OWNERSHIP AND CONTROL OF INLAND WATERWAYS WITHIN PORIRUA KI MANAWATU INQUIRY DISTRICT

(Wai 2200, #A217)

Report Summary

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A report commissioned by the Waitangi Tribunal

Introduction

1. This report was commissioned in October 2018 as a late addition ('gap-filling') to the inquiry casebook[1]. The terms of reference were similar in all but one respect to the terms for an earlier-commissioned report on Te Atiawa / Ngati Awa waterways[2]. The sole difference was the addition to the terms for this report of the impact of the Resource Management Act 1991 on Maori interests in waterways. As a late-commissioned report, every effort was made to avoid duplication with previous reports, including those on the Rangitikei River[3], and Lake Horowhenua[4]. As a consequence the geographic scope of this report, after excluding the Rangitikei catchment, closely aligns with the area still actively under inquiry by the Tribunal.

2. My report also purposely avoids reiterating the tangata whenua perspectives about waterways that are set out in other reports forming the inquiry casebook[5]. The perceived gap that is filled by this report is the Crown record about the waterways of the district still under inquiry. It follows that my report, plus the other reports about inland waterways, should be treated as a single package of information to be read together as a whole.

3. The terms of reference set out in the commission posed seven questions, and the report was written as a response to each question separately. The questions had a heavy bias towards gaining an understanding of the law relating to waterways, and the Crown's interpretations and applications of the law. It needs to be stated at the outset that I do not have the qualifications or expertise to provide legal interpretations myself. That is a matter for counsel appearing before the Tribunal. Rather my role has been to present an historical review of the various interpretations made over the years. These interpretations vary, of course, according to the latest court judgement at the time. In the same manner, counsel appearing before the Tribunal are likely to make legal submissions having particular regard for the most recent Supreme Court judgement

[1] Wai 2200, #2.3.35, dated 17 October 2018.
[2] R Webb, *Te Atiawa / Ngati Awa ki Kapiti Inland Waterways; ownership and control*, September 2018, Wai 2200 Document #A205.
[3] D Alexander, *Rangitikei River and its tributaries historical report*, November 2015, Wai 2200 Document #A187.
[4] P Hamer, *'A tangled skein'; Lake Horowhenua, Muaupoko and the Crown, 1890-2000*, June 2015, Wai 2200 Document #A150.
[5] Te Rangitawhia Whakatupu Matauranga Ltd, *Porirua ki Manawatu inland waterways historical report*, August 2017, Wai 2200 Document #A197.
H Smith, *Porirua ki Manawatu inquiry inland waterways cultural perspectives technical report*, 2017, Wai 2200 Document #A198.

concerning waterways law, *Paki (No. 2) v. Attorney General*. The *Paki* judgement, being a ruling on the status of the Waikato River rather than about a waterway in the inquiry district, is not discussed in my report.

4. The commission sought to confine my report to what it termed "waterways of importance" to claimants. Having examined CFRT-commissioned environment and waterways reports together with memoranda from claimant counsel (itemised in Appendix Two to my report), I took the view that virtually all waterways were of importance to claimants, and that it would therefore be inappropriate to distinguish some as being of greater significance than others. Having said that, the number of waterways in the inquiry district is vast, to the extent that the flat lands beneath the hills could be conceived of as a waterscape in their pre-1840 form, and limitations on time, resources and available historical material have meant that not all waterways could be given comprehensive treatment in the report.

Question (a) Crown and Maori understandings and assumptions

> *What were Crown and Maori understandings and assumptions concerning ownership and control of waterways of importance (including rivers and lakes, estuaries, springs, wetlands, ground water and other inland waterways), as identified in the CFRT environment and waterways reports or by claimants in the six memoranda cited above, and how have these changed or become entrenched over time?*

5. The parties' understandings and assumptions have varied over time, and for convenience I have split the time periods into three – before land purchase, at the time of large-scale land purchases, and after land purchase.

6. Before the large-scale land purchases in the 1850s and 1860s, both Crown and Maori thinking was quite closely aligned. Maori had absolute control over all aspects of waterways, and this was implicitly acknowledged by the Crown in the Treaty of Waitangi when it promised not to interfere with Maori authority over lands, fisheries and taonga. It was because of this acknowledgement of Maori authority that the Crown placed so much emphasis on land purchase in the early years, as a form of express extinguishment of certain customary rights.

7. The main potential difference in thinking in these early years related to navigation along waterways. The English understanding conceived of a waterway as a public highway available to all. This was at odds with Maori thinking that passage was controlled by the rangatira, from whom prior permission needed to be sought. In reality the potential difference was minimised because hapu were in such a strong position; no European or Crown official was going to tempt fate by deliberately not seeking permission. Some of the first dealings between Crown and Maori in the inquiry district were written agreements concerning ferry crossings of rivermouths along the coastal beach highway.

8. At the time of land purchase, Maori were aware that waterways and wetlands would be impacted by settler land development, and that their way of life roaming across the rohe to hunt and gather would be interrupted. The water resource would have to be shared. Hapu in the inquiry district had the advantage of being able to see for themselves what had happened on the nearby lands of the Rangitikei-Turakina purchase acquired by the Crown in 1849. Based on that experience they sought to reserve sites for fishing along the Oroua River and among the dune lakes. Their understanding, mistakenly as it happened, was that these reserves would help them preserve aspects of their traditional way of life.

9. That the reserves failed to meet the needs of tangata whenua was because of the pressure from the Crown to maximise the amount of land that it acquired. The Crown understood that the purchases were a one-time opportunity to both obtain land and develop sufficient scale to be able to exert control over future circumstances. It knew that it had to obtain water sources for the settlers, and that access to water could not be left solely in the hands of Maori. It therefore made no effort to guarantee protection of any particular water and wetlands ecosystem, or any fishery ecosystem, instead opting to offer only reserves that amounted to camping sites beside some of the more important fishing sites.

