitangi Act 1975. We recommend that the New Zealand law of waterway ownership be reformed as a matter of urgency so that it is made consistent with Treaty principles. This recommendation, on one view of it, can only relate to those claims that have not been settled by legislation. It appears to us however that the Crown's failure to resolve the issue after 21 September 1992 is a continuing omission constituting a continuing breach of the Treaty, resulting in continuing prejudice. We take that particular view. If we are wrong, we make the recommendation in any event, in relation to those groups who have not settled.

21.17.3 Findings on river management

The Crown's failure to properly acknowledge Maori ownership of their awa, is matched by its failure to give effect to the Treaty in its management of the rivers and river fisheries. While some acknowledgement was occasionally given to Maori rights to their fisheries,

precedence was given to power generation, demand for gravel, and sport fishing. Until about the 1990s, hapu and iwi were rarely even consulted over the management of rivers and river resources, even when their interests were seriously affected. The most obvious example of this was the construction of hydro works. These had hugely detrimental effects on tuna (eels) and other river life, but the affected communities were given no say or compensation.

There seems to have been some improvement in recent decades, but at the time of our hearings the Crown was still not giving effect to its Treaty obligations. In particular, it did not appear that enough was being done to restore fisheries, and Resource Management Act powers to delegate or share power with iwi were not being used. As the Wai 262 Tribunal found, the Resource Management Act 'has delivered Maori scarcely a shadow of its original promise'.[1469] In our inquiry, claimants said that they were not even properly consulted over environmental matters. Management of the Ohinemataroa River, in particular the selling of gravel, was cited as one instance in which the rights and interests of tangata whenua were virtually ignored. Overall, we did not receive enough evidence to make findings on the operation of the Resource Management Act in Te Urewera, except to say that it appears that the Wai 262 Tribunal's findings apply to our inquiry district.

We now turn to our findings on specific matters, namely gravel extraction, the impact of the Waikaremoana hydro scheme on the rivers, and customary fisheries.

(1) *Gravel extraction and flood protection*

The Crown has rightly conceded that the management of gravel extraction in Te Urewera was substandard. This management failure occurred despite Crown agencies being aware of the problem and its consequences from at least 1963. This was part of the Crown's wider failure to involve or consult kaitiaki in river management, and in this instance the Treaty breach was compounded by the cavalier attitude taken by the various bodies involved in gravel extraction from Te Urewera rivers.

The claimants argued that there were two main prejudices arising from the taking of gravel without the consent of kaitiaki: loss of royalties, and environmental damage. As we have seen, the Crown and local agencies extracted gravel from Te Urewera river beds without properly inquiring as to their ownership. To the extent that the Crown may be wrong about its ownership of Te Urewera rivers, the failure to properly ascertain ownership is compounded by its failure to pay royalties to the rivers' traditional owners.

We lack sufficient evidence to make any finding on the environmental impact of gravel takings in Te Urewera. It is clear that erosion and flooding were problems in the district before gravel extraction began, and we do not know whether they were exacerbated by gravel extraction. What is clear is that riparian Maori land in Te Urewera has not been adequately protected from flooding and river erosion, despite the restrictions placed on many

1469. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 284

21.17.3(2)

Maori land blocks for the purposes of erosion control. The Crown's failure to provide an adequate degree of protection is a breach of its article two obligation to actively protect Maori landholdings.

(2) *The impact of the Waikaremoana hydro scheme on the rivers*

In chapter 20, we found that the Crown permanently altered Lake Waikaremoana, without consulting or compensating its traditional owners, in service of the hydroelectric works. In this chapter, we have seen that the hydro works also significantly altered several rivers and a wetland, and their fisheries. Several rivers became dry much of the time, interrupting the migration of fish, and the eeling grounds at Whakamarino Flat were destroyed. As the eels were a significant source of food for local whanau, the alteration of the rivers and wetlands did significant economic as well as cultural damage. As with the lake, there was no adequate consultation with the traditional owners, and nor were they compensated.

The Crown acknowledged the 'negative impacts' of the hydro works on the local environment, but submitted that they 'must be assessed against the significant benefits [the hydro works] has provided to the country'.[1470] We acknowledge that the works did deliver a substantial benefit to the nation as a whole. In our view, however, this underlines the injustice of the Crown failing to grant compensation or other benefit to the tangata whenua whose rivers and wetlands were damaged for the benefit of others. In chapter 23 we will see that the Maori communities of Waikaremoana did not even benefit from the provision of electric power to their communities, since most could not afford to pay electricity bills.

The Te Ika Whenua Rivers Tribunal found:

> That the Crown's actions in conferring the right to generate hydroelectricity on power boards and later privatising them was in breach of the principles of the Treaty in that it failed to qualify the exercise of its power to govern with its Treaty guarantees of tino rangatiratanga over taonga and:
>
> i. to consult properly with Te Ika Whenua as a Treaty partner over the proposals;
> ii. to take into account Te Ika Whenua's interest in the rivers, including their right to development;
> iii. to attempt to ameliorate the effect and impact of the exercise of kawanatanga upon the needs and aspirations of Te Ika Whenua;
> iv. to compensate Te Ika Whenua for the loss of their rights and interests in the rivers; and
> v. to acknowledge and respect the position of Te Ika Whenua as a Treaty partner and to encourage Te Ika Whenua in the development of their resource.[1471]

1470. Crown counsel, closing submissions (doc N20), topic 28, p 17
1471. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 138

We consider that these findings apply also to the rivers affected by the Waikaremoana hydro works. As we suggest above, any works which significantly altered the rivers and wetlands should have been accompanied by fair compensation to their traditional owners. Perhaps more importantly, the owners should have been properly consulted about the hydro projects, and their potential impact on the awa, before any work started. The importance of the rivers and eeling grounds for sustenance should have been taken into account by the Crown, and every effort made to preserve and maintain those taonga. This was particularly so given the impoverished and almost landless state of the tangata whenua by the time the works began. As we find throughout this report, their condition was due almost entirely to Crown actions which we have found to be in breach of the Treaty.

(3) *Customary fisheries*

The river fisheries of Te Urewera – particularly the eels – were clearly a taonga of the peoples of the rohe, an important and valued food source for many communities. It is clear to us that the hapu and iwi of Te Urewera never ceded their rights to those fisheries, and continued to exercise their rights for as long as they were able to do so. The Crown therefore had an obligation to actively protect the fisheries and the right of Te Urewera peoples to make use of them.

Over the course of the twentieth century, however, the health and viability of the fisheries deteriorated significantly, for a range of reasons. The Te Ika Whenua Rivers Tribunal found that the rivers fishery in the Te Ika Whenua rohe was

> gravely depleted through a lack of proper control and through policies and actions of the Crown favouring trout fishing over the customary fishery and permitting the construction of the hydroelectric power schemes, particularly the Matahina and Aniwhenua Dams.[1472]

We endorse that finding insofar as our inquiry overlaps that of Te Ika Whenua, and also find that it applies to other rivers in Te Urewera, particularly those affected by the Waikaremoana hydro works. Earlier in this chapter, we saw that the introduction of trout harmed indigenous fish stocks, and that tuna were deliberately culled in order to protect trout. We found that the damage done to indigenous fisheries for the benefit of trout fishing was in breach of the Crown's Treaty obligations of partnership and active protection. We have also found, above, that the damage done to customary fisheries by the Waikaremoana hydro works, without consultation or compensation, was in breach of the Treaty guarantee of tino rangatiratanga.

From the 1950s, some attempts were made to protect indigenous fish, particularly within the national park area. More recently, steps have been taken to restore the tuna fisheries in various Te Urewera rivers, particularly where they have been affected by hydro works.

1472. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 137

21.17.3(3)

We received little information on the effectiveness of these actions, but it seems they have not been sufficient to restore eel stocks, and possibly not even enough to halt the decline. Overall, it did not appear at the time of our hearings that there was any comprehensive plan to fix the damage done to Te Urewera fisheries over the twentieth century. As the Te Ika Whenua Rivers Tribunal found, this failure of protection is in breach of the principle of active protection.[1473]

Nor did we see any evidence that the Crown has ever given the hapu or iwi of Te Urewera official control over, or partnership in, fisheries management in their rohe. From 1998, the rivers in Te Urewera should have been covered by the Fisheries (Kaimoana Customary Fishing) Regulations. By the time of our hearings in the mid 2000s these had still not been applied to rivers, only to coastal fishing. Freshwater fishing was still administered under amateur fishing regulations dating from 1986, which did not adequately recognise Maori rights or authority over their traditional fisheries. There was some allowance for traditional fishing, and cooperation between Maori and various State bodies relating to eels in the Waikaretaheke River. However there was no real partnership – in the national park, for example, decisions seem to have been made by DOC alone. There appears to have been some improvement in the 2003 management plan, but we did not receive enough evidence to be certain of this. Following the Te Ika Rivers Tribunal, we find the lack of consultation to be in breach of the principle of partnership.[1474]

Many different factors contributed to the reduction of indigenous fisheries, some of them beyond the control of the Crown. On balance, however, we find that the depletion of tuna and other indigenous fish in Te Urewera was a prejudice arising from multiple Treaty breaches, particularly the Crown's repeated failure to consult with hapu and iwi or to actively protect their customary fisheries. This prejudice was exacerbated by the Crown's failure to take adequate steps to restore the fisheries to anything close to their former state.

1473. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 137
1474. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 137

CHAPTER 22

NGA TONO ANGANUI: SPECIFIC CLAIMS

22.1 Introduction

22.1.1 Categories of claims

This chapter considers a number of discrete claims that we have not addressed elsewhere. We have grouped them into four broad categories:

- Claims relating to public works. This category includes claims about land taken under the Public Works Act; roads not built; and alleged prejudice caused by the erection of power transmission lines.
- Claims relating to rating. These relate to issues including the general exemption of Urewera District Native Reserve (UDNR) land from rating, and the lifting of that exemption in 1964; levies imposed within the UDNR area before 1964 and whether these were effectively rates; rates on Maori land outside the UDNR; and the rating of Maori land throughout the inquiry district from 1964.
- Claims relating to cultural property, specifically taonga tuturu (artefacts), and the Crown's obligations when it accepts gifts of taonga from Te Urewera leaders.
- Claims relating to schools in our district. This category includes claims that the Crown has not fulfilled the conditions of two different land donations; and a claim that schools in the inquiry district should have received the profits from trees planted by the schools' pupils.

Many related claims are dealt with elsewhere in this report. Non-land issues relating to schools, and to education more generally, are dealt with in chapter 23, on socio-economic issues. Cultural property claims on issues other than taonga tuturu have been dealt with mostly in relation to their location, and so have been addressed in our chapters on the National Park, Lake Waikaremoana and, in relation to the Whirinaki Forest, environmental issues.

22.1.2 Claims not addressed in this report

There are a number of claims that we have been unable to determine in this report because of jurisdictional problems or insufficient evidence. One is the Parahaki horse paddock

claim made by the Tuawhenua claimants. Counsel for Tuawhenua submitted that no compensation was paid for the 21-acre paddock after it was taken in 1920.[1] Although the land was valued at the time at £51, it appears that no compensation was paid in 1920, possibly due to complications relating to partitions and Crown purchasing in neighbouring blocks.[2] We have no evidence about any compensation arrangements the Crown may have made after that, and so are unable to make any finding on this matter.

Other claims on which we have been unable to make findings relate to the Mokomoko whanau. The claims relating to the trial, execution, and posthumous pardon of Whakatohea rangatira Mokomoko, and the Crown's treatment of his whanau, have been dealt with in chapter 4. We have covered these claims, even though they relate mostly to areas outside our district, because of the urgent need to address the matter of Mokomoko's pardon. Our findings on the pardon were included in part 1 of our pre-publication report, which was released in 2009.

Most of the Mokomoko whanau's other claims relate to areas outside our district, and affect hapu, whanau, and individuals who have not participated in this inquiry.[3] There are two issues that we can address to some extent: the management of Hiwarau C by the Maori Trustee, and the sufficiency of the Hiwarau reserves to meet the present or future needs of their owners.

In relation to the first issue, counsel for the Mokomoko whanau have accepted that the Maori Trustee is not part of the Crown.[4] The Crown is, however, responsible for a statutory safeguard provided for owners of land managed by the Trustee: the owners were able to seek a review of the management. Since the Hiwarau C owners did not seek any such review, the adequacy of the Crown's safeguard was never put to the test and so we are not in a position to assess it.[5]

As for the Hiwarau reserves, we saw in chapter 4 that Mokomoko and his Upokorehe hapu were in armed conflict with the Crown in the mid 1860s, and that the hapu's lands at Ohiwa were subsequently confiscated. Upokorehe were then settled on reserves at Hiwarau and Hokianga Island, comprising 1,260 and 13 acres respectively.[6] Counsel for the Mokomoko whanau described the reserves as 'woefully inadequate' due to their small area and poor quality.[7] Crown counsel accepted that the development potential of Hiwarau was

1. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p 193
2. Tuawhenua Research Team, 'Ruatahuna: Te Manawa o Te Ika: Part 2: A History of the Mana of Ruatahuna from the Urewera District Native Reserve Act 1896 to the 1980s', April 2004 (doc D2), p 179; Anita Miles, *Te Urewera*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1999) (doc A11), p 406n
3. Counsel for Mokomoko whanau, request for direction on issues not addressed in Te Urewera report, 13 November 2009 (paper 2.885), pp 1–3
4. Counsel for Mokomoko whanau, closing submissions, not dated (doc N3), p 42
5. Trustee Act 1956, s 68(1)
6. Ewan Johnston, 'Wai 203 and Wai 339 Research Report' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A14), pp 56–58, 60–61. Although Hiwarau was initially stated to be 1073 acres, a 1886 survey states it to be 1260 acres.
7. Counsel for Mokomoko whanau, closing submissions (doc N3), pp 37–38, 41

'severely limited', but maintained that there is insufficient evidence that the reserves were inadequate for Upokorehe's needs.[8]

Hiwarau's 1,260 acres were initially shared by 56 owners, which equates to 22.5 acres per person. This failed to meet the Crown's contemporary minimum reserve size of 50 acres per person.[9] Previous Tribunals have found even the 50 acre standard to be inadequate.[10] We also note that few Upokorehe had land elsewhere.[11] The problem was compounded by poor land quality. A series of reports for the Maori Land Court, the Maori Trustee, and the Hiwarau C trustees in the 1960s and 1990s found Hiwarau's potential for economic development to be limited, with the land being unable to support development costs.[12] At the time of our hearings the Hiwarau blocks collectively returned an average of about eight dollars a year to each of their 660 owners.[13] We find that the Hiwarau reserve was clearly inadequate for the contemporary and future needs of its owners. We cannot, however, say to whom this prejudice has been caused; this will require the participation of others with claims to the reserves.

22.2 Public Works Claims

22.2.1 Introduction

In general, the scale of public works takings in Te Urewera has not been large. The most significant exception has been the roading contribution made as part of the Urewera Consolidation Scheme, which we have discussed in chapter 14. The comparatively limited takings reflect both the sparse nature of infrastructural development throughout the region, and the fact that large-scale alienation of Maori land tended to occur in advance of such development. Indeed, as was seen when Urewera District Native Reserve owners sought roads, the Crown sometimes withheld development until more Maori land had been alienated. However, it is precisely because the peoples of Te Urewera have had so little utilisable land left in their possession, that the significance of further land losses for public works has been magnified.

8. Crown counsel, closing submissions (doc N20), topic 5, p 10
9. Native Land Act 1873, s 24; Johnston, 'Wai 203 and Wai 339 Research Report' (doc A14), pp 56–57
10. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, *Stage 1*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, pp 631–632.
11. Ewan Johnston, 'Ohiwa Harbour' (commissioned research report, Wellington: Waitangi Tribunal, 2003) (doc A116), p 178
12. R G Lockie, 'Utilisation Report: Hiwarau Blocks', 8 May 1968 (counsel for Mokomoko whanau, supporting papers to opening submissions (paper 2.424(b)), pp 1–2); I J Brosnahan, 'Initial Inspection Report: Hiwarau A and B Blocks', 12 May 1969 (counsel for Mokomoko whanau, supporting papers to opening submissions (paper 2.424(c))); D W Steele, 'Property Report: Hiwarau Block', 9 June 1969 (counsel for Mokomoko whanau, supporting papers to opening submissions (paper 2.424(d)), pp 1–3); John Douglas, 'Land Use Capability: Hiwarau B Block', [1994] (counsel for Mokomoko whanau, supporting papers to opening submissions (paper 2.424(a)))
13. Tuiringa Mokomoko, brief of evidence, not dated (doc B19), p 20

22.2.1

We examine four public works-related claims in this section. The first concerns unmet Crown promises to build an access road to Papapounamu and other blocks, as compensation for land loss during the consolidation scheme. The second claim also involves an unbuilt road, through the Tahora 2F2 block. In this instance the claimants submit that the Treaty breach and prejudice arises from the Crown's failure to return the land. The third claim in this section relates to the taking of land from the Heiotahoka and Te Kopani reserves south east of Lake Waikaremoana for a hydroelectric power plant. The final claim involves the building of transmission lines across part of the Te Manawa o Tuhoe block, preventing the land from being used for forestry.

It should be noted that only one of these claims directly involves Public Works legislation. We consider, however, that the Crown's Treaty obligations are the same regardless of which legislation it relies on to take or otherwise use Maori land for public works.

The taking of Maori land for public works has been discussed in detail by numerous Tribunals, which have consistently found that the Crown breached the Treaty in both the content and the application of public works law. As that law has been traversed so thoroughly by earlier Tribunals, we will not detail it here except where necessary to understand a particular taking. Instead, we move directly to summarise the Treaty standards that previous Tribunals have found the Crown must meet in relation to public works takings. We also adopt these standards.

- The Crown must enter into early and genuine consultation with Maori landowners, and ensure that it is well informed about the cultural, spiritual, and economic value of the land, and the amount of other land retained by the owners.[14] If it still intends to take the land, it must enter into fair negotiations over the extent and conditions of any alienation.[15]
- The Crown must explore all alternatives to the taking of Maori land, including the taking of other land instead, and alternatives to permanent alienation, such as leases or easements.[16]

14. Waitangi Tribunal, *Wairarapa ki Tararua*, vol 2, p 793; Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 852; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 279–283

15. Waitangi Tribunal, *Ngati Rangiteaorere Claim Report*, s 4.2.5; Waitangi Tribunal, *Te Maunga Railways Land Report*, 2nd ed (Wellington: GP Publications, 1996), p 71

16. Waitangi Tribunal, *Te Maunga Railways Land Report*, pp 70, 81; Waitangi Tribunal, *Turangi Township Report*, pp 308, 312; Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report*, p 366; Waitangi Tribunal, *The Petroleum Report*, p 54; Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 839; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui Report*, vol 3, p 1282; Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, p 795; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 273–278; Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2008), vol 2, pp 743–744, 751

- If land is taken, the Crown must pay fair, equitable, adequate, and prompt compensation, with interest if there are any delays in payment.[17] Where the Crown has suitable land, it must consider exchanging it for the land taken.[18]
- The Crown's powers of compulsory acquisition should be applied to Maori land 'only in exceptional circumstances and as a last resort in the national interest'.[19]

These standards inform our analysis of the individual public works claims, below.

22.2.2 Was the failure to build the Papapounamu access road in breach of Treaty principle, and has it caused prejudice to the landowners?

(1) *Introduction*

As we outlined in chapter 14, the Crown undertook a process of consolidation in the UDNR area during the 1920s. A Crown-appointed commission separated out land interests which the Crown had purchased from those remaining in Maori ownership, so that each group had title to specific pieces of land, rather than sharing ownership of blocks. A key promise made by the Crown was that it would build a network of arterial roads, making it easier for hapu to develop their remaining land. This promise was broken, and many parts of the district remained inaccessible by road. The claim relating to the Papapounamu access road relates to a similar story, although with the added complication that the promised but unbuilt road was to go through general land, outside the UDNR area.

We briefly discussed the Papapounamu road claim in chapter 14, stating that, because the Crown had taken land in the area, the commissioners saw a need to create legal access to the Papapounamu and Tukutomiro blocks, and the neighbouring Mokorua and Onapu blocks. As with other blocks in the consolidation scheme, the Crown had taken a quarter of the original acreage of each block. In July 1923, the Urewera Commissioners Harold Carr and R J Knight ordered that a road going through the Papapounamu and Tukutomiro blocks be continued through the Waiohau 2 block to the Galatea road.[20] Later in the year, a road was surveyed along the course of a stream between the Papapounamu and Onapu blocks on one side and the Tukutomiro and Mokorua blocks on the other, and then through

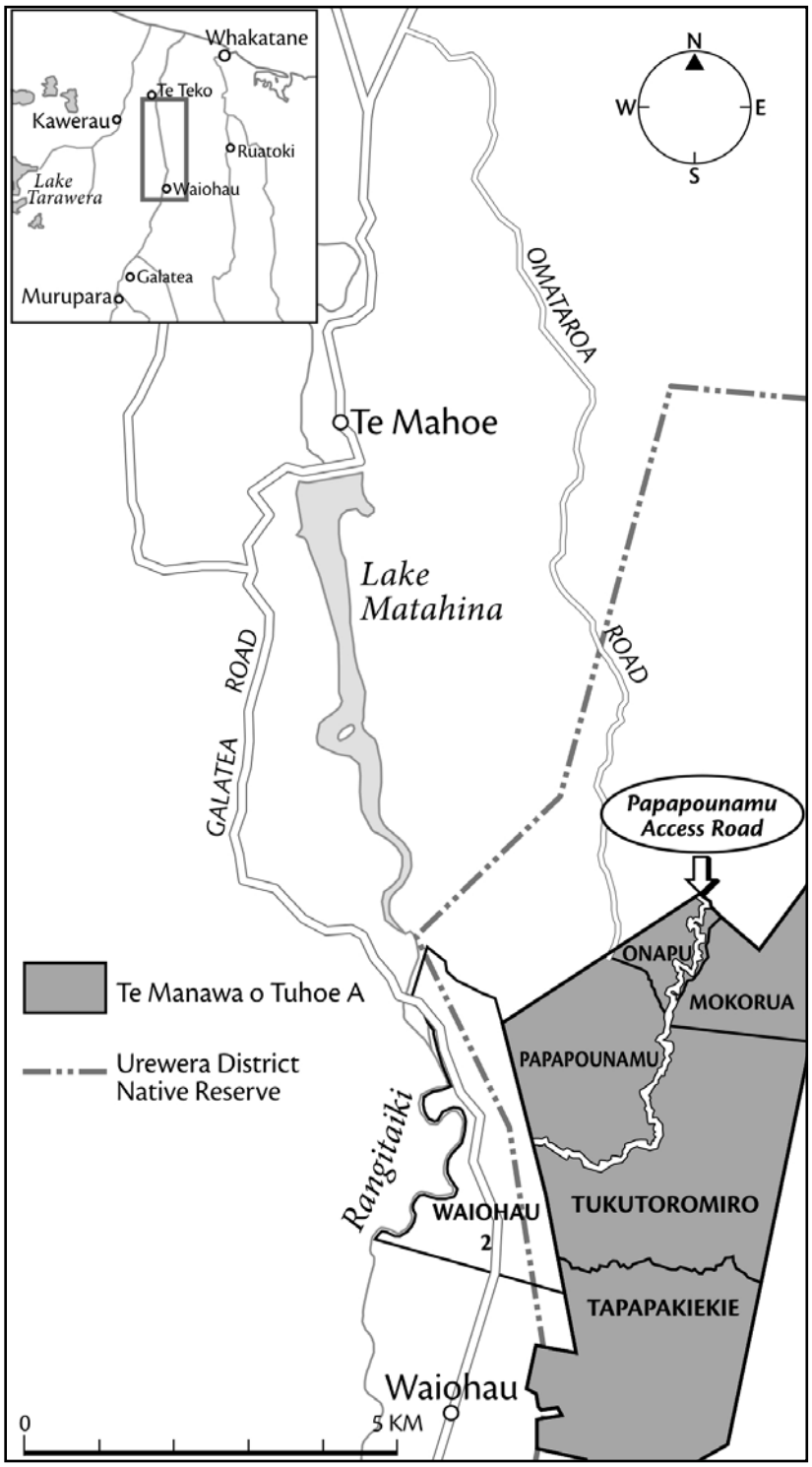
17. Waitangi Tribunal, *Ngati Rangiteaorere Claim Report*, s 4.2.5; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 648; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 839, 849; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 291–292

18. Waitangi Tribunal, *Ngai Tahu Ancillary*, p 365; Waitangi Tribunal, *Tauranga 1886–2006*, p 262

19. Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report*, p 11. See also Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 300; Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 438, 451; Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), p 54; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 839, 868; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, p 1290; Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, p 743; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 294–295

20. Urewera commission minutes, app 5 in Tama Nikora, 'The Urewera Consolidation Scheme (1921–1926): An Analysis' (doc E7), app C3

22.2.1



Map 22.1: Papapounamu access road

Sources: doc A132, map 7; doc E7, app C3, map 15; doc A132, map 17; NZ Topomap BE 39 Edgecumbe; doc E7, Appendix C2, map E (Te Manawa o Tuhoe boundary)

the Waiohau 2 block to Galatea Road.[21] This land seems to have been proclaimed as a public road in 1930, and was still appearing on cadastral maps as late as 1972.[22]

Waiohau 2, however, had been privately purchased in 1917.[23] The commissioners had no power to do anything with general land outside the UDNR area.[24] The Crown could instead have purchased the land from the owner, or used the Public Works Act to compulsorily acquire it. No land was purchased or taken, however, and no road was built, meaning that the four blocks had no connection to the main road.

In 1979 all four blocks – which had by this time become part of the huge Te Manawa o Tuhoe block – were leased to the Crown for forestry purposes.[25] As part of the lease, the Forest Service agreed to build a road from the Te Manawa o Tuhoe block to the existing Omataroa road to the north.[26] Maintenance was to be shared between the Crown and the landowners, and later between the landowners and anyone using the land for forestry purposes.[27] The new road was about 14 kilometres long, whereas the road across Waiohau 2 would have been only about one kilometre.[28] While the new road has provided access between the blocks and the main road, it is therefore much less convenient than what would have been provided under the original arrangement.

(2) *The claims and the Crown response*

Counsel for Wai 36 Tuhoe argued that the absence of the Papapounamu access road has made it costly and impractical to access the part of Te Manawa o Tuhoe A block that includes the former UCS blocks of Papapounamu, Tukotomiro, Mokorua, and Onapu. The

21. ML 13352, ML 13354, app 6, 9 in T R Nikora and K R Locke, 'Report on Legal Access to Te Manawa-o-Tuhoe A Block across Waiohau No 2 Block', app 6 in Tama Nikora, 'The Urewera Consolidation Scheme (1921–1926): An Analysis' (doc E7), app C3, pp [130], [135]

22. T R Nikora and K R Locke, 'Report on Legal Access to Te Manawa-o-Tuhoe A Block across Waiohau No 2 Block', app 2, p 4 in Tama Nikora, 'The Urewera Consolidation Scheme (1921–1926): An Analysis' (doc E7), app C3

23. Certificate of title, T R Nikora and K R Locke, 'Report on Legal Access to Te Manawa-o-Tuhoe A Block across Waiohau No 2 Block', app 2 in Tama Nikora, 'The Urewera Consolidation Scheme (1921–1926): An Analysis' (doc E7), app C3, p [120]

24. Urewera Lands Act 1921–1922, s 11(1)

25. T R Nikora and K R Locke, 'Report on Legal Access to Te Manawa-o-Tuhoe A Block across Waiohau No 2 Block', p 5 (Tama Nikora, 'The Urewera Consolidation Scheme (1921–1926): An Analysis' (doc E7), app C3)

26. Memorandum of Lease, 9 February 1979, LINZ 6900 20/1510 pt 3 (Brian Murton, supporting documents to 'The Crown and the Peoples of Te Urewera : The Economic and Social Experience of Te Urewera Maori, 1860–2000' (doc H12(a)(i)), p 84); 'Order Laying Out a Roadway Pursuant to Sections 415, 416 and 418 of the Maori Affairs Act 1953 for the Purpose of Providing Improved Access to Te Manawa-O-Tuhoe Block', 10 December 1980, Clause 1(c) (Maori Land Court documents (doc O1), pp [77]–[79]

27. Whakatane Maori Land Court, minute book 115, 20 July 2007, fols 13–17 (Maori Land Court documents (doc O1), pp [13]–[17]); Waiariki District Maori Land Court, minute book 57, 10 July 2012, fols 132–133

28. The entire roadway occupies some 27.87 hectares (68 acres 3 roods 17 perches) of these blocks and, given its more or less uniform width of 20 metres, we have calculated its length to be approximately 13.9 kilometres. See also Nikora and Locke, 'Report on Legal Access to Te Manawa-o-Tuhoe A Block', p (Nikora, 'The Urewera Consolidation Scheme' (doc E7), app C3); Peter Clayworth, 'A History of the Tuararangaia Blocks' (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A3), p 125.

claimants wanted the Crown to provide better access to the area, as was originally intended.[29] Crown counsel responded that there was insufficient evidence of any economic loss from poor access, and submitted that the failure to build the road was compensated by the Crown's 1957 payment for its failure to build the consolidation scheme roads.[30]

(3) *Tribunal analysis and conclusions*

In our discussion of the consolidation scheme in chapter 14, we noted the report of the consolidation commissioners that the hapu and iwi of Te Urewera agreed to the consolidation scheme in large part because of the promise of roads. In light of this, we found that the Crown's failure to build the roads was a particularly egregious breach of the Treaty. We also found that the compensation paid in 1958 was inadequate to redress the prejudice arising from the Crown's broken promise. Similarly, we find that the Crown's failure to build the Papapounamu access road, despite promising to do so and despite taking a quarter of each of the affected blocks, was a breach of the principles of good faith and active protection.

What prejudice has arisen from the lack of a road through Waiohau 2? Despite the road not being built, cutting rights to the Papapounamu, Onapu, and Tukutomiro blocks were sold in the 1940s.[31] This was when the Te Urewera timber industry was showing the most growth, so it is not clear that the lack of a road across Waiohau 2 delayed the logging of these blocks. Despite this early milling activity, it was still apparently necessary for the Forest Service to build a road as part of its 1979 lease. This was much longer than the Waiohau 2 route would have been, and so would have increased maintenance costs, which as we have seen were split between the owners and the leaseholders. The costs would have cut into the owners' profits, and possibly reduced the lease income. The claimants submitted that the existing route is 'impractical and costly', but did not provide any figures or evidence in support.[32] We do not know, therefore, the extent of any cost or impracticality, but note that it would depend on where workers and logging trucks were coming from. A journey to or from Kawerau or Whakatane would be roughly the same length via the current road layout or by the Papapounamu route, had it been built. If they were going to or from Murupara, on the other hand, the existing route is longer, by approximately 28 kilometres in each direction, than the Papapounamu route. We find that the increased maintenance costs on the Forest Service road were a prejudice arising from the failure to build the Papapounamu access road. We are unable to reach any further finding on the impact of the existing road's route.

29. Counsel for Wai 36 Tuhoe, second amended statement of claim (paper 1.2.2(b)), p 183; counsel for Wai 36 Tuhoe, closing submissions, part C: Schedule of Primary Findings and Recommendations, (doc N8(b)), p 10

30. Crown counsel, closing submissions (doc N20), topics 18–26, p 105

31. 'Facts and Figures of the Urewera Maori Lands in Relation to the Four Catchment Areas, National Parks and State Forests, Delivered by Honourable E T Tirikatene, Minister of Forests, at Ruatoki, 22.11.59' (Tamaroa Nikora, 'Te Urewera Lands and Title Improvement Schemes', 2004 (doc G19), app C, p 26)

32. Counsel for Wai 36 Tuhoe, second amended statement of claim (paper 1.2.2(b)), p 183

The Crown has submitted that the failure to build the road was covered by the 1957 compensation payment. In chapter 14, we found that the payment was inadequate to rectify the prejudice caused by the Crown's failure to build the arterial roads. We consider that the prejudice was less severe in this instance than in relation to the arterial roads. However, the compensation payment was only for the failure to build the arterial roads, and so it cannot also be compensation for the failure to build the Papapounamu road.

22.2.3 Was there a Treaty breach and prejudice arising from the alienation of land from the Tahora 2F2 block for a road?

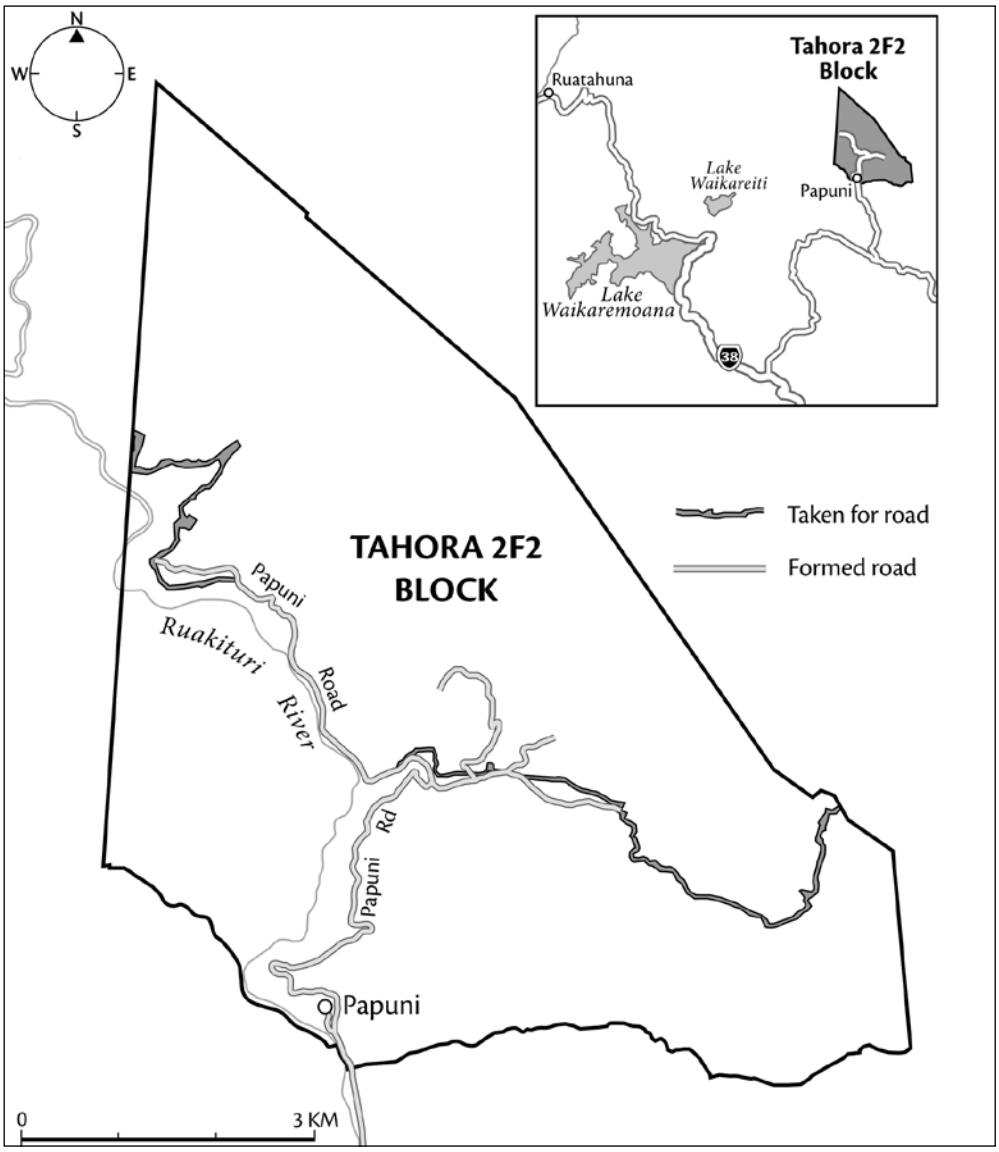
(1) *Introduction*

In this section, we look at another 'paper road' claim. In this instance, unlike the Papapounamu access road claim, the Ngai Tamaterangi claimants allege that they have been prejudiced by the Crown's failure to return the land, rather than its failure to build the road. The block in question is Tahora 2F2, which lies in the Ruakituri Valley, east of Lake Waikaremoana. In the early 1920s, as part of the wider consolidation roading scheme, the Crown planned to build a road linking Whakatane and Gisborne via the Waimana and Ruakituri Valleys.[33] At this time, Tahora 2F2 was under the control of the East Coast Commissioner, who agreed to let the Crown take nearly 50 acres from the block under section 12(3) of the Land Act 1924, on the understanding that the new road would improve access.[34] The Public Works Department had initially requested a monetary contribution from the commissioner, and later from the tenants, but seems to have been unsuccessful.[35]

As we detailed in chapter 14, the Crown abandoned its consolidation roading scheme in the 1930s. Before this, it built a 7.8-kilometre road part-way into the Tahora 2F2 block.[36] In 1972, the Counties Act 1956 was amended to transfer ownership of all rural roads except state highways and motorways to the local County Council. Consequently, both the built and unbuilt parts of the Tahora road passed out of Crown ownership, becoming the property of the Wairoa County Council, later succeeded by the Wairoa District Council. In the 1990s, the Tahora owners began negotiating with the council for the return of the unbuilt section, which was being used as a walking track. The two groups agreed that the land could be returned as long as the walking track remained open, but could not agree on where the track should run.[37] The owners then went to the Maori Land Court seeking the return of 37

33. Philip Cleaver, 'Urewera Roading' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A25), pp 75–78; *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA) at pp 690–691
34. Peter Boston and Stephen Oliver, 'Tahora' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A22), pp 288–291, 325; 'Land Proclaimed as a Road, and Roads Closed', 5 April 1930, *New Zealand Gazette*, 1930, no 27, p 1123
35. Boston and Oliver, 'Tahora' (doc A22), pp 288–291
36. *Attorney-General v Maori Land Court* (1999) 4 NZ ConvC 192,906 (CA) at p 27
37. *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA)

22.2.3(1)



Map 22.2: Tahora 2F2 paper road

Sources: doc 139, map 5; Topomap 260-w18, Waikaremoana, ed 1, 1990; Google Earth, 2014

acres of land in a 4.2-kilometre strip.[38] This eventually resulted in the High Court and then the Court of Appeal ruling that the council had no duty to either build the road or return the land.[39]

38. *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA) at p 690

39. *Wairoa District Council & Attorney-General v Maori Land Court & Proprietors of Tahora 2F2* (1998) 3 NZ ConvC 192,772; *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA)

(2) *The claims and the Crown response*

Counsel for Ngai Tamaterangi submitted that the East Coast Commissioner allowed the land to be taken without compensation, or consultation with the owners. They also noted the unsuccessful efforts of the Tahora 2F2 owners to establish in court that the Wairoa District Council holds the road under a fiduciary duty to them. Counsel submitted that the land should be returned, as it is not being used for the purpose for which it was taken.[40] Crown counsel responded that the land might still be used for a road, and is functioning as such even if only for foot traffic. It also noted that, because the land was acquired under the Land Act 1924, rather than public works legislation, the usual offer-back provisions attached to surplus public works land do not apply.[41]

(3) *Tribunal analysis and conclusions*

In chapter 12 we discussed the East Coast Native Lands Trust, and how it came to administer large areas of Maori land in and to the east of our district during the first half of the twentieth century. These included five parts of Tahora 2, including Tahora 2F2. These lands were originally vested in the Carroll-Pere Trust, and then vested by statute in 1902 in the East Coast Native Trust Lands Board. The owners of Tahora 2F2 were not consulted about the transfer, but initially no alienation could take place without the consent of the original trustees. In 1906 the Crown appointed a single commissioner in place of the Trust Board, and vested the land in him. From 1911 the East Coast commissioner had the power to sell, lease, or mortgage the land (Native Land Claims Adjustment Act 1911, s 14). In 1922 the power to sell the land was made subject to the Native Minister's approval (Native Land Amendment and Native Land Claims Adjustment Act 1922, s 28(3)) but at no point was the commissioner required to seek or obtain the approval of the owners.

It is important to note at this point that while the 1911 Act gave the commissioner the power to sell, lease or mortgage land, it did not confer the power to gift it. He was able to do so, however, under section 12 of the Land Act 1924. Although the Land Act generally applied only to Crown land, section 12 allowed the Governor-General to proclaim any Crown land or other land as a road. Any such proclamation required the consent of the owner, unless it was held in trust, in which case the trustee had the sole power to consent. This empowered the East Coast commissioner to alienate land from Tahora 2F2 without consulting the owners, or receiving any payment or other compensation.

If the land had been taken under the Public Works Act 1928, the consent of the owners would still not have been required, as the Act allows for compulsory acquisition. However the Crown would have been compelled to pay the owners compensation for loss of the land (Public Works Act 1928, s 104), whereas under the Land Act 1924 there was no such entitlement.

40. Counsel for Ngai Tamaterangi, closing submissions (doc N2), pp 60–62
41. Crown counsel, closing submissions (doc N20), topic 37, p 9

22.2.3(3)(a)

Where Maori land has been taken for public works and not used for that purpose, there are usually two means by which the former owners can get it back: offer-back provisions under public works legislation, and the Treaty claims settlement programme. Neither of these is available to the claimants in this instance. The public works legislation route is closed to them because the Land Act 1924 did not provide for offer-backs. The Treaty settlement option is also closed because it is limited to Crown land, and the land from Tahora 2F2 was transferred to the Wairoa County Council in the 1970s. In addition, both options would require the Crown to concede that it is not using the land for its original purpose. As noted above, the Crown submitted in this inquiry that the land was in fact being used as a road, even if only for foot traffic.[42] This submission was also made by the Wairoa District Council during the 1990s litigation, and was accepted by the Court of Appeal.[43]

It seems to us that the two most important facts in this claim are that the land was taken without the owners' consent, and that they now have no practical means to get it back, even though it remains essentially in public ownership. As we note above, the East Coast Commissioner did not need the owners' consent to alienate their land. In chapter 12 we found that by giving the commissioner power to alienate Maori land without the owners' consent, the Crown breached the plain meaning of article 2 of the Treaty, which guarantees Maori the continued possession of their land for as long as they wish to retain it. In this instance, the commissioner was able to give the land to the Crown under section 12(3) of the Land Act 1924, which specifies that reserved, endowed, or vested land could be taken with the consent of the 'body or persons in whom the land or the control thereof may be vested'. As applied to Maori land, this too was in breach of article 2 of the Treaty.

We consider that the East Coast Commissioner was not part of the Crown. We repeat our finding in chapter 12 that, by granting him the power to alienate Maori land without the consent of its owners, the Crown was in breach of article 2 of the Treaty and of the principle of active protection. The alienation of the Tahora 2F2 land was a prejudice arising from this breach.

(a) How harmful was this prejudice?

In alienating the land for the road, the East Coast Commissioner probably saw himself as acting in the best interests of the owners. Even if the owners had agreed with this, the Crown had a clear obligation to return the paper road land once it became clear that the road would not be completed. We are not convinced by the Crown's argument that a walking track constitutes a road, except as a legal nicety. Apart from being contrary to the usual meaning of the word, it delivers few if any of the benefits which the owners, or the East Coast Commissioner, would have expected.

42. Crown counsel, closing submissions (doc N20), topic 37, p 9
43. *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA)

We did not receive any evidence on why the Land Act, rather than the Public Works Act, was used to obtain the land for the Crown. It seems likely, in light of the Public Works officials' earlier requests that the commissioner contribute to the cost of the road, that it was used because it did not require the Crown to pay compensation. If this was the case, it compounds the Crown's breach of the Treaty.

The Land Act 1924 did not include any provision for non-Crown land to be returned if it was not being used for its intended purpose. This cut off one means for the claimants to have their land returned, and is in breach of the principle of active protection. As noted, the land is also out of reach of the Treaty settlement process.

(b) Has the Treaty breach been mitigated by the construction and maintenance of the road which was built?

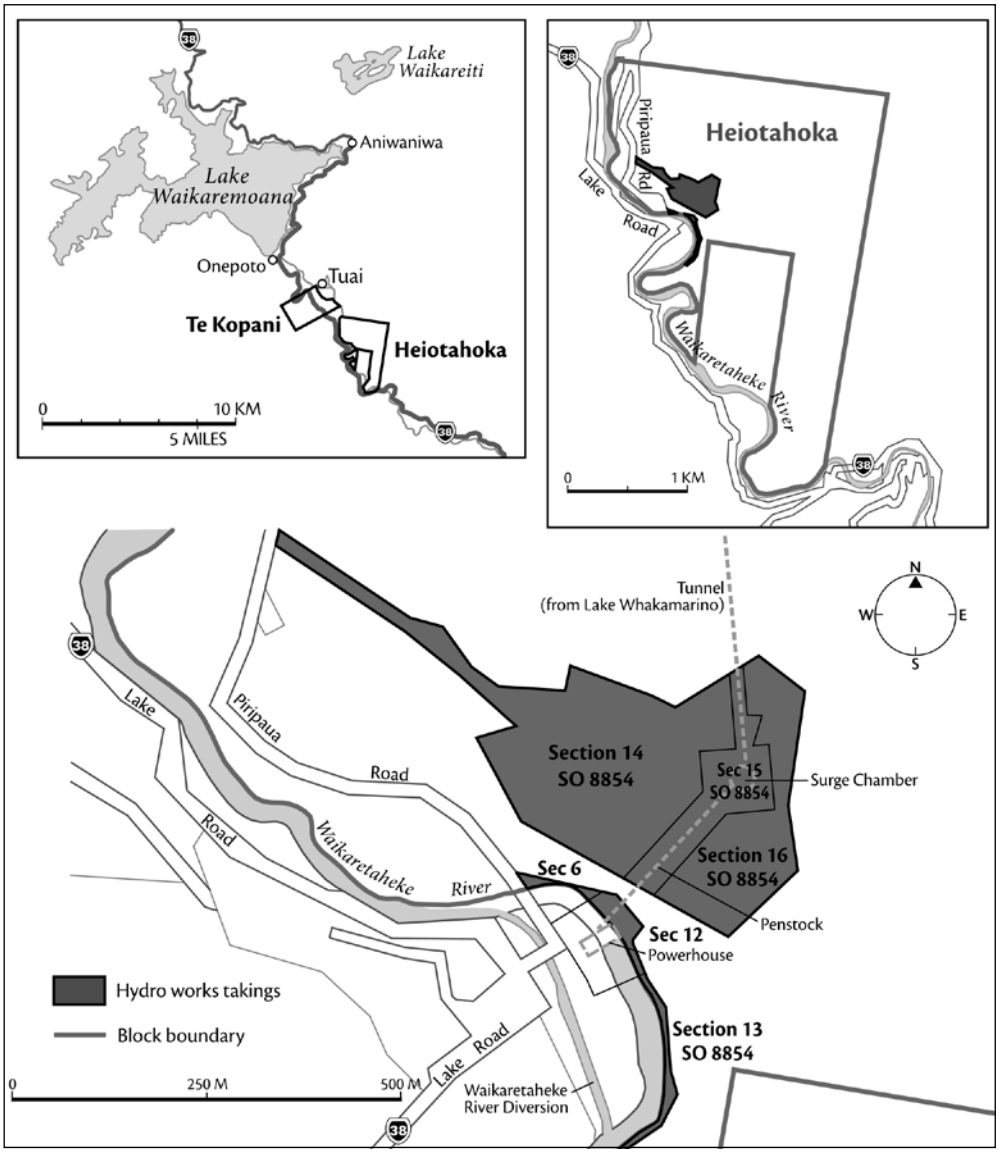
In the Court of Appeal judgment concerning the paper road, Justice Blanchard found that 'overall what was negotiated by the Commissioner seems to have been a very good deal for the owners'.[44] This was because, in exchange for a relatively small area of land, the Crown constructed and maintained nearly eight kilometres of road within the block – around twice the length of the paper road – and a bridge which in 1985 cost the Council $158,000. In addition, the judge found that the Crown had not made any commitment to building more of the road, and so had no obligation to return the land.[45] He also stated that it was 'unrealistic' to regard the built and unbuilt roads as separate matters, which we take to mean that the Crown would not have built any road at all in the block unless it had been able to take all of the paper road land.[46] We agree that the owners have received benefits from the road construction and maintenance which did go ahead, and we accept that this probably would not have happened if the paper road land had not been taken. This does not excuse the Crown's breach of the Treaty, nor does it mean that the loss of the paper road land is not a prejudice arising from that breach. We do find, however, that the prejudice has been partly mitigated.

22.2.4 Were the Crown's takings of portions of the Heiotahoka and Te Kopani reserves for public works in breach of Treaty principles and, if so, did Tuhoe and Ngati Ruapani suffer prejudice?

(1) *Introduction*

Over the course of this report, we have shown how the Crown gradually reduced Maori landholdings near Lake Waikaremoana. In 1875, it purchased the four blocks to the

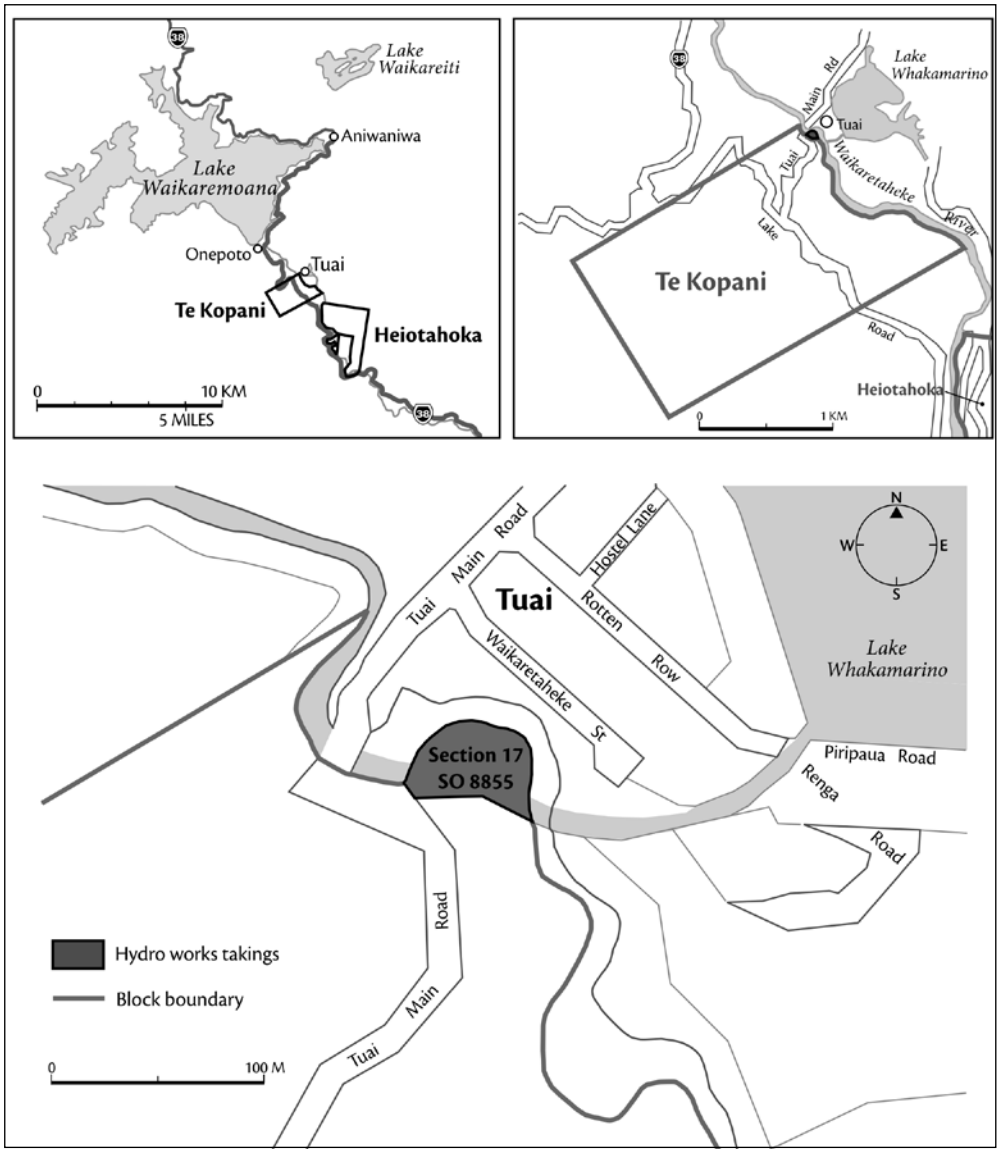
44. *Attorney-General v Maori Land Court* (1999) 4 NZ ConvC 192,906 (CA) at p 27
45. Ibid at pp 26–27. According to the Reserve Bank inflation calculator, $158,000 in the first quarter of 1985 (Q1 1985) was equivalent to $346,998 in the first quarter of 2005, at the time of our hearings. Inflation calculator at http://www.rbnz.govt.nz/monetary_policy/inflation_calculator/, accessed 6 November 2014.
46. Ibid at p 26



Map 22.3: Heiotahoka public works

Sources: doc A 117, fig 3; Heiotahoka cadastral map; Heiotahoka public works map

south-east of the lake in egregious circumstances, which we saw in chapter 7 left Tuhoe and Ngati Ruapani with four supposedly inalienable reserves. In chapter 14, we described how, during the Urewera consolidation scheme and in breach of the Treaty, the Crown took the Waikaremoana block to the north of the lake and two of the four reserves to the south. Ngati Ruapani were particularly prejudiced, as they were left virtually landless, with the Crown failing even to pay the full amount it had promised for the land. By the end of the consolidation scheme, Tuhoe and Ngati Ruapani retained just 2,488 acres near Waikaremoana,



Map 22.4: Te Kopani public works

Sources: doc A 117, fig 3; Te Kopani cadastral map; Te Kopani public works map

mostly in the Heiotahoka and Te Kopani reserves to the south east of the lake. In chapter 15, we showed that the Crown was well aware that Ngati Ruapani and other groups near Waikaremoana were living in dire poverty, having lost most of their land and having few sources of income. Despite this, in the early 1940s the Crown compulsorily acquired 35 acres from Heiotahoka reserve and one acre from the Te Kopani reserve, for use in the Waikaremoana hydroelectric scheme.

22.2.4(1)

While these takings were very small compared to many alienations discussed in this report, we consider them significant for two reasons: first because the owners, particularly Ngati Ruapani, had already lost nearly all their land and could ill afford to lose more; and second because the takings were from reserves which were supposed to be inalienable. The Waikaremoana hydro project also had significant environmental impacts, which we have discussed in chapter 20. There we found that the Crown had the lake level permanently lowered without consultation, consent, or compensation, even though this had serious long term effects on fisheries and the land around the lake, and did significant spiritual damage to the people of the lake and their taonga.

In our introduction to the public works claims, we summarised the Treaty standards which the Crown must meet in relation to public works takings. These are that:

- The Crown must enter into genuine consultation with Maori landowners, and ensure that it is well informed about the cultural, spiritual, and economic value of the land, and the amount of other land retained by the owners.[47] If it still intends to take the land, it must enter into fair negotiations over the extent and conditions of any alienation.[48]
- The Crown must explore all alternatives to the taking of Maori land, including the taking of other land instead, and alternatives to permanent alienation, such as leases or easements.[49]
- If land is taken, the Crown must pay fair, equitable, adequate, and prompt compensation, with interest if there are any delays in payment.[50] As well as the economic value, compensation must take into account the spiritual and cultural value of the land, its use for traditional purposes such as hunting, and how much comparable land the owners retained.[51]

47. Waitangi Tribunal, *Wairarapa ki Tararua*, vol 2, p 793; Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 852; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 279–283

48. Waitangi Tribunal, *Ngati Rangiteaorere Claim Report*, s 4.2.5; Waitangi Tribunal, *Te Maunga Railways Land Report*, 2nd ed (Wellington: GP Publications, 1996), p 71

49. Waitangi Tribunal, *Te Maunga Railways Land Report*, pp 70, 81; Waitangi Tribunal, *Turangi Township Report*, pp 308, 312; Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report*, p 366; Waitangi Tribunal, *The Petroleum Report*, p 54; Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 839; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui Report*, vol 3, p 1282; Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, p 795; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 273–278; Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2008), vol 2, pp 743–744, 751

50. Waitangi Tribunal, *Ngati Rangiteaorere Claim Report*, s 4.2.5; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 648; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 839, 849; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 291–292

51. Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, p 796; Waitangi Tribunal, *Te Kahui Maunga*, vol 2, p 753

- The Crown's powers of compulsory acquisition should be applied to Maori land 'only in exceptional circumstances and as a last resort in the national interest'.[52]

All of these standards are relevant to this claim, and will form the basis of our analysis below We also address the temporary use of the land by Public Works employees during construction. Most of the evidence before us related to the Heiotahoka lands; we received very little on Te Kopani.

(2) *The claims and the Crown's response*

Counsel for the Wai 144 Ngati Ruapani and Nga Rauru o Nga Potiki claimants both submitted that land was taken for the hydro works without the consent of the landowners.[53] Counsel for Nga Rauru o Nga Potiki also stated that the Crown took more land than it needed, and refused to consider alternatives to permanent alienation, despite the owners' clearly stated preference for leasing.[54] During construction, land was used without permission and crops and orchards were damaged, but only minimal compensation was paid.[55] Counsel for Nga Rauru o Nga Potiki and the Wai 144 Ngati Ruapani claimants also submitted that the Crown failed to take into account how little land remained in hapu ownership at the time of the takings, even though it was well aware that Ngati Ruapani had hardly any land and were living in dire poverty.[56]

Crown counsel submitted that a 'balancing exercise is required' between tino rangatiratanga and the Crown's kawanatanga obligations to the public interest.[57] This balance can be struck, they argued, by the Crown adequately consulting with Maori, protecting their rights and interests in land, being 'measured' in the use of its compulsory acquisition powers, and paying 'fair market compensation'.[58] They submitted that consultation did occur in this instance, but conceded that 'compensation dealings' were not satisfactory, and that workers trespassed on Maori land during construction.[59] Counsel acknowledged that the Crown should have considered whether the takings would have left hapu without sufficient land, but submitted that the evidence on the record 'does not indicate public works acquisitions

52. Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report*, p 11. See also Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 300; Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 438, 451; Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), p 54; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 839, 868; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, p 1290; Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, p 743; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 294–295

53. Counsel for Ngati Ruapani, closing submissions, 30 May 2005 (doc N13), p 58; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 279

54. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 278–279

55. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 279

56. Ibid, p 283; counsel for Wai 144 Ngati Ruapani claimants, submissions in reply, 8 July 2005 (doc N30), p 63

57. Crown Counsel, closing submissions (doc N20), topic 37, p 9

58. Ibid, topic 37, p 10

59. Ibid, topic 37, p 5

significantly impacted on the land holdings of Urewera Maori.'[60] They also submitted that Maori in Te Urewera benefited from employment in public works projects such as the hydro works, and that 'the general benefits of a strong infrastructure enhanced New Zealand's economic and social development'.[61]

(3) *Tribunal analysis and conclusions*

Waikaremoana's potential for electricity generation was first recognised in the nineteenth century, and the prospect was explored in more detail in the early twentieth century.[62] Waikaremoana was one of many different sites considered for hydroelectric development, and in 1918 was selected as one of three priority sites.[63] We have seen in chapter 14 that the requirements of the planned hydro scheme, particularly the need to maintain water levels in the lake, were a factor in the Crown's acquisition of the Waikaremoana block. The hydro works were built in stages from the early 1920s to the 1950s, with the third stage in the 1930s and 1940s involving the creation of Lake Whakamarino at Tuai and a power station at Piripaua, adjacent to the Heiotahoka reserve.[64] As part of this stage, land was taken from Heiotahoka and Te Kopani in 1941, with compensation of £275 and a five-acre paper road provided in return for nearly 40 acres of Heiotahoka, and four pounds paid for one acre of Te Kopani.[65] The return of the paper road means that a net 35 acres was lost from Heiotahoka. The main block of Heiotahoka land was used for the station's surge chamber, pipes, and access to the pipes and chamber, while another small area was involved in the channelling of the Waikaretaheke River through the power house.[66] The Te Kopani acre was used for river diversion further upstream. The hydro works are now run by Genesis Energy, a state-owned enterprise.

Investigative surveys of the Heiotahoka reserve block began around mid 1937. The surveyors did not seek permission, but instead wrote to the Native Land Court after they had

60. Ibid, topic 37, p 10
61. Ibid
62. G G Natusch, *Power from Waikaremoana: A History of Waikaremoana Hydro-Electric Power Development* (Tuai: Electricorp, 1992), p 7
63. Tony Walzl, 'Waikaremoana: Tourism, Conservation & Hydro-Electricity (1870–1970)' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A73), pp 181, 185
64. Natusch, *Power from Waikaremoana*, pp 9–11, 33; Walzl, 'Waikaremoana' (doc A73), pp 298–302
65. Wairoa Native Land Court, minute book 48, 25 February 1942, fol 76 (Tony Walzl, comp, supporting papers to 'Waikaremoana', various dates (doc A73(c)), pp 1574–1575). See 'Land taken for Road in Block IV', 13 June 1941, *New Zealand Gazette*, 1941, no 52, p 1858; 'Land taken for the Development of Water-power', 13 June 1941, *New Zealand Gazette*, 1941, no 52, p 1861 for notification of land taking. These notices seem to include land for the neighbouring Tapper farm. For details of Tapper land see 'Application for Cabinet approval of Compensation', 27 October 1943 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1510).
66. Alecock to District Engineer, 15 July 1938 (Tony Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1464)

begun work, seeking permission to cut and burn scrub.[67] The court registrar responded that he had no authority to give such permission, and advised the surveyors to notify the owners.[68] By January 1938, some of the owners had become aware that the Public Works Department was interested in their land, and telegraphed the Native Minister on 10 January to say that they 'do not want to sell but we agree to lease'.[69] On behalf of the Minister, Frank Langstone replied that no decision had been made, but when it was, 'consideration will be given to representations of owners'.[70] The owners met shortly afterwards and instructed their lawyers to seek compensation.[71] Public Works staff then met with some of the owners, 12 of whom gave written permission for Public Works employees to access their land. However some of the older owners refused to do so.[72] There seems to have been an informal agreement that if any land was taken the owners would receive 'an area of flat land, at present a "paper road," which is very suitable for potato growing' in exchange for the area required for the hydro scheme. Public Works and Native Department staff thought that the proposal would be in the owners' interests, and that 'they were definitely not averse to the land being taken'.[73] It is not clear whether this account accurately reflected any of the owners' views, let alone all of them, nor do we know how much land the owners thought they would lose. At this time, Heiotahoka was not being farmed, but there were plans for development, and the area wanted for the hydro works was 'the best part of the land'.[74]

Public Works employees entered the reserve again around June 1938, setting up camp, laying a road, making surveys, and employing two local Maori men to clear scrub.[75] The camp seems to have been on 18 acres at the western-most point of Heiotahoka 2B, 12

67. Assistant Electrical Engineer to Registrar, 28 May 1937 (Craig Innes, comp, supporting papers to 'Report on the Tenure Changes Affecting Waikaremoana "Purchase Reserves" in the Urewera Inquiry', various dates (doc A117(c)), p [168]); Engineer to O'Mally[*sic*] and Jones, 2 March 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1476)

68. Registrar to Electrical Engineer, 2 June 1937 (Innes, comp, supporting papers to 'Report on the Tenure Changes Affecting Waikaremoana' (doc A117(c)), p [169])

69. Ngati-Ruapani to Native Minister, 10 January 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1480)

70. Langstone to Waipatu Winiata, 3 February 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1481)

71. O'Malley to Engineer in Charge, 15 February 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1477)

72. Engineer, Tuai, to H Voice [*sic*], 2 March 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1475)

73. Under-Secretary, Native Department, to Engineer-in-Chief and Under-Secretary, Public Works, 8 February 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1479). The owners seem to have been Peter Taoho and Ngatau, as mentioned in Alecock to District Engineer, 15 July 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1464). The paper road referred to appears to be the five acre paper road which was eventually given to the Heiotahoka owners.

74. Registrar to Under-Secretary, Native Department, 27 January 1938 (Innes, comp, supporting papers to 'Report on the Tenure Changes Affecting Waikaremoana' (doc A117(c)), p [171])

75. Alecock to District Engineer, 15 July 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1464); O'Malley to Permanent Head, Public Works Department, 8 Dec 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1446)

acres of which was in use by the Public Works Department until 1955.[76] According to the Department, there was an agreement that the owners would be paid £8 a year for use of the land.[77] It is not clear that any rent was paid for occupation after 1942, although when the camp was vacated the owners were given the camp's water supply system.[78]

There were ongoing problems with the camp. Shortly after the workers arrived, resident owner Mokai Hine complained to the district Maori Land Board about their activities, saying that they were putting a road through her orchard and potato paddock. She added that she and all her children had been born on the land. She later consented to the road after Public Works staff agreed to fence it, transplant some trees and other plants, and leave her spring alone.[79] The Tuai Engineer, Charles Alecock, seems not to have taken her complaints particularly seriously, or seen much value in the property his men were interfering with, stating:

> As soon as we began survey work on this side of the river, the Maoris, sensing compensation, moved over and began making gardens about our road line . . . Two other Maoris have built shacks and have taken up residence apparently to have further claims. As for the orchard – there are about six weather beaten old apple trees, apparently self sown, scattered over about half a mile in length. They are infested with codlin moth and undoubtedly a menace to other fruit trees in the district.[80]

Underpinning Alecock's dismissive attitude was the belief, expressed by the District Engineer, that the Public Works Act gave his staff

> full powers of entry upon lands to carry out the necessary works . . . Notwithstanding those powers it is the practice to advise owners and/or occupiers of the lands affected of our intentions to enter upon their lands whenever practicable, but it is often impractical to advise individual owners of native lands.[81]

76. District Engineer to Permanent Head, 23 May 1944 and accompanying map (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1507–1508); Walzl, 'Waikaremoana' (doc A73), p 356; Craig Innes, 'Report on the Tenure Changes affecting Waikaremoana "Purchase Reserves" in the Urewera Inquiry' (commissioned research report, Wellington: Waitangi Tribunal, 2003) (doc A117), p 71). The area remains in Maori ownership.

77. Under-Secretary to District Engineer, 12 September 1944 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1500)

78. Innes, 'Report on the Tenure Changes affecting Waikaremoana "Purchase Reserves" in the Urewera Inquiry' (doc A117), p 71; Walzl, 'Waikaremoana' (doc A73), pp 357–358

79. Mrs Nelson or Mokai Hine to Maori Land Board, 8 July 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1468); Mrs Nelson or Mokai Hine to Tuai Engineer, 18 July 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1466). Her house also seems to have been connected to the camp water supply: Natusch, *Power from Waikaremoana*, p 34

80. Alecock to District Engineer, 15 July 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1464)

81. District Engineer to Registrar, Native Department, 22 July 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1460];see also District Engineer to Permanent Head, Public Works, 28 July 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1458)

The Public Works engineer-in-chief informed his Waikaremoana staff that they were, in fact, trespassing; a view that was confirmed by the Crown Solicitor.[82] After this, Public Works employees appear to have made more effort to work with the owners, although there continued to be friction over matters such as firewood, fencing, and the destruction of scrub and trees.[83] The diversion of the Waikaretaheke River, which acted as a stock barrier, was another problem. The Crown formally agreed to erect a fence once the river had been diverted, but does not appear to have done so until many months after the river diversion, and after the owners had complained that their crops had been destroyed by wandering stock.[84] As their solicitor pointed out, the owners 'have very little land suitable for cultivation and it will be a big hardship to them if, through lack of fencing, they cannot cultivate the above mentioned Block'.[85]

In late 1938, the Crown considered how much land it needed to take for the hydro works. The engineer-in-chief, J Wood, requested a legal opinion on whether the Crown needed to take land in order to construct and access tunnels, aqueducts, and other peripheral parts of the hydro scheme, or whether workers could simply use Public Works Act rights of access.[86] The Crown Solicitor responded that construction required the land to be purchased or leased. Tunnels could be erected under private land, but the Crown did not have the right to access them through private land.[87] Wood then asked the District Engineer to determine

> in respect of which items the land must be taken as permanently required, which items being of a temporary nature must be arranged with the consent of the land-owners, and which items although permanent do not necessitate the taking of the land.[88]

82. Engineer-in-Chief and Under-Secretary, Public Works Department, to District Engineer, 11 August 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1456); Crown Solicitor to Under-Secretary, Public Works Department, 23 September 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1451–1452)

83. Assistant Under-Secretary to District Engineer, 21 April 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1436); Matamua to Ngata, 26 February 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1437); Registrar to Hine, 1 February 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1440); Hine to Native Land Board, 27 January 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1441); Carr to Voyce, 15 February 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1442); O'Malley and Jones to Engineer, 7 December 1938 (Innes, comp, supporting papers to 'Report on the Tenure Changes Affecting Waikaremoana' (doc A117(c)), pp 185–186)

84. Wairoa Maori Land Court, minute book 48, 25 February 1942, fol 76 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1574–1575); O'Malley to Minister for Public Works, 28 July 1943 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1515–1516); Minister of Works to O'Malley and Jones, August 1943 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1514)

85. O'Malley to Minister for Public Works, 28 July 1943 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1515–1516)

86. Engineer-in-Chief and Under-Secretary, Public Works Department, to Solicitor-General, 16 September 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1453–1454)

87. Crown Solicitor to Under-Secretary, Public Works, 23 September 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1451–1452)

88. Engineer-in-Chief and Under-Secretary, Public Works Department, to District Engineer, 30 September 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1450)

22.2.4(3)

Early in 1939, Alecock stated that the Crown would need to permanently take land for tunnels, the power house, and various other parts of the hydro works, as well as a spoil tip, a permanent village, and access to the village and the works. Public Works staff had also moved a road line. In addition, staff were using areas for temporary camps and a road to the main tunnel.[89] As we have seen, the camp area was rented rather than purchased.

Alecock's letter seems to have been the basis of the decision, probably made at some point in 1939 or 1940, to take 40 acres of Heiotahoka and an acre of Te Kopani. A notice of intention to take land was issued, and Hemi Te Waaka and 11 others responded that they 'object to the taking of the aforesaid land, and hereby make application for claim of compensation for same'.[90] The Minister of Public Works responded that 'I feel sure that the position has not been fully understood as there is no intention to take the land without paying proper compensation.'[91] He informed the owners that 'your objection does not amount to a "well-grounded objection" within the meaning of those words given by the Public Works Act, in that it refers only to the compensation payable', and assumed that the owners 'will not now have any objection since compensation will be paid'.[92] The Public Works Act 1928 (section 22(1)(d)) did not define what a well-grounded objection would be, but did specify that 'no objection as to the amount or payment of compensation . . . shall be deemed a well-grounded objection'. It seems likely that the owners' reference to compensation was not the reason for the objection, but rather an assertion that they would claim compensation if the land was taken against their will. The real cause of the owners' objections was almost certainly that they had already lost most of their ancestral land and did not want to lose any more. We consider that this would have been a well-grounded objection. The Crown should also have taken steps to find out what the owners' objection actually was, rather than making a dubious assumption.

Compensation was worked out in early 1942. The owners of Heiotahoka made a compensation claim for £786, of which £100 was for the land itself and the rest for loss of timber and cultivations, and damage to the remaining land.[93] In February, the Native Land Court ruled that they would receive £275 plus a five-acre land block which had been taken for a

89. Resident Engineer to District Engineer, 24 January 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1445)

90. Legal Officer to Under-Secretary, 10 June 1941 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1598); Te Waaka to Public Works Minister, 27 March 1941 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1601

91. Minister of Public Works to Te Waaka, 22 April 1941 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1600)

92. Minister of Public Works to Te Waaka, 22 April 1941 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1600)

93. O'Malley and Jones to Permanent Head, 9 February 1942 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1578)

road but never used, and fencing where the river no longer formed a stock barrier.[94] The money appears to have included four years' rent for the workers' camp.[95] The Te Kopani owners would receive four pounds.[96] Florence Tapper, who was losing just under 30 acres of an adjoining block, meanwhile laid a claim for £1,857, of which £384 was for the land and the rest for damages done during construction.[97] In late 1943 she received £711, a three-acre paper road, and fencing.[98] While both parties had their claims drastically reduced, Tapper still received much more than either group of Maori landowners: £26 per acre, compared to just under £8 per acre for Heiotahoka and £4 for Te Kopani.[99] The Tapper land was better quality, but as there is no explanation on the record of how either compensation figure was calculated, we are not confident that the payments were fair or equitable.[100]

We now turn to address the extent to which the Crown, in taking the Heiotahoka and Te Kopani lands, met the Treaty standards outlined earlier.

(a) Did the Crown enter into early and genuine consultation with landowners? Did it have adequate knowledge and understanding of the cultural, spiritual, and economic value of the land to the owners, and the amount of other comparable land retained by them?

The Crown and the owners of the Heiotahoka block were in communication over matters including access to the land, compensation, and whether the land would be taken. However, in our view, this communication could not be described as consultation. The landowners only became aware of the Crown's plans after surveyors had entered their property, and the Crown seems to have misunderstood their objections to losing land, dismissing their protests as being about compensation. Although the owners did have an opportunity to object to their land being taken, this was only after the decision had been made. When they

94. Wairoa Maori Land Court, minute book 48, 25 February 1942, fol 76 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1574–1575). Craig Innes (doc A117, p 74) states in his report that the five acre 'paper road' still appears separately on cadastral maps, but our research indicates that it did become part of Heiotahoka 2. See calculations on 'Heiotahoka Native Res No 2' (Innes, comp, supporting papers to 'Report on the Tenure Changes Affecting Waikaremoana' (doc A117(c)), p [60]) showing the block being reduced to 817 acres by the public works takings and then increased to 822 acres with the addition of five acres. A 1960 map of the reserve shows it to be 822 acres in area: 'Heiotahoka No 2A' (Innes, comp, supporting papers to 'Report on the Tenure Changes Affecting Waikaremoana' (doc A117(c)), p [21].

95. Under-Secretary for District Engineer, 7 June 1944 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1506)

96. Wairoa Maori Land Court, minute book 48, 25 February 1942, fol 76 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1574–1575)

97. 'Application for Cabinet approval of Compensation', 27 October 1943 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1510)

98. Under-Secretary, Public Works, to F C Tapper, 11 November 1943 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1509)

99. These figures take into account the paper roads, meaning that Tapper lost a net 27 acres while the Heiotahoka owners lost 35 acres.

100. Another part of the Tapper land was graded first class. See Under-Secretary, Lands and Survey Department, to Under Secretary, Native Department, 30 August 1923 (O'Malley, comp, supporting papers to 'The Crown's Acquisition of the Waikaremoana Block' (doc A50(b)), p 442)

did object, the Crown did not understand or properly consider their objections. There were also problems with the Crown's temporary use of the land, although an effort was eventually made to communicate with owners and meet what were seen as reasonable requests.

Crown agents were rather dismissive of the land's significance for its owners, whether in cultural, economic, or spiritual terms. Apparently, they did not know or care that the Waikaremoana people retained very little land overall, and did not consider that this made their remaining land all the more important them. Crown agents failed to take into account the extreme poverty of the Waikaremoana people. Had the Crown considered its own role, since the 1860s, in reducing the people to near-landlessness, it could not reasonably or decently have taken this land.

(b) Did the Crown give proper consideration to taking other lands instead, or to non-permanent forms of alienation?

In the early decades of the twentieth century, the Crown appears to have given serious consideration to constructing hydro works in other parts of the country. We did not see any evidence of consideration given to using other lands in the Waikaremoana area for the hydro works, but nor did we see any evidence that Maori land was specifically targeted. It is likely that Crown engineers simply picked the most suitable land without consideration of who owned it; we note that general land as well as Maori land was taken for the hydro plant.

Crown employees seem to have given some consideration to non-permanent forms of alienation. The workers' camp was leased rather than purchased, and inquiries were made as to whether access to tunnels required alienation. It is clear that many parts of the works were permanent structures which in some cases were built into the land. The only alternative to acquisition in these cases would have been long-term or perhaps perpetual lease. In other instances it appears that the land was taken even though, once the works were completed, it was required only for access purposes. In these cases we consider that alternatives to purchase should have been given more consideration, and at higher levels. This may have required an amendment to the Public Works Act, so that land would not be taken from its owners when the Crown needed only access rights.

(c) Was the national interest sufficient to outweigh the interests of the landowners in retaining their land?

We accept that the hydro development was, at the time that it was built, an important project in the national interest. As we state above, however, it is not clear that it was necessary to permanently alienate all the land that was taken. Given the very limited amount of land retained by the Heiotahoka and Te Kopani owners before the hydro development began, we consider they had a very strong interest in retaining all their remaining land, and that this should have taken precedence where land was needed for access only. Where the land was

needed for permanent structures, we consider that some form of alienation was necessary in the national interest, but in that case the Crown should have considered a perpetual or long-term lease as an option.

In summary, we consider that the taking of land from the Heiotahoka and Te Kopani reserve blocks was in breach of the principles of the Treaty, for two key reasons. Firstly, there was no real consultation; although the owners did have the opportunity to object, their objections were not fully understood or given proper consideration. Nor did the Crown adequately inform itself of the value that the owners attached to two of their few remaining areas of land. In general, it had insufficient regard for the fact that the owners had already lost nearly all their land. In addition, the Crown failed to communicate with the owners at all until after its agents had begun work on their land. Secondly, it does not appear that the Crown fully considered alternatives to the permanent alienation of the land in question. While we do consider that the hydro works were necessary in the national interest, and so it may have been necessary to take some of the land, the Crown's process for doing so was in this case in breach of the Treaty principles of active protection and partnership.

(d) What prejudice resulted from the compulsory taking of land from the Heiotahoka and Te Kopani reserves?

It is clear that the hydro works project left the owners of Heiotahoka and Te Kopani worse off. They had already lost nearly all of their ancestral land, and the Crown's compulsory takings further reduced this remnant. With this in mind, it is hard to see how even a generous monetary payment could truly have compensated the owners for their cultural and spiritual loss. If the Crown needed to take land from the extremely limited acreage retained by the owners, we consider it had a duty to provide other suitable land in exchange.

In chapter 14, we saw that Ngati Ruapani agreed to participate in the consolidation scheme if the Crown purchased private land for them next to Te Kopani, from a block known as Tapper's farm, with the purchase money to be deducted from Ngati Ruapani's interests. They would also give up two of their reserves. The Crown then purchased the farm for twice its valuation, and Ngati Ruapani refused to pay this increased price, but lost their two reserves anyway. The Tuhoe owners of the reserves were not even included in the arrangement, and also received nothing in return for the lost land. As we note above, we believe that, in connection with the hydro works, the Crown should have given consideration to providing the owners with other land instead of, or as well as, money. If the Crown's part of Tapper's farm had remained in Crown ownership, this would have been an ideal exchange. Alternatively, since the Crown had acquired so much Ngati Ruapani land over the previous few decades, there must have been other land in the area that could have been returned; for example, some of the land around the lake which was later used for tourism purposes. And while the return of such land would have thwarted the Crown's other

plans for it, we are clear that, in all the circumstances, the Crown's duty of active protection required it to give precedence to the needs of Ngati Ruapani. The return of the 'paper road' was a positive step, but we consider that, since it was not being used, it should have been returned anyway, rather than being part of a compensation package.

Rather than entering into a land exchange, the Crown paid the owners monetary compensation about a year after the land was taken, and four years after Public Works employees began camping on Heiotahoka. While the compensation could perhaps have been paid sooner, we note that Tapper was not paid until nearly two years later, so the Maori owners were clearly not treated inequitably as far as prompt payment was concerned. Rent for the camp, however, was not paid until the camp had been in place for four years, which was far too late. In addition, it is not clear that any rent was paid in subsequent years. We do not know the value of the water supply system that the owners eventually received, and so are unable to say whether it was adequate payment in lieu of rent money.

22.2.5 Did Treaty breach and prejudice result from the erection of electricity transmission lines across part of Te Manawa o Tuhoe in the early 1980s?

(1) *Introduction*

In the late 1970s, as part of the Aniwhenua hydroelectric power scheme, two transmission lines were built across the southern part of the Te Manawa o Tuhoe block by the Bay of Plenty Electric Power Board (later Bay of Plenty Electricity Ltd), preventing trees from being planted along the line corridors. Counsel for Wai 36 Tuhoe provided us with evidence that the affected land was worth $58,000 in 1995.[101] As we saw in chapter 18, the Tuhoe Waikaremoana Maori Trust Board, which managed the land, was at this time leasing the affected area to the Crown under a forestry lease.[102] Although there was correspondence in the late 1980s and early 1990s between the Ministry of Forestry and Bay of Plenty Electricity about compensation, no agreement was reached and no compensation paid.[103]

(2) *The claims and the Crown response*

Counsel for Wai 36 Tuhoe submitted that the erection of transmission lines across the Te Manawa o Tuhoe block resulted in '14.5 hectares being removed from the forest plantation.'[104] They contended that this was an interference with Tuhoe's 'full, exclusive and undisturbed' possession of their land, for which the trust board has never been compensated.[105] Counsel

101. Atkinson Boyes Campbell to Tuhoe-Waikaremoana Trust Board, 4 December 1995 (Counsel for Wai 36 Tuhoe, written questions for Peter Gorman (paper 2.827), p 5)
102. Brian Murton, 'The Crown and the Peoples of Te Urewera: The Economic and Social Experience of Te Urewera Maori, 1860–2000' (doc H12), pp 847–849
103. Peter Gorman, written answers to questions, 6 May 2005 (doc M32), p 4.
104. Counsel for Wai 36 Tuhoe, closing submissions, pt A, 31 May 2005 (doc N8), p 67
105. Counsel for Wai 36 Tuhoe, closing submissions, pt B, 30 May 2005 (doc N8 (a)), p 212

stated that this was 'surely a breach of the duty of active protection'.[106] In response, Crown counsel pointed to the discussions between the Ministry of Forestry and Bay of Plenty Electricity as evidence of its efforts to ensure the Trust Board was compensated. Crown counsel further submitted that the Trust Board should seek compensation directly from the entity responsible for the transmission lines.[107] Counsel for Wai 36 Tuhoe replied that by passing responsibility to a non-Crown entity, the Crown was breaching the duty of active protection.[108]

(3) *Tribunal analysis and conclusions*

The lines are part of the Aniwhenua hydroelectric power scheme built by the Bay of Plenty Electric Power Board. Electric power boards were elected regional boards; essentially, local authorities concerned with the generation and distribution of electricity in their areas.[109] Like other local authorities, electric power boards were not part of the Crown, and therefore not subject to our jurisdiction. We are limited to assessment of relevant Crown policies and practices, such as the law governing compensation for power board work.

The Aniwhenua scheme was first publicly notified in 1975. Planning and discussion went on for most of the rest of the decade, and involved the Tuhoe Waikaremoana Maori Trust Board.[110] The route appears to have been chosen by May 1978; it is not clear whether the trust board or any other Maori group had any influence over it.[111] While this was going on, the trust board was also negotiating a 30-year afforestation lease with the Crown's Forest Service.[112] The final agreement allowed the Forest Service to 'clear or not clear[,] plant or not plant' any land under or adjacent to power transmission lines.[113] However the amount of rent for the first five years of the lease was exactly the same as had been approved by Cabinet in 1977, before the route of the transmission lines was known.[114] The Trust Board therefore did not lose any income from the location of the lines in the first few years of the

106. Counsel for Wai 36 Tuhoe, closing submissions (doc N8), p 67
107. Crown counsel, closing submissions (doc N20), topic 37, p 12
108. Counsel for Wai 36 Tuhoe, submissions in reply, 9 July 2005 (doc N31), p 57
109. Electric Power Boards Act 1925
110. Geoff Bertram, 'The Aniwhenua and Whaeo Hydro Schemes and the Energy Companies Act 1992', vol 1 (Wai 212 doc A6), pp 52–54; Minutes of meeting of Tuhoe Lands Working Party Committee, 26 May 1977, 2 September 1977, and 11 October 1978 (Brent Parker, 'List of Documents – Compensation for Restrictions Placed on Milling of Native Timber in the Urewera' (doc M27(b)), pp 698, 752, 777)
111. J Duder, Tonkin and Taylor, to [T?] Nikora, 24 May 1978 (Parker, 'List of Documents – Compensation for Restrictions Placed on Milling of Native Timber in the Urewera' (doc M27(a)), pp 207–209). Compare the transmission lines shown on 'Te Urewera Maps including Hikurangi-Horomanga, Ruatoki, Raroa, Waimana, Ohaua and Tarapounamu Series Consolidation Blocks' (doc M12(a)).
112. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 847–850
113. 'Memorandum of Lease', 9 February 1979, p 3 (Murton, comp, supporting documents for 'The Crown and the Peoples of Te Urewera' (doc H12(a)(i)), p 83)
114. Extract from minutes of Cabinet Expenditure Committee, 31 May 1977 (Parker, 'List of Documents' (doc M27(a), pp 309–310); Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 849–850

lease. We did not receive any information about lease income after the first five years, and so are unable to make any finding of prejudice or Treaty breach.

22.3 Rating Claims

22.3.1 Introduction

The imposition of rates on Maori land is an ongoing issue in our inquiry district. Nationally, the percentage of Maori land subject to rates slowly increased from the late nineteenth century into the 1920s. We do not know when rates began to be imposed on Maori land in our district, but we are aware of rates debt on the southern Waikaremoana reserves in the 1920s and on the Waiohau block by 1931. In 1922, the law implementing consolidation made most land within the Urewera District Native Reserve non-rateable, and this exemption from rates remained in place until 1964. Despite this, levies were imposed on the development schemes at Ruatoki and Ruatahuna to pay for local services. After the general exemption was lifted in 1964, some urupa, marae, and uneconomic blocks remained exempt. Other land was subject to rates, despite the difficulty many owners had in paying them or deriving economic benefit from their land. Some of this debt has been written off by local authorities.

Previous Tribunals have found, and we agree, that the Crown has a general right to allow local authorities to impose rates on Maori land. As the Turanga Tribunal found, 'Maori land should bear a fair share of the district's rates burden.'[115] Whether particular rating regimes are Treaty compliant depends on whether the rates imposed are 'a fair share'; in particular, whether they reflect the actual economic value of the land and the value of services received by the ratepayer. The Tauranga Moana Tribunal found that rating policy and practice breached the Treaty when it failed to take into account the poverty of Tauranga Maori and the difficulties that many had in using their land for economic purposes.[116] As rating issues have been explored by numerous other Tribunals, we will not include a comprehensive history of rating legislation here, but will discuss the law only insofar as it is necessary to understand the rating of Maori land in Te Urewera.

Rates have generally been levied by local authorities, such as county or district councils. Such authorities are not part of the Crown, and we therefore have no jurisdiction to make findings on their activities. We can, however, make findings on rating law, and the Crown's response to conflict between Maori and local authorities over rates.

In this section, we have grouped together claims on similar issues, for example the levies imposed on the Ruatoki and Ruatahuna development schemes. The issues we will examine are:

115. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, p 653
116. Waitangi Tribunal, *Tauranga Moana 1886–2006*, vol 1, pp 380–381

- The rating of Maori land outside the UDNR before 1964, and the role of rates debt in the Crown's acquisition of land at Waiohau, Te Teko, and Waikaremoana;
- Whether Maori land in the Urewera District Native Reserve area should have remained exempt from rates;
- The imposition of levies for local services at Ruatoki and Ruatahuna in the mid twentieth century, even though these areas were exempt from rating; and
- The imposition of rates on Maori land since 1964.

There were also claims about the rating of Minginui in the years since the village was returned to Ngati Manawa;[117] we will address these in chapter 23, in the section dealing with timber industry corporatisation.

22.3.2 The claims and the Crown response

Crown counsel submitted that rating of Maori land was not inconsistent with Treaty principles, and that 'where land receives tangible and actual services from councils then rates should be levied for those services'.[118] The issue was whether the Crown had properly balanced its exercise of kawanatanga powers with its duties and obligations under articles 2 and 3 of the Treaty.[119] In Crown counsel's submission, the balance has been 'appropriate'.[120]

Claimant counsel agreed that there was a need for balance between kawanatanga and the Crown's obligations, but submitted that the Crown had not got the balance right. Counsel for Wai 36 Tuhoe, for example, accepted that 'where land receives tangible and actual services from councils, then rates can be levied in respect of those services'. They submitted, however, that much Maori land in Te Urewera received no benefits from local councils and was not productive, and should therefore be exempt from rates.[121] Counsel for Ngati Haka Patuheuheu similarly argued that the claimants received no benefit from rates and should not therefore have to pay them.[122] Counsel for Ngati Haka Patuheuheu and Te Mahurehure submitted that Te Urewera Maori land should be exempt due to the poverty of the owners; this applied to both historical and contemporary rating.[123] Counsel for Wai 36 Tuhoe and Nga Rauru o Nga Potiki felt that rates should not be levied on land which is

117. Counsel for Ngati Whare, supplementary closing submissions on corporatisation and Minginui, 3 June 2005 (doc N16(a)), pp 28–29, 38, 42
118. Crown counsel, closing submissions (doc N20), introduction and overview, p 30; Crown counsel, closing submissions (doc N20), topics 18–26, p 81
119. Crown counsel, closing submissions (doc N20), topic 27, p 5
120. Ibid, p 6
121. Counsel for Wai 36 Tuhoe, response to statement of issues (doc N8(a)), p 128
122. Counsel for Ngati Haka Patuheuheu, submissions in reply (doc N25), p 61
123. Counsel for Te Mahurehure, closing submissions, 14 June 2005 (doc N21), pp 15–20; counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 154–155

unproductive, uneconomic, or has its use restricted for environmental purposes.[124] Crown counsel responded that rating law has always taken into account the special features and problems associated with Maori land, and that since 1988 the Crown has introduced rates relief mechanisms for Maori land for reasons including being landlocked, being used for customary purposes, or not receiving services.[125] They also noted that in 1986 the Wairoa County Council waived $40,000 in unpaid rates on the Waikaremoana reserves.[126]

On more specific matters, some claimants alleged that the Crown made and broke promises over the rating of particular areas. Counsel for Nga Rauru o Nga Potiki submitted that in 1895 the Crown pledged that Maori land in the Urewera District Native Reserve would not be rated.[127] Crown counsel responded that there is no evidence of such a promise, although the hapu and iwi of Te Urewera might have believed that their land would only be rated if it was productive; and this was provided for in 1910 legislation. In any case, Crown counsel submitted, there is no evidence of prejudice in relation to rating in the reserve area.[128] Similarly, counsel for Tuawhenua stated that in 1922, as part of consolidation negotiations, Apirana Ngata told the Ruatahuna community that land would only be rated if settled by Pakeha.[129] Crown counsel did not directly address this allegation, but did state that a promise was made that land would be unrated for a year or more after consolidation.[130]

The Crown is also alleged to have broken promises over the rating of the Waikaremoana reserves. Several claimant counsel argued that, during negotiations over the consolidation programme, the Crown agreed not to rate reserves from the Waikaremoana block. It was only because of this and other conditions, they submitted, that Tuhoe and Ngati Ruapani agreed to include Waikaremoana in the scheme. However the Wairoa County Council levied rates on the reserves despite the promise and despite the fact that the reserves produced no income.[131] The rates have been remitted since the mid 1980s, but only after a long fight by Ngati Ruapani.[132] Crown counsel responded that there was no evidence of a promise that the reserves would never be rated.[133]

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124. Counsel for Wai 36 Tuhoe, closing submissions (doc N8), pp 66–67; counsel for Wai 36 Tuhoe, schedule of primary findings and recommendations sought (doc N8(b)), p 12; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 275

125. Crown counsel, closing submissions (doc N20), introduction and overview, p 31; Crown counsel, closing submissions (doc N20), topic 27, p 5

126. Crown counsel, closing submissions (doc N20), topic 28, p 23; Statement of Issues for the claims in the Waitangi Tribunal's Urewera Inquiry District, not dated (doc 1.3.6), para 27.43. Note the Crown's closing submissions incorrectly refer to the Wairoa District Council, which was not in existence in 1986.

127. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 271

128. Crown counsel, closing submissions (doc N20), topic 27, p 8

129. Counsel for Tuawhenua (Wai 842), closing submissions, 30 May 2005 (doc N9), p 187

130. Crown counsel, closing submissions (doc N20), topics 18–26, p 17

131. Counsel for Wai 36 Tuhoe, response to statement of issues (doc N8(a)), p 124; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 250; counsel for Wai 144 Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), paras 183–188; counsel for Wai 144 Ngati Ruapani, submissions in reply (doc N30), pp 24–25

132. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), para 188

133. Crown counsel, closing submissions (doc N20), topics 18–26, p 76

Claimant counsel have alleged two instances in which rates debt led to land loss. In the 1930s, Ngati Haka Patuheuheu lost £21 worth of land at Waiohau to cover rates, even though only £2 was attributable to the Waiohau land.[134] This arose out of a rates demand for £192, mostly on their Te Teko block, in 1931, which was made even though the hapu had lost most of their good land and were consequently experiencing hardship. It was also made despite the Crown having failed to build its promised roads, and despite very little development having occurred on Ngati Haka Patuheuheu lands.[135] This contradicts the Crown's assertion that rating was only imposed on productive land.[136] Counsel for Wai 36 Tuhoe alleged that 'Rates arrears were a factor in the Crown's acquisition of the Whareama and Ngaputahi reserves' near Lake Waikaremoana.[137] Crown counsel responded that there was no evidence of this.[138] Although these were the only instances in which claimants alleged a connection between rates and land loss, counsel for Wai 36 Tuhoe submitted that the threat of land loss due to rates arrears constitutes a prejudice, even if no land has been lost in this way.[139]

Rates issues are strongly connected to the issue of roads, particularly the Crown's failure to build promised roads in the UDNR. Counsel for Tuawhenua submitted that it was a Treaty breach to allow Ruatahuna to be rated to pay for roads, since the community had already paid for them with land.[140] Similarly, counsel for Nga Rauru o Nga Potiki argued that rating to pay for roads was in breach of the Crown's 1895 agreement to pay for the roads itself.[141] Several claimant groups raised the problem of local authorities refusing to maintain roads in the UDNR when they were not receiving any rates.[142] Counsel for Wai 36 Tuhoe stated that 'Tuhoe could not produce revenue on lands that were not serviced by roads, and could not get assistance to build and maintain roads until they were able to pay rates – yet another Catch 22 created by the Crown's non-performance of its roading obligation.'[143] Crown counsel accepted that local authorities were reluctant to maintain roads in areas which did not return any rates.[144] However they did not accept that there is 'an inherent Treaty obligation to fund or ensure all roads are maintained so as to ensure Maori are properly provided with roads.'[145] They submitted that the question of whether the Crown should

134. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 124–125, 154–155
135. Ibid, p 154
136. Counsel for Ngati Haka Patuheuheu, submissions in reply (doc N25), p 35
137. Counsel for Wai 36 on behalf of Tuhoe, response to statement of issues (doc N8(a)), p 124
138. Crown counsel, closing submissions (doc N20), topics 18–26, p 75
139. Counsel for Wai 36 on behalf of Tuhoe, submissions in reply (doc N31), p 30
140. Counsel for Tuawhenua (Wai 842), submissions on issues 18 and 19 (doc N9(a)), p 94
141. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 271–272
142. Counsel for Wai 36 on behalf of Tuhoe, response to statement of issues (doc N8(a)), pp 137–138; counsel for Tuawhenua (Wai 842), submissions on issues 18 and 19 (doc N9(a)), pp 105–106; counsel for Tuawhenua (Wai 842), closing submissions (doc N9), p 243; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 274
143. Counsel for Wai 36 on behalf of Tuhoe, response to statement of issues (doc N8(a)), p 138
144. Crown counsel, closing submissions (doc N20), topics 18–26, pp 95, 101
145. Ibid, p 101

have funded maintenance is 'complex' and needed to take the contemporary context into account, including the availability of resources.[146]

22.3.3 To what extent were Te Urewera Maori lands outside the former Urewera District Native Reserve area subject to rates before 1964, and were those rates fair and equitable?

Under the changing rating laws of the late nineteenth and early twentieth centuries, whether Maori land was rated depended at various times on its title, whether it was leased to a European, and its proximity to roads.[147] At times Maori land in the north and west of our inquiry district could have been subject to rates under these laws, but we have no evidence on when rates were first charged on Maori land in our inquiry district.[148] Rates were charged on Maori land by various county councils and road boards overlapping our district from at least 1885, but we do not know if any of the rated lands were within our inquiry district.[149] We do know that the Te Aitanga-a-Mahaki incorporations were paying rates by 1908, possibly on the Tahora 2 block which was certainly being rated by 1913, but we do not know when rating began or whether any rates were actually collected.[150]

From 1925, all Maori land was made rateable unless it remained in customary ownership, or was an urupa, a marae or church, or exempted by the Governor-General in Council.[151] In 1939, the Whakatane County Council made several hundred applications to the Native Land Court under the Native Land Rating Act 1924 to have blocks at Rangitaiki, Waimana, Omataroa, and other places vested in the Native Trustee or put under a receiver in order to obtain rates owing. It appears that such applications were rarely if ever granted; the threat of vesting or receivership was essentially a tool to bring landowners into negotiation, after which back-payments in cash or produce might be made.[152] Unpaid rates were also

146. Crown counsel, closing submissions (doc N20), topics 18–26, p 101

147. Tom Bennion, 'The History of Rating in Te Urewera' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A130), pp 8–9, 12, 14, 18–20, 38

148. Before 1882 Maori land could be rated only if it was under non-customary title and leased to a European, which meant that Waimana was the only rateable Te Urewera block: Jeffrey Sissons, 'Waimana Kaaku: A History of the Waimana Block' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A24), pp 31, 36–37, 43. Between 1882 and 1888 Maori land could be rated if it was within five miles of a public road, which meant that Matahina, Ruatoki, and Waimana could have been rated: Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 283–284. See also our discussion of roads in chapter 8. For an indication of which blocks were within five miles of a public Road, see the Public Works map (PWD W000 6541) from 1877 featured in Judith Binney, 'Encircled Lands, Part One: A History of the Urewera from European Contact until 1878' (doc A12), p 118.

149. Bennion, 'The History of Rating in Te Urewera' (doc A130), pp 17–18

150. Kathryn Rose, 'Te Aitanga-a-Mahaki Land: Alienation and Efforts at Development 1890–1970' (commissioned research report, Wellington: Te Aitanga-a-Mahaki Claims Committee, 2000) (doc A64), p 255; rating schedule, April 1916 (Paula Berghan, comp, supporting documents for 'Block Research Narratives of the Urewera, 1870–1930', various dates (doc A86(o)), p 5206)

151. Rating Act 1925, ss 102–104

152. Bennion, 'The History of Rating in Te Urewera' (doc A130), pp 70–72

sometimes registered as a lien on the land title.[153] Large areas of unproductive land were exempted from rating around this time.[154]

The four reserves to the south-east of Waikaremoana were rated from the 1920s and probably earlier.[155] During the consolidation scheme of that decade, the Crown undertook to pay the local rates owing on the two reserves, Whareama and Ngaputahi, which it took as part of the scheme.[156] We do not know how much money was owed, how long the land had been rated for, or whether the debt contributed to Ngati Ruapani's decision to give up these reserves. As we found in chapter 14, the owners appear to have received nothing in return for the loss of these lands except release from that debt. The remaining southern reserves, Heiotahoka and Te Kopani, continued to be subject to rates. After partitioning in 1925, the urupa blocks Te Kopani 3 and 6 became exempt from rating, and Judge Carr recommended that Te Kopani 2 and 5 also be made exempt, probably due to the extreme poverty of the occupants, to which we refer in several chapters of this report.[157] Despite being gazetted as papakainga in 1927, these blocks were not exempted.[158]

Waiohau and Te Teko, in the north-east of our district and just outside the UDNR boundary, were also subject to rates. As we explained in chapter 19, Waiohau was incorporated into the Ruatoki consolidation scheme in the 1930s. As part of this process, the Crown took land at Waiohau and Te Teko in exchange for money owing from surveys and unpaid rates.[159] We noted that these debts were written off at Ruatoki, but not at Waiohau or Te Teko. The Crown actively opposed the remission of Waiohau rates, although it eventually agreed to write off the interest and two-thirds of the original debt. Before the write-off, the rates debt comprised £192, of which £2 was owed on Waiohau and the rest on Te Teko. We found this to be particularly unfair as Te Teko had only recently been returned to Maori ownership, as compensation for the Waiohau fraud. Most of the debt had been accrued before Ngati Haka Patuheuheu had had a chance to occupy the land. We also

153. Paula Berghan, 'Block Research Narratives of the Urewera, 1870–1930' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A86), p 694

154. Bennion, 'The history of rating in Te Urewera' (doc A130), p 72

155. Rates charging orders in Heiotahoka Block Order File 120B (Innes, comp, supporting papers to 'Report on the Tenure Changes affecting Waikaremoana "Purchase Reserves"' (doc A117(c), pp [74]–[75]; rates charging orders in Te Kopani Block Order File 240A, Maori Land Court, Gisborne (Innes, comp, supporting papers to 'Report on the Tenure Changes Affecting Waikaremoana "Purchase Reserves"' (doc A117(d), p [113]). We know that Whareama and Ngaputahi were also rated because, as we discuss in this paragraph, when the Crown took them it undertook to pay rates owed on them.