10. Subsequent to the large-scale land purchases, all understandings became dominated by the activities of the Native Land Court, which viewed the rohe of a hapu through a land titles lens. The larger the waterway the less likely it was that it would be included in a land title, leaving it potentially as a strip that continued to be customary land. However, the spread of the titles mantle over the land also brought with it an understanding,

derived from English common law and actively asserted by the Crown and the courts, that the adjoining riparian titles were presumed to have rights to the waterway strips, and the strips could no longer be regarded as Maori owned or controlled. Statute law was then developed around the understanding that waterways were generally not clothed with their own title and were not features that Maori continued to own and control.

11. Faced with the heavy pressure of Crown and settler understandings, Maori understandings went into hibernation. While waterways and water continued to retain a deep cultural and spiritual significance for Maori, and Maori therefore retained a significant interest in waterways, that seems to have no longer been expressed as an assertion of ownership or of control. The reduction in Maori assertions about waterways seems to have occurred from an early period, approximately during the 1870s. There could be various reasons for this, including the overwhelming changes created by the institution of the Native Land Court, the steps taken by the Crown to exercise control over waterways which had commenced with goldfields legislation in the mid 1860s, the general tenor of European society and the European-dominated Parliament which did not countenance any impediments to land development, and the passing of foundational administrative legislation (following the abolition of the Provinces in 1876) that did not incorporate the guarantees for Maori set out in Te Tiriti.

12. Once Maori had been excluded from consideration, a Crown understanding that Maori had no remaining rights to waterways and water generated its own momentum, being adopted and followed by central and local government elected members and officials for many decades. Maori assertions of ownership of water and waterways have only re-emerged in recent years, being based on the continued existence of aboriginal rights that have never been clearly and expressly extinguished. However, such assertions are made in the face of a statutory environment (dominated by the Resource Management Act 1991) that provides for the Crown (and Regional Councils by delegation) to have sole authority and responsibility for the management of the use of water and other waterway features.

Question (c) Mechanisms for loss of ownership and control

In my report this question was reordered to precede consideration of question (b)

> *What were the main mechanisms by which Maori of this district allegedly lost ownership and control of their waterways of importance, (such as by purchase of riparian lands, public works takings, destruction or loss from infrastructure development, roads along river banks, rights to take shingle/gravel) and land purchasing and partitioning where this is not already covered in commissioned reports for this inquiry?*

13. In the Porirua ki Manawatu Inquiry District still under inquiry, it is impossible to underestimate the impact of the early Crown purchases, being the Rangitikei-Turakina (1849), Awahou (1858), Te Ahuaturanga (1864) and Rangitikei-Manawatu (1866) purchases. Not only were they particularly large parcels of land, often with waterways as boundaries, but they were purchases ('extinguishments of native title' in the terminology of the time) where the Crown sought to comprehensively acquire Maori rights in a legal environment that was not circumscribed by statute law. This is in comparison to later efforts where the intention of the Crown or of private purchasers was to acquire statutorily-defined land titles that had already passed through the Crown-developed filter of the Native Land Court.

14. The Crown's purpose with its early large-scale purchases was to acquire the Maori rights in as complete a manner as possible, such that any carryover of Maori rights into the future, for example reserves, would be kept to a bare minimum. It therefore fashioned its purchase deeds to describe the totality of the rights acquired. The deeds variously refer to the rivers, the streams, the lakes, and the waters among the features being acquired. However, a reading of the deeds suggests that the features other than land were being referred to as being ancillary or appurtenant to the land. In a similar vein, the subsequent *Gazette* notifications of extinguishment of title concentrated on the extinguishment of rights to land (and of rights going with land), with no specific mention of rights to waterways or water. It is a matter for legal submission and interpretation, having regard for all the circumstances surrounding the negotiations and signing of the deeds, how the references to waterways and waters in the purchase deeds should be treated.

15. The legal submissions will probably also have to consider equally vexed issues concerning the status of smaller waterways and waters wholly within the lands acquired by the Crown. The Crown's understanding was that tangata whenua rights to these

smaller waterways either ceased or passed to the Crown. Certainly that was how it subsequently treated the various dune lakes, where portions not forming part of reserves returned to Maori were included in titles granted by the Crown to settlers.

16. A further issue concerns the status of waterways and waters that formed purchase block boundaries. An analysis in my report (section 3.3) shows a wide range of circumstances arising from the early purchases depending on whether lands on one or both banks of the boundary waterways were acquired by the Crown.

17. The lands acquired by the Crown were subdivided into titled sections. Both the Crown and private purchasers acquired lands held under Native Land Court title. Titled sections could be further subdivided. For all titled sections (both Crown and Court derived), and for land remaining in Crown ownership, land titles law applied. As interpreted in New Zealand, the application of titles law precluded any recognition or 'space' for the continued existence of Maori rights to waterways and water. The Crown and private landowners filled any vacuum that occurred, by repetitive assertion of their own interests in the waterways, and by local control of access to the waterways. The substantial extent to which Maori lost ownership and control of their lands was accompanied by a related and equal loss of control of their waterways.

Question (b) The application of common law and statute law to the beds of inland waterways

In my report this question was reordered to follow consideration of question (c)

> *To what extent were common law presumptions concerning ownership and control of the beds of inland waterways (such as ad medium filum aquae presumptions) or legislative provisions (such as the Coal Mines Act 1903 or drainage legislation) applied to waterways of importance in this inquiry district and with what impacts?*

18. Common law presumptions relating to waterways and freshwater in law applied in New Zealand from the proclamation of sovereignty in 1840, though it was only later in the nineteenth century, after the early Crown purchases and after the initial titling of land by the Native Land Court, that they began to have an impact. Thereafter the common law, and its relationship to a growing web of statute law, gained a greater prominence and administrative consideration. When it came to common law presumptions and precepts,

it would seem that only those imported into New Zealand from English law were recognised. These included the ad medium filum aquae presumption whereby the owner of land that had a riverbank or lake edge as a title boundary was presumed to have an exclusive right to the bed of the river or lake to the centre line of the river or centre of the lake, and could make an accretion claim up to the centre line for title to riverbed which had become permanently dry land. Another aspect of the common law was that upstream landowners could not use water to the detriment of downstream owners, as that was a form of trespass on downstream owners' rights.