156. 'Urewera Lands Consolidation Scheme', 31 October 1921, AJHR, 1921, G-7, pp 6, 8

157. Innes, 'Report On The Tenure Changes Affecting Waikaremoana "Purchase Reserves"' (doc A117), pp 80–81; court orders setting apart Te Kopani 2 and 5 as native reserves, 5 September 1925, Te Kopani Block Order Files 240A and 240C, Maori Land Court, Gisborne (Innes, supporting papers to 'Report on the Tenure Changes affecting Waikaremoana "Purchase Reserves"' (doc A117(d), pp [128]–[179])

158. Innes, 'Report on the Tenure Changes affecting Waikaremoana "Purchase Reserves"' (doc A117), p 81; 'Setting Aside Land as a Native Reservation', 6 June 1927, *New Zealand Gazette*, 1927, no 39, p 1981 [Te Kopani 2 and 5]

159. Bernadette Arapere, 'A History of the Waiohau Blocks' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A26), p 85

found that, even if the Crown chose not to wipe the rates debt, it could have been charged against the land and repaid from lease money or farming profits, as debt was at Ruatoki. Once the Ruatoki–Waiohau consolidation was completed and the Waiohau development scheme was producing an income, the Whakatane County Council began levying rates on Waiohau again. A total of £664 17s 8d was owing by 1939, including court costs. The Native Department considered that there were 12 owners able to pay rates, and that they owed a total of £130, which the department proposed to pay before recovering the money from the owners. This was accepted by the council.[160] It appears that the rest of the money was written off.

While Te Urewera Maori landowners tended to oppose rating, some were willing to pay rates if it would result in roading improvements. The Crown had stopped maintenance on the Matahi road in 1930, meaning that Maori dairy farmers in the area then had difficulty getting their cream to the local factory.[161] In desperation, a group of Tuhoe farmers offered to pay rates or a proportion of farm earnings if the road was maintained. After 'lengthy negotiations', the council agreed to maintain the road in exchange for a £1,000 Native Affairs grant and a butterfat and wool levy from the Matahi farmers.[162] Even then, the part of the road which crossed into Opotiki County was not repaired, and the council there was not prepared to maintain its part of the road without its own grant. Although Maori farmers paid £200 to the Opotiki County Council, in 1953 half the road was still unusable by dairy trucks.[163] We discussed the effects of inadequate road access on the Waimana Valley communities, and their struggle for economic survival, in chapter 15.

By the 1960s, with the district in better financial shape, most Maori communities outside the UDNR area, including Murupara, Waimana, and Waiohau, were paying rates, apparently without much controversy.[164] In 1964, the general rates exemption covering the UDNR area was removed, and from that point on there was no difference between Maori lands inside or outside the former UDNR.[165]

22.3.4 When and why were Maori lands in the UDNR area exempt from rates? What charges were imposed instead, and why was the exemption removed?

Claimants in this inquiry submitted that, during negotiations over the Urewera District Native Reserve in the 1890s, Premier Richard Seddon promised that their lands would not

160. David Alexander, 'The Land Development Schemes of the Urewera Inquiry District' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A74), p 205
161. Sissons, 'Waimana Kaaku' (doc A24), pp 129–131
162. Ibid, p 131
163. Ibid, p 132
164. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 76. For the contemporary economic situation, see the socio-economic chapter.
165. Ibid, p 93

be rated.[166] The Crown denied that any such promise was made.[167] We discussed the UDNR negotiations and agreement in chapter nine, and noted that there was no specific reference to rating in the record of the agreement reached between Seddon and the Te Urewera delegation in September 1895, or the Urewera District Native Reserve Act. We found no evidence elsewhere that there had been a promise about rating. It is possible that a promise was made but not recorded, or that, because the agreement and Act provided for local self-government, the Te Urewera chiefs assumed that any rating power would belong to the General Committee rather than a road board or county council.

In any case, no rates were imposed on any UDNR lands until the 1920s. In 1920, the Whakatane County Council began improving the roads on the Ruatoki block, which were used by the owners to transport their milk to the local dairy factory. The council collected £200 in rates from the Ruatoki owners, who had asked for the road to be improved.[168] The improvements seem to have enabled the development of Maori dairy farming in the area, which had previously been impeded by the poor roads.[169] The rates money was deducted from the owners' milk cheques, which meant that the roads were paid for by those who most benefited.[170]

In chapter 14, we saw that in the early 1920s the Crown organised the consolidation of ownership of the UDNR lands. As part of the consolidation scheme, the Crown agreed to build arterial roads through the district, on condition that Maori landowners gave up 40,000 acres of land. As we found in chapter 14, this was out of keeping with contemporary practice, which was for main roads to be funded by central government. Landowners should not therefore have had to surrender any land for roads. Even worse, the Crown never built the roads it had promised, and for which the hapu and iwi of Te Urewera had given so much land. Eventually, in 1958, the Crown paid £100,000 for the land it had taken for the roads; we found that this agreement was not adequate compensation.

Consolidation was brought about under the Urewera Lands Act 1921–22, which included a provision exempting all Maori land within the reserve from rates until at least a year after the consolidation order had been made. Once a year had passed, the Native Minister could gazette a notice ending the exemption for a specific piece of land.[171]

Claimants in this inquiry have submitted that the Crown promised that the reserves from the Waikaremoana block would have a rates exemption over and above the general UDNR

166. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 271–273
167. Crown counsel, closing submissions (doc N20), topic 27, p 8
168. Cleaver, 'Urewera Roading' (doc A25), pp 34, 43; Berghan, 'Block Research Narratives of the Urewera 1870–1930' (doc A86), p 544
169. See Berghan, 'Block Research Narratives of the Urewera 1870–1930' (doc A86), pp 535–538, 543
170. Ibid, p 544
171. Urewera Lands Act 1921, s 16; Steven Oliver, 'Ruatoki Block Report' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A6), p 160

exemption.[172] In 1925, Matamua Whakamoe and others wrote to Native Affairs Minister Gordon Coates stating that an agreement had been reached in 1923 that the reserves from the Waikaremoana block would not be rated.[173] However, the terms under which the block was transferred to the Crown, published in October 1921, did not include any mention of rates.[174] Tuhoe and Ngati Ruapani strongly objected to the terms of consolidation, and to any suggestion that their land would be rated.[175] The consolidation commissioners informed Tuhoe that it was too late to complain about the scheme, but said that rates would be levied only after the scheme had been completed, and then only if the Minister gave his approval.[176] Whakamoe and others of Ngati Ruapani and Tuhoe seem to have believed that the Crown had agreed not only to the general UDNR rates exemption, but to a more permanent exemption for the Waikaremoana reserves. We do not consider it likely, however, that any such agreement was made even though Whakamoe and others understood that it had been; indeed, the evidence we have suggests that the Crown explicitly rejected such an exemption. In any case, like all UDNR land, the Waikaremoana reserves were not rated until the general exemption for the district was lifted in 1964. We will discuss what happened after that in the next section.

Despite the rates exemption, Whakatane County Council was able to get some contributions towards roads and other local services by means of the development schemes set up by the Crown at Ruatoki and Ruatahuna from 1930. Some communities which did not have development schemes also contributed towards roads. At Matahi, for example, the Maori community spent £100 building a road, which the Whakatane County Council helped maintain. After it was washed out, however, the council refused to repair it without a rates contribution.[177]

During the 1930s and 1940s, roads and other public works at Ruatoki were paid for by the Crown, with some costs repaid through the development scheme.[178] The council continued to argue that Ruatoki lands should be rateable, and by 1938 the Department of Native Affairs, which administered the scheme, felt that some rates could be paid without hardship to the owners.[179] Due to the confusion about whether Ruatoki could legally be rated (see sidebar page 39), in 1942 the department agreed to pay the Whakatane County Council

172. Counsel for Wai 36 on behalf of Tuhoe, response to statement of issues (doc N8(a)), p 124; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 250; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), paras 183–188

173. Matamua Whakamoe and others to Coates, 30 March 1925 (Vincent O'Malley, comp, supporting documents to 'The Crown's Acquisition of the Waikaremoana Block' (doc A50(b)), p 514)

174. 'Urewera Lands Consolidation Scheme', AJHR, 1921, G-7, p 9

175. Vincent O'Malley, 'The Crown's Acquisition of the Waikaremoana Block, 1921–25' (commissioned research report, Wellington: Panekiri Tribal Trust Board, 1996) (doc A50), pp 107–108

176. Urewera minute book 1, 22 February 1922, fol 32 (O'Malley, 'The Crown's Acquisition of the Waikaremoana Block' (doc A50), pp 109–110)

177. Bennion, 'The history of rating in Te Urewera' (doc A130), p 76

178. Oliver, 'Ruatoki' (doc A6), p 162

179. Ibid

£250 for hospital rates, and to maintain bridges and roads in the Ruatoki area. The development blocks would then pay the department £250 for the hospital rates, £360 for a patriotic fund, and £600 for road maintenance. The first two payments would be charged according to ability to pay, while the road maintenance payment was compulsory. All appear to have been one-off payments.[180]

Over the next decade the department and council argued over who should be responsible for the roads, and in particular who should bring them up to county standards. Throughout, the owners opposed removal of the rates exemption, mostly on the grounds that many subdivisions were uneconomic. In the meantime, bridges at Ruatoki needed repairs and, by 1952, had become unsafe.[181] In 1948, the council agreed to take over the Ruatoki roads and bridges in return for the Crown spending £33,000 to bring them up to county standards, and the development scheme farms paying £1,000 a year in total, which would increase to £1,700 a year over an eight-year period. It is not clear when this arrangement took effect, but it seems to have been in 1949 or the early 1950s.[182] It ran into problems by the early 1960s, as farms began to be released from the development scheme and ceased to be under departmental control, and so could not continue to be levied. The remaining farms therefore carried an increasingly heavy burden.[183]

One of the kainga most severely affected by the Crown's failure to build its promised roads was Ruatahuna. By the mid 1940s, roads to the settlement had become almost impassable and a bridge had been swept away. This meant communities on the other side of the Mangaorongo Stream from Ruatahuna were cut off from the school and from medical aid.[184] The Whakatane County Council refused to maintain the roads as it was not receiving any rates from the area, although it did contribute £20 a year towards maintenance.[185] There were also some Crown contributions.[186] In 1949, the Ruatahuna community lobbied the Maori Affairs Department for road funding, agreeing to pay some rates, but pointing out that thousands of acres of Maori land had already been contributed, through the consolidation scheme, towards roading in Te Urewera.[187] Maori Land Board registrar J Dillon estimated that the road could be repaired if each farm paid about £12 to £15 per year, under a similar arrangement to that in effect at Ruatoki.[188] Local fundraising by a variety of means,

180. Oliver, 'Ruatoki' (doc A6), pp 165–166
181. Ibid, pp 166–167
182. Ibid, pp 167–168
183. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 73; Oliver, 'Ruatoki' (doc A6), pp 169–170
184. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 354; Heather Bassett and Richard Kay, 'Ruatahuna: Land Ownership and Administration c. 1896–1990' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A20), p 323
185. Bassett and Kay, 'Ruatahuna' (doc A20), pp 323–324; Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 353–355
186. Bassett and Kay, 'Ruatahuna' (doc A20), p 324
187. Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 355–356
188. Notes of Meeting, 29 August 1949 (David Alexander, comp, supporting documents to 'The Land Development Schemes of the Urewera Inquiry District', various dates (doc A74(c)), pp 655–657)

as well as a Crown contribution, led to some improvements in the 1950s.[189] However the road north from Ruatahuna to Mataatua remained in poor repair and the school bus driver threatened to stop the service if the road was not improved.[190] The lack of usable roads was also preventing the development of nearby land.[191] Part of the problem was that the council was still refusing to maintain the roads without rates being paid.[192] The road was eventually widened and metalled, and a bridge built, in 1959; this work was carried out by locals and Fletcher Timber Mills staff, with the aid of a £200 Maori Affairs grant.[193] It seems to have been part of a more general agreement that Fletcher would maintain roads which it was using and which were not otherwise being looked after.[194] Similarly, the road to Maungapohatu was built and maintained by the Bayten Timber Company; the owners seem to have sold the timber rights partly in order to get the road. The council refused to pay for maintenance to this road while no rates were being paid.[195]

In the 1950s and early 1960s, the Whakatane County Council, which covered most of the UDNR area, campaigned to have the rating exemption on UDNR land removed, particularly from blocks which were being milled.[196] The Department of Maori Affairs and the Waiariki Maori Land Court registrar were concerned about the imposition of rating on uneconomic Maori farms, unmillable land, and, in the future, land from which all the millable bush had been removed.[197] In a meeting between the department, the council, and Tuhoe in September 1959, Tuhoe representatives asked why millers could not pay timber royalties for the upkeep of roads, as they did when milling Crown land.[198] A few months later, Prime Minister and Minister of Maori Affairs Walter Nash wrote that the council could not be blamed for not wanting to maintain roads when it was not receiving rates from anywhere in the reserve area. He argued that, when the exemption was granted in the 1920s, it would have been unfair to rate Maori land in the UDNR because the consolidation scheme made ownership uncertain, and because landowners had already given up land for the roads. By 1960, however, the consolidation scheme was completed and Tuhoe had been compensated for the roading land; the general exemption should therefore be lifted.[199]

189. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 76; Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 359–360
190. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 360
191. Bassett and Kay, 'Ruatahuna' (doc A20), p 325
192. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 361
193. Ibid, p 362
194. Bassett and Kay, 'Ruatahuna' (doc A20), p 327
195. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 101
196. Ibid, pp 77–78
197. Bennion, 'The History of Rating in Te Urewera' (doc A130), pp 79–80; Bassett and Kay, 'Ruatahuna' (doc A20), pp 326–327
198. Bennion, 'The History of Rating in Te Urewera' (doc A130), pp 81–82
199. Ibid, p 82

Rating at Ruatoki: A Legal Conundrum

Ruatoki was the only large Maori community to be part of the Urewera District Native Reserve but not the Te Urewera consolidation scheme. This created a great deal of legal confusion over rating, which was finally resolved only in 2003.

In its 1921–22 governing legislation, the Te Urewera consolidation scheme adopted the UDNR boundary, which included Ruatoki even though Ruatoki was not part of the scheme.[1] This meant that Ruatoki was included in the general rates exemption, even though it had been rated earlier in the decade. Exemptions could be removed from specific blocks after a consolidation order had been made, but since Ruatoki was not part of the consolidation scheme, there could be no consolidation order there.[2] An amendment to the Act in 1922 removed the requirement for a year to pass between the order and removal of the exemption from Ruatoki 1, 2, and 3, but this did not solve the problem that there could be no order for any of those blocks.[3] The Whakatane County Council had lobbied for the amendment, pointing out that it had rated Ruatoki in the past, and consequently spent a lot of money on improving roads in the area.[4] However even after the amendment was passed, the legality of Ruatoki rates remained uncertain and the owners refused to pay. By the end of the decade there was £102 owing.[5] Another attempt was made in 1940 to remove the exemption from Ruatoki, but the legal uncertainty remained.[6]

In 1964, the rates exemption was removed for the entire former UDNR, including Ruatoki. The legality of this does not seem to have been considered until 2000, when the Whakatane District Council's right to levy rates there was legally challenged. The definitive ruling on the issue came in 2003, when the Court of Appeal held that, because no consolidation order could ever have been made for Ruatoki under the original Act, there was no requirement for one prior to the removal of the rates exemption.[7] Legally speaking, Ruatoki could have been rated from 1922. It was perhaps fortunate for its owners that the Crown did not realise this.

1. The UDNR is not referred to in the text of the Urewera Lands Act, but Bennion states that the area described therein is 'exactly' the area in the schedule of the UDNR Act: Bennion, 'The History of Rating in Te Urewera' (doc A130), p 51.
2. Oliver, 'Ruatoki' (doc A6), p 161
3. Native Land Amendment and Native Land Claims Adjustment Act 1922, s 43(3)
4. Berghan, 'Block Research Narratives' (doc A86), pp 511–512
5. Berghan, 'Block Research Narratives' (doc A86), pp 511–512; Bennion, 'The History of Rating in Te Urewera' (doc A130), pp 58–60
6. Oliver, 'Ruatoki' (doc A6), pp 163–164
7. *Keepa v Whakatane District Council* CA60/02, 24 July 2003, paras 14–16; see also *Whakatane District Council v Keepa*, High Court, M7/00, 27 June 2000, and *Whakatane District Council v Keepa*, High Court, M7/00, 18 December 2001

In 1963, as a result of the conflicts and problems outlined above, the Local Government Commission was asked to investigate and make recommendations on rating in the area.[200] The council submitted that it could not maintain roads unless rates were paid.[201] Tuhoe Tribal Committee lawyer J D Dillon responded that, in most areas, only a small amount of road maintenance would be done, and it was unfair to remove the general exemption for this. He did, however, state that it would be reasonable to rate blocks in the Ruatoki and Ruatahuna areas.[202] He also noted that Tuhoe had agreed not to mill some of their land, for flood protection and soil conservation purposes, and that Maori landowners had been contributing to road upkeep through the levies, maintenance of the Ruatahuna road, and free metal from their lands.[203] In June 1963, the commission informed the Minister of Internal Affairs that the owners and Whakatane County Council had agreed that developed and owner-managed lands in the former UDNR area should be made rateable; farms still in the development schemes should remain unrateable; millable areas should be rated, with the rates paid by the millers whenever possible; and that the council should take over roads, water supplies, and other works currently maintained by landowners or the Department of Maori Affairs.[204] The following year, the general exemption was lifted.[205]

22.3.5 To what extent have Te Urewera Maori lands been subject to rates since 1964, and have such charges been fair and equitable?

When the general rating exemption was lifted from the former UDNR in 1964, a total of 131 blocks, comprising 38,250 acres and including at least 14 urupa, eight papakainga or pa, and seven marae, were exempted from rating.[206] These were probably the blocks recommended to be exempt by the Maori Land Court, as being either urupa, marae, housing reserves, unproductive and likely to remain so, or blocks which should remain undeveloped because of water catchment needs.[207] All of these blocks were in Whakatane County; we do not

200. 'Report of the Local Government Commission for the Year Ended 31 March 1964', AJHR, 1964, H-28, p 17. The commission was tasked with investigating a range of local government issues. Its members were John Bradley Yaldwyn (chair), a barrister and solicitor and member of various Hutt Valley and Wellington region local authorities; John Charles Derbie Mackley, Masterton County Clerk and member of various local government associations; and Ronald Erle White, former Mayor of Timaru. We do not know if any of these men were Maori or whether they had any connection to Te Urewera. G C Peterson, ed, *Who's Who in New Zealand*, 8th ed (Wellington: A H & A W Reed, 1964), pp 199, 302; 'Timaru City Council: Resolution Making Special Rate', 5 August 1954, *New Zealand Gazette*, 1954, no 48, p 1282.

201. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 86

202. Ibid, p 86

203. Ibid, p 87

204. Yaldwyn to Minister of Internal Affairs, 19 June 1963 (Bennion, comp, supporting documents to 'The History of Rating in Te Urewera', various dates (doc A130(b)), pp 84–87)

205. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 93

206. 'Exempting Maori Land from Payment of Rates', 6 April 1964, *New Zealand Gazette*, 1964, no 24, pp 701–702

207. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 94

know why blocks in other counties were not included.[208] There were many large blocks on the list, including 10 of over 1,000 acres each, which were presumably not suitable for development. At the time of our hearings, none of these exemptions had been repealed.[209] However the amalgamations of the 1970s, which we detailed in chapter 19, meant that many of these blocks ceased to exist. This was especially the case at Ruatoki, where rates-exempt blocks comprising more than 5,000 acres were incorporated into the Te Manawa a Tuhoe block, leaving only about 45 acres with rates-exempt status.[210]

Maori landowners who could not pay their newly levied rates reached a variety of agreements with local councils, although this sometimes took several decades. One of the earliest agreements was reached in 1969, between a Tuhoe deputation and the Whakatane County Council. Under the agreement, all accessible Maori land in Te Urewera would be rated, even if it was incapable of returning a profit, as long as inaccessible land was not rated.[211] It appears that the council did not rate the inaccessible land even when rates were owing on other land, but there were serious fears that it would do so.[212] This was a major problem because some land was made rateable in 1964 on the basis that timber was being milled from it at that time. However rating continued 'long after timber cutting grants had expired', and even after the milling of timber was prohibited.[213] Although the 1963 agreement between landowners and the Council did not explicitly state that undeveloped and unmillable land would not be rated, this was the clear implication. Also around 1969, the Whakatane Council wrote off around $17,000 in unpaid rates and agreed not to rate some Ruatoki hill land intended for afforestation, allowing the land to be amalgamated and later leased for forestry purposes. As of the early 2000s, the owners were paying rates from the area's forest income.[214]

Wairoa County Council seems to have been more difficult. The reserves from the Waikaremoana block, north of the lake, became subject to Wairoa County rates in 1964, with the removal of the UDNR rating exemption, even though some contained urupa and marae.[215] Rating also continued after the reserves were given legal Maori reserve status in

208. The inclusion of Opotiki County blocks was suggested at the time, but this seems to have been ignored: J H W Barber to Maori Affairs Head Office, 25 February 1964 (Bennion, comp, supporting documents to 'The History of Rating in Te Urewera' (doc A130(b)), p 93).

209. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 103

210. 'Exempting Maori Land from Payment of Rates', 6 April 1964, *New Zealand Gazette*, 1964, no 24, p 701; Tama Nikora, 'Te Urewera Lands and Title Improvement Schemes', August 2004 (doc G19), p 74

211. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 467

212. Ibid, p 468

213. Cleaver, 'Urewera Roading' (doc A25), p 120

214. Oliver, 'Ruatoki' (doc A6), p 173

215. None were on the 1964 exemption list. 'Exempting Maori Land from Payment of Rates', 6 April 1964, *New Zealand Gazette*, 1964, no 24, pp 701–702; Evelyn Stokes, J Wharehuia Milroy, and Hirini Melbourne, *Te Urewera Nga Iwi Te Whenua Te Ngahere: People, Land and Forests of Te Urewera* (Hamilton: University of Waikato, 1986) (doc A111), pp 81, 85. Te Kopani and Heiotahoka were not exempted either.

1974, although some rating debt was remitted at this time.[216] In 1986, Stokes, Milroy, and Melbourne wrote:

> In the Wairoa County District Scheme all the Reserves are designated as proposed additions to the Urewera National Park. . . . In effect, the Reserves can not be used for any purpose that does not comply or accord with use as a National Park. In particular, this means that owners can not build dwellings or other accommodation. Despite this, the owners have consistently been sent rate demands for the Reserves, for land that does not and can not generate any income, has no services supplied by the county, and which owners can not use. In 1972 the rate debt was $14,056. In 1985 it was over $40,000.[217]

In 1986, after negotiations, the Wairoa County Council agreed to waive unpaid rates.[218]

In the early 2000s, the Whakatane District Council, which covers most of our inquiry district, had a policy of remitting rates on multiply owned Maori blocks which were 'non-revenue producing, inaccessible and incapable of development for future use'.[219] There was no special provision for remote areas in receipt of few services, although from 1993 the council waived the Works and Facilities rate for the Maungapohatu Incorporation block, as no money had been spent on the access road.[220] The Gisborne District Council, which covers some of the south-east of our district, had a whenua rahui programme through which Maori landowners could apply for up to three years' rates relief if their land was unoccupied and of proven historic, ancestral, or cultural significance.[221] We did not receive evidence on whether relief was received for blocks in our district.

Under the Local Government (Rating) Act 2002, urupa, marae, Maori reservations, and Maori customary land were specified as exempt from rates.[222] The Local Government Act of the same year required local authorities to adopt a policy on the remission and postponement of rates on Maori freehold land. The authority must consider a wide range of objectives including avoiding alienation of Maori land; recognition of the connection between Maori and their ancestral land; protection of wahi tapu; and recognition of inaccessible land.[223] We did not receive any information on Maori land rating policies, at the time of our hearings, of any district councils overlapping the inquiry district.

216. Innes, 'Report on the Tenure Changes Affecting Waikaremoana "Purchase Reserves"' (doc A117), pp 33–35
217. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 86–87
218. Ibid, p 87
219. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 103
220. Ibid
221. Ibid
222. Local Government (Rating) Act 2002, sch 1
223. Bennion, 'The History of Rating in Te Urewera' (doc A130), pp 104–105; Local Government Act 2002, s 108, sch 11

22.3.6 Tribunal analysis and conclusions

We consider that, generally speaking, the Crown has a kawanatanga right to allow local authorities to collect rates from Maori land. Rates should be imposed, however, only in the following circumstances:

- Consideration is given to rating relief for land incapable of returning a profit, such as urupa, marae, land not capable of development, and land with significant legal restrictions;
- Those owning and/or using the land will receive a reasonable level of services and amenities in return; and
- Rating assessment takes into account past contributions (such as land, gravel, and labour) made to construction and upkeep of roads and other amenities.

Where those terms are met, we consider that the imposition of rates on Maori land is not in breach of Treaty principles. We now turn to our findings on specific rating issues.

On the question of whether any promise was made in the 1890s not to impose rates on land within the Urewera District Native Reserve, we received insufficient evidence to make a finding.

In relation to the rates and levies imposed on Ruatoki and Ruatahuna lands before 1964, we make the following findings:

- The rating of Ruatoki lands in the early 1920s was reasonable, considering that the owners benefited from local roads and were apparently able to pay rates at this time. It was not therefore a breach of Treaty principles.
- Once owners of Maori land in the Urewera consolidation scheme had surrendered 40,000 acres of their land for arterial roads, they should not have been asked to make any further contribution to roading in the reserve area, especially given that many of the promised roads were never built. As we found in chapter 14, the compensation payment in the 1950s was inadequate, and therefore did not justify the subsequent imposition of rates for roading purposes.
- The levies imposed by the Crown on development scheme farms around the middle of the twentieth century were effectively rates. In Ruatahuna the imposition of these levies subverted the rates exemption, and ignored the substantial contribution of land which the community had already made towards roads. The Crown therefore breached the Treaty principle of partnership, which requires the parties to act towards one another with the utmost good faith. The increased hardship suffered by these impoverished communities was a prejudice arising from this breach of the Treaty.
- The levies on Ruatoki are a different matter. That area was not part of the main consolidation scheme, and the community did not give up land for roads. It was quite recently determined that the Crown could legally have removed the rates exemption, although it did not manage to do so before 1964. As with the rating in the early 1920s, we cannot

see any breach of Treaty principles in the Crown's imposition of levies on productive land at Ruatoki.

In relation to general rating policy and practice, we make the following findings:

- It is understandable that local authorities did not want to pay for roads in areas where they were collecting few or no rates. However this does not mean that Maori landowners should have shouldered the burden of high rates or bad roads. The Crown had taken large areas of their land to pay for roads that were never built, and the roads served the national park as well as Maori communities. The Crown should therefore have made more of a contribution towards roads in Te Urewera, and its failure to do so was a breach of the principle of partnership with its requirement of good faith. We discuss the prejudice arising from the Crown's failure to build its promised roads elsewhere in this report, showing that it severely impeded the economic capability of many Te Urewera communities.
- We consider that it was not a breach of Treaty principle for productive Maori land in the former UDNR to incur rates after 1964, but only if those rates related to services and amenities (other than roads) which the landowners were able to use. Rates should not have been imposed to pay for roads; as noted, Maori landowners in the UDNR had already paid for them with land.

In addition, we repeat our findings in chapters 14 and 19 that the Crown should not have taken land at Waiohau, Te Teko, and Waikaremoana as payment for rates debt. It should instead have remitted the debt as it did in relation to Ruatoki.

22.4 Cultural Property Claims

In this inquiry, most claims relating to cultural property fell into one of three categories:

1. Claims with nationwide application, such as generic issues relating to matauranga Maori and taonga tuturu, many of which have been addressed by the Wai 262 Tribunal.[224] We do not examine any generic issues in this section.
2. Claims relating to wahi tapu. Generic wahi tapu issues have been examined by the Tauranga Moana Tribunal, and we endorse its findings that the Crown has a duty to protect Maori cultural heritage, but has largely failed to do so.[225] In relation to claims about specific wahi tapu in our inquiry district, we address those relating to the National Park in chapter 16, to Waikaremoana in chapter 20, and to Whirinaki in chapter 21.

224. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims concerning New Zealand Law and Policy affecting Maori Culture and Identity*, *Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, pp 33–46, 77–91, vol 2, pp 504–514

225. See Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, pp 671–701

3. Claims relating to taonga tuturu, also known as artefacts or cultural objects. In this section, we deal with taonga tuturu which have been removed from Te Urewera.

We received other claims relating to the National Park, for example the place of matauranga Tuhoe; we address these in chapter 16.

In chapter 5, we detailed how, during the 1860s and 1870s invasions of Te Urewera by Crown forces, taonga such as wharenui were deliberately destroyed. We found that this was in breach of articles 2 and 3 of the Treaty, as well as the principle of active protection. As we stated in chapter 5, the trauma of the invasions was intensified by the wanton destruction and looting of irreplaceable taonga and the desecration of wahi tapu. One soldier boasted of having 'got some very fine specimens of Maori trappings[:] one figurehead to a Maori war canoe, tomahawk, spear, paddle and some greenstone'.[226] The present location of most of the items looted during the wars is unknown.

Some significant Te Urewera taonga were presented to high-ranking visitors to recognise their mana and mark the occasion.[227] The Wai 36 Tuhoe claimants submitted that such gifts were given

> to affirm and sustain the reciprocal relationship between Tuhoe and the Crown. The Crown has wrongly viewed such gifts as demonstration of Tuhoe submission and retained them on that basis: Tribal heirlooms such as [the taiaha] Rongokarae appear to have been treated as constituting an absolute and personal gift to the recipient. The failure to return State gifts is a breach of the Crown's duty to treat with Tuhoe in the utmost good faith.[228]

Crown counsel responded that there is no evidence that the Crown 'intended to distort tribal customs of Tuhoe' by not returning gifted taonga when this was expected. However they acknowledged that there was sometimes a failure to understand that the gifts should have been returned.[229]

One example of the Crown's failure to meet the expectations of Te Urewera iwi with regard to gifts dates from 1870. At a peace-making hui between Tuhoe rangatira Te Whenuanui and the Crown, Tuhoe presented Major William Mair with two pounamu weapons (one named Tuhua), and three cloaks. Mair reciprocated with a watch (to be named Te Maungarongo), a gold pin, a gold ring, and a shawl.[230] In 1971, T R Nikora informed the office of Maori Affairs Minister Duncan McIntyre that the Minister's upcoming visit to Ruatahuna would be an appropriate time to return the gifts. At the hui, Tuhoe returned Mair's gifts, given a century before, but McIntyre had been unable to locate Tuhoe's gifts. He then saved the Crown's honour somewhat by presenting them with his own personal walking stick, a valuable Scottish heritage piece. This was presented back to McIntyre the following year, when

226. Ngahuia Te Awekotuku and Linda Waimarie Nikora, 'Nga Taonga o Te Urewera', August 2003 (doc B6), p 56
227. Te Awekotuku and Nikora, 'Nga Taonga o Te Urewera' (doc B6), p 56
228. Counsel for Wai 36 Tuhoe, response to statement of issues (doc N8(a)), p 223
229. Crown counsel, closing submissions (doc N20), topic 40, p 12
230. Elsdon Best, *Tuhoe: The Children of the Mist*, 2nd ed (Wellington: Reed, 1972), p 665

he visited Ruatoki. In their evidence, Te Awekotuku and Nikora stated that the return of McIntyre's stick 'was in stark contrast to Pakeha practice, and recognises the significance of material objects in a ceremonial or negotiating context.'[231]

The shell trumpet Te Umukohukohu, which was sounded in 1868 to rally Tuhoe resistance to invading Crown forces, is another significant taonga presented to Crown representatives. Te Whenuanui gifted this to Lord Ranfurly's party at Ruatahuna in 1906, and it is now held by the Te Papa Tongarewa museum.[232] Te Awekotuku and Nikora argue that there would have been an expectation that the taonga, 'one of the most singularly meaningful taonga extant for Tuhoe', would be returned.[233]

The taiaha Rongokarae was presented to Richard Seddon by the Tuhoe rangatira Kereru Te Pukenui during Seddon's visit to Te Urewera in 1894. As we stated in chapter nine, this was a gift of great significance. Kereru was reported as saying that it symbolised a wish for future peace, and Tuhoe's commitment to partner with the Government and obey the law. We considered that the gift was intended to create a covenant, binding both sides to peace and future consultation with each other. Although Seddon may not have fully understood the meaning of the gift, apparently believing that it signified Tuhoe's submission, he did understand that it had imposed a trust upon him. At the time of our hearings the location of Rongokarae was unknown, which was a source of distress to the claimants. It was subsequently discovered that the taiaha had remained with the Seddon family, and in August 2014 it was returned to Tuhoe by the Crown and Richard Seddon's great-grandson, Tim Jerram.[234]

In each of the examples above, Tuhoe leaders presented high-ranking Crown representatives with taonga on significant occasions. It is clear to us that the purpose of such presentations was to ensure that the circumstances in which they were made would be remembered on both sides for generations, as part of their shared history. These were not gifts in the everyday sense of the word; according to tikanga, the recipient held the taonga on the basis that it would be returned on an appropriate occasion; years, perhaps generations, hence.

The Crown failed to inform itself of the significance attached to the presentation of taonga on historic occasions, and of its obligations as recipient, including the obligations to care for the taonga and eventually to return them. In two of the examples above – the Mair gifts and Rongokarae – the Crown seems to have lost possession of the taonga. In the case of Rongokarae, Seddon appears to have regarded the taiaha as his own personal property, and handed it down through his family. The taonga presented to Mair seem to have been

231. Te Awekotuku and Nikora, 'Nga Taonga o Te Urewera' (doc B6), pp 57–58

232. 'Putatara (Trumpet), Named "Te Umukohukohu"', Museum of New Zealand Te Papa Tongarewa, http://collections.tepapa.govt.nz/Object/119511, accessed 27 May 2015; Te Awekotuku and Nikora, 'Nga Taonga o Te Urewera' (doc B6), pp 64–65

233. Te Awekotuku and Nikora, 'Nga Taonga o Te Urewera' (doc B6), p 65

234. Christopher Finlayson, 'Address to Tuhoe – Crown Settlement Day in Taneatua', 22 August 2014, http://www.beehive.govt.nz/speech/address-tuhoe-crown-settlement-day-taneatua, accessed 10 November 2014

lost entirely; they may lie unrecognised in some museum, or be in a private collection in New Zealand or overseas. Since Te Umukohukohu is still in the Crown's possession, it can consider returning this taonga to Tuhoe on a suitable occasion. We commend the Crown and the Seddon family for their recent return of Rongokarae.

In losing the taonga presented to Mair, the Crown has breached not only its Treaty duty of active protection of taonga, but also its broader duties of partnership and good faith. In relation to Rongokarae, the Crown's carelessness is symbolic of its wider failure to honour the wider UDNR partnership, which the gift originally marked.

22.5 Schools Claims

In this section we deal with claims involving schools and school property which relate primarily to issues other than education. Education issues will be addressed in our socio-economic impacts chapter. In this section, we examine three claims. The first relates to part of the Tuararangaia block, transferred to the Crown as an education endowment on conditions that the claimants say were never fulfilled. The second is about the Te Whaiti School playing field, and whether the Crown fulfilled the conditions of that gift of land. The final claim in this chapter relates to the planting of seedlings by pupils from two primary schools in the Whirinaki Valley and one at Ruatahuna, and what should have happened to the profits when those trees were harvested.

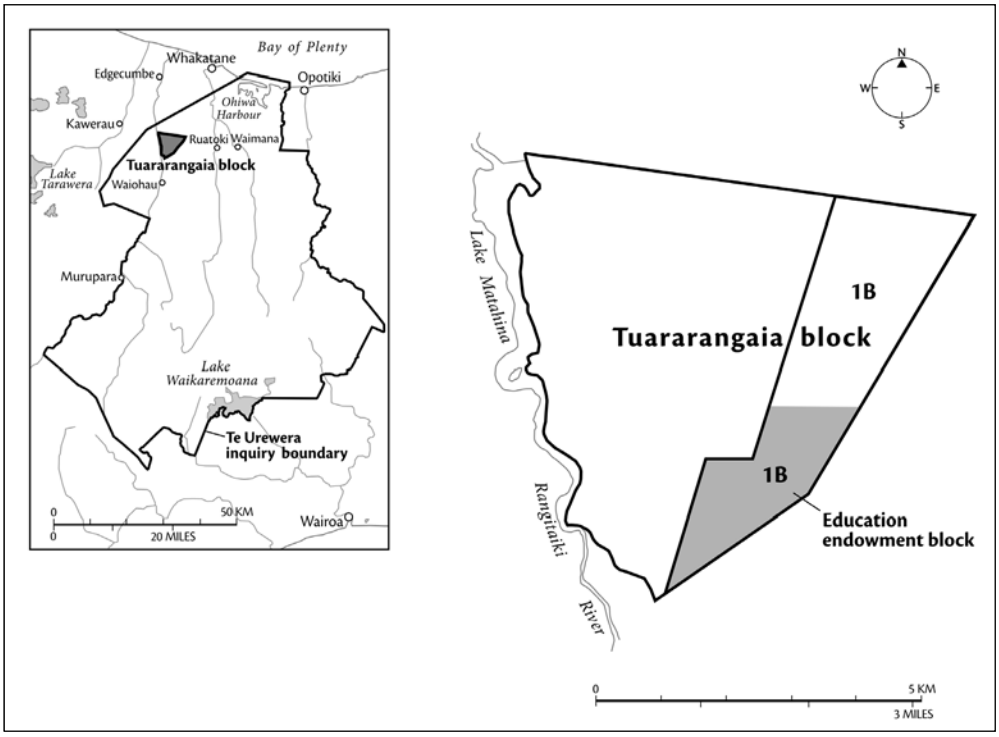
22.5.1 What were the conditions of the Tuararangaia land transfer, and did the Crown fulfil them?

(1) *Introduction*

In 1912, the assembled owners of the 2,619-acre Tuararangaia 1B block agreed to cede 1,000 acres of that block to the Crown, in support of a Maori college in the Ohiwa area. The Crown's title was not formalised until 1918, and nothing was done with the land until the 1950s, when logging took place. The profits were returned to the Education Department, which appears to have put them in its general fund. Tuhoe representatives requested the return of the land in 1972, and this occurred later in the year, on the grounds that it was no longer required for education purposes.[235] As of 2001, the endowment block was one of only two subdivisions in the greater Tuararangaia block remaining in Maori ownership. Part of the land is being used for pine plantations, while the rest is native forest.[236]

235. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 98, 103, 116–117, 123–124; Whakatane Maori Land Court, minute book 52, 1 November 1972, fols 290–291
236. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 10, 124

22.5.1(1)



Map 22.5: Tuararangaia Block

Sources: doc A3, pps 13, 74, 125

We set out the alienation history of Tuararangaia in chapter 10. In summary, the 8,656-acre parent block went through the land court in 1890, and the 3,500-acre Tuararangaia 1 was awarded to Tuhoe. Tuararangaia 1A was awarded to the Crown for survey costs, leaving Tuhoe with the 2,619-acre 1B block. On the recommendation of the Native Minister and the Stout–Ngata commission, the 1B owners formed an incorporation in 1910, with an elected management committee. The committee offered 1,000 acres to the Crown to support a college for local iwi, and this decision was confirmed by a meeting of owners assembled at Ruatoki. The rest of the block was ceded to the Crown in 1914, as a contribution to the war effort. We found in chapter 10 that at this time Tuhoe had little money, and offered gifts to the Government in the hope of improving and solidifying their relationship, establishing reciprocity, and getting college-level education for their children. We also found that the land transfers clearly had support from the wider tribe and some of its leaders, and was an example of the exercise of tino rangatiratanga.

Although the Crown investigated development of the block, no economic activity took place until the early 1950s, when the cutting rights were sold. The Education Department received a net £8,212 from the sale of timber, and appears to have put the money in its general funding account. This seems to have been done on the basis that Maori colleges and

schools were now completely funded by the Crown. Below, we will examine exactly what the terms of the gift were, and whether the Crown fulfilled them.

(2) *The claims and the Crown response*

Counsel for Wai 36 Tuhoe submitted that the Tuararangaia land was intended to establish a college 'for the children of Tuhoe, Ngati Awa and Te Arawa in the Ohiwa region.'[237] The Crown failed to establish any such college, or account for the money it derived from the land. 'In light of the above, the Crown has a long standing obligation to provide a college or tertiary institution within the Urewera area.'[238] Claimant witness Colin Pake Te Pou said to us that the 'government sold the trees and kept the profits – no school was established and none of the schools received any money.'[239] It was clear to us that the claimants regarded this as yet another promise that the Crown had made and forgotten.

Crown counsel accepted that the land was donated as an endowment for Maori schools or colleges, and that the Crown does not know exactly what the money it made from the land was spent on.[240] They conceded that it 'does not follow' that putting the endowment money into the Crown's general consolidated fund for education would have been a fulfilment of the landowners' intentions.[241] In response to questions as to why the Crown took so long to do anything with the land, counsel stated that 'from time to time' the Crown considered cost-effective uses of the land, and made a correct decision not to undertake unprofitable work.[242] To a question about the costs taken from Tuararangaia profits, Crown counsel responded that trustees were entitled to be reimbursed for reasonable costs incurred in carrying out their duties.[243]

(3) *Tribunal analysis and conclusions*

On 15 April 1912, Numia Kereru wrote to Inspector of Native Schools William Bird on behalf of the owners of Tuararangaia 1B, offering 1,000 acres of the block for a college at Ohiwa.[244] Te Pouwhare also wrote, confirming the offer.[245] Bird was initially against accepting the land, arguing that a thousand acres would 'not go far to support a "College" specially provided for the Urewera people and *it would not be right to accept the land for general school purposes*'(emphasis in original).[246] In June or July, however, he talked to Apirana Ngata,

237. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 219
238. Ibid
239. Colin Te Pou, brief of evidence, 26 March 2004 (doc C32(a)), p 13
240. Crown counsel, closing submissions (doc N20), topic 39, pp 31–33
241. Ibid, p 35
242. Ibid, p 33
243. Ibid, pp 33–35
244. Numia to Bird, 15 April 1912, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington
245. Te Pouwhare to Bird, 13 April 1912, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington
246. Bird to Secretary of Education, 24 June 1912, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington

who suggested that the Crown accept the land and ask Numia and Te Pouwhare to persuade other Te Urewera hapu to also donate land for the college. Bird now seemed to be more favourable towards accepting the land, writing that 'the Maori children would probably get much more benefit from the lands thus reserved than they would if the lands were sold or alienated, as they are being in the North'.[247] Shortly afterwards, Numia Kereru repeated the offer and the view that the college should be in the vicinity of Ohiwa. He also suggested that the Crown donate another thousand acres; it is not clear whether this was meant as a land swap or a donation towards the college.[248]

On 15 July, the Native Minister directed the Waiariki Maori Land Board to summon a meeting of the Tuararangaia 1B owners to consider a resolution that 'a portion of the south end of the block, containing 1,000 acres, be ceded to the Crown, to be set aside as a permanent endowment for Native Schools or Native Colleges'.[249] This phrasing does not seem to convey the owners' specific desire for a college in their rohe. This means that what was said at the meeting was of crucial importance. Board member and Te Arawa rangatira Hemana Pohika attended the meeting and reported back to the board president. We quote his account in full:

> Maketu
> 4 September 1912
> The President, Waiariki D M L to Board
> Te Huinga onga tangata no ratau te whenua raro i wahi XVIII, Ture Whenua Maori 1909.
> Mo Tuararangaia No 1B
> Ko te Motini 'Te whakaarohia ana te pito ki te tonga o taua whenua 1000 nga eka, kia tukua ki te Karauna hei oranga mo nga Kura me nga Kareti Maori.'
> He nui nga rangatira o Tuhoe i tu ki te whai kupu i tau huihuinga a wahakaaetia ana te motini.
> Hemana Pokiha
> Rep of Board
> I whai kupu ano aua rangatira o Tuhoe kia tino whakapumautia te whakatu e te Kawanatanga tetahi kura ara Kareti mo nga tamariki o Tuhoe o N'Awa me te Arawa ki te takiwa Ohiwa.
> Meeting at Tauarau, Ruatoki
> 27 August 1912[250]

247. Bird to Inspector General, 15 July 1912, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington
248. Extract from inspection report of Ruatoki, 22 July 1912, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington
249. Native Minister, Application to summon Meeting of Owners, 15 July 1912 (Peter Clayworth, comp, supporting papers to 'A History of the Tuararangaia Blocks', various dates (doc A3(a)), p 30)
250. Pokiha to President, Waiariki Maori Land Board, 27 August 1912 (Clayworth, comp, supporting papers to 'A History of the Tuararangaia Blocks' (doc A3(a)), p 31)

For our purposes, the most important part of this report was the postscript about the owners' expectations of the Government ('Kawanatanga') in response to their gift. Waitangi Tribunal research officer Wayne Taitoko translated it as:

> Those chiefs of Tuhoe also discussed the commitment made by the Government to erect schools, that is colleges, for the children of Tuhoe, Ngati Awa and Te Arawa in the district of Ohiwa.[251]

Tuhoe Waikaremoana Maori Trust Board claims manager Tama Nikora provided another translation:

> Those chiefs of Tuhoe also added and emphasised that Government must establish a school that is a college, for the children of Tuhoe, N'Awa and Te Arawa.[252]

It is clear to us from the te reo text and both translations that the owners expected a college to be founded at Ohiwa. In the first translation the Government is seen as having already made a commitment, whereas in the second version the owners seem to have regarded the establishment of a local school as the quid pro quo for their gift of land.

It is not clear that the Crown understood these expectations. Reporting the meeting's outcome to the Solicitor-General in November, Native Department Under-Secretary Thomas Fisher wrote only that the resolution, that the land 'be set aside as a permanent endowment for Native schools or Native colleges', had been carried.[253] When the Crown's certificate of title was issued on 10 January 1918, after more than five years of delays and official confusion, it similarly stated that the land was transferred the Crown 'to be held by His Majesty for the purpose of a permanent endowment for native schools or native colleges'.[254] It appears that this was based on the meeting resolution, rather than the clearer statement of intent in Pohika's postscript. While it conveys that the land transfer was to benefit Maori education, it gives no indication of its more specific purpose: to provide for a college at Ohiwa for Tuhoe, Ngati Awa, and Te Arawa.

It appears that no college has ever been in operation at Ohiwa, but a district high school was founded at Whakatane in 1920.[255] Although the school was located fairly close to Ohiwa, and opened just two years after the Crown's possession of the Tuararangaia endowment block was formalised, it does not appear to have been connected to Tuararangaia, and there is no indication that the school gave any particular consideration to Maori in general, let

251. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), p 100
252. Ibid, p 101
253. Fisher to Solicitor-General, 19 November 1912 (Clayworth, comp, supporting papers to 'A History of the Tuararangaia Blocks' (doc A3(a)), p 36)
254. Certificate of title, 10 January 1918 (Clayworth, comp, supporting papers to 'A History of the Tuararangaia Blocks' (doc A3(a)), p 92). For a brief account of the delays in getting the title finalised see Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), p 103.
255. The first mention we could find of Whakatane District High School was in the 1921 Education Department report: 'Secondary Education', AJHR, 1921, E-6, p 26.

alone the specific iwi mentioned at the owners' meeting. As we discuss in more detail in chapter 23 on socio-economic issues, few Maori from Te Urewera attended any secondary schools before the Second World War, for reasons including poverty, transport difficulties, and the monocultural and monolingual nature of State education. A boarding allowance and school buses were later provided, but these were never enough to remove the barriers between Te Urewera children and secondary education.

Another reason why the foundation of Whakatane District High School is unlikely to be connected to Tuararangaia is that the school was founded in 1920 and the Crown did not receive any money from the land until the mid 1950s. This was largely because of the land's unsuitability for farming. Crown surveyors and rangers inspected the land at various times in the 1920s, concluding that it would be better used as a State forest or water conservation reserve.[256] In 1924, clearly still hoping that the gifted land would be used for its intended purpose, Tupapa Tamana and 634 others petitioned Parliament for the Tuararangaia block to 'be vested in the directors of the proposed Presbyterian Maori Technical College at Waimana'.[257] However, the Native Minister considered that the endowment was intended to support Government-run Native schools and colleges, and so it would be inappropriate to transfer the land to support a denominational school.[258] In any case, the school was never founded.[259] There seems to have been little further action during the 1930s or through the war years. There were occasional suggestions that the block could be used for soldier resettlement, along with the rest of Tuararangaia 1B, which had been donated for the war effort during the First World War. This idea was rejected, as the land was unsuitable.[260]

By the late 1940s the timber industry was fully established in Te Urewera, as we describe in chapter 23. This made it more viable to mill blocks that may previously have been uneconomic for forestry purposes. In this context, the Under-Secretary of Lands reported that a number of millers were interested in the timber on the Tuararangaia endowment block. He suggested that the State-owned Forest Service be asked to administer the sale of the timber, and noted that the 'net revenue would, of course, have to be applied, in terms of the endowment'.[261] The Director of Education was somewhat confused about the status of the land, writing that it 'is not directly under the administration of this Department', and was 'something in the nature of an oddment', but also that he was 'pleased to learn that it has

256. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 18–19, 114

257. Petition 265/24, 'Reports of the Native Affairs Committee', 3 November 1924, AJHR, 1924, I-3, p 42

258. J G Coates, Native Minister, to F F Hockly, 25 June 1926, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington

259. Judith Binney, 'Maungapohatu Revisited: Or, How the Government Underdeveloped a Maori Community', *Journal of the Polynesian Society*, vol 92, no 3, 1983, p 365; J G Laughton, *From Forest Trail to City Street: The Story of the Presbyterian Church among the Maori People* (Christchurch: Presbyterian Bookroom, 1961), p 42. In 1937, the church was able to establish a school, but much further away at Te Whaiti.

260. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 114–115

261. Under-Secretary of Lands to Director of Education, 3 May 1948 (Brent Parker, comp, supporting papers to 'Tuararangaia 1B Education Endowment', various dates (doc M15(a)), p 5)

saleable timber situate [*sic*] upon it'. He stated that the land was in trust 'for the endowment of Native Schools or Colleges' and gained the approval of the Minister of Education to proceed as suggested.[262]

Timber cutting rights for two parts of the block were sold to the Tunnicliffe Timber Company in the early 1950s.[263] The Forest Service received an appraisal fee and 10 per cent commission, and Tunnicliffe had to offer 15 per cent of the rimu and miro building timber for sale to the Department of Maori Affairs, at ex-mill prices, for the 'purposes of Maori development'.[264] When milling began, the Minister of Maori Affairs informed Takurua Tamarau of Tuhoe that 'the royalties will be paid over to the Education department for assistance to Maori schools and colleges'.[265] This was in accordance with the certificate of title, but not the owners' recorded intentions when they transferred the block.

By mid 1954, the two contracts had generated a total of £10,200, from which an appraisal fee and commission were deducted, leaving £8,410.[266] In the year ending 1 March 1954, the Crown spent just over £24 million on education, of which £402,191 was spent on the Maori schools system. The Tuararangaia revenue was therefore equivalent to just over 2 per cent of annual spending on Maori schools.[267] As another point of comparison, the 1954 value of £8,410 was, according to the Reserve Bank's inflation calendar, equivalent to $340,909 at the time of our hearings.[268]

In 1948, when the plan to log the block was being discussed between departments, the acting Director of Education advised the Under-Secretary of Lands:

> The land is subject to a definite trust in favour of Maori schools but as the whole of the cost of maintaining Maori schools is now found from the Consolidated Fund through the Education Vote, it appears that any income from the land should be credited to Consolidated Fund, ordinary Revenue Account, other receipts, Departmental Receipts, Education Department General Code No.020207019.[269]

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262. Acting Director of Education to the Minister of Education, 17 May 1948, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington; Acting Director of Education to Under-Secretary of Lands, 21 May 1948 (Parker, comp, supporting papers to 'Tuararangaia 1B Education Endowment' (doc M15(a)), p 6; Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 116–117

263. Brent Parker, 'Report of Brent Parker in Relation to Tuararangaia 1B Education Endowment', 4 April 2005 (doc M15), pp 4–5

264. Ibid, pp 3–4; Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 116–117; sawmilling licence, 17 April 1951 (Parker, comp, supporting papers to 'Report in Relation to Tuararangaia 1B Education Endowment' (doc M15(a)), p 12)

265. E Corbett, Minister of Maori Affairs, to Takarua Tamarau, 25 May 1951 (Parker, comp, supporting papers to 'Report in Relation to Tuararangaia 1B Education Endowment' (doc M15(a)), p 9)

266. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), p 117

267. New Zealand Official Yearbook, 1955, available at http://www3.stats.govt.nz/New_Zealand_Official_Yearbooks/1955/NZOYB_1955.html#idchapter_1_62060, accessed 3 October 2014

268. Reserve Bank inflation calculator, http://www.rbnz.govt.nz/monetary_policy/inflation_calculator/, accessed 3 October 2014, based on the second quarter of 1954 and the first quarter of 2005.

269. Acting Director of Education to Under-Secretary of Lands, 21 May 1948 (Parker, comp, supporting papers to 'Tuararangaia 1B Education Endowment' (doc M15(a)), p 6)

22.5.1(3)

The consolidated fund was the generic account from which all education funding was paid. We are unable to find out what the Tuararangaia money was spent on, or even whether it was differentiated from other money in the fund. Education department accounting files that may have provided more information have not been found, despite searches by the Crown in the early 1970s and for this inquiry, and by our staff.[270] One Education Department file, which the Crown thought might shed some light on the matter but could not find, has been located in the course of research for this report. While this file provided useful information, it did not help us to identify how the proceeds of the endowment were spent.[271]

We stated above that the Tuararangaia endowment land was ceded to the Crown in the expectation that a college would be founded at Ohiwa for the benefit of Tuhoe, Ngati Awa, and Te Arawa. It is clear that no such college was ever founded. Should this have been impractical, the Crown could have negotiated a change of terms, perhaps offering scholarships, boarding assistance, or a Maori college in another location. It is possible that there was within the consolidated fund a sub-fund for Maori education purposes and that this was simply not mentioned in the 1948 letter. Even if this was the case – and the mention of a 'general code' makes it unlikely – we do not think it plausible that there was a separate fund for Tuhoe, Ngati Awa, and Te Arawa. Nor have those iwi, or the Ohiwa area, been mentioned in any historical Crown correspondence on the matter. The specific purpose for the Tuararangaia cession was, it seems, either misunderstood or ignored by the Crown, which took it simply as a general gift towards Maori education. From the evidence before us, it appears that even this watered-down condition was not properly adhered to.

The central concern of the claimants was the Crown's failure to meet the terms of the Tuararangaia land transfer; we consider that this claim is well founded, and that the Crown's actions were a clear breach of the good faith required by the Treaty principle of partnership. We consider that the Crown's duties were heightened by the fact that the rest of the block was also transferred as a gift to the Crown.

Two main prejudices arose from this breach of the Treaty. The first was that secondary education remained difficult for Te Urewera rangatahi to access. Although Whakatane District High School was opened shortly after the land was transferred, it made no particular provision for Maori pupils, and was unlikely to have significantly benefitted the whanau of the Tuararangaia owners. The second was that the owners lost the use of their

270. Parker, 'Tuararangaia 1B Education Endowment' (doc M15), p 2; Crown counsel, closing submissions (doc N20), topic 39, pp 32–33; see note on R Lander, for Regional Superintendent of Education, to Commissioner of Crown Lands, 25 August 1971 (Clayworth, comp, supporting papers to 'A History of the Tuararangaia Blocks' (doc A3(a)), p 95)

271. Parker, 'Tuararangaia 1B Education Endowment' (doc M15), p 1; Crown counsel, closing submissions (doc N20), topic 39, p 33. One of the files was Education Department reference E 10/13/2 (later renamed E 18/1/23). This is now ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington. The other missing file which Parker identified, E 7/1/79, was not found.

land for 50 years, for no return; had they retained it, they would have received the profits which instead went to the Crown.

Was the Crown's failure to develop the land before the 1950s also a breach of Treaty principles? We have seen that the Crown did investigate possible uses for the land in the 1920s, and concluded that it was not suitable for farming. Given that the land remains under forest today, we think that this was probably a correct assessment. We were not provided with enough evidence to determine exactly why no timber milling took place until the early 1950s. In chapter 23, however, we discuss the Te Urewera timber industry in depth, and show that it expanded dramatically in the 1940s. It may be that it was simply not economical to mill Tuararangaia until timber companies had established a presence in the area. If this was the case, the Crown acted reasonably in not attempting to mill the block before the 1940s, and this was not in itself a breach of Treaty principles. However, once it realised in the 1920s that the block would not return any profits in the foreseeable future, it should have explained the situation to the former owners and offered the land back. It failure to do so is a further breach of good faith. The owners' separation from the land for a further five decades was a prejudice arising from this breach.

22.5.2 Has the Crown acted consistently with Treaty principles in relation to the gift of the school playing fields at Te Whaiti and, if not, has any prejudice resulted?

(1) *Introduction*

In May 1938, Rama Te Tuhi of Tuhoe wrote to the Director of Education offering land for a football field for Te Whaiti School.[272] The land was two acres and two roods (10,117 square metres) in area, and came from the 171-acre Te Pahou block which surrounded the school reserve on three sides.[273] Te Tuhi was one of eight owners of the block; the other seven were members of her whanau.[274] The donation was made on four conditions, which she specified:

1. The ground shall be known as Rama Te Tuhi Park
2. Neither I nor my descendants shall be liable for any expenses incurred through this gift of land
3. The right to use the School access road to my property shall be granted [to] me
4. Improvements to the donated land shall be commence[d] within twelve months from the date of transfer.[275]

272. Peter Clayworth, 'The Te Pahou Blocks: A Report on the Wai 725 Claim' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A19), p 38
273. Ibid, pp 32, 38–40
274. Ibid, p 38
275. Rama Te Tuhi to Director of Education, 3 May 1938 (Clayworth, 'The 'Te Pahou Blocks' (doc A19), pp 38–39)

22.5.2(2)

Shortly afterwards, Te Tuhi also requested a cottage as recompense for the field and other donations of land which she claimed to have made.[276] She was turned down by the Native Department, as it was against departmental policy to provide houses without payment.[277]

On 29 September 1938, the Te Pahou block was duly partitioned by the Native Land Court, with the gifted land becoming Te Pahou 1. Te Teira Wi testified that: 'The matter has been fully discussed by the people who consent to it.'[278] He also asked, on Te Tuhi's behalf, that a means of access be preserved on the eastern side of the block, and accordingly the court ordered that the 'portion of the block to the eastward of the school reserve of Te Pahou No 1 be laid off as a road line'. The court minutes recorded that, subject to the gift being accepted, the Crown would remit the cost of the court hearing and the requisite survey costs.[279] The Crown took possession of the land in September 1939 by taking it under the Public Works Act 1928.[280]

In June 1941, the Native Land Court heard the case for compensation for the taking of Te Pahou 1. Although Rama Te Tuhi, who had died about two years earlier, had wanted to gift the land, Judge Harvey was evidently of the view – one subsequently endorsed by the chief judge in consultation with the other judges – that the court should exercise its jurisdiction as to what compensation should be paid. Since the Crown was unable to provide a valuation for Te Pahou 1, the hearing was adjourned.[281] It was not until January 1949 that the compensation case was heard again. On the basis of a special valuation made in March 1948 under section 552 of the Native Land Act 1931, the court awarded £65 compensation to the Waiariki Maori Land Board, to be held in trust for the successors to Te Pahou 1.[282]

(2) *The claims and the Crown response*

Counsel for the Te Whaiti Nui a Toikairakau claimants submitted that the Crown failed to abide by the conditions set by Rama Te Tuhi when she gifted land for the Te Whaiti school playing fields.[283] In their amended statement of claim, counsel further asserted that the £65 payment that the Native Land Court subsequently ordered, despite the gifting, was paid to the Waiariki Maori Land Board rather than to Rama Te Tuhi's successors.[284]

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276. Clayworth, 'The Te Pahou Blocks' (doc A19), p 41. See below for more on the contested donations.
277. Ibid
278. Rotorua Native Land Court, minute book 90, 29 September 1938, fol 188 (Clayworth, 'The Te Pahou Blocks' (doc A19), p 39)
279. Ibid
280. Clayworth, 'The Te Pahou Blocks' (doc A19), p 41
281. Rotorua Native Land Court, minute book 92, 11 June 1941, fol 231; Clayworth, 'The 'Te Pahou Blocks' (doc A19), pp 41–42
282. Rotorua Maori Land Court, minute book 97, 26 January 1949, fol 92; Clayworth, 'The 'Te Pahou Blocks' (doc A19), p 42
283. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 362
284. Counsel for Te Whaiti Nui A Toikairakau, amended consolidated statement of claim, 8 October 2004 (claim 1.2.7(c)), p 117

Crown counsel responded that all the conditions set by Rama Te Tuhi, other than the naming of the playing field as Rama Te Tuhi Park, were met. With respect to the £65 payment, Crown counsel have argued that there is no evidence as to whether or not the Maori Land Board held this in trust for Rama Te Tuhi's successors.[285]

(3) *Tribunal analysis and conclusions*

As we have seen, Te Tuhi's four conditions were that the field be named after her, that she and her whanau not be liable for any expenses related to the gift, that she have access to her property via the school grounds, and that improvements to the field be carried out within a year of the donation. She subsequently requested that a cottage be built for her, but the Crown declined this request before the Native Land Court hearing. We do not therefore consider that it was a condition of the donation. As well as the conditions, we also look at the £65 compensation payment.

The Crown has conceded that it failed to name the field after Rama Te Tuhi, despite this being a condition of the donation. We were not told why this was not done, but it is possible that the naming could have been regarded as exacerbating conflict over land issues in the area. These include Te Tuhi's claims to have donated the school reserve and land for a police station; in both cases other groups also claimed to have donated the land.[286] We consider that, if the Crown decided that it was not possible to meet Mrs Tuhi's naming condition, it should have informed her (or her whanau if the decision was made after her death) that this was the case. In the absence of any evidence as to why the Crown did not name the field after Mrs Te Tuhi, we are unable to make a finding on whether it was a breach of Treaty principle.

As we have seen, all the costs associated with the donation were met by the Crown, and the Native Land Court set aside an access road through the donated land. The road seems to have been formed in 1939.[287] The field itself does not seem to have been formed until mid 1941.[288] While this was in breach of Te Tuhi's conditions, we consider that the delay was probably related to the outbreak of the Second World War and does not indicate bad faith or neglect on the part of the Crown, and was not in breach of the Treaty.

285. Crown counsel, closing submissions (doc N20), topic 39, p 23; Crown counsel, statement of response to stage 3 claims, 13 December 2004 (paper 1.3.7), pp 41–42

286. For the school site, see counsel for Ngati Whare, fourth amended statement of claim (claim 1.2.16(a)), p 33; John Hutton and Klaus Neumann, 'Ngati Whare and the Crown, 1880–1999' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A28), p 243; Hiraina Hona, under cross-examination by counsel for Ngati Whare, 16 September 2004 (transcript 4.10, pp 103–104). For the police station, see Richard Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi: A History' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc A27), p 111; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 219.

287. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 468

288. The work was carried out rather reluctantly by the Forest Service, after the Minister of Education became involved: Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 468.

22.5.3

As for the payment of the £65, we believe it was appropriate for the money to have been held in trust, since it was not until 1956 that Rama Te Tuhi's successors were determined.[289] Subsections (1) and (2) of section 552 of the Native Land Act 1931 provided that the moneys held were then to be paid out, at the board's discretion, either to the beneficiary or to whomsoever the beneficiary directed the money to be paid. We have not been able to determine whether the compensation money was paid out.[290] In the absence of any further evidence on this issue, we are unable to make a finding.

22.5.3 Should Te Urewera schools have received the profits from trees planted by their pupils?

From the 1930s until the 1980s, forestry was the dominant industry in Te Urewera, and a high percentage of Maori there were timber workers, particularly in the west of our inquiry district. As we will see in our socio-economic impacts chapter, the New Zealand Forest Service had a close and paternalistic relationship with local Maori communities, acting as employer, landlord, community organiser, and, at times, teacher. One aspect of this relationship was a project in which pupils from the Minginui, Te Whaiti, and Huiarau (Ruatahuna) primary schools planted pine seedlings for the Forest Service. According to the Ngati Whare claimants, the eventual profits from the trees were supposed to go to the schools, but shortly after the last trees were planted, the Forest Service was corporatised. According to William Eketone, who worked for the Forest Service in the early 1980s and taught the pupils how to plant the trees, 'the whole project was forgotten by the Government and the companies that took over the forests'.[291]

The Forest Service instituted school planting projects in a number of State forests from the 1960s.[292] The Whirinaki Forest project seems to have begun in the late 1970s, when former Huiarau pupils remember planting and pruning stands of exotic forest at Minginui under Forest Service supervision, although the official starting point seems to have been 1981.[293] Crown counsel agreed that the project did take place, but stated that

> The files disclose that it was not Forestry [*sic*] Service's general policy at the time of the planting project in Urewera to pay a share of profits to the schools. However what the general policy does show is that in some cases ex gratia payments could be made. (This was the exception rather than the rule.)[294]

289. Clayworth, 'The 'Te Pahou Blocks' (doc A19), p 42
290. Ibid; Crown counsel, closing submissions (doc N20), topic 39, p 23
291. William Eketone, brief of evidence, September 2004 (doc G29), pp 3–4
292. Crown counsel, closing submissions (doc N20), topic 38, p 15
293. See affidavits supporting brief of evidence of William Eketone (doc G29(a)), p 2; Hutton and Neumann, 'Ngati Whare and the Crown, 188–1999' (doc A28), p 777
294. Crown counsel, closing submissions (doc N20), topic 38, p 15

Unfortunately counsel did not provide us with the documents they refer to. In general, any agreement over the trees in question was probably an informal one, and it is entirely possible that no written contract ever existed. However there does seem to have been widespread awareness and acceptance of the arrangement as Mr Eketone describes it. He provided us with affidavits and letters from other former Forest Service and school staff, as well as some of the pupils involved in the planting. All support the assertion that profit from the trees was to go at least partly to the schools.[295] During our hearings, Crown counsel conceded that there was strong evidence that the schools were to get the profits from the trees.[296]

The school planting projects ended when the Forest Service was corporatised in the mid to late 1980s, in a process which we detail in chapter 23. At Whirinaki, the indigenous forest became part of the Department of Conservation's estate, while the exotic forest areas were transferred to the new Forestry Corporation.[297] The harvesting rights to the exotic forests were sold to Fletcher Challenge in 1996, with the underlying land retained by the Crown for possible use in future treaty settlements.[298] There was nothing in the Crown Forest Licence indicating that the schools had any right to profits from any of the trees, and Fletcher Challenge later told Mr Eketone that they had not been told about the schools partnership.[299] In 2008, the land covered by the planting project was returned to Ngati Whare as part of the Crown's forestry settlement with central North Island iwi, and is now vested in the trustees of Te Runanga o Ngati Whare.[300]

In April 2014 we sought an update from the respective counsel as to whether a successful resolution had been reached.[301] Counsel for claimants and for the Crown both agreed that it would be appropriate for the Crown to deal with the matter separately from the historical Treaty claims, and noted that in 2005 the Crown offered to make a one-off payment, to be split between the three schools.[302] As counsel for Ngati Whare have explained, this offer was not responded to at the time because of uncertainty as to what role other counsel should play in representing Ruatahuna school, it being outside Ngati Whare's rohe. As of December 2014, no deal had been reached, but counsel for Ngati Whare, who were awaiting

295. Eketone, supporting papers to brief of evidence (doc G29(a))

296. Crown counsel, under questioning by the presiding officer, 16 September 2004 (transcript 4.10, p 94)

297. Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi (doc A27), p 239; Crown counsel, closing submissions (doc N20), topic 38, p 13; Douglas Rewi, brief of evidence (doc G37), pp 15–16

298. Crown counsel, closing submissions (doc N20), topic 38, p 13

299. Ibid, p 15; Eketone, brief of evidence (doc G29), pp 2, 4–5

300. Douglas Rewi, brief of evidence (doc G37), pp 15–16; Central North Island Forests Land Collective Settlement Act 2008, s6, and sch 1; Crown counsel, memorandum updating the Tribunal in respect of question 38(h), 16 May 2014 (paper 2.922), pp 2–3; Ngati Whare Claims Settlement Act 2012, ss 80, 101(2), sch 3

301. Presiding officer, memorandum requesting update in respect of question 38(h), 10 April 2014 (paper 2.921), pp 2–3

302. Crown counsel, memorandum updating ribunal in respect of question 38(h) (doc 2.922), p 2

instructions from the three school boards concerned, were hopeful of substantive progress towards a resolution in the coming months.[303]

We find that there was an agreement that the schools would receive at least some of the money from the trees planted by the pupils. The Crown's failure to keep proper records of this agreement, and then its failure to even inform Fletcher Challenge of its existence, let alone ensure that Fletcher Challenge gave effect to it, are breaches of the good faith required by the Treaty principle of partnership. We are unable to make a finding on the adequacy of the Crown's 2005 offer, as we do not know how much the eventual profits from the trees were, how the Crown's 2005 offer compared to it; nor do we know the exact terms of the original agreement.

303. Counsel in respect of school planting project, memorandum concerning Minginui-Ruatahuna-Te Whaiti School Planting Project, 4 July 2014 (doc 2.923), pp 2–3

CHAPTER 23

KAORE RATOU I TE WHAIWHAKAARO KI A MATOU: SOCIO-ECONOMIC IMPACTS, 1895–2005

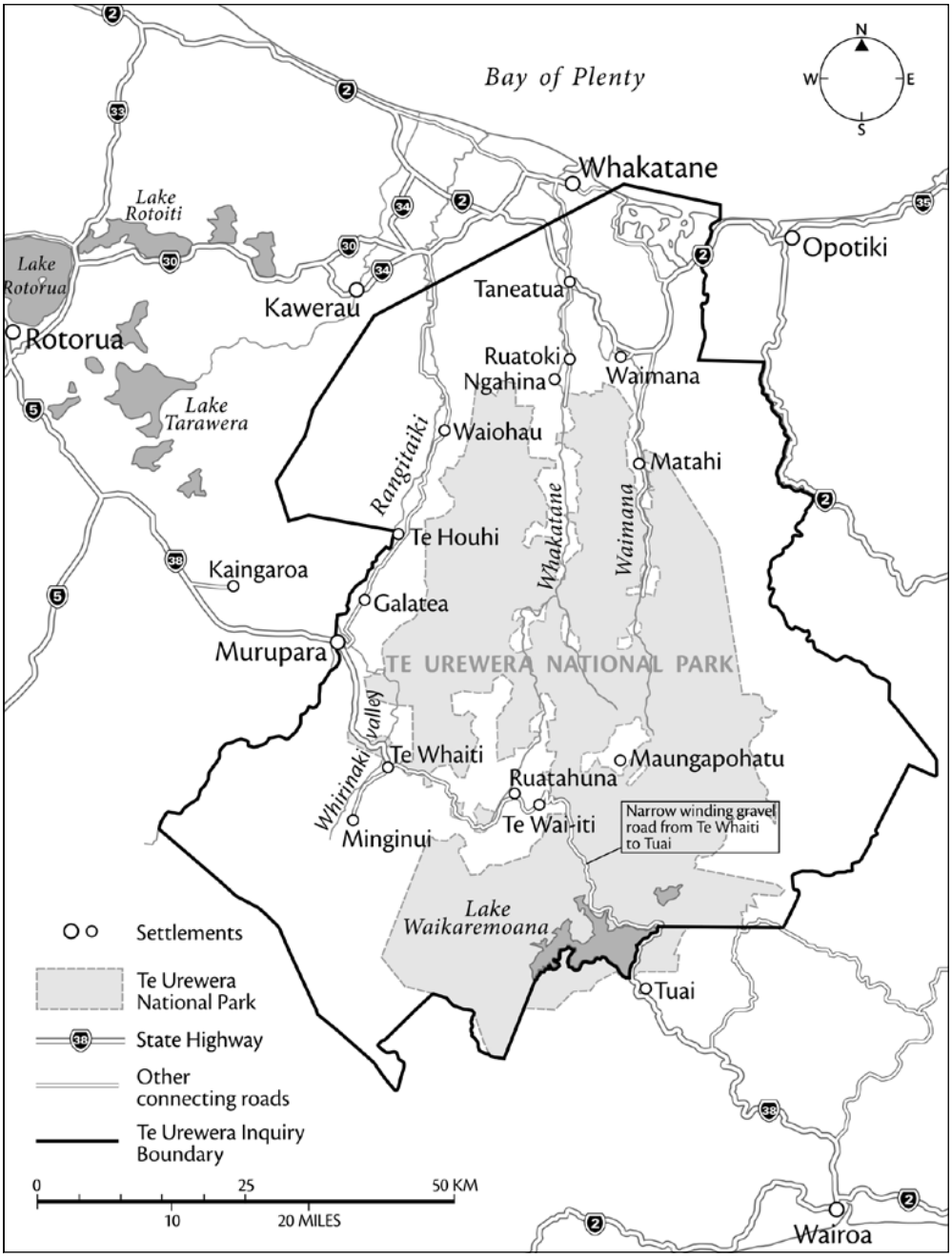
23.1 Introduction

This chapter deals with the often grim reality of everyday life for Maori in Te Urewera, from the 1890s until our hearings in the first decade of the twenty-first century. Earlier chapters in this report have detailed the interactions between the Crown and the hapu and iwi of Te Urewera. We have seen the nature and extent of the Crown's many breaches of the Treaty, in particular confiscation of land, the conduct of war, unfair purchasing practices, broken promises on such crucial issues as self-government, and the imposition of unreasonable restrictions on land use without compensation. The chapter describes the socio-economic effects of those breaches. It also looks at what the Crown has done – and failed to do – to alleviate socio-economic disparity and need. In addressing these issues, it differs from other chapters in that, as well as discussing socio-economic claims in their own right, it also addresses the socio-economic effects of various Crown acts and omissions covered elsewhere in the report.

In the 1890s and the early twentieth century, Maori in Te Urewera experienced terrible living conditions and severe crises including famine, recurrent food shortages, and frequent epidemics. We will describe a district often neglected by the Crown throughout the period we cover in this chapter, in which even the most basic social services could be inaccessible. We will show that economic opportunities were very limited, and that even during the post Second World War years, when the local economy was better than it had been since the Crown first arrived there, living conditions for Te Urewera Maori were substantially worse than those of most Pakeha. It is clear from our reading of other Tribunal reports that conditions for Te Urewera hapu and iwi were worse even than those for Maori in most other areas. We will also show the devastating economic and social impacts of the Crown's withdrawal from the timber industry in the 1980s, and how this reduced the district once again to abject poverty.

Poor socio-economic conditions should come as no surprise, given the extent of Treaty breaches detailed in previous chapters. In particular, numerous Crown actions and omissions resulted in significant land loss for Te Urewera hapu and iwi, and gave them little or

23.1



Map 23.1: Location of communities in Te Urewera

Sources: Document A13, map 4 'Te Urewera Settlements Noted by the Anglican Missionaries Rev A N Brown and William Colenso in the 1840s'; doc A13, map 2, 'Orientation Map Depicting the Urewera Inquiry Boundary'

nothing in return. These included raupatu, predatory and at times unlawful Crown purchasing, failure to take action over the Waiohau fraud, and the deeply flawed consolidation

programme. The Crown also failed to give effect to the mana motuhake of Te Urewera hapu and iwi: it broke its promises concerning the Urewera District Native Reserve and imposed upon them land titles and systems of land management which they did not want and were not to their benefit. In the twentieth century, successive governments failed to counter the effects of these and other breaches by providing adequate aid for economic development, even when such aid was available to Pakeha settlers.

It is not always easy, however, to tell exactly how Treaty breaches and other Crown actions contributed to poor socio-economic conditions. While it is clear that confiscation of good farmland has a negative effect on economic capability, there is generally no direct link between land loss and ill health, or educational under-achievement. In section 23.5, below, we outline a framework proposed by Professor Brian Murton which helps explain the connections between Crown actions and negative socio-economic statistics. Through the chapter as a whole, we will look at the extent to which socio-economic problems were caused by Crown acts and omissions, and also by other contributing factors, such as the geography and poor land quality of our inquiry district, and immunological vulnerability to new diseases. We will see that there were a number of factors contributing to the poor socio-economic status of Te Urewera hapu and iwi, and that Crown actions were among those factors. We will also see that some Crown actions had positive effects on the health, education, and living standards of Maori in Te Urewera.

The extent to which Crown actions and omissions had a negative effect on the hapu and iwi of Te Urewera was one of the key areas of disagreement between the claimants and the Crown. The claimants submitted that their poor socio-economic standing, both in the past and at the time of our hearings, was the direct result of Crown breaches of the Treaty. As we discuss below, they argued that the Crown has a duty to provide aid and social services to the hapu and iwi of Te Urewera, but has failed to provide the level of services needed to eliminate Maori disadvantage. Some services were not provided at all, some were difficult to access, and some had culturally harmful effects. The Crown submitted that there was insufficient evidence to show the causes of socio-economic disadvantage, that it had no inherent duty to provide aid or social services, and that those services which it did provide were acceptable by the standards of the time.

Because this chapter deals with a multitude of inter-related subjects over a period of more than a century, we have structured it differently from the rest of the report. After setting out the issues for Tribunal determination, we will outline the living conditions experienced by the hapu and iwi of Te Urewera from the 1890s until the time of our hearings in the early twenty-first century. We then turn to the essence of the difference between the parties in this inquiry, before setting out Professor Murton's socio-economic framework mentioned above. After this, the body of the chapter is divided into three chronological sections: 1890 to 1935, 1935 to 1984, and 1984 to 2005. The rationale behind these divisions will be explained below. In each section, we look first at economic issues such as land development and

employment opportunities, before examining provision of aid and social services, particularly health care and education, but also pensions and other welfare benefits, housing, and water supplies. Finally, we analyse this information in Treaty terms, and ask whether the Crown breached the principles of the Treaty in relation to the issues covered in this chapter.

23.2 Issues for Tribunal Determination

Our key questions in this chapter relate to successive time periods. They are:

- What was the Crown's response to Maori hardship in Te Urewera prior to the creation of the welfare state?
- What effects did the expansion of the Crown's role in Te Urewera, through welfare and service provisions and the creation of the timber towns, have on the well-being of Maori communities up to the 1980s?
- What effects did the corporatisation of the timber industry and the reduction of social services have on Maori communities from the 1980s?

The first section covers the period roughly from 1890 to 1935, the second from 1935 to 1984, and the third from 1984 until the time of our hearings in the mid 2000s. We focus particularly on three key events, one in each time period: the Te Urewera famine of 1898, the introduction of the welfare state and managed economy from 1935, and the corporatisation of the state Forest Service in the late 1980s. The first of these is an illustration of the precarious socio-economic position of Te Urewera hapu and iwi around the end of the nineteenth century. The second and third show how Crown actions and policy could affect the peoples of Te Urewera for better or worse.

23.3 The Living Conditions of the Peoples of Te Urewera

Before addressing our key questions, we look at everyday life in Te Urewera Maori communities from the late nineteenth century until the early twenty-first century. This will assist us in assessing the adequacy of Crown policy and practice in alleviating distress and inequality. We will see that, since at least the late nineteenth century, Maori in Te Urewera have experienced ongoing and often severe poverty, accompanied by extremely bad living conditions. These have resulted in high rates of disease and early death, especially before the middle of the twentieth century. Significant progress was made in the post Second World War period, but this appears to have stalled or reversed in recent decades.

The experiences of Maori in Te Urewera were not uniform, especially when the timber industry was at its peak; some areas had relatively good employment opportunities, for

example, while others had almost none. The varied terrain meant that parts of the district were more suitable for growing crops, while in others people had better access to wild foods. Nevertheless, at most times and in most respects there were more similarities than differences between Te Urewera Maori communities.

We received a great variety of evidence for this inquiry, including claimant oral tradition and personal recollections; letters and reports written by Crown employees from the 1890s onwards; official statistics; and historical research reports. This evidence collectively created a compelling picture of extreme hardship, which the Crown did not contest. The evidence also told a story of cultural tenacity and revival, and the determination of the peoples of Te Urewera to protect and nurture their culture and language.

23.3.1 Living conditions in the 1890s and the early twentieth century

Government ministers and officials visiting Te Urewera in the late nineteenth century often described the living conditions in Maori communities there. For example Premier Richard Seddon, during his tour of Te Urewera in 1894, described Tuhoe as 'living in absolute poverty, not having sufficient food'.[1] Joseph Wylie, the Native School teacher at Galatea, wrote in the same year that:

> The Galatea Natives are very poor at present. They cannot raise a little money by selling produce like some of their friends on the coast or those who live near a European population. If the good people in Wellington who kindly sent us some clothing for the school children before would allow their compassion to extend to these little ragged ones again I would be greatly obliged to them.[2]

The same year, it was reported that Maori at Ruatoki and Ruatahuna were also short of food.[3]

Food shortages were often followed by disease outbreaks, as malnutrition weakened people's immune systems.[4] Professor Murton refers to this process as the 'malnutrition-infection cycle,' and notes that disease outbreaks were more devastating when they struck during periods of food shortages, such as during the 1898 famine across Te Urewera, and at Maungapohatu in 1927.[5] Researchers John Hutton and Klaus Neumann explain that:

1. 'Pakeha and Maori: A Narrative of the Premier's Trip Through the Native Districts of the North Island', AJHR, 1895, G-1, p 49
2. Wylie quoted in Peter McBurney, 'Ngati Manawa and the Crown, 1840–1927' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc C12), pp 397–398
3. Seddon cited in Brad Coombes 'Making "Scenes of Nature and Sport" – resource and wildlife management in Te Urewera, 1895–1954' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003 (doc A121), p 42; Te Tuhi cited in Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 40
4. Brian Murton, 'The Crown and the Peoples of Te Urewera: The Economic and Social Experience of Te Urewera Maori, 1860–2000' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004 (doc H12), p 300
5. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1632, 1656

23.3.1

> Sickness would have also reduced the labour the adult population could perform, and it would have siphoned off a large amount of otherwise productive labour from those who had to look after the sick. In this manner sickness and poverty existed in a bitter circle – the sicker a community the less work it could perform, and thus the less food it could grow, which only increases the susceptibility of the community to illness.[6]

We were presented with considerable evidence on the many devastating diseases that affected the peoples of Te Urewera in the late nineteenth and early twentieth centuries. Native School teachers and others recorded regular outbreaks of influenza, whooping cough, mumps, typhoid, measles and tuberculosis throughout Te Urewera, and some instances of smallpox, scarlet fever and chickenpox.[7] Disease was widespread even in relatively prosperous areas, such as the dairy-farming region of Ruatoki-Tawera, which experienced at least 18 serious outbreaks of disease in the 30 years between 1897 and 1927.[8]

The most devastating epidemics in terms of known deaths were outbreaks of measles across Te Urewera in 1897 and 1898, influenza and other diseases at Te Kopani in the same year, typhoid and measles in Waimana and Maungapohatu in 1907, and the influenza pandemic of 1918–19. Official recording of Maori deaths and population was not particularly reliable in this period, but the information we do have indicates substantial death tolls. In his book *Rua and the Maori Millennium*, Webster states that 'about eighty' people died in the 1890s measles epidemic, representing around 5 per cent of the 'Urewera tribe' counted in the 1896 census.[9] The death toll from the outbreaks at Te Kopani the same year was recorded at 28.[10] We do not know the total population of the area, but the 1896 census recorded only 131 Urewera Maori in the whole of Wairoa County, most of whom were presumably living around Waikaremoana.[11] We received conflicting evidence on the death toll of the 1907 outbreaks. A contemporary press report stated that 30 children had died, and Binney gives a total death toll of 50 at Maungapohatu and another six at Waimana, where the epidemic began. Numia Kereru wrote at the time that a hundred people had died, but

6. John Hutton and Klaus Neumann, 'Ngati Whare and the Crown, 1880–1999' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001 (doc A28), p 159

7. Most of the evidence comes from the records of Native School teachers, who provide us with some insight into the health of Maori children. The Health Department only reported on severe outbreaks, such as the influenza pandemic of 1918–9, and death registers for Maori were not kept until 1935. Teachers' records are somewhat limited in that they only usually noted outbreaks when they were severe enough to close schools, which happened on a regular basis: Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1645–1646.

8. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1644–1649, Peter Webster, *Rua and the Maori Millennium* (Wellington: Victoria University Press, 1979) (doc K1), p 146; Steven Oliver, 'Ruatoki Block Report'(commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A6), p 192

9. Webster, *Rua and the Maori Millennium* (doc K1), p 146; Raeburn Lange, 'The Revival of a Dying Race: A Study of Maori Health Reform, 1900–1918, and its Nineteenth Century Background' (MA thesis, University of Auckland, 1972), p 39 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 147); Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1644–1645. The census figure is from Judith Binney, 'Encircled Lands Part Two: A History of the Urewera, 1878–1912', overview report, 2002 (doc A15), p 493

10. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1644

11. Census figure from Binney, 'Encircled Lands' (doc A15), p 493

Tutakangahau on the Impact of Epidemics

According to Elsdon Best, the Tuhoe chief Tutakangahau lamented after the death of his young granddaughter from influenza at Maungapohatu in 1897:

> This rapid dying of our people is a new thing. In former times our people did not die so – they knew no disease; they died on the battlefield or of old age . . . These diseases which slay our people are all from the Pakeha – it was the white men who brought them among us . . . I see before me O friends, the end of the Maori people. They will not survive. We can see plainly that our people are fast going from the earth. We have discarded our laws of tapu and trampled upon our mana Maori . . . The Maori is passing away and the Pakeha steps into his place.

Source: Webster, *Rua and the Maori Millennium* (*doc* K1), *p 146; E W G Craig, Man of the Mist: A Biography of Elsdon Best* (Wellington: A H & A W Reed, 1964), p 78

he was antagonistic to Rua and may have wanted to discredit him and his new community at Maungapohatu.[12] It has been estimated that 500 to 600 people lived at Rua's settlement, so even Binney's relatively low figure represents at least 10 per cent of the population, and it is possible that 20 per cent died.[13]

A major famine occurred in 1898, after severe frosts in January and February destroyed crops in Waiohau, Te Houhi, Galatea, Whirinaki, Te Whaiti, Ruatahuna, Maungapohatu, and possibly other areas. This resulted in the loss not only of that year's harvest of potatoes, gourds, maize, and pumpkins, but also of seed for the next season.[14] Tukuaterangi Tutakangahau, the son of the Tuhoe rangatira Tutakangahau, wrote from Maungapohatu to the Under-Secretary for Justice, requesting flour: 'Friend, do not imagine that there is food.

12. *New Zealand Times*, 14 August 1907 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera: The Economic and Social Experience of Te Urewera Maori, 1860–2000' (doc H12(a)(EE)), p 90), Binney, 'Encircled Lands' (doc A15), p 495, Numia Kereru, Ahukata Te Kaha and Te Pouwhare Te Raou to James Carroll, 13 December 1907 (Anita Miles, *Te Urewera*, Waitangi Tribunal Rangahau Whanui Series (Wellington: Waitangi Tribunal, 1999) (doc A11), p 325). On 24 May 1907, the Native School Teacher at Waimana, Hugh Hamilton, reported two deaths from typhoid at Waimana: Jeffrey Sissons, *Te Waimana – The Spring of Mana, Tuhoe History and the Colonial Encounter* (Dunedin: University of Otago Press, 1991) (doc B23), pp 195–196.

13. Sissons estimates 500 to 600 lived there in 1907: see Sissons *Te Waimana* (doc B23), p 201; Binney estimates 600 people lived there in 1907: see Judith Binney, 'Maungapohatu Revisited: Or, How the Government Underdeveloped a Maori Community', *Journal of the Polynesian Society*, vol 92, no 3 (1983) (doc A128), p 387n. The 10 per cent figure assumes that in addition to the 30 children mentioned in the press, there were a number of adult victims.

14. Binney, 'Encircled Lands' (doc A15), p 287

23.3.1

There is absolute starvation, there is nothing to look at but the bare sky.'[15] Joseph Wylie at Galatea wrote that:

> Their [local Maori] crops have been completely destroyed by the frost. Nothing in the shape of food is left. They are in a very bad way and unless relief is afforded immediately, their case will be desperate.[16]

His brother Thomas Wylie, the teacher at Te Houhi on the Rangitaiki river, confirmed that 'the Natives are quite destitute, all their food being destroyed' by the frosts.[17] That this was a famine rather than a mere food shortage is confirmed by statements of contemporary Crown employees. In July 1898, Native Schools Inspector James Pope wrote that in Te Houhi, Galatea and Te Whaiti, 'the famine is in full force.'[18] Thomas Wylie also referred to a famine.[19]

Without doubt, disease, food shortages, and famine had a substantial demographic impact on the Maori population of Te Urewera, although the exact extent at this time is difficult to determine. Censuses were conducted, but until 1926 Maori were counted by census enumerators, usually from the Native Department, rather than being given forms to fill out themselves. The enumerators sometimes failed to visit or locate isolated or migratory groups, and in some areas Maori distrusted the government and were therefore reluctant to be counted. Some official figures are difficult to believe; for example the 1901 census recorded that there were no 'Urewera' Maori in Wairoa County.[20] This seems unlikely, since Ngati Ruapani, Tuhoe, and Ngati Kahungunu were still living near Lake Waikaremoana, in Wairoa County, at this time. The fact that 'Urewera' was given as an iwi name also indicates the inaccuracy of official statistics on iwi. Collection of iwi information stopped after 1901 and was not resumed for another 90 years.

Despite these problems, analysis of census returns, in combination with Native School rolls and accounts of disease and famine, suggest that there was a drop in the Maori population of Te Urewera around the turn of the century. Maori recorded as belonging to the 'Urewera tribe' fell from 1,421 in 1896 to 1,094 in 1901.[21] In the same period, Native Schools across the district showed falling rolls; for example at Kokako, at Waikaremoana, the roll of

15. Tutakangahau to F Waldegrave, Under-Secretary for Justice, 26 November 1898 (Brenda Tahi on behalf of the Tuawhenua Research Team, 'Ruatahuna, Te Manawa o Te Ika, Part Two: A History of the Mana of Ruatahuna from the Urewera District Native Reserve Act 1896 to the 1980s', research report, 2004 (doc D2), p 83

16. Joseph Wylie, to F Waldegrave, circa February 1898 (Cecilia Edwards, comp, supporting papers to 'Te Urewera District Native Reserve Act 1896: Part Two: Title Determination under the Act, 1896–1913' (doc D7(i) vol 1)), p 477)

17. Thomas Wylie to the Secretary for Education, 31 March 1898 (Edwards, supporting papers to 'Te Urewera District Native Reserve Act 1896 Part Two' (doc D7(i), vol 1)), p 449)

18. Quoted in Binney, 'Encircled Lands' (doc A15), p 272

19. McBurney, 'Ngati Manawa and the Crown' (doc C12), p 413

20. New Zealand Census 1901, available at http://www3.stats.govt.nz/historic_publications/1901-census/1901-results-census/1901-results-census.html, accessed 28 January 2015

21. *Population Census, 1896*, *Population Census, 1901*

76 in 1897 had dropped to just 32 in 1900.[22] After 1901, the Maori population of Whakatane County provides some guide to population numbers, since the county contained most of the inquiry district area and most of the 1896 and 1901 'Urewera' population. However Whakatane County also included significant areas and large Maori populations which did not belong to Te Urewera; in 1896 only 32 per cent of the Whakatane County Maori population was recorded as 'Urewera'.[23] The county also excluded some parts of the inquiry district, including Waikaremoana. With these caveats in mind, we note that the Maori population of Whakatane County fluctuated between 1906 and 1926, but overall trended upwards. The national Maori population meanwhile increased steadily in those years, despite conscription-related resistance to the census in 1916 and the impact of the influenza epidemic of 1918.[24]

Census figures on stock numbers and crop acreages are probably no more reliable than population figures from the same period, but do provide some indication of change over time. They show that, in Whakatane County in 1901, numbers of Maori-owned pigs and cattle, and the acreage of maize on Maori land, were about a third of their 1896 levels. There were significant drops in numbers of other stock animals and the acreage of other crops, and in most cases these had not recovered to 1896 levels even by 1911.[25] This probably overstates the level of change, since the creation of Opotiki County in 1900 meant that some large areas of good Maori land were no longer included in Whakatane County statistics. However there were stock and acreage declines in Opotiki as well.

23.3.2 Poverty and disease in the early twentieth century

Early twentieth century officials continued to report on Maori living conditions in Te Urewera. In 1904, Native Schools Inspector William Bird visited Ruatahuna and wrote that

> Their living conditions were wretched, their food from our point of view very uninviting to say the best of it, and their housing conditions wretched . . . They were suspicious of the Pakeha and did not want to be disturbed. In these circumstances their children had a very hard life and the death rate must have been very high. The road from Rotorua ended at Ruatahuna about 72 miles from that centre [Rotorua] and all supplies had to be carted that distance to be sold at very high prices in the local store.[26]

22. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1285; Kathryn Rose, 'A People Dispossessed: Ngati Haka Patuheuheu and the Crown, 1864–1960' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003 (doc A119), pp 144–146
23. *New Zealand Population Census, 1896*
24. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 70; Ian Pool, *The Maori Population of New Zealand, 1769–1971* (Auckland: Auckland University Press, 1977), p 237; Census and Statistics Office, *Population Census, 1926*, 17 vols (Wellington: Government Printer, 1927), vol 14, p 2
25. *Population Census, 1896*; *Population Census, 1901*; *Population Census, 1911*
26. Bird quoted in Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 222

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The following year he described the peoples of Te Urewera as 'for the most part poor and the food and the clothing of the children are of the scantiest.'[27] In his capacity as Native Sanitary Inspector, Elsdon Best found varying standards at different kainga. He thought that Te Kautawhero, at Ruatahuna, and Te Murumurunga at Te Whaiti were the most 'deplorable and backward' in the district, while Ruatoki (including Tauarau and Waikirikiri), Waimana and Te Houhi were all described as 'creditable'. Ruatahuna and Maungapohatu were as 'as good as can be expected when one remembers their isolation and the poverty of the people'.[28] It is not clear on what basis Best made these judgements. The following year he noted that Tauarau had experienced a major outbreak of typhoid and described conditions there as 'by no means of a healthful nature'.[29] He also reported that latrines were rarely built in Te Urewera, leading to contamination of drinking water.[30] Around 1903, Maui Pomare noted that Maori in 'Tuhoeland' were building Pakeha-style houses, but these were 'very often made of palings, have no floors or chimneys; they are draughty and very cold in winter.'[31] Families would often move into them before they were floored, lined and had chimneys built.[32]

Conditions improved in the northern part of the inquiry district once dairy factories began opening there in the 1900s. Tuhoe from Ruatoki and Waimana began running dairy cows and supplying milk to the factories, which were also a source of employment.[33] Best wrote in 1908 that

> A marked change has taken place in the status of the Natives of the Ruatoki district ---i.e., among those who have during the past year turned their attention to milking for the new cheese-factory now operating at Te Rewarewa. These Natives have now the advantage accruing from a steady income, which, albeit small, is yet sufficient to keep them in comparative comfort. They are able to purchase food at the local stores, which enables them to treat lightly any failure of their crops. They also acquire a better standing among storekeepers and Europeans generally.[34]

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27. Quoted in Webster, *Rua and the Maori Millennium* (doc K1), p 140. Webster does not name the Inspector, but Bird was Inspector from 1903 to 1916: William Renwick, 'Bird, William Watson 1870–1954', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, http://www. TeAra.govt.nz/en/biographies/3b33/bird-william-watson, last modified 5 June 2013.

28. Best to Pomare, 20 February 1906, AJHR, 1906 sess 2, H-31, p 75

29. Best to Pomare, 30 March 1907, AJHR, 1907, H-31, p 58

30. Best, 'Memorandum for Health Officer to the Maoris, Auckland', 24 April 1908, AJHR, 1908, H-31, p 134 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1843); Binney, 'Encircled Lands', (doc A15), pp 495–496

31. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 154

32. Eru Pomare, 'Report of Dr Pomare, Health Officer to the Maoris', AJHR, 1904, H-31, p 61

33. Best to Pomare, AJHR, 1906, H-31, p 76; Judith Simon and Linda Smith, ed, *A Civilising Mission?: Perceptions and Representations of the Native School System* (Auckland: Auckland University Press, 2001), p 291; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 489–490

34. Best, 'Memorandum for Health Officer of the Maoris', 24 April 1908, AJHR, 1908, H-31, p 134

In 1916 Judge Browne thought that Maori at Ruatoki had been living in what he considered to be very 'backward' conditions, but due to the dairy industry they were now improving 'themselves and their mode of living'.[35] In the Waimana Valley, the establishment of dairying in the early 1920s 'meant that there was a brief period of social prosperity, remembered long afterwards as a time of happiness.'[36] By the mid 1930s, however, many of the farms were in financial difficulty for reasons which included inadequate land blocks, lack of roads, and existing roads falling into disrepair and becoming unusable.[37] Horopapera Tatu told Jeffrey Sissons that

> When I was at Tawhana I cleaned that place up. I cleaned it up and then I started a farm there. I went to Te Teko and got some cows from there and brought them up to Tawhana. Black and white ones, they were good for the cold. I got a pedigree bull and crossed them myself. I had them milking well . . . But the road got worse between Tauwharemanuka and Tawhana so they closed it. We couldn't get the milk out. We took it down on pack-horses for a while but it was no good. So I shifted all my cows to Te Teko, I had some land there. I took all my gear and my horses there. It was very hard to packsaddle the milk out. We couldn't go on like that.[38]

By 1949, there was only one economic dairy farm in the Matahi area.[39]

Outside the dairying region and to some extent within it, food shortages, disease, and severe poverty continued to afflict Maori in Te Urewera through the 1910s and 1920s. Ngati Manawa were reportedly unable to afford food and clothing, and a dental researcher sent into Te Urewera by the government in 1914 said that the 'partition between the Natives and starvation in some places seemed very thin indeed.'[40] In 1916, Maori in Te Urewera were said to be short of both food and money.[41] The same year, Judge Browne wrote that he had noticed no real improvement in Maori health in the Bay of Plenty (including Te Urewera) since 1911. Despite noting considerably better economic and housing conditions at Ruatoki, he concluded that there 'have been the usual outbreaks of enteric, typhoid and measles, and the usual number of deaths from those diseases. There are always cases of consumption [tuberculosis] amongst them as well.'[42] In 1919, a Department of Education official attributed a number of deaths of female pupils at Kokako Native School to 'insufficient nourish-

35. Census and Statistics Office, *Results of a Census of the Dominion of New Zealand Taken for the Night of the 15th October 1916* (Wellington: Government Printer, 1920), app A, p xi
36. Jeffrey Sissons, 'Waimana Kaaku: A History of the Waimana Block', June 2002 (doc A24), p 128
37. Ibid, pp 128–133
38. Ibid, p 133
39. Ibid, p 131
40. McBurney, 'Ngati Manawa and the Crown' (doc C12), pp 418–421. Dental researcher quoted in Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 223
41. Brian Murton, 'Summary of evidence of Brian Murton: Stage Three: Socio-Economic Impact Issues', 10 January 2005 (doc J10), p 14
42. Census and Statistics Office, *Results of a Census of the Dominion of New Zealand Taken for the Night of the 15th October 1916*, app A, p xii

ment' or malnutrition.[43] There were still severe food shortages in 1927, when a nurse visited Maungapohatu and reported that infant mortality was high there as a result of a 'hard winter for food.'[44]

Te Urewera was also affected by the influenza pandemic of 1918. In his book on the pandemic, historian Geoffrey Rice concluded that, nationwide, Maori were seven times more likely than Pakeha to die from influenza. In the Bay of Plenty region, he estimated the Maori death rate to be 48.7 deaths per 1,000 people, higher than the national Maori average of 42.3 per 1,000.[45] This was supported by the evidence we received. Dr CS Murray of the New Zealand Medical Corps, who the government sent to Te Urewera to deal with the pandemic, estimated that there was a total of about 108 Maori deaths in Murupara, Waiohau, Waimana-Matahi and Ruatoki.[46] Of these, Waimana and Ruatoki were worst affected. It was estimated there were 36 to 48 deaths at Waimana, and 51 or 52 deaths at Ruatoki, where around 500 Maori fell sick.[47] Surprisingly, while the disease reached Ruatahuna and Maungapohatu, few deaths occurred there. The pandemic caused only two deaths at Maungapohatu and none at Ruatahuna, although two outbreaks of influenza occurred in Ruatahuna in 1920, killing several people.[48]

The general pattern of disease resumed after the pandemic ended. There was a typhoid epidemic at Maungapohatu in 1925, leading to a major reorganisation of the village and its sanitary arrangements.[49] At Ruatoki, eight children and infants died from whooping cough, influenza and bronchial pneumonia in 1927, and in the same year nine children at Maungapohatu died from the same ailments, as well as croup.[50] Influenza struck Ruatoki in 1931, causing the head teacher there to write that

43. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1309
44. MacPherson, to Medical Officer of Health, Auckland, 4 November 1927 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(EE)), p 65)
45. Geoffrey Rice, *Black November: The 1918 Influenza Pandemic In New Zealand* (Christchurch: Canterbury University Press, 2005), pp 159–160
46. CS Murray to Dr Hughes, 'Report – Influenza Epidemic 1918', 30 December 1918 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(EE)), p 132)
47. Estimate of 36 Maori deaths at Waimana and 'Mataki' (presumably Matahi), J Ferguson, Sergeant NZ Police to Inspector of Police Hamilton, 4 December 1918 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(EE)), p 133). Estimate of 48 deaths at Waimana, Dr CS Murray to Dr Frengley, 11 December 1918 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(EE)), p 137). Estimate of 51–52 deaths at Ruatoki, C Mahoney to the Secretary of Education, 31 December 1918, BAAA 1001 541a, National Archives Auckland (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1660). Mahoney was the head teacher at Ruatoki Native School. Estimate of 500 sick at Ruaoki, Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 161n.
48. Maungapohatu: Judith Binney, Gillian Chaplin and Craig Wallace, *Mihaia: The Prophet Rua Kenana and His Community at Maungapohatu* (Auckland: Auckland University Press and Bridget Williams Books, 1996) (doc A112), p 149. Webster, *Rua and the Maori Millennium* (doc K1), p 214 mentions one death from influenza. Ruatahuna: Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 227; *PWMU Harvest Field*, 8 March 1919, (McBurney, supporting papers to 'Ngati Manawa and the Crown 1840–1927' (doc C12(a), p 192)
49. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1929
50. Ibid, pp 1650–1651

The Impact of the Influenza Pandemic in Te Urewera

Te Paea Rua described the effect of the flu at Matahi in the upper Waimana valley:

> They started dying, ooh, one after another, every day. Only two people didn't have the flu, they were going around and around and around burying the dead ones every day . . . [Parinui-te-ra, the wharenui] was full of sick people. Some were dying. Two, three, four at the same time . . . they used to take all the dead straight down to the cemetery . . . There was no time for a tangi or anything. Everybody was sick and dying, you might as well say every hour of the day.[1]

Desmond Renata told us about the effect of the flu epidemic at Waikaremoana:

> My Mother used to tell us about my great grandfather who would go from house to house to pick up the dead on a horse and sledge. He would go past at night. People were frightened to leave their homes. People were afraid to go and help him with handling the dead.[2]

1. Te Paea interviewed in Sissons, *Te Waimana* (doc B23), p 258
2. Desmond Renata, brief of evidence, 22 November 2004 (doc I24), p 12

> We have had a very bad time with the influenza in Ruatoki – it came like a wave and caught all the Maoris, practically at once. There were *three deaths* caused, I think, indirectly by the epidemic . . . the nurse and I reckoned out that at least five hundred of the people have been affected, and there are still some belated cases being notified. [Emphasis in original.][51]

At Waikaremoana, there were outbreaks of influenza, whooping cough, measles and polio in the 1930s, but these caused fewer deaths than in prior decades.[52] Even at this time, however, outbreaks of disease in Te Urewera tended to be more serious than in other parts of New Zealand, probably because they occurred when people were malnourished, and because people sometimes had more than one disease at a time, or in succession.[53]

Judith Binney examined death registers kept by the Presbyterian Mission at Maungapohatu from 1924 to 1936, and found that there was a very high mortality rate, especially for young children. Between 1924 and 1930, she found that there were 64 births, and 18 deaths of children aged under four years. Of 28 adult deaths between 1924 and 1936, a quarter were attributed to tuberculosis.[54]

51. R H Hausler to the Director of Education, 5 October 1931 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(EE)), pp 116–117)
52. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1647–1652
53. Ibid, p 1671
54. Binney, 'Maungapohatu Revisited' (doc A128), pp 376, 384

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Despite this, mortality rates were decreasing, and the decrease combined with a high birth rate seems to have led to a substantial increase in the Maori population of Te Urewera from the mid 1920s.[55] Census figures were now more reliable than in earlier decades, and showed that the Maori population of Whakatane County increased by about 60 per cent between 1926 and 1945.[56] Figures for smaller areas are less reliable, however, so it is difficult to know the extent to which the Maori population of Te Urewera increased during this time. The picture is further complicated by migration out of and within Whakatane County, which reduced the populations of some areas and increased those of others, regardless of mortality and birth rates.