19. The ad medium filum aquae presumption could be rebutted (deemed to not be applicable) in certain circumstances. The most substantive circumstance from the Crown's perspective, and which directly impinged on any Maori ownership rights to a waterway that might exist, was that the bed of a navigable river was considered to be vested solely in the Crown. The Crown's right to the beds of navigable rivers became codified in statute law from 1903 (Section 14 Coal-mines Act Amendment Act 1903). Crown departments from then on went to considerable lengths to inquire into and examine the navigability of rivers, and then to publicly state their belief that a river might be navigable. In the inquiry district still under inquiry, their claims of navigability applied to the Manawatu River (usually up to Palmerston North, though sometimes up to the Gorge), the lower reaches of the Oroua River, and the Rangitikei River (discussed in a separate report). However, it needs to be explained that the Crown's claims were an assertion that was not legally tested – the Crown consistently declined to state its claim before a court, preferring that ad medium filum rights holders should be placed in the position of having to prove that the Crown vesting did not apply.

20. Another instance where the ad medium filum aquae presumption might be rebutted was if the Native Land Court and its titles jurisdiction could be considered to predominate and had expressed a different intention. However, that matter was considered by the Native Land Court in 1941 in a case concerning the Manawatu River a few kilometres downstream of its junction with the Oroua River. At this point along the river, the land on one bank was held in a title derived from a Native Land Court title for Tuwhakatupua 2 block ordered in 1889, while the land on the opposite bank was held in a title derived from a Crown grant issued in 1881 for a reserve (Himatangi Reserve) that had been set aside in the Rangitikei-Manawatu purchase. The Court found that in both instances ad

medium filum rights applied. In the case of Tuwhakatupua this was because the effect of the centre-line principle was understandable to what it termed 'the Native mind', and was consistent with Maori custom. In the case of Himatangi this was because in its opinion it was reasonable to imagine that the Crown had acquired rights to the river ad medium filum by the 1866 purchase, and had returned all those waterway rights to Maori when issuing grants under the Himatangi Crown Grants Act 1877. In reaching its findings, the Court was aware of a Crown legal opinion that rights to the river could not go with the riparian land because the Court's investigation of title did not investigate the title to the bed of the river; this would have suggested that the river itself had remained customary land. However, the Court chose to reject that argument in favour of the linkage between riparian land and the waterway. The effect of the Court's decision will have to be a matter for legal interpretation and argument before this Tribunal, having regard for later Court decisions, including that concerning the bed of the Whanganui River.

21. The 1941 Native Land Court decision that ad medium filum rights attached to court titles endorsed the practice of the Court that had been followed up to then. The very same stretch of the Manawatu River had been addressed by the Court in 1916, when decisions were made to adjust riverbank titles to accommodate a change of river course on the basis that the ad medium filum aquae presumption was relevant and did apply. The presumption had also been adopted for a series of title adjustments for changes of course of the Oroua River in the 1910s-1930s period. Since 1941 the application of the presumption has been a matter at issue in a Maori Land Court decision and subsequent appeal concerning a portion of the Manawatu River estuary. In that particular case the lower court found in favour of Maori owners of Papangaio J block being entitled to claim title to a portion of the estuary that had become dry land. However the Maori Appellate Court found that the manner in which the estuary bed became dry land was by a sudden change (known as a process of avulsion) when the estuary mouth changed its position, rather than as a result of a slow and imperceptible change (the process known as accretion), so that the ad medium filum aquae presumption and its right to accretion land did not apply in that instance. Because the presumption did not apply, the dry land was deemed to be Crown land.

22. A wider assessment of common law precepts than those derived from English common law has historically not generally been a feature of New Zealand legal interpretations. Where this leaves Maori customary authority for waterways and waters in a colonial environment has only been addressed in more recent years, and is best left to legal submissions.

Question (d) The impact of waterways management regimes

> *What has been the impact of waterways management regimes, including the Resource Management Act 1991 regime, on Maori authority over, use of and enjoyment of their waterways in this inquiry district?*

23. The spread of statute law into the sphere of waterways and freshwater has been a gradual one, rather than having a single impact. Waterways and water have been split into component features, with each feature being dealt with separately at different periods of time in the development of the country. In each case, the needs of land settlement in particular were deemed to require statutory action because the common law was not considered to be capable of providing a remedy appropriate to the circumstances of New Zealand. The compartmentalisation of features has seen a progressive erosion of non-Crown authority.

24. In my report I have canvassed the impact of each new piece of legislation on the waterways of the inquiry district still under inquiry. The need for cooperation in the drainage of land (rather than each landowner addressing only the needs of their own land) saw the passing of the Counties Act 1886 and the Land Drainage Act 1893, whereby county councils and drainage boards respectively could implement local drainage schemes. The need to prevent floodwaters flowing onto farmland saw the passing of the River Boards Act 1884 to allow river boards to undertake flood protection and channel improvement works. The need for all-of-catchment consideration of runoff from land and responses to river flows saw the passing of the Soil Conservation and Rivers Control Act 1941 to establish catchment boards with widespread powers to deal with waterways and water flows.

25. All these pieces of legislation were specifically designed to benefit agricultural development. They contained no or insufficient provisions to mitigate their impact on fisheries, or on values of importance to Maori communities. In each case the local

membership of the boards that were established was elected by ratepayers. In general, when Maori land was leased, as was the case with the majority of land remaining in Maori ownership, it was the European lessee who was responsible for paying the rates, and thereby had input into the activities of each board. Maori landowners had a smaller voice and were effectively precluded from participation. While they might have been actively-involved owners and farmers in a drainage or river district, they would have been overwhelmingly outnumbered by the surrounding European farmers.

26. Direct Crown involvement prior to 1941 was limited. This meant there were also limits to the size and scale of the engineering works that affected waterways, because the resources of local boards were constrained. The hands-off approach of the Crown relaxed during the 1930s and was abandoned altogether after 1941, so that it was possible for larger scale projects to receive Crown funding support. The Crown approach to funding requests was solely focused on the river engineering aspects of a proposal, with no consideration for any Maori dimension about waterways. On the lower Manawatu River, Maori landowners at Taupunga lost land and were displaced by flood channel diversions, while at Whirokino some urupa were lost, access to Matakarapa was severed, and the Foxton Loop was left a smelly backwater. On the Otaki River, a large area of customary riverbed land was compulsorily taken under the Public Works Act when a more direct channel to the sea was dredged. The Crown actively endorsed these changes.

27. The catchment boards were hybrid organisations with a mix of Crown appointees and locally elected members. Their activities were under the control of a national Soil Conservation and Rivers Control Council, with the overall result being that the Crown was the dominant party. Catchment boards covered a whole district, so that the river engineering practices that had previously applied to the Manawatu and Otaki Rivers spread to cover virtually all waterways in the inquiry district under inquiry. Few waterways were unaffected as the boards, urged on by the farming community, sought to tap into the Crown subsidy funds that were made available. Waterways were straightened, stopbanks were erected, and where necessary gravel was removed to maintain channel flow capacity. The engineering activities were a step change up from the more limited efforts of individual landowners on their own river frontages. No provision was made in the 1941 Act for Maori participation or consideration of values of

significance to Maori. Unsurprisingly, the features of waterways given the greatest attention were those highlighted in the legislation, that is flood protection and river control. Freshwater fisheries, cultural values and spiritual values were quite literally bulldozed aside.

28. Running on a separate administrative path through to the early 1970s was governmental action (or rather inaction) on water pollution. The common law position was that an upstream riparian owner could not damage or interfere with water in such a way as to make it unsuitable for use by a downstream riparian owner. When a court in 1912 decided in favour of a downstream farmer against an upstream flax miller who was discharging waste into the Oroua River, the Crown considered legislation that would change the common law and allow valued economic activities such as flax mills, dairy factories and meat works to prevail in any dispute with another water user. In the event this proposal was not followed through on, and the common law position continued through to the passing of the Water Pollution Act 1953 (and more particularly the introduction in 1963 of regulations under the 1953 Act). The regulations placed a high priority on protecting catchments used for town water supply purposes, and instituted a licensing regime for waste dischargers into other waterways which set considerably lower water quality standards.

29. The Crown asserted greater powers over waterways and water with the passing of the Water and Soil Conservation Act 1967, under which the use of water and its management was vested in the Crown, and all users (abstractors and dischargers) had to obtain a water right. Yet again the legislation imposed no obligations on the Crown or local authorities to consider or manage waterways and freshwater for the benefit of Maori values. Almost all waterways and water legislation was then wrapped into the Resource Management Act 1991. This includes some Maori values among the purposes for which water and the beds of rivers and lakes are to be managed, though the needs of Maori values tend to get swamped by the needs of a plethora of other purposes for which water is to be managed.

30. Under the 1967 Act management responsibility was placed in the hands of Regional Water Boards. Under the 1991 Act management is in the hands of Regional Councils. The powers of these local authorities are such that they have had and continue to have

virtually absolute control over what happens in waterways, and the quality of the water. That is why it is so important that tangata whenua obtain cut-through that influences these authorities to push for gains for values of significance to Maori. The record, however, is not good. Indeed, in many respects the authorities have presided over a deterioration of water quality and a sidelining of Maori efforts to be heard and considered.

31. The sheer number of water rights under the 1967 Act and water consents under the 1991 Act has meant that it was not possible in my report to examine any more than a very small proportion of water uses in the inquiry district under inquiry. In making choices, I opted to continue the emphasis in the companion Rangitikei River report on discharges of treated human waste into waterways, and examine how these discharges were treated under the different statutory regimes over time. Knowing that such discharges are of particular concern to Maori communities, I was expecting to find expressions of that concern among the historical records. That turned out to be true for the Resource Management Act era, though far less so during the Water Pollution Act and Water and Soil Conservation Act eras. I also examined two water right applications where I was aware that tangata whenua had been actively involved. Looking at these two applications first, and then at three sewage waste discharges:

32. ***Kuku Stream dairy factory discharge***: Ngati Tukorehe in the lower Ohau River have to cope with all the consequences of upstream use of the catchment. In 1973-74 a dairy factory on Kuku Stream was required to obtain a water right for its discharge into the stream. Members of Ngati Tukorehe were among those in the local community who lodged objections. They feared the impact of the waste water on fish life, food gathering, and supply of water for stock. Many of these impacts were already occurring from the existing discharge from the factory, and the objectors were concerned that the water right would allow a greater volume of waste to be discharged. The factory offered to put in additional equipment that would reduce the volume of wastewater, and the water right was issued for a two-year term on that basis. When an application to renew the right was heard in 1977, the evidence of a Maori neighbour of the factory was that water quality in Kuku Stream had improved. Interestingly, the Regional Water Board's hearing of the 1977 application was held on Tukorehe marae, an enlightened event in those days.