The population increase occurred despite continued poor living conditions. Rano (Bert) Messent told us that when he was a child in 1930s Murupara, 'most children had no foot wear and our clothing was rather shabby and thin'.[57] After potato blight struck in the summer of 1932–33, the *Rotorua Morning Post* reported that, with their 'main source of food supply ruined by blight', Maori at Ruatahuna were faced with

> actual starvation this coming winter, unless some means are found to enable them to earn sufficient money to tide them over . . . It is an absolute fact that last winter season children arrived at school without having had anything to eat since the previous evening. And this when the ground was a foot deep in snow, and the bitter winter wind was whistling through the ragged clothing, which was all that they had to cover them. They have streams to wade through too before they can get to school, insufficiently clad and chilled with the icy water dragging their numbed feet through the snow to sit shivering through hours of school . . . With their ruined crops, and a bitter winter before them, the future of the Ruatahuna Maori looks black. Surely some loosening of the Unemployment Board's purse strings can be made to permit of these families being allowed to live.[58]

Perhaps the worst affected area was that near Waikaremoana, where Maori experienced food shortages, a lack of clothing, limited or non-existent income, extremely poor housing conditions, and outbreaks of influenza.[59] Nina Buxton described how her family lived temporarily in a basic shelter next to Kokako School from 1938. They erected a lean-to, which became the kitchen, and slept in a tent, on a bed of bracken ferns that they covered with

55. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1050–1051, 1673

56. Census and Statistics Office *Population Census, 1926*, vol 14, p 15, Census and Statistics Department *Dominion of New Zealand Population Census, 1936*, 13 vols (Wellington: Government Printer, 1937), vol 1, p 50, Census and Statistics Department *New Zealand Population Census, 1945*, 11 vols (Wellington: Census and Statistics Department, 1947), vol 1, p 5

57. Rano (Bert) Messent, brief of evidence, 9 August 2004 (doc F12), p 2

58. *Rotorua Morning Post*, 25 February 1933 (Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 273–274)

59. Vincent O'Malley, 'The Crown's Acquisition of the Waikaremoana Block, 1921–25', report for the Panekiri Tribal Trust Board, 1996 (doc A50), pp 136–143; Tony Walzl, 'Waikaremoana: Tourism, Conservation & Hydro-Electricity (1870–1970)'(commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A73), pp 228–232; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1647–1649

canvas. She described an unexpected visit from her 'Nanny Puhina', from Ruatoki: 'When she saw the conditions we were living in she took the baby and we never saw him again until he was ten years old'.[60] This area was the first in the district to be connected to the electrical grid, after the hydro works were built nearby. However the poverty of the community there meant that few could afford to pay the bills, and some ended up in serious debt.[61]

Employment prospects at Te Kuha, near Waikaremoana, were considered so bad that in 1940 the Registrar of the Gisborne Native Land Court proposed that the residents be re-located, citing a lack of arable land at the settlements and of other work nearby.[62] Unemployment had long been widespread throughout the district. Missionaries at Waiohau in the 1920s reported that nearly all the Ngati Haka Patuheuheu men there were looking for work outside the district, presumably because none was available nearby.[63] Although this was probably common around the district at this time, most of the evidence we heard on unemployment related to the Depression of the 1930s, or more recently. For example, in 1931 very high rates of unemployment were reported in Ruatahuna and in Rangitahi, near Murupara.[64] In 1936, government officials MJ Galvin and TP Shepherd recommended that 'some more permanent livelihood' must be found for those living in Maungapohatu 'if they are to survive'.[65] The best employment prospects were at Te Whaiti, where private and state-owned timber mills operated from 1928.[66] Maori and Pakeha alike moved to the town, which experienced a four-fold increase in population between 1926 and 1936.[67] However work there was still sometimes short during the Depression, and in 1931 and 1932 Te Whaiti residents were among those asking for unemployment relief work.[68]

The national economy began to improve from the mid 1930s, but many Te Urewera communities saw little change. Ngati Ruapani near Waikaremoana were still in 'distressingly poor circumstances' in 1935, according to Judge Carr.[69] There was flooding the next year,

60. Nina Buxton, brief of evidence, 11 October 2004 (doc H54), p 4
61. Walzl, 'Waikaremoana' (doc A73), p 228
62. Thompson, Registrar, Native Land Court, Gisborne to the Under Secretary of the Native Department, 21 September 1940 (Vincent O'Malley, comp, supporting papers to 'The Crown's Acquisition of the Waikaremoana Block, 1921–25' (doc A50(c)), p 755)
63. Rose 'A People Dispossessed' (doc A119), pp 188–192
64. Kori Katene to Apirana Ngata, Minister of Native Affairs, 16 January 1931 (Heather Bassett and Richard Kay, comp, supporting papers to 'Ngati Manawa and the Crown c 1927–2003' (doc C13(a)), p 865)
65. Shepherd Galvin Report (Evelyn Stokes, J Wharehuia Milroy and Hirini Melbourne, *Te Urewera Nga Iwi Te Whenua Te Ngahere People, Land and Forests of Te Urewera* (Hamilton: University of Waikato, 1986) (doc A111), p 162; Shepherd and Galvin to Under-Secretary for Lands, 'Urewera District Lands (Interim Report)', undated [May or June 1936], p 6 (SKL Campbell, 'Urewera Overview Project Four: Te Urewera National Park 1952–75'(commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc A60(a)), p 52)
66. Best, Sanitary Inspector, to Pomare, 20 Feb 1906, AJHR, 1906, sess 2, H-31, 1906, p 75
67. Between 1926 and 1936 the population of Te Whaiti rose from 86 Maori and four non-Maori to 226 Maori and 180 non-Maori. Census and Statistics Office, *Population Census, 1926*, vol 1, p 56 and vol 12, p 32; Census and Statistics Department *Population Census, 1936*, vol 1, p 50
68. Hutton and Neumann, 'Ngati Whare and the Crown (doc A28), pp 339–340
69. Carr quoted in O'Malley, 'The Crown's Acquisition' (doc A50), p 145. W Pitt from the Native Department also said they were 'in very poor circumstances' in 1935 (quoted in O'Malley, 'The Crown's Acquisition' (doc A50), p 148).

causing the potato crops which made up their core food supply to rot. Maria Waiwai told us that 'We still needed to eat, so we would harvest the rotten potatoes. We'd put them in the Lake to rot them further, then hang them from the trees to drain. Later we made them into fritters fried in pork fat'.[70] Throughout the district, water supplies were unreliable and unsafe. In 1935 it was reported:

> The settlements of Mataatua, Tatahoata and Umuaroa [*sic*] are very badly off for fresh clean water, the Health Department having condemned the supply in two instances. Good supplies can only be got by going up to springs in the hillsides.[71]

Serious illness was still common, for example an outbreak of measles which affected children throughout Te Urewera in 1938 and 1939.[72] The Medical Officer of Health estimated that 50 per cent of children in the East Cape Health District, which included Te Urewera, had been affected. Complications were numerous and severe, including 100 cases of pneumonia leading to 24 deaths, four cases of encephalitis with one death, and many cases of conjunctivitis, as well as pleurisy, jaundice, strabismira (an eye disorder), and nephritis.[73] A 1939 study also found syphilis to be widespread.[74]

23.3.3 Housing and health in the 1930s and 1940s

The amount of information about housing in Te Urewera increases substantially from the late 1930s. This was not because of any change in conditions, but rather because this was when many of our older claimant witnesses were children, and also when the Crown became more interested in Maori housing. One of the few groups for whom we have earlier information, Ngati Ruapani, continued to live in very poor conditions into the early 1940s.[75] Things were little better at Ruatahuna, where the housing was also described as very poor quality.[76] At Ruatoki, a land development scheme had included provision of housing for unit occupiers, but this had not eliminated substandard accommodation. In 1945 the development scheme houses were described as 'hovels', and in 1952 a medical student noted that

70. Maria Whakatiki Tahu Waiwai, brief of evidence, not dated (doc H18), p 11
71. John Dickin, letter to Registrar, Waiariki District Maori Land Board, 30 December 1935 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(HH)), p 127)
72. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1647. Maungapohatu was the only area for which no evidence of an epidemic was found in the reports from teachers and principals.
73. East Cape Health District, Annual Report 1938, 3 April 1939 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1652)
74. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1666–1667
75. O'Malley, 'The Crown's Acquisition' (doc A50), pp 145–153; Murton, 'The Crown and the Peoples of Te Urewera', (doc H12), pp 1941–1942; Maria Whakatiki Tahu Waiwai, brief of evidence, not dated (doc H18), p 12
76. W T Church quoted in Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 307; Temuera Morrison to the Registrar, no date (1945) (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(KK)), p 42); see also William Te Rangiua Temara, brief of evidence, 21 June 2004 (doc E10), p 12

the majority of the houses at Ruatoki were of a low standard, with many having mud floors, only one or two rooms, no bathrooms or kitchens, and no piped water.[77]

Kaa Kathleen Williams and her family lived in a cave at Painoaiho in Murupara during the early 1940s. She gave the following account of their home there:

> It had a roof and the floor was hard black earth. My mother swept it clean with a Manuka broom then she laid flax mats over it and covered parts of the walls. At night flax mats were hung at the entrance to keep out the wind. Our beds were made by piling up fern fronds covering them with flax mats and sacking and blankets were laid on top of that. They were warm and comfortable. The eating table was a covered box with no chairs. The fire for cooking was lit outside. Old cleaned out kerosene tins held water and luckily a spring well was close by with fresh pure water. My mother's foster parents had put an eel in it to keep the well clean. They said that if we killed the eel the well will dry up. The well is still there today but I don't know about the eel.
>
> . . . . .
>
> We all went to Rangitahi School from that cave by walking through the paddocks barefooted. The teachers and the other children did not believe we lived in a cave. To us it was a wonderful home, warm and cosy. It wasn't until we looked back at it and thought '*Wow that was living in poverty*.'[78]

While Ms Williams' situation was extreme and unusual, most Maori families in the Murupara-Rangitahi area were still living in substandard accommodation in 1950.[79] At Te Wai-iti near Ruatahuna the housing was described in 1937 as 'not fit for a human to live in.'[80] In 1945, William Te Rangiua (Pou) Temara of Tuhoe was living in a 'comfortable' but 'very small' house with an earthen floor, bark roof and bracken bedding.[81]

Even in Te Whaiti, where the timber industry provided relatively high employment, there were still many socio-economic problems. Timber companies supplied houses for their workers, but they were described as 'damp, draughty, and unsanitary slum dwellings.'[82] A Department of Labour report of 1944 investigated the private housing provided by Wilson Timber Mills in Te Whaiti, and described in detail the conditions of some houses. For example:

77. Sub-Provincial Secretary, Bay of Plenty Sub-Province, New Zealand Farmers' Union, to the Minister of Native Affairs, 30 August 1945 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(KK)), pp 25–26); Mason, to the Sub Provincial Secretary, 7 September 1945 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(KK)), pp 28–29); Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1952
78. Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc C16), p 37
79. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1951
80. Petera quoted in Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 306
81. William Te Rangiua Temara, brief of evidence, 21 June 2004 (doc E10), p 12
82. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 456

23.3.3

> No 32: Mr P Taylor (Maori). Two-roomed shack, no washhouse or bathing facilities. Roof is not weather-proof, walls lined with T & G [tongue and goove]. No drainage and storm and waste water is left to disappear in its own time. Closet [toilet] 12 yds distant. This place should be condemned. Two of the children are to go to hospital on account of pneumonia and continued colds.[83]

The overwhelming majority of the houses designated as being unfit for human habitation had Maori occupants.[84]

Sanitary provisions were generally also substandard. In his report on housing in the Whakatane District during the 1945 to 1955 period, Sanitary and Building Inspector R D Stirling noted that 'a large number of the Maori people in this district are living under deplorable conditions'. He identified overcrowding, a lack of drainage and sanitary connections, dubious water supplies, open pit privies, and homes in disrepair, as the main problems.[85] Rubbish disposal was also a problem throughout the 1930s and 1940s; Murton notes that most people dug pits and covered the rubbish with soil, or left the rubbish uncovered.[86] Some improvements were made; from the late 1930s, communities were able to apply for funds to improve sewage disposal and water supplies, and many did so. For example, a large water reticulation system was built at Ruatoki in 1937.[87] From 1946, houses built by the Department of Native Affairs adhered to the national building code, meaning that they had to be fitted with flush toilets or septic tanks, drinking water supplies, bathrooms, and wash houses.[88]

There were still epidemics in the 1940s: of syphilis in 1943, and poliomyelitis across Te Urewera in 1947–48.[89] According to information supplied by school teachers and the Department of Health about local epidemics, Te Whaiti experienced the worst health conditions of all Te Urewera communities from 1930 to 1948, with its residents suffering 10 outbreaks of influenza, two each of measles, chickenpox, mumps, whooping cough and polio, and one of typhoid in that period.[90] From about the 1950s onwards, however, infectious disease became less common and less serious throughout Te Urewera and New Zealand generally, although Maori continued to contract and die of infectious disease at higher rates

83. J A Suiter, 'Investigation as to Conditions at Wilson's Sawmill, Te Whaiti, on Wednesday, 26th January, 1944' (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 458–459)

84. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 458

85. R D Stirling, 'Report on Sub-Standard Maori Dwellings, Whakatane County', 22 June 1955 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (H12(a)(11)), p 41). Areas within the inquiry district that were covered by the survey are Ruatoki, Matahi, Waimana, Tanatana, Waiohau, and Murupara.

86. Brian Murton, summary of 'The Crown and the Peoples of Te Urewera, 1860-c2000: The Economic and Social Experience of a People', not dated (doc J1), p 42

87. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1877–1881; Murton, summary of 'The Crown and the Peoples of Te Urewera', (doc J1), p 41

88. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1872–1873

89. Ibid, pp 1649, 1668

90. Ibid, pp 1647–1649

than Pakeha.[91] As infectious disease declined, degenerative diseases such as coronary heart disease, strokes, and cancer became the main causes of death among Maori.[92]

Poor dental health was also a problem in some communities. A high incidence of gingivitis among children was observed by the principal dental officer at Te Whaiti in 1948.[93] In Ruatahuna the local medical practitioner, Dr North, issued several warnings about the teeth of the children at Huiarau school in the mid to late 1940s, and in 1949 the district health nurse commented that the state of the children's teeth 'must be unique in New Zealand for the percentage of gingivitis and dental caries [cavities]'.[94]

Ill health, poverty, and bad housing made life hard for Te Urewera communities in the early and mid twentieth century. However there were also positive aspects. In particular, claimant witnesses from all over Te Urewera told us of the benefits of growing up in an area where their ancestral culture and language were still strong, as were whanau and hapu ties. Kahui Ana Doherty, who was a child in the 1940s, said the most important thing from those times was 'he mahi whakakotahi i ngā whamere katoa o Te Whaiti', or how all the families of Te Whaiti worked together.[95] Te Tuhi Hune also described growing up in Te Whaiti in the late 1930s: 'Our first language was Te Reo Tuhoe . . . We were always at the marae, whatever was on, whatever needed doing, you would always find us there'.[96] Timoti Karetu, who grew up at Waimako, said that 'The original language spoken here was Māori, which extended out towards Ruatahuna, Waiohau, Ruatoki and Te Waimana Kaaku. The vitality of Māori customs and the Māori spirit . . . was very much alive'[97] Charles Manahi Cotter of Rangiahua described how the traditional system of having tohunga, or experts in particular fields, meant that community members relied on one another for help. He said, 'our people were all links in the chain . . . Each ensured the general well being of the community as a whole.'[98]

23.3.4 The timber industry and migration

An important development came in the 1940s, when the Te Urewera timber industry began to expand substantially; a pulp and paper mill opened at Kawerau, and the development of the logging, pulp and paper industry there and at Murupara and Kaingaroa created

91. EW Pomare, *Maori Standards of Health, 1995–1977* (Auckland: Medical Research Council of New Zealand, 1980) (Murton, The Crown and the Peoples of Te Urewera (doc H12), pp 1674–1675)
92. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1673. Children under five years were excluded from the study.
93. Ibid, p 1711
94. M D Ambercombe, district health nurse, to medical officer of health, Gisborne, 4 March 1949 (Tuawhenua research team, 'Ruatahuna', (doc D2), p 382)
95. Kahui Ana Doherty, brief of evidence, 6 September 2004 (doc G17), p 6
96. Te Tuhi Hune, brief of evidence, 6 September 2004 (doc G15), p 4
97. Timoti Karetu, brief of evidence, 18 October 2004 (doc H50), p 3
98. Charles Manahi Cotter, brief of evidence, not dated (doc I25), p 24

many new jobs.[99] The expansion of Minginui and Murupara, with new housing and services for forestry workers, and projects associated with hydro-electricity development at Waikaremoana, brought employment and better living conditions to Maori in the southern and western margins of Te Urewera during the 1950s and 1960s.[100] In other parts of Te Urewera, however, economic prospects stagnated or declined, resulting in continued poor living conditions and migration out of rural communities to the towns fringing Te Urewera, and further afield.[101]

Few places underwent greater change than Murupara and Minginui. Between 1936 and 1951 the Murupara population rose from 453 to 643, although the proportion who were Maori stayed steady at around half. The increase was partly because of general population growth, but also because of the opportunities provided by the Kaingaroa forest and Galatea dairy farming industry, both nearby. In the 1950s, the government and private business both substantially expanded their forestry operations in the area. Murupara became a major base for both private and state logging operations, and the railhead for Kaingaroa forest. As a result, by 1961 the population of Murupara and its vicinity (including Rangitahi Pa) had tripled to 1,929, and by 1971 it had increased to 3,068, with Maori making up 60 per cent of the population.[102] Douglas Rewi described how Murupara became a town 'overnight'.[103] Nearby Minginui was also transformed after it was turned into a 'model village' forestry town in 1948, and its total population rose from 41 in 1945 to a peak of 448 in 1961.[104]

We have seen that Te Whaiti had already experienced significant timber industry-driven growth from the late 1920s. This peaked in 1945, with Te Whaiti and its vicinity, combined with nearby Ngaputahi, having a total population of 463, of whom two-thirds were Maori.[105] In the following decade, three mills closed in Te Whaiti and many residents appear to have left for nearby Minginui.[106] By 1981, the last year for which Te Whaiti census data is available, the total population had fallen to 85. We do not know what percentage of this total

99. Murton, 'Summary of evidence of Brian Murton: Stage Three' (doc J10), p 64. Note that Kawerau and Kaingaroa are just outside of the inquiry district.

100. Murton, summary of 'The Crown and the Peoples of Te Urewera' (doc J1), p 31

101. Murton, 'Summary of evidence of Brian Murton: Stage Three' (doc J10), p 63

102. Census and Statistics Department, *Census of Population, 1936*, vol 1, p 150; Census and Statistics Department, *New Zealand Census of Population, 1951*, 8 vols (Wellington: Government Printer, 1951), vol 1, p 90; Department of Statistics, *Population Census, 1961*, 10 vols (Wellington: Government Printer, 1991), vol 1, pp 35, 55; Department of Statistics, *New Zealand Census of Population and Dwellings, 1971*, 12 vols (Wellington: Department of Statistics, 1972), vol 1, pp 39, 64

103. Douglas Te Rangi Kotuku Rewi, brief of evidence, 9 August 2004 (doc F18), p 4

104. Census and Statistics Department, *Census of Population, 1945*, vol 1, p 49; Department of Statistics, *Population Census, 1961*, vol 1, p 55

105. Census and Statistics Department, *Census of Population, 1945*, vol 1, p 49

106. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1984

was Maori, but Pakeha residents had started leaving early; their population peaked in 1936, compared to 1945 for Maori.[107]

Other Te Urewera communities lost population from the middle of the century. The lower Whakatane / Ohinemataroa river valley area is the site of Hanamahihi, one of the original Te Urewera settlements founded hundreds of years ago by Tawhaki. Both it and neighbouring kainga were slowly abandoned as their inhabitants moved down the valley to Ruatoki.[108] Menu Ripia, whose family farmed at Hanamahihi, and Pou Temara, whose family farmed at Waikarewhenua, told us that their farms were abandoned by the 1950s.[109] The communities at Tawhana and Tauwharemanuka, between Waimana and Maungapohatu, declined from an estimated combined population of 52 in 1936 to 11 in 1981.[110] Ruatahuna saw some increase in population in the post war years, peaking at 467 in 1961, of whom 423 were Maori. After that, the numbers declined to 210 in 1981.[111] A 1958 study showed that many migrants from Ruatahuna left to find work in the timber towns in and near the inquiry district, although others went further afield.[112]

Migration impacted on those who left and on the places they left behind. In 1970 a District Welfare Officer wrote that 'It is sad to see places which were previously full of people becoming desolated with the attendant problems of desolation on buildings and families'.[113]

Alana Burney described the connections she and her family members maintained with their whanau in Ruatoki: 'My mother's heart was here . . . shown in her tears when we'd visit her tipuna at the urupa or driving from the homestead'.[114] She told us of 'childhood

107. Census and Statistics Department, *Census of Population, 1951*, vol 1, p 90; Department of Statistics, *New Zealand Population Census, 1956*, 10 vols (Wellington: Government Printer, 1956), vol 1, p 104; Department of Statistics, *Population Census, 1961*, vol 1, p 55; Department of Statistics, *New Zealand Census of Population and Dwellings, 1966*, 10 vols (Wellington: Department of Statistics, 1967), vol 1, p 44; Department of Statistics, *Census of Population and Dwellings, 1971*, vol 1, p 64; Department of Statistics, *New Zealand Census of Population and Dwellings, 1981*, 12 vols (Wellington: Department of Statistics, 1982), vol 1, pt B, p 28. Te Whaiti's decline roughly correlates with the increase in the population of nearby Minginui in the 1950s and 1960s, particularly for Maori.

108. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111) p 149

109. Menu Ripia, brief of evidence, 10 May 2004 (doc D16), pp 3–4 and William Te Rangiua Temara, brief of evidence, 21 June 2004 (doc E10), pp 15–16

110. 1936 figure: 'List of Inhabitants from Tauwharemanuka to Tawhana' Waiariki District Maori Land Board and Native Land Court, Rotorua, 1 June 1936 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(B)), p 37). Of these, Sissons calculates that 30 lived at Tawhana, and 22 at Tauwharemanuka and Otane (just north of Tawhana): Sissons *Te Waimana* (doc B23) p 275. 1981 figure: Stokes et al calculate that the combined total population of Matahi, Whakarae (Matahi–Tawhana) and Tawhana-Tauwharemanuka was 166 in 1981. We can deduce that, because Matahi had a census population (total) of 88 and because Whakarae's population was 67, Tawhana–Tauwharemanuka had a total population of 11 in 1981: Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111) p 120.

111. Census and Statistics Department, *Population Census, 1936*, vol 1, p 50; Census and Statistics Department, *Population Census, 1945*, vol 1, p 49; Department of Statistics, *Population Census, 1961*, vol 1, p 55; Department of Statistics, *Census of Population and Dwellings, 1981*, vol 1, pt B, p 28; Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 118, 120

112. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 198

113. Murton, 'Summary of evidence of Brian Murton: Stage Three' (doc J10), p 67

114. Ibid, para 19

Growing up Outside the Rohe

Alana Burney, a Nga Rauru o Nga Potiki claimant, described the sense of dislocation she and others felt growing up away from their rohe. Her family moved from Ruatoki in 1975 to live in a 'nuclear-based one bedroom whanau home on the North Shore'.[1] Growing up, she said, she had struggled to feel accepted, 'as a Maori in a Pakeha world', and similarly, had felt that she was missing out on Maori, and Tuhoe, culture.[2] Ms Burney recounted, as an example of her cultural discomfort, a story about her mother showing her class how to cook huhu grubs. She remembered feeling a confusing mix of pride at her mother's knowledge and shame at the 'oohing and yucking and laughing and smirking' that came from the students.[3]

1. Alana Burney, brief of evidence, 10 January 2005 (doc J14), paras 1, 9
2. Ibid, paras 8, 12
3. Ibid, para 12

memories of waking up at Toikairakau, whakairo all around, made me feel stronger as a Tuhoe living in the city, as did the knowledge that we had a home here too, an old homestead that mum made sure to make known to us kids'.[115] In the early 1970s Tuhoe in Auckland founded Te Tira Hou marae in Panmure; Ms Burney's mother was the secretary. There, Ms Burney could play with other Tuhoe children who, like her, could not speak Maori. She said that this 'made us feel part and parcel of our iwi – us kids at this Marae were not ostracised for not knowing the reo – it was more that the elders felt sorry for us. I am thankful for Te Tira Hou but it is not enough'.[116] Awhina Rangiaho, who affiliates to several Tuhoe hapu, described moving from Maromahue Pa in Waiotahe Valley with her family in the early 1960s, after the Department of Maori Affairs condemned their home: 'Moving to Hastings was like moving to a new country, the language was different, no one spoke Māori, not even Māori and everyone lived like Pākehā'. She told us she and her family felt like 'immigrants in another land'.[117] Nor did the migration lead to improved living standards: the whanau often had to choose between paying the power bill and buying food, and Ms Rangiaho's brothers were frequently subject to racist insults from teachers and police. They became 'violent angry adults' who joined gangs, committed violent crime, spent time in prison and, in one case, committed suicide.[118]

In the communities left behind, standards of living were still low In 1955, R D Stirling, the Sanitary and Building Inspector for Whakatane, reported that a 'large number' of Maori in

115. Murton, 'Summary of evidence of Brian Murton: Stage Three' (doc J10), para 20
116. Ibid, para 8
117. Awhina Rangiaho, brief of evidence, 10 January 2005 (doc J15), p 4
118. Ibid, pp 5–6

Standards of Housing in the 1950s and 1960s

Numerous claimant witnesses told us about the housing conditions of the post war decades. Lenny Mahururangi Te Kaawa grew up at Uwhiarae, near Ruatahuna, in the 1960s. He described living with a family of thirteen in a small, old mill house, which would become even busier during the weekends and holidays, when about the same number again of relatives would come and stay. 'Although we never complained about our living conditions at the time, we look back now and wonder how our parents ever managed to keep us all . . . Mum applied for assistance for a new home because of the condition of the old one, but never received any help from the Government. She never did get her new home. She moved to the old cookhouse at the village in her later years'.[1]

Korotau Tamiana provided evidence about farming at Ohaua from the 1950s. He described how he and his family lived in a small house made from totara slabs, with one window, a dirt floor and a fireplace. 'Each time we arrived there, we would cut down ferns to lay down under the tarp or bags on half of the house for bedding. The rest of the area was used for cooking and eating . . . We did not have plates. We would open tins of condensed milk and then keep them and use them for cups. The old man and old lady had a cup and plate. We used mussel shells for spoons. We would all eat from the same dish; we lacked plates so we shared our kai'.[2]

Menu Ripia described growing up at Hanamahihi, near Ruatoki:

> Our house was an open plan – one room – with kitchen and dining at one end, sleeping quarters at the other end. It had a dirt floor. It was quite a small house, made out of totara slabs, adzed. The slabs were placed in a way to close the gaps between them. The house had an iron roof, had two windows and open fire for cooking, and heating. Washing was done outside at the spring nearby. There was always a big whanau staying with us. People staying with us from Ruatoki and Ruatahuna would sleep in tents outside. They would often come to visit and to help with some of the work.[3]

1. Lenny Mahurangi Te Kaawa, translation of brief of evidence 21 June 2004 (doc E9(a)), p 2
2. Korotau Tamiana, brief of evidence, 10 May 2004 (doc D20), p 5
3. Menu Ripia, brief of evidence, 10 May 2004 (doc D16), p 3

the northern and western areas of Te Urewera 'are living under deplorable conditions.'[119] He noted many houses were small, overcrowded, unlined, unsanitary, without weatherproofing, and in need of repairs.[120] Surveys of housing conditions undertaken by Maori Welfare Officers in 1956 found that a large majority of houses at Uwhiarae (near Ruatahuna), Te

119. R D Stirling to the County Clerk, Whakatane, 22 June 1955 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1952–1954). Stirling inspected Maori houses at Ruatoki, Matahi, Waimana, Waiohau, Murupara and Tanatana.
120. Ibid

Whaiti, Waiohau, Rewarewa (near Ruatoki), and Matahi were unsatisfactory, as were all the houses at Ngahina.[121]

Given the poor housing conditions prevailing in most parts of Te Urewera, one of the attractions of the Minginui and Murupara forestry towns was the relatively high standard of housing.[122] Hutton and Neumann note that with the establishment of Minginui in about 1948 'the living standards of those living and working in the valley . . . improved dramatically.'[123]

23.3.5 Living conditions in the mid twentieth century

Poor housing is a major contributing factor to ill health, as the Department of Health recognised at the time.[124] Studies carried out in Ruatahuna in the late 1950s and early 1960s showed that Maori housing there tended to be overcrowded and of poor quality.[125] Dr Ian Prior, who authored one of the studies, told us that the standard of housing was 'for the most part quite bad' and overcrowded, contributing to the spread of respiratory infections. 'Houses were often in need of repair and repainting and sanitation was often defective'. He noted that impetigo skin lesions were common, and smoke from indoor fires was contributing to bronchitis.[126] Inadequate sanitary facilities and unsafe drinking water also contributed to the spread of bacillary dysentery in the 1950s and early 1960s.[127] There were reports of unsafe or unreliable drinking water in Murupara and Ruatoki in 1952, and in 1955 the Sanitary and Building Inspector of Whakatane County, R D Stirling, reported that the 'majority [of Maori households surveyed] obtain household water from very doubtful and dangerous sources. A number of the water points were some distance from the

121. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1956
122. Wakeley Matukuare, brief of evidence, September 2004 (doc G40), p 5
123. Hutton and Neumann, 'Ngati Whare and the Crown (doc A28), p 481
124. 'Inspector's Report on Infectious and Notifiable Disease: Department of Health', 3 October 1950, 5 August 1950, 19 September 1950, 18 January 1957, 21 August 1964 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1677–1678)
125. John R McCreary and John Rangihau, *Parents and Children of Ruatahuna: A Report to the People* (Wellington: School of Social Sciences, Victoria University of Wellington, 1958), p 6; A Health Survey in a Rural Maori Community, with particular emphasis on the Cardiovascular, Nutritional and Metabolic Findings 1962 (Ian Ambury Miller Prior, comp, supporting papers to brief of evidence (doc E14(a)), p 2); 'The Prevalence of Anaemia in Two Maori Communities, 1962' (Ian Ambury Miller Prior, comp, supporting papers to brief of evidence doc E14(b)), p 7)
126. Ian Ambury Miller Prior, brief of evidence, 21 June 2004 (doc E14), p 7
127. 'Inspector's Report on Infectious and Notifiable Disease: Department of Health', 3 October 1950, 5 August 1950, 19 September 1950, 18 January 1957, 21 August 1964 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1677)

habitation – up to half-a-mile.'[128] Poor health and bad water were among the reasons why Maori continued to be more prone to infectious disease than non-Maori, although both groups experienced huge declines in disease rates over this period.[129] In the 1950s and 1960s there were reported cases of bacillary dysentery, meningitis, and infective hepatitis in Te Urewera.[130]

Maori, in Te Urewera and elsewhere, also had disproportionately high rates of degenerative diseases.[131] In the early 1960s, Dr Ian Prior led studies into Maori health in Ruatahuna, finding high rates of obesity, diabetes, rheumatic heart disease and chronic chest disease, and inadequate iron and protein intakes among young children.[132] Prior told us that the reasons for these high rates of ill health included poverty and its influence on food choices.[133] Meanwhile, infant mortality rates among Maori declined from 57 per 1,000 live births in 1954–58 to 30 per 1,000 births in 1964–68. In comparative terms, Maori infant mortality dropped from nearly three times the non-Maori rate in the 1950s to just over twice the non-Maori rate in the 1960s.[134] We lacked similar information for other parts of Te Urewera, but the Ruatahuna data combined with national Maori health statistics suggest that health conditions were similar throughout the inquiry district.

During the 1970s and early 1980s Maori life expectancy continued to improve, but psychiatric hospital admissions, and lung and breast cancer, became more common among Maori than non-Maori.[135] Childhood ear infection, sometimes leading to hearing loss, was an ongoing problem in Te Urewera and elsewhere, affecting Maori at a higher rate than Pakeha.[136] Housing problems also continued. According to the 1981 census, Matahi-Tawhana's population of 166 was housed in just 20 dwellings; so the average occupancy rate was 8.3 people per household. This compared with an average occupancy of 4.5, 4.4, 4.3 and 4.2 respectively in Murupara, Waimana, Ruatoki and Ruatahuna. All the Te Urewera com-

128. W B Paton, 'The Ruatoki Maoris' (MBChB thesis, University of Otago, 1952), p 14 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1887); R D Stirling, 'Report on Sub-Standard Maori Dwellings, Whakatane County', 22 June 1955 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(11)), p 40). Stirling inspected dwellings in Ruatoki, Waimana, Matahi, Murupara, and Waiohau, as well as others outside the district, including Matata, Te Teko, and Onepu. Of the fifty dwellings inspected, twenty-seven were in Te Urewera.

129. Murton, summary of 'The Crown and the People of Te Urewera' (doc J1), p 38

130. 'Inspector's Report on Infectious and Notifiable Disease: Department of Health', 3 October 1950, 5 August 1950, 19 September 1950, 18 January 1957, 21 August 1964 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1677–1678)

131. Eru W Pomare, *Maori Standards of Health: A Study of the 20 Year Period 1955–75 – A Report Prepared for the Medical Research Council of New Zealand* (Wellington: Medical Research Council of New Zealand, 1980)

132. A Health Survey in a Rural Maori Community 1962 (Prior, supporting papers to brief of evidence (doc E14(a))); The Prevalence of Anaemia in Two Maori Communities 1962 (Prior, supporting papers to brief of evidence (doc E14(b)), pp 7–8). The first study had a high level of participation: 99 per cent of the population of 491 people took part.

133. Ian Prior, brief of evidence, 21 June 2004 (doc E14), p 5

134. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1675

135. Ibid, p 1690

136. Ibid, p 1687

munities were above the average occupancy rate for the Whakatane district, which was 3.5.[137] In Murupara, almost 80 per cent of homes were rented, compared with a national average of 27 per cent.[138] The same year, a rural housing survey identified 'a substantial number of sub-standard dwellings' lacking essential facilities in Waiohau, Waimana, Ruatoki, Murupara, Ruatahuna, and Galatea.[139] Henry Pryor, the Senior Community Officer for Maori Affairs in Whakatane, noted around this time that many Maori in the Whakatane district, which included Te Urewera, were living in garages and other unsuitable dwellings. This was especially the case for Maori who were young, unemployed, or married with children.[140]

There was significant variation in the quality of life in different parts of Te Urewera. In particular, the forestry industry directly and indirectly provided jobs for many residents of Murupara and Minginui, while the hydro electric power industry did the same for the Waikaremoana area. Consequently, these areas enjoyed much higher rates of employment and lower rates of poverty than other settlements in the district. We note, however, that these figures are for the total population, and it seems probable that Maori in these areas, particularly Waikaremoana, were more likely to be unemployed than their Pakeha neighbours. In the early to mid 1980s, when the national unemployment rate averaged about 4 per cent, the rate in Waimana was 12 per cent, in Ruatahuna 17 per cent, and in Ruatoki 29 per cent. In the Minginui–Te Whaiti and Waikaremoana areas, by contrast, unemployment was at about the national average.[141] In Minginui–Te Whaiti and the Waikaremoana area, around 43 per cent of the total population had at least some income, compared to just under a third in Waimana and Ruatahuna, and less than a fifth in Ruatoki.[142] Claimant witnesses fondly recalled the quality of life in Minginui and Murupara during this time. Mereru Mason told us that Minginui was a 'hustling and bustling town' and that, from the 1960s to the early 1980s, it was 'thriving'.[143] The small village had a general store, a post office, a

137. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 120, 268
138. Ibid, p 268
139. W W Downes, Regional Building Supervisor, "Sub Standard Homes: Rural Housing Survey, '21 June 1982 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(NN)), pp 7–9); Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 2019
140. 'Need to Change Rules and Make Money Available', *Whakatane Beacon*, [1982] (Murton supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(NN)), p 71)
141. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 124–127. Stokes, Milroy, and Melbourne indicated it was difficult to calculate the exact unemployment rate in Te Urewera, given incomplete data and difficulties of definition. This, together with the fact that those unemployed in places such as Ruatoki found it difficult to register as unemployed (as it required a trip to Whakatane and there was no public transport) means that the levels of unemployment and underemployment were underestimated. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 126–127. The percentages used here are calculated by dividing the number of unemployed by the number of employed plus unemployed.
142. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 131
143. Mereru Mason, brief of evidence, September 2004 (doc G41), p 3

The Impact of the Timber Industry on the Murupara Community

Douglas Rewi told us about the changes the timber industry brought to Murupara and the hapu and iwi of Te Urewera:

> Prior to 1986 when the Forestry Corporation closed down it was a good time for people. There was never a shortage of work from private Native Timber operations through to the Forestry Service, the Ministry of Works and work in the nearby Kaingaroa Forest. There was always work for the people to rely on. There was work for not only Ngati Whare but also Ngati Manawa, Tuhoe, Ngati Haka Patuheuheu. Everyone worked together no matter what hapu they were from.[1]

He went on:

> The forestry industry gave a sense of unity to the community. . . .
>
> . . . . .
>
> The decades following the start of the forestry industry meant a prosperous and happy period for Murupara and Ngati Manawa, but it was all ultimately dependent on the Crown involvement in forestry . . . Forest work was easy to come by, however, like every town that has a quick influx of people in a short period of time, it brings with it its downfalls.
>
> . . . . .
>
> It was common for a number of workers to visit the local hotel and consume a great quantity of alcohol in a very short time. It was also common for alcohol to be brought and taken to homes where parties would continue late into the night. It was a common sight to see young children gathered outside the hotel waiting for their parents to take them home.[2]

1. Douglas Rewi, brief of evidence, September 2004 (doc G37), p 14
2. Douglas Rewi, brief of evidence, 9 August 2004 (doc F18), pp 6, 9

community hall, a church, a working men's club, a volunteer fire brigade, and several sports teams. The fire brigade and women's golf team won national competitions.[144]

Ruatoki, meanwhile, was beginning to experience a downturn in employment. For many years it was the largest Maori community in Te Urewera, overtaken by Murupara only in 1961. As we saw earlier, in the early twentieth century it was also one of the more prosperous parts of the district, due mostly to the dairy industry. However 1964 saw the closure of

144. Wakeley Matukuare, brief of evidence, September 2004 (doc G40) p 3; William Eketone, brief of evidence, September 2004 (doc G29). p 3; Mereru Mason, brief of evidence (doc G41) p 5; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 746

the dairy factory, which had been Ruatoki's major employer since it opened in 1908.[145] By the early 1980s, many residents had left, and nearly a third of those who remained were dependent on welfare benefits.[146]

Although the Maori residents of Murupara, Minginui, and perhaps Waikaremoana were better off than those in other parts of Te Urewera, their well-being was always precarious. When unemployment became more common in the late 1960s, on a national level Maori were disproportionately likely to be without work, with Maori men being four to six times more likely to be unemployed than non-Maori men.[147] The Maori female unemployment rate was eleven times that of non-Maori women, although high rates of non-participation in the paid workforce make comparison difficult.[148] As the national economy deteriorated over the 1970s, unemployment increased. Te Urewera, with its almost total dependence on the timber, farming, and power industries, was particularly vulnerable. By 1977, the timber and paper plants at Kawerau and Whakatane had stopped hiring new staff, and the effect was felt in the retail and service sector. Some new processing and manufacturing jobs became available, but local unemployment rates were increased by the return of people who had been living in the main centres.[149]

23.3.6 Economic decline and social problems

From about the early 1980s, and for a variety of reasons discussed below and in chapter 18, the timber industry began to decline.[150] In response, private logging companies began to 'rationalise' their operations, resulting in the loss of at least 255 jobs around Murupara over five years.[151] In 1987, the Forestry Corporation was turned into a State-Owned Enterprise and dramatically reduced its workforce.[152] Douglas Rewi estimated that from the mid to late 1980s 'approximately 60% of forestry workers – many Maori, many Ngati Manawa – lost their jobs'.[153] Mr Rewi and Margaret Herbert detailed the effects from this, including widespread stress, worry, depression, alcoholism and crime, the closure of many shops, the loss

145. Oliver 'Ruatoki Block report' (doc A6) p 199
146. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111) pp 118, 120, 125, 132, 144
147. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1147, 1151
148. Ibid, p 1151
149. Ibid, pp 1155–1156
150. Tony Walzl, 'Maori and Forestry (Taupo–Rotorua–Kaingaroa) (1890–1990)' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004 (Wai 1200, doc A80), p 749
151. *New Zealand Herald*, 11 September 1986 (Heather Bassett and Richard Kay, 'Ngati Manawa and the Crown c 1927–2003', overview report, 2004 (doc C13), pp 176–177)
152. Walzl, 'Maori and Forestry' (Wai 1200, doc A80), pp 746, 838; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 738, 740.
153. Douglas Rewi, brief of evidence, 9 August 2004 (doc F18), pp 10–12

of services, especially health services such as the small maternity hospital, and the loss of purpose and unity in the community.[154] Many people left the area in search of work.[155]

Even before the Forestry Corporation layoffs, it was clear that major changes were taking place. In their 1986 study of Te Urewera, Stokes, Milroy and Melbourne wrote that

> the strong impression is that the trends identified in this report – high unemployment rates, particularly among women and young people, overcrowded, substandard housing, low incomes and difficulties in relating these to rising prices, few job opportunities, poor access to health, education and welfare services which are centred in towns outside Te Urewera – are all increasing in intensity, such that the viability of these communities is under threat.[156]

A police report, from the same year, about the greater Murupara area (including Minginui and Ruatahuna) explicitly noted the links between mushrooming unemployment and a host of social and community problems:

> There is reason to believe that at the personal level unemployment has brought a host of attendant problems, including ill-health, psychological disturbance, delinquency, criminality and other malfunctions that can be broadly classified as personal, family and social breakdown.[157]

Symptoms of this breakdown were the prominence of gangs, alcohol and drug abuse, public drinking, absenteeism from work, vandalism, burglary, theft, and other crimes.[158] The 'police sense a feeling of hopelessness from within the community, brought on by falling employment and a feeling it will get worse, poor social attitudes and the diminishing lack of community spirit.'[159] Similarly, a 1987 survey of Murupara indicated that 'morale is low, [and] the outlook is bleak unless there is a major development in the town.'[160]

We have seen that the tangata whenua of Te Urewera had been leaving the district for decades. Because recording of iwi affiliation in the census only resumed in 1991, we do not know when the peak period of this migration was, or the extent to which it later slowed or reversed.[161] What is clear, however, is that the vast majority of people whose ancestral rohe is Te Urewera were not living there at the time of our hearings. The 2006 census showed

154. Douglas Rewi, brief of evidence, 9 August 2004 (doc F18), pp 9–13 and Margaret Marino Herbert, brief of evidence, 11 August 2004 (doc F30), pp 4–5

155. Ben Mitai, brief of evidence, 9 August 2004 (doc F13), p 8

156. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 368

157. 'Murupara from a Police Perspective', 30 July 1986 (Bassett and Kay, supporting papers to 'Ngati Manawa and the Crown c 1927–2003' (doc C13(a)), p 522)

158. 'Murupara from a Police Perspective', 30 July 1986 (Bassett and Kay, supporting papers to 'Ngati Manawa and the Crown c 1927–2003' (doc C13(a)), pp 521–525)

159. 'Murupara from a Police Perspective', 30 July 1986 (Bassett and Kay, supporting papers to 'Ngati Manawa and the Crown c 1927–2003' (doc C13(a)), p 525)

160. Mark Collet, 'Murupara Survey – May 1987' (Bassett and Kay, supporting papers to 'Ngati Manawa and the Crown c 1927–2003' (doc C13(a)), p 495)

161. Census authorities had stopped recording iwi affiliation after the 1901 census.

that only 15 per cent of Tuhoe lived in the Whakatane district, and only 6.4 per cent lived in the core Te Urewera census area units of Matahina-Minginui, Waimana, Urewera and Murupara. For Ngati Manawa, the figures were 27 per cent in Whakatane and 23 per cent in the core census area units, while for Ngati Whare it was 23 per cent and 19 per cent.[162]

One of the factors behind the migration, especially in recent decades, was high unemployment in all parts of Te Urewera. A household survey in Minginui found that 51 per cent of respondents were registered as unemployed in 1987, and in 1988, after further job losses, the village experienced near total unemployment of 94 per cent.[163] A survey of Murupara in 1987 found that 62 per cent of adults were unemployed.[164] A Ruatahuna study in 1987 and 1988 found that 35 per cent of the working age total population were unemployed. The study also found a high level of underemployment.[165] Since at least 1991, unemployment has been much higher in Te Urewera than for New Zealand as a whole. In 1996, for example, the national unemployment rate was 7.7 per cent, compared to 19.3 per cent in Waimana and 26.9 per cent in once-prosperous Murupara. Ten years later the national rate had dropped to 5.1 per cent, but was still at 11.4 in Waimana and 17.9 per cent in Murupara (see graph 23.1).[166] Since Maori in general were disproportionately likely to be unemployed, the rates of Maori unemployment in these areas would have been even higher. In Whakatane District, for example, the Maori unemployment rate was 26.1 per cent in 1996, 24.8 per cent in 2001, and 16.7 per cent in 2006.[167]

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162. Statistics New Zealand, 'Iwi (Total Responses) for the Maori Descent Census Usually Resident Population Count, 2006', http://www.stats.govt.nz/tools_and_services/tools/nzdotstat/2006-census-pop-dwellings-tables/culture-and-identity/iwi.aspx

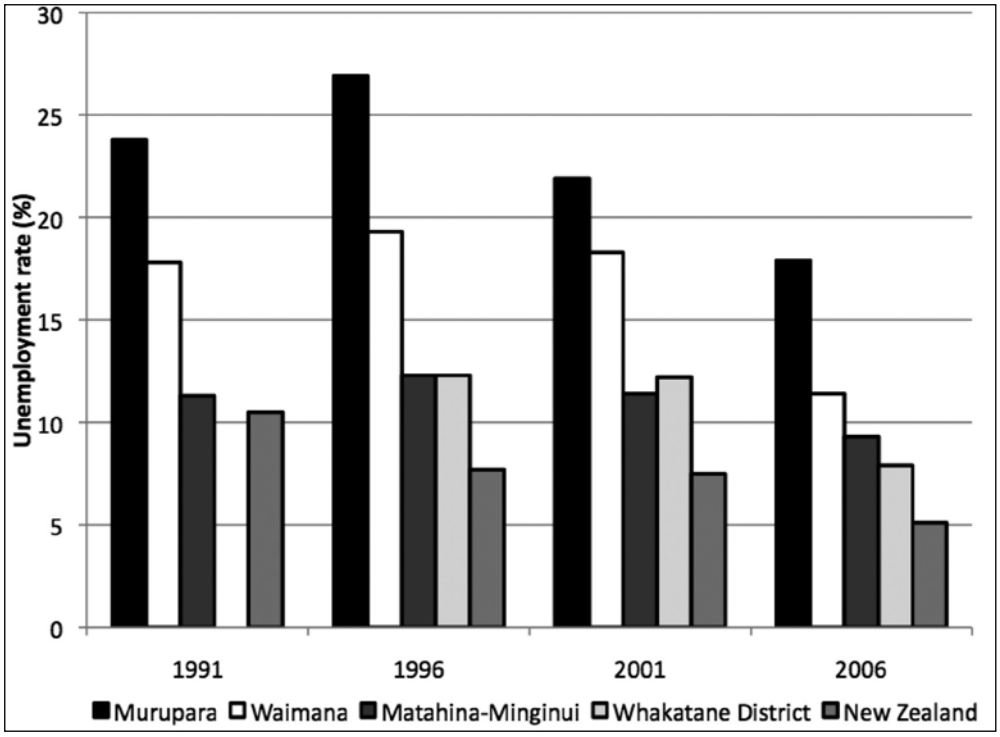
163. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 742; M James, for Secretary of Treasury, 'The Future of Minginui', 22 September 1988 (John Hutton and Klaus Neumann, comp, supporting papers for 'Ngati Whare and the Crown, 1880–1999' (doc A28(b)), p 188). The figure of 94 per cent is the percentage of the workforce unemployed; it is not clear whether this was the case for the figure of 51 per cent, or whether it was a percentage of the total adult population.

164. Mark Collet, 'Murupara Survey – May 1987' (Bassett and Kay, supporting papers to 'Ngati Manawa and the Crown c 1927–2003' (doc C13(a)), p 492)

165. Bryan Poulin and Brenda Tahi, *A Study on Community Services and Development for Ruatahuna* (Hamilton: Management Development Centre, University of Waikato, 1991) pp 45, 52 (Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 570)

166. Department of Statistics, *1991 New Zealand Census of Population and Dwellings: Waikato/Bay of Plenty Regional Report* (Wellington: Department of Statistics, 1992), p 154; Statistics New Zealand, 'Quick Stats About a Place', http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/AboutAPlace.aspx; Statistics New Zealand, 'Standard Regional Tables Census 1996', http://www.stats.govt.nz/Census/1996-census-data/standard-regional-tables.aspx, (table 15 status in employment and labour force status)

167. Statistics New Zealand, 'Whakatane District (Census 96) (1996 Census of Population and Dwellings) – Brochure' http://www2.stats.govt.nz/domino/external/pasfull/pasfull.nsf/web/Brochure+Whakatane+District+%28Census+96%29+1996+Census+of+Population+and+Dwellings?open; Statistics New Zealand, 'Whakatane District Census 2001'; http://www2.stats.govt.nz/domino/external/pasfull/pasfull.nsf/web/ Brochure+Whakatane+District+Census+2001+Area+data?open; Statistics New Zealand, 'Quick Stats About Whakatane District', http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/AboutAPlace/ SnapShot.aspx?type=ta&ParentID=1000004&tab=Work&id=2000025



Unemployment rates in Te Urewera census areas, 1991–2006

Source: Department of Statistics, 1991 New Zealand Census of Population and Dwellings: Waikato/Bay of Plenty Regional Report, p 154; Statistics New Zealand, 'Quick Stats About a Place', http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/AboutAPlace.aspx; Statistics New Zealand, 'Standard Regional Tables Census 1996', http://www.stats.govt.nz/Census/1996-census-data/standard-regional-tables.aspx, (table 15, status in employment and labour force status). Figures for Whakatane district not available for 1991.

One of the most useful tools for determining levels of deprivation in a community is the Deprivation Index developed by Otago University, and widely used by Crown agencies. Census data on factors such as income level, receipt of a means-tested benefit, unemployment, qualifications, living space, and car and telephone access are used to calculate deprivation 'scores' for specific areas. Areas are then grouped into 10 deciles, ranked from most to least deprived. Therefore a census area with a decile score of 10 is among the most deprived 10 per cent of places in New Zealand.[168] In every census year from 1991 to 2006, the Murupara, Urewera, and Waimana areas were rated at 10 on the deprivation index, while

168. Peter Crampton, Clare Salmond, Russell Kirkpatrick, Robin Scarborough, and Chris Skelly, *Degrees of Deprivation in New Zealand: An Atlas of Socio-Economic Difference* (Auckland: David Bateman, 2000), p 16

Matahina-Minginui was rated at nine in 1991 and 2001, and 10 in 1996 and 2006.[169] Figures for meshblocks, the smallest area used in the census, are even more indicative of severe and ongoing poverty. In 2006, central Minginui was the fourth most deprived place in New Zealand, out of more than 40,000 meshblock areas, and the most deprived rural area.[170] Waikirikiri and two parts of Ruatahuna were also among the 100 most deprived areas.[171]

Earlier, we discussed the nationwide reduction in health disparities between Maori and non-Maori in the post-war decades. Since the 1980s, however, this progress has stalled, slowed, and in some cases even reversed. In 1951 the gaps in life expectancy between Maori and non-Maori men and women were 14 and 16 years respectively, and by 1980 these had been reduced to six and five years. By 1997, however, the life expectancy gap had widened again, to an average of more than nine years for both sexes. Despite some minor improvement in the disparities by 2008, the gap remained large.[172] We did not have specific Te Urewera data, but mid 1990s figures for the wider Bay of Plenty region show a life expectancy gap of nine years for women and eight years for men.[173]

Maori in Te Urewera and elsewhere continued to suffer from most diseases and other health problems at higher rates than non-Maori.[174] For example, in the Bay of Plenty in the late 1980s, Maori were admitted to hospital for asthma three times more frequently than non-Maori per head of population. The disparity was similar for pneumonia, chronic obstructive respiratory disease, and middle ear problems, and much higher for rarer conditions such as tuberculosis and rheumatic fever.[175] From 1985 to 1989, Maori were nearly seven times more likely than non-Maori to die of diabetes, and nearly twice as likely to die of cancer.[176] These trends continued into the 1990s.[177] We were presented with very little specific information on Te Urewera, but what we did see indicated that Te Urewera Maori may be even more prone to ill health. A study conducted by staff from Waikato Hospital, for ex-

169. Socioeconomic Deprivation Indexes: NZDep and NZiDep (HIRP), New Zealand Indexes of Deprivation, NZDep 1991 census Area Unit data, http://www.otago.ac.nz/wellington/otago020345.txt; Socioeconomic Deprivation Indexes: NZDep and NZiDep (HIRP), New Zealand Indexes of Deprivation, NZDep 1996 census Area Unit data, http://www.otago.ac.nz/wellington/otago020347.txt; Socioeconomic Deprivation Indexes: NZDep and NZiDep (HIRP), New Zealand Indexes of Deprivation, NZDep 2001 census Area Unit data, http://www.otago.ac.nz/wellington/otago020335.txt; Paul White, Jinny Gunston, Clare Salmond, June Atkinson and Peter Crampton, *Atlas of Socioeconomic Deprivation in New Zealand NZDep 2006* (Wellington: Ministry of Health, 2008), p 24

170. The three most deprived meshblocks were in South Auckland, Napier, and Whanganui City.

171. 'NZDep 2006 Meshblock data' available at http://www.otago.ac.nz/wellington/ research/hirp/otago020194.html. For meshblock locations, see the interactive boundary map at http://www.stats.govt.nz/StatsMaps/Home/Maps/2006-census-quickstats-about-a-place-map.aspx

172. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, p 642

173. Julie Warren, *Profile 2001: A Socio-economic Profile of the People of the Bay of Plenty Region – Census 2001* (Whakatane: Environment Bay of Plenty, 2002), p 89

174. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1680–1683, 1690–1698

175. Ibid, p 1683

176. Ibid, p 1694

177. Julie Warren, *Profile 2001: A Socio-economic Profile of the People of the Bay of Plenty Region – Census 2001*, pp 93–94

ample, found that in a 10 month period in 1987, 35 per cent of children in the Ruatoki Valley had contracted otitis media (glue ear), and 25 per cent suffered some degree of hearing loss.[178] Tuhoe Hauora found that 50 per cent of Tuhoe men who had health checks in 2003 and 2004 had high blood pressure, high blood sugar levels, or both.[179] When asked to go on a diet to prevent diabetes and heart diseases, clients told Tuhoe Hauora that they could not afford the recommended foods.[180]

As in earlier decades, one of the major factors causing and exacerbating ill health was substandard housing. In 1984, the *New Zealand Herald* reported that there was overcrowding and 'dire poverty' in Waimana and Ruatoki, and there were reports of Maori in the Whakatane District living in 'run-down houses with mud floors' and, in one case, a hay barn.[181] A Department of Housing staff member described the housing in Ruatahuna in 1987 as 'sub-standard to such a stage they have been considered condemned by the Health Department. The interiors of these houses are cold, damp, leaking water through the roof and very unsanitary'.[182] Overcrowding was also reported, as were people living in caravans and sheds.[183] Ministry of Works staff investigated Minginui in 1987, reporting that more than half the houses had been built using unsuitable materials.[184] Even the better quality houses have since fallen into disrepair because of the lack of money in the community. Wakeley Matekuare told us in 2004:

> While the older Forest Service houses were made of native timber and quite solid, time has taken its toll and they have now fallen into disrepair. Many of the newer houses were not well built and they are also in a very bad way. I have now moved into another house in Minginui, but we are having to fix it up – put in windows and other things. It also needs to have electricity connected and we are presently cooking on a coal range.[185]

A study conducted by Housing New Zealand in 2000 showed that a number of homes in the Ruatoki Valley were uninhabitable. In some cases floors had collapsed due to water damage. Some houses were also damp, unhealthy, had faulty or non-existent sewerage systems, or were built with untreated timber.[186] In 2005, Housing New Zealand published

178. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1687
179. Current Housing, Health and Crime for Tuhoe, not dated (Awhina Rangiaho, comp, supporting papers to brief of evidence (doc J15(c)), p 10)
180. Awhina Rangiaho, brief of evidence, 10 January 2005 (doc J15), p 10
181. *New Zealand Herald*, 15 June 1984 and 4 October 1984 (Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 119)
182. J Pene, Advisory Officer (Housing) to Director, 15 June 1987 (Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 550–551)
183. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 552; Poulin and Tahi, *A Study on Community Services and Development for Ruatahuna*, pp 31, 33–34
184. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 746
185. Wakeley Matekuare, brief of evidence, September 2004 (doc G40), p 5
186. Housing Corporation of New Zealand Report into Tuhoe Housing that is in Chronic or Serious Dis-Repair in the Ruatoki Valley, 9 October 2000 (Awhina Rangiaho, comp, supporting papers to brief of evidence (doc J15(b)), p 1)

a regional profile recognising that there was still significant overcrowding in Te Urewera, especially at Ruatoki and Waimana, and that this was causing a high level of ill health and numerous avoidable hospitalisations.[187] One positive statistic was that Maori in Te Urewera were significantly more likely to own their homes than Maori elsewhere. The 2001 census showed that nearly two-thirds of Maori households in Te Urewera owned their home (similar to non-Maori in the same areas), compared to just under half of Maori households in New Zealand generally.[188] For low income families, however, home ownership may be as much a curse as a blessing, given the poor condition of many houses, and the high costs of repairs and upkeep.

Securing a reliable supply of clean water was also difficult for some communities, even in recent decades. In 1984, the Department of Health found the Ruatoki water supply to be so polluted, mainly from stock waste, that it required boiling or treating before use.[189] As we discussed in chapter 19, a new supply was set up on a 'user pays' basis, and some residents had their water cut off due to unpaid water bills.[190] In 1994 the Galatea supply was found to be contaminated and on the verge of breaking down, and two years later the Murupara supply was losing water due to leaks.[191] Like Ruatoki, Ruatahuna has experienced on-going problems with its multiple water supply systems. The school supply dried up in 1978, and one of the District Council-operated systems also tended to dry up until a new source was tapped in the late 1980s.[192] In 1998, the supply to Ruatahuna village, including the kohanga reo, was found to be contaminated.[193] The next year there was no capacity to add new customers to the Ruatahuna village supply.[194] In 2002, the Tatahoata supply dried up, forcing the closure of Huiarau School, and the water supply to Ruatahuna village was found to be 'a significant risk for human consumption'.[195]

187. Bay of Plenty Regional Profile February 2005, 2005 (Tony Marsden, comp, supporting papers to 'Evidence on behalf of Housing New Zealand Corporation: Answers to Questions Arising From Second Crown Hearing Week' (doc M40(b)), p 35)

188. Statistics New Zealand, 'Tenure of Household, Ethnic Group in Household (Level 1 Grouped Total Responses) and Total Household Income, for Households in Private Occupied Dwellings, 1991, 1996 and 2001', available through NZ.Stat, at http://www.stats.govt.nz/tools_and_services/nzdotstat.aspx, accessed 2 August 2013. 'Te Urewera' is the Census Area Units of Matahina-Minginui, Waimana, Urewera, and Murupara. The percentages were NZ: 47%, Matahina-Minginui: 69%, Waimana: 63%, Urewera: 66%, and Murupara: 56%. 'Maori households' are households with at least one resident identifying as Maori.

189. Sir John Robertson, Chief Ombudsman to Keepa, P., 7 October 1994 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a(JJ)), pp 40–41)

190. In 1997, 59 consumers were behind with their payments. In 1999, 46 were. It was estimated there were 285 households in the Ruatoki Valley in 2000. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1908–1909

191. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1891–1892

192. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 475; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1888

193. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 574

194. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1888

195. Webber to Chief Executive Officer, Whakatane District Council, 21 March 2002 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a(II), p 124); Merepeka Teka to Jacob Te Kurapa, 16 April 2002 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(II), p 126)

23.3.7 Cultural regeneration

While poverty and poor living conditions are very common in Te Urewera, the district remains culturally strong, with many fluent te reo speakers. Stokes, Melbourne and Milroy stated in the mid 1980s:

> Most Te Urewera residents fall into the lower ranks of existing socio-economic categories, however measured in quantitative terms. What is more difficult to measure is the strength of the intangible qualities of Tuhoe culture, language, identity, social cohesion, life style, self esteem and freedom to maintain traditional patterns of living and being, without too many constraints or advice imposed by the outside world. All these things are also very significant in assessing the social well-being of Te Urewera communities.[196]

They also noted that 'despite rural poverty in material things, there is a richness and vitality in cultural and spiritual things' in Te Urewera.[197] We wholeheartedly agree. Te Urewera was at the forefront of the Maori renaissance during the 1970s, precisely because the peoples of Te Urewera had maintained much of the language, traditions, tikanga and practices of their ancestors, even given very difficult circumstances.

In 1977, Ruatoki Primary School became the first officially bilingual school in New Zealand. In the early years of the bilingual programme, the principal said that his pupils 'don't have to establish themselves, they intuitively know they belong . . . Their special strength is their Maoriness, their Tuhoetanga.'[198] Other aspects of the cultural and linguistic renaissance have included kura kaupapa schools, kohanga reo, community health providers, cultural festivals such as Hui Ahurei a Tuhoe, and the kokiri centre and wananga during the 1980s which taught traditional skills and knowledge.[199] As we noted earlier, the vast majority of Tuhoe live outside Te Urewera, which means events such as Hui Ahurei a Tuhoe play a vital role in maintaining and renewing Tuhoe reo, whanaungatanga, and Tuhoetanga. Kararaina Rangihau told us that she grew up attending the festivals:

> The main focus is not about competing in the haka and other customary forms of dance, but it is about building the relationships among those of Tuhoe who live in the cities, and strengthening their bonds back to their home villages, so that the descendants of Tuhoe will continue to return home. Why? To unite Tuhoe. Another reason is to retain the treasures of our old people . . . so they will never be lost.[200]

Stokes, Milroy and Melbourne also noted that the gatherings aim to make Tuhoe migrants aware of the problems in the 'home communities' of Te Urewera.[201]

196. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 329
197. Ibid, p 368
198. Ibid, p 148
199. Ibid, p 307
200. Kararaina Rangihau, brief of evidence, 18 October 2004 (doc H43), p 5
201. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 307

23.3.7

Despite these efforts, the culture has been eroded over the years, as people have moved away and become disconnected from the land and from their communities. One aspect of this, mentioned by several claimants, was that many people in Te Urewera no longer grow their own food.[202] Matekino Hita of Waikaremoana said:

> Now only a few of us still work our mara kai [vegetable gardens]. Our younger generation mara kai at the supermarket. Many don't know how to work the whenua, nurture the whenua so that it will give back to you . . . Many of my generation were taught all the skills and tikanga in working of the whenua. We were taught to plant then; it was just a natural for us because we had an affinity with the whenua. A lot of the present generation do not want to do the garden work any more; but that is understandable because their connection with the land has been interfered with. In the Maori world gardening is one of the biggest skills you can have. One of the greatest skills to have is in mara kai. To live off the land. From my generation, those of us that were born on Papatuanuku, and not in a hospital, have a special affinity with the whenua.[203]

Meanwhile, fluent speakers of te reo Tuhoe were becoming fewer. A number of kaumatua told us that in the 1930s and 1940s the dominant, everyday language in their communities was te reo.[204] By the late 1970s, English was being spoken more and more within people's homes, and by 1977 it was apparent that schoolchildren in Ruatoki and Ruatahuna were speaking less Maori, with only 30 per cent in Ruatoki being fluent speakers.[205] Desmond Renata said:

> Now we are in a place where there is only 23 of us in the Tuai community of approximately 360 who speak fluent Te reo. We have 1800 acres of land that is undeveloped. We are dependent on the 'system' for our living needs, everyone's on some form of benefit. We are pani [orphans]. All of this is as a result of the Crown actions over the years, which compounded to bring us to the point we are at today. Central to this is the loss of the culture. The family structure has broken down. The worst sign of all is that we don't have happy children . . . There's a feeling that we are a second rate people. I know this feeling filtered from my father down to me. Our values system has been broken and our traditional practices lost. If we don't do something about all this now, it's only going to get worse.[206]

Likewise, Pem Bird, the principal of Te Kura Kaupapa Motuhake o Ngati Manawa, lamented the loss of te reo for Ngati Manawa:

202. James Edward Doherty, brief of evidence, 11 May 2004 (doc D27), p 6; Neuton Lambert, brief of evidence, 11 October 2004 (doc H57), pp 4–5, 7

203. Matekino Hita, brief of evidence, 11 October 2004 (doc H58), pp 6–8

204. See for example Te Tuhi Hune, brief of evidence, 6 September 2004 (doc G15), p 4; Timoti Karetu, brief of evidence, 18 October 2004 (doc H50), p 3

205. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1479–1480, 1496

206. Desmond Renata, brief of evidence, 22 November 2004 (doc I24), p 22

Locality	Number	Percentage of population
Matahina–Minginui	459	31.4
Waimana	195	31.9
Urewera	654	32.3
Murupara	618	33.6
Whakatane District	5,319	16.0
New Zealand	157,110	3.9

Number and percentage of total population who can hold an everyday conversation in te reo, 2006

Source: Statistics New Zealand, 'Language spoken by age, 2006 census', http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE254#:

> We are in a desperate situation as a people. The language of our tipuna has all but vanished; it has all but disappeared. We have few tipuna left in the generation over seventy who speak te reo Maori, as the last natural native speakers. In my generation few speak te reo Maori. The next generation down when quantifying the number of Maori speakers we are looking at no more than fingers on one hand.[207]

Kaa Kathleen Williams, who in 1977 helped make Ruatoki the first bilingual school in New Zealand, told us that 'our language has suffered to the extent that even today there are now only small pockets of Ngati Haka-Patuheuheu who are fluent, confident and competent to speak Maori in more than a conversational sense'.[208]

The 2006 census showed the percentage of the general population who could hold an everyday conversation in te reo Maori was much higher in Te Urewera than New Zealand generally (see table this page).

One of the reasons why the figures for Te Urewera census areas were much higher than for New Zealand as a whole is that Te Urewera has a much higher proportion of Maori, and Maori are far more likely than non-Maori to speak te reo. However Maori with links to Te Urewera seem to have had even higher rates of te reo fluency: 38.8 per cent of Tuhoe were fluent in te reo, compared to 19.9 per cent of other Maori who knew their iwi.[209] We also have data on the number of languages spoken by Maori individuals in particular areas. This shows that, nationwide, 23 per cent of Maori spoke more than one language. In the core Te Urewera census areas the percentage was much higher (see table), with the majority of

207. Pem Bird, brief of evidence, 9 August 2004 (doc F16), pp 2–3

208. Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc C16), p 54

209. Statistics New Zealand, 'Iwi (Total Responses) by Official Language Indicator, for the Maori Descent Census Usually Resident Population Count, 2006' http://www.stats.govt.nz/tools_and_services/tools/nzdotstat/2006-census-pop-dwellings-tables/culture-and-identity/iwi.aspx

23.3.7

Locality	One	Two or more	Other*	Total
Matahina–Minginui	315 (41%)	408 (54%)	39 (5%)	762
Waimana	228 (55%)	174 (42%)	12 (3%)	417
Urewera	393 (38%)	576 (56%)	63 (6%)	1035
Murupara	855 (56%)	543 (36%)	120 (8%)	1518
Whakatane District	7,869 (60%)	4,695 (36%)	639 (5%)	13,203
New Zealand	407,091 (72%)	131,799 (23%)	26,436 (5%)	565,329

* People with no language (generally infants too young to speak) and people coded as 'not elsewhere included'

Numbers and percentages of Maori by number of languages spoken, 2006 census

Source: Statistics New Zealand, 'Languages Spoken (Number of) by Ethnic Group, 2006 Census', http://www.stats.govt.nz/tools_and_services/tools/nzdotstat/2006-census-pop-dwellings-tables/culture-and-identity/language.aspx

Maori in Matahina-Minginui and Urewera speaking at least two languages.[210] Especially in Te Urewera, it seems reasonable to assume that most of these people spoke te reo. All this data indicates that Maori in Te Urewera were much more likely to speak te reo than Maori in other parts of the country. Even here, however, a large number of Maori were unable to speak their ancestral language.

Since the late nineteenth century, the hapu and iwi of Te Urewera have undergone dramatic changes in their living conditions and ways of life. In terms of health, housing, and education, there was a huge improvement by the 1970s. Even during the post-war decades, when conditions were at their best since the Crown's arrival in Te Urewera a century earlier, most Maori in Te Urewera were worse off than the average New Zealander in terms of health, income, and education. Income-earners were concentrated in low skilled jobs, particularly in the timber industry, and were highly vulnerable to economic changes and downturns. The timber industry restructuring of the 1980s had a devastating effect on Te Urewera communities. As a result of this and other changes, living conditions deteriorated once more, although never to the depths of the 1890s. While all this was going on, Te Urewera hapu and iwi were compelled to adapt to the new world created by colonisation; this meant speaking English and taking up new ways of life. The traditional language and culture suffered, and fluency in te reo declined. Compared to most other parts of the country, however, Te Urewera remained a place where te reo and tikanga were still part of daily life for many.

210. Statistics New Zealand, 'Languages Spoken (Number of) by Ethnic Group, 2006 Census', http://www.stats.govt.nz/tools_and_services/tools/nzdotstat/2006-census-pop-dwellings-tables/culture-and-identity/language.aspx

23.4 Essence of difference between the parties

In relation to socio-economic issues, there were three key points of difference between claimants and the Crown. These were:

- Whether, or to what extent, the socio-economic deprivation of Maori in Te Urewera was or is the result of Crown actions and omissions.
- Whether the Crown has duties to Maori in Te Urewera to provide social services, aid for economic development, employment opportunities, and relief from hardship; and if so, to what extent and under what circumstances.
- Whether the services and assistance provided by the Crown to Maori in Te Urewera at various times were adequate and equitable.

This section will focus on these three issues. By the end of our hearings, the parties were broadly in agreement on most of the facts presented to us; where there was disagreement, this will be covered later in the chapter as part of our analysis of the issues in question. In general, though, disagreement was over the meaning of the facts rather than the facts themselves.

Claimant counsel submitted that the poor socio-economic position of Maori in the inquiry district, historically and at the time of hearings, was the result of the Crown's actions and omissions, particularly those relating to land and mana motuhake. In their view, the Crown had, and still has, a duty to alleviate this situation, partly because of alleged Treaty breaches and partly because of its general obligations to Maori under the Treaty. Despite this duty, the claimants told us, the Crown has consistently failed to provide adequate and equitable levels of social services, relief from hardship, and economic assistance to Maori in Te Urewera.

Crown counsel did not contest the low socio-economic standing of Maori in the inquiry district, but submitted that in most cases there was insufficient evidence to conclude that it was the result of Crown actions or omissions. They also denied that the Crown had any general duty, Treaty-related or otherwise, to provide social services, relief from hardship, or economic assistance. Counsel did acknowledge that, when the Crown did provide such services, it was obliged to provide them to Maori on an equitable basis with other New Zealanders. However they emphasised that this did not necessarily mean that Te Urewera Maori were entitled to exactly the same services as people in other areas and other circumstances. In general, Crown counsel did not explicitly state whether or not its services have been adequate, although in a few cases they acknowledged that the services had fallen short.

In relation to the first point of difference, claimant counsel submitted that the historical and contemporary socio-economic deprivation of Maori in Te Urewera was the direct or indirect result of Crown actions and policies, particularly land confiscation, its military campaigns during the New Zealand Wars, other actions resulting in land loss, the

implementation of the new land title system, and restrictions on the use of land and forests.[211] Counsel argued that, by depriving Te Urewera Maori of their land and preventing them from fully utilising their remaining resources, the Crown made it difficult or impossible for them to develop these resources, achieve a reasonable standard of living, and fully participate in the national and local economy.

Crown counsel responded that there was insufficient evidence to link socio-economic conditions with Crown actions and omissions, 'although some contribution might be acknowledged'.[212] They also said that although 'historical factors such as warfare and confiscation of land may be linked to current socio-economic conditions . . . they are likely to be a small factor when compared to other more contemporary trends.'[213] More specifically, they submitted that it is difficult to know the long term effects of the war in Te Urewera, but 'most areas affected by warfare seemed to recover quite quickly after the conflict ended'.[214] Crown counsel also argued that 'it is too simplistic to claim that land loss led to poverty'.[215]

Where the parties agreed that Crown actions did result in hardship, they disagreed over whether these actions were breaches of the Treaty. For example, counsel for the Wai 66 Ngati Whare claimants submitted that Crown policies on native logging, corporatisation, and the transfer of Minginui village individually and cumulatively breached the Treaty duties of partnership, good faith, and active protection.[216] Counsel for Ngati Manawa likewise argued that the Crown's failure to protect the iwi from the effects of restructuring was a breach of the Treaty.[217] Crown counsel acknowledged that the restructuring carried out under the fourth Labour government had serious prejudicial effects on Te Urewera communities.[218] However they submitted that although 'the suffering of these communities is a matter of great regret . . . it is not a Treaty breach'.[219] The Treaty was not breached, they argued, because attempts were made to 'ease the impact' of the changes on the most vulnerable communities, and the relevant Crown forests were available for Treaty settlements.[220]

211. Waikaremoana, amended statement of claim, 16 April 2004 (claim 1.2.1(a)), p 141; Te Whanau a Kai, third amended statement of claim, 27 January 2003 (claim 1.2.3), p 5; Te Whaiti Nui a Tokairakau, amended statement of claim, 8 October 2004, (claim 1.2.7(c)), pp 122–124, 129–130; Ruatoki, amended statement of claim, 8 October 2004 (claim 1.2.8(b)), pp 129–136; Te Waimana and Maungapohatu, amended statement of claim, 8 October 2004, (claim 1.2.14(b)), pp 162–170; Ngati Ruapani, fourth amended statement of claim, 4 October 2004, (claim 1.2.19(b)), pp 60–65; counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 158–163; counsel for Wai 36 on behalf of Tuhoe, closing submissions part B, 30 May 2005 (doc N8(a)), pp 215–216; counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), pp 85–86; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 342–343; counsel for Te Mahurehure, closing submissions, 14 June 2005 (doc N21), pp 2–16

212. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 2

213. Crown counsel, statement of response to stage 3 claims, 13 December 2004 (claim 1.3.7), p 1

214. Crown counsel, closing submissions, June 2005 (doc N20), topic 3, p 21

215. Ibid, topic 39, p 4; see also doc N20, topic 3, pp 23–24

216. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), pp 9–10

217. Te Okoro Joe Runga, final amended statement of claim, 15 August 2003 (claim 1.2.23(c)), p 27

218. Crown counsel, closing submissions, June 2005 (doc N20), topic 38, pp 15–16

219. Ibid, p 16

220. Ibid

The second key point of dispute was whether the Crown had a duty to provide social services, relief from hardship, employment opportunities, and economic assistance to Maori in Te Urewera. In general terms, Crown counsel submitted that

> There is not and has never been a duty on the Crown [to provide social services], in a legal or Treaty sense. However, the Crown has, at various times and to certain extent, assumed the role of doing so as part of its governance responsibilities. Role is a different thing to duty. Duty appears to obviate the existence of choice and allow for little flexibility in government policy.[221]

The Crown's role expanded significantly during the twentieth century, and Crown counsel acknowledged that 'responsible governments' are likely to take a role in 'core areas' such as health, housing and education. What role the Crown chooses to take will vary over time, depending on prevailing ideologies, including levels of public support; the national and international economic context; knowledge and technology; population distribution; and the general national interest.[222] The Crown also had to ensure that assistance did not involve undue interference, or create dependence. For example, counsel argued that providing more economic assistance to Te Urewera Maori in the nineteenth century would probably have involved 'some element of direction . . . which is unlikely to have been well received.' They emphasised the need to avoid state paternalism.[223]

In relation to the 1898 famine and Depression-era unemployment, Crown counsel acknowledged that modern states usually accept that they have a duty 'in a sense of the moral obligation' to care for their citizens in times of famine and natural disaster.[224] This, in their submission, was as far as the Crown's duties went. They stated that there was no 'strict "duty". . . in the sense of a moral or legal obligation' to provide relief work or unemployment benefits, nor to assist in the economic development of remote areas such as Te Urewera.[225]

Claimant counsel submitted that the Crown did in fact have a duty to provide at least some level of social services, relief and assistance. To some, this was simply a matter of equal rights under article three of the Treaty.[226] Counsel for Ngati Haka Patuheuheu made this point in relation to the famine of 1898, arguing that the Crown has always provided some relief to victims of natural disasters, 'and accordingly, there is no reason why similar care should not be provided for Maori'.[227]

Crown counsel conceded that article three guarantees Maori the same rights as British subjects (in contemporary terms, the same as other New Zealanders), and that this obliges

221. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 15
222. Ibid, pp 6, 15
223. Ibid, p 9
224. Ibid, p 10
225. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, pp 6, 11
226. For example, see counsel for Wai 144 Ngati Ruapani, submissions by way of reply, 8 July 2005 (doc N30), p 71
227. Counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 163–164

the Crown to treat Maori equitably in the prevailing circumstances. They submitted that there is 'little evidence' of discrimination or unfair actions against Te Urewera Maori in relation to social service provision. They also said that the obligation to treat Maori in Te Urewera equitably did not mean an obligation to treat them exactly the same as all other New Zealanders; in some circumstances they may be treated differently without this being unfair or discriminatory.[228] As an example of this, they mentioned problems with the multiple ownership of Maori land, stating that 'as general land was not often held in multiple ownership, the question of whether Māori citizens were treated "equally" may not be apposite here'.[229] The issue should be whether the Crown took account of the problems of multiple ownership and attempted to overcome them.

Crown counsel submitted that the key question overall was whether or not Maori in Te Urewera were treated equitably 'in all the prevailing circumstances.'[230] These circumstances include the resources available to the Crown, and their prioritisation. Counsel argued that

> The Tribunal should be cautious in considering these issues where the full context of Crown actions and demands on its resources, including on a national scale, is not known. Context, and a measurement of Crown action, also includes a comparative assessment with the experiences of others in New Zealand, both Māori and Pakeha.[231]

Other 'prevailing circumstances' include factors such as population distribution, so that although citizens living in isolated areas such as Te Urewera may not have the same access to health and education services as citizens living in the cities, this is not inequitable or unfair.[232]

Counsel for the Wai 144 claimants responded that the Crown has a general duty to provide services and assistance to Maori, regardless of where they live. They submitted that the Crown has a fiduciary duty to provide Maori with care and assistance.[233] They also drew on the Muriwhenua Fisheries Report to argue that the Treaty 'promised two prosperous people within one country', and the Crown therefore has an obligation to help Maori to become prosperous.[234] This duty is even more important when communities have been denied particular sources of wealth generation, such as timber milling.[235] Counsel submitted that

> The Crown was and is required to ensure that Tuhoe and Ngati Ruapani were and are provided with the means to develop, exploit and manage their resources in accordance

228. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 3
229. Ibid, p 8
230. Ibid, p 3
231. Ibid
232. Ibid, pp 15–16, 22
233. Counsel for Wai 144 Ngati Ruapani, submissions by way of reply, 8 July 2005 (doc N30), pp 67–69
234. Ibid, p 67
235. Ibid, p 68

with their cultural preferences – which were to remain on their lands. That these lands were 'remote' does not negate the performance of this duty by the Crown.[236]

They further stated that the people of Waikaremoana did not choose to live in an isolated area, but rather 'the land has chosen them.'[237] The tangata whenua are forced to choose between coping with limited and difficult access to social services, or leaving their turangawaewae.[238] In their closing submissions, counsel for Nga Rauru o Nga Potiki similarly submitted that Te Urewera is remote by 'Crown led definition only', and provision of services should not be affected by any additional costs this supposed remoteness creates.[239]

As we noted earlier, claimant counsel argued that the poor socio-economic circumstances of Maori in Te Urewera were the result of prior breaches of the Treaty by the Crown. Several counsel argued that the Crown therefore had a duty to remedy those breaches, by relieving socio-economic distress or assisting in economic development.[240] For example, counsel for the Wai 36 Tuhoe claimants submitted that the economic potential of Te Urewera was stifled when the Crown broke its promise to build roads there. Since the Crown has 'unilaterally chosen to not provide arterial roads, [it] now has a positive duty to Tuhoe to assist in the economic development of Te Urewera.'[241]

Similarly, counsel for the Wai 66 Ngati Whare claimants argued that, as well as its general Treaty responsibilities in relation to Ngati Whare and the Minginui community, the Crown had additional responsibilities arising from past Treaty breaches, which had made Ngati Whare dependent on the timber industry. As a result, it should have done more to help mitigate the effects of its corporatisation of the Forest Service.[242] Counsel for Ngati Whare and Ngati Manawa submitted that corporatisation was carried out without adequate consultation, without proper regard for negative impacts, and without proper amelioration of those impacts.[243] According to counsel for Ngati Whare, the Crown's actions were a breach of its Treaty duties of partnership, good faith, and active protection.[244] As we noted earlier, Crown counsel acknowledged the negative effects of the cessation of native logging and of corporatisation, but submitted that although the suffering that these caused 'is a matter of great regret . . . it is not a Treaty breach.'[245] They argued that consultation was carried out, and steps – albeit unsuccessful ones – were taken to ameliorate the effects of corporatisation.[246]

236. Ibid, p 67
237. Ibid, p 71
238. Ibid, p 71
239. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 350
240. bid, p 354; counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), p 10
241. Counsel for Wai 36 on behalf of Tuhoe, closing submissions part B, 30 May 2005 (doc N8(a)), p 218
242. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), pp 44, 56–58
243. Counsel for Ngati Manawa, closing submissions, 2 June 2005 (N12), pp 80–81; counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), pp 13–15, 30–43
244. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), p 10
245. Crown counsel, closing submissions, June 2005 (doc N20), topic 38, pp 2, 16; topic 31, pp 21–22
246. Ibid, topic 38, pp 2, 10–12

23.4

They did not directly address the question of whether prior Treaty breaches create extra duties to provide services or assistance. In relation to corporatisation, they submitted that the issue is 'complex', but denied that historical Treaty breaches created an additional obligation to help Te Urewera communities through corporatisation and its aftermath.[247]

The third major issue on which the parties disagreed was whether the services and assistance provided by the Crown have been adequate. Claimant counsel gave us numerous examples of what they saw as inadequate economic and social service provision, which will be discussed throughout this chapter.[248] In response, the Crown submitted that the evidence in this inquiry 'has not provided a statistical, comparative assessment of service delivery to Urewera Māori over time, and the results of that.'[249] Consequently, 'there is insufficient evidence on which to base findings of inadequacy'.[250] Crown counsel also submitted that 'it can be problematic to assess the effectiveness of the Crown's provision of economic and social services, when practical factors such as access and use, and individual action, can significantly impact on their delivery and therefore effect'.[251]

Crown counsel did respond to some allegations of inadequacy. They felt that the provision of health services had been analysed in sufficient depth by Murton, and were able to submit that, at least from the 1920s, some aspects of provision of medical services in Te Urewera were adequate 'within the resources and knowledge available' at the time.[252] Crown counsel emphasised the need to have full regard for contemporary context. In the late nineteenth and early twentieth centuries, for example, 'there was little the Government could do in respect of [epidemic] diseases given that there were extremely limited and ineffective treatments available'.[253] They also stated that 'all health services to New Zealanders in the first half of the twentieth century were inadequate by current day standards', due to a lack of effective treatments such as antibiotics.[254] In general, Crown counsel submitted that we should have regard to factors including contemporary ideas about the role of the state and the purpose of education and other services, the isolation of Te Urewera, the national and international economic situation, and Maori willingness to make use of available services.[255]

247. Crown counsel, closing submissions, June 2005 (doc N20), topic 38, p 13

248. Waikaremoana, amended statement of claim, 16 April 2004 (claim 1.2.1(a)), pp 142–146; Wai 36 Tuhoe, second amended statement of claim, 4 October 2004 (claim 1.2.2(b)), pp 228–230; Te Whaiti Nui a Tokairakau, amended statement of claim, 8 October 2004, (claim 1.2.7(c)), pp 131–135; Tuawhenua block owners, second amended statement of claim, 30 September 2004 (claim 1.2.12(b)), pp 77–80; Te Waimana and Maungapohatu claimants, amended statement of claim, 8 October 2004, (claim 1.2.14(b)), pp 170–174; Nga Rauru o Nga Potiki, amended statement of claim, 8 October 2004 (claim 1.2.18(b)), pp 73–74; Ngati Haka-Patuheuheu Trust, stage 3 pleadings, 29 September 2004 (claim 1.2.22(b)), pp 14–15

249. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 16

250. Ibid

251. Ibid, p 2

252. Ibid, pp 17–20

253. Crown counsel, statement of response to stage 3 claims, 13 December 2004 (claim 1.3.7), p 17

254. Ibid, p 29

255. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, pp 6, 19

There was some acknowledgement of problems with the services and assistance the Crown has historically provided. Perhaps Crown counsel's most important concession was that the official response to the famine of 1898 was 'too slow and barely adequate even by the standards of the day'.[256] Counsel made some other concessions, for example, that resettlement schemes for Maori returned servicemen were 'paternalistic', and may not have been provided in 'a timely and compassionate manner'. However they rejected assertions that resettlement policies were racist or separatist.[257] In relation to other issues, Crown counsel acknowledged problems, but did not concede that they necessarily resulted in prejudice. For example, they conceded that some school buildings in Te Urewera were leaky and overcrowded, but stated that 'those factors do not necessarily hinder educational achievement'.[258] We will discuss parties' submissions on specific issues in more detail in the relevant sections of this chapter.

23.5 Socio-Economic Framework

As we outline above, a key area of disagreement between the parties was the extent to which Te Urewera socio-economic problems were caused by Crown actions and omissions. The most important of these problems was poverty, as it contributed to most of the other issues dealt with in this chapter. That poverty leads to and exacerbates other socio-economic problems is uncontroversial, and was not contested by the Crown. As Professor Brian Murton explained,

> A vast literature, both theoretical and case study in nature, deals with the linkages between poverty and a range of social conditions. These studies, both internationally and in New Zealand, link poverty to poor environmental conditions (housing, sanitation, nutrition), and then to poor health.[259]

The causes of poverty are harder to pin down, and much more contentious. In his socio-economic report for this inquiry, Professor Murton developed a framework within which to explain and explore the causes and contexts of poverty. He stated that 'It is too simplistic to claim that the loss of their land led to poverty amongst Te Urewera Maori. People can own land, as did most Te Urewera Maori, and be poor, as most were.'[260] He added that although it is 'extremely difficult' to conclusively establish direct causal links between Crown actions

256. Crown counsel, statement of response to stage 3 claims, 13 December 2004 (claim 1.3.7), p 18
257. Crown counsel, closing submissions, June 2005 (doc N20) topic 39, pp 13–14
258. Crown counsel, statement of response to stage 3 claims, 13 December 2004 (claim 1.3.7), p 41
259. Murton, summary of 'The Crown and the Peoples of Te Urewera' (doc J1), p 36. Murton drew particularly on the work of Amartya Sen and the co-authors Michael Watts and Hans-Georg Bohle: Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 47–85.
260. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 50

and socio-economic conditions, it can be shown that the living conditions of Te Urewera hapu and iwi are connected to the acts and omissions of the Crown.

Murton's framework presents poverty and consequent social problems as being caused by the inter-connection of three factors: power and the political system, property regimes, and economic capability.

- *Political power* includes the operation of coercive power, for example via the police and armed forces, and disciplinary power, by establishing and controlling institutions, such as schools, which attempt to instil a set of desired behaviours. It also includes the operation and impact of the political system: the extent to which people can run their own affairs, and effectively participate in national and local political decision making.[261]
- *Property regimes* are the ways in which property rights are understood and enforced: for example, what rights and responsibilities come with ownership, and whether or to what extent those rights can be restricted; mechanisms for collective ownership and control of assets; and what sorts of things can be owned.[262]
- *Economic capability* is the extent to which a person or group has the freedom and capacity to act and achieve in the economic sphere. This encompasses such things as educational and employment opportunities and the ability to use and develop property or common resources for profit or subsistence.[263]

These three factors influence each other. Political power determines whose property regimes will prevail, and one of the main determinants of economic capability is what property a group controls and what it can do with that property. Economic capability in turn influences the amount of power a group has, since the wealthy generally have better access to the levers of power and are better able to influence the powerful. For most of the period we look at in this chapter, the Crown had much more power and economic capability than the peoples of Te Urewera, and had been able to impose its own property regime on them. It was therefore able to control or at least influence most aspects of Te Urewera life; moreover, the impacts of individual Crown actions were cumulative.

In essence, Murton's argument is that the poor socio-economic status of Te Urewera hapu and iwi ultimately resulted from the huge power imbalance between them and the Crown. The peoples of Te Urewera lacked substantial political, legal, economic, and coercive power, whereas the Crown had a great deal of the first three and a monopoly on the fourth. As we have seen throughout this report, the political and legal power imbalance meant that the Crown could and did replace the traditional property regimes of Te Urewera hapu and iwi with those imported from England, regardless of the impact on the people of Te Urewera, and despite their protests. According to this argument, the new property regime and its effects severely limited their economic capability, reducing them to poverty and making

261. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 78–80
262. Ibid, pp 59–61
263. Ibid, pp 56–58

them dependent on the Crown for aid and services. We found Professor Murton's framework to be a useful tool, and have applied it in this chapter where appropriate.

At the time they entered into the Urewera District Native Reserve (UDNR) agreement, those Te Urewera hapu and iwi within the UDNR area retained internal political power and complete control over their own affairs. This was why they were able to negotiate with the Crown and reach a meaningful agreement. Even at this point, however, they had very limited economic capability; few of the lands which they had retained more or less complete control over were suited to farming, and so hapu and iwi were vulnerable to crop failures and unable to build a substantial economic base. This was compounded by the Crown's control of the national property regime, and the incompatibility of that regime with the traditional Maori regime.

As we have seen earlier in this report, over time the Crown gained political power over all of Te Urewera, imposing its laws and regulations, and establishing schools in the district which trained Te Urewera children in English language, literacy and Pakeha knowledge, largely to the exclusion of their own reo and matauranga. The Crown used its power to defeat the purpose of the UDNR agreement, and secure possession of much of the UDNR lands, establishing its own property regime there. Neither Te Urewera leaders who had entered into the agreement in the mid 1890s, nor Rua Kenana, who attempted to establish an independent and self-regulating community at Maungapohatu over a decade later, were able to turn the Crown aside from its own agenda. And Rua, whose much reduced community remained a thorn in the side of the Crown by the time of the First World War, felt the full force of the Crown's monopoly on coercive power. The Crown also imposed its own property regime over the area, replacing the traditional property regime which Te Urewera hapu and iwi had maintained for generations. The peoples of Te Urewera did eventually see an improvement in their living conditions and economic capability, particularly in the west of the inquiry district. However this economic capability was highly dependent on a few industries, particularly timber, and deteriorated substantially from the 1980s. In recent years hapu and iwi have regained some degree of political power, but they must still work within the Crown's systems in order to exercise it.

23.6 What was the Crown's Response to Maori Hardship in Te Urewera Prior to the Creation of the Welfare State?

Summary answer: *An earlier section of this chapter showed that, in the period from about 1890 to 1935, Maori throughout Te Urewera experienced ongoing and extreme hardship. There were repeated epidemics and constant ill health, frequent food shortages, especially around the turn of the century, and extremely poor housing conditions. The most serious socio-economic*

crisis in Te Urewera during this period was a famine which struck the region in 1898, following the destruction of crops by unseasonable frost.

The hapu and iwi of Te Urewera were vulnerable to famine and other socio-economic crises because, in Professor Murton's terms, they had limited economic capability and limited power to influence governments. Having lost a great deal of their best land and much of their millable forests, most groups had difficulty supporting themselves on what remained. Since there was little paid work in the district, many people travelled in search of work; this made farming even more difficult and disrupted children's education.

Because Te Urewera hapu and iwi had very little political power, they were unable to persuade the Crown to give them enough assistance to rebuild their economic capability. This was the case even though they had, in the mid 1890s, entered into a partnership with the Crown for the creation and protection of the Urewera District Native Reserve (UDNR). Despite the partnership, and the Crown's knowledge of the extreme hardships experienced by Maori in Te Urewera, little was done to help them. The Crown was extremely parsimonious even during the 1898 famine, providing limited supplies of food and insisting that most of it was paid for by labour on road works. Medical aid was also very limited and difficult to access, despite the frequent epidemics and general ill health of the Te Urewera communities. Nor were those communities given much help to improve their own standards of living, despite the provisions for self-government made through the 1896 UDNR Act and, later, to some extent, the Maori Councils Act 1900. At times Maori in Te Urewera and elsewhere experienced discrimination in the provision of welfare and economic aid; for example, pensions and relief work payments were sometimes made to Maori at lower rates than Pakeha, even when their circumstances were the same.

The Crown was relatively active in providing schools in Te Urewera, and Premier Richard Seddon promoted state education throughout his visit to the district in 1895. Some communities, however, experienced long delays between their request for a school and the school being built. Perhaps more importantly, schools were used by the Crown as a means of assimilating Maori into Pakeha culture. Pupils were punished for speaking te reo in school, and the curriculum was Anglocentric and at times disparaging to Maori history and culture. Few Te Urewera pupils had any real opportunity to attend secondary school before the 1930s, even though community leaders had expressed their desire for better educational opportunities and donated land for a secondary school.

Overall, the hapu and iwi of Te Urewera gained very little socio-economic benefit from their new partnership with the Crown under the UDNR Act. Welfare and relief were minimal and grudging, even when the Crown was fully aware that need was dire. Moreover, the provision of aid and services was sometimes discriminatory and, in relation to education, culturally damaging. The only specific promises made by the Crown in the 1890s were for schools, which

would distribute medicine. While it fulfilled this limited undertaking, the Crown failed to fulfil its broader obligations to support and assist the hapu and iwi of Te Urewera.

23.6.1 Introduction

In this section, we explore the Crown's responses to Maori hardship in the period from the 1890s to 1935. This starts with what we consider to be the beginning of the Crown's true Treaty relationship with the hapu and iwi of Te Urewera, which occurred with the Urewera District Native Reserve (UDNR) negotiations in the mid 1890s. It ends around 1935, the year which saw the election of the first Labour government and the beginning of a new way of running the country, through the welfare state and a more managed economy. These developments will be addressed in the next section.

In this section, we will first examine the response to the 1898 famine, as a case study of the Crown's provision of aid and social services in the decades prior to the creation of the welfare state. This will be followed by a survey of the Te Urewera economy in the late nineteenth and early twentieth centuries, and the Crown's role in that economy. We will also discuss the Crown's more general provision of social services, specifically pensions and other forms of social welfare; health care and sanitation; and education.

23.6.2 The 1898 famine and the Crown's response

As we saw in the living conditions section, severe frosts in early 1898 destroyed crops throughout Te Urewera, leading to famine and increased rates of disease. Although population data for this period is problematic, there seems to have been a reduction in the Te Urewera Maori population between 1896 and 1901. During this time there was also a dramatic drop in Maori-owned stock numbers and crop acreage. As the worst single disaster to affect the inquiry district between 1890 and 1935, the famine and the Crown's response serves as a first and dramatic test of the relationships between the Crown and Maori in Te Urewera in the wake of the agreements over the UDNR. In the first crisis experienced by the hapu and iwi of Te Urewera after forming their Treaty partnership with the Crown, we would expect the Crown to have been particularly diligent in providing aid in their time of extreme need. Despite Seddon having said that his government wanted to end the poverty and food shortages plaguing Te Urewera, the Crown's assistance consisted only of small amounts of relief work and some donations of food to the elderly.[264] It seemed already to have forgotten its promises.

In this section, we look first at the long and short-term causes of the famine, and to what extent the Crown was responsible, examining the famine in a broad historical and

264. For Seddon's statement, see AJHR, 1895, G-1, p 49

23.6.2(1)

Food, Fertilty and Survival

The Tuhoe people understood well the direct correlation between food supply, fertility and the survival of a people. They forged this understanding into their tradition to remind their generations of this fundamental premise of human existence. This puha heriheri kai, used when traditional foods are to be served for a hakari or feast, provides us with a graphic example:

He kūmara kai hamuhamu	Scavenging the reject kumara
Ko te ehu o te kupu nei na	Is a way of saying
Kia hoki kau atu, ina te tinaku	You will return empty, for the cultivation
Taia mai, ka mate, taia mai	After a while dies, by and by.
Ka horehore ka horehore	When there is nothing, absolutely nothing
Ka mate te puke tu iho nei	The pubes will be barren
Ka horehore ka horehore	When there is nothing, absolutely nothing
He kotahi te kete i kimihia	And just one kit was sought
Ki te kore, kore rawa aku iwi	If not, my people will never
Ki te mahi kai e	Cultivate food again.

Source: Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 86

theoretical context. We then examine the Crown's response, before assessing the general economic capability of Te Urewera hapu and iwi from about 1890 to 1930, and the extent to which it was enhanced or reduced by the Crown.

(1) *What caused the famine?*

The direct cause of the 1898 famine was a series of severe and unseasonable frosts in January and February of that year. These destroyed all the food crops, including seeds and seed potatoes for the next year. While the frosts caused the crop failure, however, they did not cause the famine. Bad weather and natural disaster have afflicted farmers from the beginnings of agriculture to the present day, but, even when this results in total crop destruction, it does not inevitably mean that farmers and their communities will starve.

Earlier in this chapter, we discussed Murton's socio-economic framework, and his argument that socio-economic inequity and distress are caused primarily by the intersection of political power, property regimes, and economic capability, which can result in marginalised groups becoming highly vulnerable to catastrophic events such as famine.[265] Famine is

265. For Murton's discussion of the causes of the famine, see Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 305–308

usually sparked, as it was in Te Urewera, by a 'trigger event': the collapse or severe contraction of a group's economic capability, for example from a crop failure or natural disaster. For this to lead to famine, however, the group must already have a fairly limited economic capacity, so that they have no alternative resources or income sources to fall back on. They must also be without an economic safety net such as insurance, savings, or the ability to borrow money or call in loans. This limited capability might be due to the imposition of a particular property regime, for example one which leads to land loss, makes it difficult to borrow money, or prevents the use of particular resources. Even in these circumstances, trigger events usually do not lead to famine if the affected group has sufficient power to access emergency aid. In a modern nation-state this would typically occur through an appeal to central government, which would then provide relief from the national budget. A group with little or no power will be unable to obtain aid itself, and have difficulty persuading authorities that its needs are both genuine and sufficiently urgent to be worthy of official relief.

Famine, in summary, does not necessarily occur when a community is unable to grow and harvest its own food. It occurs only when a community is unable to obtain food by *any means*. Crop destruction and other disasters happen to all kinds of communities, but famine happens only to those with limited economic capability and little or no power. This was the situation in which the hapu and iwi of Te Urewera found themselves in 1898, and that was why they starved.

We noted earlier in this chapter that contemporary Crown employees, such as Native Schools Inspector James Pope and school teacher Thomas Wylie, specifically described the events of 1898 as a famine.[266] We note that the Crown's closing submissions in this inquiry also referred to a famine taking place.[267] Some readers may nevertheless have difficulty believing that any part of New Zealand could suffer in the 1890s from 'famine'; a term which today is normally associated with large scale events in very poor or underdeveloped countries. The term does not, however, apply only to crises affecting entire countries or large regions, but to any situation in which there is an extreme shortage of food.[268] Nor should anyone be surprised that famine could occur in the nineteenth century in a settled and reasonably prosperous country with stable government. One of the best-known historical famines is, after all, the Irish potato famine, which took place within living memory of the events we discuss here. Ireland was at that time part of the United Kingdom, the wealthiest country in the world, and continued to export food throughout the famine. But, like the hapu and iwi of Te Urewera, most Irish people were at the time of the famine living on land which was barely able to supply them with their basic needs. Like the people of Te Urewera, they had few other resources, and lacked the power to convince or compel the Crown to

266. Binney, 'Encircled Lands' (doc A15), p 272; McBurney, 'Ngati Manawa and the Crown' (doc C12), p 413
267. Crown counsel, closing submissions, June 2005 (doc N20), topics 18–26, p 88, topic 39, p 10
268. *Oxford English Dictionary* (2014): 'extreme and general scarcity of food, in a town, country, etc; an instance of this, a period of extreme and general dearth.'

prevent or properly alleviate the famine. The Irish famine was of course on a much greater scale than that in Te Urewera, with the estimated number of famine dead exceeding the entire New Zealand population in 1898. Proportionally, though, Te Urewera iwi and hapu probably suffered nearly as much of a population decline.[269]

Claimant counsel submitted that the Crown was ultimately responsible for the famine and other food shortages. Counsel for Ngati Manawa argued that 'continued loss of land and diminishing resources . . . meant that the people of Te Urewera became vulnerable to famine by the 1890s and early twentieth century'.[270] Counsel for Ngati Haka Patuheuheu submitted that the military campaigns of the 1860s left Tuhoe 'vulnerable to famine and illness' in later decades.[271] Counsel for the Tuhoe Wai 36 claimants saw confiscation of Tuhoe's best agricultural land, in the eastern Bay of Plenty, as another factor.[272] Citing Murton, counsel for Ngati Haka Patuheuheu argued that the removal of access to kai moana at Ohiwa Harbour severely limited Tuhoe's food supply.[273] Counsel also reproduced Murton's statement that:

> Effectively, a set of processes initiated by government action created a situation by 1900 where the people of Te Urewera not only found themselves among the poorer segment of society in New Zealand, but more vulnerable than most to 'trigger events'.[274]

The Crown did not reply to these arguments, but did respond to claims concerning the long-term economic impacts of its raupatu and military operations. Briefly, the Crown accepted that the confiscation of land had a clear economic impact, although it denied that it blocked Tuhoe access to the kai moana of Ohiwa Harbour.[275] It also questioned the quality of the land lost, and suggested that Tuhoe economic development was impeded by their remoteness and their lack of engagement with the colonial economy.[276] Crown counsel acknowledged that government forces destroyed settlements, pa, food and crops during military campaigns between 1865 and 1872, but argued that Tuhoe recovered from these shocks.[277]

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269. At section 13.6.4, we estimated that between 1896 and 1901 the Maori population of Te Urewera declined by about 16 per cent. Irish census returns showed a population decline of 22 per cent between 1841 and 1851. It is generally estimated that about half of the Irish decline resulted from emigration, but this too was caused by the famine. In both cases epidemic and other diseases were a major contributor to population decline, partly because of the 'malnutrition-infection cycle' discussed earlier in this chapter. Irish statistics from Irish Central Statistics Office, http://www.cso.ie/px/pxeirestat/Statire/SelectVarVal/Define.asp?Maintable=C0102&Planguage=0, accessed 4 September 2014

270. Counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), p 85

271. Counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 158–159

272. Counsel for Wai 36 on behalf of Tuhoe, closing submissions part B, 30 May 2005 (doc N8(a)), p 215

273. Counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), p 159

274. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 308, cited by counsel for Ngati Haka Patuheuheu, closing submissions, 30 May 2005 (doc N7), p 159

275. Crown counsel, closing submissions, June 2005 (doc N20), topic 3, pp 22, 24

276. Ibid, pp 22, 24

277. Ibid, topic 4, pp 15–16

It is clear that the famine and food shortages were caused in part by a series of natural disasters which affected Te Urewera in the 1880s and 1890s. The Tarawera eruption of 1886 made farming in most of western Te Urewera temporarily impossible; flooding along the Rangitaiki River in 1892 and 1893 caused problems there; and the whole district was also affected by drought in the late 1880s and early 1890s.[278] The famine was triggered by a series of severe and unseasonable frosts across Te Urewera in 1898, destroying the food crops in Maori communities there. Natural disasters and crop disease continued to afflict Te Urewera for at least the next 12 years: there was flooding in Ruatoki in 1900, severe frosts throughout the district in 1901, more flooding along the Rangitaiki River in 1904, and potato blight in 1905, 1906, and 1910.[279] These events would probably have caused some degree of hardship regardless of other circumstances. But in the context which we will describe below, they became what Murton calls 'trigger events', tipping a precarious subsistence economy into extreme hardship.

In chapter four of this report, we found that raupatu had long term effects on the hapu and iwi of Te Urewera. Tuhoe lost their flattest, warmest, and most productive land, which was also about half of all their productive land. This land would not have been significantly affected by frost in summer, and would probably also have produced a surplus to fall back on if crops failed for other reasons. Once this land was lost, however, Tuhoe could no longer use it to grow crops or raise stock for themselves or for trade, and so became more dependent on their lower-quality holdings further inland. Murton argued that the full impact of confiscation was not felt until the 1890s, when the former landowners were completely shut out of their old hunting and gathering areas, and blocked from accessing the harbour. In short, the confiscations made Tuhoe dependent on a relatively small area of land which was not well suited to supporting any substantial population.

How the wars of the 1860s and early 1870s contributed to the famine is less clear. As we found in chapters five and six, the conflict clearly had devastating short term consequences, as people were killed or driven away from their homes, and crops and other property deliberately destroyed. Most communities, however, seem to have been recovering by the 1870s. One of the most significant long term impacts seems to have been that, in later Land Court hearings, some people found it hard to prove their ongoing connections to the land from which they had been driven. The wars also led to the loss of the four blocks to the south and south-east of Lake Waikaremoana. Although some of this land was unsuitable for development, parts of it had been cultivated, and the blocks were also a good source of wild food.

The hapu and iwi of Te Urewera also lost land to Crown and private purchasing, which we found in chapter 10 to involve multiple Treaty breaches. As we found in chapter 10, the

278. McBurney, 'Ngati Manawa and the Crown' (doc C12), pp 387, 395, Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 215–216; Gwenda Monteith Paul and C Maanu Paul, 'The History of Kaingaroa No 1, The Crown and the People of Ngati Manawa', claimant report, 1994 (doc A89), pp 78–80

279. Rose, 'A People Dispossessed' (doc A119), p 146; Binney, 'Encircled Lands' (doc A15), pp 294–295

'rim block' land was a particularly great loss, since it was capable of growing crops which the mountainous interior would not support. Parts of the rim block area later sustained successful farms. This land was also a valuable source of wild foods and other resources.

By 1898, in summary, the hapu and iwi of Te Urewera had lost a significant amount of land, including a great deal of their most fertile acres. Some groups were completely dependent on the cold, hilly, and not very fertile land of the interior, where harvests would be vulnerable to bad weather and somewhat meagre even in good years. This meant not only a small and vulnerable food supply, but also a very limited capacity to grow food or raise stock for sale. Lack of income from cash crops and food surpluses meant that land could not be developed and made more productive. Access to Ohiwa harbour fisheries and other sources of wild food had also been lost or reduced.

The impact of land loss on Maori of Te Urewera is illustrated by statistics on crop acreage at the time of the famine. From 1897 to 1898, when Maori communities were starving, the total crop acreage in Whakatane County increased by more than 20 per cent.[280] These crops were grown mostly by Pakeha farmers, on land which had been confiscated or purchased from Maori in circumstances which we have found were in breach of Treaty principles. Had this land not been lost, there is little reason why it could not have been farmed by the original Maori owners, providing a buffer against total crop failure and subsequent famine.

We stated earlier that crop loss resulted in starvation only when communities had no alternative means of support. Traditionally, whanau and hapu suffering crop failure or destruction might live temporarily with relatives, who could expect reciprocal hospitality at a later date. Because of widespread crop failure throughout the district, as well as general poverty, by 1898 there were few hapu capable of supporting large numbers of relatives at short notice. Another means of recovery in difficult years had been to relocate to unaffected lands elsewhere. This was done by Hutton Troutbeck, a Pakeha settler whose farm at Galatea was covered with ash after the 1886 Tarawera eruption. He and numerous farmhands herded his sheep and cattle to another Troutbeck property near Napier. When the Galatea farm had recovered, the stock was moved back.[281] Had Maori in Te Urewera retained more of their land, they would have been able to move to areas unaffected by the frosts.

Te Urewera hapu and iwi were caught in a vicious cycle of insufficient land that was usable at that time, poverty, and the continued reduction of their remaining land base. In 1893, for example, Ngati Manawa chief Harehare Atarea sold 6,000 acres of land to support those affected by flooding that year.[282] This was an unusually large sale of land, but as we found in chapter 10, poverty and the inability to do much with land other than sell it were major con-

280. From 9,040 to 10,996: *New Zealand Official Yearbook 1898*, p 408; *New Zealand Official Yearbook 1899*, p 347
281. Alex A Coates, *The Galatea Story* (Whakatane: Whakatane & District Historical Society, 1980), pp 30, 32
282. Tracy Tulloch, 'Heruiwi 1–4'(commissioned research report, Wellington: Waitangi Tribunal, 2000) (doc A1), p 77

tributing factors to the piecemeal land sales of the late nineteenth and early twentieth centuries. Land selling presumably held off starvation for a while, but would also have made food shortages worse in later years. We will see below that some contemporaries thought that, if Maori in Te Urewera were truly in serious distress, they should relieve it by selling land. In this context, such suggestions were not only heartless but also misguided. The Te Urewera communities were in distress in part *because* they had lost so much of their best arable land; losing more land would only make things worse in the long term.

We also saw earlier that stock numbers and crop acreage owned by Maori declined dramatically between 1896 and 1901. Stock was almost certainly sold or eaten by those without other food; this again provided a short term solution at the expense of future opportunities. Crop acreage may have declined due to land loss, a lack of resources to keep lands under crop, or a combination of the two. We have already seen that the Crown did almost nothing to assist Maori to develop their land.

The famine seems to have stalled attempts made to develop the remaining Maori land in Te Urewera. Whakatane County was a major maize-growing area, and Maori grew maize in the lower valleys, at Galatea, and in a few highland niches, such as Te Whaiti and Ruatahuna.[283] At Waimana, communal maize growing began in the 1890s after money was raised through gum-digging in the Coromandel.[284] The first crop alone produced 60 to 72 sacks of grain.[285] Between 1891 and 1896, the acreage of maize grown by Maori almost doubled.[286] Although commercial maize farming by Whakatane County Maori continued into the early twentieth century, the number of acres under maize did not return to 1896 levels until at least 1906.[287] Maori sheep farming in the inquiry district, much of it communally run, also increased in the 1890s, before declining in the wake of the famine.[288]

283. *New Zealand Official Yearbook 1899*, p 353; Webster, *Rua* (doc K1), p 89; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 263

284. Webster, *Rua and the Maori Millennium* (doc K1), p 89; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 270; Kihoro Te Puawhe cited in Sissons, *Te Waimana* (doc B23), pp 167–168

285. Kihoro Te Puawha estimated that the first crop was transported to Whakatane by six carts carrying 10–12 sacks of the grain each, hence the figure of 60–72 sacks. Puawha quoted in Sissons, *Te Waimana* (doc B23) p 168

286. Registrar-General's Office, *Results of a Census of the Colony of New Zealand, Taken for the Night of the 5th April, 1891* (Wellington: Government Printer, 1892), app C, p lx; Registrar-General's Office, *Results of a Census of the Colony of New Zealand, Taken for the Night of the 12th April, 1896* (Wellington: Government Printer 1897), app B, p lvi

287. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 498; Registrar-General's Office, *Results of a Census of the Colony of New Zealand Taken for the Night of the 31st March, 1901* (Wellington: Government Printer, 1902), app B, p lviii; Registrar-General's Office, *Results of a Census of the Colony of New Zealand Taken for the Night of the 29th April, 1906* (Wellington: Government Printer 1907), app B, p liii. In 1900, Opotiki County was created out of Whakatane County, making comparisons somewhat difficult. However, the acreage of maize in Whakatane and Opotiki Counties in 1901 was just 895, compared to 3,178 in Whakatane County in 1896. By 1906, the acreage in the two counties had increased to 3,885.

288. Sissons, 'Waimana Kaaku', (doc A24), p 61; Kihoro Te Puawha quoted in Sissons, *Te Waimana* (doc B23), p 167; Murton. 'The Crown and the Peoples of Te Urewera' (doc H12), p 271 [doc A24 and doc B23 are the same quote]

23.6.2(1)

The Effect of Temporary Labour Migration on Food Production

These changes in the Ruatāhuna economy [the increase in migration for seasonal work] did not hold the same rhythm of the traditional practices. In the past, crops were sown in spring, tended in the summer, when seafood would also be gathered and dried, the crops harvested in autumn, and then birds hunted in the winter. The timing of the seasons, cultivation of crops, and hunting in the forests fitted neatly together. But the scheduling of itinerant work grated against the natural rhythms of the traditional practices. Work on Gisborne farms came in late spring and early summer, when crops should have been planted. Road work was not seasonal, but took people away altogether for a period of time in which their crops could not be planted or tended. When the famine struck in 1898, the men at Toreatai [at Maungapohatu] left their settlement to work on the road, leaving no able bodied men to plant the seed potatoes distributed by the government.

Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 23

As we will discuss in more detail below, there were few opportunities for employment in Te Urewera: there was some farm labour, such as shearing, ditch digging, and scrub cutting, which tended to be seasonal in nature, uncertain in duration, temporary, and low-paid.[289] The physically demanding nature of the work also meant that it was unsuitable for those weakened by age, disease, or malnutrition. Maori employed in seasonal labour were also sometimes unavailable to fulfil the needs of their own farms; for example the shearing season occurred when crops needed to be planted, and those employed harvesting others' crops could not harvest their own. This was a particular problem since many people had to travel long distances from home for work.

The unseasonable frosts of 1898 and the resulting crop destruction led to famine only because the hapu and iwi of Te Urewera had become almost totally dependent on a fairly precarious supply of home grown food. They were in this situation because they had lost so much land, particularly their flattest, warmest and most fertile land, in the north of the inquiry district and to a lesser extent in the rim blocks. They had also been cut off from some alternative foods such as kai moana, and people could not be supported by more fortunate relatives, as in past times of shortage, because poverty was so widespread. Paid work was only sporadically available, and when it was it was badly paid, unsuitable for anyone not in full health, and tended to interfere with food production at home. Commercial timber milling was not yet feasible as an alternative source of income.

289. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 274–277, 307; Webster, *Rua and the Maori Millennium* (doc K1), pp 157–158; Paul and Paul, 'The History of Kaingaroa No 1' (doc A89), p 83

We have seen that Maori in various parts of Te Urewera had experienced food shortages earlier in the 1890s, and in the years after the famine. Although these too seem to have been caused by bad weather and natural disaster, they show that the 1898 famine was not simply the result of a rare calamity. It was rather the worst of a series of events in which misfortune tipped communities over the edge from bare subsistence to absolute deprivation. In European tradition, famine is personified as one of the four horsemen of the apocalypse. He rides in company with War, Pestilence, and Death, who, in the nineteenth century, made a path for Famine into Te Urewera.

(2) *Crown responses to the famine*

In chapter nine, we discussed the negotiations between the Crown and Te Urewera leaders over what became the UDNR. We found in chapter nine that the Crown agreed in 1895 to protect the peoples of Te Urewera and promote their prosperity, and that it would give social and economic assistance to meet those ends. During his tour of Te Urewera, Seddon specifically named food shortages as one of the things which his government wanted to change under the UDNR.[290] Just three years after this agreement was reached, and just two after the UDNR Act formalised it, the peoples of Te Urewera urgently needed the Crown's help. Although it is difficult to know exactly what the parties agreed to in 1895, in terms of socio-economic assistance, the Crown had clearly committed to improving the lives of Te Urewera hapu and iwi, which must surely include relief in times of serious crisis. In this section, we look at whether the Crown fulfilled its promises and provided adequate aid to those suffering famine in Te Urewera.

The government first received reports of the crisis in February 1898, when Maori from around the district requested food. Native School teachers at Te Whaiti, Galatea, and Te Houhi confirmed that there was a severe food shortage.[291] On 15 March, the Assistant Surveyor General in Rotorua, A Barron, warned that 'old people must die' if food supplies were not provided within a week.[292] By the end of the month, the government had also received a full report on the situation by Elsdon Best, and a further request for food from Tuhoe rangatira Numia Kereru.[293] By the end of March 1898, in summary, the Crown was fully aware of the nature and extent of crop destruction and food shortages in the inquiry district.

290. AJHR, 1895, G-1, p 49

291. Cecilia Edwards, 'The Urewera District Native Reserve Act 1896 Part 2: Title Determination under the Act, 1896–1913'(commissioned research report, Wellington: Crown Law Office, 2004) (doc D7), pp 33–34; Thomas Wylie to Seddon, 16 February 1898 (Edwards, supporting papers to 'Te Urewera District Native Reserve Act 1896 Part Two', (doc D7(i), vol 1), p 470)

292. Barron, to Surveyor General, 15 March 1898 (Edwards, supporting papers to 'Te Urewera District Native Reserve Act 1896 Part Two' (doc D7(i) vol 1), pp 472, 474)

293. Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), pp 35–37

23.6.2(2)

The government provided famine relief in two forms: supplies and work. Following Barron's telegram on 15 March, James Carroll and Richard Seddon authorised flour and potatoes to be sent to Te Houhi, Galatea and Te Whaiti, and for young men to be put on to road work. Under Secretary of Justice Frank Waldegrave then told Barron to purchase two tons of potatoes and one ton of flour for each of the settlements, although it is unclear from the evidence whether Barron actually did this.[294] On 11 April Seddon, who was in Rotorua, wired Waldegrave to say that no aid had been provided.[295] The next day, S Percy Smith, the Surveyor-General, ordered an official in Rotorua to provide food aid in the form of potatoes, flour, rice and sugar to Te Houhi and Galatea.[296] One ton of potatoes were supplied as a gift for the elderly at Te Houhi, Galatea and Whirinaki, later supplemented by rice, flour and more potatoes.[297] The gifts were intended only for the 'indigent' and 'very old and feeble', who could not work on the roads.[298] The remaining food, apart from seed potatoes, was to be paid for by road work in the future. Ten tons of seed potatoes were sent at the end of May 1898 to Te Urewera communities on the upper Rangitaiki River, and to Ruatahuna and Maungapohatu, so that they could plant them for next year's crop. Joseph Wylie, the teacher at Galatea, thought that amount might perhaps provide a sack for each family; he viewed this as very inadequate, as 'one bag for each family cannot possibly be expected to grow a sufficient supply for twelve months consumption'.[299] He believed their annual needs were normally about five to eight sacks per family. A very limited quantity of seed potatoes was later supplied to Ruatoki.[300]

Relief work was also provided. During 1898, 87 Maori were employed on the Galatea to Ruatahuna road, 20 employed near Ruatahuna clearing bush, about 20 from Te Whaiti on the Te Papa road, and about 40 from Te Houhi, Galatea and Whirinaki on other road works. Other groups were contracted to construct and improve roads and stock tracks near Ruatoki and around Maungapohatu, but their work was in payment for food supplies already provided, rather than for cash.[301] The work was unevenly distributed, so that there were no workers from the Ngati Marakoko and Warahoe hapu of Te Whaiti, who collectively numbered 26. Other groups had some men employed, but not enough to feed everyone.[302]

294. Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), pp 34–35

295. Native Minister Richard Seddon to H Waldegrave, U-S Justice, 11 April 1898, (Edwards, supporting papers to 'Te Urewera District Native Reserve Act 1896 Part Two' (doc D7(i), vol 1), pp 452–455)

296. Smith, Surveyor General to Dowsett, 12 April 1898 (Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 37)

297. Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), pp 38, 40

298. Edwards, supporting papers to 'Te Urewera District Native Reserve Act 1896 Part Two', (doc D7(i)), vol 1, p 432

299. J Wylie to F Waldegrave, U-S Justice, 15 Sep 1898 (Edwards, supporting papers to 'Te Urewera District Native Reserve Act 1896 Part Two' (doc D7(i)) vol 1), p 404)

300. Binney, 'Encircled Lands' (doc A15), p 289; Rose, 'A People Dispossessed' (doc A119), p 143

301. Robert H Reaney, 'Rotorua', AJHR, 1899 C-1 p 56; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 291–292

302. Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 40

Meanwhile, work was being given to unemployed Pakeha.[303] From June, numbers of Maori on the Galatea road were reduced, in order to save money.[304] By December, the roading budget was overspent, and work ceased.[305] There is some evidence that the Ruatahuna relief workers were paid less than Pakeha working on the Te Whaiti to Ruatahuna road around the same time.[306] The standard relief work wage was seven shillings a day, similar to the average wage for ordinary unskilled labourers. As a point of comparison, a bag of flour from the local store cost nine shillings and a bag of potatoes 16 shillings.[307]

Despite the provision of some limited free supplies and roadwork, many Te Urewera people continued to experience food shortages. It appears that those who could not work, such as children and the elderly, suffered most.[308] In May 1898, Mehaka Tokopounamu requested free food from the government for Ngati Haka Patuheuheu, because they could not afford the food that the government had sent to Wylie for distribution.[309] In July and November, Pihopa Taumutu and others requested food for the school children at Te Whaiti. In mid-November, the schoolteacher at Te Whaiti found old people subsisting on earthworms, puha and fern root. In December, Ngati Haka Patuheuheu from Te Houhi again requested food, and in the same month Tukuaterangi Tutakangahau repeated earlier requests for flour for the elderly at Maungapohatu.[310] Waldegrave refused to provide more food, saying that they had received enough already.[311]

We turn now to examine the reasons why the relief took so long to arrive, why it stopped when it did, and why it took the forms it did. What is particularly striking, from a modern perspective, is that the Crown seemed to have no structure in place to investigate, assess, or respond to crises such as this, even though localised natural disaster seems to have been

303. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 291

304. Smith, Surveyor General, to U-S Justice, 11 June 1898 (Edwards 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 40)

305. Rose, 'A People Dispossessed' (doc A119), p 144; Binney, 'Encircled Lands' (doc A15), p 289; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 292

306. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 90

307. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 293

308. See for example, the claim by Korowhiti Ratahu (Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 39), and a letter from Joseph Wylie, the school teacher at Galatea, to Seddon: 'A number of the old and ailing people have earnestly requested me to ask you to pity and help them, until they are able to grow some food; at present they are obliged to go to those who are working to get a meal, some of them have had families but they are grown up and have wives and children to provide for. Others have no children'. J Wylie to Seddon, 5 May 1898 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896 Part 2', (doc D7(i), vol 1), p 420). In response, Seddon authorised £20 of food to cover three months. Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 40

309. Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 39

310. Pihopa and all the members of the Te Whaiti School Committee to Mr Thompson, November 17 1898 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7(i) vol 1), p 374); Mehaka Tokopounamu, Wi Patene Tarahanga, Waihia Turua from all Patu heuheu to Seddon, 21December 1898 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7(i),vol 1), p 366); Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 41; Binney 'Encircled Lands' (doc A15), p 291

311. Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 41

a regular occurrence in this period. Requests for help were sometimes bounced around between the Education, Justice, and Works departments, without any of them having any clear responsibility.[312] The abolition of the Native Department in 1892, and the fact that there was no Health Department at this stage, no doubt played a role in this organisational vacuum, although there seems to be no reason why famine and disaster relief could not have been a clearly assigned duty of another department.

Another major problem seems to have been that many officials did not believe that there really was an ongoing crisis, despite the evidence. Waldegrave told Seddon in April that he had been slow to respond to requests for help as it was 'difficult to obtain reliable information as to the real necessities of these people'. He also said that the reports which Seddon had received in Rotorua were probably 'somewhat exaggerated'.[313] It seems likely that if Seddon had not happened to be in Rotorua, even less assistance may have been provided. Robert Reaney, the road surveyor for the Rotorua District, was suspicious that some of the relief workers might be 'undeserving cases'.[314] As we discuss below, state officials of this period frequently made the distinction between 'deserving' and 'undeserving' people when deciding whether to provide aid. In this case it is not clear where the line was drawn; 'undeserving cases' may have meant those who were not really destitute, or who he thought had become destitute through carelessness or laziness rather than misfortune. When relief supplies ran out towards the end of the year, Waldegrave refused to supply more, and was supported in this by the Native School teacher at Te Whaiti, F R Wykes, who told Waldegrave that

> Since receiving your note I have decided not to supply any more except it might be in the case of Hamiora [an elderly rangatira who was starving]. I quite agree with you in the opinion that the people in this District have been very liberally treated by the Govt. The more they receive the more they expect. I am of opinion they should be asked to sell land, or horses and buy food if they are really starving.[315]

Wykes's scepticism and distinct lack of sympathy even for genuine cases of starvation are evident. As we noted earlier, land loss was one of the factors contributing to the famine, and so the idea that famine victims should sell more land was both callous and misguided.

Officials also preferred to provide destitute Maori with the opportunity to earn money for food, or to work for food, rather than simply providing them with supplies.[316] This was the case even when it was reported that elderly people would die if food were not provided

312. Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 37
313. Waldegrave, U-S Justice to Seddon, 15 April 1898 (Edwards 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 38)
314. Reaney, 'Rotorua', p 58
315. Wykes to Under Secretary of Justice [Waldegrave], 13 December 1898, J1 99/124, NA, Wellington (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 137)
316. Thomas Wylie to Seddon, 16 February 1898 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7(i), vol 1), p 470); Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), pp 34–37

within a week.[317] When food was supplied, it was not always free, but was to be paid for with labour on the roads.[318] Although some communities specifically requested donations of food, others preferred relief work, or food which could be paid for with work.[319] Elsdon Best and Inspector of Native Schools James Pope both reported that those who did not want free food were afraid that their land would be taken in payment.[320] Best stated that some hapu were generally suspicious and distrustful of the government, and 'would rather live on fern root than take food from Govt.'[321] He ascribed this to the recent sentencing of 50 year old Tuhoe woman Makurata Hineore to one month's imprisonment with hard labour, which both Best and her relatives considered to be unjust. As we discussed in chapter 13, Makurata was convicted after a land dispute turned into a fight.[322] The case and its context highlighted the fact that, despite what they had been led to believe, the peoples of Te Urewera were not allowed to resolve their own disputes, but rather had to submit to the Crown's justice system. In general, the refusal of some groups to take food from the Crown illustrates early challenges for the UDNR partnership in attempting to overcome the long history of Crown injustice.

There were some advantages to relief work as a substitute for food supplies. It avoided creating any sense of obligation or anxiety that the Crown would want repayment for goods supplied, which might mean land would have to be sold, and it avoided creating any dependency on Crown welfare. Crown counsel submitted that this was a key reason for the preference for work rather than food, describing it as 'reflective of the government's ethos of individual responsibility, and also the government's concern not to encourage dependency. Urewera Māori did not want to be dependent on the government either.'[323] But it seems unlikely to us that the provision of food in the wake of a natural disaster would have caused long-term dependency. Nor should the Crown have regarded welfare dependency as a worse fate than starvation. While it is certainly true that many in the inquiry district were afraid of owing anything to the Crown, this seems to have been primarily the result of the Crown's past actions, which included land confiscation and military invasion. The Crown's relationship with the peoples of Te Urewera had recently become more positive, as their leaders negotiated the UDNR. But this was not enough to overcome the distrust created by decades of war, confiscation, and broken promises, especially given that the Crown seemed

317. Barron, to Surveyor General, 15 March 1898 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7(i) vol 1), pp 472, 474)

318. Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), pp 37–38

319. Binney, 'Encircled Lands' (doc A15), p 291; Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), pp 33–34, 37

320. Rose, 'A People Dispossessed' (doc A119), p 143; Best to Under-Secretary of Justice, 17 March 1898, (Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), pp 36–37)

321. Best to U-S Secretary of Justice, 14 March 1898 (Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 35)

322. Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), pp 20–23

323. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 10

already to be forgetting the partnership. That some hapu seem to have preferred malnutrition and possible death from starvation to accepting aid from the Crown is not testament to an 'ethos of individual responsibility'; it is an indictment of the Crown's earlier relationships with them.

Regardless of any arguments in favour of relief work, it was clearly insufficient to aid all Maori suffering from the famine. We have noted above that some hapu did not receive any work. Other groups had so few able bodied men that, even if all were employed on relief wages, they would have been unable to support everyone in need of food. At Te Whaiti, for example, there were only 12 men able to work in support of a total population of 81.[324] In other areas only a third or less of the population were able to work on the roads.[325] As the famine went on, it is likely that fewer people were able to work, as malnutrition and associated disease weakened the formerly able-bodied. There is evidence that the road work itself was dangerous and conducive to ill health, and that this may have led to several deaths among Maori road workers.[326] As a general matter of policy, relief work was made 'deliberately unattractive' through low pay and harsh conditions, so that it would only be taken by those in desperate need.[327] Illness among workers and their dependants would also have forced the healthy to choose between looking after sick family members and working. The need to work certainly prevented people from planting crops at their usual time, meaning that they ripened late and food ran out again at the end of the year.[328] To some extent, therefore, relief work actually exacerbated problems rather than solving them.

We received very little evidence on the Crown's response to other crises and disasters around this time. After the Tarawera eruption in 1886, parliament voted £2,000 for the relief of affected settlers and just £400 for affected Maori, even though the overwhelming majority of people killed in the disaster were Maori.[329] The money was intended to provide for only the most 'pressing' and 'extreme' cases; Robert Stout said in parliament that he did not think it was reasonable to ask the government to 'compensate every one who was injured, to the full extent of the injury.'[330] This indicates that the Crown saw its disaster relief role in quite limited terms, but also shows that it saw Pakeha as being more in need or deserving of relief than Maori. It must also be noted that in 1898 the Crown significantly expanded its social welfare role by introducing old age pensions. It appears, though, that this increased generosity did not extend to famine-afflicted Maori.

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324. Binney, 'Encircled Lands' (doc A15), p 292
325. Edwards, 'The Urewera District Native Reserve Act 1896 Part 2' (doc D7), p 40; Murton 'The Crown and the Peoples of Te Urewera' (doc H12), p 292; Binney, 'Encircled Lands' (doc A15), pp 288–289
326. Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 91–92
327. Thomson, *A World Without Welfare*, pp 113–114
328. Binney, 'Encircled Lands' (doc A15), p 291
329. Ward, *A Show of Justice?*, p 294. In the end, a total of £1,200 was spent on Maori.
330. NZPD, vol 55, 6 July 1886, p 279. There was also a public relief fund: Brabant to Under-Secretary, AJHR, 1887, sess 2, G-1, p 9.

To sum up, the Crown's response to the 1898 Te Urewera famine was woefully inadequate. It was late, it was insufficient, and when it took the form of relief work it sometimes made things worse. Some Crown employees actively argued against more relief, claiming that conditions were not particularly bad, or arguing that Maori who were 'really starving' should simply sell their land. Other Crown employees, and Seddon, were more sympathetic, but overall the Crown showed little regard for the peoples of Te Urewera in their time of crisis. The response was inadequate even by the standards of the time; the peoples of Te Urewera were entitled to at least the same level of aid as would have been provided to a Pakeha community in a similar situation. In addition to any general duties of disaster relief, we repeat that the UDNR agreement in particular obliged the Crown to aid and assist the hapu and iwi of Te Urewera, particularly in times of crisis, and that this included help with food supplies. The Crown failed to meet these obligations.

(3) *Employment opportunities and economic assistance*

What was the general economic context of the famine, and did the Te Urewera economy improve in the early twentieth century? We have seen that Te Urewera hapu and iwi experienced famine in part because of their extremely limited economic capability, and because they did not benefit from the property regime imposed by the Crown. We turn now to look at the economic opportunities available to the hapu and iwi of Te Urewera in the period from about 1890 to 1935, and the extent to which the Crown helped or hindered them in taking up those opportunities. Other than selling land, the only significant potential income sources were farming, forestry, and paid work.

Land loss continued in the early decades of the twentieth century, through Crown and private purchasing, and the Urewera consolidation process that followed the Crown's sustained purchase programme in the UDNR in the 1910s, which we outlined in chapter 15. By 1930, Maori owned just 19.3 per cent of the land in our inquiry district. During the consolidation process, Maori landowners were allowed to select a maximum of three blocks to take their interests in, and most concentrated their interests in just two. This meant they had a greatly reduced ability to use different areas for different, seasonal purposes, which restricted economic capability. Individualised titles meant that the small amounts of good remaining farmland tended to be partitioned over time into sections too small for profitable farming. In addition, the Crown's failure to build promised arterial roads made farming in many parts of Te Urewera even more difficult and unprofitable than would otherwise have been the case, particularly in areas which had only been developed because of the promise of roads. Maungapohatu, which was revived in the late 1920s after Rua's return, went again into serious decline because there was no real road access.

In chapter 18, we examined the first significant Crown programme to assist Maori in farming: the development schemes which began from 1929. We accepted that the Crown

had sought to act in the best interests of the Maori landowners, and the schemes had delivered tangible benefits which otherwise could not have been obtained. Although the quality of management was mixed, and the schemes were not a financial success, we found that the inception and conduct of the schemes was not in breach of the Treaty. We received little evidence on Crown assistance to Maori farming prior to the development schemes, and it appears that little assistance was provided. One of the few exceptions was the Crown's aid in the establishment of the Ruatoki dairy factory in 1907. The factory was a private concern made possible by a gift of land by local Maori, but the gift was facilitated by the passage of legislation to allow land transfers for factories or public purposes.[331] As we noted earlier in this chapter, the establishment of the factory, and of the Ruatoki dairy industry more generally, enabled a significant improvement in living standards among Ruatoki Maori. Maori dairy farmers in Ruatoki still struggled, however, as limited land holdings, land title problems and a lack of capital prevented them from fully developing their farms.[332] The dairy industry also made Maori land in the area more attractive to Pakeha, increasing pressure on landowners to sell.[333] Elsewhere in Te Urewera, dairy farming was impractical even when the land was suitable, as there were no roads to get the milk to the factories. Sheep farming was the dominant form of pastoralism in most parts of the district, but Maori flocks tended to be small.[334]

Murton argues that farming was becoming more complex and expensive at this point, making it difficult for those with limited financial resources to compete.[335] For example, successful commercial dairy farming by about 1910 required investment in milking sheds, milking and cream separation equipment, and a plentiful and clean water supply to meet increasingly stringent quality control requirements; not to mention the usual need to improve the land and stock.[336] We received no evidence that the Crown provided development capital to Maori in Te Urewera before 1930.[337]

There were some means by which Maori could, in theory, access development loans. The Crown passed legislation to provide Maori farmers with mechanisms to secure finance collectively, such as by forming an incorporation of owners (enacted in 1894), or by vesting land in a trust (1897). But these were seldom used.[338] Other Tribunals have suggested that

331. Oliver, 'Ruatoki' (doc A6), p 197
332. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 490–491
333. Jeffrey Sissons, 'Waimana Kaaku, A History of the Waimana Block' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A24), p 67
334. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 271–273, 492–495; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 79, 138, 177
335. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 466
336. Ibid, pp 442–443; see also Gary Richard Hawke, *The Making of New Zealand: An Economic History* (Cambridge: Cambridge University Press, 1985), pp 88–90
337. Crown counsel, statement of response to stage 3 issues, 13 December 2004 (claim 1.3.7), p 12
338. Murton 'The Crown and the Peoples of Te Urewera' (doc H12), pp 468, 715

this was because of the heavy government control that went with the mechanisms.[339] In chapter 12 we showed that, in the rim blocks, the Crown's purchasing activities meant the owners could not have formed incorporations even if they had wanted to. From the early 1920s, loans were also available through the Native Trust Office and the District Maori Land Boards, but the amounts involved were very small, and we received no evidence that any Maori from Te Urewera borrowed money in this way.[340] From the 1890s, financial assistance was available for farmers generally, and Maori were not specifically barred from accessing it, but the Wairarapa ki Tararua Tribunal found that Maori could not do so in practice.[341] Substantial economic assistance was not accessible to Maori until 1929, when the development schemes were introduced by the new Minister of Native Affairs, Apirana Ngata.[342] In 1921, Fred Biddle of Ruatoki stated to a group of visiting Members of Parliament that

> I am sorry you have come now when you see the nakedness of our land; we regret that it is not cultivated. There is a two-fold reason. (1) We are not the acknowledged owners of any piece of land – we have no title in the pakeha sense. (2) Even if we had a title we have no money and the banks and other lending institutions will not lend to Maoris.[343]

Most Maori land in Te Urewera had multiple owners, and neither banks nor the state would loan on the security of these titles, because the land could not be repossessed in the event of default.[344]

Crown action and inaction could also seriously hinder farming development, as it did for the Waiohau and Maungapohatu communities. In chapter 11, we showed that the Crown failed to take action in the matter of the Waiohau fraud, which resulted in Ngati Haka Patuheuheu losing their best farm land. They also lost all their cattle and most of their sheep through debt arising from legal costs.[345] We found that the compensation granted by the government was clearly inadequate, and no assistance was given for development of their remaining lands. In chapter 17, we found that the police raid on Maungapohatu had a devastating effect on the community there, and that it never fully recovered. Like Ngati Haka Patuheuheu, Rua's followers were compelled to sell livestock in order to pay legal costs.

339. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, p 535; Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, pp 381, 385, vol 3, p 980

340. Brian Murton, under cross-examination by Crown counsel, Tauarau Marae, Ruatoki, 20 January 2005 (transcript 4.13, p 83)

341. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 577–589

342. Ibid, pp 596, 612

343. Biddle quoted in S K L Campbell, 'Land Alienation, consolidation and development in the Urewera, 1912–1950' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1997 (doc A55), p 35

344. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 715–716, 973; Murton, 'Summary of Evidence of Brian Murton: Stage Three' (doc J10), p 16

345. Binney, 'Encircled Lands' (doc A15), p 347; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 494–495

23.6.2(3)

The absence and imprisonment of Rua and others resulted in land falling into disuse and becoming overgrown.

In the long term, the most important source of income in our inquiry district was forestry. In chapter 15, we showed that Crown actions meant that the hapu and iwi of Te Urewera gained little benefit from the growth of the timber industry in the early twentieth century. Ngati Ruapani at Waikaremoana lost most of their forest land and gained little in return. Most of this forest was never milled, as it was needed for environmental and tourism purposes. We found, though, that the land was no less valuable to the Crown as a conservation forest and therefore its price should have reflected market rates for the land and timber. Nor did most other landowners who sold their interests receive payment for their timber. Land which was retained was sometimes later subject to milling restrictions.

As we found in chapter 15, the Te Whaiti owners suffered the worst losses in terms of forest resources. By the early twentieth century, Ngati Whare were aware that timber was their last remaining resource of any financial significance, and in 1915 asked the government to allow them to enter into timber leases. These, they said, would give them royalty income as well as employment from the sawmills which would open to process the timber.[346] The Crown refused, and some owners turned to harvesting the timber themselves for telephone poles and fence posts. A Crown injunction in 1917 cut off this source of income too.[347] Having blocked most of the Te Whaiti owners' economic opportunities, the Crown unlawfully purchased the majority of individual interests in the forest blocks, and then retrospectively validated its actions.[348] We found in chapter 13 that the standing timber was worth at least seven times what the Crown paid for it. We also found, in chapter 15, that the purchases had negative long-term effects on Ngati Whare's economic capability. They did benefit from the timber industry in their rohe, as we will discuss in detail below, but the establishment of the timber industry on the back of aggressive Crown purchasing consigned Ngati Whare and other Te Urewera peoples to the role of labourers and indirect beneficiaries, where they might have been owners.

Counsel for Nga Rauru o Nga Potiki submitted that because Maori in Te Urewera had lost most of their assets and were unable to derive income from what remained, they had by the 1920s 'developed an almost institutionalised reliance on seasonal and casual work.'[349] Crown counsel responded that, given population growth and the lack of suitable land for farming in Te Urewera, 'it is likely that many Urewera Maori would have been reliant on wage work or seasonal work by the 1920s' even if land loss had not occurred. Even in the 1840s, they said, Te Urewera Maori were already travelling out of the district to trade and

346. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp178, 195

347. Ibid, p198; Richard Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi: A History', claimant report, 1999 (doc A27), pp177–181

348. Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi' (doc A27), p198

349. Nga Rauru o Nga Potiki, statement of claim, 11 October 2004 (claim 1.2.24(a)), p18, citing Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p1583

work.[350] Nevertheless, they also submitted that 'the Crown did open up significant work opportunities in and around Te Urewera, in particular timber, pulp and paper, and also projects associated with the hydroelectric development.'[351]

Overall, little private or public employment was available in Te Urewera before the 1930s. The Crown provided occasional temporary employment to local Maori in four areas: on roads throughout Te Urewera from the 1890s, from the tourist lodge at Waikaremoana from 1903, the timber industry, and the construction of two hydro-electric stations near Lake Waikaremoana in the 1920s. The public works employment on roads and dams was only temporary, and the tourist lodge offered few employment opportunities. The timber industry eventually came to dominate the Te Urewera economy, but provided few jobs before the 1920s. In 1925 the new State Forest Service substantially expanded the Kaingaroa forest.[352] The planting programme became a major employer for Maori in the area, particularly Ngati Manawa, Ngati Whare, and Ngati Haka Patuheuheu.[353] The timber milling industry did not get fully underway in Te Urewera until 1929 and did not really take off until even later; forestry from this date onwards will be covered below, as part of a general discussion of the industry in the mid-twentieth century.

As we outlined in our earlier discussion of the famine, the Crown provided some road-building work to Maori in Te Urewera, in some cases so that workers could pay for emergency food supplies. The work was seen as a form of social welfare, even though the Crown benefited as much as the workers. After the famine, road work continued to be available intermittently, and Maori were employed on at least some of the Te Urewera roading projects.[354] We have noted in chapter 14, however, that most of the roads promised by the government were never built. This not only held back farming development, as we have shown, but also meant one less source of paid work.

Other employment opportunities came with the construction of two hydro electric power stations near Lake Waikaremoana in the 1920s. The first was a small temporary station built in 1923 at Whakamarino Flat; the second was the larger and permanent Tuai station. Work on the Tuai station began in 1926 and ended in the late 1960s.[355] These projects provided some employment to the peoples of Te Urewera, especially those living on the nearby Te

350. Crown counsel, statement of response on stage 3 issues, 13 December 2004 (claim 1.3.7), p 47
351. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 26
352. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 265
353. Ibid, pp 265, 267; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 353, 399; Presbyterian Church of New Zealand, *Proceedings of the General Assembly of the Presbyterian Church of New Zealand, 1926* (Dunedin: Otago Daily Times and Witness Newspapers), p 73; Rose, 'A People Dispossessed' document bank (doc A119(a)), p 47; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1054
354. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1046
355. Walzl, 'Waikaremoana', (doc A73), pp 190, 214, 294–298; Garth Cant, Robin Hodge, Vaughan Wood and Leanne Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana and Lake Waikareiti, Te Urewera' (commissioned research report, Wellington: Waitangi Tribunal, 2004) (doc D1), p 151; John Martin, *People, Politics and Power Stations: Electric Power Development in New Zealand, 1880–1990* (Wellington: Bridget Williams Books and Electricity Corporation New Zealand, 1991), pp 99, 102

Kopani reserve. The teacher at Kokako Native School claimed in 1932 that 'during the construction of the Hydro Electric Scheme and while shearing wages were high, these people [on the reserve] experienced good times.'[356]

We received conflicting contemporary evidence on the total numbers employed building the power stations, but there were clearly several hundred.[357] Nor do we know how many were Maori; contemporary photographs indicate a mixed workforce.[358] Maria Waiwai of Ngati Ruapani lived nearby during construction. She told us about the building of the Tuai station, and the division of labour at the site:

> Labourers were employed to do manual work with pick-axes, shovels and wheelbarrows. The power stations were owned and run by the Pakehas, but our Maori men did all the labouring. It's true that Pakeha and Maori worked together – the village gang worked outside and the skilled Pakeha labourers and engineers inside. The Maori did all the manual work like spalling rocks for the crusher and using wheelbarrows to cart the rocks wherever they were needed. Our fathers and grandfathers built the stone walls that are still here today.[359]

From the evidence we received, we cannot be sure that Pakeha took most of the skilled labouring and engineering jobs, but it seems likely. We saw earlier that in the 1930s Te Kopani Maori were living in dire poverty, suggesting that the power station work had not resulted in any improvement in their living or economic conditions at this stage. It is unclear how much employment the power stations provided once they were completed. In 1981, there were 75 people in the Waikaremoana area working in the 'electricity, gas, and water' sector, most of them apparently in jobs defined as 'production, transport or labour'.[360] However we do not know how many of these people were Maori, what kind of work they did, or what they were paid.

Another source of casual work was the tourist resort on Lake Waikaremoana. Tourism in Te Urewera seems to have begun in 1874, when a lodging house was established at Onepoto. Excursion trips to Waikaremoana operated in the 1880s, but tourist activity was minimal at this time because of the district's isolation.[361] From the 1890s, the government expanded its role in the tourism industry, building or buying accommodation, sites, and transport

356. A J Lambert to the Director of Education, 28 October 1932 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(Y)), p 61)

357. Walzl, 'Waikaremoana' (doc A73), p 298; *The Daily Telegraph*, 13 February 1928 (Tony Walzl, supporting papers to 'Waikaremoana: Tourism, Conservation & Hydro-Electricity (1870–1970)' (doc A73(c)), vol 3, p 1643; 'Main Hydro-Electric Scheme', *Star*, 23 February 1927, in Walzl, 'Supporting papers for Waikaremoana' (doc A73(c)), p 1645)

358. Martin, *People, Politics and Power Stations*, p 100; Gilbert G Natusch, *Power from Waikaremoana: A History of Waikaremoana Hydro-electric Power Development* (Tuai: Electricorp Production, 1992), pp 12, 18

359. Maria Waiwai, brief of evidence, not dated (doc H18), p 8

360. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 124–125

361. Walzl, 'Waikaremoana' (doc A73), p 38

around the country.[362] In 1901 the Department of Tourist and Health Resorts became the world's first state tourism department.[363] The Crown dominated the tourist industry, including that based around Lake Waikaremoana. A lake house was built in 1903 on Crown land at the eastern end of the lake, and by 1905 the Tourist Department had acquired a boat, erected a jetty, laid out lawns and gardens, and planted an orchard.[364] Lake House staff were advised to maintain good relations with local Maori, although this did not always happen.[365]

In the late 1920s there was an increase in car ownership in New Zealand, sparking a nationwide tourist boom. The Lake House was extended in 1927 to cope with increased visitor numbers.[366] There was also an increase in camping around the lake. Government officials were concerned about possible environmental impacts, and also that free or private camping might reduce its profits. In 1929 the Crown took two steps: it established its own motor camp, and issued a proclamation temporarily preventing the sale or commercial lease of Maori land around the lake, except to the Crown. The proclamation was extended the following year.[367] Following requests from the Tourist Department, the Tairawhiti Maori Land Board made the restriction permanent from 1932.[368] Waikaremoana Maori continued to enter into informal lease arrangements, despite Tourist Department protests.[369] They had the sympathy of Native Land Court Judge Harold Carr, who remarked on the 'distressingly poor circumstances' of the owners.[370] All the same, the ability of Waikaremoana Maori to benefit from tourism was severely hampered by Crown restrictions that were primarily aimed at protecting the profitability of its own operations.

Despite the Crown's efforts, Waikaremoana was never a popular tourist destination, mostly because of poor access but also because of unfavourable weather.[371] As with most of the state tourist developments, the tourist facilities at Waikaremoana ran at a loss every year except 1928 and 1929.[372] The Crown's investment in tourism was therefore in effect a subsidy, generally amounting to a few hundred pounds per year. A small amount of this trickled down to local Maori, mostly in the form of occasional employment. Over the years Maori were hired as boat crew, orchardists, road workers, and guides, and provided firewood and horse transport. They were also given medicine, and could borrow a boat, which

362. Ibid, pp 74–75
363. Margaret McClure, *The Wonder Country: Making New Zealand Tourism* (Auckland: Auckland University Press, 2004), pp 24–26
364. Walzl (doc A73), pp 75–77
365. Coombes, 'Making "scenes of nature and sport"' (doc A121), pp 106–108; Walzl, 'Waikaremoana' (doc A73), pp 78–81
366. Cant, Hodge, Wood and Boulton, 'The Impact of Environmental Changes' (doc D1), p 93; Walzl, 'Waikaremoana' (doc A73), pp 246–247
367. Walzl, 'Waikaremoana' (doc A73), pp 257–258
368. Ibid, pp 260–261
369. ibid, pp 261–262
370. Memorandum from Judge Carr to The Registrar, Native Land Court, Gisborne (O'Malley, supporting papers to 'The Crown's Acquisition of the Waikaremoana Block' (doc A50(c)), pp 627–628)
371. Walzl, 'Waikaremoana' (doc A73), pp 77, 84–86, 177, 243
372. Ibid, pp 246–247

was later given to them.[373] While these benefits were presumably welcomed, they were not an adequate substitute for meaningful participation in the tourism industry. Also, as we discussed in chapter 20, the people were not compensated for the use of their lake until the Crown began to pay annual rent in 1971, backdated to 1967.

Te Urewera Maori often had to travel outside the district, to places such as Gisborne and Hawke's Bay, to gain work: shearing, bush burning and clearing, grass seed cutting and sowing, ditch digging, maize picking, and general labouring. For example, Rua Kenana was employed in the late nineteenth and early twentieth centuries as a shearer, ditch digger and general labourer.[374] Dairy factories in and near northern Te Urewera also employed Maori. Murton states that hundreds of people from Te Urewera temporarily left the district for seasonal and casual farm employment. Many departed for the shearing season in Gisborne, for example, forming shearing gangs that travelled around farms.[375] In 1926 Sister Tiaki of the Waiohau Presbyterian Mission stated that 'nearly all the able-bodied men and women' had left for seasonal work elsewhere.[376]

Some who left in search of work never returned. Murton states that many Tuhoe shearers intermarried with Te Aitanga-a-Mahaki and lived on various stations near Gisborne.[377] David Hawea told us that land in the Okahuatiu block, near Turanga, was given to Tuhoe people by Te Whanau a Kai, so that they could build themselves a marae there; the marae, Ngatapa, symbolises the close links between Tuhoe and Te Whanau a Kai.[378] Hutton and Neumann note that there was 'significant out-migration' of Ngati Whare to Gisborne, Taupo and the Waikato, as evidenced 'by Ngati Whare's efforts to include non-resident members on the title of the Te Whaiti block in 1907.'[379] They estimate that by 1925 'Well over half the tribe resided outside their customary rohe.'[380] In the second half of the 1910s, much of the Native Land Purchase Department's correspondence with Tuhoe was with owners living outside Te Urewera.[381] However, we received little evidence on the nature and causes of this migration before the 1930s.

In summary, from about 1890 to 1930, there was little economic opportunity for the hapu and iwi of Te Urewera. Some of this was the result of poor land quality, lack of natural resources other than timber, and distance from major ports and centres of population. But the lack of access to development finance, especially cheap government credit, was also

373. Walzl, 'Waikaremoana' (doc A73), pp 47, 79–80; Walzl, 'Waikaremoana' (doc A73), p 105; Coombes, 'Making "scenes of nature and sport"' (doc A121), pp 108–109, 193
374. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 274; Binney, Chaplin and Wallace, *Mihaia*, pp 12–13
375. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 273–277, 1582
376. Tiaki quoted in Rose, 'A People Dispossessed' (doc A119), p 190
377. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1046
378. David Hawea, brief of evidence, 24 November 2004 (doc 137), p 4
379. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 176
380. Ibid, p 218
381. Miles, 'Te Urewera' (doc A11), p 374

crucial before 1930, as we noted in chapter 18. Various Crown actions made the situation worse: in particular its unethical – and at times unlawful – purchase of UDNR lands; its failure to pay a fair price for those lands and the timber on them; its failure to give owners of UDNR land a workable means of land management; and its failure to build promised roads. The Crown did grant some economic and employment assistance. The development schemes, which began in the early 1930s, enabled some land owners to benefit from their lands in ways which would not otherwise have been possible. The Crown funded work on roads, hydro schemes, and the tourist resort, but, with the possible exception of the roads, these projects benefitted the nation more than the local Maori communities and therefore cannot really be seen as assistance to the peoples of Te Urewera. In any case, the work was neither well paid nor of sufficient duration to make any long term difference to living standards.

23.6.3 Welfare and social services before the welfare state

In addition to its derisory response to crises such as the 1898 famine, before 1935 the Crown responded to ongoing hardship and other socio-economic problems among Maori in Te Urewera. As with its response to the famine, the Crown's response to everyday need was minimal by later standards. This was despite serious and ongoing hardship across our inquiry district. Many communities experienced recurring shortages of food, of which the 1898 famine was only the worst. A vicious cycle developed in which malnutrition made people more vulnerable to sickness, which in turn perpetuated poverty, leading to further food shortages. As we saw in our discussion of living conditions, there were numerous epidemics in Te Urewera during this period, some of which killed large numbers of people. Illness was also exacerbated by inadequate housing; we received many accounts of dwellings which were overcrowded, unable to properly keep out the elements, or which lacked even the most basic sanitary facilities. In the early twentieth century there was some improvement in parts of the inquiry district, particularly the dairy farming region in the north, the timber towns in the west and, temporarily, at Maungapohatu. However living conditions remained far below standards of the time even in those areas.

From the evidence presented to us, it is clear that the Crown was fully aware of the poor conditions in Te Urewera. Most of our evidence on periods before the 1930s came from Crown employees, who reported their observations to their superiors. Details may have been lacking in some cases, but there is no doubt that the Crown knew there were serious problems. It did take a few steps before the mid 1930s to improve Maori living conditions and educational opportunities in Te Urewera. One of these, famine relief, has already been discussed. Here, we examine pensions and relief work, health care and sanitation, and education.

23.6.3(1)

Historian Margaret McClure argues that Maori were generally regarded by Pakeha administrators and officials as less 'deserving' of benefits than Pakeha applicants. She writes that

> Distinctions between deserving and undeserving have also been founded on race; this has meant that Maori who have claimed social security rights have been more likely than Pakeha to be subject to scorn, scrutiny, and supervision. Since the old-age pension's introduction in 1898 there was a long history of official and public scepticism over Maori rights to pensions. It is ironic that the extreme poverty of Maori communities became the rationale for different treatment. In critical Pakeha eyes, Maori poverty was a sign of lower expectations rather than greater need, and by the 1920s living in a pa had become a reason to disbar Maori from full pension entitlement.[382]

As we will see, many administrators assumed that all Maori had low living costs, and were more likely to 'waste' their money, for example by spending it on alcohol. This mindset, together with other Crown practices and policies which marginalised Maori, highlights the limited ability of Maori to influence a range of official policies at this time; they were unable to prevent outright discrimination on the part of Crown agents.

As we noted earlier in this chapter, claimants and the Crown disagreed over whether the Crown had a duty to provide welfare assistance to Te Urewera Maori. Claimant counsel submitted that, for a variety of reasons, the Crown has always had a duty to provide Maori in Te Urewera with the same access to social services as New Zealanders elsewhere, but has failed to do so. Crown counsel responded that the Crown had never had any such duty, and that in particular it is not obliged to provide people in 'remote' areas with the same level of service as people in other parts of the country. Crown counsel submitted that there was insufficient evidence to make any assessment in regard to adequacy of services, and that that quality of service should be judged by the standards of the time, taking into account less advanced medical technology, and prevailing ideologies about the role of the state.

(1) *Pensions and relief work*

Before the passage of the Old-age Pensions Act in 1898, pensions and other financial support were provided by the state in a rather ad-hoc manner. Some early settlers were given small relief payments if they had no family support and were considered 'deserving', but there was no right to such support.[383] Maori do not seem to have received any discretionary relief payments, but some did receive pensions from the Civil List; we know of six senior Tuhoe chiefs in receipt of Crown pensions from 1872 until at least the end of the century.

382. Margaret McClure, 'A Badge of Poverty or a Symbol of Citizenship? Needs, Rights and Social Security, 1935–2000' in Bronwyn Dalley and Margaret Tennant, eds, *Past Judgement: Social Policy in New Zealand History* (Dunedin: University of Otago Press, 2004), p 145

383. Thomson, *A World without Welfare*, pp 83–103

These were not pensions in the present day sense of the word, which is associated exclusively with old age. Rather, they were pensions in an older sense: an ongoing payment from an authority to its supporters. Binney wrote that chiefs and the government both saw the pensions 'as affirming an "alliance" or association'. When one of the six died in 1894, his pension was inherited by his son, with the stated purpose of 'strengthening friendly relations' between Tuhoe and the Crown.[384] Although the income would have been appreciated, and probably sorely needed, the pensions were not welfare benefits, since they were paid on the basis of status rather than need.

Some limited relief from hardship was available. In 1895, Seddon spoke during his visit to Galatea of the extreme poverty of Ngati Haka Patuheuheu, saying that

> I admit the force of your argument, that, having stood loyally and true to the Queen, and being now in a destitute condition, their case is one where the Government should assist, so that they should not be in want . . . Nothing would give me more pain than to think that those who had been friends of the Government were left in want in their old age. I do not wish that, and will not let [it] be if it is in my power to prevent it.[385]

Seddon explained he had a fund available 'out of which I can alleviate suffering of that kind'. However, despite the fact that poverty was severe and widespread, he only asked the hapu to nominate 'one or two extreme cases' for him to consider, probably to receive Civil List pensions.[386] This example illustrates the ad hoc and personalised nature of hardship relief before the beginnings of the welfare state. Although we received little evidence on relief of this kind, it appears to have been highly dependent on personal connections and chance events such as a visit by the Premier. Another consideration was the Crown's perception of a hapu's 'loyalty' in the past.

In 1898 the government passed the Old-age Pensions Act, which in some ways was a formalised version of earlier charitable relief: applicants had to meet strict income and asset tests, and demonstrate that they were 'deserving' by having 'good moral character'. To be 'of good moral character', the applicant had to have been 'leading a sober and reputable life' for five years preceding the application, not been imprisoned for more than four months, and never left their spouse for more than six months, nor failed to maintain their children. They also had to be at least 65 years old, resident in New Zealand for at least 25 years, and not 'Asiatic'.[387] Undetermined interests in Maori land, and any other landholdings not under

384. Binney, 'Encircled Lands' (doc A15), pp 20–21

385. 'Pakeha and Maori: A Narrative of the Premier's Trip Through the Native Districts of the North Island', AJHR, 1895, G-1, p 64

386. 'Pakeha and Maori: A Narrative of the Premier's Trip Through the Native Districts of the North Island', p 64

387. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 997; Margaret McClure, *A Civilised Community: A History of Social Security in New Zealand, 1898–1998* (Auckland: Auckland University Press, 1998), pp 17–18; Gaynor Whyte, 'Beyond the Statute: Administration of Old-Age Pensions to 1938', in *Past Judgement: Social Policy in New Zealand History*, ed Bronwyn Dalley and Margaret Tennant (Dunedin: Otago University Press, 2004), p 126

'defined legal title' were taken into account at the discretion of the Stipendiary Magistrate.[388] Prospective pensioners had to appear in a magistrate's court for their initial application, and thereafter apply yearly to have their pension renewed. Not surprisingly, only a minority of those over 65 were granted pensions, and some successful applicants received a lower rate of pension due to the means test. Even the full amount was low, set at one third of a 'low working-man's wage'.[389]

At first, the majority of Maori over the age of eligibility had little trouble being granted pensions. In 1901, an estimated 65 per cent of Maori over 65 were receiving pensions, compared with 36 per cent of Europeans.[390] That same year, 99 Maori in the Whakatane District had been approved for the pension: nearly half of all Maori aged 60 and over in the district.[391] The high uptake was almost certainly reflective of high levels of Maori poverty. Shortly afterwards, though,

> the administration of pensions was tightened noticeably, the claims of pension applicants were challenged increasingly, the moral character requirements were pressed hard, and the proportion of the old who qualified for a pension fell.[392]

Overall, the practice seems to have been to deny pension applicants the benefit of any doubt as to eligibility. Between 1902 and 1904, the proportion of the total population eligible by age and residence receiving pensions dropped from 43 to 27 per cent. Many pensioners were struck off the roll after their eligibility was reinvestigated or when they applied for renewal.[393]

Maori pensioners were hit particularly hard by the new policies, resulting in a large drop in their number. In Whakatane District the numbers fell from 84 in 1902 to 36 in 1906.[394] By 1922 there were just eight Maori pensioners in the district.[395] Maori had two main problems proving their eligibility: supplying proof of their age, and the nature of their interests in land. From 1903 or earlier, the Deputy Registrar at Whakatane was instructed to ask for the 'most conclusive evidence' and 'absolute proof' of the age of Maori.[396] This was difficult, given that those old enough to qualify would have been born before the signing of the Treaty of Waitangi and well before any documentation of identity became common. They had to rely instead on alternative evidence, such as personal testimony. For example, Gilbert

388. Old-age Pensions Act 1898, s 66
389. McClure, *A Civilised Community*, p 23
390. Whyte, 'Beyond the Statute', p 132
391. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 997; Census 1901, available at http://www3.stats.govt.nz/historic_publications/1901-census/1901-results-census/1901-results-census.html#d50e479046
392. Thomson, *A World Without Welfare*, p 162
393. Whyte, 'Beyond the Statute', p 128
394. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), pp 997–998
395. Ibid, p 998
396. Instructions from the Registrar in 1903 and 1906 (Murton, 'The Crown and Peoples of Te Urewera' (doc H12), pp 1000–1001)

Mair testified in 1911 that he had known several Whakatane District pension applicants since the 1860s or earlier.[397]

Determination of interests in land was even more difficult. Pension administrators were instructed to refer all Maori applications to the Native Land Court and then to a Land Purchase officer for a land valuation. As a result, Wairoa's Deputy Registrar complained that Maori pensioners were 'starving' because delays in their land statements had prevented their pensions being renewed.[398] Even once the paperwork had come through, elderly Maori were often denied pensions on the grounds that they had land assets, regardless of whether the land actually returned any income. As we have seen, much of the land Te Urewera Maori owned was of little economic value and brought in no income; for example interests in the rim blocks tended to be scattered, and difficult or impossible to use in any way other than sale. However such interests were still considered an asset for pension purposes, based on their government valuation.[399]

In addition to declining many Maori pensions, from 1904 the Pensions Department also encouraged local officials to reduce all Maori pensions to two-thirds of the amount received by Pakeha.[400] Registrar of Old-Age Pensions Edmund Mason justified this discrimination by arguing that the 'communistic customs' of Maori meant that they could live on less.[401] The magistrates were independent and so could ignore this advice; Maori pensions were reduced in Wairoa, but not Whakatane, Rotorua, or Opotiki.[402]

Welfare administration was centralised in 1925, and the following year a uniform policy was introduced whereby most Maori pensions were reduced to a standard 75 per cent of the maximum rate, unless they had no interest in land, or lived in a 'European fashion', and paid rent.[403] This was again justified with the argument that Maori lived communally, and thus needed less than Pakeha. Commissioner of Pensions George Fache claimed that 'Where the communal life in the Pah is lived, £26 per annum to a Native is equivalent to what £39 per annum is to a European'. He also suggested that communal lifestyles led to the pension being misused, for example by giving it 'to Ratana', or to younger people who spent it on alcohol.[404] Here we see again the Pakeha-determined distinction between 'deserving' and 'undeserving', and how it fell particularly hard on Maori. By 1937, 93 per cent of Maori

397. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), pp 1003–1004.
398. Whyte, 'Beyond the Statute', p 132
399. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 1009
400. The maximum amount was originally £18 year, meaning Maori would get £12; the following year the maximum was raised to £26. McClure, *A Civilised Community*, pp 26–27; Whyte, 'Beyond the Statute', pp 132–133; Old-age Pensions Act 1905, s2
401. McClure, *A Civilised Community*, p 26
402. Whyte, 'Beyond the Statute', p 133, Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 1009
403. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), pp 1009–1011; Whyte, 'Beyond the Statute', p 134; see also Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(Q)), pp 25–27, 44
404. Commissioner of Pensions to the Hon. Minister of Pensions, 27 May 1926 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(Q)), p 26)

old age pensions were being paid at a reduced rate.[405] Contrary to Fache's assessment, we received evidence that pensions were insufficient for even basic needs. In 1930, for example, the Head Teacher at Rangitahi school stated that Maori 'who are in receipt of pensions complain that the pension money is not sufficient to buy food and clothing.'[406] Centralisation of welfare administration does at least appear to have resulted in increased Maori pensioner numbers; between 1922 and 1926 the number in Whakatane District went from eight to 67.[407]

Other welfare benefits were gradually introduced, but, like pensions, were very difficult to acquire. Widows' pensions were introduced in 1911 and required applicants to have young dependent children, and to fulfil means and morality criteria; once again, to be 'deserving' of help.[408] Even at a national level, the number of recipients remained tiny.[409] Widows' pensions paid to Maori were also subject to a general reduction, after 1926, to 75 per cent of the maximum rate, for the same reason as the reduction in the old-age pension.[410] The only pre-1935 benefit which does not seem to have involved discrimination against Maori was the Family Allowance, introduced in the late 1920s. This paid 2s per week in respect of every child after the first two, in families with a household income of less than £4 a week. By 1938, 1,822 Maori families nationally were receiving the allowance for a total of 9,577 children.[411]

Maori also experienced discrimination in relation to unemployment relief work. As it had during the 1898 famine, the Crown used roads and other public works to provide a way for the unemployed and otherwise poverty-stricken to earn money. With the onset of the Great Depression, use of relief schemes expanded, and 'relief camps' were created to house large numbers of men on relief work.[412] The Unemployment Act 1930 established an Unemployment Board to institute mass relief schemes, funded by a compulsory levy on most male workers that was supplemented from general taxation from 1931.[413]

Maori were exempt from the levy, but could choose to contribute and thereby become eligible for relief work. By 1935, nearly 75 per cent of eligible Maori were contributing.[414] Maori who participated in relief work, however, were generally paid at lower rates than non-Maori, despite paying the same contributions.[415] A report in 1936, shortly after rates were equalised, showed that, for example, married men with 3 children in country districts had received £1

405. Whyte, 'Beyond the Statute', p 134
406. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 1012
407. Ibid, p 998
408. McClure, *A Civilised Community*, pp 31–33
409. Ibid, pp 35, 47
410. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 1010
411. Ibid, pp 1031–1032
412. John E Martin, *Holding the Balance: A History of New Zealand's Department of Labour, 1891–1995* (Christchurch: Canterbury University Press, 1996), p 163
413. Ibid, p 172
414. 'Report of Unemployment Board', AJHR, 1935, H-35, p 8. The Board reported that 'Some 13,000 Natives have elected to become contributors to the Unemployment Fund' out of an estimated 17,700 eligible male adults.
415. Unemployment Amendment Act 1931, s 9(1)(c)

13s per week if Pakeha and £1 10s if Maori.[416] As this indicates, rates varied by geography as well as ethnicity, with men in rural areas being paid less than men in cities. Women were not eligible for relief work at all.

In 1934–35 the Unemployment Board spent £195,578 on all forms of unemployment assistance to Maori. This equates to 4.4 per cent of the funds available for unemployment relief.[417] The 1936 census showed that Maori made up 5.2 per cent of the population. Given that only 75 per cent of eligible Maori were contributing to the relief fund, on a crude population basis they were therefore getting slightly more than their fair share of unemployment assistance.[418] However, a disproportionate number of Maori were unemployed, as most lived in rural districts where there was little work. In 1935, for example, the Unemployment Board estimated that monthly registered unemployment among Maori ranged from 5,000 to 7,000 during the previous year.[419] In contrast, total registered unemployment for the year peaked at 49,393 in July 1935.[420] Maori therefore constituted about 10 to 14 per cent of the unemployed, at least twice their representation in the general population, despite the fact that proportionately fewer Maori were of working age. This means that Maori, including those in Te Urewera, should have received considerably more unemployment assistance than they did.

Maori employed in relief work in Te Urewera mostly worked on the land development schemes, with their pay coming from the Unemployment Board via the Maori Land Settlement Board.[421] The schemes therefore served the dual purpose of assisting Maori landowners to increase productivity, and providing work for unemployed Maori.[422] In the 1933–34 financial year, for example, £74,080 of unemployment funds were spent nation-wide on employing Maori on development schemes.[423] Four development schemes operated within the inquiry district although one, the Ngati Manawa scheme, was not constituted until 1937.[424]

As the Hauraki Tribunal found, the evidence of discrimination against Maori in provision of employment relief is 'quite clear'.[425] We agree, and add that it is equally clear with regard to the payment of old-age and widows' pensions; in each case, Maori were almost

416. 'Report of the Secretary of Labour Upon Activities and Proceedings Under the Employment Promotion Act, 1936', AJHR, 1937, H-11A p 7

417. 'Report of Unemployment Board', p 9. The total spent on unemployment relief in 1934–5 was £4.45 million.

418. If it is assumed that benefits should reflect contributions, Maori should have been getting about 4 per cent of total assistance. This does not take into account the different age structure of the Maori and Pakeha populations.

419. Ibid

420. Ibid, p 30

421. Murton, 'Summary of evidence of Brian Murton: Stage Three' (doc J10), p 34; Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 656

422. Murton, 'The Crown and Peoples of Te Urewera' (doc H12) p 656

423. 'Report of the Unemployment Board', pp 3, 7. Unemployment funds represented only part of the total budget for a development scheme, which included a variety of loans and grants.

424. David Alexander, 'The Land Development Schemes of the Urewera Inquiry District' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002 (doc A74), p 338

425. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 3, p 1184

always paid less than Pakeha. This was justified at the time mainly on the grounds that Maori had lower living costs and needs due to their communal way of life. It is fair to say that in this period Maori tended to share their resources, and had lower accommodation costs because they did not need to rent. However the policy failed to take into account other factors such as the high cost of food and other supplies in areas such as Te Urewera.[426] It also failed to take into account the high needs of most Maori communities; most had little income and were faced with very poor living conditions and high rates of disease. Crown counsel conceded that Maori were treated differently, but emphasised that this was because of particular circumstances such as ownership of unproductive land, and difficulty proving age, rather than racial discrimination as such.[427]

Given that there was no general legal entitlement to benefits at this time, we think it might reasonably be argued that the Crown was entitled to pay a lower benefit to anyone, Maori or Pakeha, who genuinely had lower living costs than the typical recipient. However it was not reasonable for the Crown to reduce the rates paid to all Maori without consideration of individual circumstances. Nor was it reasonable for the Crown to refuse to pay pensions to elderly Maori who could not clearly prove their age, or who had interests in multiply-owned land, regardless of whether it returned any income. Whether or not the Crown had a general duty to provide welfare benefits and other hardship relief in this period is an issue that will be addressed at the end of this chapter. Here it is sufficient to say that the Crown's provisions for elderly and impoverished Maori were discriminatory, and seem to have been unreasonably low by the standards of the time.

(2) *Health care and sanitation*

One of the most serious ongoing problems facing the peoples of Te Urewera was disease and general ill health. In our examination of living conditions, we outlined the abysmal state of health of the peoples of Te Urewera. The Crown did provide some health care and public health services, in forms such as subsidised doctors and nurses, free medicines, vaccination, and assistance with sanitary improvements. In addition, Maori Councils (later Maori Health Councils) were established partly in order to help Maori improve their living conditions. However, none of these was well funded and sufficiently accessible to properly counter the severe health problems in Te Urewera. In this section we examine the nature and adequacy of services provided before 1935, specifically the Native Schools medicine scheme, vaccination, epidemic relief, medical professionals, hospitals, and sanitation. We also look at the Maori Councils system.

Counsel for the Crown and the claimants spent some time debating whether the health services provided to Te Urewera Maori were adequate; the Crown gave more attention to this issue than to the adequacy of any other social service. Claimant counsel submitted that

426. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 1012
427. Crown counsel, statement of response to stage 3 issues, 13 December 2004 (claim 1.3.7), pp 21–23

the health services provided to Te Urewera Maori in this period were inadequate or non-existent, despite the Crown being aware of ongoing and severe health problems.[428] Crown counsel responded, first, that the Crown has never had a duty 'in a legal or Treaty sense' to provide health care to its citizens. However they conceded that, where the Crown does provide such care, Maori and Pakeha have the same right to treatment.[429] The Crown did not take responsibility for 'the co-ordinated delivery of medical and hospital treatment to the wider community' until the late 1930s.[430] Where the Crown did take on a duty to provide services, counsel said, 'equal delivery of that to all its citizens may be impacted by practical factors such as remoteness, disposition to use services, and the higher costs of servicing isolated areas'. The test should therefore be what is fair or equitable in the circumstances, rather than what is equal.[431]

In relation to adequacy of health care in Te Urewera, Crown counsel also submitted that 'there is insufficient evidence on which to base findings of inadequacy.'[432] In the first half of the twentieth century, they said, all health services were inadequate by current day standards.[433] Counsel submitted that the Crown dealt well with medical emergencies in Te Urewera, although this seems to relate mostly to periods later than that covered in this section.[434] They did cite policies and initiatives from before 1935, however, including the Native Sanitary Inspectors, the Maori Councils, and the Division of Maori Hygiene.[435] The Crown conceded that people in rural areas, such as Te Urewera, generally had less access to health care, but this was because of 'the relative isolation of their settlements, rather than positive neglect, or a poor standard of health care.'[436] Counsel submitted that 'many Pakeha farming communities would have experienced similar problems.'[437] As we noted in section 23.4, counsel for Nga Rauru o Nga Potiki responded that Te Urewera is remote only by the Crown's definition, and that provision of health services should not be affected by geography.[438] We add that Pakeha farming communities generally tended to be financially better off than Maori communities, and did not face cultural and language barriers to medical aid, as many Maori did.

In the late nineteenth and early twentieth centuries, the Crown had limited involvement in health care. Hospital care was provided on a user-pays basis, and people were

428. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p 248; counsel for Tuawhenua, synopsis of submissions, 10 June 2005(doc N9(b)), p 19; counsel for Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), app A, p 183
429. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 15
430. Crown counsel, statement in response, 13 December 2004 (claim 1.3.7) p 31
431. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, pp 15–16
432. Ibid, p 16
433. Crown counsel, statement in response, 13 December 2004 (claim 1.3.7), p 29
434. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 18
435. Ibid, p 19
436. Crown counsel, statement in response, 13 December 2004 (claim 1.3.7), p 29
437. Ibid, p 30
438. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 350

generally expected to provide for their own health care, for example, by paying for doctors themselves.[439] The Crown's involvement in health care for the general population was limited mostly to subsidising hospitals and funding vaccinations. There were a few initiatives specifically for Maori, such as the funding provided to some doctors and pharmacists to treat Maori who could not afford medical fees, and the distribution of medicines by Native School teachers. Historian W H Oliver described nineteenth century health initiatives in general as 'often tardy and inadequate, and always dominated by strict financial constraints.'[440] Consequently, health services for Pakeha and Maori alike were inadequate by today's standards.[441] Health historian Raeburn Lange has stated that 'at no stage before 1900 did the government see a need for concerted official action against low standards of Maori health.'[442]

From 1900 Crown involvement in health care began to increase, partly in the context of the general expansion of the Crown's role under the Liberal government, but also because of advances in medical science, such as the new discipline of bacteriology.[443] The Public Health Act 1900 marked an expansion of state involvement in public health, and set up a Public Health Department that was largely concerned with sanitation and the control of infectious diseases.[444] It was merged with the Department of Hospitals and Charitable Aid in 1909. Expenditure on hospitals increased, but at the expense of preventative public health.[445] In the wake of the 1918 influenza pandemic, the health system was again overhauled and expanded.[446]

One of the earliest means of providing medical aid to Maori in Te Urewera, as elsewhere, was through the Native Schools. Teachers at Native Schools could request up to £2 a year worth of basic medicines, which were then given to pupils and their families free of charge.[447] Medicines were distributed from schools at Galatea; Te Houhi; Te Whaiti; Ruatoki, which received £3 worth due to its large roll; and possibly elsewhere.[448] At Galatea in the 1890s, teacher Joseph Wylie often ran out of supplies due to high demand, and had to purchase more himself. He wrote that 'The Natives here are very poor and will not pay for medicine. In fact they have not got the money to do so, and I cannot allow them to die for want of

439. Waitangi Tribunal, *The Hauraki Report*, vol 3, p 1175
440. Ibid, p 1181
441. Ibid
442. Raeburn Lange, *May the People Live: A History of Maori Health Development, 1900–1920* (Auckland: University of Auckland Press, 1999), p 68
443. Derek Dow, Safeguarding the Public Health: A History of the New Zealand Department of Health (Wellington: GP Print, 1995), pp 40–41
444. Waitangi Tribunal, *The Hauraki Report*, vol 3, pp 1175–1176
445. Dow, *Safeguarding the Public Health*, pp 67, 70
446. Ibid, pp 92–93
447. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 140–141, 146
448. Ibid, pp 140–153, Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1407–1410

treatment.'[449] We received evidence that the medicines made a positive difference, but given the limits of medical treatment at the time, they would have made little difference to the widespread ill health in Te Urewera, even if more had been made available.[450]

More action was sometimes taken when epidemics broke out. In 1897, Seddon dispatched a doctor into Te Urewera to deal with an influenza outbreak at Te Whaiti and Ruatahuna. Yet this was only after a request from Elsdon Best, and after Wylie threatened to close down his school for two weeks so that he could nurse the sick.[451] Aid improved in the early twentieth century, once the Public Health Department was established. Typhoid camps were established at Waimana at some point in the mid 1910s, and at Maungapohatu in 1925.[452] After the Maungapohatu hospital was established, there were no further fatalities from the epidemic, which had by that stage killed several children. Medical workers were aided in this instance by mission workers and Rua's committee.[453] It appears that the tent hospital was established at least partly because an Otago Medical School professor happened to be visiting at the time.[454]

As well as tent hospitals, the Crown provided vaccination and inoculation against some infectious diseases. In 1904, Native Health Officer Maui Pomare reported that 630 Maori in 'Tuhoeland' had been vaccinated against smallpox.[455] During the 1913 'smallpox scare', Native Medical Officer J C Wadmore, based in Whakatane, claimed that he had vaccinated 'well over' 1000 Maori in Whakatane County.[456] Further vaccinations occurred at Murupara.[457] From the 1920s the government also began a programme of inoculating Maori children in most parts of the country against typhoid. From 1928 to 1932 District Nurses visited all the schools throughout Te Urewera and inoculated hundreds of children against the disease.[458]

The Crown's biggest one-off health challenge before 1935 was the influenza pandemic of 1918. In response to the pandemic, Dr C S Murray of the New Zealand Medical Corps visited Murupara, Waiohau, Waimana-Matahi and Ruatoki.[459] Temporary hospitals for Maori were

449. J Wylie to Seddon, 17 September 1894 (Hutton and Neumann 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 147)

450. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 146

451. Binney, 'Encircled Lands' (doc A15), pp 268–269

452. Lange, *May the People Live*, p 174; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1735

453. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1655; Albert Henderson, School Medical Officer to the Medical Officer of Health, 12 June 1925 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(EE)), pp 143–144)

454. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1735

455. Terry Hearn, 'Maori, the Crown, and the provision of health services, 1900–1945'(commissioned research report, Wellington: Crown Law Office, 2005) (doc M1), pp 11, 15; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1845

456. Wadmore to. Hultquist, 23 February 1937 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(QQ)), pp 42–43

457. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1662

458. Ibid, pp 1826–1829; Derek Dow, *Maori Health and Government Policy, 1840–1940* (Wellington: Victoria University Press, 1999), pp 191–192

459. Murray to Dr Hughes, 'Report – Influenza Epidemic 1918', 30 December 1918 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(EE)), p 132)

established at Ruatoki and Waimana schools, and Maori were also treated in a marquee tent erected on the lawn of a private residence at Waimana. Teachers and police officers visited and helped care for the sick, and medical supplies were sent in.[460] The police constable at Te Whaiti, A Grant, enforced an eight-week long isolation policy for the interior of Te Urewera, preventing anyone from infected areas from visiting the interior.[461] There was still widespread illness at Ruatahuna, but according to the Auckland Medical Officer of Health, Grant's actions prevented higher levels of disease.[462] We note that nearly all the medical aid was provided by volunteers.[463] Historian Katharine Goodfellow has written in regard to the outbreak at Ruatoki that the 'Health Department sent medicine, but there was virtually no outside medical aid as the nearest doctor, Dr Smythe in Whakatane, was too busy tending his local patients.'[464]

The entire medical system was stretched to breaking point by the pandemic, but the amount of sickness might have been reduced if there had been a doctor or nurse stationed in Te Urewera before the pandemic began. Since the 1850s, the Crown had subsidised doctors, known as Native Medical Officers (NMOs), to treat Maori for free.[465] This not only made it possible for indigent Maori to receive medical treatment, but also made medical practice in Maori areas more financially viable. The money came from the Civil List, with £3,000 a year earmarked for general Maori health spending, including the NMOs.[466] This was not enough to provide doctors to cover all Maori communities, and Te Urewera was one of the areas with insufficient coverage.

There were NMOs in Whakatane from about 1906 to 1937, and at Opotiki from about 1910 to 1937, both of whom sometimes visited Te Urewera.[467] There was also an NMO at Wairoa from about 1884, who may have visited Waikaremoana.[468] All of these doctors would have found it difficult to reach patients in Te Urewera, and the patients would likewise have

460. Ferguson, NZ Police Sergeant Opotiki to Inspector of Police, Hamilton, 10 December 1918 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(EE)), p 134)

461. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1658–1659

462. 'Sister Annie' *The Daily Post*, 25 August 1948 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(B)), p 103); Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1658–1659

463. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12) pp 1735–1736

464. Katharine Goodfellow, 'Health for the Maori? Health and the Maori Village Schools, 1890–1940' (MA Research Essay, University of Auckland, 1991), p 30 (Hutton and Neumann 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 161)

465. See, for example, Waitangi Tribunal, *The Hauraki Report*, vol 3, pp 1171–1172, 1175; Waitangi Tribunal *Te Tau Ihu o te Ika a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 2, p 968

466. Dow, *Maori Health and Government Policy*, pp 94–95

467. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1761–1763.

468. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 666; 'Return of Subsidised Native Medical Officers' 21 September 1906 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(QQ)), p 12); 'Re: Circular No 295: List of Medical Attendants on Natives', July 1909 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)QQ)), p 19)

found it difficult to reach them.[469] For residents of western and central Te Urewera, it would have been quicker to get to Rotorua than to the coast, but there was no NMO at Rotorua. In effect, then, parts of the inquiry district had minimal NMO coverage, and most of it had none at all. Despite this, the overall budget for NMOs was reduced in the 1910s, as part of a wider programme of government cost-cutting.[470]

For much of the early twentieth century, the NMOs best able to serve Maori in Te Urewera were Dr Eric Candy from Opotiki, and Dr J C Wadmore in Whakatane.[471] East Coast District Medical Officer of Health Dr H B Turbott wrote in 1932 that Dr Candy 'does very little, and most of his work could be avoided if it were not for a local and unjustifiable rule that admissions to hospital will only be made through a medical man.'[472] By contrast, Turbott wrote that Dr Wadmore

> Gives freely and willingly his services as required, and is the only subsidized medical officer to take his subsidy seriously. Looks on himself as Government official charged with the supervision of Maori health (curative).[473]

However Turbott also noted that he was 'unpopular with Maoris, unfortunately from, they say, incapability.'[474] The Mataatua Maori Council wrote in 1933 that Maori in the district 'desire that no more of their patients be taken to this doctor for treatment because too many women have died.'[475] Turbott investigated these allegations and could not substantiate them. However he acknowledged that Wadmore 'had lost mana with all but the minority of Whakatane County Maoris.'[476] Both doctors' subsidies were cancelled in 1937, as the NMO system was replaced by the new Social Security system and increased numbers of district nurses.[477]

Apart from the NMO system, the main system for providing medical aid to Maori was the Native Health Nurse service, founded by the Public Health Department in 1911.[478] Amelia

469. The first and only Native Medical Officer stationed in Te Urewera was Dr R R Hooper, who practised at Galatea from 1884 to 1886. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 141

470. Dow, *Maori Health*, pp 96–97, 118. Expenditure on Maori health increased in 1909, but was still noted as inadequate to meet Maori needs, as discussed in the text below.

471. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1761

472. Turbott, Medical Officer of Health, Gisborne, 'Memorandum for Director-General of Health, Wellington', 14 December 1932 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(QQ)), p 31)

473. Turbott quoted in Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1762. Turbott also said "The doctor [Wadmore], it is agreed on all sides, is kindly and willing to give his best, and never refuses to attend Maori work." Turbott, Medical Officer of Health, Gisborne to the Director-General of Health, 7 August 1933 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(HH)), p 92)

474. Turbott, quoted in Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1762

475. Translated letter from Mataatua Council to Director-General of Health, quoted in M H Watt, Director-General of Health, memo to Medical Officer of Health, Gisborne, 24 July 1933 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(HH)), p 91)

476. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1762

477. That is, in 1937, the Minister of Health decided it that NMOs were not necessary in areas already served by a district nurse. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1763

478. Dow, *Safeguarding the Public Health*, p 83

Bagley, who oversaw the scheme, wrote that it aimed to provide nursing care to Maori in their own kainga, rather than in a foreign environment such as a hospital.[479] Officials hoped it would be more effective than the NMO system.[480] The nurses were required to 'visit the kaingas, report on and attend to the sanitation and sickness amongst Maoris, and strive to educate Maoris in these directions'. They would '*preach* and show by practical example the *gospel* of cleanliness and proper sanitation' (emphasis in original).[481] Until about the 1940s, it appears that nurses largely concentrated on treating the sick, rather than long-term preventive work. This was largely because the nurses were the most available medical professionals in many rural communities, and thus had to spend most of their time dealing with immediate needs.[482] Some preventive work was undertaken in the late 1920s and early 1930s, however, such as vaccination against typhoid.[483] The nurses' services were usually provided free of charge. They could charge fees where appropriate, and Maori often provided voluntary donations to the scheme, but nurses could not refuse care if the patient could not afford it.[484] By 1919, there were 18 Native Health Nurses at work across the whole of New Zealand, a total which increased to 23 by 1930.[485] Edward Ellison, the Director of the Division of Maori Hygiene, and M. H. Watt, the Deputy Director-General of Health, recognised that the provision was inadequate, and that Te Urewera was one area urgently requiring more nurses.[486]

The first Native Health Nurse to serve in Te Urewera was Ellen Taare, who briefly worked at a typhoid camp at Waimana in the mid 1910s, before resigning due to the gruelling nature of the work.[487] The first permanent Native Health Nurse to be stationed within Te Urewera was Ellen MacPherson, an unqualified part-time nurse at the Presbyterian mission at Te Whaiti, from 1923. She was paid a subsidy by the government, and made occasional visits to Ruatahuna, Murupara, and Maungapohatu.[488] There were some full time nurses stationed near the inquiry district from the 1920s. In 1928, there were nurses at Frasertown and Nuhaka who might have served Waikaremoana, but we lack evidence about their activities.

479. Comments of Amelia Bagley, Superintendent of the Native Health Nursing Scheme (Alexandra McKegg, 'The Maori Health Nursing Scheme: An Experiment in Autonomous Health Care', *New Zealand Journal of History*, vol 26, no 2 (1992), p 157

480. Hearn, 'Maori, the Crown, and provision of health services' (doc M1), p 22

481. Inspector-general of Hospitals and Charitable Institutions and Chief Health Officer, 'Public Health and Hospitals and Charitable Aid, AJHR, 1911, H-31, pp 4, 78 (McKegg, 'The Maori Health Nursing Scheme: An Experiment in Autonomous Health Care', p 154)

482. 'Annual Report, East Cape District . . . 1943' (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1810)

483. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1827–1829

484. Hearn, 'Maori, the Crown, and Provision of Health Services' (doc M1), p 22

485. Ibid, pp 24–25

486. Watt, Deputy-Director General of Health to the Director-General, 17 April 1930 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p 84); Ellison, Director Division of Maori Hygiene, to Secretary, Maori Purposes Board, 1 October 1930 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), pp 85–86); Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 303

487. Lange, *May the People Live*, p 174

488. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1798–1799, 1814

Neither nurse was provided with transport, so travelling to Waikaremoana would have been difficult.[489] We know more about the nurses appointed to Opotiki in 1920 and Whakatane in 1921. By 1928 both nurses (who were Pakeha) had Maori assistants. The nurses were required to visit Maori communities in northern Te Urewera, and provided with transport to do so; horses from 1921 and cars later on.[490] The cars greatly helped their mobility, and between 1928 and 1931 they visited most of the communities and schools of Te Urewera. The coverage was uneven, however. Ruatoki was visited about once a month on average, but Ruatahuna and Maungapohatu were each visited only once in three years.[491] The Presbyterian missionaries, who had stations across Te Urewera, filled some of the gap in health provision, but it is not clear that any had formal medical training.[492] From the mission newspaper, it appears that they performed a similar role to the Native school teachers.[493]

Medical professionals in Te Urewera often found that, although medical help was generally welcomed, Maori there would not automatically accept Pakeha treatments and practices. According to health historian Alexandra McKegg, nurses had to work with Maori, rather than impose European practices upon them. If they did not compromise, Maori would not co-operate, making their job almost impossible.[494] For instance, Nurse Lillian Hill, who was Whakatane District Nurse in 1930, said

> You had to go along with them for a while, until you got to know them and they had confidence in you . . . and you would say to them, 'there you've shown me your ways now, what about you do it how I want you to do it', and they would say 'alright you do it'.[495]

But, she adds, they would only agree if they felt it was a 'good way'. Some nurses did not offer services in particular fields, as they were satisfied with the work of those offering traditional medical aid. For example, Nurse Enid Pickett did not offer maternity services in the Opotiki district in 1930, as there was an 'old man' in the district who had delivered more than a thousand babies without fatality.[496]

There have never been any hospitals in Te Urewera; residents needing hospital treatment have had to travel outside of the district. The most accessible hospitals were at Wairoa,

489. 'Nurse Inspector to the Deputy-Director of Health', 19 November 1928 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p 82)

490. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1798–1799

491. 'Epitome of work done and Itinerary' reports by nurses S Trewby and L A Hill, March 1928 to 31 August 1931 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(EE)), pp 151–189)

492. In 1928, there were Presbyterian mission stations at Waiohau, Te Whaiti, Ruatahuna, Maungapohatu, Matahi, Waimana, and Waikaremoana: *PWMU Harvest Field*, 8 March 1928, p x (Rose, supporting papers to 'A People Dispossessed' (doc A119(a), p 34). For an example of missionary medical treatment, see *PWMU Harvest Field*, 8 September 1925, p viii (Rose, supporting papers to 'A People Dispossessed' (doc A119(a), p 30).

493. *PWMU Harvest Field*, (Rose, supporting papers to 'A People Dispossessed' (doc A119(a), pp 21–41)

494. McKegg, 'The Maori Health Nursing Scheme' pp 155–157

495. Ibid, p 157

496. McKegg, 'The Maori Health Nursing Scheme', p 157

from 1897, Rotorua from 1916, Opotiki from 1917, and Whakatane from 1921.[497] Except for Rotorua, these were all small 'cottage' hospitals; in November and December 1923, for example, only 35 admissions were made to Whakatane Hospital, and 43 at Opotiki.[498] We have very limited evidence on the extent to which Maori used these hospitals. At Wairoa hospital, in the 1897–8 year, 11 out of 37 patients were Maori; in 1898–9, 14 out of 43; in 1899–1900, 10 out of 40; and in 1908, only one of 53 patients.[499] Since Wairoa was practically inaccessible from most of Te Urewera, it is unlikely that many of these patients came from the inquiry district.[500] There were a few Te Urewera admissions to other hospitals, such as two typhoid patients from Ruatahuna who were admitted to Rotorua Hospital in the late 1920s.[501]

Perhaps the most fundamental barrier to admission was distance. All the above hospitals were many miles from Te Urewera, over dirt tracks or bad roads. Even if Maori were fortunate enough to have access to a car – which was highly unlikely – it has been claimed that in the 1920s and 1930s travelling by car from Ruatahuna to Rotorua, a distance of 74 miles, took two days.[502] Travel within the district was also difficult, meaning that even the nurses were sometimes hard to reach. The road between Te Whaiti and Ruatahuna was so bad that, even though the two settlements were only 17 miles apart, the trip took about six hours even in good weather, and was sometimes impassable in winter.[503] The Tuawhenua research team wrote that, as a result

> The people – adults and children – were often sick, and died needlessly. The sick had to be carried for miles over rough country to any medical help. Sister Annie considered that 'these conditions were largely responsible for the heavy mortality' among the local people during times of epidemic disease.[504]

The Medical Officer commented that 'Maungapohatu is such an isolated place that it is difficult for us to give the assistance we would like to give to these Maoris.'[505] Travel costs would also have been prohibitive. Some of the isolation was due to the geography of the area, but it could have been dramatically reduced if the Crown had built its promised roads.

497. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1779–1780
498. Ibid, p 1780
499. Dow, *Maori Health and Government Policy*, pp 70, 103
500. In 1896, 131 'Urewera' lived in Wairoa County out of a Maori population of 1,766: *New Zealand Population Census, 1896*, app B, p li.
501. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 227
502. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1780–1781; Tuawhenua Research Team, 'Ruatahuna', (doc D2), p 226
503. Tuawhenua Research Team, 'Ruatahuna', (doc D2), pp 229–230, 251
504. Ibid, p 226
505. Medical Officer of Health, Auckland to the Inspector of Police, Hamilton, 20 August 1927 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(EE)), p 63)

Cost was also another major barrier, since hospital care was provided on a fee-for-service basis until 1938.[506] As we have seen, Maori in Te Urewera were generally very poor, and so patients ended up in debt to the hospitals. In 1913, for example, Numia Kereru wrote to the Native Minister requesting "a portion of the money for lands sold" in order to pay a hospital bill for his daughter Tiria.[507] In 1929 the Bay of Plenty Hospital Board estimated that it had recovered only 8.4 per cent of fees from Maori patients; in the 1933–34 financial year only 13 per cent was recovered, and the next year only 10.4 per cent.[508] Around this time, that is, in the middle of the depression, the Director-General of Health found it necessary to send out a circular advising that hospitals should admit all Maori in need of treatment, regardless of their ability to pay.[509] This suggests that some Maori were being denied admission. Dr Turbott, the Medical Officer of Health for the East Cape Health District (which included Wairoa, Whakatane, and Opotiki hospitals), replied

> The Hospital Boards have hindered with their reluctant admissions unless the Maori can pay. I think this statement is true, that most indigent Maoris would sooner suffer than obtain begrudged treatment from hospitals. This is our most frequent reply 'But I can't pay, and the hospital will send a bill' (and usually a summons from some Boards).[510]

It appears, therefore, that fear of debt kept Maori out of hospital even when the board was prepared to admit them.

The other main source of hospital income, apart from fees and government subsidies, was funds from local body rates. After the passage of the Urewera Lands Act 1921–1922, land owned by Maori in the former UDNR was exempted from rates.[511] This, along with the inability of Maori landowners outside the UDNR area to pay their rates, meant that the hospitals serving Te Urewera received far less rate money from Maori than they did from Pakeha. For example, in 1922 the Bay of Plenty Hospital Board received £26,000 in rates from Pakeha, while 4,000 Maori contributed only £1,400.[512] This was a source of great annoyance to hospital boards, and contributed to their reluctance to admit Maori.[513]

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506. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1784; Dow, *Maori Health and Government Policy*, p 61

507. Steven Webster, 'The Urewera Consolidation Scheme: Confrontations between Tuhoe and the Crown, 1915–1925'(commissioned research report, Wellington: Waitangi Tribunal, 2004) (doc D8), p 192

508. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1785, 1787

509. Watt, Director-General of Health to all Medical Officers of Health, 22 November 1932 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p 47)

510. Turbott quoted in Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1787

511. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1789–1790. Even before this Act, many Te Urewera Maori were exempted from rates: see Tom Bennion, 'The History of Rating in Te Urewera' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003 (doc A130), pp 106–109.

512. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1784–1785. Murton does not state how many Pakeha ratepayers there were.

513. *Whakatane Press*, 10 March 1922 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p 24); Lange, *May the People Live*, p 36

23.6.3(2)

Apart from the barriers of cost and distance, many Te Urewera Maori were deeply distrustful of hospitals at this time, particularly when surgery was involved. In 1922, government officials asked Ruatahuna land owners to gift land for a Presbyterian mission hospital, but were told that 'they objected to a place where doctors would be employed in cutting them up and stated that under no circumstances, whatever, would they agree to give up a piece of land for this purpose.' Even when assured that no surgery would be performed, the owners refused to give up land.[514] The Crown donated some land instead, but the hospital was never built, and the mission asked instead for a doctor to be stationed in the district.[515]

This cultural distrust of hospitals was present even when land was not involved.[516] Lange notes 'as a Pakeha institution, the hospital was suspect to many Maori. It was run by people who were usually disdainful of Maori beliefs.' Maori were afraid that hospital staff would breach personal tapu, and found repugnant the possibility of dying among strangers.[517] Maori aversion to hospitals was one of the reasons for the establishment of typhoid camps to deal with epidemics, and also for the Native Health Nurse system.[518] By the 1930s, however, it was reported that Maori were more willing to be admitted. In 1932 the Medical Superintendent of Rotorua Hospital noted that

> members of the Maori race are showing every year a greater confidence in the methods of Western medicine . . . This has been shown by the large numbers of these patients who come from the Urewera Country from which part previously very few could be induced to come to hospital for treatment.[519]

Given the distance between Te Urewera and Rotorua, and the other barriers to admission, these numbers may have been 'large' relative to previous small numbers, rather than being a high proportion of those in need of treatment.