33. ***Lake Tangimate water level control***: Partitioning by the Native Land Court in the late 1800s placed a greater emphasis on agricultural development opportunities than on protection of traditional fishing. The important eel fishing site of Ngati Huia ki Poroutawhao at Lake Tangimate was recognised by the ordering of a small reserve alongside the lake, while the lake itself became part of a larger partition block that later passed into settler hands. In 1981 the European owner of the lake sought to control the water levels of the lake by installing an overflow weir, to avoid flooding of adjoining land at certain times, and the Catchment Board was willing to assist. It was left to the trustees of the fishing reserve to stand up for the fishing and wildlife values of the lake. The chairman of the trustees attended a site meeting, where he was heavily outnumbered by Pakeha participants. He was told that the European ownership of the lake counted against the views of the hapu, which could only be primarily concerned with the impact of the proposal on the fishing reserve that adjoined the lake. Subsequent to the site inspection the water right was granted, along lines which the chairman had indicated would be supported by the trustees. The trustees do not seem to have been notified when the water right came up for renewal in later years. Subsequently, in 1995, it was found that the outlet pipes through the weir had been installed at a lower level than authorised, so that Lake Tangimate would always be smaller in size than had been intended when the initial water right had been granted. No remedial action was taken, and the fishing reserve trustees were not informed. In 2001 it was necessary to renew the water right granted under the 1967 Act with a resource consent granted under the 1991 Act. The fishing reserve trustees put in a submission and attracted supportive submissions from others, including Ngati Tukorehe. They clearly anticipated that under the 1991 Act Maori interests in Lake Tangimate would be taken more seriously than previously. However, it was not possible for the various parties to reach agreement, and the European applicant decided to abandon further efforts to keep the lake level artificially low. The outlet pipes were blocked up. The opportunity for an accommodation to develop between farming interests and Maori interests was lost.

34. ***Feilding treated sewage discharge***: Feilding town has always discharged its sewage into the Oroua River, initially from a communal septic tank where solids were allowed to settle out, and then from 1967 from a treatment plant constructed on the banks of the river. When the treatment plant was being designed the Crown queried why the

Borough Council was advocating tertiary bacterial treatment when the Water Pollution Council's water classification of the Oroua River did not set any bacterial limits. It suggested that such over-design would result in unnecessary expenditure. This demonstrates the low level at which the Pollution Council's water quality standards under the Water Pollution Act 1953 had been set at that time. Yet even when the treatment plant started operating, it could not meet the standards that the Pollution Council had set. This was the pattern that developed throughout the era of the 1967 Act. While the Regional Water Board set water quality standards that the treatment plant never met, there was never any penalty imposed on the Borough Council, and the Regional Water Board acted in a toothless manner. Even when staff reported in 1978 that "water quality below the Borough [outfall] is by far the worst example of continuous pollution remaining in the Board's area", nothing changed. The Regional Water Board's ineptitude was shown up when the local acclimatisation society successfully prosecuted the Borough Council in 1982 for polluting the river to the detriment of its fish life, though that still failed to induce a change in behaviour by the administering authorities during the rest of the 1980s. The Regional Council inherited the Water Board's shambles in 1991, including a water right that was not being complied with and that was due to expire in 1994. It continued the softly-softly approach aimed at encouraging a voluntary improvement of the situation by the (now) Manawatu District Council. It allowed the right expiring in 1994 to run on until 1997 before there was a hearing of a new discharge consent application. The 1997 hearing was the first time that Ngati Kauwhata formally expressed their abhorrence about the discharge of human waste into the Oroua River. A short-term consent of four years was granted, to allow the District Council to carry out all the planning and design for improvements to its treatment plant that it had promised in its application. These studies included investigating disposal to land of the plant's effluent. This, together with ultraviolet radiation, was adopted by the District Council as the intended way forward. Thanks to delays allowed by the Regional Council, it was not until 2005 that a replacement consent, again for another four-year term, was granted. The short term of the consent was because more rigorous water quality standards were being introduced region-wide, which would take effect in mid 2009. On its expiry in 2009, the short-term consent granted in 2005 continued to apply through to 2016, because both the District Council and the Regional Council were complicit in manipulating the provisions of the Resource Management Act. A series of fresh applications were allowed to be made, with each preceding application placed on hold

rather than withdrawn. All submitters, including Ngati Kauwhata, were obliged to make submissions on each application, which then got ignored as a further round of application and submission commenced. The matter was finally heard in 2014 and a decision given in 2015. The decision was appealed by iwi organisations representing Ngati Kauwhata and Ngati Whakatere (among others) and was not decided until 2016, when a ten-year consent was granted with some amended conditions. In its decision, the Environment Court was critical of the delays that had occurred, which it called "an abuse of RMA which brings no credit on either the territorial authorities involved or the Regional Council". It also questioned the commitment and ability of the District Council to meet consent standards set for the future, though was prepared to give the Council the benefit of the doubt that improvements could be achieved. The consequences of the Environment Court's decision are that some improvements in discharge quality have been made, the improvements do not fully satisfy the expectations of Ngati Kauwhata because the consent conditions still allow for some continuing discharge of treated wastes to the Oroua River at particular times of the year, and Ngati Kauwhata and Ngati Whakatere have placed the District Council on notice that the iwi expect further improvements (and further studies for longer-term improvements) during the ten-year term of the discharge consent. However, matters have not got off to a promising start; shortly after irrigation to land in terms of the new consent commenced, a compliance monitoring report dated January 2019 found "significant non-compliance" with the conditions of the consent.