The Crown also took some steps towards helping Maori improve their own community health. The Maori Councils Act 1900 was intended to provide 'a limited measure of self-government' to Maori communities by setting up a system of regional Maori Councils. Among other things, the councils were tasked with improving the sanitation and general hygiene of

514. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 225

515. Ibid, pp 224–226; Commissioner of Crown Lands to Under Secretary for Lands, 1 September 1926 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p 12); Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1782

516. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1813; Murton supporting documents (doc H12(a)(SS)), pp 129–130

517. Lange, *May the People Live*, pp 43–44

518. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1734–1735, Mason Durie, *Whaiora: Maori Health Development* (Auckland: Oxford University Press, 1994), pp 44, 168; McKegg, 'The Maori Health Nursing Scheme', p 157

519. Quoted in Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1786. Similarly, the numbers of Maori admitted to Wairoa Hospital increased from 198 in 1935–36 to 348 in 1936–37. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1787

Maori settlements.[520] *The Napier Hospital and Health Services Report* noted that 'the Maori Councils Act 1900 opened a small door, briefly, to self-help public health reform by Maori communities, but it offered minimal resources by way of assistance.'[521] It also found that 'there was inclusive community involvement' in the councils, which had 'no sequel until late in the century', when Maori and iwi health providers began emerging.[522]

Nineteen elected Maori councils were established under the Maori Councils Act, including the Mataatua Maori Council, which served Ngati Awa, Whakatohea, Ngati Whare, Ngati Manawa, and Tuhoe.[523] From 1904, Native Sanitary Inspectors were attached to these councils, and Elsdon Best was appointed as inspector for Mataatua.[524] He toured communities in Te Urewera, urging Maori 'to improve hygiene and to adopt safer practices for the disposal of household and human waste' and to improve their housing.[525] The council took some steps towards housing improvement; in 1904 Maui Pomare reported that 28 unsanitary whare had been demolished in 'Tuhoeland'.[526] Overall, though, Best was scathing about the council's efforts, accusing them of inaction and a lack of interest in sanitation.[527] Murton writes that by 1909 the council 'had ceased to operate.'[528]

The Mataatua council, like Maori Councils elsewhere, was stymied partly by a lack of funds.[529] Lange writes that

> Finance was a persistent problem for the individual councils since the only sources of revenue, apart from fines and hawkers' license fees, were donations, the dog tax, and government subsidies. Although at first some councils managed to collect a few hundred pounds in dog taxes, this was a time-consuming and unpopular source of funds. . . . It was thought that government grants and subsidies would assist the councils to undertake sanitary works. But the grants were very small – each council could expect only a share of the £500 or so usually allowed for this purpose – and subsidies were not forthcoming after the first two years; even then they were small. Such assistance barely covered the administrative expenses of the councils, and left almost nothing for sanitation projects. No grants at all were made after 1909.[530]

Communities were encouraged to improve their housing and sanitation, but few could afford any project which cost money. The only time the government assisted the construction of

520. Maori Councils Act 1900
521. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 326
522. Ibid, p 152
523. On official documents the name is spelt 'Matatua'; we have used the correct spelling in this report.
524. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1840
525. Hearn, 'Maori, the Crown, and provision of health services' (doc M1), p 15
526. Maui Pomare, 'Report of Dr Pomare, Health Officer to the Maoris', AJHR, 1904, H-31, p 61
527. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1843
528. Ibid, p 1847
529. Ibid, p 1858
530. Lange, *May the People Live*, p 195

a new water supply in Te Urewera during the first phase of the councils was in 1903 or 1904, when the council received £15 to match its expenditure on the Ruatoki water supply.[531] Best was also underfunded, with the result that he could not visit all settlements in his area, and in 1909 he was dismissed.[532]

The Mataatua council was also opposed by many Te Urewera communities. Best found that both Ngati Whare and Ngati Manawa were 'distinctly' hostile to the council.[533] Rua and his followers, along with much of Tuhoe, were also antagonistic, partly because the Council was dominated by Ngati Awa and partly because they saw it as a 'puppet agent' of Pakeha rule; they wanted real self-government as promised under the UDNR Act.[534] We note at this point that the General Committee provided for in the Act was not formed until 1909, and the Crown seems to have made no effort from that point to involve it in health and sanitation work. Binney wrote that Tuhoe felt that the Mataatua council 'had done little other than impose the highest tax-rate (license) on their dogs, so as to gain revenue for itself.'[535] However some Tuhoe, particularly those opposed to Rua, did support the council. Rangatira such as Numia Kereru, Akuhata Te Kaha and Te Pouwhare Te Roau did so because they wanted to improve living conditions for Tuhoe within the framework of the Councils.[536]

Rua and his followers also wanted to improve sanitation, but preferred to do it without the council's involvement. Binney, Chaplin and Wallace note that 'all the visitors to the community were impressed by the strict standards of hygiene imposed by Rua.'[537] He made use of modern western medical knowledge to combat the epidemics which still ravaged Maori communities in the early twentieth century. After the smallpox epidemic of 1913, which affected much of the northern North Island, Rua was 'singled out by Europeans for his cooperation . . . as he worked to ensure that all his people received the vaccine.'[538] In 1925, he talked to visiting Otago University Professor of Public Health and Bacteriology Charles Hercus about how to avoid a recurrence of a typhoid outbreak at Maungapohatu. Hercus suggested constructing houses with at least two rooms and outside toilets. Accordingly, the village was neatly laid out in a geometric pattern, with toilets, and fines for violating rules of hygiene.[539]

531. Lange, *May the People Live*, p 220
532. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1844. In 1912, all Native Sanitary Inspectors were laid off: Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 1, p 343.
533. Best to Pomare, 7 March 1905, AJHR, 1905, H-31, p 61; Best to Pomare, 20 February 1906, AJHR, 1906, H-31, p 75
534. Binney, Chaplin and Wallace, *Mihaia* (doc A112), p 74; Binney, 'Encircled Lands' (doc A15), p 309
535. Binney, 'Encircled Lands' (doc A15), p 309
536. Miles, *Te Urewera* (doc A11), p 325
537. Binney, Chaplin and Wallace, *Mihaia* (doc A112), p 52; see also Webster, *Rua and the Maori Millennium* (doc K1), p 200
538. Binney, Chaplin and Wallace, *Mihaia* (doc A112), p 79
539. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1929

The government revived the Maori Council system in 1919, in the wake of the influenza pandemic the previous year. Under the direction of Dr Peter Buck (Te Rangi Hiroa), the councils became Maori Health Councils and were encouraged to focus primarily on improving sanitation.[540] By 1929, Mataatua council had established marae committees at Ruatoki (Tauarau, Otenuku, Ohutu, Rewarewa, Waikirikiri), Ruatahuna (Makoi), Rangitahi, Maungapohatu, Ngahina, Te Whaiti, Matahi, Waimana (Tataiahape), and Waiohau.[541] However the council did not seem to be any more effective than in its earlier incarnation. The only evidence we received on the council or committees improving sanitation relates to Maungapohatu after the 1925 typhoid epidemic, and it seems likely that Rua deserves the credit for this.[542] Hiroa reported in 1925 that three water supplies were installed under the jurisdiction of the Mataatua and Arawa councils, but did not identify their locations, so we do not know if any were installed in Te Urewera.[543]

The council's problems seem again to have been caused by a lack of funding and by community opposition.[544] In 1922, 105 Tuhoe, mostly from Ruatahuna, delivered a petition against its by-laws, which allegedly prohibited tangi and required houses to be lined. The tangi prohibition was opposed because 'it is a custom handed down to us from our ancestors', and the house lining law was considered impractical because of cost.[545] The housing requirements applied only to new houses, although the council could require existing homes to be altered to comply with the new by-laws. Tangi were banned when the death was from infectious disease, and Hiroa wrote that, since not all tangi were banned, the 'old custom [had] not been interfered with in any marked degree.'[546] Given the prevalence of infectious disease in Te Urewera, however, it is likely that the prohibition would have applied to a high proportion of tangi there.

Overall, it appears that the Crown's efforts to improve Maori health in Te Urewera were completely inadequate in the face of severe and ongoing health problems. The district experienced repeated epidemics in the late nineteenth and early twentieth centuries, as well as ongoing poor health. Despite this, Crown aid within Te Urewera itself was limited to some very basic nursing cover; ad hoc responses to some epidemics; the distribution of basic medicines by Native School teachers; and some limited support for the Mataatua Maori Council. Theoretically, Maori could also access hospitals and subsidised doctors outside the district, but in reality distance, bad roads, costs, and cultural barriers made access difficult

540. Ibid, pp 1848–1849
541. Ibid, p 1851
542. Ibid, p 1850
543. Ibid, p 1852
544. Ibid, p 1853
545. 'The Tribes of Tuhoe to The Hon. Sir Maui Pomare and to the Superintendent of Maori councils', 3 April 1922 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(HH)), p 24)
546. 'The Maori Council of the Matatua Maori District: By-Laws', 2 February 1922, *New Zealand Gazette*, 1922, vol 1, p 274; Te Rangi Hiroa, Director of Maori Hygiene, to the Deputy Director General, Department of Health, 14 August 1922 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(HH)), pp 29–30)

or impossible. As we have seen, the Crown also did little to alleviate the dire poverty which was a major causative factor of the high levels of ill health.

(3) *Education*

Crown-funded education came to Te Urewera in 1877, with the opening of a Native School at Galatea. It was part of a wider system of primary schools for Maori which had been established a decade earlier, to replace mission schools which had largely been abandoned during the New Zealand Wars. From 1877, Native schools were administered by the new Education Department, while mainstream state schools were run by regional education boards. Primary education became compulsory for Pakeha in 1877, and for Maori in 1894. Each group could attend either kind of school. It was originally intended that the Native schools would become education board schools once pupils became fluent in English, and by 1909 a majority of Maori were attending board schools.[547] In Te Urewera, however, the majority of primary schools remained Native schools (Maori schools after 1947) until the separate Maori school system was abolished in 1969, and the remaining Maori schools transferred to board control.

Native schools opened and closed around our inquiry district throughout the late nineteenth and early twentieth centuries. The Galatea school closed after only a few months, but was reopened in 1881.[548] In 1898 the school was moved to Awangararanui in 1898, initially operating out of a temporary building before the Galatea schoolhouse was transported to the new site. It closed in 1904, and there was no school in the area until Rangitahi School opened in 1912. During the 1890s, schools opened at Te Houhi, Te Whaiti, Te Kopani near Waikaremoana (Kokako Native School), Waimana, and Ruatoki. Kokako School was closed between 1900 and 1906, and Te Houhi shut down in 1905. The opposition of Rua Kenana to Pakeha education caused Kokako to close again from 1907 to 1911, and Waimana to be turned into an education board school in 1907. Native schools were opened at Rangitahi in 1912 and Tawera in 1931, and Presbyterian mission schools at Ruatahuna (Huiarau School), Waiohau, Maungapohatu, Matahi, and Tanatana in the late 1910s and early 1920s. Maungapohatu was opened with Rua's permission, after he became reconciled to the idea of Pakeha schooling. The school was taken over by the state in 1924, as were Huiarau and Waiohau.[549]

The Te Whaiti Tuhoe claimants alleged that Tuhoe children were turned away from Te Whaiti school after it opened in 1896.[550] Crown counsel disputed this.[551] Research for this

547. Simon and Smith (ed), *A Civilising Mission?*, pp 8–10
548. Except where otherwise stated, the rest of this paragraph summarises Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1231–1239
549. Binney, Chaplin, and Wallace, *Mihaia* (doc A112), p 139
550. Counsel for Te Whaiti Nui A Toikairakau, amended consolidated statement of claim (doc 1.2.7(c)), p 125; see also Hiraina Ngatima Hona, brief of evidence (doc G44), p 28
551. Crown counsel, closing submissions (doc N20), Topic 39, p 23, para 109

inquiry shows that the Crown opened Te Whaiti on the understanding that its pupils would include Tuhoe children from Ruatahuna.[552] Shortly after the school opened, the teachers reported that there was a dispute between Ngati Whare and Tuhoe, which led to Ngati Whare expelling Tuhoe from their pa, and Tuhoe boycotting the school in retaliation.[553] The dissension between Tuhoe and Ngati Whare was still seen as having a significant impact on the Te Whaiti school roll in 1901, but five years later there were substantial numbers of Tuhoe children from Te Houhi and Ruatahuna attending school at Te Whaiti.[554]

In relation to most social services, claimant submissions centred on the Crown's alleged failure to provide an adequate level of service. Where education is concerned, however, the claimant counsel also submitted that the services provided were culturally damaging. They stated that the Native school system acted to 'Europeanise' Maori, in particular by forbidding pupils to speak te reo at school.[555] Counsel for Ngati Haka Patuheuheu alleged that this was damaging to te reo Maori and caused te reo Tuhoe to decline, which in turn resulted in the loss of 'tikanga, kawa, ritenga, waiata, whakapapa and other assorted taonga.'[556] Crown counsel acknowledged that

> English language was promoted in the first half of the twentieth century as an important skill for children to acquire. This promotion of English did prove to be at the expense of Te Reo Maori and local tikanga. There is consistent evidence of Maori children being forbidden from speaking Te Reo Maori in schools until the latter half of the twentieth century.[557]

However, they noted evidence of teachers allowing the use of te reo Maori in Te Urewera schools.[558]

Previous Tribunals have found that Crown policies of the late nineteenth and early twentieth centuries aimed to assimilate Maori children into Pakeha society and culture.[559] We received considerable evidence that Te Urewera Native schools were intended to 'civilise' Maori. For example, Native Schools Inspector James Pope thought the reopening of the Galatea school in 1881 was important because it was near Te Urewera, 'where the wildest of all the Maoris now living are to be found'. A school would gradually undermine 'their

552. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 252, 254, 258
553. Ibid, pp 250–251
554. Ibid, pp 258–259, 272
555. Counsel for Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), app A, p 187; counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), pp 295–296; counsel for Ngati Hineuru, closing submissions, 30 May 2005 (doc N18), p 40
556. Counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), p 133
557. Crown counsel, statement of response, 13 December 2004 (claim 1.3.7), p 38; see also Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 21
558. Crown counsel, statement of response, 13 December 2004 (claim 1.3.7), p 38
559. Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 1, p 320; Waitangi Tribunal, *The Wananga Capital Establishment Report* (Wellington: Legislation Direct, 1999), pp 5–9

prejudice and superstition . . . and they will be prepared to ask for schools themselves.'[560] Te Whaiti School was likewise regarded as an 'outpost' of civilisation.[561] Another education official, H G Walmsley, wrote in 1892 that establishing a school in Ruatoki would be of

> far more importance and a far greater 'wedge' than all the flying visits of Governors, Native Ministers, et hoc genus omne [and everything of this kind]. The Uriweras [*sic*] know really nothing about the pakeha, they fancy that our only wish is to get their land from them[562]

Hutton and Neumann point out that Te Urewera was seen as New Zealand's 'last frontier', where Maori traditions and customs still dominated, there was no significant Pakeha settlement, and hardly any intermarriage with Pakeha.[563]

Schools were explicitly regarded as the key to 'civilising' Maori, that is, making them more like Pakeha. Seddon described education as the 'benefits of civilisation'.[564] To Maui Pomare, writing in 1904, schools were 'Tuhoe's foot on the first rung of the ladder of civilisation.'[565] Native Schools Inspector William Bird regarded Te Urewera in 1913 as 'the most backward [district] that we have left'; a school at Ruatahuna would lead to the area being opened up and developed.[566] Gordon Coates, Native Minister for most of the 1920s, saw schools at Ruatahuna and Maungapohatu as having two purposes: the education of 'the most backward and the least educated' areas in the country and, he said, to draw Maori there away from the Kingitanga.[567]

Knowledge of the English language and Pakeha customs could of course be useful to Maori, and this was recognised by Maori parents at the time.[568] However the Native schools went beyond providing practical knowledge, promoting the entire Pakeha culture and way of life as superior to that of Maori. Pope wrote approvingly in 1903 that the Te Whaiti school teachers were 'trying with very great earnestness to completely revolutionise (for the better) the lives of the children committed to their care by training them in as much of the Pakeha tikanga as they can by any means be got to learn.'[569] At Ruatoki school, pupils learnt traditional British dances such as the sailor's hornpipe.[570] Gladys Colquhoun told us that her school history lessons had focussed mostly on the history of British royalty:

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560. Pope, Examination Schedule, Fort Galatea Native School, 4 November 1882 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1379)
561. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 246
562. Murton 'The Crown and the Peoples of Te Urewera' (doc H12(a)(S)), p 70
563. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 246
564. 'Pakeha and Maori: A Narrative of the Premier's Trip Through the Native Districts of the North Island', p 64
565. Pomare, 'Report of Dr Pomare, Health Officer to the Maoris', p 61
566. Bird, 1913, quoted in Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1259; see also Bird's comments in 1914 about a school at Maungapohatu in Binney, Chaplin and Wallace, *Mihaia* (doc A112), p 136
567. J G Coates quoted in Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1316
568. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1391
569. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 263
570. Simon and Smith, ed, *A Civilising Mission?*, p 291

> What they did and who they stuck in a dungeon and who they stuck in the Tower. It was mostly kings, the royal palace, and we learned more about the Queen and all her whanau than we did about our ancestors and our history.
>
> They [our teachers] never said anything about the Maori wars. We thought that our ancestors were bad for killing the pakeha. Even when we asked they would never tell us how many Maori the Pakeha killed. Never mind the pakeha killing the Maori. They made you feel inferior. We were always made to feel bad, and treated as if we are poor, poor, poor people.[571]

Native schools became somewhat less monocultural under the leadership of Douglas Ball, Inspector of Native Schools from 1931. Ball was influenced by new anthropological ideas about the inherent value of all cultures, and education theory about culturally appropriate education. He was also aware of the concerns of Apirana Ngata and other Maori leaders that Maori culture was under threat. As a result, the Education Department now encouraged schools to include elements of Maori culture, particularly 'arts and crafts'.[572] A 1934 memorandum for the head teachers of all Native Schools instructed that

> it is very desirable that the system of Native School education should not only fit the Maori child to take his place in the community, but that it should also preserve the best in Maori culture, mythology, arts and crafts, and develop the special gifts and talents with which the race is so richly endowed.[573]

As we will see later in this chapter, though, Maori culture remained a minor and fairly superficial part of the curriculum. The first aim of the schools was still the teaching of spoken and written English.[574]

Fluency in English was taught using total immersion, a practice which has been discussed in previous Tribunal reports. The Te Reo, Hauraki, and Wairarapa ki Tararua Tribunals all found that te reo was suppressed in state schools, and that children were punished for speaking Maori.[575] It is not clear that there was ever an explicit Education Department policy banning te reo, but it was certainly the practice in most Native schools for more than half a century, from the 1890s until about the middle of the twentieth century. The Native Schools Act 1867 specified that English be the mode of instruction only 'as far as practicable'.[576] Until the 1890s some schools allowed some te reo to be spoken in junior classes, if children did not

571. Gladys Colquhoun, brief of evidence, 15 October 2004 (doc H55), p 8

572. John Barrington, 'Ball, Douglas George', from the *Dictionary of New Zealand Biography*, teara.govt.nz/en/biographies/4b3/ball-douglas-george, last modified 4 June 2013; Simon and Smith, ed, *A Civilising Mission?*, pp 115, 187–189; Walker, *He Tipua*, pp 317–318

573. Simon and Smith, ed, *A Civilising Mission?*, p 115

574. Ibid

575. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim* 2nd ed (Wellington: Waitangi Tribunal, 1989), pp 8–9; Waitangi Tribunal, *The Hauraki Report*, vol 3, pp 1192–1193; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 1, pp 297, 302–303

576. Native Schools Act 1867, s 21

know any English.[577] From around this time, however, it seems that most schools completely prohibited te reo both inside and outside the classroom.

Our evidence on Te Urewera schools dates back only to the 1920s and 1930s, when there was a strict ban on te reo. It is very likely that this ban was in place from the 1890s, in line with common practice. In Te Urewera, pupils were punished for speaking Maori at Maungapohatu school, and at Huiarau, where pupils who used Maori inside the school boundary were strapped.[578] New entrants relied on body language and guidance from older children to get by until they learnt English.[579] Maria Waiwai told us that after her first day at Kokako Native School in 1927, she saw the teacher strap one of the boys for speaking Maori, and so decided to avoid school for a few years.[580] Some schools did allow limited use of te reo, however. At Rangitahi School, Maori junior assistant Miss Mauriohooho used Maori to help junior pupils.[581] She and the main teacher were also 'slightly chastised' by an Inspector for allowing te reo in the playground.[582] Even here, though, there seems to have been a total classroom ban on te reo for older pupils. Bert Messant told us that, on 'many occasions' during his time at Rangitahi, he was punished for speaking te reo by having his mouth washed out with a fingernail brush.[583]

Some who were punished for speaking te reo refused to teach their own children the language, so that they would not go through the same thing. James Doherty told us that

> As a result of the hardship experienced during my early schooling it left a heavy mark within me. So much so that when I had children of my own I did not teach them Maori, in the fear of the hardship that I experienced would be repeated.[584]

The suppression of te reo had other long term consequences, Kaa Kathleen Williams told us:

> The Crown . . . caused us to suffer in that they required the English language only to be taught in schools, and that is no better highlighted than in my own experience . . . for approximately two years I said nothing at school. They wanted us to learn and use the English language only in years gone by. I go back to the time I started school to a time when I was hit, but it wasn't just losing my language that was the problem, but it had deeply affected my thoughts and my spirits. These feelings are still within me, and I'm sure it's also in my people of Ngati Haka-Patuheuheu.[585]

577. Simon and Smith, eds *A Civilising Mission?* p 165
578. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12) p 1389; Tuawhenua Research Team (doc D2), p 299
579. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12) p 1389
580. Maria Waiwai, brief of evidence, no date (doc H18), p 17
581. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1387–1388
582. Ibid, p 1387
583. Rano (Bert) Messent, brief of evidence, 9 August 2004 (doc F12), p 3
584. James Doherty, brief of evidence, 11 May 2004 (doc D27), pp 9–10
585. Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc C16), p 55

The Te Reo Tribunal found in 1986 that the end result of the ban on te reo in schools was that 'a whole generation has been reared who know no [te reo] Maori or who knowing so little of it are unable to use it effectively and with dignity.'[586] The hapu and iwi of Te Urewera have retained their reo to a greater extent than Maori in many other parts of the country, and the situation has improved somewhat in recent decades, but there are still many Te Urewera people who cannot speak or understand the language. Those without te reo are not only missing out on their ancestral language, but are also prevented from fully experiencing their own culture.

With regard to education, the claimants' main focus was the promotion of the English language and Pakeha culture at the expense of te reo and Maori culture. However claimant counsel also submitted that the education provided in Te Urewera was low quality, failed to foster Maori achievement, and directed Maori into low paid and low status jobs.[587] Counsel for Nga Rauru o Nga Potiki went further and argued that a major aim of education was to produce 'industrious and obedient subjects'.[588] Specific allegations relate mostly to periods after 1935 but, in relation to earlier decades, claimant counsel submitted that teachers in Te Urewera were mostly unqualified, and that it was sometimes difficult for communities to get and keep schools.[589] Claimants also submitted that secondary education was difficult to access until the 1940s.[590] The Crown did not respond to these allegations in relation to the pre Second World War period.

Claimant counsel submitted that there was often a long gap between a community requesting a school and the school being established. Huiarau School, at Ruatahuna, and Maungapohatu School were cited as examples.[591] There was also a long wait at Waiohau. Requests for these schools were first made between 1904 and 1913, and all took at least 10 years to open. The longest gap was at Ruatahuna, where a school was first requested in 1904, but not established until 1918. In all three cases, the schools were established by missionaries and later taken over the Crown. Even after decisions were made, concerns about cost delayed the construction of new buildings.[592] It is likely that World War I diverted resources and generally caused delays.

The Education Department was understandably reluctant to found schools unless it was clear that there was a suitable site available, and that the local community was supportive

586. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 10

587. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 358–360; counsel for Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), app A, p 187; counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p 296

588. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 359

589. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), pp 198–199; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 358; counsel for Ngati Hineuru, closing submissions, 30 May 2005 (doc N18), p 40

590. Counsel for Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), app A, p 188

591. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), pp 198–199; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 358

592. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12) pp 1247–1268, 1307, 1313–1319

and had enough children to keep the school going in the long term. This was particularly the case in areas such as Te Urewera, since poor road access and distance from Pakeha settlement tended to drive up costs. Officials were particularly concerned about Rua's influence; as we have seen, his antipathy to Pakeha schools had in 1907 caused the closure of one school and the conversion of another to a board school.

When schools were opened, they were frequently staffed by unqualified teachers. This was a widespread problem; in the period before 1935, few Native school teachers, in Te Urewera and elsewhere, were qualified.[593] The Education Department found it particularly difficult to find suitable teachers willing to work in Te Urewera. At Te Whaiti, the very well regarded Johannes Zimmermann stayed for only three years, and the school was later closed for several months because the Department was unable to find anyone to teach there.[594] Te Urewera schools may have been used as training grounds for young and inexperienced teachers, possibly because they could not compete with experienced teachers for more popular positions elsewhere.[595]

Some teachers certainly left much to be desired. Joseph Wylie taught for about 16 years at Galatea and Awangararanui despite having no previous teaching experience and allegedly neglecting his students to focus on farming.[596] Pope was scathing about unqualified Te Whaiti teacher Chamberlin Tims, writing in 1903 that his work was 'of little value' and that only one out of 29 pupils had passed their exams.[597] Ruatoki teacher J B Lee was removed from his post in 1912, after the school committee complained that he was not teaching older students well enough to pass the school proficiency examinations, and that he was falling asleep in class. His replacement was highly regarded, but died in 1921 and was replaced with another teacher who, though experienced, seemed unable to cope with the demands of the job.[598] The infant teacher at Huiarau in the late 1930s was reported as having poor method, and according to her head teacher, 'appears to have no love for the Maoris'.[599]

Substandard teachers seem to have been exceptions, however, as inspectors generally returned positive reports about Te Urewera schools. Kokako was consistently graded as 'satisfactory' or better, with particularly positive reports in 1913 and the mid 1920s.[600] In 1929

593. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1336. He also notes (on p 1335) that 'in the 1880s less than 20 per cent of Native School teachers [nationwide] were either licensed or certificated teachers, and while this percentage had increased to around 50 per cent in the early years of the twentieth century, through the 1910s and 1920s, it hovered between 20 and 30 per cent.'

594. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 277–279, 281–282

595. See Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 268

596. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1341–1345

597. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 263. The next year not one pupil passed (p 266).

598. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1347–1352; Bird, Native Schools Inspector, Memorandum to The Inspector General of Schools, 16 September 1912 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(x)), p 19)

599. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 296

600. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1358–1359

it was reported that Maori pupils there were outperforming their Pakeha classmates.[601] Te Whaiti, Maungapohatu, and Waiohau schools also received good reports, especially in the 1920s.[602] Rangitahi was more uneven. It rated badly from 1915 to 1917, but after the teacher was replaced it received reports ranging from 'satisfactory' to 'very good to excellent'.[603] At the start of the twentieth century, half of a school's grade came from its pupils' exam results, and half from a mark given by the inspector, based on a range of factors including organisation, discipline, teaching method, condition of school records, and 'extras' such as singing, drawing, and drill.[604] These criteria, with their emphasis on organisation and discipline, reflect the intention that Native Schools act as a 'civilising force' on Maori. This meant that, while the schools were generally judged to be satisfactory by the Education Department, its criteria reflected purely Pakeha perspectives. From a Maori perspective, there were serious problems with the schools, particularly their attitude to Maori language and culture, and assumptions made about the capabilities and futures of Maori pupils.

As noted above, claimants and their counsel submitted that the education system did little more than prepare Maori to be manual labourers.[605] This issue has been addressed by the Wananga Capital Establishment Tribunal, which found that the Native school curriculum was 'designed to restrict Maori to working-class employment.' Major emphasis was placed upon manual and domestic training for Maori.[606] The Wairarapa ki Tararua Tribunal agreed.[607] Education researchers Judith Simon and Linda Tuhiwai Smith argued that educational policy strongly favoured a 'practical curriculum' for Maori from about 1900.

601. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1310–1312, 1404. The Pakeha pupils were the children of saw millers living at Tuai.

602. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1368–1371; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 258–302

603. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1353–1355

604. The criteria for judging the performance of a school are outlined by Hutton and Neumann: 'What did constitute "good work in school" in the eyes of the Department? The inspection schedules for native schools that were used during Tims's time in Te Whaiti provide one answer to this question: Teachers could score a maximum of 50 points, 10 each for "condition of records and other school documents except the time table"; "Organization of school, and condition of buildings, furniture, and appliances so far as this depends on the master"; "Discipline, including order, tone, nature of punishments, and punctuality"; "Extras – Singing, drawing, and drill"; and "Methods, judged partly from inspection and partly from the kind of passes obtained". The inspector then calculated the relation between the total marks obtainable by the students, and those actually obtained; half of the resulting percentage was then added to what the teacher(s) had scored for records, organisation, discipline, extras, and methods. The result was a mark out of 100. A teacher's civilising influence was accounted for under "discipline" and "extras". The inspector judged, for example, how well the children were dressed, and how "pleasing" or "accurate" the drill was.' Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 269. Inspection reports after 1904 used much the same criteria.

605. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 358–360; counsel for Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), app A, pp 187–188; counsel for Tuawhenua, closing submissions (doc N9), p 296

606. Waitangi Tribunal, *The Wananga Capital Establishment Report*, p 7

607. Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 1, pp 296–297

23.6.3(3)

> They [Education Department Officials] sought through the curriculum to control the vocational choices available to Maori, channelling pupils into those vocations they deemed appropriate – manual, technical and domestic work . . . [Education emphasised] manual, technical and domestic training, rather than academic or intellectual development . . . The types of schooling prescribed for Maori would prepare them for working- or labouring-class status.[608]

George Hogben, the Inspector-General of Education, argued that Maori needed a practical rather than academic education in order to 'recognise the dignity of manual labour.'[609] Henry Vine, the teacher at Ruatoki in the 1920s, and also the secretary of the Native Schools Teachers' Association, supported such an emphasis on practical education. In 1920, he urged that Maori secondary schools be reformed to teach Maori boys farming skills, and girls 'be made capable housewives.'[610] A Maori pupil at Ruatoki school from 1929 to 1931 thought that the education he received fitted him only to be a labourer (see sidebar, The Limits of a Native School Education, p 161).

While practical skills, particularly the farming skills needed for land development, are obviously useful, manual work should not have been the only direction Maori children and teenagers were pointed in. By 1910 there had already been multiple Maori university graduates; the men in charge of the Native school system were therefore well aware that high level academic achievement was not the exclusive preserve of Pakeha. Yet, as the Ruatoki pupil's interview indicates, even 'really bright' Maori pupils in Te Urewera were given little opportunity to continue their education beyond primary school.

Until the 1940s there were no high schools in, or readily accessible from, Te Urewera. The closest secondary schools were in Wairoa, Gisborne, Whakatane, and Rotorua.[611] Given the state of the roads, daily travel to and from these schools would have been impossible, and few families would have been able to afford boarding costs. Most secondary schools also charged fees at this time. Scholarships were available for Maori boarding schools such as Te Aute, St Stephen's, and Turakina, but only a few pupils from Te Urewera managed to access them.[612] There were no boarding scholarships for high schools closer to home.[613] The inaccessibility of secondary school to most young Maori in Te Urewera before the 1940s was despite a 1912 Tuhoe donation of land from the Tuararangaia block for the express purpose of supporting a Maori college at Ohiwa. As we found in chapter 22, the land did not return any profit until the early 1950s, and the Crown seems to have simply added this to its

608. Simon and Smith, ed, *A Civilising Mission?*, pp 112–113
609. Ibid, pp 111–112
610. Ibid, p 113
611. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1393
612. Ibid, pp 1397–1401
613. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 479

The Limits of a Native School Education: A Ruatoki View

There weren't secondary schools . . . It was straight-out primary, up to Standard 6 and from there on we didn't have secondary school. Secondary school was in the Pakeha area . . . We actually were people just for scrub cutting and that . . . As soon as you get to Standard 6 you're finished, you can't go any further. Even if you get to Standard 1 or Standard 2 and you're too big, you knock off . . . We had some really bright ones but they just knocked off. There was nothing there to encourage them to go on because there was no other better school . . . We were just there to learn the Pakeha language and manners, nothing else. We weren't encouraged to further our education . . . That is the bottom line, the Maoris were suited for labour, working on the roads, that is the bottom line – just to get by, to suit them, not to suit you. So they can tell us, well, put a fence here, put a fence there, and we'll do it. Most of the heavy work was done by our people, the roads were done by our people. You didn't have trucks and bulldozers in those days – just a shovel and wheelbarrow . . . I only went up to Standard 2 and the teacher said 'Go away, get lost.'. . . The teachers, they know they're wasting their damn time – 'Go on you – out!' And you go back on the farm. Quite a few of us like that, chucked out of school.

'Maori pupil, 1929–31', Ruatoki Native School, interviewed in Simon and Smith, ed, *A Civilising Mission?*, **p 292**

general education fund. We found that by not using the money to assist Maori education in Te Urewera, the Crown failed to meet the conditions of the Tuararangaia donation.

Secondary school was not the expected destination even for those children who could access it. Before 1900 it was 'essentially a prerogative of the middle-upper class' even for Pakeha, and even by 1922 only 47 per cent of primary school leavers went on to secondary school.[614] The percentage of Maori who did so seems to have been much lower, however.[615] This would have been partly because most Maori lived in rural areas distant from secondary schools. However it also seems to reflect a general disengagement from the state education system. Maori in Te Urewera and elsewhere tended to start school a year or more later than their Pakeha counterparts, and to leave school early.[616] Several claimant witnesses told us that as children they rarely attended school because they were often too busy looking after younger children, gathering food, and doing other tasks for their families. Some

614. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1392–1393
615. Ibid, pp 1397–1401. Primary school lasted until standard six.
616. Ibid, pp 1403

also worked in shearing gangs.[617] Most of this evidence related to the late 1930s and the 1940s, but almost certainly reflects the situation in earlier decades. Absenteeism and early leaving would have been driven mostly by the dire poverty of most communities. Families struggling to feed themselves needed everyone to help out, even if this came at the expense of children's education. The alien and unwelcoming nature of the schooling system, which punished children for speaking their own language, would also have discouraged regular attendance.

At nearly every stop on his tour of Te Urewera in 1895, Seddon promoted the benefit of Pakeha education. At Galatea, he said that

> My heart gladdens when I hear you ask for a school, and that you have devoted land for it. You ask for the benefits of civilisation. You ask that your children should be put upon the same footing as the European children . . . I will see that the boon is granted to you permanently.[618]

He told the people of Waikaremoana that

> Without education your position will grow worse and worse every year, and the day will come when your children will say, 'Why did we not have the privilege that was given to the pakehas and others of our race in the different parts of the colony?'[619]

The hapu and iwi of Te Urewera were given a clear promise that education would give their children the same opportunities as Pakeha, and would generally allow them to advance in the world. Could Te Urewera children access an education which would do this?

By and large, the primary education provided to Maori in Te Urewera was good enough to meet contemporary Crown standards. School inspectors regularly assessed Te Urewera Native schools as satisfactory or better, and under-performing teachers were usually replaced. There were some delays in establishing primary schools in some areas, which clearly disadvantaged the local communities, but this seems to have been due mostly to the need to properly investigate whether a school would be viable in the long term. Even by contemporary standards, however, access to secondary education was too difficult for most Te Urewera pupils. We accept the Crown's argument that it cannot be expected to provide full educational facilities wherever there are children.[620] But it should have provided a secondary school somewhere in Te Urewera, and done more to help pupils access secondary education elsewhere. This was especially so given its agreement to the Tuararangaia land

617. Kahui Ana Doherty, brief of evidence, 6 September 2004 (doc G17), pp 3–4; Desmond Renata, brief of evidence, 22 November 2004 (doc I24), p 12; Rere Puna, brief of evidence, 6 September 2004 (doc G10), p 7

618. 'Pakeha and Maori: A Narrative of the Premier's Trip Through the Native Districts of the North Island', AJHR, 1895, G-1, p 64

619. Ibid, p 83

620. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 22

transfer, which was clearly intended to support the education of Tuhoe, Ngati Awa, and Te Arawa. It was not, as the Crown treated it, simply a general gift to the education system.

Although primary education was generally acceptable by the Crown standards of the time, it was still deeply problematic from a Maori perspective. We accept that Maori benefitted from learning the English language and becoming familiar with Pakeha customs and ways of life, but we see no reason why this had to happen at the expense of Maori language and culture. Regardless of whether the te reo ban was official policy or simply widespread practice, its effect was to alienate many pupils from education and, in the long term, reduce levels of te reo fluency to the point that the language has, for many years now, been endangered. The education system also failed to give Maori culture and history at least the same regard as their Pakeha equivalents. This taught Maori children, at times intentionally, that their culture was of less worth than that of Pakeha.

23.6.4 Conclusions

When Te Urewera leaders negotiated the UDNR agreement with the Crown in 1895, they were doing so as, effectively, the leaders of an independent district. In Professor Murton's terms, they had political authority over their own affairs and could maintain their own property regime in the territory they controlled. This power meant that, as we saw in chapter nine, when the Crown wanted to bring roads and surveys into the district, they needed to use a combination of negotiation and the threat of force. It also meant that the Te Urewera leaders were able to negotiate with the Crown for the UDNR, which was to be a self-governing district, recognising the kawanatanga of the Crown.

The political power exercised by the leaders of Te Urewera hapu and iwi did not mean, however, that the hapu and iwi of Te Urewera were able to engage with the Crown as equals. Although the Crown preferred in the 1890s to act peacefully, it was prepared to threaten Te Urewera with military force, as it did in mid 1895. Perhaps even more importantly, the peoples of Te Urewera had very limited economic capability, especially compared to the Crown. The 656,000 acres which were to become the UDNR were Maori-controlled, but did not provide a strong economic base. As we outlined earlier in this chapter, the land was largely unsuitable for farming and had limited economic potential. This meant that, despite their political independence, the hapu and iwi of Te Urewera were in a precarious economic position and dependent on the Crown when their food supply failed, as it did in 1898. The Crown's failure to provide adequate assistance during the 1898 famine illustrates the limits of Te Urewera power. While its leaders could and did negotiate with the Crown and gain official recognition for their mana motuhake (at least on paper), they could not prevail on the Crown to help them in their time of extreme need.

23.6.4

Based on the Crown's promises, the UDNR agreement should have given Te Urewera hapu and iwi official recognition of their political authority over their own rohe, and led to improved economic capability. Instead the balance of power, already heavily weighted towards the Crown, tipped further away from the leaders of Te Urewera. As we saw in chapter 13, the UDNR General Committee was not established until 1909, and had much less power than the rangatira who negotiated the UDNR wanted or expected. The UDNR Act was repealed in 1922, removing reserve status, and the protections which it afforded, from the district. By this time, the Crown had taken steps to establish its own property regime over the whole of Te Urewera. It converted Urewera Commission orders into Native Land Court orders and embarked in the 1910s on aggressive purchase of individual interests throughout the Reserve, which it then consolidated in the 1920s into a massive Crown block of several hundred thousand acres.

In chapters 13 and 14 we found that all of this was in breach of the principles of the Treaty. The Crown also restricted what hapu and iwi could do with the lands and resources they retained, banning timber milling in some areas and forbidding or restricting the hunting of some native birds. These factors combined to further weaken the already limited economic capability of Te Urewera peoples. The hapu and iwi of Te Urewera, in short, had lost most of their independent political power (and a substantial amount of land) and had gained very little in return.

In chapter nine we saw that, during his tour of Te Urewera, Seddon promised that Maori would enter a new age of prosperity if they fully engaged with the Crown.[621] He said that the people of Te Urewera were 'living in absolute poverty, not having sufficient food, not having the comforts they ought to have. We wish to alter this state of things'.[622] Seddon promised that the Crown would look after the people of Te Urewera and protect them from harm. 'I say [Tuhoe] will never be landless – never be without money, food, or clothes. They will be more prosperous than Tuhoe have been since they have been Tuhoe.'[623] We have seen that Tuhoe and the other iwi of Te Urewera did engage with the Crown, and recognised its kawanatanga in return for its recognition of their own self government within the newly established UDNR. However they did not receive the promised benefits. Throughout the period we covered in this section, they lost more land, continued to live in poverty, and were often without money or sufficient food. The Crown did increasingly provide social services, particularly schools, but these never came close to relieving the extreme hardship experienced by many Te Urewera communities, and fell well short of the benefits which Seddon had led the peoples of Te Urewera to believe they would receive.

621. 'Pakeha and Maori: A Narrative of the Premier's Trip Through the Native Districts of the North Island', AJHR, 1895, G-1, pp 49, 53–55

622. Ibid, p 49

623. Ibid, p 55

23.7 What Effects did the Expansion of the Crown's Role in Te Urewera have on the Well-being of Maori Communities up to the 1980s?

Summary answer: *Following the election of the first Labour government in 1935, the role of the state expanded dramatically. A welfare state was founded, based on the idea that all New Zealanders had the right to a decent standard of living and to full education and health services. The Crown became more involved in industry, health care, and housing, and provided much more aid and assistance to those in need, including Maori in Te Urewera. As part of the Crown's increased involvement in the economy, the State Forest Service helped turn settlements in the Whirinaki valley and elsewhere into thriving timber towns, where jobs were plentiful and workers were provided with cheap rental housing.*

Maori in Te Urewera and elsewhere were major beneficiaries of the expanded state. Timber industry employment, aid for housing, increased welfare benefits, improvements in water supplies, and better access to health care combined to significantly lift standards of living in most parts of Te Urewera. Improved access to education, particularly beyond primary school, also opened up new opportunities.

These changes helped to significantly improve the health, education, and standards of living in Te Urewera Maori communities. They were not enough, however, to close the huge socio-economic gaps between Maori and non-Maori. Some services remained difficult to access. Housing assistance in particular was out of reach of the most impoverished communities, as it was generally only granted to those who individually owned land or could repay loans. Similarly, improvements to water supplies depended on the ability of communities to provide half the funds. While health care was now free, except for doctors' visits, it was still geographically remote from most Maori in Te Urewera. Likewise, many school pupils faced long journeys to the nearest secondary school, or had to board. Schools became less monocultural than they had been before the 1930s, but until about the 1950s pupils were still punished for speaking te reo, and in most schools Maori culture remained a minor part of an almost entirely Pakeha system.

Outside of the timber industry, there was little employment in Te Urewera which was not seasonal, temporary, or both. The district's dependence on the timber industry made it highly vulnerable to economic downturns and other adverse trends. The Crown and Te Urewera communities made some attempts to diversify the Te Urewera economy, but these were largely unsuccessful, and the Crown did not always give its full support to community initiatives. The Crown became increasingly sympathetic to conservationist arguments against logging of native timber, restricting and then banning the harvesting of native trees from the Whirinaki Forest.

In terms of Professor Murton's socio-economic framework, which we outlined earlier in this chapter, the economic capability of Maori in Te Urewera significantly increased in the mid twentieth century. Although they remained poorer, on average, than other New Zealanders, poverty became much less common and, where it continued, much less dire. The economic

improvement was primarily the result of government policy, particularly relating to social welfare and the timber industry, and therefore highly vulnerable to future policy changes. The hapu and iwi of Te Urewera had no more political power than they had possessed at the start of the century, as became clear when the Crown ignored their objections to restrictions on native timber harvesting. Their marginalisation also meant that the dominant property regime remained one based on English law, which failed to take Maori needs, culture, and aspirations into account. Indeed, local planning legislation and the establishment of Urewera National Park meant that Maori landowners in Te Urewera lost even more control over their land in this period.

23.7.1 Introduction

This section looks at the period from about 1935 to about 1984. These dates mark the beginning and end of the period in which the Crown was heavily involved in nearly every aspect of New Zealand life. The first Labour government, elected in 1935, dramatically expanded earlier piecemeal welfare provisions into an all-encompassing welfare state. While earlier welfare provisions had been based on giving limited aid to the 'deserving', the new system was based on the idea that everyone had a right to a decent standard of living, and that the nation had a duty to provide this to those who could not provide it for themselves.[624] Underpinning the welfare state was an interventionist style of close economic management, in which the state nationalised or became involved in important industries such as forestry and the railways. The welfare state and managed economy were carried on and in many ways enlarged by subsequent governments, until the election of the fourth Labour government in 1984. By this time, some regarded the managed economy as inefficient, the welfare state as wasteful, and both as doing more harm than good. The restructuring of the state, and its impact on the hapu and iwi of Te Urewera, will be addressed later in this chapter.

In this section we look first at the Te Urewera economy and the place of Maori within it. We pay particular attention to the timber industry, which employed large numbers of Maori in Te Urewera during this period. We will show how the industry grew dramatically from the 1930s, creating thriving timber towns with full employment, and then how from the 1960s it suffered from an economic downturn and increased public opposition to the logging of native forests. As in earlier decades, the Te Urewera economy was very limited, with forestry dominating, farming coming a distant second, and other industries playing a very minor role. The economic capability of Te Urewera hapu and iwi remained low, as we can see from their dependence on paid work. We will look at farming and other industries in Te Urewera from the 1930s to the 1970s, and at attempts in the 1970s to diversify the regional economy. In the second half of this section, we examine the expanded welfare state and the

624. McClure, 'A Badge of Poverty or a Symbol of Citizenship?', pp 143–144

extent to which it benefitted Te Urewera hapu and iwi. In particular, we will look at social welfare, health care, housing, water supplies, and education, and assess how accessible each of these were for Maori in Te Urewera, and the extent to which the services provided met their needs.

23.7.2 The timber industry and the Te Urewera economy

During the twentieth century, Te Urewera communities, particularly those in the west of the inquiry district, became highly dependent on the timber industry. Crown and claimant counsel agreed on this point, although not on the causes of the dependence.[625] Counsel for Ngati Manawa, Ngati Whare, and Nga Rauru o Nga Potiki all submitted that Crown actions, particularly those leading to the loss of so much Maori land in the nineteenth and early twentieth centuries, meant that virtually the only opportunities for work or income in Te Urewera were through forestry. The Crown did not respond specifically to these allegations.

The claimants' submissions on tangata whenua dependence on the timber industry were made in relation to the 1980s, when the Crown withdrew its support for the Te Urewera forest industry, resulting in high levels of unemployment and poverty in the former timber towns. In order to assess the validity of these claims, however, we must examine the rise of the timber industry in Te Urewera, and show how and why hapu and iwi became dependent on it. As well as looking at the timber industry, we must also examine other industries and potential sources of economic capability in Te Urewera, and show how the Crown helped or hindered them.

(1) *The rise of the timber industry*

Concerted Crown involvement in the timber industry began in 1919, with the foundation of the State Forest Service.[626] Concerned about the dwindling base of native timber remaining in New Zealand, the Forest Service began planting exotic trees in state forests around the country, particularly at Kaingaroa, to the west of our inquiry district. From the 1930s onwards, the Forest Service had social as well as economic objectives, with large scale planting in that decade being partly a way to reduce unemployment. As we will see, it also provided its workers with a variety of benefits, including rental housing. In areas such as Kaingaroa, forestry was a way to make productive use of marginal land, stimulate the regional economy, and provide employment to locals, including Maori. To these ends, the Crown effectively subsidised private timber and timber processing companies, and encouraged Maori from Te Urewera and elsewhere to join the timber industry workforce.

625. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), pp 11–13, 56; counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), p 80; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 287–289; Crown counsel, closing submissions, June 2005 (doc N20), topic 38, p 4

626. All information in this paragraph is from Waitangi Tribunal, *He Maunga Rongo*, pp 1203–1206, 1209–1210.

23.7.2(1)

In our inquiry district, the timber industry was mostly concentrated in and near the Whirinaki Valley, in the west of the district. It essentially began in 1928, when a private mill was established at Te Whaiti. The mill struggled at first, due to the onset of the Great Depression, but survived in part because Crown officials permitted the miller to pay less than the standard legal minimum for the timber, due to concern that the mill might otherwise close.[627] Hutton and Neumann were unable to discover how many of twelve to fifteen people employed in the mill also owned the land, but assumed that there was some local involvement, since Ngati Whare rangatira Wharepapa Whatanui was a shareholder.[628] The mill did not eliminate unemployment in Te Whaiti, as residents there petitioned for relief work in 1932.[629]

The employment situation at Te Whaiti improved dramatically a few years later. Wilson's mill opened on the Kaitangikaka block in 1934, employing 75 men in the mill and the bush; it was said to be the fourth largest sawmill in New Zealand at the time.[630] Other sawmills opened around the same time, providing employment and some royalties to the people of Te Whaiti. By 1935 the Certifying Officer of the Employment Bureau at Rotorua estimated that only 'one or two of the Natives at Te Whaiti would be eligible for relief'.[631] More jobs were available once logging began in Whirinaki State Forest in 1938.[632] A housing shortage meant that outside workers could not be brought in, and for some mills this 'often meant working shorthanded'.[633] Since most of the jobs would have been classed as unskilled or semi-skilled, we can assume this meant the area had full employment.[634] The Second World War intensified the labour shortage, with a 1943 report on the forest stating that 'owing to the scarcity of labour it has been necessary to curtail all operations not directly concerned with timber production'.[635] The same year, a group of Ngati Whare landowners agreed to provide land for workers' housing to the Forest Service in return for the Service employing their relatives, presumably those from outside Te Whaiti.[636] The local Conservator of Forests also reached a noteworthy agreement with Native Land Court Judge Harvey in 1944 that no outsiders should be hired to do work that could be done by Maori already living

627. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 308–315
628. Ibid, pp 310, 316
629. Ibid, p 340
630. Ibid, p 311
631. Certifying Officer, Employment Bureau Rotorua, to Commissioner of Unemployment, 29 January 1935, W1 35/237 vol 2 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 337)
632. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 500
633. 'Annual Report. Whirinaki Forest Management. 31/3/39', BAFK 1466/37a (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 400)
634. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 403
635. 'Whirinaki Forest Management. Report for the Year Ended 31.3.43', BAFK 1466/37a (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 401)
636. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 401

at Te Whaiti.[637] In general, those Maori who migrated to the Whirinaki Valley at this time came from elsewhere in the inquiry district, particularly Ruatoki and Waimana.[638]

The Ruatahuna valley was brought into the timber industry in the early 1940s, when a mill was temporarily established there. In the mid 1950s, cutting rights were sold for most of the Ruatahuna blocks, and the Fletcher Timber Company built a mill and workers' houses. Some of the mill employees were from outside the valley, but others were locals, and by 1958, 35 per cent of employed adults in Ruatahuna were working either in the bush or at the mill.[639] The Fletcher mill closed in 1975, after which the Forest Service employed nearly half of the town's paid workforce, either in Ruatahuna itself or in Minginui.[640]

The timber industry also provided work in areas to the west and north of the inquiry district. To the west, the Crown-owned Kaingaroa forest was a major source of employment.[641] Like the Te Whaiti mills, it suffered from a labour shortage during the Second World War, to the point where the value of the forest deteriorated because work such as thinning and pruning was not carried out.[642] Some jobs left by absent men were probably taken by Maori women.[643] To the north, there was also a paper mill in Whakatane and, from 1947, a sawmill at Waiohau, although we do not know if either of these employed Maori from the inquiry district.[644] The expansion of the forest industry brought money into the area, which would have created a market for food suppliers and other small businesses. However we do not know whether this resulted in further employment for Maori.

Many communities became highly dependent on the timber industry and, by extension, on the Crown. The most obvious example of this was Minginui. Most of the timber harvested and processed there, including that cut by private mills, came from Crown land. The Forest Service built Minginui as a 'model village' in 1947 and, in 1978, out of the 169 full time workers living there, 91 were employed by the Forest Service.[645] Forest Service workers in Minginui generally lived in houses built and owned by the Forest Service, and their neighbours working for private sawmills also tended to live in employer-owned housing.[646] The Forest Service also played a major role in non-work life. It provided a doctor's surgery

637. Ibid, pp 484–485
638. Walzl, 'Maori and Forestry' (Wai 1200, doc A80), p 628
639. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1101
640. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 124–125, 205, 251
641. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 114, 138; Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 1205–1206
642. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 267
643. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 45
644. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 267; Rose, 'A People Dispossessed' (doc A119), p 222
645. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 508; Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 248
646. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 496. A 1984 breakdown of housing in Minginui reported that 51 were owned by the Forest Service, 40 by the sawmill company, 2 by the Education Department, and there was one privately owned dwelling. There was also a single men's camp in the village: Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 232.

for general practitioner visits, a fire station, and an ambulance service.[647] It had a veto power over spending by the Minginui's Workmen's Club and the hiring out of the community hall, and regulated the construction of residents' chicken-runs.[648] One Minginui resident later recalled that 'If you had a leaking tap, the Forest Service fixed it'. Another described the Forest Service as being like a mother and father to the people of Minginui.[649] In our inquiry, counsel for Ngati Whare submitted that the 'relationship with the Forest Service was, for Ngati Whare, the only tangible manifestation of its Treaty relationship with the Crown.'[650] It was a relationship which, at the time, seems to have worked reasonably well for the people of Minginui, but it made them enormously vulnerable to any shrinking of state activity. There was an ominous portent of this in 1957 when the log supply to the last Te Whaiti mill was cut off. The mill closed and the population dwindled, as we saw in our examination of living conditions.[651] The example of Ruatahuna showed that reliance on private milling was no guarantee of job security either.

Further down the Whirinaki Valley, Murupara was dependent on the Kaingaroa Logging Company (KLC), which was originally co-owned by the Crown and Tasman Pulp and Paper. During the 1950s and 1960s Tasman progressively took ownership of KLC from the Crown. Ben Mitai told us that when he started at KLC in 1970:

> KLC was Murupara. Murupara lived for KLC and KLC lived for Murupara. The only other employer was the NZ Forest Service, but KLC was the place to be.
>
> There was a virtual total dependence developed by the people of Murupara on KLC. KLC provided the housing at very low cost (lease to buy, or rental), provided transport to and from work, provided you with firewood because it was freezing cold in the winter. Each worker was allocated a certain number of loads a year. KLC provided you with work clothing because the conditions were extreme. You had a summer set and a winter set.
>
> The people had developed this dependency on KLC. They worked hard for the company. It was not an easy life in those days, they would leave in the dark and they would get back in the dark during winter. They enjoyed it, they loved it, they lived for the work, and the forest was like a second home.
>
> The company did as much as it could to put things back into the people and into the community – they supported a lot of community activities in terms of playing fields, sponsorship, assisted the schools with transport and holiday work for students.[652]

647. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 725, 745–746; Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 233, 252
648. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 511–514
649. Ibid, p 663
650. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (docN16(a)), p 12
651. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 393–394; Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 228, 258
652. Ben Mitai, brief of evidence, 9 August 2004 (doc F13), pp 2–3

As Mitai suggests, the Forest Service was a relatively minor player in Murupara. At the start of the 1980s it employed a small minority of the town's forestry workers, and owned about a tenth of the houses, although it had built many of those owned by KLC.[653] Murupara was still dependent on the Crown, however, due to the generous deal the Crown had made with Tasman in the 1950s. Once the Forest Service chose to demand a market price for Kaingaroa's timber, then the profitability of KLC's operations, and its ability to maintain a large local workforce, would be significantly undermined.[654]

Other Maori communities tried to become involved with the timber industry, but were prevented from doing so. In chapter 18, we looked at how restrictions on timber milling affected the owners of Maori land in Te Urewera.[655] From about the 1920s, the Crown considered that forests in most parts of the district were more valuable for water and soil conservation purposes, and for scenic preservation, than for timber. Consequently, it denied the majority of applications to mill timber on Maori land in Te Urewera. By 1953, Minister of Maori Affairs Ernest Corbett had accepted that it was unfair to prevent Maori land owners from utilising their timber resources, especially since no compensation was available, and they did not want to sell the land. Consequently, some limited milling was allowed. Even though Crown officials had recognised since the 1930s that Maori landowners ought to receive compensation for timber milling restrictions, and despite negotiations between Tuhoe and the Crown in the 1970s, no such compensation was paid.

From 1936, the owners of the Te Wai-iti blocks near Ruatahuna began lobbying the government for a sawmill to provide employment in the area; owner representative Rewi Petera told Prime Minister Michael Joseph Savage that this was 'the only avenue open to us to obtain a living'.[656] Savage responded that the government was making plans which would provide 'plenty of work' for the area, possibly in reference to road and development work recommended by Lands and Survey.[657] However this never went ahead, due to the expense involved, and no alternative employment was provided.[658] Despite the lack of local employment, the Crown denied the owners a milling licence for the block. When limited milling

653. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 49; Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 187. The 1981 Census recorded that there were 876 Murupara residents with full-time employment, 54.51 per cent of whom were employed in the Agriculture/Fishing/Hunting/Forestry sector: *New Zealand Census of Population and Dwellings, 1981*, vol 4, p 232.

654. Andrew Kirkland and Peter Berg, *A Century of State-Honed Enterprise: 100 Years of State Plantation Forestry in New Zealand* (Auckland: Profile Books, 1997), pp 80–81, 85–86

655. All information in these paragraphs from chapter 18 unless otherwise specified.

656. Rewi Petera to MJ Savage, June 1936, English-language translation, MA1 19/1/135 vol1, (Klaus Neumann, '". . . That No Timber Whatsoever be Removed" The Crown and the Reservation of Maori-Owned Indigenous Forests in the Urewera, 1889–2000'(commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A10), p 91)

657. MJ Savage to Rewi Petera, 22 June 1936, MA1 19/1/135 vol1 (Neumann, '. . . That No Timber Whatsoever be Removed' (doc A10), p 92); Philip Cleaver, 'Urewera Roading' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002 (doc A25), pp 99–106

658. Philip Cleaver, 'Urewera Roading' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002 (doc A25), pp 99–106

was allowed in the 1950s, Te Wai-iti was one of the areas which was allowed to be milled.[659] In chapter 18, we found that the Crown is obliged to compensate Maori if it denies them the full use of their timber and the development of the underlying land, even if the restrictions are legitimately imposed for the public good. We found that, in failing to compensate Te Urewera Maori land owners for timber restrictions, the Crown breached the principles of partnership and active protection. We also found that these breaches were somewhat mitigated by the fact that some exceptions were made to the timber restrictions, and so some land owners were able to have their timber milled.

The owners of Te Wai-iti and other areas initially under milling restrictions were eager to be involved in forestry partly because other Te Urewera landowners had been told that it had good long-term prospects and high levels of job security. As we noted in chapter 21, the Forest Service's long term plan was to mill all or most of the accessible timber in the Whirinaki Valley, and replace it with plantations of fast-growing 'exotic' trees such as pine. It did not intend simply to cut down all the good trees in the area and then leave, and its dialogue with Whirinaki communities reflected this. In August 1949, at a meeting between Ngati Manawa land owners and a ministerial delegation (including Prime Minister Peter Fraser), Assistant Director of Forestry Norman Dollimore told the owners that the Murupara scheme would 'benefit the Maori people for generations.'[660] Ngati Manawa considered that this meeting set up an agreement between them and the Crown, by which Ngati Manawa would give up land in Murupara in exchange for ongoing timber industry employment.[661] Two weeks after the Ngati Manawa meeting, Dollimore repeated his message to Ngati Whare land owners on Waikotikoti marae, telling them that they 'had nothing to fear as regards employment', as there was sufficient work in the Whirinaki Forest for the next 40 years.[662] Two years later, the Forest Service's first Whirinaki Working Plan included permanent, rather than transitory, sawmill communities as one of its objectives.[663] This was in keeping with a general principle of Crown forestry administration, that the sector should meet social objectives as well as turn a profit.[664] This principle was most clearly demonstrated in the deal between the Crown and Tasman Pulp and Paper in the early 1950s; in return for Tasman's substantial investment in Murupara and Kawerau, the Crown would provide it with logs from Kaingaroa at the minimum stumpage rate.[665] The future of the

659. Bassett and Kay, 'Ruatahuna' (doc A20), pp 185–186; Neumann, '. . . That No Timber Whatsoever be Removed' (doc A10), p 129

660. 'Notes or representations made to Rt Hon P Fraser, Minister of Maori Affairs, at Murupara', 14 August 1949 Rachel Paul, 'Murupara Log Yard & Rail Head Report', claimant report, not dated (doc A88), pp 26–27. This meeting was held on Rangitahi marae (Maurice Toe Toe, brief of evidence, 9 August 2004 (doc F11), p 3)

661. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 1214

662. 'Meeting of members of the Ngatiwhare Tribe and Members of a Previous Deputation at Waikotikoti Meeting House', 30 August 1949 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 505)

663. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 503

664. Ibid, pp 702–704

665. See Kirkland and Berg, *A Century of State-Honed Enterprise*, pp 79–86; Bassett and Kay, 'Ngati Manawa and the Crown,' (doc C13), p 174

timber industry in Te Urewera seemed secure, and for this reason it was common for young men to follow their fathers and brothers into forestry work at the earliest opportunity.[666]

In the post-war decades, most forestry work required no formal qualifications and little training. Douglas Rewi told us that 'The term "learn as you work" was the norm in those days with no questions asked provided you could swing an axe'.[667] While this meant that the large numbers of Maori who had been unable to access much, or any, secondary education were fully employable, it created other problems. Rewi told us that the limited training led to some 'dreadful work accidents', some of them fatal.[668] The lack of educational requirements also encouraged young Maori to leave school early, confident of a job in the forests. For a while this confidence was justified, but as work became harder to come by, those without formal qualifications had the most difficulty finding other work.

The ready availability of 'unskilled' forestry work from the 1940s to the 1960s led to high levels of migration. Many families and individuals from Te Urewera moved to towns just outside the inquiry district, such as Whakatane, Kaingaroa and Kawerau.[669] Kaingaroa was even more of a Forest Service town than Minginui, as it lacked the latter's private sawmilling enterprises.[670] Kawerau, meanwhile, was dependent on Tasman's pulp and paper mill. As Murton notes, the majority of people from Ruatahuna tended to move to the nearby timber towns of Minginui, Murupara and Kaingaroa, while the majority from Waiohau, Ruatoki and Waimana tended to move to Kawerau and Whakatane.[671] Many claimant witnesses spoke to us about this migration. For example, Te Tuhi Hune told us that many people moved from Ruatoki to Minginui in the 1950s for jobs, so that they could send remittances back home.[672] Mereru Mason spoke about her family's move from Te Whaiti to Kiorenui village near Murupara in the 1960s, where she met many people from Waimana and Ruatahuna, and her husband secured a Forest Service job at Kaingaroa. They lived at Kiorenui until 1988, but most of her children moved to Minginui to work after they left Rangitahi college.[673]

Migration was driven mostly by migrants' wishes for better standards of living for themselves and their families. It was also encouraged by Crown policy. In the early 1940s officials recommended that Ruatahuna's unemployed be relocated to Kaingaroa, and this policy was actively pursued by the Crown once Murupara began to be developed as a major sawmill site. In July 1949 the Assistant Director of Forestry had told Maori Affairs Undersecretary

666. See, for example, Mereru Mason, brief of evidence, September 2004 (doc G41), p 3; Wakeley Matekuare, brief of evidence, September 2004 (doc G40), pp 2–3
667. Douglas Rewi, brief of evidence, 9 August 2004 (doc F18), p 7
668. Ibid
669. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 1205–1206
670. Walzl, 'Maori and Forestry' (Wai 1200, doc A80), pp 673, 882; Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 270
671. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1135
672. Te Tuhi Hune, brief of evidence, 6 September 2004 (doc G15), p 6
673. Mereru Mason, brief of evidence, September 2004 (doc G41), pp 2–3

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Tipi Ropiha that 'work can be provided for people from Ruatoki and Ruatahuna and from anywhere else if necessary', and in August all Maori Welfare Officers were instructed to survey individuals and whanau who were prepared to move to Murupara.[674] It is evident that some officials adopted a dictatorial approach, with several forestry workers living in Te Whaiti being told that their jobs at Minginui would be given to others if they did not move there.[675] From about 1956, the Department of Maori Affairs offered housing and other assistance to unemployed people in Te Urewera who wanted to move, whether to the timber towns or further afield.[676] By about 1960 the Department of Maori Affairs officially adopted its 'relocation policy', noting that 'a more positive effort must be made to encourage Maori families to live where permanent work is available'.[677] Officials promised housing loans, the prospect of forestry work, and secondary schooling.[678] Assistance was provided to families who signalled their readiness to move, and to those who had already moved and were seeking help in finding suitable housing or employment.

We lack firm evidence on the effectiveness of this policy in relocating the peoples of Te Urewera, and how many whanau were specifically encouraged to move to timber towns or gain work in the timber industry. Only three applicants from Te Urewera were relocated in 1961, for example, none of them to become forestry workers.[679] Over 1962 and 1963, several dozen families were relocated with government assistance to Taneatua, Whakatane, Kawerau and Rotorua. Of these, 27 were from Ruatoki, 10 from Waimana, three from Waiohau and three from Ruatahuna.[680] In 1964, thirty families from the Waiariki district were relocated.[681] Waiariki Maori Welfare Officer John Rangihau reported in 1967 that the relocation policy 'is starting to bear fruit in that young people show a keen desire to move', particularly to towns relatively close to their homes.[682] By 1970 the relocation policy was no longer seen as necessary, since people were moving to places such as Murupara and Te

674. 'Notes of Requirements of Maori Land (Karatia Block) for Project Arising out of Discussion between the Under-Secretary, Department of Maori Affairs and Assistant Director of Forestry, 24 July 1949' (Neumann, '. . . That No Timber Whatsoever be Removed' (doc A10), p 103 n 73)

675. In 1949, a committee of Te Whaiti residents submitted the paper 'Te Whaiti and its Future' (which had been endorsed by a public meeting) to JH Grace of the Maori Affairs Department, in which it was stated that several workers had been informed that failure to occupy accommodation at Minginui would result in their replacement by workers from elsewhere: Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 517.

676. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1137–1140

677. Report of the Board of Maori Affairs Secretary, Department of Maori Affairs and the Maori Trustee for the year ended 31 March 1960, AJHR, 1960, G-9, p 16.

678. Jack Te Pihi Hemi Kanuehi Te Waara, translation of brief of evidence, 21 June 2004 (doc E23(a)), p 2; Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 369–372, 408–409, 494–498

679. John Rangihau, Rotorua Department of Maori Affairs, to Head Office, 'Maori Employment and Relocation', 28 July 1961 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(M)), p 102)

680. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1139, 1981–1982

681. John Rangihau, District Maori Welfare Officer, 'Annual Welfare Report – Waiariki District', 1964 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(K)) p 197)

682. For example, people moved from Ruatahuna to Murupara, and from Ruatoki and Waimana to Taneatua John Rangihau, District Maori Welfare Officer, 'Annual Welfare Report – Waiariki District', 1967 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(M)), p 43)

Mahoe of their own accord, lured by good pay and encouraged by relatives who had already moved.[683]

Overall, the causes of this migration are complex and multifaceted, involving push and pull factors from many different actors, private and state, as the Mohaka ki Ahuriri Tribunal has recognised.[684] Most people moved of their own volition, in the sense that they made the decision themselves and were not aided by the state.[685] However the widening gulf between the timber towns and other Te Urewera settlements meant that the choice was heavily weighted, often by Crown policy and practice.[686] Tame Iti said at our hearings that young Tuhoe people had two options: 'either work very hard on our papa kainga for no money and with little hope of a better future or move to the cities where you were guaranteed a job for your whole working lifetime and a better lifestyle for you and your family.'[687] Similarly, Lenny Te Kaawa told us that families

> had to move out of Ruatahuna as there was no housing, no work and they had to move to put their kids through school. They had no choice and it was common to move out.
>
> I remember when I was young there were many many houses around the marae in Ruatahuna and there were many families living there. Now there are few houses around most marae. Many families have moved out and had children who have no way back to their connections here.
>
> This is particularly sad because their parents left because they had no choice.[688]

While there was pressure to migrate, it was not only the timber towns pulling workers and their families to new homes. Many families moved, and were helped to move, to towns not reliant on the timber industry, such as Taneatua, Rotorua and Te Mahoe. While Maori Welfare Officers recognised that the timber and pulp and paper industries were the major employers in the area, they encouraged employment in any industry with permanent jobs available.[689]

To sum up, the emergence of the timber industry in and around the Whirinaki Valley had huge impacts on the hapu and iwi of Te Urewera. Most obviously, the industry created

683. John Rangihau, 'Annual Welfare Report – Waiariki District', for 1970 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(L)) p 50); Anne Anituatua Delamere, brief of evidence, 21 June 2004 (doc E15), pp 5–6; John Rangihau, quoted in Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 496

684. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 2, pp 660–662

685. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1135

686. Gallen, to the Minister of Lands and Maori Affairs, Matiu Rata, 7 March 1975 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(NN)) p 21)

687. Tame Iti, brief of evidence, 10 January 2005, p 7

688. Lenny Mahururangi Te Kaawa, translation of brief of evidence, 21 June 2004 (doc E9(a)), pp 3–4; see also Joseph Takuta Moses, brief of evidence, 18 October 2004 (doc H15), p 2

689. See for instance Samuel Jaram, Welfare Officer, Whakatane, 'Annual Welfare Report', 1969 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(L)), p 40); Samuel Jaram, Welfare Officer, Whakatane, 'Annual Welfare Report', 1968 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(L)), pp 33–34)

numerous jobs, most of them requiring no qualifications or prior experience. By the 1950s, western Te Urewera appears to have had full employment, or close to it. As we will see in more detail later in this chapter, the Forest Service and other employers also provided housing and other services to their workers, particularly in Minginui. All of this meant that the communities of Whirinaki enjoyed a much higher standard of living in the middle of the twentieth century than in earlier decades. The plentiful jobs and relatively good living standards drew individuals and whanau from communities all over Te Urewera, which in many cases depopulated the home kainga and ultimately left some migrants disconnected from their roots. In the long term, the dependence of the Whirinaki communities on the timber industry would also prove to be detrimental, as we will see later in this chapter.

(2) *Farming in the mid twentieth century*

Apart from forestry, how could Maori in Te Urewera gain employment and income? Between the 1930s and 1970s, farming seems to have been the second most important industry in Te Urewera, with other sources of employment lagging far behind. However farm income, particularly on workers' own farms, was often inadequate to provide the necessities of life. In large part, this was because land loss, unworkable land title and land management systems, and difficulty accessing credit, meant that Te Urewera hapu and iwi had very little good land, and found it difficult to develop what land they had. The causes and effects of this limited economic capability have largely been set out above in section 23.6.2(3), above. Development difficulties continued in the period discussed here, as did land loss, particularly to the National Park.

As we discussed in chapter 18, the land development schemes continued to provide some employment for Maori in Te Urewera; at the end of the 1930s, around 90 people had Crown-subsidised work on the development schemes, including about 40 unit occupiers whose farms were too small to fully support them. In some cases, the Crown paid all of their wages, while in other cases it paid a 75 per cent subsidy. The workers were chosen by the owners. Subsidised work was cut back to the essentials during the Second World War and was never restored to pre-war levels. We found that it was not unreasonable of the Crown to cut back on subsidies, since the schemes were intended to make communities self-sufficient, not to soak up local unemployment through subsidised jobs. By the 1960s or earlier, some of the schemes were able to hire permanent and casual workers, apparently without subsidies. The first development lands to be released back to the owners were the Waiohau A farms, released in 1941. The rest were gradually released over the next few decades, the last one in 1990.

Development scheme pay was quite low, similar to that of shearers. As a result, development scheme work was less appealing than labouring work elsewhere, even for those with farms in the scheme. On many schemes, farm income was not enough to provide even the

basics, especially in the early years; Ani Hare's mother, for example, had to catch eels and 'work in as many jobs and as often as possible' in order to supplement the farm income.[690] Noera Tamiana's parents caught eels, hunted pigs for food and deer for a cash bounty, and hired horses to other hunters.[691]

After the Second World War, the Crown enacted a rehabilitation scheme whereby returned servicemen were assisted into farming. The Servicemen's Settlement and Land Sales Act 1943 enabled the government to compulsorily acquire land on which to settle ex-servicemen. The programme was designed to be an improvement on a similar scheme implemented after World War I. In that scheme, many untrained men had struggled with, and eventually abandoned, their farms. To avoid this problem, applicants for assistance were now classified according to experience and ability, and training was provided where necessary.[692] Cheap loans or leases were provided to those who were allocated farms. Maori land was exempted from the Act and thus protected from compulsory acquisition, but some Maori voluntarily sold land for settlement purposes.[693]

Counsel for Ngati Manawa submitted that their returned servicemen were unable to enter the ballot for land developed for this purpose near Galatea. 'By what can only be described as a racist policy all Maori applicants, no matter how experienced at farming they might be, were ineligible'.[694] It was evident during our hearings that this topic was a source of great anger and resentment in the claimant communities. Crown counsel acknowledged that resettlement schemes for returned servicemen were 'paternalistic' in relation to Maori, and that assistance 'may not have been provided in a timely and compassionate manner'. However, the Crown 'rejects claims that the rehabilitation policy in respect of land settlement for Maori returned servicemen was racist or separatist'. Instead, counsel submitted that most Maori were ineligible for general settlement schemes such as that at Galatea because of lack of training and experience. There was also a shortage of suitable land.[695]

The scheme used to grade returned servicemen was complicated. Pakeha applicants were graded 'A', 'B', or 'C' according to training and experience. Applicants graded A were given priority on available farms, while others were given training before being allocated a farm. Rehabilitation assistance for Maori returned servicemen was a separate system run by the Maori Rehabilitation Finance Committee, which consisted of a joint committee of the Rehabilitation Board and the Board of Maori Affairs.[696] Due to widespread inexperience in financial management, some Maori 'A' applicants were required to be supervised by the

690. Anitewhatanga Hare, brief of evidence, 15 March 2004 (doc C17(a)), pp 23–24
691. Noera Tamiana, brief of evidence, 10 May 2004 (doc D15), pp 2–8
692. J V T Baker, *The New Zealand People at War: War Economy* (Wellington: Historical Publications Branch, Department of Internal Affairs 1965), pp 513–515
693. Ashley Gould, 'Maori Land Development Schemes Generic Overview Circa 1920–1993'(commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc M7), p 222
694. Counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), pp 72–73
695. Crown counsel, closing submissions, June 2005 (doc N20) topic 39, pp 12–14
696. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 43

Native Department, making the restricted A grade roughly equivalent to a B grading under the general system.[697] It was still possible for Maori to qualify for an unrestricted A grading, without the supervision requirement, but this seems to have been rare.[698] At the time, the confusing dual system led some officials to suspect that lower standards were being applied to Maori, but when all A graded Maori applicants were re-graded in 1952, none were down-graded and several had restrictions removed.[699]

Until 1954, Maori were ineligible to be balloted land in general farming schemes unless they had an unrestricted A grade. One such scheme was the former Galatea Estate, which the Land Development Branch of the Department of Land and Survey had taken over in 1941.[700] At the end of the war it became available for the settlement of returned servicemen.[701] D Matthews from Tauranga was informed in 1946 that his application for a Galatea section could not be accepted because his rehabilitation grading certificate said he was eligible 'only if you are subject to the supervision of the Native Department. To participate in a ballot such as this one you must be eligible without restriction.'[702] After this, there is no evidence that other Ngati Manawa applied for Galatea farms, probably because no one was eligible.[703]

There were other barriers between Maori ex-servicemen and rehabilitation farms. The Rehabilitation Board initially had a policy of trying to settle Maori servicemen on Maori land, and most Maori applicants wanted to be settled in or near their own communities if possible. This meant that suitable land was hard to come by, since Maori land could not be compulsorily acquired, and the most suitable Maori land in areas such as Te Urewera was already involved in development schemes.[704] From 1954, 'the shortage of Maori sourced land saw a widening of the farming scheme generally so that all categories of Maori returned servicemen could access all avenues provided under the Rehabilitation Board's farming schemes.'[705] But this change came too late. By this time, most of the Galatea sections had been taken; the last ballot was held in 1958.[706]

We received little evidence on other opportunities in farming, but it seems likely that seasonal and casual work continued to be available on Pakeha farms, especially in the north

697. Gould, 'Maori Land Development Schemes' (doc M7), pp 224–226
698. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 43
699. Gould, 'Maori Land Development Schemes' (doc M7), p 225
700. Nicola Bright, 'The Alienation History of the Kuhawaea No 1, No 2A and No 2B Blocks'(commissioned research report, Wellington: Waitangi Tribunal, 1998) (doc A62), p 68
701. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 42
702. Commissioner of Crown Lands to D Matthews, 18 November 1946 (Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 43)
703. Heather Bassett, under cross-examination by Crown counsel, 18 August 2004, Rangitahi Marae, Murupara, (transcript 4.9), p 88
704. Gould, 'Maori Land Development Schemes' (doc M7), p 222; Murton, 'Summary of Evidence of Brian Murton: Stage Three' (doc J10), pp 36–37
705. Gould, 'Maori Land Development Schemes' (doc M7), p 222
706. Bright, 'The Alienation History of the Kahuwaea No 1, No 2A and No 2B Blocks' (doc A62), p 68

of the inquiry district and on the Galatea plain. Maori landowners were running their own farms in those areas, but in the 1950s some gave up on farming because they could earn more money as labourers.[707] This is shown in the occupations recorded in electoral rolls. In 1957, farmers made up 27 per cent of all Tuhoe, Ngati Manawa, and Ngati Whare men on the Eastern Maori roll, compared to just 9 per cent in 1969.[708]

Overall, farming Maori land in Te Urewera was difficult in the mid twentieth century, despite some Crown assistance. The returned servicemen's resettlement scheme, which could potentially have helped some Maori farmers to become established on the land, does not appear to have helped anyone from Te Urewera. As we discussed earlier in this report, the development schemes enabled the farming of various parts of the inquiry district, but never delivered the benefits which the Crown and the land owners hoped for. The problems of marginal land and difficult access prevented either the development scheme farms or independent Maori farms from delivering much of a return. Many landowners found waged work, whether in the forests or for Pakeha farmers, to be a more reliable way of feeding their families.

(3) *Other industries before 1970*

Te Urewera had some industries and sources of employment other than forestry and farming, but these were very limited in scope. Those which were available before 1970 were the armed forces during the Second World War, the tourist industry and the national park, public works, and processing and manufacturing. Department of Maori Affairs welfare officers assisted Maori, particularly school leavers, into a variety of jobs. However employment statistics for Te Urewera men indicate that they tended to be concentrated in a very narrow range of jobs and industries. In large part, the narrow range of economic opportunities was due to factors beyond the Crown's control, particularly the rugged terrain of our inquiry district and its distance from major transport hubs and centres of population. As we will see, even when the Crown gave its full support to an industry in Te Urewera, it was unable to overcome these problems.

During the Second World War, many men from Te Urewera enlisted in the armed forces. We do not know their numbers, but Murton writes that 'all communities contributed their share of men'.[709] Some did not return, and several claimant witnesses told us that this deprived their iwi, hapu and whanau of leaders.[710] Maori were also mobilised to work in 'essential industries', mostly under the direction of the Maori War Effort Organisation,

707. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 91; Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 139–140

708. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1142–1143

709. Ibid, p 1064

710. Charles Manahi Cotter, brief of evidence, not dated (doc I25), p 23; Sarah Hohua, brief of evidence, 11 August 2004 (doc F32), p 3; Vera Teaotuhirangi Hale, brief of evidence, 9 August 2004 (doc F15), pp 4–6

which ran from June 1942 until the end of the war.[711] However most seem to have been directed into the forestry and farm work which already dominated Maori employment in Te Urewera.[712] Because forestry was an essential industry, emergency regulations were used to prevent timber workers from leaving for higher paying jobs.[713]

We received very limited information on the involvement of Maori in the Waikaremoana tourist industry between the 1930s and the 1970s. What we do know strongly suggests that the tangata whenua of the Waikaremoana area received little benefit from tourism, and that tourism failed to balance out the negative impacts of the park. Even if local hapu had played a more prominent role, however, it is not clear that there was much money to be made. Tourist numbers were reasonably good in the post-war years, but the Lake House continued to lose money due to the short tourist season and poor road access.[714] It closed in 1972 because of continuing losses, the fact that it no longer met Licensing Control Commission standards, and problems with its sewerage system.[715] We do not know if any Maori were employed there.

As we discussed in chapter 16, the tourist industry, and the National Park more generally, did deliver some limited income, in a range of ways. Before the creation of the National Park, Maori around Lake Waikaremoana unlawfully leased land to visitors, who built huts and semi-permanent camps. The 'squatters' were evicted by the Crown in the late 1950s.[716] As we noted in chapter 16, there was some, generally casual, Maori employment in the park, mostly in the 1970s and early 1980s, peaking in 1982 with five permanent Maori employees and 75 casual employees. Pest control also provided some income. In 1950 the Crown introduced a one shilling bounty on possums, soon raised to 2s 6d for skins.[717] There seem to have been fairly high levels of trapping in Te Urewera, presumably carried out at least partly, perhaps mostly, by Maori. From the 1960s, poison became the preferred method of control, and local Maori were sometimes employed to lay it.[718] This seems to have been less lucrative than shooting and trapping, and also affected food sources such as wild pigs.[719] Deer and pig hunting were important sources of food and supplementary income, partly through the Crown's deer control scheme. A few Maori were employed as professional deer cullers.[720]

Public works employment continued to be available. Up until the late 1940s, it was used as a means of relieving local unemployment; after this, Crown policy was to encourage

711. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1063
712. Ibid, pp 1066, 1068–1069
713. Ibid, p 1069
714. Walzl, 'Waikaremoana' (doc A73), pp 367–368
715. Cant, Hodge, Wood and Boulton, 'The Impact of Environmental Changes' (doc D1), pp 90, 93
716. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 960–961
717. Ibid, pp 946–947
718. Ibid, p 952
719. Jack Te Waara, translation of brief of evidence, 21 June 2004 (doc E23(a)), p 4
720. Ibid, p 2

people to move to areas where ongoing work was available.[721] According to Pari Winitana, heavy machinery was introduced to road work in the 1950s, reducing the need for labourers. 'The government stripped our Dads and korouas of their dignity, because now there was no more mahi for them.'[722] There was some railway construction work at this time, on the Murupara-Edgecumbe railway.[723]

The biggest public works project was the expansion of the Waikaremoana hydro-electric system, which took place on and off from 1938 until the end of the 1950s.[724] We do not know how many local Maori were employed on these construction projects, but Tahuri Tait told us that when he was a child in the 1940s, people from that area 'tended to work for NZED [NZ Electricity Department]'.[725] It seems reasonable to assume that patterns of employment were similar at this time to the earlier period of construction in the 1920s: although there were significant job opportunities for local Maori, they tended to be in lower paid and insecure labouring jobs, while Pakeha had more skilled and better paid jobs. We also do not know what job opportunities were available once the works were completed. They were a significant employer in the early 1980s, but we do not know how many employees were Maori, or what sort of work they did.[726] The inquiry district had a very small processing and manufacturing industry, which seems to have had a largely Maori workforce. As we saw in our discussion of living conditions, the Ruatoki dairy factory employed a number of Maori, but closed down in 1964, leading to local population decline as people left to find work elsewhere.[727] The Crown did make at least one attempt, in the 1940s, to promote other industries in Te Urewera, by offering to build a factory in Ruatoki which could be rented out to a manufacturer. The possibilities included a clothing or shoe factory, a cannery, a concrete products plant, and a joinery factory, but no manufacturer took up the offer. After this, successive governments tended to be against Maori Affairs involvement in such projects, regardless of location.[728]

An important role was played by Maori Affairs welfare officers, who helped school leavers and other Maori in Te Urewera and surrounding areas into a range of careers and industries, including the police, office work, nursing, teaching, and factory work, as well as farming and forestry.[729] The forestry work was not all manual labour; one Whakatane High School leaver became a laboratory technician for Tasman Pulp and Paper.[730] Many of the jobs were

721. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1089–1090
722. Paringamai O Te Tau Winitana, brief of evidence, not dated (doc H24), p 10
723. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 104
724. Cant, Hodge, Wood and Boulton, 'The Impact of Environmental Changes' (doc D1), pp 151–152; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1107, 1109
725. Tahuri o te Rangi Trainor Tait, statement of evidence, 18 October 2004 (doc H29), para 5
726. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 124–125
727. Oliver 'Ruatoki Block report' (doc A6) p 199; Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111) pp 118, 120, 125, 132, 144
728. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1091–1098
729. Ibid, pp 1102, 1124–1133
730. Ibid, p 1124

23.7.2(3)

	1957		1969	
	Number	Percentage	Number	Percentage
Farming	197	41%	105	21%
Forestry	86	18%	152	30%
'Labourer'*	122	25%	80	16%
Other	81	17%	169	33%
Total	486	100%	506	100%

* Workers who stated their occupation only as 'labourer'. The majority of these men likely worked in forestry or agriculture.

Tuhoe, Ngati Manawa and Ngati Whare men registered on Eastern Maori electoral roll, with stated occupations other than 'pensioner', 1957 and 1969, by industry

Source: Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1142–1143

outside the inquiry district, sometimes a long way from home.[731] For example, young people from areas such as Ruatahuna were helped to get seasonal work such as fruit-picking in areas as far afield as Marlborough.[732] As we noted earlier, Maori Affairs staff also helped older Maori relocate to areas, inside and outside the inquiry district, where they could get jobs.

The Eastern Maori electoral rolls for 1957 and 1969 confirm that men from Tuhoe, Ngati Whare and Ngati Manawa were mostly concentrated in a narrow range of occupations and industries, especially in 1957.[733] It is difficult to know the exact nature of some of the stated jobs. For example, 'railway workers' could include engineers and administrators as well as labourers. However nearly all the men appear to have been doing some kind of manual labour. Work which would seem to be classed as unskilled or semi-skilled manual labour made up 62 per cent of jobs in 1957 and 71 per cent in 1969.[734] Nearly all the rest were in more skilled manual work or in jobs which could broadly be described as managerial, such as farmer or contractor. Only about 2 per cent each year were professionals or technical workers.[735] Meanwhile the vast majority of women listed unpaid occupations such as

731. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1133
732. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 407
733. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1142–1143
734. Labourers, mill hands, shed hands, bushmen, non-specific forestry, farming, timber and railway workers, roadmen, factory hands, hospital orderlies, watersiders, shepherds, stockmen, fencers, trappers, hunters, truck and bus drivers, machinists, heavy equipment operators, school caretakers, freezing workers and quarrymen. The increase in unskilled and semi-skilled work came about through the decrease in the number of farmers, who have been classed as managerial workers.
735. In 1957 they were one welfare officer, six ministers, one teacher, and two surveyors. In 1969 there were one civil servant, four ministers, six teachers, and one surveyor.

housewife or widow. Interestingly, of the 51 women who listed paid occupations in 1969, just over a third had technical or professional jobs, mostly as teachers and nurses but also as laboratory workers.[736] The 1966 census showed that, nationwide, 3.5 per cent of Maori workers of both sexes were in professional, technical or related occupations, compared to 10.6 per cent of non-Maori workers.[737] It must be remembered that the electoral rolls covered the entire Eastern Maori electoral district, which was much larger than Te Urewera.[738] It is certain that, within the inquiry district, male workers were even more strongly concentrated into farming and forestry.

In summary, during the period from the mid 1930s to the 1960s, paid work outside of the timber industry seems to have been very limited in Te Urewera. There were very few permanent full time jobs in industries other than farming and forestry. Farm work tended to be badly paid even for those few lucky enough to get a development scheme or rehabilitation farm, and uncertain and seasonal for everyone else. Dairy farming had led to an improvement in conditions in the north-eastern part of the inquiry district in the 1920s, but by the 1930s bad roads, land problems, and probably the general economic difficulties of the time had caused many to become uneconomic. The expansion of the Waikaremoana hydro-electric system almost certainly provided some full time employment, but this did not last. The national park provided little in the way of work or income opportunities, and apparently none which was permanent. For most of the tangata whenua of Te Urewera, the realistic options were, quite simply: forestry or farm work, migration out of the rohe, or unemployment.

(4) *The end of native logging and the decline of the timber industry*

For most of the 1950s there was a 'staggering' amount of forestry work available in parts of Te Urewera.[739] By the end of the decade, however, employment was already becoming less certain. Private employers were becoming 'more selective' in hiring workers, which seems to have been a problem mostly for school-leavers and those with a history of frequent moves from job to job.[740] By the late 1960s, the economy was beginning to go into recession, and private mills had stopped creating new jobs.[741] The economy, and the timber industry in particular, worsened over the next decade and a half.[742] This decline was caused primarily by international circumstances, including a worldwide rise in inflation, and the reduction in New Zealand's trade with Britain following the latter's entry into the European

736. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1144. There were 10 teachers, five nurses, one dental nurse, a laboratory assistant and a laboratory technician. There was also one post mistress.
737. Ibid, p 1151. It is not clear whether this included women in unpaid occupations.
738. It also excluded the Waikaremoana area.
739. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1103
740. Ibid, pp 1106–1108
741. Ibid, p 1109
742. Ibid, p 1161

Economic Community. In the late 1970s, the large timber processing plants in Kawerau and Whakatane had stopped hiring, and there was no forestry work in Ruatahuna, where the mill had closed down. Unemployment was still low overall, however.[743] In the early 1980s there were large-scale redundancies in Kawerau, and mills were not replacing workers.[744] Workers with limited skills and education, a disproportionately Maori group, were the most vulnerable to unemployment.[745]

Meanwhile, native timber milling was reduced. As we discussed in chapter 18, there were restrictions on the milling of native timber on and off for much of the twentieth century. Until the 1970s, however, these were imposed mostly to stop erosion, river silting, and similar problems, rather than in order to preserve native forest as an end in itself. Over the course of the 1970s and 1980s, public pressure led by environmental activists resulted in the end of native timber milling, in Te Urewera and most other parts of the country.

Counsel for Ngati Whare submitted that the Crown failed to adequately consult with Ngati Whare over the end of native logging, or ensure that the policy was not detrimental to Ngati Whare and the people of Minginui.[746] Despite undertakings by both major political parties to the contrary, the claimants note that the Crown did not protect the forestry jobs affected by this change, or take steps to create alternative employment.[747] Crown counsel acknowledged that Ngati Whare were not consulted over the 1979 management plan for Whirinaki State Forest, but have submitted that the New Zealand Forest Service advocated for itself and the communities that relied on it for employment and income. They also submitted that Ngati Whare were given the opportunity for input through the inclusion of a Ngati Whare representative on the Whirinaki Forest Park Advisory Committee.[748] Crown counsel also acknowledged that the cessation of native logging impacted negatively on the Minginui community, but submitted that the Crown was duty bound to act in the national interest by balancing conservation with production needs, even if local communities sometimes suffered as a result.[749]

The first moves to curtail the logging of native timber in Whirinaki State Forest (State Forest 58) date from the mid-1970s. They came as a response to increased environmental activism beginning in the late 1960s, one strand of which focussed on the preservation of New Zealand's native forests.[750] Environmentalists and many of the general public were horrified by the rapid clear-felling of native forests, which occurred partly because the

743. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1155
744. Ibid, p 1156
745. Murton, summary of 'The Crown and the Peoples of Te Urewera' (doc J1), p 32
746. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), p 14
747. Ibid, pp 14, 19–20
748. Crown counsel, closing submissions, June 2005 (doc N20), topic 31, p 21
749. Ibid, pp 21–22
750. Simon Nathan, 'Conservation – a history – Environmental activism, 1966–1987', *Te Ara – the Encyclopedia of New Zealand*, updated 13 July 2012, TeAra.govt.nz/en/conservation-a-history/page-8

government had maintained artificially low timber prices from the 1940s to the 1970s.[751] In 1975 a new Forest Service policy, in the Whirinaki State Forest and elsewhere, replaced clear-felling with selective logging. This took trees which were nearing the end of their natural lives, and areas of forest which would be replenished, as far as possible, with new plantings.[752] As Crown counsel have acknowledged, there was no consultation with Maori about the general introduction of selective logging policy in 1975, or specifically with Ngati Whare with respect to its adoption in Whirinaki State Forest.[753] The change turned out to be mostly positive for the forest workers, as the new process was more labour intensive and more skilled.[754] Sarah (Hera) Harris told us that

> the skill of the forestry workers had to be seen to be believed. I remember seeing Tihema Ruri take out three trees in an area where there were many other trees nearby. Looking at it even I couldn't believe that those trees could be cut down without hitting and damaging the surrounding trees. However, after sizing up the job, Tihema cut down the three trees with perfect precision and ensured that they fell exactly between the other trees in the forest. The precision of his work was amazing and these were the skills that were held by men throughout the forest at Minginui.[755]

However the process could also be more dangerous than clear-felling.[756] The planting programme was another source of new jobs, with a women-only planting gang hired in 1977. According to Hutton and Neumann, this was the first time that women had worked Whirinaki timber jobs since the Second World War, when they had replaced absent men.[757]

Although selective logging was a great improvement on clear felling from an ecological perspective, conservationists wanted an end to all logging of native trees. In 1977, the Native Forests Action Council presented Parliament with the 'Maruia Declaration', a 341,160-signature petition calling for an outright ban on all logging of native timber. The Labour opposition adopted a similar policy position, at least with respect to State Forests such as Whirinaki, in the 1978 general election.[758] The Muldoon government meanwhile agreed to end logging in Pureora State Forest, west of Lake Taupo, which effectively spelled the end of the forestry communities of Barryville and Pureora.[759] The Native Forests Action Council followed up on its success by making a supplementary submission to the Maruia

751. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 700
752. Ibid, pp 635–639; Brad Coombes, 'Cultural Ecologies of Te Urewera II, Preserving "a great national play area" – conservation conflicts and contradictions in Te Urewera, 1954–2003' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003' (doc A133), p 303
753. Crown counsel, closing submissions, June 2005 (doc N20), topic 31, p 21
754. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 641–642; Coombes, 'Cultural Ecologies of Te Urewera' (doc A133), p 335
755. Sarah (Hera) Harris, brief of evidence, September 2004 (doc G39), p 8
756. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 642
757. Ibid, p 642
758. Ibid, pp 645, 656; Coombes, 'Cultural Ecologies of Te Urewera II' (doc A133), p 303
759. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 646–648

23.7.2(4)

Minginui Residents Versus Environmentalists

Bob Collins was the Forest Service's District Ranger, based in Minginui and in charge of the Whirinaki State Forest in the 1970s. He was a strong advocate for the Whirinaki logging industry and the timber towns. This quote comes from his unpublished autobiography, *Who Dares Wins*, written in the early 1980s:

> It is easy to hate the fanatics, the professionals, and the back stabbers in our own department, but what about the average person who was against us. They came into the forest in their droves throughout 1978/79, stayed a half day, perhaps a day, maybe even two or three days, professed a great love for the forest, looked upon us, who lived in the forest, as lepers, or butchers who did not love the forest. What do THEY know about the forest? What DO they know about the forest and about us?
>
> Of course, we don't LOVE the forest, we are part of the forest, as much a part as the birds or the ferns. Does a man love his left hand, or his liver? . . . If they love the forest as much, why don't they live in it?[1]

In 1979, the Forest Service called for public submissions on its Management Plan for Whirinaki State Forest. The Plan aimed to continue what the Forest Service regarded as sustainable native logging in Whirinaki, which it argued was crucial to the New Zealand economy as well as the Minginui community.[2] In response to a conservationist campaign against the Management Plan, Collins encouraged Minginui residents to make their own submissions in favour.[3] A total of 12,497 submissions were made, about two-thirds in support of the plan.[4] One of these submissions came from Catherine Tai, a young girl living in Tokoroa but with strong family links to Whirinaki.

> My dads family live in Minginui. My Nana and Grandad lived there a long time ago. My dad and his sisters all lived and went to school there. I know that we have land there belonging to my dad and all our relations. Some of this land has been leased to the State Forest and will in time provide more and more work for my Generation and the Generation to come. I wouldn't like the Conservationists to get it because they will take all our land for nothing and my Aunty has told me that they have enough of our land . . . Don't let them have it 'PLEASE'. My grandad and Nana

1. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 664. For more information on Collins, see p 638n. Collins' superiors advised him to keep the autobiography 'under wraps' since if it 'got into the wrong hands it could bring trouble for you & the Dept.'
2. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 666
3. Ibid, pp 670–672
4. Ibid, p 672

are buried up there in the Whirinaki Valley, and who will tend their graves. We all do when we go HOME. Tell them to leave the Valley alone and get out. Minginui belongs to us, our friend and tribe.[5]

Wakeley Matekuare was brought up in Te Whaiti in the 1940s and 1950s. Speaking before us at Murumurunga Marae at Te Whaiti, Mr Matekuare said that he, his father and all four of his brothers worked in forestry. He told us about the hardship caused by job losses, and contrasted it with the happier days of the 1970s:

Because of the Greenies, there were problems with not being able to log indigenous trees. However, by that time we were carrying out selective logging because it was more sustainable and there was less impact on the forest. This was supported by Ngati Whare. The selective logging involved logging about one in every ten trees. After that the ladies planting crew would go in and replant with natives the next year. However, the Greenies wanted all native logging to stop.

. . . . .

Minginui people felt like we were fighting for our survival because we could see the signs that we were going to lose our jobs. The Greenies were all from outside our rohe. They didn't understand what the forestry industry meant to people here.[6]

5. Catherine Tai to Conservator of Forests Rotorua, 7 July 1979, BAFK 1537/8a, NA, Auckland (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 680)
6. Wakeley Matekuare, brief of evidence, September 2004 (doc G40), p 4

Declaration, calling for log production from Whirinaki to be restricted to exotics.[760] In June 1978 a large party of conservationists visited Whirinaki Forest and were blockaded by angry Minginui residents. The Minginui community subsequently held a forum explaining their views to the government and the general public. As a result, Cabinet decided in July 1978 that selective native logging would continue in Whirinaki, but with the annual cut steadily reduced from 30,000m^3 to 5,000m^3 by 1989. By this time, there would be sufficient mature exotic timber to sustain a local forest industry.[761]

The Forest Service based its Whirinaki forest management plan on the 1978 Cabinet decision, and the plan was released for public comment in May 1979.[762] As immediate conversion to exotic forestry was not financially viable for the Minginui mills, it was clear that

760. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 658–659
761. Ibid, pp 652–658; Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 233–237
762. This release of the proposals for public scrutiny fulfilled a commitment made by the Muldoon government in 1978: Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 665–666.

they would close if the management plan was not approved.[763] There was no consultation specifically with Ngati Whare, but the Forest Service encouraged individual iwi members to make submissions, to counter anti-logging submissions by conservationists.[764] The submissions emphasised the threat to Minginui, and to the ability of Ngati Whare to maintain ties to their rohe if there was no work there.[765] Meanwhile, conservationists and the Urewera National Park Board persuaded the National Parks Authority to investigate, and then recommend, the incorporation of parts of Whirinaki State Forest into the park.[766] Cabinet decided against this, primarily because of the 'adverse social and economic aspects, especially to the Minginui community'.[767] Indeed, the only significant change Cabinet made to the proposals was to bring the date when the native timber cut was reduced to 5000m^3 forward from 1989 to 1985.[768] With this amendment in place, the new management plan was issued in 1981.[769]

By the early 1980s, therefore, the Crown was moving towards a future for Whirinaki Forest that was not based on native logging. In late 1983 the Crown decided that the State Forest should be redesignated as a Forest Park, which meant that the balance of uses in the forest shifted towards recreation.[770] The transition to a Forest Park also saw the establishment of a Forest Park Advisory Committee, which gave the opportunity for more public input into park management. The 10-member committee had only two Maori representatives: Sarah (Hera) Harris, who had been a spokesperson for Ngati Whare in 1979, and Winiata Herewini from the Tuhoe Waikaremoana Maori Trust Board.[771]

Whirinaki Forest Park was officially opened on 28 April 1984.[772] Three months later, the fourth Labour government was elected on a platform which included ending native timber logging on Crown-owned land.[773] The Forest Service halted the logging of native timber in Whirinaki in December 1984, despite a petition from Minginui residents the previous month asking Parliament to show 'as much regard for the people of Minginui and the

763. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 675–676; Coombes, 'Cultural Ecologies of Te Urewera II' (doc A133), p 315. As Hutton and Neumann note, Forest Service staff felt that they had some obligation to ensure the viability of the sawmill, as only four years earlier the three Minginui mills had amalgamated to form it at the Forest Service's behest: Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 667–668.

764. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 670–672

765. Ibid, pp 676–680, 683–685, 688; Coombes, 'Cultural Ecologies of Te Urewera II' (doc A133), pp 312–314

766. Coombes, 'Cultural Ecologies of Te Urewera II' (doc A133), p 326; Stokes, Milroy, and Melbourne., *Te Urewera* (doc A111), p 245

767. 'Whirinaki State Forest management proposals', Secretary of the Cabinet to the Minister of Forests, 11 December 1979 (Coombes, 'Cultural Ecologies of Te Urewera II' (doc A133), p 330)

768. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 687

769. Ibid, p 690

770. Coombes, 'Cultural Ecologies of Te Urewera II' (doc A133), p 331

771. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 678–679, 688; Coombes, 'Cultural Ecologies of Te Urewera II' (doc A133), pp 332–333

772. The commitment to only salvaging timber from wind thrown and dying trees was reiterated at this time. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 247

773. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 696

future as it will have for the trees'.[774] In May 1985 Cabinet decreed that the only native timber that could be removed from the Whirinaki forest was totara from dead trees, if needed for specific cultural purposes.[775]

During a decade of debate, Ngati Whare were never asked for their views on the future of native logging at Whirinaki. Contrary to the Crown's submissions, the Whirinaki Forest Park Advisory Committee (and indeed Whirinaki Forest Park) did not exist until 1984, and therefore could not have been 'consulted in the formulation of the 1979 management plan'.[776] Ngati Whare had, however, received frequent assurances that jobs at Minginui, on which so many depended, would be protected. At the June 1978 forum held in Minginui, for example, the Minister of Forests, Venn Young, stated that 'No Government policy will destroy this village', while Labour's forestry spokesperson Richard Prebble and Eastern Maori MP Paraone Reweti each gave 'an assurance that villagers at Minginui would not lose their jobs under a Labour Government's native forest policy'.[777] A week earlier, Prebble had told Parliament that the Labour Party could give 'an unqualified assurance that it will not throw the workers on the scrap heap'.[778] At the opening of Whirinaki Forest Park nearly six years later, Peter Tapsell, the Labour MP for Eastern Maori, told the people of Minginui that no jobs would be lost as a result of his party's native forests policy.[779] Indeed, Labour's 1984 election manifesto specifically stated that 'Sawmill employment at Minginui will be safeguarded using the State's available exotic timber resources, and Labour will guarantee the future of the forest work force'.[780] The soon to be defeated Muldoon government, meanwhile, promised to maintain the cut of native timber at a level that would sustain the Minginui sawmill.[781]

Despite the promises of both parties, the timber industry around Minginui had ceased to exist by the late 1980s. Ultimately, however, this was not because of the end of native logging, but rather because of the corporatisation of the Forest Service, to be discussed later in this chapter. As we discussed in more detail in chapter 21, the Crown's original plan for Whirinaki was that native logging would eventually be replaced by logging of non-native trees such as pine. This was also Labour's election promise in 1984; native logging would stop but the jobs would remain. Initially, this is what happened. It was a short reprieve, however, as the corporatisation of the Forest Service and the end of subsidies for private mills resulted in massive job losses in Whirinaki and elsewhere.

774. *New Zealand Herald*, 7 November 1984 Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 257
775. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 258
776. Crown counsel, closing submissions, June 2005 (doc N20), topic 31, p 21
777. *Whakatane Beacon*, 23 June 1978 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 657); see also *New Zealand Herald*, 10 November 1978, and *New Zealand Herald*, 23 June 1978 (Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 237, 241)
778. R Prebble, 14 June 1978, NZPD, 1978, vol 417, p 865 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 656 n 93)
779. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 700
780. New Zealand Labour Party, 'Environment Policy: Basic Principles / Native Forests / National Parks' (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 695)
781. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 695 n 216

23.7.2(5)

(5) *Attempts at diversification*

During the 1970s and 1980s, Te Urewera communities attempted to diversify their local economy and thereby free it from its dependence on the faltering timber industry. Counsel for Tuawhenua submitted that the Crown failed to adequately support these initiatives, and Crown agents hindered some of them.[782] Crown counsel did not specifically respond to these submissions, but submitted more generally that:

> The rather brutal, but fundamental, reality is that employment opportunities in contemporary New Zealand are overwhelmingly located in urban areas. New Zealand is not alone in this regard. To create meaningful, alternative employment in new areas . . . presented and presents real challenges . . . In this context it needs to be acknowledged that Crown Treaty responsibilities do not extend to guaranteeing economic success for community-based initiatives and projects that the government might support, either in whole or in part.[783]

Crown counsel also stated that the Crown does not have any general duty 'to assist the economic development of remote areas'.[784]

By 1967, unemployment was increasing, and the rate among Maori men was anywhere from four to six times that of non-Maori men.[785] Unemployment increased further during the 1970s and 1980s; by 1981 the national unemployment rate for Maori was 14.1 per cent, compared to 3.7 per cent for Pakeha.[786] As we noted earlier, people with limited education or work experience were particularly vulnerable.[787] There was some limited diversification in Te Urewera in the 1970s; a shoe factory opened in Waimana in 1974, and in 1979 processing plants opened in Taneatua and Ruatoki. However these new opportunities were not enough to counter the fall in timber industry jobs.[788] In 1981, around half of all full time workers in Ruatoki, Waimana, Minginui and Te Whaiti were in farming, forestry, or hunting jobs.[789] Rising unemployment, in combination with the decline of the timber industry, meant that there was an urgent need for economic diversification in Te Urewera. Welfare officers continued to play an important role, for example helping to get the Waimana shoe factory established.[790]

In chapter 16 we explored allegations relating to 1970s and early 1980s initiatives and income sources involving the National Park, namely Venturetreks, Te Rehuwai Safaris, Ruatahuna Fur and Game Products and the possum fur industry more generally, and

782. Counsel for Tuawhenua, closing submissions (doc N9(b)), pp 28–29
783. Crown counsel, closing submission, June 2005 (doc N20), topic 38, p 2
784. Ibid, topic 39, p 6
785. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1147, 1151. The differential was much higher for women (p 1151), but high rates of non-participation in the labour market make comparisons difficult.
786. Ibid, pp 1152, 1161
787. Ibid, p 1151
788. Ibid, pp 1155–1156, 1170
789. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 125
790. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1098

pest control. Te Rehuwai Safaris survived in the long term, but this was no thanks to the largely uncooperative attitude of park management. We also discussed employment by park authorities, which tended to be casual and badly paid, and essentially a modern form of unemployment relief work. Although we did not find any Treaty breach in relation to these matters, we did find that the Crown could have done more to help tangata whenua benefit economically from the Park.

Outside of the national park, locals explored other economic possibilities, such as growing various fruits and vegetables, and farming deer and goats. They carried out their own research into the viability of these ideas, with positive results, and Department of Scientific and Industrial Research (DSIR) staff conducted trials which seemed to show that carrots and cherries could be commercially grown at Ruatahuna. However no further support was forthcoming and, as the local communities had no start-up funds of their own, the projects never got off the ground.[791] Neville Jennings was one of those leading the exploration of new initiatives, and told us how the lack of support led to those involved becoming 'burnt out financially, physically, mentally and emotionally.'[792] We did not hear enough evidence, unfortunately, to determine whether or not more Crown support would have been warranted.

We heard of three initiatives which did receive Crown support: Ruatahuna Fur and Game Products (briefly discussed in chapter 16), a seed potato venture in Ruatahuna, and a deer farming company in Ruatoki. These were all supported by the Department of Maori Affairs' Maori Access Scheme (Maccess), introduced in 1977. The scheme aimed to help Maori communities to develop and manage their own economic opportunities and create local employment.[793] The only one of these enterprises on which we received substantial evidence was the seed potato venture.

In the late 1970s, the DSIR conducted trials which showed that, despite Ruatahuna's short growing season, the land there could produce a commercially viable yield of quality potatoes.[794] The trials were funded by a Department of Maori Affairs loan, which also paid for seed, fertiliser, and other supplies.[795] The DSIR also provided helpful advice. The next step was to secure suitable land for a full-scale operation. It was estimated that 60 acres were required for the project to be commercially successful.[796] The Ruatahuna community

791. Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 542–543; Neville Maurice Jennings, brief of evidence, 21 June 2004 (doc E16), pp 6–7; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1170–1171

792. Neville Maurice Jennings, brief of evidence, 21 June 2004 (doc E16), pp 3–8

793. Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 542–543; Neville Maurice Jennings, brief of evidence, 21 June 2004 (doc E16), pp 6–7; Murton, 'The Crown and the Peoples of Te Urewera', (doc H12), pp 1170–1172

794. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 538

795. Brenda Tahi on behalf of the Tuawhenua Research team, summary of 'Ruatahuna, Te Manawa O Te Ika, Part Two: A History of the Mana of Ruatahuna from the Urewera District Native Reserve Act 1898 to the 1980s', 22 June 2004 (doc E17), pp 11–12; Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 537–539

796. When the potato seed project was revived, an anonymous government report estimated that 15 hectares (37 acres) needed to be planted for economies of scale were satisfactory – 'Ruatahuna Seed Potatoes', no date [1990] (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(E)), p 97)

believed that the only suitable land in the area was on the Ruatahuna Farm, which was still being managed under the land development schemes initiated in the 1930s. It had 60 acres in one contiguous flat area, which would be easier to access and work on than the trial plots, which had been in five different places.[797] In 1980, the Ruatahuna people applied to Noel Thomas, a Rotorua-based District Field Officer of the Department of Maori Affairs, to lease land on the Ruatahuna Farm for the potato venture. Thomas rejected the application, giving four reasons. First, it went against the objective of the Ruatahuna Farm; second, he did not want to set a dangerous precedent, and feared that much of the Ruatahuna Farm would end up leased out to its owners; third, he argued that there was a 'considerable area' of 'suitable poorly utilised land' elsewhere in Ruatahuna; and fourthly, the area in question was needed to grow stock feed.[798]

The validity or otherwise of these arguments is not clear from the evidence we received. The farm's land was allowed to be partitioned for cropping and other purposes, but only if this did not interfere with the overall scheme. In 1987 there were 3,536 acres of the farm under grass, so it seems somewhat implausible that 60 acres could not have been spared.[799] By 1982, the potato farm project had come to a standstill. H Pryor, a Community Officer for the Department of Maori Affairs, stated that the major reason for this was

> the lack of a suitable area of land to plant potatoes in . . . The people of Ruatahuna who are involved in the project felt that 60 acres from the development [the Ruatahuna farm] could have been leased to them . . . but as it was pointed out to them all the flat land was required for the growing of supplementary food for Block stock.[800]

Pryor suggested additional reasons for the failure of the project: waning enthusiasm of the workers; poor supervision; high wage costs that exceeded returns; and their inability to sell their crop on the Auckland market.[801] Neville Jennings, who had been involved in this venture, suggested to us an important reason for waning enthusiasm:

> While it did create some employment it was of no real advantage to the local people because it was only seasonal work and they got little financial return from the project. Our full project was to grow horticulture products, for example cabbage, onions, carrot, cauliflower in conjunction with potatoes giving much longer employment opportunities.[802]

Stokes, Milroy and Melbourne also suggested that 'the caring, sharing, communal nature of the community' meant that 'too many potatoes were eaten locally and the profits were

797. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 540
798. Noel Thomas to W Jaram, undated (Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 540–541)
799. Alexander, 'The Land Development Schemes' (doc A74), p 329
800. Pryor to Nicklin, 2 August 1982 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(E)), p 63)
801. Ibid
802. Neville Maurice Jennings, brief of evidence, 21 June 2004 (doc E16), pp 7–8

literally eaten into.'[803] The project was later revived in the late 1980s with assistance from the government's Access and Community Employment Investigation Schemes, but still only provided seasonal employment for five to six people.[804]

Overall, the project proved to be a viable option that produced a good quality, high yield crop. It is too simplistic, however, to say that Crown action in itself was the only cause of its failure. It did not succeed for a variety of factors, outlined above. The main one was the lack of a suitable area of flat land. The crucial decision was the Department's refusal to lease 60 acres for the project on the grounds that it was needed for stock feed. We lack the evidence to assess whether this was essential for the functioning of the farm's operation, or whether 60 acres of flat land could have been found elsewhere. Ideally, some sort of balance between the farm scheme's operation and the potato seed venture ought to have been worked out, but we do not know whether this was possible. The crucial point, in our view, is that it was a Department official making the decision, not the owners. The limited success of the revived project later in the 1980s suggests, however, that even if the land had been made available, it would have done little to relieve Ruatahuna's economic problems. Indeed, the amount of attention paid in this inquiry to 60 acres of potatoes is, in itself, a strong indication both of the limited possibilities of the Te Urewera economy, and the determination of the Ruatahuna people to try and get an economic venture off the ground. Other initiatives had some success, but remained small scale and did little to relieve unemployment or revitalise the Te Urewera economy. More Crown assistance may have improved matters, but it is clear that the district had fundamental economic problems which could not easily be overcome.

23.7.3 The expansion of the welfare state

Earlier in this chapter, we saw that Maori living conditions in 1930s Te Urewera were extremely bad. There were numerous epidemics, although these were not as severe as in earlier decades, and high levels of chronic ill health. Housing and sanitary provisions were completely inadequate even by the standards of the time, and education was generally available only until the end of primary school. Education and other social services tended to be difficult to access, monocultural, and monolingual.

The elimination of conditions such as this was one of the motivations behind the welfare state built up from 1935. The Social Security Act 1938 was particularly important, progressively removing fees for hospital treatment and introducing a range of welfare benefits to which particular groups were entitled as of right. No longer were benefits limited to those who were both 'deserving' and completely without other options; instead social services and a basic standard of living became rights to which everyone was entitled. Spending on

803. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 201

804. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1196; Poulin and Tahi, *A Study on Community Services and Development for Ruatahuna*, p 57

health, education, sanitation, and housing increased, and more effort was put into ensuring that services were available in rural areas.

In Te Urewera, Maori standards of living improved significantly in the mid twentieth century, partly because of the welfare state but primarily because of the employment provided by the timber industry. Outside the timber towns and other areas with high employment, however, living conditions continued to be poor. Housing was particularly bad, with many people living in overcrowded, draughty and rundown houses with little or no sanitary facilities. There were substantial shifts of population from settlements in the heart of Te Urewera to the forestry towns and further afield. Some areas saw major population decline and the abandonment of uneconomic farms, while others saw huge increases in population. Throughout the district, Maori health continued to be poor by comparison to that of Pakeha, although levels of infectious disease and premature death were far lower than in earlier decades.

From about the 1960s, Maori increasingly asserted the value of their language and culture, demanding that it receive more respect from the Crown, and occupy a more prominent place in New Zealand life, particularly in the education system. With very limited Crown support, they founded the kohanga reo movement and began making some primary schools bilingual. Te Urewera was at the forefront of this movement, with Ruatoki Primary School becoming the first in New Zealand to go bilingual, in 1977. Meanwhile, activists raised the profile of the Treaty of Waitangi and called on the government to give effect to its guarantees. The third Labour government and its Minister of Maori Affairs, Matiu Rata, were sympathetic, and in 1975 passed legislation to create the Waitangi Tribunal. At this stage, however, it was empowered only to investigate contemporary Treaty breaches, and it was little used until the appointment of Chief Judge Edward Durie as chair in 1980.

(1) *Social welfare*

The Social Security Act 1938 introduced a range of benefit entitlements, removing the need for beneficiaries to prove themselves 'deserving'. It also abolished differential provisions for Maori. However the Act retained the possibility of paying lower benefit rates if the full amount was not 'necessary for the maintenance of the beneficiary'.[805] This meant that Maori could still be paid lower rates, as was explicitly laid out by the Minister of Social Security in 1939 in response to a letter from Judge Harvey of the Waiariki District Maori Land Court:

> Having regard to the fact that most Maoris live in a Pa in communal fashion and have not the living expenses to meet as compared with Europeans, the Commission considers that it has authority to grant reduced benefits under Section 72 of the Social Security Act, and in view of all the circumstances it would seem that there is some justification for such

805. Social Security Act 1938, quoted in McClure, *A Civilised Community*, p 112

a procedure. I may say that the policy as set out by the Commission appears to be a reasonable one to follow.[806]

McClure notes other contemporary justifications, such as the idea that Maori were used to a low standard of living, and therefore needed less money, and concern, from Apirana Ngata among others, that they would become dependent on welfare.[807] The high cost of retail goods in rural areas was not taken into account. As a result, many Maori were paid reduced pensions and widows' benefits until the passage of the Maori Social and Economic Advancement Act in 1945.[808]

Family allowances had always been paid equally to Maori and Pakeha, and over time such payments constituted an increasingly significant source of welfare assistance. When the allowance was introduced in the late 1920s, it paid two shillings a week for every child after the first two, in households with an income of less than four pounds a week. By 1938, 1,822 Maori families were claiming this allowance.[809] In 1939 the rate was doubled, and in 1946 it was replaced by the Family Benefit. This was paid for all children, and no means test was applied.[810] As a result, levels of uptake were extremely high.[811] Nine years later, the Chairman of the Social Security Commission attributed the improved health and well being of Maori children to the increase in family incomes brought about by the universal Family Benefit.[812] The benefit was not adjusted for inflation, however, and by the 1970s was an 'insignificant' amount of money. It was abolished in the late 1980s.[813] An emergency benefit for single-parent families was introduced in 1968, and expanded in the early 1970s to become the Domestic Purposes Benefit.[814]

Another important provision of the Social Security Act was the unemployment benefit. This was not widely used at first, since by 1938 the mass unemployment of the Depression had passed, and there was close to full employment during the Second World War and the years afterwards. Even in the 1940s, however, the benefit was claimed in places such as Ruatoki, where there were few jobs.[815] When unemployment became common from the 1970s, and especially from the 1980s, the unemployment benefit meant that those without work, and their families, would not face complete destitution and near-starvation, as they

806. W E Parry, Minister of Social Security to Judge J Harvey, 7 November 1939. SS W2756 9/9/2. National Archives, document vol Q, pp 56–57 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1013)
807. McClure, *A Civilised Community*, p 112
808. Whyte, 'Beyond the Statute', pp 134–135
809. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1031–1032
810. Ibid, p 1034
811. The only requirement was proof of birth registration, which had previously not happened for a significant minority of Maori children. After the new benefit was introduced, there were so many late birth registrations that they seriously distorted data for 1946: Ian Pool, *Te Iwi Maori: A New Zealand Population Past, Present and Projected* (Auckland: Auckland University Press, 1991), pp 107–108
812. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1037
813. Ibid, p 1039
814. Ibid, p 1039
815. Ibid, p 1096

had in earlier decades. In the 1970s and early 1980s, the Crown also subsidised short-term employment and provided training for people who would otherwise be unemployed. Most of these programmes were abolished in the mid 1980s.[816]

The various welfare benefits available from around the late 1930s contributed to the mid twentieth century improvement in Te Urewera living conditions. The Family Benefit, which was not means tested and was particularly helpful to large Maori families, was probably the most important at this stage. Later the unemployment benefit was probably crucial in keeping many families from complete destitution. Differential benefit levels for Maori were abolished in 1938, but discretionary provisions meant that some discrimination continued into the 1940s.

(2) *Health care*

Apart from introducing a wider range of welfare benefits, the Social Security Act 1938 aimed to introduce free health care for all New Zealanders. Over the course of the late 1930s and the 1940s, charges were gradually abolished for all hospital treatment, prescription medicines, maternity care, district nursing services, dental treatment for under-16s, and a range of other health care needs. General Practitioner (GP) services were subsidised, although most GPs continued to charge for visits. Throughout the 1935 to 1984 period, distance from health care was an ongoing problem for many Te Urewera communities, especially those such as Ruatahuna which lacked good road access. This problem will be addressed later in this chapter, with respect to the entire century.

The Crown's public health programme was also expanded in the mid-twentieth century. Most importantly for Maori health, the Health Department began a concerted campaign to eliminate tuberculosis. An early initiative was the provision of small huts for tuberculosis patients, so that they could be separated from uninfected whanau without having to be admitted to hospital. The first such huts in Te Urewera were erected in 1940. From the mid-1940s to the early 1950s, Murton states there were on average 'three to four huts in the Ruatoki area, two to three in the Tanatana-Waimana area, and one to two in the Murupara area.'[817] This worked around 'the disinclination of Maori for institutional care' in hospitals and sanatoria.[818] After this, effective drug treatments became available, and the huts became less necessary.[819] From 1953, vaccinations against tuberculosis were provided in Te Urewera and elsewhere.[820] As a result of the campaign, and the availability of effective medical treatment, rates of tuberculosis among Maori and the general population plummeted from the mid 1940s. What had once been the leading killer of Maori became a relatively rare disease,

816. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1163–1164
817. Ibid, p 1750
818. Ibid, p 1749
819. Ibid, p 1750
820. Ibid, p 1756

although it never entirely died out.[821] As Ian Pool explains, the biggest decline in tuberculosis mortality pre-dated the introduction of the most effective drug treatments.[822] It was brought about through extensive screening, better Maori access to medical treatment, and 'a social welfare backup' which improved patients' living standards.[823]

Illness and death from other infectious diseases also decreased dramatically in the post-war years, thanks in large part to a comprehensive immunisation programme.[824] In addition, in the late 1930s and 1940s the Crown continued to respond to outbreaks of disease in Te Urewera by sending in medical staff. In 1939, for example, a medical officer was sent to deal with an outbreak of syphilis at Ruatoki.[825] The Superintendent of Rotorua Hospital, Dr Bridgman, visited the Whirinaki valley four years later to treat another syphilis outbreak as well as other diseases.[826] Bridgman visited Te Whaiti school about once a fortnight in the mid 1940s, treating skin and ear problems, and presumably other medical conditions. He also arranged for the entire rolls of Te Whaiti and Minginui Maori Schools to spend three weeks at a health camp at Waikato Heads.[827]

The visiting doctors were required because Te Urewera continued to lack adequate access to GP services. In 1938, Mrs R Barnes wrote to the Minister of Health on behalf the broader Te Whaiti area, requesting that a doctor be stationed there. She stated that the nearest doctors were in Rotorua and Whakatane, and in cases of serious accident, for example in the sawmills, 'any person could bleed to death' before help arrived.[828] Shortly afterwards, Dr Golan Maaka was appointed as 'whole-time Medical Officer for Treatment of Maori' in Te Urewera, but only for about a year.[829] Maaka was of Ngati Kahungunu and Ngai Tahu descent, and later became a GP in Whakatane.[830] In 1947 Dr Allan North became the first doctor to be based in Te Urewera for any extended period of time, practising at Te Whaiti until 1971.[831] He estimated that in 1947 he provided services to nearly 1,500 patients, of whom 64 per cent were Maori.[832] North's area initially included Galatea, Murupara and Waiohau,

821. Ibid, pp 1755–1758
822. Pool, *Te Iwi Maori*, p 149
823. Ibid, p 151
824. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1830, 1834
825. Ibid, pp 1736–1737
826. Ibid, p 1739
827. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 560
828. R Barnes to Minister of Health, 16 August 1938 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p 118)
829. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1736–1737, 1764
830. Bradford Haami, 'Maaka, Golan Haberfield', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, http://www.teara.govt.nz/en/biographies/4m1/maaka-golan-haberfield, last modified 12 November 2013
831. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1769–1774
832. Ibid, p 1770

but the growth of the timber towns meant he could no longer visit these three settlements.[833] Another doctor set up in Murupara in 1954, but left two years later.[834]

North had been appointed by the Health Department, under a provision of the Social Security Act aimed at delivering medical services to isolated areas.[835] This indicates that the Crown recognised the additional needs and difficulties faced by isolated rural communities such as those in Te Urewera. Labour had hoped to bring all GPs fully into the state health system, making them Crown employees who would treat patients free of charge.[836] However most doctors refused to accept this, and the result was a continued fee-for-service system whereby part of the patient's fee was paid by the Crown.[837] This meant that patients still had to pay to see a GP, although fees were smaller than previously. Since the Native Medical Officer (NMO) service was abolished around this time, however, the changes may have made GPs less accessible to Maori who had previously used the NMO service.[838] This did not affect patients in Te Urewera, since, as we have seen, there were never any NMOs stationed in Te Urewera.

Apart from North, the main GP for Te Urewera was Dr Maaka, who was based at Whakatane from 1944 to about 1978, but until the 1960s often visited patients in Waimana, Matahi, Ruatoki, Waiohau, Murupara, and Ruatahuna.[839] Brandon Haami, Maaka's grandson, states that Maaka became the doctor for the Tuhoe people after he removed a cyst from Takurua Tamarau, then considered to be the paramount leader of Tuhoe.[840] He was popular with Tuhoe partly because he did not charge them for his services, and partly because he combined Western medicine with traditional Maori healing, including rongoa taught to him by Tuhoe elders.[841] His unorthodox methods made him somewhat unpopular among the Whakatane medical community, and hospital staff were often suspicious of his diagnoses.[842]

Maaka's efforts were extraordinary, but he and North could not cover the entire Te Urewera region. Doctors based in Wairoa served Te Kuha and Waimako, but it is unlikely that they visited often; Wairoa borough and county had only four GPs serving a scattered population of 12,000.[843] Many Te Urewera communities were 12 to 20 miles from the nearest doctor, and it was said that patients would lose a day's pay if they travelled to Whakatane

833. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1770
834. Ibid, pp 1771–1772
835. Social Security Act 1938, s82; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1769–1770
836. Dow, *Safeguarding the Public Health*, p 122
837. Ibid, pp 122–123
838. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1615–1616
839. Ibid, p 1764
840. Haami cited in Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1764–1765; Wharehuia Milroy, foreword to *Dr Golan Maaka: Maori Doctor*, by Bradford Haami (North Shore: Tandem Press, 1995), p 9
841. Bradford Haami, 'Maaka, Golan Haberfield'
842. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1765
843. Ibid, p 1767

Dr Golan Maaka

Dr Golan Maaka (1904–78) was a charismatic, colourful, and passionate doctor of Ngati Kahungunu and Ngai Tahu descent. He received his training at Otago Medical School in the 1930s, writing a dissertation on health practices at Ratana Pa. After treating syphilis in Taneatua and Ruatoki from 1939 to 1941, he was nicknamed the 'pox doctor', which he loathed. He was stationed in Kawakawa from 1941 to 1943, and then became a General Practitioner at Whakatane until his death. He was also known as the 'cabbage doctor' as he accepted food and drink as koha for his work in lieu of money. He often travelled by horse and canoe into the Urewera forest to visit isolated patients.

Source: Bradford Haami, 'Maaka, Golan Haberfield' in the *Dictionary of New Zealand Biography*

to see a GP.[844] The doctor shortage cannot be blamed entirely on the Crown, as there was a national shortage of doctors willing to work in rural areas, especially those lacking infrastructure or regarded as 'remote'.[845] The Crown was certainly aware of the inadequate coverage; for example, Medical Officer W C Davidson noted in 1964 that the Matahi area 'gives most concern by reason of lack of medical facilities.'[846] Some efforts were made in the 1950s to get a doctor for Taneatua, but nothing came of them.[847]

Partly because of the access difficulties, Maori in Te Urewera began to set up their own medical facilities, often incorporating Maori concepts of health and well-being, and traditional methods. The first of these, which opened in 1977, was Ruatoki's Maaka Clinic, named after Dr Golan Maaka. This arose out of discussions between the Western Tuhoe Tribal Executive, the local public health nurse, the South Auckland Education Board, the Whakatane Hospital Board, and the Department of Health.[848] It was funded by the Government's Community Health Fund, while the Bay of Plenty Hospital Board agreed to maintain and staff the building.[849]

Communities without adequate access to doctors relied mostly on district nurses. In 1938, New Zealand's 49 district nurses treated 58,008 Maori patients and made 18,848 visits to

844. 'Resident Doctor wanted at Taneatua', *Bay of Plenty Beacon*, 25 May 1951 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(QQ)), p 128)
845. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1776
846. Davidson, Medical Officer of Health (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1766)
847. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1765
848. Oliver, 'Ruatoki Block Report' (doc A6), pp 193–194
849. Puti O'Brien 'Community Health Clinics in the Eastern Bay of Plenty: The Ruatoki-Maaka Clinic', in *Hui Whakaoranga: Maori Health Planning Workshop* (Wellington: Department of Health, 1984), app 9, p 3

Medical Services at Waikaremoana in the 1940s

I remember that there was always a District Nurse available here [at Waikaremoana]. However, there wasn't a doctor here all the time. From 1944, Doctor Acheson and Doctor Tate would visit from Wairoa once a fortnight, and if you had the money, you'd be able to see him. If you didn't have the money, you didn't go. There was a time during the 1940s when my mother in law Mereana was the midwife, and all babies were either born here in their homes or on the way to Wairoa. Without money, people would turn to the bush for their rongoa.

Source: Maria Waiwai, brief of evidence, not dated (doc H18), p20

Maori settlements.[850] Around this time, all specialised nursing services, including the Native health nursing service, were folded into the general district nursing service which served everyone. The Crown also expanded nursing services, appointing new nurses to Rangitahi, just outside Murupara, in 1936, Taneatua in 1940 and Tuai in 1943. Second nurses were stationed at Whakatane and Opotiki in 1945.[851] By this time, most Te Urewera communities had a nurse either living among them or nearby; the main exceptions were Ruatahuna and Maungapohatu.

The nearest nurse to Ruatahuna was based at Murupara. She had originally been appointed to Ruatahuna, on the basis that its Maori population of 459 had specifically requested a nurse, and was bigger than the Maori population of either Murupara (258) or Te Whaiti (220).[852] Ruatahuna was considered to be close enough to the latter areas for the new nurse to serve them too, even though the road between them was 'difficult'.[853] However the Health Department changed its mind and stationed her in Murupara.[854] The rationale for this was that the area was growing in population, and someone was needed to serve the local Pakeha population as well as Maori. The Director-General of Health, M H Watt, did explicitly state that the nurse's primary duties would be to Maori; but as long as 'the

850. Hearn, 'Maori, the Crown, and provision of health services' (doc M1), p25; 'Annual Report of the Director-General Health', AJHR, 1935, H-31, p56; 'Annual Report of the Director-General Health', AJHR, 1939, H-31, p67; 'Annual Report of the Director-General Health', 1949, AJHR, H-31, p40

851. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p1802

852. B Wyn Irwin, Medical Officer of Health, Gisborne to the Director-General of Health, 8 February 1936 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p103); Tuawhenua Research team, 'Ruatahuna' (doc D2), p303

853. B Wyn Irwin, Medical Officer of Health, Gisborne to the Director-General of Health, 8 February 1936 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p103)

854. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p1801

Urewera remains in its more or less undeveloped state and so long as it continues to be without adequate medical or nursing services,' the district nurse would have to treat Pakeha as well as Maori.[855] Medical Officer Harold Turbott argued that Murupara was the best location because it had the largest total population, 'apparently the largest growth potentialities in the area', and was central 'to the district as a whole', being accessible to the Galatea area and Waiohau. 'Ruatahuna, on the other hand, is right on the extreme end of the district and there would be too much dead running and not enough population in the village to justify stationing the nurse there.'[856] Meanwhile, according to Turbott, the Ruatahuna people were 'certainly making a determined effort to get a nurse of their own, and apparently in their zeal are using every possible way of drawing attention to their request.'[857] R Nattras of Ruatahuna objected to the nurse being stationed in Murupara: 'She will be of little, if any, use to this district which is in urgent need of a fully qualified nurse.'[858] Ruatahuna, along with Maungapohatu, Matahi and Waiohau, seems to have been served mostly by Presbyterian missionaries, although district nurses did visit on a weekly or fortnightly basis.[859]

In this instance no nurse was appointed to Ruatahuna because the Crown preferred Murupara as a base. However there were more general problems in finding nurses willing to work in areas considered to be remote and isolated. Over the decades, this affected Te Whaiti, Murupara, and Taneatua.[860] The Department of Health stated that it made every effort to fill these vacancies, but few nurses would apply for them.[861] In order to fill the Murupara vacancy, the Department decided the nurse would be allowed to live outside the district.[862]

The quality of nursing seems to have improved when their numbers were increased. In the mid 1930s, Te Whaiti was served only by an unqualified part-time nurse who also ran a store and raised a large family. In 1936, the Gisborne Medical Officer described her methods as 'lax' and 'inadequate according to modern standards'; as a result, Te Whaiti had a 'bad reputation for typhoid'.[863] In 1940, however, the Gisborne Medical Officer of Health reported that District Nurse Mackay was doing 'excellent work' in the greater Taneatua

855. M H Watt, Director-General of Health, to Medical Officer of Health, Hamilton, 7 December 1936 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p 111)

856. H B Turbott, Medical Officer of Health, Hamilton, to Director-General of Health, Wellington, 6 April 1937 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), pp 113–114)

857. Ibid, p 113)

858. R Nattras to F Moncur MP, 8 March 1937 (Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 304)

859. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1837

860. Ibid, pp 1804–1807

861. R J Tizard, Minister of Health, to D E Beer, Secretary of the Taneatua Primary School Committee, 26 October 1973 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(SS)), p 66)

862. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1807

863. Medical Officer of Health, Gisborne to Director-General of Health, 8 February 1936 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p 103); see also R Barnes to Minister of Health, 16 August 1938 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p 118)

district, although she was working very long hours.[864] In 1943, Mary Lambie, the Director of the Division of Nursing, assessed Nurse Orbell in Murupara as being 'very good', and Nurse Gill of Whakatane as having good potential.[865]

By the late 1970s, nurses' duties included maternal and child health; disease prevention through identifying tuberculosis cases, tracing sexually transmitted diseases, immunising children, and treating scabies and glue ear; some psychiatric and elder care; and the operation of Family Planning clinics.[866] In the early 1980s the roles were revised, and a greater emphasis seems to have been given to working with Maori communities and community organisations such as the Maori Women's Welfare League.[867]

Access to hospitals continued to be difficult, as there were still none in the inquiry district, although a maternity annex was built in Murupara in 1956.[868] Hospital fees were completely abolished in 1941, and so ceased to be a barrier to treatment.[869] Until 1957, hospitals continued to be part-funded by local rates, however, and this meant that the difficulties relating to rating of Maori land continued to trouble hospitals.[870] It is possible that this continued to affect the willingness of hospitals to treat Maori, although we received no evidence on this. The most important remaining barrier for Maori in Te Urewera was probably distance, although the monocultural and largely monolingual nature of hospitals doubtless also remained a problem.

By 1935 there were hospitals in Wairoa, Whakatane, Opotiki and Rotorua. Road access between the hospitals and Te Urewera improved in the middle of the century, but even today many settlements are still a long car journey from the nearest hospital. Then as now, this created practical difficulties and could also be very expensive, particularly if a taxi was required.[871] Around 1950, Horomi Williams was 'born in Ruatoki, I think under a tree' because 'in those times there was no adequate transport to convey expectant mothers to the hospital.'[872] As Stokes, Milroy and Melbourne commented in the mid 1980s, 'for those who require regular check ups or a course of treatment as an outpatient, factors of time and distance discourage full use of existing health services.'[873] This would have been the case in earlier decades as well. Until the 1960s, the only access to Maungapohatu was by horse

864. L S Davis, Gisborne Medical Officer of Health, to the Director-General of Health, 4 April 1940 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p 98)

865. Mary Lambie, Director, Division of Nursing, to Dr Watt, 12 Jan 1943 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(RR)), p 122)

866. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1811

867. Ibid, p 1812

868. Ibid, p 1784

869. Fees for basic hospital care were abolished in 1939, but fees for services such as x-rays were not abolished until 1941.

870. Dow, *Maori Health & Government Policy*, p 166; Murton, 'Summary of Evidence of Brian Murton: Stage Three' (doc J10), p 42

871. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 319

872. Horomi Williams, oral evidence, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), p 125

873. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 319

The Decline of Community Health Organisations in Murupara

When Murupara was bustling and it was really community minded they had St Johns and the Red Cross. They also had the fire brigade and all those kinds of organisations. Everyone belonged to them. If people got sick the doctor would refer you to the hospital in Rotorua, and people could access that health care because there was the St Johns Ambulance. Many people in the community were on the roster to volunteer for the St Johns Ambulance.

Today you have got only two people running that service, and that is a big difference from what it was. The real effect of that is that people who live in Murupara have a lot more difficulty accessing healthcare.

Source: Margaret Herbert, brief of evidence, 11 August 2004 (doc F30), p 5

track.[874] Some communities, such as Murupara, had a volunteer ambulance service (see sidebar, this page), which must have aided access. However we do not know what services other communities had, or whether the Murupara ambulance was available for non-emergency travel such as outpatient visits.

We saw earlier in this chapter that the peoples of Te Urewera experienced huge health improvements in the mid twentieth century. This change had two main drivers: the reduction of poverty, mostly as a result of increased employment, and improvements to the health system. From the late 1930s, medical services such as hospital treatment became free of charge, and the health system in general was expanded and better funded, allowing nurses and GPs to be sent into Te Urewera. Maori in the inquiry district did benefit from these initiatives; most notably, tuberculosis ceased to be a significant cause of death. There was, however, still much room for improvement. There were never enough medical professionals to properly address the poor health conditions in Te Urewera, and some smaller communities continued to have difficulty accessing medical aid. Distance to hospitals remained a significant problem, although much less so than in previous decades.

(3) *Housing*

We saw earlier in this chapter that Maori housing in Te Urewera was generally inadequate and unhealthy in the 1930s. Between then and the 1980s there were significant improvements, especially in the timber towns, but substantial problems remained. Claimant counsel submitted that, in general, the Crown's housing policies at this time were 'attuned to the

874. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1781

needs of suburban New Zealand and not rural Urewera.'[875] The Crown responded that some housing improvements were made in this period, but conceded that houses provided under the development schemes were often regarded as substandard.[876] In the period covered here, the Crown provided housing assistance in a range of ways: through the development schemes, state-funded loans, ex-service rehabilitation schemes, state housing, and timber industry employee housing. In general, housing policy tended to focus on urban areas and was premised on cost-recovery, both of which factors made it difficult or impossible for many Maori in Te Urewera to access help.[877]

The main way in which the Crown helped Maori in Te Urewera into new owner-occupied housing was through the development schemes. Unit occupier housing was one of the expenses for which schemes could borrow money, and this was done on the Ruatoki, Waiohau, and Ngati Manawa schemes. Between 1930 and 1940, 131 houses were built as part of the Ruatoki development, while 21 were built in Waiohau and 11 as part of the Ngati Manawa development.[878] It seems that more would have been built if not for the Second World War, which caused a shortage of materials and labour, and increased costs.[879]

Because the houses created debt on the development schemes, landowners and the Crown wanted to keep costs down. Ngata was aware that the available funding was quite limited and felt it should be focussed on farm development rather than housing; he also argued that 'Maori settlers did not need housing of a standard comparable to Pakeha farmers.'[880] As a result, the development scheme houses were extremely basic. Most were quite small, despite the large whanau common at this time, and lacked basic amenities such as running water, toilets and bathrooms.[881] One Maori critic called the cottages 'little more than glorified cowsheds'.[882] The Health and Public Works Departments were also concerned, wanting a minimum standard including 'a bath, laundry tubs, kitchen sink, copper, toilet, and effective plumbing.'[883]

875. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 356
876. Crown counsel, statement of response, 13 December 2004 (claim 1.3.7), p 33
877. Gael Ferguson, *Building the New Zealand Dream* (Palmerston North: Dunmore Press and Department of Internal Affairs, 1994), pp 59–176
878. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1934
879. Alexander, 'The Land Development Schemes' (doc A74), p 95
880. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1935; Ferguson, *Building the New Zealand Dream*, pp 99–100; Mark Krivan, 'The Department of Maori Affairs Housing Programme, 1935 to 1967' (MA thesis, Massey University, 1990), p 21
881. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1934; Rose, 'A People Dispossessed' (doc A119), p 214
882. *Report of Young Maori Conference, 22–26 May 1939* (Claudia Orange, 'A Kind of Equality: Labour and the Maori People 1935–1967' (MA thesis, University of Auckland, 1977), p 94)
883. Krivan, 'The Department of Maori Affairs Housing Programme', p 43, citing Director General of Health to US, 11 May 1939; Ferguson, *Building the New Zealand Dream*, p 100

The new houses were still an improvement on previous housing, at least initially.[884] In 1937, two students from the Otago School of Medicine, Allan North (later the Te Whaiti GP) and Lester Suckling, commented favourably on the standard of housing in the Ruatoki scheme:

> In Tanatana, Tawera, Ruatoki and Waiohau, largely owing to the Ngata Scheme the houses were well built four roomed wooden cottages, with wooden floors, ample light and ventilation, grates or open fireplaces, wash-houses and privies, though baths were rarely seen. Some had tanks, gardens and electricity, while furniture and cleanliness were much more in evidence than elsewhere.[885]

The development scheme houses, unlike most previous accommodation in Te Urewera, were weatherproof, lined, had iron roofs, were on pilings rather than the ground, had bedrooms and kitchens, and, from the late 1930s, bathrooms.[886] However many quickly deteriorated, especially at Ruatoki. By the mid-1940s, reports stated that many were in an 'extremely dilapidated' and 'deplorable' condition.[887] In 1945, the Farmers' Union wrote to the government that 'Some of them are said to be literally worse than pig houses and are described as simply terrible places to live in.'[888]

No houses were built as part of the Ruatahuna development scheme, as it was felt it could not stand the additional debt. Landowners were however encouraged to build their own homes.[889] Noera Tamiana, whose whanau worked on the scheme, told us that

> Whilst we were developing the other side of the farm, my father built temporary housing for us at Parekaeaea. He built two shelters for us there at different times. They were made from kaponga trees and a tin roof and he did a good job. They had a window and a door. They were lined with chaff bags from the horse feed. We also used the chaff bags for flooring . . . There was a natural spring there across the river that we used as a fridge.[890]

Her brother, Korotau Tamiana, recollects that they lived in a cave for a month while their father built a 'little house' for his whanau. 'It was part of our survival, and the conditions that the old man had to put up with to be able to develop the land, in order to get ahead.'[891] As on the other schemes, the houses were an improvement on what had gone before; a 1938 report stated that the Ruatahuna houses were 'clean and comfortable inside . . . It is a pleas-

884. Rose, 'A People Dispossessed' (doc A119), p 214
885. North and Suckling (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 430)
886. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 689–691, 1747
887. Secretary of the Auckland Branch of the New Zealand Farmers' Union to the Minister of Native Affairs, 1945 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1949); *Bay of Plenty Times*, 27 August 1945 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1950)
888. Secretary of the Bay of Plenty Sub-Province of the New Zealand Farmers' Union to the Minister of Native Affairs, 1945 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1950)
889. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 686
890. Noera Tamiana, brief of evidence, 10 May 2004 (doc D15), pp 4–5
891. Korotau Tamiana, brief of evidence, 10 May 2004 (doc D20), p 2

ing feature to note the improvement in the health and dress of the children of this district.'[892] Here too, the houses had deteriorated by the 1940s.[893] A visiting overseer requested immediate Departmental action to improve them, but it appears that nothing happened.[894]

Maori could also borrow money for housing through the Native Housing Act 1935, which was the first legislation specifically designed to provide housing loans to Maori. Previous Tribunals have found that few Maori qualified for these loans, because they required a secure land title and the ability to make repayments.[895] According to Murton, this was also the situation in our district; he was unable to find evidence of anyone in Te Urewera being able to borrow money under the Act.[896] Another problem with the Act was that it allowed the Crown to take the land in the event of default.[897]

We know that some Maori from Te Urewera applied for loans under the Act.[898] In 1937, the Under Secretary of the Native Department refused the applications of four people from the Te Kopani Reserve near Waikaremoana on the grounds that 'the applicants' means of repayment were slight and insecure, and that the proposed site of the dwellings was a Native Reserve, and was inalienable.'[899] The land therefore could not be used as security. The Registrar of the Gisborne Native Land Court pleaded for assistance, saying that

> There is no doubt that the housing conditions there are worse than in any other part of this District but their hopes of improvement are only debarred by the fact that no security can be taken over the title.[900]

The government offered a compromise agreement to build 'simple houses' on the reserves if the applicants had enough income to repay loan advances, and would allow the government the right to remove buildings on the reserve in the event of non-payment. However it appears that the houses were never built. An application in 1948 from settlers on the Ruatoki

892. Board of Native Affairs, 'Report on Native Land Development and the Provision of Houses for Maoris, Including Employment Promotion', AJHR, 1938, G-10, p 47 (Alexander, 'The Land Development Schemes' (doc A74), p 275)

893. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 687; Alexander, 'The Land Development Schemes' (doc A74), p 285

894. Alexander, 'The Land Development Schemes' (doc A74), p 285

895. Waitangi Tribunal, *The Hauraki Report*, vol 3, pp 1185–1186 and Waitangi Tribunal, *Te Tau Ihu Report*, vol 2, p 998

896. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1937; Murton, 'Summary of Evidence of Brian Murton: Stage Three' (doc J10), p 44

897. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1936

898. P Tureia cited in O'Malley, 'The Crown's Acquisition' (doc A50), pp 148–149

899. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1940. O'Malley also claims that some of the reasons given for rejecting the application were not financial: 'Yet despite this concession, it appears to have been these doubts as to the "economic justification" of providing housing at Waikaremoana which resulted in little being done. One official, for example, queried whether providing housing for old age pensioners would be "unwisely encouraging young people to return to the settlement."' O'Malley 'The Crown's Acquisition' (doc A50), p 152

900. Registrar, Native Land Court, Gisborne to Native Under Secretary, 4 August 1938 (O'Malley, 'The Crown's Acquisition' (doc A50), p 151)

scheme, supported by the Rotorua Native Land Court registrar, was deferred, apparently because of a shortage of skilled labour to build the houses.[901]

In general, few Maori were able to access loans under the Act. By 1940, only 171 homes had been built, purchased or renovated nationwide under the original provisions of the Act, and by 1948, 13 years after the Act was passed, only 742 had been built, purchased or renovated.[902] By comparison, by 1940, 1,224 houses had been built, purchased or renovated as part of development schemes.[903] Between 1938 and 1941, in the entire Waiariki Maori Land Board District, which included most of the Bay of Plenty, and all of Te Urewera apart from land south of Waikaremoana, just 33 applications were approved under the original Act.[904] Unfortunately, we received no evidence on how many of these, if any, were in Te Urewera. A report on housing in the Waiariki District noted that 'the need for improved housing conditions in the district is very great, particularly in areas not affected by the Native land development policy'. Where the need was greatest, people had insufficient security or income to obtain a loan.[905] They were caught in a cruelly ironic situation whereby the poverty which forced them to live in substandard housing also prevented them from getting help.

The government was aware of these problems, and consequently amended the Act in 1938 to establish a special fund for Maori who could not give security or make payments required under the parent Act.[906] The fund was, however, far too small. The Under Secretary of the Native Department admitted in 1939 that about three million pounds was required to provide adequate housing for all Maori, but only £100,000 was available.[907] By mid-1939, the money had run out.[908] Despite the stated purpose of the fund, the government preferred to loan the available money to applicants who had paid a deposit of £50, and could repay the loan, since they had 'made an effort to help themselves'.[909] As a 1941 report on Maori housing in the Waiariki District noted:

> The great majority of the Maoris in this district who have already applied for assistance have little or no security to offer. How to build a house for a large family with a limited capacity to repay is the ever-present problem. The deplorable living conditions under which a large number of Natives are still living in this district are of such extent that neither the

901. Alexander, 'The Land Development Schemes' (doc A74), pp 113–114; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1963
902. Orange, 'A Kind of Equality', pp 89, 93
903. Ibid, p 93
904. Board of Native Affairs, Reports on Native Land Development and the Provision of Houses for Maoris, Including Employment Promotion, AJHR, 1938, G-10, p 10, AJHR, 1939, G-10, p 9, AJHR, 1940, G-10, p 7, AJHR, 1941, G-10, p 8
905. Board of Native Affairs, Report on Native Land Development and the Provision of Houses for Maoris, 1938
906. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1937, 1941; Native Housing Amendment Act 1938, s 18
907. Orange, 'A Kind of Equality', p 91
908. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1938
909. Orange, 'A Kind of Equality', p 88; Ferguson, *Building the New Zealand Dream*, p 164

present funds nor the existing organization can hope to satisfactorily meet the position in the near future. Years of unremitting effort lie ahead.[910]

By 1940, 197 houses nationwide had been built, purchased or renovated under the amendment, and by 1948 the number was 555.[911] In the Waiariki District between 1938 and 1942, there were 121 successful applications.[912] As with the original Act, we do not know how many such loans were granted to Maori in Te Urewera, but it is clear that there were not enough to meet the urgent need.

The ex-servicemen's rehabilitation scheme offered housing loans on similar terms to the Native Housing Act.[913] As with that Act, most Maori were unable to access rehabilitation loans, as their land was multiply owned and they lacked sufficient income to afford repayments. The Board of Native Affairs was involved in administering the rehabilitation loan process, and seems to have required larger deposits and shorter repayment times than were required for Pakeha applicants. For example, John Waiwai from Te Kuha-Waimako applied for a loan in 1946, and was told he would be required to repay five pounds per month over 20 years. He stated he could only afford to pay 10 shillings per week, less than half the amount stipulated. Pakeha applicants were usually given 30 years to repay their loans.[914] Overall, 44 rehabilitation scheme houses were built in the Waiariki Maori Land Board District from 1945 to 1948.[915] The Waiariki District was much larger than Te Urewera, and it seems that few of the 44 houses were in our inquiry district.[916]

Other steps were taken in the post war decades. From the late 1940s, Maori Welfare Officers played 'crucial roles' in helping people to apply for home loans.[917] From 1959, families were enabled to capitalise future family benefits to provide mortgage deposits; this was reported as being of 'tremendous assistance' to Maori.[918] A decade later, 100 per cent (no deposit) loans specifically for rural housing improvements were made available through the Department of Maori Affairs. However applicants did need to have an undivided interest in the mortgaged land.[919]

Building a home in many rural areas posed additional challenges for Maori. In 1956, the Department of Maori Affairs announced that it would now only help provide housing in

910. Board of Native Affairs, Report on Native Land Development and the Provision of Houses for Maoris1941
911. Orange, 'A Kind of Equality', pp 89, 93
912. Board of Native Affairs, Reports on Native Land Development and the Provision of Houses for Maoris, 1938, 1939, 1940, 1941
913. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1943
914. Ibid, pp 1967–1968
915. Ibid, p 1968
916. Ibid, p 1966. For the boundaries of the Waiariki district, see map of pre-1961 Maori Land Board Administrative Districts in Krivan, 'The Department of Maori Affairs Housing Programme', between pp 35–36. The district also included most of Bay of Plenty, the Western part of the East Cape, Taupo and a small part of the Eastern Waikato.
917. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1946, 1969
918. Ibid, pp 1946, 2005
919. Ibid, p 2007

areas where there were 'normal employment opportunities', and where 'educational and other amenities were within reasonable reach.'[920] It later explained that in isolated areas the cost of building a house was 'well above its market value'. According to Murton

> The department acknowledged that there were excellent reasons for people not leaving particular areas, and pointed out that it was not its intention to use housing policy as a measure to induce Maori families to leave their ancestral areas.[921]

This was, however, the inevitable effect. In 1959, Tuhoe representative Parimi Rangi told the Minister of Maori Affairs that many people did not want to relocate, but wanted better housing in their home kainga. In response, the Minister simply reiterated the need for people to live where there were jobs, schools, and services.[922] By 1960 the Department was asking its welfare officers to 'do everything they could' to encourage Maori to move away from places such as Matahi and Ruatahuna.[923]

Building houses in 'isolated' areas was also made difficult by the Town and Country Planning Act 1953. This encouraged local authorities to control the size, land use, and housing density of rural land blocks, in order to properly co-ordinate infrastructure and utilities, and avoid indiscriminate building over productive farmland.[924] Initially, most local bodies were fairly flexible where Maori land was concerned, but by the early 1960s the Whakatane County Council tightened up its policies and now refused to consent to partitions which created sections smaller than five acres in rural areas.[925] Wairoa County Council, which covered the Waikaremoana area, had a similar attitude.[926] This made it difficult for Maori to subdivide their land holdings and thereby gain access to housing assistance.[927] Even where land had already been subdivided, planning rules often prevented the construction of new houses.[928] The Department of Maori Affairs initiated talks with councils and with other departments, but it took a Planning Tribunal Appeal decision in 1985 to make Whakatane County Council change its policies.[929] This was despite the Town and Country Planning Act 1977 stating (in s 3(1)(g)) that the 'relationship of the Maori people . . . with their ancestral land' was a matter of national importance, and should be provided for in regional and district planning schemes. Awhina Rangiaho told us that her whanau's homes were unjustly condemned as unsanitary, and the whanau could not get permission to build new houses because they did not have enough land to meet the subdivision requirements. It was made

920. Ibid, p 1971
921. Ibid, p 1972
922. Ibid, p 1972
923. Ibid, p 1973
924. Ibid, p 1996; Town and Country Planning Act 1953, s 3
925. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1996–1998
926. Ibid, p 2024
927. Ibid, p 1999
928. Ibid, pp 2025–2028
929. Ibid, pp 2026–2030

clear to her whanau that they should leave the Waiotahe Valley, near Ohiwa, and move to Rotorua:

> Our parents were offered state homes in the city (Rotorua) and were told they had to go and work in the big city. Bulldozers were sent to destroy our homes. They left only two for the koroua and kuia who could not have survived relocating to the city and were far too old to be productive in a factory environment. This was the early 1960s.[930]

It should be noted at this point that county councils have never been part of 'the Crown', and we therefore lack jurisdiction over their activities. However the Crown did set the rules by which local authorities could operate, including the Town and Country Planning Act. It could have modified this Act, or in some other way compelled county councils to allow Maori to build homes on their own land.

Murton states that between 1935 and 1967, the number of permanent private dwellings owned by Maori increased by about 23,000. Of this total, about 64 per cent were built with the help of the Department of Native / Maori Affairs. Another 20 per cent were built with other financial aid from the Crown, such as the State Advances Corporation.[931] In his study of Maori housing policy in this period, Mark Krivan stated that Crown provision of houses to Maori fell well short of what was needed; population growth and the need to replace existing substandard houses meant that in the 1960s around 4,200 new houses were needed each year.[932]

By the early 1980s, around 90 per cent of Maori housing finance was provided by the Crown, through either the Department of Maori Affairs or the State Advances Corporation.[933] Even this, however, was nowhere near enough to meet the huge demand.[934] Moreover, most of these houses were built in urban areas. Murton states that 'the [Maori Affairs] department allowed Maori rural housing stock, much of which was already poor quality, to deteriorate even more.' He suggests that this was part of the general policy of amalgamating Maori into Pakeha culture; the provision of housing was a 'reward for adopting a Pakeha way of life.'[935] In practical terms, it was partly the result of new rural planning regulations, and partly because of the Crown's cost-recovery policy for housing, which meant it preferred to lend to those in areas with a reasonable supply of jobs. The mass urban migration of the post-war years was both a cause and an effect of the Crown's focus on urban housing: Maori migrated partly in search of better housing, and the Crown provided housing in cities and towns because that was where Maori were finding steady work.

930. Awhina Rangiaho, brief of evidence 10 January 2005 (doc J15), p 4
931. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1947
932. Krivan, 'The Department of Maori Affairs Housing Programme', pp 107–108
933. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 2008
934. Ibid, pp 1946–1947
935. Ibid, p 1947

The Crown was also involved in providing rental housing for Maori. In Te Urewera, this mostly occurred through employee housing in the timber industry. One of the reasons behind the establishment of Minginui was the substandard housing in Te Whaiti; Minginui was designed to be a 'model village' where forestry and sawmill workers could be properly housed.[936] By 1950 the Forest Service owned 32 houses in the village.[937] By the 1980s it also owned 62 houses in Murupara, and all the housing stock in Kaingaroa, where significant numbers of Maori from Te Urewera had migrated.[938] The Crown also built houses in Murupara and leased them to the Kaingaroa Logging Company, which sub-let them to its employees.[939] KLC purchased the houses from the Crown in the early 1960s.[940] It became apparent in the late 1980s that some of these Forest Service houses were not well constructed, but while the Service was maintaining the buildings there seem to have been few problems. In 1972 DS Cowbourne of the Forest Service's Rotorua office observed that Minginui 'in its present form has a life of perhaps another 10 years, by which time the bulk of the houses will be well past their useful life'.[941] In response, the Crown built 18 new houses and purchased one private house in the village.[942]

Elsewhere in New Zealand, the Crown provided state rental houses, but for several decades this was of no benefit to Maori in Te Urewera because the houses were built only in cities and towns.[943] It was not until the 1970s that the Crown began building rural state houses, despite high levels of need in rural areas.[944] The first rural state housing initiative was the kaumatua flats scheme, begun by the Department of Maori Affairs in 1965. This initially provided rental flats for Maori pensioners in urban areas. In 1971, the government allowed these flats to be built near rural marae (often called papakainga zones) or on Maori-owned land.[945] In Te Urewera, two single bedroom and two double bedroom kaumatua flats were built at Ruatoki in 1974.[946] The budget for the flats was derisory, allowing only about three per year to be built nationwide from 1965 to 1975.[947] Funding seems to have increased significantly by the 1980s, and flats were built at Te Kuha-Waimako (six units of two flats each),

936. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 483, 484–485, 496
937. Ibid, p 508
938. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 187
939. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1985
940. Ibid, p 1988
941. DS Cowbourne, 'Minginui Village and HQ', 22 November 1972 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 520)
942. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 232
943. Ferguson, *Building the New Zealand Dream*, p 137
944. Murton writes that some houses built in Murupara in the 1950s were technically state houses. However they were leased to the Kaingaroa Logging Company, which sub-let them to its employees, so they were not state houses in the usual sense. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1985
945. Ibid, p 2006
946. Ibid, p 2059
947. Krivan, 'The Department of Maori Affairs Housing Programme', p 125

Ruatoki (four units, built in 1985), and Ruatahuna (four units completed in 1988).[948] The Ruatoki flats came about through three years of Ngati Rongo lobbying, while the Te Kuha-Waimako flats were the result of two years of lobbying by a Wellington-based Ngati Ruapani group, which also provided free building labour.[949]

In summary, Crown aid for Maori housing in Te Urewera during the period 1935 to 1984 was limited, and based mostly on loans. Credit was available through the development schemes, the Native Housing Act 1935 and its 1938 amendment, and the ex-service rehabilitation scheme, and these mechanisms allowed some improvements in Maori housing in Te Urewera. Of these, the development schemes were the most effective means of housing improvement, but excluded those who had no scheme lands, and those on the Ruatahuna scheme, whose lands could not take more debt. The desire to save money, on the part of both owners and the Crown, also meant that many development scheme houses were substandard and lacking in basic amenities. People without individual land titles or sufficient income were usually unable to get loans, which ironically meant that those most in need of aid were the least able to access it. The Crown provided some rental housing, mostly through the Forest Service but later also the kaumatua flats. As we have seen, the provision of Forest Service housing in Minginui and elsewhere led to a significant improvement in standards of living in the timber towns, but only in those towns. The 1938 amendment to the Native Housing Act, which provided financial aid to those who could not qualify for other loans, improved the lives of those few lucky enough to receive help, as did the kaumatua flats, but as we have seen their numbers were very small.

(4) *Water supplies*

Throughout the period covered by this chapter, various Te Urewera communities had persistent difficulties in accessing reliable and safe supplies of drinking water. As we noted earlier, there were widespread problems with water supplies in the early twentieth century, and Crown efforts to improve them were fairly limited. Water supplies in Te Urewera were mostly the responsibility of the Department of Health and the Department of Maori Affairs until the mid 1960s, when ownership and responsibility was shifted to county councils.

When water supplies were improved, it was generally through community initiatives, with the Crown usually providing half the funds. At Umuroa, for example, the water supply was condemned by the Department of Health in 1937. The local komiti marae responded by buying materials, raising money, and lobbying the government. Komiti secretary Sonny Kameta wrote to the Health Department requesting some financial assistance to build a new water system, stating that

948. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 2060–2068; Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 551; Planning Committee minutes, 3 October (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(PP)), p 12)

949. Ben Couch to the Chairman, Cabinet Committee on Expenditure, July 1982 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 2064–2065)

> For a number of years there was a serious epidemic of typhoid fever and through this the water was considered to have caused this out-break. The water has been condemned by the Health Authorities from time to time but no improvements have been made.[950]

The Native Department agreed to use Civil List money to pay £23 of the estimated £37 cost. After some delays, and further inquiries from Kameta, the system was built in 1938.[951] In the late 1930s the Department of Health established a fund for improving Maori water supplies and constructing pit toilets. About £10,000 per year was set aside for water supplies, with the money being made available on a pound-for-pound basis.[952] Over the next few years, water supply systems were built at other settlements around Ruatahuna, namely Mataatua, Tatahoata, and Kakanui, with a combination of local and Crown funds.[953] Supply systems were also built at Waitokitoki kainga in Te Whaiti in 1943, Waimako in 1944 (after war-related delays) and at Otekura in 1945.[954] By 1950, previously installed systems had been extended at Ruatahuna, and a new system installed at Uwhiarae. At Te Kuha, the old supply system was found in 1950 to be silted and contaminated by animal waste, and so a new water system was installed in 1952.[955]

The Crown did not always respond favourably to requests for help. In 1939 the Department of Health turned down an application from Otekura on the basis that no suitable source of water could be found. Residents promptly took matters into their own hands and dug a well for themselves.[956] In 1940, the people of Waimako raised half the funds for a new water tank, in the expectation the government would pay the other half. However the request was shelved, apparently because it was felt the community could afford to pay for the entire project themselves.[957] Both kainga did get water supply systems in the mid 1940s, with the Health Department paying half the costs and the community the other half.[958]

Water supply systems could also be funded through the development schemes. In chapter 19, we discussed the Ruatoki water scheme, which was constructed in the late 1930s and early 1940s as part of the development scheme there. Its primary purpose was to serve the development farms and, as with other development scheme work, the money had to be

950. Sonny Kameta, Secretary Umuroa Committee Marae, to Maori Hygiene Department, 24 April 1937 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(HH)), p 132)
951. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1866–1867
952. Ibid, pp 1863, 1876
953. Ibid, pp 1867, 1877
954. Ibid, pp 1878–1879, 1881–1882
955. Ibid, pp 1883–884
956. Ibid, pp 1877–1878
957. Ibid, p 1868; Watt, Director-General of Health to the Under-Secretary, Native Department', 17 December 1936 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(HH)), p 155)
958. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1881, 1882

repaid.[959] In 1947, the Department of Health improved the Tatahoata supply, which served the Ruatahuna development scheme.[960]

In 1964, Whakatane County Council became the principal rating authority for Te Urewera. Within a year it had taken over the maintenance and provision of the vast majority of water supplies in Te Urewera from the Departments of Health and Maori Affairs. The Crown financed upgrades to the water systems at Ruatoki and Ruatahuna before they were handed over.[961] In chapter 19, we found that the transfer of the Ruatoki water system to the Council was a Treaty breach and possibly also unlawful; the Ruatoki community had contributed most of the funding for the system and the Crown therefore had no right to give it away. We also saw that Ruatoki experienced ongoing problems with the quality of their water, and that it was deemed unfit for human consumption throughout the 1970s and 1980s. We found in that chapter that these problems were a prejudice arising from the Crown's actions in depriving the community of control of the water system which they had largely paid for.

Improvements were made to the water supplies of several Te Urewera communities in the middle of the twentieth century. In most cases, these were paid for partly by the Crown and partly by the community, although at least part of the Crown's contribution generally had to be repaid. Several communities experienced ongoing problems with water quality, and there were ongoing conflicts between local and central government and the local communities over who should be responsible for the considerable upkeep costs of water supply systems.

(5) *Education*

As in earlier periods, the claimants' allegations about education can be grouped into two basic categories: those relating to the monocultural and monolingual nature of state education, and allegations of inadequacy, specifically in terms of access and career preparation. For this period, we had the benefit of many of the claimants' personal recollections of their school years.

We saw earlier in this chapter that Native schools tended to promote Pakeha culture and to regard Maori culture, implicitly or otherwise, as inferior and unworthy of a place in the school system. New leadership in the Native Schools branch of the Education Department led to Maori arts and crafts being introduced into the curriculum from the early 1930s.[962]

959. Oliver, 'Ruatoki Block Report' (doc A6), pp 150–152; Alexander, 'The Land Development Schemes' (doc A74), p 92; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1894

960. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1883

961. Heather Bassett and Richard Kay, 'Ruatahuna: Land Ownership and Administration, c 1896–1990'(commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A20), p 335; Oliver, 'Ruatoki Block Report' (doc A6), p 186. The Tuawhenua Research Team claim that the Ruatahuna supply was not handed over to the Whakatane County Council until 1971. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 474

962. Simon and Smith, ed, *A Civilising Mission?*, pp 115, 174

In Te Urewera, elements of Maori culture were taught at Huiarau, Rangitahi, and Ruatoki schools from the mid to late 1930s, and Kokako school from 1946.[963] Murton writes that 'an extensive range of Maori arts and crafts were offered in most schools. These included wood carving, design, tukutuku and taniko work, games, song and dance.'[964] Local and Maori history was also taught at Kokako school in 1939.[965] Acting Inspector T A Fletcher commended the teachers at Rangitahi school for their 'encouragement given to Maori arts and crafts, singing . . . rhythmic dancing, pois and other features of the revised curriculum'.[966] Fletcher reported in 1938 that the pupils at the same school had constructed a model carved meeting house, which was opened with 'due ceremonial function', and noted that the school had excellent relations with parents and the community.[967] In the 1950s and 1960s schools all over Te Urewera received positive reports on their Maori culture programmes.[968] The wider community sometimes benefitted as well. Te Whaiti Maori School offered adult education classes in Maori arts and crafts and te reo, and in 1950 these were attracting up to 70 students from around the Whirinaki valley.[969] The school also organised a trip to Auckland, where pupils took great interest in the museum's collection of taonga.[970]

Much of the Maori cultural content was taught by Maori teaching assistants, especially in the early years of the Maori culture policy. Local speakers were also brought in to instruct in areas such as carving and local history. At Huiarau in Ruatahuna, for example, 'the old chief, Te Whenuanui' gave lessons in carving, and an 'old Maori man called Rehua' gave lessons in Maori knowledge and histories, which the children had to translate into English and sometimes turn into a play.[971] In general, Maori cultural content was more likely to be taught where Maori junior assistants were employed. Simon and Smith note that Pakeha teachers were often reluctant to take up such activities because they were unfamiliar with them, or their workloads were already too high.[972] In Te Urewera, it appears that Maori junior assistants were only consistently employed at Ruatoki and Rangitahi schools in the 1930s and 1940s, hence their stronger programmes. Other schools that lacked Maori junior assistants, such as Waiohau, seemed to have taught less Maori cultural content at this time.[973]

963. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1384, 1384 n 4781
964. Ibid, p 1384
965. Ibid, p 1386
966. T A Fletcher, Acting Inspector of Native Schools, 'Inspection Report Rangitahi Native School', 13 October 1936 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(X)), p 156)
967. T A Fletcher, Acting Inspector of Native Schools, 'Inspection Report Rangitahi Native School', 22 September 1938 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(X)), p 158)
968. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1473
969. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 556
970. Ibid, p 559
971. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1385
972. Simon and Smith, eds, *A Civilising Mission?*, pp 175–176
973. See table of Maori Junior Assistants and Assistant Teachers to 1946 in Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1374

23.7.3(5)

By the 1950s and 1960s, most Te Urewera primary schools seem to have had a Maori culture element to the curriculum.[974] In part this was because there was an increasing number of Maori teachers, some of whom were outstanding. Minginui Maori School was particularly fortunate, successively employing Merimeri Penfold, Hirini Moko Mead, and Paki Harrison from the late 1940s to the early 1960s. Mead and Penfold also taught at Te Whaiti, which had 'a strong focus on tikanga Maori'.[975] Ruatoki and Huiarau schools both had Maori head teachers in the 1960s.[976] Pou Temara has said that when Maurice Bird became head of Huiarau in 1958, 'ka Māori te āhua o te kura' ('the school changed to be Māori in nature').[977]

At most schools, however, the Maori aspects of the curriculum seem to have been minor additions to a school system which was still overwhelmingly Pakeha, especially in the 1940s. Te Tuhi Hune, who went to Tawera Native School in that decade, said that

> The only rules were Pakeha, there was no consideration given to our ways . . . Had it not been for a complete denial of my Tuhoetanga or of a total rejection of those things most important to me and my Maori world at Te Whaiti, I would have happily participated in school.[978]

Kaa Kathleen Williams told us about her monocultural experience at Waiohau school:

> During my years of schooling at Waiohau, not one topic of Maori was ever studied. There was a clash of cultures.
>
> For example:
>
> (a) We learnt songs like 'Do ye Ken John Peel'; 'British Grenadiers'.
>
> (b) We flew the union jack. But because it was flown on the flag pole of one of our ancestors respect was paid not so much to the flag, but to our ancestor who stood beneath it. There was also a form of sport which conflicted badly with Maori tikanga. It was a sport called 'Leap Frog'. There were two lines. One formed stones, the others leaped over the stones with legs straddled. If the stones were boys and the girls frogs then no one jumped. We pretended to be sick, to go to the toilet, or to sit and not jump. The teachers got very angry until the old people and parents explained to them that girls must 'never jump over boys'.[979]

Even in 1983, the focus of Rangitahi District High School was almost solely on western academic achievement; there was little Maori content, despite Maori pupils making up 81 per cent of the roll.[980] The Maori cultural elements were never intended to be a major part

974. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12) p 1473
975. Ibid, pp 1474–1475
976. Ibid, p 1475
977. Tuawhenua Research Team, 'Ruatahuna', (doc D2), pp 478–479
978. Te Tuhi Hune, brief of evidence, 6 September 2004 (doc G15), pp 5–6
979. Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc C16), p 44
980. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1452

of the curriculum at any school; a 1934 memorandum stated that the first aim of the schools remained a higher standard of attainment in oral and written English.[981] A report from the following year stated that the new Maori cultural elements:

> are, and will remain, subsidiary to the main task of the Native primary school. This is to give the Native children a thorough training and facility in all branches of English, writing, and arithmetic.[982]

While there was clearly some intention of making Native schools less monocultural, most pupils' experiences were still of an alien environment.

The monocultural nature of the state school system was shown most clearly in the ban on te reo, which continued in Te Urewera until the 1940s or 1950s, and which was enforced with a range of degrading punishments.[983] We received a wealth of evidence from claimant witnesses on the te reo ban, and how it made them feel humiliated, belittled, and ashamed of being Maori. For example, Mrs Williams recalled traumatic experiences at Huiarau and Rangitahi native schools in the 1940s:

> I was five when I started at Huiarau school in Ruatahuna. It was my first contact with the English language. Maori was my first language or mother tongue. My older brother warned me at the gate '*Don't you speak Maori beyond this gate*.' This was an established rule in all schools . . . Without a voice, I couldn't enunciate my thoughts. How could I express my simple wants and desires? How could I express my feelings? How could I laugh and sing? Tears poured down constantly. I wet myself. I couldn't ask to go to the toilet. I sat silent. For one whole year I was silent and unhappy. Not a sound came out of my mouth while I was at school.[984]

She then moved to Waiohau, where punishments for speaking Maori continued:

> In Waiohau the children and the adults still spoke Maori but at school it was a hidden language. If caught, we were strapped, hit with a length of supple jack, or sent to collect firewood from amongst the gorse. We tiptoed trying to dodge the prickles because of our bare feet.[985]

981. Education Department, Memorandum for Headteachers of all Native Schools', 19 January 1934, (Simon and Smith, ed, *A Civilising Mission?*, p 115)

982. 'Education of Native Children', AJHR, 1935, E-3, p 5 (Simon and Smith, ed, *A Civilising Mission?*, p 115)

983. There was disagreement on exactly when it ended; it probably differed between schools. Counsel for Tuawhenua and Ngati Hineuru submitted the general prohibition ended in 1946and Counsel for Tuawhenua submitted that it did not end until 1959 at Huiarau School in Ruatahuna. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p 296; counsel for Ngati Hineuru, closing submissions, 30 May 2005 (doc N18), p 40; counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p 263

984. Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc C16), pp 39–40

985. Ibid, p 41

23.7.3(5)

James Doherty spoke to us about being punished at Te Whaiti school around the same time, saying that 'Most days I was strapped, because I could not spell and for not speaking English, I didn't know any English at all.'[986] Mr Hune told us about Tawera Native School in the 1940s and early 1950s:

> In the school, the only language used was reo Pakeha. The only rules were Pakeha, there was no consideration given to our ways. We were forbidden from speaking Reo Maori. If the teacher heard us speak Maori, we were sent to the Principals office. I was often sent to the office. I recall vividly being whipped with rakau. I couldn't understand the reason for being punished, it made me want to learn English just to avoid being whipped.[987]

At Ruatoki School in the 1940s, pupils were strapped or made to write 'I will not speak Maori' over and over.[988] Gladys Colquhoun, who went to Kokako school in the 1940s, recalled that male pupils were 'thrashed' with bamboo, and had a rolled-up strap thrown at them for speaking te reo. She stated that the teacher, Miss Harvey, said that she had been told by her superiors from the Education Department to 'knock the Maori out of us' at school.[989] Another Kokako pupil, Pari Winitana, told us that a new teacher started when he was there:

> He had been teaching at Ruatāhuna, and boy, was he strap happy. He used the same strap as [the previous teacher], but also introduced the eating of the taniwha soap.
>
> I had to eat a block of soap 2 inches by 6 inches by 1 inch thick. Each time he caught me korero Māori, he took me to the cloakroom and made me eat that soap. I had to swallow all the soap, then he'd get me to drink water so the soap would go down my throat. I can still taste the soap today.[990]

Matekino Hita also referred to soap being used as punishment at Kokako.[991]

Because te reo was still the dominant language in Te Urewera, most pupils from the 1930s and 1940s grew up fluent in the language despite the schools' policy. Terry Firkin said that in Ruatoki he was expected to speak Maori when he came home from school.[992] A pupil at Ruatoki school in the 1940s said that English was banned at home:

> When [the strap] stung your hands and legs you knew you had to try hard not to speak the Maori language. Then when you go home and you have picked up that foreign language that is going to be your scholarship for the next five or six years . . . and drop all these beautiful English words, you get another walloping and you would get a good dressing-down.

986. James Edward Doherty, brief of evidence, 11 May 2004 (doc D27), pp 9–10
987. Te Tuhi Hune, brief of evidence, 6 September 2004 (doc G15), p 5
988. Terry Ferkin, brief of evidence, 10 January 2005 (doc J32), p 2; Simon and Smith, ed, *A Civilising Mission?*, pp 96, 290
989. Gladys Colquhoun, brief of evidence, 15 October 2004 (doc H55), pp 8–9
990. Paringamai o te Tau Winitana, brief of evidence, not dated (doc H24), p 8
991. Matekino Hita, brief of evidence, 11 October 2004 (doc H58), p 3
992. Terry Ferkin, brief of evidence, 10 January 2005 (doc J32), p 2

> 'Who do you think you are – you come back here, you speak your own Maori language. You are Māori, you belong here. You speak your language. You respect your grandparents'. . . My parents . . . made sure the speaking of the English language was done at school, not at home.[993]

Nina Buxton, who went to Kokako school from 1945 to 1953, informed us that

> The original aim of the Native Schools was to assimilate Maori pupils, who were expected to respect and honour Her Majesty the Queen and 'Mother England'. Because our kuia, koroua were still numerous in our formative years the impact on the language and tikanga was minimal.[994]

For most children, the te reo environment at home made up for the English-only environment at school, allowing most to retain their reo and become bilingual.

Around the middle of the century, English became stronger in Te Urewera. The ban on te reo in schools seems to have done the most linguistic damage not on those who experienced it, but on their children. Rangimarie Paku, who attended both Huiarau and Kokako schools from about 1945 to 1953, told us that the use of te reo declined because parents did not want children to be punished for using it in the classroom. 'Our elders were scared that their children would be hit . . . To me that is when the language started to die, as the elders felt for their children and grandchildren so they turned to learn to speak English.'[995] As we noted earlier in this chapter, some who were punished for speaking te reo in the 1930s did not pass the language on to their own children for fear of their children being punished. Other parents spoke English at home because they thought English fluency would help their children progress in life.[996] There were other factors at work, however, such as the growth of the timber towns. These attracted Maori and Pakeha workers, and meant that more Maori grew up in mixed settlements. By the 1940s, most children at Rangitahi were speaking English as their main language.[997] In the less mixed settlements of Tawera and Ruatoki, reports from the early 1960s stated that many pupils had limited English fluency, and at Ruatoki 'the only English spoken was in the classroom', which inspectors felt was a cause of poor School Certificate results.[998]

By this time, most schools were beginning to accept te reo, especially outside of the classroom. Jack Ohlson was invited to teach Maori at Te Whaiti Native School in 1947

993. 'Maori pupil, 1940s', interviewed in Simon and Smith, ed, *A Civilising Mission?*, p 290
994. Nina Buxton, brief of evidence, 11 October 2004 (doc H54), p 7
995. Rangi Paku, brief of evidence, 18 October 2004 (doc H37), pp 5–6; see also James Edward Doherty, brief of evidence, 11 May 2004 (doc D27), pp 9–10
996. Doris Rurehe, brief of evidence, 22 June 2004 (doc E24), p 2; Vera Teaotuhirangi Hale, brief of evidence, 9 August 2004 (doc F15), p 3
997. Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc C16), p 40
998. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1432, 1476–1477

or 1948, assisting a Pakeha teacher who was a poor speaker of Maori but 'a gun' at writing it.[999] Another claimant witness, Maria Waiwai, was a teaching assistant at Ruatahuna, Mangamuka and Rangihau-ua schools in the 1940s, transferring to Kokako school in 1945.[1000] A Maori teacher at Ruatoki school from 1947 to 1949 allowed children to speak Maori in the playground, and did not strap them for speaking Maori in class. The teacher spoke te reo to the children in the playground, but on moving into the classroom said 'Ko inaianei te Pākehā to tatou reo.' (Now our language is English).[1001] In the early 1950s Merimeri Penfold began teaching some of her classes at Te Whaiti in te reo, to the disapproval of the school inspector.[1002] Inspectors also disapproved of Ruatoki pupils being allowed to speak Maori 'at all times' in 1962.[1003] At Huiarau, Maurice Bird allowed te reo in the playground and other informal situations.[1004] Later teachers at Huiarau played records in te reo in the classroom.[1005]

The secondary schools began to offer te reo as a subject; it was available at Rangitahi High School as early as 1950.[1006] Te reo Maori was also offered along with Maori studies at Ruatoki District High School, and in 1970 six pupils from the school passed School Certificate Maori.[1007] Outside te reo class, however, pupils in the 1960s were still punished for speaking te reo on school grounds, by being made to write 'I will not speak Maori' a hundred times or collect horse or cowpats for an hour.[1008] Tame Iti told us that 'The only lingering memories of the state school system I have are of the stench of cow shit that I was made to carry from one paddock to the other for speaking my native tongue.'[1009] When Ruatoki High School closed in 1972, the community made it clear they wanted te reo and Maori studies to be available at Whakatane's Trident High School, to which most pupils transferred. Although the programme initially flourished, the Maori studies and te reo roll dropped by the end of the decade, and seems to have received limited support from the school.[1010]

The decline in te reo fluency appears to have occurred in the 1970s. In 1963 a study by Richard Benton found that Maori was the sole medium of communication in the playgrounds of Ruatoki and Tawera schools.[1011] However a follow-up study at Ruatoki and Tawera schools in 1977 showed that the use of Maori by the children had declined considerably.

999. Jack Tapui Ohlson, brief of evidence, September 2004 (doc G36), paras 5–7
1000. Maria Waiwai, brief of evidence, not dated (doc H18), pp 18–19
1001. 'Maori teacher, 1947–49' (Simon and Smith, ed, *A Civilising Mission?*, pp 290–291)
1002. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 559
1003. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1474–1476
1004. Tuawhenua Research Team, 'Ruatahuna,' (doc D2), pp 478–479
1005. Doris Rurehe, brief of evidence, 22 June 2004 (doc E24), p 2
1006. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1442
1007. Ibid, p 1434. These were the school's only School Certificate passes that year.
1008. Tame Iti, brief of evidence, 10 January 2005, p 5
1009. Ibid
1010. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1435–1436
1011. Ibid, p 1481

Testing by school staff at Ruatoki found that only about 30 per cent of the children were fluent in Maori.[1012] Benton thought that one important factor was urbanisation, since Ruatoki children would often spend part of each school holiday with relatives in centres where English was the predominant language.[1013] Television was another key influence, according to the head teacher at Ruatahuna from 1976 to 1981, Kevin Lawson.[1014] When interviewed in 1991 he said that when he first arrived at the school 'TV had come and the kids had really stopped speaking much Maori. But the group who were a bit older who had not had TV, they all spoke exceptionally well'.[1015] This evidence suggests that although the ban on te reo in schools was psychologically scarring, it was only one of several factors contributing to the decline of the language in Te Urewera.

Once the decline in children's te reo usage became obvious in the 1970s, communities in Te Urewera responded quickly. Ruatoki, Tawera and Huiarau schools had bilingual preschool units from as early as 1973.[1016] In 1977, Ruatoki became the first bilingual school in the country, and nearby Tawera School followed suit in 1981. Huiarau school in Ruatahuna did not became bilingual until 1985, primarily because existing staff were not sufficiently fluent in te reo.[1017]

The move to bilingualism came about mainly through community initiative, with largely passive support from education authorities. Funding for the bilingual programmes initially came from sources including Telethon, the Golden Kiwi, the Maori Education Foundation, and the Rural Education Activities Programme. The Education Department also provided some additional funding.[1018] The government became more supportive during the 1980s, and from 1986 bilingual schools were given regular grants for the development of resources and materials.[1019] During the 1980s numerous kohanga reo were established in Te Urewera, at Huiarau, Te Kuha-Waimako, Minginui, Waiohau, Te Whaiti and Waimana.[1020]

We now turn to the question of whether the education provided to Maori in Te Urewera was adequate in more general terms. Specifically, how easy was it for children in Te Urewera to access primary and post-primary education, and was it a good education by standards of the time?

By about the 1940s, primary education was reasonably easy to access from most Te Urewera settlements. In the 1950s, for example, there were three primary schools in the

1012. Ibid, p 1496
1013. Ibid, pp 1481–1482
1014. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 554; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1482
1015. Murton, 'The Crown and the Peoples of Te Urewera' (H12), p 1482
1016. Ibid, pp 1494, 1524, 1528, 1558
1017. Ibid, pp 1483, 1500, 1525
1018. Ibid, pp 1501–1502, 1527
1019. Ibid, pp 1527–1528
1020. Ibid, pp 1559–1560; Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 557, 573

Whirinaki valley.[1021] There were, however, still some areas without easy access. After a road was built from Waimana to Tawhana, the lower Waimana river valley was repopulated, and whanau dairy farms established. By the mid 1940s, there were at least 30 children in the Tauwharemanuka area, and the community requested a Native school. This was approved by the Native School Inspector and a site found. 'But owing to the state of the road no tenders were received for the construction of the one-roomed school or the teacher's residence. It was apparently impossible even for a light truck to get closer than 12 miles to the site.'[1022] It appears that the school was never built.

From most parts of Te Urewera, access to secondary schools has always been difficult. Things improved slightly in 1936, when the proficiency examination was abolished.[1023] Secondary schools were generally still out of reach geographically, but students who could get to them at least did not have to pass an exam to get in. That year also saw the opening of an agricultural high school at Te Whaiti, run by the Presbyterian church. This had a small roll, however: only eight in the first year, and only 20 by 1948, many of whom came from outside Te Urewera.[1024] It closed in 1967, after enrolments fell.[1025]

The school leaving age was raised from 14 to 15 in 1943, but few Te Urewera children would have remained in school for this long. The primary school at Tuai briefly became a secondary school, but reverted in 1942.[1026] Around this time there were third and fourth form classes at Ruatoki and Tawera primary schools, but the few children in them 'were not getting the attention they deserved'. At Ruatoki, a formal secondary programme was established at the start of 1947, and enrolments quickly increased.[1027] Rangitahi District High School opened the same year, with a mostly Maori roll of 23.[1028] Ruatoki's secondary section was closed in 1972, and pupils bussed to Whakatane.[1029] Students from Kokako, Waimana, Matahi, Waiohau, Minginui, and Te Whaiti were also bussed long distances to school.[1030] Trainor Tait remembers living at Waikaremoana and going to school in Wairoa; the bus would arrive at school at 10.30 in the morning and leave at two in the afternoon, which he found deeply embarrassing.[1031] Students living in Waimana and attending school at Opotiki

1021. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 555
1022. Cleaver, 'Urewera Roading' (doc A25), p 98
1023. Nancy Swarbrick, 'Primary and Secondary Education – Standards and Examinations', *Te Ara: the Encyclopedia of New Zealand*, updated 13 July 2012, TeAra.govt.nz/en/primary-and-secondary-education/page-4
1024. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 474–475
1025. Ibid, p 477
1026. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1235
1027. Ibid, p 1424
1028. Ibid, p 1425
1029. Ibid, p 1237
1030. Ibid, p 1462
1031. Tahuri o te Rangi Trainor Tait, brief of evidence, 18 October 2004 (doc H29), para 6

faced a round trip of over 60 kilometres, which for many years included patches of very bad road and two river fords, that were sometimes impassable.[1032]

Even when all the secondary schools were open, students from Ruatahuna were reliant on boarding or correspondence, as they lived too far from the nearest high school to travel there daily.[1033] Pupils from Waiohau also boarded or studied by correspondence until 1962, when a secondary school opened in Edgecumbe.[1034] In the mid 1950s it was found that, of the 58 Ruatahuna children who had finished primary school, only 40 per cent had gone on to secondary school, either through boarding or correspondence, 17 per cent were in work or apprenticeships, and the remaining 43 per cent were not in work or school.[1035] The possibility of opening a secondary school at Ruatahuna was discussed in the early 1960s, but officials felt that there were too many practical problems. In the end it was decided that parents could apply to the newly-established Maori Education Foundation for funding to assist with boarding, or continue to rely on correspondence.[1036]

Boarding was not always an adequate solution. The Tuawhenua Research Team reported that

> Some clearly bright children could not stand to live away from family and home, finding the boarding and secondary school a foreign and alienating environment, and they ran away from boarding school forsaking their secondary education in the process.[1037]

Cost was a major problem. Several claimant witnesses told us of their families' struggle to afford boarding fees.[1038] In the early 1960s, boarding fees were £180 per year, while boarding assistance was only £75.[1039] The shortfall was extremely hard for many parents to meet, and families often ended up in serious debt.[1040] Boarding school was still putting a serious strain on family finances into the 1980s.[1041]

Generally speaking, the quality of education at mid-century Te Urewera schools seems to have been well-regarded at the time, although the evidence we received was limited. Harata

1032. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1454. Murton states that the journey from Waimana to Opotiki was 'just over 30 miles' (about 50 kilometres), but it appears that he meant to write kilometres rather than miles.

1033. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 480

1034. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1455

1035. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 480

1036. Ibid, pp 481–483. The Maori Education Foundation (now Toitu Kaupapa Maori Matauranga: Maori Education Trust) was founded in 1962 with the objective of encouraging Maori into tertiary education through grants and scholarships, evidently at secondary as well as tertiary level. 'About Us', Toitu Kaupapa Maori Matauranga website, http://maorieducation.org.nz/index.php/about-us-, accessed 2 February 2015

1037. Tuawhenua Research Team, 'Ruatahuna', (doc D2), p 408

1038. Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc C16), p 44; Lenny Mahurangi Te Kaawa, translation of brief of evidence, 21 June 2004 (doc E9(a)), p 2; Rangi Paki, brief of evidence, 18 October 2004 (doc H37), p 4; Nina Buxton, brief of evidence, 11 October 2004 (doc H54), p 4

1039. Tuawhenua Research Team, 'Ruatahuna', (doc D2), p 484

1040. Ibid, pp 484–485

1041. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1561–1563

Williams spoke highly of her time at Ruatoki school.[1042] The pre-war inspection reports on Rangitahi School were almost universally favourable.[1043] At Maungapohatu, all the reports cited by Murton were positive, including the school's final report in 1950.[1044] Waiohau school received good reports in the 1940s, with the 1944 report stating that it was 'one of the best in the Native School's service'.[1045] At Minginui Maori School, the temporary building initially provided by the Forest Service was too small and badly constructed, and a new building erected in 1950 was not much better.[1046] Former pupils remembered a good standard of teaching, however, considering the difficulties under which the teachers worked.[1047]

Secondary schools were more uneven. There were persistent staffing problems at Ruatoki District High School, which meant a limited range of subjects was offered.[1048] Some pupils had to take correspondence courses, and School Certificate marks were poor.[1049] Ongoing problems led to the school being closed in 1972.[1050] Rangitahi District High School seems to have provided a better standard of education, although it was reported that it had little meaningful connection with its wider community.[1051] In 1969 its School Certificate pass rate for Maori students was 43 per cent, compared to the national figure of 20 per cent, and a third of Maori sixth formers achieved University Entrance.[1052] Figures were similar a decade later.[1053]

Claimants have alleged that the schools did little to prepare students for anything more than a life of unskilled labouring work. Drawing on Murton's research, counsel for Tuawhenua argued that there was

> an emphasis on manual, technical and domestic training rather than academic or intellectual development. Education policy up to 1945 was based on the assumption that Maori would be farmers and farmers' wives. Educational planners did not recognise that Maori were rapidly urbanising and that young people needed to be educated to participate in a different kind of world.[1054]

1042. Harata Williams, brief of evidence, 10 January 2005 (doc J31), p 7
1043. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1353–1357
1044. Ibid, pp 1368–1369
1045. Ibid, pp 1369–1371
1046. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 544, 547
1047. Ibid, p 545
1048. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1421
1049. Ibid, p 1427
1050. Ibid, pp 1426–1434
1051. Ibid, pp 1442–1452
1052. Ibid, p 1450
1053. Ibid, p 1451
1054. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p 296

Likewise, counsel for Ngati Ruapani submitted that the 'education supplied to Te Urewera Maori was not of sufficient quality to lift most of the people from the lower end of the socio-economic scale.'[1055] They quoted Murton's statement that:

> Under-achievement was the norm, and the schools did not do a good job in preparing children to further their education and participate in the world of business, the professions, education, the trades, and more skilled employment.[1056]

In response, Crown counsel acknowledged that many Maori were employed on public works and nearby forest industries, but noted that 'there is also considerable evidence of local communities ensuring their young people were sent to secondary schools, training institutions, colleges and universities to further their education.'[1057]

One way in which Te Urewera school children became involved with the forest industry was through a partnership project between the Forest Service and Minginui, Te Whaiti, and Huiarau primary schools. The project, which began in the early 1980s, had pupils planting and perhaps maintaining pine saplings near Minginui. According to claimants, the schools were supposed to get the profits when the trees were eventually harvested, but after the Forest Service was corporatized later in the decade, the partnership was forgotten.[1058] We covered this issue in more detail in chapter 22, focussing on the claim for those profits.

We received limited evidence on the curriculum of Te Urewera schools in the middle of the century. Murton states that Ruatoki District High School had an emphasis on practical subjects, but that this was 'in addition to core subjects'.[1059] The curriculum was similar at Rangitahi.[1060] In the Waiariki District more generally, Maori pupils tended to be streamed into the lowest, non-academic classes.[1061] Murton concludes that:

> The curriculum at all of the schools, with perhaps the exception of Ruatoki in the late 1940s and 1950s, and at Rangitahi up until the late 1950s, was oriented toward passing school certificate, or at least providing sufficient academic background to get boys into apprenticeships and girls into clerical work, nurses' training and the like.[1062]

These were reasonable goals for the time, as long as they were not considered the upper limit of what Maori might be expected to achieve. However, for reasons which we discuss below, the rates of Maori educational achievement were very low. A major cause of the low

1055. Counsel for Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), app A, p 187; see also Counsel for Ngati Hineuru, closing submissions, 30 May 2005 (doc N18), p 40
1056. Counsel for Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), app A, p 188; see also Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 359
1057. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 21
1058. William Eketone, brief of evidence, September 2004 (doc G29), pp 3–4
1059. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1427
1060. Ibid, pp 1442, 1448
1061. Ibid, p 1438
1062. Ibid, p 1462

success rate was the scaling system in School Certificate, which gave much higher pass rates to academic subjects than to practical subjects.[1063] As the Te Reo Tribunal found, the pass rate for te reo was also set very low, further depressing overall Maori pass rates.[1064] Another factor was the disengagement of many Maori parents from the education system. Murton records that some Maori parents placed limited value on secondary school, sometimes seeing it only as 'a European institution which takes care of their youngsters until the age of 15'.[1065] Many had a limited understanding of the school system, and so could not help their children to understand and thrive in it.[1066] All of this doubtless reflected the parents' own experiences of school.

Another major problem was the limited opportunities for tertiary education in or near Te Urewera. In order to advance beyond secondary school, Te Urewera students had to travel long distances to an alien environment in which there were few Maori and almost none from Te Urewera. The Crown did provide assistance for those who wanted to access training outside Te Urewera, especially in the trades. Carpentry training was made available as part of the ex-servicemen's rehabilitation scheme, for example, and was taken up by some Tuhoe men. Murton states that rehabilitation training was 'the first instance of any government directly preparing young Maori for a future other than rural wage labour or farming.'[1067] Another form of assistance was the Department of Maori Affairs' Trade Training Scheme, initiated in 1959, in order to overcome the lack of training opportunities in rural areas.[1068] Hostel accommodation was provided, mostly in Auckland, Christchurch and Wellington, for those enrolled in training schemes. One of the trainees was Tame Iti, who recalled at our hearings that in Christchurch, where he was sent,

> we were subject to overt racism, were unfamiliar with the lifestyles of a city, and there was no support for us within the time of transition . . . The new social living situations and industries which we were forced into were devoid of any tikanga, let alone Tuhoetanga.[1069]

Some trainees were also placed in Whakatane and at the Presbyterian agricultural school in Te Whaiti. Overall, few Te Urewera students were accepted into trade training and pre-employment programmes. Between 1963 and 1969 a total of about 40 boys and girls from the Maori Affairs department's 'Zone 11' attended such programmes. The zone covered most of the inquiry district, but most attendees were from Whakatane.[1070]

1063. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1463
1064. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 29
1065. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1451, quoting an Education Department report on Rangitahi High School from 1979 or 1980.
1066. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1477
1067. Ibid, p 1088
1068. Ibid, p 116
1069. Tame Iti, brief of evidence, 10 January 2005 (doc J22), pp 6–7
1070. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1116. For a discussion of zone boundaries, see page 1113.

There were a few training opportunities in and near Te Urewera. There were some apprenticeships, such as the New Zealand Forest Service's Junior Woodsman training programmes.[1071] There were some trade training schools, but in the 1960s many potential trainees were reluctant to enrol or stay on, because their friends who were not in training were often earning relatively good money in unskilled labouring jobs. As a result, many parents preferred to send their children out of the district, where their friends were less likely to tempt them to drop out.[1072] The first tertiary institution anywhere near Te Urewera was the Waiariki Community College, established in Rotorua in 1978. It became a polytechnic in 1987 and an Institute of Technology in 1998.[1073] During discussions over the future of Whirinaki forest, proposals were made for a Maori-oriented training centre at Minginui. However these were caught up in rancour between local residents and environmentalists, and never eventuated.[1074]

Overall, the state education system of the mid twentieth century failed the hapu and iwi of Te Urewera in many ways. Perhaps most importantly, it marginalised Maori language and culture, with many pupils being subject to harsh punishments for speaking their own language. Such practices alienated many Maori students from the education system, and, in the long term, jeopardised the survival of te reo. Secondary education was difficult to access from many parts of the inquiry district, and was largely unsuccessful at preparing young Maori for higher education or skilled work. Primary education was also difficult to access from some areas, although overall the quality of Te Urewera primary schools seems to have been good by the Education Department's standards of the time.

The concentration of Maori, in Te Urewera and elsewhere, in low paid and low skilled jobs is sometimes blamed on the shortcomings of the education system.[1075] While these were certainly a cause, there were also other factors in play. In the 1950s and 1960s there was an abundance of work available which required no school qualifications or prior skills, and this combined with the many obstacles to secondary education to make early entry to the workforce very attractive.[1076] It is also clear that prejudice also contributed to Maori being over-represented in low paid jobs. In 1948, for example, a Forest Service paper written for the Maori Education and Employment Committee claimed that Maori in general were 'not fitted to embark on any enterprise which involves continuous responsibility and sustained

1071. Ibid, p 1130
1072. Ibid, p 1117
1073. 'Waiariki Institute of Technology', Archives New Zealand, http://thecommunityarchive.org.nz/node/67743/description, last modified 2 June 2009
1074. Hutton and Neumann (doc A28), pp 694–695
1075. For example, Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 359
1076. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1427–1428

effort'.[1077] Such attitudes – especially from a major employer of Te Urewera Maori – meant that Maori were less likely to be hired in positions of responsibility, regardless of education.

23.7.4 Conclusions

In Te Urewera, the period between 1935 and 1984 was characterised by a huge expansion of the Crown's role and presence in Te Urewera, initiated by the first Labour government during its decade and a half in power, but continued and built upon by subsequent National and Labour governments. The Crown became heavily involved in the district's timber industry: opening its own mills, assisting private mills, and creating and running Minginui village. Its service provision role also expanded significantly: new schools were opened, the health system was expanded and made somewhat more accessible, assistance was provided for housing and water supplies, and the social welfare system was expanded on the basis of the Labour government's underlying philosophy that all were entitled to a decent standard of living. No longer were benefits provided only to those deemed to be deserving. Instead, nearly everyone unable to support themselves was now covered.

To use the framework proposed by Professor Murton, in this period the Crown's political power and economic capability expanded; it took on new tasks and roles and became more involved in industry and the wider economy. Through this expansion, it became more heavily involved in the lives of Maori in Te Urewera, employing them, housing them, educating them for longer, and helping them to improve their health. Maori political and economic agency became inextricably connected with the Crown. Many whanau were completely dependent on the Crown for their income, whether through employment, benefits, Crown forestry leases, or development scheme farming. Opportunities for hapu and iwi, or Maori individuals, to have input into political decisions which deeply affected them were extremely limited, and largely controlled or facilitated by the Crown. In chapter 21 we saw that proposed changes to the Whirinaki State Forest would have greatly affected Maori in that area, and yet much of the lobbying was led or guided by the Forest Service and its senior staff. This lack of Maori political power was also one of the reasons why the property regime went largely unchanged, and the Town and Country Planning Act now allowed local authorities to regulate what Maori could do with their own land, even at the cost of preventing them from living on their turangawaewae.

The expansion of the Crown's role had many positive effects for the peoples of Te Urewera. Their economic capability improved significantly, although mostly on an individual level rather than collectively. Individual improvement may have led to collective improvement, however, as relatively well-off individuals were able to give financial support to marae and

1077. 'Notes by State Forest Service for its second meeting concerning Maori education and welfare', 27 May 1948, L1 30/1/28 pt 4 (Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 46); see also Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 1211

whanaunga. The Crown's substantial presence in Te Urewera resulted in Maori there becoming more prosperous, healthier, better educated, and better housed. Most importantly, the Crown's support for the timber industry created steady employment for many Maori in the inquiry district, boosting their economic capability and allowing a higher standard of living and consequently better health and other socio-economic markers. Most whanau still had less economic capability, and their standards of living remained below those of the average Pakeha family of the time, but still greatly improved on those in previous decades. Maori health continued to be poorer than that of Pakeha, on average, and some people probably found it difficult to afford a healthy diet. Drinking water was not always safe and, in at least one community, remained unfit for human consumption into the 1980s. But famines, food shortages, and devastating epidemics had become a thing of the past. By about the 1950s virtually all Te Urewera children had at least a primary education, and increasing numbers received a secondary education as well.

The employment, education, housing and health care available to Maori in Te Urewera was mostly provided by the Crown or in accordance with its rules. This meant that, although these policies and practices were probably beneficial overall, they were generally monocultural and monolingual, and served the Crown's purposes at least as much as they served Maori. Nowhere was this more obvious than in the education system. The hapu and iwi of Te Urewera largely accepted the need for Pakeha-oriented education, including learning the English language. However they had no real influence and certainly no control over how this was delivered; this power imbalance resulted in an education system in which Maori culture played a token and peripheral role, when it was present at all. Te reo Maori was excluded from the state education system, with many children physically punished for speaking their own language. We realise that corporal punishment of children was widely accepted in past decades, but the forced eating of bars of soap, and any punishment of new entrants for speaking the only language they knew, was brutal and went beyond contemporary norms. Such punishments helped alienate Maori from the education system, and eventually had a devastating effect on te reo. As we have seen, many parents refused to pass the language onto their children for fear they would be subject to the same kinds of punishment which they themselves had endured. As a result, many young and middle aged people now speak little or no te reo. Crown control over other matters had less negative results, although Crown policy effectively compelled many whanau to leave their homes in order to access employment, education, health care and better housing. Te Urewera Maori who wanted to improve their economic capability could only do so by engaging with Crown-controlled systems, and this came at a terrible cultural cost.

Another downside of the Crown's interventionist role at this point was that it fostered heavy dependence on the state. The Crown's dominance of the health and education sectors meant that Maori communities had no real opportunities to set their own priorities

and determine how the systems would work. The Forest Service's management of Minginui was highly paternalistic, which meant that when the Crown later withdrew from the village the residents had no experience of leadership, local government or running their own affairs. Most importantly, though, the hapu and iwi of Te Urewera, especially in the west of the district, were highly dependent on the Crown's support for the timber industry. Not only did the State Forest Service supply the Whirinaki timber towns with jobs, housing, and other services, it also allowed private sawmillers to harvest trees from Crown forests at prices below market rates. As we will see, this meant that there would be devastating consequences when the Crown decided to reduce its involvement.

23.8 What were the Effects of State Sector Restructuring on Maori Communities in Te Urewera from 1984?

Summary answer: *The fourth Labour government, elected in 1984, introduced a new and minimalist concept of the state to New Zealand. Crown involvement in industries such as forestry was now seen as inefficient and a waste of taxpayer money. Government departments such as the Forest Service and the Post Office were transformed into State Owned Enterprises and required to act like private corporations, focused on maximising profits and acknowledging only limited social obligations. In Te Urewera, this meant massive job cuts in the former Forest Service, the sale of the Forest Service's housing stock, post office closures, and withdrawal of public transport. Ngati Manawa, Ngati Whare, Tuhoe, and other Te Urewera iwi experienced high levels of unemployment and poverty as a result. In 1987 the Court of Appeal ruled that the Crown could not sell assets which might be subject to Treaty claims, which ultimately led to Minginui being transferred to the Ngati Whare Trust rather than being sold on the open market. Regaining Minginui was not all good news for Ngati Whare, however, as the village was in urgent need of housing and infrastructure repairs and upgrades. The cumulative effect of all these changes was devastating to the Te Urewera economy.*

Meanwhile, social services such as health and education were also overhauled to make them more cost-effective and responsive to local needs. The drive for greater efficiency resulted in the withdrawal of some services, particularly in health, from Te Urewera. However the shrinking of the state, along with greater recognition of the Treaty of Waitangi, also allowed for greater participation by iwi and communities in the provision of services. The specific health needs of Maori were recognised, and partnerships established between iwi and health authorities. Maori-medium education also expanded significantly in Te Urewera, led by tangata whenua but supported by the Crown. This meant that around the time of our hearings the majority of children in Te Urewera were being taught at least partly in te reo. Living standards remained

low, however, and there were ongoing problems with water supplies and housing which the Crown did little to alleviate.

The greater recognition of Treaty of Waitangi obligations by the Crown gave Maori communities in Te Urewera increased political agency. However they had not yet achieved real clout, and were not able to protect themselves from state sector restructuring, and the economic and social devastation it caused. Te Urewera hapu and iwi gained some economic capability as the Crown began to involve them more in the delivery of social services such as health and education. However this was more than offset by the dramatically decreased economic capability of whanau in the inquiry district, who faced the consequences of extremely high unemployment as a result of timber industry restructuring. The property regime remained largely Pakeha-oriented, although there was now some limited and long overdue recognition of Maori needs and values, for example in local government planning policy.

23.8.1 Introduction

This section begins with the election of the fourth Labour government in 1984, and covers the period from then until our hearings twenty years later. These decades saw the Crown reduce its involvement in the economy and provision of social services, sharing some power with Te Urewera hapu and iwi and allowing them a greater role in the delivery of services such as health and education. Overall, however, the reduction of the Crown's role had a devastating effect on the peoples and communities of Te Urewera, severely reducing their economic capability. This came primarily as a result of the Crown's restructuring and privatisation of the Forest Service, which resulted in massive job losses in our inquiry district, and the near-destruction of several once-thriving communities.

The many changes made by the Crown at this time were largely motivated by neo-liberal ideology, which held that the state was inherently inefficient compared to the private sector, and that 'big government' caused more problems than it solved. It was felt that generous social service provision created a culture of dependence, and that state ownership and state support for industry wasted taxpayer money on inefficient ways of doing business. While this ideology underlay most of the changes affecting Te Urewera communities at this time, individual decisions were usually made independently, by different people in different parts of the state sector, often without communicating with each other. For the people of Te Urewera, however, the changes and their effects were inter-connected and often exacerbated and compounded one another. The widespread unemployment and consequent poverty resulting from the corporatisation of the Forest Service, for example, made the loss of district nurses and local post offices harder to cope with. Withdrawal of public transport services made the loss of local services even more difficult for communities hard pressed to afford petrol. Although we largely address the different kinds of change separately, we

acknowledge that Maori experienced all of them simultaneously, and that their negative effects were often compounded.

Concurrent with the shrinking role of the Crown was the increased political and legal influence of the Treaty of Waitangi. As in earlier decades, activists demanded justice for historical Treaty breaches, although in the early 1980s many considered that, in a words of an activist slogan of the time, 'the Treaty is a fraud'. Public servants, Labour Party MPs, and legal theorists were becoming increasingly sympathetic, and in 1985 the Waitangi Tribunal was given jurisdiction to investigate and make findings on Treaty breaches going back to 1840. The same year, the Court of Appeal ruled in the New Zealand Maori Council's 'lands case' that the Crown could not dispose of lands which might be subject to Treaty claims. The Treaty also became increasingly important in statements of public policy in a range of areas. In Te Urewera, all this resulted in hapu and iwi lodging historical claims with the Waitangi Tribunal, and becoming involved in the delivery of social services, which were now more bicultural and bilingual. Also, Minginui village was returned to Ngati Whare ownership and control. Such changes marked the beginning of a return to the exercise of tribal tino rangatiratanga.

In contrast to our examination of earlier periods, we rely here much less on written and archival historical evidence and much more on claimant oral evidence. Claimant testimony has allowed us to get a much better idea of the social and psychological impacts of Crown policy and practice, but at times the paucity of professional research has led to gaps in the evidence. We received no specific evidence, for example, on the welfare benefit cuts of the early 1990s, even though they must have had a strongly negative effect on poverty-stricken and largely unemployed communities in our district.[1078]

We turn first to look at the economic restructuring carried out under the fourth Labour government, focussing on the Forest Service but also looking at the restructuring of other commercial government departments such as Electricity, Railways, and the Post Office. We also look at Forest Service housing, particularly Minginui Village and the nature and context of its eventual transfer to the Ngati Whare Trust. We then examine restructuring and other developments in the provision of social services, specifically health care, housing, water supplies, and education. We will look both at the withdrawal of state services and the increasing involvement of Maori and iwi organisations in their delivery.

23.8.2 Corporatisation and its effects

For nearly 50 years after the election of the first Labour government in 1935, the state played a strong role in New Zealand's economy. It restricted imports, strictly controlled currency trading, and provided tax breaks, subsidies, and other benefits for various industries. It also

1078. Although Murton's report covers the period up to the year 2000, his chapter on social welfare stops at the late 1980s. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1039–1041

created government departments which took on roles otherwise filled by private business. For the purposes of this inquiry, the most important of these was the Forest Service, which owned, grew, and milled vast forests of native and exotic timber, and employed a significant proportion of the Te Urewera population. Other such departments included the Post Office, which until the 1980s also controlled telecommunications and included a savings bank; the Electricity Department; and the Railways Department.

The first Labour government saw these departments not just as a means to make money, but as part of their wider plan to improve the lives of ordinary New Zealanders, particularly those on low incomes. This meant that departments responsible for essential goods or services, such as electricity or mail delivery, tried to make these available to as many people as possible, even if it was not cost effective. This might mean keeping prices low, or providing services to isolated areas even when it cost more money than it brought in. The provision of post offices and banks to places such as Te Urewera was one such example. Another role of these departments was to provide jobs, particularly in areas which would otherwise have high unemployment. The departments were also used to support the wider economy, including private industry. One example of this, discussed earlier, was the Forest Service supplying private mills with cheap timber. This ensured that New Zealand had a good supply of timber, and also helped the mills to employ people in areas such as Te Urewera. As well as all this, the departments were supposed to deliver a surplus to the state. In practice, however, the demands of the other roles meant that most ended up running at a loss.

The managed economy initially seemed to work well, with New Zealanders enjoying nearly full employment and high standards of living in the decades after the Second World War. As we saw earlier in this chapter, Maori in Te Urewera benefitted even though their living standards generally remained below those of Pakeha. By the 1970s, however, international factors such as rising oil prices and Britain's entry into the European Economic Community fuelled inflation and led to worsening terms of trade, which in turn led to increased unemployment and heavy pressure on government finances. Successive governments, particularly the 1975 to 1984 National government led by Robert Muldoon, responded mostly with even closer economic regulation. By the early 1980s, neo-liberalism was gaining adherents in politics and Treasury, with the most important convert being Roger Douglas, the Labour Party's finance spokesman from 1983. Douglas was appointed Minister of Finance after Labour's landslide victory in the 1984 election, and attempted to revitalise the economy by drastically reducing the state's role. This policy was taken up by the subsequent National government, and has not been substantially reversed or altered since. Government departments with commercial roles were 'corporatized' by being transformed into State Owned Enterprises (SOEs), which were intended to behave like private companies, and some were then sold. Although those that remained in Crown ownership retained some social obligations, they were required to prioritise profit.

23.8.2

Once a government department became an SOE, it was no longer part of 'the Crown' and therefore not within our jurisdiction. As such, we cannot make findings on their actions or omissions. However we can make findings on the Crown's activities in setting up the SOEs, and in particular its setting of priorities.

Ngati Whare, Ngati Manawa, Nga Rauru o Nga Potiki, and Tuhoe Tuawhenua claimant counsel submitted three key grievances in relation to corporatisation. These were that:

- The Crown did not consult with the hapu and iwi of Te Urewera in a meaningful way;[1079]
- The Crown implemented corporatisation without sufficient regard for the timber town communities; and[1080]
- The Crown's responses to the adverse effects of corporatisation in Te Urewera were inadequate, in both the short and long terms.[1081]

Claimant counsel also stated that the privatisation and closure of government services, particularly banks, post offices, and bus services, caused unnecessary hardship for, and imposed high costs on, the peoples and communities of Te Urewera.[1082]

Crown counsel accepted 'that the predominantly Maori communities of Minginui, Te Whaiti and Murupara suffered significantly as a result of the corporatisation of the NZFS.'[1083] Counsel nevertheless maintained that the Crown took appropriate action in relation to potential impacts, particularly through the Social Impact Unit.[1084] They also submitted that 'genuine attempts were made by the Crown to ease the impact of the structural changes on the most vulnerable communities'.[1085] Counsel asserted that ultimately the communities of Te Urewera could not escape the global downturn in the forestry sector. In this regard, they pointed to the more recent receivership of another significant player in Bay of Plenty forestry, the privately owned Fletcher Forests.[1086] Overall, Crown counsel acknowledged that attempts to mitigate the effects of corporatisation were unsuccessful, largely due to the general downturn of the forestry industry and the dependence of Te Urewera on that indus-

1079. Counsel for Ngati Whare, supplementary closing submissions, 3 June 3005 (doc N16(a)), p 33; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 293–295; counsel for Nga Rauru o Nga Potiki, submissions by way of reply, 8 July 2005 (doc N33), p 17

1080. Counsel for Ngati Whare, closing submissions, 9 June 2005 (doc N16), p 161, and supplementary closing submissions, 3 June 2005 (doc N16(a)), pp 56, 60; counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), p 80; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 297, 300

1081. Counsel for Ngati Whare, closing submissions, 9 June 2005 (doc N16), p 161, and supplementary closing submissions, 3 June 2005 (doc N16(a)), pp 29, 36, 42–43, 56–57; counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), pp 80–81; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 296–299; counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p 278

1082. Counsel for Tuawhenua, synopsis of submissions, 10 June 2005 (doc N9(b)), pp 29–30; counsel for Ngati Ruapani, closing submissions, 2 June 2005 (doc N19), app A, pp 179–80; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 354

1083. Crown counsel, closing submissions, June 2005 (doc N20), topic 38, p 2

1084. Ibid, pp 10–11

1085. Ibid, p 2

1086. Ibid, pp 2, 12

try.[1087] They accepted that 'closure of banks and post offices have created inconvenience and difficulties for some, especially in terms of transport and associated costs.'[1088] However, they submitted that this has been the case for all rural communities, Maori and Pakeha alike, and has been mitigated somewhat by the use of electronic services and the establishment of a Heartland Centre and Work and Income Centre in Murupara.[1089]

(1) *Corporatisation of the forest service*

Once the fourth Labour government's policy of corporatisation was decided, the Forest Service became an obvious target. Despite theoretically being a profit-making arm of the state, it had made a loss of more than $200 million, before depreciation, in the three years prior to 1985.[1090] In addition, conservationists felt that no organisation should be both a timber producer and a conservator of forests, as the Forest Service was at this time.[1091] On 16 September 1985, Cabinet voted to dismantle the Forest Service, with production forestry being handed over to a new Forestry Corporation, and conservation forestry becoming the responsibility of the new Department of Conservation.[1092]

The Forestry Corporation was designed by a specially constituted Establishment Board, and came under the State-Owned Enterprises Act 1986. Section 4 of the Act stated that:

> (1) The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be –
>
> a) as profitable and efficient as comparable businesses that are not owned by the Crown; and
>
> b) a good employer; and
>
> c) an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

Over the course of 1986, the Forestry Corporation Establishment Board decided that the new SOE could only become profitable if staff numbers were drastically reduced, and that productivity could be increased if wage workers were replaced by contractors.[1093]

1087. Ibid, p 12

1088. Ibid, topic 39, p 14

1089. Ibid, topic 39, p 14; Crown Counsel, statement of response, 13 December 2004 (claim 1.3.7), pp 23–24. Heartland Centres are offices in rural centres such as Murupara and Kawerau which provide services and information from a range of government agencies, including ACC; Child, Youth and Family; Housing New Zealand; Inland Revenue; the Maori Land Court; StudyLink; and Te Puni Kokiri. 'Our Services', Heartland Services website, http://www.heartlandservices.govt.nz/our-services/index.html, accessed 2 April 1015.

1090. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 707–709; Kirkland and Berg, *A Century of State-honed Enterprise*, p 135

1091. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 709–710

1092. Ibid, p 710

1093. Kirkland and Berg, *A Century of State-honed Enterprise*, pp 123–127

23.8.2(1)

Ngati Whare, Ngati Manawa, and Nga Rauru o Nga Potiki claimants alleged that the Crown failed to adequately consult with them on the corporatisation policy.[1094] Counsel for Ngati Whare acknowledged that there was some consultation, but only on how to manage the changes and to inform the communities about what was happening, not on what form the changes should take or whether they should happen at all.[1095]

Crown counsel accepted that 'Ngati Whare, Ngati Manawa and other Urewera Māori were not consulted over the policy of corporatisation.'[1096] However they submitted that the Crown did consult with Maori and others over broader SOE policy, and that the Crown has no duty to consult with every community affected by its macroeconomic policies.[1097] In doing so they drew upon the *Lands* case (*New Zealand Maori Council v Attorney-General* [1987]), in which the Court of Appeal found that, under the Treaty, there was no 'absolute open-ended and formless duty to consult'. The Crown's duty is rather to make well-informed decisions which have proper regard to the Treaty. Although becoming well-informed might require consultation, the Court found, this is not necessarily the case.[1098] We note that Crown counsel did not mention that the Court also found that the Crown policy at the centre of the *Lands* case was 'such a major change that, although the Government is clearly entitled to decide on such a policy, as a reasonable Treaty partner it should take the Maori race into its confidence regarding the manner of implementation of the policy.'[1099]

Between February and May 1986, Forestry Corporation Establishment Board members visited almost all of the Forest Service's plantations, and met with representatives of a wide range of groups, including the Timber Industry Federation, New Zealand Pulp and Paper Industry Association, Institute of Foresters, New Zealand Workers' Union, Timber Workers' Union, Forest Owners' Association, Forest Service staff, Public Service Association, Treasury, State Services Commission, and environmental organisations.[1100] There is no evidence that it met with representatives of the peoples of Te Urewera, or with any Maori organisation. It is possible, however, that the Timber Workers' Union provided an indirect voice for the peoples of Te Urewera, as it represented the largely Maori workforce of the Kaingaroa Logging Company, based in Murupara.[1101]

1094. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), p 33; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 293–295; counsel for Nga Rauru o Nga Potiki, submissions by way of reply, 8 July 2005 (doc N33), p 17

1095. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), p 33

1096. Crown counsel, closing submissions, June 2005 (doc N20), topic 38, p 7

1097. Ibid, pp 7–8

1098. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), at p 683; Crown counsel, closing submissions, June 2005 (doc N20), topic 38, pp 8–9

1099. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), at p 665

1100. Walzl, 'Maori and Forestry' (Wai 1200, doc A80), p 743; Reg Birchfield and Ian Grant, *Out of the Woods: The Restructuring and Sale of New Zealand's State Forests* (Wellington: GP Publications, 1993), p 54

1101. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 176

In 1986, the Crown established a Social Impact Unit (SIU), to find out how particular communities would be affected by corporatisation, and develop means to assist them.[1102] The Department of Maori Affairs was given responsibility for the SIU in regions with high percentages of Maori; one such region was the Bay of Plenty, which included the Te Urewera timber towns. The SIU regional co-ordinator for the area was Rotorua Maori Affairs Director Kim Workman.[1103] Almost immediately after its formation, the SIU received a Forest Service report which identified Minginui as one of the communities which would be most severely affected by corporatisation.[1104] In late 1986 Workman and other civil servants from various departments visited the timber towns, finding that the towns would be left with much greater problems than the 'short term disruption' which the State Services Commission had predicted for the country as a whole.[1105] Workman wrote that the impact on the Ruatahuna and Te Whaiti communities had already been 'devastating'.[1106] All of this makes it clear that the Crown was well aware of its policies' likely impact, and indeed the establishment of the SIU indicates that it had some idea of this right from the start.

The Forestry Corporation officially came into being on 1 April 1987, with a much smaller staff than that employed by the Forest Service. Nationwide, Forestry Corporation staff numbers were just 39 per cent of commercial forestry staff numbers in the Forest Service. We do not have figures for our inquiry district, but at Murupara, staff numbers went from 25 to seven.[1107] Te Urewera tangata whenua living and working in Kaingaroa also saw huge numbers of jobs disappear. At Kaingaroa, a total of 627 permanent and contractor jobs were lost in the 12 months from October 1986, reducing the workforce from 682 to just 55.[1108] It had been expected that the Department of Conservation would create a number of jobs but, as we have noted in chapter 16, these estimates were very optimistic. What few jobs the Department of Conservation offered have also tended to be in the Waikaremoana region rather than the former timber towns.[1109] Douglas Rewi told us that

> A number of ex Forest Service personnel joined the Department of Conservation and the incoming Forest Corporation, many of them holding top managerial positions. However,

1102. Ibid, pp 178–179
1103. Ibid, p 184
1104. S Wilson (compiler), 'Social Impact of Forestry Corporatisation (draft)' (Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003 document bank' (doc C13(a)), pp 532–534)
1105. Director of Maori Affairs, Rotorua, to Deputy Secretary of Maori Affairs, 7 October 1986 (Bassett and Kay, comp, supporting papers to 'Ngati Manawa and the Crown c 1927–2003' (doc C13(a)), p 569); Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 182–183; Chairman, State Services Commission, to Ministerial Co-ordinating Committee on State Owned Enterprises, 19 August 1986 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 715)
1106. Director of Maori Affairs, Rotorua, to Deputy Secretary of Maori Affairs, 7 October 1986 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 721)
1107. Walzl, 'Maori and Forestry' (Wai 1200, doc A80), p 746
1108. Ibid, p 838; Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 210
1109. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 740

> there was little employment available for the forestry and mill workers further down the chain, many of them Maori.[1110]

The conservation and tourism jobs which did exist made little or no use of forestry workers' skills. The Conservator of Forests at Rotorua had pointed this out in 1984, saying that 'the head faller of the indigenous logging gang at Whirinaki has every bit as much prestige in the Minginui village as a professor on a university campus', and that telling such a man to get a tourism job would be like telling a professor to become a bus driver.[1111]

Forest Service workers deemed surplus to requirements were given two options: they could have either a year's employment with the Forestry Corporation from 1 April 1987, at the end of which no redundancy payment would be made, or a redundancy payment equivalent to their previous year's earnings.[1112] Most workers accepted the Corporation's recommendation to take immediate redundancy but, as the Murupara Forestry Housing Committee observed, it was 'not viewed with any great favour – even by those who chose to take it.'[1113] The extent of payments to Te Urewera Forest Service personnel is not known, but nationally 3,762 people, just over half of all staff, chose redundancy and received an average payment of $17,500.[1114]

In 1986, the Forest Service at Kaingaroa had nearly twice as many permanent staff as contractors. The Forestry Corporation aimed to have most of its work carried out by contractors, with very few permanent staff. In response, many redundant workers invested their payments into setting up contracting firms. This required expensive equipment; the Forest Service's eight-man Gang 42 at Kaingaroa, for example, set themselves up as Fast Logging Ltd, with $350,000 worth of equipment.[1115] We note that even if all eight men had received the average redundancy payout and put all of it into the new company, they still would have had to borrow a further $210,000 to get their business started. Because there were more contractors than work, the contracting system pitted former workmates against each other. As Grace Dorset, a liaison officer for Internal Affairs put it:

> people saw the selection process of who would get jobs as a process of vying with each other so that neighbour would vie with neighbour, brother against brother, race against race. This

1110. Douglas Rewi, brief of evidence, 9 August 2004 (doc G37), p 13
1111. Elliott to Cullen, 17 May 1984 (Hutton and Neumann, comp, supporting papers to 'Ngati Whare and the Crown, 1880–1999' (doc A28(a)), p 132)
1112. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 177
1113. Murupara Forestry Housing Committee to Timberlands – Kaingaroa, February 1987 (Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 177)
1114. The total paid out in redundancy was $65.7 million: Birchfield and Grant, *Out of the Woods*, p 73; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 712.
1115. Walzl, 'Maori and Forestry (Taupo–Rotorua–Kaingaroa)' (Wai 1200, doc A80), pp 847–848

to them was unacceptable destroying both the bonds that exist among them as well as the strength of the fabric of community closeness of caring and sharing being torn to shreds.[1116]

Another problem was that, according to Kim Workman, few forestry workers felt able to successfully establish themselves as private contractors.[1117] The Social Impact Unit's co-ordinating committee at Rotorua expressed concern in early 1987 'at the number of people who are submitting contracting proposals which are reckless in nature. People have opted to mortgage assets or redundancy payments, and take foolish risks to join the private enterprise thrust'. In the words of the regional co-ordinating committee, these proposals were being made by people in 'a state of panic'.[1118] Aspiring contractors were given some assistance and training, but it does not seem to have been enough.[1119] As we will discuss below, some redundant workers were unable to make any sort of business investment, as their homes had been put up for sale and so the redundancy money was needed to buy them.

In 1996, the Crown sold its Kaingaroa Forest cutting rights to Fletcher Challenge Paper. Fletcher was initially committed to using Murupara-based contractors in its Bay of Plenty operations, but subsequently threw its contracts open to all-comers, so that just two contracting gangs were left in Murupara, where previously there had been more than twenty.[1120] Ben Mitai and Douglas Rewi told us that the competitive contracting process led to further job losses in Murupara.[1121] Mitai said that many highly skilled contractors from Murupara had invested significant money in equipment, but could not then get enough work, became indebted to banks, and had to sell their equipment at below market value. 'They were worse off than when they started.'[1122] The business practices of private organisations such as Fletchers are outside our jurisdiction. However in selling its cutting rights, the Crown could have required the purchaser to give preference to local or tangata whenua contractors, thereby aiding their continued employment in their rohe.

Work in the private forestry sector became harder to find because the Forestry Corporation, unlike the Forest Service, did not provide logs at artificially low prices.[1123] As we noted earlier, Tasman Forestry and its Te Urewera employees at Kaingaroa Logging Company had been key beneficiaries of the Service's policy. After it came to an end, Tasman

1116. [Grace Dorset,] Liaison Person Ministerial Task Force to National Co-ordinator, 15 September 1986, (Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 181–182)

1117. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 182

1118. Report to Advisory Committee of the Social Costs of Transition to Corporation, from Regional Co-ordinating Committee, Rotorua, 23 January 1987 (Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 186)

1119. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 195–196, 205–206

1120. Waitangi Tribunal, *Tarawera Forest Report*, p 52; Rangi Anderson, brief of evidence, 18 August 2004 (doc F29), pp 5–6; Ben Mitai, brief of evidence, 9 August 2004 (doc F13), p 6

1121. Douglas Rewi, brief of evidence, 9 August 2004 (doc F18), p 13; Ben Mitai, brief of evidence, 9 August 2004 (doc F13), p 6

1122. Ben Mitai, brief of evidence, 9 August 2004 (doc F13), pp 6–7

1123. Kirkland and Berg, *A Century of State-Honed Enterprise*, pp 80–81, 85–86, 137–138

announced that it would lay off 70 workers from the Murupara area.[1124] By 1987, the real unemployment rate in Murupara was estimated at 30 per cent, around four times the national unemployment rate.[1125] Minginui's last significant employer, the Carter Holt Harvey mill, was meanwhile struggling to compete against larger, less isolated mills.[1126] It closed in 1988 with the loss of about 40 jobs, causing the Minginui unemployment rate to reach 94 per cent.[1127]

It was clear to the Crown that corporatisation was going to have negative impacts on the Te Urewera timber communities, and it did make some attempts to alleviate them. In particular, the Social Impact Unit, as well as having a consultative purpose, was intended to help reduce the negative effects of corporatisation. However this was difficult in practice because of uncertainty about what form the changes would take.[1128] It was not until November 1986 that the Forestry Corporation Establishment Board revealed that there would be massive staff cuts, and a redundancy package was not produced until 'well into 1987'.[1129] The Forest Corporation housing policy, which would be crucial to the futures of Minginui and Kaingaroa in particular, was not announced until 24 February 1987.[1130] Consequently, when the final Social Impact Unit regional report was released in February 1987, it stated that the employment and housing situation was still undetermined.[1131]

The Social Impact Unit encouraged communities affected by corporatisation to form community groups, such as the Minginui Development Council, which could provide leadership and lobby on the communities' behalf. Such lobbying was largely ineffective, however. For example, after visiting Te Urewera in October 1986, officials recommended proposals to alleviate unemployment in Minginui, which were ignored.[1132] The Mayor of Murupara also led a delegation to the Minister of Forests, and Kaingaroa residents submitted a housing plan to MPs, only to be told that the Forestry Corporation's decisions, including those involving residents' homes, were commercial matters.[1133] Workman complained in his May

1124. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 194

1125. The recorded unemployment rate in Murupara was lower than 30 per cent because of the number of people living off redundancy payouts rather than the unemployment benefit. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 205; *New Zealand Official Yearbook, 1990* (Wellington Department of Statistics, 1990), pp 359, 370

1126. See, in relation to the prospects of the Minginui sawmill, Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 230–232.

1127. M James, for Secretary of Treasury, 'The Future of Minginui', 22 September 1988 (Hutton and Neumann, supporting papers to 'Ngati Whare and the Crown, 1880–1999' (doc A28(b)), pp 186–188)

1128. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 184–186

1129. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 710; Birchfield and Grant, *Out of the Woods*, p 70

1130. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 189–190

1131. Ibid, pp 190–191

1132. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 723–724, 730

1133. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 186, 205–206

1987 report that the Corporation ought to have consulted affected communities on options which might meet both parties' needs.[1134]

Practical help for communities affected by corporatisation mostly took the form of job training, and support for small businesses. Schemes such as the Project Employment Programme (PEP) and the Maori Access (Maccess) scheme provided work experience and new job skills, as well as short term employment. These were operating in Te Urewera even before corporatisation, but expanded significantly once redundancies began.[1135] Substantial funding was provided; in 1990, for example, the Tuhoe Waikaremoana Maori Trust Board received $796,042 from Maori Access and $311,091 from General Access to fund its programmes. This included the allowances paid to trainees, which typically accounted for around half of expenditure.[1136] At Murupara the training modules consisted of basic accounting, typing, reception work, computer skills, general management, te reo, first aid, and small business management.[1137] At Ruatahuna, meanwhile, a further Maori Access scheme on possum hunting was added to the PEP schemes run through two Ruatahuna marae and a training course in weaving.[1138]

In addition, and in order to deal with general unemployment rather than that caused specifically by corporatisation, a Kokiri Skill Centre was established in Ruatoki in 1986. This provided short training courses at Ruatoki, Ruatahuna, Waiohau, Waimana, Waikaremoana, and Rotorua.[1139] Courses included business and office practices, primary health, horticulture, forestry, driver education, Maori arts and crafts, music, bush craft, carving, motor mechanics, waitressing, Maori tourism, and clerical and computer skills.[1140] In 1990 and 1991, 150 Maori, three Pakeha and one Pacific Islander attended 22 courses offered by the Ruatoki Kokiri Centre in Ruatoki, Taneatua, Waimana, Waikaremoana and Ruatahuna.[1141] These schemes came to an end shortly afterwards, mostly because of government cost-cutting.[1142]

Even before the programmes ended, people in Te Urewera had lost faith in their usefulness; they were regarded as temporary stop-gaps which did not lead to permanent employment.[1143] Mereru Mason explained that there was little benefit for the Minginui trainees who gained computer skills from a course run at Ruatahuna, as there were no businesses which

1134. Ibid, p 206
1135. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1178; Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 176
1136. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1182–1183
1137. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 196
1138. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1180; Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 560
1139. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1179, 1181–1183
1140. Ibid, pp 1180, 1183, 1209
1141. Ibid, p 1208–1209
1142. Ibid, p 1209
1143. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 565; Tuhoe Waikaremoana Maori Trust Board, 1989 Annual Report (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(O)), p 59)

needed computer skills in Minginui, and this in turn meant that at the end of the course the trainees could not build up the experience needed to get a job elsewhere.[1144] She told us that

> People lost faith in any schemes and lost motivation to support any kind of work, because they knew that at the end of the day it would all amount to nothing and they would be going back to the dole again.[1145]

Similarly, a Ruatahuna submission to the Royal Commission on Social Policy stated in 1987 that

> Most of our young people and older unemployed are willing to work and they appeal for the creation of job opportunities in our area. They do not want to leave Ruatāhuna nor do they want to be professional ACCESS trainees or PEP workers. They want real jobs right here.[1146]

Murton summarised the problems with the training programmes:

> First, there was no guarantee of employment for trainees who successfully completed a course. Most went to other schemes or went back on unemployment. Second, many of the young people in the programs had already been labelled as failures, and they continued to have low expectations of themselves and their job prospects. For many, it seemed, the prime motivation for attending a course was to get the stipend. Third, many of the tutors and training providers were of the opinion that trainees felt that there was no difference between being on the dole and receiving a stipend on a training program. Fourth, many programs were under funded and there was great uncertainty about the ongoing availability of funds. Fifth, criteria for programs, both in terms of funds and types of courses, were often inflexible, even when courses were based on community needs and had commercial potential.[1147]

The contestability of funding for such schemes also had the potential to create division within communities, as it did in Minginui, where the Minginui Community Services Trust, set up by the Te Arawa Trust Board, fell out with the Ngati Whare-based Minginui Development Council.[1148] We note that some programmes, such as te reo, bush craft, and traditional arts, were at least culturally beneficial. In general, though, it is clear that there was little or no point in providing job training when there was no realistic prospect of work at the end of it. It is not clear that the Crown realised this at the time.

1144. Mereru Mason, brief of evidence, September 2004 (doc G41), p 4
1145. Ibid, p 5
1146. Tuhoe Submissions to the Royal Commission on Social Policy (Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 563)
1147. Kath Boswell and Denise Brown, with Jo Maniapoto and Tamati Kruger, *At the Grassroots: Community Responses to Unemployment*, (Wellington: New Zealand Planning Council, 1990), pp 25–26 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1215)
1148. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1184–1186

As well as providing job training, the Crown helped Te Urewera communities to create new businesses. The Adjustment Assistance Contingency Fund and the Mana Enterprises scheme both provided grants to new enterprises, and business development teams provided advice. In May 1987, for example, a visiting development team discussed funding options for computer training, eel farming, a hot bread shop and a weed spraying business.[1149] A report later that year listed sixteen businesses in the Bay of Plenty set up following feasibility studies, including a silvicultural contracting firm working in the Minginui / Kaingaroa area, and three Murupara businesses, one doing landscape gardening, one weed spraying, and the third doing general contracting work.[1150] Short term funding was also available from 1987 through the Community Organisation Grants Scheme and the Community Employment Investigation Scheme. This enabled the appointment of a Community Development Co-ordinator in Ruatahuna, and provided $105,000 to promote job creation projects. A total of twelve projects were investigated, five of which were ongoing businesses in 1991.[1151] In addition, the Forestry Corporation and the Enterprise Opportunity Scheme helped former forestry workers set up as contractors.[1152]

Despite the efforts of the Crown and local communities, these schemes created few jobs, and fewer small businesses which were successful in the long term.[1153] In 1991 Brenda Tahi, the Community Development Co-ordinator at Ruatahuna, hoped that at least two or three of the Ruatahuna enterprises would survive beyond a few years, which would result in employment for five people.[1154] We have also seen that numerous ex-Forest Service workers set up as contractors, but few were successful in the long term. As we saw earlier in this chapter, unemployment has consistently been very high in Te Urewera since the mid 1980s. Residents of Te Urewera feel that the Crown has failed to capitalise on opportunities to create work there; for example Jack Te Waara has asked why the Crown has not employed local people in possum and deer control, and in recovering windfall timber from Te Urewera National Park.[1155] Unfortunately we did not receive enough information to determine why so few businesses survived, but it is likely that the general poverty in Te Urewera made it difficult for them to prosper.

The effects of corporatisation on the Maori communities of Te Urewera went far beyond the economic impacts of job loss. There was also a heavy psychological toll, not only on those who lost their jobs, but also on their whanau. For decades, forestry had provided not only income but a sense of security and identity. Many families had successive generations

1149. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 184, 194–195
1150. Regional Liaison Officer to Regional Co-ordinator, 22 October 1987 (Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003 document bank' (doc C13(a)), pp 488–489)
1151. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 561; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1195–1196; Poulin and Tahi, *A Study on Community Services and Development for Ruatahuna*, pp 56–59
1152. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 205–206
1153. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1192
1154. Poulin and Tahi, *A Study on Community Services and Development for Ruatahuna*, pp 56–59
1155. Jack Te Piki Hemi Kanuehi Te Waara, translation of brief of evidence, 21 June 2004 (doc E23(a)), p 4

of forest workers.[1156] Once corporatisation began, depression, anxiety and anger became widespread, often preventing people from planning for the future, or taking advantage of what little help was available.[1157] There was an increase in drug and alcohol abuse, and social disorder ranging from school truancy to violent assaults.[1158] Gang membership rose, as did the crime rate.[1159] Ben Mitai told us that these problems in Murupara were the direct result of the town having its economic base stripped away:

> When there are no jobs people get a little edgy and I believe that is why Murupara is in its current situation. It has no economic base. It does not have any now. It has all been stripped. The whole economy is downscaled. I could see the changes because I would come back probably every second year [Mitai left in 1986] and it was just startling the way things were moving backwards there. There are major social problems developing out of lack of activity, lack of opportunity. The people don't have the means to move out and start over again somewhere else.[1160]

Numerous claimant witnesses told us of the ill effects corporatisation had on Te Urewera marae. Sarah (Hera) Harris of Ngati Whare said that, due to mass unemployment, 'the marae which had also been so vibrant began to struggle because people no longer had the spare cash to contribute to the upkeep of the maraes and other community facilities.'[1161] Likewise, Anaru Te Amo said to us that after the downturn in the forestry industry, the marae 'could no longer rely on koha from Ngati Whare iwi members given the sudden loss of jobs among the local community.'[1162] Marae and community groups also suffered as iwi and hapu members left the rohe in search of work. Numerous claimant witnesses told us about this unwilling migration.[1163]

In summary, the transformation of the Forest Service into the Forestry Corporation had dramatic negative effects on the timber towns of Te Urewera, severely reducing the economic capability of those communities. Most importantly, the new Corporation drastically cut staff numbers, creating very high rates of unemployment in Minginui and elsewhere.

1156. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 233

1157. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 721–725, 734–735; Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 182–183; Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 560–562

1158. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), p 183

1159. Director Rotorua Maori Affairs to Deputy Secretary Maori Affairs, 7 October 1986 (Bassett and Kay, supporting papers to 'Ngati Manawa and the Crown c 1927–2003' (doc C13(a)), p 572); Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 722; Regional Co-ordinator to Advisory Committee of the Social Costs of Transition to Corporatisation, no date [February 1987] (Bassett and Kay, supporting papers to 'Ngati Manawa and the Crown c 1927–2003' (doc C13(a)), p 472)

1160. Ben Mitai, brief of evidence, 9 August 2004 (doc F13), p 8

1161. Sarah (Hera) Harris, brief of evidence, September 2004 (doc G39), p 11

1162. Anaru Te Amo, brief of evidence, September 2004 (doc G38), p 4

1163. Sarah (Hera) Harris, brief of evidence, September 2004 (doc G39), p 11; Rangi Anderson, brief of evidence (doc F29), pp 5–6; Jack Te Piki Hemi Kanuehi Te Waara, translation of brief of evidence, 21 June 2004 (doc E23(a)), p 3

The Effects of Redundancy and Unemployment

Many claimant witnesses spoke of the pain caused by redundancy and unemployment. Jack Te Waara of Tuhoe told us that:

> I was made redundant when the Forest Service was corporatized. Many people lost work. They had left their homelands to work in the forestry, and were left stranded there when it suited the government. The redundancy caused me real pain. We were treated like we were disposable.[1]

Douglas Rewi of Ngati Manawa spoke to us about the 'destructive' and 'severe' effects of corporatisation in Murupara in the mid-1980s, including the stress placed upon workers and their families:

> Approximately 60 per cent of forestry workers – many Maori, many Ngati Manawa – lost their jobs during this period . . . The closure of both State Forest Service and Tasman forestry caused enormous amount of worry and concern among the workers and their families. One was now burdened with the knowledge that no prospect of any future employment within the forestry industry was possible. The workers now unemployed were faced with the prospect that they had no skills apart from those suited to only forestry work to call upon.[2]

A submission from the people of Ruatahuna to the Royal Commission on Social Policy in 1987 described a range of social and psychological effects due to mass unemployment: 'the loss of culture and self-esteem, the stress and breakdown for families and relationships, the lack of resources to improve one's lot, the loss of habits and disciplines, the inability to fulfil responsibilities.'[3]

Even at the time of our hearings, two decades after corporatisation, the persistence of high rates of unemployment in these communities has meant that many young people struggle to find the motivation to work.[4]

1. Jack Te Piki Hemi Kanuehi Te Waara, translation of brief of evidence, 21 June 2004 (doc E23(a)), p 3
2. Douglas Rewi, brief of evidence, 9 August 2004 (doc F18), pp 11–12
3. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 563
4. Sarah (Hera) Harris, brief of evidence, September 2004 (doc G39), p 11; Wakeley Matekuare, brief of evidence September 2004 (doc G40), p 8

When the Corporation ceased to provide artificially cheap logs to private timber companies in Te Urewera, these companies also laid off staff, further increasing unemployment. Some skilled workers were initially able to set up as independent contractors, but there were too many contracting gangs for the work available, so many ended up not only unemployed, but owing money for the equipment they had bought in order to begin contracting. Because staff cuts were made all across the timber industry, laid-off workers could not simply get

work at other companies. Widespread unemployment plunged many Te Urewera whanau into poverty, and also led to social problems such as crime and substance abuse. The Crown did make some attempts to relieve unemployment, through job training and support for small business. However job training is essentially useless unless there are jobs available, and Te Urewera's general economic difficulties meant that small businesses found it difficult to survive.

Although it was always clear that the Te Urewera timber towns were going to be hugely affected by corporatisation, we saw no evidence that the Crown consulted with these communities before deciding on the policy. Some consultation activities were carried out, but these were neither effective nor particularly meaningful. Their main purpose was to give communities information on what was happening and, in theory, to minimise the adverse effects of corporatisation. As we have seen, such consultation was hamstrung by uncertainty, which prevented both the Social Impact Unit and the communities themselves from knowing what was going to happen. The peoples of Te Urewera were also unable to influence either the government or the Forestry Corporation, both of which seem to have regarded the restructuring in purely commercial terms, and failed to take into account its impacts on the Te Urewera communities.

(2) *Minginui village and Forest Service housing*

Since it was required to be profitable and efficient, the Forestry Corporation saw little reason to provide its employees with accommodation, as the Forest Service had. There was even less reason to house those it no longer employed, such as the large numbers in Te Urewera who had been made redundant. Loss of housing combined with loss of work made the corporatisation of the Forest Service doubly traumatic for many Te Urewera families. One somewhat positive outcome of the process was the transfer of the ownership and administration of Minginui to the Ngati Whare Trust. However this has also left Ngati Whare to deal with the village's substandard housing and infrastructure.

Counsel for Ngati Whare submitted that the poor condition of the village and its infrastructure meant that it was essentially a liability; the cost of its upkeep and repair needs was greater than the value of the village itself.[1164] In short, Ngati Whare were doing the Crown a favour by taking Minginui off its hands. Counsel further submitted that the Crown has failed since the transfer to provide adequate resources to Ngati Whare, as kaitiaki of the Minginui community, to 'remedy the poor social and economic condition of that community and ensure that its infrastructure and utilities can be maintained to an adequate standard'.[1165] In addition, at the time of our hearings several sites in the village were contam-

1164. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), pp 49–50; counsel for Ngati Whare, closing submissions, 9 June 2005 (doc N16), p 161

1165. Counsel for Ngati Whare, closing submissions, 9 June 2005 (doc N16), p 161; see also counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), p 57

inated with toxic wood-processing chemicals or asbestos, and the Crown had done nothing about this.[1166] Counsel for Ngati Whare also stated that the Crown had made no grants to the asset-poor Minginui Village Council for infrastructural development and maintenance, even though it had provided such funding to the Whakatane District Council.[1167]

Crown counsel responded that there was 'a misapprehension that on the transfer of Minginui Village to Ngati Whare they were effectively cut loose from the resources of the Whakatane District Council and Environment Bay of Plenty and their predecessors.'[1168] Counsel stated that the Ngati Whare Trust was responsible for the 'administration of the land and the houses that are on the land' only, and that 'it was not intended that the village should thereby become responsible for all of the infrastructure developments that local authorities would normally be responsible for.'[1169] They conceded that there were contaminated sites in Minginui, but stated that the Crown was not aware of these until after the transfer, and that, at the time of our hearings, steps were being taken to decontaminate the sites.[1170]

The corporatisation of the Forest Service and the staff reductions that followed left ex-forestry families in all the timber towns under significant stress about housing: what would happen to the Forest Service houses, and would former employees have to move? In October 1986, the Public Service Association negotiated an agreement whereby Forest Service employees would be guaranteed a minimum of three months' tenure, and those in isolated forestry communities would be offered Housing Corporation mortgage assistance, but it was not until late February 1987 that the Forestry Corporation agreed to leave its former employees with secure tenure and unchanged terms and conditions until 1 April 1988.[1171] However this meant only that tenants had another year to resolve their situation.[1172] The serious shortage of housing in the Bay of Plenty region meant that few tenants had anywhere nearby to move to, and the redundancy payment was too small to pay for equivalent accommodation further afield.[1173] The focus for most of the ex-Forest Service tenants therefore was whether or not they would be able to retain their existing homes.

In November 1986, the Social Impact Unit's Merepeka Sims had recommended that the ex-Forest Service houses be purchased by the Department of Maori Affairs, since 80 per cent of their occupants were Maori and there were widespread problems with housing quality and availability at the time. This idea received serious consideration by the Department,

1166. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), p 48
1167. Ibid, p 29
1168. Crown counsel, closing submissions, June 2005 (doc N20), topic 34, p 13
1169. Ibid, pp 13–14
1170. Ibid, pp 12–14
1171. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 187, 189–190
1172. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 732
1173. Murupara Forestry Housing Committee to Timberlands, Kaingaroa, February 1987 (Bassett and Kay, supporting papers to 'Ngati Manawa and the Crown c 1927–2003' (doc C13(a)), p 426); Douglas Rewi, brief of evidence, 9 August 2004 (doc F18), p 12

but was not adopted.[1174] In late 1987, the New Zealand Maori Council similarly requested that alternative options for Murupara tenants, such as long-term leases, be investigated.[1175] The consistent position of the Forestry Corporation, however, was that the housing stock of the Forest Service ought to be sold, preferably to the highest bidder. Yet it was unlikely that any purchaser would be interested in keeping the houses where they were, let alone renting them to impoverished former forestry workers.[1176]

In May 1987, the Murupara Forestry Housing Committee proposed that existing Murupara tenants be able to buy their houses at a 50 per cent discount, since many had committed their redundancy money to setting up contracting businesses. However the Forestry Corporation rejected the idea, on the basis that this would jeopardise its commercial imperatives.[1177] Eventually the Corporation chose to match the offer made by Tasman to its Murupara ex-employees, that is, to sell at two-thirds of market value. As a result of further discussions involving the Housing Corporation, the State Services Commission, Treasury and the New Zealand Maori Council, Cabinet did not sign off on this offer until late December 1987.[1178] The prolonged process made it more difficult for Murupara's tenants to purchase their homes, as the need to pay rent in the interim chipped away at the redundancy lump sum payments.[1179] In addition, the loss of jobs and secure housing at the same time meant that ex-forestry workers had to choose between buying their houses and setting up as contractors. They were left with the choice of being homeless contractors or unemployed homeowners.

The situation was even more uncertain in Kaingaroa and Minginui, where the Forestry Corporation wanted to extract itself from the villages completely. The Forest Service had not only provided the housing there but had also paid for the upkeep of the infrastructure. The Forestry Corporation regarded this as an unnecessary expense, particularly as there was now little active forestry in the area.[1180]

The Crown's plans to sell Minginui and Kaingaroa on the open market were ultimately stymied by the New Zealand Maori Council's *Lands* case. The Court of Appeal found that the Crown could not sell or transfer to SOE land which might be used in Treaty settlements. This meant that the Forest Service villages of Kaingaroa and Minginui could no longer be regarded simply as commercial assets. The judgment was cited in the Department of Maori Affairs' submission to the Cabinet's SOE Committee on Kaingaroa, and the case also featured in the Ministry of Works and Development's report of August 1987 on the

1174. Bassett and Kay, 'Ngati Manawa and the Crown c 1927–2003' (doc C13), pp 186, 189
1175. Ibid, p 201
1176. Ibid, p 197
1177. Ibid, pp 198–199
1178. Ibid, pp 200–201
1179. Ibid, pp 202–203
1180. Ibid, pp 211–212; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 734–737

administration of Minginui village.[1181] The report concluded that, since the village could not be transferred to the Forestry Corporation, for the time being it was probably an asset of the Forest Service Disestablishment Board.[1182]

The idea of Ngati Whare taking ownership and control of Minginui seems to have first arisen at a Ngati Whare hui at Murumurunga Marae, Te Whaiti, on 2 February 1987.[1183] A survey was held to establish whether the continuing existence of the village was viable from a social standpoint, and this found that 76 per cent of households defined themselves as 'stayers', and 12 per cent as 'uncertain stayers'.[1184] Tom Woods, office solicitor at the Maori Affairs Department in Rotorua, reported in June 1987 that there was a legal justification for returning Minginui to Ngati Whare: it had been acquired under the Public Works Act, which meant that once it was surplus to requirements, the Crown was obliged to offer to sell it back to the original owners.[1185] In March 1988, the State Services Commission paper, 'The Future of Minginui: An Interim Strategy' commented that, as tangata whenua, Ngati Whare's 'interests need be to considered as part and parcel of any future strategy'.[1186] After the residents reiterated their commitment to the village at a hui in May 1988, Cabinet agreed to return the village to Ngati Whare in October.[1187] This paralleled an earlier decision to return the Kaingaroa village land to Ngati Manawa, even though the Forestry Corporation had recommended that the village should be closed down and sold off.[1188]

It took some time to establish the terms under which Minginui would be transferred. One complicating factor was the poor state of the village's infrastructure and housing stock. A Ministry of Works and Development report written in 1987 showed that nearly two-thirds of Minginui houses had been built from untreated timber, and in many cases also had low stud and substandard framing.[1189] The septic tank-based sewage system was also substandard, with many of the tanks draining inadequately. In one instance this led to the contamination of a water supply bore.[1190] The water system also had major problems: the pipes were old and in regular need of repairs, the water main was nearing the end of its useful life, and the fire hydrants needed replacing. Neither the inadequately-maintained storm water system nor the roads were compliant with council standards, and the street lighting also needed upgrading.[1191] In total, $1,187,000 worth of work was identified in the report, with

1181. Bassett and Kay, 'Ngati Manawa and the Crown c. 1927–2003' (doc C13), p 211
1182. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 744
1183. Ibid, pp 739–740
1184. Ibid, pp 741–742
1185. Ibid, p 743, 764
1186. S Rodger, 'The Future of Minginui: an interim strategy' (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 756)
1187. See Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 758–760
1188. Ibid, pp 761–762; Bassett and Kay, 'Ngati Manawa and the Crown c. 1927–2003' (doc C13), pp 214–215. As Kaingaroa is outside the inquiry district, we do not discuss its transfer in this report.
1189. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 746
1190. Ibid, pp 747–748
1191. Ibid, p 747

the cost of a minimal upgrade estimated at $787,000.[1192] Fearing that Minginui would be killed by upkeep costs, a meeting of Minginui residents and the Minginui Development Council on 11 March 1988 took the drastic step of voting against fixing the village's sewage disposal system, which had accounted for about half the projected expense in the Works report's minimum upgrade scenario.[1193]

The Works report estimated that the rates needed to keep Minginui up to standard would be $91,800 per year.[1194] By contrast, the 1986 rates assessment for the entire village had been just $324.64. Because the Forest Service had taken care of all Minginui's services and facilities, the County Council had rated and serviced the village as if it was a farm, even though it accommodated hundreds of people.[1195] In any case, neither the Minginui Development Council nor the Whakatane County Council wanted the County Council to administer the village.[1196] The State Services Commission developed a plan to gift the land and 54 houses owned by the Crown (thought to be worth $500,000) to an iwi trust, which would then sell the houses to their occupants to raise capital for infrastructural development. In addition, the Crown would grant $200,000 for more urgent infrastructural work. The Commission estimated that nearly $50,000 per year, or $520 per household, would be required to carry out the necessary upgrades, as long as all the work was carried out by volunteers.[1197]

Treasury objected to the Commission's plan on principle, arguing that local residents ought to pay for a share of the capital works. Its paper on Minginui claimed that Treasury had 'no information' on residents' financial resources, even though another part of the paper noted that the village had a 94 per cent unemployment rate.[1198] By ignoring this rate of unemployment, Treasury could propose a 50/50 cost split between residents and the Crown.[1199] It also advised against giving any discount to residents buying their homes, as they were already entitled to mortgage assistance from the Housing Corporation. It did, however, downgrade the value of the housing stock from $500,000 to $410,000, or just under $8,000 each.[1200] While this was an improvement on the Commission's estimate, it is not clear how either figure was determined, and it appears that Minginui residents were never provided with an independent valuation.[1201] Treasury's proposal explicitly rejected the

1192. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 748–749. Another cost-saving option, which would have saved about $400,000 in the short term, was to persevere with the aging water reticulation system and septic tanks for sewage disposal, but the report observed this would be offset by higher ongoing maintenance costs (p 748).

1193. Ibid, pp 748, 753

1194. Ibid, pp 748–749

1195. Ibid, pp 745, 749–750

1196. Ibid, pp 748, 753

1197. Ibid, p 763

1198. M James, for Secretary of Treasury, 'The Future of Minginui', 22 September 1988 (Hutton and Neumann, supporting papers to 'Ngati Whare and the Crown, 1880–1999' (doc A28(b)), pp 188, 190)

1199. M James, for Secretary of Treasury, 'The Future of Minginui', 22 September 1988 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 767)

1200. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 766

1201. Ibid, p 770

Crown's approach to the ex-Forest Service houses in Kaingaroa, in which the asking price for tenants had been two-thirds of the market value, and also the substantial discounts on market value that Carter Holt Harvey had agreed to as part of the redundancy package for its Minginui workers.[1202] Lastly, Treasury stressed that

> It should be made clear to the residents, that after the initial period of support, no further Government assistance will be provided for the village, and the administrative body will take full responsibility for the future viability of the village.[1203]

Treasury's advice was fully in keeping with the Crown's contemporary ideology of a minimal state with limited support for citizens. It was also completely detached from the reality of Minginui, which by now had almost total unemployment.

Cabinet voted in October 1988 to hand the Crown's land and houses to an iwi trust, and grant $100,000 for an immediate infrastructural upgrade, which was spent by the Department of Conservation on sealing Minginui's roads.[1204] A further $37,000 was also voted to cover interim administration by the Department of Conservation, and $30,000 to cover the legal and surveying costs associated with setting up the trust and remedying Minginui's title issues, although ultimately an additional $100,000 would be needed to complete these two exercises.[1205] Finally, on 29 March 1989, a sitting of the Maori Land Court at Te Whaiti vested the village in the eponymous Ngati Whare ancestor Wharepakau, and, using section 436 of the Maori Land Act 1953, appointed the new Ngati Whare Trust as the village's trustee. The Ngati Whare Trust in turn then leased the land, and handed over day-to-day administration of Minginui, to the Minginui Village Council Limited.[1206]

If we are to accept Treasury's $410,000 valuation for the land and houses, and the Ministry of Works' report upgrade estimates, then there can be no doubt that the Crown was transferring a financial liability rather than an asset to Ngati Whare. Even when the $787,000 estimate for a minimal upgrade is stripped of planning and engineering consultancy fees and contingency funding, the works programme was estimated to cost $639,200.[1207] In summary, Ngati Whare were given a village worth $410,000 which required at least $639,200 to bring it up to a liveable standard. The Crown spent $100,000 on road improvements, leaving Ngati Whare and the largely unemployed residents of Minginui with at least $539,200 worth of work needing to be done.[1208] The original State Services Commission plan for

1202. Ibid, pp 760, 769–770
1203. M James, for Secretary of Treasury, 'The Future of Minginui', 22 September 1988 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 768)
1204. Hutton, summary of 'Ngati Whare and the Crown, 1880–1999' (doc G5), para 49; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 748, 760; Anaru Te Amo, brief of evidence, September 2004 (doc G38), p 10
1205. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 769
1206. Ibid, p 771
1207. Ibid, pp 748–749
1208. Assuming that all the roading costs were part of the $639,200; it is not clear that they were.

23.8.2(2)

Minginui envisioned that improvements would be funded partly by the sale of houses to residents and partly by rates paid to the Ngati Whare Trust. However many residents had difficulty buying their houses, and there was also significant rates defaulting.[1209] Even if all houses had been sold at their estimated value, there would still have been a shortfall of $129,200. Another difficulty was that the Forest Service's all-encompassing and paternalistic management of Minginui meant that residents had no experience in local body government.[1210] As of 2004, the Minginui Village Council had effected modest improvements to the water reticulation system, but the other pressing concern, the inadequate sewage system, remained unaddressed.[1211] In the words of Anaru Te Amo at our hearings that year, 'Minginui Village is now [in] dire need of assistance which is well beyond the means of the Ngati Whare Trust or the residents.'[1212]

Another problem which faced the Trust and residents was the presence of toxic timber processing chemicals and asbestos in the village. For at least some of its period of operation, the Minginui sawmill used a copper, chromium and arsenate mix (CCA) and other chemicals to treat pine timber and protect it from decay and insects.[1213] After the mill was closed, the building was levelled, but as of 2001 'a significant volume of debris', including asbestos roofing, remained on the site, which local children used as a play area.[1214] Examinations in 1991 and 1993 showed that the soil on the mill site had high levels of CCA contamination.[1215] In addition, the former Forest Service depot was built with material containing asbestos, and became unsafe to use; and at the time of hearings the Minginui rubbish dump was leaching contaminants into the Whirinaki river.[1216] As Douglas Rewi pointed out, fixing these problems was far beyond Ngati Whare's resources.[1217]

The Crown provided us with conflicting evidence as to the level of risk posed by the Minginui sites and how much it knew about them. As noted above, high levels of contamination were shown in the early 1990s. During our second hearing of Crown evidence in

1209. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 771–772, 775

1210. Hutton, summary of 'Ngati Whare and the Crown, 1880–1999' (doc G5), para 55; Anaru Te Amo, brief of evidence, September 2004 (doc G38), pp 10–11; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 774–775

1211. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 775; Wakeley Matekuare, brief of evidence, September 2004 (doc G40), p 8

1212. Anaru Te Amo, brief of evidence, September 2004 (doc G38), p 10

1213. Gwilym Environmental Services, 'Contaminated sites screening assessment: Henderson and Pollard Sawmill and Minginui Sawmill', August 2001 (Jonathan Davis Coakley, comp, supporting papers to 'Evidence on behalf of the Ministry for the Environment' (doc M8(a)), attachment L, p 4). According to Ngati Whare, the Henderson and Pollard sawmill, which processed native timber only, used no chemical treatment agents.

1214. Gwilym Environmental Services, 'Contaminated sites screening assessment: Henderson and Pollard Sawmill and Minginui Sawmill', August 2001 (Coakley, supporting papers to 'Evidence on behalf of the Ministry for the Environment' (doc M8(a)), attachment L, p 1)

1215. Gwilym Environmental Services, 'Contaminated sites screening assessment: Henderson and Pollard Sawmill and Minginui Sawmill', August 2001 (Coakley, supporting papers to 'Evidence on behalf of the Ministry for the Environment' (doc M8(a)), attachment L, p 4)

1216. Douglas Rewi, brief of evidence, September 2004 (doc G37), pp 11–12

1217. Ibid

2005, Jonathan Coakley of the Ministry for the Environment stated that he had been told by Environment Bay of Plenty that the Minginui sites were low priorities for decontamination, as they were not considered high risk.[1218] However he admitted under cross examination that the 2001 report which supposedly supported this conclusion in fact did no such thing.[1219] Earlier in 2005, a Department of Health official reported that 'insufficient is known about the levels of contamination at the former sawmill site or potential dump sites to draw any conclusions', and recommended that more tests be undertaken 'to determine if any significant risk exists to local residents'.[1220] We find this startling, given that the Crown had known about the contamination for at least 14 years, and Environment Bay of Plenty was apparently dismissing the sites as low risk. Counsel for Ngati Whare submitted that the Crown should have conducted a thorough investigation into potential contamination before the transfer of Minginui, and fixed any problems this uncovered.[1221] This seems to us entirely reasonable.

In theory, and as Crown counsel have stressed, Minginui's infrastructure and environment were the responsibility of Whakatane County Council and Environment Bay of Plenty, not the Ngati Whare Trust or the village residents.[1222] However the District Council justifiably argued that it was not fair to its ratepayers to spend considerable sums in the village to remedy deficiencies arising from past underfunding by the Crown.[1223] There were some positive developments leading up to our hearings, such as a Te Puni Kokiri initiative to coordinate local and central government assistance to Minginui.[1224] Another was the provision of suspensory (deferred payment) loans for repairs by Housing New Zealand to Minginui homeowners, which we will discuss in the section on housing, below.[1225] While these initiatives were welcome, they seemed inadequate to fix Minginui's problems.

1218. Jonathan Davis Coakley, 'Evidence on Behalf of the Ministry for the Environment'(commissioned research report, Wellington: Crown Law Office, 2005) (doc M8), p 15

1219. Jonathan Coakley, under cross-examination by Jamie Fergusson, Taneatua School, Taneatua, 15 April 2005 (transcript 4.16(a)), p 557. The report in question was the Gwilym Environmental Services report (doc M8(a) attachment L) cited above.

1220. Phil Shoemack, 'Preliminary report regarding Minginui', 2 March 2005 (Paul Francis Prendergast, comp, supporting papers to 'Evidence on behalf of the Ministry of Health' (doc M21(a)), attachment J, p 2)

1221. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), p 51

1222. Crown counsel, closing submissions, June 2005 (doc N20), topic 34, p 13

1223. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 762–763

1224. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), p 53; Paul Francis Prendergast, 'Evidence on behalf of the Ministry of Health'(commissioned research report, Wellington: Crown Law Office, 2005) (doc M21), pp 18–19; Coakley, 'Evidence on behalf of the Ministry for the Environment' (doc M8), pp 15–16

1225. Hutton, summary of 'Ngati Whare and the Crown, 1880–1999' (doc G5), para 62; Tony Marsden, 'Evidence on behalf of Housing New Zealand Corporation'(commissioned research report, Wellington: Crown Law Office, 2005) (doc M23), pp 10–11. It was reported that around $750,000 worth of spending would be needed to bring Minginui's homes up to an acceptable standard (Anaru Te Amo, brief of evidence, September 2004 (doc G38), p 10). Presumably there was some allowance for the need for remedial work in the Treasury housing stock valuation, but in the absence of details about these valuations, it is not possible to confirm this.

23.8.2(3)

Hutton and Neumann argued that, in negotiating the transfer of Minginui, the Crown took advantage of the power imbalance between itself and the residents, and the residents' emotional, spiritual, and cultural interests in regaining control of their ancestral land.[1226] As Rangi Anderson observed at the 1989 Land Court hearing, 'we see the land coming back to our people and I think that's the main thing'.[1227] Similarly, Mr Te Amo told us in September 2004 that even though the Ngati Whare Trust had taken on a financial liability, 'it was something that could never have been declined because it was an opportunity for Ngati Whare to recover at least a small part of the land that was lost to the Crown.'[1228] We note that, at the time of our hearings, Minginui village and their two marae were the only lands Ngati Whare owned as an iwi.[1229]

It is undoubtedly positive that Minginui was returned to Ngati Whare, but the Crown erred in a number of ways. It should have realised much earlier that it was obliged under the Treaty to return the village. It should have made a more realistic assessment of the financial liabilities associated with the village, particularly infrastructure and housing repairs and upkeep, and of the ability of the Minginui community to pay for them. Once it had done this, it should have done more to help the community bring Minginui up to a reasonable standard, especially considering that many of the problems were the result of Crown neglect and poor construction. Finally, as we noted above, it should have undertaken an early and full assessment of environmental problems in the village, and then fixed them.

(3) *Other State-owned enterprises*

The corporatisation of the Forest Service was only one part of the wider programme of restructuring and privatisation carried out by successive Labour and National governments in the 1980s and 1990s. Hapu and iwi of Te Urewera were also affected by the transformation of the Electricity Department, the Post Office, and the Railways Department into SOEs. Major policy changes in education and health also had impacts, positive and negative, which will be discussed later in this chapter.

Like the Forest Service, the Electricity Department was transformed from a government department into a State-Owned Enterprise, Electricorp (ECNZ). As an SOE, ECNZ was required to turn a profit, and as a result laid off workers at Waikaremoana. In 1999, the Waikaremoana power stations became part of Genesis Energy, and by the early 2000s they were remotely operated from the Tokaanu power station at Lake Taupo.[1230] We were not

1226. Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 772–773

1227. Rotorua Maori Land Court, minute book 224, 29 March 1989 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 771)

1228. Anaru Te Amo, brief of evidence, September 2004 (doc G38), p 10

1229. Counsel for Ngati Whare, closing submissions, June 2005 (doc N16), p 121. Members of Ngati Whare own some other lands, both individually and collectively; see Ngati Whare Deed of Settlement, pp 13–14

1230. Kerryn Pollock, 'Hawke's Bay places – Waikaremoana', Te Ara – the Encyclopedia of New Zealand, Ministry for Culture and Heritage, http://www. TeAra.govt.nz/en/hawkes-bay-places/page-12, last modified 13 July 2012

provided with information on the extent of job losses, or how many employees were Te Urewera tangata whenua. However we were told that since corporatisation the local infrastructure, such as roads and drainage, is no longer well maintained.[1231]

The corporatisation of the Post Office also affected Te Urewera communities. In the late 1980s the Post Office was split into three entirely separate SOEs: New Zealand Post, Telecom, and PostBank. Telecom and PostBank were sold to the private sector, with the bank being absorbed into ANZ and losing its identity, while New Zealand Post remains an SOE. As private companies and SOEs, all three were expected to prioritise profit over social concerns, which meant a reduction of services in rural areas such as Te Urewera. Rural mail delivery was reduced, and post offices closed in Ruatahuna, Minginui, and Murupara, removing postal and banking services from those communities. Their replacement was a postal agency in the Ruatahuna store, offering limited postal services.[1232] The Ruatahuna Post Office was closed despite lobbying from the local community, who wanted a mobile banking unit if they could not keep their post office. This request was also denied.[1233]

New Zealand Railways was yet another government department corporatized with adverse effects on Te Urewera. Railways had provided a daily bus service from Rotorua to Minginui, via Murupara, and a service, three times a week, from Rotorua to Wairoa, via Murupara, Ruatahuna, and Waikaremoana. These ceased to operate in the late 1980s, presumably because they were uneconomic.[1234] This meant that those with no private car access had no way to travel significant distances within or outside the inquiry district. As we have seen, Te Urewera was a disproportionately poor area, and so would have had a particularly high proportion of residents without the means to run a car or afford alternative transport such as taxis. We heard that a number of people from Te Urewera borrowed money to buy cars in order to commute to work, and that in some cases these were later repossessed.[1235]

The cumulative effects of all these changes, in combination with the restructuring and privatisation of the Forest Service, were catastrophic for Te Urewera communities. Tangiora Tawhana, who was Ruatahuna post mistress in the 1980s, described the effects:

> There was still some economy in Ruatahuna [in the mid 1980s]. The money would cycle from the post office to the people through the shop and back to the post office.
>
> Things changed in the late 1980s when the post office closed. We met with post office officials who told us that the service would continue. Yet, they closed our post office and

1231. Lorna Taylor, brief of evidence, 18 October 2004 (doc H17), p 11

1232. Poulin and Tahi, *A Study on Community Services and Development for Ruatahuna*, pp 20, 25; Tuawhenua Research Team, 'Ruatahuna' (doc D2), pp 566–567; Tangiora Tawhara, brief of evidence, not dated (doc E42), pp 1–2

1233. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 566

1234. Hutton and Neumann, 'Ngati Whare' (doc A28), pp 745–746; Tangiora Tawhara, brief of evidence, not dated (doc E42), p 1; Submissions of the Ruatahuna people to the Royal Commission on Social Policy 1988 (Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 567)

1235. Mereru Mason, brief of evidence, September 2004 (doc G41), p 4; Wakeley Matekuare, brief of evidence, September 2004 (doc G40), p 6

the service remained at Murupara. Everyone here had to travel into Murupara to do any banking.

Then the bus service ceased. Without transport people could not get access to any money. The effect of this was that people stopped purchasing at our shop because they were going into Murupara and Rotorua to get their money and shopped while they were there. This prevented money circulating in the community as it had done in the past.

Then the Murupara post office closed. This created real problems. We now had to go into Rotorua get cash. Not many people operated cheque accounts at that time, as in Ruatahuna all our budgeting and money handling was done in cash.

Every month a marae was responsible for fundraising. So practically speaking every week there was a fundraiser and for these to operate you had to have cash. There were stalls, housie, raffles and lunches but to set these up and make them work you required cash.

At that stage it was really hard. We had to travel for all business activities and to access basic banking, postal and medical services. We had to travel to access our money. You had to travel two hours each way to get supplies. To compound the problems there was no public transport service. If you didn't have access to a vehicle you could not access services. In the mid 1990s a private van was purchased to act as transport in the valley. It was a 10 seater vehicle to service a 300 strong community. It cost $10 to travel one way into Rotorua.

During this period use of the Ruatahuna shop dropped right away. People were now travelling to access petrol, finance and supplies. No money circulates in Ruatahuna for sustaining the shop and the marae. In recent years even the petrol service has ceased.[1236]

The effect on Ruatahuna had been predicted by the Tuhoe Manawaru Tribal Executive in 1988, prior to the closure of the post offices:

> Social Welfare beneficiaries [in Ruatahuna] receive about $13,000 a week in benefit payments. . . . The people do not wish to open cheque accounts as they are not familiar with that form of transaction and have only ever dealt with cash. The Ruatahuna store is not willing to carry the extra money to cash cheques and the Trustee Bank in Murupara which is 50 kms away while it will act as an agent for the people of Ruatahuna is not willing to send a mobile unit out to the area to make cash payments. If the beneficiaries are forced to go to Murupara to collect their benefits, it will cost $30 of their benefit for bus travel and overnight accommodation.[1237]

As Merepeka Sims reported in 1988, businesses in Ruatahuna and Minginui experienced a marked drop in turnover, as people who had to travel to Murupara to cash their

1236. Tangiora Tawhara, brief of evidence, not dated (doc E42), pp 1–2
1237. Tuhoe Manawaru Tribal Executive, January 1988 (Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 566)

benefits shopped there.[1238] The Minginui Community Store closed in the early 1990s, and the Ruatahuna store retrenched and offered fewer goods for sale.[1239] Between 1988 and 1997, Murupara lost all three of its banks, although a credit union opened a new branch there in 1997.[1240] Douglas Rewi told us that in the 1960s or 1970s Murupara had

> a draper and women's shop, (now Ngati Whare's Runanga Office), 2 general stores, green groceries, restaurant, 2 butchers, 2 men's clothes shops, 2 milk bars, a chemist, a wine shop, a hardware shop, 3 banks (Post office bank, BNZ, Trust Bank), men's and women's hairdressers, 2 book shops, a sport shop, electrical shop, TAB, a billiard room (now Ngati Manawa's Runanga Office). Most of these shops provided services during the 1960's and 1970's (a total of approximately 25 businesses).
>
> Today (Year 2004) the town comprises of an electrical, hardware shop, 2 secondhand shops, chemist, cafe, dairy, clothing shop, butchers shop, fish n chips, credit union bank and a 4 Square (a total of approximately 12 businesses).[1241]

As Crown counsel has pointed out, the advent of eftpos and other forms of electronic transaction have alleviated some of these problems. In particular, since 1991 welfare benefits have been direct credited into bank accounts, so beneficiaries no longer have to travel to access their money.[1242] This transition would have been difficult for some Te Urewera people, particularly the elderly, who were used to dealing exclusively with cash.[1243]

Crown counsel have submitted that the reduction of state services affected all rural areas, not just the Maori communities of Te Urewera.[1244] However this misses the point: these communities were among the poorest in New Zealand, and service reductions therefore hit them particularly hard. As we have seen, the cumulative effects of the contraction of the state in the 1980s and 1990s created mass unemployment and drastically shrank the economy of Te Urewera. In this context it is simply not credible to argue that, for example, removing public transport from these communities was the same as taking it from communities which had been less hard hit.

The fourth Labour government's corporatisation programme affected all profit-oriented government entities, including the Forest Service, the Post Office, Railways, and numerous other departments. None of these were as vital to Te Urewera as the Forest Service, which

1238. Merepeka Sims, Regional Transition Manager, Social Impact Unit, 'Monthly Report – April 1988', 2 May 1988 (Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 567); see also Bassett and Kay, 'Ngati Manawa' (doc C13), p 205

1239. Mereru Mason, brief of evidence, September 2004 (doc G41), p 5; Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), pp 720, 746; Tangiora Tawhara, brief of evidence, not dated (doc E42), p 2; Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 568

1240. Wayne McClintock, 'Resource Community Formation and Change: A Case Study of Murupara', June 1998, pp 3, 9 (Bassett and Kay, 'Ngati Manawa and the Crown c. 1927–2003' (doc C13), p 205)

1241. Douglas Rewi, brief of evidence, 9 August 2004 (doc F18), p 5

1242. Crown Counsel, statement of response, 13 December 2004 (claim 1.3.7), pp 23–24

1243. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 566

1244. Crown Counsel, closing submissions, June 2005 (doc N20), topic 39, p 14

provided jobs and housing to a significant number of residents. However the peoples of Te Urewera were also affected by the corporatisation of the Post Office, which also provided telephone and some banking services; Railways, which provided a bus service; and the Electricity Division of the Ministry of Energy, which may have provided some employment for Maori in the Waikaremoana area. These organisations became more profit-focussed, which made them less willing to service poorer rural areas such as Te Urewera where there were no profits. Combined with the effects of job losses, the impact of these cuts was devastating. Many people were compelled to travel outside the district to access their money, even though there was now no public transport. The removal of banking services meant that little cash circulated in Te Urewera, which had a range of negative impacts, including making it difficult for marae to raise money.

23.8.3 Social service restructuring

Although the fourth Labour government and its successors rejected the idea that the Crown should be heavily involved in business and the economy, they maintained other state roles. The welfare and public health systems largely created by the first Labour government remained in place, although a drive for efficiency and cost-effectiveness led to service cuts in rural areas such as Te Urewera. The 1990s saw state houses sold, although in Te Urewera this was often to iwi organisations. Meanwhile, various communities continued to experience problems with their water supplies.

The shrinking of the state, and the realisation that it did not have all the answers, had some positive outcomes. The health system in particular began to work more closely with communities and iwi to improve public health. At the same time, the Treaty of Waitangi became much more prominent in public policy. These two factors meant that the Crown, and the health and education systems especially, became more inclusive of Maori culture, for example by making some limited provision for rongoa services in the public health system, and increasing support for te reo immersion education.

(1) *Health care*

Like other areas of Crown activity, the public health system underwent huge reorganisation after 1984. Between the early 1980s and our hearings in the mid 2000s, the health system was reorganised several times, generally in order to provide a more efficient and cost-effective service. Some of these changes were positive: for example, patients gained more rights; health policy was influenced at least in principle by the Treaty of Waitangi; and Maori culture, including traditional healing, was given greater recognition by the health system. However there were also negative changes, primarily cutbacks in services to rural areas such as Te Urewera. As we saw in our examination of Te Urewera living conditions,

Waiata o Nga Mokopuna

Te Kura Kaupapa Motuhake o Tawhiuau presented us with a book of the waiata which they performed at our hearings, affirming their kaupapa: mana motuhake, restoration of cultural identity, Ngati Manawatanga, the emancipation of Maori, and the rejection of Pakehatanga and 'the overwhelming forces of statetanga'.

They described this waiata as a 'rallying cry against the rampant forces of Pakehatanga and its insidious promotion by the Crown as the normal natural way of being.'

Kaati te Moumou Mokopuna/ Na Peraniko Bird

Tenei matou o Ngati Manawa
Whakawhirinaki ana ki to tatou mana
Maori Motuhake e
E te iwi e!
Whakapiri mai whakatata mai ra
Kaati ake te moumou mokopuna atu
Kia here kupapa noa te hinengaro
Ko te utu ko te whakama
Ko te utu ko te kuware e
Tena whaia mai!
Whirinaki whirinaki tatou katoa
Haumi ehui e
Taiki e Hii

We of Ngati Manawa have faith and trust in our unique inherent mana Maori
Tribes
Let us close together and draw together
We must cease forthwith the wasting of our mokopuna
whereby they are indoctrinated to be Pakeha
The price to be paid is shame and embarrassment
The price to be paid is abject ignorance
Therefore come be with us
Let us all have faith and trust together

Source: 'Ko Nga Waiata o Te Kura Kaupapa Motuhake o Tawhiuau' (doc F39), p 8

23.8.3(1)

Maori health had been improving throughout the twentieth century, but from the 1980s this improvement stalled and in some cases reversed. We received very little professional evidence on health services from 1984, but what we did receive, in combination with claimant evidence, indicates a mix of service reduction and an increased role for Maori culture and Maori and iwi organisations in the health service.

It is difficult to improve population health, or know whether any measures have been successful, without accurate and detailed statistics. Until recently, collection of Maori health statistics has not been adequate to this task, and there were still problems at the time of our hearings. For example, Ria Earp of the Ministry of Health told us in 2005 that the Ministry does not have data on specific communities, although she suggested that the local District Health Board might.[1245] She also said that both the extent of Maori healthcare needs and the amount spent were only estimated, and that 'only in certain areas of health are we now collecting ethnicity data in a way that we can actually say has some validity, is credible.'[1246] Even then, she told us, 'there is no comprehensive, routine collection of data for outpatient, accident and emergency, primary health care or community care services. This lack of data means that the level of mainstream health service expenditure can only be estimated.'[1247] The estimate for mainstream funding spent on Maori patients in the 2003/2004 financial year was $1,213 million, or 14.4 per cent of total health expenditure; at this time Maori were 15 per cent of the population.[1248] In addition, another $199 million was spent on services targeted specifically at Maori, through both Maori and mainstream providers. Of this, the Bay of Plenty District Health Board received $378,647; Maori health providers in our district received about $65,400 of this.[1249] Awhina Rangiaho of the Tuhoe Hauora Trust pointed out that funding for specifically Maori services constituted only about 2 per cent of health funding; the mainstream providers which receive the rest 'fail in delivering to Maori', which she said was shown by worsening Maori health statistics.[1250]

As earlier parts of this chapter have shown, access to health services has always been more difficult in Te Urewera than in most other parts of New Zealand. The limited evidence we received on the post-1984 period means that it is difficult to tell whether these problems simply continued into the 1980s and beyond, or whether they became worse. For example, health surveys in 1990 showed that, for most people in communities throughout Te Urewera, having more accessible GP services was a top priority.[1251] However we do not

1245. Ria Earp, oral evidence, Taneatua School, Taneatua, 14 April 2005 (doc 4.16(a)), p 408
1246. Ibid
1247. Ria Earp, 'Evidence on Behalf of the Ministry of Health' (commissioned research report, Wellington: Crown Law Office, 2005) (doc M18), p 22
1248. Ibid, p 22
1249. Ibid, p 23
1250. Awhina Rangiaho, brief of evidence, 10 January 2005 (doc J15), p 7
1251. Murton, 'The Crown and peoples of Te Urewera' (doc H12), pp 1791–1792. The survey was conducted by the Bay of Plenty Health Board.

know whether access to doctors had become more difficult or simply remained as bad as in most previous decades.

Major restructuring of the health system took place in the early 1990s, under the fourth National government. A key piece of legislation was the Health and Disability Services Act 1993, which reorganised the health system's structure and administration, splitting organisations into purchasers and providers of health services.[1252] This meant that purchasers, such as Regional Health Authorities, were able to contract non-governmental organisations, including iwi and Maori health organisations, to provide health services.[1253] The Act also required health entities to have regard to 'the special needs of Maori and other particular communities of people' if directed to do so by the Minister of Health.[1254]

In 1993 the Ministry of Health published *Whaia te ora mo te iwi*, which set out the Crown's objectives for Maori health.[1255] These were to improve:

- Participation of Māori at all levels of the health sector;
- Resource allocation priorities which took into account Māori health needs and perspectives; and
- The development of culturally appropriate practices and procedures as integral requirements in the purchase and provision of health services.[1256]

The Midland Regional Health Authority, which included the Te Urewera inquiry district, aimed to develop 'Māori for Māori providers' and enhance 'culturally appropriate service provision'.[1257] Ms Earp told us that in order to do so it worked closely with iwi across its area of authority, including iwi from Te Urewera.[1258] Later in the decade, the Crown identified key areas in which to improve Maori health, specifically smoking, immunisation, diabetes, oral health, hearing, asthma, injury prevention, and mental health.[1259] Ms Earp told us that by the early 2000s there had been positive results in the areas of immunisation, smoking cessation, and asthma.[1260]

After the 1999 election, the Labour-led government undertook another restructuring of the health system, primarily through the New Zealand Public Health and Disability Act 2000. As one of its fundamental objectives, this aimed to reduce health disparities by improving the health outcomes of Maori and other groups.[1261] It also specifically recognised

1252. Earp, 'Evidence on behalf of the Ministry of Health' (doc M18), p 3
1253. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, pp 254–255
1254. Health and Disability Services Act 1993, s8(1)(e)
1255. Earp, 'Evidence on behalf of the Ministry of Health' (doc M18), p 5
1256. Ibid
1257. Ibid, p 6
1258. Ibid, pp 6–9
1259. Ibid, p 10
1260. Ria Earp on behalf of Ministry of Health, Answers to questions arising from second hearing week, 17 May 2005 (doc M37), pp 3–7
1261. New Zealand Public Health and Disability Act 2000, s3(1)(b)

the importance of the Treaty of Waitangi, and required District Health Boards and their key committees to include representatives of Maori.[1262] The Act also required the formulation of a national Health Strategy. According to Ms Earp, two of the seven 'fundamental principles' of the Strategy were acknowledgement of the Treaty relationship between Maori and the Crown, and improvement of the health of disadvantaged groups.[1263]

The Crown's various initiatives seem to have helped create a more culturally inclusive and welcoming health service. A 1996 survey showed that only 3 per cent of Maori in the Rotorua and Taupo ('Lakes') sub region of the Midland District Health Board area regarded their treatment as culturally inappropriate, although 11 per cent felt they had been dealt with in an insensitive manner.[1264] A Maori Health Unit was established at Whakatane Hospital in the 1990s; Murton states that this was intended 'to provide health services by Maori, for Maori.'[1265] As we have noted, and will discuss in more detail below, health authorities were also entering into contracts with numerous Maori health providers, most of whom aimed to provide health services to Maori in keeping with Maori kaupapa. However, there is some evidence that in the area of mental health the hospitals were not attuned to community needs, and not consulting appropriately.[1266] Tangiora Tawhara also told us that in the early 1990s 'nurses and medical professionals were not culturally responsive to the needs of our people.'[1267]

While the health system was generally becoming more culturally welcoming to Maori, its services were becoming less accessible to many in Te Urewera. It appears that a number of services were reduced or eliminated altogether, although we received little evidence on the exact nature and timing of this. For example, counsel for the Waikaremoana claimants referred to the loss of district nurse services to that area, but we were not presented with any evidence relating to this.[1268] Ms Tawhara gave us some useful information, for example that from the early 1990s the weekly doctor visits to Ruatahuna were reduced to monthly visits.[1269] She also told us that around this time she was hired by the Department of Health as a community health worker. 'My job was to liaise between the community and the Health Department to improve access and use of existing services.'[1270] She was given very little training and was sometimes 'caught in the middle' when the Department refused assistance to people.[1271]

1262. Ibid, ss 4, 5(3)(a), 34–36
1263. Earp, 'Evidence on behalf of the Ministry of Health' (doc M18), p 12
1264. Murton, 'The Crown and peoples of Te Urewera' (doc H12), p 1794
1265. Ibid, p 1794
1266. See Murton, 'The Crown and peoples of Te Urewera (doc H12), pp 1794–1795
1267. Tangiora Tawhara, brief of evidence, not dated (doc E42), p 3
1268. Waikaremoana, 'statement of claim, 8 October 2004 (claim 1.2.1(b)), p 172
1269. Tangiora Tawhara, brief of evidence, not dated (doc E42), p 2
1270. Ibid, p 2
1271. Ibid, p 2

We also received some evidence on reductions in hospital services. In 1991 the Murupara maternity annex was closed, forcing women in that area to go to Rotorua for hospital birth. The closure occurred despite protests from Murupara community groups and the Ngati Manawa Tribal Committee.[1272] Wairoa Hospital has been significantly downgraded since the mid 1980s, when it had 120 beds.[1273] In 2005 it had only 14 beds, and the Waikaremoana claimants seemed to regard it as no longer a true hospital.[1274] In the mid 1980s or earlier, Opotiki Hospital seemed to have been downgraded from a small hospital of 58 beds to a community medical centre.[1275]

The hospitals serving the Te Urewera population in 2005 were:

- Tauranga Hospital, which provided 'the full range of medical and surgical specialties (excluding neurosurgery and cardiac surgery) . . . and a full range of clinical support and non-clinical support services.' It had 326 beds. Maori services were provided using a kaupapa model which Earp stated was 'strongly supported by local iwi'.[1276] The hospital is approximately 105 kilometres' drive from Taneatua, near the western boundary of the inquiry district.
- Rotorua Hospital, which seems to have provided similar services to Tauranga Hospital, and is approximately 65 kilometres' drive from Murupara.
- Whakatane Hospital had 140 beds and provided 'emergency, medical, surgical, child, maternal, and intensive care inpatient and outpatient specialist services', as well as a range of support services including Maori health.[1277] It is about 12 kilometres' drive from Taneatua.
- Wairoa Hospital and Health Centre had 14 beds and provided 'a limited range of health services', including a day surgery from a mobile surgical bus, maternity care for low-risk deliveries, antenatal and postnatal care, and various external services including district nurses and public health education.[1278] It is approximately 55 kilometres' drive from the southern shore of Lake Waikaremoana. Patients whose needs cannot be met at Wairoa are usually transferred to Hastings.[1279]
- Opotiki Hospital and Health Centre. We received very little information on Opotiki Hospital. It is about 15 kilometres' drive from the south-eastern reach of Ohiwa Harbour, just inside the inquiry district boundary.

As the distances indicate, hospital care was difficult to access from many parts of the inquiry district, especially for people without their own transport, or living away from main

1272. Margaret Marino Herbert, brief of evidence, 11 August 2004 (doc F30), pp 4–5
1273. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 319
1274. Earp, 'Evidence on behalf of the Ministry of Health' (doc M18), p 31; Waikaremoana, statement of claim, 8 October 2004 (claim 1.2.1(b), p 172. The statement of claim refers to the 'loss' of Wairoa Hospital.
1275. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 318
1276. Earp, 'Evidence on behalf of the Ministry of Health' (doc M18), p 26
1277. Ibid, pp 26, 27
1278. Ibid, p 31
1279. Lorna Taylor, brief of evidence, 18 October 2004, p 9

roads. The transport problem became especially acute once bus services were withdrawn. Margaret Herbert pointed out to us that

> if someone in Rotorua is sick in the night or have a sick child they can get to the hospital in ten minutes. They can be treated in Accident and Emergency. The people of Ngati Manawa have to look around for an ambulance, and then they have to pay for that service. Many people in Ngati Manawa do not have vehicles to transport themselves to Rotorua.
>
> Then there is added complications for Ngati Manawa people if they have to have follow up appointments. There is no longer a public transport system; that was stopped years ago. They have to keep appointments in Rotorua hospital or Whakatane and it is very hard to keep those appointments because of the transport issues.[1280]

These problems were felt by all Te Urewera hapu and iwi. Mrs Tawhara, a community health worker in Ruatahuna in the early 1990s, told us that she was frequently asked to drive emergency cases to the doctor or hospital because the patient lacked vehicle access. 'If they did have access to a vehicle it often did not have a warrant or registration because people did not have the means of meeting these requirements and there was no public transport.'[1281] Despite this, 'the Department [of Health] informed me that I was not a taxi service' and refused to fund transport.[1282] Some patients were compelled to take an actual taxi, and the expense of this tended to deter people from seeking medical aid. The Tuawhenua Research Team, citing Dr Ian Pryor, stated that transport problems 'affected the general health and well-being of the Ruatahuna population as a whole.'[1283] Murton wrote that Ruatahuna was one of the Te Urewera communities most remote from hospital services, along with (to a lesser extent) Murupara, Galatea, Te Whaiti, and Minginui. Even in 1990, it took one hour to travel from Ruatahuna to Murupara by a winding unsealed road, and then a further hour to travel from Murupara to the nearest hospital, in Rotorua.[1284] Even the regional hospitals in Rotorua and Tauranga were unable to provide some services, such as cardiac and neurosurgery.[1285] We also heard that at times diabetes patients have had to travel regularly to Wellington.[1286]

Another problem is that most of our inquiry district was in the Bay of Plenty District Health Board district, which had its main hospital in Tauranga.[1287] As we note above, Rotorua Hospital is significantly closer, particularly for the Whirinaki Valley communities and Ruatahuna; indeed, the most obvious route from these places to Tauranga goes through

1280. Margaret Marino Herbert, brief of evidence, 11 August 2004 (doc F30), pp 6–7
1281. Tangiora Tawhara, brief of evidence, not dated (doc E42), p 2
1282. Ibid, p 3
1283. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 487
1284. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1783
1285. Earp, 'Evidence on behalf of the Ministry of Health' (doc M18), p 26
1286. Lorna Taylor, brief of evidence, 18 October 2004, p 8. Patient travel was paid for, but whanau travel and accommodation was not, even if the patient needs to be accompanied.
1287. For a map, see Ria Earp, list of attachments, 4 April 2005, app D, p 2 (p 38 of PDF)

Rotorua. Although hospitals were able to accept patients from outside their districts, this meant, as counsel for Tuawhenua pointed out during our hearings, that Te Urewera residents were generally unable to vote in the elections of the DHB they were most likely to use.[1288]

Maori health worker and claimant witness Margaret Herbert spoke to us about the impact of the arrival and departure of the state health system in Te Urewera. She submitted that, in the past, Ngati Manawa had traditional remedies and treatments for injuries and a wide range of diseases.[1289] However the new diseases brought to Te Urewera by Pakeha were 'difficult to treat using traditional methods', and so people began to use Pakeha health care.[1290] She went on to say that:

> When the forestry industry began to leave Murupara there was a reversal back to the situation where there were no doctors and health services. However it was more than a reversal back to the times before Pakeha medicine was introduced; because at this time there was no longer any traditional health infrastructure there.
>
> The new health system had been introduced and people had been made to rely on it; and people were actively discouraged [*sic*] to abandon traditional healing. So when Pakeha doctors and nurses left Murupara they left a void, that normally would have been filled by our own knowledge and practices, but in this case that was too simplistic. That does not account for the fact that the traditional system had been discredited and nearly destroyed in the duration.[1291]

Partly in response to the shortage of medical services in Te Urewera, Maori communities in Te Urewera set up their own health agencies. One such was Te Runanga Matauranga o Tuhoe (Tuhoe Matauranga), established in 1992 with the objective of 'enhancing the social and economic well-being of all Tuhoe in a manner that promotes and preserves the integrity of Tuhoetanga.'[1292] It included a general practitioner service, which in 2000 was based in Taneatua but visited kura and kohanga around Te Urewera.[1293] The Tuhoe Hauora Trust also provided primary medical care, with a team of medical professionals operating in Ruatoki, Waimana, and Taneatua, and on call 24 hours a day.[1294]

Various Maori and iwi health providers in Te Urewera held contracts with the Bay of Plenty District Health Board or the Ministry of Health at the time of our 2005 hearings. For example, Tuhoe Hauora was contracted to provide a wide range of services including

1288. Kathy Ertel, cross examination of Ria Earp, Taneatua School, Taneatua, 14 April 2005 (doc 4.416(a)), pp 410–411
1289. Margaret Marino Herbert, brief of evidence, 11 August 2004 (doc F30), p 2
1290. Ibid, p 3
1291. Ibid, p 4
1292. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1777
1293. Ibid, pp 1777–1778
1294. Ibid, p 1778

mobile nursing, mental health services, alcohol and drug whanau support, and transport assistance.[1295] Te Ika Whenua, based in Murupara, provided services relating to alcohol and drug abuse.[1296] Te Tapenakara mo te Iwi was part of a Maori youth suicide prevention initiative funded by the Ministry of Health, and had a joint contract with Te Kaokao o Takapau to provide care and wellbeing services for kaumatua and kuia. Te Kaokao was also contracted with the Ministry of Health to provide health promotion, injury prevention, and mental health services.[1297] Maori health organisations based outside the inquiry district also held contracts relating to Te Urewera. Tipu Ora and He Korowai Aroha, both based in Rotorua and funded by Lakes District Health Board, respectively provided child health checks and mobile nursing.[1298] In Tuai, Nga Kaitiaki Hauora o Waikaremoana was funded by the Hawkes Bay District Health Board to provide a range of services to the Waikaremoana communities.[1299]

Some of these providers, including Te Tapenakara and the Waimana-based Te Wairua O Te Ora Trust, also provided traditional rongoa services.[1300] Provision of rongoa was also given limited assistance by the Department of Conservation, which allowed the collection of flora from the Te Urewera National Park for rongoa 'in special circumstances', as long as the plants were not 'rare, vulnerable or endangered.'[1301]

Ms Herbert explained to us the importance of Maori health providers, describing the work of Te Whanau Poutirirangaiora A Papa:

> I think it is important because if you go into Pakeha surgery things are different. Our people will not always go to doctors until they are really sick. Especially the old people who wait until they are quite sick. We have a kaupapa Maori service here. Our doctors continually learn te reo. We had a kuia coming up and teaching the staff te reo so that Maori can be comfortable when accessing our services.
>
> The big difference here is that access to services is improved when there is a place where people can feel comfortable. We have a room downstairs where kaumatua can come and have a cup of tea while they are waiting for appointments or test results. We have walk in clinics for those people who come in without appointments. They come in knowing that they can stroll along to the room and have a cup of tea and talk to us in Maori. We have Pakeha doctors and we have a Maori GP but the key difference is the environment. Without that, Maori are being forced to access services in an environment that is foreign to them. Either that or they forgo health care altogether.[1302]

1295. Earp, 'Evidence on behalf of the Ministry of Health' (doc M18), p 28
1296. Earp, 'Evidence on behalf of the Ministry of Health' (doc M18), p 29
1297. Ibid, pp 28–29; Te Kaokao O Takapau Health and Disability Services, http://www. tuhoemataurangа.org.nz
1298. Earp, 'Evidence on behalf of the Ministry of Health' (doc M18), p 30
1299. Ibid
1300. Ibid, pp 25, 28
1301. Department of Conservation, *Te Urewera National Park Management Plan*, 2003, pp 138–139
1302. Margaret Marino Herbert, brief of evidence, 11 August 2004 (doc F30), p 7

She also said that it was important from a Maori perspective to take a holistic approach to health, having regard for taha hinengaro (psychological health) and taha wairua (spiritual health), not just the physical side, as western medicine does.[1303]

In summary, there were two main trends in Maori health care in Te Urewera between the mid 1980s and the time of our hearings. One was the repeated restructuring of the health system. The most important outcome of this for the claimants was that services in rural areas were reduced. This in combination with increased poverty and the withdrawal of public transport made it very difficult for many people in Te Urewera to access health care. In our opinion, the increased inaccessibility of health care was, along with increased poverty and dislocation, one of the key reasons why the health improvements of the mid twentieth century stalled or went backwards from the 1980s. The other important change was that the public health system became more aware of the Crown's obligations under the Treaty of Waitangi, and thus more culturally sensitive, more receptive to Maori ways of doing things. This meant that Maori health organisations received state funding and were able to take some control of the health services delivered to Maori in Te Urewera. It also meant that mainstream health organisations made more of an effort to improve Maori health outcomes and close the gaps between Maori and non-Maori. The health service did not become bicultural, and the changes which were made were not enough to compensate for the negative effects of cost-cutting and restructuring. But they did mean that health services were no longer as culturally alienating for Maori in Te Urewera as they had been in previous decades.

(2) *Housing*

Since at least the 1930s, the Crown's policies on housing assistance for low-income people have focussed on creating and improving housing stock in urban areas and towns. The Crown was well aware that Maori housing conditions in rural areas such as Te Urewera were woefully substandard, and made some attempts to improve them, as this chapter has shown. Improvements were made via the development schemes, and timber town workers enjoyed a relatively high standard of housing, but there were no rural state houses other than a handful of kaumatua flats, and it was difficult for Maori landowners to borrow money to improve their accommodation.

From the mid 1980s, the Crown began to provide more housing assistance to Te Urewera Maori. While claimant counsel have generally acknowledged this, they submit that it has been minimal, and inadequate to fix the huge problems in Te Urewera housing.[1304] Counsel for Tuawhenua also stated that no housing services were available in Ruatahuna until the twenty-first century.[1305] In response, Crown counsel listed a number of recent actions the

1303. Ibid, p 9

1304. Counsel for Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), app A, pp 186, 195; counsel for Nga Rauru O Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 356; counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), pp 23–24

1305. Counsel for Tuawhenua, synopsis of submissions, 10 June 2005 (doc N9(b)), p 19

Crown has taken to alleviate Te Urewera housing problems. However they did not specifically address the question of whether these were enough to fix the problems or fulfil the Crown's Treaty responsibilities.[1306]

As noted above, the Crown's greatest contribution to Maori housing in Te Urewera was through timber town worker housing. Following the corporatisation of the Forest Service in the mid 1980s, the Crown attempted to sell this housing stock. In the end, Minginui village was transferred to the Ngati Whare Trust, leaving Ngati Whare and Minginui residents to cope with serious problems with the village's infrastructure and housing stock. This story has been discussed at length in the corporatisation section above, and will not be further addressed here.

Apart from the small number of kaumatua flats discussed earlier in this chapter, there was no rural state housing in Te Urewera or elsewhere until the 1980s.[1307] In 1986, the Housing Corporation in association with the Department of Maori Affairs finally introduced a scheme to build rural state housing. Seven such houses were built at Ngahina marae in Ruatoki from 1988.[1308] We were not informed of any other rural state houses being built in the inquiry district, and in any case the rural state housing initiative was short-lived. In 1992, the National Government restructured the Housing Corporation, requiring it to administer its rental properties on a commercial basis, with market-based rents.[1309] Other state sector organisations with housing assets were encouraged to sell them; these included ECNZ, which presumably owned the hydro workers' houses near Waikaremoana, and Te Puni Kokiri (TPK), which owned the Te Urewera kaumatua flats built in the 1970s and 1980s.[1310] TPK granted loans, managed by the Housing Corporation, to local Maori authorities, who from 1993 to 1995 purchased all the Te Urewera kaumatua flats.[1311] According to Murton, this was part of a general policy of 'giving responsibility to Maori authorities."[1312]

The election of a Labour-led government in 1999 saw another reversal of state housing policy, with a shift to income-related rents for state houses.[1313] There was also recognition of the need for a bigger supply of affordable accommodation, including housing in rural areas. In 2001 the Housing Corporation (now generally referred to as Housing New

1306. Crown Counsel, statement of response, 13 December 2004 (claim 1.3.7), pp 33–34. In their closing submissions, Crown counsel barely addressed the issue of housing: Crown counsel, closing submission, June 2005 (doc N20), topic 39, p 20.

1307. The Minginui houses are sometimes considered state housing, as they were built by the state. However they have never been 'state houses' in the usual sense of the word, since they came with forestry jobs.

1308. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 2032

1309. Tony Marsden, 'Evidence on behalf of Housing New Zealand Corporation' (doc M23), p 3; Gael Ferguson, *Building the New Zealand Dream*, pp 288–291

1310. Desmond Renata, brief of evidence, 22 November 2004 (doc I24), p 17. The hydro houses were sold into private ownership, but Renata did not say who originally owned them.

1311. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 2069–2070

1312. Ibid, p 2071

1313. Tony Marsden, 'Evidence on behalf of Housing New Zealand Corporation' (doc M23), p 5

Kaumatua flats	Purchaser
Ngati Whare Oki Oki	Tuhoe Waikaremoana Maori Trust Board
Mahurehure	Mahurehure Marae Committee
Tauarau	Tauarau Marae Trust
Ruatahuna	Hinepukohurangi Trust (initially Tuhoe Manawaru Maori Executive)

Te Urewera kaumatua flats and their purchasers, 1993–95

Source: Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 2069–2070

Zealand) established the Rural Housing Programme to address severely substandard housing in Northland, the East Coast, and the eastern Bay of Plenty, including Te Urewera.[1314] The programme had two main aspects: provision of loans, to be discussed below, and building more state houses. By the time of our 2005 hearings, at least 27 rural state houses had been constructed in Te Urewera: 13 in Ruatoki, 10 in Ruatahuna, three in Waiohau, and one in Waimana. Another seven were built in Waikaremoana, but not necessarily within our inquiry district.[1315] Whereas in previous decades housing had been built or improved almost exclusively in areas where jobs were available, this programme indicates a willingness to build houses anywhere with a shortage of good quality affordable accommodation.[1316] In Ruatahuna, some of the labour was carried out by locals, who gained skills and experience.[1317]

While these improvements were welcomed, claimant witnesses told us that they have been inadequate to fix the Te Urewera housing crisis.[1318] Awhina Rangiaho said that there were not enough rural state houses to meet demand, leading to overcrowding. In the early 2000s, there were 45 families who qualified for a rural state house but did not have one; housing them all would require the inquiry district's state housing stock to more than double.[1319] Even for those who could afford market rents, there were few available properties in

1314. Ibid, p 8; Cabinet Policy Committee, Minute of Decision, 'Whole of Government Initiatives to Address Housing Risk in Northland and East Coast/Bay of Plenty', POL Min (01) 17/9 and Cabinet Policy Committee paper, 'Whole of Government Initiatives to Address Housing Risk in Northland and East Coast/Bay of Plenty', 6 July 2001 (Tony Marsden, comp, supporting papers to 'Evidence on behalf of Housing New Zealand Corporation' (doc M23(a)) attachment C)

1315. Tony Marsden, 'Evidence on behalf of Housing New Zealand Corporation' (doc M23), p 11

1316. Ibid, p 9

1317. Ibid, p 10

1318. Alana Burney, brief of evidence, 10 January 2005 (doc J14), para 23; Awhina Rangiaho, brief of evidence, 10 January 2005 (doc J15), p 13

1319. Awhina Rangiaho, brief of evidence, 10 January 2005 (doc J15), p 13. Ms Rangiaho, manager of the Tuhoe Hauora Trust, did not say whether all 45 families lived in the inquiry district, but we have assumed this to be the case.

some parts of the district. Alana McBurney told us that it was 'practically impossible' to find a house for rent in Ruatoki.[1320]

As we noted in the living conditions section, around two thirds of Maori households in Te Urewera owned their own home in 2001. The inquiry district also contains under-utilised Maori land suitable for housing. These two factors mean that improving Maori housing in Te Urewera is not only a matter of providing more rental properties, but also assisting people to build new houses on their own land, and to repair and improve the houses they already own and live in. Many of the Crown's rural housing initiatives since the mid 1980s have been based on this idea.