35. ***Shannon treated sewage discharge***: Shannon township originally relied on individual septic tanks for treatment of sewage. A community scheme based on oxidation pond treatment commenced in 1970, with discharge from the pond into a waterway (Mangaore Stream just above its junction with the Manawatu River) permitted under the Water Pollution Act 1953. This permit continued as the operative approval right through to 2015. It completely avoided the Water and Soil Conservation Act era, because no changes to the treatment system were proposed and it did not come to the Regional Water Board's attention during that time. By law the permit was supposed to expire in 2001, being ten years after the introduction of the Resource Management Act. However, a compliant Regional Council, seeking to encourage Horowhenua District Council to act voluntarily, allowed delays by the District Council to occur, so that the effect of the permit was allowed to run on pending approval of a new consent. Applications were lodged

(and overlapped one another because none were withdrawn) in 2001, 2006, 2007, 2011 and 2013. As the applications progressed, they showed that the District Council had decided to provide treatment that was additional to the oxidation pond. Initial applications were for the treated effluent to flow out of the pond into an artificial wetland, and from there directly into the Manawatu River. Later applications provided for the final step to be disposal on to land where possible, and otherwise into the river. The 2011 application was necessary because the 2007 application, which ran through all its submission, hearing and decision-making processes, was found on appeal to be procedurally flawed, and was therefore declared to be null and void. Maori organisations and individuals had made submissions, and then later found that they were worthless. The final application, in 2013, was dealt with under the procedure in the Resource Management Act that allowed for a direct reference to the Environment Court, rather than a decision by the Regional Council with right of appeal. The Court's processes encouraged pre-hearing mediation, and it was through this medium that agreement was reached between the District Council and submitters that land disposal over a larger area than previously envisaged would predominate. Direct discharge to the Manawatu River would then be necessary on only a few days a year (10 days a year on average according to data modelling), and the Court declared that it was satisfied that it had addressed the cultural abhorrence for river discharge "to the extent we are able". The 1970 permit finally ceased to be the prevailing discharge authority in 2015.

36. ***Foxton treated sewage discharge***: Initially Foxton houses discharged from a communal septic tank into the Foxton Loop of the Manawatu River, while its industries discharged directly into the Loop. At the insistence of the Pollution Advisory Council, first expressed in 1964, an oxidation pond was eventually constructed on a Crown-owned portion of Matakarapa land in 1975. At that time a water right was issued under the 1967 Act. However, the inclusion of factory wastes meant the pond became overloaded with organic matter and discharged effluent that failed to meet the water quality standards set out in the water right. This was identified in 1979, and again in 1986, with the Regional Water Board doing nothing in the intervening years to require remediation. The following year the Board required a new water right application, and then did nothing to progress the application that was received until a flurry of activity immediately before the Resource Management Act came into effect. A short-term water right was issued, intended to cover a period while Horowhenua District Council

investigated how to upgrade the treatment plant and produce a higher quality of treated effluent for disposal in an environmentally acceptable manner. The water quality standards of the new right were able to be met because one factory had closed down and a second had installed pre-treatment facilities. At the end of the term, in 1992, an application for a new consent was lodged which canvassed land disposal in a preliminary manner. The application was put on hold by the Regional Council awaiting more information, and was not reconsidered until 1997, by which time the District Council had refined its proposals to include construction of two 'maturation ponds' downstream of the oxidation pond, and then land disposal "as finances permit". Two Maori organisations, though not the hapu of Matakarapa landowners, had been consulted by the District Council. A ten-year consent was granted, with quality standards increasing in two steps during the term of the consent, and with a requirement to report annually on progress with land disposal investigations. The latter requirement was not enforced by the Regional Council. It turned out that land disposal investigations did not advance during the term of the consent because the District Council was unable to find any landowners willing to make their lands available for the purpose. This only became apparent in 2006 when the District Council applied for fresh consent to continue discharging into the Manawatu River. It took the Regional Council two years before the application was publicly notified. There were a number of Maori submitters, and the Regional Council decided to grant a short-term consent of six years (2009-2015) to enable the District Council to continue its investigations into land disposal (three years) and to design and implement the chosen disposal option (three years). Towards the end of the term of the consent, it was apparent that the District Council had failed to meet the time deadlines, and it applied for another short-term consent, concurrently applying for this new application to be placed on hold. This procedure allowed the 2009 consent to run on past its expiry date. The application for short-term consent was then replaced one year later (in late 2015) by an application to discharge on to Matakarapa land on a long-term basis, because it was only by then that the District Council had been able to make the necessary arrangements for land disposal. There were a large number of submissions in opposition, many from Maori individuals and organisations, because the Matakarapa land was owned by Europeans and there had been insufficient consultation by the District Council with the former Ngati Whakatere owners, who still retained strong connections with the block. Following the receipt of submissions the District Council opted to have its application directly referred to the Environment Court. The Court

proceedings extended over a period from June 2016 (confirmation of referral) to February 2019 (final decision). During that period, in September 2017, the District Council and two of the three Maori organisations that had registered as interested parties to the Court proceedings reached a side-agreement whereby they withdrew from the proceedings. The third Maori organisation reached a similar type of agreement the following year. The result was that Maori cultural issues were no longer a matter of contention, and the Court then concentrated its inquiry on the technical matter of how sustainable it was to apply water loaded with nitrogen and phosphorus on poorly-draining Matakarapa soils. When it was satisfied, the Court granted a consent for land disposal with a 29-year term, while a separate consent provided for a phasing out of the discharge of treated effluent direct to the Manawatu River by February 2022.

37. The examination of the case studies discussed above shows that the Crown interventions from the 1960s on were a continuation of a Eurocentric approach to waterways and water, whereby land development, urban needs and natural resources exploitation were the drivers for the changes occurring in the waterways and to water. No heed was paid to cultural and spiritual needs. Maori had much earlier concluded that it would be impossible to fight the direction of development, and their voice was virtually non-existent in the records of the relevant administering authorities. It was only with a revival of legal recognition of Maori interests generally in the 1980s, and the inclusion of such recognition with respect to environmental matters in the Resource Management Act 1991, that Maori sought to participate in the processes provided by the legislation. Their success in the current era has been patchy at best. They have become victims of a close association between regulator (Regional Council) and operator (District Councils), with respect to sewage treatment discharges, that has enabled delay rather than positive and timely action, and that has given concern for Maori interests a lower priority when change was deemed to be too hard to countenance. The regulatory failures of the past have continued to the present day. The jury is still out on whether the water quality standards prescribed in the most recent resource consents are achievable in practice.

38. The net result of Crown interventions into the management of waterways and water has been that Maori interests have not received active protection. Maori authority has been displaced by Crown actions that have prioritised the needs of European settlement at the

expense of in-stream, intrinsic and cultural values. Legislation has been crafted on the basis that the Crown has sole authority. Perceptions of the worth of waterways have become skewed towards utilitarian and developmental ends, and away from a more balanced view about the contribution they can make to New Zealand society.

Question (e) Consultation, consent or protest – interactions between the Crown, local authorities and Maori

> *To what extent do the records show consultation with them or their consent being obtained and how have they responded or protested to the Crown and/or local authorities regarding issues of rights of control and ownership of waterways (or beds of waterways) in this inquiry district?*

39. As already alluded to in answer to earlier questions, a Maori voice commenting on the direction being taken by European settlers and by the Crown with respect to waterways and water is sadly lacking in the Crown historical records examined for this report. That in itself is hardly surprising when so few opportunities were provided for receipt of such views. Efforts to consult and seek consent have been generally non-existent ever since the early large-scale purchases of Maori land, which the Crown took as an extinguishment of the right to be heard or to have any residual interest, as well as an extinguishment of title to land. There was no legal requirement to take Maori values about waterways and water into consideration until the *Huakina* judgement in 1987. Before then it was the views of the farming community and industry, as expressed through the governing institutions such as local authorities that represented them, that predominated. The interests of those communities became the entrenched prevailing attitudes that had to be changed, with varying degrees of success, when Maori were allowed a voice after 1987. That Maori are a minority in a modern-day democracy does not open the doors particularly wide.

40. These comments have nationwide application. They applied no differently in the inquiry district under inquiry. Maori interests in waterways and water were either totally sidelined or, more recently, compromised by adoption in part only.

41. In this generalised climate, it should not be forgotten that the Native / Maori Affairs Department was heavily invested in encouraging successful land development. The Native / Maori Land Court was equally biased towards land development in its activities

such as partitioning. The Department and the Court supported the subordination of waterways and wetlands to the needs of the economic use of land. Maori seeking to protect waterway and wetland values of significance to them could not expect much help from the agencies supposedly acting on their behalf.

Question (f) Inland fisheries

> *What are the impacts for them of the application of common law and/or legislative presumptions to waterways of importance to them in this district for the continued exercise of their customary rights in fisheries and other waterways resources?*

42. My report does not include a definitive description of the customary rights in fisheries and other waterways resources that were carried over into the colonial era. That would be a matter for legal interpretation. By the early 1900s, however, the Crown's interpretation of such rights was that they had largely ceased to exist, because the Treaty obligation to protect such rights had not been legislated for. Customary rights became subsumed into the general right of fishing that was available to all citizens of New Zealand, European and Maori, and it was only on rare occasions that Maori fishing was given priority. The general right derived from English common law principles held that in tidal waters no one could claim a private right to fish, while in non-tidal waters a private right to fish was held by a riparian landowner fishing from their own land. The general right could only be availed of by a person who had the necessary landowner permission to gain access to their fishing spot. Where a waterway was within a privately-owned title boundary, the fishery was deemed a private fishery. Statute law allowed the Crown to prescribe when a fishing licence was required, and the manner in which fishing could be carried out. So far as I know, this remained the legally accepted situation until the *Te Weehi* judgement in 1986.

43. The consequences of the common law and statutory law was that fishing for introduced fish such as trout, which by law required a licence, could not be carried out as of right by Maori, while fishing for whitebait, and non-commercially for tuna, could be undertaken by both Maori and Europeans under the general common law, though how a fisher went about their fishing was subject to fisheries regulations.

44. Maori have retained a strong sense of dissatisfaction at how they have been treated by the application of the law, because their plain reading of Te Tiriti was that the Crown promised to recognise and protect their rights to fish. A series of petitions to Parliament in the 1929-31 period are recorded in my report. It is not a coincidence that such petitions were lodged at a time when unemployment was high, when Maori had to fall back on their own resources, and when Europeans also sought to rely on fishing to put food on the table.

45. As the Crown was of the opinion that references to Maori fishing rights in the fisheries legislation had been stripped of most of their legal meaning, requests and protests from Maori could be quickly brushed aside. Unsurprisingly the general Crown historical record about Maori fishing is slight, and the record for the inquiry district under inquiry is equally so. I was obliged to confine my reporting to just five features about fisheries. I looked at the introduction of trout into the Manawatu River in about 1890, inquiries into whitebaiting at the mouth of the Manawatu River in 1930, the Crown's purchase of two lakes significant for their eel harvest, and the management of commercial eeling in the modern era, in particular a management review that took place during 2018. These represent a very limited and selective coverage of the fisheries topic, which was all that could be achieved with the time and resources available.

46. The Crown's purchase of Lake Pukepuke from Ngati Apa is relevant to the inquiry because, notwithstanding the award to Ngati Apa, all Manawatu based iwi seem to claim a connection to the site. It was the largest fishing reserve set aside out of the Rangitikei-Manawatu purchase, and included most of the lake itself. The Crown adopted a casual attitude to the issue of a Crown Grant title to the lake, not completing the procedure until 1950. That was many years after the lake had become a central feature of Manawatu County Council's Oroua Drainage District, and the title issued to Ngati Apa was made subject to a continuing right for the Crown and the Council to carry out drainage operations within and through the lake in ways that suited the needs of surrounding land rather than the needs of the lake or fishing. At the same time as issuing title, the Crown indicated that it wished to acquire the reserve as a whole for addition to the Tangimoana Farm Settlement. The Ngati Apa owners agreed provided they could continue to harvest eels and could have access across the Farm Settlement for that purpose. The agreement to this effect attached to the purchase deed obligates the Crown to consult

with the fishing rights holders on any changes that might affect the rights, and not to introduce any changes that would lessen the rights the rights holders have. On the other side of the agreement, it is the responsibility of the Maori Trustee, acting on behalf of the rights holders, to ensure that the rights are safeguarded. The Crown has failed in its duty on at least two occasions, firstly when preparing a management plan for the lake which neglected to mention the eeling right, and secondly when on one occasion it allowed a commercial eeler to harvest eels from the lake. On neither occasion was the Maori Trustee notified.