Earlier in this chapter, we showed how Maori attempts to build on their own land were often stymied by the Town and Country Planning Act 1953, and the restrictions it encouraged local authorities to put on rural development. It took a Planning Tribunal Appeal decision in 1985 to make Whakatane County Council change its policies to make it easier to build houses on rural Maori land.[1321] Meanwhile, the multiple ownership of many Maori land blocks was a longstanding barrier to securing housing loans. In 1986 the Housing Corporation introduced the Papakainga Housing Programme (also known as Multiple Ownership Housing Contracts), which provided loans on multiply owned land. At Ruatoki, about 30 houses were built with the aid of papakainga loans between 1986 and 1993.[1322] Lenders had generally been reluctant to loan on multiply-owned land because it could not be repossessed in the event of a loan default, meaning lenders had no security on the loan. The Papakainga programme overcame this by requiring the houses to be easily moveable; if the borrowers failed to keep up their payments, the house could be repossessed and moved elsewhere.

The changes to the Council's planning policies and the Papakainga scheme were both welcome developments. However claimant witnesses told us that it was still very difficult to get a house built. Papakainga loans could only be granted if the plans met the District Council's compliance provisions, and Doris Rurehe told us that these were expensive and difficult to comply with. They could include survey costs, installation of water and power transformers, roadway access and street lighting.[1323] Lenny Te Kaawa said that his whanau could not get a Papakainga loan because access to the proposed sections was considered inadequate.[1324] As we saw earlier in this chapter and in chapter 14, poor or non-existent roading is a long-standing and fairly widespread problem in our inquiry district. By the late 1990s, most of the houses built with Papakainga loans in Te Urewera had become run down,

1320. Alana Burney, brief of evidence, 10 January 2005 (doc J14), p 7
1321. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 2026–2030
1322. Ibid, p 2033
1323. Doris Rurehe, brief of evidence, 22 June 2004 (doc E24), p 3
1324. Lenny Mahurangi Te Kaawa, brief of evidence, 21 June 2004 (doc E9), p 3 (in te reo); Lenny Mahurangi Te Kaawa, translation of brief of evidence, 21 June 2004 (doc E9(a)), p 3

apparently because they had been poorly built.[1325] Housing New Zealand stated in 2000 that it 'has *no* legal obligation' to repair the houses (emphasis in original), but because it had encouraged people to take out mortgages, 'the Government has some obligations to assist the mortgagors to restore their home to an acceptable habitable standard'.[1326]

Although run-down housing was known to be a major problem in Te Urewera and other rural areas for many decades, aid for repairs was not available until the 2000s. One of the Labour-led government's first housing improvement programmes after its formation in 1999 was the Special Housing Action Zones (SHAZ) programme, which began in 2000.[1327] This was originally targeted at low-income rural Maori families living on multiply-owned land, but it was later expanded to include 'any community of households in serious housing need.'[1328] Householders in Action Zones were given access to suspensory (deferred payment) loans to repair problems which, if not fixed, could cause serious illness or injury, or death.[1329] The loan did not have to be repaid unless the house was sold within three years.[1330] Under the scheme, 96 suspensory loans for essential repairs were granted in Ruatoki before the scheme was replaced by the Rural Housing Programme in 2001.[1331]

The Rural Housing Programme (RHP) followed on from SHAZ, and according to Housing New Zealand's Tony Marsden, the experience gained from SHAZ helped in its development.[1332] Marsden told us that the RHP involved two 'streams of work':

> An immediate response, including a housing assessment, repairing the most unsafe housing or finding alternative housing for those families at serious risk, and installing smoke alarms and providing fire safety education to families; and
>
> A longer-term response, which involves repairing existing housing and making new housing investment using a multi-agency social development approach aimed at preventing the recurrence of substandard housing. This wider approach addresses other elements such as employment, public and personal health, education and skills and infrastructure development.[1333]

1325. Current Housing, Health and Crime for Tuhoe (Rangiaho, supporting papers to brief of evidence (doc J15(c)), p 1)

1326. Housing Corporation of New Zealand, 'Ruatoki Housing', 2000 (Rangiaho, supporting papers to brief of evidence (doc J15(b)), p 2)

1327. Cabinet Policy Committee Paper, POL (01)182 (Marsden, supporting papers to 'Evidence on behalf of Housing New Zealand Corporation' (doc M23(a)), attachment D, para 20)

1328. Housing New Zealand Corporation, 'Partnerships Procedure: Special Housing Action Zones (SHAZ)', (Rangiaho, supporting papers to brief of evidence (doc J15(b)), p 2)

1329. Marsden, 'Evidence on behalf of Housing New Zealand Corporation' (doc M23), p 9; Housing New Zealand Corporation, 'Partnerships Procedure: Special Housing Action Zones (SHAZ)', (Rangiaho, supporting papers to brief of evidence (doc J15(b)), p 4)

1330. Dominic Foote, Manager Special Housing Action Zones, to Donna Hake-Rangiaho, Roimata Aroha Advocacy, Whakatane, 13th March 2001 (Rangiaho, supporting papers to brief of evidence (doc J15(b)), p 2)

1331. Marsden, 'Evidence on behalf of Housing New Zealand Corporation' (doc M23), p 11

1332. Ibid, p 7

1333. Ibid, p 8

The involvement of communities in identifying their housing needs was seen as crucial.[1334] Specific initiatives included the rural state housing programme discussed above, repair loans under the same terms as the SHAZ loans, loans to community organisations to build rental housing, and infrastructure suspensory loans.[1335] From 2001 to 2004, at least 94 repair loans were provided under the RHP in Te Urewera: 49 in Minginui, 20 in Ruatoki, 13 in Waiohau, eight in Waimana, and four in Ruatahuna. Another 26 were provided in the Waikaremoana area, but it is likely that many of these were outside our inquiry district.[1336]

Much of the RHP work was carried out in partnership with iwi organisations, including Tuhoe Hauora, which focuses primarily on health but fundamentally exists to 'give hope, to educate and restore mana' to Tuhoe.[1337] In 2004, Tuhoe Hauora was contracted to assess the housing needs of the Ruatoki and Waimana areas, obtain quotes for essential repairs and maintenance, and hire contractors to carry out the work.[1338] Awhina Rangiaho, manager of Tuhoe Hauora, told us that the money provided under the RHP was inadequate to fix the severe housing problems in Te Urewera. She stated that $300,000 was allocated for repairs in the 2004–05 financial year, which paid for repairs in 20 houses, at an average cost of $15,000. However 22 houses had been assessed as needing aid, and many others in the area had not yet been assessed.[1339] There were also many people who were in urgent need of help, but did not qualify for it because they did not own their homes, or who did qualify, but missed out because preference was given to whanau with young children.[1340] The criteria for essential repairs was very narrow, for example excluding painting exterior walls or fixing more than one window per room.[1341] The repairs which were carried out were often of poor quality, as Housing New Zealand 'slash[ed] tradesmen's quotes so harshly we find it difficult to get and retain quality tradesmen'. As a result, Ms Rangiaho argued, 'we will be re-visiting this problem again in 10 years time'.[1342] She did not know how this would be funded, as the Rural Housing Programme was scheduled to end in May 2006.[1343]

During cross-examination, Tony Marsden of Housing New Zealand conceded that there had been some problems with the Rural Housing Programme: poor quality material had been used in some cases; the programme had been slow to start due to the need to build relationships with communities which often distrusted government agencies; and funds

1334. Marsden, 'Evidence on behalf of Housing New Zealand Corporation' (doc M23), p 8
1335. Ibid, p 9
1336. Ibid, p 11
1337. Ibid, p 10; Awhina Rangiaho, brief of evidence, 10 January 2005 (doc J15), p 6
1338. Current Housing, Health and Crime for Tuhoe (Rangiaho, supporting papers to brief of evidence (doc J15(c)), p 7); Tony Marsden, oral evidence, Taneatua School, Taneatua, 14 April 2005(transcript 4.16(a)), p 388
1339. Current Housing, Health and Crime for Tuhoe (Rangiaho, supporting papers to brief of evidence (doc J15(c)), p 7)
1340. Awhina Rangiaho, brief of evidence, 10 January 2005 (doc J15), p 12
1341. Ibid
1342. Ibid, p 13
1343. Current Housing, Health and Crime for Tuhoe (Rangiaho, supporting papers to brief of evidence (doc J15(c)), p 9). We do not know if the programme still exists, but it was still running in 2009.

were limited.[1344] However he denied that Housing New Zealand was providing only a short term solution, saying that

> We are certainly working towards development practices that ensure sustainability, it would be a pointless exercise for us to do a quick band aid fix because we would be back in ten years . . . We are helping to build the sector in terms of community and iwi groups and in terms of their aspirations for housing and the social and physical health of communities.[1345]

Marsden did not reply to Rangiaho's claim that they 'slashed' quotes from tradesman, except to say that Housing New Zealand check the assessments carried out by community groups and subsequent quotes to ensure that the quotes are fair.[1346]

The rural housing programmes of the 2000s were important initiatives which doubtless improved the homes and lives of scores of Te Urewera whanau. However it is clear that they were inadequate to fix or even substantially alleviate the severe problems in Te Urewera Maori housing. The number of new state houses built in Te Urewera was nowhere near enough to meet the need for affordable rental property. SHAZ and the RHP both helped Maori homeowners but, as Ms Rangiaho pointed out, the funds available could not improve more than a handful of houses out of the many which needed repairs and maintenance. It appears that the need to save money also compromised the quality of the work which was carried out. Moreover, the repair programme did not even address some of the fundamental and serious problems with Maori housing in Te Urewera, such as overcrowding and lack of electricity. We applaud the Rural Housing Programme, however imperfect its execution may have been at times, but reiterate that it was not enough.

(3) *Water supplies*

One of the essential requirements for good health is a clean and reliable water supply. Despite this, several mostly Maori communities in Te Urewera have had ongoing problems accessing such a supply. The Whakatane District Council is responsible for most water supplies in Te Urewera, but in many cases has had trouble finding the money to undertake necessary upgrades, repairs, and replacements. The Council's acts and omissions are outside our jurisdiction, but as we stated earlier, the Crown has a Treaty obligation to try and alleviate Maori health disparities. Clean water is a basic requirement for good health, and polluted water supplies have historically been a major cause of disease among Maori, in Te Urewera and elsewhere. We therefore consider that, where a town or village has a contaminated water supply, the Crown has a clear duty to ensure it is fixed.

We received considerable evidence on the Ruatoki water supply, reflecting the importance of this issue to the village's residents. We have discussed the ownership of the water

1344. Tony Marsden, oral evidence, Taneatua School, Taneatua, 14 April 2005 (transcript 4.16(a)), pp 381, 394
1345. Ibid, p 375
1346. Ibid, p 398

supply system in chapter 19; here we look at the matter from a health perspective. In 1984, the Department of Health found the water supply there to be so polluted, mainly from stock waste, that it required boiling or treating before use.[1347] The situation had not improved by 1988, and new home owners were installing their own water bores, sometimes at the risk of sewage contamination, rather than be connected to the water supply.[1348] By this time it had become clear that the village system needed to be replaced rather than simply repaired.[1349] In 1989 the Crown provided a subsidy of $308,926, but this was only 40 per cent of the money required.[1350] The Whakatane District Council was compelled to borrow money to pay the remaining costs, and in order to repay the loan it increased rates and introduced water meters so that residents could be charged for the water they used. When the system was completed in 1990, residents were charged $2,500 per household to be connected to it. In response, Ruatoki residents formed the Ruatoki Water Supply Action Committee, which launched a petition against the fee, and appealed to Helen Clark, then the Minister of Health.[1351] Clark deferred the matter to the Whakatane District Council, and reminded the Committee that the Crown had already provided a subsidy.[1352]

In 1994, the Committee complained to the Ombudsman, saying that as well as the $2,500 fee, connection involved 'hidden costs' such as pipes from the house to the road, meter reading fees, and having to replace plumbing as older pipes could not cope with increased water pressure.[1353] The Ombudsman was sympathetic to the Committee, finding that the Council had reneged on an agreement to use local labour to build the scheme; had based water rates on the average nuclear family rather than taking into account the extended families which were more typical for Maori; and had failed to adequately consult with the community.[1354] He acknowledged, however, that the question of how to pay for the new system had no easy answers; the Council had a high bill to pay, but residents could not afford a user pays system.[1355] He suggested that a more radical solution would be for the local Iwi

1347. Cited in 'Sir John Robertson, Chief Ombudsman to Keepa, P.', 7 October 1994 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(JJ)), pp 40–41)

1348. Oliver, 'Ruatoki Block Report' (doc A6), pp 186–187

1349. Peter Tapsell, letter to Helen Clark 'Re: The New water supply at Ruatoki', Minister of Health, 29 August 1990 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(JJ)), p 115). The Chief Ombudsman noted 'the old scheme was dangerously polluted, and in such a state of obsolescence that despite expensive maintenance the pipe lines were falling apart'. Sir John Robertson to P Keepa, 7 October 1994 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(JJ)), p 50)

1350. Murton, 'The Crown and the peoples of Te Urewera' (doc H12), pp 1903, 1913

1351. Ibid, pp 1904–1905; 'Ruatoki Water Supply Action Committee Petition', 21 August 1990 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(JJ)), p 113)

1352. Helen Clark, letter to Rameka Teepa, Chairman, Ruatoki Water Action Committee, 23 August 1990 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(JJ)), p 116)

1353. P Keepa, letter to Chief Ombudsman, 21 March 1994, quoted in Sir John Robertson to P Keepa, 7 October 1994 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(JJ)), p 68)

1354. Murton, 'The Crown and the peoples of Te Urewera' (doc H12), pp 1910–1911

1355. Sir John Robertson to P Keepa, 7 October 1994 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(JJ)), p 70)

Trust Board to purchase the supply from the Council, thus allowing 'greater means to assist those who are in arrears, or are financially unable to access the water'.[1356] We are uncertain, however, whether the Board had the necessary resources. Since then, Ruatoki residents who paid to be connected to the scheme have sometimes had difficulties paying their water bills, and became indebted to the Council, in some cases for large sums. In 1997, the Council decided to disconnect the supply to households in arrears. Debt was reduced by nearly half between 1997 and 1999, but at the cost of cutting some households off from their water supply.[1357]

In our living conditions section earlier in this chapter, we showed that Ruatahuna also had ongoing water supply problems. Because the village has multiple systems, it has required multiple injections of funding. In the early 1990s a subsidy was provided by the Ministry of Health, under a programme which was phased out shortly afterwards.[1358] Problems remained, and a series of meetings were held on the matter in the late 1990s and early 2000s. The Whakatane District Council was initially reluctant to carry out improvements as the local community lacked the ability to contribute financially.[1359] However in 2002 it agreed to undertake minor repairs and upgrade the header tank and intake structure.[1360] The following year Housing New Zealand approved a suspensory loan to build a water system, although at the time of our hearings this was still in the design stage.[1361]

For many decades, several Te Urewera communities have experienced ongoing problems accessing clean and reliable water supplies. It appears that this is at least partly because the District Council has been unable to pay for improvements without significant rates rises. As well as being electorally unpopular, such rises would have adversely affected the very communities which needed the improvements. At various times the Crown has provided funds and suspensory loans to fund improvements and replacements, but in general these have been inadequate to solve the problems.

(4) *Education*

Before the 1980s, two of the main problems that the hapu and iwi of Te Urewera had with the education system were that it did not adequately recognise or respect te reo Maori, or Maori culture more generally; and that it was difficult to access from many parts of the inquiry district, especially at post-primary level. Earlier in this chapter we showed that, from the mid twentieth century, and especially from about the 1970s, te reo gained a growing place

1356. Ibid (pp 70–71)
1357. In 1997, 59 consumers were behind with their payments. In 1999, 46 were. It was estimated there were 285 households in the Ruatoki Valley in 2000. Murton, 'The Crown and the peoples of Te Urewera' (doc H12), pp 1908–1909
1358. Prendergast, 'Evidence on behalf of the Ministry of Health" (doc M21), p 9
1359. Murton, 'The Crown and the peoples of Te Urewera' (doc H12), pp 1888–1890
1360. Ibid, pp 1890–1891
1361. Marsden, 'Evidence on behalf of Housing New Zealand' (doc M23), p 10

in the education system. This was especially so in Te Urewera, where many schools became bilingual, and later kura kaupapa. While the claimants had some concerns over resource funding and the extent of support for the Tuhoe dialect in the system, marginalisation of te reo was no longer the raw and painful problem that it had been in earlier decades. Children in Te Urewera were no longer punished for speaking te reo in school; indeed most of them were taught in te reo. The second key problem, that of access, continued into the twenty-first century, with only a few improvements. For the most part, the problem was much the same as it had been in the 1970s and has thus been described earlier in this chapter. This section will therefore not revisit the issue of access, except to note the few changes which have taken place. For the post-1984 period, the main education issue raised by claimants is the relationship between the Tuhoe Education Authority and the Crown.

One of the most important changes made to the education system in the 1984 to 2005 period was the introduction of the Tomorrow's Schools policy in the late 1980s. Among other things, it introduced an ethos in which schools competed with each other for students. Some claimants argued that this was 'a con job by the Crown . . . [which] brought about a system of inequality, disparities in resourcing and elitism.'[1362] However it also allowed much more parental and community involvement in their local schools.[1363] It is likely that the policy played an important role in allowing the hapu and iwi of Te Urewera to transform their schools from monocultural entities to the Maori-focussed organisations they mostly are today. In general, the education system was reformed to allow much greater community involvement in determining the nature of their children's education. One example of this is the heavy involvement of the Tuhoe Education Authority in Te Urewera schools.

While Maori-medium education was broadly supported by the Crown from the 1970s, it took some time for funding to catch up. Until 1986, bilingual schools were not given any more funding than monolingual schools, despite the inevitable need for specialised resources.[1364] As a result, when Huiarau primary school became bilingual in 1985, no extra funding was given, and the quality and quantity of the teaching material available was unsatisfactory. Further funding and resources had to come from the community.[1365] From 1986 bilingual schools were given grants for materials, and Huiarau received funding for materials and later for a teacher to produce them.[1366] Maori language education continued to expand in Te Urewera, and by 1997 there were five kura kaupapa in the district.[1367]

1362. 'Ko Nga Waiata o Te Kura Kaupapa Motuhake o Tawhiuau' (doc F39), p 14
1363. Rawiri Brell and Kathy Smith, 'Evidence on behalf of the Ministry of Education'(commissioned research report, Wellington: Crown Law Office, 2005) (doc M11), p 20
1364. Tuawhenua Research Team, 'Ruatahuna' (doc D2), p 554
1365. Ibid, pp 554–555
1366. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 1527
1367. They were Te Kura Kaupapa Maori o Matahi, Te Whare Kura Maori o Ruatoki, Te Kura Maori o Rohe o Waiohau, Te Kura Kaupapa Motuhake o Tawhiuau (in Murupara), and Te Kura Kaupapa Maori o Huiarau. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 1568

The resources provided by the Crown use a standardised version of te reo rather than one specific to any particular iwi or rohe. Teina Boasa-Dean of the Tuhoe Education Authority told us that there was no funding for resources or assessment in specific dialects such as te reo o Tuhoe, forcing the community to create resources themselves.[1368] Boasa-Dean said that the Crown was attempting to standardise te reo Maori, and explained that dialects such as te reo o Tuhoe were important because they 'have whakapapa, they have sanctity, they have hapu, they have whanau connections. When you hear a dialect, you will know where the speaker comes from.'[1369] Crown counsel denied that a standardised version of te reo had been imposed on Tuhoe at the expense of their own dialect.[1370] Although Crown counsel and Ministry of Education witnesses stated that the Crown supports the development of dialect-specific resources, they confirmed that there was no funding for them.[1371] We note that, since our hearings, the Wai 262 Tribunal has found that

> tribal dialects must be considered iwi taonga in the same way that te reo Māori is a taonga to Māori generally . . . for individual iwi, dialects are taonga of the utmost importance; they are the traditional media for transmitting the unique knowledge and culture of those iwi and are bound up with their very identity.[1372]

We agree.

Access to post-primary education continued to be difficult for many Te Urewera pupils. There were some improvements, however. From the late 1980s the Maori Education Foundation began providing boarding assistance to pupils who lived far from a secondary school and were fluent in te reo. Pupils with benefit-dependent parents had all their boarding costs paid, while those with employed parents received partial grants.[1373] The situation in Ruatahuna also improved from the 1990s, when secondary education was provided at Huiarau school.[1374] From about the early 1980s, some skills training was also provided in a range of fields through Ruatahuna's Kokiri Centre and the Access and Maccess schemes.[1375] These have been addressed above, in the section on the corporatisation of the Forest Service. While the programmes taught valuable skills including first aid, te reo, and small business management, most people became disillusioned with them when they failed to lead to

1368. Teina Boasa-Dean, oral evidence, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), pp 133–135
1369. Ibid, p 135
1370. Crown counsel barely addressed the issue of housing. Crown counsel, closing submission, June 2005 (doc N20), topic 39, p 21; see also Brell and Smith, 'Evidence on behalf of the Ministry of Education' (doc M11), p 15
1371. Brell and Smith, 'Evidence on behalf of the Ministry of Education' (doc M11), p 13; Rawiri Brell and Kathy Smith, 'Evidence on behalf of the Ministry of Education: Answers to Questions During the Second Crown Hearing Week, 11–15 April 2005'(commissioned research report, Wellington: Crown Law Office, 2005) (doc M36), p 2
1372. Waitangi Tribunal, *Ko Aotearoa Tēnei: Taumata Tuarua*, vol 2, p 442
1373. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 1562. The Foundation (now the Maori Education Trust) is subsidised by the Crown but raises much of its money from private donations and bequests.
1374. Ibid, p 1563
1375. Ibid, pp 1179–1180

employment. In general, these improvements were inadequate to deal with the results of increased poverty and unemployment at this time.

A number of Te Urewera schools experienced problems from the 1980s as population numbers declined in the wake of corporatisation. Rolls dropped and, as shown earlier, there was a rise in anti-social behaviour. During the 1990s, a number of schools throughout Te Urewera received critical reviews from the Education Review Office. Student performance was poor, and declining school rolls made it increasingly difficult to recruit staff, resulting in key vacancies at Rangitahi College.[1376]

The poor performance of many Te Urewera schools was a key factor in the formation of the Tuhoe Education Authority (TEA). In 1993, Te Runanga Matauranga o Ngai Tuhoe developed a strategic plan, supported by the Ministry of Education, to improve educational outcomes for Tuhoe, improve performance of local schools, and develop better relationships between schools and the Tuhoe community.[1377] The TEA was founded in the late 1990s and entered into a partnership with the Crown in March 1999.[1378] The partnership was substantially expanded by a 2002 memorandum of understanding.[1379]

The TEA places particular emphasis on Tuhoetanga and Tuhoe values; it hopes that integrating these into education will help overcome the poor performance of many Tuhoe schools and improve community connections.[1380] It also helps co-ordinate 13 schools in and near Te Urewera, and assists them to work together. Previously they had tended to have little assistance other than aid from the Ministry of Education, which they did not find particularly useful.[1381] Eight of the schools taught entirely in te reo, three were bilingual, and two were mainstream. All were low decile, and all except the two mainstream schools had completely or almost completely Maori rolls.[1382]

Counsel for Nga Rauru o Nga Potiki submitted that there have been serious problems in the relationship between the TEA and the Crown. They and claimant witnesses alleged that the TEA has been underfunded and generally inadequately supported, and that the Crown has not treated the TEA as a partner but rather has sought to exert control over it.[1383] Crown counsel dispute these allegations.

1376. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), pp 1566–1567

1377. 'Partnership Initiative and History' (Teina Boasa Dean, comp, supporting papers to brief of evidence (doc J23(a)), app 6, pp 1–2)

1378. Ibid (p 2)

1379. See 'Memorandum of Understanding between Tūhoe Education Authority and the Minister of Education', 2002 (Boasa Dean, supporting papers to brief of evidence (doc J23(a)), app 9)

1380. 'Partnership Initiative and History' (Boasa Dean, supporting papers to brief of evidence (doc J23(a)), app 6, p 3); *He Mahere Wharaunga: Tuhoetanga*, Tuhoe Education Authority strategic plan (Boasa Dean, supporting papers to brief of evidence (doc J23(a)), app 1, pp 8–9, 15–17)

1381. Haromi Williams, oral evidence, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), pp 130, 140–141

1382. 'Partnership Initiative and History' (Teina Boasa Dean, comp, supporting papers to brief of evidence (doc J23(a)), app 6, p 1)

1383. Counsel for Nga Rauru O Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 358; Haromi Williams, oral evidence, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), pp 132–133

Haromi Williams of the TEA told us that the Ministry only funded those objectives which corresponded with its own priorities.[1384] Reasons for turning down other objectives included the Ministry already having people and resources to deliver those objectives, but, as Williams told us, 'they're not Tuhoe ones'.[1385] As a result of lack of funding, the TEA's Teina Boasa-Dean told us the TEA was able to achieve only 23% of its goals set out in its strategic plan.[1386] In particular, she said that funding for resources in te reo Maori was very poor and, as we discussed above, non-existent for resources in te reo o Tuhoe.[1387] The witnesses also felt that the Ministry attempted to exert power over it, for example by asking it to reorganise into a structure which conflicted with its fundamental kaupapa.[1388] Boasa-Dean described the Ministry in terms which evoke a vengeful deity: 'it says to Tuhoe, lest you forget Tuhoe, I have the mana to make you vanish, I will shut off your funding and resources so that you know again my power.'[1389] Because the Ministry controls funding, she told us, 'they say when you jump, and when you stand and . . . when you will crawl.'[1390] The relationship was not one of equals but one in which the Ministry's goals came first.[1391] Overall, Boasa-Dean implied that the partnership between TEA and MOE had been set up to fail.[1392]

Rawiri Brell and Kathy Smith of the Ministry of Education responded that the Ministry could only 'support those aspects of the plans that the Ministry has some ability and authority to – recognising that the Ministry must work within parliamentary and policy requirements.'[1393] Unfortunately they did not specify which objectives were outside these requirements. They denied that the Ministry was attempting to control the TEA.[1394] They also stated that the TEA has been more successful than its representatives suggested, and have made significant achievements in areas including adult literacy and a computers in homes project.[1395] In their annual report on Maori education for 2000–2001, the Ministry commended the TEA's 'flax roots' approach, and promoted it as a model for other areas.[1396] Brell and Smith also suggested that the problems the TEA did have could be the result of

1384. Haromi Williams, oral evidence, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), pp 132–133; Haromi Williams, under cross-examination by Crown counsel, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), pp 137–138

1385. Haromi Williams, under cross-examination by Crown counsel, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), p 137

1386. Teina Boasa-Dean, oral evidence, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), p 133

1387. Ibid, pp 133–134

1388. Haromi Williams, oral evidence, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), p 133

1389. Teina Boasa-Dean, oral evidence, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), p 135

1390. Ibid, p 135

1391. Haromi Williams, oral evidence, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), p 132

1392. Teina Boasa-Dean, under cross-examination by NRONP counsel, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), p 139

1393. Brell and Smith, 'Evidence on behalf of the Ministry of Education' (doc M11), pp 11–12

1394. Ibid, p 20

1395. Ibid, pp 23–25

1396. Murton, 'The Crown and Peoples of Te Urewera' (doc H12), p 1571, citing *Nga Haeta Matauranga: Annual Report on Maori Education 2000/2001 and Direction for 2002*.

factors including unrealistic timeframes, lack of specialist knowledge, or insufficient stakeholder engagement, rather than inadequate funding.[1397] Brell denied that funding was inadequate, estimating that over eight years TEA had been granted three to five million dollars.[1398]

It is difficult for us to assess exactly what went wrong in the relationship between the TEA and the Ministry, the extent to which the TEA has been able to achieve its goals, or the reasons behind any problems. Some of Brell and Smith's alternative explanations seem implausible; for example given the Ministry's commendation of its flaxroots approach, stakeholder disconnection seems unlikely to be a significant problem. The amount of money given to the TEA seems fairly substantial, considering it is additional to the normal funding given to Te Urewera schools, including (we assume) continued extra funding for te reo resources. However the fact that the community needed to create its own educational resources suggests that this money is either inadequate or badly targeted. The lack of funding for resources in iwi dialects is particularly concerning.

It seems that the TEA has compromised with the Ministry. Williams has said that they have 'no problems' with the Ministry's objectives, including increasing the capacity of children, increasing community involvement in schools, providing quality teaching and teacher training.[1399] The TEA has stated that its plans serve not only Tuhoe priorities but also those of the Ministry: they were constructed with that 'dual purpose' in mind.[1400] It is less clear that the Ministry has compromised with the TEA; it appears that when the objectives of the two clash, the Ministry simply fails to fund the objectives it considers problematic, rather than reconsidering its own policies.

A fundamental problem seems to be that the memorandum of understanding has set up an equal partnership between unequal partners. As Boasa-Dean suggested, the Ministry's control of funding means that it inherently has more power than the TEA. Moreover, if the relationship breaks down completely, the Ministry can simply continue to oversee the Te Urewera schools and perhaps work with other iwi organisations. The TEA, by contrast has few if any alternatives to the Ministry; it needs the Ministry more than the Ministry needs it. This kind of power imbalance is probably unavoidable in relationships between the Crown and iwi organisations. However it may be helpful if the imbalance is explicitly acknowledged, and steps taken to prevent the Crown from – intentionally or otherwise – using its superior power to pressure or bully the weaker partner. In a meeting with TEA in 2005, Ministry head Howard Fancy 'acknowledged that through the Ministry having greater understanding, it would progressively be able to change its way of doing things to better

1397. Brell and Smith, 'Evidence on behalf of the Ministry of Education' (doc M11), p 14
1398. Rawiri Brell, under cross-examination by Kathy Ertel, Taneatua School, Taneatua, 11 April 2005 (transcript 4.16(a)), p 90
1399. Haromi Williams, oral evidence, Tauarau Marae, Ruatoki, 21 January 2005 (transcript 4.13), p 132
1400. 'Partnership Initiative and History' (Boasa Dean, supporting papers to brief of evidence (doc J23(a)), app 6, p 2)

support Tūhoe's goals and objectives.'[1401] We hope that the past 10 years have in fact seen a range of changes in the Ministry's approach, such that Tuhoe now consider their objectives are supported.

Changes in education in Te Urewera over the late twentieth century and early years of the twenty-first century were largely positive, although they did fall short of what they could have been. Te reo received extensive support within schools, albeit in a generic form of the language rather than specific dialects. Maori organisations such as the TEA were able to be strongly involved in Te Urewera schools and influential in the directions and goals of education in the district. As we note above, though, the TEA's relationship with the Crown was not an equal one, and its leaders often felt marginalised or compelled to do things the Crown's way. Some problems of earlier decades continued, particularly access to post-primary education. Some improvements were made, but it seems unlikely that they were enough to counter the heightened difficulties caused by increased poverty levels at this time.

23.8.4 Conclusions

In the mid to late 1980s, the welfare state and managed economy which had characterised New Zealand since the 1930s was substantially restructured. Governments went from closely managing the economy to adopting a 'hands off' position with minimal intervention. Various forms of assistance, particularly subsidies to farmers and other groups, were also cut back or abolished. In general, the welfare state remained in place, although with some alterations. In a few areas, policy was changed back and forth with each change of government; for example in housing. Another important change was the much greater recognition of the Treaty of Waitangi in public policy; in combination with the shrinking of the state, this allowed Maori and iwi organisations to play a much greater role in social service delivery. Even in mainstream organisations, Maori culture and language was given much more respect than had been the case in earlier decades. Perhaps most importantly, the majority of children in Te Urewera were now given their primary education at least partly in te reo. The change from the years in which children were strapped or made to eat soap for speaking Maori could hardly have been more profound. Maori values and traditional healing were also given a place, albeit a limited one, in the public health service.

In applying Professor Murton's socio-economic model to this period, we can see that political power and economic capability remained largely in the hands of the Crown. Hapu and iwi organisations such as Tuhoe Hauora and the Tuhoe Education Authority could now be involved in the delivery of social services such as health, education, and housing improvement, but only within a Crown framework, and with limited Crown funding. As numerous representatives of these organisations told us, their relationship with the Crown

1401. Brell and Smith, 'Evidence on behalf of the Ministry of Education' (doc M11), p 16

was not a true partnership, despite being ostensibly based on the Treaty. The Crown held the power and controlled the money, and Maori organisations had to fulfil its requirements rather than setting their own path. Some felt that they were being set up to fail. While the power imbalance was not as great as in earlier decades, it was still substantial.

The lack of power possessed by Te Urewera hapu and iwi, relative to the Crown, is shown most strikingly in the restructuring of the Forest Service. It was clear to hapu and iwi, and to some extent to the Crown, that restructuring would have a devastating effect on the communities of Te Urewera, particularly the timber towns which derived most of their employment and housing from the Forest Service and from private firms which were assisted by the Crown. The Crown and the peoples of Te Urewera were aware that this devastation would be exacerbated by cuts to other services such as banks, post offices, and medical clinics. Despite all this, the Crown went ahead with its programme, with catastrophic consequences for Te Urewera communities. Despite the new political prominence of the Treaty, the Crown was as ready to prioritise its interests over those of Te Urewera hapu and iwi as it had been a hundred years before.

The shock of restructuring was much more than simply economic. For half a century, the Crown had employed, housed, and educated a significant proportion of the Te Urewera population, tried to improve their health, and, in Minginui especially, looked after the smallest matters of community life. Counsel for Ngati Whare told us that this relationship was 'the only tangible manifestation of [Ngati Whare's] Treaty relationship with the Crown.'[1402] The corporatisation process made it clear that the Crown did not see the relationship in this way. The system which existed from the 1930s to 1984 recognised the human and community values of the timber towns, albeit in a paternalistic and monocultural manner. Under the new system, the towns were simply an under-performing asset, which needed to be scrapped in order to improve the bottom line. What Ngati Whare and other Te Urewera peoples regarded as a real relationship, in other words, was unilaterally ended by a Crown which seemed not to have even realised that the relationship existed.

The limits of Maori political power allowed the Crown to implement policies which hugely reduced the already limited economic capability of Maori in Te Urewera. Although the welfare state meant that there was no return to the absolute poverty of the early twentieth century, many communities had extremely low incomes which made meeting even basic needs a struggle. The once-thriving town of Minginui became one of the most deprived parts of the country. Beyond the economic impact on individuals and whanau, restructuring destroyed the economic capability of many communities. The withdrawal of banking services meant that people had to travel long distances to access cash, meaning that money previously spent in Ruatahuna and Murupara was now spent elsewhere. Shops closed, further reducing the viability of small towns. Marae could no longer rely on

1402. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (docN16(a)), p 12

donations or income from housie and other fundraisers. Withdrawal of public transport services combined with a reduction in health services to render health care virtually inaccessible from most parts of the inquiry district, especially for the large numbers of people who could not afford to own or run a car. Meanwhile, many communities suffered from inadequate and decaying infrastructure, unable to pay for repairs and upgrades but refused funding from central and local government. The hapu and iwi of Te Urewera had little to show for their years of work in the forests, other than run-down houses, contaminated land, and advanced skills in an industry which was no longer hiring.

23.9 Treaty Analysis

We have identified three key points of difference between the claimants' views and those of the Crown in regard to socio-economic issues. These are:

- Whether, or to what extent, the socio-economic deprivation of Maori in Te Urewera was or is the result of Crown actions and omissions;
- Whether the Crown has duties to Maori in Te Urewera to provide social services, aid for economic development, employment opportunities, and relief from hardship; and if so, then to what extent and under what circumstances;
- Whether the services and assistance provided by the Crown to Maori in Te Urewera at various times were adequate and equitable.

We saw earlier in this chapter that Crown and claimant counsel also disagreed on several issues relating to the timber industry, specifically the causes of dependence on the timber industry, and the Crown's corporatisation of the Forest Service. Although these issues come broadly under the topic of economic aid and relief from hardship, we consider that the industry, and the Crown's changing relationship with it, played such an important role in our inquiry district that we need to consider it separately and in some detail. In particular, we will address the allegations that the Crown deliberately made Te Urewera communities dependent on the timber industry, and that it withdrew its support for the industry without consultation with or sufficient regard for those communities, and without giving them adequate support in the aftermath.

Crown counsel stated that it is extremely difficult to establish links between actions or omissions and socio-economic effects. They submitted that we had insufficient evidence to make such links, 'although some contribution might be acknowledged.'[1403] This submission was strongly rejected by claimant counsel, with counsel for Tuawhenua describing it as

1403. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 2

'unreal'.[1404] They also pointed out that the socio-economic evidence in this inquiry was not significantly challenged by the Crown.[1405]

In relation to the second point of difference, claimant counsel submitted that the Crown had failed in its Treaty duty to provide adequate and equitable levels of aid and services to Te Urewera hapu and iwi. Crown counsel responded that 'There is not and has never been a duty on the Crown [to provide social services], in a legal or Treaty sense.'[1406] They acknowledged that when the Crown does choose to provide social services, it has a duty under article three of the Treaty to provide them to Maori on an equitable basis with Pakeha 'in the circumstances'.[1407] Relevant circumstances included the geographic isolation of some Te Urewera communities, the amount of support given to Pakeha, and the extent to which Te Urewera hapu and iwi wanted the Crown to provide services.

In analysing the Crown's role in socio-economic issues, we first ask whether there is any demonstrable connection between Crown actions or omissions and social economic disparity. We then turn to look at the timber industry, specifically the dependence of hapu and iwi on the industry, and the Crown's corporatisation programme, and whether either of these things involved breaches of the Treaty. Finally, we ask what the Crown's duties were in relation to aid and social services, and whether these were provided in an equitable manner. As part of this investigation, we ask what does equitable provision mean in practical terms, and are there circumstances in which the Crown might legitimately provide less aid or reduced services to the peoples of Te Urewera.

23.9.1 Socio-economic cause and effect

We agree with Crown counsel that establishing a link between socio-economic status and Crown action or omission is no easy task. This is an issue which other Tribunals have also addressed, generally in response to Crown submissions that it is difficult or impossible to establish a causal link.[1408] Like those Tribunals, we reject the argument that there is no discernible connection between Crown actions and omissions and low Maori socio-economic status. In Te Urewera as elsewhere, poor socio-economic status is the result of many factors, some of them – such as individual action, terrain, climate, and lack of immunity to introduced disease – beyond the control of the Crown. Other important factors, however, include massive loss of land; cultural and linguistic marginalisation, especially within the

1404. Counsel for Nga Rauru o Nga Potiki, submissions by way of reply, 8 July 2005 (doc N33), pp 14–15; counsel for Wai 144 Ngati Ruapani, submissions by way of reply, 8 July 2005 (doc N30), pp 71–74; counsel for Tuawhenua, submissions by way of reply, 8 July 2005 (doc N34), p 39

1405. Counsel for Tuawhenua, submissions by way of reply, 8 July 2005 (doc N34), p 39

1406. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 15

1407. Ibid, pp 15–16

1408. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 2, pp 679–680; Waitangi Tribunal, *The Hauraki Report*, vol 3, p 1226; Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, p 796

education system; and lack of political and economic power. These three factors, as well as numerous lesser factors, were well within the Crown's sphere of influence and were in fact often the direct result of Crown action.

Tribunals which have examined this issue have tended to focus on the link between land loss and poverty. The link between poverty and other socio-economic problems, such as ill health and educational under-achievement, has received less attention. We consider that the first link, although not straight-forward, is relatively unproblematic. It has been discussed at length by a succession of Tribunals, all of which concluded that although there is no simple 'land loss equals poverty' equation, there is a causal link between the two.[1409] The loss of some tribal lands need not have led to poverty, if the remaining land was able to be developed and generally fully utilised, and if there was enough of it to support the people. This was generally not the case, however. Numerous hapu and iwi across New Zealand were left without enough land to participate fully in the colonial or modern economy, and some were left without enough even for a subsistence living. Maori landowners were frequently unable to fully utilise and develop their remaining lands, for a variety of reasons including formal Crown restrictions on use; lack of expertise; inability to access finance; lack of road access; and title issues such as multiple ownership and undifferentiated interests. All of these problems were at least partly the result of Crown action or omission, particularly the imposition of a virtually unworkable system of land law on multiply-owned Maori land. Remarkably, this system made no provision for collective management. In some cases it was clear that the Crown forced Maori landowners into a position where they had little option other than to sell their land. Previous Tribunals have therefore concluded that there is a link between land loss, which was caused at least partly by the Crown, and poverty.

There was more to the poor socio-economic standing of Te Urewera hapu and iwi than land loss, however. Earlier in this chapter, we outlined Professor Murton's socio-economic framework, which suggests that the poor socio-economic status of Te Urewera hapu and iwi resulted ultimately from the huge power imbalance between them and the Crown.[1410] The power imbalance led to poverty in a range of ways. As we have shown in previous chapters, the Crown's control of property regimes, in the form of Maori land law, new title systems and the operation of the Native Land Court, and the Crown's powers of confiscation and purchase, led to the loss of most of the best farmland in Te Urewera. This hamstrung the economic capability of Te Urewera hapu and iwi by reducing or eliminating their ability to lease land, sell agricultural produce, or fully participate in the growing dairy industry. The poverty resulting from this lack of capability was combined with restrictions on the use of their remaining land, which included timber milling restrictions in the public interest.

1409. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 2, pp 679–681; Waitangi Tribunal, *The Kaipara Report* (Wellington: Legislation Direct, 2006), pp 320–321; Waitangi Tribunal, *The Hauraki Report*, vol 3, pp 1206–1230; Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui*, vol 2, pp 1025–1034

1410. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 49–86

23.9.1

Together these factors prompted further sales of interests in land, and deepening poverty. These restrictions were another way in which the imbalance of power hurt Te Urewera hapu and iwi.

Land use restrictions and other Crown acts and omissions (such as reneging on its promise to build roads) helped keep Te Urewera communities poor, yet those communities lacked the political power to persuade the government to change them. Their tools consisted only of measures, such as petitions, letters, and pleas to infrequently visiting cabinet ministers, that the government could easily ignore. Measures which could have put economic or legal pressure on the Crown included legal action, boycotts, withdrawal of labour, withdrawal of capital, or the creation of alternative power structures. However all of these require significant financial resources and a degree of political power; we have seen earlier in this report that, while many of these were tried, they rarely had any significant success. Poverty and powerlessness fed each other in a mutually reinforcing cycle: lack of power meant hapu and iwi could not alter policies which kept them poor, and poverty meant they were unable to exert economic or legal pressure on the Crown.

Lack of political power also had significant cultural effects. As with economic effects, powerlessness meant that, for most of the period covered in this chapter, Maori had little or no influence over Crown policies which harmed or denigrated their culture and language. Most obviously, the great majority of Maori were compelled to send their children to monocultural and monolingual schools, not only because education was compulsory, but because this was the only way that the Crown provided the skills and knowledge needed to participate fully in the mainstream society and economy. Although it was not always the Crown's intent, the message that Maori children received from the education system was that their culture and language were of less value than those of Pakeha. By implication, they too were of less value than Pakeha children. This was damaging to children's self-esteem, to their chances of educational achievement and, in the long term, to the culture and language themselves.

The Crown's control of the health system meant that it could provide entirely monocultural and monolingual health services, regardless of the barriers this created for Maori in need of medical aid. Another vicious cycle was created: the power imbalance created social services unfriendly to Maori, which meant that Maori made limited use of them, which meant they remained disproportionately unhealthy and under-educated, which made it harder for them to use what little power they possessed. Educational under-achievement and ill health also made it harder for people to climb out of poverty, feeding into the cycle of poverty and powerlessness outlined above. The long-term socio-economic impacts of the Crown's Treaty breaches were usually not a case of simple cause and effect, in other words, but were more in the nature of interlocking cycles of disadvantage which, once established, could and did perpetuate themselves even after the damaging policies were replaced.

In summary, the socio-economic problems and disparities experienced by the peoples of Te Urewera between the late nineteenth century and the time of our hearings were in large part prejudices caused by the Crown's breaches of the principles of the Treaty. Crown actions and omissions were not the sole causes of any of these problems, but they did play a crucial and often deciding role. Prejudice arose in a variety of ways. It arose from neglect, such as inadequate famine relief, and the inaccessibility of adequate health care or post-primary education. It arose when the Crown attempted to improve Maori lives without considering cultural factors, as in an education system which taught their children Pakeha knowledge and ways of life at the expense of their own language and culture. Prejudice arose when the Crown put Maori interests last, prioritising its own interests or those of Pakeha settlers. The Crown did not set out during the period covered by this chapter to reduce the hapu and iwi of Te Urewera to largely impoverished, unhealthy, and under-educated peoples without sufficient political power or economic capability to set their own paths. But this was the effect of its breaches of the Treaty.

23.9.2 The timber industry

One of the major themes of this chapter has been the central role played by the timber industry in the twentieth century Te Urewera economy. Land loss and poor land quality, among other problems, meant that Maori life in Te Urewera before the advent of the timber industry was often characterised by grinding poverty and precarious subsistence farming, vulnerable to crop failure and natural disaster, and often suffering from food shortages. Once substantial milling got underway, the timber towns were transformed into thriving and relatively well-off communities, with full or near full employment and cheap rental housing. From about the 1970s, however, the timber industry went into severe decline. In the 1980s the government, as part of a much wider programme of reform, decided that it could no longer support the unprofitable Forest Service. As the state withdrew from the timber industry there were mass redundancies, a housing crisis, and social problems which flowed on from economic devastation.

As we discussed earlier in this chapter, the claimants in this inquiry alleged that the Crown made their communities dependent on the local timber industry, and then restructured it out of existence without consulting with them, without sufficient regard for the affected communities, and without adequate mitigation of the adverse affects of corporatisation.[1411] Here we consider whether the Crown made Te Urewera hapu and iwi dependent on the timber industry and, if so, whether this constitutes a Treaty breach. We ask whether

1411. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p 278; counsel for Ngati Whare, closing submissions, 9 June 2005 (doc N16), p 161; counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), pp 11–13, 29, 33, 36, 42–42, 56–57, 60; counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), pp 80–81; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 287–300; counsel for Nga Rauru o Nga Potiki, submissions by way of reply, 8 July 2005 (doc N33), p 17

23.9.2(1)

the Crown was entitled to corporatize the Forest Service and what obligations it had to the hapu and iwi of Te Urewera. Finally, we assess whether it met those obligations.

(1) *Dependence on the timber industry*

Crown counsel did not contest the fact that various Te Urewera communities were dependent on the timber industry. Around the middle of the twentieth century, the timber industry employed a high percentage of Te Urewera's Maori workers, provided them with housing, and in some cases with other community services. The Crown strongly encouraged Maori to move to areas where forestry jobs were available, often with inducements of housing and education. It did so with good intentions, particularly in respect of the alleviation of poverty and the improvement of living standards. We note that where the Crown failed to enable Maori involvement in the timber industry, this was, quite reasonably, a subject of complaint at the time and in this inquiry. Crown officials did not encourage Maori participation in the timber industry because they aimed to make Maori dependent on it, but because it provided virtually the only steady work available in or near Te Urewera, especially for people without educational qualifications or prior work experience. It is important to remember that the timber industry did not supplant some previous source of jobs and income; it provided stable jobs and adequate levels of income in an area previously characterised by unemployment and crushing poverty.

Within Te Urewera, work opportunities other than in forestry and timber processing were extremely limited. There was farm work, but this was badly paid, uncertain, and often seasonal, casual, or both. Even on the better-resourced development schemes, the unit occupiers struggled to make a living from full time farming. Labouring work was available on the hydro schemes for several decades, but it is not clear whether they were a significant employer of Maori once the construction was completed. Work in pest control and for the National Park was available, but like farm work this tended to be casual, and was generally no more than a supplement to more reliable sources of income. The Crown made some attempts to entice industry to Te Urewera and to support community business initiatives, but these were largely unsuccessful.

Maori in Te Urewera were dependent on the timber industry in part because they could not support themselves on their own land. The main reason for this was that, as we have stated in earlier chapters, they had lost most of it in the nineteenth and early twentieth centuries. Nearly all of the good farmland in the inquiry district had been taken by the Crown through confiscation, unfair or unlawful purchase, failure to protect Maori land from fraudulent purchase, and other means which we have found were in breach of the Treaty. If the hapu and iwi of Te Urewera had retained more good land, and had been supported in farming to the same extent as Pakeha farmers, we see no reason why some at least could not have made a reasonable living from farming. It is likely that significant numbers would have

turned to forest work anyway, particularly as the population grew, but even if forestry had still become a major source of employment, it would not have dominated the Te Urewera Maori economy to such a great extent.

Once the land had been lost, however, it is difficult to see that much could have been done to lessen the district's dependence on the timber industry. Certainly some measures would have helped, such as improving roads and infrastructure, and perhaps more support for community business ventures. However the topography and climate of Te Urewera, in combination with its distance from major ports and centres of population, mean that large parts of it are inherently more suited to forestry than anything else. The dependence of the hapu and iwi of Te Urewera on the timber industry left them deeply vulnerable to downturns and policy changes in that industry, as we have seen. However it is clear that, up until the 1980s, the Crown did intend to continue its support for the timber industry. Given the lack of economic alternatives in Te Urewera, it was entirely reasonable of the Crown to encourage Maori participation in the industry as it developed and while it was at its peak.

(2) *Corporatisation*

It is clear from the evidence before us that the Crown's corporatisation of the Forest Service had a devastating effect on the hapu and iwi of Te Urewera, particularly Ngati Whare, Ngati Manawa, Tuhoe, and other Maori residents of the timber towns. Crown counsel acknowledged the suffering which corporatisation produced, but denied that corporatisation was in breach of Treaty principles.[1412] In order to determine whether corporatisation, or any aspect of it, was in breach of the Treaty, we ask three key questions:

1. Did the Crown have an obligation to consult with affected hapu and iwi over corporatisation? If so, how far did those obligations extend and were they fulfilled?
2. Given that corporatisation was highly likely to have negative effects on the hapu and iwi of Te Urewera, did the Crown have the right to corporatize the Forest Service at all?
3. If it did have the right to corporatise the Forest Service, did the Crown carry out corporatisation in a Treaty-compliant manner?

We address these questions in turn.

With regard to consultation, we consider that there were two levels at which the Crown could have consulted with hapu and iwi. First is the broad policy level, at which the key questions were whether the state should continue to be involved in commercial activities such as forestry, what balance should be struck between profit-making and social goals, whether any restructuring programme should be carried out gradually or quickly, and whether there should be any local exceptions. The second level was the way in which the policy was implemented on the ground. At this level the key questions were more specific,

1412. Crown counsel, closing submissions, June 2005 (doc N20), topic 38, pp 2, 16

such as what the Crown should do with Minginui and other Forest Service housing, what redundancy terms should be offered, and what assistance the Crown should give to communities affected by corporatisation.

At the policy level, we agree with Justice Somers in the Court of Appeal's *Lands* decision that

> the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.[1413]

The Crown carried out consultation over the implementation of the wider corporatisation policy, including through the Social Impact Unit, and also received considerable information as a result of the *Lands* case and its aftermath. The Crown did not corporatise the Forest Service in ignorance of the likely impacts on the Te Urewera timber towns; it was aware of the kinds of impacts that might follow, and decided to proceed anyway. Whether this was in keeping with the Treaty will be discussed below.

The Crown's obligation to make well-informed decisions applies also at the more detailed 'on the ground' level, and here the Crown does not always appear to have made the effort to sufficiently inform itself. We have seen, for example, that the Treasury paper on the future of Minginui professed to have no information on the economic resources of Minginui residents. This was not so, as the report mentions the village's near-total unemployment, but in any case it is clear that Treasury was not making an evidence-based assessment. The Crown also failed to properly assess the nature and extent of chemical contamination in the village, a problem which it had not fully investigated or begun rectifying even at the time of our hearings. More generally, there was some consultation with affected communities, and this sometimes led to positive outcomes, such as the initial decision to return Minginui to Ngati Whare. By and large, though, consultation seems to have resulted in few significant changes to the way that policy was implemented.

1413. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 683

Given that corporatisation was always highly likely to have devastating effects on Te Urewera communities, and the Crown knew this to be the case, did it have the right to go ahead with the policy? We consider that it did. The te reo text of the Treaty of Waitangi grants the Crown 'kawanatanga', which literally translates as governorship, but is usually taken to mean the right to govern the country. Following the courts and other Tribunals, we consider that this includes the right to set economic policy and, in this case, to decide whether and how the state should be involved in the timber industry.[1414] As we state above, though, the Crown's decisions on economic policy must be informed and Treaty-compliant. Generally speaking, this means that the Crown has an obligation to consult with hapu and iwi who may be affected by proposed policies. It should have been clear early in the planning stage of corporatisation that Ngati Whare, Ngati Manawa, Tuhoe, and other Te Urewera iwi would be gravely affected by the proposed restructuring of the Forest Service; the Crown therefore had a duty to consult with them. It is clear that it did not do this at the implementation level, nor does it seem to have given any consideration, before the Lands case, to the Treaty implications of corporatisation. We now consider whether hapu and iwi interests were given the protection to which they are entitled under the Treaty.

The Central North Island (CNI) Tribunal found that, in order for corporatisation to be Treaty-compliant, the Crown had to take into account the long-standing economic dependence of CNI Maori on the forests, and the economic and cultural price they had paid for having the timber industry in their rohe. The Crown should also have acted in partnership with affected Maori communities, and actively protected their economic and cultural interests, and rights to economic development. More specifically, it should have helped CNI Maori to overcome past barriers to development and fully participate in new forestry opportunities or alternative industries, and provided better transitional arrangements.[1415] The CNI Tribunal found that the Crown had failed to do these things, and that forestry corporatisation in its inquiry district therefore breached the Treaty principles of partnership and active protection.[1416]

We consider that these are reasonable standards by which to judge the implementation of corporatisation in our district. Although the Crown clearly knew about the long-standing dependence of the hapu and iwi of Te Urewera on the timber industry, it did not adequately take this into account when implementing its corporatisation policy. It did not act in partnership with any of the affected communities, but instead imposed measures on them even when it should have been clear that these were not in their interests. The Crown did take some steps towards helping affected communities to participate in new opportunities, but those opportunities were few and far between, and the help provided was nowhere near

1414. Waitangi Tribunal, *Ko Aotearoa Tenei: Te Taumata Tuarua*, vol 1, p 15
1415. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 1216
1416. Ibid, p 1217

enough to overcome the problems the communities faced. Nor were transitional arrangements remotely adequate.

Perhaps the most grievous example of the Crown's failure to actively protect the hapu and iwi affected by corporatisation is the disposal of Minginui village. The transfer of the village back to Ngati Whare was, in itself, a positive act, but the way that it was done was in clear breach of the Treaty. Because the village land had been taken under the Public Works Act, it should not have taken the *Lands* case to make the Crown realise that it needed to return it to its original owners. Rather than leaving newly redundant forestry workers in the dark for more than two years as to whether they would own their homes or whether they would have to move out, the Crown should have known and announced right at the start that the village would be returned to tangata whenua. Before transferring the village to Ngati Whare, the Crown should have identified and fixed the numerous problems arising from its own neglect, poor construction methods, and use of dangerous chemicals. It was not reasonable to expect either Ngati Whare, the Minginui residents, or the district council to fix problems of the Crown's making, even if any of them had been able to do so. We are also very concerned that, nearly 20 years after the village was handed over, the Crown had not even properly identified Minginui's environmental problems, let alone fixed them. The Crown seems to have regarded Minginui as an asset which it was generously granting to the local community. In reality, the village was a financial liability which was nonetheless of great cultural value to Ngati Whare because it was their ancestral land.

The shortcomings of transitional arrangements are also a cause for concern. As noted above, the Crown should also have provided more certainty as to the housing situation, so that people could make better-informed decisions on their futures. The provision of skills training was a positive step, particularly as it included subjects, such as te reo, which also have cultural value. However job training is essentially meaningless if there are no jobs available, and the people of Te Urewera quickly came to realise this. We do not know if there was any good solution to this issue, but it is not clear that the government of the time even realised the extent of the problem.

Overall, the Crown's assistance did not go far enough. We have seen that corporatisation and privatisation resulted in too many logging contractors chasing too few contracts, with disastrous economic effects. The Crown had an obligation to use its expertise in forestry and economic matters to actively assist its Treaty partners to adapt to the new circumstances in Te Urewera resulting from its corporatisation policy. Its failure to do so was in breach of Treaty principles.

23.9.3 Provision of aid and social services

We stated above that the poor socio-economic position of Te Urewera Maori is partly the result of Crown actions and omissions. That being so, the Crown has a clear duty under the Treaty to try to remedy the prejudicial effects of its actions. We also consider, however, that the Crown has duties over and above its duty of redress. In other words, even if it could be shown that the Crown was in no way responsible for the socio-economic disparity between Maori and non-Maori (which is not the case), it would still be obliged to try to correct it. Here we will consider the nature and extent of the Crown's obligations to provide aid and social services to Maori in Te Urewera.

(1) *The Crown's duties*

As noted above, Crown counsel submitted that the Crown had no inherent duty to provide aid or social services to Maori. The Crown's only obligation was that, if it chose to provide aid or services, it could not provide them to Pakeha only; it had to provide them to Maori as well. Counsel for the Wai 144 claimants said that the Crown's duties in relation to relief from famine and unemployment are in the nature of fiduciary duties, deriving from the Treaty of Waitangi, the 1871 compact, and the negotiations over the UDNR.[1417] The idea that the Crown has a duty to Maori akin to a fiduciary duty has been well established by the courts and by previous Tribunals, although it is not clear that this duty extends to the provision of relief from hardship.[1418]

We are not convinced that the Crown has an inherent Treaty duty to provide social services or assistance to Maori in any and all circumstances. There are, however, Treaty principles which are applicable in this context. With regard to assistance with economic development, Crown counsel submitted that

> In the 19th century the government provided a bare framework for economic activity with little direct assistance, and operated with a minimal bureaucracy and a revenue base considerably smaller than that available to it today. Another dominant ideology of this period was the belief in free trade in both land and commodities.[1419]

Versions of this argument have been presented by the Crown to other Tribunals, which have found that, in the nineteenth and early twentieth centuries, the Crown often intervened in the New Zealand economy.[1420] Most notably, in the present context, it played a major role in

1417. Counsel for Wai 144 Ngati Ruapani, submissions by way of reply, 8 July 2005 (doc N30), p 68

1418. For mentions of fiduciary duty, see Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed (Wellington: GP Publications, 1996), p 191; Waitangi Tribunal, *Te Maunga Railways Land Report*, 2nd ed (Wellington : GP Publications, 1996), p 80; *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 21; *Taiaroa v Minister of Justice* [1995] 1 NZLR 411, 517; Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 289

1419. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 6

1420. Waitangi Tribunal, *The Hauraki Report*, vol 3, p 1226; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 595

acquiring Maori land and assisting Pakeha settlers to acquire and develop it. The Hauraki and Te Tau Ihu Tribunals both found that the Crown had an obligation to grant Maori at least as much assistance as it was giving to Pakeha.[1421] The Central North Island Tribunal offered perhaps the most thorough examination of the Crown's role in the economy, showing that the Crown took an active and sometimes leading role in assisting economic development, particularly in relation to farming.[1422] It found that:

> The issue we have to consider . . . is not so much whether positive Crown intervention was possible – for clearly it was – but for whose benefit the Crown acted and whether it took reasonable steps to ensure that Maori could participate on an equal basis with more favoured sectors of the community.[1423]

In our inquiry, Professor Murton demonstrated that the Crown offered considerable economic assistance to the farming industry in the late nineteenth and early twentieth centuries.[1424] From the 1870s, a key component of Crown assistance to Pakeha farmers in our inquiry district was facilitating the transfer of thousands of acres of land from Maori to Pakeha ownership. From the 1890s, it also provided these Pakeha farmers with cheap loans to develop the land. In summary, the Crown did provide direct economic assistance, but it provided it to Pakeha instead of, and often at the expense of, Maori.

Crown counsel did acknowledge, and we agree, that the Crown has a clear obligation to provide aid and social services to Maori on the same basis as other New Zealanders. Both the te reo and English texts of article three of the Treaty clearly state that Maori are to have the rights of British subjects, which in the modern context means equal rights with other New Zealanders. If Maori are denied aid or services granted to non-Maori in the same situation, this is a breach of both the letter and spirit of the Treaty. In practice, however, Maori and non-Maori have often been in different situations, making assessments of equal treatment difficult. As Crown counsel submitted:

> In some contexts it is simple to apply that obligation of equality, such as the right to vote. In other areas, including some of those under consideration here, delivery can be more complex. For example, while the Crown may recognise in principle the right to free education and healthcare (as part of its current policy), equal delivery of that to all its citizens may be impacted by practical factors such as remoteness, disposition to use services, and the higher costs of servicing isolated areas. Here it should be asked instead, has the Crown treated Māori equitably, or fairly, in the circumstances.[1425]

1421. Waitangi Tribunal, *The Hauraki Report*, vol 3, p 1226; Waitangi Tribunal, *Te Tau Ihu Report*, vol 2, p 1026
1422. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 891–896, 941–948
1423. Ibid, p 948
1424. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 441–442, 445–446
1425. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, pp 15–16, see also p 3

The distinction between equality and equity is a useful one, which we will explore in depth below. Here we simply agree with the Crown's suggestion that equity and fairness are more or less the same thing, and that equity can be more important than equality, depending on the circumstances.

With regards to social services and assistance, the only unambiguous example of unequal treatment we found was that, in the first half of the twentieth century, Maori pensioners, widows, and relief workers received smaller benefits than their Pakeha counterparts. Crown counsel stated that the policy was 'properly abandoned', but submitted that it arose in part from 'perceived need', rather than from racism.[1426] We accept that the relevant policy decisions were not motivated by any conscious feeling that Maori were, as a people, inferior to Pakeha. However we do think that Crown counsel's distinction between discrimination based on race, and discrimination based on perception of Maori needs, is an artificial one. Maori in desperate need of state aid were given less help than their Pakeha counterparts, and this was justified by the argument that Maori needed less money to live on. Nor was any consideration given to the particular circumstances of rural Maori, which would have exposed the weakness of the 'lesser needs' argument. The policy was a clear breach of the principle of equity.

Claimant counsel drew our attention to a $120 million development package, presented to West Coast communities on the cession of native logging in 2000, contrasting it with the lack of compensation given to the Te Urewera timber communities in the wake of the native logging ban there. It was submitted that there was an obviously unfair difference between the two.[1427] It is difficult for us to compare the two situations, as we did not receive any detailed information on the West Coast agreement. In addition, although no assistance was provided to Te Urewera when native logging ended there, we note that the Te Urewera timber industry was not dependent on native logging. It continued to mill exotic plantation timber for several years after native logging ended, and it is not clear to us that the end of native logging (as opposed to the corporatisation which followed a few years later) resulted in substantial job losses. In summary, we do not have enough information to say whether or not the Crown's treatment of these two communities was inequitable.

The next question is whether extreme circumstances, such as famine or natural disaster, create an obligation on the Crown to assist those affected. Today it is generally agreed that disaster relief is a fundamental duty of the state, but this has not always been the case.

1426. Ibid, p 11; Crown counsel, statement of response, 13 December 2004 (claim 1.3.7), pp 19–23

1427. Counsel for Ngati Whare, supplementary closing submissions, 3 June 2005 (doc N16(a)), p 58; counsel for Nga Rauru o Nga Potiki, submissions by way of reply, 8 July 2005 (doc N33), p 24. It should be noted that the Ngati Whare submission gives the figure of $90 million as opposed to the $120 million cited in the Nga Rauru o Nga Potiki submission; in doing so, counsel for Ngati Whare have counted only the development fund itself ($92 million), and not included the extra $28 million given to West Coast district councils, which made the whole adjustment package worth $120 million. In reference to the adjustment package, see P Hodgson, 18 October 2000, NZPD, 2000, vol 588, p 6244.

23.9.3(1)

Did the Crown have such an obligation in the nineteenth century, for example in response to the 1898 famine? Crown and claimant counsel were in agreement that there was some obligation, although they disagreed on why. Crown counsel submitted that 'Modern states generally accept they have some duty (in a sense of the moral obligation) to care for their citizens during times of famine and natural disaster.'[1428] They further stated that aid was provided for famine victims in the late nineteenth century, although they acknowledged that it was inadequate 'even by the standards of the day'.[1429] Counsel appear to be arguing that the Crown's duty to relieve extreme hardship in the nineteenth century was a moral rather than a legal or Treaty duty. By contrast, counsel for the Wai 144 claimants submitted that 'As the Treaty promised two prosperous peoples within one country, it is self evident that it is at times of crisis the Crown's duty to provide care and assistance as a fiduciary becomes of paramount importance.'[1430]

We find that the Crown has always had a Treaty duty to do what it could to relieve extreme hardship. This duty derives from two principles. First, the duty of active protection has always required the Crown to act when the wellbeing of Maori communities is seriously threatened, as many Te Urewera communities were during the famine of 1898 and when experiencing severe poverty at other times. Second, the principle of equity compels the Crown to give aid to Maori communities on the same basis as non-Maori communities. We are not aware of any Pakeha community which faced starvation in the late nineteenth century, and so cannot make any direct comparisons. But we do know that, after the Tarawera eruption, the government granted more money to Pakeha affected by the disaster than to Maori, although many more Maori were affected. During the 1898 famine, the Crown failed to provide adequate relief to the hapu and iwi of Te Urewera, and thereby breached the principles of equity and active protection.

The Crown's duty to relieve the 1898 famine was heightened because the famine was caused, at least partially if somewhat indirectly, by the Crown's prior breaches of the Treaty. We have referred in many parts of this report to the principle of redress, which means that the Crown has an obligation to remedy Treaty breaches and the prejudice which arises from them. In earlier chapters our discussions of redress related mostly to issues of land loss. But the principle of redress applies equally to other kinds of Treaty breach, and to socio-economic prejudice. Although claimant counsel generally felt that the Crown's socio-economic obligations arose from the Treaty rather than from the Crown's breaches of it, several considered that these obligations were deepened or enhanced by Treaty breach.[1431] The Crown has recognised its obligation of redress through its Treaty settlements programme, although

1428. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 10

1429. Ibid, topic 39, pp 10–12

1430. Counsel for Wai 144 Ngati Ruapani, submissions by way of reply, 8 July 2005 (doc N30), pp 68–69

1431. Counsel for Wai 36 on behalf of Tuhoe, closing submissions part B, 30 May 2005 (doc N8(a)), p 220; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 350–351, 354; counsel for Wai 144 Ngati Ruapani, submissions by way of reply, 8 July 2005 (doc N30), p 68

mostly in relation to land and other material resources such as fisheries and forests. We consider that, just as Treaty breaches resulting in land loss oblige the Crown to return land, where possible, Treaty breaches resulting in widespread socio-economic disparity oblige the Crown to try to reduce that disparity.

As we have shown, socio-economic disparity in Te Urewera has many causes other than breaches of the Treaty. Some were the result of the influx of non-Maori settlers, rather than Treaty breaches as such, and might have happened even if the Crown had been entirely Treaty compliant. One clear example of this is introduced diseases, which would almost certainly have devastated Maori communities even if they had entirely retained their mana motuhake. In its discussion of health care obligations, the Napier Hospital Tribunal found that the Crown has a duty to try to reduce persistent and marked disparities between Maori and non-Maori levels of ill health and mortality, regardless of the causes of the disparity. The duty arises from the principles of equity and active protection.[1432] We see no reason why this duty would not apply equally to other forms of socio-economic disparity, including levels of educational achievement, housing standards, income levels, and employment. We acknowledge that some of the causes of socio-economic disparity in Te Urewera are beyond the Crown's control; for example, individual action, genetic vulnerability to disease, and the terrain and land quality of Te Urewera. However we reiterate that the Crown has a duty under the Treaty to try to reduce disparities between Maori and non-Maori, regardless of their causes. In Te Urewera, of course, the Crown's actions were at the root of these disparities.

In attempting to reduce disparity, however caused, the Crown has an obligation to do so in good faith and partnership with the hapu and iwi of Te Urewera. It cannot simply present Maori with its own solutions, however well-intentioned they might be; at minimum it must consult with Maori, and ideally it will either form a partnership with, or deliver funding and autonomy to, Maori organisations. For most of its history, the Crown has not worked in partnership with Maori in Te Urewera. Until recently, Maori could usually engage with Crown services only passively, as students, patients, or beneficiaries, with little or no influence on the way services were delivered. A handful of Maori, from both within and outside Te Urewera, became Crown employees and some, like Dr Golan Maaka, were able to adapt their services to Maori needs and preferences. Their presence within the Crown's systems, however, was not indicative of a partnership.

In recent decades the Crown has made an effort to work in partnership with Maori, through its relationships with groups such as Tuhoe Hauora and other iwi and hapu health organisations, kura and kohanga reo, and with the Tuhoe Education Authority. However representatives of these groups told us that the Crown was not treating them as full partners. From the evidence we were presented with, it was not possible to tell whether or not

1432. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, pp 54, 64

the Crown's actions were those of a conscientious Treaty partner. It was clear, however, that the huge power imbalance between the two 'partners' was a source of serious tension, and that not enough was being done to acknowledge and mitigate that imbalance.

(2) *Equitable provision*

In their closing submissions, Crown counsel made a distinction between equal and equitable treatment. They submitted that Maori in Te Urewera may have been treated differently to other citizens at various points, but that this is not the same thing as unfair or discriminatory treatment.[1433] Crown counsel's discussion of equity and equality related mostly to circumstances under which it was difficult for the Crown to provide services to Maori in Te Urewera; this will be discussed in section three below. We believe that the distinction between equality and equity has a much broader application, which is highly relevant to the provision of social services.

The *Oxford English Dictionary* defines 'equal' in terms of sameness; for example, people having the same rights and status, or something being uniform in application. By contrast, equity is defined in terms of fairness. Crown counsel also suggested that 'equitably' is synonymous with 'fairly'.[1434] In terms of social services, we consider that equal provision means providing everyone with the same type and level of service, whereas equitable provision means providing everyone with the services which best meet their needs.

Perhaps the most important aspect of equitable provision derives from unequal needs. As we have stated above, following the Napier Hospital report, the Crown has a duty to reduce socio-economic disparity. We have shown that Maori in Te Urewera have consistently suffered from worse health and housing, lower education levels, and higher rates of poverty than non-Maori. This means that, regardless of the reasons behind this disparity, the Crown has a duty to devote additional resources to reducing it. The Crown has failed to adequately carry out this duty, and partly as a result socio-economic conditions for Maori in Te Urewera remained far below those of the general New Zealand population, even in the mid twentieth century, which was Te Urewera's economic high point since the Crown's arrival in the district a century before. Providing the district with the same limited level of service as another rural area with a less disadvantaged population may be equal treatment, but it is not equitable.

At times, the Crown did recognise some differing Maori needs and circumstances, and provided differing but broadly equitable services. One example was the Department of Maori Affairs' welfare officer system. The welfare officers helped Maori to find jobs, improve their housing, and generally achieve a higher standard of living. Non-Maori had no equivalent system, but this recognised greater levels of need among Maori, and the difficulty

1433. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 3

1434. Ibid, pp 15–16. They also used 'impartially' as a synonym; the *Oxford English Dictionary* defines 'impartial' as 'unprejudiced, unbiased, fair, just, equitable' (p 3).

which some had navigating mainstream systems. Another example was the land development schemes, which recognised the particular difficulties of developing Maori-owned land, given the title system imposed by the Crown. The schemes were somewhat paternalistic and generally did not work as well as either Maori or the Crown had hoped, but they were a genuine attempt to improve the living standards and economic capabilities of Maori communities.

Another crucial aspect of equitable provision is the delivery of culturally appropriate services. This obligation derives from the principle of active protection in two ways. First, active protection includes the removal of barriers which may prevent Maori from accessing social services, including linguistic or cultural barriers.[1435] Secondly, and as the Napier Hospital Tribunal found, the Crown's obligation actively to protect te reo and Maori culture means that they must be respected and provided for in the delivery of social services. That Tribunal acknowledged, however, that this can 'be subject to the limits of practicality, reasonable cost, and clinical safety'.[1436] The duty to provide culturally appropriate services was also upheld by the Tauranga Moana Post-Raupatu Tribunal, which found that the partnership principle obliged the Crown to provide and support culturally appropriate health services, and the Wananga Capital Establishment Tribunal, which found that one of the rights which the Crown must actively protect is 'the right to participate in a tertiary education in a Maori paradigm'.[1437]

In our inquiry we have seen that, until about the 1950s, Maori language and culture were routinely marginalised and disparaged by Crown bodies, particularly schools. Cultural factors may also have kept some Maori in Te Urewera from accessing public hospitals and other medical aid. Crown policies relating to land and housing often ignored the realities of traditional land ownership, family structures, and ties to ancestral land. In particular, Crown policy in the middle of the twentieth century encouraged Maori to move away from their ancestral homes in 'isolated' areas, often using education and housing to reward those who shifted. We accept that these policies were made with good intentions, but they also ignored the expressed preferences of many Maori to remain in their traditional rohe. Similarly, we accept that the monocultural and monolingual nature of Native schools arose from a genuine belief that assimilation was in the best interests of Maori. We also acknowledge that in practical terms Maori needed to become fluent in English, and that those who did not do so were at a disadvantage in twentieth century New Zealand. But we do not accept that this had to happen at the expense of their own language and culture, nor that there was no reciprocal obligation on Crown employees to become more familiar with te reo and tikanga Maori. Apart from issues of geographical access, the education provided to Te Urewera

1435. Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 2, p 810
1436. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 57
1437. Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 2, p 811; Waitangi Tribunal, *The Wananga Capital Establishment Report*, p 51

23.9.3(2)

Maori communities appears to have been mostly satisfactory by Pakeha standards of the time. But the Treaty principle of options means that Maori had to be able to choose between 'mainstream' services largely designed by and for Pakeha, and those designed by and for Maori.[1438] Providing a monocultural and monolingual service to everyone is, again, equal but not equitable.

Is the Crown obliged to ensure that Maori socio-economic outcomes are equal (or equitable) with those of non-Maori? Counsel for Tuawhenua submitted that ensuring equitable outcomes is a Crown duty under article three of the Treaty.[1439] Crown counsel conceded that the ideal standard is one which results in equality of outcome, but submitted that this was an impossible goal, as 'this standard ignores individual choice and action.'[1440] The question has been addressed by the Napier Hospital Tribunal, which found that

> A balance must also be struck in any period between the Crown's obligation of active protection of Maori health and the responsibility of individual Maori to maintain their personal health . . . In general, we do not consider it reasonable to expect that Crown action aimed at the active protection of Maori health, however assiduous, can guarantee particular health outcomes for individual Maori.[1441]

We accept this caution, and find that it also applies to other socio-economic outcomes, such as education, income, and employment. As we said earlier, the Crown is obliged to address disparities between Maori and non-Maori, but it is reasonable to expect that outcomes should be at least partly dependent on individual or community (especially tribal community) effort.

In summary, article 3 of the Treaty of Waitangi guarantees to Maori the rights and privileges of British subjects, which in today's terms means the same rights and privileges as other New Zealanders. But we consider that the Crown's obligations under article 3 should not be conceived as a duty to provide aid and services to Maori on exactly the same basis as non-Maori. Where aid or services are tailored to Pakeha needs or are more accessible to Pakeha than to Maori, Maori are not receiving the same privileges as other New Zealanders. We are reminded of the words of French writer Anatole France, who wrote that

> In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.[1442]

In our view, it is this kind of equality which has prevailed in the Crown's provision of aid and social services to the peoples of Te Urewera. The Crown's 'majestic equality' provided

1438. For a discussion of the principle of options in a social services context, see Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 65.

1439. Counsel for Tuawhenua, synopsis of submissions, 10 June 2005 (doc N9(b)), p 12

1440. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 16

1441. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 55

1442. Anatole France, *Le Lys Rouge* (1894, reprinted Paris: Calmann-Lévy, 1906), p 118

Maori and Pakeha alike with monolingual English-language schooling, and penalised Maori and Pakeha alike for ownership of unproductive land. Needless to say, the impact did not fall equally on both groups. A 'one size fits all' model tends in practice to suit the needs of the majority, who are rarely the group in most need of help. Even when they can access mainstream aid and services, minority groups such as Maori have often found that what is being provided simply does not work for them, or is so alienating that they prefer to disengage. This is bad for many reasons: it means that the Crown's money is not being spent efficiently, and that public health measures and other crucial programmes will be less successful because they are not reaching everyone. When Maori are being marginalised, it also means that the Crown is not providing them with the full benefits of citizenship as guaranteed in article 3, and is therefore in breach of the Treaty of Waitangi.

(3) *Restrictions on duty*

Crown counsel submitted that, in assessing the adequacy of social service provision, we must take into account all the prevailing contemporary circumstances, particularly cost, location, and practicality.[1443] We accept this as a general principle: it would not be reasonable for us to impose standards on Crown action without any regard to the contemporary context. We examine here a number of factors which might legitimately reduce the Crown's socio-economic obligations under the Treaty.

In most cases, potential restrictions on Treaty obligations turn on what was practical or realistic at the time, rather than what was possible. One exception is the contemporary state of knowledge and technology; it is unreasonable, for example, to expect the Crown to have prevented the spread of disease in the nineteenth century, when the causes of disease were not really understood and few effective treatments or preventatives were available. As the Crown has pointed out, before the middle of the twentieth century all health care was inadequate by today's standards.[1444] This was not due to any failing of the Crown, but rather to the state of medical knowledge and care at the time.

In this inquiry, Crown counsel suggested that the high cost of providing services to 'remote' areas such in Te Urewera meant that it could legitimately provide a lower level of service.[1445] This argument was rejected by claimant counsel.[1446] Counsel for Tuawhenua and the Wai 144 claimants based their counter-arguments primarily on the spiritual and cultural importance of the 'isolated' and 'remote' places which the Crown said it could not reasonably service. Counsel for Tuawhenua stated that 'The lifestyle and community at Ruatahuna

1443. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 16
1444. Ibid, pp 18–19
1445. Ibid, pp 16, 22
1446. Counsel for Tuawhenua, synopsis of submissions, 10 June 2005 (doc N9(b)), p 12; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 350; counsel for Wai 144 Ngati Ruapani, submissions by way of reply, 8 July 2005 (doc N30), p 67

is a taonga to Tuhoe' which requires Crown protection.[1447] They described Ruatahuna as the 'kohanga' (nest or nursery) of Tuhoe.[1448] Counsel for the Wai 144 claimants submitted that

> The Crown was and is required to ensure that Tuhoe and Ngati Ruapani were and are provided with the means to develop, exploit and manage their resources in accordance with their cultural preferences – which were to remain on their lands. That these lands were 'remote' does not negate the performance of this duty by the Crown.[1449]

They suggested that the tangata whenua of the Waikaremoana area were not simply free to move to areas with better social services, because

> They are the kaitiaki of the Lake, the land, and all that lives in the area. They do not choose to live there, isolated from services. The land has chosen them. There is no choice about schooling, health services or infrastructure at Waikaremoana, apart from suffer with little, or move away.[1450]

The special relationship between the people and their land was also discussed by counsel for Nga Rauru o Nga Potiki, who rejected the Crown's argument that, because other rural communities also suffered from corporatisation, its impacts on the Te Urewera timber communities did not constitute a Treaty breach. Counsel submitted that this argument 'avoids the Treaty obligations to Maori and ignores the special relationship between tangata and their whenua and tangata whenua and the Crown.'[1451]

The argument that cost is a legitimate constraint on the Crown's socio-economic Treaty duties was also presented in the Tauranga Moana post-raupatu inquiry, where Crown counsel submitted that there were limits on Maori health entitlement, 'since governments had to prioritise the allocation of resources.'[1452] The Tauranga Moana Tribunal accepted this, but also stated that cost 'does not remove the Crown's obligation to make every effort (as far as circumstances permit) to eliminate all barriers to services to which Māori were entitled as citizens.'[1453]

Whether Maori should be able to access modern social services from their traditional rohe has been explicitly addressed by few previous Tribunals. The Rekohu Tribunal found that although Maori and Moriori living on the Chatham Islands suffered greatly from a lack of health care and other services, 'the Crown did substantially all that was reasonably practical at the time.' It also found that all Chatham Islanders suffered equally, regardless

1447. Counsel for Tuawhenua, synopsis of submissions, 10 June 2005 (doc N9(b)), p 12
1448. Ibid, p 30
1449. Counsel for Wai 144 Ngati Ruapani, submissions by way of reply, 8 July 2005 (doc N30), p 67
1450. Ibid, p 71
1451. Counsel for Nga Rauru o Nga Potiki, submissions by way of reply, 8 July 2005 (doc N33), p 17
1452. Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 2, p 806
1453. Ibid

of ethnicity.[1454] The Te Tau Ihu Tribunal similarly found that failure to provide services to isolated Maori settlements was 'not necessarily' a breach of the Treaty, since isolated Pakeha settlements also suffered.[1455] We have reached a different conclusion from those Tribunals, for two reasons.

First, Te Urewera is much less distant and isolated from the rest of New Zealand than the Chatham Islands. The Rekohu Tribunal found that the high cost of providing services to the Chathams meant that such provision was not a Treaty obligation. But that increased cost is on a different and much larger scale than it is in relation to Te Urewera. Clearly a line must be drawn somewhere to determine the point at which a service becomes too expensive for the Crown to provide. As we discuss in more detail below, we do not think it was reasonable to expect the Crown to provide residents of Te Urewera with the same level of services as it provides to city dwellers. But we do consider that, particularly before the 1940s and from the mid 1980s, the Crown drew the line in the wrong place. With the partial exception of the period between the 1930s and the 1980s, most Te Urewera communities had inadequate access to social services. Some communities lacked adequate access even during that period. The Crown's provision of services was inadequate even when the small and scattered population of Te Urewera, and its distance from major towns, are taken into account. We find that this was in breach of the principles of equity and active protection.

We respectfully disagree with both the Rekohu and Te Tau Ihu Tribunals if it is their view that it is acceptable for the Crown to neglect Maori communities if it also neglects non-Maori communities. To draw on our discussion earlier in this chapter, this would be equal treatment, but not equitable. In our district, this is in part because deprivation has been so prolonged and so marked. In addition, it could be argued from a Pakeha perspective that communities such as Minginui and Murupara suffered no more than hypothetical non-Maori communities which had also lost their only significant source of employment, assuming that the Crown gave both communities the same level of support. But from a Maori perspective, the destruction of the Whirinaki job market severely damaged the ability of the tangata whenua to maintain their ahi ka. We heard extensive evidence from claimant witnesses who left Te Urewera for economic reasons, and the pain they felt at being away from their homelands. This was not simply the emotional wrench of leaving a childhood home, but the profound cultural and spiritual pain of disconnection from ancestral land. Those who remained in their rohe were able to maintain their ahi ka and therefore their own spiritual wellbeing, as well as sustaining the ancestral home to which others could return. But the lack of social services and assistance meant that they often did so at risk to their health, and at the expense of a reasonable standard of living.

1454. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), pp 234–235

1455. Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui*, vol 2, p 1032

23.9.3(3)

Levels of access to social services fluctuated over the period covered by this report. There were almost no social services in our inquiry district in 1900, but provision and access slowly improved, reaching its peak in about the 1950s. Even then, however, access was still difficult from many parts of the inquiry district. A huge change came in the late 1980s, when many services were withdrawn. People who had relied on these services were forced to move elsewhere, significantly alter their lives, or accept a lower standard of living. Crown counsel have submitted that such changes affected all of rural New Zealand, not just Te Urewera.[1456] While this is true, the changes did not impact on all communities equally. Few rural communities had been left as poor as Te Urewera in the wake of repeated Crown breaches of the Treaty, few had such limited economic prospects, few suffered so grievously from job losses in the course of corporatisation and, consequently, few were affected as badly as the Te Urewera communities.

Having said all this, we do accept that it is not realistic for the Crown to provide the same level of services in Te Urewera as are available in the cities and large towns. It is not, and never has been, practical or cost effective to build, for example, a full scale hospital in Te Urewera. We do consider, however, that it is reasonable to expect people in our inquiry district to be able to access medical and social services. Remaining in one's ancestral rohe should not mean going without the benefits of citizenship. The Crown's failure to provide services and assistance, such as public transport, free ambulance services, and adequate allowances for students who need to board, rendered many basic services inaccessible to many Te Urewera residents, especially those on low incomes. This was in breach of the principles of equity and active protection.

Another factor which Crown counsel submitted could reasonably restrict the Crown's provision of social services was 'disposition to use services'.[1457] We take this to mean that the Crown was not obliged to provide services which Maori did not want. This is relevant mostly to the late nineteenth and early twentieth centuries. In this period, we encountered three instances of Maori being unwilling to accept state aid. These were, first, the reluctance of some communities to accept free food during the 1898 famine; second, reluctance to use hospitals; and third, the opposition of Rua and his followers to the Native school system. We addressed the first instance earlier in this chapter, and concluded that reluctance to accept Crown aid during the famine was a result of deep mistrust of the Crown, after decades of poor Crown relations with the peoples of Te Urewera. The establishment of the UDNR partnership appeared to be setting things on a more positive track. However by 1898 the Crown had still not set up mechanisms for self-government, or otherwise done much to uphold its side of the deal. Even if the Crown had carried out its obligations, it is likely that some groups would still not have trusted it enough to accept food, in which case more relief work should have been provided. We also note again that numerous communities asked the

1456. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p14
1457. Ibid, p16

Crown specifically to provide them with food, so this reluctance to accept the Crown's aid was not universal, and perhaps not even particularly widespread.

With regard to antipathy towards hospitals in the nineteenth and early twentieth centuries, it appears that the Crown developed some innovative policies to offer Maori medical treatment in non-hospital settings, particularly through tent hospitals, Native Medical Officers, and the Native health nursing system. We accept that there was little point in providing access to hospitals which communities did not want, and would not use. However we saw no evidence that health authorities made any effort to help Maori become more comfortable with hospitals, or to make hospitals near Te Urewera more welcoming for Maori patients, for example by employing Maori staff, educating Pakeha staff on Maori cultural needs, or by removing or reducing other barriers to access, such as cost.

In the first decade of the twentieth century, Rua and his followers were opposed to Pakeha education. In 1906, Rua banned his followers from attending the Native schools, causing the Kokako school to be shut down, and Waimana to be turned into a board school. Many children were also removed from Ruatoki and Te Whaiti schools. The reasons Rua gave were that they did not need to learn English, as he prophesised the Pakeha would be expelled from Aotearoa, and because children only learned 'European vices' at school.[1458] He was reported as saying 'Hei aha te kura, ko ahau te kura', which translates as 'don't bother with the school, I am the school', but can also be understood to mean 'don't worry about Pakeha education, my church is your school.'[1459] Another version came from H Curran, the teacher at Kokako school, who claimed that Rua was preaching that 'God will teach their children in their homes' and thus they did not need to go to school.[1460] We consider that, as well as the pervasive influence of the religious and millennial aspects of Rua's teaching at this time, many of his supporters would have been disillusioned with the Crown and its schools due to the broken promises of the UDNR agreement. After his release from prison, Rua no longer opposed Pakeha education, and sent his own children to mission and Native schools at Matahi and Maungapohatu in the 1920s.[1461] Rua's opposition to Pakeha education was not long-lasting, and of course only affected those areas in which his influence was strong. It must also be seen in the context of disappointment over the lack of benefits from the UDNR, particularly its failure to deliver meaningful self government, and general distrust of the Crown. We do consider, however, that it was reasonable for the Crown to make sure, before it opened a school, that the community actually wanted one.

In general, the hapu and iwi of Te Urewera did want more welfare provision and economic aid, and in numerous instances specifically asked for them. Cases in which communities specifically rejected assistance were few, and tended to result directly or indirectly

1458. Binney, Chaplin and Wallace, *Mihaia* (doc A112), pp 34–35
1459. Sissons, *Te Waimana* (doc B23), p 197
1460. Curran cited in Binney 'Encircled Lands' (doc A15), p 286
1461. See Binney, Chaplin and Wallace, *Mihaia* (doc A112), pp 150–151. Rua also supported the Presbyterian Mission School established in Maungapohatu in 1918. Binney, Chaplin and Wallace, *Mihaia* (doc A112), p 139.

from their entirely justified mistrust of the Crown. In entering into the UDNR partnership with Te Urewera hapu and iwi, the Crown appeared to be taking steps to turn this history around and build a more positive relationship. Had it fulfilled its UDNR promises and given the peoples of Te Urewera the self-government and support they were expecting, they may have overcome their distrust and begun to make more use of Crown aid and services. Instead, the Crown's failure to carry out its side of the bargain, particularly with regard to self-government and land administration, only reinforced the idea, held by some Te Urewera people, that nothing good could come from the Crown.

Finally, Crown counsel reminded us 'not to ascribe today's standards and reasonable expectations to the Crown actions and actors of the past.'[1462] This is an issue addressed in detail by the Central North Island Tribunal in relation to nineteenth century Maori self-government. That Tribunal stated that

> we accept the Crown's submission that we ought to avoid presentism . . . We also accept the Crown's submission that its Treaty obligations have to be interpreted according to what was reasonable in the circumstances, as established by the Privy Council in the *Broadcasting Assets* case. We note, however, that what was 'reasonable in the circumstances' is not equivalent to an uncritical acceptance of the majority standards of the time.[1463]

The range of options open to the historical Crown, in other words, was generally far wider than the things it actually did. The Central North Island Tribunal demonstrated that nineteenth century politicians 'were capable of active protection of Maori interests, and of conceptualising a high ideal of protecting and reconciling the best interests of both peoples.'[1464] Such policies would not always have been popular with voters, but, as that Tribunal pointed out, 'governments sometimes have to court electoral defeat by insisting on unpopular policies.'[1465] We are well aware that we must judge the Crown and its agents by contemporary standards rather than by those of today. We cannot, and do not, judge Crown officers for failing to consider options which would never have occurred to them, or which they would have regarded as impossible or immoral. We do, however, think that they should have lived up to their own rhetoric and to have been open to possibilities presented to them at the time. In particular, the UDNR agreement established a Treaty relationship between the Crown and the hapu and iwi of Te Urewera, and so the Crown had a particularly strong obligation to meet the commitments it made, as well as to meet its wider obligations under the Treaty. That it largely failed to do so was a failure to meet its duties of good faith and partnership.

1462. Crown counsel, closing submissions, June 2005 (doc N20), topic 39, p 2
1463. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 178
1464. Ibid, pp 181–188
1465. Ibid, p 179

23.10 Conclusions

Our Treaty analysis has focussed on the nature of the Crown's duties to the peoples of Te Urewera in relation to socio-economic matters, and the extent to which socio-economic disparities and problems are prejudices caused by Crown breaches of the Treaty. Here we summarise those duties, outline the extent to which they have been fulfilled, and the extent to which failure to fulfil them is a breach of the principles of the Treaty. We then summarise the prejudice caused to the peoples of Te Urewera by those breaches.

23.10.1 The Crown's duties

We find that the Crown has obligations to provide aid and social services to the hapu and iwi of Te Urewera in the following circumstances:

- When the aid or services are being provided to non-Maori in similar or equivalent circumstances;
- When hapu or iwi are suffering extreme hardship, for example during the 1898 famine;
- When there is a significant disparity between Maori and non-Maori outcomes in socio-economic areas such as health or education; or
- When aid or services are needed to alleviate or redress the prejudice caused by the Crown's prior Treaty breaches.

In addition, we find that

- The Crown has an obligation to provide services equitably to Maori. This means that the services provided must meet the needs of hapu and iwi, rather than just New Zealanders in general.
- Where the provision of particular aid and services within a particular district, such as Te Urewera, is prohibitively expensive or highly impractical, the Crown does not have an obligation to provide those services. However the services must be reasonably accessible to people living in the district, even if they have limited financial means.
- Whenever hapu and iwi are willing and able, the Crown is obliged to work in partnership with them in the provision of aid and social services.
- The Crown is entitled, in its exercise of kawanatanga, to determine economic policy, including the nature and extent of its involvement in the timber industry. In doing so, however, it is obliged to consult with hapu and iwi likely to be significantly affected by proposed changes, and to ensure that it is making well-informed decisions. This obligation applies to both overall policy-making and the implementation of policy.

23.10.2 Has the Crown fulfilled its obligations under the Treaty?

We find that, although the Crown at times made very real efforts to improve the socio-economic standards of the peoples of Te Urewera, it often failed to fulfil the obligations we list above. In many instances, the peoples of Te Urewera were given less consideration than other communities, which we find to be a breach of the principle of equity. Where the Crown failed to protect Te Urewera communities from severe hardship, or took actions which had negative effects on them or their culture and language, we find the Crown to be in breach of the principle of active protection. Until relatively recently, the Crown has not enabled Maori groups and organisations to play a significant role in the design or delivery of social services. This was part of a wider failure by the Crown to properly consult with Te Urewera hapu and iwi, and is in breach of the principle of partnership. The Crown's failure to uphold its own promises is a failure to uphold its duty of good faith.

More specifically, we find that:

- The provision of aid and social services to Maori communities in Te Urewera has never been sufficient in relation to the various disparities between the hapu and iwi of Te Urewera and New Zealanders as a whole, even though the Crown has been aware of these disparities since at least the 1890s. This was in breach of the principle of equity.
- The Crown's aid to communities affected by the 1898 famine was inadequate even by the standards of the day. This was in breach of the principles of active protection and equity. Given that the Crown had made explicit promises to protect the peoples of Te Urewera, it failed to adhere to its duty to act in good faith.
- The Crown discriminated against Maori in the provision of pensions and other welfare benefits up to 1938, and in some cases up to 1945. This was in breach of the principle of equity.
- Because a supply of safe drinking water is essential to good health, the Crown's failure to ensure all Te Urewera communities had such a supply is a breach of the principles of active protection and equity.
- Communities in Te Urewera have consistently been provided with fewer services than are available in most parts of New Zealand. To some extent, this was an inevitable consequence of the area's low and scattered population and distance from cities and larger towns. Even taking this into account, however, access to health care, education, and other services has often been inadequate, in breach of the principle of equity.
- Until recent decades, the Crown largely failed to provide Te Urewera communities with social services best fitted to their needs. In particular, they were provided with monolingual and monocultural education which threatened the survival of their own reo and tikanga. This was in breach of the principles of equity and active protection.
- In the mid-twentieth century, the Crown encouraged Maori in Te Urewera to leave their home kainga in order to find work and to access education, health care, and

improved housing. Such encouragement paid insufficient regard to cultural ties to ancestral lands, but as long as undue pressure was not imposed was not a breach of Treaty principles. Rather it was a practical response to the limited economic options in the district and the difficulty of providing a full range of services to isolated communities.

- The Crown's corporatisation of the Forest Service was planned and carried out without adequate consultation with affected hapu and iwi, particularly at the level of implementation, and decisions were made which were not always well-informed. This was in breach of the principle of partnership.
- The Crown's rapid implementation of the corporatisation programme, and its withdrawal of economic and social services from Te Urewera, were carried out without adequate regard for the wellbeing and economic survival of Te Urewera communities, and in violation of specific promises. While earlier Crown policy and practice had simply encouraged people to leave places where it was increasingly hard to make a living and services had long been minimal, it now took jobs and services away from communities which had become dependent on them. This was in breach of the principles of partnership and active protection and its duty of good faith.
- While the return of Minginui to Ngati Whare was a positive step, the Crown failed to communicate properly with residents, or to identify or fix the numerous housing and environmental problems caused by its neglect, poor construction methods, and use of dangerous chemicals. This was a breach of the principles of good faith and active protection.
- Until about the 1980s, the Crown rarely made any effort to work with hapu and iwi in the provision of social services, or even to properly consult them over how these services should be delivered. This was in breach of the principle of partnership.
- In recent decades the Crown has taken significant steps towards such partnerships with hapu and iwi, but the people with whom the Crown works in Te Urewera have felt marginalised and sometimes bullied. We did not receive enough evidence to determine whether the Crown has breached the principles of the Treaty in this matter.

23.10.3 Prejudice arising from the Crown's breaches of Treaty principles

We have shown throughout this chapter that these Treaty breaches, and those which we detail in other parts of this report, had numerous and severe prejudicial effects on the peoples of Te Urewera. We find that there are clear causative links between the Crown's repeated breaches of the Treaty and these prejudices, specifically:

- The Crown's large-scale acquisition of Maori land in Te Urewera, for small or in some cases no payment, led directly to widespread and severe poverty among the hapu

23.10.3

and iwi of Te Urewera. Accordingly, we find that this ongoing poverty was and is a prejudice arising from the Crown's numerous breaches of the Treaty, which we have addressed in earlier chapters of this report.

- This prejudice was exacerbated by the Crown's restrictions on land use, usually without compensation, which prevented Te Urewera hapu and iwi from utilising their lands and forests, and by its failure, before the 1930s, to provide Maori with any effective assistance in developing their remaining land.
- The lack of economic opportunities in some parts of the inquiry district, and the very limited opportunities in other parts, were a key factor behind the migration of many Maori away from their turangawaewae. As a result of this, the majority of Maori with whakapapa links to Te Urewera live outside the rohe. To the extent to which these economic circumstances are a prejudice caused by Crown Treaty breaches, reluctant migration and cultural disconnection are also prejudices.
- The Crown's acquisition of Te Urewera Maori land (including most of their best land), was one of the main factors behind the dependence of Te Urewera hapu and iwi, particularly Ngati Whare, Ngati Manawa, and Tuhoe, on the timber industry. This dependence is therefore a prejudice resulting in part from the Crown's acquisition of so much land in breach of the Treaty.
- The dependence of Te Urewera hapu and iwi on the timber industry was one of the main reasons why corporatisation of the Forest Service had such a disastrous effect on the district and its communities. Another important reason was the Crown's failure to adequately mitigate the negative effects of corporatisation. This means that the dire economic state of Te Urewera at the time of our hearings, and the attendant social problems, are prejudices arising directly and indirectly from the Crown's breaches of the Treaty.
- The primary cause of increased ill health in nineteenth century Te Urewera was lack of immunity to introduced diseases. The Crown was not responsible for this, and until around the middle of the twentieth century had few effective means to combat such diseases. However the Crown is at least partly responsible for other contributing factors to Maori ill health in Te Urewera, such as poverty, food shortages and, in the nineteenth century, the impact of the Crown's conduct of its military expeditions. By the twentieth century, poverty had become the main contributing factor to poor Maori health in Te Urewera. As this poverty was caused primarily by the Crown's earlier breaches of the Treaty, we find that health disparities are a prejudice partly arising from those breaches.
- Another important contributing factor to ill health in Te Urewera was the poor overall quality of housing in the district. This in itself was a consequence of widespread poverty, and also of Crown and local government policy and practice which made it

difficult for Maori to finance and build better homes on their own land. This reinforces our finding that disproportionate ill health is a prejudice arising from Treaty breach.

- The Crown failed to provide a school system which served the needs and aspirations of Maori pupils in Te Urewera, who had difficulty accessing all levels of education, particularly after primary school. The monolingual and monocultural nature of state schools alienated many young Maori, and so their limited success in the education system is a prejudice arising from the Crown's Treaty breaches in relation to the education system.
- The ban on speaking te reo in state schools, and the often brutal physical punishments used to enforce this ban, prejudicially affected the health and continued survival of te reo Maori and its Te Urewera dialects, and had far-reaching prejudicial effects on the cultures of Te Urewera hapu and iwi and on the pupils themselves.

Overall, the living conditions experienced by the hapu and iwi of Te Urewera have consistently been far below those of most other New Zealand communities in the same period. For most, perhaps all, of the time between the 1890s and our hearings, Te Urewera has been home to some of the poorest and most deprived communities in the country. At times some communities have been without even the most basic necessities of life, and there has never been a point at which every Te Urewera community has been properly supplied with essentials such as clean water and adequate housing. The Crown has been aware of these conditions since the 1890s or earlier, but has never taken the steps necessary to ensure that living conditions met the standards of the time.

We find that the poor socio-economic standing of the peoples of Te Urewera is in large part a prejudice arising from the Crown's repeated and often grievous breaches of the Treaty, which we have detailed throughout all parts of this report.

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Dated at Wellington this 22nd day of December 2015

Judge Patrick J Savage, presiding officer

Joanne R Morris, member

Joseph Tuahine Northover MNZM, member

Dr Ann R Parsonson, member

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