47. For all other lakes in the inquiry district under inquiry, all or the majority of the area occupied by each lake (with the exception of Lake Waiorongomai) passed out of Maori ownership. Lake Waiwiri (also known as Muhunoa and Lake Papaitonga) is located on the boundary of the Horowhenua and Waiwiri blocks. It was in private ownership for some 80 years before being acquired by the Crown in 1980. Because the vendor already had an arrangement with an eel harvesting company, the agreement to purchase was made subject to the vendor retaining an exclusive right to harvest eels for 10 years from September 1980. The current administrative regime for the lake, under the Department of Conservation, offers opportunities for hapu involvement in its management that were not available while it had been in private ownership.

48. There is some evidence, recorded in my report, that Maori had been able to harvest tuna in Lake Waiwiri during at least some of the period that it had been in private ownership. This points to a feature that cannot be discovered from an examination of the Crown historical record. While there has been an extensive loss of land out of Maori ownership, it does not follow that the waterways of the inquiry district at the same time became unavailable to Maori in the district. Agricultural development changed the character of the district more slowly, and many of the smaller waterways, often the most productive from a fish harvesting perspective, could have survived for many years with little change. Local arrangements could have allowed access to the waterways to continue. Evidence to the Tribunal by elderly claimants shows that they could still access kai awa during their younger years. It is likely that the loss of fishing and harvesting opportunities occurred at a slower rate than the loss of land title.

49. However, it is the extent of the cumulative loss of harvesting opportunities over the years that underlies the widespread concern in the modern period with the eel fishery quota management system. How is it that with tuna populations in decline, extensive habitat loss compared to earlier eras, and Maori voicing concern about increasing difficulty in putting tuna on the table in wharekai, that so much tuna can continue to be made available for commercial harvest? A report from the Parliamentary Commissioner for the Environment in 2013 about declining numbers of longfin eels prompted a harvesting review by Fisheries New Zealand. That review concluded that numbers of tuna were not so low that the allowable commercial harvest should be cut, relying on technical experts who calculated that the tuna population had to fall below 20% of its pre-harvest abundance before there was a need to change the rules. However, taking a cautious approach, and to placate the Maori community, the Crown did approve a reduction in the commercial allowable catch for longfin eels in 2018. The allowable catch for shortfin eels remained unchanged. This was despite many Maori submissions, including one from Te Runanga o Raukawa and another that was a thorough appraisal by a Ngati Raukawa individual speaking for Nga Hapu o Otaki, asking for the whole system to be amended so that there would be a better balance between the commercial harvest and customary and recreational harvesting. The Crown's willingness to countenance a savage reduction in tuna abundance indicates policy settings that fail to provide an appropriate balance between commercial exploitation and protection for a species that is integral to hapu identity and Maori wellbeing. There has also been a failure by the Crown to support and progress hapu initiatives, shown by a complete absence of freshwater mataitai reserves set aside in the inquiry district, and a complete absence of any catchments in the inquiry district closed to commercial harvesting, despite these potential opportunities having been statutorily available for many years.

Question (g) The impacts over time of waterways law for tangata whenua

> *What are the impacts for them over time of the application of common law and/or legislative presumptions concerning ownership and control of their waterways of importance in this inquiry district, including rivers, lakes, estuaries, springs and other inland waterways?*

50. The longer that prevailing views are unchallenged, the more strongly they become held. That has certainly been the case for waterways and water, where customary rights and authority held by hapu in 1840 have mysteriously disappeared from view without clear

evidence of them having been explicitly extinguished. In the place of customary authority has arisen a Crown authority that has grown in scale and coverage to almost completely blanket the whole waterway and water 'space'. Hapu authority seems to have become lost early in the colonial era and was never given any ability to recover until the reconsideration in the 1980s and thereafter of the legal framework that applied to Crown – Maori relations. The waterways of a hapu have become other people's waterways too. More significantly, those other people now dominate management control and decision making.

51. While under the authority and control of the Crown and other people, the primary purpose of waterways has been overturned. No longer are they sources of pride and identity for local residents. No longer does their health and wellbeing revolve around their ability to nourish the local residents by being a source of foods and medicines, and by providing spiritual comfort. All these aspects could have been protected so that new settlers who would share New Zealand with hapu could have enjoyed them as much as hapu had been able to do for generations previously. Instead, however, the use and management of waterways became diverted into a different direction with a different sense of purpose. They became seen as flood channels along which would flow the increased peak volumes of water caused by the loss of the sponge effect as steep hillsides were cleared of vegetation cover and as wetlands were drained. This larger flow had to be allowed to pass through lowland farmland in such a way that there was no overflow on to that farmland. Waterways also came to be perceived as a means for diluting and disposing of wastes from homes and industry.

52. Each of these new purposes for waterways and water had and has a beneficial side. But the benefits were not and are not shared equally. Most of the changes to waterways undertaken by the Crown, or by local authorities under delegated authority, have assisted the new settlers and their communities. It is Maori communities that have been more heavily affected. Their lifestyle and connection to waterways and water has been more severely upset, and the impact of the changed priorities has been greater for them. That Maori are smaller in numbers than the new settlers does not reduce the harm or the pain that has been suffered.